UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT #14-51224

Appellant requests oral argument of this appeal

DATE_____

No. 14-51224 DAVID MCCRAE v. PHH Mortgage, et al.
USDC No. 1:14-CV-733

MORTGAGE AND CONSUMER FRAUD - COMPLEX

APPEAL OF FINAL JUDGMENT

from the United States District Court of Western Texas #1:14-cv-733

BRIEF FOR APPELLANT

DAVID MCCRAE , PRO SE
350 CEE RUN
BERTRAM, TEXAS 78605
512.557.0283
XSTEK99@GMAIL.COM

in the UNITED STATES COURT OF APPEALS 5th CIRCUIT
600 S. Maestri Place / New Orleans, LA 70130

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT #14-51224

CERTIFICATE OF INTERESTED PERSONS

In the case of Mortgage and Consumer Fraud,5th Circuit USCA #14-51224, Appeal from Western Texas District Court 1:14-cv-733-ly-ml

The undersigned affiant certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification and recusal.

1. UNITED STATES OF AMERICA - CONSUMER FINANCIAL PROTECTION BUREAU, APPELLANT,
2. David McCrae, APPELLANT,
3. Current or past mortgagees to PHH Mortgage Corporation, or it's subsidiaries; CLASS
4. PHH MORTGAGE CORPORATION, APPELLEES,
5. BURNET MORTGAGE SERVICES,
6. CENTURY 21 MORTGAGE,
7. COLDWELL BANKER MORTGAGE,
8. DOMAIN DISTINCTIVE PROPERTY FINANCE,

9. ERA MORTGAGE,

10.INSTAMORTGAGE.COM,

11.MORTGAGE SERVICE CENTER,

12.MORTGAGEQUESTIONS.COM,

13.MORTGAGESAVE.COM,

14.PHH MORTGAGE SERVICES

15.BARRETT, DAFFIN, FRAPPIER, TURNER AND ENGEL, LLP;

APPELLEES

16.MCGLINCHEY STAFFORD, LLP; COUNSEL,

NOTE:

-If you make your living loaning money at interest[43], or in real estate speculation and trading[17], 'flipping houses,' or are now bankrupt, homeless, or economically diminished by such actions of others[38], you may have strongly held personal opinions that should prompt your recusal from this case.

-If you are currently a class member under the administrative oversight of Joseph A. Smith[6], mortgagesettlementoversight.com[6], due to a past association with Bank of America[11], JP Morgan/Chase[11], Citibank[7], Wells Fargo[12],

Ocwen[8], Ally GMC, Greentree[13], or their subsidiaries[36], you should consider recusal from this case.

-If you are a managing officer or stockholder of a corporation under current ongoing investigation by SEC or US DOJ[15], or an investigator or enforcement agent involved in such current ongoing investigation[39], you should consider recusal from this case.

-If you work in law enforcement, or as a principal or partner in a law practice which serves an inordinate concentration of either plaintiffs or defendants, you should consider recusal from this case.

/s/David McCrae, pro se - APPELLANT 15 January 2015

DAVID MCCRAE , PRO SE
350 CEE RUN
BERTRAM, TEXAS 78605
512.557.0283
XSTEK99@GMAIL.COM

TABLE OF CONTENTS

ORAL ARGUMENT REQUESTED

I'd like to appear to present oral argument in this matter.[37] I'm not an attorney so I would appear Pro Hac Vice. I'm not going to read the complaint, all set out in 30 pages or less. I wrote it, you've read it. You have an opinion already. Like Officer Monday, I've stuck to the facts. I try not to judge. If I had my druthers, I would just call the Marshal and haul these people off to jail. They're from New Jersey. What else would they expect?

But, I digress...they're also from America. In America, we're a family. We're better. We're entitled to confront our accusers.[50] Our accusers are allowed to confront us. In complex cases, we collect a jury of impartial citizens.[3] This is not the case in most little countries in the world, where people just get their heads chopped off.[43] I've had a sad experience with these people. If I thought that this was just an unfortunate series of events, I wouldn't waste your time. I would go play golf. I'd go swimming. I'm retired; I have a million commitments today that I'm not going to get to.

But, I digress...the first time I called a lawyer to get this straightened out, I apologized for taking up her time with such a simple matter of obvious confusion.[4] People were trying to steal my house.[40] It looked like a professional

crew.[15,48] Ann actually gave me some good advice. She said 'Why don't you just pay them?' That was in February of 2012. I should have gotten a Title Loan and just paid them off. Then we could go play golf today; none of us would have any work. I didn't pay the ransom. I like my house. I still live in my house. It cost me money. I want my money back.[45]

But, I digress...the first response of the defendants' in this case was 'We didn't do nothin'. He still lives in the house. It's just business.[5,40]' I've decided that this is a business we don't need.[18] Other people in my neighborhood feel the same way. A friend of mine in California lives in her car. She used to live in a house. In California, at least they have nice beaches. People live there. No dogs, though. A friend of mine in Idaho lives in a connex box. I've lived in connex boxes, out on the ocean. Houses are nicer. I have 290 other friends who have these problems. There are probably more out there. We will eventually retain counsel, charter a Class, amend our complaint, and proceed through our pretrial motions until we're all prepared and informed. We are not at that point yet.

But, I digress...we aren't going to solve this problem today. We're not going to pass messages back and forth and see who's right and who's wrong. The

solution is not in the back of the book. We're talking about more than $75,000. We're talking about my house in Texas, and a bunch of other people spread out over 45 other states. You have that jurisdiction[1]. We need help. I pick up the phone, and talk to people in Pakistan to help me out. It's daytime over there, when it's night over here. I have a blog. Consumer fraud is a hot topic on Google.

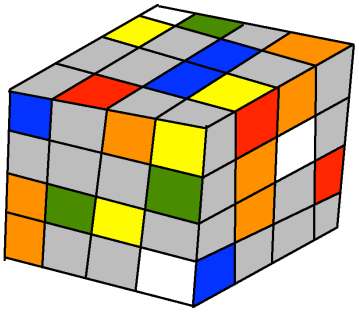
But, I digress...Today, I have a proposal, and I'd like to advocate it. I'd like to shed some light on your concerns. I'd like to find out more from my counterparties. I'd like to share our thoughts. The case is closed in Texas, on motion from the defendants, with little discussion. In fact, none. We still have issues. They're on somebody else's docket now. It's five o'clock somewhere. I'd like to remand this case back to Texas, complete our pretrial responsibilities to the best of our ability, and try these issues before a jury. I thought we were doing just that. I think the judicial system, and the jury system, is an incredibly good system for solving problems.[32] This is a problem, in every town in America. Let's use the system. Let's get a jury together. Let's get them the best information we can collect. Let's disclose all our facts, and let's decide all our issues. Let's deliberate, and let's make some intelligent changes. It's 2014 in

America. It's modern times. Let's act like citizens. Let's do our jobs. Let's solve some problems. I need your help.

-Appeal Exercise / Oral Argument 5th USCA / Fifteen minutes

Put scrambled Rubik's cube in order, 16 squares x 6 sides, one color each side. 42 squares are identifiable color, 8 red, 11 green, 2 white, 5 yellow, 6 blue, 10 orange. The other stickers have been removed and original color must be deduced. The correct order is-

Side 1, Blue Facts -Side 2, White Facts -Side 3, Yellow Issues -Side 4, Green Facts -Side 5, Orange Issues -Side 6, Red Facts



-OR-

Remand this complex case back to District Court and get the jury to color in the missing squares! It's called judging the Facts and Issues.[38, 35]

TABLE OF AUTHORITIES

STATUTES AND REGULATIONS

CASES

OTHER AUTHORITIES

36. Enhanced FHFA Oversight Is Needed to Improve Mortgage Servicer Compliance with Consumer Complaint Requirements, Federal Housing Finance Agency, OIG Audit Report: AUD-2013-007 .....4, 15, 27, 34

37. Fed Up! - Rick Perry 6,27, 33, 35

38. A Fighting Chance - Elizabeth Warren 3, 9, 32

39. FY 2013 Budget Request US DOJ 4, 22-24, 26, 33, 36

40. Greedy Bastards - Dylan Ratigan 6, 7, 28, 35

41. Know How - Ram Charan 35

42. Law Hour and Editorial Review - www.GeorgeGordon.org 25, 35

43. The Merchant of Venice - Wm. Shakespeare 3, 6

44. The No Asshole Rule - Robert Sutton 29

45. The Revolution - Ron Paul 7, 33, 34

46. Right to Jury Trial, Eric Grant, Hicks, Thomas, LLP website 15-20

47. Stress Test - Tim Geithner 28, 33, 36

48. System and Method for Electronic Processing of Default Case Files, Patent Application 20080201190, Barrett Burke Wilson Castle Daffin & Frappier, LLP 7, 28, 35

49. Web of Debt - Ellen Hodgson Brown 25

50. Win Your Case - Gerry Spence 6, 27, 35

51. http://www.theguardian.com/commentisfree/2014/aug/19/ferguson-looting-national-guard-black-citizens-get-by 35

GLOSSARY OF ABBREVIATIONS

PHH - PHH Corporation, Defendant, in business in 46 states, excluding Hawaii, Illinois, Nebraska and Colorado

BBDFTE or **BDFTE** - Barrett, [Burke], Daffin, [Wilson, Castle], Frappier, Turner, and Engle, LLP, mortgage mill, patent holder of document processing system, and agent of PHH in Texas and California

FIRREA - Financial Institution Regulatory and Reform Act of 1989, clarification of lawful and unlawful business practices in the United States

TILA-RESPA - Truth in Lending Act - Real Estate Settlement Procedures Act, clarification of lawful and unlawful business practices of the United States, latest rules have been issued for comment, revised and scheduled to take effect in 2015

FRAP - Federal Rules of Appellate Procedure, latest edition, in this case including Local Court Rules and IOP USCA 5th Circuit

CFPB - Consumer Financial Protection Bureau, established in 2012 by Dodd-Frank, designated enforcement agent for US in 2014

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked under Section 1291, Title 28, United States Code, as an appeal from a final judgment and dismissal in the United States District Court for the Western District of Texas. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

The subject matter in controversy is within the jurisdictional limits of this Court. Fraudulent acts were committed and continue in commission by resident and foreign corporations and individual actors acting in many United States locations, with adverse results to the appellant, who resides in Western Texas. All appellees have offices or registered agents convenient to this venue. These acts were coordinated by more than four individuals, more than three times, in violation of Title 18 U S Code Section 151, Paragraph 4 – Submission of False Claims and numerous violations of the Financial Institution Reform Recovery and Enforcement Act.[4] The pattern of fraudulent activity in the course of mortgage service and attempted seizure of property conforms to a pattern of specific prohibited behavior under existing law leading to recent and distinct consent judgments filed in US District Court with Chase/JP Morgan,[11] Ocwen,[8] Citigroup,[7] Bank of America,[11] Wells Fargo,[12] Greentree[13] and all 50 United States Attorney Generals. We are asking for continuing enforcement of

those agreements, as is now well defined within the industry[6] by regulation, judgment and habit. Investigations and negotiations continue with other actors in this industry.[36] Contrary judgment of this case was entered by Western Texas District Court without consent of the adverse parties, or required trial by jury of facts and issues. Amount of damages and claims in dispute is expected to exceed $75,000.

STATEMENT OF ISSUES

Issue One. Right to Jury Trial

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. - Heritage Guide to the Constitution

Toward the end of the Constitutional Convention, Hugh Williamson of North Carolina noted that "no provision was yet made for juries in civil cases and suggested the necessity of it." Elbridge Gerry agreed, while George Mason further argued that the omission demonstrated that the Constitution needed a Bill of Rights. Nathaniel Gorham responded that the question should be left to Congress because of complexities in determining what kind of civil cases should be given to a jury. A few days later, when Gerry and Pinckney moved to insert "And a trial by jury shall be preserved as usual in civil cases," Gorham argued that there was no usual form, because the structure of civil juries varied among the states. Apparently sensing the difficulty in phrasing the guarantee, the Convention unanimously defeated the motion.

It was a costly oversight, for the omission of a guarantee of civil juries occasioned the greatest opposition to the Constitution in the ratifying conventions, as Alexander Hamilton candidly admitted in *The Federalist* No. 83. Hamilton tried to minimize the differences by arguing that the only difference between the supporters and detractors of the Constitution on this issue was that "the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government." Mason and Gerry had themselves refused to sign the Constitution, citing the absence of the guarantee among their other concerns. In the ratification debates, the Anti-Federalists argued that the provision in the Constitution for juries in criminal cases necessarily implied their abolition in civil cases. The Anti-Federalists tied this argument to their objections to the power of the Supreme Court in Article III to hear appeals "both as to law and fact," suggesting that the Constitution would effectively abolish juries in the states as well.

In response, the Federalists continued to argue that defining in the Constitution the appropriate cases for civil juries was too difficult a task and that the Congress could be trusted to make provision for civil juries. This was a weak argument, as twelve of the states themselves protected civil juries in their constitutions. Of the six ratifying conventions that proposed amendments to the Constitution, five included a right to a jury in civil cases.

The history of the revolutionary struggle also counted against the Federalists. The colonists had had no objection to trials without juries in traditional admiralty and maritime cases. But when Parliament extended the jurisdiction of the admiralty courts to other cases, the colonists' opposition to England crystallized around the deprivation of their right to trial by jury. In the *Declaration of the Causes of Taking up Arms* (1775), the Second Continental Congress declared: "[S]tatutes have been passed for extending the jurisdiction of courts of Admiralty and Vice-Admiralty beyond their ancient limits; for depriving us of the accustomed and inestimable privilege of trial by jury, in cases

affecting both life and property." The complaint was also among the bill of particulars in the Declaration of Independence.

The Seventh Amendment, passed by the First Congress without debate, cured the omission by declaring that the right to a jury trial shall be preserved in common-law cases, thus leaving the traditional distinction between cases at law and those in equity or admiralty, where there normally was no jury. The implied distinction parallels the explicit division of federal judicial authority in Article III to cases (1) in law, (2) in equity, and (3) in admiralty and maritime jurisdiction. The contemporaneously passed Judiciary Act of 1789 similarly provided that "the trial of issues of fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." As Justice Joseph Story later explained in*Parsons v. Bedford* (1830): "In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights."

The Supreme Court has, however, arrived at a more limited interpretation. It applies the amendment's guarantee to the kinds of cases that "existed under the English common law when the amendment was adopted," *Baltimore & Carolina Line v. Redman* (1935), or to newly developed rights that can be analogized to what existed at that time, *Luria v. United States* (1913), *Curtis v. Loether* (1974). Accordingly, in a series of decisions in the second half of the twentieth century, the Supreme Court ruled that the Seventh Amendment guarantees the right to trial by jury in procedurally novel settings, like declaratory judgment actions, *Beacon Theatres v. Westover* (1959), and shareholder derivative suits, *Ross v. Bernhard*(1970). The Court also applied the amendment to cases adjudicating newly created statutory rights, *Curtis v. Loether*, *Pernell v. Southall Realty* (1974). In addition, the Supreme Court has ruled unanimously that when factually overlapping "legal" and "equitable" claims are joined together in the same action, the Seventh Amendment requires that the former be adjudicated first (by a jury); and that when legal claims triable to a jury are erroneously dismissed,

relitigation of the entire action is "essential to vindicating [the plaintiff's] Seventh Amendment rights." *Lytle v. Household Manufacturing, Inc.* (1990).

The right to trial by jury is not constitutionally guaranteed in certain classes of civil cases that are concededly "suits at common law," particularly when "public" or governmental rights are at issue and if one cannot find eighteenth-century precedent for jury participation in those cases. *Atlas Roofing Co. v. Occupational Safety & Health Review Commission* (1977). Thus, Congress can lodge personal and property claims against the United States in non-Article III courts with no jury component. In addition, where practice as it existed in 1791 "provides no clear answer," the rule is that "[o]nly those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature." *Markman v. Westview Instruments* (1996). In those situations, too, the Seventh Amendment does not restrain congressional choice.

In contrast to the near-universal support for the civil jury trial in the eighteenth and early nineteenth centuries, modern jurists consider civil jury trial neither "implicit in the concept of ordered liberty," *Palko v. State of Connecticut* (1937), nor "fundamental to the American scheme of justice," *Duncan v. Louisiana* (1968). Accordingly, in company with only the Second Amendment and the Grand Jury Clause of the Fifth Amendment, the Seventh Amendment is not "incorporated" against the states; it applies only in the federal courts. In the federal courts, the parties can waive the right, but there is no longer a requirement, as there was in 1791, that civil juries be composed of twelve persons and must reach a unanimous verdict. *Colgrove v. Battin* (1973)."

-Eric Grant[46]
Senior Counsel
Certified Specialist in Appellate Law
Hicks Thomas LLP

Further Reading - Jury Trial

1 George E. Butler II, *Compensable Liberty: A Historical and Political Model of the Seventh Amendment Public Law Jury*, 1 Notre Dame J.L. Ethics & Pub. Pol'y 595 (1985)

2 Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144 (1996)

3 Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. Rich. L. Rev. 407 (1999)

4 1 John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights*(1986)

5 Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639 (1973)

6 Duncan v. Louisiana, 391 U.S. 145 (1968)

7 Palko v. State of Connecticut, 302 U.S. 319 (1937)

8 Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999)

9 Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830)

10 Kohl v. United States, 91 U.S. 367 (1876)

11 Luria v. United States, 231 U.S. 9 (1913)

12 Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935)

13 Beacon Theatres v. Westover, 359 U.S. 500 (1959)

14 Ross v. Bernhard, 396 U.S. 531 (1970)

15 Colgrove v. Battin, 413 U.S. 149 (1973)

16 Curtis v. Loether, 415 U.S. 189 (1974)

17 Pernell v. Southall Realty, 416 U.S. 363 (1974)

18 Atlas Roofing Co. v. Occupational Safety & Health Review Commission, 430 U.S. 442 (1977)

19 Tull v. United States, 481 U.S. 412 (1987)

20 Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)

21 Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990)

22 Markman v. Westview Instruments, 517 U.S. 370 (1996)

ref: Federal Rules of Civil Procedure Rule 38. Right to a Jury Trial; Demand[3]

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.

(b) DEMAND. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).
(c) SPECIFYING ISSUES. In its demand, a party may specify the is- sues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may—within 14 days after being served with the demand or within a shorter time ordered by the court—serve a demand for a jury trial on any other or all factual issues triable by jury.
(d) WAIVER; WITHDRAWAL. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

(e) ADMIRALTY AND MARITIME CLAIMS. These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h).

ref: BLACKSTONE'S COMMENTARIES - The Jury[32]

"Great as this eulogium may seem, it is no more than the admirable constitution, when traced to its principles, will be found in sober reason to deserve. The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely trusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that the few should always be attentive to the interests and good of the many. On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts. It is wisely therefore ordered, that the principles and axioms of law, flowing from abstracted reason, and not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope: the law is well known, and is the same for all ranks and degrees; it follows as a regular conclusion from the premises of fact pre-established. But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or more artfully oppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here therefore a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed until the hour of trial; and that when once that fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal, erected for the decision of facts, without the intervention of a jury (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates), is a step towards establishing aristocracy, the most oppressive of absolute governments."

-Blackstone's Commentaries on the Laws of England[32], Book 3, Chapter 23

Issue 2 - Recusal of Mark Lane

Mark Lane was assigned as Magistrate Judge in the initial stages of case management, and filed an early report and recommendation for dismissal. Mark is actually regularly employed as Deputy Assistant Federal Prosecuting Attorney. In his normal course of duties with the Department of Justice, he was very likely aware of, or may have taken an active role in, significantly increased enforcement activity in this milieu, or possibly even with these defendants. Mark should have recused himself immediately from a judgment role.

ref: From the US Department of Justice FY2013 Budget Request Overview-[39]

"The Administration and the Department remain committed to investigating and prosecuting financial and mortgage fraud that harm the American people and the financial markets. In order to strengthen our efforts at combating this fraud, we propose a new financial and mortgage fraud enforcement initiative, which is intended to complement ongoing efforts to root out various forms of fraud, including health care fraud, that are supported by existing direct resources and reimbursable funding.

DOJ plays a crucial role in the federal financial recovery effort through criminal and civil litigation. The Department requests program increases totaling $55 million for a variety of economic fraud enforcement efforts, including work being done by DOJ members of the President's Financial Fraud Enforcement Task Force. This increase will support additional FBI agents, criminal prosecutors, civil litigators, in-house investigators, forensic accountants, paralegals, and other support positions to ultimately improve the Department's capacity to investigate and prosecute allegations of financial and mortgage fraud. This national initiative will pool state and federal resources to leverage impact.

To that end, the FY 2013 Budget requests a total program increase of $55 million (including $9.8 million for technology tools and automated litigation support) for this

priority initiative. The request seeks 328 additional positions, including 40 FBI agents, 184 attorneys, 49 in-house investigators, 31 forensic accountants, 16 paralegals, and 8 support staff. Of the total $55 million program increase, $37.4 million is to increase criminal enforcement efforts and $17.6 million is to increase civil enforcement efforts.

The additional resources will support the Department's investigation and prosecution of the broad range of crimes that fall under the definition of financial fraud, including securities and commodities fraud, investment scams, and mortgage foreclosure schemes. The additional resources will build upon the successes of the Financial Fraud Enforcement Task Force that, since its inception in FY 2010, has facilitated increased investigations and prosecutions of financial fraud relating to the financial crisis and economic recovery efforts.

As a prelude to implementing this initiative in FY 2013, the Attorney General has announced the formation of the Residential Mortgage-Backed Securities Working Group, supported by existing FY 2012 resources, which will leverage state and federal resources to strengthen current and future efforts to investigate and prosecute instances of wrongdoing in the residential mortgage-backed securities market. The working group, working under the authorities of the Financial Fraud Enforcement Task Force, will be co-chaired by senior DOJ and Securities and Exchange Commission officials, along with the New York Attorney General. It will be staffed by at least 55 DOJ attorneys, analysts, agents, and investigators from around the country.

Program Increases Federal Bureau of Investigation (FBI)

• **Financial and Mortgage Fraud:** $15.0 million and 44 positions (40 agents)
The requested funding will increase the FBI's capacity to investigate financial fraud and mortgage fraud schemes. In FY 2011 the FBI had over 1,500 pending financial fraud (corporate and securities) cases and over 2,900 pending mortgage fraud cases. The requested 40 new agents and 4 forensic accountants will create two hybrid squads to target the most significant complex financial crimes and remaining resources will be allocated to FBI field offices to increase financial and mortgage fraud efforts. This enhancement will permit the FBI to address high priority and high loss investigations and provide a substantial return on investment. For example, the average return on investment for one corporate fraud agent was approximately $54 million over the past three fiscal years. FY 2013 current services for economic fraud are 1,239 positions (921 agents) and $195.7 million.

Criminal Division (CRM)

• **Financial and Mortgage Fraud:** $5.0 million and 28 positions (16 attorneys)
The Criminal Division will use its resources to prosecute the most significant financial crimes, including mortgage fraud, corporate fraud, and sophisticated investment

fraud, coordinate multi-district financial crime cases, and assist U.S. Attorneys Offices (USAOs) in financial crime cases with significant money laundering and asset forfeiture components. The FY 2013 current services for this initiative are 278 positions
(182 attorneys) and $66.5 million.

Civil Division (CIV)

• **Financial and Mortgage Fraud:** $7.0 million and 51 positions (38 attorneys) Through this enhancement, the Civil Division will expand civil enforcement efforts to continue to obtain recoveries from individuals and companies who have defrauded the government by violating the terms of Federal contracts, grants, loans, and subsidies. This increase will enable the Division to vigorously pursue perpetrators of mortgage, procurement and other financial fraud that have robbed the treasury of hundreds of millions of dollars. The Division will also use the additional funds to obtain relief for consumers who have fallen victim to unscrupulous schemes that contributed to the financial crisis that is crippling so many sectors of our economy today. The FY 2013 current services for this initiative are 65 positions (52 attorneys) and $17.8 million.

Civil Rights Division (CRT)

• **Financial and Mortgage Fraud:** $1.5 million and 15 positions (10 attorneys) CRT will expand civil enforcement efforts, including investigations of predatory lending; pricing discrimination matters involving allegations of potentially fraudulent behavior; and redlining discrimination involving allegations that reputable lenders failed to provide loan opportunities on an equal basis in majority-minority neighborhoods leaving those markets open to fraudulent or predatory lenders. FY 2013 current services for this initiative are 12 positions (9 attorneys) and $1.4 million.

U.S. Attorneys (USA)

- **Financial and Mortgage Fraud:** $26.5 million and 190 positions (120 attorneys) The U.S. Attorneys will expand criminal investigations and prosecutions of mortgage fraud, predatory lending, financial fraud, and market manipulation matters. These prosecutorial resources will enable the U.S. Attorney community to quickly address the increasing number of mortgage and financial fraud cases referred by the FBI for prosecution. The U.S. Attorneys will also expand civil enforcement efforts to continue to obtain recoveries from individuals and companies that have defrauded the government by violating the terms of Federal contracts, grants, loans, and subsidies. The FY 2013 current services for this initiative are 2,262 positions (1,544 attorneys) and $274.3 million."

Issue 3 - Case Management by Western Texas District Court[35]

David McCrae filed this case initially in Burnet County 447th Court and as it more clearly emerged as a complex case it was sheltered briefly at the Western Texas Federal Bankruptcy Court, and then removed to Western Texas District Court on motion of the defendants. The early stages of the dispute, David's defense of his own homestead property, were resolved at the Western Texas Bankruptcy Court Level[5,49]. On removal to District Court about a year after initiation, Mr. McCrae amended his complaint to file as a whistleblower[19] on behalf of the Consumer Financial Protection Bureau (which agency had since assumed such enforcement responsibilities for the United States in January of 2014)[1], and on behalf of a Class of like individuals[7]. The Class is yet to be identified and certified, and Mr. McCrae continues to seek qualified and interested counsel. On appearance at District Court the Court expressed stronger concern that Mr. McCrae was practicing law without the necessary training and certification,[32,42] rather than a more proper concern that counsel should be provided to investigate the wider claim more thoroughly.[16] This error was possibly confounded by the failure of Mark Lane to recuse himself, or recognize the issue.[20] Legislation in this area is relatively recent,[1] and specific conflicts are still percolating into the judicial system dockets for more definition. Since December of 2013, seven like cases have been resolved by consent

judgments (one with the New Jersey Attorney General,[9] and the other six with the USAG joined by all 50 State Attorneys General).[7,8,10,11,12,13] No cases have gone to trial. PHH currently operates in 46 states, under sanction and consent of the New Jersey Attorney General. Ref. Appendix pp. 126-63 Our current situation in Texas has been reviewed by the New Jersey AG, and excluded from that agreement. Nevertheless, in this case the defendants' initial response to the complaint of blanket denial, or charge of failure to state a claim, were supported by Mark Lane in his initial fact-finding report, and the case was dismissed without investigation. No pre-trial conferences occurred. No Rule 26(f) meetings occurred. No disclosures were entered or discovery of evidence pursued. Based on the widespread social dimension of the current economic crisis,[18] a very new regulatory environment which remains largely undefined by the judiciary,[1] and the colossal resource assignment and direction of the Department of Justice in this area,[39] judgment was ill-considered and premature.

Issue 4 - Certification of Class

Due to lack of recognition of this dimension at the District Court, and general disinterest in pretrial responsibilities, appropriate resources were never assigned

to this issue. We expect to certify a Class in future during normal pretrial discovery.[20,36]

Issue 5 - Failure to State a Claim

This claim was docketed at $150,000,072,000, an estimate of real and consequential damages to an uncertain number of class members to be discovered,[20,36] an estimate of salutary fines to be levied per current FIRREA Guidelines[4] along current DOF Consent Judgments in the industry, an estimate of disgorgement of unlawful gains to be discovered, and an estimate of salutary penalties as signposts to the industry. Ref. Appendix 1 pp. 117-22. Appellant hesitates to imagine how a jury might address the situation,[37] if properly presented.[50] Appellant and Appellees all have business records, and records of any eventual class to be identified are also readily available in electronically stored information format, able to be discovered in pre-trial action.[3] Plaintiff has entered written offers of settlement. Plaintiff has entered motion for Alternative Dispute Resolution. Our pre-trial discovery responsibilities were never pursued. Our jury was never assembled. Our work is incomplete.

Issue 6 - Sanctions

In view of Appellee's consistent dithering and delay, and apparent strategy of procedural obfuscation rather than honest and forthright address of the issues of

contention, Appellant prays for his removal and for substantial sanctions to be issued.[34] PHH is currently operating under a consent judgment with the New Jersey AG for just such behavior as we have noted, with current quarterly legal expenditures of $10M noted in their SEC 10Q and 10K reports. Their behavior continues unchecked. BDFTE focuses their effort in this tiny area of concentration, has been sanctioned in the past for this specific behavior as local agent for Countrywide, indeed has a patented document processing system[48] focused on maximal generation of fees, and their behavior continues unchecked.

Issue 7 - Motion for Stay of Foreclosures in Progress

In addition to a salutary economic sanction, we also pray for a stay of all property seizure underway by PHH and BDFTE until we finish this adjudication and are able to establish guidelines for review.[40,47]

Issue 8 - Coordination of Federal Resources

The mortgage servicing industry has been near the top of the list of federal enforcement activity since 2008, in response to the general economic meltdown of America.[18,19,40,47] Our economic strength is built on private property.[5,32] The Consumer Financial Protection Bureau, and each State Attorney General, receives reports every day from potential Class Members of this action. We

have inquired concerning these reports from each State Attorney General, with cryptic result. We would like to request a Federal Assistant Prosecutor and necessary staff to be assigned to this case as liaison for the collection and verification of this information.[44] The resource cost is already allocated in the FY2015 DOJ budget, appropriated late last night.

STATEMENT OF CLAIM*

#	Description	McCrae	CLASS
1	Costs of Defense, Professional Services	100	x6847
2	Costs of Defense, Court Filings	IFP	
3	Costs of Defense, Incidental	n/c	
4	Restitution	10,000	68,470,000
5	Foreclosure Sale in Error	1,000,000	4,000,000
6	Affidavit of Indebtedness Preparation	1,000,000	4,000,000
7	Proof of Claim	1,000,000	4,000,000
8	Motion for Relief from Stay Affidavits	1,000,000	4,000,000
9	Preforeclosure Initiation	1,000,000	4,000,000
10	Fee adherence to guidance	1,000,000	4,000,000
11	Adherence to customer payment processing	1,000,000	4,000,000
12	Reconciliation of certain waived fees	1,000,000	4,000,000
13	Third party vendor management	1,000,000	4,000,000
14	Customer portal (multiple)	5,000,000	-
15	Single point of contact (multiple)	5,000,000	-
16	Workforce management	1,000,000	4,000,000
17	Affidavit of indebtedness Integrity	1,000,000	4,000,000
18	Account status activity (multiple)	5,000,000	-
19	Complaint response timeliness (multiple)	5,000,000	-
20	Dual track referral to foreclosure	1,000,000	4,000,000
21	Dual track failure to postpone foreclosure	1,000,000	4,000,000
22	Other violations		50,000,000

#	Description	McCrae	CLASS
23	Disgorgement of unlawful gains		500,000,000
24	Salutary Fines		1,500,000,000
	Total	**33,010,100**	**2,170,470,000**

***FIRREA Guidelines,**

Joseph A. Smith

Mortgage Settlement Oversight Guidance

All penalties to date have been assessed by consent judgments,[6,7,8,9,10,11,12,13] essentially 'plea bargains,' with the individual mortgage servicer and the DOJ prosecution team, considering both the extent and seriousness of the violations, the sincerity of the management motivation to reform, and the company resources. All agreements to date have also involved a period of oversight and consequent variability of sanction. A jury has never been presented with this situation. An opportunity to seek their judicial review and guidance in resolution of this widespread socioeconomic crisis would be invaluable.

STATEMENT OF THE CASE

1. The appellee BDFTE, as agent for the appellee PHH, acted without good cause to foreclose and sell appellant's homestead at public auction.[5] Reference Appendix pp. 29-33
2. The appellant filed an unsuccessful motion in Burnet County 447th to stop sale.[5] Reference Appendix p. 33
3. As time went by, appellant McCrae filed bankruptcy in Western Texas, #13-10386, to protect assets while bankruptcy plan was implemented in satisfaction of creditors.[38] Reference Appendix p. 34
4. BDFTE, an appellee, filed proof of claim with trustee and was paid in full. PHH executed release of lien on mortgage and filed in Burnet County. Reference Appendix pp. 35-36
5. Appellant McCrae resumed attempts to collect debt from appellee PHH for real and consequential damages incurred in defense of wrongful foreclosure action, predatory insurance practice of PHH, and lost escrow funds.[34] Reference Appendix p. 37-40
6. Appellees removed trial from Burnet County to Texas Western District Court, for diversity, and as claim appeared in excess of $75,000. Appellant concurred. Reference Appendix p. 42

7. Appellant filed amended complaint to recover damages for himself and a potential class of like parties.[19,33,47] The class is not certified at this point. Reference Appendix p. 40-42
8. Appellant filed motion under Rule 38[4] in demand of jury trial.[3,32] Jury trial was docketed, as such motion cannot be routinely opposed, and was not in this case. Reference Record Document 23, Appendix p. 48-51, Document 23.1, Appendix pp. 49-105 - Jury Demand
9. Prior to trial, without examination, the case was judged and dismissed. Reference Appendix p. 45

OUR PRAYER

10. In view of the complexity of facts and issues,[17,19,47] the apparent large class of affected parties in similar current or past circumstance,[18,37] and the continuing financial crisis of far-reaching negative social impact in the United States,[37,45,47] I pray this panel to remand this case to Western Texas District court for proper trial before jury of all facts and issues.[4,33,47] Reference Appendix. p. 29-45
11. I pray also for directed assignment[39] of a US Attorney or Attorneys from such existent resources as the Mortgage Fraud Task Force Working Group,[39] or the FBI White Collar Crime Task Force,[39] to assist our lead counsel in the prosecution of this case, and the judge in proper case management, as

information liaison to facilitate investigation and discovery under Rule 26 prior to trial. Reference Appendix p. 45

12. I pray for production to that attorney, or the Mortgage Fraud Task Force Working Group, of electronically stored information and complete audit of all payment records and circumstances of foreclosures currently in process by PHH in 46 states, and by their agent BDFTE in Texas and California.[36] I am able to join the current Attorney General Eric Holder in recommending Joseph A. Smith[6] of mortgagesettlementoversight.com as most appropriate analyst and expert witness, based on his current specific and appropriate experience as designated monitor for all consent judgments currently under enforcement action by US Department of Justice. Reference Appendix p. 41
13. I pray for meaningful and cautionary sanctions[45] to be assessed versus McGlinchey Stafford and BDFTE for gratuitous obstruction of legal process by their obfuscation, dithering and delay up to this point. PHH currently operates under the consent and sanction of the New Jersey Attorney General. BDFTE has been sanctioned for just such behavior in the past by Federal Bankruptcy Court of Southern Texas. Reference Appendix pp. 163-202

14. I pray for restraining order to stay all non-judicial foreclosures currently in process, about 8-10,000 across America of one million or more properties in some stage of mortgage service, by PHH[9] and their regional agents until jury trial in Western Texas of all facts and issues is complete. Defer to Oral Argument.[50] The looting we all watched in Ferguson was for amateurs.[51]
15. In short, we need to remand this case to the senior judge in Western Texas District Court, who needs to fully embrace his duties[41,35] to conserve the public good and assign serious resources into resolving this local, regional, and national issue.[17,37,40] We have a 'rocket docket' here in Texas. With no judicial oversight, a company in Guernsey can assert ownership and post and sell a home in twenty three days on the courthouse steps.[48] This is not a benefice to our community.[37] I've wasted ten thousand dollars, which was invested in ...NOTHING. This gives us a community wherein we can hold a lottery to choose 275 public welfare residents of our showpiece 'tiny houses,' which is all they really need as breakfast is still served every day at Austin Resource Center for the Homeless. I have a public high school education, and I listen to the Law Hour,[42] and I am able to read, write, spell, do sums, communicate at great distances, manage robots...that is a statistical outlier in today's graduate. Our foundation in this country is private property,[32] and we have noted that attention to that value since 1776 tends

to contribute to strong and valuable communities. Our economy is not built on tulips, or South Seas Trading Stock, or collateralized debt obligations.[47] We never had a King, or a treasure vault. Our community is not enhanced by owning a package of 30% houses, 30% hotels, 30% commercial strip center, 10% manufacturing for a few moments until the euros or renminbis balance in our favor and we can dump it on the Russians. This is like a 250-year-old hollow oak tree, waiting for the lightning stroke. We are still experiencing an economic crisis in this country. We have a judicial system which is able to contribute significant value to satisfactory resolution, and we have the necessary resources. Bernie Madoff is in jail. Countrywide no longer does business here. I have a litigation budget of five million dollars, and a projected return to the community of several thousand percent, along with the intangible benefit of supplying a little guidance to the business interests among us.[1,5] I propose we have an organizational meeting at ARCH on the day we remand this case to Austin, and make some serious plans. We should invite the New Jersey Attorney General, or one of his minions, to join us to discuss how they addressed this identical problem in New Jersey. I'm retired. I work for free. I have the time, and the inclination. Everyone else is getting paid.[39] I was asked at one point in this case, by one of my esteemed counterparties, 'Are you going to oppose all my

motions?' I replied, 'Yes, any motion that operates to delay or prevent this case from going before a jury, I will oppose. It costs me ten cents per page. I can write economically.' We have a nice new courthouse, built by Barack Obama especially for our use, for work just like this. He has big ears, so what? He runs this country.

For Truth, Justice, and America,

15 January 2015 /s/ David McCrae

By: DAVID MCCRAE, Pro Se* **
350 Cee Run / Bertram Texas 78605
512.557.0283 / xstek99@gmail.com

***Per FRAP Rule 3(c)(3) Pro se includes Barbara McCrae, Spouse**

**** Per FRAP Rule 3(d)(1) David and Barbara McCrae are designated potential members of a Class not yet certified**

TRIAL EXHIBITS

This case was judged and dismissed for failure to state a claim on motion of appellee without trial. The facts and issues have been unexplored beyond assertion and denial, remain in question between the parties. Pretrial discovery was never pursued, ordered or completed by the litigants. Jury Demand was filed by appellant in accord with Rule 38 by Documents 23 and 23.1. Ref. Appendix pp. 60-116, and properly docketed, prior to dismissal. No evidence has been reviewed. No jury has been summoned or assembled. We have nothing to Exhibit.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

600 S. MAESTRI PLACE - NEW ORLEANS, LA 70130

No. 14-51224 DAVID MCCRAE v. PHH Mortgage, et al.
USDC No. 1:14-CV-733

STATEMENT OF DAVID MCCRAE

In October of 2001, I retired from Northwestern Steel in Sterling Illinois on occasion of plant bankruptcy and closing. I purchased five acres in Burnet County, Texas and erected a manufactured home. I obtained a mortgage through United Services Automobile Association for $72,500 on appraised property value of $100,000. USAA delegated the mortgage to PHH, an unaffiliated recommended vendor, and Barbara and I cosigned a 15-year conventional mortgage at 6.25% fixed rate. On receipt and review of loan payoff documents filed in Burnet County in March 2014 (Paid in Full 12 years and six months after execution), we noted that the mortgage had been endorsed to Federal National Mortgage Assurance approximately 8 days after we had executed it. Since that time, I believe our mortgage document had been securitized in many investment packages, and held in part or in toto by many investors or syndicates of investors, for trading purposes. Typically these investor groups operate to acquire packages of real property from the securitization authority, hoping to profit from

turnover times as short as a few moments, while protecting themselves from any risk of asset maintenance, impairment or destruction. The syndicator surrenders all collateral rights to a black hole, and keeps a commission for his efforts in sorting and posting income payments to the various traders of record at particular strike dates. The traders naturally surrender all collateral rights to any individual properties in these monster packages, relying on the statistical general increase of value and yield, while protecting themselves from any particular disaster. The syndicator generally invests a small tithe of his earnings from the package to insure continuous flow of cash for disbursement to his group. With the economies of scale, it generally works to the benefit of all, until the wheels fall off and a major goes bankrupt. Bankruptcy events can also be profitably managed, by those who are a little less bankrupt. Like sharks in a tidal pool.

But, I digress. I continued to work in Texas after leaving Northwestern, mostly as a consultant for clients still interested in building or overhauling steel mills, refineries, undersea oil production, and the like. At 62 years old, I came to the end of a project in Mississippi for the Russians and found it convenient to retire almost completely, working occasionally in the area for

Home Depot and the like. I decided to pay off my house and economize on my daily/weekly/monthly expenditures. My household computer is able to run Excel, so I can find out stuff like @PMT, PRIN, INT, @NOW, @NOW +30.25, and I knew how much money I owed. I called PHH in New Jersey to ask for a loan payoff statement. They were very confused, and unable to send me anything. A while went by, and I received a notice to contact HAMP and get another thirty year mortgage for however much I needed. We were having some difficulty communicating. I sent them a pretty clear letter stating I did not intend to take out a new mortgage, I only wanted them to send me a statement that I owed $7,558 on my existing mortgage, so I could pay it off on 1 January, 2013. I couldn't address it to anyone, as no one signs anything in New Jersey with their name, and different people answer the phone each time I call. Later I found out that they have about 16,000 employees, and maybe one is named Lemony Snicket. I started sending registered mail to see who signed for stuff. I was able to eventually contact Nora Wocken, and found out I needed to send a Qualified Written Request. On my next letter to Nora I wrote 'Qualified Written Request,' and asked how we could resolve our issues. She appointed me a Single Point of

Contact, Audrey Welsh. Audrey Welsh never answered the phone. She never returned a letter. I spent one day on the phone with Robert, Mike, and Melanie, who consulted their computer screens and eventually told me I owed $8,300+. They indicated I would soon receive a payoff statement. It never arrived. What did arrive was a Notice of Foreclosure, and a house inspector to see if my house did in fact exist, and to hang a notice on my doorknob that she had been there. She didn't have time to talk. She waved as she drove off.

I went to the courthouse to see my house posted for sale on the rocket docket on 5 March. BBDFTE would not talk to me on the phone, only in writing. I went to see Ann Little, a local lawyer. She advised me to just pay them whatever they want, it was cheaper. We talked some more, and I decided to hire her for $1,000 to intervene with BBDFTE and get our financial differences resolved. BBDFTE would not talk to Ann without my written authorization. I authorized Ann in writing to communicate with BBDFTE (there were two B's then). BBDFTE told Ann it was their policy to communicate only with their client, and never with an adverse party. Ann told me I could file a lawsuit, but with little probability of success, for $2,500.

I considered it. I decided to go to the courthouse and see if I could talk to a judge and stop the sale. I paid $350 and filed my motion. I thought that was more reasonable than $2,500, and it seemed fairly simple. The clerk told me to call Miss Cindy for scheduling. A couple days went by before I could get in touch with Miss Cindy, who told me the Judge couldn't look at my motion due to lack of a white space page for him to sign. Sure enough, I hadn't thought to put in a white space page. Now I know.

I had to go down Option Path 2 and seek bankruptcy advice. By this time my e-mail and mailbox was full of letters from the bankruptcy attorneys offering to help me out. I picked Ray Fisher. I got quickly trained on credit on the internet, protected all my personal inventory, disclosed all my debts, and we filed our petition and notified BBDFTE that the house was unavailable for sale. I paid Ray a retainer of $1500 for a flat fee of $2500 and dismissed Ann. Later Ann paid me back $400 in unused retainer funds. I paid Ray another $1000 to cover his whole fee. His fee had gone up to $3500 due to the rate change. I paid the rest of my US Income Tax refund to the trustee and started on my $1200 payments, in accord with plan. No one had yet submitted their proof of claim, though we were expecting it.

The trustee continued making payments to everyone, plus PHH in anticipation. Mississippi eventually sent me a tax refund of $183, which I gave to the trustee. She was expecting more, since I had filed for $3200 and I was never a resident of Mississippi, just working there occasionally, staying in a hotel and paying my transient tax nightly. I'd also worked that year in Illinois, Ohio, and Michigan, but those were flat rate states and I was not required to file, having paid my obligations as they occurred. Like paying the Federal tax on fuel, every time I purchase a gallon of fuel, wherever I buy it, I pay the tax. So the trustee wanted more money, after the $183. I told Ray that I had agreed to pay all the money, which I had done. Mississippi had not explained their reasoning to me, but I had paid the trustee all the money they had sent. Ray said he would make some calls. The trustee made some calls. Sure enough, Mississippi sent me another $1,630. I gave it to the trustee. Ray told the trustee he had done some extra work, and asked for $450. The trustee gave Ray $450, and added it to my bill. I had to fire Ray before he did any more extra work, and I had to pay another $450. I fired Ray, and told the trustee and the judge Ray was no longer working for me and I would handle all further inquiries. I asked

the trustee for a proof of claim from PHH and sure enough they had by now submitted one, for $9,465, which was their $7,558 plus a bunch of fees for selling my house. The fees were created from thin air, as BBDFTE had a computer program that specialized in creating fees and submitting them to anyone who had an account. A person logs into the computer system periodically and clicks a permissive, and the fee is generated. They used to do this by hand, but sometimes they forgot, so they devised a computerized document processing system and patented it. It was a great improvement, and there were no more people involved. They had not sold my house. We never had an auction. They never earned any fees. But this is how they make their living, creating and processing documents, and creating and processing fees. They are apparently tremendously successful. I paid the entire proof of claim. and all of Ray's fees, and told the trustee the plan was all paid and to discharge me. She wanted another $23, which she paid to PHH. PHH returned $18 that was overpaid. The trustee could not give the money to me, so she gave it to a charitable cause. PHH had been holding $1,280 in escrow for insurance and taxes, and they wanted more. I canceled the PHH insurance and bought my own insurance

from Standard Guaranty for $481. We corresponded for a while, and PHH issued a refund credit of $600 for the pro rata insurance premium cancellation. They could not give me the money, so they credited it to escrow. I told them I had already paid the taxes directly so send the remaining escrow money to me, along with the Release of Lien documentation for filing. At the time I had completed the fraudulent Proof of Claim payments so I stopped paying anything. I had no more creditors. All my lawyers were paid. Eventually my bankruptcy was dismissed. Burnet County received the Paid In Full lien release and recorded the paperwork. We now owned our house, two years and eight months before scheduled contractual mortgage end date of 31 October 2016. My payment records showed an additional $1900 in fraudulent fees, $2400 in missing escrow funds, $600 in fees for an ineffective lawyer, and $4950 for an incompetent lawyer.

Now I was able to communicate directly again with PHH, as they were no longer a creditor, and I asked for my money back. I also asked for my fee of one bitcoin per day for the 18 months or so of account administrations. I prefer to deal in bitcoins for my own billing, as it is a more stable currency

than the dollar. Some people like renminbi, indeed most people. Renminbis are used in China, and there are more of them than there are of us. I prefer bitcoins, as they go right into my phone, and I can buy whatever I need, wherever I'm at. I don't think PHH took my complaints seriously. I know their lawyer thought I was acting frivolously. But...I was not the one who was threatening to send the sheriff to their office in New Jersey, cleaning out their bank accounts, and evicting all their employees. I just wanted to collect my debts. Now I had them by their tail on a downhill pull. Now that I knew the extent of my damages, I lodged a complaint with the Consumer Financial Protection Bureau. The CFPB had been set up by Congress as part of the Warren Dodd Financial Reform act of 2012 to strengthen America, and especially to address and reconcile situations just such as I had been going through for the last eighteen months. The Financial Crisis Investigation Committee, in 2008, had issued a report assigning significant responsibility for the Financial Crisis of 2006, to the largely unregulated financial speculators, who were dealing in real estate like they were playing on roulette wheels and living in comped rooms. They were winning the black bets among themselves, and the government was

paying the red bets. The situation was intolerable. American citizens who used to own houses were living under bridges. The Americans who still lived in houses were only paying half taxes, because the neighborhoods were full of vacant houses and shantytowns. Long Term US Government Bonds were just for suckers. People like me were working for Russian investors, French investors, German investors, Italian investors, English and Norwegian investors, Chinese investors, and American capital was fleeing the country. Life was intolerable, and getting intolerabler.

I was hopeful that the CFPB would be able to find someone responsible, clear up the confusion and get everything straightened out. I sent in my complaint, and all my documentation. PHH responded to CFPB with about 62 pages of the confused accounts of Christopher McCrae, who was having similar problems as I, and the same lack of resolution. Christopher lived in Ludlow, Massachusetts, where I lived in second grade, but other than that we were totally unrelated. I gave CFPB some feedback that the response of PHH was totally unresponsive, and they should redouble their efforts. CFPB may or may not have proceeded further, and PHH may or may not have ever replied. After that we were all confidential.

I started assembling my material and organizing to go to court again. I decided I would go in as a class action, and I had learned that since FIRREA of 1989, when the Keating Five went to jail, all these cases needed to be brought by the Attorney General. These cases are often fairly complex, heavily interlocked, sometimes involving organized crime, requiring a lot of deal making and structured prosecution, so they are generally best pursued by an organized, centralized authority. That was sure enough the case with Ocwen, a mirror image of PHH, who entered into a consent agreement on 19 December of 2013 after appearing in court for about 20 minutes with the CFPB and all 50 State attorneys general to resolve their claims without the need for a lot of discrete and time consuming litigation and only the payment of $2.1 Billion in consumer relief to be refunded to damaged individuals just such as myself, and the monitoring for three years of Joseph A. Smith to verify that their activities continued in a lawful and just manner, of benefit to the community. I was greatly encouraged.

I knew I had to go through this qui tam procedure in a specific and lawful manner, so I initially invited my counterparties, PHH and BBDFTE, to an Alternative Dispute Resolution meeting at my house on 25 December 2013,

so we could walk around the property, discuss our differences like civilized people, and come to a mutual agreement acceptable to all. Nobody responded. Nobody came. On 26 December 2013, I went to the FBI in Austin, the nearest Department of Justice, and reported the suspicious activity in my community and my intent to prosecute the miscreants to the fullest extent of the law. They (the FBI) have 90 days to make sure there are no investigations in progress that I might disrupt, and are able to order me to desist if they feel that necessary. Unless ordered not to, I am then free as a citizen to represent the United States, investigate the extents of the activity and eventually report my findings to the prosecutor, or prosecute them with my own resources. These methods have been tremendously successful in the arena of drugs or organized crime, and investigators are generally extended the courtesy of anonymity if they so desire, as one contributor to personal security. For financial people, generally considered pillars of the community, I had no such concerns and have waived that privilege. I view information on my computer to be as secure as information on Post-It notes on my refrigerator.

Actually, the qui tam approach has been of tremendous assistance to the DOJ in their investigations and prosecutions, and a flurry of consent judgments have continued all through 2014, with such large financial institutions as Citibank, Chase/JP, BAC, Greentree, Ally, Wells Fargo quickly coming to fruition. These companies, with their feet held to the fire, are standing in line to come to Jesus, and seeing the benefit of converting large liabilities of unknown size into manageable disgorgements of earnings, and clear regulatory oversight of their continuing operations. To date, at this writing, all settlements have been negotiated by the Department of Justice, and no jury has yet been empanelled for the complex duty of disentangling the web of interlocking debt and speculation. My case would appear to be unique, precedent setting, of great current social import, and of invaluable guidance to the long-term planning of both the legitimate businesses and the interested consumers. It's like a sign post on the highway - "How fast should I be able to go here? Is there a school nearby? Does this bridge get icy?" And then you can read the signs - "80 - School Zone 7:15 to 8:45, 2:30 to 4:15 - Bridge Ices Before Road." It all contributes to help make modern life simple. America is not a jungle. We are not dumb beasts.

While I was organizing myself and gathering resources, and seeking legal counsel, I received a note that my initial motion to stay my foreclosure sale had been removed to Western Texas District Court, at the request of one of the defendant appellees, PHH. I was at the time wondering what district court I should file a new cause in, and actually Western Texas here in Austin is downright convenient. I modified my complaint to update all the intervening time and activity since last visited, in accord with the rules of civil procedure and the local court rules, and delivered my amended complaint to the court clerk. I also simultaneously served my counterparties, applied for my PACER account so we could all work electronically, and stopped by the local Austin FBI office again and delivered them a printed copy of my amended complaint so they could get caught up on events, or take over prosecution if they so desired. We had another long talk and we reviewed my amended complaint. I told them the filing was not sealed, as that is at my option, and I had no unusual concerns for my personal protection. I have nothing but good things to say about the FBI field agents, who show remarkable knowledge of and interest in current

events. There was a nice picture of Barack Obama on the wall. Maybe today there is someone else.

We then started through the characteristic Complaint-Response-Reply routine characteristic of establishing the informational foundations of emerging conflict, and organizing the presentation to the jury. I thought we were getting ourselves pretty well established in our differing views, and moving toward a little better definition. The defendants consistently motioned for dismissal, on many and various grounds, which in itself is not unusual. I made sure to move for jury trial under Rule 38, to get it in the record and notify the defendants that they should not neglect their fact-seeking responsibilities to their client. I was accused of being intransitive at one point, so I immediately entered my written offer of settlement. Two have expired, the third offer is still in effect, expiring when we seat a jury. We were all seemingly neglecting our responsibilities under Rule 26, and at one point I moved for Alternative Dispute Resolution to be ordered, as a catalytic process. Time went by. The magistrate judge, Mark Lane, eventually opined in support of the defendants for dismissal, on the basis of very little information. I replied that I'm sure we would continue to entertain

motions for dismissal, right up to the point of the jury retiring to deliberations, but we could surely put that off to a point in the future where we might all have a little more information, and a little more basis for our opinion.

On 4 November 2014 the judge dismissed the case. I filed an appeal to USCA 5th to remand the case for proper jury trial, including completing all our obligations under Rule 26 to enable the jury to receive as complete a picture of the situation as possible. PHH forecloses 8-10,000 houses per quarter. Lender owned real estate is a blight on the landscape in every town in America. I believe there are 6,000 people like me who have been damaged by common predatory practices all over the country. I can look on Zillow.com and shop for foreclosed houses nearby; in a 10 mile radius; in Lubbock, Texas; in Washington, D.C.; and be overwhelmed with offers from slumlords everywhere. The regulatory and enforcement arms of government have been ineffective. The legislative powers have created sweeping new regulatory powers. The DOJ has a Mortgage Fraud Task Force, with significant power, reach, and budgetary resources. Now I am a judicial activist. Let's put away these bad actors, one by one.

For Truth, Justice, and America,

24 November 2014 /s/ David McCrae

By: DAVID MCCRAE, Pro Se* **

350 Cee Run / Bertram Texas 78605

512.557.0283 / xstek99@gmail.com

* Note: Per FRAP Rule 3 (c)(2) David McCrae also represents claim of spouse, Barbara McCrae

** Note: per FRAP Rule 3 (d)(1) David and Barbara McCrae are Class Members #1 of a future class that is not currently certified

NOTARY

This sworn statement of David McCrae is executed before me on DATE_____

at LOCATION _____

_____

RECORD ON APPEAL

DOCKET SHEETS pp.1-6

DOCUMENT 23 - Jury Demand

DOCUMENT 23.1 - Supporting

Case 1:14-cv-00733-LY Document 23 Filed 09/01/14 Page 1 of 4

[FORMATTING AND PAGINATION ENHANCED FOR READABILITY]

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS

_____

DAVID MCCRAE AND BARBARA MCCRAE,] PLAINTIFFS, qui tam] CONSUMER FINANCIAL PROTECTION BUREAU] vs.] LENDER PHH MORTGAGE, LLC., and] SUBSTITUTE TRUSTEE BARRETT BURKE DAFFIN] FRAPPIER TURNER AND ENGEL, LLP,] and VARIOUS ACTORS AND EMPLOYEES] OF DEFENDANTS JOHN DOE 1-100]

_____

Demand for Trial by Jury

Judge –

In accord with Rule 38, I am demanding a trial by jury.

CIVIL ACTION NO. 1:14-cv-00733-LY

Since the recent and ongoing financial crisis in this country (Wall Street and the Financial Crisis, Anatomy of a Financial Collapse, Majority and Minority Staff Report, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Carl Levin, Chairman and Tom Coburn, Ranking Minority Member), the Financial Institutions Reform, Recovery, and Enforcement act of 1989 (FIRREA)has been passed by the legislature (still being widely litigated) to define and confirm the ethical bedrock foundations of proper financial institution operations to the benefit of our community. The Consumer Financial Protection

Board has been established specifically by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 to address, and the Department of Justice appears to have expended great effort in examining and regulating, mortgage servicing industry practice, company by company. The most egregious violators in the arena (BofA, Chase, Citi, Greentree, Ocwen, Wells) have already begun to appear in courts to register consent judgments with the united group of all 50 State Attorneys General, and to disgorge record setting penalties in restitution of past practices, and to submit themselves and their changing practices to regulatory oversight by Joseph A. Smith, The Office of Mortgage Settlement Oversight (Joseph A. Smith does not participate in litigation). We are now considering just such industry practices in the case of the plaintiff and these two defendants. A jury has never been empaneled before to openly consider and judge these issues, or their most proper and effective remediation. Now is the time.

Attached Exhibit P-11, Better Markets v. DOJ - Complaint.

Respectfully,

Date: 1 September 2014 Signature: /s/ David McCrae, Pro se
350 Cee Run/Bertram, Texas 78605

512.557.0283 Xstek99@gmail.com

[PROPOSED] ORDER GRANTING Trial by Jury
DATE:
TIME:

COURTROOM:
JUDGE: Lee Yeakel
The Court has considered the Motion for Trial by Jury.
Finding that good cause exists, the Motion is GRANTED / DENIED.

MAKE IT SO.

DATED: United States District/Magistrate Judge

[Jury Trial was properly docketed by Clerk]

I have served this Demand for trial by jury To
McGlinchey Stafford, PLLC
Mr. Nathan Anderson nanderson@mcglinchey.com

Mr. David Smith

sdsmith@mcGlinchey.com

By e-mail

Pete Nantirux
Barrett, Burke, Daffin, Frappier, Turner and Engel 15000 Surveyor Blvd.
Suite 100
Addison, TX 75001

By US Mail
Sworn to on 1 September 2014 by /s/David McCrae, Pro se

350 Cee Run / Bertram Texas 78605

Xstek99@gmail.com

512.667.0283

Case 1:14-cv-00733-LY Document 23-1 Filed 09/01/14 Page 1 of 60

[FORMATTING AND PAGINATION ENHANCED FOR READABILITY]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BETTER MARKETS, INC. 1825 K Street, N.W., Suite 1080 Washington, D.C. 20006

v.

Plaintiff,

UNITED STATES DEPARTMENT
OF JUSTICE and ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States,
950 Pennsylvania Avenue, N.W. Washington, D.C. 20530-0001

Defendants.

Civil Action No. [NOT FILED IN D.C. YET]

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF I. INTRODUCTION AND SUMMARY

1. This is an action under the Constitution of the United States, the Administrative Procedure Act ("APA"), and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), against the United States Department of Justice and the Attorney General of the United States, Eric H. Holder, Jr. (together, "DOJ"), challenging the validity of the historic and unprecedented $13 billion contractual agreement between the DOJ and JPMorgan Chase & Co. ("JP Morgan Chase") that was announced on November 19, 2013 but never reviewed or approved by any court ("$13 Billion Agreement").

2. The $13 Billion Agreement is a mere contract whereby JP Morgan Chase agreed to pay $13 billion in exchange for complete civil immunity from DOJ

for years of pervasive, egregious, and knowing alleged fraud and other illegal conduct related to the worst financial crash in the U.S. since 1929, which caused the worst economy in the U.S. since the Great Depression ("Financial Crisis"). The Financial Crisis is estimated to cost the U.S. between $13 trillion and $38 trillion (which would be as much as $120,000 for every man, woman and child in the country).

3. As the DOJ admitted, JP Morgan Chase's illegal conduct in making "serious misrepresentations to the public" and "knowingly bundl[ing] toxic loans and sell[ing] them to unsuspecting investors" had a "staggering" impact, "helped sow the seeds of the mortgage meltdown," and "contributed to the wreckage of the" Financial Crisis.

4. The DOJ has also admitted that this contract for $13 billion and civil immunity is "record breaking" and the "largest settlement with a single entity in American history." In fact, it is more than 300% larger than the next largest settlement with a single entity that the DOJ has ever entered into, which was for only $4 billion.

5. In addition, of the $13 billion, the DOJ imposed a $2 billion penalty, which the DOJ admitted was "the largest FIRREA penalty in history." That is actually a gross understatement because the next largest FIRREA penalty assessed in at least the last five years appears to have been a mere $15.5 million. Thus, the FIRREA penalty the DOJ imposed on JP Morgan Chase here by contract was 12,000% larger than that next largest penalty.

6. Yet, this contract was the product of negotiations conducted entirely in secret behind closed doors, in significant part by the Attorney General personally, who directly negotiated with the CEO of JP Morgan Chase, the bank's "chief negotiator." No one other than those involved in those secret negotiations has any idea what JP Morgan Chase really did or got for its $13 billion because there was no judicial review or proceeding at all regarding this historic and unprecedented settlement. However, it is known that JP Morgan Chase's $13 billion did result in almost complete nondisclosure by the DOJ regarding JP Morgan Chase's massive alleged illegal conduct.

7. Thus, the Executive Branch, through DOJ, acted as investigator, prosecutor, judge, jury, sentencer, and collector, without any review or approval of its unilateral and largely secret actions. The DOJ assumed this all-encompassing role even though the settlement amount is the largest with a single entity in the 237 year history of the United States and even though it provides civil immunity for years of illegal conduct by a private entity related to an historic financial crash that has cause economic wreckage affecting virtually every single American. The Executive Branch simply does not have the unilateral power or authority to do so by entering a mere contract with the private entity without any constitutional checks and balances.

8. Notwithstanding such extensive and historic illegal conduct that resulted in a $13 billion payment, the DOJ did not disclose the identity of a single JP Morgan Chase executive, officer, or employee, no matter how involved in or responsible for the illegal conduct. In fact, the DOJ did not even disclose the number of executives, officers, or employees involved in the illegal conduct or if any of them are still executives, officers, or employees of JP Morgan Chase today. Moreover, the DOJ did not disclose the material details of what these individuals did, when or how they did it, or to whom and with what consequences. The DOJ was even silent as to which specific laws were violated, to what degree, and by what conduct. The DOJ also did not disclose even an estimate of the amount of damage JP Morgan Chase's years of illegal conduct caused or how much money it made or how much money its clients, customers, counterparties, and investors lost. Remarkably, the DOJ does not even clearly state the period for which it is granting JP Morgan Chase immunity: The $13 Billion Agreement states that the investigation spanned the period between 2005 and 2008; another document refers to JP Morgan Chase's illegal conduct between 2005 and 2007; and the DOJ press release references actions in connection with the listed RMBS issued "prior to January 1, 2009."

9. Thus, these and many other critical facts remain unknown and undisclosed in the substantively uninformative settlement agreement; the brief and misleadingly-labeled document entitled "Statement of Facts" ("SOF"), which was clearly drafted by the DOJ and JP Morgan Chase

to conceal rather than reveal; or the press release issued by DOJ to trumpet the $13 Billion Agreement ("Press Release").

10. As a result, no one has any ability to determine if the $13 Billion Agreement is fair, adequate, reasonable, and in the public interest or if it is a sweetheart deal entered into behind closed doors that, by design, intent, or effect, let the biggest, most powerful, and well- connected bank in the U.S. off cheaply and quietly for massive illegal conduct that contributed to the Financial Crisis and the economic disaster it caused. Indeed, one could argue that the $13 billion payment was for making sure no one ever learns the scope and detail of JP Morgan Chase's illegal conduct.

11. For example, did JP Morgan Chase settle liability for $100 billion, $200 billion, or more for just $13 billion? Did JP Morgan Chase make $20 billion, $40 billion, or more from its illegal conduct? Should JP Morgan Chase have disgorged $20 billion, $40 billion, or more in ill-gotten gains? Are the same executives, officers, and employees involved in the settled illegal conduct in the same or similar positions of trust and responsibility today, and if so, what measures have been taken to ensure their illegal conduct is not repeated?

12. In addition, why is the $13 billion the only sanction against JP Morgan Chase? Although requiring changes in the way an institution conducts business are typical (if not standard) measures when settling much smaller, less consequential matters, DOJ did not require JP Morgan Chase to undertake remedial measures of any type to ensure that the illegal conduct at issue or similar illegal activities are not repeated in the future. Similarly, the $13 Billion Agreement provides for no injunction against JP Morgan Chase, yet injunctions are standard features of settlements in matters much less grave and historic than this one.

13. Given all those undisclosed facts and the shroud of secrecy in which the DOJ and JP Morgan Chase have cloaked the $13 Billion Agreement, the public could well perceive it as an effort by the DOJ to keep JP Morgan Chase's illegal conduct nonpublic so that the agreement between DOJ and JP Morgan Chase could never be independently scrutinized or evaluated.

Would that perception have a factual basis? No one knows, and without review and assessment by a court, no one will ever know because transparency, accountability, and oversight were all sacrificed in this settlement and in the settlement process.

14. The imperative for judicial review is all the more important here because the DOJ and the Attorney General have an apparent conflict of interest, if not a motive to accept a seemingly strong but actually weak and inadequate settlement that could not pass judicial scrutiny: The $13 Billion Agreement follows years of sustained, intense, and high profile criticism of the DOJ and the Attorney General personally for failing to hold Wall Street's biggest and most powerful institutions like JP Morgan Chase accountable for their central role in causing or contributing to the Financial Crisis. Indeed, they have been accused of creating a double standard of justice in the U.S.: one for Wall Street and one for Main Street.

15. The Attorney General's testimony before the U.S. Senate confirmed that there is indeed a double standard because he and the DOJ take into account the possible systemic implications of Wall Street's biggest banks before deciding whether to charge or punish them. As a result, the too-big-to-fail Wall Street banks get a break while others too-small-to-care-about get punished. The testimony of the Attorney General caused an immediate furor and he has tried to walk back his statement. However, as chronicled by 60 Minutes, Frontline, and much of the media, a dark cloud has hung over the DOJ and the Attorney General since his testimony.

16. The DOJ and the Attorney General have aggressively used the $13 Billion Agreement to try to restore their reputations and rebut these charges. For example, the DOJ proclaimed that the "settlement represents another significant step towards holding accountable those banks which exploited the residential mortgage market and harmed numerous individuals and entities in the process." The Attorney General himself said "[t]he size and scope of this resolution should send a clear signal that the Justice Department's financial fraud investigations are far from over. No firm, no matter how profitable, is above the law, and the passage of time is no shield from accountability."

17. Thus, the DOJ and the Attorney General have a vested interest in proclaiming this settlement tough on Wall Street and it would be devastating to them if it were not perceived that way. Structuring the agreement so that there would be no judicial review ensured that there would be no independent check on their claims. The DOJ avoided oversight and accountability. Furthermore, the total lack of transparency and meaningful information regarding what JP Morgan Chase did, how they did it, how much they profited, how much clients lost, of course, ensures that no one will ever be in a position to challenge their self-serving assertions. One might think that was the point of secretly negotiating the agreement and drafting it to reveal as little as possible.

18. Demonstrating the DOJ's fervent self-interest in promoting the story line that it was finally getting tough on Wall Street, it misrepresented or, at best, exaggerated the terms of the settlement as being more severe than they were. As detailed below, DOJ claimed that it got JP Morgan Chase to acknowledge making "serious misrepresentations to the public," but JP Morgan Chase quickly and directly contradicted the DOJ, stating that it made no such acknowledgment.

19. In addition, high level political appointees of the DOJ, including the Attorney General personally, led the secret negotiations and the eleventh-hour discussions that resulted in the $13 Billion Agreement. In fact, at a critical juncture, with the DOJ just hours away from filing a lawsuit, JP Morgan Chase's CEO directly and personally called the cellphone of the third highest ranking official at the DOJ, who reportedly "recognized" the incoming phone number of the CEO, who then offered billions of dollars more to prevent the filing of the lawsuit. This very well-timed call to the DOJ official's cellphone was successful: The DOJ called off the filing of the lawsuit later that day; face-to-face negotiations between the Attorney General and the CEO commenced a day later; JP Morgan Chase began offering billions of dollars more to prevent the filing of any lawsuit; and the $13 Billion Agreement was reached and finalized, ensuring that no lawsuit would be filed and no meaningful disclosure of JP Morgan Chase's vast illegal conduct would ever occur.

20. The heavy and decisive involvement of such high level political appointees at the DOJ is particularly important given the status, connectedness, and political activities not just of JP Morgan Chase, but also its very high profile CEO. As was widely reported, JP Morgan Chase's CEO was considered for nomination as the President's Treasury Secretary just a few short years ago. He was, thus, a potential fellow cabinet officer of the Attorney General. Although never elevated to Treasury Secretary, JP Morgan Chase's CEO is still a welcome guest at the highest levels of the Administration, including at the White House.

21. While such actions, agreements, and settlements might be permissible under other circumstances, the DOJ does not have the unilateral authority to, by contract and without any judicial review or approval, (a) finalize what it admitted is "the largest settlement with a single entity in American history," with the largest bank in the U.S., regarding an historic financial crash that has inflicted widespread economic wreckage across the U.S.; (b) obtain an unprecedented $13 billion monetary payment, including an historic $2 billion penalty; (c) tell the American public almost nothing about what was involved; (d) provide blanket immunity to the bank; and then, (e) as the DOJ has stated, use it as a template for future contractual settlements with the other largest too-big-to-fail Wall Street institutions for their role in causing or contributing to the Financial Crisis.

22. The DOJ and the Attorney General have used the settlement amount of $13 billion as a sword and a shield to deflect questions and blind people to the utter lack of meaningful information about their unilateral action and JP Morgan Chase's illegal conduct. However, a record-breaking settlement amount does not make an agreement right, adequate, or legal. A dollar amount, no matter how large, cannot substitute for transparency, accountability, oversight, or a government that operates in the open, not behind closed doors. Such actions, however well-meaning or motivated they might be, will erode public confidence in government officials and, indeed, government itself. Thus, even an unprecedented settlement amount cannot blind justice or immunize the DOJ from having to obtain independent judicial review of its otherwise unilateral, secret actions regarding such historic events.

23. Under these facts and circumstances, the DOJ's decision not to seek and obtain judicial review and approval of the $13 Billion Agreement is a violation of the separation of powers doctrine; the APA; and the explicit requirements of FIRREA, 12 U.S.C. § 1833a. It was incumbent on the DOJ to file a lawsuit in a federal court and submit the $13 Billion Agreement to that court so it could perform its constitutionally assigned review function. The facts and circumstances in this case demonstrate why constitutional checks and balances are so vitally important.

24. As set forth in detail below, the DOJ's failure to obtain the required judicial review of the $13 Billion Agreement has injured and continues to injure Plaintiff Better Markets, Inc. ("Better Markets") by undermining its mission objectives; by interfering with its ability to pursue its advocacy activities; by forcing it to devote resources to identifying and counteracting the harmful effects of the DOJ's unlawful settlement process; by depriving Better Markets of the information to which it would have been entitled had the DOJ sought judicial review and approval of the $13 Billion Agreement; and by depriving Better Markets of a judicial forum in which it could seek to participate to influence the settlement process before the agreement becomes effective.

25. To remedy the defects in the $13 Billion Settlement and in the settlement process, and as set forth in more detail in the Prayer for Relief, Better Markets seeks a judgment declaring that:

a. the DOJ violated the separation of powers doctrine by unilaterally finalizing the $13 Billion Agreement without seeking judicial review and approval;

b. b. the DOJ acted in excess of its statutory authority by unilaterally finalizing the $13 Billion Agreement without seeking judicial review and approval;

c. c. the DOJ acted arbitrarily and capriciously by unilaterally finalizing the $13 Billion Agreement without seeking judicial review and approval;

d. d. the DOJ failed to comply with the explicit requirements of FIRREA, 18 U.S.C. § 1833a(a) and (e), when it assessed and extracted a $2 billion civil monetary penalty from JP Morgan Chase without having a court assess that penalty;

e. the DOJ failed to comply with the explicit requirements of the APA, 5 U.S.C. § 558, when it extracted monetary sanctions from JP Morgan Chase without being authorized by law to do so; and

f. the $13 Billion Agreement is unlawful and invalid, in whole or in part.

26. Better Markets further seeks an injunction preventing the DOJ from enforcing the $13 Billion Agreement unless and until the DOJ submits the $13 Billion Agreement to a court with an ample and detailed record so that such court may review all the facts and circumstances, enlarge the record supporting the $13 Billion Agreement as it deems necessary, and determine whether the $13 Billion Agreement meets the applicable standard of review.

II. PARTIES

Defendants
27. Defendant Department of Justice is an agency of the United States Government, and it is subject to the APA. See 5 U.S.C. §§ 551(1), 703; 28 U.S.C. § 501.

28. Defendant Eric H. Holder ("Attorney General") is the Attorney General of the United States. The Attorney General has ultimate authority over the DOJ and is responsible for overseeing the DOJ's compliance with, among other statutes, FIRREA in its enforcement actions. See 5 U.S.C. § 703.

Plaintiff
29. Plaintiff Better Markets is a 501(c)(3) tax-exempt nonprofit organization incorporated in Georgia with its principal place of business in Washington, D.C. It was founded in 2010 to promote the public interest in the financial markets. It advocates for greater transparency, accountability, and oversight in the financial system through a variety of activities, including, without limitation, the following:

a. commenting on rules proposed by the financial regulators;

b. engaging in public advocacy through the print, broadcast, and social media;

c. issuing press releases, press statements, and newsletters;

d. testifying before congressional committees;

e. hosting or participating in federal agency roundtables and other public
events;

f. conducting and publishing independent research; and

g. participating in litigation.

30. One goal of Better Markets to ensure that the rules promulgated in accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act ("2010 Financial Reform Law") by the financial regulatory agencies are sufficiently strong and comprehensive to end the inappropriate, reckless, and fraudulent practices that caused the Financial Crisis and that will inevitably lead to another crisis absent strong regulatory reform, among other things.

31. Accordingly, Better Markets devotes many of its resources to commenting on, and in some cases defending in court, the vast collection of rules being proposed and adopted by the financial regulators to implement the 2010 Financial Reform Law. For example, and without limitation, Better Markets has engaged in the following activities:

a. Better Markets has submitted over 150 letters, including formal comment letters, to the financial regulatory agencies on rules being promulgated in the areas of securities, commodities, and banking regulation. The depth and breadth of Better Markets' activities here are unique; no other non-industry group has engaged on the issue of financial reform at this level. In those submissions, Better Markets has advocated for the imposition of strong, clear, and enforceable regulatory standards that will promote transparency, accountability, and oversight in the financial markets and that will eliminate or minimize the threat of another Financial Crisis.

b. Better Markets has had over 75 meetings with U.S. federal regulators, attended by agency heads or senior staff members of those regulators, to highlight areas where rules must be strengthened.

c. Better Markets has conducted extensive research into a variety of topics relating to financial reform, ranging from excessive speculation in the commodities markets to the use of so-called cost-benefit analysis by opponents of reform challenging rules promulgated in accordance with the 2010 Financial Reform Law.

d. Better Markets has appeared in eight cases in federal court as amicus curiae to defend agency rules against industry allegations that the agencies failed to conduct adequate economic analysis or violated the

APA when they promulgated their financial reform rules. Natl Assoc. of Manufacturers v. SEC, No. 13-cv-5252 (D.C. Cir. filed Aug. 13, 2013); Inv. Co. Inst. v. CFTC, 720 F.3d 370 (D.C. Cir. 2013); Natl Assoc. of Manufacturers v. SEC, No. 1:13-cv-635 (D.D.C. July 23, 2013); American Petroleum Inst. v. SEC, No. 12-cv-1668 (D.D.C. July 2, 2013); Natl Assoc. of Manufacturers v. SEC, No. 12-1422 (D.C. Cir. May 2, 2013); American Petroleum Inst. v. SEC, No. 12- 1398 (D.C. Cir. Apr. 16, 2013); Inv. Co. Inst. v. CFTC, No . 1:12-cv-612 (D.D.C. Dec. 12, 2012); Int'l Swaps and Derivatives Ass'n v. CFTC, 887 F. Supp. 2d 259 (D.D.C. 2012). Better Markets is the only organization to consistently assist federal agencies in defending against such industry rule challenges in court.

32. Better Markets also recognizes that effective financial regulation and reform, and the prevention of another Financial Crisis, depends not only on the enactment of strong laws and the promulgation of strong rules, but also on the effective enforcement of those laws and rules. Accordingly, another goal of Better Markets is to promote strong enforcement under the laws and regulations governing financial markets and institutions. To further that mission, Better Markets urges federal agencies to include robust enforcement mechanisms in their reform rules; meets with agency heads and senior enforcement officials at federal agencies to encourage aggressive, transparent, and effective enforcement of financial regulations; and argues in court as an amicus curiae for the imposition of monetary penalties and other sanctions that are sufficient to effectively deter and punish illegal conduct in the financial sector.

33. A specific focus of Better Markets' advocacy is on the settlement of enforcement actions by financial regulators, because almost all of those enforcement actions are resolved through the settlement process. Better Markets devotes significant resources to evaluating settlement agreements in government enforcement actions and advocating for settlements that are open and transparent; based on a sufficiently detailed record; and sufficiently strong to effectively punish and deter unlawful conduct in the financial markets.

34. Better Markets further advocates that judicial review of settlements in federal agency enforcement action is a vitally important part of the process—

a. whenever the parties themselves enlist the power of a federal court to approve and enforce a settlement; or

b. whenever, as in this case, the resolution of the matter will have a profound, historic, and unprecedented impact on the public interest.

35. Better Markets promotes strong settlements through a variety of activities, including, without limitation, the following:

a. Better Markets holds meetings with federal agency heads and senior level agency staff, urging the agencies to pursue stronger settlement terms in enforcement actions and to create a more complete and transparent record in the settlement process.

b. Better Markets challenges settlements in enforcement actions in federal court when they are based upon an inadequate factual record; they lack sufficient explanation or justification; they are not subjected to a meaningful judicial review according to the applicable legal standard; or they are facially weak and incapable of punishing or deterring unlawful conduct. See, e.g., Brief of Better Markets, Inc. as Amicus Curiae filed in SEC v. Citigroup Global Mkts. Inc., No. 11-cv-5227 (2d Cir. Dec. 20, 2011).

c. Better Markets publicly urges regulators and enforcement authorities to ensure that their settlements are transparent and based on a record that enables the public, and where appropriate a court, to understand and evaluate the agreements. For example, in anticipation of the $13 Billion Agreement in this case, Better Markets submitted a letter to the DOJ, advocating for transparency in any forthcoming settlement and urging that "any settlement with JP Morgan Chase provide full, comprehensive, and detailed public disclosure regarding all matters settled, including the facts related to each matter, the damages and harm caused, the ill-gotten gains received, the executives involved, and the other specific terms relating to each matter." See Letter from Better Markets to Attorney General Holder, Re: JP Morgan Chase, Agreement Negotiations & Final Agreement (Nov. 6, 2013), available at http://bettermarkets.com/sites/default/files/Better%20Markets%20Letter%20to%20AG% 20Holder-%20JPM%20Agreement-%2011-6-13.pdf. The letter further argued that "any failure to fully explain, justify, and detail all aspects of any settlement will be inexcusable," as "it will confirm suspicions that the settlement is in fact a carefully choreographed charade, devised behind closed doors primarily to satisfy the interests of the bank and the Department [of Justice], not the public." Id. at 3

d. Better Markets engages in significant public education and advocacy through the media regarding the importance of settlements and the settlement process. For example, in anticipation of the $13 Billion Agreement in this case, and acting through media channels, Better Markets (1) highlighted the need for transparency in the settlement process, so that the public could judge the adequacy of the $13 Billion Agreement for itself; (2) questioned whether the DOJ was giving JP Morgan Chase special treatment in the settlement process; and (3) argued that, notwithstanding the reportedly large $13 billion settlement amount, the $13 Billion Agreement may not serve as an effective punishment or deterrent given the nature of the reported monetary sanctions, the anticipated failure to hold responsible individuals accountable, and the egregious and widespread misconduct involved.

36. Better Markets is a "person" within the meaning of the APA, 5 U.S.C. §§ 551(2),

III. JURISDICTION AND VENUE

37. This action arises under the United States Constitution; the APA, 5 U.S.C. §§ 500 et seq.; and FIRREA, 12 U.S.C. § 1833a. Jurisdiction therefore lies in this Court under 28 U.S.C. § 1331.

38. Venue is proper in this Court under 28 U.S.C. § 1391(e) because this is an action brought by a plaintiff that resides in this judicial district, against an agency of the United States and an officer of that agency acting in his official capacity or under color of legal authority that reside in this judicial district, and a substantial part of the events or omissions giving rise to this action occurred in this judicial district.

39. The actions and failures to act of the DOJ complained of herein, including, without limitation, the $13 Billion Agreement, constitute "agency action" within the meaning of the APA, 5 U.S.C. §§ 551(13), 702, 704, 706.

40. The actions and failures to act of the DOJ complained of herein, including, without limitation, the $13 Billion Agreement, constitute final agency action for which there is no other adequate remedy in court, all within the meaning of the APA, 5 U.S.C. § 704.

41. As a result of the actions and failures to act of the DOJ complained of herein, including, without limitation, the $13 Billion Agreement, Better Markets is suffering legal wrong and is adversely affected or aggrieved by agency action, all within the meaning of the APA, 5 U.S.C. § 702.

42. As a result of the actions and failures to act of the DOJ complained of herein, including, without limitation, the $13 Billion Agreement, Better Markets is entitled to judicial review

43. As detailed more fully above and below, Plaintiff Better Markets has standing to bring this action because the DOJ's violations of the Constitution, the APA, and FIRREA have injured and continue to injure Better Markets by undermining its mission objectives; by interfering with its

ability to pursue its advocacy activities; by forcing it to devote resources to counteracting the harmful effects of the DOJ's unlawful settlement process; by depriving Better Markets of the information to which it would have been entitled had the DOJ sought judicial review and approval of the $13 Billion Agreement; and by depriving Better Markets of a judicial forum in which it could seek to participate to influence the settlement process before the agreement becomes effective.

44. All of the foregoing injuries to Better Markets have been caused by the unlawful activities of the DOJ in entering the $13 Billion Agreement without any judicial oversight, and all of those injuries will be redressed if the relief requested herein is granted.

45. Finally, the interests of Better Markets are consistent with the purposes of the constitutional and statutory provisions at issue. Indeed, the efforts of Better Markets in this case will further, rather than frustrate, the policies and objectives underlying the constitutional and statutory provisions at issue, including the separation of powers doctrine, FIRREA, and Section 558 of the APA, 5 U.S.C. § 558.

IV. FACTS

46. The DOJ entered into the $13 Billion Agreement with JP Morgan Chase on November 19, 2013.[1]

[1] The $13 Billion Agreement and related material from the DOJ that are referred to in this Complaint are available on the DOJ's website, http://www.justice.gov/opa/pr/2013/November/13-ag-1237.html.

47. This $13 Billion Agreement between the DOJ and JP Morgan Chase was unprecedented and historic in many ways, including the following:

a. It was "the largest settlement [amount] with a single entity in American history," as the DOJ admitted. Press Release. In fact, it was more than 300% larger than the next largest settlement amount with a single entity, which was just $4 billion.

b. b. It included "the largest FIRREA penalty in history," as the DOJ also admitted;

c. c. It related to the largest financial crash in the U.S. since the Great Crash of 1929 and the worst economy in the U.S. since the Great Depression of the 1930s.

d. d. It was with the largest, richest, and most well-connected bank in the United States and the world, JP Morgan Chase.

e. It was negotiated between senior political appointees at the DOJ including the Attorney General personally and the CEO of JP Morgan Chase.

f. It resulted from a phone call from JP Morgan Chase's CEO directly and personally to the cellphone of the third highest ranking official at the DOJ, who tellingly "recognized" the incoming phone number of the CEO.

g. It resulted from JP Morgan Chase's CEO personally offering the DOJ billions of dollars more to prevent the imminent filing of a lawsuit and to prevent the public disclosure of JP Morgan Chase's illegal conduct.

h. It stopped the DOJ from filing a lawsuit detailing JP Morgan Chase's illegal conduct, which the DOJ had drafted and had been planning to file just hours after the phone call was placed.

i. It gave blanket civil immunity to JP Morgan Chase for all of its illegal conduct over some number of years related to its creation, packaging, marketing, sale, issuance, and distribution of toxic subprime mortgages.

j. It related to massive and pervasive illegal conduct by JP Morgan Chase that lead up to and contributed to the Financial Crisis, which caused and continues to cause economic wreckage across the United States and which will likely cost more than $13 trillion and possibly as much as $120,000 for every man, woman, and child.

k. It disclosed very few meaningful facts related to this illegal conduct to the public.

l. It is going to be a template for the DOJ's settlements with the other handful of gigantic, too big, too complex, and too-interconnected-to-fail Wall Street banks.

48. The $13 Billion Agreement has three principal components.

a. First, it fully, finally, and forever resolves unspecified "potential legal claims" for unspecified violations of federal civil laws in connection with the creation, packaging, marketing, sale, issuance, and distribution of residential mortgage-backed securities ("Subprime Securities") by JP Morgan Chase and two companies it purchased (The Bear Stearns Companies ("Bear Stearns") and Washington Mutual Bank ("Washington Mutual")) over the four-year period from 2005 to 2008.

b. Second, it fully, finally, and forever resolves unspecified "potential legal claims" of four states (California, Delaware, Illinois, and Massachusetts) for unspecified violations of state law in connection with the creation, packaging, marketing, sale, issuance, and distribution of Subprime Securities. Those four states are parties to the $13 Billion Agreement.

c. Finally, the $13 Billion Agreement memorializes the separate disposition of claims made in 20 civil lawsuits previously filed by the Federal Deposit Insurance Corporation ("FDIC"), the Federal Housing Finance Agency ("FHFA"), the National Credit Union Association Board ("NCUA"), and the State of New York, against JP Morgan Chase and other defendants in various federal and state courts, also relating to the creation, packaging, marketing, sale, issuance, and distribution of Subprime Securities ("Related Actions"). The FDIC, FHFA, NCUA, and the State of New York are not parties to the $13 Billion Agreement.

49. The $13 Billion Agreement specifies the amounts of money that JP Morgan Chase must pay to eliminate all of its liability regarding the unspecified potential civil claims held by the DOJ and the four states, and to terminate each of the Related Actions brought by the FDIC, the FHFA, the

NCUA, and the State of New York. $13 Billion Agreement at 3-5. Those payments total $13 billion ("Agreement Amount"), apportioned as follows–

a. $2 billion is a civil monetary penalty that the DOJ obtained "pursuant to" FIRREA and solely related to the illegal conduct of JP Morgan Chase.

b. $4 billion is purportedly for "consumer relief" that the DOJ obtained in exchange for releasing JP Morgan Chase of liability under enumerated federal statutes and common law theories, "to remediate harms allegedly resulting from unlawful conduct of JP Morgan, Bear Stearns, and Washington Mutual."

c. The remaining $7 billion is allocated in varying amounts, in accordance with an unknown formula, to California, Delaware, Illinois, and Massachusetts (the four state parties to the $13 Billion Agreement), as well as the FDIC, the FHFA, the NCUA, and the State of New York (the plaintiffs in the Related Actions).

A. The $13 Billion Agreement resolved potential civil claims arising from illegal conduct by JP Morgan Chase that was willful and pervasive.

50. Attached to the $13 Billion Agreement and incorporated by reference is a very short, largely uninformative summary of conduct engaged in by some unidentified staff, managers, and officers of JP Morgan Chase, which the DOJ and JP Morgan Chase refer to as a "Statement of Facts" ("SOF"). However, as alleged below, the SOF contains very few facts or details concerning the unidentified "potential legal claims." It does describe, in general terms, an egregious, systemic pattern of intentional misrepresentations and omissions by JP Morgan Chase, Bear Stearns, and Washington Mutual spanning several years in connection with the creation, packaging, marketing, sale, issuance, and distribution of an unknown number of Subprime Securities leading up to and contributing to the Financial Crisis.

51. Each of the three banks securitized an undisclosed number of subprime and Alt-A mortgage loans, representing undisclosed dollar amounts, into 1,605 Subprime Securities and allegedly fraudulently sold them to an

unknown number of investors, including their customers, clients, and counterparties. This process was supposed to be subject to guidelines, procedures, and various layers of review, both internally and by third-party service providers, to ensure that only properly underwritten loans were included in each Subprime Security.

52. According to the DOJ, each bank represented to investors (again, their customers, clients, and counterparties) that their Subprime Securities complied with their stated controls and procedures. However, contrary to those representations, the banks repeatedly and knowingly failed to follow those controls and procedures, and they included an unknown, but apparently large number of improperly underwritten loans in their securitization pools. As a result, investors were fraudulently induced to purchase an unknown number of high-risk securities that were virtually certain to lose money. The magnitude of investor losses resulting from the alleged fraudulent conduct is nowhere specified or estimated in the $13 Billion Agreement.

53. Moreover, it is apparent that management level employees, although unidentified, participated to an undisclosed extent in this fraud. For example, on one occasion, unidentified "due diligence employees and at least two [unidentified] JPMorgan managers," determined that several pools of loans from just one unidentified lender contained "numerous" loans where borrowers had overstated their incomes. SOF at 5-6. Some of those unidentified JP Morgan Chase employees and managers concluded that those pools "should be reviewed in their entirety, and all unreasonable stated income loans eliminated before the pools were purchased." Id. One unidentified JP Morgan Chase employee even "told an [unidentified] Executive Director in charge of due diligence and a [unidentified] Managing Director in trading that due to their poor quality, the [unidentified] loans should not be purchased and should not be securitized." Id.

54. After the unidentified originator of the loan pools objected, unidentified JPMorgan Managing Directors from several departments (due diligence, trading, and sales) met with unidentified representatives of the unidentified originator to discuss the loans. However, notwithstanding the concerns and recommendations of multiple due diligence employees and managers, JP Morgan Chase purchased two loan pools without reviewing those loan pools in their entirety; waived a number of the stated income loans into the pools; purchased the pools; securitized hundreds of millions of dollars of loans from those pools into one security; and then sold them to an unidentified number of investors, for unidentified amounts, without disclosing the problems with the loans, presumably resulting in unidentified losses.

55. Although not stated and certainly not detailed, the SOF and the $13 Billion Agreement suggest that this episode was part of, and illustrative of, a pervasive pattern and practice of knowing, fraudulent conduct at JP Morgan Chase over the years.

B. The fraudulent conduct resolved through the $13 Billion Agreement was extraordinarily damaging to investors, financial markets, and the entire economy.

56. Neither the $13 Billion Agreement nor the SOF provide any quantitative measure, or even estimate, of the harm that JP Morgan Chase inflicted on investors and others through its fraudulent conduct. However, the uninformative list of 1,605 securitizations and the $13 Billion Agreement make clear that the damages inflicted by JP Morgan Chase had to be very substantial, undoubtedly tens of billions of dollars and almost certainly hundreds of billions of dollars in damages.

57. Indeed, the DOJ's own publicity surrounding the $13 Billion Agreement hints at the enormity of the harm done by JP Morgan Chase's abuses. For example, the DOJ Press Release announcing the $13 Billion Agreement provides some indication, albeit in little more than short sound-bites, of the central role that the fraud played in triggering the Financial Crisis. The Press Release contains a number of testimonials from DOJ officials about the

purportedly enormous value of the $13 Billion Agreement and the seriousness of the violations at issue, including the following:

a. Defendant Attorney General Holder stated: "Without a doubt, the conduct uncovered in this investigation helped sow the seeds of the mortgage meltdown."

b. b. Associate Attorney General Tony West stated: "The conduct JP Morgan [Chase] has acknowledged—packaging risky home loans into securities, then selling them without disclosing their low quality to investors—contributed to the wreckage of the financial crisis."

c. U.S. Attorney for the Eastern District of California Benjamin Wagner stated: "Abuses in the mortgage-backed securities industry helped turn a crisis in the housing market into an international financial crisis . . . . The impacts were staggering. JP Morgan Chase sold securities knowing that many of the loans backing those certificates were toxic. Credit unions, banks, and other investor victims across the country, including many in the Eastern District of California, continue to struggle with losses they suffered as a result."

58. Moreover, there is widespread consensus among academic experts, policy makers, and regulators that the type of illegal conduct underlying the $13 Billion Agreement was one of the central causes of the Financial Crisis and, therefore, the damages are likely historically high. FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, 165-69 (2011); CARL LEVIN, CHAIRMAN & TOM COBURN, RANKING MINORITY MEMBER, U.S. PERMANENT SUBCOMM. ON INVESTIGATIONS: COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 75 (Apr. 13, 2011) available at http://www.hsgac.senate.gov//imo/media/doc/Financial_Crisis/FinancialCrisisReport.pdf.

59. None of this is to suggest that JP Morgan Chase alone is to blame for the Financial Crisis or the damages it caused. But it appears clear from the $13 Billion Agreement, the DOJ press release and other statements, and the SOF that the damages JP Morgan Chase itself caused were very high. Yet no one has any idea of what they were in fact because the DOJ and JP Morgan Chase's $13 Billion Agreement was carefully crafted to ensure that as little as possible was disclosed to the public and nothing was ever disclosed to a court. Notwithstanding the apparent gravity of JP Morgan Chase's fraud, the enormous harm it caused, and the extraordinary importance of the $13 Billion Agreement to the public, the DOJ never filed an action in court, thus avoiding the development of a sufficient record and a judicial determination as to the adequacy of the $13 Billion Agreement.

60. The DOJ never filed an action in court and never sought any review or approval of the $13 Billion Agreement by any court. Indeed, the $13 Billion Agreement confirms its nonjudicial character, stating that "[t]he Parties acknowledge that this $13 Billion Agreement is made without any trial or adjudication or finding of any issue of fact or law, and is not a final order of any court or governmental authority." $13 Billion Agreement at 15.

61. The $13 Billion Agreement is a mere contract between the DOJ and JP Morgan Chase.

62. As a consequence of the DOJ's decision to enter the $13 Billion Agreement in the form of a mere contract, without any review or assessment by any court:

a. The DOJ never filed a complaint detailing the specific acts and violations of law committed by JP Morgan Chase and the individuals responsible for those acts and violations.

b. The DOJ never filed a motion or memorandum with a court, or participated in any hearing convened by the court, to explain how the relief obtained under the $13 Billion Agreement was justified in light of all the facts and circumstances, including the gravity of the violations, the profits received by JP Morgan Chase from its violations, and the magnitude of the harms inflicted on investors and other victims.

c. The DOJ never participated in an open judicial proceeding that would have allowed interested parties to seek intervention or amicus curiae status so that their views on the matter could be considered by a court.

d. Most importantly, the DOJ never subjected the $13 Billion Agreement to an independent judicial determination as to whether the terms were appropriate and in the public interest under the applicable legal standard and all the facts and circumstances.

63. Without the benefit of these proceedings, and without full disclosure of all material facts relating to JP Morgan Chase's illegal activity and its impact, neither the $13 Billion Agreement itself nor the DOJ's actions in connection with the $13 Billion Agreement can be subjected to meaningful review by anyone.

D. Instead of seeking judicial review, the DOJ documented the $13 Billion Agreement in a way that failed to disclose important information about virtually every material aspect of the deal.

64. Rather than initiating an action in federal court, detailing the allegations against JP Morgan Chase, and engaging in a public process through which a court would either adjudicate the DOJ's claims through trial or review and approve any settlement of those claims, the DOJ memorialized the terms of the $13 Billion Agreement in a way that minimized public disclosure of the facts of the case, the laws that were broken, and the basis for the $13 Billion Agreement.

65. The $13 Billion Agreement is embodied in just two short documents, the $13 Billion Agreement itself and the SOF. Although the $13 Billion Agreement is accompanied by several attachments, those items simply include a short outline regarding implementation of the $4 billion in "consumer relief"; a list of the 1,605 Subprime Securities offerings encompassed by [t]he $13 Billion Agreement; and the settlement agreements in the Related Actions between JP Morgan Chase and other state and federal regulatory authorities.

66. This documentation provides only a skeletal description of JP Morgan Chase's illegal conduct, and it omits an abundance of critically important

information necessary to adequately evaluate the $13 Billion Agreement, including

a. the scope of the investigation;

b. the underlying illegal conduct;

c. the specific violations of law committed;

d. the benefits (monetary and otherwise) received by JP Morgan Chase;

e. the damages inflicted on investors and other victims by JP Morgan Chase;

f. the impact of those violations in terms of contributing to the Financial Crisis;

g. the individuals involved in and responsible for the violations; and

h. the appropriateness of the civil monetary penalty and other relief included

in the $13 Billion Agreement under all the facts and circumstances.

67. Specifically, the $13 Billion Agreement and the SOF omit important information about virtually every material aspect of the deal, including, without limitation, the following:

a. The $13 Billion Agreement does not describe the nature, scope, or thoroughness of the investigation that led to the $13 Billion Agreement, including such basic information as the duration of the investigation; the number and nature of the documents actually reviewed; and the number of individuals, including executives and supervisors, who were substantively interviewed, who were deposed under oath, or who provided sworn statements or other evidence. Instead, the $13 Billion Agreement simply recites that "[t]he Department of Justice conducted investigations of the packaging, marketing, sale, and issuance of

residential mortgage-backed securities" by the settling banks, and it lists the small subset of Subprime Securities offerings covered by the $13 Billion Agreement that the DOJ actually reviewed: a mere 10 out of 1,605. $13 Billion Agreement at 1 (emphasis added); SOF at 2 n. 2. Thus, there is no way to determine if the so-called investigation was adequate to develop a sufficient basis for the $13 Billion Agreement.

b. The $13 Billion Agreement does not describe in any meaningful detail the illegal conduct by JP Morgan Chase that gave rise to the civil monetary penalty, including an explanation of how those 1,605 Subprime Securities were selected for coverage under the $13 Billion Agreement; the number, type, and content of the misrepresentations and omissions that JP Morgan Chase committed, both in documents and orally; and when the acts of misconduct occurred. Nor does the $13 Billion Agreement attach any of the term sheets and offering materials for the Subprime Securities listed in Annex 3. Instead, the SOF employs vague terms and phrases, such as

   i. "large amounts;"

   ii. "in certain instances;"

   iii. "at least some of the loan pools;"

   iv. "in various offering documents;"

   v. "certain pools;"

   vi. "a number of;"

   vii. "certain investors;"

   viii. "purchasers;" and

   ix. ix. "a number of loans."

c. The $13 Billion Agreement does not identify, by name and title, a single JP Morgan Chase or other individual who was responsible for or involved in the illegal conduct. For example, there is no disclosure of the individual employees, managers, and executives who committed any of the violations, aided and abetted any violations, or acted as controlling persons with respect to others who committed any violations. Instead, the SOF either simply attributes actions to inanimate objects (such as "JP Morgan" or the "offering documents") or it employs generic descriptions (such as "employee," "salespeople," "due diligence managers," "Executive Director," "Managing Director," or "personnel").

ci. The $13 Billion Agreement does not identify any specific violations of any statute that supports the civil monetary penalty or the other relief obtained in the $13 Billion Agreement. The recitals in the $13 Billion Agreement merely refer vaguely to "potential claims by the United States against JP Morgan, . . . for violation of federal laws in connection with the packaging, marketing, sale, and issuance of RMBS." $13 Billion Agreement at 1 (emphasis added). Similarly, the provision in the $13 Billion Agreement identifying all claims released by the United States simply lists five federal statutes and a series of general common law theories of liability, and incorporates by reference a vast collection of statutes that the DOJ has authority to "assert and compromise pursuant to 28 C.F.R. § 0.45." The $13 Billion Agreement does not identify any specific provisions of any law that JP Morgan Chase violated. Id. at 8.

cii.The $13 Billion Agreement does not specify, or even estimate, the monetary harm that the fraudulent conduct inflicted, either directly or indirectly, on investors, mortgagors, market participants, financial markets, the U.S. economy, or any other persons or institutions, including in particular JP Morgan Chase's clients, customers, and counterparties.

ciii.The $13 Billion Agreement does not specify, or even estimate, the gross or net monetary gains or other benefits that JP Morgan Chase received as a direct or indirect result of its fraudulent conduct, including profits; fees; other profitable transactions or deals that were facilitated; losses that

were avoided; and any support in the share price of JP Morgan Chase that was traceable to the illegal conduct.

civ.The $13 Billion Agreement does not explain how the $2 billion civil monetary penalty was calculated, or how the civil penalty can effectively punish JP Morgan Chase for its past illegal conduct, or deter its future illegal conduct, given JP Morgan Chase's size, revenues, and profits, and given JP Morgan Chase's recidivist history of pervasive, systemic, and knowing violations of law over many years. In fact, JP Morgan Chase is the largest financial institution in the United States, with $2.4 trillion in assets; $100 billion in net revenues in 2013; and $18 billion in net income in 2013 (after accounting for $11.1 billion in legal expenses).

cv.The $13 Billion Agreement does not take into account the profoundly difficult challenges involved in punishing and deterring JP Morgan Chase, and assessing any effective penalty against it, in light of its extensive history of violating federal laws, as evidenced by the following highlights of just some of the many government enforcement actions against it:

(1) United States v. JPMorgan Case Bank, NA, No-1:14-cr-7 (S.D.N.Y. Jan 8, 2014) ($1.7 billion criminal penalty); In re JPMorgan Chase Bank, N.A., OCC Admin. Proceeding No. AA-EC-13-109 (Jan. 7, 2014) ($350 million civil penalty); In re JPMorgan Chase Bank, N.A., Dept. of the Treasury Financial Crimes Enforcement Network Admin. Proceeding No. 2014-1 (Jan. 7, 2014) ($461 million civil penalty) (all for violations of law arising from the bank's role in connection with Bernie Madoff's Ponzi scheme, the largest in the history of the U.S.);

(2) In re JPMorgan Chase Bank, N.A., CFTC Admin. Proceeding No. 14-01 (Oct. 16, 2013) ($100 million civil penalty); In re JPMorgan Chase & Co., SEC Admin. Proceeding No. 3-15507 (Sept. 19, 2013) ($200 million civil penalty); In re JPMorgan Chase & Co., Federal Reserve Board Admin. Proceeding No. 13-031-CMP-HC (Sept. 18, 2013) ($200 million civil penalty); UK Financial Conduct Authority, Final Notice to JP Morgan Chase Bank, N.A. (Sept. 18, 2013) (£137.6 million ($221 million) penalty); In re

JPMorgan Chase Bank, N.A., OCC Admin. Proceeding No. AA-EC-2013-75, #2013-140 (Sept. 17, 2013) ($300 million civil penalty) (all for violations of federal law in connection with the proprietary trading losses sustained by JP Morgan Chase in connection with the high risk derivatives bet referred to as the "London Whale");

(3) In re JPMorgan Chase Bank, N.A., CFPB Admin. Proceeding No. 2013-CFPB-0007 (Sept. 19, 2013) ($20 million civil penalty and $309 million refund to customers); In re JPMorgan Chase Bank, N.A., OCC Admin. Proceeding No. AA-EC-2013-46 (Sept. 18, 2013) ($60 million civil penalty) (both for violations in connection with JP Morgan Chase's billing practices and fraudulent sale of so-called Identity Protection Products to customers);

(4) In Re Make-Whole Payments and Related Bidding Strategies, FERC Admin. Proceeding Nos. IN11-8-000, IN13-5-000 (July 30, 2013) (civil penalty of $285 million and disgorgement of $125 million for energy market manipulation);

(5) SEC v. J.P. Morgan Sec. LLC, No. 12-cv-1862 (D.D.C. Jan. 7, 2013) ($301 million in civil penalties and disgorgement for improper conduct related to offerings of mortgage-backed securities);

(6) In re JPMorgan Chase Bank, N.A., CFTC Admin. Proceeding No. 12-37 (Sept. 27, 2012) ($600,000 civil penalty for violations of the Commodities Exchange Act relating to trading in excess of position limits);

(7) In re JPMorgan Chase Bank, N.A., CFTC Admin. Proceeding No. 12-17 (Apr. 4, 2012) ($20 million civil penalty for the unlawful handling of customer segregated funds relating to the bankruptcy of Lehman Brothers Holdings, Inc.);

(8) United States v. Bank of America, No. 12-cv-00361 (D.D.C. 2012) (for foreclosure and mortgage-loan servicing abuses during the Financial Crisis, with JP Morgan Chase paying $5.3 billion in monetary and consumer relief);

(9) In re JPMorgan Chase & Co., Federal Reserve Board Admin. Proceeding No. 12-009-CMP-HC (Feb. 9, 2012) ($275 million in monetary relief for

unsafe and unsound practices in residential mortgage loan servicing and foreclosure processing);

(10) SEC v. J.P. Morgan Sec. LLC, No. 11-cv-03877 (D.N.J. July 7, 2011) ($51.2 million in civil penalties and disgorgement); In re JPMorgan Chase & Co., Federal Reserve Board Admin. Proceeding No. 11-081-WA/RB-HC (July 6, 2011) (compliance plan and corrective action requirements); In re JPMorgan Chase Bank, N.A., OCC Admin. Proceeding No. AA-EC-11-63 (July 6, 2011) ($22 million civil penalty) (all for anticompetitive practices in connection with municipal securities transactions);

(11) SEC v. J.P. Morgan Sec., LLC, No. 11-cv-4206 (S.D.N.Y. June 21, 2011) ($153.6 million in civil penalties and disgorgement for violations of the securities laws relating to misleading investors in connection with synthetic collateralized debt obligations);

(12) In re JPMorgan Chase Bank, N.A., OCC Admin. Proceeding No. AA-EC-11-15, #2011-050 (Apr. 13, 2011) (consent order mandating compliance plan and other corrective action resulting from unsafe and unsound mortgage servicing practices);

(13) In re J.P. Morgan Sec. Inc., SEC Admin. Proceeding No. 3-13673 (Nov. 4, 2009) ($25 million civil penalty for violations of the securities laws relating to the Jefferson County derivatives trading and bribery scandal);

(14) In re JP Morgan Chase & Co, Attorney General of the State of NY Investor Protection Bureau, Assurance of Discontinuance Pursuant to Exec. Law §63(15) (June 2, 2009) ($25 million civil penalty for misrepresenting risks associated with auction rate securities);

(15) In re JPMorgan Chase & Co., SEC Admin. Proceeding No. 3- 13000 (Mar. 27, 2008) ($1.3 million civil disgorgement for violations of the securities laws relating to JPM's role as asset-backed indenture trustee to certain special purpose vehicles);

(16) In re J.P. Morgan Sec. Inc., SEC Admin. Proceeding No. 3-11828 (Feb. 14, 2005) ($2.1 million in civil fines and penalties for violations of Securities Act record-keeping requirements); and

(17) SEC v. J.P. Morgan Securities Inc., 03-cv-2939 (WHP) (S.D.N.Y. Apr. 28, 2003) ($50 million in civil penalties and disgorgements as part of a global settlement for research analyst conflict of interests).

a. The $13 Billion Agreement does not explain how the $4 billion in "consumer relief" was calculated or why the judicial power to enforce such obligations was never sought as a component of the $13 Billion Agreement.

b. b. The $13 Billion Agreement does not explain how any of the other monetary amounts to be paid by JP Morgan Chase under the $13 Billion Agreement were calculated and apportioned.

c. The $13 Billion Agreement does not explain why it fails to impose on JP Morgan Chase any obligation to change any of its business or compliance practices, which are conduct remedies that regulators routinely require as a condition of settling allegations of wrongdoing by a financial institution of much lesser significance than present here.

d. The $13 Billion Agreement does not explain whether JP Morgan Chase faces collateral regulatory consequences from the imposition of a penalty under FIRREA or any other aspect of the $13 Billion Agreement; whether JP Morgan Chase will be immunized from any such collateral consequences as part of the $13 Billion Agreement; and if JP Morgan Chase has been so immunized, how that is justified in light of the gravity of the illegal misconduct at issue.

e. The $13 Billion Agreement does not contain admissions of fact or law by JP Morgan Chase.

