

Congress of the United States
Washington, DC 20515

October 26, 2012

The Honorable Shaun Donovan
Secretary
U.S. Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410

Dear Mr. Secretary:

We are examining the quid pro quo agreement between the Department of Justice (DOJ) and the City of St. Paul, Minnesota, that culminated in the City's withdrawal of its Supreme Court appeal in *Magner v. Gallagher*.¹ Information available to the Committees indicates that officials from the Department of Housing and Urban Development (HUD) played an appreciable role in the development of this quid pro quo. Accordingly, we ask that you produce all documents and communications relevant to this inquiry and that you make available certain HUD officials for transcribed interviews.

In November 2011, the Supreme Court agreed to hear the City's appeal in *Magner* to determine whether the Fair Housing Act supported claims of disparate impact.² Assistant Attorney General Thomas Perez, head of DOJ's Civil Rights Division, worried that the Court would eviscerate the disparate impact analysis that DOJ had used to bring lending discrimination lawsuits. To prevent the Supreme Court from hearing the case, Mr. Perez arranged a quid pro quo with the City in which the City agreed to withdraw its appeal in exchange for DOJ's agreement to not intervene in two unrelated False Claims Act (FCA) cases, *Newell* and *Ellis*.³

In *Newell*, an African-American small-business owner and whistleblower alleged that the City had received millions in federal dollars by fraudulently certifying compliance with Section 3 of the HUD Act.⁴ Specifically, he alleged that the City had falsely certified that it was compliant with Section 3's training and employment requirements for low-income individuals from 2003 to 2009.⁵ Similarly, in *Ellis*, three private citizens alleged that the City had falsely certified its compliance with federal fair housing laws to secure federal HUD dollars.⁶

Documents reviewed by the Committees demonstrate that HUD initially supported intervention in *Newell* before acquiescing to Mr. Perez's quid pro quo. In early October 2011,

¹ See *Magner v. Gallagher*, 132 S. Ct. 1306 (Feb. 14, 2012) (dismissing writ of certiorari).

² See *Magner v. Gallagher*, No. 10-1032 (Nov. 7, 2011) (granting writ of certiorari).

³ See False Claims Act Complaint and Demand for Jury Trial, United States *ex rel.* *Newell v. City of Saint Paul*, Civ. No. 09-1177 (D. Minn. filed May 19, 2009); False Claims Act Complaint and Demand for Jury Trial, United States *ex rel.* *Ellis v. City of Minneapolis & City of St. Paul*, Civ. No. 11-416 (D. Minn. filed Feb. 18, 2011).

⁴ False Claims Act Complaint and Demand for Jury Trial, United States *ex rel.* *Newell v. City of Saint Paul*, Civ. No. 09-1177 (D. Minn. filed May 19, 2009).

⁵ *Id.*

⁶ False Claims Act Complaint and Demand for Jury Trial, United States *ex rel.* *Ellis v. City of Minneapolis & City of St. Paul*, Civ. No. 11-416 (D. Minn. filed Feb. 18, 2011).

career attorneys in DOJ's Civil Division – with responsibility for litigating FCA cases – recommended that DOJ intervene in *Newell*, finding that the City's behavior was a “particularly egregious example” of false certification. HUD agreed with this evaluation. On October 7, Dane Narode, HUD's Associate General Counsel in the Office of Program Enforcement, told attorneys in DOJ's Civil Division that HUD concurred in the recommendation for intervention.⁷

However, after Mr. Perez began negotiations on the quid pro quo, HUD's assessment changed. Notes from one late November meeting indicate HUD's willingness to “leverage” the case. Soon thereafter, on November 29, Mr. Narode called a Civil Division attorney to inform her that HUD had reconsidered its support for intervention in *Newell*. After the Civil Division requested more information on HUD's sudden change of heart, Mr. Narode authored a memorandum on December 20 with HUD's formal recommendation to decline intervention in *Newell*. Mr. Narode sent a second memorandum on December 21 formally recommending non-intervention in *Ellis*.⁸

Officials in DOJ's Civil Division were puzzled by HUD's sudden reversal. One attorney called it “cover your head’ ping pong” and another bemoaned the “fast change of heart” at HUD. The U.S. Attorney for Minnesota, B. Todd Jones, felt that HUD was “abandoning ship” and speculated that it may have been “lobbied” to change its view. Mr. Narode bluntly told a career DOJ attorney: “If DOJ wants further information about what is driving HUD's decision, someone high level within DOJ might need to call [HUD General Counsel] Helen Kanovsky.”⁹

The documents appear to show that Mr. Perez was a driving force behind HUD's change of heart. On November 30, Assistant Attorney General Tony West, head of the Civil Division, emailed Mr. Perez about HUD's initial assessment to intervene in *Newell*. Mr. Perez responded later the same day: “I am confident that [HUD's] position has changed. You will be hearing from Helen [Kanovsky] today.”¹⁰ Mr. Perez's response suggests a special knowledge of HUD's decision-making in changing its recommendation.

