No.

IN THE

Supreme Court of the United States

UNITED STATES EX REL.
ADVOCATES FOR BASIC LEGAL EQUALITY, INC.,
Petitioner,

v.

U.S. BANK, N.A.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The public disclosure bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A), prohibits *qui tam* actions when "substantially the same allegations or transactions" have previously been publicly disclosed, unless the *qui tam* plaintiff is an original source of the information. The circuits are divided over the level of specificity at which a public disclosure must be "substantially the same" as the alleged fraud to trigger the bar.

The question presented is:

Under the public disclosure bar, may a *qui tam* action proceed when it is based on specific allegations of fraud that were not the subject of prior public disclosures and that add substantial material information to the public disclosures, and when the publicly disclosed allegations "encompass" the *qui tam* allegations only if both sets of allegations are characterized at a very high level of generality?

PARTIES TO THE PROCEEDING

The parties to the proceedings below, and in this Court, are:

Advocates for Basic Legal Equality, Inc., suing as relator on behalf of the United States as plaintiff in the district court, appellant in the court of appeals, and petitioner in this Court; and

U.S. Bank, N.A., the defendant in the district court, appellee in the court of appeals, and respondent in this Court.

RULE 29.6 STATEMENT

Advocates for Basic Legal Equality, Inc., is a nonprofit, non-stock corporation. Because it does not issue stock, there is no publicly traded corporation that owns any stock in it, or any other form of ownership interest.

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INTRODUCTION

This case presents an important, recurring, and unsettled issue concerning the "public disclosure bar" of the False Claims Act (FCA). That provision bars an FCA *qui tam* action if official documents or the news media publicly disclosed "substantially the same allegations or transactions" before the case was filed. 31 U.S.C. § 3730(e)(4)(A). Courts of appeals disagree over the level of specificity at which a disclosure must be "substantially the same" as the alleged fraud to trigger the bar.

The United States Court of Appeals for the Sixth Circuit held below that public disclosures that do not reveal the specific fraud alleged in a *qui tam* action are, nonetheless, "substantially the same" and bar the action if the public allegations, as broadly characterized by the court, can be said to "encompass" the *qui tam* action's specific allegations. Pet. App. 8a. In the court's view, public allegations of some sort of misconduct generically comparable to the alleged fraud suffice to "put[] the government on notice 'of the possibility of fraud.'" *Id.* at 9a.

The Seventh and Ninth Circuits have considered and rejected this broad-brush approach. They hold that "a complaint that is similar [to a public disclosure] only at a high level of generality" does not "trigger[] the public disclosure bar." *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 575 (9th Cir. 2016); *accord*, *e.g.*, *United States ex rel. Goldberg v. Rush Univ. Med. Ctr.*, 680 F.3d 933, 936 (7th Cir. 2012). In those circuits, public disclosure of *some* wrongdoing does not bar an FCA action unless it "alerted the government to the specific areas of fraud alleged" in the action. *Mateski*, 816 F.3d at 579. Only disclosures alleging "that a particular [defendant] had committed a particular fraud in a particular way" suffice. *Goldberg*, 680 F.3d at 935.

Here, petitioner Advocates for Basic Legal Equality, Inc. (ABLE), a non-profit organization devoted to advocating for the interests of low-income individuals, brought an FCA *qui tam* action against respondent U.S. Bank. ABLE alleged that the bank made false claims for government payments under the mortgage insurance program administered by the Federal Housing Administration (FHA), an arm of the Department of Housing and Urban Development (HUD). ABLE claimed that, in submitting insurance claims for losses incurred in foreclosing on FHA-insured loans, U.S. Bank falsely certified that it had complied with pre-foreclosure requirements, unique to the FHA program, that are intended to mitigate the government's losses. Specifically, ABLE alleged that U.S. Bank systematically foreclosed on FHA-insured loans without first meeting with borrowers and exploring alternatives to foreclosure, as FHA regulations require before foreclosure on an FHA-insured mortgage.

The Sixth Circuit held that the action was barred by public disclosures in two documents:

> (1) a report by federal banking regulators (not FHA or HUD) finding that many banks, including U.S. Bank, engaged in *different* unsound or illegal practices (such as robo-signing documents) in foreclosures generally—but *not* alleging FHA insurance fraud or violations of loss-mitigation requirements specific to FHA-insured mortgages (such as failure to meet with borrowers before foreclosing); and
>
> (2) a consent order issued by bank regulators alleging that U.S. Bank had engaged in specific foreclosure-related wrongdoing that had nothing to do with fraud on the FHA or violation of any loss-mitigation requirements, let alone those specific to FHA-insured loans.

Neither the report nor the order (Pet. App. 36a & 73a) alleged that U.S. Bank (or any bank) had violated the FHA's special loss-mitigation requirements, much less that U.S. Bank misrepresented compliance with those or any other FHA program requirements.

Even so, the Sixth Circuit found the case barred because the public disclosures, as characterized generally by the court, disclosed that the bank had engaged in "bad foreclosure practices," Pet. App. 7a, a sweeping category that "encompass[ed]" ABLE's particularized allegations of fraud specific to the FHA program. *Id.* at 8a. Similarly, the court found that ABLE could not contribute material new information that would qualify it as an "original source" under the FCA because the government was already aware of "bad foreclosure practices." *Id.* at 7a. In the Seventh and Ninth Circuits, which reject such an over-generalized approach to the public disclosure bar, the disclosures cited by the Sixth Circuit would neither have triggered the bar nor precluded ABLE from qualifying as an original source.

The Sixth Circuit's restrictive approach blocks lawsuits based on allegations that identify specific frauds not previously disclosed to the public, and it disrupts the FCA's "effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 295 (2010). The Court should grant this petition to restore that balance and resolve the conflict among the circuits.

OPINIONS BELOW

The Sixth Circuit's decision is reported at 816 F.3d 428 and reproduced in the appendix at 1a. The court's unreported order denying a petition for rehearing en banc is reproduced in the appendix at 35a. The district

court's memorandum opinion and order and its entry of final judgment are unreported and are reproduced in the appendix at 12a and 34a, respectively.

JURISDICTION

The court of appeals issued its decision on March 14, 2016, and denied a timely petition for rehearing en banc on April 27, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4), provides:

> (A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—
>
> (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) from the news media,
>
> unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is

> independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

STATEMENT OF THE CASE

1. The False Claims Act—First enacted in 1863, the FCA prohibits knowingly presenting false claims for payment to the federal government and prescribes civil penalties and remedies for violations of its antifraud provisions. *See* 31 U.S.C. § 3729. The FCA was Congress's response to "the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1996 (2016) (quoting *United States v. Bornstein*, 423 U.S. 303, 309 (1976)). Congress's ongoing concern over the perpetual problem of false claims for government payment has resulted in many amendments to the Act, "but its focus remains on those who present or directly induce the submission of false or fraudulent claims." *Id.*

Among the false claims that violate the FCA are requests for payment that impliedly, and falsely, certify compliance with regulatory requirements that are material to the government's obligation to make payment. As this Court recently held, such implied certification "can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." *Id.* at 2001.

FCA violators are liable to the United States for substantial per-violation civil penalties and "3 times the amount of damages which the Government sustains." 31

U.S.C. § 3729(a). The FCA authorizes civil actions by the government to recover penalties and damages, *see id.* § 3730(a), and also provides that a private person "may bring a civil action for a violation of [the FCA] for the person and for the United States government." *Id.* § 3730(b)(1). Such actions, "brought in the name of the Government" by private plaintiffs, *id.*, are referred to as "*qui tam* actions." *See id.* § 3730(c); *see also Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774–75 (2000). Courts generally refer to the *qui tam* plaintiff as the "relator." *See id.* at 769.

Upon initiating an FCA *qui tam* action, a relator must provide the complaint and the evidence and information on which it is based to the government, which then decides whether to intervene and conduct the action itself. Meanwhile, the complaint remains under seal for at least 60 days. 31 U.S.C. § 3730(b)(2). If the government chooses not to proceed, the relator may conduct the action, *id.* § 3730(b)(4)(B), and receive 25 to 30 percent of any recovery, plus costs and attorneys' fees. *Id.* § 3730(d)(2). If the government conducts the action, the relator generally receives 15 to 25 percent of the proceeds. *Id.* § 3730(d)(1).

The Act's *qui tam* provisions strike a balance. On the one hand, they seek to remedy frauds on the government and deter would-be fraudsters by encouraging meritorious lawsuits that bring to light frauds that might otherwise escape the public eye. On the other hand, they prevent suits that would not further those purposes—actions Congress "deemed unmeritorious or downright harmful." *Graham Cty.*, 559 U.S. at 298. Accordingly, the FCA includes limits on who may bring a *qui tam* action, who may be sued, and the circumstances under which an action may be brought. *See* 31 U.S.C. §§ 3730(b)(5), (e).

At issue here is the Act's "public disclosure bar," which prohibits some *qui tam* actions that mirror allegations already in the public domain. *Id.* § 3730(e)(4). "As originally enacted, the FCA did not limit the sources from which a relator could acquire the information to bring a *qui tam* action." *Graham Cty.*, 559 U.S. at 293–94. A relator could bring an entirely "parasitic" action—even one based on information gleaned from a federal criminal indictment. *Id.* at 294 (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943)). To preclude such suits, Congress enacted the so-called "government knowledge" provision barring *qui tam* actions "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." *Id.* (quoting Act of Dec. 23, 1943, 57 Stat. 609). That draconian provision substantially curtailed "the volume and efficacy of *qui tam* litigation." *Id.*

In 1986, Congress balanced the two earlier approaches by limiting the bar to actions "based upon public disclosure of allegations or transactions" in specified official hearings and reports or in the news media. Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157 (1986), *codified at* 31 U.S.C. § 3730(e)(4)(A) (2009). The 1986 legislation sought "to make the FCA a 'more useful tool against fraud in modern times,'" *Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003) (quoting S. Rep. No. 99-345, at 2 (1986)), by achieving "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who had no significant information to contribute of their own." *Graham Cty.*, 559 U.S. at 294 (quoting *United States ex rel. Springfield Terminal R.R. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)).

In 2010, Congress again amended the public disclosure bar. *See* Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010). That legislation introduced the provision's current language stating that the bar is triggered by prior disclosure of allegations or transactions "substantially the same" as those in the *qui tam* action. The new language codified the construction most circuits had already given the former language, which barred actions "based upon" public disclosures—language most courts construed to bar an action if its allegations were "substantially identical" or "substantially similar" to public disclosures. *See United States ex. rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 514 (6th Cir. 2009); *Leveski v. ITT Educ. Servs. Inc.*, 719 F.3d 818, 828 & n.1 (7th Cir. 2013) (citing *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 920 (7th Cir. 2009)). Thus, both before and after the 2010 amendments, the bar requires courts to compare prior disclosures to the *qui tam* allegations to determine whether they are substantially the same.[1] But as demon-

[1] The 2010 amendments altered the statute in other respects as well. The public disclosure bar does not apply to an action brought by an "original source" of information. 31 U.S.C. § 3730(e)(4)(A). Until 2010, an original source was defined as "an individual who has direct and independent knowledge of the information on which the allegations are based." *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467 (2007) (quoting former 31 U.S.C. § 3730(e)(4)(B)). After the 2010 amendments, an original source must either (1) have supplied the information on which the allegations are based to the government before the public disclosure, or (2) have "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." 31 U.S.C. § 3730(e)(4)(B).

The 2010 amendments also eliminated language that had made the bar jurisdictional, *see Rockwell*, 549 U.S. at 467, and provided that only *federal* hearings, reports, audits and investigations trigger the bar. *See* 31 U.S.C. § 3730(e)(4)(A)(i)–(iii).

strated below, the courts of appeals have diverged sharply over how to apply the standard.

2. The FHA Mortgage Insurance Program—This case involves false claims under the FHA mortgage insurance program established by section 203 of the National Housing Act, 12 U.S.C. § 1709. Through that program, private lenders issue mortgage loans for modestly priced homes, with borrowers making very low down payments. The FHA insures these loans to protect lenders against losses when a homeowner defaults and the lender forecloses. When a foreclosure or other event causes a participating lender to suffer a loss, it submits a claim to the FHA and recoups the lost money from the government. By assuming the risk involved in making these low-down-payment loans, the FHA gives lenders incentives to lend to homebuyers who might not qualify for a conventional loan. It thus aims to expand home ownership by making home loans more available and affordable to first-time homebuyers and other higher-risk and lower-income borrowers.

The FHA mortgage program, over its 82-year history, has insured over 34 million home mortgages. It helped foster a significant expansion of home ownership in the United States between the Depression era, when the rate of home ownership bottomed out at less than 44%, and the early years of this century, when it peaked at over 68%.[2] Lenders participating in the FHA program have gained access to an enormous market that other-

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[2] *See* U.S. Dep't of Hous. & Urban Dev., *The Federal Housing Administration (FHA)*, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/fhahistory; U.S. Census Bureau, *Historical Census of Housing Tables*, https://www.census.gov/hhes/www/housing/census/historic/owner.html.

wise might not exist, and on remarkably favorable terms: Lenders keep the profits from FHA-insured loans, while the government shoulders the risk. When foreclosures multiply, as they did during the recent housing crash, the federal government's exposure is substantial.

In exchange for the benefits it offers lenders, the FHA program imposes unique regulatory requirements that are critical to limiting potentially huge federal liabilities. At issue in this case is the requirement that lenders take steps mandated by federal law to mitigate losses before declaring an FHA-insured mortgage in default, foreclosing, and making a claim for reimbursement from the FHA. Federal statutes and regulations explicitly prohibit mortgagees from initiating foreclosure on an FHA-insured loan unless they first have complied with specific loss-mitigation procedures, including face-to-face meetings with the homeowners and evaluation of alternatives to foreclosure that would minimize losses to the insurance program. *See* 12 U.S.C. § 1715u(a); 24 C.F.R. §§ 203.500, 203.501, 203.604, 203.605. The alternatives lenders must evaluate include "special forbearance, loan modification, preforeclosure sale, support for borrower housing counseling, subordinate lien resolution, borrower incentives, and deeds in lieu of foreclosure." 12 U.S.C. § 1715u(a). Because these loss-mitigation requirements are mandatory with respect to every foreclosure on an FHA-insured loan, submission of an FHA insurance claim following foreclosure impliedly warrants that the mortgagee complied with them. Participating mortgagees must also certify their compliance with these and other regulatory requirements upon applying to participate in the program and annually thereafter.

3. The *Qui Tam* Action—U.S. Bank is a significant participant in the FHA mortgage insurance program. In

the decade before this case was filed, U.S. Bank made more than 22,000 insurance claims for losses on foreclosures of FHA loans and received more than $2.3 billion in FHA payments on those claims. Petitioner ABLE received information from multiple homeowners with FHA-insured mortgage loans that U.S. Bank had foreclosed on their homes without holding the required face-to-face meeting or otherwise evaluating loss-mitigation options. It is undisputed that these homeowners' specific claims had never been publicly disclosed in the media or in any federal hearing, audit, report, or investigation.

On April 1, 2013, ABLE filed its complaint under seal in the District Court for the Northern District of Ohio. The complaint alleges that U.S. Bank routinely foreclosed on FHA-insured mortgages without complying with the requirements that it hold face-to-face meetings with homeowners and otherwise consider loss-mitigation options. It further alleges that U.S. Bank knowingly made false claims when requesting insurance benefits for losses resulting from those foreclosures—claims that falsely represented the bank's compliance with loss-mitigation requirements. The complaint alleges that those false representations were material to payment of the claims.[3] It identifies three specific instances when U.S. Bank foreclosed in violation of face-to-face meeting and loss-mitigation requirements, and details the resulting false claims and insurance payments. It alleges that these examples are representative of thousands of fore-

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[3] The complaint also alleged the making of false records and statements in connection with claims, in violation of 31 U.S.C. § 3729(a)(1)(B), in the form of the bank's multiple certifications of compliance with applicable regulations.

closures that violated loss-mitigation requirements and led to false insurance claims.

The United States declined to conduct the lawsuit, and the complaint was unsealed. U.S. Bank moved to dismiss for failure to state a claim under the FCA. As to that issue, the United States filed two "statements of interest" supporting ABLE's argument that it had stated claims actionable under the FCA. The government explained that compliance with loss-mitigation requirements was material to payment decisions under the mortgage insurance program and that mortgagees claiming insurance benefits impliedly certified compliance.

Correctly anticipating this Court's decision in *Universal Health Services* that a false certification theory can be a basis for FCA liability, the district court held that ABLE had stated an FCA claim by alleging implied misrepresentations of compliance with the loss-mitigation regulations. Compliance with those regulations, it found, "goes to the heart of the government's bargain with the mortgagee to pay claims" and is material to the government's payment decision. Pet. App. 22a; *cf. Universal Health Servs.*, 136 S. Ct. at 1995–96.

4. The Claimed Public Disclosures—U.S. Bank also moved for dismissal under the public disclosure bar. Its motion attached three claimed sets of disclosures: (1) an April 2011 report entitled "Interagency Review of Foreclosure Policies and Practices," issued by the Federal Reserve System, the Office of the Comptroller of the Currency (OCC), and the Office of Thrift Supervision (Pet. App. 36a); (2) a consent order issued by the OCC in April 2011 based on the findings of the Interagency Review (*id.* at 73a); and (3) newspaper reports describing the Interagency Review, related settlement agreements

with U.S. Bank and other banks, and litigation concerning foreclosure violations by other banks.

None of these sources disclosed that U.S. Bank had violated requirements that it meet with mortgagees and consider loss-mitigation requirements before foreclosing on FHA-insured mortgages or, indeed, on any mortgages. Nor did any of them allege or suggest that U.S. Bank knowingly filed false claims for FHA insurance coverage based on misrepresentations of regulatory compliance.

The Interagency Review contained no allegations specific to U.S. Bank, let alone allegations relating to the bank's compliance with loss-mitigation requirements or its handling of FHA-insured loans and claims for insurance benefits. The report neither addressed compliance with FHA requirements nor mentioned the FHA mortgage insurance program. Rather, it contained an "industrywide" analysis of "foreclosure processing weaknesses" based on reviews of "a relatively small number of files from among the volumes of foreclosures processed" by 14 major mortgage servicers (including U.S. Bank). *Id.* at 38a–39a & n.1.

The principal "weaknesses" identified in the report related to inadequate "governance processes" to "manage and control operational, compliance, legal, and reputational risk associated with an increasing volume of foreclosures"; "inadequate organization and staffing of foreclosure units"; improper practices with respect to the affidavits and notarizations required in the foreclosure process; documentation errors involving fees charged to borrowers; inadequate management of third-party vendors, including some problems with respect to physical control over original notes and mortgages; and weaknesses in quality control and internal auditing. *Id.* at 44a–46a. Although the report concluded that all of the 14

servicers had enough "weaknesses" to support a conclusion that they had engaged in "unsafe and unsound practices" and violations of some applicable federal and state laws, it did not specify violations committed by any particular bank, and it emphasized that "findings varied across institutions." *Id.* at 42a.

Far from disclosing violations of the loss-mitigation requirements at issue in the complaint, the Interagency Review stated that "review of the foreclosure files showed that servicers were in contact with the delinquent borrowers and had considered loss-mitigation alternatives, including loan modifications." *Id.* at 54a. In other words, the banking regulators' limited file reviews had *not* disclosed the allegations or transactions at issue here. To the contrary, the reviews had *failed* to uncover the evidence on which this action is based.

Similarly, the OCC consent order alleged no violations of FHA loss-mitigation requirements, and it described no transactions involving those requirements. Not surprisingly, given that the consent order arose from the Interagency Review, it found that U.S. Bank had "engaged in unsafe or unsound banking practices" of the type the Review identified. It alleged four specific forms of misconduct: (1) filing affidavits in judicial foreclosure proceedings that were not based on the affiant's personal knowledge or review of relevant books and records; (2) filing affidavits in courts and land records offices that were not properly notarized or signed in a notary's presence; (3) failing to "devote to its foreclosure processes adequate oversight, internal controls, policies, and procedures, compliance risk management, internal audit, third party management, and training"; and (4) failing to oversee outside counsel and third-party providers of foreclosure-related services. *Id.* at 72a–73a.

The consent order nowhere alleges that U.S. Bank failed to meet with borrowers and consider loss mitigation before foreclosing on *any* mortgages, much less that it violated specific regulatory preconditions for foreclosing on *FHA-insured* mortgages. Nor does the consent order allege that U.S. Bank made any false certifications in its FHA insurance claims, or even mention the FHA insurance program or its regulatory requirements—which is not surprising, given that the OCC does not administer the FHA program. Although the consent order contains provisions imposing additional loss-mitigation requirements on U.S. Bank with respect to its entire mortgage portfolio, *id.* at 75a, those new requirements are not linked to any violation alleged in the order, which neither states nor implies that the bank had violated the specific loss-mitigation regulations already applicable to the FHA-insured subset of its mortgage portfolio.

Finally, the news articles on which U.S. Bank relied for the most part described the Interagency Review, the investigation leading up to it, and the consent orders that resulted. The articles added nothing relevant here to the official disclosures about U.S. Bank. They did not suggest that U.S. Bank had violated FHA loss-mitigation requirements or made false claims for FHA insurance benefits. The only mention of the face-to-face meeting requirement of the FHA regulations came in two articles describing a Virginia Supreme Court decision holding that a violation of the regulations—by a *different* lender—could constitute a defense to a foreclosure action.

5. The District Court's Public Disclosure Decision—The district court dismissed ABLE's claims under the public disclosure bar, concluding that they involved "substantially the same" allegations as the media reports, consent order, and Interagency Review relied up-

on by U.S. Bank. The court's decision effectively equated the media reports of "allegations of mortgagees' servicing failures and improper foreclosures," the consent order's finding of "unsound banking practices," and the Interagency Report's generic conclusion that mortgage servicers' "foreclosure processes were under-developed, insufficient, and inadequate" with "allegations that U.S. Bank did not comply with HUD's loss mitigation requirements." Pet. App. 28a–29a.[4] The court also held that ABLE was not an "original source" entitled to bring a claim notwithstanding the supposed public disclosures, because it lacked "inside information" about the violations and its allegations added "nothing" to the public disclosures the court had described. *Id.* at 32a.