68. In addition to omitting a vast amount of critically important information, as detailed above, the $13 Billion Agreement is in some important respects misleading, seemingly by design. For example, while the $13 Billion

Agreement creates the impression that it does contain admissions by JP Morgan Chase, in reality it does not. The $13 Billion Agreement states that "JP Morgan [Chase] acknowledges the facts set out in the" SOF. $13 Billion Agreement at 3 (emphasis added). There is no disclosure explaining why there are no admissions of either law or fact and there is no disclosure of the legal significance, if any, of JP Morgan Chase's "acknowledgement."

69. Yet, when the DOJ portrayed this statement as an admission, JP Morgan Chase issued a prompt and public rebuke. On the date the settlement was announced, the DOJ stated that "[a]s part of the settlement, JP Morgan [Chase] acknowledged it made serious misrepresentations to the public." Press Release. This claim reportedly prompted Marianne Lake, Chief Financial Officer for JP Morgan Chase, to contradict the DOJ statement by insisting that: "[w]e didn't say that we acknowledge serious misrepresentation of the facts." She added that "[w]e would characterize potentially the statement of facts differently than others might." According to Ms. Lake, JP Morgan Chase acknowledged the SOF without admitting violations of law. Hugh Son et al., JPMorgan $13 Billion Mortgage Deal Seen as Lawsuit Shield, BLOOMBERG (Nov. 20, 2013), available at http://www.bloomberg.com/news/2013-11- 20/jpmorgan-13-billion-mortgage-deal-seen-as-lawsuit-shield.html. Jamie Dimon, Chief Executive Officer of JP Morgan Chase, also insisted publicly that "[w]e did not admit to a violation of law." Michael Hiltzik, Bottom line on JPMorgan's $13 billion settlement: not nearly enough, LA TIMES (Nov. 19, 2013), available at http://articles.latimes.com/2013/nov/19/business/la-fi-mh-jpmorgans-20131119.

70. Simple admissions would have cleared all this up, but presumably JP Morgan Chase refused to admit anything and the DOJ accepted that. As a consequence, the misleading and apparently meaningless term "acknowledgement" was used, which caused many, including sophisticated and informed observers, to nonetheless conclude that the "acknowledgement" was in fact admissions. For example, Jonathan Weil, a columnist for Bloomberg View, wrote "Leave it to a bunch of politicians to misrepresent what JPMorgan Chase & Co. admitted as part of a settlement over the bank's supposed misrepresentations" and he repeatedly referred to what he called JP Morgan Chase's "admissions," even though there were

none. Jonathan Weil, Why Believe What the Government Says About JPMorgan?, BLOOMBERG (Nov. 19, 2013), available at http://www.bloomberg.com/news/2013-11-19/why-believe-what-the-government-says-about- jpmorgan-.html (emphasis added).

71. Mr. Weil concluded by stating that "There is nothing in JPMorgan's admissions that would be damaging to the company." Id. That is all the more so because there were no JP Morgan Chase admissions at all; it only "acknowledged" the SOFs and everyone is left to wonder why the DOJ allowed such a meaningless and even misleading provision to be included in the agreement.

72. Moreover, as also observed by Mr. Weil, "It isn't a good sign when the company paying billions of dollars to resolve a government probe comes across as more believable than the government lawyers who cut the deal." Jonathan Weil, The JPMorgan Settlement Isn't Justice, BLOOMBERG (Nov. 21, 2013), available at http://www.bloomberg.com/news/2013-11- 21/the-jpmorgan-settlement-isn-t-justice.html.

E. The process that lead to the $13 Billion Agreement highlights the need for judicial review.

73. The little information that is available concerning the settlement process has been reported in the press. It indicates that the DOJ and JP Morgan Chase went to extraordinary lengths to minimize the disclosure of information about the $13 Billion Agreement and the underlying illegal conduct. As a result, of course, no one can scrutinize or evaluate what the DOJ has done here.

74. For example, media outlets reported the following series of events surrounding JP Morgan Chase's successful, eleventh-hour effort to prevent the DOJ from filing a complaint against the bank and revealing to the American people JP Morgan Chase's years of illegal conduct:

a. The DOJ decided to file a civil lawsuit against JP Morgan Chase on or about September 24, 2013, for its role in the fraudulent offer and sale of toxic securities during the period leading up to the Financial Crisis. The

DOJ planned a press conference for on or about the morning of September 24 to announce the filing of the case and to detail the allegations of massive illegal conduct against JP Morgan Chase.

b. In preparation for the news conference, the U.S. Attorney for Sacramento, Mr. Benjamin Wagner, flew to Washington D.C. on or about September 23, 2013, with at least two large charts detailing JP Morgan Chase's illegal conduct. U.S. Attorney Wagner had amassed nationwide evidence of fraudulent activity by JP Morgan Chase itself, apart from the conduct of either Bear Stearns or Washington Mutual. Further, the DOJ had the benefit of detailed information from at least one employee inside the bank, a whistleblower, who was assisting prosecutors. The DOJ planned to display those charts during the news conference as part of the presentation of the lawsuit describing JP Morgan Chase's illegal conduct.

c. Also on or about September 23, 2013, the day before the planned news conference, the DOJ sent a copy of the complaint it was planning to file the next day to JP Morgan Chase.

d. On or about September 24, 2013, just hours before the press conference, JP Morgan Chase's Chief Executive Officer, Jamie Dimon, telephoned a high-ranking Justice Department official involved in the case, Associate Attorney General Tony West, the third most senior official at the DOJ. At the time he received the phone call, Associate Attorney General West was "put[ting] the finishing touches on a lawsuit against JP Morgan Chase [when] he saw a familiar number flash on his cell phone." Ben Protess & Jessica Silver-Greenberg, In Extracting Deal From JPMorgan, U.S. Aimed for Bottom Line, NYTIMES DEALBOOK, Nov. 19, 2013, available at http://dealbook.nytimes.com/2013/11/19/13-billion-settlement-with-jpmorgan-is- announced/ (emphasis added).

e. During the call, Mr. Dimon sought to prevent the DOJ from publicly filing the lawsuit against JP Morgan Chase, signaled a willingness to very significantly increase the bank's settlement offer, and requested an in-person meeting with the Attorney General.

f. Following that discussion, the DOJ canceled the planned press conference and the filing of the lawsuit.

g. Two days after that phone call, on or about Thursday, September 26, 2013, Mr. Dimon flew to Washington, D.C. to lead face-to-face negotiations with the Attorney General at the DOJ. Thereafter, Mr. Dimon personally spoke to the Attorney General approximately five times as they negotiated the terms of the $13 Billion Agreement. During those negotiations, Mr. Dimon more than quadrupled the bank's reported settlement offer, from $3 billion to $13 billion.

75. The filing of that lawsuit would have provided the public with a detailed account of the specific acts and omissions of JP Morgan Chase and its executives, supervisors, and employees, as they engaged in a pervasive pattern of fraud in the offer and sale of billions of dollars' worth of toxic Subprime Securities to their clients, customers, counterparties, investors, and others.

76. Evidence of the profoundly damaging impact that the public filing of the complaint would have had on JP Morgan Chase is also reflected in JP Morgan Chase's staunch refusal to produce the draft complaint to the Federal Home Loan Bank Board of Pittsburgh ("FHLB") in other litigation.

a. On November 23, 2009, FHLB sued various JP Morgan Chase affiliates and three credit-rating agencies in Pennsylvania state court over losses sustained from $1.8 billion in mortgage-backed securities that FHLB had purchased in 2006 and 2007. FHLB v. J.P. Morgan Securities LLC, No. GD-09-016892 (Ct. C.P. Allegheny County, Pa. Nov. 23, 2013)

b. When it became aware of the existence of a draft DOJ complaint against JP Morgan Chase, a copy of which the DOJ had provided to JP Morgan Chase, the FHLB sought its production. On October 17, 2013, the state court ordered the draft complaint to be produced to the FHLB.

c. In response to requests from the DOJ, the FHLB agreed to two extensions of the deadline for production of the draft complaint, so as not to disturb

the ongoing settlement negotiations between the DOJ and JP Morgan Chase in connection with what became the $13 Billion Agreement.

d. Those settlement negotiations culminated on November 19, 2013, when the $13 Billion Agreement was announced. Yet even then, JP Morgan Chase refused to produce the draft complaint to FHLB. JP Morgan Chase actually moved to vacate the state court's order of production on November 22, 2013. JP Morgan Chase argued strenuously that the draft complaint was protected from production as a confidential settlement document; that the SOF released by the DOJ in connection with the $13 Billion Agreement made it unnecessary to force disclosure of the draft complaint; and that the draft complaint was not reasonably calculated to lead to the discovery of admissible evidence.

e. On November 26, 2013, FHLB filed a motion to compel JP Morgan Chase's compliance with the state court's October 17 order requiring production of the DOJ's draft complaint. In the motion, FHLB aptly characterized both the anticipated value of the draft complaint and some of the policy concerns arising from JP Morgan Chase's assiduous efforts to keep it cloaked in secrecy:

The most important public policy issue here is transparency—what did DOJ actually learn about JP Morgan's conduct which caused JP Morgan [Chase] to pay $13 billion? The Statement of Facts does not answer that question. . . . The draft complaint most likely provides a rich source of detailed facts about JP Morgan's conduct that have not been made public. And those facts should be made public, not only to aid private litigants such as Pittsburgh FHLB in the pursuit of their claims, but also to inform the public of the basis for the DOJ's settlement." Plaintiff's Motion to Compel Compliance with the Court's October 17, 2013 Order, FHLB v. J.P. Morgan Securities LLC, No. GD-09-016892 (Ct. C.P. Allegheny County, Pa. filed Nov. 26, 2013) (emphasis added).

f. However, before that motion was ruled upon, JP Morgan Chase agreed to settle all of FHLB's claims, on undisclosed terms, thus ensuring that the draft complaint would never see the light of day in that case and ensuring

that their conduct and the terms of settlement would never see the light of day in the Pennsylvania case either.

77. The same overriding desire to minimize public disclosure, transparency, and judicial oversight relating to the $13 Billion Agreement and the actions underlying it was also apparent in the way the Related Actions were resolved. In all of those cases, the parties to those actions, including plaintiffs FDIC, FHFA, NCUA, and the State of New York, agreed to seek either voluntary dismissal or a stipulation of discontinuance, with prejudice, of the actions. Moreover, in none of those cases did the parties actually file the $13 Billion Agreement with the court, or the separate agreements pursuant to which those Related Actions were settled. This procedure enabled the parties to those actions to avoid any public, substantive judicial oversight, scrutiny, or evaluation of the terms under which those actions were settled.

F. The DOJ also disregarded the explicit requirements of FIRREA by obtaining the historic $2 billion civil monetary penalty without any judicial assessment.

78. Under the $13 Billion Agreement, the DOJ assessed and extracted a $2 billion civil monetary penalty from JP Morgan Chase. The $13 Billion Agreement expressly states that the penalty was "recovered [by the DOJ] pursuant to FIRREA, 12 U.S.C. § 1833a." $13 Billion Agreement at 3. Elsewhere, the $13 Billion Agreement states that the "$2 billion will be paid as a civil monetary penalty pursuant to FIRREA." Id. at 7. The Press Release further confirms that the DOJ was relying on FIRREA as the statutory basis for the penalty and that it was "the largest FIRREA penalty in history". It states that:

a. "JP Morgan [Chase] will pay $2 billion as a civil penalty to settle the Justice Department's claims under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA);"

b. "By requiring JP Morgan [Chase] both to pay the largest FIRREA penalty in history and provide some needed consumer relief to areas hardest hit

by the financial crisis, we rectify some of that harm today" (quoting Associate Attorney General Tony West); and

c. "Today's global settlement underscores the power of FIRREA and other civil enforcement tools" (quoting Assistant Attorney General for the Civil Division Stuart F. Delery).

79. However, the DOJ ignored the explicit provisions in FIRREA that require a court to assess any civil monetary penalty sought pursuant to the statute. FIRREA provides that:

(a) In general. Whoever violates any provision of law to which this section is made applicable by subsection (c) shall be subject to a civil penalty in an amount assessed by the court in a civil action under this section. -12 U.S.C. § 1833a(a) (emphasis added).

80. In addition, FIRREA requires the Attorney General to file a civil action to recover a civil penalty:

(e) Attorney General to bring action. A civil action to recover a civil penalty under this section shall be commenced by the Attorney General. -12 U.S.C. § 1833a(e) (emphasis added).

81. The legislative history of FIRREA explains the purpose of FIRREA and the method for obtaining the civil penalty as follows:

The Committee believes that the enhancement of the regulatory powers and criminal justice provisions should go far in restoring public confidence in the nation's financial system and serve to protect the public interest. This Title gives the regulators and the Justice Department the tools which they need and the responsibilities they must accept, to punish culpable individuals, to turn this situation around, and to prevent these tremendous losses to the Federal deposit insurance funds [due to the savings and loan crisis] from ever again recurring. . . . The Attorney General recovers the civil penalty through a civil action brought in a United States district court." H.

Rep. No. 101-54, Part 1 (May 16, 1989) (H.R. 1278), at 465-66; 472 (emphasis added).

82. In violation of these requirements, the DOJ negotiated, finalized, and executed the $13 Billion Agreement without filing any court action and without seeking or obtaining a judicial assessment of the civil monetary penalty.

83. Had the DOJ filed an action against JP Morgan Chase to enforce the law and to obtain relief, including the $2 billion penalty under FIRREA, as required, the reviewing court would have been called upon to exercise its judgment regarding the penalty amount in light of the acts and omissions of JP Morgan Chase, the violations of law at issue, and a host of other factual and legal issues. To that end, the court would have been entitled to ask for and consider a wide range of information concerning the facts of the case, the DOJ's investigation, and the appropriate civil penalty, including, without limitation, the missing information detailed above.

84. For example, under applicable case law, much of the information listed above has been found relevant to a court's assessment of the appropriate civil penalty under FIRREA, including a defendant's degree of scienter; the extent of injury to the public; whether the defendant's conduct created substantial losses to other persons; the egregiousness of the violations; the isolated or repeated nature of the violations; and the defendant's financial condition and ability to pay. See United States v. Menendez, 2013 U.S. Dist. LEXIS 39584, No. 11-cv-06313 (C.D. Calif. Mar. 6, 2013). However, by extracting the penalty without complying with FIRREA, the DOJ prevented any court from evaluating the appropriateness of the penalty in light of such factors, as provided by law.

G. The lack of transparency in the settlement process prevented a meaningful evaluation of the $13 Billion Agreement by anyone.

85. In short, the DOJ's decision to settle all of the potential claims encompassed by the $13 Billion Agreement through a private contract rather than a public judicial proceeding resulted in a public record that was devoid of any significant detail regarding the illegal conduct at issue, the

consequences of that illegal conduct, and the extent to which the $13 Billion Agreement would effectively punish or deter JP Morgan Chase.

86. By precluding any meaningful independent review and evaluation of the $13 Billion Agreement by a court, the DOJ was able to proclaim, with minimal risk of contradiction, that through the $13 Billion Agreement and its record-breaking monetary sanctions, it finally had held a large Wall Street bank accountable for the abuses that were a central cause of the Financial Crisis. This is how the DOJ and the Attorney General have attempted to remove the dark cloud that has hung over them for years, particularly since the Attorney General's testimony suggesting that too-big-to-fail Wall Street banks receive favorable treatment from the DOJ.

87. Yet it is far from clear that the terms of the $13 Billion Agreement will have any significant punitive or deterrent effect upon JP Morgan Chase, and without the indispensable safeguard provided by the judicial branch of government, there is no hope of ever knowing the actual merits or value of the $13 Billion Agreement.

H. Because the DOJ reached the $13 Billion Agreement wholly outside of court, in a case of historic importance, the DOJ usurped the judiciary's constitutionally established review role, in violation of the separation of powers doctrine.

88. The U.S. Constitution establishes three distinct branches of government, the Executive, the Legislative, and the Judicial, each with defined powers and authorities. This framework protects against the accumulation of excessive power in any one branch, and it limits the ability of any one branch of government to encroach upon, usurp, or deny the authority of another. Most importantly, this concept embodies the most fundamental constitutional protection afforded to the American people: checks and balances.

89. In this case, the DOJ violated the separation of powers doctrine by usurping judicial authority in at least two ways.

90. First, while the DOJ may have the authority to decide whether to bring an enforcement action in the first instance, as well as the authority to supervise the conduct of litigation it initiates, 28 U.S.C. §§ 516, 519, Congress has never authorized the DOJ to pursue the type of monetary sanctions at issue in the $13 Billion Agreement entirely outside the purview of a court. For example, with respect to the civil monetary penalty under FIRREA, Congress has expressly provided that the Attorney General must seek such a remedy through an action in federal court.

91. Therefore, it was incumbent upon the DOJ, in accordance with the Constitution, to bring its claims in these circumstances to a court either for adjudication or a judicially supervised settlement. Instead, the Executive Branch, acting through the DOJ, entered the $13 Billion Agreement, resolved its unspecified potential claims under Federal law, and imposed sanctions without filing an action in federal court and without seeking judicial approval of the $13 Billion Agreement. The DOJ thus usurped the role of the judiciary, without authority from Congress or the Constitution, in violation of the separation of powers doctrine.

92. Second, regardless of any putative authority the DOJ may have to pursue or settle potential claims or to impose penalties without court involvement, the separation of powers doctrine forbids the exercise of such authority by the DOJ under the extraordinary circumstances of this case.

93. Federal courts have the inherent authority to review settlements in cases that are extraordinarily complex and far-reaching in their impact on a large number of injured parties, an important industry, or the wider public interest.

94. This is a case where the use of that inherent authority is essential. According to the DOJ's own claims, the $13 Billion Agreement represents the "the largest settlement with a single entity in American history." Press Release. And, the $13 Billion Agreement is between the DOJ and the largest bank in the United States (and, indeed, the largest bank in the world if its assets are measured under international accounting standards). In addition, JP Morgan Chase is a "systemically significant financial institution"

under the 2010 Financial Reform Law, a designation reserved for the handful of largest bank holding companies because they pose a real and substantial threat to the entire financial system and economy of the U.S. Moreover, JP Morgan has also been designated by the Financial Stability Board as a "global" systemically significant financial institution, due to its enormous size, complexity, and interconnectedness in international financial markets.

95. The $13 Billion Agreement is also extraordinary in that it purports to hold JP Morgan accountable for a systemic course of egregious illegal conduct that contributed directly to the greatest financial calamity and economic disaster since the Great Depression. The Financial Crisis will almost certainly inflict at least $13 trillion in damages on our economy, as well as untold human suffering through massive and persistent unemployment; an historic surge in poverty and homelessness; millions of homes foreclosed and more foreclosures to come; the ongoing damage caused by the massive fiscal deficits resulting from the Financial Crisis; and the costs of the extraordinary monetary policy actions taken by the Federal Reserve Board to limit the damage caused by the crisis; among many other costs.

96. The $13 Billion Agreement also involves many other extraordinary factors and circumstances, including, directly or indirectly, (a) a broad mix of federal and state regulatory and enforcement authorities; (b) the resolution of multiple pending and potential civil actions; (c) fraud in highly complex financial transactions; (d) massive harm to millions if not tens of millions of investors, homeowners, and citizens throughout the country; (e) billions of dollars in monetary relief in various forms, including a $2 billion penalty and a $4 billion "consumer relief" fund; (f) appointment of a monitor to oversee implementation of the consumer relief fund provision; (g) a potentially significant impact on the nation's largest participant in the financial services industry; and (h) the public's trust and confidence not only in our financial markets, but in our system of justice and government as well.

97. Furthermore, the DOJ has indicated that the $13 Billion Agreement will serve as the template for similar agreements anticipated with the other

biggest too-big-to-fail Wall Street banks for their role in triggering the Financial Crisis through the sale of toxic mortgage-backed securities. The extraordinary importance of the $13 Billion Agreement will thus be multiplied in those other matters.

98. Any enforcement action involving such an extraordinary combination of factors and having such a profound impact on the public interest, could not and should not be left for resolution to a settlement negotiated in secret between the Executive Branch and some of the same bankers who wre[a]ked such devastation on our financial system and our entire economy. Under these circumstances, the judiciary has a constitutionally assigned and protected role in safeguarding the public interest by adjudicating such claims, or overseeing any settlement the parties wish to enter in lieu of such adjudication. Accordingly, by circumventing the judicial process and keeping the case outside the judiciary's constitutional domain, the DOJ violated the separation of powers doctrine.

I. In addition to violating the Separation of Powers doctrine, the DOJ has also acted in excess of its statutory authority, acted arbitrarily and capriciously, and adopted a general enforcement policy that abdicates its responsibilities.

99. As explained above, the DOJ clearly acted in excess of its statutory authority by assessing and extracting an historically high $2 billion penalty from JP Morgan Chase pursuant to FIRREA without filing an action in federal district court and seeking a judicial assessment of that penalty.

100. In addition, the DOJ violated an express prohibition of the APA, 5 U.S.C. § 558, which provides that a "sanction" may not be imposed by an agency "except within jurisdiction delegated to the agency and as authorized by law." The DOJ's conduct in entering into the $13 Billion Agreement, including, without limitation, assessing and extracting the FIRREA penalty from JP Morgan Chase, constituted the imposition of a sanction in violation of Section 558 of the APA, 5 U.S.C. § 558.

101. Furthermore, by declaring its intention to use the $13 Billion Agreement as the template in futures cases involving the handful of too-

big-to-fail Wall Street banks, the DOJ has adopted an enforcement policy that represents an abdication of its responsibility to enforce the law aggressively, transparently, and in accordance with the Constitution and laws of the United States. Such an approach to enforcement in such exceptionally important cases is a policy that must be, and is, subject to judicial review.

102. Finally, the DOJ's decision to adopt such an enforcement policy, and to apply it in this case by entering the $13 Billion Agreement without seeking judicial review and approval, under the unprecedented and extraordinary circumstances, was also arbitrary and capricious. In so doing, (a) the DOJ failed adequately to consider a host of relevant factors, including, without limitation, those enumerated in parts D and H above, as well as the need for the utmost transparency in the settlement process to help restore the public's confidence in our financial markets and our system of justice; (b) the DOJ inappropriately relied on certain factors, including, without limitation, the intense, self-interested, and overriding desire of JP Morgan Chase to prevent disclosure of detailed allegations concerning the matters that were settled; (c) the DOJ made a clear error of judgment by avoiding judicial review of the $13 Billion Agreement, given the requirements of the Constitution and the laws of the United States, and given the compelling need for public transparency and accountability in the process; and (d) the DOJ offered an explanation for its decision that runs counter to what the surrounding circumstances indicate, including, without limitation, the claim that the $13 Billion Agreement will effectively hold JP Morgan Chase, a bank with trillions of dollars in assets and an extraordinary history of recidivism, accountable for its role in triggering the Financial Crisis.

J. Better Markets has suffered injury as a result of the DOJ's decision to exclude the judicial branch from the settlement process, in violation of the separation of powers doctrine, FIRREA, and the APA and that injury is ongoing.

103. The DOJ's conduct has harmed, is harming, and will continue to harm Better Markets in at least the following ways, without limitation:

a. Conflict with mission. The $13 Billion Agreement directly undermines one of the primary missions of Better Markets. Better Markets is dedicated to promoting settlements in enforcement actions that are transparent, based on an adequate record, strong enough to punish and deter misconduct, and, at least under the extraordinary circumstances present in this case, subjected to judicial review. The $13 Billion Agreement has none of those attributes, and the DOJ's decision to enter the $13 Billion Agreement directly undermines Better Markets' mission.

b. Impairment of Better Markets' ability to advocate for and promote strong enforcement of the laws governing financial regulation. Because the DOJ never sought any form of judicial review of the $13 Billion Agreement, Better Markets has been deprived of a uniquely valuable assessment, and other uniquely valuable information, that it needs to pursue its advocacy activities, to critique the $13 Billion Agreement through its advocacy channels, and to more generally promote effective enforcement of the laws governing misconduct in the financial markets.

c. There was no judicial determination regarding whether the $13 Billion Agreement should be approved and on what grounds. Such a culmination of the judicial review process is an irreplaceable diagnostic tool that Better Markets needs to advocate for strong enforcement of the law. Without an independent, reliable, judicial assessment of the efficacy of the DOJ's current enforcement efforts, including the settlement of potential claims as in the $13 Billion Agreement, Better Markets is hampered in its ability to identify, and to advocate for, any necessary changes in the DOJ's substantive approach to enforcement.

d. In addition, because the DOJ circumvented the judicial process, Better Markets was deprived of other information that it requires to advocate for effective enforcement of the law. For example, no complaint was ever filed, so Better Markets was deprived of detailed factual and legal allegations setting forth the fraudulent conduct; the specific violations of law that resulted; the individuals responsible for those violations; and how those violations benefited JP Morgan Chase and harmed investors and other victims. Better Markets was also deprived of the inherent

reliability of the proceedings in federal court, relative to a privately negotiated agreement. Further, the DOJ never had to justify or explain the terms of the $13 Billion Agreement to a court, either in motions, supplemental filings, or at hearings convened by a court. Better Markets requires this information to carry out its advocacy activities and to educate the public, other regulators, and policy makers about necessary changes in the government's approach to enforcement. Better Markets must have detailed, accurate, and comprehensive information about settlements, including the $13 Billion Agreement, to understand how well the relief obtained redresses the misconduct that occurred in light of the harm done, the benefits received, the recidivist history of the wrongdoers, and other factors. Without this indispensable informational platform, Better Markets cannot effectively identify weaknesses in the $13 Billion Agreement or other settlements, and therefore cannot most effectively promote changes in the way our financial regulatory laws and rules are enforced.

e. In short, without a judicial evaluation of the $13 Billion Agreement, and the information that would be forthcoming in that process, Better Markets has been and continues to be impeded in its ability to carry out its advocacy activities aimed at promoting transparent and effective financial regulation and law enforcement in the public interest.

f. Expenditure of resources to counteract the harmful effects of the DOJ's failure to seek judicial review and approval of the $13 Billion Agreement. Because the DOJ never sought any form of judicial review of the $13 Billion Agreement, Better Markets has been forced to expend resources to neutralize the harmful impact of the unlawful settlement procedure followed by the DOJ. That deployment of resources is still underway, and it has entailed a public education and advocacy effort aimed at highlighting the lack of any judicial oversight or transparency in the settlement process, and questioning whether the substantive terms are in fact sufficiently strong to punish and deter JP Morgan Chase. For example, as a direct consequence of the unlawful settlement process, Better Markets was forced to expend significant resources advocating on its website and through the media, including blogs posts, press

statements, and interviews, that because the $13 Billion Agreement would never be scrutinized by any court, the DOJ should disclose vastly more information about the $13 Billion Agreement for the benefit of the public; that the $13 Billion Agreement was not transparent, as it left many questions unanswered; and that the $13 Billion Agreement may in fact have been extremely lenient under all the circumstances. Moreover, the unlawful settlement process has required Better Markets to question and to counteract what appears to be a misleading public relations campaign effectuated by the DOJ in connection with the $13 Billion Agreement. The DOJ has boldly and publicly asserted that the $13 Billion Agreement does in fact promote accountability on Wall Street, without providing any credible basis. Without judicial review, and the information that judicial review would generate, Better Markets cannot effectively counter what is in effect a potential fraud on the public. At a minimum, Better Markets must engage in a more intensive public education effort regarding what appears to be an enforcement regime that is not adequately punishing or deterring Wall Street from serious and repeated violations of the law.

g. Deprivation of a procedural forum. Because the DOJ never sought any form of judicial review of the $13 Billion Agreement, Better Markets was deprived of a public forum in which it could have exercised its right to seek participation through intervention or amicus curiae status. Better Markets was thus deprived of a uniquely valuable opportunity to press for the judicial compilation of a complete record on which to assess the $13 Billion Agreement, to advocate for a court-approved penalty and other sanctions that would adequately punish and deter JP Morgan Chase, and to influence the settlement process before the agreement became effective.

h. Threatened exacerbation of the injuries already inflicted. Because the DOJ intends to use the $13 Billion Agreement as a template for resolving similar potential claims against Wall Street's biggest banks that sold toxic securities leading up to the Financial Crisis, all of the foregoing harms will be perpetuated and compounded, further interfering with the activities of Better Markets and draining its resources.

COUNT ONE:
THE DOJ VIOLATED THE SEPARATION OF POWERS DOCTRINE

1. Plaintiff incorporates by reference all the allegations of the preceding paragraphs.

2. By entering the $13 Billion Agreement without filing a lawsuit and seeking judicial review and approval, the DOJ violated the separation of powers doctrine, and its actions were "contrary to constitutional right, power, privilege, or immunity" within the meaning of Section 706(2)(B) of the APA.

106. The Plaintiff is therefore entitled to relief under Section 702 of the APA.

COUNT TWO:
THE DOJ ACTED IN EXCESS OF ITS STATUTORY AUTHORITY

1. Plaintiff incorporates by reference all the allegations of the preceding paragraphs.

2. Because the DOJ entered the $13 Billion Agreement and obtained sanctions without statutory authority, including, without limitation, the FIRREA penalty, the DOJ acted "not in accordance with law" and "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," within the meaning of meaning of Sections 706(2)(A) and (C) of the APA.

109. The Plaintiff is therefore entitled to relief under Section 702 of the APA.

COUNT THREE:
THE DOJ'S ACTIONS WERE ARBITRARY AND CAPRICIOUS

110. Plaintiff incorporates by reference all the allegations of the preceding paragraphs.

111. By entering the $13 Billion Agreement without filing a case and seeking judicial review and approval under the extraordinary circumstances

detailed above, the DOJ's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," within the meaning of meaning of Section 706(2)(A) of the APA.

112. In addition, by declaring its intention to use the $13 Billion Agreement as a template in future cases involving the handful of the largest too-big-to-fail Wall Street banks that caused or significantly contributed to the Financial Crisis, the DOJ has adopted an enforcement policy that represents an abdication of its responsibility to enforce the law aggressively, transparently, and in accordance with the Constitution and laws of the United States.

113. The Plaintiff is therefore entitled to relief under Section 702 of the APA.

COUNT FOUR:

THE DOJ VIOLATED FIRREA BY UNILATERALLY EXTRACTING A $2 BILLION PENALTY WITHOUT A COURT ASSESSMENT OR APPROVAL

114. Plaintiff incorporates by reference all the allegations of the preceding paragraphs.

115. By entering into the $13 Billion Agreement, which incorporated a penalty pursuant to 12 U.S.C. § 1833a, without any court involvement in assessing the penalty, the DOJ violated the explicit statutory requirements of FIRREA.

116. The DOJ's actions were "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law;" "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;" and "without observance of procedure required by law," within the meaning of Sections 706(2)(A), (C), and (D) of the APA.

117. The Plaintiff is therefore entitled to relief under Section 702 of the APA.

COUNT FIVE:
THE DOJ VIOLATED THE APA IN EXTRACTING THE $2 BILLION PENALTY

118. Plaintiff incorporates by reference all the allegations of the preceding paragraphs.

119. By entering into the $13 Billion Agreement and extracting a $2 billion civil penalty without complying with the explicit requirements of FIRREA, and by extracting other monetary sanctions without authority, the DOJ also violated the APA, which provides that "[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b) (emphasis added); see also 5 U.S.C. § 551 ("Sanction" includes the "imposition of a penalty.").

120. The DOJ's actions were therefore "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law;" "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;" and "without observance of procedure required by law;" within the meaning of Sections 706(2)(A), (C), and (D) of the APA.

The Plaintiff is therefore entitled to relief under Section 702 of the APA.

COUNT SIX:
BETTER MARKETS IS ENTITLED TO INJUNCTIVE RELIEF

Plaintiff incorporates by reference all the allegations of the preceding paragraphs.
injunctive relief. As detailed above, by virtue of the actions complained of herein, the DOJ is interfering with the ability of Better Markets to pursue its advocacy activities; forcing Better Markets to expend resources to counteract the harmful effects of the DOJ's unlawful $13 Billion Agreement; and depriving Better Markets of a judicial forum in which it could have sought, and if granted relief will be able to seek, to influence the settlement process and the reviewing court's evaluation of the $13 Billion Agreement. These injuries will intensify as the DOJ uses the $13 Billion Agreement as a template, and follows the same unacceptable settlement procedure in

Better Markets is suffering and will continue to suffer irreparable injury absent future cases. Moreover, none of these injuries is compensable through any means other than the injunctive relief sought.

124. The balance of hardships favors Better Markets, in that the injuries that Better Markets is suffering and will continue to suffer absent injunctive relief outweigh the DOJ's interest in preserving an unlawful settlement that was procured through a violation of the separation of powers doctrine and other federal law and that has not been determined by a court to be in the public interest. Moreover, the DOJ may still effectuate the $13 Billion Agreement, provided it can persuade a court, upon compilation of an adequate record, that the terms are adequate under the applicable standard of review. If the DOJ cannot make such a showing, and cannot obtain approval for the $13 Billion Agreement, that failure would not be a cognizable burden for purposes of balancing the hardships of the parties. Such harm would result not from the imposition of injunctive relief, but from the determination that the $13 Billion Agreement fails to meet the applicable legal standard.

125. Finally, the public interest strongly supports granting the requested injunction. The primary purpose of the injunction will be to protect the public interest in seeing that officers of the United States comply with the law; that a settlement in an extraordinarily important matter is subjected to an independent review by a court to ensure that it serves the public interest; and to protect the public's right to judge the $13 Billion Agreement for itself, on the basis of a full and transparent record.

126. Better Markets is therefore entitled to injunctive relief.

COUNT SEVEN:
BETTER MARKETS IS ENTITLED TO DECLARATORY RELIEF

127. Plaintiff incorporates by reference all the allegations of the preceding paragraphs.

128. As alleged above, and by virtue of the actions complained of herein, a definite, concrete, and substantial dispute exists between the DOJ and Better Markets concerning the legality and validity of the $13 Billion Agreement. This dispute is of sufficient immediacy and reality as to warrant a declaratory judgment.

1. The Plaintiff is therefore entitled to relief pursuant to 28 U.S.C. § 2201(a).
   PRAYER FOR RELIEF:

2. WHEREFORE, Plaintiff prays for an order and judgment:

a. Declaring, pursuant to the APA and 28 U.S.C. § 2201, that—

i. By entering the $13 Billion Agreement with JP Morgan Chase without seeking judicial review and approval, under the extraordinary circumstances, the DOJ usurped the adjudicatory role of the judicial branch of government, in violation of the separation of powers doctrine.

ii. The DOJ lacked statutory authority to enter the $13 Billion Agreement with JP Morgan Chase and extract the relief it did without seeking judicial review and approval, and it therefore acted "not in accordance with law" and "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," within the meaning of Sections 706(2)(A) and (C) of the APA.

iii. The DOJ's actions in entering the $13 Billion Agreement without judicial review and approval, and in adopting an enforcement policy predicated on the $13 Billion Agreement, were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," within the meaning of meaning of Section 706(2)(A) of the APA.

iv. The DOJ failed to comply with the explicit requirements of FIRREA, 18 U.S.C. § 1833a(a) and (e), when it recovered the $2 billion civil monetary penalty from JP Morgan Chase without having a court assess or approve that penalty, and its actions were therefore "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law;" "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;" and without observance of procedure required by law," within the meaning of Sections 706(2)(A), (C), and (D) of the APA.

v. The DOJ failed to comply with the explicit requirements of the APA, 5 U.S.C. § 558, when it extracted a $2 billion penalty and other monetary sanctions upon JP Morgan Chase without being authorized by law to do so,

and its actions were "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law;" "in excess of statutory jurisdiction, authority, or limitations, of short of statutory right"; and without observance of procedure required by law," within the meaning of Sections 706(2)(A), (C), and (D) of the APA.

vi. The $13 Billion Agreement is unlawful and invalid in whole or in part.

b. Permanently enjoining the DOJ from enforcing the $13 Billion Agreement unless and until the DOJ submits the $13 Billion Agreement to a court so that such court may review all the facts and circumstances, enlarge the record supporting the $13 Billion Agreement as it deems necessary, and determine whether the $13 Billion Agreement meets the applicable legal standard of review.

c. Awarding Plaintiff its reasonable costs, including attorneys' fees, incurred in bringing this action; and

d. Granting such other and further relief as this Court deems just and proper. Respectfully submitted,

/s/ Dennis M. Kelleher_____ Dennis M. Kelleher, D.C. Bar No. 1009682 dkelleher@bettermarkets.com
Stephen W. Hall, D.C. Bar No. 366892 shall@bettermarkets.com

Better Markets, Inc.
1825 K Street, N.W., Suite 1080 Washington, D.C. 20006
Tel: 202-618-6464
Fax: 202-618-6465

Attorneys for Plaintiff

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Court's $1.3 Billion Judgment against Bank of America Signals FIRREA's Potential Role as a Powerful Substitute for the False Claims Act in Financial Fraud Cases[33]

In a much-anticipated ruling applying the civil penalties provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1833a ("FIRREA"), against a major financial institution, the U. S. District Court for the Southern District of New York may have cemented—at least for now—FIRREA's place as a new favorite Justice Department tool. In his July 30, 2014 decision, Judge Jed Rakoff—well known for his publicly stated views that the Justice Department and Securities and Exchange Commission are too hesitant in holding financial institutions and their executives accountable for fraudulent practices—imposed a massive, nearly $1.3 billion penalty against Bank of America, and also ordered a former executive to pay a $1 million penalty. See United States ex rel. O'Donnell v. Countrywide Home Loans, Inc., No. 12-cv-1422 (JSR), 2014 WL 3734122 (S.D.N.Y. July 30, 2014).

The court's decision, following a jury verdict last year finding the bank liable for FIRREA violations, is the first of its kind to construe the manner in which FIRREA's alternative "gain or loss" penalty provision should be calculated. The opinion makes clear—in Judge Rakoff's view—that the starting point in FIRREA cases is gross, rather than net, gains or losses attributable to the conduct. Based on the court's rationale, the traditional compensatory damages methodology that applies in other civil fraud cases, including those brought under the False Claims Act ("FCA"), has no place in a FIRREA penalty analysis.

Background of FIRREA and the O'Donnell Case

FIRREA, enacted in the wake of the savings and loan crisis of the 1980s, enables the Justice Department to seek civil penalties based on violations of certain predicate criminal statutes, all of which are tied in some way to financial fraud. FIRREA liability can be established by a mere preponderance of the evidence, a far more favorable standard for the government than that necessary to establish criminal liability under the

same statutes. In addition, FIRREA's pre-suit investigative subpoena power and ten- year statute of limitations make the statute particularly attractive to the Justice Department.

For much of its 25-year existence, FIRREA had been rarely used. That has changed recently, however, with the Justice Department invoking FIRREA with increasing frequency. In particular, the Justice Department has brought FIRREA claims against financial institutions in mortgage fraud and foreign currency exchange cases. In many instances, including complaints involving FHA-insured mortgage lending, the Justice Department is combining its FIRREA claims with FCA causes of action.

In O'Donnell, the government alleged that Countrywide's High Speed Swim Lane loan origination program ("HSSL") was a fraudulent scheme—in place for nine months in 2007 and 2008—that served to undermine the underwriting process and misrepresent to Fannie Mae and Freddie Mac the quality of risky mortgage loans Countrywide sold to those entities.[1] O'Donnell, a former Countrywide officer, filed suit under the FCA, and also brought FIRREA allegations to the Justice Department's attention, prior to the Justice Department's intervention. Before trial, however, the court dismissed the FCA counts on the grounds that the FCA did not apply to pre-May 20, 2009 false claims to government-sponsored enterprises, such as Fannie Mae and Freddie Mac.[2] That impediment did not prevent the Justice Department from pursuing the FIRREA allegations based on the same HSSL conduct.

In a trial last year, the jury found that Bank of America and its co-defendant, former Countrywide executive Rebecca Mairone, were liable for FIRREA violations. Following that verdict, the parties engaged in lengthy post-trial proceedings aimed at influencing the FIRREA penalty that Judge Rakoff would impose.

Penalties under FIRREA

FIRREA provides for a maximum civil penalty of $1.1 million per violation or $5.5 million for a continuing violation, but also states that these limitations

may be exceeded if they are less than the defendant's "pecuniary gain" or the victim's "pecuniary loss." 12 U.S.C. § 1833a(b)(3)(A) ("If any person derives pecuniary gain from the violation, or if the violation results in pecuniary loss to a person other than the violator, the amount of the civil penalty ... may not exceed the amount of such gain or loss."). As Judge Rakoff noted, the statute "provides no guidance, however, as to how to calculate such gain or loss or how to choose a penalty within the broad range permitted." O'Donnell, 2014 WL 3734122, at *1.

Prior to Judge Rakoff's decision in O'Donnell, only one reported case grappled with this particular penalties provision. In United States v. Menendez, No. 11-cv-6313 MMM (JCGx), 2013 WL 828926 (C.D. Cal. Mar. 6, 2013), the district court set forth a number of factors to consider when imposing a FIRREA civil penalty, including the good/bad faith of the defendant, the injury to the public and others, the egregiousness of the violation, and the defendant's ability to pay. However, Menendez provided no guidance as to how to calculate pecuniary gain or loss for FIRREA purposes, leaving a blank slate—in terms of court decisions—for Judge Rakoff's analysis.

Judge Rakoff's FIRREA Penalties Calculation Rejects FCA Precedent

In O'Donnell, the bank defendants argued that FCA and other civil statute damages methodologies were the appropriate measure for establishing loss and that these statutes' "net"—as opposed to "gross"—loss approach should be adopted in the FIRREA context. Indeed, under the rule established by the Supreme Court in United States v. Bornstein, 423 U.S. 303 (1976), FCA damages are determined using a benefit of the bargain analysis, based on the recognition that where a benefit has been received notwithstanding the violation, the actual damages caused by the defendant are the difference between the market value received and the market value promised. Just last year, in another mortgage fraud case, United States v.Anchor Mortgage Corp., the Seventh Circuit reaffirmed Bornstein and clarified that the proper methodology for calculating treble FCA damages is net trebling, rather than gross trebling. 711 F.3d 745 (7th Cir. 2013). See

FraudMail Alert No. 13-03-25, Seventh Circuit Reins in Justice Department's Overreaching False Claims Act Damages Theory (Mar. 25, 2013).

However, Judge Rakoff rejected the defendants' attempts to rely on this traditional and established "netting" methodology for purposes of FIRREA, noting that the different purposes underlying the FCA and FIRREA rendered that analogy "inapt." 2014 WL 3734122, at *4 n.6. Judge Rakoff noted that whereas FCA damages are meant to compensate for losses by restoring the government to pre-violation status, FIRREA penalties are designed to deter and punish. Id. Judge Rakoff reasoned that a net measurement of gain or loss could result in nullifying the purposes of the statute as a fortuitous rebound in the housing market or a bank's repurchase of faulty mortgages could virtually wipe out the penalties. Id. at *4 n.8.

After rejecting the traditional civil statute damages methodologies and any "net" loss or gain approach, Judge Rakoff held that, under the circumstances of this case, the gross loss and the gross gain were the same —nearly $3 billion. That amount equated to the entire price Fannie Mae and Freddie Mac paid for all the HSSL program mortgage loans and served as the upper limit for the FIRREA penalty. Id. at *5. Judge Rakoff then determined that he had discretion to depart downward from the upper limit based on mitigating factors. Relying on evidence from the government's own expert that 57% of the HSSL program loans purchased by Freddie Mac and Fannie Mae were of acceptable quality, Judge Rakoff decided to reduce the gross penalty amount by that percentage, leaving the nearly $1.3 billion penalty he ultimately imposed on the bank defendants. Id. at *6.[3]

A Final Note

Last year when the Menendez court found the government's civil penalty request of nearly $1.1 million excessive and imposed a penalty of only $40,000, practitioners struggled to predict how FIRREA's penalties provision would be applied in cases involving financial institutions (rather than a bankrupt individual who made a relatively small profit from his one act of

bank fraud). After that decision, no one was sure whether it would be worth the government's efforts to pursue such claims in the future.

This decision by Judge Rakoff removes much of that doubt. Now, the Justice Department is incentivized to assert FIRREA causes of action wherever possible. In particular, if the government is unable to bring or maintain FCA allegations due to the statute of limitations or its inability to state a claim (as was the case in O'Donnell), FIRREA is now a viable enforcement alternative. Even without the FCA's powerful treble damages threat, the government's ability to argue for "gross" penalties, based on Judge Rakoff's decision, makes it a formidable enforcement substitute. However, this is just one decision, and practitioners, financial institutions, and the government alike will have to wait and see how FIRREA penalties hold up over time. We have yet to know if Judge Rakoff's analysis will be adopted by other courts, how the gain versus loss debate will ultimately be answered (since Judge Rakoff equated gain and loss in O'Donnell), and how the apparently broad judicial discretion for downward departure will be used in other proceedings.

Authors:

Douglas W. Baruch John T. Boese
Jennifer M. Wollenberg

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or the attorney listed below:

Contacts:

Douglas W. Baruch +1.202.639.7052 douglas.baruch@friedfrank.com

John T. Boese +1.202.639.7220 john.boese@friedfrank.com

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JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
Division of Law
124 Halsey Street
P. O. Box 45029
Newark, New Jersey 07101
Attorney for Division of Consumer Affairs

By: Kevin Jespersen and Brian McDonough,
Assistant Attorneys General,
Janine Matton,
Deputy Attorney General, Nicholas Dolinsky
and Steven Scutti, Special Deputy Attorneys General
973-648-2500

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS

In the Matter of	:	Administrative Action
PHH MORTGAGE CORPORATION,	:	
Respondent.	:	**CONSENT ORDER**

This matter was initiated by the New Jersey Attorney General ("Attorney General") and the New Jersey Division of Consumer Affairs, Office of Consumer Protection ("Division") (collectively "New Jersey"), as an Investigation to ascertain whether violations of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. ("CFA"), have been or are being committed by PHH Mortgage Corporation, ("Respondent" or "PHH"), which is a New Jersey corporation with its principal place of business at 3000 Leadenhall Road, Mount Laurel, Burlington County, New Jersey. The Attorney General and the Division, in the interest of preserving resources and without prejudicing the public interest, and Respondent, in the interest of preserving PHH's resources, have agreed to resolve all

issues in controversy in this matter on the terms set forth in this Consent Order, which terms have been reviewed and approved by the Director of the Division, Eric T. Kanefsky ("Director") as confirmed by his entering this Consent Order. The Acting Attorney General and the Director also find that the remedial provisions of this Consent Order are in the public interest, for the protection of consumers and consistent with the purposes of the CFA.

I. Stipulations

1. PHH Mortgage Corporation is a wholly-owned subsidiary of PHH Corporation and has its principal place of business in Mount Laurel, New Jersey.

2. PHH represents that, according to the rankings reported by Inside Mortgage Finance, as of the 1st quarter of 2013, PHH is the fourth largest non-bank residential mortgage servicer in the United States and the ninth largest residential mortgage servicer.

3. From 2007 through the present, PHH serviced approximately one million loans at any given time.

II. Investigation by the State of New Jersey

4. In early 2011, based on the receipt of more than 100 complaints against PHH to the New Jersey Division of Consumer Affairs (the "Division") over a period of years from both New Jersey and out-of-state borrowers, New Jersey commenced an investigation (the "Investigation") to ascertain whether violations of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. ("CFA"), have been or are being committed by PHH. The Investigation included the review of hundreds of thousands of pages of documents, data and e-mails subpoenaed from PHH, hundreds of hours of audio tapes of customer contact calls with PHH representatives, numerous interviews of borrowers who complained to the Division or were identified through the investigation, and an

investigative interview of a PHH representative. New Jersey acknowledges PHH's cooperation throughout the investigation.

5. The State of New Jersey contends, based the Investigation, that PHH committed violations of the CFA. PHH denies any legal violations. New Jersey contends the following violations occurred:

a. **Loss Mitigation Delays.**

i. PHH informed certain borrowers they would learn whether they received requested loan modifications within 30-60 days of PHH's receipt of the borrowers' complete financial documentation, but PHH frequently failed to decide modification applications within that timeframe.

ii. While requests for loan modifications were pending, certain borrowers who did not pay their mortgages accumulated arrears, interest charges and late and other fees.

iii. PHH contributed to these delays through practices that included:

(a) Failing to communicate with certain borrowers seeking information about requested loan modifications;

(b) Directing calls from certain borrowers seeking information about loan modifications to PHH's collections department;

(c) Failing to maintain sufficient staffing levels and technology;

(d) Failing to adequately train and supervise staff and third party vendors;

(e) Failing to send applications for loan modifications to certain borrowers in a reasonable period of time;

(f) Misplacing or losing certain borrowers' documents;

(g) Failing to inform certain borrowers when additional information was required;

(h) Failing to conclude trial modifications as agreed;

(i) Failing to timely advise certain borrowers whether they had been approved or denied for permanent modifications;

(j) Offering loan modifications on terms deemed unreasonable by New Jersey including, but not limited to, offering higher monthly payments than certain borrowers' existing mortgage payments; and

(k) Providing unclear and inaccurate calculations and information concerning fees, charges, contribution amounts and overall financial impact of proposed loan modification terms.

b. **PHH's Practices Regarding Payments and Fees.**

i. In several instances, PHH incorrectly allocated certain borrowers' payments and in certain cases assessed improper late and other ancillary fees.

c. **Dual Tracking and Foreclosures.**

i. PHH was required by many of its investors, including the Federal National Mortgage Association ("FNMA") and the Federal Home Loan Mortgage Corporation ("FHLMC"), to continue foreclosure proceedings even when borrowers were actively pursuing loss mitigation alternatives. While FNMA and FHLMC required servicers to continue with foreclosure proceedings while loss mitigation options were being explored, they required that loan modifications be fairly evaluated within a reasonable period. FNMA and FHLMC also did not permit servicers to proceed with foreclosure sales while applications for modifications were pending, except in limited circumstances depending on the relative timing of a modification request and the scheduled Sheriff's sale.

ii. However, PHH:

(a) Told certain borrowers to ignore foreclosure and sheriffs' sales notices as long as the borrowers were proceeding with trial modifications;

(b) Caused certain borrowers' homes to be sold at sheriffs' sales, after approving trial modifications or while modification applications were pending;

(c) Foreclosed on certain borrowers' homes and then sent them approved loan modifications, seemingly unaware the homes had been foreclosed; and

(d) Pursued foreclosure proceedings after approving loan modifications.

d. **Delinquency Reports to Credit Bureaus.**

i. New Jersey contends that in several instances, PHH issued inaccurate delinquency reports to credit bureaus.

e. **Balloon Payments and Trial Modifications.**

i. PHH failed to disclose to certain borrowers applying for loan modifications and forbearances that balloon payments would be required immediately at the end of the trial or forbearance periods.

ii. At the end of trial modification-periods, PHH failed to disclose to certain borrowers whether their applications for permanent modifications had been approved; what steps they must take to finalize their permanent modifications; and the required amounts of their next monthly payments.

6. PHH disputes the investigation's findings and denies that there has been any violation of the CFA or any other laws.

III. Contentions of PHH

7. PHH disputes the investigation's findings and denies that there has been any violation of the CFA or any other laws. PHH further notes that the approximately 100 borrower complaints nationwide made to New Jersey is out of the approximately 1 million loans serviced by PHH at any one time, or approximately 0.01% of the Company's servicing portfolio. It is also significant that PHH was operating in a complex environment resulting from the meltdown of the housing market, as well as the collapse of its largest investors, FNMA and FHLMC, and their subsequent placement into conservatorship. FNMA, FHLMC and PHH have struggled to respond to the housing crisis and related issues. As a result, for example, FNMA announced more than 100 program changes to its servicing guidelines in two years, for an average of more than four changes a month. PHH contends there is no evidence that the borrower complaints against PHH were caused by systemic, continuing servicing issues. PHH contends that a combination of consumer stressors -- such as unsupported expectations that everyone qualifies for a loan modification and individual circumstances, such as unemployment and illness, increased the volume of loss mitigation requests.

8. PHH represents that, as of the 1st quarter of 2013, PHH is the fourth largest non-bank residential mortgage servicer in the United States and the ninth largest residential mortgage servicer as reported by Inside Mortgage Finance. From 2007 through the present, of approximately one million loans in PHH's servicing portfolio, over 70% are loans owned by FNMA, FHLMC and the Government National Mortgage Association ("GNMA"). The remaining approximately 30% of PHH's servicing portfolio is owned by approximately 615 investors. PHH is contractually obligated to service loans in accordance with its investors' guidelines. Among other things, through most of the time period covered by the investigation, FNMA and FHLMC required servicers to continue with foreclosure proceedings while loss mitigation options were being explored and even today FNMA

and FHLMC require servicers to process borrowers in default for foreclosure while the borrower prepares his or her loss mitigation application package and they expect servicers to adhere to their foreclosure timelines.

9. PHH represents that it has made a number of improvements to its servicing operations including, for example, the voluntary implementation of a comprehensive servicing default review and enhancement project based on: a) OCC Bulletin 2011-29 (Foreclosure Management Supervisory Guidance); b) the Interagency Review of Foreclosure Policies and Practices Report, dated April 2011; and c) the Federal Housing Finance Agency ("FHFA") GSE Servicing Standards Alignment Initiative from April 28, 2011. Also during 2011, PHH developed and implemented a Single Point of Contact model ("SPOC"), and implemented an escalation prevention management program. PHH Mortgage increased staffing resources by over 300% from the second quarter of 2008 to the end of 2011 and the Company has instituted new comprehensive training on issues specifically tailored to dealing with borrowers in default.

10. New Jersey does not adopt the foregoing contentions.

IV. Resolution of the Matter

11. To save the expense and delay of any further legal action, and without the trial of any issues, the Parties have agreed to enter into this Consent Order. As explained in detail below, this Consent Order creates a framework for PHH to provide restitution to borrowers within and outside New Jersey identified through the investigation, and adopt certain servicing standards. This Consent Order also creates, as explained below, a reporting requirement, whereby PHH will provide New Jersey with ongoing information related to PHH's efforts to provide timely and accurate foreclosure prevention assistance to borrowers nationwide.

12. THEREFORE, based on the above investigation by the State of New Jersey and for good cause shown IT IS ORDERED AND AGREED as follows:

V. PHH Shall Pay $6.25 Million

13. In consideration of this Consent Order, PHH shall provide a total payment of $6.25 million to certain borrowers nationwide and to New Jersey, as detailed below.

VI. Restitution Payments for Borrowers

A. Payments to Identified Borrowers

14. Within five days of the Effective Date PHH will deposit $3,612,000 in a separate, interest-bearing account ("the Restitution Account"), and will provide written notification to New Jersey that it has done so.

15. PHH shall provide restitution to the borrowers nationwide that PHH and New Jersey identified as entitled to relief in the amounts agreed to by the Parties and detailed on the attached Confidential Appendix C to this Consent Order as follows:

a. $10,000 to each of 44 borrowers nationwide whose homes were sold in sheriffs' sales while a loan modification decision was pending; totaling $440,000;

b. $4,000 to each of 310 borrowers nationwide who waited 180 days or more for a loan modification decision after PHH had all of the borrowers' relevant documentation; totaling $1,240,000;

c. $800 to each of 711 borrowers nationwide who waited between 90 and 180 days for a loan modification decision after PHH had all of the borrowers' relevant documentation; totaling $568,800; and

d. $200 to each of 736 borrowers nationwide who waited an undetermined number of days for a modification decision; totaling $147,200;

e. $4,000 to each of 179 borrowers nationwide whom, the investigation found, suffered similar related harms to those set forth in this paragraph, but were not otherwise included in these categories as reported by PHH; totaling $716,000; and

f. $500,000 shall be set aside and used for borrower restitution as set forth in Paragraphs 19 and 20.

16. PHH utilized information in its servicing system and did not perform a file-by-file review for each borrower identified above. Given that limitation, PHH represents and warrants that it exercised reasonable diligence in determining the number and identities of borrowers entitled to restitution in Paragraphs 15 a. through 15 e. of this Consent Order, and represents and warrants that to the best of its knowledge as of the Effective Date of this Consent Order, those numbers are complete with respect to loans PHH serviced between 2010 and 2012. PHH advised New Jersey of the source of the information and the Company further acknowledges that New Jersey relied on its representations of the number and identities of consumers in entering this Consent Order.

17. PHH will take all necessary steps to locate borrowers eligible for restitution (identified on Confidential Appendix C) and make payment disbursements from the restitution account within thirty days of the Effective Date of this Consent Order. Specifically, PHH will obtain the most current mailing address for all eligible borrowers from its own records, public records, or from an appropriate vendor, and will mail restitution checks to those borrowers at the most current address.

18. PHH shall continue to make diligent efforts to locate borrowers identified on Confidential Appendix C who are eligible for restitution for a period of six months from the Effective Date.

B. Payments to Other Borrowers

19. PHH shall reserve $500,000 from the restitution account in Paragraph 15, which shall be designated as the "residual restitution fund," and PHH shall disburse this fund to borrowers nationwide who can demonstrate they (a) suffered delays greater than 90 days in having their completed loan modification applications decided between 2008 and the Effective Date, and/or (b) had their homes sold in sheriffs' sales while a completed loan modification package was pending between 2008 and the Effective Date, in accordance with paragraph 20 below.

20. For any borrowers claiming rights to restitution from PHH for the matters listed in Paragraph 19 within six months from the Effective Date, and who are not borrowers eligible for restitution under this Consent Order, PHH shall make reasonable efforts to evaluate claims and determine whether they fall under one of three categories as follows:

a. Category A - waited between 90 and 180 days for a loan modification decision after all relevant and necessary documentation was submitted to PHH;

b. Category B - waited 180 days or more for a loan modification decision after all relevant and necessary documentation was submitted to PHH; or

c. Category C - home was sold in a sheriff's sale while a loan modification application was pending and the borrower had submitted all relevant and necessary documentation to PHH.

d. If PHH determines that a borrower falls into any of the above categories, it shall include that borrower in a list to receive restitution from the residual restitution fund no later than nine months after the Effective Date. If PHH reasonably determines in good faith that restitution is not appropriate for any particular borrower, it shall advise New Jersey of its

basis for its determination and PHH shall be under no obligation to make a restitution payment to the borrower.

e. Borrowers eligible for restitution from the residual restitution fund shall receive $800 for Category A, $4,000 for Category B, and $10,000 for Category C, except that if a borrower falls into either Category A or B, and also under Category C, the consumer shall receive compensation under Category A or Category B as applies, and under Category C.

f. PHH shall make all such payments from the residual restitution fund. In no event shall PHH be liable to reserve more than $500,000 for the residual restitution fund.

B. Restitution Payment Reports Requirement

21. Starting sixty (60) days from the Effective Date, PHH shall report to New Jersey on a monthly basis the number of borrowers that have received restitution in that month and cumulatively for each category of consumer in Paragraph 15, and provide New Jersey statements for the restitution account. Starting at the end of the first calendar quarter from the Effective Date, PHH shall report to New Jersey on a quarterly basis any payments made pursuant to Paragraph 20.

22. PHH shall maintain complete and accurate records of its actions taken to locate, pay and determine eligibility for borrowers entitled to restitution as set forth in Paragraphs 15 and 20 of this Consent Order, and New Jersey shall be entitled to inspect those records on demand.

C. Unused Restitution to be Paid to New Jersey

23. In the event that any funds in the restitution account, the residual restitution fund, or otherwise designated for restitution are not delivered to, or claimed by borrowers after eighteen (18) months from the Effective Date of this Consent Order, those funds shall be turned over to the Attorney General to be used for foreclosure relief or home preservation assistance, or for other

investigatory or enforcement efforts related to consumer fraud. All funds unclaimed by borrowers shall be delivered to the Attorney General no later than 12 months after the last check is delivered.

VII. Additional Payments

24. Within fourteen (14) days of the execution of this Consent Order, PHH shall make a payment to New Jersey in the amount of $2,638,000. Of that payment, $500,000 shall be designated for the Attorney General's use for investigative or enforcement efforts related to foreclosure relief or home preservation, or for other investigatory or enforcement efforts related to consumer fraud.

25. Five hundred thousand dollars ($500,000) of the payment to New Jersey shall be designated to reimburse New Jersey for costs of the investigation.

VIII. Injunctive Relief and PHH's Business Practices

26. PHH shall not engage in any unfair or deceptive acts or practices in the conduct of its servicing business and shall comply with such State and/or Federal laws, rules and regulations as now constituted or as may hereafter be amended, including the New Jersey Consumer Fraud Act.

27. PHH agrees to adopt on a nationwide basis the servicing standards set forth in Appendix A. To the extent the Consumer Financial Protection Bureau ("CFPB") implements national servicing standards that conflict in any way with any of the servicing standards set forth in Appendix A, PHH shall follow the CFPB's servicing standards. In the event of such a conflict, PHH shall notify New Jersey of the conflict.

28. PHH has already implemented the provisions of Appendix A except for the following provisions: 1.b., 1.d, 1.f., 1.h., 1.k., 2.a.vi(b), 2.a.ix., 4.b.i, all of paragraph 5, 6.c, 6.i., 8.a., 8.b., 8.e., 9.f., 9g., 10.b.iii., 10.b.iv.(c), and 10.c.i.(c). All injunctive relief is to be in place no later than the date of implementation of the similar CFPB servicing standards. If injunctive relief is not

implemented by the CFPB for a servicing standard set forth in Appendix A, then PHH shall implement the standard by January 10, 2014.

IX. Reporting Requirements

29. Within thirty (30) days from the end of the calendar quarter of the Effective Date, and on a quarterly basis for the following eight quarters, PHH will provide quarterly reports to New Jersey with the information indicated in Appendix B to this Consent Order, with data provided for the current quarter reported as well as cumulatively from the fourth quarter of 2013 through the last reported quarter.

30. The Attorney General and Division agree that all confidential information disclosed to them by PHH, its parent, subsidiaries or any of its affiliates, including but not limited to the periodic reports that will be provided pursuant to Paragraph 29, shall be kept confidential. The Attorney General and Division shall not disclose or use any confidential information without the prior written consent of the disclosing party, except to the extent required by law, regulation or court order (and in any of these circumstances, only upon prior written notice to PHH).

X. Enforcement, Release and Additional Terms

31. PHH will appoint an internal compliance coordinator to implement this Consent Order and to be the point of contact with New Jersey for purposes of this Consent Order.

32. The Parties consent to the entry of this Consent Order for the purposes of settlement only and this Consent Order does not constitute any admission of liability or wrongdoing, either express or implied, by PHH or any other party.

33. PHH consented to this Consent Order upon advice of counsel as its own free and voluntary act and with full knowledge and understanding of the nature of the investigation and the obligations

and duties imposed upon it by this Consent Order, and PHH consents to the Consent Order without further notice, and avers that no offer, agreement or inducements of any nature whatsoever have been made to it by New Jersey or New Jersey's employees to procure this Consent Order.

34. This Consent Order shall be governed by, and construed and enforced in accordance with, the laws of the State of New Jersey. In any action or dispute relating to this Consent Order, the jurisdiction and venue shall be in the Superior Court of the State of New Jersey.

35. This Consent Order is not intended to confer upon any person not a party to this Consent Order any rights or remedies, including rights as a third-party beneficiary. This Consent Order is not intended to create a private right of action on the part of any person or entity, other than the Parties hereto.

36. The Parties have negotiated, jointly drafted and fully reviewed the terms of this Consent Order and the rule that uncertainty or ambiguity is to be construed against the drafter shall not apply to the construction or interpretation of this Consent Order.

37. This Consent Order and its appendices contain the entire agreement among the Parties. Except as otherwise provided herein, this Consent Order shall be modified only by a written instrument signed by or on behalf of the Parties.

38. PHH waives its right to argue, submit, propose, seek to establish or otherwise contend before any court or tribunal that New Jersey's claims against it or any of its bankruptcy estates, including claims or debt based on this Consent Order, are dischargeable debt or claims under the United States Bankruptcy Code (including under 11 U.S.C. § 523, including 11 U.S.C. § 523 (a)(7), (a)(19)) or any other federal or state law. This waiver is limited solely to New Jersey and does not constitute a

waiver of any rights in bankruptcy that PHH may possess against third parties, even if those claims are based in whole or in part upon the claims investigated by New Jersey.

39. This Consent Order shall bind PHH, its officers, directors, agents, representatives, and employees, and shall be binding on any and all successors and assigns, future purchasers, acquired parties, acquiring parties, successors-in-interest, shareholders, and their officers, agents, representatives, and employees, directly or indirectly or through any corporation or anyone acting directly or indirectly on its behalf. In no event shall assignment of any right, power or authority under this Consent Order avoid compliance with this Consent Order.

40. In exchange for the consideration set forth herein, the Attorney General and the Division agree to release PHH from civil claims or borrower-related administrative claims, to the extent permitted by New Jersey law, which New Jersey could have brought prior to the Effective Date against PHH for violations of the CFA arising from servicing residential mortgage loans from 2008 to the Effective Date. This Consent Order, when fully executed and performed by PHH, will resolve all Consumer Fraud Act claims against PHH arising from servicing residential mortgage loans from 2008 to the Effective Date. However, nothing in this Consent Order is intended to, nor shall, limit the Attorney General's investigatory or compliance review powers otherwise provided by law. The release language in this paragraph is not intended to apply to any private right of action brought by any individual or entity, or to any Federal authority, or to any other State authority for conduct not related to PHH's responses to mortgage loan modification requests or other loss mitigation requests.

41. Notwithstanding any term of this Consent Order, the following do not comprise released claims: (a) private rights of action, provided however, that nothing herein shall prevent PHH from raising the defense of set-off against a borrower who has received Restitution; (b) actions to enforce this Consent Order; (c) any claims against PHH by any other agency or subdivision of the State,

including the Division of Criminal Justice; and (d) claims, enforcement actions or prosecutions by any person or entity not a party to this Consent Order.

42. If any portion of this Consent Order is held invalid or unenforceable by operation of law, the remaining terms of this Consent Order shall not be affected.

43. The signatories to this Consent Order warrant and represent that they have read and understand this Consent Order, that they are duly authorized to execute it, and that they have the authority to take all appropriate action required to be taken pursuant to the Consent Order to effectuate its terms.

44. This Consent Order may be executed in multiple counterparts, each of which shall be deemed a duplicate original.

45. This Consent Order is final and binding on the Parties, including all principals, agents, representatives, successors in interest, assigns, and legal representatives thereof. Each party has a duty to so inform any such successor in interest of the terms of this Consent Order.

46. All of the terms of this Consent Order are contractual and not merely recitals and none may be amended or modified except by a writing executed by all Parties hereto.

47. This Consent Order supersedes and renders null and void any and all written or oral prior undertakings or agreements between the Parties regarding the subject matter hereof.

48. If PHH fails to comply with any provision of this Consent Order, New Jersey may take any and all steps available to enforce this Consent Order, including commencing an action in New Jersey Superior Court, after providing PHH with the specific details of the alleged noncompliance and providing PHH sixty (60) days to cure any such noncompliance.

49. Failure by any party to seek enforcement of this Consent Order pursuant to its terms with respect to any instance or provision shall not be construed as a waiver to such enforcement with regard to other instances or provisions.

50. Nothing in this Consent Order shall preclude a right of action by any person not a party to this Consent Order and nothing in this Consent Order shall preclude PHH from asserting any defense to any action brought by a person not a party to this Consent Order.

51. In the event PHH enters into any agreement or consent order with any other State, group of States, or federal entity in connection with PHH's servicing practices that results in the obligation of PHH to make a payment of funds to New Jersey, regardless of how the payments of such funds are characterized by any such agreement or consent order, PHH shall be entitled to an offset against any such future payments in the amount of any funds paid to New Jersey pursuant to Paragraphs 23 and 24 of this Consent Order, but excluding from the total the State's litigation costs, set forth in Paragraph 25, which shall not be subject to an offset.

52. This Consent Order shall remain in effect for a period of two (2) years from the Effective Date.

53. All communications and notices regarding this Consent Order shall be sent by first class mail and facsimile, if twenty-five (25) pages or less in length, to:

Office of the Attorney General

Janine N. Matton
State of New Jersey
Office of the Attorney General
Department of Law and Public Safety
Division of Law
124 Halsey Street, 5th Floor
Newark, New Jersey 07101

Respondent

Madeline Flanagan
Senior Vice President and General Counsel
PHH Mortgage Corporation
1 Mortgage Way
Mt. Laurel, NJ 08054
Fax: 856-917-0950

Copy to:

Mitchel H. Kider
Weiner Brodsky Kider PC
1300 19th Street, N.W., 5th Floor
Washington, D.C. 20036
Fax: 202-628-2011

Attorneys for PHH Mortgage Corporation

IT IS ON THE 4th **DAY OF** December**, 2013 ("Effective Date") SO ORDERED.**

JOHN J. HOFFMAN

ACTING ATTORNEY GENERAL OF NEW JERSEY

By: _____
ERIC T. KANEFSKY, DIRECTOR
DIVISION OF CONSUMER AFFAIRS

THE PARTIES CONSENT TO THE FORM, CONTENT AND ENTRY OF THIS CONSENT ORDER ON THE DATES BESIDE THEIR RESPECTIVE SIGNATURES.

FOR THE DIVISION:

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: Janine Matton Dated: 12/2, 2013

Janine Matton
Deputy Attorney General
Kevin R. Jespersen
Brian McDonough
Assistant Attorneys General
Division of Law
124 Halsey Street - 5th Floor
P.O. Box 45029
Newark, New Jersey 07101

FOR THE RESPONDENT:

PHH MORTGAGE CORPORATION

By: Dated: 11/27, 2013

Martin Foster
Senior Vice President – Servicing
PHH Mortgage Corporation
1 Mortgage Way
Mt. Laurel, NJ 08054

APPENDIX A – NATIONWIDE SERVICING STANDARDS

The provisions outlined below are intended to apply to loans secured by owner-occupied properties that serve as the primary residence of the borrower unless otherwise noted herein. PHH services loans for FNMA, FHLMC, FHA, VA and approximately 615 private investors (collectively "investors"). For avoidance of doubt, the provisions below are subject to all Applicable Requirements (as defined below) and where there is a conflict between the provisions below and the Applicable Requirements, PHH shall adhere to the Applicable Requirements.

The servicing standards and any modifications or other actions taken in accordance with the servicing standards are expressly subject to, and shall be interpreted in accordance with, (a) applicable federal, state and local laws, rules and regulations, including, but not limited to, any requirements of the federal banking regulators, (b) the terms of the applicable mortgage loan documents, (c) Section 201 of the Helping Families Save Their Homes Act of 2009, and (d) the terms and provisions of the Servicer Participation Agreement with the Department of Treasury, any servicing agreement, subservicing agreement under which PHH services for others, special servicing agreement, mortgage or bond insurance policy or related agreement or requirements to which PHH is a party and by which it or its servicing is bound pertaining to the servicing or ownership of the mortgage loans, including without limitation the requirements, binding directions, or investor requirements of the applicable investor (such as Fannie Mae or Freddie Mac), mortgage or bond insurer, or credit enhancer (collectively, the "Applicable Requirements").

1. **Requirements for Accuracy and Verification of Borrower's Account Information.**
   a. PHH shall maintain procedures to ensure accuracy and timely updating of borrower's account information, including posting of payments and imposition of fees. PHH shall also maintain adequate documentation of borrower account information, which may be in either electronic or paper format.
   b. PHH shall credit a periodic payment to the borrower's loan account as of the date of receipt, except when a delay in crediting does not result in any charge to the borrower or in the reporting of negative information to a consumer reporting agency. However, if PHH specifies in writing requirements for the borrower to follow in making payments, but accepts a payment that does not conform to the requirements, PHH shall credit the payment as of five days after receipt. A periodic payment, as used in this paragraph, is an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle. A payment qualifies as a periodic payment even if it does not include amounts required to cover late fees, other fees, or non-escrow payments a servicer has advanced on a borrower's behalf.
   c. If PHH retains a partial payment, meaning any payment less than a periodic payment, in a suspense or unapplied funds account, PHH shall, on accumulation of sufficient funds to cover a periodic payment in any suspense or unapplied funds account, treat such funds as a periodic payment received and credit such payment in accordance with paragraph (b) of this section.
   d. PHH shall not take funds from suspense or unapplied funds accounts to pay fees until all unpaid contractual interest, principal, and escrow amounts are paid and brought current or other final disposition of the loan.
   e. Notwithstanding the provisions above, PHH shall not be required to accept payments which are insufficient to pay the full balance due after the borrower has been provided

written notice that the contract has been declared in default and the remaining payments due under the contract have been accelerated.

f. PHH shall provide to borrowers (other than borrowers in bankruptcy or borrowers who have been referred to or are going through foreclosure) adequate information on monthly billing or other account statements to show in clear and conspicuous language:
    i. total amount due;
    ii. allocation of payments, including a notation if any payment has been posted to a "suspense or unapplied funds account";
    iii. unpaid principal;
    iv. fees and charges for the relevant time period; and
    v. current escrow balance.