Sara Pratt, HUD's Deputy Assistant Secretary for Enforcement and Programs, also appears to have played some role in shaping the quid pro quo. Ms. Pratt emailed Mr. Perez in late November 2011 with an update on the *Magner* appeal. In early December, Mr. Perez connected Ms. Pratt with David Lillehaug, the attorney representing the City in the *Newell* case. Ms. Pratt subsequently met with the City – including Mayor Christopher Coleman, City Attorney Sara Grewing, and Lillehaug – on December 13 to discuss *Newell*. After the meeting Mr. Lillehaug thanked Ms. Pratt for the “productive” meeting and expressed dismay at the City's other meeting with DOJ's Civil Division attorneys, who he said “described their job as ‘bringing in money to the U.S. Treasury.’”¹¹

⁷ Committees staff review of documents from the Dep't of Justice (Aug. 20, 2012).

⁸ Committees staff review of documents from the Dep't of Justice (Aug. 20, 2012).

⁹ Committees staff review of documents from the Dep't of Justice (Aug. 20, 2012).

¹⁰ Committees staff review of documents from the Dep't of Justice (Aug. 20, 2012).

¹¹ Email from David Lillehaug, Fredrickson & Byron P.A., to Sara Pratt, Dep't of Housing and Urban Development (Dec. 14, 2011).

Over the course of the next two months, Mr. Perez and Ms. Pratt continued to negotiate with the City. Mr. Lillehaug and his law partner, John Lundquist, sent information to Ms. Pratt on the City's Section 3 programs in December 2011. Meanwhile, Mr. Perez told the City that his "top priority" was the withdrawal of *Magner* and continued to explore how to leverage *Newell* to achieve his goal.¹² After Mr. Perez proposed the details of the quid pro quo, Mr. Perez promised the City that "HUD would be helpful" in the event the *Newell* litigation continued after DOJ declined to intervene. In February 2012, he told the City that Ms. Pratt had begun to assemble information to assist the City with its motion to dismiss the *Newell* case. After the Civil Division objected to HUD assisting the City, Mr. Perez withdrew his offer of HUD's assistance.¹³

Because the United States did not intervene in these two cases, it is likely that American taxpayers will never recoup the millions of dollars in wrongfully allocated funds. Moreover, according to the whistleblower in *Newell*, the City's compliance with Section 3 of the HUD Act remains deficient.¹⁴ As such, the sudden unexplained reversal of HUD's assessment of *Newell* and HUD's recommendation of non-intervention in *Ellis* demand a thorough and vigorous examination. To assist us in understanding HUD's role in the quid pro quo between DOJ and the City of St. Paul, please provide the following information by November 9, 2012:

1. All documents and communications between or among employees of the Department of Housing and Urban Development and employees of the Department of Justice referring or relating to (a) *Magner v. Gallagher*, (b) *United States ex rel. Newell v. City of St. Paul*, or (c) *United States ex rel. Ellis v. City of Minneapolis & City of St. Paul* for the period May 19, 2009, through the present;
2. All documents and communications between or among employees of the Department of Housing and Urban Development and employees or representatives of the City of St. Paul, Minnesota, referring or relating to (a) *Magner v. Gallagher*, (b) *United States ex rel. Newell v. City of St. Paul*, or (c) *United States ex rel. Ellis v. City of Minneapolis & City of St. Paul* for the period May 19, 2009, through the present; and
3. All other documents and communications referring or relating to (a) *Magner v. Gallagher*, (b) *United States ex rel. Newell v. City of St. Paul*, or (c) *United States ex rel. Ellis v. City of Minneapolis & City of St. Paul* for the period May 19, 2009, through the present.

This quid pro quo raises numerous legal and ethical questions about the Administration's actions and whether DOJ and HUD elevated its ideological agenda above the taxpayers' interest in fighting fraud and mismanagement. In order to further the Committees' oversight of this important matter, we also ask that you make the following HUD officials available for transcribed interviews: Helen Kanovsky, Sara Pratt, Dane Narode and Maurice McGough.

¹² Meeting with David Lillehaug, Fredrickson & Byron P.A., and Sara Grewing, St. Paul City Attorney (Oct. 16, 2012) (statement of David Lillehaug).

¹³ Meeting with David Lillehaug, Fredrickson & Byron P.A., and Sara Grewing, St. Paul City Attorney (Oct. 16, 2012) (statement of David Lillehaug).

¹⁴ Phone conversation with Fredrick Newell (Oct. 18, 2012).

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Please contact David Brewer or Katelyn Christ of the House Committee on Oversight and Government Reform to schedule the transcribed interviews by October 31, 2012. Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman
Committee on Oversight
and Government Reform
United States House of Representatives



Lamar Smith
Chairman
Committee on the Judiciary
United States House of Representatives



Patrick McHenry
Chairman
Subcommittee on TARP, Financial Services and
Bailouts of Public and Private Programs
United States House of Representatives



Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate

cc: The Honorable Elijah E. Cummings, Ranking Member
Committee on Oversight and Government Reform
United States House of Representatives

The Honorable John Conyers, Jr., Ranking Member
Committee on the Judiciary
United States House of Representatives

The Honorable Mike Quigley, Ranking Member
Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs
United States House of Representatives

The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate