

Department of Justice Documents

From: Lillehaug, David [REDACTED]
Sent: Tuesday, January 31, 2012 2:53 PM
To: Perez, Thomas E (CRT)
Cc: 'Sara Grewing'; Lundquist, John
Subject: RE: Followup

Tom -- We propose 10 a.m. at the Mayor's office, City Hall. If this works for you, please hit "reply all" and let us know. If it doesn't work, the Mayor may well be able to do another time.

We look forward to seeing you.

David Lillehaug
Fredrikson & Byron, P.A.
612-[REDACTED]

-----Original Message-----

From: Perez, Thomas E (CRT) [REDACTED]
Sent: Tuesday, January 31, 2012 12:09 PM
To: Lillehaug, David
Subject: Followup

David

It looks like I will be in the twin cities on friday. The morning has some flexibility and I could get over to the meeting we discussed if you are able to arrange. Let me know if that is doable. Anytime until 1230 could happen. If it works, let me know if this works.

Tom

From: Line Attorney 1
Sent: Tuesday, October 4, 2011 5:05 PM
To: HUD Line Emp.
Cc: Line Attorney 3; Line Attorney 2
<Line Attorney 2>
Subject: City of St. Paul qui tam

HUD Line
Emp.

Our office is recommending intervention. Does HUD concur? Thank you.

Line Attorney 1

Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: HUD Line Emp.
Sent: Friday, October 7, 2011 11:27 AM
To: Line Attorney 1
Cc: Line Attorney 3; Line Attorney 2
<Line Attorney 2>
Subject: RE: City of St. Paul qui tam

Line Attorney 1: HUD concurs with DOJ's recommendation. HUD Line Emp.

From: Line Attorney 1
Sent: Tuesday, October 04, 2011 5:05 PM
To: HUD Line Emp.
Cc: Line Attorney 3; Line Attorney 2
Subject: City of St. Paul qui tam

HUD Line Emp.
Our office is recommending intervention. Does HUD concur? Thank you.

Line Attorney 1
Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: Line Attorney 3
To: Brooker, Greg (USAMN)
Sent: 10/7/2011 11:28:26 AM
Subject: FW: City of St. Paul qui tam

Looks like everyone is on board.

From: HUD Line Emp.
Sent: Friday, October 07, 2011 10:27 AM
To: Line Attorney 1
Cc: Line Attorney 3, Line Attorney 2
Subject: RE: City of St. Paul qui tam

Line Attorney 1: HUD concurs with DOJ's recommendation. HUD Line Emp.

From: Line Attorney 1
Sent: Tuesday, October 04, 2011 5:05 PM
To: HUD Line Emp.
Cc: Line Attorney 3, Line Attorney 2
Subject: City of St. Paul qui tam

HUD Line Emp.
Our office is recommending intervention. Does HUD concur? Thank you.

Line Attorney 1
Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: Line Attorney 3
Sent: Wednesday, October 26, 2011 3:39 PM
To: Line Attorney 2; Line Attorney 1
<Line Attorney 1 >
Cc: Brooker, Greg (USAMN) <RC-1 >
Subject: Signed USAO-MN authority memo in U.S. ex rel. Newell v. City of St. Paul, Minnesota
Attach: 2011.10.25- Memo.pdf

Our signed memo is attached.

<<...>>

Line Attorney 3

Assistant United States Attorney
612. RC-1

Memorandum

U.S. Department of Justice



United States Attorney
District of Minnesota

Subject Intervention Memo <i>U.S. ex rel. Newell v. City of St. Paul, Minnesota,</i> Case No. 09-SC-001177 (D. Minn.)	Date October 25, 2011
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To
Gregory G. Brooker
Civil Chief

From
Line Attorney 3 AUSA

The operative qui tam complaint (“Complaint”) in this matter was filed in 2009 against the defendant, the city of St. Paul (“St. Paul” or “The City”). The Complaint alleges that the Defendant defrauded the United States by submission of false and fraudulent claims to the United States Department of Housing and Urban Development (“HUD”). The claims were allegedly false because the City falsely certified that it was in compliance with Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. § 1701u) (“Section 3”) in order to obtain tens of millions of dollars from HUD in the form of Community Development Block Grants and other federal funds which require compliance with Section 3.

After extensive investigation, we have determined that the City was not in compliance with Section 3. For much of the investigation, the City did not seriously dispute that the City did next to nothing to comply with Section 3, notwithstanding the fact that it was put on notice on multiple occasions over the years that it was allegedly out of compliance. After we completed our investigation, the City retained outside counsel, and the outside counsel now argues that the City did not knowingly violate Section 3. Even assuming that the City did not technically comply with Section 3, it argues that the non-compliance was inadvertent. Essentially, it argues that the City had initiatives intended to benefit minority-owned businesses and women-owned businesses, and that the City reasonably believed that these programs brought it into compliance with Section 3. Additionally, the City will likely raise a number of legal defenses.

We are not persuaded by the City’s arguments. We believe that the City had the requisite knowledge about its obligations to comply with Section 3 and how to do so.

The City made annual certifications that it was in compliance with Section 3, but knew when it made the certifications that it had no plans to comply with it. While some HUD grantees might argue that they simply do not understand what they must do in order to comply with Section 3, Saint Paul will have a very difficult time making this argument because it received multiple reminders over the years of its obligations under Section 3. Despite knowing that it was out of compliance, the City repeatedly told HUD and others that it was actually in compliance. In short, this is a case of a City knowingly submitting false certifications in order to obtain federal funds.

That said, we will have to contend with a number of difficult arguments by the City, including arguments related to HUD's knowledge or, at a minimum, lack of oversight. These arguments are discussed in more detail below.

I. Applicable Law

A. Section 3

The Defendant is a recipient of Community Development Block Grants ("CDBG") and other federal funds which require compliance with Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. § 1701u). The purpose of Section 3 is to ensure that employment and other economic opportunities generated by certain HUD financial assistance shall, to the greatest extent feasible, be directed to low- and very low-income persons, particularly those who are recipients of government assistance for housing, and to business concerns which provide economic opportunities to low- and very low-income persons. To receive Section 3 funds, an applicant must annually submit a certification that it will comply with Section 3. Specifically, St. Paul is required to certify annually that the City "will comply with Section 3 of the Housing and Urban Development Act of 1968, and implementing regulations, at 24 C.F.R. Part 135." 24 C.F.R. § 91.225(a)(7).

B. False Claims Act Theory

Our theory is a straightforward one. In order to receive CDBG funds, among others, the City is obligated to certify annually that it is in compliance with Section 3. The City then makes claims for payment that rely on that certification, impliedly certifying compliance with Section 3 each time it does so. This two-part certification theory has been endorsed in cases such as *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005), and *United States ex rel. Hendow v. Univ. of Phx.*, 461 F.3d 1166 (9th Cir. 2006), but the Eighth Circuit has recently called it into some question in *United States ex. rel. Vigil v. Nelnet*, 2011 WL 1675418 (8th Cir. May 5, 2011).

II. Affirmative Case Against the City

There is little or no question that the City annually certified its compliance with Section 3. The City has also made helpful admissions in the past regarding these certifications. 24 C.F.R. § 91.225(a)(7). When the City's compliance with Section 3 was litigated in the past, the City admitted on multiple occasions that compliance with Section 3 was a requirement for the receipt of federal funds that carry Section 3 obligations. *See* 1991 Affidavit of Jacqui Shoholm (“[c]ompliance with the provisions of section 3 is a condition for the receipt of federal funds provided to the project and binding on all parties to the project.”); City's 1985 Summary Judgment Brief (“It is the stated policy of the City of Saint Paul that compliance with section 3, as well as all other applicable rules and regulations promulgated by HUD, shall be a condition for the receipt of the federal assistance provided to the project and binding upon all of the parties.”)

It also should be largely uncontested that the City fell well short of compliance with Section 3. While this litigation was ongoing, an administrative claim against the City for Section 3 non-compliance was proceeding on a parallel track. In that administrative proceeding, HUD determined that the City was out of compliance with Section 3. It did not appear to be a particularly close call. The City initially contested that finding, but dropped its challenge in order to retain its eligibility to compete for and secure discretionary HUD funding. The City agreed to enter into a Voluntary Compliance Agreement (“VCA”), which required it to take a number of affirmative steps to come into compliance with Section 3.¹

Consistent with HUD's findings, although the City has contended for years that it has been in compliance with Section 3, our investigation revealed very little evidence of the City's Section 3 compliance.² The closest the City came was a Section 3 clause in various City agreements, but even those clauses fell well short of the Section 3 clause mandated by 24 C.F.R. § 135.38. We interviewed multiple project managers, who would have been responsible for implementing Section 3 on various projects for which the

¹ The VCA addresses compliance with Section 3 on a going-forward basis, and does not deal with a remedy for past violations. FCA liability is specifically reserved from the Agreement.