6. The Court of Appeals' Decision—ABLE appealed, and the Sixth Circuit affirmed, holding that the public disclosure bar applied because, in the court's view, "the 'allegations or transactions' on which [ABLE] premised its claim were publicly disclosed before it filed this lawsuit." Pet. App. 5a. The court applied the current ver-

[4] The district court also mentioned an Ohio state court's 2010 holding that an issue of fact existed as to whether U.S. Bank had wrongly foreclosed on one specific mortgage in violation of FHA loan servicing requirements. As ABLE had pointed out, however, a state-court case does not qualify as a public disclosure under the current version of the statute, and, in any event, the case involved only a single alleged violation and did not indicate that the bank had knowingly made any false claim for insurance coverage arising out of this or any other violation. Because the Sixth Circuit did not rely on this claimed disclosure, we do not discuss it further.

In addition, the district court mentioned a May 2011 settlement between U.S. Bank and HUD involving violations of FHA loan *underwriting* requirements. Even U.S. Bank had not argued that this wholly unrelated disclosure triggered the bar, and, again, it played no role in the decision on appeal.

sion of the public disclosure bar because "some of the allegedly fraudulent acts occurred before the 2010 amendments, some happened after, and ABLE did not file this lawsuit until 2013," *id.* at 4a, and because the differences between the pre- and post-2010 versions were not material to the outcome. *Id.*

In determining whether ABLE's allegations had been publicly disclosed, the court gave a "broad meaning" to the disclosure bar's same-allegations-or-disclosures trigger. *Id.* at 5a. Based on that reading of the statute, the court focused on whether the public disclosures relied upon by U.S. Bank, characterized broadly, could be said to "encompass[]" ABLE's specific claims. *Id.* at 8a.

The court relied exclusively on the consent order and the Interagency Review even though neither document discusses compliance with FHA regulations or specifically describes any conduct with respect to FHA-insured loans. It found that the consent order disclosed violations of FHA's face-to-face meeting and other loss-mitigation rules because it "required U.S. Bank to implement a wide variety of reforms," including "'*Loss Mitigation* and foreclosure prevention for delinquent loans.'" *Id.* at 5a (quoting consent order, *id.* at 90a, emphasis added by court). And it held that the Interagency Review likewise disclosed such violations because (according to the court) the report "noted that various banks, including U.S. Bank, had failed to take a variety of loss mitigation measures," and it emphasized the "need" for "appropriate" loss-mitigation efforts. *Id.* at 6a.

The two official documents, the court found, disclosed failings that could be characterized as relating to "loss mitigation measures." *Id.* at 6a. That they do not mention FHA loss-mitigation requirements was irrelevant, the court held, because "the broader, publicly disclosed cate-

gory (a variety of mortgages) encompasses ABLE's narrower category (federally insured mortgages)." *Id.* at 8a.

The court painted with a similarly broad brush in holding that ABLE's allegation "that U.S. Bank committed fraud when it made false certifications about whether it had engaged in loss mitigation … also was publicly disclosed." *Id.* at 6a. Stating that a disclosure that put the government on notice of the "possibility" of fraud sufficed, the court held that the consent order provided such notice because it required U.S. Bank to implement a "compliance program" to ensure that it did not submit improper affidavits and declarations in connection with foreclosures. *Id.* According to the court, this requirement "put the government (and everyone else) on notice that U.S. Bank allegedly had filed non-compliant documents," *id.*, which in turn "put the government on notice of the possibility of fraud," *id.* at 7a.

In other words, the court held that one form of improper activity (filing false affidavits in foreclosure proceedings, which is a fraud on a state court but not on the federal government) put the federal government on notice that U.S. Bank might have engaged in a wholly different form of fraudulent activity (submitting federal insurance claims resting on false certification of compliance with FHA loss-mitigation requirements).

Finally, the court of appeals used similar reasoning to hold that ABLE was not an "original source" of its allegations. The court viewed the prior public disclosures of generic "bad foreclosure practices" as full disclosures of ABLE's fraud allegations. *Id.* at 7a. It followed that ABLE's particular allegations of fraud—including allegations of specific regulatory violations and the knowingly false claims for federal insurance benefits that ensued, as well as concrete examples of that misconduct—"did

not provide information that materially adds to the prior publicly disclosed information." *Id.* Thus, for purposes of the original source exception as well as the basic public disclosure bar, the court effectively held that the claims could not proceed because the public disclosures, broadly viewed, "encompasse[d]" the claims. *Id.* at 8a.

ABLE petitioned for rehearing en banc. ABLE argued that the court had applied the bar too rigidly, treating specific fraud claims as being substantially the same as earlier allegations of very different misconduct by characterizing both at the highest level of generality. ABLE pointed out that this approach conflicted with holdings of other circuits, particularly the Seventh and Ninth. *See*, *e.g.*, *Leveski*, 719 F.3d at 831; *Mateski*, 816 F.3d at 578. The Sixth Circuit denied rehearing.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's reading of the public disclosure bar conflicts with decisions of the Seventh and Ninth Circuits.

A. In barring ABLE's *qui tam* suit based on prior public disclosures of wrongdoing entirely distinct from the fraudulent conduct alleged in the action, the Sixth Circuit adopted a sweeping view of the public disclosure bar. Under the Sixth Circuit's reading, if a prior disclosure, characterized at a high level of generality, "encompasses" a *qui tam* plaintiff's allegations, it places the government on notice of the "possibility" of fraud and bars a *qui tam* action. Pet. App. 8a, 9a.

In sharp contrast, the Seventh and Ninth Circuits have repudiated the approach applied here by the Sixth Circuit. In a string of recent cases, the Seventh Circuit has repeatedly held that "viewing FCA claims 'at the highest level of generality … in order to wipe out *qui tam* suits that rest on genuinely new and material infor-

mation is not sound." *Leveski*, 719 F.3d at 831 (quoting *Goldberg*, 680 F.3d at 936); *see, e.g.*, *Cause of Action v. Chi. Transit Auth.*, 815 F.3d 267, 281 (7th Cir. 2016); *United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 707–09 (7th Cir. 2014); *United States ex rel. Heath v. Wis. Bell, Inc.*, 760 F.3d 688, 691 (7th Cir. 2014); *Goldberg*, 680 F.3d at 935–36; *United States ex rel. Baltazar v. Warden*, 635 F.3d 866, 869–70 (7th Cir. 2011). Under the Seventh Circuit's approach, a *qui tam* plaintiff who supplies "vital details" of an FCA claim by alleging that "a particular [defendant] had committed a particular fraud in a particular way" cannot be "thrown out of court under § 3730(e)(4)(A)" based on public disclosures that fail to provide that specific information. *Goldberg*, 680 F.3d at 935.

In its recent decision in *Mateski*, the Ninth Circuit endorsed the Seventh Circuit's approach. 816 F.3d at 577. Citing *Baltazar*, *Goldberg*, and *Leveski*, the court stated that "[w]e find the reasoning of these cases persuasive, and we believe that the Seventh Circuit's approach effectuates the purpose of the public disclosure bar by 'strik[ing] a *balance* between encouraging private persons to root out fraud and stifling parasitic lawsuits.'" 816 F.3d at 577 (quoting *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 413 (2011)). The court therefore expressly "adopt[ed] the Seventh Circuit's approach." *Id.* The court explicitly *rejected* an approach, like the Sixth Circuit's, that focuses solely on whether the government is "on notice" of the generic *possibility* of fraud. *See id.* at 574. To bar a *qui tam* action, the court held, a public disclosure must do more than "provide[] enough information to pursue an investigation into *some* fraud." *Id.* at 579 (internal quotation marks and ellipsis omitted). Rather, the public disclosure

must "have alerted the Government to the specific areas of fraud alleged by [the relator]." *Id.*[5]

B. Compounding the conflict among the circuits over the breadth of the public disclosure bar is the Sixth Circuit's extraordinarily narrow reading of the "original source" exception. Having concluded that the public disclosures here made the same allegations as the *qui tam* action because, read generally, they encompassed any sort of "problematic foreclosures," Pet. App. 7a, the court reasoned that ABLE could not be an original source because its specific allegations did not "add anything" to those disclosures—even though ABLE supplied key details (violations of FHA loss-mitigation rules and the knowingly false insurance claims that followed) critical to a claim of fraud on the FHA and wholly absent from the public disclosures. Pet. App. 7a. Despite the statute's express language stating that a plaintiff who "materially adds to the publicly disclosed allegations" may proceed, 31 U.S.C. § 3730(e)(4)(B), the Sixth Circuit effectively held that a relator's allegations cannot "materially add" to publicly disclosed allegations that suffice to trigger the public disclosure bar—thus reading one part of the original source exception out of the statute.

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[5] The defendant in *Mateski* recently received an extension of time to petition for certiorari. *Raytheon Co. v. United States ex rel. Mateski*, No. 15A1237 (June 13, 2016). The extension application argues that there is a "split among the circuit courts of appeals on the level of generality at which to assess public disclosure of alleged fraud for purposes of the public disclosure bar," and that the Sixth Circuit's decision in this case, "in direct conflict with [*Mateski*]," holds "that a 'broader, publicly disclosed category [of misconduct] … encompasses [any] narrower category." Application for Extension of Time, at 2, *Mateski*, No. 15A1237 (filed June 3, 2016).

This holding, too, runs counter to the Seventh Circuit's reading of the original source provision. That court has held that the dispositive question is whether the relator is the "original source of the specific allegations in her complaint." *Leveski*, 719 F.3d at 836. Thus, even if a prior publication has disclosed the allegations in a complaint on a very general level, if the *qui tam* relator adds specific details that are material to the claim of fraud, the action may proceed. Together with its broad reading of the public disclosure bar, the Sixth Circuit's cramped reading of the original source exception departs dramatically from the Seventh Circuit's recognition that the public disclosure bar must be read consistently with the statutory goal of allowing relators with "genuinely new and material information" to proceed. *Id.* at 831.

II. The disagreement among the circuits is outcome-determinative.

The circuits' disagreement is not semantic. The Seventh and Ninth Circuits' rule results in outcomes irreconcilable with the Sixth Circuit's rule. This case exemplifies the difference: This action would not have been barred in the Seventh or Ninth Circuit because the public disclosures did not reveal the specific fraud alleged in the *qui tam* action.

The two disclosures relied upon by the Sixth Circuit—the Interagency Review and the consent order—alleged, respectively, a variety of unsound banking practices by a large number of industry participants and a smaller number of unsound banking practices by U.S. Bank. But neither identified the practices that form the basis of ABLE's *qui tam* action: U.S. Bank's false claims for insurance coverage. On the contrary, in the one passage that comes closest to touching on the practices at issue here, the Interagency Review specifically found

that, in the files it reviewed, banks had *not* failed to meet with distressed homeowners and consider mitigation. And neither document said a word about whether any bank had violated *any* FHA requirements or misrepresented that it had complied. The consent order, while imposing its own new loss-mitigation requirements on U.S. Bank, did not allege past violations of any legally required loss-mitigation measures—let alone the specific measures required by the FHA. Even assuming, generously, that imposing these new requirements prospectively might imply that U.S. Bank did not always fully consider loss mitigation for all loans, it did not imply that the bank had failed to meet existing requirements under the special FHA regulations to take loss-mitigation steps (including required face-to-face meetings) with respect to FHA loans, nor that it knowingly misrepresented compliance while seeking government payments.

The two documents thus did not satisfy the Seventh and Ninth Circuits' requirement that a disclosure reveal that this "particular [defendant] had committed a particular fraud in a particular way." *Goldberg*, 680 F.3d at 935. And even if, as the Sixth Circuit held, allegations that U.S. Bank had filed improper affidavits in foreclosure proceedings might have put the government on notice of *some* fraud, Pet. App. 6a, it could not "have alerted the Government to the specific areas of fraud alleged by [ABLE]." *Mateski*, 816 F.3d at 579.

Analysis of the Seventh and Ninth Circuit precedents underscores the concreteness of the conflict among the circuits and confirms that the outcome here would have been different in the Seventh or Ninth Circuit. The key precedents from those circuits involved strikingly similar issues about how broadly to construe prior disclosures, yet they reached opposite results from the Sixth Circuit

and reversed district courts that adopted the same reasoning used by the Sixth Circuit here.

Ninth Circuit—In *Mateski*, the *qui tam* relator alleged that Raytheon, a federal contractor tasked with designing and building a key imaging sensor for a satellite system, submitted false claims for payment under its contract. The relator specifically alleged that Raytheon falsified waivers of specifications, forged signoffs certifying work performed, failed to address electrostatic discharge issues, and used cross-contaminated and prohibited materials. 816 F.3d at 568.

Just as U.S. Bank did here, Raytheon invoked the public disclosure bar based on reports that did not make those specific fraud allegations. Instead, the reports included broad allegations of mismanagement, breach of contract, and costly delays in Raytheon's work. The district court in *Mateski* followed exactly the approach taken by the Sixth Circuit in this case, reasoning that "public disclosures that broadly discuss design noncompliance and manufacturing defects cover this claim and others like it." 2013 WL 692798, at *3 (C.D. Cal. Feb. 26, 2013).

Reversing, the Ninth Circuit rejected that approach. The court held that such reports of "general problems involving mismanagement, technical difficulties, and noncompliance with contract and policy directives," 816 F.3d at 579, were insufficient to bar the relator's specific allegations of fraud. The general allegations the Ninth Circuit found insufficient in *Mateski* are directly analogous to the "weaknesses" and "unsound banking practices" disclosed in the Interagency Review and consent order here. The Ninth Circuit held such disclosures inadequate because Mateski's claim, like the claim here, "alleges fraud that is different in kind and degree from the previously disclosed information about [the defendant's]

problems." *Id.* at 567. Even if those different allegations might have led (indeed, did lead) the government to investigate "*some* fraud," they did not disclose the *fraud alleged by the relator*. *Id.* at 579.

Under the Sixth Circuit's standard, by contrast, the disclosures in *Mateski* would have been characterized generically as revealing "bad contract practices"—just as the Sixth Circuit characterized the prior disclosures here as involving "bad foreclosure practices," Pet. App. 7a—and would have barred the *qui tam* action because they "encompassed" its allegations and put the government "on notice" of a "possibility of fraud." *Cf.* Pet. App. 8a–9a.

Seventh Circuit—Four Seventh Circuit decisions likewise starkly illustrate that the conflict with the Sixth Circuit is outcome-determinative.

In *Goldberg*, the relator alleged that a teaching hospital made false Medicare and Medicaid claims by billing for surgeries performed by residents and falsely certifying that the procedures were supervised by a teaching physician (as required for payment). The certifications were false because the teaching physician was not available throughout the procedure: The hospital assigned physicians to supervise multiple procedures simultaneously. 680 F.3d at 935. The hospital contended that the public disclosure bar applied because both the Department of Health and Human Services (HHS) and a GAO report had previously alleged that fraudulent billing for unsupervised surgical procedures was an "industry-wide practice" engaged in by "*all* (or almost all) teaching hospitals." *Id.* at 934, 936. The district court agreed, reasoning—as the Sixth Circuit did here—that the *qui tam* allegations were "encompassed" by public disclosures that it characterized broadly as describing "fail[ure] to follow Medicare Rules and Regulations regarding attending

physician supervision." 748 F. Supp. 2d 917, 927 (N.D. Ill. 2010).

The Seventh Circuit reversed because billing for *improperly supervised* services was a different fraud from billing for *unsupervised* services. "[N]o one who read" the prior disclosures, the court observed "would know or even suspect that [the defendant] was misrepresenting the 'immediate availability' of teaching physicians during concurrently scheduled procedures." *Id.* at 935. Unless the prior disclosures were improperly read "at the highest level of generality—as covering all ways that supervision could be missing or inadequate—the allegations of these relators are not 'substantially similar.'" *Id.* at 936. Such a view of the public disclosure bar, the court held, was "not sound." *Id.*

Goldberg's test, applied here, would foreclose application of the bar. No one reading the Interagency Review or consent order would "know or even suspect" that U.S. Bank misrepresented compliance with the face-to-face meeting and other loss-mitigation requirements specific to FHA loans. Unless those sources are read at the highest level of generality—as covering all ways that foreclosures could be improper—ABLE's allegations are not substantially similar.

Conversely, the Sixth Circuit's approach would require a different outcome in *Goldberg*, as demonstrated by the district court's opinion in that case. Indeed, the public disclosures there described conduct with far greater resemblance to the alleged fraudulent conduct than the disclosures here.

In *Absher*, another Seventh Circuit case, the relators alleged that a nursing home made false Medicare and Medicaid claims by failing to record and disclose noncompliant care that resulted in scabies, pressure ulcers,

and rashes. The defendant invoked the public disclosure bar based on government reports documenting inadequate care at the nursing home and revealing "issues" with scabies, pressure sores, and other skin problems. 764 F.3d at 708. Emphasizing that a public disclosure bars a *qui tam* claim only if it alleges fraud or discloses "facts establishing the essential elements of fraud," *id.*, the Seventh Circuit held that the action could proceed. The court found that, even if the reports disclosed that the defendant had "provided non-compliant" care, they did not disclose its *concealment* of and *misrepresentations* concerning the medical problems, and thus did not reveal knowing submission of false claims. *Id.*

Under *Absher*, even if the generalized allegations of bad foreclosure practices in the Interagency Review and consent decree were relevant to U.S. Bank's violation of FHA-specific regulations, they could not disclose U.S. Bank's *fraud*—the subsequent knowing submission of false claims. By the same token, the *Absher* plaintiffs' claims would have been barred under the Sixth Circuit's holding in this case: The court would certainly have found that disclosures of bad patient care—disclosures much more closely related to the alleged fraud than any disclosures of "bad foreclosure practices" in this case—put the government on notice of the "possibility" of fraudulent claims concerning patient care.

In the Seventh Circuit's *Baltazar* decision, the plaintiff claimed that a chiropractor submitted false Medicare and Medicaid claims by "upcoding" them to misrepresent services performed. The defendant argued that the claim was barred by GAO and HHS reports finding similar fraud in 73% of claims by chiropractors. The Seventh Circuit held that reports attributing misconduct to industry members without revealing which ones committed

which fraud "do not prevent a *qui tam* suit against any particular member of that industry." 635 F.3d at 868.

Under *Baltazar*, the Interagency Review, which did not attribute specific conduct to any particular industry member, would not disclose *anything* as to U.S. Bank. Even if it could be read to allege that *someone* violated FHA-specific loss-mitigation rules—and under a fair reading, it cannot—the report did not allege that *U.S. Bank* committed any such violations. ABLE, like the *Baltazar* relator, "supplied vital facts that were not in the public domain," 635 F.3d at 869, when it alleged such violations by U.S. Bank.

Finally, in *Leveski*, the relator alleged that a for-profit college submitted false financial aid claims to the Department of Education by paying recruiters and financial aid officers commissions for signing up students, in violation of Department regulations, and disguising the commissions as bonuses legitimately based on other criteria. The school argued that the allegation was disclosed by a prior lawsuit alleging that it maintained a pay system including explicit commissions for recruiting students. Although both the public disclosures and the *qui tam* allegations could be characterized generally as involving fraud regarding incentive-based compensation, the Seventh Circuit held that the relator's claims were not barred because "the details" of the violations were "quite different." 719 F.3d at 832. The new claims involved allegations of concealment that were "wholly absent from" the earlier case. *Id.* at 830. Further, the court held that even if the public disclosures could be read to trigger the fraud, the specifics supplied by the relator would render her an "original source." *Id.* at 836.

Under *Leveski*, the allegations of wrongdoing against U.S. Bank in the consent order would not bar the quite

different allegations of FHA loss-mitigation rule violations and fraudulent FHA insurance claims, which are "wholly absent" from that order. Conversely, the Sixth Circuit's standard would dictate a different outcome in *Leveski*, as prior claims of fraud regarding "bad employee compensation" would have encompassed *Leveski*'s more specific allegations and meant that her specific details "added nothing."

III. The issue is important and requires resolution by this Court.

In the FCA, "Congress wrote expansively, meaning 'to reach all types of fraud, without qualification, that might result in financial loss to the Government." *Cook Cty.*, 538 U.S. at 129. The FCA is "the primary vehicle" for "recouping losses suffered through fraud" against the government. H.R. Rep. No. 99-660, at 18 (1986). It "has been used more than any other [statute] in defending the Federal treasury against unscrupulous contractors and grantees." S. Rep. No. 99-345, at 4 (1986). In fiscal year 2015 alone, the government recovered $3.5 billion from FCA cases, $2.8 billion of which came in cases filed as *qui tam* actions, as most FCA cases are.[6]

Given the critical importance of the FCA and the centrality of its *qui tam* provisions to its effectiveness, this Court has recognized the need to resolve disagreements over the Act's construction and application, deciding ten significant FCA cases since 2000,[7] and granting review of

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[6] Press Release, U.S. Dep't of Justice, Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015 (Dec. 3, 2015), https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015.

[7] *See Universal Health*, 136 S. Ct. 1989; *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015);
(*Footnote continued*)

another for this Term.[8] The attention this Court has given the statute reflects both the FCA's importance and the Court's acknowledgment that its "*qui tam* provisions present many interpretive challenges." *Kellogg Brown & Root*, 135 S. Ct. at 1979.

The interpretive challenge at issue here is particularly significant because it involves a gateway issue determining whether any FCA claim—even one that, as the district court found, properly pleads substantial allegations of fraud—may proceed at all. The public disclosure bar is now a much heavier impediment to FCA actions in the states that make up the Sixth Circuit than in the Seventh and Ninth Circuits. Because the Act provides jurisdiction over *qui tam* actions only in districts where a defendant "can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred," 31 U.S.C. § 3732(b), the obstacles to bringing suit—or, viewed from another perspective, the protections for defendants—imposed by the public disclosure bar will depend on where defendants operate or commit fraud.

That lack of uniformity is troubling because it involves a provision critical to effectuating Congress's intended balance between encouraging beneficial efforts to assist in recovering federal monies and discouraging "parasitic" litigation that does not advance the FCA's goals. *See Schindler Elevator*, 563 U.S. at 413; *Graham*

Schindler Elevator, 563 U.S. 401; *Graham Cty.*, 559 U.S. 280; *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009); *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008); *Rockwell*, 549 U.S. 457; *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005); *Cook Cty.*, 538 U.S. 119; *Stevens*, 529 U.S. 765.

[8] *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, No. 15-513 (cert. granted May 31, 2016).

Cty., 559 U.S. at 295. The importance, and difficulty, of achieving that balance is reflected in the many occasions when this Court has been forced to address interpretive issues regarding the public disclosure bar that divided the lower courts.[9] Plaintiffs and defendants alike require guidance and certainty on the critical question presented by this petition.

Reviewing this case to resolve the lower courts' disagreement is especially appropriate because the rule adopted by the Sixth Circuit led it to a grievously erroneous decision here: The court held that ABLE's lawsuit was barred by disclosures that do not even hint at the fraud alleged in the complaint. No one reading the Interagency Review or the OCC consent order would have any reason to suspect that U.S. Bank had committed fraud against the FHA program by falsely certifying compliance with loss-mitigation requirements. The disclosures in those documents never touch on the loss-mitigation rules, describe no conduct that would violate them, and say nothing at all about the FHA program. And the court compounded its error by finding that ABLE's specific allegations—without which a claim of fraud against the FHA would not have been possible—did not even add anything material to the public disclosures. This case is a classic instance of a bad reading of the law leading to an indefensible result.

That result substantially distorts the balance Congress attempted to draw. The "touchstone" of the bar's "generally broad scope" has always been "public disclosure." *Schindler Elevator*, 563 U.S. at 408, 410. The Sixth

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[9] *See Schindler Elevator*, 563 U.S. 401; *Graham Cty.*, 559 U.S. 280; *Rockwell*, 549 U.S. 457; *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Marcus*, 317 US. 537.

Circuit's construction of the statute loses sight of that touchstone by allowing generic allegations of wrongdoing to substitute for the specific disclosures required by the statute, and barring actions involving allegations and transactions that have never been publicly disclosed in any meaningful sense. That reading of the statute prevents it from accomplishing, in the end, what it is supposed to do: "allow relators who provide the Government with genuinely new and material information of fraud to move forward with their *qui tam* suits." *Mateski*, 816 F.3d at 579; *accord Leveski*, 719 F.3d at 831.

Restoring the balance is a job for this Court. Congress has spoken clearly by expressly limiting the bar to actions based on allegations "substantially the same" as those already disclosed and providing that an action that "materially adds" to publicly disclosed information may proceed. 31 U.S.C. § 3730(e)(4). Yet the Sixth Circuit read the statute to bar an action based on *substantially different* disclosures, even when the relator's allegations reveal fraud with specificity not remotely found in those disclosures. That misreading of the law—to which the Sixth Circuit adhered even when informed that it has been explicitly rejected by other circuits—demands review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 16a0064p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA ex rel. ADVOCATES FOR BASIC LEGAL EQUALITY, INC.,

Relator-Appellant,

v.

U.S. BANK, N.A.,

Defendant-Appellee.

No. 15-3654

Appeal from the United States District Court
for the Northern District of Ohio at Toledo.
No. 3:13-cv-00704—Jack Zouhary, District Judge.

Argued: March 9, 2016

Decided and Filed: March 14, 2016

Before: MERRITT, GIBBONS, and SUTTON, Circuit Judges.

[Names of counsel omitted]

OPINION

SUTTON, Circuit Judge. Suing on behalf of the United States, Advocates for Basic Legal Equality ("ABLE" for short) contends that U.S. Bank violated the False Claims Act when it requested federally backed insurance payments after several borrowers defaulted on their loans. To state a *qui tam* claim, a plaintiff must show that it uncovered the claim—that the factual basis of the claim was not publicly disclosed before the plaintiff sued. Otherwise, only the government can vindicate the claim in a lawsuit in its own name. Because ABLE did not satisfy this requirement, we affirm the district court's decision to reject this claim as a matter of law.

U.S. Bank participates in a mortgage insurance program, backed by the Federal Housing Administration, that encourages banks to lend money to high-risk borrowers. The insurance covers losses caused by a borrower who defaults on a loan. To participate in the program, U.S. Bank had to certify that it would meet certain requirements, and each time it requested an insurance payment U.S. Bank had to certify that it had followed the requirements. *See* 24 C.F.R. § 203.500. The key requirement for our purposes is that U.S. Bank would engage in "loss mitigation" measures, such as attempting to arrange a face-to-face meeting with the defaulting borrower, before foreclosing. *See id.* §§ 203.604–.606.

According to ABLE, an Ohio non-profit organization that advances the interests of low-income individuals, U.S. Bank did not satisfy the loss mitigation requirement. It contends that U.S. Bank promised that it would engage in loss mitigation, failed to do so, then lied about

the failure. ABLE points to three foreclosures where this happened and claims that they demonstrate a pattern—indeed a widespread pattern, one that purportedly shows that U.S. Bank wrongfully foreclosed on 22,000 homes and wrongfully collected $2.3 billion in federal insurance benefits. ABLE filed this lawsuit on behalf of itself and the United States claiming that U.S. Bank violated the False Claims Act. *See* 31 U.S.C. § 3729. The Department of Justice declined to intervene. *See id.* § 3730(b)(2), (4).

In handling this case, the district court issued two relevant decisions on the pleadings. It decided that two of ABLE's claims stated a cognizable violation of the False Claims Act. *United States v. U.S. Bank, N.A.*, No. 3:13 CV 704, 2015 WL 2238660, at *4–7 (N.D. Ohio May 12, 2015). And it decided that ABLE premised its case on information that had already been publicly disclosed, precluding it from bringing the lawsuit as a *qui tam* plaintiff. *Id.* at *8–11.

On appeal, the parties join debate over each holding. Because we agree with the district court's second holding—the public disclosure holding—we need not consider its first. That may be for the best, as the Supreme Court recently granted certiorari in a similar case under the False Claims Act, the resolution of which may affect our precedents governing ABLE's ability to state a claim. *See Universal Health Servs., Inc. v. United States*, 136 S. Ct. 582 (2015) (mem.).

A claimant may establish eligibility to bring a *qui tam* lawsuit on one of two grounds: (1) that the factual premise of its claim was not publicly disclosed before it filed the lawsuit, or (2) even if it was, that the claimant was the original source of the information. 31 U.S.C. § 3730(e)(4). Here's how the statute defines a prior public

disclosure: "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed … (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media." *Id.* § 3730(e)(4)(A). Here's how the statute in relevant part defines someone who is an original source: one "who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." *Id.* § 3730(e)(4)(B).

These formulations of "public disclosure" and "original source," it's worth adding, reflect current law. The Patient Protection and Affordable Care Act became law on March 23, 2010. In addition to its better-known provisions, the Act amended the False Claims Act. *Compare* Pub. L. No. 111-148, § 10104, 124 Stat. 119, 901–02 (2010), *with* Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157 (1986). The 2010 amendments made two pertinent changes. They prevented federal courts from considering state court actions when determining whether there has been a public disclosure, and they introduced "materially adds" to the original source definition.

The new amendments, it is true, are not retroactive. See *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010). In this instance, some of the allegedly fraudulent acts occurred before the 2010 amendments, some happened after, and ABLE did not file this lawsuit until 2013. ABLE urges us to apply the new, more lenient requirements for filing a complaint under the False Claims Act to all of its claims. Because ABLE's claims fail even under the new requirements, we see no problem in doing so.

This leaves us with two pertinent questions: Were U.S. Bank's alleged false claims publicly disclosed before ABLE filed this lawsuit? And, if so, was ABLE an original source? Because the answers to these questions are yes and no (respectively), we affirm.

Public disclosure. "[T]he public disclosure bar provides a broa[d] sweep," the Supreme Court has told us, in part because "[t]he phrase 'allegations or transactions' … [has] a broad meaning." *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 408 (2011) (quotation omitted). Unfortunately for ABLE, the "allegations or transactions" on which it premises this claim were publicly disclosed before it filed this lawsuit. ABLE's case rests on two factual allegations: that U.S. Bank (1) failed to take required loss mitigation measures before foreclosing and (2) committed fraud by falsely certifying, on various forms, that it would and did engage in those loss mitigation measures.

At least two sources publicly disclosed the first allegation. One was a 2011 consent order between U.S. Bank and the federal government, which qualifies as "a Federal criminal, civil, or administrative hearing in which the Government … [was] a party." 31 U.S.C. §3730(e)(4)(A)(i). That consent order required U.S. Bank to implement a wide variety of reforms, including measures "to ensure [that] reasonable and good faith efforts, consistent with applicable Legal Requirements, *are engaged in Loss Mitigation* and foreclosure prevention for delinquent loans." *In re U.S. Bank Nat'l Ass'n*, AA-EC-11-18, Consent Order (OCC Apr. 13, 2011), at 19 (emphasis added), *available at* http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47j.pdf; *see also id.* at 5–9, 16, 18–22. The other was a 2011 foreclosure practices review from three federal agencies (also a

public disclosure, *see* 31 U.S.C. §3730(e)(4)(A)(ii)), which noted that various banks, including U.S. Bank, had failed to take a variety of loss mitigation measures. The report emphasized the need to require banks to make "reasonable and good faith efforts, consistent with applicable law and contracts, to engage in loss mitigation and foreclosure prevention for delinquent loans where appropriate." R. 25-3 at 17. It also promised to push industry-wide reforms to "ensure borrowers are offered appropriate loss-mitigation options." *Id.* at 19. The consent judgment and report amply disclose the allegation that U.S. Bank failed to engage in appropriate loss mitigation measures—the first premise of ABLE's claim.

The second premise—that U.S. Bank committed fraud when it made false certifications about whether it had engaged in loss mitigation—also was publicly disclosed. If the disclosure "puts the government on notice of the 'possibility of fraud' surrounding the … transaction, the prior disclosure is sufficient." *U.S. ex rel. Gilligan v. Medtronic, Inc.*, 403 F.3d 386, 390–91 (6th Cir. 2005) (quotation omitted). The consent order did just that. It required U.S. Bank to implement a compliance program, including "processes to review and approve standardized affidavits and declarations for each jurisdiction … to ensure compliance with applicable laws, rules and court procedures." *In re U.S. Bank*, *supra*, at 7. This language put the government (and everyone else) on notice that U.S. Bank allegedly had filed non-compliant documents—documents that could supply the foundation for a fraud claim. A 2011 news article discussing the consent order explained that U.S. Bank "engaged in a pattern of misconduct and negligence." R. 25-2 at 36 (quotation omitted). And the publicly available 2011 foreclosure practices review found that a majority of the banks reviewed "had inadequate affidavit … processes

that did not ensure proper attestation (or verification) of the underlying documents." R. 25-3 at 11. Taken together, all of this put the government on notice of the possibility of fraud. *See Gilligan*, 403 F.3d at 390–91.

Original source. To be an original source, the claimant must have knowledge that "materially adds to" the public disclosure. 31 U.S.C. § 3730(e)(4)(B). Materiality in this setting requires the claimant to show it had information "[o]f such a nature that knowledge of the item would affect a person's decision-making," is "significant," or is "essential." Black's Law Dictionary 1124 (10th ed. 2014). ABLE points to three incidents that purportedly show that U.S. Bank failed to engage in appropriate loss mitigation measures. But the incidents do not materially add to the thousands of prior problematic foreclosures already disclosed. See *In re U.S. Bank, supra,* at 2. There is nothing significant or new about the nature of these foreclosures other than proof that there were others like them. That doesn't add anything, materially or otherwise. How, moreover, could we say that these *three* incidents affected the government's decision-making? It *already* tried to remedy U.S. Bank's bad foreclosure practices in its 2011 consent decree. ABLE notably offers no proof to the contrary. Because ABLE did not provide information that materially adds to the prior publicly disclosed information, it is not an original source.

ABLE offers two responses, both unconvincing. It first says that there was no prior public disclosure because neither the consent order nor the foreclosure practices review dealt with loss mitigation related to the types of loans here: federally insured mortgages. It's true that the consent order and the report do not directly mention federally insured mortgages. But that is be-

cause they do not single out *any* type of mortgage. Both documents, as the foreclosure practices review attests, cover a swath of "loss mitigation and foreclosure prevention" procedures that U.S. Bank failed to carry out in a manner "consistent with applicable law and contracts." R. 25-3 at 17. That is what ABLE alleges in this case: U.S. Bank did not engage in loss mitigation as required by law. Under the "wide-reaching public disclosure bar," *Kirk*, 563 U.S. at 408, we have no problem finding that the broader, publicly disclosed category (a variety of mortgages) encompasses ABLE's narrower category (federally insured mortgages). Otherwise, one could always—or at least nearly always—evade the public disclosure requirement by focusing the allegations in a second action on sub-classes of potential claims covered by the initial action. That's not how it works. As we have explained, "additional details are insufficient to avoid our broad construction of the public disclosure bar, which precludes individuals who base any part of their allegations on publicly disclosed information from bringing a later qui tam action." *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 975 (6th Cir. 2005); *see Dingle v. Bioport Corp.*, 388 F.3d 209, 215 (6th Cir. 2004) (explaining that a *qui tam* suit would be barred when the public disclosures "include[d] multiple general allegations of fraud by public sources with respect to [a] car" and the qui tam suit involved "a more specific claim of fraud … with respect to the engine of the car"); *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 646 (6th Cir. 2003) (holding that there was prior public disclosure even when the *qui tam* suit "contain[ed] more detailed allegations about the fraud[]").

The same problem exists with respect to ABLE's claim that the consent decree and foreclosure practices review dealt with loss mitigation measures in general,

not with specific types of loss mitigation measures, such as face-to-face meetings. A *qui tam* plaintiff "is not allowed to proceed independently if [it] merely 'adds details' to what is already known in outline." *U.S. ex rel. Bogina v. Medline Indus., Inc.*, 809 F.3d 365, 370 (7th Cir. 2016) (quotation omitted). The absence of face-to-face meetings is merely one type of failure— "add[ed] details"—when it comes to loss mitigation measures.

ABLE adds that no public disclosures of this type of fraud—lying to a government agency about failing to follow loss mitigation requirements—were ever made. But that doesn't matter. "To qualify as a public disclosure of fraud," we have explained, "the disclosure is not required to use the word 'fraud' or provide a specific allegation of fraud." *U.S. ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 512 (6th Cir. 2009). "[T]he prior disclosure is sufficient" if it "puts the government on notice of the '*possibility* of fraud' surrounding the … transaction." *Gilligan*, 403 F.3d at 390–91 (emphasis added) (quotation omitted). These disclosures did just that. They indicated that U.S. Bank failed to "approve standardized affidavits and declarations" that were in "compliance with applicable laws, rules and court procedures." *In re U.S. Bank*, *supra*, at 7. They also charged U.S. Bank with "engag[ing] in a pattern of misconduct and negligence." R. 25-2 at 36 (quotation omitted). Even though this did not "constitute[] an explicit, formal allegation of either fraud or the essential elements of fraud, it certainly presented enough facts to create an inference of wrongdoing." *U.S. ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 332 (6th Cir. 1998). That's all that's required. *See Poteet*, 552 F.3d at 512–13.

All of this shows that the district court correctly dismissed the lawsuit. Whether the court should have dis-

missed the case under Civil Rule 12(b)(1) for lack of subject matter jurisdiction or Civil Rule 12(b)(6) for failure to state a claim deserves a final word (or two). Before the 2010 amendments, the public disclosure bar stated that "[n]o court shall have jurisdiction over an action … based upon … public disclosure," 31 U.S.C. § 3730(e)(4)(A) (2006), prompting the Supreme Court to treat the bar as jurisdictional, see *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 460 (2007). But Congress changed this language in the 2010 amendments. The provision now says that, if there has been a prior public disclosure, "[t]he court shall dismiss [the] action or claim." 31 U.S.C. § 3730(e)(4)(A). That means the requirement no longer goes to our power—our subject matter jurisdiction—to hear a case. Unless Congress has "clearly state[d]" that a rule is jurisdictional, the Supreme Court has said, "courts should treat the restriction as nonjurisdictional in character." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (quotations omitted); *see Herr v. U.S. Forest Serv.*, 803 F.3d 809, 813–14 (6th Cir. 2015). In this instance Congress removed the jurisdictional language, and the different language leads to a different meaning. The public disclosure bar is no longer jurisdictional, as every other circuit to address the question has concluded. *See U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 299–300 (3d Cir. 2016); *U.S. ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 916–17 (4th Cir. 2013); *U.S. ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 809–11 (11th Cir. 2015); cf. *U.S. ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 705–06 (7th Cir. 2014); *U.S. ex rel. Kraxberger v. Kan. City Power & Light Co.*, 756 F.3d 1075, 1082 (8th Cir. 2014).

For these reasons, we affirm the dismissal of this case, albeit under Civil Rule 12(b)(6), not Civil Rule 12(b)(1).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America, et al.,

Plaintiffs,

-vs-

U.S. Bank, N.A.,

Defendant.

Case No. 3:13 CV 704

MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS

JUDGE JACK ZOUHARY

Advocates for Basic Legal Equality, Inc. ("ABLE" or "Relator"), on behalf of itself and the United States of America, sues U.S. Bank, N.A, alleging violations of the False Claims Act, 31 U.S.C. § 3729 ("FCA") (Doc. 1). ABLE claims U.S. Bank falsely affirmed compliance with the regulatory requirements of certain government-insured home mortgage programs and that, when U.S. Bank foreclosed on the mortgaged properties, U.S. Bank wrongfully collected insurance payments and the government lost millions of dollars. U.S. Bank moves to dismiss the Complaint pursuant to Federal Civil Rules 12(b)(1) and 12(b)(6) on the grounds that (1) the Complaint fails to allege an actionable false statement or claim and fails to allege U.S. Bank acted knowingly, and (2) Relator is jurisdictionally barred from bringing suit under the FCA public disclosure bar, 31 U.S.C. § 3730(e)(4)(a) (Docs. 25, 31 & 36). ABLE opposes (Docs. 30 & 38). United States of America declined to intervene but filed Statements of Interest (Docs. 29, 34 & 43). On March 5, 2015, this Court held a record hearing on the

Motion (Docs. 44 & 46). This Court will address U.S. Bank's arguments in the order presented.

BACKGROUND

The FHA Mortgage Insurance Program

Pursuant to the National Housing Act of 1934, the Federal Housing Administration ("FHA"), a constituent office of the U.S. Department of Housing and Urban Development ("HUD"), offers single-family mortgage insurance programs to incentivize private mortgage lenders to provide mortgage loans to borrowers who might not otherwise qualify for mortgages in the private market (Doc. 1 at ¶ 28). In the event of a mortgagor default and foreclosure, the mortgagee may apply to the FHA for insurance benefits to make it whole (*id.* at ¶ 2). To be eligible for the FHA-insured mortgage program, a mortgagee must agree to comply with HUD's service regulations (*id.* at ¶ 31). Before a mortgagee can foreclose on an FHA-insured loan, and before it can apply for insurance benefits, the mortgagee must take "Loss Mitigation Measures" to determine whether the mortgagor can cure its deficiencies and avoid foreclosure (*id.* at ¶¶ 8, 33; 24 C.F.R. §§ 203.361, 203.500, 203.606). The applicable Loss Mitigation Measures are specific to the mortgagor's circumstances. In certain situations, before three full monthly mortgage installments are unpaid, the mortgagee may be required to have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting. 24 C.F.R. § 203.604. And before four full monthly installments are unpaid, the mortgagee must evaluate specific loss mitigation options, including deeds in lieu of foreclosure, re-casting of mortgages, pre-foreclosure sales, and special forbearances, and take "appropriate" loss mitigation actions (*see* Doc. 1 at ¶ 38; *see also* 24 C.F.R. §§ 203.501, 203.605).

U.S. Bank's Certifications to HUD

In 1998, Star Bank, a predecessor to U.S. Bank, applied to HUD for approval as an FHA lender (Doc. 1 at ¶ 55; Doc. 1-2). In that application, Star Bank agreed that it would "comply with the provisions of the HUD regulations" (Doc. 1-2 at 3). Thereafter, U.S. Bank certified to HUD on an annual basis its continued eligibility to participate in the FHA insurance program (Doc. 1 at ¶¶ 6, 59–64; *see* Doc. 1-1). For example, on March 30, 2010 and January 13, 2011, Sharon Bond, a U.S. Bank Vice President, submitted an annual certification to HUD of U.S. Bank's compliance with all HUD regulations and handbooks:

> I certify that I know, or am in the position to know, whether the operations of the above-named lender conform to HUD-FHA regulations, handbooks, Mortgagee Letters, Title I Letters, and policies; and that I am authorized to execute this report on behalf of the lender.
>
> I certify that the lender complied with and agrees to continue to comply with HUD-FHA regulations, handbooks, Mortgagee Letters, Title I letters, policies, and terms of any agreements entered into with the Department.
>
> I certify that to the best of my knowledge, the above-named lender conforms to all HUD-FHA regulations necessary to maintain its HUD-FHA approval, and that the above-named lender is fully-responsible for all actions of its principals, owners, officers, directors, managers, supervisors, loan processors, loan underwriters, loan originators and all other employees conducting FHA business for the above-named lender in all of its

> offices where it performs any functions of an FHA-approved lender.
>
> * * * * *
>
> Each of my certifications is true and accurate to the best of my knowledge and belief. I understand that if I knowingly have made any false, fictitious, or fraudulent statement(s), representations, or certification on this form, I may be subject to administrative, civil and/or criminal penalties; including debarment, fines and imprisonment under applicable federal law.

(Doc. 1 at ¶¶ 56–64; Doc. 1-1). U.S. Bank filed the same annual certification in 2012 and 2013 (Doc. 1 at ¶ 64).

Each time U.S. Bank requested FHA insurance benefits following a foreclosure, U.S. Bank submitted Form 27011 to HUD (*id.* at ¶ 65). In each submission, U.S. Bank certified under the threat of False Claims Act liability:

> **Certification:** … The undersigned further agrees: (1) that in the event the Secretary finds it necessary to reconvey the above described property to the mortgagee, because of the mortgagee's noncompliance with HUD regulations, the mortgagee shall reimburse the Secretary … and (2) that if a mortgagee does not comply with HUD regulations, the mortgagee remains responsible for the property, and any loss or damage thereto, notwithstanding the filing of the deed to the Secretary for record, and such responsibility is retained by the mortgagee until HUD regulations have been fully complied with (203.379).
>
> **Warning:** HUD will prosecute false claims and statements. Conviction may result in criminal

and/or civil penalties. (18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802)

By signing below, the undersigned certifies that the statements and information contained hereon (face and reverse) are true and correct.

(emphasis in original) (id. at ¶ 66; Doc. 25-1).

U.S. Bank's Allegedly Deficient Loss Mitigation Practices

Relator alleges it consulted with "many people" whose mortgage loans were foreclosed by U.S. Bank (*id.* at ¶ 13). Citing its "unique contacts, experiences, research and investigation," Relator alleges U.S. Bank "repeatedly" initiated foreclosure proceedings on FHA-insured mortgage loans without complying with HUD's servicing and loss mitigation regulations (*id.* at ¶¶ 16, 68). Relator recounts three instances in 2008–09 when U.S. Bank did not meet face-to-face with an Ohio borrower or properly evaluate loss mitigation alternatives before foreclosing on the property (*id.* at ¶¶ 14, 18, 67, 74–101 (Forsythe Street Property Example), 102–29 (Gregory Avenue Property Example), 130–56 (Brooks Street Property Example)). Nevertheless, U.S. Bank filed a Form 27011 for each of the foreclosures and was paid on its FHA insurance claim (*id.* at ¶¶ 80–82, 108–10, 135–37).

Relator alleges that "the uniform consistency of U.S. Bank's disregard of the FHA regulations in these instances is representative of its disregard of the regulations" with respect to over 22,000 foreclosures handled by U.S. Bank nationwide (*id.* at ¶ 14). Based on those three examples, Relator concludes U.S. Bank knowingly presented claims to HUD for, and received, over $2.3 billion in FHA mortgage insurance benefits to which it was

not entitled because of its noncompliance with HUD's regulations (*id.* at ¶ 21). Relator alleges that by foreclosing on those loans in knowing violation of HUD servicing and loss mitigation regulations, U.S. Bank made false statements to HUD in its annual certifications and in its claims for FHA insurance benefits (*id.* at ¶ 12).

Procedural History

As required by Section 3730(b)(2) of the FCA, in April 2013, Relator filed the Complaint under seal (Doc. 1). The statute provides at least sixty days for the Department of Justice ("DOJ") to review a relator's claims. If the DOJ decides to intervene in the action, it assumes the role of lead prosecutor. 31 U.S.C. § 3730(b)(4)(A), (c)(1). Alternatively, the DOJ may decline to join the action, leaving the *qui tam* plaintiff as the sole prosecutor. 31 U.S.C. § 3730(b)(4)(B). During this time, the proposed defendant is not notified of the claim. 31 U.S.C. § 3730(b)(2), (3). In August 2014, following its investigation of Relator's claims, the DOJ declined to intervene and ABLE then served the unsealed Complaint on U.S. Bank (Docs. 12–14).

STANDARD OF REVIEW

Under Federal Civil Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." While Rule 8 departs from the hyper-technical, code-pleading requirements, "it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Therefore, under Rule 12(b)(6), the court tests the legal sufficiency of the complaint, which requires accepting all well-pleaded factual allegations as true and construing the complaint in the light most favorable to plaintiff. *See*

Dubay v. Wells, 506 F.3d 422, 426 (6th Cir. 2007). Although a complaint need not contain "detailed factual allegations," it does require more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint survives a motion to dismiss if it contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. And "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).

A motion to dismiss under Federal Civil Rule 12(b)(1) may be treated as either a facial or factual attack on the court's subject matter jurisdiction. *Gentek Bldg. Prods., Inc. v. Sherwin–Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). A facial attack questions the sufficiency of the pleading, and the court takes the allegations in the complaint as true and construes them in the light most favorable to plaintiff. *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). When a Rule 12(b)(1) motion is a factual attack, as is the case here, "no presumptive truthfulness applies to the allegations" and "the district court must weigh the conflicting evidence to arrive at the factual predicate that subject matter does or does not exist." *United States ex rel. Whipple v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 782 F.3d 260, 265 (6th Cir. 2015). In ruling on a factual attack, the court may consider evidence outside the pleadings. *Ohio Nat'l Life Ins. Co.*, 922 F.2d at 325. In evaluating the applicability of the FCA public disclosure bar, this Court considered the Complaint (Doc. 1), public documents cited

by the parties in its filings (Docs. 25, 30–31, 36 & 38), and a publicly available news article (cited *infra* at 15).

ANALYSIS

Relator brings three FCA claims: U.S. Bank *caused* false claims related to the submission of individual-loan certifications, in violation of 31 U.S.C. § 3729(a)(1)(A) (Count I); U.S. Bank *used* false statements related to the submission of individual-loan and annual certifications, in violation of 31 U.S.C. § 3729(a)(1)(B) (Count II); and U.S. Bank *kept* the funds it received as a result of its false statements, in violation of 31 U.S.C. § 3729(a)(1)(G) (Count III).

U.S. Bank moves to dismiss on three grounds: (1) U.S. Bank has not expressly certified its compliance with loss mitigation requirements and thus has not made any false claims; (2) U.S. Bank has not impliedly certified its compliance with any regulation which is a condition of receiving payment on an FHA insurance claim; and (3) the Complaint fails to allege U.S. Bank acted knowingly (Doc. 25). As explained below, reading the Complaint in the light most favorable to Relator, Relator has sufficiently pled that U.S. Bank knowingly and falsely certified compliance with HUD and FHA regulations upon which payment was conditioned, and that U.S. Bank knowingly and fraudulently induced FHA to pay insurance benefits on claims it otherwise would not have paid (Counts I and II). However, Relator has failed to plead a reverse false claim theory (Count III).

U.S. Bank's Alleged False Claims Act Violations (Counts I and II)

The "chief purpose" of the False Claims Act is to "provide for restitution to the government of money taken from it by fraud." *United States v. Hess*, 317 U.S. 537,

551 (1943). The FCA creates civil liability for any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the Government, or "knowingly makes, uses, or causes to be made or used, a false record or statement" to get a false or fraudulent claim paid or approved by the Government. 31 U.S.C. § 3729(a)(1)(A), (B). The FCA provides for treble damages and "a civil penalty of not less than $5,000 and not more than $10,000" for each false claim. 31 U.S.C. § 3729(a)(1).

A "claim" is "any request or demand, whether under a contract or otherwise, for money or property … that is presented to an officer, employee, or agent … or is made to a contractor, grantee or other recipient, if the money or property is to be spent or used on the Government's behalf … and if the United States Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded[.]" 31 U.S.C. § 3729(b)(2)(A). "In addition to obvious cases of fraud, as where a provider bills for procedures or services that were not rendered or not necessary, a claim may be false under a 'false certification' theory, as 'when the claimant knowingly falsely certifies that it has complied with a statute or regulation the compliance with which is a condition for Government payment.'" *United States ex rel. Hobbs v. MedQuest Assocs., Inc.*, 711 F.3d 707, 714 (6th Cir. 2013) (quoting *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 305 (3d Cir. 2011)). A condition of payment is a circumstance where "the government would not have paid the claim had it known the provider was not in compliance" with the regulation. A regulation may in some cases be both a "condition of participation" in the government program and a "condition of payment" from the government program. *Id.*

False certifications may be express or implied. In an express false certification case, "the defendant is alleged to have signed or otherwise certified to compliance with some law or regulation on the face of the claim submitted." *Id.* In an implied false certification case, "liability can attach if the claimant violates its continuing duty to comply with the regulations on which payment is conditioned." *Chesbrough v. VPA*, P.C., 655 F.3d 461, 468 (6th Cir. 2011) (quoting *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002)).

Express Certification. Relator cannot point to any express certification made by U.S. Bank that it was in compliance with HUD servicing or loss mitigation requirements. U.S. Bank's general certification of compliance with all applicable HUD regulations in its initial application, annual certifications, and on the Form 27011, are not specific enough to support an express false certification claim under the FCA. *Hobbs*, 711 F.3d at 714 (certification that defendant would "abide by the Medicare laws, regulations and program instructions" was insufficient).

Implied Certification. Relator has adequately alleged that by submitting its annual certification and HUD Form 27011 to claim FHA insurance benefits, U.S. Bank attested by implication to its compliance with HUD loss mitigation requirements which are a condition of payment on its FHA insurance claim.

U.S. Bank offers two reasons why the Complaint fails to state a claim under an implied false certification theory. First, U.S. Bank argues that the regulations with which it allegedly falsely certified compliance are conditions of participation in the FHA insurance program and not conditions of receiving payment on FHA insurance

claims (Doc. 25 at 14–16). The United States in its Statement of Interest (Doc. 34 at 3) explains that compliance with HUD's servicing regulations, including the loss mitigation rules, is "both a condition of payment and a condition of participation." *See Hobbs*, 711 F.3d at 714. Servicers have a statutory obligation to engage in loss mitigation before claiming FHA insurance benefits. *See* 12 U.S.C. § 1715u(a) ("upon default or imminent default … of any mortgage insured under this subchapter, mortgagees shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure"). A failure to engage in loss mitigation directly bears on whether HUD will have to pay an insurance claim on a foreclosed loan and, as explained by the United States in its Supplemental Statement of Interest, "goes to the heart of the government's bargain with a mortgagee to pay claims only where the loan was legitimately originated and serviced" (Doc. 43 at 8). Loss mitigation protects the insurance fund by reducing the likelihood of foreclosure and of claims for insurance benefits. 24 C.F.R. § 203.605(a); *see also* 70 Fed. Reg. 21572, 21575 (April 26, 2005) (HUD explaining that mortgagees' failure to perform required loss mitigation results in "greater losses to HUD" and "harm the insurance fund").

U.S. Bank argues it "did not impliedly make a false certification merely by requesting payment because the regulations governing submission and payment of claims do not make compliance a 'prerequisite to the government's payment.'" (Doc. 31 at 6) (quoting *Hobbs*, 711 F.3d at 714). U.S. Bank's reliance on *Hobbs* is misplaced. In *Hobbs*, the Sixth Circuit refused to find a condition of payment in "isolated phrases" scattered across several sections of complex Medicare regulations, which would have required a "cut-and-paste approach [that was] not supported by the structure of the regulatory scheme,

and [was] not reasonable to expect [of] Medicare providers." 711 F.3d at 715. Here, all of HUD's servicing regulations are contained in Subpart C and expressly link a mortgagee's right to receive and retain FHA insurance benefits to its compliance with HUD's loss mitigation rules. See 24 C.F.R. § 203.500 ("It is the intent of the Department that no mortgagee shall commence foreclosure or acquire title to a property until the requirements of this subpart have been followed."). payment in "isolated phrases" scattered across several sections of complex Medicare regulations, which would have required a "cut-and-paste approach [that was] not supported by the structure of the regulatory scheme, and [was] not reasonable to expect [of] Medicare providers." 711 F.3d at 715. Here, all of HUD's servicing regulations are contained in Subpart C and expressly link a mortgagee's right to receive and retain FHA insurance benefits to its compliance with HUD's loss mitigation rules. *See* 24 C.F.R. § 203.500 ("It is the intent of the Department that no mortgagee shall commence foreclosure or acquire title to a property until the requirements of this subpart have been followed.").

Second, U.S. Bank argues that once a loan is endorsed for HUD insurance, the validity of the insurance claim is incontestable and Relator cannot allege that any false certification was material to the government's payment decision (Doc. 25 at 27–29). However the incontestability provision does not mean FCA liability cannot attach as a matter of law, and "does not destroy the causal nexus between the bank's fraud and the government's loss" (Doc. 43 at 6). Although HUD may initially pay insurance benefits even where a mortgagee has failed to mitigate, HUD retains the authority to impose a civil monetary penalty up to three times the paid insurance benefits from the mortgagee who failed to mitigate.

12 U.S.C. § 1735f-14(a)(2), (b)(1)(I); 24 C.F.R. § 30.35(c)(2). The penalty is a "punitive damage" and is "designed to remind mortgagees of the importance of complying with existing regulations and policies that require lenders to engage in loss mitigation." 70 Fed. Reg. at 21576.

U.S. Bank is also incorrect in asserting that compliance with HUD's loss mitigation regulations is not material to HUD's decision to pay an insurance claim (Doc. 25 at 28). "[L]iability does not arise merely because a false statement is included within a claim, but rather the claim itself must be false or fraudulent. A false statement within a claim can only serve to make the entire claim itself fraudulent if that statement is material to the request or demand for money or property." *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 443 (6th Cir. 2005). U.S. Bank's repeated certification of its compliance with HUD regulations -- beginning with its initial application to become a HUD approved lender, renewed annually in its certifications, and confirmed with each FHA insurance claim filing -- has "a natural tendency to influence" or is "capable of influencing" the payment or receipt of money from the HUD insurance program. *Id.* at 445. Read in the light most favorable to Relator, the Complaint adequately pleads that U.S. Bank violated the FCA when it certified compliance with its continuing duty under HUD regulations on which payment is conditioned.

Scienter. The FCA requires a showing that defendant acted "knowingly," which includes "actual knowledge," "deliberate ignorance," or "reckless disregard of the truth or falsity of the information" on which the claim is based. 31 U.S.C. § 3729(b)(1); *see also United States ex rel. Wall v. Circle C Const., L.L.C.*, 697 F.3d

345, 356 (6th Cir. 2012) ("An aggravated form of gross negligence (*i.e.*, reckless disregard) will satisfy the scienter requirement for an FCA violation."). Proof of specific intent to defraud is not required. 31 U.S.C. § 3729(b)(1)(B); *see also Wall*, 697 F.3d at 356.

Construing the Complaint in the light most favorable to Relator and accepting all factual allegations as true, Relator sufficiently alleges U.S. Bank knowingly committed fraud (*see, e.g.*, Doc. 1 at ¶¶ 1, 12, 14–15, 19, 21, 164, 173–74, 181). Relator quotes U.S. Bank's annual HUD certifications, in which a U.S. Bank vice president certified "I know, or am in the position to know" whether U.S. Bank conformed to HUD regulations; based on that knowledge, the employee certified that U.S. Bank complied with and agreed to continue to comply with HUD regulations (*id.* at ¶ 60). The Complaint alleges U.S. Bank was aware HUD's regulations precluded foreclosures without loss mitigation, but disregarded those rules and foreclosed (*id.* at ¶ 70). For the three representative FCA violations, the Complaint alleges U.S. Bank knew it failed to comply with HUD regulations by not scheduling a pre-foreclosure face-to-face meeting with the mortgagors and nevertheless foreclosed on the properties and submitted FHA insurance claims (*id.* at ¶¶ 99, 127, 154, 159).

U.S. Bank's Alleged Reverse False Claim Violations (Count III)

The FCA imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or … avoids or decreases an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G). Allegations of a re-

verse false claim require "proof that the defendant made a false record or statement at a time that the defendant owed to the government an obligation" -- a duty to pay money or property. *Am. Textile Mfrs. Inst., Inc. v. The Ltd., Inc.*, 190 F.3d 729, 736 (6th Cir. 1999). Relator claims U.S. Bank is obligated to repay HUD all money it received for provable false claims (Doc. 1 at ¶¶ 180–83). However, the Complaint does not allege any obligation U.S. Bank owed HUD at the time U.S. Bank made the allegedly false claim. The possibility that U.S. Bank could be found liable to repay a claim or to pay a penalty is not an "obligation." *See Chesbrough*, 655 F.3d at 473 (finding relators did not identify "any concrete obligation" defendant owed the government at the time of the alleged false statement and "merely alleg[ing] that [defendant] is obligated to repay all payments it received from the government" was insufficient to state reverse false claim). Relator's reverse false claim theory fails.

FCA Public Disclosure Bar

U.S. Bank argues that even if Relator has properly alleged a knowing false claim (which this Court has found as to Counts I and II), the Complaint should nonetheless be dismissed because Relator's allegations have been publicly disclosed and Relator is not an original source. This Court agrees. Relator has failed to demonstrate that the allegations in the Complaint are not based upon publicly disclosed information.

"In addition to encouraging whistleblowers to act as private attorneys-general in bringing suits for the common good, the FCA also seeks to discourage opportunistic plaintiffs from bringing parasitic lawsuits whereby would-be relators merely feed off a previous disclosure of fraud." *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 507 (6th Cir. 2009) (internal quotation

marks and citations omitted). The FCA's public disclosure provision, 31 U.S.C. § 3730(e)(4)(A), "limits the subject matter jurisdiction of federal courts over qui tam actions based upon previously disclosed information." *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 973 (6th Cir. 2005); *see also Whipple*, 782 F.3d at 264 ("The public-disclosure bar … is recognized to be a clear and explicit withdrawal of subject matter jurisdiction."). The party asserting that jurisdiction exists has the burden of proof. *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 329 (6th Cir. 1998); *United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 938 (6th Cir. 1997).

The FCA public disclosure bar precludes actions "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed … unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). To determine whether the jurisdictional bar applies, a court must consider "first whether there has been any public disclosure of fraud, and second whether the allegations in the instant case are 'based upon' the previously disclosed fraud." *United States ex rel. Gilligan v. Medtronic, Inc.*, 403 F.3d 386, 389 (6th Cir. 2005); *see also Walburn*, 431 F.3d at 974 ("In determining whether the jurisdictional bar of § 3730(e)(4) applies to a relator's case, we consider: '(A) whether there has been a public disclosure; (B) of the allegations or transactions that form the basis of the relator's complaint; and (C) whether the relator's action is 'based upon' the publicly disclosed allegations or transactions.'") (quoting *Jones*, 160 F.3d at 330).

Public Disclosure. A disclosure is "public" if it appears "in a Federal criminal, civil, or administrative

hearing … in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or from the news media." 31 U.S.C. § 3730(e)(4)(A).

In the wake of the mortgage crisis, the public was inundated with media coverage from nearly every news outlet reporting allegations of mortgagees' servicing failures and improper foreclosures (*see* Doc. 25 at 33; *see, e.g.*, Doc. 25-2 at 7–8 (October 15, 2010 Wall Street Journal article noting that "the Office of the Comptroller of the Currency is examining big mortgage servicers' foreclosure practices, a move that could lead to regulatory reprimands of banks for botched foreclosure documentation"), Doc. 25-2 at 36–37 (April 13, 2011 Cleveland Plain Dealer article titled "Nation's largest banks engaged in 'misconduct and negligence' during mortgage crisis, may have foreclosed on some improperly" and identifying U.S. Bank).

The specific issue of whether mortgagees complied with HUD's loss mitigation requirement of meeting face-to-face with borrowers has been litigated nationwide, including in Ohio state courts against U.S. Bank (Doc. 25 at 34). *See, e.g., U.S. Bank, Nat'l Ass'n v. Detweiler*, 191 Ohio App.3d 464 (2010) (finding triable issue existed as to whether U.S. Bank complied with HUD conditions precedent to foreclosure, including face-to-face meeting with mortgagor). In its own Opposition, Relator concedes "all eight Ohio appellate courts" and "courts in at least sixteen other states" have found foreclosures illegal when commenced without following HUD regulations, including foreclosures by U.S. Bank which pre-date the Complaint (Doc. 30 at 26, n.5). *See Poteet*, 552 F.3d at 513 (finding state court complaint sufficient to qualify as a public disclosure).

Long before Relator's Complaint, the government was on notice of allegations that U.S. Bank did not comply with HUD's loss mitigation requirements. In March 2011, the Office of the Comptroller of the Currency issued a public Consent Order concluding that U.S. Bank "engaged in unsafe or unsound banking practices" by "fail[ing] to devote to its foreclosure processes adequate oversight, internal controls, policies, and procedures, compliance risk management, internal audit, third party management, and training." OCC Consent Order, *In re U.S. Bank, Nat'l Ass'n* (AA-EC-11-18), at 2–3. The Consent Order required that U.S. Bank adopt an Action Plan ensuring it "achieves and maintains effective mortgage servicing, foreclosure, and loss mitigation activities" and addressing "governance and controls to ensure compliance with … servicing guides of the Government Sponsored Enterprises ("GSEs") or investors, including those with the Federal Housing Administration." *Id.* at 4–6. The Consent Order also required that U.S. Bank retain an independent consultant to review certain foreclosure actions, including whether U.S. Bank complied with its loss mitigation policies. *Id.* at 5–6.

In addition to the Consent Order, notice of U.S. Bank's loss mitigation violations was published in an April 2011 Federal Reserve report (Doc. 25-3). The report detailed the results of an inter-agency review of fourteen loan servicers, including U.S. Bank, and included an analysis of whether servicers were "in direct communications with borrowers and whether loss-mitigation actions … were considered as alternatives to foreclose" (Doc. 25-3 at 6). The review concluded the servicers' foreclosure processes were under-developed, insufficient, and inadequate (Doc. 25-3 at 7).

Relator's allegations that U.S. Bank did not comply with FHA requirements and that HUD lost money because of a mortgagee's non-compliance is also not new information. In May 2011, U.S. Bank agreed to pay HUD $1.2 million to resolve allegations it failed to comply with FHA requirements in connection with twenty-seven mortgages. HUD documented losses of over $465,000 in relation to those loans. *See* "HUD Announces $1.2 Million settlement with U.S. Bank," HUD Press Release No. 11-095 (May 20, 2011), *available at* http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2011/HUDNo.11-095 (last accessed May 11, 2015).

Complaint "Based Upon" Disclosed Fraud. The Sixth Circuit has construed "based upon" to mean "supported by." *McKenzie*, 123 F.3d at 940. "[A] public disclosure reveals fraud if the information is sufficient to put the government on notice of the likelihood of related fraudulent activity." *Poteet*, 552 F.3d at 512. The key issue is whether "enough information exists in the public domain to expose the fraudulent transaction or the allegation of fraud." *Walburn*, 431 F.3d at 975 (quoting *Jones*, 160 F.3d at 331).

Relator contends that no public disclosure specifically addresses U.S. Bank submitting fraudulent claims for FHA mortgage insurance payouts, but rather "describe only generalized problems found throughout the industry in foreclosure processes" (Doc. 30 at 36). A public disclosure need not use the word "fraud" or provide a specific allegation of fraud to trigger the jurisdictional bar. *Poteet*, 552 F.3d at 512; *Dingle v. Bioport Corp.*, 388 F.3d 209, 214 (6th Cir. 2004) ("The words fraud or allegations need not appear in the disclosure for it to qualify."); *United States ex rel. Burns v. A.D. Roe Company, Inc.*,

186 F.3d 717, 724 (6th Cir. 1999) ("[P]ublicly disclosed documents need not use the word "fraud," but need merely to disclose information which creates an inference of impropriety.") (internal quotation marks omitted). "[T]he information suggesting fraud need not even come from the same source as long as the different sources 'together provide information that leads to a conclusion of fraud.'" *Poteet*, 552 F.3d at 512 (quoting *Gilligan*, 403 F.3d at 390).

The primary focus of the Complaint is alleged failure of loss mitigation and servicing. "Any 'action based *even partly* upon public disclosures' will be jurisdictionally barred." *Poteet*, 552 F.3d at 514 (emphasis in original) (quoting *McKenzie*, 123 F.3d at 940). A review of news articles, publicly available court filings, published Federal audit reports and government publications, all predating the Complaint, demonstrate sufficient information was publicly disclosed regarding U.S. Bank's loss mitigation failures from which the Government could infer the alleged fraudulent transactions referenced in the Complaint.

Original Source. Having failed to show the FCA claims are not based upon public disclosures, ABLE must prove to be an "original source" of the information. 31 U.S.C. § 3730(e)(4). An original source is "an individual: (1) with direct and independent knowledge of the information on which the allegations are based; and (2) who has voluntarily provided the information to the government before filing an action under the FCA which is based upon the information." *Jones*, 160 F.3d at 333 (citing 31 U.S.C. § 3730(e)(4)(B)). The parties do not dispute that prior to filing the Complaint, ABLE made a "comprehensive disclosure to the government" (Doc. 1 at ¶ 25).

The Complaint does not establish ABLE as an original source. ABLE is "an Ohio non-profit corporation dedicated to providing high-quality legal advocacy in civil matters to help low-income individuals and groups in western Ohio achieve self-reliance, equal justice, and economic opportunity. In furtherance of its mission, ABLE advocates for low- and moderate-income families who participate as mortgagors in the FHA single-family insured mortgage program." (*Id.* at ¶ 26). "ABLE has consulted with many people whose mortgage loans U.S. Bank foreclosed upon without fulfilling its requirement to engage in the Loss Mitigation Measures" and has "unique information" through its "contacts, experiences, research, and investigation" about how mortgagors were denied Loss Mitigation Measures (*id.* at ¶¶ 13–17). ABLE claims to be "uniquely aware" of three examples of U.S. Bank's FCA violations through "direct contacts and communications" with former U.S. Bank mortgagors and claims to have met with those mortgagors (*id.* at ¶¶ 73, 84, 112, 139; Doc. 46 at 41:1–9) (Relator's counsel explaining "the complaint itself, it makes clear that [ABLE has] gone and spoken with homeowners who have been affected by U.S. Bank's actions. That's the original information that they have."). At the Motion hearing, Relator's counsel stated ABLE is not "required to say exactly how we went and found" the three mortgagors (Doc. 46 at 42:21–22).

ABLE is not the model whistleblowing insider contemplated by the FCA and does not claim to have inside information on the mortgage industry or U.S. Bank's loss mitigation practices. ABLE's knowledge of U.S. Bank's alleged false claims is neither direct nor independent, and adds nothing to the public disclosures that have already been made. ABLE was not the first to inform the government of the alleged fraud being perpe-

trated by U.S. Bank. ABLE filed the Complaint approximately three years after the alleged FCA violations and two years after the Consent Order. ABLE derived the facts relating to the three representative examples from conversations with the foreclosed mortgagors, whose own foreclosure actions are public record. *See United States ex rel. Stratienko v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 958 F. Supp. 2d 846, 864 (6th Cir. 2013) (finding relator was not an original source where "most if not all of Relator's information appears to come from her husband"); *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006–07 (10th Cir. 1996) (A relator's knowing "must not be derivative of the information of others, even if those others may qualify as original sources."). The Complaint merely strings together information ABLE could have gleaned from news reports, government publications, court filings, publicly available documents, and conversations with individuals who participated in the events at issue. ABLE does not become an original source of information by putting its own spin on prior public disclosures of U.S. Bank's regulatory failures.

CONCLUSION

Because Relator's FCA claims against U.S. Bank are barred by the public disclosure doctrine, U.S. Bank's Motion to dismiss is granted.

IT IS SO ORDERED.

/s/
JACK ZOUHARY
U.S. DISTRICT JUDGE
May 12, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America, et al.,

Plaintiffs,

-vs-

U.S. Bank, N.A.,

Defendant.

Case No. 3:13 CV 704

JUDGMENT ENTRY

JUDGE JACK ZOUHARY

This Court having contemporaneously filed its Memorandum Opinion and Order (Doc. 48), orders Defendant U.S. Bank's Motion to Dismiss (Doc. 25) is granted. No other claims remaining, this Court enters final judgment for Defendant and orders this case is dismissed.

IT IS SO ORDERED.

/s/
JACK ZOUHARY
U. S. DISTRICT JUDGE

May 12, 2015

No. 15-3654

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA EX REL. ADVOCATES FOR BASIC LEGAL EQUALITY, INC.,	)	FILED
	)	Apr 27, 2016
	)	DEBORAH S. HUNT, Clerk
Relator-Appellant,	)	
v.	)	O R D E R
U.S. BANK, N.A.,	)	
Defendant-Appellee.	)	

BEFORE: MERRITT, GIBBONS, and SUTTON, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Deborah S. Hunt, Clerk

[Duplicate cover page omitted]

Interagency Review of Foreclosure Policies and Practices

Federal Reserve System
Office of the Comptroller of the Currency
Office of Thrift Supervision

[Agency seals omitted]

Washington, D.C. • April 2011

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Executive Summary

The Federal Reserve System, the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS), referred to as the agencies, conducted on-site reviews of foreclosure processing at 14 federally regulated mortgage servicers during the fourth quarter of 2010.[1]

This report provides a summary of the review findings and an overview of the potential impacts associated with instances of foreclosure-processing weak-nesses that occurred industrywide. In addition, this report discusses the supervisory response made public simultaneous with the issuance of this report, as well as expectations going forward to address the cited deficiencies. The supervisory measures employed by the agencies are intended to ensure safe and sound mortgage-servicing and foreclosure- processing business practices are implemented. The report also provides an overview of how national

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[1] Agencies conducted foreclosure-processing reviews at Ally Bank/GMAC, Aurora Bank, Bank of America, Citibank, EverBank, HSBC, JPMorgan Chase, MetLife, OneWest, PNC, Sovereign Bank, SunTrust, U.S. Bank, and Wells Fargo. The reviews included mortgage-servicing activities conducted by insured banks and thrifts, as well as by several nonbank affiliates of these organizations. The 14 servicers were selected based on the concentration of their mortgage-servicing and foreclosure- processing activities. The agencies typically do not disclose examinations or examination findings regarding particular institutions. In light of the formal enforcement actions entered into by these 14 servicers, which are being made public, the agencies have determined that it is appropriate to identify the servicers (whether a bank or a bank affiliate) that were reviewed. The bank and thrift holding company parents of Ally Bank/GMAC, Bank of America, Citibank, Everbank, HSBC, JPMorgan Chase, MetLife, OneWest, PNC, SunTrust, U.S. Bank, and Wells Fargo also entered into formal enforcement actions.

standards for mortgage servicing can help address specific industrywide weaknesses identified during these reviews.

Review Scope and Objectives

The primary objective of each review was to evaluate the adequacy of controls and governance over servicers' foreclosure processes and assess servicers' authority to foreclose. The reviews focused on issues related to foreclosure-processing functions. While the reviews uncovered significant problems in foreclosure processing at the servicers included in the report, examiners reviewed a relatively small number of files from among the volumes of foreclosures processed by the servicers. Therefore, the reviews could not provide a reliable estimate of the number of foreclosures that should not have proceeded. The agencies, therefore, are requiring each servicer to retain an independent firm to conduct a thorough review of foreclosure actions that were pending at any time from January 1, 2009, through December 31, 2010, to, among other things, 1) identify borrowers that have been financially harmed by deficiencies identified in the independent review and 2) provide remediation to those borrowers where appropriate. These independent reviews will be subject to supervisory oversight to ensure that the reviews are comprehensive and the results are reliable.

For the reviews discussed in this report, examiners evaluated each servicer's self-assessments of their foreclosure policies and processes; assessed each servicer's foreclosure operating procedures and controls; interviewed servicer staff involved in the preparation of foreclosure documents; and reviewed, collectively for all servicers, approximately 2,800 borrower foreclosure files

that were in various stages of the foreclosure process between January 1, 2009, and December 31, 2010.2[2]

Examiners focused on foreclosure policies and procedures; quality control and audits; organizational structure and staffing; and vendor management, including use of third-party vendors such as foreclosure attorneys, Lender Processing Services (LPS) and other default-service providers, and MERSCORP and its wholly owned subsidiary, Mortgage Electronic Registration Systems, Inc. (MERS). Based on their reviews of the limited number of foreclosure-file samples, examiners also assessed the accuracy of foreclosure-related documentation, including note endorsements and the assignments of mortgages and deeds of trust, and loan document control.[3] With respect to those files, examiners also assessed whether fees charged in connection with the foreclosures exceeded the amounts reflected in the servicers' internal records. In addition, the Federal Reserve and the OCC solicited views from consumer groups to help detect problems at specific servicers, and the Federal Reserve expanded the file sample to include borrowers who were delinquent, but not yet in foreclosure.

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[2] Foreclosure files at each servicer were selected from the population of in-process and completed foreclosures during 2010. The foreclosure file sample at each servicer included foreclosures from both judicial states and nonjudicial states. Review teams independently selected foreclosure file samples based on pre-established criteria (such as files for which consumer complaints had been raised, or those in geographic areas with high volumes of foreclosures) with the balance of the files selected based on examiner judgment.

[3] For purposes of this report, default management services generally include administrative support and services provided to the servicers by third-party vendors to manage and perform the tasks associated with foreclosures.

The file reviews did not include a complete analysis of the payment history of each loan prior to foreclosure or potential mortgage-servicing issues outside of the foreclosure process. Accordingly, examiners may not have uncovered cases of misapplied payments or unreasonable fees, particularly when these actions occurred prior to the default that led to the foreclosure action. The foreclosure-file reviews also may not have uncovered certain facts related to the processing of a foreclosure that would lead an examiner to conclude that a foreclosure otherwise should not have proceeded, such as undocumented communications between a servicer employee and the borrower in which the employee told the borrower he or she had to be delinquent on the loan to qualify for a modification. In addition, the reviews did not focus on loan-modification processes, but when reviewing individual foreclosure files, examiners checked for evidence that servicers were in contact with borrowers and had considered alternative loss-mitigation efforts, including loan modifications.

To ensure consistency in the reviews, the agencies used standardized work programs to guide the assessment and to document findings pertaining to each servicer's corporate governance process and the individual foreclosure-file reviews. The work programs were organized into the following categories:

- **Policies and procedures.** Examiners reviewed the servicers' policies and procedures to see if they provided adequate controls over the foreclosure process and whether those policies and procedures were sufficient for compliance with applicable laws and regulations.
- **Organizational structure and staffing.** Examiners reviewed the functional unit(s) responsible

for foreclosure processes, including their staffing levels, their staff's qualifications, and their training programs.

- **Compliance with applicable laws.** Examiners checked the adequacy of the governance, audits, and controls that servicers had in place to ensure compliance with applicable laws.
- **Loss mitigation.** Examiners determined if servicers were in direct communication with borrowers and whether loss-mitigation actions, including loan modifications, were considered as alternatives to foreclosure.
- **Critical documents.** Examiners evaluated servicers' control over critical documents in the foreclosure process, including the safeguarding of original loan documentation. Examiners also determined whether critical foreclosure documents were in the foreclosure files that they reviewed, and whether notes were endorsed and mortgages assigned.
- **Risk management.** Examiners assessed whether servicers appropriately identified financial, reputational, and legal risks and whether these risks were communicated to the board of directors and senior management of the servicer.

Summary of Review Findings

The reviews found critical weaknesses in servicers' foreclosure governance processes, foreclosure document preparation processes, and oversight and monitoring of third-party vendors, including foreclosure attorneys. While it is important to note that findings varied across institutions, the weaknesses at each servicer, individually or collectively, resulted in unsafe and unsound practices and violations of applicable federal and state law and re-

quirements.[4] The results elevated the agencies' concern that widespread risks may be presented—to consumers, communities, various market participants, and the overall mortgage market. The servicers included in this review represent more than two-thirds of the servicing market. Thus, the agencies consider problems cited within this report to have widespread consequences for the national housing market and borrowers.

Based on the deficiencies identified in these reviews and the risks of additional issues as a result of weak controls and processes, the agencies at this time are taking formal enforcement actions against each of the 14 servicers subject to this review to address those weaknesses and risks. The enforcement actions require each servicer, among other things, to conduct a more complete review of certain aspects of foreclosure actions that occurred between January 1, 2009, and December 31, 2010. The specific supervisory responses are summarized in Part 3 of this report.

The loan-file reviews showed that borrowers subject to foreclosure in the reviewed files were seriously delinquent on their loans. As previously stated, the reviews conducted by the agencies should not be viewed as an analysis of the entire lifecycle of the borrowers' loans or potential mortgage-servicing issues outside of the foreclosure process. The reviews also showed that servicers possessed original notes and mortgages and, therefore, had sufficient documentation available to demonstrate authority to foreclose. Further, examiners found evidence that servicers generally attempted to contact distressed borrowers prior to initiating the foreclosure process to pursue loss-mitigation alternatives, including loan

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[4] This report captures only the significant issues found across the servicers reviewed, not necessarily findings at each servicer.

modifications. However, examiners did note cases in which foreclosures should not have proceeded due to an intervening event or condition, such as the borrower (a) was covered by the Servicemembers Civil Relief Act, (b) filed for bankruptcy shortly before the foreclosure action, or (c) qualified for or was paying in accordance with a trial modification.[5]

The interagency reviews identified significant weaknesses in several areas.

- **Foreclosure process governance.** Foreclosure governance processes of the servicers were under-developed and insufficient to manage and control operational, compliance, legal, and reputational risk associated with an increasing volume of foreclosures. Weaknesses included:
    - inadequate policies, procedures, and independent control infrastructure covering all aspects of the foreclosure process;
    - inadequate monitoring and controls to oversee foreclosure activities conducted on behalf of servicers by external law firms or other third-party vendors;
    - lack of sufficient audit trails to show how information set out in the affidavits (amount of indebtedness, fees, penalties, etc.) was linked to the servicers' internal records at the time the affidavits were executed;
    - inadequate quality control and audit reviews to ensure compliance with legal requirements, policies and procedures, as well as the maintenance of sound operating environments; and

[5] Servicemembers Civil Relief Act, 50 USC App. sections. 501–596, Public Law 108-189.

- inadequate identification of financial, reputational, and legal risks, and absence of internal communication about those risks among boards of directors and senior management.

- **Organizational structure and availability of staffing.** Examiners found inadequate organization and staffing of foreclosure units to address the increased volumes of foreclosures.

- **Affidavit and notarization practices.** Individuals who signed foreclosure affidavits often did not personally check the documents for accuracy or possess the level of knowledge of the information that they attested to in those affidavits. In addition, some foreclosure documents indicated they were executed under oath, when no oath was administered. Examiners also found that the majority of the servicers had improper notary practices which failed to conform to state legal requirements. These determinations were based primarily on servicers' self-assessments of their foreclosure processes and examiners' interviews of servicer staff involved in the preparation of foreclosure documents.

- **Documentation practices.** Examiners found some— but not widespread—errors between actual fees charged and what the servicers' internal records indicated, with servicers undercharging fees as frequently as overcharging them. The dollar amount of overcharged fees as compared with the servicers' internal records was generally small.

- **Third-party vendor management.** Examiners generally found adequate evidence of physical control and possession of original notes and mort-

gages. Examiners also found, with limited exceptions, that notes appeared to be properly endorsed and mortgages and deeds of trust appeared properly assigned.[6] The review did find that, in some cases, the third-party law firms hired by the servicers were nonetheless filing mortgage foreclosure com-plaints or lost-note affidavits even though proper documentation existed.

- **Quality control (QC) and audit.** Examiners found weaknesses in quality control and internal auditing procedures at all servicers included in the review.

Summary of Supervisory Response

The agencies recognize that a number of supervisory actions and industry reforms are required to address these weaknesses in a way that will hold servicers accountable for establishing necessary governance and controls. Measures that the servicers are being required to implement are designed to ensure compliance with applicable laws, promote foreclosure processing in a safe and sound manner, and establish responsible business practices that provide accountability and appropriate treatment to borrowers.

At this time, the agencies are taking formal enforcement action against each of the 14 servicers and parent bank

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[6] The agencies expect federally regulated servicers to have the necessary policies and procedures in place to ensure that notes are properly endorsed and mortgages are properly assigned, so that ownership can be determined at the time of foreclosure. Where federally regulated servicers serve as document custodians for themselves or other investors, the agencies require controls and tracking systems to properly safeguard the physical security and maintenance of critical loan documents.

holding companies because the deficiencies and weaknesses identified during the reviews represent unsafe or unsound practices and violations of applicable law. The foreclosure-file reviews showed that borrowers in the sampled pool were seriously delinquent. The reviews also showed that the appropriate party brought the foreclosure action. However, a limited number of mortgages should not have proceeded to foreclosure because of an intervening event or condition. Nevertheless, the weaknesses in servicers' foreclosure processes, as confirmed by the reviews, present significant risk to the safety and soundness of mortgage activities. The failures and deficiencies identified as part of the reviews must be remedied swiftly and comprehensively.

The agencies will continue to assess and monitor corrective actions and will address servicers' failures to correct identified deficiencies where necessary.

Going forward, servicers must develop and demonstrate effective risk management of servicing operations to prevent a recurrence of deficiencies cited in this report. The agencies are currently engaged in an effort to establish national mortgage-servicing standards to promote the safe and sound operation of mortgage-servicing and foreclosure processing, including standards for accountability and responsiveness to borrower concerns. Such an effort will include engaging the Government Sponsored Enterprises, private investors, consumer groups, the servicing industry, and other regulators. Part 4 of this report provides a general overview of the core principles that should be included in future national mortgage-servicing standards.

Part 1: Background and Risks Associated with Weak Foreclosure Process and Controls

Mortgage servicing plays a central role in the management of mortgage loans from origination to final disposition. The mortgage servicer is the intermediary between borrowers and their lenders. When the borrower is paying as agreed, the servicer's duties are ministerial: collecting payments, distributing payments to investors, managing cash and administering funds in escrow, and reporting to investors. When a loan is in default, the demands on the servicer necessarily expand, requiring additional resources and much more sophisticated risk management. A necessary consequence of the growth in foreclosures since 2007 is increased demands on servicers' foreclosure processes.

The residential mortgage-servicing market is highly concentrated among a few servicers. The five largest mortgage servicers by activity volume—included among the 14 servicers subject to the reviews addressed in this report—account for 60 percent of the industry's total servicing volume.[7] The 14 servicers included in the interagency review collectively represent more than two-thirds of the servicing industry (see **figure 1**), or nearly 36.7 million mortgages.[8]

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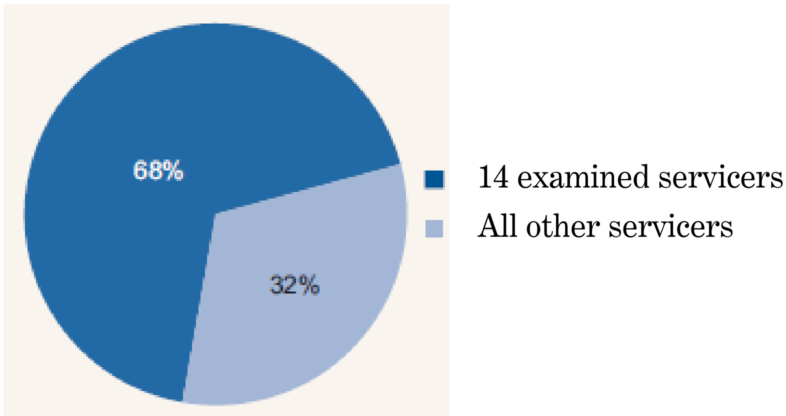
[7] The five largest mortgage servicers in order are Bank of America, Wells Fargo, JPMorgan Chase, Citibank, and Ally Bank/GMAC.

[8] Federal Reserve staff estimates 54 million first-lien mortgages outstanding as of December 31, 2010.

Figure 1. Concentration of the mortgage-servicing Industry



Source: Federal Reserve staff estimates of the concentration of servicing volume, based on data from Inside Mortgage Finance.

At the end of the fourth quarter of 2010, nearly 54 million first-lien mortgage loans were outstanding, 2.4 million of which were at some point in the foreclosure process. Additionally, two million mortgages were 90 or more days past due and at an elevated risk of foreclosure. New foreclosures are on pace to approach 2.5 million by the end of 2011. In light of the number of foreclosures and continued weakness in overall mortgage performance, the agencies are concerned that the deficiencies in foreclosure processing observed among these major servicers may have widespread consequences for the housing market and borrowers.

Impact on Borrowers

Weaknesses in foreclosure processes and controls present the risk of foreclosing with inaccurate documentation, or foreclosing when another intervening circumstance should intercede. Even if a foreclosure action can

be completed properly, deficiencies can result (and have resulted) in violations of state foreclosure laws designed to protect consumers. Such weaknesses may also result in inaccurate fees and charges assessed against the borrower or property, which may make it more difficult for borrowers to bring their loans current. In addition, borrowers can find their loss-mitigation options curtailed because of dual-track processes that result in foreclosures even when a borrower has been approved for a loan modification. The risks presented by weaknesses in foreclosure processes are more acute when those processes are aimed at speed and quantity instead of quality and accuracy.

Impact on the Industry and Investors

Weaknesses in foreclosure processes pose a variety of risks to the financial services industry and investors. These risks extend beyond the financial cost of remedying procedural errors and re-filing affidavits and other foreclosure documents. Servicers may also bear legal costs related to disputes over note ownership or authority to foreclose, and to allegations of procedural violations through the use of inaccurate affidavits and improper notarizations. Servicers may be subject to claims by investors as a result of delays or other damages caused by the weaknesses. Furthermore, concerns about the prevalence of irregularities in the documentation of ownership may cause uncertainty for investors of securitized mortgages. Servicers and their affiliates also face significant reputational risk with their borrowers, with the court system, and with regulators.

Impact on the Judicial Process

Weaknesses in foreclosure processes have resulted in increased demands on judicial resources to resolve a variety of foreclosure-related matters, including note own-

ership. In addition, courts rely extensively on affidavits (usually affidavits of indebtedness) submitted by servicers to decide foreclosure actions on a summary basis without requiring in-person testimony.[9] If such affidavits were not properly prepared or executed, courts may lose confidence in the reliability of the affidavits as persuasive evidence filed on behalf of servicers.[10]

Impact on the Mortgage Market and Communities

Weaknesses in foreclosure processes led several servicers to slow, halt, or suspend foreclosure proceedings in late 2010, and, in many cases, re-file foreclosure documents. Delays in foreclosure processing, which averaged 450 days in the fourth quarter of 2010, slow the clearing of excess inventory of foreclosed properties and lead to extended periods of depressed home prices.[11] Such delays also impede the efficient disposition of foreclosed homes and the clearing of seriously delinquent mortgages, particularly in geographic regions with

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[9] The basic affidavit of indebtedness typically sets forth the name of the party that owns the loan, the default status, and the amounts due for principal, interest, penalties (such as late charges), and fees. This affidavit is frequently the principal basis upon which a court is permitted to order a foreclosure without requiring in-person testimony. Similar documentation may be required in bankruptcy proceedings.

[10] Mortgage foreclosures occur under either a judicial or a nonjudicial process. Judicial foreclosures are court-supervised and require the lender to bring a court action to foreclose. Nonjudicial foreclosures (also known as "power of sale") involve little or no court oversight and generally are governed by state statutes. Even foreclosures that are instituted outside the judicial process can be challenged in court, however, and then become subject to court actions.

[11] See Lender Processing Services Applied Analytics (December 2010, www.lpsvcs.com/RiskMgmt). Current time frames to move a property to foreclosure sale have increased from an average of 250 days in first quarter 2008 to 450 days by fourth quarter 2010.

greater concentrations of vacant and abandoned properties. This outcome acts as an impediment for communities working to stabilize local neighborhoods and housing markets.[12]

Moreover, local property values may be adversely affected if foreclosed homes remain vacant for extended periods, particularly if such homes are not properly maintained.[13] Widely publicized weaknesses in foreclosure processes also adversely affect home buyer and investor confidence. Assuring robust and credible remedial programs for mortgage servicers so that foreclosure processes can operate and markets can clear without impediments or interventions contributes to attaining a stable national housing market.

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[12] Industry data show approximately four million properties currently listed that have been foreclosed in the past few years. See Mortgage Bankers Association, National Delinquency Survey, (November 18, 2010, www.mbaa.org/NewsandMedia/PressCenter/74733.htm).

[13] Campbell, John Y., Stefano Giglio and Parag Pathak (July 2010) Forced Sales and House Prices Manuscript, Harvard University Department of Economics (kuznets.fas.harvard.edu/~campbell/ papers/forcedsales072410.pdf).

Part 2: Review Findings

The reviews found critical weaknesses in foreclosure governance processes, foreclosure document preparation processes, and oversight and monitoring of third-party law firms and other vendors. These weaknesses involve unsafe and unsound practices and violations of applicable federal and state laws and requirements, and they have had an adverse effect on the functioning of the mortgage markets. By emphasizing speed and cost efficiency over quality and accuracy, examined servicers fostered an operational environment contrary to safe and sound banking practices.

In connection with the reviews of sampled files and assessments of servicers' custodial activities, examiners found that borrowers whose files were reviewed were seriously delinquent on their mortgage payments at the time of foreclosure and that servicers generally had sufficient documentation available to demonstrate authority to foreclose on those borrowers' mortgages.[14] Nevertheless, examiners noted instances where documentation in the foreclosure file alone may not have been sufficient to prove ownership of the note at the time the foreclosure action commenced without reference to additional information. When additional information was requested and provided to examiners, it generally was sufficient to determine ownership.

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[14] As previously noted, examiners were limited to the documents in the foreclosure files. Those documents may not have disclosed certain facts that might have led examiners to conclude that a foreclosure should not have proceeded, such as misapplication of payments that could have precipitated a foreclosure action or oral communications between the borrower and servicer staff that were not documented in the foreclosure file.

In addition, review of the foreclosure files showed that servicers were in contact with the delinquent borrowers and had considered loss-mitigation alternatives, including loan modifications. Examiners also noted a small number of foreclosure sales, however, that should not have proceeded because of an intervening event or condition, such as the borrower: (a) was covered by the Servicemembers Civil Relief Act, (b) filed bankruptcy shortly before the foreclosure action, or (c) was approved for a trial modification.

A summary of the major findings identified during the reviews is set forth below.

Foreclosure Process Governance

Examiners found governance at each examined servicer in need of substantial improvement, and often cited the absence of sound controls and ineffective management of foreclosure processes. Foreclosure policies and procedures at many of the servicers were either weak or needed substantial expansion to provide effective guidance, control, and ongoing monitoring. As noted above, examiners concluded that the majority of servicers reviewed had inadequate affidavit and notary-signing processes that did not ensure proper attestation (or verification) of the underlying documents.

Examiners found that most servicers had inadequate staffing levels and training programs throughout the foreclosure-processing function and that a large percentage of the staff lacked sufficient training in their positions. The reviews also revealed that all of the servicers relied heavily on outsourcing arrangements with outside counsel and other third-party vendors to carry out foreclosure processes without adequate oversight of those arrangements. Some servicers failed to enter into contracts with the foreclosure law firms performing critical

steps in the foreclosure process, including affidavit- and notary-preparation and signing processes. Audit and quality-assurance controls and self-assessment reviews at all of the examined servicers lacked comprehensiveness and failed to identify specific weaknesses and process gaps. Details on these areas of weakness are included below.

Organizational Structure and Availability of Staffing

At the time of the review, a majority of the servicers had inadequate staffing levels or had recently added staff with limited servicing experience. In most instances, servicers maintained insufficient staff to appropriately review documents for accuracy, and provided inadequate training for affidavit signers, notaries, and quality-control staff. Examiners also noted weak controls, undue emphasis on quantitative production and timelines, and inadequate workload monitoring.

Affidavit and Notarization Practices

Deficiencies in servicers' processes, procedures, controls, and staffing resulted in numerous inaccurate affidavits and other foreclosure-related documents. Examiners found that most servicers had affidavit signing protocols that expedited the processes for signing foreclosure affidavits without ensuring that the individuals who signed the affidavits personally conducted the review or possessed the level of knowledge of the information that they attested to in those affidavits. Examiners confirmed these deficiencies through interviews with individuals who signed documents, as well as through a review of servicers' self- assessments. Examiners also found the majority of the servicers had improper notary practices that failed to conform to state legal requirements. Examiners noted some servicers failed to maintain an accurate list of approved and acceptable notaries that individuals

signing documents did not do so in the presence of a notary when required, and that documents often were executed in a manner contrary to the notary's acknowledgement and verification of those documents. In addition, some foreclosure documents indicated they were executed under oath when no oath was administered. Again, examiners confirmed these deficiencies by interviewing notaries and reviewing servicers' self-assessments.

At the examined servicers, anywhere from 100 to more than 25,000 foreclosure actions occurred per month between January 1, 2009, and December 31, 2010, with the quantity depending upon the size of the servicer's operations. It was common to find an insufficient number of staff assigned to review, sign, and notarize affidavits. At some of the servicers, examiners found that insufficient staff—or the lack of specified guidance to staff or external law firms on affidavit completion—contributed to the preparation and filing of inaccurate affidavits. In the sample of foreclosure files reviewed, examiners compared the accuracy of the amounts listed on affidavits of indebtedness to the documentation in the paper foreclosure file or computerized loan servicing systems. Although borrowers whose foreclosure files were reviewed were seriously in default at the time of the foreclosure action, some servicers failed to accurately complete or validate itemized amounts owed by those borrowers. At those servicers, this failure resulted in differences between the figures in the affidavit and the information in the servicing system or paper file. In nearly half of those instances, the differences— which were typically less than $500—were adverse to the borrower. While the error rates varied among the servicers, the percentage of errors at some servicers raises significant concerns re-

garding those servicers' internal controls governing foreclosure-related documentation.

Documentation Practices

During the foreclosure-file reviews, examiners compared the accuracy of amounts listed on the servicers' affidavits of indebtedness with documentation on file or maintained within the electronic servicing system of record. For most of the servicers, examiners cited the lack of a clear auditable trail in reconciling foreclosure filings to source systems of record. In some cases, examiners directed servicers to further audit foreclosure filings to verify the accuracy of information and compliance with legal requirements. Likewise, in connection with the file review, examiners also determined whether critical foreclosure documents were in the foreclosure files, and whether notes appeared properly endorsed and mortgages appeared properly assigned. Examiners noted instances where documentation in the foreclosure file alone may not have been sufficient to prove authority to foreclose without reference to additional information.[15] When more information was requested and provided, it generally was sufficient to determine authority. With some exceptions, examiners found that notes appeared properly endorsed, and mortgages appeared properly assigned.[16]

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[15] Servicers frequently maintained custody of original mortgage documents, although in some cases third-party trustees or custodians held original documents. Custodians are entrusted to manage the original documents that establish note ownership, and, when necessary, produce the original documents for a foreclosure action.

[16] Only in rare instances were custodians unable to produce original loan documentation, and in those instances the servicers generally were able to provide adequate explanations, including that copies in the possession of the custodian were acceptable under applicable law.

Examiners also traveled to servicers' document repository locations to assess custodial activities. Examiners found that servicers generally had possession and control over critical loan documents such as the promissory notes and mortgages. The review did find that, in some cases prior to 2010, the third-party law firms hired by the servicers were nonetheless filing lost-note affidavits or mortgage foreclosure complaints in which they claimed that the mortgage note had either been lost or destroyed, even though proper documentation existed.

Third-party Vendor Management

The agencies found that the servicers reviewed generally did not properly structure, carefully conduct, or prudently manage their third-party vendor relationships with outside law firms and other third-party foreclosure services providers. Failure to effectively manage third-party vendors resulted in increased reputational, legal, and financial risks to the servicers.

Arrangements with Outside Law Firms

Servicers typically used third-party law firms to prepare affidavits and other legal documents, to file complaints and other pleadings with courts, and to litigate on their behalf in connection with foreclosure and foreclosure-related bankruptcy proceedings. The servicers reviewed generally showed insufficient guidance, policies, or procedures governing the initial selection, management, or termination of the law firms that handled their foreclosures. Many servicers, rather than conducting their own due diligence, relied on the fact that certain firms had been designated as approved or accepted by investors. Servicers often did not govern their relationships with these law firms by formal contracts. Instead, servicers frequently relied on informal engagements with law firms, at times relying on investors' business relation-

ships with the law firms or the law firms' contractual relationships with default management service providers.

Inadequate Oversight

Servicers also did not provide adequate oversight of third-party vendor law firms, including monitoring for compliance with the servicers' standards. Several servicers exempted third-party law firms from the servicers' vendor management programs or did not identify them as third-party vendors subject to those programs. In some cases, servicers assumed that investors performed such oversight, in which case oversight was limited to ensuring that the law firms were on the investors' lists of approved or accepted providers. Where monitoring of law firms was conducted, it was often limited to things such as responsiveness and timeliness, checking for liability insurance, or determining if any power of attorney given to the firm remained valid rather than assessing the accuracy and adequacy of legal documents or compliance with state law or designated fee schedules.

Document Retention Weaknesses

Examiners also found that the servicers did not always retain originals or copies of the documents maintained by the third-party law firms that conducted their foreclosures. Instead, the servicers relied on the firms to maintain those documents. The absence of central and well-organized foreclosure files by the servicers and the consequent need for the examiners to collect foreclosure documentation derived from numerous sources made it difficult at times for examiners to conduct full foreclosure-file reviews while on-site.

Inadequate guidance, policies, procedures, and contracts

In addition, examiners generally found an absence of formal guidance, policies, or procedures governing the selection, ongoing management, and termination of law firms used to handle foreclosures. This deficiency resulted in a lack of clarity regarding roles, responsibilities, and performance parameters. Examiners also observed an absence of written contracts between certain servicers and law firms, which left those servicers with no contractual recourse for liability against the firms for performance issues. These deficiencies, coupled with the overall lack of adequate oversight, contributed to instances in which servicers and law firms failed to identify problems with the firms' foreclosure practices, thereby exposing the servicers to a variety of significant risks.

Those problems include instances in which law firms signed documents on behalf of servicers without having the authority to do so, or they changed the format and content of affidavits without the knowledge of the servicers. These defects could, depending upon the circumstances, raise concerns regarding the legality and propriety of the foreclosure even if the servicer had sufficient documentation available to demonstrate authority to foreclose.

Arrangements with Default Management Service Providers (DMSPs)

In connection with the on-site reviews of servicers, the agencies also conducted an on-site review of Lender Processing Services, Inc. (LPS), which provides significant services to support mortgage- servicing and foreclosure processing across the industry. The review of LPS involved a number of issues that are similar to those raised in the reviews of the servicers, and the LPS review covered issues that are unique to the operations, structure and corporate governance of LPS. During the review of

LPS, the agencies found deficient practices related primarily to the document execution services that LPS, through its DocX, LLC, and LPS Default Solutions, Inc. subsidiaries had provided to servicers in connection with foreclosures. To address these issues, the agencies are taking formal enforcement action against LPS under section 7(d) of the Bank Service Company Act, 12 USC § 1867(d), and section 8(b) of the Federal Deposit Insurance Act, 12 USC § 1818(b).

Inadequate Contracts

During the review of servicers, examiners assessed servicers' relationships with third-party vendor DMSPs, focusing primarily on DMSPs that supported the execution of foreclosure-related documents, such as affidavits of indebtedness, lost-note affidavits, and assignments of mortgages.[17] Examiners found that contracts between the servicers and DMSPs generally were inadequate, often omitting significant matters such as service-level agreements. Contracts did not provide for an appropriate level of oversight of third-party vendor law firms in situations where the servicers relied on the DMSPs to conduct such oversight.

Inadequate Oversight

Examiners also observed that servicers generally demonstrated an overall lack of adequate oversight of DMSPs. At times, the servicers failed to identify DMSPs as vendors subject to the servicers' vendor management programs and demonstrated an inability to provide the examiners with sufficient evidence of due diligence. Examiners found no evidence that servicers conducted au-

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[17] Not all of the servicers engaged the services of third-party vendor DMSPs to perform document execution services.

dits of the document execution operations of their DMSPs.

The lack of sufficient oversight of DMSPs, coupled with the contractual deficiencies, led to instances in which employees of those DMSPs signed foreclosure affidavits without personally conducting the review or possessing the level of knowledge of information that they attested to in those affidavits. Employees of DMSPs, like the employees of the servicers themselves, executed documents in a manner contrary to the notary's acknowledgement and verification of those documents. In addition, in limited instances, employees of DMSPs signed foreclosure-related documents on behalf of servicers without proper authority. Because some of the servicers relied on DMSPs to oversee their third-party vendor law firms, the contractual deficiencies and lack of oversight of DMSPs contributed to the weaknesses identified above regarding the oversight of third-party vendor law firms.

Arrangements with Mortgage Electronic Registration Systems, Inc.

In connection with the on-site reviews of servicers, the agencies, together with the Federal Housing Finance Agency (FHFA), also conducted an on-site review of MERSCORP and its wholly owned subsidiary, Mortgage Electronic Registration Systems, Inc. (collectively, MERS), which, as detailed below, pro-vides significant services to support mortgage- servicing and foreclosure processing across the industry. The review of MERS involved a number of issues that are similar to those raised in the reviews of the servicers, and the MERS review covered issues that are unique to the operations, structure and corporate governance of MERS. During the review of MERS, the agencies and FHFA found significant weaknesses in, among other things, oversight, manage-

ment supervision and corporate governance. To address these issues, the agencies, together with FHFA, are taking formal enforcement action against MERS under section 7(d) of the Bank Service Company Act, 12 USC § 1867(d), and section 8(b) of the Federal Deposit Insurance Act, 12 USC § 1818(b).

MERS streamlines the mortgage recording and assignment process in two ways. First, it operates a centralized computer database or registry of mortgages that tracks the servicing rights and the beneficial ownership of the mortgage note. Each mortgage registered in the database is assigned a Mortgage Identification Number (MIN). Second, MERS can be designated by a member (and its subsequent assignees) to serve in a nominee capacity as the mortgagee of record in public land records. Designating MERS as the mortgagee is intended to eliminate the need to prepare and record successive assignments of mortgages each time ownership of a mortgage is transferred. Rather, changes in beneficial ownership of the mortgage note (and servicing rights) are tracked in the MERS registry using the MIN.[18] All of the examined servicers had relationships with MERS.

Inadequate Oversight

Servicers exercised varying levels of oversight of the MERS relationship, but none to a sufficient degree. Several of the servicers did not include MERS in their vendor management programs. In these instances, the servicers failed to conduct appropriate due diligence assessments and failed to monitor, evaluate, and appropri-

[18] While MERS maintains a registry of the beneficial ownership of the mortgage note, this registry is not a system of legal record. The ownership of the note is determined by the Uniform Commercial Code, and, if a change in ownership of a note is not recorded in MERS or is recorded incorrectly, the transfer is still valid.

ately manage the MERS contractual relationship. Deficiencies included failure to assess the internal control processes at MERS, failure to ensure the accuracy of servicing transfers, and failure to ensure that servicers' records matched MERS' records.

Inadequate Quality Control

Examiners also determined that servicers' quality- control processes pertaining to MERS were insufficient. In some cases, servicers lacked any quality- assurance processes and relied instead on the infrequent and limited audits that MERS periodically conducted. Other deficiencies included the failure to conduct audit reviews to independently verify the adequacy of and adherence to quality-assurance processes by MERS, and the need for more frequent and complete reconciliation between the servicers' systems and the MERS registry. Several servicers did not include MERS activities in the scope of their audit coverage.

Ineffective Quality Control (QC) and Audit

Examiners found weaknesses in quality-control procedures at all servicers, which resulted in servicers not performing one or more of the following functions at a satisfactory level:

- ensuring accurate foreclosure documentation, including documentation pertaining to the fees assessed;
- incorporating mortgage-servicing activities into the servicers' loan-level monitoring, testing, and validation programs;
- evaluating and testing compliance with applicable laws and regulations, court orders, pooling and servicing agreements, and similar contractual arrangements; and

- ensuring proper controls to prevent foreclosures when intervening events or conditions occur that warrant stopping the foreclosure process (e.g., bankruptcy proceedings, applicability of the Servicemembers Civil Relief Act, or adherence to a trial or permanent loan modification program).

Examiners also found weaknesses in internal auditing procedures at all the servicers included in the review. When performed, the few internal audits conducted by servicers failed to identify fundamental control issues that led to the foreclosure process breakdowns. Failures to perform internal audits effectively resulted in servicers' inability to identify, address, and internally communicate foreclosure-processing risks. The failures to identify and communicate these risks resulted in servicers not strengthening the quality of risk-management processes to a level consistent with the nature, increasing size, and complexity of the servicer's foreclosure activities. Moreover, failure to conduct comprehensive audits to identify weaknesses in foreclosure processes resulted in servicers not taking sufficient corrective action to strengthen policy and procedural gaps, increase staffing levels, and improve training in response to sharply rising foreclosure volumes prior to the agencies' foreclosure reviews. The failure to identify the risks associated with foreclosure processing also resulted in servicers not taking action to improve foreclosure documentation-related processes ranging from custody and control of documents to proper notarization processes, or to enhance oversight of third parties managing foreclosure activities on their behalf.

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Part 3: Supervisory Response

At this time, the agencies are taking formal enforcement actions against each of the 14 servicers under the authority of section 8(b) of the Federal Deposit Insurance Act, 12 USC § 1818(b). The deficiencies and weaknesses identified by examiners during their reviews involved unsafe or unsound practices and violations of law, which have had an adverse impact on the functioning of the mortgage markets. Furthermore, the mortgage servicers' deficient foreclosure processes confirmed during the reviews have compromised the public trust and confidence in mortgage servicing and have consequences for the housing market and borrowers. The formal enforcement actions will require servicers, among other things, to:

- **Compliance program:** Establish a compliance program to ensure mortgage-servicing and foreclosure operations, including loss mitigation and loan modification, comply with all applicable legal requirements and supervisory guidance, and assure appropriate policies and procedures, staffing, training, oversight, and quality control of those processes.
- **Foreclosure review:** Retain an independent firm to conduct a review of residential foreclosure actions that were pending at any time from January 1, 2009, through December 31, 2010, to determine any financial injury to borrowers caused by errors, misrepresentations, or other deficiencies identified in the review, and to remediate, as appropriate, those deficiencies.
- **Dedicated resources for communicating with borrowers/single point of contact:** Ensure the following: effective coordination of communication

with borrowers related to foreclosure, loss mitigation, and loan modification activities; assurance that communications are timely and appropriate and designed to avoid borrower confusion; continuity in the handling of borrower cases during the loan modification and foreclosure processes; reasonable and good faith efforts, consistent with applicable law and contracts, to engage in loss mitigation and foreclosure prevention for delinquent loans where appropriate; and assurances that decisions concerning loss mitigation or loan modifications will be made and communicated in a timely manner.

- **Third-party management:** Establish policies and procedures for outsourcing foreclosure or related functions to ensure appropriate oversight and that activities comply with all applicable legal requirements, supervisory guidance, and the servicer's policies and procedures, including the appropriate selection and oversight of all third-party service providers, including external legal counsel, DMSPs, and MERS.

- **Management information systems:** Improve management information systems for foreclosure, loss mitigation, and loan modification activities that ensure timely delivery of complete and accurate information to facilitate effective decision making.

- **Risk assessment:** Retain an independent firm to conduct a written, comprehensive assessment of risks in servicing operations, particularly in the areas of foreclosure, loss mitigation, and the administration and disposition of other real estate owned, including but not limited to operational,

compliance, transaction, legal, and reputational risks.

In addition to the actions against the servicers, the Federal Reserve and the OTS have issued formal enforcement actions against the parent holding companies to require that they enhance on a consolidated basis their oversight of mortgage-servicing activities, including compliance, risk management, and audit.

The agencies will monitor and assess, on an ongoing basis, the corrective actions taken by the servicers and holding companies that are required by the enforcement actions and take further action, when necessary, to address failures. Enforcement actions and more frequent monitoring will remain in place at each servicer until that servicer has demonstrated that its weaknesses and deficiencies have been corrected, including that adequate policies, procedures, and controls are in place. The agencies will continue to explore ways to improve their supervisory frameworks to identify more promptly and effectively the potential risks in mortgage-servicing and other banking operations.

Part 4: Industry Reforms

Financial regulatory agencies are developing standards within their authority to improve the transparency, oversight, and regulation of mortgage-servicing and foreclosure processing and to set additional thresholds for responsible management and operation of mortgage-servicing activities. Moreover, a uniform set of national mortgage-servicing and foreclosure-processing standards would help promote accountability and appropriateness in dealing with consumers and strengthen the housing finance market.

Industry reforms that could improve the oversight and regulation of mortgage-servicing and foreclosure processing should generally include standards that require servicers to address major areas of weaknesses highlighted in the review, including in the following general areas:

Governance and Oversight

- implement and routinely audit sound enterprise-wide policies and procedures to govern and control mortgage-servicing and foreclosure processes
- develop quality controls for effective management of third-party vendors who support mortgage-servicing and foreclosure processing
- strengthen the governance standards intended to ensure compliance with applicable federal and state laws and company policies and procedures
- develop company standards that emphasize accuracy and quality in the processing and validation of foreclosure and other servicing-related documents throughout the entire foreclosure process

Organizational Structure, Staffing, and Technology

- increase staffing to adequate levels and provide them with requisite training to effectively manage the volume of default loans and foreclosures
- upgrade information systems and practices to better store, track, and retrieve mortgage-related documents

Accountability and Responsiveness Dealing with Consumers

- ensure borrowers are offered appropriate loss-mitigation options
- ensure proper custody and control of borrower documents related to the servicing of the mortgage
- increase coordination between loss mitigation and foreclosure-processing units to prevent inappropriate foreclosures
- improve communication with borrowers and establish measurable goals and incentives for delivering accurate information and responsive assistance
- develop complaint-resolution processes that are routinely monitored and measured for quality assurance

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
COMPTROLLER OF THE CURRENCY

In the Matter of:	)	
	)	
U.S. Bank National Association	)	AA-EC-11-18
Cincinnati, Ohio	)	
and	)	
U.S. Bank National Association ND	)	
Fargo, North Dakota	)	

CONSENT ORDER

The Comptroller of the Currency of the United States of America ("Comptroller"), through his national bank examiners and other staff of the Office of the Comptroller of the Currency ("OCC"), as part of an interagency horizontal review of major residential mortgage servicers, has conducted an examination of the residential real estate mortgage foreclosure processes of U.S. Bank National Association, Cincinnati, Ohio and U.S. Bank National Association ND, Fargo, North Dakota (collectively, "Bank"). The OCC has identified certain deficiencies and unsafe or unsound practices in residential mortgage servicing and in the Bank's initiation and handling of foreclosure proceedings. The OCC has informed the Bank of the findings resulting from the examination.

The Bank, by and through its duly elected and acting Board of Directors ("Board"), has executed a "Stipulation and Consent to the Issuance of a Consent Order,"

dated April 13, 2011 ("Stipulation and Consent"), that is accepted by the Comptroller. By this Stipulation and Consent, which is incorporated by reference, the Bank has consented to the issuance of this Consent Cease and Desist Order ("Order") by the Comptroller. The Bank has committed to taking all necessary and appropriate steps to remedy the deficiencies and unsafe or unsound practices identified by the OCC, and to enhance the Bank's residential mortgage servicing and foreclosure processes. The Bank has begun implementing procedures to remediate the practices addressed in this Order.

ARTICLE I
COMPTROLLER'S FINDINGS

The Comptroller finds, and the Bank neither admits nor denies, the following:

(1) The Bank is among the largest servicers of residential mortgages in the United States and services a portfolio of 1,400,000 residential mortgage loans. During the recent housing crisis, a large number of residential mortgage loans serviced by the Bank became delinquent and resulted in foreclosure actions. The Bank's foreclosure inventory grew substantially from 2008 through 2010.

(2) In connection with certain foreclosures of loans in its residential mortgage servicing portfolio, the Bank:

(a) filed or caused to be filed in state and federal courts affidavits executed by its employees making various assertions, such as the amount of the principal and interest due or the fees and expenses chargeable to the borrower, in which the affiant represented that the assertions in the affidavit were made based on personal knowledge or based on a review by the affiant of the relevant books and records, when, in many cases, they were

not based on such personal knowledge or review of the relevant books and records;

(b) filed or caused to be filed in state and federal courts, or in local land records offices, numerous affidavits that were not properly notarized, including those not signed or affirmed in the presence of a notary;

(c) failed to devote to its foreclosure processes adequate oversight, internal controls, policies, and procedures, compliance risk management, internal audit, third party management, and training; and

(d) failed to sufficiently oversee outside counsel and other third-party providers handling foreclosure-related services.

(3) By reason of the conduct set forth above, the Bank engaged in unsafe or unsound banking practices.

Pursuant to the authority vested in him by the Federal Deposit Insurance Act, as amended, 12 U.S.C. § 1818(b), the Comptroller hereby ORDERS that:

ARTICLE II
COMPLIANCE COMMITTEE

(1) The Board shall maintain a Compliance Committee of at least three (3) Bank or Holding Company directors, of which at least two (2) may not be employees or officers of the Bank or any of its subsidiaries or affiliates. In the event of a change of the membership, the name of any new member shall be submitted to the Examiner-in-Charge for Large Bank Supervision at the Bank ("Examiner-in-Charge"). The Compliance Committee shall be responsible for monitoring and coordinating the Bank's compliance with the provisions of this Order. The Compliance Committee shall meet at least monthly and maintain minutes of its meetings.

(2) Within ninety (90) days of this Order, and within thirty (30) days after the end of each quarter thereafter, the Compliance Committee shall submit a written progress report to the Board setting forth in detail actions taken to comply with each Article of this order, and the results and status of those actions.

(3) The Board shall forward a copy of the Compliance Committee's report, with any additional comments by the Board, to the Deputy Comptroller for Large Bank Supervision ("Deputy Comptroller") and the Examiner-in-Charge within ten (10) days of receiving such report.

ARTICLE III
COMPREHENSIVE ACTION PLAN

(1) Within sixty (60) days of this Order, the Bank shall submit to the Deputy Comptroller and the Examiner-in-Charge an acceptable plan containing a complete description of the actions that are necessary and appropriate to achieve compliance with Articles IV through XII of this Order ("Action Plan"). In the event the Deputy Comptroller asks the Bank to revise the Action Plan, the Bank shall promptly make the requested revisions and resubmit the Action Plan to the Deputy Comptroller and the Examiner-in-Charge. Following acceptance of the Action Plan by the Deputy Comptroller, the Bank shall not take any action that would constitute a significant deviation from, or material change to, the requirements of the Action Plan or this Order, unless and until the Bank has received a prior written determination of no supervisory objection from the Deputy Comptroller.

(2) The Board shall ensure that the Bank achieves and thereafter maintains compliance with this Order, including, without limitation, successful implementation of the Action Plan. The Board shall further ensure that, upon implementation of the Action Plan, the Bank

achieves and maintains effective mortgage servicing, foreclosure, and loss mitigation activities (as used herein, the phrase "loss mitigation" shall include, but not be limited to, activities related to special forbearances, modifications, short refinances, short sales, cash-for-keys, and deeds-in-lieu of foreclosure and be referred to as either "Loss Mitigation" or "Loss Mitigation Activities"), as well as associated risk management, compliance, quality control, audit, training, staffing, and related functions. In order to comply with these requirements, the Board shall:

(a) require the timely reporting by Bank management of such actions directed by the Board to be taken under this Order;

(b) follow-up on any non-compliance with such actions in a timely and appropriate manner; and

(c) require corrective action be taken in a timely manner for any non-compliance with such actions.

(3) The Action Plan shall address, at a minimum:

(a) financial resources to develop and implement an adequate infrastructure to support existing and/or future Loss Mitigation and foreclosure activities and ensure compliance with this Order;

(b) organizational structure, managerial resources, and staffing to support existing and/or future Loss Mitigation and foreclosure activities and ensure compliance with this Order;

(c) metrics to measure and ensure the adequacy of staffing levels relative to existing and/or future Loss Mitigation and foreclosure activities, such as limits for the number of loans assigned to a Loss Mitigation employee, including the single point of contact as hereinafter defined, and deadlines to review loan modification

documentation, make loan modification decisions, and provide responses to borrowers;

(d) governance and controls to ensure compliance with all applicable federal and state laws (including the U.S. Bankruptcy Code and the Servicemembers Civil Relief Act ("SCRA")), rules, regulations, and court orders and requirements, as well as the Membership Rules of MERSCORP, servicing guides of the Government Sponsored Enterprises ("GSEs") or investors, including those with the Federal Housing Administration and those required by the Home Affordable Modification Program ("HAMP"), and loss share agreements with the Federal Deposit Insurance Corporation (collectively "Legal Requirements"), and the requirements of this Order.

(4) The Action Plan shall specify timelines for completion of each of the requirements of Articles IV through XII of this Order. The timelines in the Action Plan shall be consistent with any deadlines set forth in this Order.

ARTICLE IV
COMPLIANCE PROGRAM

(1) Within sixty (60) days of this Order, the Bank shall submit to the Deputy Comptroller and the Examiner-in-Charge an acceptable compliance program to ensure that the mortgage servicing and foreclosure operations, including Loss Mitigation and loan modification, comply with all applicable Legal Requirements, OCC supervisory guidance, and the requirements of this Order and are conducted in a safe and sound manner ("Compliance Program"). The Compliance Program shall be implemented within one hundred twenty (120) days of this Order. Any corrective action timeframe in the Compliance Program that is in excess of one hundred twenty

(120) days must be approved by the Examiner-in-Charge. The Compliance Program shall include, at a minimum:

(a) appropriate written policies and procedures to conduct, oversee, and monitor mortgage servicing, Loss Mitigation, and foreclosure operations;

(b) processes to ensure that all factual assertions made in pleadings, declarations, affidavits, or other sworn statements filed by or on behalf of the Bank are accurate, complete, and reliable; and that affidavits and declarations are based on personal knowledge or a review of the Bank's books and records when the affidavit or declaration so states;

(c) processes to ensure that affidavits filed in foreclosure proceedings are executed and notarized in accordance with state legal requirements and applicable guidelines, including jurat requirements;

(d) processes to review and approve standardized affidavits and declarations for each jurisdiction in which the Bank files foreclosure actions to ensure compliance with applicable laws, rules and court procedures;

(e) processes to ensure that the Bank has properly documented ownership of the promissory note and mortgage (or deed of trust) under applicable state law, or is otherwise a proper party to the action (as a result of agency or other similar status) at all stages of foreclosure and bankruptcy litigation, including appropriate transfer and delivery of endorsed notes and assigned mortgages or deeds of trust at the formation of a residential mortgage-backed security, and lawful and verifiable endorsement and successive assignment of the note and mortgage or deed of trust to reflect all changes of ownership;

(f) processes to ensure that a clear and auditable trail exists for all factual information contained in each affidavit or declaration, in support of each of the charges that are listed, including whether the amount is chargeable to the borrower and/or claimable by the investor;

(g) processes to ensure that foreclosure sales (including the calculation of the default period, the amounts due, and compliance with notice requirements) and post-sale confirmations are in accordance with the terms of the mortgage loan and applicable state and federal law requirements;

(h) processes to ensure that all fees, expenses, and other charges imposed on the borrower are assessed in accordance with the terms of the underlying mortgage note, mortgage, or other customer authorization with respect to the imposition of fees, charges, and expenses, and in compliance with all applicable Legal Requirements and OCC supervisory guidance;

(i) processes to ensure that the Bank has the ability to locate and secure all documents, including the original promissory notes if required, necessary to perform mortgage servicing, foreclosure and Loss Mitigation, or loan modification functions;

(j) ongoing testing for compliance with applicable Legal Requirements and OCC supervisory guidance that is completed by qualified persons with requisite knowledge and ability (which may include internal audit) who are independent of the Bank's business lines;

(k) measures to ensure that policies, procedures, and processes are updated on an ongoing basis as necessary to incorporate any changes in applicable Legal Requirements and OCC supervisory guidance;

(l) processes to ensure the qualifications of current management and supervisory personnel responsible for mortgage servicing and foreclosure processes and operations, including collections, Loss Mitigation and loan modification, are appropriate and a determination of whether any staffing changes or additions are needed;

(m) processes to ensure that staffing levels devoted to mortgage servicing and foreclosure processes and operations, including collections, Loss Mitigation, and loan modification, are adequate to meet current and expected workload demands;

(n) processes to ensure that workloads of mortgage servicing, foreclosure and Loss Mitigation, and loan modification personnel, including single point of contact personnel as hereinafter defined, are reviewed and managed. Such processes, at a minimum, shall assess whether the workload levels are appropriate to ensure compliance with the requirements of Article IX of this Order, and necessary adjustments to workloads shall promptly follow the completion of the reviews. An initial review shall be completed within ninety (90) days of this Order, and subsequent reviews shall be conducted semi-annually;

(o) processes to ensure that the risk management, quality control, audit, and compliance programs have the requisite authority and status within the organization so that appropriate reviews of the Bank's mortgage servicing, Loss Mitigation, and foreclosure activities and operations may occur and deficiencies are identified and promptly remedied;

(p) appropriate training programs for personnel involved in mortgage servicing and foreclosure processes and operations, including collections, Loss Mitigation, and loan modification, to ensure compliance with appli-

cable Legal Requirements and supervisory guidance; and

(q) appropriate procedures for customers in bankruptcy, including a prohibition on collection of fees in violation of bankruptcy's automatic stay (11 U.S.C. § 362), the discharge injunction (11 U.S.C. § 524), or any applicable court order.

ARTICLE V
THIRD PARTY MANAGEMENT

(1) Within sixty (60) days of this Order, the Bank shall submit to the Deputy Comptroller and the Examiner-in-Charge acceptable policies and procedures for outsourcing foreclosure or related functions, including Loss Mitigation and loan modification, and property management functions for residential real estate acquired through or in lieu of foreclosure, to any agent, independent contractor, consulting firm, law firm (including local counsel in foreclosure or bankruptcy proceedings retained to represent the interests of the owners of mortgages), property management firm, or other third-party (including any affiliate of the Bank) ("Third-Party Providers"). Third-party management policies and procedures shall be implemented within one hundred twenty (120) days of this Order. Any corrective action timetable that is in excess of one hundred twenty (120) days must be approved by the Examiner-in-Charge. The policies and procedures shall include, at a minimum:

(a) appropriate oversight to ensure that Third-Party Providers comply with all applicable Legal Requirements, OCC supervisory guidance (including applicable portions of OCC Bulletin 2001-47), and the Bank's policies and procedures;

(b) measures to ensure that all original records transferred from the Bank to Third-Party Providers (including the originals of promissory notes and mortgage documents) remain within the custody and control of the Third-Party Provider (unless filed with the appropriate court or the loan is otherwise transferred to another party), and are returned to the Bank or designated custodians at the conclusion of the performed service, along with all other documents necessary for the Bank's files, and that the Bank retains imaged copies of significant documents sent to Third-Party Providers;

(c) measures to ensure the accuracy of all documents filed or otherwise utilized on behalf of the Bank or the owners of mortgages in any judicial or non-judicial foreclosure proceeding, related bankruptcy proceeding, or in other foreclosure-related litigation, including, but not limited to, documentation sufficient to establish ownership of the promissory note and/or right to foreclose at the time the foreclosure action is commenced;

(d) processes to perform appropriate due diligence on potential and current Third-Party Provider qualifications, expertise, capacity, reputation, complaints, information security, document custody practices, business continuity, and financial viability, and to ensure adequacy of Third-Party Provider staffing levels, training, work quality, and workload balance;

(e) processes to ensure that contracts provide for adequate oversight, including requiring Third-Party Provider adherence to Bank foreclosure processing standards, measures to enforce Third-Party Provider contractual obligations, and processes to ensure timely action with respect to Third-Party Provider performance failures;

(f) processes to ensure periodic reviews of Third-Party Provider work for timeliness, competence, completeness, and compliance with all applicable Legal Requirements and supervisory guidance, and to ensure that foreclosures are conducted in a safe and sound manner;

(g) processes to review customer complaints about Third-Party Provider services;

(h) processes to prepare contingency and business continuity plans that ensure the continuing availability of critical third-party services and business continuity of the Bank, consistent with federal banking agency guidance, both to address short-term and long-term service disruptions and to ensure an orderly transition to new service providers should that become necessary;

(i) a review of fee structures for Third-Party Providers to ensure that the method of compensation considers the accuracy, completeness, and legal compliance of foreclosure filings and is not based solely on increased foreclosure volume and/or meeting processing timelines; and

(j) a certification process for law firms (and recertification of existing law firm providers) that provide residential mortgage foreclosure and bankruptcy services for the Bank, on a periodic basis, as qualified to serve as Third-Party Providers to the Bank including that attorneys are licensed to practice in the relevant jurisdiction and have the experience and competence necessary to perform the services requested.

ARTICLE VI
MORTGAGE ELECTRONIC REGISTRATION SYSTEM

(1) Within sixty (60) days of this Order, the Bank shall submit to the Deputy Comptroller and the Examin-

er-in-Charge an acceptable plan to ensure appropriate controls and oversight of the Bank's activities with respect to the Mortgage Electronic Registration System ("MERS") and compliance with MERSCORP's membership rules, terms, and conditions ("MERS Requirements") ("MERS Plan"). The MERS Plan shall be implemented within one hundred twenty (120) days of this Order. Any corrective action timetable that is in excess of one hundred twenty (120) days must be approved by the Examiner-in-Charge. The MERS Plan shall include, at a minimum:

(a) processes to ensure that all mortgage assignments and endorsements with respect to mortgage loans serviced or owned by the Bank out of MERS' name are executed only by a certifying officer authorized by MERS and approved by the Bank;

(b) processes to ensure that all other actions that may be taken by MERS certifying officers (with respect to mortgage loans serviced or owned by the Bank) are executed by a certifying officer authorized by MERS and approved by the Bank;

(c) processes to ensure that the Bank maintains up-to-date corporate resolutions from MERS for all Bank employees and third-parties who are certifying officers authorized by MERS, and up-to-date lists of MERS certifying officers;

(d) processes to ensure compliance with all MERS Requirements and with the requirements of the MERS Corporate Resolution Management System ("CRMS");

(e) processes to ensure the accuracy and reliability of data reported to MERSCORP and MERS, including monthly system-to-system reconciliations for all MERS mandatory reporting fields, and daily capture of

all rejects/warnings reports associated with registrations, transfers, and status updates on open-item aging reports. Unresolved items must be maintained on open-item aging reports and tracked until resolution. The Bank shall determine and report whether the foreclosures for loans serviced by the Bank that are currently pending in MERS' name are accurate and how many are listed in error, and describe how and by when the data on the MERSCORP system will be corrected; and

(f) an appropriate MERS quality assurance workplan, which clearly describes all tests, test frequency, sampling methods, responsible parties, and the expected process for open-item follow-up, and includes an annual independent test of the control structure of the system-to system reconciliation process, the reject/warning error correction process, and adherence to the Bank's MERS Plan.

(2) The Bank shall include MERS and MERSCORP in its third-party vendor management process, which shall include a detailed analysis of potential vulnerabilities, including information security, business continuity, and vendor viability assessments.

ARTICLE VII
FORECLOSURE REVIEW

(1) Within forty-five (45) days of this Order, the Bank shall retain an independent consultant acceptable to the Deputy Comptroller and the Examiner-in-Charge to conduct an independent review of certain residential foreclosure actions regarding individual borrowers with respect to the Bank's mortgage servicing portfolio. The review shall include residential foreclosure actions or proceedings (including foreclosures that were in process or completed) for loans serviced by the Bank, whether brought in the name of the Bank, the investor, the mort-

gage note holder, or any agent for the mortgage note holder (including MERS), that have been pending at any time from January 1, 2009 to December 31, 2010, as well as residential foreclosure sales that occurred during this time period ("Foreclosure Review").

(2) Within fifteen (15) days of the engagement of the independent consultant described in this Article, but prior to the commencement of the Foreclosure Review, the Bank shall submit to the Deputy Comptroller and the Examiner-in-Charge for approval an engagement letter that sets forth:

(a) the methodology for conducting the Foreclosure Review, including: (i) a description of the information systems and documents to be reviewed, including the selection of criteria for cases to be reviewed; (ii) the criteria for evaluating the reasonableness of fees and penalties; (iii) other procedures necessary to make the required determinations (such as through interviews of employees and third parties and a process for submission and review of borrower claims and complaints); and (iv) any proposed sampling techniques. In setting the scope and review methodology under clause (i) of this sub-paragraph, the independent consultant may consider any work already done by the Bank or other third-parties on behalf of the Bank. The engagement letter shall contain a full description of the statistical basis for the sampling methods chosen, as well as procedures to increase the size of the sample depending on results of the initial sampling;

(b) expertise and resources to be dedicated to the Foreclosure Review;

(c) completion of the Foreclosure Review within one hundred twenty (120) days from approval of the engagement letter; and

(d) a written commitment that any workpapers associated with the Foreclosure Review shall be made available to the OCC immediately upon request.

(3) The purpose of the Foreclosure Review shall be to determine, at a minimum:

(a) whether at the time the foreclosure action was initiated or the pleading or affidavit filed (including in bankruptcy proceedings and in defending suits brought by borrowers), the foreclosing party or agent of the party had properly documented ownership of the promissory note and mortgage (or deed of trust) under relevant state law, or was otherwise a proper party to the action as a result of agency or similar status;

(b) whether the foreclosure was in accordance with applicable state and federal law, including but not limited to the SCRA and the U.S. Bankruptcy Code;

(c) whether a foreclosure sale occurred when an application for a loan modification or other Loss Mitigation was under consideration; when the loan was performing in accordance with a trial or permanent loan modification; or when the loan had not been in default for a sufficient period of time to authorize foreclosure pursuant to the terms of the mortgage loan documents and related agreements;

(d) whether, with respect to non-judicial foreclosures, the procedures followed with respect to the foreclosure sale (including the calculation of the default period, the amounts due, and compliance with notice periods) and post-sale confirmations were in accordance with the terms of the mortgage loan and state law requirements;

(e) whether a delinquent borrower's account was only charged fees and/or penalties that were permissible under the terms of the borrower's loan documents, appli-

cable state and federal law, and were reasonable and customary;

(f) whether the frequency that fees were assessed to any delinquent borrower's account (including broker price opinions) was excessive under the terms of the borrower's loan documents, and applicable state and federal law;

(g) whether Loss Mitigation Activities with respect to foreclosed loans were handled in accordance with the requirements of the HAMP, and consistent with the policies and procedures applicable to the Bank's proprietary loan modifications or other loss mitigation programs, such that each borrower had an adequate opportunity to apply for a Loss Mitigation option or program, any such application was handled properly, a final decision was made on a reasonable basis, and was communicated to the borrower before the foreclosure sale; and

(h) whether any errors, misrepresentations, or other deficiencies identified in the Foreclosure Review resulted in financial injury to the borrower or the mortgagee.

(4) The independent consultant shall prepare a written report detailing the findings of the Foreclosure Review ("Foreclosure Report"), which shall be completed within thirty (30) days of completion of the Foreclosure Review. Immediately upon completion, the Foreclosure Report shall be submitted to the Deputy Comptroller, Examiner-in-Charge, and the Board.

(5) Within forty-five (45) days of submission of the Foreclosure Report to the Deputy Comptroller, Examiner-in-Charge, and the Board, the Bank shall submit to the Deputy Comptroller and the Examiner-in-Charge a plan, acceptable to the OCC, to remediate all financial

injury to borrowers caused by any errors, misrepresentations, or other deficiencies identified in the Foreclosure Report, by:

(a) reimbursing or otherwise appropriately remediating borrowers for impermissible or excessive penalties, fees, or expenses, or for other financial injury identified in accordance with this Article; and

(b) taking appropriate steps to remediate any foreclosure sale where the foreclosure was not authorized as described in this Article.

(6) Within sixty (60) days after the OCC provides supervisory non-objection to the plan set forth in paragraph (5) above, the Bank shall make all reimbursement and remediation payments and provide all credits required by such plan, and provide the OCC with a report detailing such payments and credits.

ARTICLE VIII
MANAGEMENT INFORMATION SYSTEMS

(1) Within sixty (60) days of this Order, the Bank shall submit to the Deputy Comptroller and the Examiner-in-Charge an acceptable plan for operation of its management information systems ("MIS") for foreclosure and Loss Mitigation or loan modification activities to ensure the timely delivery of complete and accurate information to permit effective decision-making. The MIS plan shall be implemented within one hundred twenty (120) days of this Order. Any corrective action timeframe that is in excess of one hundred twenty (120) days must be approved by the Examiner-in-Charge. The plan shall include, at a minimum:

(a) a description of the various components of MIS used by the Bank for foreclosure and Loss Mitigation or loan modification activities;

(b) a description of and timetable for any needed changes or upgrades to:

(i) monitor compliance with all applicable Legal Requirements and

(ii) ensure the ongoing accuracy of records for all serviced mortgages, including, but not limited to, records necessary to establish ownership and the right to foreclose by the appropriate party for all serviced mortgages, outstanding balances, and fees assessed to the borrower; and

(iii) measures to ensure that Loss Mitigation, loan foreclosure, and modification staffs have sufficient and timely access to information provided by the borrower regarding loan foreclosure and modification activities;

(c) testing the integrity and accuracy of the new or enhanced MIS to ensure that reports generated by the system provide necessary information for adequate monitoring and quality controls.

ARTICLE IX
MORTGAGE SERVICING

(1) Within sixty (60) days of this Order, the Bank shall submit to the Deputy Comptroller and the Examiner-in-Charge an acceptable plan, along with a timeline for ensuring effective coordination of communications with borrowers, both oral and written, related to Loss Mitigation or loan modification and foreclosure activities: (i) to ensure that communications are timely and effective and are designed to avoid confusion to borrowers; (ii) to ensure continuity in the handling of borrowers' loan files during the Loss Mitigation, loan modification, and foreclosure process by personnel knowledgeable about a specific borrower's situation; (iii) to ensure rea-

sonable and good faith efforts, consistent with applicable Legal Requirements, are engaged in Loss Mitigation and foreclosure prevention for delinquent loans, where appropriate; and (iv) to ensure that decisions concerning Loss Mitigation or loan modifications continue to be made and communicated in a timely fashion. Prior to submitting the plan, the Bank shall conduct a review to determine whether processes involving past due mortgage loans or foreclosures overlap in such a way that they may impair or impede a borrower's efforts to effectively pursue a loan modification, and whether Bank employee compensation practices discourage Loss Mitigation or loan modifications. The plan shall be implemented within one hundred twenty (120) days of this Order. Any corrective action timeframe that is in excess of one hundred twenty (120) days must be approved by the Examiner-in-Charge. The plan shall include, at a minimum:

(a) measures to ensure that staff handling Loss Mitigation and loan modification requests routinely communicate and coordinate with staff processing the foreclosure on the borrower's property;

(b) appropriate deadlines for responses to borrower communications and requests for consideration of Loss Mitigation, including deadlines for decision-making on Loss Mitigation Activities, with the metrics established not being less responsive than the timelines in the HAMP program;

(c) establishment of an easily accessible and reliable single point of contact for each borrower so that the borrower has access to an employee of the Bank to obtain information throughout the Loss Mitigation, loan modification, and foreclosure processes;

(d) a requirement that written communications with the borrower identify such single point of contact along

with one or more direct means of communication with the contact;

(e) measures to ensure that the single point of contact has access to current information and personnel (in-house or third-party) sufficient to timely, accurately, and adequately inform the borrower of the current status of the Loss Mitigation, loan modification, and foreclosure activities;

(f) measures to ensure that staff are trained specifically in handling mortgage delinquencies, Loss Mitigation, and loan modifications;

(g) procedures and controls to ensure that a final decision regarding a borrower's loan modification request (whether on a trial or permanent basis) is made and communicated to the borrower in writing, including the reason(s) why the borrower did not qualify for the trial or permanent modification (including the net present value calculations utilized by the Bank, if applicable) by the single point of contact within a reasonable period of time before any foreclosure sale occurs;

(h) procedures and controls to ensure that when the borrower's loan has been approved for modification on a trial or permanent basis that: (i) no foreclosure or further legal action predicate to foreclosure occurs, unless the borrower is deemed in default on the terms of the trial or permanent modification; and (ii) the single point of contact remains available to the borrower and continues to be referenced on all written communications with the borrower;

(i) policies and procedures to enable borrowers to make complaints regarding the Loss Mitigation or modification process, denial of modification requests, the foreclosure process, or foreclosure activities which pre-

vent a borrower from pursuing Loss Mitigation or modification options, and a process for making borrowers aware of the complaint procedures;

(j) procedures for the prompt review, escalation, and resolution of borrower complaints, including a process to communicate the results of the review to the borrower on a timely basis;

(k) policies and procedures to ensure that payments are credited in a prompt and timely manner; that payments, including partial payments to the extent permissible under the terms of applicable legal instruments, are applied to scheduled principal, interest, and/or escrow before fees, and that any misapplication of borrower funds is corrected in a prompt and timely manner;

(l) policies and procedures to ensure that timely information about Loss Mitigation options is sent to the borrower in the event of a delinquency or default, including plain language notices about loan modification and the pendency of foreclosure proceedings;

(m) policies and procedures to ensure that foreclosure, Loss Mitigation, and loan modification documents provided to borrowers and third parties are appropriately maintained and tracked, and that borrowers generally will not be required to resubmit the same documented information that has already been provided, and that borrowers are notified promptly of the need for additional information; and

(n) policies and procedures to consider loan modifications or other Loss Mitigation Activities with respect to junior lien loans owned by the Bank, and to factor the risks associated with such junior lien loans into loan loss reserving practices, where the Bank services the associated first lien mortgage and becomes aware that such

first lien mortgage is delinquent or has been modified. Such policies and procedures shall require the ongoing maintenance of appropriate loss reserves for junior lien mortgages owned by the Bank and the charge-off of such junior lien loans in accordance with FFIEC retail credit classification guidelines.

ARTICLE X
RISK ASSESSMENT AND RISK MANAGEMENT PLAN

(1) Within ninety (90) days of this Order, the Bank shall conduct a written, comprehensive assessment of the Bank's risks in mortgage servicing operations, particularly in the areas of Loss Mitigation, foreclosure, and the administration and disposition of other real estate owned, including, but not limited to, operational, compliance, transaction, legal, and reputational risks.

(2) The Bank shall develop an acceptable plan to effectively manage or mitigate identified risks on an ongoing basis, with oversight by the Bank's senior risk managers, senior management, and the Board. The assessment and plan shall be provided to the Deputy Comptroller and the Examiner-in-Charge within one hundred twenty (120) days of this Order.

ARTICLE XI
APPROVAL, IMPLEMENTATION AND REPORTS

(1) The Bank shall submit the written plans, programs, policies, and procedures required by this Order for review and determination of no supervisory objection to the Deputy Comptroller and the Examiner-in-Charge within the applicable time periods set forth in Articles II through X. The Bank shall adopt the plans, programs, policies, and procedures required by this Order upon submission to the OCC, and shall immediately make any

revisions requested by the Deputy Comptroller or the Examiner-in-Charge. Upon adoption, the Bank shall immediately implement the plans, programs, policies, and procedures required by this Order and thereafter fully comply with them.

(2) During the term of this Order, the required plans, programs, policies, and procedures shall not be amended or rescinded in any material respect without the prior written approval of the Deputy Comptroller or the Examiner-in-Charge (except as otherwise provided in this Order).

(3) During the term of this Order, the Bank shall revise the required plans, programs, policies, and procedures as necessary to incorporate new or changes to applicable Legal Requirements and supervisory guidelines.

(4) The Board shall ensure that the Bank has processes, personnel, and control systems to ensure implementation of and adherence to the plans, programs, policies, and procedures required by this Order.

(5) Within thirty (30) days after the end of each calendar quarter following the date of this Order, the Bank shall submit to the OCC a written progress report detailing the form and manner of all actions taken to secure compliance with the provisions of this Order and the results thereof. The progress report shall include information sufficient to validate compliance with this Order, based on a testing program acceptable to the OCC that includes, if required by the OCC, validation by third-party independent consultants acceptable to the OCC. The OCC may, in writing, discontinue the requirement for progress reports or modify the reporting schedule.

(6) All communication regarding this Order shall be sent to:

(a) Sally G. Belshaw
Deputy Comptroller for Large Bank Supervision
Office of the Comptroller of the Currency
250 E Street SW
Washington, DC 20219

(b) Grace E. Dailey
Examiner-in-Charge
National Bank Examiners
800 Nicollet Mall, BC-MN-H17O
Minneapolis, MN 55402

ARTICLE XII
COMPLIANCE AND EXTENSIONS OF TIME

(1) If the Bank contends that compliance with any provision of this Order would not be feasible or legally permissible for the Bank, or requires an extension of any timeframe within this Order, the Board shall submit a written request to the Deputy Comptroller asking for relief. Any written requests submitted pursuant to this Article shall include a statement setting forth in detail the special circumstances that prevent the Bank from complying with a provision, that require the Deputy Comptroller to exempt the Bank from a provision, or that require an extension of a timeframe within this Order.

(2) All such requests shall be accompanied by relevant supporting documentation, and to the extent requested by the Deputy Comptroller, a sworn affidavit or affidavits setting forth any other facts upon which the Bank relies. The Deputy Comptroller's decision concerning a request is final and not subject to further review.

ARTICLE XIII
OTHER PROVISIONS

(1) Although this Order requires the Bank to submit certain actions, plans, programs, policies, and procedures for the review or prior written determination of no supervisory objection by the Deputy Comptroller or the Examiner-in-Charge, the Board has the ultimate responsibility for proper and sound management of the Bank.

(2) In each instance in this Order in which the Board is required to ensure adherence to, and undertake to perform certain obligations of the Bank, it is intended to mean that the Board shall:

(a) authorize and adopt such actions on behalf of the Bank as may be necessary for the Bank to perform its obligations and undertakings under the terms of this Order;

(b) require the timely reporting by Bank management of such actions directed by the Board to be taken under the terms of this Order;

(c) follow-up on any material non-compliance with such actions in a timely and appropriate manner; and

(d) require corrective action be taken in a timely manner of any material non-compliance with such actions.

(3) If, at any time, the Comptroller deems it appropriate in fulfilling the responsibilities placed upon him by the several laws of the United States to undertake any action affecting the Bank, nothing in this Order shall in any way inhibit, estop, bar, or otherwise prevent the Comptroller from so doing.

(4) This Order constitutes a settlement of the cease and desist proceeding against the Bank contemplated by

the Comptroller, based on the unsafe or unsound practices described in the Comptroller's Findings set forth in Article I of this Order. Provided, however, that nothing in this Order shall prevent the Comptroller from instituting other enforcement actions against the Bank or any of its institution-affiliated parties, including, without limitation, assessment of civil money penalties, based on the findings set forth in this Order, or any other findings.

(5) This Order is and shall become effective upon its execution by the Comptroller, through his authorized representative whose hand appears below. The Order shall remain effective and enforceable, except to the extent that, and until such time as, any provision of this Order shall be amended, suspended, waived, or terminated in writing by the Comptroller.

(6) Any time limitations imposed by this Order shall begin to run from the effective date of this Order, as shown below, unless the Order specifies otherwise.

(7) The terms and provisions of this Order apply to the Bank and its subsidiaries, even though those subsidiaries are not named as parties to this Order. The Bank shall integrate any foreclosure or mortgage servicing activities done by a subsidiary into its plans, policies, programs, and processes required by this Order. The Bank shall ensure that its subsidiaries comply with all terms and provisions of this Order.

(8) This Order is intended to be, and shall be construed to be, a final order issued pursuant to 12 U.S.C. § 1818(b), and expressly does not form, and may not be construed to form, a contract binding the Comptroller or the United States. Nothing in this Order shall affect any action against the Bank or its institution-affiliated parties by a bank regulatory agency, the United States De-

partment of Justice, or any other law enforcement agency, to the extent permitted under applicable law.

(9) The terms of this Order, including this paragraph, are not subject to amendment or modification by any extraneous expression, prior agreements, or prior arrangements between the parties, whether oral or written.

(10) Nothing in the Stipulation and Consent or this Order, express or implied, shall give to any person or entity, other than the parties hereto, and their successors hereunder, any benefit or any legal or equitable right, remedy or claim under the Stipulation and Consent or this Order.

(11) The Bank consents to the issuance of this Order before the filing of any notices, or taking of any testimony or adjudication, and solely for the purpose of settling this matter without a formal proceeding being filed.

IT IS SO ORDERED, this 13th day of April, 2011.

/s/ .
Sally G. Belshaw
Deputy Comptroller
Large Bank Supervision

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
COMPTROLLER OF THE CURRENCY

	)	
In the Matter of:	)	
U.S. Bank National Association	)	
Cincinnati, Ohio	)	AA-EC-11-18
and	)	
U.S. Bank National Association ND	)	
Fargo, North Dakota	)	
	)	

STIPULATION AND CONSENT TO THE ISSUANCE OF A CONSENT ORDER

The Comptroller of the Currency of the United States of America ("Comptroller") intends to impose a cease and desist order on U.S. Bank National Association, Cincinnati, Ohio and U.S. Bank National Association ND, Fargo, North Dakota (collectively, "Bank") pursuant to 12 U.S.C. § § 1818(b), for unsafe or unsound banking practices relating to mortgage servicing and the initiation and handling of foreclosure proceedings.

The Bank, in the interest of compliance and cooperation, enters into this Stipulation and Consent to the Issuance of a Consent Order ("Stipulation") and consents to the issuance of a Consent Order, dated April 13, 2011 ("Consent Order");

In consideration of the above premises, the Comptroller, through his authorized representative, and the Bank, through its duly elected and acting Board of Directors, stipulate and agree to the following:

ARTICLE I
JURISDICTION

(1) The Bank is a national banking association chartered and examined by the Comptroller pursuant to the National Bank Act of 1864, as amended, 12 U.S.C. § 1 *et seq.*

(2) The Comptroller is "the appropriate Federal banking agency" regarding the Bank pursuant to 12 U.S.C. §§ 1813(q) and 1818(b).

(3) The Bank is an "insured depository institution" within the meaning of 12 U.S.C. § 1818(b)(1).

(4) For the purposes of, and within the meaning of 12 C.F.R. §§ 5.3(g)(4), 5.51(c)(6), and 24.2(e)(4), this Consent Order shall not be construed to be a "cease and desist order" or "consent order", unless the OCC informs the Bank otherwise.

ARTICLE II
AGREEMENT

(1) The Bank, without admitting or denying any wrongdoing, consents and agrees to issuance of the Consent Order by the Comptroller.

(2) The Bank consents and agrees that the Consent Order shall (a) be deemed an "order issued with the consent of the depository institution" pursuant to 12 U.S.C. § 1818(h)(2), (b) become effective upon its execution by the Comptroller through his authorized representative, and (c) be fully enforceable by the Comptroller pursuant to 12 U.S.C. § 1818(i).

(3) Notwithstanding the absence of mutuality of obligation, or of consideration, or of a contract, the Comptroller may enforce any of the commitments or obligations herein undertaken by the Bank under his supervi-

sory powers, including 12 U.S.C. § 1818(i), and not as a matter of contract law. The Bank expressly acknowledges that neither the Bank nor the Comptroller has any intention to enter into a contract.

(4) The Bank declares that no separate promise or inducement of any kind has been made by the Comptroller, or by his agents or employees, to cause or induce the Bank to consent to the issuance of the Consent Order and/or execute the Consent Order.

(5) The Bank expressly acknowledges that no officer or employee of the Comptroller has statutory or other authority to bind the United States, the United States Treasury Department, the Comptroller, or any other federal bank regulatory agency or entity, or any officer or employee of any of those entities to a contract affecting the Comptroller's exercise of his supervisory responsibilities.

(6) The OCC releases and discharges the Bank from all potential liability for a cease and desist order that has been or might have been asserted by the OCC based on the banking practices described in the Comptroller's Findings set forth in Article I of the Consent Order, to the extent known to the OCC as of the effective date of the Consent Order. However, the banking practices alleged in Article I of the Consent Order may be utilized by the OCC in other future enforcement actions against the Bank or its institution-affiliated parties, including, without limitation, to assess civil money penalties or to establish a pattern or practice of violations or the continuation of a pattern or practice of violations. This release shall not preclude or affect any right of the OCC to determine and ensure compliance with the terms and provisions of this Stipulation or the Consent Order.

(7) The terms and provisions of the Stipulation and the Consent Order shall be binding upon, and inure to the benefit of, the parties hereto and their successors in interest. Nothing in this Stipulation or the Consent Order, express or implied, shall give to any person or entity, other than the parties hereto, and their successors hereunder, any benefit or any legal or equitable right, remedy or claim under this Stipulation or the Consent Order.

ARTICLE III
WAIVERS

(1) The Bank, by consenting to this Stipulation, waives:

(a) the issuance of a Notice of Charges pursuant to 12 U.S.C. § 1818(b);

(b) any and all procedural rights available in connection with the issuance of the Consent Order;

(c) all rights to a hearing and a final agency decision pursuant to 12 U.S.C. §§ 1818(b) and (h), 12 C.F.R. Part 19;

(d) all rights to seek any type of administrative or judicial review of the Consent Order;

(e) any and all claims for fees, costs, or expenses against the Comptroller, or any of his agents or employees, related in any way to this enforcement matter or this Consent Order, whether arising under common law or under the terms of any statute, including, but not limited to, the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412; and

(f) any and all rights to challenge or contest the validity of the Consent Order.

ARTICLE IV
OTHER PROVISIONS

(1) The provisions of this Stipulation shall not inhibit, estop, bar, or otherwise prevent the Comptroller from taking any other action affecting the Bank if, at any time, it deems it appropriate to do so to fulfill the responsibilities placed upon it by the several laws of the United States of America.

(2) Nothing in this Stipulation shall preclude any proceedings brought by the Comptroller to enforce the terms of this Consent Order, and nothing in this Stipulation constitutes, nor shall the Bank contend that it constitutes, a waiver of any right, power, or authority of any other representative of the United States or an agency thereof, including, without limitation, the United States Department of Justice, to bring other actions deemed appropriate.

(3) The terms of the Stipulation and the Consent Order are not subject to amendment or modification by any extraneous expression, prior agreements or prior arrangements between the parties, whether oral or written.

IN TESTIMONY WHEREOF, the undersigned, authorized by the Comptroller as his representative, has hereunto set her hand on behalf of the Comptroller.

/s/	April 13, 2011
Sally G. Belshaw Deputy Comptroller Large Bank Supervision	Date

IN TESTIMONY WHEREOF, the undersigned, as the duly elected and acting Board of Directors of the Bank, have hereunto set their hands on behalf of the Bank.

[Additional names and dates omitted]