   In lieu of a billing or account statement, where a borrower is provided with a coupon book, PHH will establish a system that permits the borrower to obtain this information through electronic access to his or her account.

g. Prior to referring a loan to foreclosure counsel, PHH shall validate the note or, if necessary, create a lost note affidavit, and PHH shall conduct a legal entity review, which will include a chain of title review and validation as well as verification of the identity of the current investor that owns the loan.

h. Concurrent with the referral of a loan to foreclosure, PHH shall send borrowers a letter ("Notice of Foreclosure Counsel Letter") that will inform the borrower that they may receive, upon written request:
    i. A copy of the borrower's payment history since the borrower was last less than 60 days past due;
    ii. A copy of the borrower's note;
    iii. If PHH has commenced foreclosure or filed a POC, copies of any assignments of mortgage or deed of trust required to demonstrate the right to foreclose on the borrower's note under applicable state law; and
    iv. The name of the investor that holds the borrower's loan.

   The letter will also include clear language that:

    i. PHH may have sent the borrower one or more borrower solicitation communications;
    ii. The borrower can still be evaluated for alternatives to foreclosure even if he or she had previously shown no interest;
    iii. The borrower should contact PHH to obtain a loss mitigation application package;
    iv. The borrower must submit a loan modification application to PHH to request consideration for available foreclosure prevention alternatives; and
    v. Provides PHH's toll-free number for obtaining a loan modification application

i. PHH shall adopt enhanced billing dispute procedures, including for disputes regarding fees. These procedures will include:
    i. Establishing readily available methods for customers to lodge complaints and pose questions, such as by providing toll-free numbers and accepting disputes by email;

ii. Assessing and ensuring adequate and competent staff to answer and respond to borrower disputes promptly;
iii. Establishing a process for dispute escalation;
iv. Tracking the resolution of complaints; and
v. Providing a toll-free number on monthly billing statements.

j. PHH shall take appropriate action to promptly remediate any inaccuracies in borrowers' account information, including:
i. Correcting the account information;
ii. Providing cash refunds or account credits; and
iii. Correcting inaccurate reports to consumer credit reporting agencies.

k. PHH's systems to record account information shall be periodically independently reviewed for accuracy and completeness by an independent reviewer.

l. PHH shall in accordance with contractual and legal requirements and prior to foreclosure referral send a delinquent borrower a periodic statement or, as applicable, a delinquency notice, or the Notice of Foreclosure Counsel Letter, setting forth each of the following items, to the extent applicable:
i. The total amount needed to reinstate or bring the account current, and the amount of the principal obligation under the mortgage;
ii. The date through which the borrower's obligation is paid;
iii. The date of the last full payment;
iv. The current interest rate in effect for the loan (if the rate is effective for at least 30 days);
v. The date on which the interest rate may next reset or adjust (unless the rate changes more frequently than once every 30 days);
vi. The amount of any prepayment fee to be charged, if any;
vii. A description of any late payment fees;
viii. A telephone number or electronic mail address that may be used by the borrower to obtain information regarding the mortgage; and
ix. The Website to access either the Consumer Financial Protection Bureau list or the HUD list of homeownership counselors and counseling organizations and the HUD toll-free telephone number to access contact information for homeownership counselors or counseling organizations.

m. In active Chapter 13 cases, PHH shall ensure that:
i. Prompt and proper application of payments is made on account of (a) pre-petition arrearage amounts and (b) post-petition payment amounts and posting thereof as of the successful consummation of the effective confirmed plan;
ii. The debtor is treated as being current so long as the debtor is making payments in accordance with the terms of the then-effective confirmed plan and any later effective payment change notices; and
iii. As of the date of dismissal of a debtor's bankruptcy case, entry of an order granting PHH relief from the stay, or entry of an order granting the debtor a discharge, there is a reconciliation of payments received with respect to the debtor's obligations during the case and PHH's systems of record are appropriately updated. In connection with such reconciliation, PHH shall

reflect the waiver of any fee, expense or charge that has not been disclosed to the borrower and approved by the bankruptcy court.

2. **Third-Party Provider Oversight.**
   a. ***Oversight Duties Applicable to All Third-Party Providers.*** PHH shall adopt policies and processes to oversee and manage foreclosure firms, law firms, foreclosure trustees, subservicers and other agents, independent contractors, entities and third parties (including subsidiaries and affiliates) retained by or on behalf of PHH that provide foreclosure, bankruptcy or mortgage servicing activities (including loss mitigation) (collectively, such activities are "Servicing Activities" and such providers are "Third-Party Providers"), including:
      i. PHH shall perform appropriate due diligence of Third-Party Providers' qualifications, expertise, capacity, reputation, complaints, information security, document custody practices, business continuity, and financial viability.
      ii. PHH shall amend agreements, engagement letters, or oversight policies, or enter into new agreements or engagement letters, with Third-Party Providers to require them to comply with PHH's applicable policies and procedures (which will incorporate any applicable aspects of this Consent Order) and applicable state and federal laws and rules.
      iii. PHH shall ensure that agreements, contracts or oversight policies provide for adequate oversight, including measures to enforce Third-Party Provider contractual obligations, and to ensure timely action with respect to Third-Party Provider performance failures.
      iv. PHH shall ensure that foreclosure and bankruptcy counsel and foreclosure trustees have appropriate access to information from PHH's books and records necessary to perform their duties in preparing pleadings and other documents submitted in foreclosure and bankruptcy proceedings.
      v. PHH shall ensure that all information provided by or on behalf of PHH to Third-Party Providers in connection with providing Servicing Activities is accurate and complete.
      vi. PHH shall conduct periodic reviews of Third-Party Providers. These reviews shall include:
         (a) A review of a sample of the foreclosure and bankruptcy documents prepared by the Third-Party Provider, to provide for compliance with applicable state and federal law and this Consent Order in connection with the preparation of the documents, and the accuracy of the facts contained therein;
         (b) A review of the fees and costs assessed by the Third-Party Provider to provide that only fees and costs that are lawful, reasonable and actually incurred are charged to borrowers and that no portion of any fees or charges incurred by any Third-Party Provider for technology usage, connectivity, or electronic invoice submission is charged as a cost to the borrower;
         (c) A review of the Third-Party Provider's processes to provide for compliance with PHH's policies and procedures concerning Servicing Activities;

(d) A review of the security of original loan documents maintained by the Third-Party Provider; and

(e) A requirement that the Third-Party Provider disclose to PHH any imposition of sanctions or professional disciplinary action taken against them for misconduct related to performance of Servicing Activities.

vii. The quality agreement steps set forth above shall be conducted by PHH employees who do not prepare foreclosure or bankruptcy affidavits, sworn documents, declarations or other foreclosure or bankruptcy documents.

viii. PHH shall take appropriate remedial steps if problems are identified through this review or otherwise, including, when appropriate, terminating its relationship with the Third-Party Provider.

ix. PHH shall adopt processes for reviewing and appropriately addressing customer complaints it receives about Third-Party Provider services.

x. PHH shall regularly review and assess the adequacy of its internal controls and procedures with respect to its obligations under this Section, and take appropriate remedial steps if deficiencies are identified, including appropriate remediation in individual cases.

b. ***Additional Oversight of Activities by Third-Party Providers.***

i. PHH shall require a certification process for law firms (and recertification of existing law firm providers) that provide residential mortgage foreclosure and bankruptcy services for PHH, on a periodic basis, as qualified to serve as a Third-Party Provider to PHH, including that attorneys have the experience and competence necessary to perform the services requested.

ii. PHH shall ensure that attorneys are licensed to practice in the relevant jurisdiction, have the experience and competence necessary to perform the services requested, and that their services comply with applicable rules, regulations and applicable law (including state law prohibitions on fee splitting).

iii. PHH shall ensure that foreclosure and bankruptcy counsel and foreclosure trustees have an appropriate PHH contact to assist in legal proceedings and to facilitate loss mitigation questions on behalf of the borrower.

iv. PHH shall adopt policies requiring Third-Party Providers to maintain records that identify all notarizations of PHH documents executed by each notary employed by the Third-Party Provider.

3. **Loss Mitigation Requirements.**

a. PHH shall be required to notify potentially eligible borrowers of currently available loss mitigation options prior to foreclosure referral. Upon the timely receipt of a complete loan modification application, PHH shall evaluate borrowers for all available loan modification options for which they are eligible prior to referring a borrower to foreclosure and shall facilitate the submission and review of loss mitigation applications. The foregoing notwithstanding, PHH shall have no obligation to solicit borrowers who are in bankruptcy.

b. PHH shall offer and facilitate loan modifications for borrowers eligible for HAMP or other available investor approved loan modification programs rather than initiate

foreclosure when such loan modifications for which they are eligible are net present value (NPV) positive and meet other investor, guarantor, insurer and program requirements. Nothing in this paragraph will require PHH to utilize NPV for purposes of evaluating loan modifications where the investor does not accept NPV for purposes of evaluating loan modifications.

c. PHH shall allow borrowers enrolled in a trial period plan under prior HAMP guidelines (where borrowers were not pre-qualified) and who made all required trial period payments, but were later denied conversion to permanent modification, the opportunity to reapply for a HAMP modification or to apply for an investor approved loan modification using current financial information, subject to the timeline requirements as provided by 12 C.F.R. § 1024.41 and applicable investor guidelines.

d. PHH shall promptly send a final modification agreement to borrowers who have enrolled in a trial period plan under current HAMP guidelines (or fully underwritten or streamlined modification programs with a trial payment period including FNMA or FHLMC streamlined programs if trial periods are applicable) and who have made the required number of timely trial period payments, where the modification is underwritten prior to the trial period and PHH has received any necessary investor, guarantor or insurer approvals. The borrower shall then be converted by PHH to a permanent modification upon execution of the final modification documents, consistent with applicable program guidelines, absent evidence of fraud.

4. **Independent Evaluation of First Lien Loan Modification Denials.**

a. Except when evaluated as provided in paragraphs 5(h) or 5(i), PHH's initial denial of an eligible borrower's request for first lien loan modification following the submission of a complete loan modification application shall be subject to an independent evaluation. Such evaluation shall be performed by an independent entity or a different employee who has not been involved with the particular loan modification.

b. Denial Notice.

i. When a first lien loan modification is denied after independent review, PHH shall send a written non-approval notice to the borrower identifying the specific reason or reasons for denial. The notice shall inform the borrower that he or she has 14 days from the date of the denial letter to provide evidence that the eligibility determination was in error.

ii. If the first lien modification is denied because disallowed by investor, PHH shall summarize in the written non approval notice the reasons for investor denial. Where feasible and not disallowed and upon borrower request, PHH shall also disclose the name of the investor that owns the loan.

iii. For those cases where a first lien loan modification denial is the result of a net present value ("NPV") calculation, if, within 14 days of receiving the denial the borrower submits a written request, PHH shall provide the monthly gross income and property value used in the calculations.

c. Appeal Process.

i. After the automatic review in paragraph 4(a) has been completed and PHH has issued the written non-approval notice, in the circumstances described in the first sentences of paragraphs 5(c), 5(e), or 5(g), except when otherwise required by federal or state law or investor directives, borrowers

shall have 14 days to request an appeal and obtain a review by an alternative employee that has not previously reviewed/worked on the file of the first lien loan modification denial in accordance with the terms of this Consent Order. PHH shall ensure that the borrower has 14 days from the date of the written non-approval notice to provide information as to why PHH's determination of eligibility for a loan modification was in error, unless the reason for non-approval is (1) ineligible mortgage, (2) ineligible property, (3) offer not accepted by borrower or request withdrawn, or (4) the loan was previously modified.

ii. Subject to Applicable Requirements, for those cases in which the first lien loan modification denial is the result of an NPV calculation, if a borrower disagrees with the property value used by PHH in the NPV test, the borrower can request that a full appraisal be conducted of the property by an independent licensed appraiser (at borrower expense) consistent with Making Home Affordable Directive 10-15. PHH shall comply with the process set forth in Making Home Affordable Directive 10-15, including using such value in the NPV calculation.

iii. PHH shall review the information submitted by borrower and use its best efforts to communicate the disposition of borrower's appeal to borrower no later than 30 days after receipt of the information unless investor timeframe allows for longer time period for investor to consider appeal and respond to borrower in which case PHH shall communicate the status of the appeal within 30 days of receipt of the borrower's information.

iv. If PHH denies borrower's appeal, PHH's appeal denial letter shall include a description of other available loss mitigation, including short sales and deeds in lieu of foreclosure.

5. **Dual Track Restricted.**

a. Subject to Applicable Requirements, if a borrower has not already been referred to foreclosure, PHH shall not refer an eligible borrower's account to foreclosure while the borrower's complete application for any loan modification program is pending if PHH received (a) a complete loan modification application no later than day 120 of delinquency, or (b) a substantially complete loan modification application (missing only any required documentation of hardship) no later than day 120 of delinquency and PHH receives any required hardship documentation no later than day 130 of delinquency. PHH shall not make a referral to foreclosure of an eligible borrower who so provided an application until:

i. PHH determines (after the automatic review in paragraph 4(a)) that the borrower is not eligible for a loan modification, or

ii. If borrower does not accept an offered loan modification within 14 days of the evaluation notice, the earlier of (i) such 14 days, and (ii) borrower's rejection of the loan modification offer.

b. Subject to Applicable Requirements, if borrower accepts the loan modification resulting from PHH's evaluation of the complete loan modification application referred to in paragraph 5(a) (verbally, in writing (including e-mail responses) or by submitting the first trial modification payment) within 14 days of PHH's offer of a loan modification, then PHH shall delay referral to foreclosure until (a) if PHH fails timely to receive the

first trial period payment, the last day for timely receiving the first trial period payment, and (b) if PHH timely receives the first trial period payment, after the borrower breaches the trial plan.

c. If the loan modification requested by a borrower as described in paragraph 5(a) is denied, except when otherwise required by federal or state law or investor directives, if borrower is entitled to an appeal under paragraph 4(c), PHH will not proceed to a foreclosure sale until the later of (if applicable):
    i. expiration of the 14-day appeal period; and
    ii. if the borrower appeals the denial, until the later of (if applicable) (i) if PHH denies borrower's appeal, 15 days after the letter denying the appeal, (ii) if PHH sends borrower a letter granting his or her appeal and offering a loan modification, 14 days after the date of such offer, (iii) if the borrower timely accepts the loan modification offer (verbally, in writing (including e-mail responses), or by making the first trial period payment), after PHH fails timely to receive the first trial period payment, and (iv) if PHH timely receives the first trial period payment, after the borrower breaches the trial plan.

d. Subject to Applicable Requirements, if, after an eligible borrower has been referred to foreclosure, PHH receives a complete application from the borrower within 30 days after the Notice of Foreclosure Counsel Letter, then while such loan modification application is pending, PHH shall not move for foreclosure judgment or order of sale (or, if a motion has already been filed, shall take reasonable steps to avoid a ruling on such motion), or seek a foreclosure sale. If PHH offers the borrower a loan modification, PHH shall not move for judgment or order of sale, (or, if a motion has already been filed, shall take reasonable steps to avoid a ruling on such motion), or seek a foreclosure sale until the earlier of (a) 14 days after the date of the related offer of a loan modification, and (b) the date the borrower declines the loan modification offer. If the borrower accepts the loan modification offer (verbally, in writing (including e-mail responses) or by submitting the first trial modification payment) within 14 days after the date of the related offer of loan modification, PHH shall continue this delay until the later of (if applicable) (A) the failure by PHH timely to receive the first trial period payment, and (B) if PHH timely receives the first trial period payment, after the borrower breaches the trial plan.

e. If the loan modification requested by a borrower described in paragraph 5(d) is denied, then, except when otherwise required by federal or state law or investor directives, if borrower is entitled to an appeal under paragraph 4(c), PHH will not proceed to a foreclosure sale until the later of (if applicable):
    i. expiration of the 14-day appeal period; and
    ii. if the borrower appeals the denial, until the later of (if applicable) (i) if PHH denies borrower's appeal, 15 days after the letter denying the appeal, (ii) if PHH sends borrower a letter granting his or her appeal and offering a loan modification, 14 days after the date of such offer, (iii) if the borrower timely accepts the loan modification offer (verbally, in writing (including e-mail responses), or by making the first trial period payment), after the failure of PHH timely to receive the first trial period payment,

and (iv) if PHH timely receives the first trial period payment, after the borrower breaches the trial plan.

f. Subject to Applicable Requirements, if, after an eligible borrower has been referred to foreclosure, PHH receives a complete loan modification application more than 30 days after the Notice of Foreclosure Counsel Letter, but more than 37 days before a foreclosure sale is scheduled, then while such loan modification application is pending, PHH shall not proceed with the foreclosure sale. If PHH offers a loan modification, then PHH shall delay the foreclosure sale until the earlier of (i) 14 days after the date of the related offer of loan modification, and (ii) the date the borrower declines the loan modification offer. If the borrower accepts the loan modification offer (verbally, in writing (including e-mail responses) or by submitting the first trial modification payment) within 14 days, PHH shall delay the foreclosure sale until the later of (if applicable) (A) the failure by PHH timely to receive the first trial period payment, and (B) if PHH timely receives the first trial period payment, after the borrower breaches the trial plan.

g. If the loan modification requested by a borrower described in paragraph 5(f) is denied and it is reasonable to believe that more than 90 days remain until a scheduled foreclosure date or the first date on which a sale could reasonably be expected to be scheduled and occur, then, except when otherwise required by federal or state law or investor directives, if borrower is entitled to an appeal under paragraph 4(c)(i), PHH will not proceed to a foreclosure sale until the later of (if applicable):
    i. expiration of the 14-day appeal period; and
    ii. if the borrower appeals the denial, until the later of (if applicable) (i) if PHH denies borrower's appeal, 15 days after the letter denying the appeal, (ii) if PHH sends borrower a letter granting his or her appeal and offering a loan modification, 14 days after the date of such offer, (iii) if the borrower timely accepts the loan modification offer (verbally, in writing (including e-mail responses), or by making the first trial period payment), after PHH fails timely to receive the first trial period payment, and (iv) if PHH timely receives the first trial period payment, after the borrower breaches the trial plan.

h. Subject to Applicable Requirements, if, after an eligible borrower has been referred to foreclosure, PHH receives a complete loan modification application more than 30 days after the Notice of Foreclosure Counsel Letter, but within 37 to 15 days before a foreclosure sale is scheduled, then PHH shall conduct an expedited review of the borrower and, if the borrower is extended a loan modification offer, PHH shall postpone any foreclosure sale until the earlier of (a) 14 days after the date of the related evaluation notice, and (b) the date the borrower declines the loan modification offer. If the borrower timely accepts the loan modification offer (either in writing or by submitting the first trial modification payment), PHH shall delay the foreclosure sale until the later of (if applicable) (A) the failure by PHH timely to receive the first trial period payment, and (B) if PHH timely receives the first trial period payment, after the borrower breaches the trial plan.

i. Subject to Applicable Requirements, if, after an eligible borrower has been referred to foreclosure, PHH receives a complete loan modification application more than 30 days after the Notice of Foreclosure Counsel Letter and less than 15 days before a scheduled

foreclosure sale, PHH must notify the borrower before the foreclosure sale date as to PHH's determination (if its review was completed) or inability to complete its review of the loan modification application. If PHH makes a loan modification offer to the borrower, then PHH shall postpone any sale until the earlier of (a) 14 days after the date of the related evaluation notice, and (b) the date the borrower declines the loan modification offer. If the borrower timely accepts a loan modification offer (either in writing or by submitting the first trial modification payment), PHH shall delay the foreclosure sale until the later of (if applicable) (A) the failure by PHH timely to receive the first trial period payment, and (B) if PHH timely receives the first trial period payment, after the borrower breaches the trial plan.

j. For purposes of this section 5, PHH shall not be responsible for failing to obtain a delay in a ruling on a judgment or failing to delay a foreclosure sale if PHH made a request for such delay, pursuant to any state or local law, court rule or customary practice, and such request was not approved or PHH did not make request on advice of local counsel that such request will be viewed by the court as without merit and subject PHH to potential sanctions or judicial rebuke.

k. PHH shall not move to judgment or order of sale or proceed with a foreclosure sale under any of the following circumstances:
    i. The borrower is in compliance with the terms of a trial loan modification, forbearance, or repayment plan; or
    ii. A short sale has been approved or deed-in-lieu of foreclosure has been approved by all parties (including, for example, first lien investor, junior lien holder and mortgage insurer, as applicable), and proof of funds or financing has been provided to PHH.

l. PHH shall send to all eligible borrowers the required loss mitigation communications for the HAMP program. Unless prohibited by investor requirements, PHH shall send letters containing similar loss mitigation options and efforts to borrowers with non-HAMP eligible loans.

m. PHH shall ensure timely and accurate communication of or access to relevant loss mitigation status and changes in status to its foreclosure attorneys, bankruptcy attorneys and foreclosure trustees and, where applicable, to court-mandated mediators.

6. **Single Point of Contact.**

a. PHH shall establish an easily accessible and reliable single point of contact ("SPOC") for each potentially-eligible first lien mortgage borrower so that the borrower has access to an employee of PHH to obtain information throughout the loss mitigation, loan modification and foreclosure processes.

b. PHH shall initially identify the SPOC to the borrower promptly after a potentially-eligible borrower requests loss mitigation assistance. PHH shall provide one or more direct means of communication with the SPOC on loss mitigation-related correspondence with the borrower. PHH shall promptly provide updated contact information to the borrower if the designated SPOC is reassigned, no longer employed by PHH, or otherwise not able to act as the primary point of contact.

c. PHH shall ensure that debtors in bankruptcy are assigned to a SPOC specially trained in bankruptcy issues.

d. The SPOC shall have primary responsibility for:

i. Communicating the options available to the borrower, the actions the borrower must take to be considered for these options and the status of PHH's evaluation of the borrower for these options;
ii. Coordinating receipt of all documents associated with loan modification or loss mitigation activities;
iii. Being knowledgeable about the borrower's situation and current status in the delinquency/imminent default resolution process; and
iv. Ensuring that a borrower who is not eligible for the Making Home Affordable programs is considered for proprietary or other investor loss mitigation options.

e. The SPOC shall, at a minimum, provide the following services to borrowers:
i. Contact borrower and introduce himself/herself as the borrower's SPOC;
ii. Explain programs for which the borrower is eligible;
iii. Explain the requirements of the programs for which the borrower is eligible;
iv. Explain program documentation requirements;
v. Provide basic information about the status of borrower's account, including pending loan modification applications, other loss mitigation alternatives, and foreclosure activity;
vi. Notify borrower of missing documents and provide an address or electronic means for submission of documents by borrower in order to complete the loan modification application;
vii. Communicate PHH's decision regarding loan modification applications and other loss mitigation alternatives to borrower in writing;
viii. Assist the borrower in pursuing alternative non-foreclosure options upon denial of a loan modification;
ix. If a loan modification is approved, call borrower to explain the program;
x. Provide information regarding credit counseling where necessary;
xi. Help to clear for borrower any internal processing requirements; and
xii. Have access to individuals with the ability to stop foreclosure proceedings when necessary to comply with the Making Home Affordable programs or this Consent Order.

f. The SPOC shall remain assigned to borrower's account and available to borrower until such time as PHH determines in good faith that all loss mitigation options have been exhausted, borrower's account becomes current or, in the case of a borrower in bankruptcy, the borrower has exhausted all loss mitigation options for which the borrower is potentially eligible and has applied.

g. PHH shall ensure that a SPOC can refer and transfer a borrower to an appropriate supervisor upon request of the borrower.

h. PHH shall ensure that relevant records relating to borrower's account are promptly available to the borrower's SPOC, so that the SPOC can timely, adequately and accurately inform the borrower of the current status of loss mitigation, loan modification, and foreclosure activities.

i. PHH shall establish and make available to Chapter 13 trustees a toll-free number staffed by persons trained in bankruptcy to respond to inquiries from Chapter 13 trustees.

7. **Loss Mitigation Communication with Borrowers.**
   a. PHH shall commence outreach efforts to communicate loss mitigation options for first lien mortgage loans to all potentially eligible delinquent borrowers in accordance with applicable laws and investor requirements. PHH shall conduct affirmative outreach efforts to inform delinquent second lien borrowers (other than those in bankruptcy) about the availability of payment reduction options. The foregoing notwithstanding, PHH shall have no obligation to solicit borrowers who are in bankruptcy.
   b. PHH shall disclose and provide accurate information to borrowers relating to review requirements and loss mitigation programs.
   c. PHH shall communicate, at the written request of the borrower, with the borrower's authorized representatives, including housing counselors. PHH shall communicate with representatives from state attorneys general and financial regulatory agencies acting upon a written complaint filed by the borrower and forwarded by the state attorney general or financial regulatory agency to PHH. When responding to the borrower regarding such complaint, PHH shall include the applicable state attorney general on the written response with the borrower regarding such complaint.
   d. PHH shall cease all default-related collection efforts, excluding the transmission or mailing of periodic statements that include delinquency information, and referrals to foreclosure, while the borrower (i) is making timely payments under a trial loan modification or (ii) has submitted a complete loan modification application, and a modification decision is pending. Notwithstanding the above, PHH reserves the right to contact a borrower to gather required loss mitigation documentation or to assist a borrower with performance under a trial loan modification plan.
8. **Loan Modification Timelines.**
   a. PHH shall subject to 12 C.F.R. § 1024.41, notify the borrower in writing within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving the loss mitigation application that PHH acknowledges receipt of the loss mitigation application. In its initial acknowledgment, PHH shall briefly describe the loan modification process and identify expiration dates for submitted documents.
   b. PHH shall notify borrower of any known deficiency in borrower's initial submission of information, no later than 5 business days after discovery of the deficient documents and no later than 30 business days after receipt, including any missing information or documentation required for the loan modification to be considered complete.
   c. Subject to section 5, and subject to Applicable Requirements, PHH shall afford borrower 30 days from the date of PHH's notification of any missing information or documentation to supplement borrower's submission of information prior to making a determination on whether or not to grant an initial loan modification.
   d. Subject to Applicable Requirements, PHH shall review the complete first lien loan modification application submitted by borrower and shall determine the disposition of borrower's trial or preliminary loan modification request no later than 30 days after receipt of the complete loan modification application, absent compelling circumstances beyond PHH's control.
   e. PHH shall implement processes to ensure that second lien loan modification requests are evaluated on a timely basis. When a borrower qualifies for a second lien loan modification after a first lien loan modification, PHH as the servicer of the second lien loan shall (absent compelling circumstances beyond PHH's control) send loan

modification documents to borrower no later than 45 days after PHH receives official notification of the successful completion of the related first lien loan modification and the essential terms.

f. For all proprietary first lien loan modification programs, PHH shall allow properly submitted borrower financials to be used for 90 days from the date the documents are dated, unless PHH learns that there has been a material change in circumstances or unless investor requirements mandate a shorter time frame.

g. PHH shall notify borrowers of the final denial of any first lien loan modification request within 10 business days of the denial decision.

9. **General Loss Mitigation Requirements.**

a. PHH shall maintain adequate staffing and systems for tracking borrower documents and information that are relevant to foreclosure, loss mitigation, and other PHH operations. PHH shall make periodic assessments to ensure that its staffing and systems are adequate.

b. PHH shall maintain adequate staffing and caseload limits for SPOCs and employees responsible for handling foreclosure, loss mitigation and related communications with borrowers and housing counselors. PHH shall make periodic assessments to ensure that its staffing and systems are adequate.

c. PHH shall establish reasonable minimum experience, educational and training requirements for loss mitigation staff.

d. PHH shall document electronically key actions taken on a foreclosure, loan modification, bankruptcy, or other servicing file, including verbal communications between the borrower and SPOC.

e. PHH shall not adopt compensation arrangements for its employees that encourage foreclosure over loss mitigation alternatives.

f. PHH shall not make inaccurate payment delinquency reports to credit reporting agencies when the borrower is making timely reduced payments pursuant to a trial or other loan modification agreement. PHH shall provide the borrower, prior to entering into a trial loan modification, with clear and conspicuous written information that adverse credit reporting consequences may result from the borrower making reduced payments during the trial period.

g. Where PHH grants a loan modification, PHH shall provide borrower with a copy of the fully executed loan modification agreement within 45 days of receipt of the executed copy from the borrower. If the modification is not in writing, PHH shall provide the borrower with a written summary of its terms, as promptly as possible, within 45 days of the approval of the modification.

h. PHH shall not instruct, advise or recommend that borrowers go into default in order to qualify for loss mitigation relief.

i. PHH shall not discourage borrowers from working or communicating with legitimate non-profit housing counseling services.

j. PHH shall not, in the ordinary course, require a borrower to waive or release claims and defenses as a condition of approval for a loan modification program or other loss mitigation relief. However, nothing herein shall preclude PHH from requiring a waiver or release of claims and defenses with respect to a loan modification offered in connection with the resolution of a contested claim.

k. PHH shall not charge borrower an application fee in connection with a request for a loan modification. PHH shall provide borrower with a pre-paid overnight envelope or pre-paid address label for return of a loan modification application or a portal to electronically submit the loan modification application.

l. Notwithstanding any other provision of this Consent Order, and to minimize the risk of borrowers submitting multiple loss mitigation requests for the purpose of delay, PHH shall not be obligated to evaluate requests for loss mitigation options from (a) borrowers who have already been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of HAMP or proprietary modification programs, or (b) borrowers who were evaluated after the date of implementation of this Consent Order, consistent with this Consent Order, unless there has been a material change in the borrower's financial circumstances that is documented by borrower and submitted to PHH, and the evaluation of the loss mitigation request is not inconsistent with the investor's requirements.

10. **Restrictions on Servicing Fees.**

a. ***General Requirements.***

i. All default, foreclosure and bankruptcy-related service fees, including third-party fees, collected from the borrower by PHH shall be bona fide and reasonable in amount.

b. ***Specific Fee Provisions.***

i. PHH shall maintain and keep current a schedule of common non-state specific fees or ranges of fees that may be charged to borrowers by or on behalf of PHH. PHH shall make this schedule available on its website and to the borrower or borrower's authorized representative upon request. The schedule shall identify each fee, provide a plain language explanation of the fee, and state the maximum amount of the fee or how the fee is calculated or determined.

ii. PHH may collect a default-related fee only if the fee is for reasonable and appropriate services actually rendered and one of the following conditions is met:

(a) the fee is expressly or generally authorized by the loan instruments and not prohibited by law or this Consent Order;

(b) the fee is permitted by law and not prohibited by the loan instruments or this Consent Order; or

(c) the fee is not prohibited by law, this Consent Order or the loan instruments and is a reasonable fee for a specific service requested by the borrower that is collected only after clear and conspicuous disclosure of the fee is made available to the borrower.

iii. In addition to the limitations in paragraph 10(b)(ii) above, attorneys' fees charged in connection with a foreclosure action or bankruptcy proceeding shall only be for work actually performed and shall not exceed reasonable and customary fees for such work. In the event a foreclosure action is terminated prior to the final judgment and/or sale for a loss mitigation option, a reinstatement, or payment in full, the borrower shall be liable only for reasonable and customary fees for work actually performed. Notwithstanding the same, PHH may provide an estimate of such

attorneys' fees to borrower with good through dates in order to prepare payoff or reinstatement figures in advance to borrower. Once such attorneys' fees have been received and applied to the loan account, PHH shall reconcile the estimated attorneys' fees charged to the actual attorneys' fees incurred and provide refunds or credits, if necessary.

iv. Late Fees.

(a) PHH shall not assess any late fee or delinquency charge when the only delinquency is attributable to late fees or delinquency charges assessed on an earlier payment, and the payment is otherwise a full payment for the applicable period and is paid on or before its due date or within any applicable grace period.

(b) PHH shall not collect late fees (i) based on an amount greater than the past due amount; (ii) collected from the escrow account or from escrow surplus without the approval of the borrower; or (iii) deducted from any regular payment.

(c) PHH shall not collect any late fees for periods during which (i) a complete loan modification application is under consideration; (ii) the borrower is making timely trial modification payments; or (iii) a short sale offer is being evaluated by PHH.

c. ***Third-Party Fees.***

i. Subject to Applicable Requirements, PHH shall not impose unnecessary or duplicative property inspection, property preservation or valuation fees on the borrower, including, but not limited to, the following:

(a) No property preservation fees shall be imposed on eligible borrowers who have a pending application with PHH for loss mitigation relief or are performing under a loss mitigation program, unless PHH has a reasonable basis to believe that property preservation is necessary for the maintenance of the property, such as when the property is vacant or listed on a violation notice from a local jurisdiction;

(b) No property inspection fee shall be imposed on a borrower any more frequently than the timeframes allowed under GSE or HUD guidelines unless PHH has identified specific circumstances supporting the need for further property inspections; and

(c) PHH shall be limited to imposing property valuation fees (*e.g.*, BPO) once every 12 months, unless other valuations are requested by the borrower to facilitate a short sale or to support a loan modification as outlined in paragraph 4(c)(i), or required as part of the default or foreclosure valuation process.

ii. Default, foreclosure and bankruptcy-related services performed by third parties shall be at reasonable market value.

iii. PHH shall not assess any fee for default, foreclosure or bankruptcy-related services by an affiliate unless the amount of the fee does not exceed the lesser of (a) any fee limitation or allowable amount for the service under applicable state law, and (b) the market rate for the service. To determine the market rate, PHH shall obtain annual market reviews of its affiliates'

pricing for such default and foreclosure-related services; such market reviews shall be performed by a qualified, objective, independent third-party professional using procedures and standards generally accepted in the industry to yield accurate and reliable results. The independent third-party professional shall determine in its market survey the price actually charged by third-party affiliates and by independent third party vendors.

iv. PHH shall be prohibited from collecting any unearned fee, or giving or accepting referral fees in relation to third-party default or foreclosure-related services.

v. PHH shall not impose its own mark-ups on PHH initiated third-party default or foreclosure-related services.

d. ***Certain Bankruptcy Related Fees.***

i. PHH must not collect any attorney's fees or other charges with respect to the preparation or submission of a POC or MRS document that is withdrawn or denied, or any amendment thereto that is required, as a result of a substantial misstatement by PHH of the amount due.

11. PHH shall not collect late fees due to delays in receiving full remittance of debtor's payments, including trial period or permanent modification payments as well as post-petition conduit payments in accordance with 11 U.S.C. § 1322(b)(5), that debtor has timely (as defined by the underlying Chapter 13 plan) made to a Chapter 13 trustee.
12. In addition to the reporting requirements set forth in the Consent Order, within thirty days of the Effective Date, and on a quarterly basis for the following eight quarters, the compliance coordinator shall provide New Jersey with a report describing how PHH has incorporated the obligations of this Appendix into its policies and procedures, and any failures to bring its practices in line with these enumerated Business Practices.
13. The Attorney General and Division agree that all confidential information disclosed to them by PHH, its parent, subsidiaries or any of its affiliates, including but not limited to the periodic reports that will be provided pursuant to Paragraph 12 of this Appendix, shall be kept confidential. The Attorney General and Division shall not disclose or use any confidential information without the prior written consent of the disclosing party, except to the extent required by law, regulation or court order (and in any of these circumstances, only upon prior written notice to PHH).

APPENDIX B - REPORTING REQUIREMENTS

1. The number of loans PHH services.
2. Number of borrowers delinquent as of the last day of the quarter.
3. Number of borrowers who are 30 -59 days delinquent as of the last day of the quarter.
4. Number of borrowers who are 60-89 days delinquent as of the last day of the quarter.
5. Number of borrowers who are 90-120 days delinquent as of the last day of the quarter.
6. Number of borrowers who are more than 120 days delinquent.
7. Number of borrowers referred to foreclosure counsel for the initiation of a foreclosure action.
8. Number of foreclosure judgments received in a judicial foreclosure.
9. Number of foreclosure sales completed.
10. For loan modifications requiring trial periods, for the quarter:
    a. Total number of trial modifications requested;
    b. Total number from 10a. that were assigned a SPOC;
    c. Total number of trial modifications offered (financial package required);
    d. Total number of trial modifications offered (no financial package required);
    e. Total number of trial modifications where the first trial payment has been received and recorded in the servicing system;
    f. Total number of final modification agreements mailed to the borrower;
    g. Total number of borrowers that have submitted all trial payments ;
    h. Total number of borrowers that submitted all trial payments and PHH has received and accepted the executed and notarized final modification agreement from borrower.
11. For loan modifications that do not require a trial period, for the quarter:
    a. Total number of borrowers requesting loss mitigation assistance by submitting a package;
    b. Of the borrowers in 11a. the number that have been assigned a SPOC by PHH;
    c. Total number of final modification agreements mailed to the borrower for execution and notarization;
    d. Total number of borrowers that have submitted required funds;
    e. Total number in 11d. for whom PHH has received and accepted the executed and notarized final modification agreement.
12. The average case load of a PHH "Single Point of Contact" representative who is assisting a borrower who has requested loss mitigation assistance.
13. The number and percentage of loan modification requests (both those that require a trial period and those that do not) evaluated and denied, including each reason for denial and the number and percentage of borrowers to which that reason applies.
14. The average length of trial modifications where borrowers made all required payments.

15. The number and percentage of borrowers who had trial modifications that lasted for more than four months.
16. The number and percentage of borrowers who received permanent loan modifications after having trial modifications lasting longer than four months.
17. The average number of days for PHH to approve or deny requests for loan modifications:
    a. from initial borrower request to initial decision;
    b. from the date some documentation is received to initial decision; and
    c. from the date all documentation is received to initial decision.
18. The number and percentage of borrowers who had or have requests for loan modifications pending after submitting all required documentation for more than:
    a. thirty days;
    b. ninety days;
    c. 180 days; and
    d. One year.
19. The average call hold times for borrowers wishing to speak with PHH's loss mitigation department or SPOC.

CONFIDENTIAL APPENDIX C - RESTITUTION FOR IDENTIFIED CONSUMERS

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ENTERED 03/05/2008

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	**Case No. 05-90374**
WILLIAM ALLEN PARSLEY,	§	
Debtor	§	**Chapter 13**

MEMORANDUM OPINION ON SHOW CAUSE ORDERS OF FEBRUARY 12, 2007 AND MAY 18, 2007

I. Introduction

The matter before this Court began with a routine motion to lift stay, but has spiraled into a lengthy ordeal which has cost the parties substantial time, attorneys' fees, and costs. Over one year ago, on February 6, 2007, the Court sought a simple answer to a simple question—why was a motion to lift stay being withdrawn? The movant's attorney, rather than answer the question truthfully by admitting that the motion was based upon an incorrect payment history, attempted to conceal the truth from the Court—that the motion should have never been filed. This rather narrow issue precipitated an expansive proceeding. During several hearings over the past year, the Court received evidence on a wide range of misconduct beyond this initial misrepresentation.

The parties are a mortgage loan servicer and its two law firms: (1) Countrywide Home Loans, Inc. (Countrywide), the loan servicer for Fannie Mae, the mortgagee of the Debtor's home loan; (2) McCalla, Raymer, Patrick, Cobb, Nichols & Clark (McCalla Raymer), the national law firm to which Countrywide referred the file after deciding to seek relief from the automatic stay; and (3) Barrett, Burke, Wilson, Castle, Daffin & Frappier, L.L.P. (Barrett Burke), the Texas law firm which McCalla Raymer chose to draft, file, and prosecute the motion to lift stay. Their collective conduct caused

this Court to issue two Show Cause Orders. This Memorandum Opinion discusses how their actions in the case at bar have shown a disregard for the professional and ethical obligations of the legal profession and judicial system.[1]

II. Background of the events preceding the First Show Cause Order

A. The importance of homesteads in Texas

In Texas, homesteads are sacrosanct. *In re McDaniel*, 70 F.3d 841, 843 (5th Cir. 1995). Indeed, when it first took effect, the Texas State Constitution expressly forbade forced foreclosure sales on homesteads except for those creditors who held purchase money liens, mechanics' liens, or tax liens. *Magallanez v. Magallanez*, 911 S.W. 2d 91, 94 (Tex. App.—San Antonio 1995) (citing TEX. CONST. art. XVI, § 50; TEX. PROP. CODE ANN. § 41.002 (Vernon 2006)).[2] The public policy of Texas' liberal protection of homesteads is "to protect citizens and their families from the miseries and dangers of destitution." *In re Bradley*, 960 F.2d 502, 505 (5th Cir. 1992) (quoting *Franklin v. Coffee*, 18 Tex. 413, 415-16 (1857)); *In re Sorrell*, 292 B.R. 276, 280 (Bankr. E.D. Tex. 2002).

B. The Court's concern over withdrawn motions to lift stay on homesteads of debtors

Given this important, long-standing policy protecting homesteads in Texas, this Court makes every effort to ensure that motions to lift stay seeking to foreclose on homesteads contain accurate information regarding payments made by the debtor. When a debtor's homestead is the subject of a withdrawn motion to lift stay, this Court typically inquires why the movant wants to withdraw the

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[1] *See In re Maisel*, 378 B.R. 19, 20-21 (Bankr. D. Mass. 2007) ("Unfortunately, concomitant with the increase in foreclosures is an increase in lenders who, in their rush to foreclose, haphazardly fail to comply with even the most basic legal requirements of the bankruptcy system.")

[2] In 1997, the Texas Constitution was amended to allow for forced sales where the lien was created through a qualifying home equity loan. TEX. CONST. art. XVI, § 50(a)(6)(A); *see also Box v. First State Bank*, 340 B.R. 782, 784 (S.D. Tex. 2006).

motion. In some cases, there is an entirely reasonable explanation. For example, if, between the date of the filing of the motion and the date of the hearing on the motion, the debtor has cured the defaults that were the basis of the motion, it makes sense for the movant to withdraw the motion. Conversely, the reason for withdrawal is suspect if, after the date of the filing of the motion, the movant discovers that the motion contains inaccurate factual allegations about the debtor's default. It is also reasonable to withdraw the motion under these circumstances, but it is neither fair nor equitable for the movant to charge the debtor for the attorney's fees and costs incurred in connection a motion that was deficient when filed.

Unfortunately, such fee and cost shifting sometimes occurs without the movant informing the Court or the debtor. *See Sanchez v. Ameriquest Mortgage Co. (In re Sanchez)*, 372 B.R. 289 (Bankr. S.D. Tex. 2007); Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, U. of Iowa Legal Studies Research Paper No. 07-29, Nov. 6, 2007, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027961. The debtor only discovers the additional obligation months or years later when, believing he has paid all of the monthly payments on the note, he learns that the debt is not entirely retired because these unfamiliar fees and costs, plus interest that has accrued thereon, remain unpaid. It is just such a scenario which this Court seeks to prevent by inquiring why a movant is withdrawing its motion to lift stay on a debtor's homestead.

If counsel for the movant concedes that the motion should not have been filed because it contained inaccurate allegations about payments and further represents that the movant will not shift the fees and costs to the debtor, this Court will typically sign the order allowing withdrawal of the motion and take no further action. However, if counsel for the movant does not concede that the

motion contained inaccurate factual allegations, then this Court will inquire about the original basis for filing the motion to lift stay and why the movant is seeking to withdraw the motion.

C. The January 23, 2007 preliminary hearing on Countrywide's motion to lift stay

In the case at bar, the Court was faced with a motion to lift stay which the Debtor claimed contained factually inaccurate allegations about his payment history. Countrywide, the servicer of the Debtor's mortgage, retained McCalla Raymer, whose offices are in Roswell, Georgia. McCalla Raymer then sent the Debtor's file to Barrett Burke's Houston office with a request that Barrett Burke file a motion to lift stay, which Barrett Burke did on December 29, 2006 (the Motion). [Docket No. 26.]

At the preliminary hearing on January 23, 2007, Warren Lee (Lee) appeared on behalf of the Debtor and announced that, based upon payment information provided by the Debtor on the previous day, the Debtor's counsel of record, Christopher Morrison (Morrison), had filed a response opposing the Motion (the Response). [Docket No. 27.] According to Lee, the Response was based on information which the Debtor himself had received from Countrywide the previous day. The Response states:

> "The mortgage payment history, which is attached to the Movant's Motion for Relief, reflects that the Movant inaccurately applie[d] the first post-petition mortgage payment (received 11/09/2005) to the pre-petition arrears, rather than the November 2005 payment (see attached pay history). Furthermore, the attached mortgage payment history does not reflect the payment received by Movant on May 5, 2006 as shown on the Movant's own year-end 'transaction history for 2006.'"

One of Barrett Burke's attorneys, Yvonne Knesek (Knesek), also appeared at the preliminary hearing and informed this Court that she had just seen the Response a few minutes prior to the hearing. She stated that she would need to verify the payment history provided by the Debtor, but

despite the misapplication of the Debtor's monthly payments, he was "still delinquent." [January 23, 2007 Hr'g Tr. 2:4-10.] Lee and Knesek represented that the parties wanted more time to ascertain the exact amount of the Debtor's arrearage; accordingly, they requested that the preliminary hearing be passed to a final hearing. The Court granted this request and set a final hearing for February 6, 2007.

D. The February 6, 2007 final hearing

At the final hearing on February 6, 2007, a different Barrett Burke attorney, Walter Thurmond (Thurmond), appeared for Countrywide and announced that Countrywide wished to withdraw the Motion.[3] This Court, mindful that the Debtor's response set forth that the payment history was inaccurate, inquired whether the Motion contained allegations about the Debtor's payment history that were "just flat-out wrong." [Feb. 6, 2007 Hr'g Tr. 4:2-7.] Thurmond responded by saying that, "From what I have read in our system this morning and what I could tell from this, *the answer is it was a good motion*." [Feb. 6, 2007 Hr'g Tr. 4:8-10 (emphasis added).] When this Court informed Thurmond that it had concerns that the Motion contained factual inaccuracies, Thurmond then represented to the Court that he would "check when I go back and see what the deal was with it." [Feb. 6, 2007 Hr'g Tr. 4:20-21.] Thurmond never informed the Court of the results of his research on the Motion. The Court was therefore left with two distinct impressions: (1) the Motion contained inaccurate allegations about the Debtor's payment history;

[3] At the final hearing, neither Morrison nor Lee appeared for the Debtor because, according to Thurmond, Morrison knew that Barrett Burke was going to inform the Court that Countrywide wished to withdraw the Motion. [Feb. 6, 2007 Hr'g Tr. 3:5-11.] Presumably, Morrison saw no need to attend this hearing because he knew there would be no testimony and therefore his services would not be needed.

and (2) Thurmond did not want to own up to these false allegations, and hoped that this Court would forget the whole matter.

III. The First Show Cause Order

Based upon the suspect comments made by Thurmond, this Court issued a show cause order on February 12, 2007 requiring Countrywide and its counsel to appear and show cause why they should not be sanctioned for their conduct relating to the Motion (the First Show Cause Order). [Docket No. 29.] Specifically, the First Show Cause Order stated:

> This Court is concerned that Countrywide and/or its counsel have caused the Debtor to incur unnecessary legal fees and expenses by filing the [Motion] and then withdrawing it at the eleventh hour because it contained factual inaccuracies that Countrywide and its counsel should have discovered prior to the filing of the Motion if proper attention [had] been given to the Debtor's mortgage payment history and appropriate procedures.
>
> [Docket No. 29.]

The hearing on the First Show Cause Order was scheduled for March 5, 2007. The Court required a representative from Countrywide and three individuals from Barrett Burke to appear. At this point, the Court had not been made aware of the existence of McCalla Raymer and its role in this matter. As indicated by the language in the First Show Cause Order, the Court was focused on (1) whether misrepresentations were made to the Court that the Motion was factually accurate; and (2) ensuring that the Debtor was not being charged attorney's fees for a motion that should have never been filed. But for the extremely thorough investigation by the Office of the United States Trustee (UST), the Court may never have become aware of the numerous other issues discussed herein.

A. The role of the United States Trustee in this matter

Prior to addressing the events of the March 5, 2007 hearing on the First Show Cause Order, the Court believes it is necessary to discuss the role of the UST–in this case, specifically, and in the bankruptcy system, generally–due to complaints by Barrett Burke, McCalla Raymer, and Countrywide that the UST was overstepping its authority by being so actively involved in this matter.

When this Court issued the First Show Cause Order setting a hearing for March 5, 2007, the Court had no knowledge of the UST's intention to appear and be heard in this matter. The Court assumed that only Countrywide and Barrett Burke would appear at the hearing. Three days prior to the hearing, on its own volition, the UST filed a pleading entitled "Statement of the United States Trustee regarding this Court's Order requiring Countrywide Home Loans, Inc. [and Barrett Burke Wilson Castle Daffin & Frappier L.L.P. attorneys and personnel] to appear and show cause why [they] should not be sanctioned for filing a motion for relief from stay containing inaccurate debt figures and inaccurate allegations concerning payments received from the debtor." [Docket No. 40.] In this statement, the UST encouraged the Court to issue sanctions against Countrywide and Barrett Burke based on a bad faith failure to investigate the factual basis for the Motion. The UST further requested this Court to conduct an examination to determine whether Barrett Burke and/or Countrywide had engaged in similar past behavior. [*Id.*]

On the day of the March 5, 2007 hearing, Barrett Burke filed a Motion to Strike or, in the Alternative, Limit Issues and/or Continue Show Cause Hearing. [Docket No. 43.] In this motion, Barrett Burke asserted that the UST had no standing to participate in the show cause hearing. This Court disagreed and issued a ruling that the UST did have standing. [Docket No. 48.]

Notwithstanding this ruling, Barrett Burke, McCalla Raymer, and Countrywide, from time to time during the show cause hearings, questioned the UST's motives. Indeed, in closing arguments, Barrett Burke's counsel noted that in the case at bar, the Debtor himself had not lodged any complaint against Countrywide and its counsel—thereby insinuating that the UST had no business involving itself in the show cause hearing. [Dec. 12, 2007 Tr. 13:5-14:5 and 17:20-25.] The level of vituperation towards the UST merits some discussion of the UST's role in the bankruptcy system.

The UST frequently participates in matters such as objecting to fee applications, prosecuting motions to dismiss cases, prosecuting motions against bankruptcy petition preparers for violations of 11 U.S.C. § 110, objecting to disclosure statements and plans in Chapter 11 cases when these pleadings are legally deficient, and prosecuting objections to discharge in Chapter 7 cases. Although it is uncommon, and possibly unprecedented until recently, for the UST to focus on the conduct of a mortgagee, a servicer, or its counsel in a Chapter 13 case, it does not follow that the UST is outside of its Congressional mandate as suggested by Barrett Burke, McCalla Raymer, and Countrywide.

Statutory law, case law, and legislative history indicate the UST has an extremely broad role in the bankruptcy process. 11 U.S.C. § 307 states that: "The United States trustee *may raise and may appear and be heard on any issue in any case* or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title." (emphasis added). The language in this statute is unambiguous: the UST, on its own, has the right to raise and be heard on any issue of its choosing. *See, e.g., In re Revco, Inc.*, 898 F.2d 498, 499 (6th Cir. 1990) (reversing district court's holding that the UST lacked standing because it had no pecuniary interest at stake, the Sixth Circuit held that the UST had standing to appeal because its role is "protecting the public interest and ensuring that

bankruptcy cases are conducted according to law."); *In re Clark*, 927 F.2d 793, 794 (4th Cir. 1991) (holding that the UST has standing to appeal based on Revco's reasoning that the UST's duty is to ensure that bankruptcy cases are conducted according to law); *In re Dow Corning Corp.*, 194 B.R. 147 (Bankr. E.D. Mich. 1996) ("One of the United States trustee's principal raisons d'etre is to guard and protect the bankruptcy system . . . The United States trustee now monitors such activities and objects *not because parties in interest may be harmed by the action, but merely to protect the integrity of the system.*") (emphasis added).

Congressional history supports wide-ranging authority for the UST. In discussing the role and duties of the UST, the legislative history of the Bankruptcy Reform Act of 1978 stated that:

> They [i.e., the UST] will serve as enforcers of the bankruptcy laws by bringing proceedings in the bankruptcy courts in particular cases in which a particular action taken or proposed to be taken deviates from the standards established by the proposed bankruptcy code . . . The United States Trustee will conduct investigations in appropriate circumstances to ensure that participants in bankruptcy cases are not avoiding the requirements of the bankruptcy code.
>
> H.Rep. No. 595, 95th Cong., 1st Sess. 109-10 (1977).

In the case at bar, the UST read this Court's First Show Cause Order and decided to appear and be heard on the issues raised therein. In so doing, the UST was well within its authority to investigate the activities of Countrywide, Barrett Burke, and McCalla Raymer to determine if their activities undermined the integrity of the bankruptcy system. The Court would also note that the discovery conducted by the UST, and its examination of witnesses at the show cause hearings, has been very thorough and skillful.

In sum, merely because the UST has not previously focused on the practices of mortgagees in consumer bankruptcy cases does not mean that the UST is prohibited from doing so now. 11

U.S.C. § 307 grants the UST extremely broad standing. The Court greatly respects the UST's work in this case and anticipates that the UST will participate in future hearings in this Court.

B. The March 5, 2007 hearing on the First Show Cause Order

Three witnesses testified at the March 5, 2007 hearing on the First Show Cause Order: (1) Felicia Sanov (Sanov), the associate attorney at Barrett Burke who signed the Motion; (2) Lois Ortiz (Ortiz), the manager of the bankruptcy department at Countrywide; and (3) John Schlotter (Schlotter), an associate attorney at McCalla Raymer who had knowledge about the Debtor's file.[4]

1. Felicia Sanov's testimony

Sanov worked as an attorney at Barrett Burke for over four years and has been licensed to practice law in Texas since 1987.[5] [March 5, 2007 Hr'g Tr. 18:6-21.] Sanov stated that McCalla Raymer had been referring files to Barrett Burke for approximately 15 years and that the volume ranged from 100-150 files per month; indeed, she testified unequivocally that McCalla Raymer is "a major client of the firm." [March 5, 2007 Hr'g Tr. 20:15-24; 21:5-6.] She also stated that McCalla Raymer referred the Debtor's file to Barrett Burke on December 11, 2006 for the purpose of filing a motion to lift stay. [March 5, 2007 Hr'g Tr. 20:2-8; 21:21-25.]

On December 29, 2006, Sanov signed the Motion, attached the Debtor's loan history, and filed this pleading with the Clerk's office. The Motion alleged that the Debtor had: (1) estimated

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[4] The Court heard testimony from many witnesses during the numerous hearings on the Second Show Cause Order. In order to assist the reader with following the names of the witnesses referenced in this Memorandum Opinion, the Court has attached an addendum which identifies the witnesses who testified in the case at bar.

[5] On March 5, 2007, Sanov was still employed at Barrett Burke. However, at the hearing on August 10, 2007, Sanov testified that Barrett Burke had fired her on March 20, 2007 due to her conduct in *In re Allen*, 2007 Bankr. LEXIS 2063 (Bankr. S.D. Tex. June 18, 2007). [Aug. 10, 2007 Hr'g Tr. (afternoon session) 116:13-22.]

equity in his homestead of $8,653.21; (2) total post-petition arrearages of $2,255.07; and (3) total arrearages (both and pre- and post-petition) of $6,969.92. [Docket No. 26.]

Sanov testified that prior to the preliminary hearing scheduled for January 23, 2007, counsel of record for the Debtor, Chris Morrison (Morrison), left a message for Sanov's colleague at Barrett Burke, Chris Reilly (Reilly), to the effect that the Debtor had in fact made the November 2005 payment which Barrett Burke alleged was part of the post-petition defaults. [March 5, 2007 Hr'g Tr. 31:7-16.] Sanov admitted that this payment was in fact made by the Debtor but mistakenly applied as a pre-petition rather than a post-petition payment. [March 5, 2007 Hr'g Tr. 36:22-37:25.] Sanov also testified that contrary to the loan repayment history, the Debtor did in fact make a full payment in May 2006. She conceded that she had made a mistake in reviewing the loan history prior to filing the Motion. [March 5, 2007 Hr'g Tr. 38:1-14.]

Finally, Sanov testified that whenever McCalla Raymer referred a Countrywide file to Barrett Burke, the attorneys at Barrett Burke never dealt directly with Countrywide and, indeed, had no ability to contact Countrywide directly with regard to the accuracy of a loan history. Rather, Barrett Burke dealt solely with McCalla Raymer. [March 5, 2007 Hr'g Tr. 23:11-18.] The Court was concerned that a law firm would contractually obligate itself to be precluded from any and all communication with its actual client.[6] This issue is one of the new issues which this Court raised in the Second Show Cause Order.

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[6] The written agreement that McCalla Raymer has with its local counsel throughout the country, including Barrett Burke, states that: "All communications must be made through your McCalla contact at our office. We require responses to your inquiries within 24 hours and will hold your office to the same standard." [Barrett Burke Exhibit No. 4A.]

2. Lois Ortiz's testimony

Ortiz has been the manager of Countrywide's bankruptcy department for over two and a half years and has over twenty years of experience in the mortgage lending industry. [March 5, 2007 Hr'g Tr. 51:18-52:5.] Ortiz testified that no Countrywide employee reviews pleadings before they are filed; rather, Countrywide relies entirely on its attorneys to ensure that the pleadings being filed on its behalf are accurate based upon information provided by Countrywide. [March 5, 2007 Hr'g Tr. 69:9-70:13.] Additionally, she stated that no one at Countrywide reviewed the loan history attached to the Motion prior to its filing. [March 5, 2007 Hr'g Tr. 68:12-24.]

Ortiz also conceded that Countrywide did not give credit to the Debtor for the post-petition payment that he made on November 9, 2005 because Countrywide believed the filing date was November 15, 2005—in Ortiz's own words, "We did not know about the bankruptcy until November 15th. And during that process, it was not acknowledged that the November payment was received as a post-petition payment." [March 5, 2007 Tr. 58:9-12.] She also conceded that the payment history attached to the Motion failed to reflect that the Debtor made a complete monthly payment on May 5, 2006. [March 5, 2007 Hr'g Tr. 71:9-19.]

Finally, Ortiz testified that Countrywide's policy is that if it withdraws a pleading, Countrywide does not assess to the borrower any attorney's fees incurred by Countrywide in the drafting and prosecution of the pleading prior to its withdrawal. [March 5, 2007 Hr'g Tr. 71:20-72:20.] Despite Ortiz's testimony on this issue, the Court was concerned that Countrywide did not have an actual written policy against charging debtors for withdrawn motions. This is another issue which the Court raised in the Second Show Cause Order.

3. John Schlotter's testimony

Schlotter has been an associate attorney at McCalla Raymer for 10 years and has been licensed to practice law for 28 years. [March 5, 2007 Hr'g Tr. 75:24-76:10.] He testified that one of his duties is to ensure that referrals such as the one in the case at bar are sent to the appropriate local counsel in the state where the bankruptcy is filed. [March 5, 2007 Hr'g Tr. 76:11-21.] The Court was surprised by Schlotter's testimony that he was the attorney-in-charge of the Debtor's file. [March 5, 2007 Hr'g Tr. 90:25-91:6.] Although he testified that he was the attorney-in-charge, Schlotter also testified that he had not filed a notice of appearance, had never read the Local Rules for the Southern District of Texas, and had not reviewed the Motion before it was filed. [March 5, 2007 Hr'g Tr. 91:7-92:14; 95:4-22.] The Court was further surprised by Schlotter's testimony that Barrett Burke's client in the case at bar was McCalla Raymer, not Countrywide, and that McCalla Raymer directs Barrett Burke on how any file, including the file in the case at bar, is to be handled. [March 5, 2007 Hr'g Tr. 78:6-14; 93:8-94:6.]

With respect to the payment history attached to the Motion, Schlotter testified that his firm's paralegal staff prepared this history "[a]nd the reason they're prepared this way is because we've had different courts require legible payment histories. And when we submitted screens, we've got courts that have rejected them. And other courts have said, 'We can't read these. We want something that's legible, that shows exactly how the payments are applied, that somebody who doesn't have an accounting background can read it.'" [March 5, 2007 Hr'g Tr. 80:25-81:7.] Schlotter testified that no attorney at McCalla Raymer reviews the loan histories prepared by the paralegals. [March 5, 2007 Hr'g Tr. 96:1-97:5.]

Schlotter also testified that he became aware of the errors in the Debtor's payment history when he received a call from Thurmond, who told him that the Debtor had filed a response opposing the Motion and that there were some discrepancies in the payment history. [March 5, 2007 Hr'g Tr. 90:15-19.] Based upon this information from Thurmond, Schlotter personally authorized Thurmond to withdraw the Motion. [March 5, 2007 Hr'g Tr. 88:19-21.]

Finally, Schlotter testified—just as Sanov had—that any communications from Barrett Burke must be directed to McCalla Raymer, not Countrywide. [March 5, 2007 Hr'g Tr. 79:11-20; 99:18-100:6.] Indeed, he stated that if Barrett Burke were to contact Countrywide directly without going through McCalla Raymer, it would be a problem: "It can be [a problem]. It usually is . . . Because, pursuant to agreement with local counsel, the reason that Countrywide would hire us is because it wants to deal with one firm. It doesn't want to have 50 firms calling it on every case that it handles in the country. So it asks that all communication goes through our office." [March 5, 2007 Tr. 94:21-95:3.] The Court was concerned that Countrywide has insufficient lines of communication with those attorneys throughout the country who are representing Countrywide in the courtroom.

C. The Court's concerns arising from the March 5, 2007 hearing

Based upon the testimony of these three witnesses, the Court had further concerns about the activities of Barrett Burke, McCalla Raymer, and Countrywide in connection with the filing of the Motion. Two of these concerns have already been discussed above: (1) Barrett Burke's contractual obligation to refrain from any and all communication with Countrywide; and (2) Countrywide's lack of a written policy against charging debtors for withdrawn motions. Third, the Court was concerned as to why Schlotter testified that he was the attorney-in-charge when Sanov signed the Motion and

Schlotter did not file a notice of appearance or review the Motion prior to its filing.[7] Fourth, Sanov and Schlotter both testified that McCalla Raymer was the client of Barrett Burke; yet, the Motion represented that Barrett Burke was the attorney for Countrywide, not McCalla Raymer. Finally, Sanov, Ortiz, and Schlotter all testified that the loan payment history contained several inaccuracies, and Schlotter testified that it was Thurmond who informed him of these errors. Yet, when this Court had asked Thurmond on February 6, 2007 if the Motion contained inaccurate allegations, he represented to this Court that "from what I read in our system this morning, and from what I could tell from this, the answer is it was a good motion." [Feb. 6, 2007 Tr. 5:8-10.] Accordingly, this Court decided to issue the Second Show Cause Order to obtain clarification of these various issues.

IV. The Second Show Cause Order

After reviewing the transcript of the March 5, 2007 hearing, the Court issued a second show cause order (the Second Show Cause Order). [Docket No. 57.] The Second Show Cause Order set forth that the Court was concerned about the following issues: (1) why Thurmond expressly represented to this Court that the Motion was "good" when Sanov, Ortiz, and Schlotter all testified that the pay history attached to the Motion failed to account for the Debtor's November 9, 2005 and May 6, 2006 payments, and when Schlotter himself testified that he learned about these errors from Thurmond; (2) the language in paragraph 16 of McCalla Raymer's referral guidelines prohibiting Barrett Burke—or any firm retained by McCalla Raymer—from communicating directly with Countrywide; (3) Schlotter's confusing testimony that Barrett Burke's client was McCalla Raymer, not Countrywide, and that he was the attorney-in-charge despite neither signing the Motion nor filing

[7] Local Rule 11.1 of the United States District Court of the Southern District of Texas states: "On first appearance through counsel, each party shall designate an attorney-in-charge. Signing the pleading effects designation." The District Local Rules are made applicable to all bankruptcy court proceedings by Bankruptcy Local Rule 1001(b).

a notice of appearance; and (4) whether Countrywide really did have a written policy not to assess a borrower any attorney's fees incurred in the drafting and filing of a motion to lift stay when that motion is later withdrawn due to inaccurate allegations. [*Id.*]

Based upon a motion of the UST, the Court continued the scheduled June 26, 2007 hearing until July 27, 2007. [Docket No. 105.] The number of witnesses and scope of examination in connection with the Second Show Cause Order far exceeded the Court's original expectation. In addition to the July 27, 2007 hearing, the Court held four more days of hearings in August on the Show Cause Orders.[8] There were too many witnesses and too much testimony to address the hearings chronologically in this Memorandum Opinion. Instead, the balance of this Memorandum Opinion is organized by issue: first, the specific issues raised in the Second Show Cause Order; and second, the miscellaneous issues that came to light during the hearings within the context of the parties' general conduct related to the Motion as raised in the First Show Cause Order.

A. Why did Thurmond represent to the Court that the Motion was a "good motion?"

On direct examination by Barrett Burke's attorney, Thurmond conceded that when he went to the courthouse on February 6, 2007, he knew that the payment history attached to the Motion was incorrect with respect to the November 9, 2005 and May 6, 2006 payments.[9] [July 27, 2007 Tr. 350:15-19.] Thurmond was asked why, when this Court asked him at the February 6, 2007 hearing

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[8] The Court also held a hearing on October 29, 2007 and heard closing arguments on December 12, 2007.

[9] On cross-examination, Thurmond stated that he was unaware that the payment made on December 13, 2006 was not reflected in the payment history attached to the Motion. [July 27, 2007 Tr. 365:3-8.] The Court is skeptical of this testimony in view of the fact that Thurmond had an attorney worksheet with him when he appeared at the February 6, 2007 hearing. This worksheet expressly stated that the Motion needed to be withdrawn because the Debtor had, in fact, made payments on November 9, 2005, May 5, 2006, and December 13, 2006. [Barrett Burke Exhibit No. 31.]

whether there were any allegations in the Motion that were factually inaccurate, he represented that the Motion was a "good motion." Thurmond responded:

> "In the context of all the work that I have ever done going back to 1984 . . . if there's a default and there's minimal equity, that's grounds for a motion for relief.
>
> In this case, I looked in the system notes that were part of the database and saw that the payoff was in excess of $59,000. If you use the value that the Debtor had put on his schedules, the $65,000, and you look to the net realizable net equity after taking out hypothetical closing costs, they probably had no equity. If you looked at the Harris County website appraisal, I think it was only, like, $48,000 or $49,000 so that if I was going to try that one, I would want to try to reconcile the two valuations. If you went with the Harris County Appraisal District value and they were clearly in a position of no equity, they were, I believe, undisputedly behind by a month and then on February 6th, they're behind two more months. And probably every place that I've ever worked, that would be a good motion. It would have been one that I felt like I could prosecute and win . . .
>
> My frame of reference when I was looking through all this information was whether or not it complied with Rule 11—or 9011. Was it based on facts that supported the argument that was being presented in the Motion? It was a valid, prosecutable motion . . . "
>
> [July 27, 2007 Tr. 353:1-21, 353:25-354:4.]

Thurmond's answer is disingenuous. This Court did not ask Thurmond whether the Motion was a "valid, prosecutable motion." Rather, this Court expressly asked him the following question: "Okay. I guess what I'd like to know Mr. Thurmond, is when the motion was filed, are the allegations in the motion just flat-out wrong?" [Feb. 6, 2007 Hr'g Tr. 4:2-7.] Thurmond's answer on February 6, 2007 that it was "a good motion," and his subsequent explanation of that answer at the July 27, 2007 hearing, artfully dodges the subject of the Court's inquiry—whether the Motion contained factual inaccuracies. Thurmond knew full well that the payment history attached to the Motion did not account for the November 9, 2005 payment or the May 6, 2006 payment, and that therefore the allegations in the Motion concerning the defaults and post-petition arrearage were, in

fact, "flat-out wrong." Indeed, under cross examination by the UST, Thurmond conceded that he knew about the errors in the Debtor's payment history when he came to court on February 6, 2007. [Aug. 10, 2007 Hr'g Tr. (afternoon session) 46:11-47:9.]

Moreover, this Court has no doubt that Thurmond knew about these problems with the payment history because Schlotter convincingly testified that "I got involved in this case either a day or two before the final hearing on the motion for relief in February of 2007, when I got a call from Walter Thurmond at Barrett Burke telling me that there were some discrepancies with the payment history, and it didn't appear that the debtor was now more than 60 days delinquent in his recommendation. And he asked for my consultation on it and an agreement that we would withdraw that motion."[10] [Aug. 8, 2007 Hr'g Tr. 13:16-23.] Indeed, Schlotter had a distinct and credible recollection of a conversation with Thurmond the day *before* the February 6, 2007 hearing:

> The Court: All right. Let's go through that. Did you call Mr. Thurmond or did Mr. Thurmond call you?
>
> Schlotter: He called me.
>
> The Court: All right. Morning or afternoon, if you remember?
>
> Schlotter: I'm trying to remember, but I think—I don't know for sure, but it seems like it was sometime close to lunch.
>
> The Court: And do you recollect what Mr. Thurmond told you? Tell me everything he told you.
>
> Schlotter: He said, 'John, I think this one, there's a problem with the loan history, and the debtor is saying that they made more payments, and I got a history from the client showing that there were payments that weren't reflected, and if he's correct, then the loan isn't as far delinquent as we said in the motion. So, you

[10] Schlotter's testimony that the Debtor was not more than 60 days delinquent refers to a Fannie Mae guideline setting forth that no motion to lift stay should be filed unless the debtor is at least 60 days delinquent (i.e. has failed to make two monthly payments). *See* Sec. IV.E.5 *infra*.

know, it's a Fannie Mae loan, but it's not 60 days delinquent. Assuming the debtor is correct in his assertions, I think we should withdraw this, and I'd like to do that.'

The Court: Okay. And what did you say?

Schlotter: I said, you know, I talked to him. I asked him what were the problems on the history, and he told me basically that there was misapplied pre- or post-petition payment, and that there was an annual statement that went out to the debtor that showed receipt of a payment. No, that was after the fact. There was one, I think a May payment or something had not been applied properly, so that would have been two payments, which meant that at that point, then, the debtor was probably only one month behind. And I agreed with him that it was a good idea we should withdraw it instead of pursuing it.

The Court: So, are you telling me that Mr. Thurmond was knowledgeable about payment problems?

Schlotter: When he spoke to me, he was, yes.

[Aug. 8, 2007 Hr'g Tr. 70:2-71:11][11]

Thurmond also acknowledged that he had the attorney worksheet for the Debtor's file in his possession when he came to court on February 6, 2007, and that he read this attorney worksheet prior to attending that hearing.[12] [Aug. 10, 2007 Hr'g Tr. (afternoon session) 31:3-7; 46:1-4.] The attorney worksheet contained the following paragraph:

> Please submit the [agreed order withdrawing the Motion]. This is the second hearing on this matter and a response has been filed in opposition. We had a signed [agreed order] on this file and then right before the first hearing the [Debtor's attorney] provided proofs of payments and informed us that the first payment the debtor made post petition was applied as a pre petition payment. This payment was

[11] Schlotter's recollection of his telephone conversation with Thurmond was vivid and very credible even though, as is subsequently discussed herein, Schlotter's testimony on a variety of other issues was muddled and, in some instances, simply incorrect.

[12] The attorney worksheet is a document internally generated within Barrett Burke. This document contains a summary of information relevant to a certain hearing, including basic information such as the time, location, and name of opposing counsel as well as instructions for the attorney making the appearance. The entire instruction portion of the attorney worksheet is comprised of the above-quoted paragraph. [Barrett Burke Exhibit No. 31]

> applied on 11/09/2005 in the amount of $684.62 and has now been reversed from pre petition and reapplied to the 11/01/2005 post petition payment. Also the debtor provided a copy of a transactional history that they received from Countrywide which showed that they made a payment [in the amount of] $751.69 on 5/5/2006 that was not listed on Countrywide post petition history as well as a payment [in the amount of] $751.69 on 12/13/2006. These payments have now been applied correctly and we have found that the loan was post petition due for 12/01/2006 with money in suspense when we filed the [Motion] on 12/29/2006 and this is why we are withdrawing [the Motion]. The loan is still past due for 12/01/2006. Yvonne Knesek and Chris Reilly approved the withdraw and the [Debtor's attorney] is aware we are withdrawing.
>
> [Barrett Burke Exhibit No. 31.]

Because Thurmond admitted reviewing these notes prior to the February 6, 2007 hearing, he knew that the Motion contained allegations that were factually inaccurate and that, therefore, the Motion needed to be withdrawn.[13]

Aside from the attorney worksheet, Barrett Burke also created a document known as the "Bankruptcy Case Comments." [Barrett Burke Exhibit No. 3.] This document contained several comments indicating that the Debtor had provided proof of payments that the Motion alleged had not been made. Most important of these comments was the one made on February 5, 2007 (i.e., the day before the final hearing) by a legal assistant named Sabrina LaPell, the same legal assistant who prepared the attorney worksheet: "[talked to] Chris R. [i.e., Chris Reilly] and YK [i.e. Yvonne Knesek], per YK we need to get approval to [withdraw] this MFR b/c after confirming a [payment] was [received] on 12/13 this would mean that the loan was post [sic] due for 12/1/06 when we filed

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[13] It is also worth noting that the Debtor was not in sufficient default for the Motion to have been filed under the Fannie Mae guideline which requires two missed monthly payments before filing a motion to lift the stay. [Aug. 10, 2007 Hr'g Tr. (afternoon session) 21:14-22:19.] Thurmond was well aware of this Fannie Mae guideline at the time he represented to this Court the Motion was a "good motion." Moreover, John Smith, the Countrywide representative, testified that if he had been asked whether he would authorize the filing of the Motion, he would have said, "without question, don't file it . . . because it did [not] meet the guidelines that we have set forth to file a Motion for Relief in that instance." [Aug. 9, 2007 Hr'g Tr. 260:20-24.]

the MFR on 12/29." [Barrett Burke Exhibit No. 3, pg. 2.] These comments leave no doubt that Knesek knew of the errors in the Motion. Therefore, Thurmond, who testified that he spoke with Knesek prior to going to court on February 6, 2007 [Aug. 10, 2007 Hr'g Tr. (afternoon session) 34:2-35:13], had to have known that the Motion contained inaccurate factual allegations.

As a final note on the issue of Thurmond's misrepresentation that "it was a good motion," the Court asked several witnesses what would have been their response had they been standing in Thurmond's place at the February 6, 2007 hearing when the Court inquired about the factual inaccuracies in the Motion. Although hindsight is 20/20, their answers are telling.

Mary Daffin, the Barrett Burke partner in charge of the bankruptcy department, responded to this hypothetical as follows: "If you had asked me if it contained inaccurate factual allegations, I would have told you, yes, sir, it does contain inaccurate factual allegations." [July 27, 2007 Hr'g Tr. 336:15-17.]

The following exchange between this Court and Sanov occurred at the July 27, 2007 hearing:

The Court: Let's assume you had come [to the February 6, 2007 hearing].

Sanov: Okay.

The Court: And you had gone up to the podium and said [just like Thurmond did] "Judge, we want to withdraw the Motion." And let's assume I said to you, "why?" What would you have said?

Sanov: I would have said that a mistake was made on the pay history and that the loan was not sufficiently delinquent when the Motion was filed.

The Court: And if I had said to you, "You mean you're telling me that the Motion to Lift Stay contains factual allegations that are not true," what would your answer have been?

Sanov: I would have said that I now know that they are not true.

[July 27, 2007 Hr'g Tr. 221:21-222:10.]

Finally, the following exchange between this Court and Schlotter occurred at the August 8, 2007 hearing:

> The Court: If I had said, ' Are there allegations in the motion that are incorrect?', what would you have said to me?
>
> Schlotter: I would have said, 'It appears that there are, yes.'
>
> [Aug. 8, 2007 Hr'g Tr. 72:25-73:4.]

In addition to the "good motion" misrepresentation, the Court had a second concern about Thurmond's other statements at the February 6, 2007 hearing. After Thurmond told this Court that the Motion was a "good motion," the undersigned judge stated that "what I'm going to do is take a look at the motion myself." [Feb. 6, 2007 Hr'g Tr. 4:14-15.] Thurmond then replied that he would "check when I go back and see what the deal was with it." [Feb. 6, 2007 Hr'g Tr. 4:20-21.] This statement led the Court to believe that Thurmond would return to his office, check with his colleagues to determine whether the Motion contained inaccurate factual allegations, and, if he was incorrect, file a notice with the Court correcting his prior misstatement that the Motion was a "good motion."

Thurmond never reported back to the Court. Indeed, his silence was deafening. At the July 27, 2007 hearing, Thurmond could offer no explanation as to why he did not report back to the Court:

> The Court: Did you check?
>
> Thurmond: Yes, I did.
>
> The Court: Did you get back with the Court?
>
> Thurmond: I did not.
>
> [July 27, 2007 Tr. 374:10-13; *see also* Aug. 10, 2007 Hr'g Tr. (afternoon session) 62:4-23.]

Thurmond's concession that he did not report back to the Court underscores his less than commendable view regarding the professional duty that an attorney has to be candid with the Court.[14]

B. The policy prohibiting Barrett Burke from communicating directly with Countrywide

Sanov and Schlotter both testified at the March 5, 2007 hearing that Barrett Burke attorneys were not allowed to contact Countrywide, and that all communications must be filtered through McCalla Raymer. The Court was troubled by such an arrangement because it precluded the attorney filing the motion from speaking with the actual client. This issue was included in the Second Show Cause Order and addressed by several witnesses during the later hearings.

Sanov returned to court for a second round of testimony on July 27, 2007. She reiterated her previous testimony that all Barrett Burke communications went through McCalla Raymer. [July 27, 2007 Hr'g Tr. 204:5-15.] She further acknowledged that Barrett Burke had to ask permission from McCalla Raymer to withdraw any pleadings. [July 27, 2007 Hr'g Tr. 191:18-24.]

Reilly also testified on July 27, 2007 about the "no communication clause." Reilly was an attorney at Barrett Burke who handled files involving Fannie Mae loans, including files where McCalla Raymer was national counsel and retained Barrett Burke as local counsel. He was steadfast in his testimony that he was not permitted to communicate directly with Fannie Mae and that he could only communicate with McCalla Raymer. [July 27, 2007 Tr. 47:18-48:14.] He also testified

[14] In contrast to Thurmond's nonchalant attitude towards his obligation to correct false statements he made to the Court, Barrett Burke's outside counsel for the show cause hearings, William Greendyke, exhibited the appropriate behavior in such circumstances. Greendyke made an argument in closing based on statements that were objected to and excluded at a previous hearing. During a break in the closing arguments, Greendyke reviewed the record, realized his mistake, and informed the Court of his error. [Dec. 12, 2007 Hr'g Tr. 137:12-22.] Barrett Burke should train its own associates to conduct themselves in the same manner as their outside counsel.

that McCalla Raymer had to give its approval before he could withdraw a motion or enter into an agreed order.[15] [July 27, 2007 Tr. 48:25-49:8; *see also* 104:15-19.]

Regina Thomas (Thomas) is the managing attorney for McCalla Raymer's bankruptcy department. Thomas confirmed McCalla Raymer's policy prohibiting local counsel such as Barrett Burke from communicating directly with Countrywide and testified that the purpose of the policy is to ensure that McCalla Raymer keeps apprised of the status of any matter in litigation for which McCalla Raymer is national counsel. [Aug. 7, 2007 Hr'g Tr. 37:15-25.] She further testified that Countrywide has never complained to McCalla Raymer about this restriction. [Aug. 7, 2007 Hr'g Tr. 38:11-13.] According to Thomas, Countrywide desires this restriction because it does not want the various local firms throughout the country contacting Countrywide for information. [Aug. 7, 2007 Hr'g Tr. 38:14-39:1.] Thomas also testified that, pursuant to McCalla Raymer's terms of engagement with Countrywide, McCalla Raymer is not required to monitor post-petition payments made by debtors. [Aug. 7, 2007 Hr'g Tr. 21:11-19.]

Given that Barrett Burke must communicate only with McCalla Raymer, and that McCalla Raymer is not required to monitor post-petition payments made by debtors, this Court is at a loss to understand how Barrett Burke can possibly comply with Bankruptcy Rule 9011 before filing a motion to lift stay. This arrangement truly creates a situation where the blind (McCalla Raymer) is leading the blind (Barrett Burke).

In the wake of this Court's Show Cause Orders, McCalla Raymer changed the language of its engagement letters with local counsel so that they now do not expressly prohibit direct

[15] This testimony tracks with Schlotter's testimony insofar as Schlotter testified that he personally authorized Thurmond to withdraw the Motion. [March 5, 2007 Hr'g Tr. 88:19-21.]

communication with the client. Thomas testified that communication through McCalla Raymer is now just the "preferred method of communication . . . because again, the foundation of this is that we're representing the client in the context of the entire case, versus a specific litigated matter. But its [sic] basically a language change reflects [sic] that in the event that counsel needs to contact the client, they are permitted to do so. And then we ask them to notify us what that communication was, so that we can maintain our records for all communication." [Aug. 7, 2007 Hr'g Tr. 40:8-16; *see also* 75:14-76:1.] The Court recognizes that this is an improvement upon the previous outright ban on communication with the client. However, the Court remains concerned that local counsel will still be hesitant to directly contact the client out of the fear that McCalla Raymer will cease sending files to that local counsel.

C. Who was Barrett Burke's client and who was the attorney-in-charge?

1. Who was Barrett Burke's client?

At the March 5, 2007 hearing, Schlotter testified that Barrett Burke's client was McCalla Raymer, as opposed to Countrywide. [March 5, 2007 Hr'g Tr. 78:6-14.] However, Schlotter recanted that testimony at the August 8, 2007 hearing:

UST: Mr. Schlotter, [Countrywide's counsel] asked you [at the March 5, 2007 hearing], 'Who is the client for Barrett Burke?' on page 78, line 8. Let me know when you get there.

(Witness complies)

UST: She asked you, 'Who is the client for Barrett Burke?' And your answer was, 'Well, we would be the client.' That was your testimony?

Schlotter: Yes.

UST: Did you feel rushed in giving that answer?

Schlotter: Yes.

UST: You did?

Schlotter: Yes.

UST: Why?

Schlotter: Because I hadn't had time to think it through; because I knew what was going on. I knew that we had sent the referral for Countrywide, but, as I said, and I'll say it again, our office retained Barrett Burke. Countrywide did not retain Barrett Burke. Our office retained Barrett Burke on behalf of Countrywide, and we were the contact with Barrett Burke. We would pay them for their services. So, in my mind, they represented Countrywide to file the motion. That's what we asked them to do. But Countrywide did not hire them; McCalla Raymer did.

UST: Well, sir, when the Court then followed up on that particular answer, and I'll direct your attention to page 93 of your testimony that day. Let me know when you get there.

(Witness complies)

. . .

UST: Okay. The Court followed up at line 8 on page 93; 'I thought I heard you testify when Ms. Madan [Countrywide's counsel] was asking you questions, that you said your firm was the client of Barrett Burke. Is that correct?' Answer: 'That's correct.' Did you not have enough time the second time you were asked that question?

Schlotter: Apparently not, because my mind was still based on the same thoughts that our office hired Barrett Burke, and we paid Barrett Burke.

UST: Well, the Court then followed up again. The third time you've been asked this question, at line 13: 'And that's your understanding?' Answer: 'That's my understanding.' Three times you were asked the question, 'Who was the client,' and three times you said, 'McCalla Raymer.' Is that correct?

Schlotter: That's correct. And if you'll go on, and the Court asks more questions about that, and I think that's where I confused it more.

UST: So, it was only because of the Court's persistence that you answered—you kept answering differently instead of telling the truth the first time? Is that what you're saying?

(Witness reviews the transcript)

Schlotter: Well, that's what I said.

UST: How many times do you have to be asked the same question to give you enough time to tell the truth?

Schlotter: That's a question I can't answer. I guess it depends on what I understand of the question. I certainly didn't intend to mislead the Court, and I don't at this point intend to mislead the Court, but I certainly want to clarify what happened.

[March 5, 2007 Hr'g Tr. 43:2-45:14.]

After all was said and done, this Court has no doubt now that everyone understands that Barrett Burke's client is Countrywide. It is disconcerting that Schlotter, an attorney with 28 years of experience, would think otherwise. His initial testimony underscores the need for McCalla Raymer to properly train its attorneys.

2. Who was the attorney-in-charge?

District Court Local Rule 11.1 of the Southern District of Texas requires each party to designate an attorney-in-charge, and signing the first pleading for that party is effective designation. Local Rule 11.2 states: "The attorney-in-charge is responsible in that action for the party. That individual attorney shall attend all court proceedings or send a fully informed attorney with authority to bind the client."

On July 27, 2007, Sanov testified that she was definitively the attorney-in-charge of the Debtor's file under Local Rule 11.2. [July 27, 2007 Hr'g Tr. 201:2-11.] This testimony directly contradicts Schlotter's testimony at the March 5, 2007 hearing that he was the attorney-in-charge of the Parsley file. [March 5, 2007 Hr'g Tr. 90:25-91:3.] However, when Schlotter took the stand again on August 8, 2007, he recanted this testimony:

MR's Attorney: At the time you answered [the UST's] questions [on March 5, 2007] and the Court's follow up question, were you aware that the

phrase 'attorney-in-charge' had special significance under the Local Rules in the Southern District of Texas?

Schlotter: No, I was not.

MR's Attorney: Have you since read the Local Rules of the Southern District of Texas?

Schlotter: Yes, I have.

MR's Attorney: Are you, under those Rules, the attorney-in-charge of the Parsley matter?

Schlotter: No.

MR's Attorney: Did you sign the initial pleading, the motion for relief filed in the Parsley matter that brings us down here today?

Schlotter: No.

MR's Attorney: Were you designated as the attorney-in-charge under the Southern District of Texas Local Rules?

Schlotter: No.

MR's Attorney: Did you mean to answer to the Court and to [the UST] that you were the attorney-in-charge under the Local Rules in the Southern District of Texas?

Schlotter: No, I did not. I did not comprehend the concept because I hadn't read the Local Rules.

[Aug. 8, 2007 Hr'g Tr. 17:14-18:10.]

Thomas testified that Barrett Burke was the "lead counsel for the Motion for Relief in the Southern District of Texas." [Aug. 7, 2007 Hr'g Tr. 42:16-17.] Her testimony conflicted with Schlotter's testimony at the March 5, 2007 hearing when he testified that he was the attorney-in-charge. That two seasoned attorneys at McCalla Raymer can have such a difference of opinion on this important point once again underscores the lack of training at McCalla Raymer.

Daffin correctly testified that Sanov was the attorney-in-charge pursuant to District Court Local Rule 11.2 because Sanov signed the Motion. [July 27, 2007 Hr'g Tr. 339:12-340:19.] Daffin further stated that this Local Rule requires the attorney-in-charge to appear at a hearing or to send an attorney who is fully informed and with authority to bind the client. [*Id.*] She also stated that it was therefore acceptable for Thurmond, as opposed to Sanov, to appear at the February 6, 2007 hearing so long as Thurmond was fully informed and had authority to bind Countrywide. [*Id.*]

The Court agrees with Daffin's testimony and interpretation of Local Rule 11.2. However, her testimony places her firm in an awkward position. If Thurmond was fully informed about the Parsley file, which this Court believes he was, then he knowingly made a misrepresentation to this Court while an associate at Barrett Burke. The alternative explanation of his misrepresentation to this Court— that the Motion was a "good motion"—is that he lacked full knowledge of the file, which would put him in violation of Local Rule 11.2. Under these circumstances, Sanov, the attorney-in-charge and also an associate at Barrett Burke, would have sent another attorney from Barrett Burke, i.e. Thurmond, to the hearing without full knowledge of the file. This scenario means that both Sanov and Thurmond would have been in violation of Local Rule 11.2, and, as associates at Barrett Burke, their actions are imputed to the firm. *See Religious Tech. Ctr. v. Liebreich*, 98 Fed. Appx. 979, 988 n.30 (5th Cir. 2004) (imposing sanctions under 28 U.S.C. § 1927 jointly and severally against attorneys and their law firm).

D. Does Countrywide have a policy not to assess the borrower any attorney's fees and costs for filing a motion to lift stay when Countrywide later withdraws the motion due to its own errors or the errors of its counsel?

Both Ortiz, at the March 5, 2007 hearing, and Smith, at the August 8, 2007 hearing, testified that Countrywide does not charge borrowers in bankruptcy for any attorney's fees and costs incurred

by Countrywide in connection with any motion to lift stay that is subsequently withdrawn by Countrywide; however, they also conceded that Countrywide has never committed this policy to writing. [March 5, 2007 Hr'g Tr. 71:24-72:20; Aug. 8, 2007 Hr'g Tr. 134:16–135:14.] In the case at bar, Countrywide did *not* reclassify the fees and costs associated with the Motion as non-recoverable until *after* this Court issued the First Show Cause Order. In spite of Countrywide's alleged unwritten policy of not charging debtors for fees related to motions that are withdrawn due to Countrywide's errors, Countrywide was charging those fees to the Debtor until the Court raised the issue.

Ortiz testified as follows about Countrywide's practice of waiting until the time of discharge to determine whether fees are recoverable from borrowers/debtors:

BB counsel: At some point in the bankruptcy case, is there a reconciliation of discrepancies in the accounts?

Ortiz: Yes.

BB counsel: When does that happen?

Ortiz: That generally happens when the loan is discharged—

BB counsel: Okay.

Ortiz: —and the case is completed and a thorough review of all transactions and fees are done to determine and make sure that the POC has been paid in full, that if there has been any actions on the case that the fees that have been assessed are proper and that we are abiding by any either court orders or if something was withdrawn, that we have, you know, properly reassessed those fees. And then it is also then reviewed and audited by the team leader before it gets sent on to the next stage.

BB counsel: Okay. So at the end of a bankruptcy case, in this case, a Chapter 13 discharge, successful completion of the plan, that process is done to the file and are reconciliations or eliminations of erroneous charges made at that time?

Ortiz: They can be, yes.

BB counsel: Okay. Assuming there is an erroneous charge, is that the case—

Ortiz: Assuming, yeah.

[Aug. 10, 2007 Hr'g Tr. 34:10-35:10; 36:13-37:4.]

Smith also testified that the charges related to the Motion will be removed only when the Debtor receives his discharge:

UST: This $550 was part of the fee that Countrywide had assigned to Mr. Parsley for the filing of the withdrawn Motion for Relief from Stay; was it not?

Smith: That's correct.

UST: And then there's the $150, which was the court costs for the filing of that withdrawn Motion for Relief from Stay, correct?

Smith: That's correct.

UST: And we see two entries again on March 12th, 2007. And the last entry on March 12th after all the reclassification has been done, what is the balance on Mr. Parsley's account for the fees he owes to Countrywide?

. . .

Smith: Twelve thousand sixty or, I'm sorry, $1,260.53 would be the balance. Now, but did you say that would be owed by Mr. Parsley?

UST: Isn't that what the balance shows?

Smith: Well, no, not directly. That would be the balance that would be in the fees due. However, again, that would not be chargeable because it's been reclassified. So once the loan was completed it would actually be—it would go through a process we call "book loss" to actually book the fees off of the loan.

UST: Why is [sic] there two entries on March 12th as debits in the amount of $550 and $150? Why do you debit it, which increases the balance total back to what it was before you re-classed these fees for the withdrawn Motion for Relief from Stay?

Smith: Again, it's—it would be an internal accounting function. Again, that's part of the book loss process that I spoke about before. But it would be reclassified, so Mr. Parsley would not have been charged for that.

UST: But the running balance reflected in your system has it the same amount, correct?

Smith: It has a running total of the same amount. But, again, it's being reclassified to a non-claimable amount. So when the loan is completed we book that item off of the system. It's just an accounting function.

UST: Mr. Parsley's loan is a 30-year loan, correct?

Smith: That's correct.

UST: So in 2029 someone at Countrywide is going to remember to go back and book loss this amount?

Smith: No. Actually, this would occur—in this case in the bankruptcy context we would book loss the loan as soon as—typically, as soon as it would come out of the bankruptcy environment.

. . .

UST: Where on Countrywide's system would the balance be reflected that Mr. Parsley owes?

Smith: He would have to—and I'm not aware if you can create a report to show, to just pull out the recoverable items. But you would have to add up those items that were fees due and showing as in a code that would be owed by the borrower.

UST: So Mr. Parsley has to hope that five years or so from now when his Plan ends someone from Countrywide is going to go back and do this math correctly?

Smith: Well, we have a book loss department within the finance group that actually is responsible for doing just that.

UST: But Countrywide can't even get it right when it files an Amended Proof of Claim a month later from reclassifying these fees as non-recoverable, correct?

Smith: Again, the Amended Proof of Claim was filed without direct correspondence, communication as to what was going to be revised at that time for the Amended Proof of Claim.

[Aug. 8, 2007 Hr'g Tr. 256:9-260:1.]

The Court cannot understand why Countrywide does not determine whether the debtor is charged with the fees and costs *at the time the motion is withdrawn* rather than at the time the debtor receives a discharge—which can be several months, if not years, after the withdrawal of the motion. [Aug. 8, 2007 Hr'g Tr. 138:9-20.] Smith wants this Court to believe that, in the case at bar, when

the Debtor receives a discharge two and a half years from now, Countrywide will ensure that the fees and expenses associated with the Motion will not be charged to him.[16] Given the myriad of errors in the case at bar, the Court doubts Countrywide would take such action. Indeed, Smith conceded that Countrywide would not have even thought about refraining from imposing these fees and costs on the Debtor if this Court had not issued the First Show Cause Order. [Aug. 8, 2007 Hr'g Tr. 263:9-14.] Left unanswered is the question of what happens if the Debtor's Chapter 13 case is dismissed. Since those fees have not been written off and still appear on the account, there is nothing to stop Countrywide from reclassifying those fees back to the "recoverable" category and charging them to the Debtor.

If a written policy actually existed stating that Countrywide would not charge debtors for fees and costs associated with its withdrawn motions, then that policy should demand that the charge be reclassified *immediately* after the motion is withdrawn. A Countrywide employee should not need to determine the status of those fees several months or years later. This reluctance, if not refusal, to immediately reclassify these fees as unrecoverable has called into question whether Countrywide had any such unwritten policy when Ortiz and Smith testified in August of 2007; or, if such a policy existed, whether Countrywide did anything to properly enforce it.

During closing arguments on December 12, 2007, counsel for Countrywide addressed the Court's concern over Countrywide's failure to commit to writing a policy stating that it would not charge debtors for motions to lift stay that are later withdrawn due to Countrywide's error. Counsel informed the Court that, as a result of the show cause hearings, Countrywide now had a policy in

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[16] The Debtor's Chapter 13 plan was confirmed on February 27, 2006. [Docket No. 23.] Thus, because his plan is a 54 month plan, he will receive a discharge in August of 2010, i.e. two and a half years from now.

writing to this effect. [Dec. 12, 2007 Hr'g Tr. 67:21-24.] The Court requested to see a copy of this written policy [Dec. 12, 2007 Hr'g Tr. 74:14-23], and Countrywide submitted a document for *in camera* inspection on December 14, 2007. After reviewing the relevant language in this document, the Court does not understand why Countrywide would believe that this document contains a policy that Countrywide will not charge debtors for fees and costs associated with motions that it withdraws due to inaccurate factual allegations. What Countrywide submitted is not an instruction or a policy; it is simply an explanation of how a Countrywide employee would code fees as not chargeable to the borrower.[17] Nothing has changed. Countrywide may have the ability to code fees as non-chargeable, but it has not shown this Court a commitment to write off these fees.

This Court is certainly not going to write Countrywide's policies. However, given the representation made by Countrywide's counsel, the Court expected a plain and simple sentence declaring that Countrywide will not charge borrowers any fees related to any motion to lift stay withdrawn as a result of Countrywide's own errors. Countrywide appears unwilling to take this basic step towards accepting responsibility for motions which are incorrectly filed based upon its own errors and the mistakes of its counsel.

Moreover, Countrywide represented that it has not changed its practice of determining whether fees are recoverable at the time of discharge. There is no justifiable reason that these types of fees cannot be *immediately* written off. If Countrywide allows up to five years to pass before deciding whether to charge a debtor for these fees, it is very likely that a debtor, who may not have

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[17] Because this document was submitted for *in camera* inspection only, the Court will not directly quote the language to which it refers. Further, in fairness to Countrywide, after it reads this Memorandum Opinion, if it believes that the Court is incorrect, the Court will allow Countrywide to file the document with the Clerk of Court and the Court will amend this Memorandum Opinion to include the verbatim language in the document as an addendum. Countrywide shall have ten (10) days from the entry of this Memorandum Opinion on the docket to file this document with the Court.

the assistance of counsel at that point, will be willing to pay these fees out of a desire to extricate himself from bankruptcy and move on with his life.[18] When asked why this policy had not been changed, and why Countrywide was still waiting until discharge to make the non-recoverability determination, its counsel responded, "Your Honor, I'm not prepared to answer that question today." [Dec. 12, 2007 Hr'g Tr. 80:23-24.] Countrywide's unwillingness to put into effect a straight-forward policy and to reconsider when fees are deemed non-dischargeable makes this Court all the more concerned about Countrywide's policies.

E. The general conduct of Barrett Burke, McCalla Raymer, and Countrywide in connection with the Motion

The issues discussed above were specifically enumerated in the Second Show Cause Order. Due to the UST's thorough investigation and examination, the Court heard testimony on many other issues regarding miscellaneous conduct of Barrett Burke, McCalla Raymer, and Countrywide which related to the Motion specifically and to their business practices generally. The Court would be remiss if it failed to address these other issues which in some cases are as, if not more, disconcerting than the ones already discussed above. Primarily, this analysis is organized around the flow of information through the system created by the parties in this case. Tracing the steps leading up to the filing of the Motion shows that this is an assembly line process. There are attorneys involved throughout this process that should be catching these errors. However, the attorneys, do not dedicate sufficient time and care to ensure adequate quality control. Eventually, despite being passed through

[18] The Debtor's Chapter 13 petition was filed prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Thus, his plan will last only 54 months. However, with a certain narrow exception, all Chapter 13 cases filed after BAPCPA must last 60 months unless unsecured creditors receive payment in full of their claims. *See* 11 U.S.C. § 1325(b)(4)(A) and (B). Accordingly, in most cases, under Countrywide's present policy of deciding whether the fees and costs are recoverable only at the date of discharge, this decision will not be made until five years after the confirmation of the plan.

the hands of several paralegals and attorneys, the Court receives an erroneous motion that should never have been filed.

1. Countrywide's Payment History

This process begins with Countrywide and, ultimately, must end with Countrywide because the actions of McCalla Raymer and Barrett Burke were done on behalf of Countrywide. As Ortiz testified, the mistakes Countrywide made in the Debtor's payment history are the root cause of the Motion being filed. As previously stated, she conceded that Countrywide did not acknowledge the Debtor's bankruptcy filing in their electronic files until several days after he filed and Countrywide had received notice of the filing. [March 5, 2007 Hr'g Tr. 68:12-24.] Thus, the Debtor's post-petition payment on November 9, 2005 was posted as a pre-petition payment, and Countrywide's records indicated that the Debtor missed his first post-petition payment. Although this was not the only mistake in the payment history that the Court eventually received, it was the first.

Ortiz also testified that no one at Countrywide reviews pleadings before they are filed on its behalf, and in this case no one at Countrywide looked at the final payment history attached to the Motion. [March 5, 2007 Hr'g Tr. 68:12-24; 69:9-70:13.] This hands off approach is consistent with the no communication clause between Countrywide and its local counsel, such as Barrett Burke. Countrywide's attitude is that once it has referred the file to national counsel, it does not want to be bothered with any details about the pleadings and proceedings which follow.

Additionally, Smith testified that Countrywide has been asked by courts to clarify the payment histories that it has submitted with motions to lift stay. [Aug. 9, 2007 Hr'g Tr. 197:20-24.]

Indeed, he stated that such requests have been "happening more and more frequently."[19] [Aug. 9, 2007 Hr'g Tr. 197:25-198:2.] The next step in the process is for Countrywide to transmit this inscrutable pay history to McCalla Raymer.

2. Simplified payment histories prepared by McCalla Raymer legal assistants

Thomas testified that, in the spring of 2006, McCalla Raymer "made a business decision to create a separate entity known as MR Default Services, which provided non-legal support services to the law firm." [Aug. 7, 2007 Hr'g Tr. 23:14-20.] This new entity employs 300-350 legal assistants formerly employed directly by McCalla Raymer. [Aug. 7, 2007 Hr'g Tr. 163:6-9.] These legal assistants perform the same functions as when they were direct employees of McCalla Raymer. [Aug. 7, 2007 Hr'g Tr. 24:11-18.] The attorneys at McCalla Raymer continue to oversee and control the legal assistants at MR Default Services. [Aug. 7, 2007 Hr'g Tr. 24:19-21.] It is these legal assistants who, upon receipt of Countrywide's loan history, create a simplified loan history which the McCalla Raymer attorney delivers to local counsel such as Barrett Burke. Yet, no attorney at McCalla Raymer ever reviews the simplified loan history for its accuracy.[20] [Aug. 7, 2007 Hr'g Tr. 164:19-165:6.]

According to Thomas, these legal assistants do—to use her words—a "cut and paste" job using the Countrywide loan history [Aug. 7, 2007 Hr'g Tr. 63:23; *see also* 165:18.], suggesting that there is no need for any attorney at McCalla Raymer to be concerned about the accuracy of the

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[19] Schlotter testified that McCalla Raymer received similar complaints from various courts about the complexity of Countrywide's loan histories. To use Schlotter's own words, courts want to see a loan history "that somebody who doesn't have an accounting background can read." [March 5, 2007 Hr'g Tr. 81:7.]

[20] If courts throughout the country have complained that Countrywide's original loan histories are too complex to decipher, then attorneys at McCalla Raymer should be reviewing the simplified payment histories that the legal assistants are constructing.

simplified loan histories. Yet, the MR Default Services employee, LaToya President (Ms. President), who converted the Debtor's loan history from the Countrywide version to the McCalla Raymer version, admitted that she made a mistake in this case. She testified that when she did the cutting and pasting, she created the inaccurate payment history, not reviewed by an attorney at McCalla Raymer, which was delivered to Barrett Burke.

The following exchange between McCalla Raymer's counsel and Ms. President is telling:

MR's Attorney: Okay. What happened here?

Ms. President: In the process of cutting and pasting and deleting, I deleted the mortgagor's [monthly payment] versus the trustee [i.e. the trustee's payment to Countrywide].

MR's Attorney: Which you had pulled from the webpage; you deleted the wrong—

Ms. President: The wrong—

MR's Attorney: —entry.

Ms. President: Correct.

. . .

MR's Attorney: Is the May 5th payment here at the top of the page, is that the one you deleted in error?

Ms. President: Correct.

MR's Attorney: And the May 8th payment is the one you placed on the payment history in error?

Ms. President: Correct.

[Aug. 8, 2007 Hr'g Tr. 100:12-18; 101:23-102:3.]

This Court understands that mistakes happen, and it is by no means upset or unhappy with Ms. President. What this Court does not understand is why Countrywide's original loan payment history is so complex that McCalla Raymer, through MR Default Services, must simplify the history

so that this Court—and other courts— will be able to comprehend the payment history. Is it too much to ask of Countrywide, or any mortgagee or servicer, to generate a payment history that does not have to be simplified by legal assistants who inevitably will make mistakes? Countrywide's payment histories are so complex that judges, attorneys, and borrowers have difficulty understanding them. Indeed, these payment histories are sufficiently confusing that many debtors, and their attorneys, are unable to determine if Countrywide has overcharged them.

3. The need for Barrett Burke employees to confirm the accuracy of payment histories pursuant to Barrett Burke policy

The next step on this assembly line is for McCalla Raymer to forward the file to local counsel, which was Barrett Burke in the case at bar. Reilly conceded that when McCalla Raymer referred the Debtor's file to Barrett Burke requesting for Barrett Burke to file a motion to lift stay, the file "fell through the cracks" [July 27, 2007 Hr'g Tr. 55:4-5], and that Sanov, not he, ended up signing the Motion because he was on vacation. Reilly testified that all Barrett Burke employees are supposed to confirm the accuracy of all payment histories prior to the filing of any motion to lift stay, and conceded that Sanov would have been in violation of this Barrett Burke policy if she filed the Motion without doing such a check. [July 27, 2007 Hr'g Tr. 57:12-19 and 57:25-58:3.]

Sanov testified that, between December 11, 2006 (when Barrett Burke received the referral from McCalla Raymer) and December 29, 2006 (when she filed the Motion), neither she nor anyone else at Barrett Burke checked with McCalla Raymer or Countrywide to confirm whether the payment history needed to be updated. [July 27, 2007 Hr'g Tr. 213:20-23.] Had anyone taken the time to check, they would have discovered that the Debtor had made a payment on December 13, 2006.

Since neither Sanov nor Reilly verified the accuracy of the payment history before the Motion was filed, the Court received a motion to lift stay riddled with errors that could have—and should

have—been caught by any number of attorneys whose hands it passed through on the way to the docket. Unlike McCalla Raymer, Barrett Burke at least acknowledges that its attorneys bear the responsibility of checking the accuracy of the payment history and deficiencies before filing motions to lift stay. Unfortunately, quality control does not appear to have been a priority at Barrett Burke, and its attorneys filed the Motion without verifying the factual basis underlying this pleading.

4. The proofs of claim filed by McCalla Raymer

Countrywide, McCalla Raymer, and Barrett Burke vociferously objected on grounds of relevancy to the introduction of any evidence about the Countrywide proof of claim, and two amendments thereto, that were filed in the case at bar. The parties argued that neither the First Show Cause Order nor the Second Show Cause Order referenced Countrywide's proof of claim. [Dec. 12, 2007 Hr'g Tr. 25:2-12.]

Yet, Sanov, the Barrett Burke attorney who signed the Motion, testified that "[i]f there are mistakes in the proof of claim, those mistakes were transposed onto the Motion for Relief From Stay." [Aug. 10, 2007 Hr'g Tr. (afternoon session) 86:18-20.] Indeed, Sanov reviewed the proof of claim in preparing the Motion. [Aug. 10, 2007 Hr'g Tr. (afternoon session) 74:4-19.] She testified that she used the proof of claim to determine what figure she should include in the Motion for pre-petition arrears owed by the Debtor. [*Id.; see also* Aug. 10, 2007 Hr'g Tr. (afternoon session) 79:11-16; 80:22-81:1; 83:3-11; 117:2-4.] Thus, the Court concluded that evidence regarding the proof of claim was relevant to the Show Cause Orders because it might help to explain some of the inaccuracies in the Motion. Accordingly, the parties' objections were overruled and the UST proceeded to examine the errors in the proof of claim filed in this case.

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CERTIFICATE OF SERVICE

I have served this Appellant Brief, including Appendix 1, Statement of David McCrae,Record on Appeal, Texas Western District Court Docket Sheet 1:14-cv-733Document 23 and 23.1 [formatting and pagination enhanced for readability], PHH Consent Agreement, and Memorandum Opinion re: BBDFTE

To

McGlinchey Stafford, PLLC

Nathan T. Anderson 2711 North Haskell Avenue Suite 2750, LB 25 / Dallas, Texas 75204 / 214.445.2445, and

S. David Smith /1001 McKinley Suite 1500 / Houston, TX 77002 / 713.335.2136

and Barrett, Daffin, Frappier, Turner and Engel, LLP

Coury M Jacocks / 15000 Surveyor Blvd. / Addison, TX 75001 / 972.386.5040

By CM/ECF

Sworn to on 15 January 2015 by /s/David McCrae, Pro se

350 Cee Run / Bertram Texas 78605

Xstek99@gmail.com

512.667.0283

***Per FRAP Rule 3(c)(3) Pro se includes Barbara McCrae, Spouse**

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(s)David McCrae, pro se

Sworn to on 15 January 2015

by /s/David McCrae, Pro se

350 Cee Run / Bertram Texas 78605

Xstek99@gmail.com

512.667.0283

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