² The City made numerous changes after HUD notified it in 2009 that the City was out of compliance with Section 3. This memo addresses the City's behavior prior to those changes.

funding required Section 3 compliance. All indicated that they did little if anything to comply with Section 3, and many were essentially unaware of Section 3 for most of the relevant time period. The City's purported compliance with Section 3 relies predominantly on its efforts to comply with minority-based contracting initiatives. The City now acknowledges that while there may be some overlap between those initiatives and Section 3, minority-based initiatives are distinct from the Section 3 requirements.

The City should also not be heard to complain that it lacked the requisite knowledge of Section 3. In 1984, the City and HUD entered into a Voluntary Compliance Agreement and associated plan of compliance that lay out in detail what a city needs to do to comply with Section 3. The City's Deputy Director of Community Development informed HUD that "The plan will be incorporated into the City's Compliance Users Manual and monitoring of Section 3." In 1991, in the course of seeking the dismissal of a suit alleging Section 3 non-compliance, the City directed the Court to that Section 3 Plan of Compliance. In 2003, a city employee charged in part with Section 3 compliance notified the City, "This also suggests that MN Statute 469 may not be completely complied with as well as federal section 3..." Most recently, Frederick Newell sued the City in federal court, alleging that the City was out of compliance with Section 3.

Each time its compliance with Section 3 was challenged, the City had an opportunity to consult the Section 3 statute and regulations and compare the mandates contained therein with the City's own performance. In light of what our investigation has uncovered, even a cursory examination of the City's practices would have revealed the City's noncompliance with Section 3. Instead, the City simply and repeatedly told the relevant entities that it was in compliance with Section 3. That includes its responses to the recent Newell lawsuit and the HUD administrative proceeding. See Affidavit of Ronald C. Ross ("Plaintiffs' allegation that the City of Saint Paul is not complying with federal statutes...is wrong."); August 5, 2008 letter to HUD in the administrative context ("The Section 3 complaint against the City lacks merit for the same reasons set forth in the earlier letters...The City continues to fully comply with Section 3 requirements.").

For much of our investigation, the City did not seriously dispute that it had been out of compliance with Section 3 during much of the relevant time period. After bringing in new outside counsel, however, the City now argues that it did not have the requisite knowledge to support an FCA claim. It argues that it reasonably believed that its actions taken with respect to minority-owned businesses and women-owned businesses satisfied its Section 3 obligations. The City's primary basis for this contention is the VCA it

entered into with HUD in the 1980's, which makes reference to tracking the number of minorities and women affected by the VCA in various respects. But shortly after the VCA went into effect, the City entered into the very detailed plan of compliance, referenced above, that set forth all of the things it needed to do in order to comply with Section 3. It will be difficult for the city to rely on the language of the Section 3 VCA while at the same time disavowing knowledge of the detailed plan of compliance.

The City was repeatedly put on notice of its obligations to comply with Section 3. At best, its failure to take any steps towards compliance, while continually telling federal courts, HUD and others that it was in compliance with Section 3, represents a reckless disregard for the truth. Its certifications of Section 3 compliance to obtain HUD funds during the relevant time period were knowingly false.

III. Anticipated Defenses

a. HUD's Inattentiveness or Blessing: Knowledge and Materiality Arguments

The City plans to argue that even if we assume that the City was violating Section 3 for many years, the violations cannot form the basis for an FCA case because HUD was aware of the violations and at least tacitly approved them by not doing anything to address the violations. The City will probably make a combined legal and equitable argument. The legal argument is that under the FCA, a defendant can set out an affirmative defense that the government knew about the offending conduct and approved of it. We are not aware of an actual approval of the conduct at issue. The closest we have seen is a HUD affidavit in the litigation in the early 1990s, indicating that the City was doing an adequate job of complying with Section 3. It is unclear how helpful this is to the City given that this was 20 years ago, and even more importantly, it came at a time when the City was telling HUD that it was following the detailed VCA that it had entered into with HUD in the 1980's. But it is certainly worth noting, and there may be other, similar documents. The City's fallback argument could be that even if HUD did not say in as many words that the City's conduct was approved, its silence over many years is tacit approval. Even acknowledging that HUD must oversee an entire country of grantees, the City would argue that if the City's Section 3 non-compliance is really as complete as we suggest, surely someone from HUD would have noticed and raised this with the City.

This argument does have some persuasive appeal, particularly as an equitable argument. While we will likely be able to show that HUD never approved the City's non-compliance, the City was failing in ways that should have been apparent to HUD. For example, the City is obligated to submit a Form 60002 each year to report its compliance with various aspects of the program. Many years, it failed to submit the

form. HUD did not raise the issue with the City. The City could argue that this failure to monitor Section 3 compliance by the City was consistent with HUD's general lack of oversight of Section 3 over the relevant period. In order to demonstrate liability under the FCA, the pertinent materiality standard requires us to show that the violation "could have affected" HUD's decision to pay the claims. The City could argue that HUD was so unconcerned with Section 3 compliance that the City's failure to comply could not have affected the decision to pay. It could argue that the previous administration was not nearly as concerned with Section 3 compliance as this administration is (a position that has some support in HUD's recent public comments). Essentially, the argument is that it is unfair to require a City to make a boilerplate certification each year, ignore non-compliance, and then seek FCA relief when a new administration comes in that is more concerned with compliance with Section 3.

b. Relevant certifications are prospective and not a condition of payment

The City will likely argue that the certifications of compliance with Section 3 were not conditions of payment. As discussed above, that position is at odds with positions the City has taken in the past. But the City could argue that these positions were taken 20 years ago or more, and they do not relate to the distinction between conditions of payment and conditions of participation that has arisen in the FCA jurisprudence. Cases like *Main* and *Hendow*, mentioned above, stand for the proposition that making a promise that a defendant intends to violate is a violation of the FCA, and we would hope that this argument is dispositive here. But the City will likely direct the Court to *United States ex. rel. Vigil v. Nelnet*, 2011 WL 1675418 (8th Cir. May 5, 2011) and argue that only the City's initial certification is relevant to the court's determination. It will also argue that the certifications are forward-looking, such that a violation of the certification cannot violate the FCA.

We believe that we have the better side of these arguments in the district court. But in light of the Eighth Circuit's recent *Vigil* decision, we should be mindful of the risk that the district court could rely on *Vigil* to rule against the government or that a favorable decision in the district court could be reversed on appeal.

c. Administrative Remedies Argument

This is another argument that became much stronger for the City after *Vigil*. The City will likely argue that if HUD finds that a grantee is out of compliance with Section 3, it has a number of options for dealing with the non-compliance, the most draconian of which is debarment. The City will argue that permitting FCA liability in this context is akin to transforming a discretionary administrative remedy into a mandatory and extremely harsh penalty. Indeed, in this specific instance, HUD found the City to be out of compliance, but permitted it to continue receiving funds and in fact awarded it

significant new funds in a competitive bidding process right around the same time. In light of this, the City will direct the Court to this portion of *Vigil*:

Finally, we consider it significant that the FFELP statutes and regulations provide detailed remedies for noncompliant Lenders and Servicers... Nowhere do the extensive regulations require that a Lender certify its compliance with FFELP's anti-inducement and false-advertising provisions, nor do they suggest that noncompliance with these regulatory requirements may result in the wholesale recovery of claims previously paid to the offending Lender on eligible student loans. When the statute creates "a complex monitoring and remedial scheme that ends [FFELP] payments only as a last resort," it would "be curious to read the FCA, a statute intended to protect the government's fiscal interests, to undermine the government's own regulatory procedures." *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1222 (10th Cir.2008).

Again, we think we have the better of this argument. Defendants make this argument frequently, and we often prevail on it. The FCA provides a remedy that is distinct from administrative remedies, not dependent on them. But it is entirely possible that the district court will consider *Vigil* to be dispositive of the issue in this context, or that the Eighth Circuit would reach a similar conclusion when it considers the issue again in this case.

d. Vagueness of language—to the greatest extent feasible

24 C.F.R. Part 135 contains the phrase "to the greatest extent feasible" in numerous places. The City has indicated that it plans to rely on the potential ambiguity of this language. We do not believe that this is a terribly strong argument for the City. First, the argument ignores HUD's regulations. Although the broad statement in the statute and in the first paragraph of the regulations is general, HUD's Section 3 regulations as a whole are more specific. Further, this argument might be more effective if the City were making some effort to comply with Section 3 but falling short of full compliance. Given the City's complete failure even to try to comply with Section 3, we do not think a vagueness argument is well taken. Finally, we take the position that where a claimant believes regulations are vague, they have an obligation to seek clarification from the government, not to default on their obligations unilaterally. Nevertheless, a court could be persuaded that this "to the greatest extent" language is too slippery to form the basis for an FCA claim.

IV. Most Recent Discussions with the City

On September 6, we met with the City's outside counsel at Civil Frauds. The City continued to argue that any non-compliance with Section 3 was not willful, and that it reasonably believed its programs to benefit minority-owned businesses, women-owned businesses, and small businesses satisfied Section 3, even in the absence of targeted Section 3 programs. It argued that we should not bring the first Section 3 FCA suit against a generally well-intentioned entity, and that a jury would not sympathize with our case. It reiterated these points in a September 14 letter. It further requested that if we decide to recommend in favor of intervention in this matter, it would like to further discuss this matter with "the highest decision-makers" at DOJ and HUD. The City appears uninterested in discussing settlement at this time.

CONCLUSION

For the reasons discussed above we recommend that the United States intervene in this action, and assert False Claims Act claims against the City of St. Paul, Minnesota based on its false certification of Section 3 compliance.

SO APPROVED this 25th day of October 2011.



BY: Gregory G. Brooker
Civil Chief
United States Attorney's Office
District of Minnesota

From: Line Attorney 2
Sent: Tuesday, November 22, 2011 2:54 PM
To: Line Attorney 3
Cc: Line Attorney 1
Subject: FW: Emailing: 2011.11.22 Newell Action Memo - Intervention.rb
Attach: 2011.11.22 Newell Action Memo - Intervention.rb.wpd

Line Attorney 3 - Be aware, this just means the approval has cleared one hurdle. It still needs to be approved in the front office before it is final. - Line Attorney 2

-----Original Message-----

From: Civil Division Admin. Employee
Sent: Tuesday, November 22, 2011 2:52 PM
To: Line Attorney 2 ; Line Attorney 3
Subject: Emailing: 2011.11.22 Newell Action Memo - Intervention.rb

Memo was signed by Mike Granston for Joyce Branda and sent to the front office via messenger.

Your message is ready to be sent with the following file or link attachments:

2011.11.22 Newell Action Memo - Intervention.rb

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

U.S. Department of Justice

Civil Division

Washington, D.C. 20530

MEMORANDUM FOR TONY WEST
ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

Re: U.S. ex rel. Newell v. City of St. Paul, Minnesota, Case No. 09-SC-001177 (D. Minn.)

DJ No. 46-39-955

REQUEST FOR AUTHORITY TO INTERVENE

TIME LIMIT: The intervention deadline is November 29. We have sought an extension of the seal until January 13, 2012. At defendant's request, counsel for the City and the Mayor of St. Paul are meeting with Deputy Assistant Attorney General Michael F. Hertz on December 13.

NATURE OF CLAIMS: *Qui tam* action under the False Claims Act, 31 U.S.C. §§ 3729-3733, alleging that defendant, the City of St. Paul, Minnesota, falsely certified it was in compliance with Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. § 1701u) (Section 3) in order to obtain tens of millions of dollars from the Department of Housing and Urban Development (HUD) in the form of community development grants that require compliance with Section 3.

AMOUNT OF CLAIMS: The total HUD grants the City obtained based on its false certifications were \$86,363,362.

CRIMINAL ACTIONS: There was no criminal investigation.

RECOMMENDATION: The United States Attorney's Office for the District of Minnesota (Att. A) and HUD (Att. B) recommend that we intervene. We concur.

This False Claims Act (FCA) *qui tam* action was filed in 2009 against the City of St. Paul, Minnesota (the City). Relator, a St. Paul small business owner, alleges that the City failed to comply with Section 3, and that in its annual consolidated federal grant applications, the City falsely certified to HUD that it was in compliance with Section 3. Relator alleges that based on this false certification, the City was given \$86 million in federal community development grants. Based on our conclusion that the Relator's allegations are correct, we recommend intervening in this action to assert FCA and common law claims against the City.

BACKGROUND

A. Section 3 of the Housing and Development Act of 1968 (Section 3)

Section 3 requires that employment and other economic opportunities generated by certain HUD financial assistance programs be directed, to the greatest extent feasible, and consistent with existing Federal, State and local law, to low- and very low-income persons, particularly those who are recipients of government assistance for housing, and to business concerns which provide economic opportunities for low- and very low-income persons.

Section 3 applies to public housing authorities, and to other grant recipients (recipients) who get funds from certain HUD housing and community development programs.¹ Section 3 only applies to funding for projects that involve the construction or rehabilitation of housing, or other public construction. Section 3 applied to grants made to the City of St. Paul during the relevant time period.

Section 3 is race and gender neutral. Preferences are based on income-level and location. HUD's Section 3 regulations require recipients of HUD funding to direct new employment, training, and contracting opportunities to low-income residents, and to businesses that employ them without regard to race or gender.

HUD regulations establish that Section 3's requirements apply to recipients of community development assistance exceeding \$200,000 from all sources in any year, and to contractors and subcontractors working for such grant recipients that get contracts in excess of \$100,000. The regulations establish numerical goals for grant recipients and contractors. Thirty percent of new hires on covered projects have to be Section 3 residents, ten percent of the dollars awarded for covered contracts have to be awarded to Section 3 businesses, and three percent of the dollars awarded for non-construction Section 3 contracts (i.e. professional services contracts awarded in connection with Section 3 contracts) have to be awarded to Section 3 businesses. These numerical goals are minimum targets. If a recipient or contractor meets the goals, they are considered to be in compliance with Section 3, absent evidence to the contrary. If recipients or contractors fail to meet the goals, they have to document the efforts they took to try to meet them.

Grant recipients have to comply with Section 3 in their own operations, and to ensure compliance in the operations of their contractors and subcontractors. Recipients have to establish procedures to: notify Section 3 residents about Section 3 training and employment opportunities; notify Section 3 business concerns about Section 3 contracting opportunities; notify contractors about Section 3 requirements; include the required Section 3 contract clause in all solicitations and contracts; facilitate the training and employment of Section 3 residents and the award of contracts to Section 3 businesses; assist and actively cooperate with HUD in obtaining the compliance of contractors and subcontractors; document actions taken to comply with Section 3; and, retain compliance records for HUD review. Each recipient also has to submit an annual Form HUD 60002 report to allow HUD to evaluate the effectiveness of Section 3.

To qualify for federal grants, and to draw funds from such grants, fund recipients have to certify each year, in HUD Action Plans, that they "will comply with Section 3."

B. Results of Our Investigation

The City was required to comply with the statute. Our investigation confirms that the City failed to do so. During

¹ Section 3 applies to the following HUD programs: Community Development Block Grant (CDBG); HOME Investment Partnership (HOME); Neighborhood Stabilization Program Grants (NSP 1, 2 & 3); Economic Development Initiative (EDI); Brownfield Economic Development Initiative Grants; Housing Opportunities for Persons with AIDS (HOPWA); Homeless Assistance Grants (ESG); University Partnership Grants Economic Stimulus Funds (including CDBG-R and CFP Supplemental) 202/811 Grants; Lead Hazard Control Grants.

the relevant period the City: made no effort to comply with Section 3's numerical goals; did not notify Section 3 residents or business concerns about training, employment or contracting opportunities; made no effort to facilitate Section 3 training or employment or the award of Section 3 contracts; made little or no effort to obtain the compliance of contractors with Section 3; did not maintain required documentation; and never submitted a HUD 60002 annual report. In most City contracts we reviewed, there was no Section 3 language at all. In some contracts, there was minimal Section 3 language, but we never saw the required seven paragraph Section 3 contract language in any City solicitation or contract.

Our investigation also established that the City was repeatedly put on notice that it was out of compliance with Section 3, but never took steps to cure that lack of compliance. Late in our investigation, the City retained outside counsel, who now argue that the City did not knowingly violate Section 3, and that any failure to comply was inadvertent. Essentially, the City now asserts that it believed it was complying with Section 3 through initiatives intended to benefit minority-owned, women-owned and small businesses.

C. The City's History of Section 3 Non-Compliance

In 1983, Mr. James Milsap filed a letter-complaint with HUD alleging that St. Paul was in violation of Section 3 and Title VI of the Civil Rights Act of 1964. HUD's resulting investigation found Section 3 violations. In 1984, the matter was resolved when the City and HUD entered into a Voluntary Compliance Agreement (VCA) and associated plan of compliance. The 1984 VCA and plan lay out in detail what the City had to do to comply with Section 3. The City's Deputy Director of Community Development told HUD that the plan would be incorporated into the City's Compliance Users Manual and monitoring of Section 3.

In 1989, Mr. Milsap filed a federal lawsuit against HUD and the City alleging that the City continued to be in violation of Section 3. Moving to dismiss the suit, the City directed the Court to its 1984 Section 3 Plan of Compliance. The case was eventually dismissed on procedural grounds and based on the fact that there is no private right of action under Section 3. The Court did not reach the question of the City's compliance with Section 3's requirements.

In 2003, Mr. Edward McDonald, a City employee, told the City in an e-mail and in reports, that the City "may not" have "completely complied with . . . federal Section 3..." The City subsequently fired Mr. McDonald. In our interview of Mr. McDonald, he confirmed that he told his managers that the City was not complying with Section 3 and told them how the City could comply, but that his Managers were uninterested and took no action.

Most recently, Nails Construction Company, a company owned by Frederick Newell, our relator, sued the City in federal court in 2009, alleging that the City was out of compliance with Section 3, and submitted a parallel administrative complaint to HUD alleging the same failure. The lawsuit was dismissed on the grounds that there was no private right of action under Section 3. Again, there was no finding as to whether the City was in compliance with Section 3.

In the administrative proceeding that was the result of the Nails Construction HUD complaint, HUD determined the City was out of compliance with Section 3. The City initially contested that finding, but dropped its challenge in order to renew its eligibility to compete for and secure discretionary stimulus HUD funding. The City agreed to enter into a new Voluntary Compliance Agreement, which requires it to take a number of affirmative steps to come into compliance with Section 3.

We interviewed multiple project managers, who would have been responsible for implementing Section 3 on various projects. All indicated they did little if anything to comply with Section 3, and many admitted they were unaware of Section 3's requirements during the relevant time period. To the extent employees asserted the City had complied with Section 3, they relied on the City's efforts to comply with minority- and woman- owned contracting initiatives. City employees admitted they now understand that while there may be some overlap between those initiatives and Section 3, such programs

do not satisfy Section 3's requirements.

HUD will have to admit, and has publically acknowledged, that for a significant period of time it was not focused on Section 3 compliance anywhere in the country. HUD employees conducted annual reviews of St. Paul and regularly approved the City's Action Plans and Consolidated Annual Performance and Evaluation Reports, and conducted on site performance reviews, but did not notice or flag the City's Section 3 deficiencies. As described above, however, in the 1980's and again in 2010, when HUD did focus on Section 3 and St. Paul, it found the City to be out of compliance.

D. Damages

The total HUD awarded to the City in development grants is over \$86 million. A substantial portion of that money was devoted to construction projects subject to Section 3. The precise amount is not tracked by HUD and will have to be obtained from the City. The most aggressive damages position to be taken here, based on *United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 473 (5th Cir. 2009), is that the entire amount of the construction grants to the City are forfeited because Section 3 is designed to benefit third parties, so there is no tangible benefit to the government and the intangible benefit is impossible to calculate; thus, it is appropriate to value damages in the amount the government actually paid to the City. We acknowledge this is an aggressive position, and that some less aggressive approach may be needed for trial. To date, however, we have not yet determined an alternative approach.

DISCUSSION

The City knew about its obligation to comply with Section 3, and knew or should have known how to do so, but failed to comply. The City was repeatedly reminded of its obligations under Section 3. The City repeatedly and falsely told HUD and others it was in compliance. The City knowingly submitted false claims in order to obtain federal funds.

Each time its compliance with Section 3 was challenged, the City had an opportunity to consult the Section 3 statute and regulations and to compare their requirements with the City's activities. Even a cursory examination of the City's practices would have revealed the City's noncompliance. Instead, the City simply and repeatedly told whoever challenged it that it was in compliance with the statute.

To qualify for HUD grant funds, the City was required to certify each year that it was in compliance with Section 3. The City then made claims for payment, drawing down its federal grant funds. Distribution of funds by HUD to the City was based on the City's certifications. Each time the City asked HUD for money, it impliedly certified its compliance with Section 3. At best, the City's failure to take any steps towards compliance while continually telling federal courts, HUD and others that it was in compliance with Section 3 represents a reckless disregard for the truth. We believe its certifications of Section 3 compliance to obtain HUD funds were actually more than reckless and that the City had actual knowledge that they were false.

For much of our investigation, the City did not seriously dispute that it had been out of compliance with Section 3 during the relevant time period. The City's new outside counsel have now, however, raised a number of arguments against liability. We address them in turn.

Lack of Requisite Intent: The City will argue that it reasonably believed minority- and women-owned business programs satisfied Section 3. This is, of course, contrary to explicit

statements made by HUD to program recipients. In making this argument the City relies on the 1984 VCA it entered into with HUD, which makes reference to tracking the number of minorities and women affected by the VCA in various respects. That VCA, however, was in response to a dispute about gender and race discrimination issues as well as the Section 3 violation. It is not surprising, then, that gender, minority and income issues were addressed in the VCA, and the fact that the 1984 VCA requires the City to track race and gender data does not change the requirements of Section 3, which are gender and race neutral. Further, shortly after the 1984 VCA went into effect, the City entered into the very detailed plan of compliance that described all the things it needed to do to comply with Section 3. The City knew how to comply with Section 3.

Government Knowledge/Materiality: The City argues that even if it was violating Section 3, its violation cannot form the basis for an FCA claim because HUD was aware of its failures, and did nothing to address the problem. In 1985, HUD conducted an investigation in response to a Section 3 complaint by a Mr. William Davis, and concluded that the City was complying with Section 3. There is also a HUD affidavit in the 1989 Milsap litigation, where HUD says that the City was doing an adequate job of complying with Section 3. We are not aware of any other or more recent actual approval of the City's conduct by HUD. Given the age

of these approvals and the more recent specific evidence of the City's Section 3 default, we do not expect them to block our claim.

The City will argue that even if HUD did not say it explicitly, HUD's silence over many years is tacit approval. We will have to admit that the City was failing to comply with Section 3 in ways that should have been apparent to HUD. The City did not send HUD its HUD 60002 forms each year. HUD never objected to this failure. The City will argue that HUD was so unconcerned with Section 3 compliance that the City's failure to comply did not affect, or could not have affected a HUD decision to pay.

The City will argue that HUD's failure to monitor its Section 3 compliance was consistent with HUD's general lack of oversight of Section 3 during the relevant period. The City has already noted that previous federal administrations were not concerned with Section 3 (a position with support in recent HUD public comments), and that it is unfair to require a City to make a boilerplate certification each year, ignore the City's non-compliance year-after-year, and then seek FCA relief when a new administration comes in that is more concerned with compliance with Section 3.

We believe we will be able to establish that HUD never approved of the City's failures, that silence is not approval, and that this program is designed as a self-monitoring program, with the City responsible for its own compliance. Any lack of attention by HUD does not change the City's legal obligations, or its default.

Prospective Certifications, and Not a Condition of Payment: The City will argue that its certifications were only that it "will" comply, not that it had done so.

In *United States ex. rel. Vigil v. Nelnet*, 2011 WL 1675418 (8th Cir. May 5, 2011), the Eighth Circuit distinguished between false statements made to induce the payment of a claim, and those made to qualify for a government program. The Court drew a distinction between conditions of payment and conditions of participation. The Appeals Court held that the former could be the basis for an FCA claim but the latter could not.

In *Vigil*, the defendant had to comply with certain Department of Education (DOE) regulations to qualify to participate in a program where it could make government subsidized student loans. The *Vigil* relator alleged that when the defendant lender submitted claims for interest subsidies on student loans it made, and for default insurance related to such loans, without being in compliance with the participation regulations, those claims were false. Under the relevant DOE regulations, however, once a lender was enrolled in the program, their eligibility continued until after a contrary decision in a contested termination proceeding. The lender explicitly continued to be eligible under the program until the termination proceeding was complete. In addition, under the regulations termination did not affect a lender's rights or responsibilities related to its prior loans. In these circumstances, the Court held that the lender's certification that it was an eligible lender was a condition of participation, not payment.

The Section 3 regulations provide procedures for compliance reviews, and administrative complaints, procedures and time lines for cure of identified deficiencies, and sanctions for continuing failure or refusal by a recipient or contractor to comply with HUD's regulations, including remedies under the CDBG or HOME programs (which include contested administrative hearings), debarment, suspension or limited denial of participation. Given these procedures there is a risk a trial court in the Eighth Circuit will consider the annual certifications in this case conditions of participation that will not support an FCA claim.

We will argue, to the contrary, that the annual certifications made in the Section 3 HUD program, that have to be made repeatedly by jurisdictions that have already applied for, been approved for and been allocated federal funds, are distinguishable from the certification in *Vigil*. We will be able to show that the City has previously acknowledged in a

number of documents in prior litigation that “[c]ompliance with the provisions of section 3 is a condition for the receipt of federal funds. . . .” See 1991 Affidavit of City employee Jacqui Shoholm. This question will present issues of fact and law. The possibility that we could lose this argument is an aspect of the litigation risk presented.

Administrative Remedies: The City will argue that if HUD finds that a grantee is out of compliance with Section 3, it has a number of administrative options and procedures to deal with the non-compliance, including suspension and debarment. The City will argue that permitting FCA liability in this context is akin to transforming a discretionary administrative remedy into a mandatory and harsh penalty. We believe this argument is not well taken. The FCA provides a remedy that is distinct from and designed to be supplemental to any available administrative remedies.

Vagueness: The City will argue that the phrase “to the greatest extent feasible” is vague and ambiguous, and that it cannot provide the basis for an FCA claim. We do not believe this is a strong argument for the City. First, the argument ignores HUD’s regulations. Although the broad statement in the statute and in the first paragraph of the regulations is general, some of HUD’s Section 3 regulations are more specific, weakening the vagueness argument. Second, this argument might be more effective if the City were making some effort to comply with Section 3 but falling short of full compliance. Given the City’s complete failure even to try to comply with Section 3, we do not think a vagueness argument is well taken. Finally, we take the position that where a claimant believes regulations are vague, they have an obligation to seek clarification from the government, not to default on their obligations unilaterally.

RECENT DISCUSSIONS WITH THE CITY

On September 6, we met with the City’s outside counsel. During the meeting the City made legal and policy arguments against government intervention in this case. The City argued that there has never been a Section 3 FCA case, because such a claim is inappropriate given the lack of precision in the “to the greatest extent feasible” requirement. The City argued that an FCA case, which if successful will burden St. Paul taxpayers, is undesirable. The City argued that it has been a constructive HUD partner over the years, and should not be punished here. The City believes a claim is particularly unattractive given that when its Section 3 deficiencies were identified in the recent administrative action, the City entered into a VCA and is now held up by HUD as a model Section 3 participant, and as a model for other jurisdictions.

The City asked that if we decide to recommend in favor of intervention in this matter, it be allowed to discuss this matter with “the highest decision-makers” at DOJ and HUD. A meeting has been scheduled with Deputy Assistant Attorney General Michael F. Hertz for December 13, 2011. The Mayor of St. Paul, Christopher Coleman, and the United States Attorney for the District of Minnesota, B. Todd Jones, will attend the meeting.

Although we acknowledge that there are significant potential policy issues associated with this case, we note that St. Paul’s reform, in response to the threat of missing out on stimulus funds, does not mean it complied with the program prior to that reform. We believe this is a particularly egregious example of false certifications given by a City that was repeatedly shown what it had to do, but repeatedly failed to do it.

We have offered to enter into settlement discussions with the City on a number of occasions. The City’s final position is that if a settlement will require the payment of funds, the City is not interested in an agreement. The City appears uninterested in further settlement discussions at this time.

CONCLUSION

For the reasons discussed above we recommend that the United States intervene in this action, and assert False Claims Act claims against the City of St. Paul, Minnesota based on its false certification of Section 3 compliance, and that the United States assert common law fraud, unjust enrichment and

payment by mistake claims as well.

Joyce R. Branda
Director
Commercial Litigation Branch

Attachments

Reviewer: **Line Attorney 1**

Senior Trial Counsel: **Line Attorney 2**

AUSA: **Line Attorney 3**

MEMORANDUM FOR FILE

Re: *U.S. ex rel. Newell v. City of St. Paul, Minnesota*,
Case No. 09-SC-001177 (D. Minn.)

DJ No. 46-39-955

Authority is hereby granted to intervene in the above-referenced *qui tam* action to assert False Claims Act, common law fraud, unjust enrichment and payment by mistake claims against the City of St. Paul, Minnesota based on the City's false certification of compliance with Section 3 of the Housing and Urban Development Act of 1968, 12 U.S.C. § 1701u.

Tony West
Assistant Attorney General
Civil Division

Dated: _____

SUMMARY

Section 3 of the Housing and Urban Development Act of 1968 (Section 3) requires that employment and other economic opportunities generated by certain Department of Housing and Urban Development (HUD) financial assistance programs be directed, to the greatest extent feasible, and consistent with existing Federal, State and local law, to low- and very-low-income persons, particularly those who are recipients of certain government assistance for housing, and to business concerns which provide economic opportunities for low- and very low-income persons.

The instant *qui tam* case alleges that the City of St. Paul, Minnesota, was required to comply with Section 3 but failed to do so. At best, the City's failure to take any steps towards compliance with Section 3, while continually telling HUD and others to the contrary, represents a reckless disregard for the truth. We therefore recommend that the United States intervene in the instant *qui tam* action and add common law claims of fraud, unjust enrichment and payment by mistake against the City. The City has asked, if we make this recommendation, that it be allowed to talk to the ultimate Department decision-maker to explain why intervention is not warranted. The City has already met with Director Joyce Branda. A meeting with the City and Deputy Assistant Attorney General Michael Hertz is scheduled for December 13, 2011.

RELATOR'S COUNSEL

Thomas F. DeVincke
Bonner & Borhart LLP
1950 US Bank Plaza
220 South Sixth Street
Minneapolis, Minnesota 55402
(612) 313-0735

DEFENDANT'S COUNSEL

John W. Lundquist
David L. Lillehaug
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000 Minneapolis, MN 55402-1425
(612) 492-7000

From: Pratt, Sara K [RC-1]
Sent: Sunday, November 13, 2011 2:59 PM
To: Perez, Thomas E (CRT)
Subject: Magner

Michael Allen and John Relman are going to meet with the appellees counsel a week from tomorrow (next Monday) to find out what blandishments will be needed. For one of the attorneys, passing the hat may be necessary—there ARE still some fees and damages questions. There are other efforts going on by St. Paul players (Myron Orfield, Jay Wilkinson) with the city players and lawyers.

Sara K. Pratt
Deputy Assistant Secretary for Enforcement and Programs
Department of Housing and Urban Development
451 Seventh Street, SW
Room RC-1
Washington, D.C. 20410
RC-1 (direct line)

From: Fraser, Thomas [RC-1]
Sent: Tuesday, November 22, 2011 7:07 PM
To: Perez, Thomas E (CRT)
Subject: RE: Question

Tom -

As I mentioned when we first talked, we have one matter in which we represent the City of St. Paul. My partner, David Lillehaug, represents the City of St. Paul in that matter, which potentially involves the federal government. He is also somewhat of a political mentor to the City Attorney. He learned of my involvement in this matter via my call to my friend, the City's Head of the Civil Division, who I am sure mentioned it to the City Attorney. (I mentioned all of this to John and Michael yesterday.) He asked me what I knew about this and I told him of my limited role and that John and Michael were trying to work out a resolution.

He (David) has talked to the City Attorney after John and Michael's meeting with her. David would like to talk to you about this other potential federal issue, which (I think) he thinks might bear on the City's handling of the case that Michael and John are working with the City on. I made no commitment to him other than to say I would ask you if you wanted to be in on a three-way call with me and David. By way of background, David was U.S. Attorney for Minnesota under Clinton and, like you, was a candidate for office.

I am going to NYC tomorrow morning with my family for the Macy's parade and assorted festivities, but I could put together a call with David tomorrow afternoon if you are interested and willing.

Tom

P.S. I just saw your email. Happy Thanksgiving to you as well.

-----Original Message-----

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Tuesday, November 22, 2011 2:58 PM
To: Fraser, Thomas
Subject: Re: Question

Thx so much for your help. I am most grateful for your willingness to assist. It is critically important to get someone like you who has local and national respect involved.

Tom

----- Original Message -----

From: Fraser, Thomas [mailto:RC-1]
Sent: Friday, November 18, 2011 12:15 AM
To: Perez, Thomas E (CRT)
Subject: Re: Question

Will call in the morning.

----- Original Message -----

From: Perez, Thomas E (CRT) [mailto:RC-1]

Sent: Thursday, November 17, 2011 08:13 PM
To: Fraser, Thomas
Subject: Question

Tom

I hope you are well. I am sorry about your Vikings. As a lifelong Buffalo Bills fan, I have grown accustomed to playing for draft position.

I had a work related matter I was hoping to discuss with you if you have a free moment in the next 24 hours. If you are able to give me a shout on my cell, I would be most grateful.
202 **RC-1**

Take care

Tom Perez

From: Perez, Thomas E (CRT)
Sent: Wednesday, November 23, 2011 2:29 PM
To: Sara Pratt
Subject: Re: Magner

Can u call me asap at 202 RC-1

From: Pratt, Sara K [RC-1]
Sent: Sunday, November 13, 2011 02:58 PM
To: Perez, Thomas E (CRT)
Subject: Magner

Michael Allen and John Relman are going to meet with the appellees counsel a week from tomorrow (next Monday) to find out what blandishments will be needed. For one of the attorneys, passing the hat may be necessary—there ARE still some fees and damages questions. There are other efforts going on by St. Paul players (Myron Orfield, Jay Wilkinson) with the city players and lawyers.

Sara K. Pratt
Deputy Assistant Secretary for Enforcement and Programs
Department of Housing and Urban Development
451 Seventh Street, SW
Room RC-1
Washington, D.C. 20410
RC-1 (direct line)

RC-1

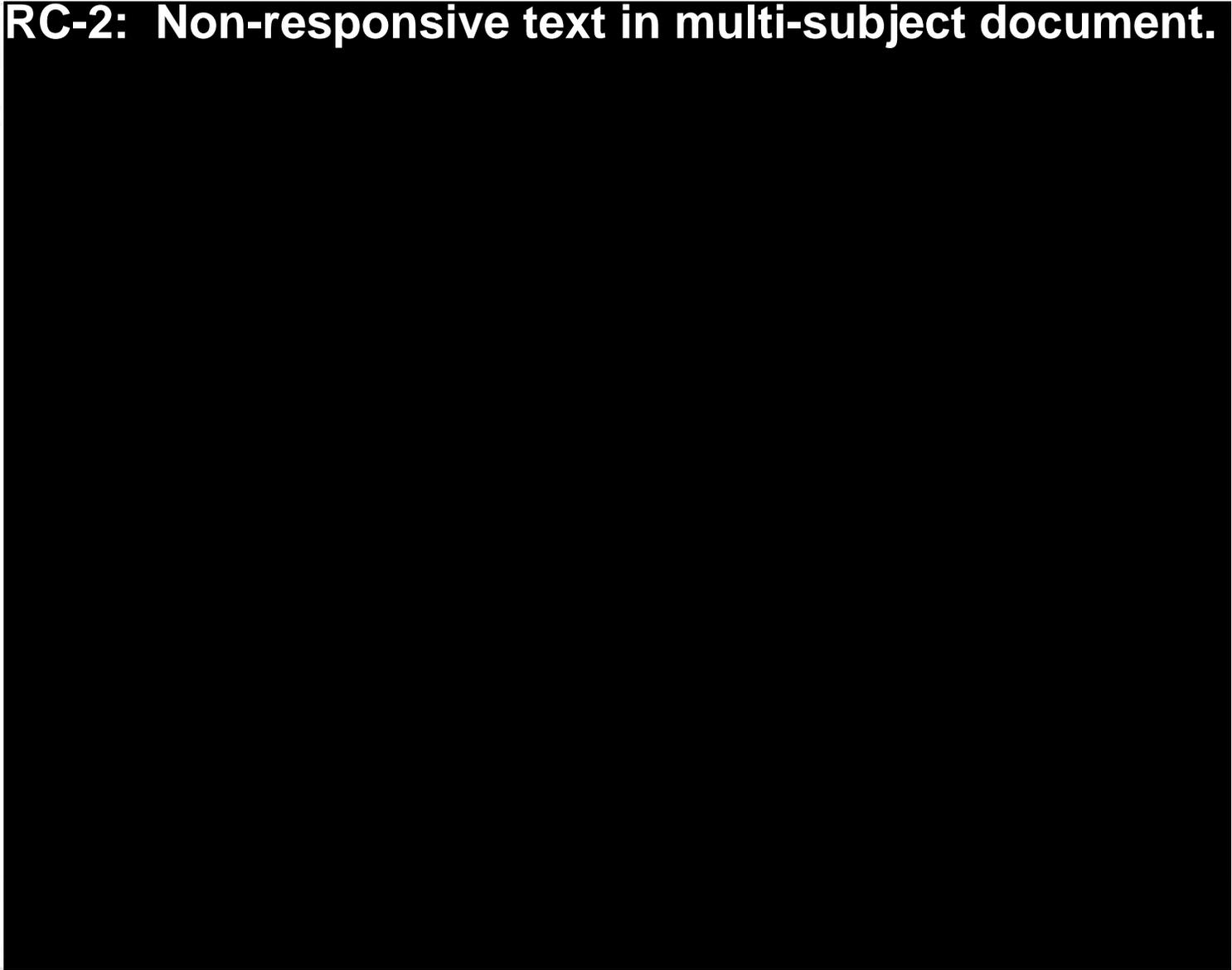
From: Perez, Thomas E (CRT)
Sent: Wednesday, November 23, 2011 2:33 PM
To: West, Tony (CIV)
Subject: Re: RC-2

Tony

So sorry to bother u the day before thanksgiving. I was wondering if I could talk to you today if possible about a separate matter of some urgency. My cell is 202 RC-1

Tom

RC-2: Non-responsive text in multi-subject document.



From: Line Attorney 3
To: Line Attorney 4
Sent: 11/28/2011 11:09:56 AM
Subject: RE: Magner v. Gallagher

Very interesting—man, you really never know what HUD is going to do.

From: Line Attorney 4
Sent: Monday, November 28, 2011 9:40 AM
To: Line Attorney 3
Subject: Magner v. Gallagher

Interesting blog on developments in HUD disparate impact case before Supreme Court:

<http://lenderscompliance.blogspot.com/2011/11/empire-strikes-back-hud-fair-lending.html>

call of Tom, Jocelyn, Vicki & Eric 4/28/41

- Wagner

- Search p Average

② - award 7:

inquiry of St Paul -
contractor is Mondak

he doesn't want to get
money accepted

② award 8:

False Claim Act case been
filed vs. City of St Paul

§ 3 of Housing & Urban
Development Act of 68
best possible effort

a disgruntled contractor
has filed a claim

- CIV & HUD ~~will~~
considering to intervene

genl counsel at HUD -
believe Maynard case
& would have no problem on
behalf of HUD not doing
it

HUD is willing to leverage
case to help resolve other
cases.

st Paul is in net of AIC &
Tony West

↳ would look favorable

regarding going to DC today
to meet w/ Ken Senator

↳ to ask pressure on AIC &
Tony West.

- Tom paper 3 right

- Buehler - prelim agreement

> Need to happen

make sure he
knows not to call
us if we're
top side

① Need to talk to Sri

② Cannot tell John Rehrman
about other source
leverage

③ If have to file top side we
will

④ Tried to keep ~~her~~ us out, H.

Tom: Spring want to talk to
H.H.

Ideal result -

- dismiss Mary of prejudice
w/ regard to Bear team cost

- other case go away

From: Civil Rights Division Ethics Officer
Sent: Monday, November 28, 2011 3:53 PM
To: Perez, Thomas E (CRT)
Subject: ethics question

Tom,

You asked me whether there was an ethics concern with your involvement in settling a Fair Lending Act challenge in St. Paul that would include an agreement by the government not to intervene in a False Claims Act claim involving St. Paul. You indicated that you have no personal or financial interest in either matter. Having reviewed the standards of ethical conduct and related sources, there is no ethics rule implicated by this situation and therefore no prohibition against your proposed course of action. Please let me know if you have any questions.

Civil Rights Division Ethics Officer

11/28/11

VICT, ERAC

included notes

- Matter is about DOJ not a party - strong interest in outcome - public utility, private IP
- 2d matter - potential matter - Felix (Class Act - public utility is 1st matter)
- (private utility files FCA matter - Civil assesses whether just will get resolved)
- DOJ doesn't know whether civil law correct - decide
- Q: Any issue if same for DOJ meeting w/ lawyer for public utility
- A: Any issues about grid for gov
- Anyone saw lawyer in both matters - City's Council
- Civil will know about meeting
- Appearance case: Would be open to discussing 1st matter if DOJ will not interfere in 2d matter

Notes: - Rule 1.6.

- Impliedly prohibited to negotiate for US
- US is single client

11/29/11

RC-2: Non-responsive text in multi-subject document.

→ Duty of fairness / duty to be truthful

→ Be clear if
Confidentiality of information - in process -
duty not to reveal Rule 1.6
*prohibit disclosure but exception
*disclosure is impliedly authorized
- As long as here
- Delegated authority to speak for the client

Sara
Steeny
Represent clients zealously

Counsel ← David Lillehaug - (612)
Counsel for City

RC-1

From: Brooker, Greg (USAMN)
To: Line Attorney 3
Sent: 11/30/2011 10:48:26 AM
Subject: RE: Agency Recommendation Regarding Intervention in Newall

HUD is so messed up.

Greg

From: Line Attorney 3
Sent: Wednesday, November 30, 2011 9:46 AM
To: Brooker, Greg (USAMN)
Subject: FW: Agency Recommendation Regarding Intervention in Newall

Quite a change in the HUD case. I just talked to Line Attorney 2, but he doesn't really have any more detail than this. We'll work on figuring out what's going on with this.

From: Line Attorney 2
Sent: Wednesday, November 30, 2011 8:44 AM
To: Line Attorney 3
Cc: Line Attorney 1
Subject: Agency Recommendation Regarding Intervention in Newall

Line Attorney 1 called me briefly from a mediation yesterday, so I have very little detail, but she tells me HUD has changed its mind and now recommends that we decline to intervene in the Newell case. When you get a moment lets discuss.

* * * * *

Line Attorney 2

Senior Trial Counsel

Civil Division, Commercial Litigation Branch, Frauds Section

United States Department of Justice

Patrick Henry Building

Room RC-1

601 D. Street, N.W.

Washington, D.C. 20004

RC-1

From: Perez, Thomas E (CRT)
Sent: Wednesday, November 30, 2011 3:14 PM
To: West, Tony (CIV)
Subject: Re: St. Paul

I am confident that position has changed. You will be hearing from Helen today.

----- Original Message -----

From: West, Tony (CIV)
Sent: Wednesday, November 30, 2011 03:07 PM
To: Perez, Thomas E (CRT)
Subject: St. Paul

Have more info on this. HUD formally recommended intervention. Let's discuss.

From: HUD Line Emp. [REDACTED]
Sent: Thursday, December 1, 2011 10:08 AM
To: Line Attorney 1 [REDACTED]
Cc: Aronowitz, Michelle <RC-1 [REDACTED]>
Subject: St. Paul Qui Tam

Line Attorney 1

This is to confirm our telephone conversation of Tuesday night in which I informed you that HUD has reconsidered its support for intervention by the government in the St. Paul qui tam matter. HUD has determined that intervention is not necessary because St. Paul's programmatic non-compliance has been corrected through a Voluntary Compliance Agreement with HUD.

If you have any questions, please feel free to contact me. HUD Line Emp. [REDACTED]

RC-1

From: Perez, Thomas E (CRT)
Sent: Thursday, December 01, 2011 10:59 AM
To: 'Kanovsky, Helen R'
Subject: RE: So sorry

Thx for that update.

-----Original Message-----

From: Kanovsky, Helen R [mailto:RC-1]
Sent: Thursday, December 01, 2011 10:50 AM
To: Perez, Thomas E (CRT)
Subject: RE: So sorry

I hope OK. He was aware of our communication to his staff earlier and asked for it in writing. We sent **Line Attorney 1** the requested email this morning.

-----Original Message-----

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Wednesday, November 30, 2011 7:20 PM
To: Kanovsky, Helen R
Subject: Re: So sorry

How did things go with Tony?

----- Original Message -----

From: Kanovsky, Helen R [mailto:RC-1]
Sent: Tuesday, November 29, 2011 07:18 AM
To: Perez, Thomas E (CRT)
Subject: RE: So sorry

I'm in my office. Feel free to call 202-RC-1.

-----Original Message-----

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Monday, November 28, 2011 9:58 PM
To: Kanovsky, Helen R
Subject: Re: So sorry

Can we talk tomorrow morning for 5 minutes regarding a time sensitive matter? My cell is 202-RC-1. I am just landing in bwi so you could get me for the next hour or alternatively, we could talk tomorrow.

Tom

----- Original Message -----

From: Perez, Thomas E (CRT)
Sent: Wednesday, November 23, 2011 02:30 PM
To: Helen Kanovsky, RC-1
Subject: So sorry

To bother you the day before thanksgiving, but can we talk today about a rather urgent matter

Tom

RC-1

From: Perez, Thomas E (CRT)
Sent: Thursday, December 01, 2011 2:24 PM
To: West, Tony (CIV)
Subject: RE: RC-2

RC-2

On a different matter, it is my understanding you have received a formal request from the other agency. Would love to catch up for 3 minutes if we could. (Perhaps at RC-1 party if possible).

RC-2: Non-responsive text in multi-subject document.

Tom

-----Original Message-----

RC-2: Non-responsive text in multi-subject document.

From: Line Attorney 1
Sent: Friday, December 2, 2011 11:59 AM
To: Branda, Joyce (CIV) <RC-1>
Subject: Friday Report

U.S. ex rel. Newell v. City of St. Paul, MN. HUD sent an email stating that “HUD has reconsidered its support for intervention by the government in the St. Paul *qui tam* matter.

HUD has determined that intervention is not necessary because St. Paul’s programmatic non-compliance has been corrected through a Voluntary Compliance Agreement with HUD.”

HUD Line Emp. said that if DOJ wants further information about what is driving HUD’s decision, someone high level within DOJ might need to call Helen Kanovsky because he does not have any further information. Line Attorney 2 spoke with Tim Moran/Deputy in Civil Rights who said that Civil Rights was not handling the *Gallagher* 8th Circuit case. Greg Friel supervises the Appellate Division for Civil Rights. He is handling the *Gallagher* case. He never heard of the *Newell* case, so he cannot imagine how the *Gallagher* case can be affecting the *Newell* case.

RC-2: Non-responsive text in multi-subject document.

From: Line Attorney 3
To: Brooker, Greg (USAMN)
Sent: 12/2/2011 12:02:54 PM
Subject: FW: Newell

Weirdness

From: Line Attorney 1
Sent: Friday, December 02, 2011 11:01 AM
To: Line Attorney 3; Line Attorney 2
Subject: Newell

Here is the update I just sent my Director, fyi...

U.S. ex rel. Newell v. City of St. Paul, MN. HUD sent an email stating that “HUD has reconsidered its support for intervention by the government in the St. Paul *qui tam* matter. HUD has determined that intervention is not necessary because St. Paul’s programmatic non-compliance has been corrected through a Voluntary Compliance Agreement with HUD.” HUD Line Emp. said that if DOJ wants further information about what is driving HUD’s decision, someone high level within DOJ might need to call Helen Kanovsky because he does not have any further information. Line Attorney 2 spoke with Tim Moran/Deputy in Civil Rights who said that Civil Rights was not handling the *Gallagher* 8th Circuit case. Greg Friel supervises the Appellate Division for Civil Rights. He is handling the *Gallagher* case. He never heard of the *Newell* case, so he cannot imagine how the *Gallagher* case can be affecting the *Newell* case.

Line Attorney 1
Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: Hertz, Michael (CIV)
</O=USDOJ/OU=CIVIL/CN=RECIPIENTS/CN=MAILBOXES/CN=MHERTZ>
Sent: Tuesday, December 6, 2011 1:58 PM
To: Branda, Joyce (CIV) <RC-1 [REDACTED]>
Cc: Line Attorney 1 [REDACTED]; Line Attorney 2 [REDACTED]
<Line Attorney 2 [REDACTED]>
Subject: RE: The Gallagher decision -- to provide context for Newell

US ex rel. Ellis v. St Paul:

- 1) Who is Ellis? (Any relationship between Ellis, Newell and Gallagher or any other named plaintiffs in the cases) (How about relationships between plaintiff's law firms and/or lawyers?)
- 2) How is this case similar to the Westchester case? I don't recall the fact pattern in Westchester. I don't recall that case involved condemning and knocking down buildings. I do recall that Westchester was taking some actions (perhaps zoning) without considering certain factors they were required to consider before taking those actions.
- 3) I also recall that Civil Rights had some concerns in connection with the Westchester case. What were those concerns? How were those concerns ultimately addressed?

From: Branda, Joyce (CIV)
Sent: Monday, December 05, 2011 7:05 AM
To: Hertz, Michael (CIV)
Subject: Fw: The Gallagher decision -- to provide context for Newell

Yes. See below. I am not sure ow gallagher impacts newell.

From: Line Attorney 2 [REDACTED]
Sent: Wednesday, November 30, 2011 05:40 PM
To: Branda, Joyce (CIV); Line Attorney 1 [REDACTED]
Subject: RE: The Gallagher decision -- to provide context for Newell

Oops – Although I can't imagine you really want to read it – since it was promised – here is the attachment (a copy of the *Gallagher* opinion).

From: Line Attorney 2 [REDACTED]
Sent: Wednesday, November 30, 2011 5:37 PM
To: Branda, Joyce (CIV); Line Attorney 1 [REDACTED]
Subject: The Gallagher decision -- to provide context for Newell

Joyce and Line Attorney 1 [REDACTED]

Based on my discussion with Joyce this afternoon I offer the following summary of the *Gallagher* Civil Rights case from

Joyce, Mike H.,

Line Attorney 2

12/07

- Gallagher - no one wants up there
- Civil Rights concerned about bad law
 - ~~Prof~~ IT have to file - would have to come out against St. Paul
 - This could be disparate impact

St. Paul does not want to be on other side of quest

In our avi term as Gallagher

Civil Rights wants a settlement
St. Paul brought up another case

Conu. bet. St. Paul & HUD
Probably disc - will continue
St. Paul wants to say we are in compliance w/ § 3

~~Prof~~

- Still going to have a meeting

- Mayor of St. Paul -
Political protege of Monahan
Who wrote fair housing act
Uncomfortable position

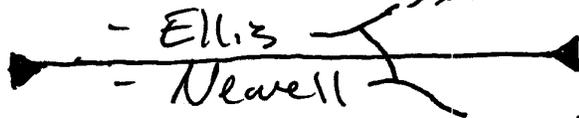
Can we get an extension

St. Paul will continue to discuss w/ HUD

Mike - said we should be involved

Should we

Get extension in



ext. & lim. lift of the seal

St. Paul coming in to meet on other case

As US Atty office to see if they have view

Should we push harder to be involved

* Get Helen's #

Lillehang

12-7-11

Newell

Callaghan. No one wants it there. Court R doesn't want it there

They file a brief

US: Ask St. Paul - dispositive impact can be used to assess duration

St. Paul ~~dispositive~~ ^{dispositive} ~~impact~~ ^{impact} ~~can~~ ^{can} be used to assess duration w/ health + safety

St. Paul does not want to oppose US in SCT or in quiet title case

They are being urged to settle the SCT case

CR wants to encourage them to do this

- St. Paul brought up the quiet title case

- St. Paul may have talked to HUD - They want to say this is a violation of Sec. 3 and that's a good reason to decline

1/19 deadline

Mayor of St. Paul - purchase of W Mendall fabric of Fair Housing Act

Can we get on extension at least temporarily?

Idea - push everything off

(2) - Will they continue to talk to HUD? Is HUD talking to St Paul + should we be part of meeting?

(3) Under seal case - for ed left? Ask for extension + forward left

Talk to us about trying cases together -
if we are going to ask for learned
help whether we want to cite
other cases or reasons

*
Try to
subsume
1. find
on APPEAL
quitting

From: Line Attorney 1
Sent: Thursday, December 8, 2011 5:14 PM
To: Branda, Joyce (CIV) <RC-1>
Cc: Line Attorney 2; Civil Division Line Attorney
<Civil Division Line Attorney>
Subject: RE: Ellis Order Partial Lift as to Defendants

Joyce—Line Attorney 3 reports that the Relator will oppose our request for an extension in the Newell case. L.A. 3 believes it would be helpful to provide some detail about the discussions with the City in *Gallagher* in our Motion for an Extension, but I do not think you and Mike were in favor of that approach. Do you want us to draft something to that effect and see what you think or ditch the idea altogether?

I think we should include the fact that City is meeting with high level Department of Justice Officials and more time is needed to consider its presentation.

Line Attorney 1

Assistant Director

U.S. Department of Justice

Civil Division

Commercial Litigation Branch

Fraud Section

601 D Street N.W.

Suite RC-1

Washington, DC 20004

(202) RC-1

From: Hertz, Michael (CIV)
Sent: Wednesday, December 07, 2011 12:47 PM
To: Line Attorney 2; Branda, Joyce (CIV); Line Attorney 1
Cc: Schmelzer, Eric (CIV)

Subject: RE: Ellis Order Partial Lift as to Defendants

We're still going to need an extension of the intervention deadline. Perhaps that can wait until after our meeting with the City, since we may want a further extension in the Newell case as well, and then we could coordinate the dates.

From: Line Attorney 2
Sent: Wednesday, December 07, 2011 12:25 PM
To: Branda, Joyce (CIV); Line Attorney 1; Hertz, Michael (CIV)
Cc: Civil Division Line Attorney
Subject: FW: Ellis Order Partial Lift as to Defendants

It turns out D. Minn. already got an order allowing us to disclose the Ellis case to the City at our discretion. I will send a copy to St. Paul's counsel.

From: Line Attorney 4
Sent: Wednesday, December 07, 2011 12:18 PM
To: Line Attorney 2
Subject: Ellis Order Partial Lift as to Defendants

As discussed.

Line Attorney 4

<< File: Docket 9 Order granting extension.pdf >>

RC-1

From: Pratt, Sara K [mailto:RC-1]
Sent: Thursday, December 08, 2011 9:15 PM
To: Perez, Thomas E (CRT)
Subject: RC-2

Yep. Right behind me....

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Thursday, December 08, 2011 09:14 PM
To: Pratt, Sara K
Subject: RC-2

Is michelle still here?

From: Pratt, Sara K [mailto:RC-1]
Sent: Thursday, December 08, 2011 09:08 PM
To: Perez, Thomas E (CRT)
Subject: RC-2

I hear that.....

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Thursday, December 08, 2011 09:07 PM
To: Pratt, Sara K
Subject: RC-2

RC-2: Non-responsive text in multi-subject document.

From: Pratt, Sara K [mailto:RC-1]
Sent: Thursday, December 08, 2011 09:05 PM
To: Perez, Thomas E (CRT)
Subject: RC-2

RC-2: Non-responsive text in multi-subject document.

From: Perez, Thomas E (CRT) [mailto:RC-1]
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From: Pratt, Sara K [mailto:RC-1]
Sent: Thursday, December 08, 2011 08:52 PM
To: Perez, Thomas E (CRT)
Subject: RC-2

Yep.

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Thursday, December 08, 2011 08:41 PM
To: Pratt, Sara K
Subject: RC-2

Can we talk before I have to leave. I cannot stay too much longer.

From: Pratt, Sara K [mailto:RC-1]
Sent: Thursday, December 08, 2011 08:35 PM
To: Perez, Thomas E (CRT)
Subject: RC-2

Seeing you across the room...coming over to hAve a conversation.....

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Thursday, December 08, 2011 09:27 AM
To: Pratt, Sara K
Subject: RC-2

The trial atty assigned to the matter is Line Attorney 2. He reports to Line Attorney 1, who can be reached at 202RC-1. Line Attorney 1 in turn reports to Joyce Branda, I am told, who can be reached at 202RC-1. My instinct would be to start with Line Attorney 1, and see how it goes. I do not know any of these folks.
Thx again for agreeing to conduct an independent review of this matter.
Tom

From: Pratt, Sara K [mailto:RC-1]
Sent: Sunday, December 04, 2011 6:01 PM
To: Perez, Thomas E (CRT)
Subject: RC-2

202RC-1. Just left you a message.

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Sunday, December 04, 2011 05:41 PM
To: Pratt, Sara K
Subject: RC-2

Can u give me a shout at 202RC-1 if you get a chance.

Thx

From: Pratt, Sara K [mailto:RC-1]
Sent: Wednesday, November 30, 2011 11:00 AM
To: Perez, Thomas E (CRT)
Subject: RC-2

RC-2: Non-responsive text in multi-subject document.

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Wednesday, November 30, 2011 10:30 AM

To: Pratt, Sara K

Subject: RC-2

RC-2: Non-responsive text in multi-subject document.

From: Pratt, Sara K [mailto:RC-1]

Sent: Tuesday, November 29, 2011 08:54 AM

To: Perez, Thomas E (CRT)

Subject: RC-2

RC-2: Non-responsive text in multi-subject document.

From: Perez, Thomas E (CRT) [mailto:RC-1]

Sent: Tuesday, November 29, 2011 8:45 AM

To: Pratt, Sara K

Subject: RC-2

RC-2: Non-responsive text in multi-subject document.

From: Pratt, Sara K [mailto:RC-1]

Sent: Tuesday, November 29, 2011 08:39 AM

To: Perez, Thomas E (CRT); Schultz, Vicki (CRT)

Subject: RC-2

RC-2: Non-responsive text in multi-subject document.

Sara

Sara K. Pratt

Deputy Assistant Secretary for Enforcement and Programs

Department of Housing and Urban Development

451 Seventh Street, SW

Room RC-1

Washington, D.C. 20410

202 RC-1 (direct line)

RC-1

From: Kanovsky, Helen R [RC-1]
Sent: Thursday, December 08, 2011 9:36 PM
To: Perez, Thomas E (CRT)
Subject: Re: So sorry

Sure. Call me now if that works for you.

On Dec 8, 2011, at 9:03 PM, "Perez, Thomas E (CRT)" [RC-1] wrote:

> Helen

>

> I just contacted Sara to get an update on the time sensitive matter we discussed. It appears that there is a step that needs to occur in your office that has not occurred and has therefore prevented progress from occurring. Can I speak to you tonight?

>

> Tom

>

> ----- Original Message -----

> From: Kanovsky, Helen R [mailto:RC-1]
> Sent: Sunday, December 04, 2011 05:18 PM
> To: Perez, Thomas E (CRT)
> Subject: Re: So sorry

>

> Surem. Call me at home. 301-RC-1

>

> ----- Original Message -----

> From: Perez, Thomas E (CRT) [mailto:RC-1]
> Sent: Sunday, December 04, 2011 05:14 PM
> To: Kanovsky, Helen R
> Subject: Re: So sorry

>

> Do you have a few minutes to catch up? Thx

>

> ----- Original Message -----

> From: Kanovsky, Helen R [mailto:RC-1]
> Sent: Thursday, December 01, 2011 10:50 AM
> To: Perez, Thomas E (CRT)
> Subject: RE: So sorry

>

> I hope OK. He was aware of our communication to his staff earlier and asked for it in writing. We sent Line Attorney 1 the requested email this morning.

>

> -----Original Message-----

> From: Perez, Thomas E (CRT) [mailto:RC-1]
> Sent: Wednesday, November 30, 2011 7:20 PM
> To: Kanovsky, Helen R
> Subject: Re: So sorry

>

> How did things go with Tony?

>

> ----- Original Message -----

> From: Kanovsky, Helen R [mailto:RC-1]
> Sent: Tuesday, November 29, 2011 07:18 AM
> To: Perez, Thomas E (CRT)

> Subject: RE: So sorry
>
> I'm in my office. Feel free to call 202-RC-1.
>
> -----Original Message-----
> From: Perez, Thomas E (CRT) [mailto:RC-1]
> Sent: Monday, November 28, 2011 9:58 PM
> To: Kanovsky, Helen R
> Subject: Re: So sorry
>
> Can we talk tomorrow morning for 5 minutes regarding a time sensitive matter? My cell is
202-RC-1. I am just landing in bwi so you could get me for the next hour or alternatively,
we could talk tomorrow.
>
> Tom
>
> ----- Original Message -----
> From: Perez, Thomas E (CRT)
> Sent: Wednesday, November 23, 2011 02:30 PM
> To: Helen Kanovsky, RC-1
> Subject: So sorry
>
> To bother you the day before thanksgiving, but can we talk today about a rather urgent
matter
>
> Tom
>
> 202-RC-1 is my cell

RC-1

From: Perez, Thomas E (CRT)
Sent: Thursday, December 08, 2011 10:42 PM
To: Sara Pratt
Subject: RC-2

He is expecting your call in the morning

From: Pratt, Sara K [mailto:RC-1]
Sent: Thursday, December 08, 2011 09:16 PM
To: Perez, Thomas E (CRT)
Subject: RC-2

Table behind me.

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Thursday, December 08, 2011 09:14 PM
To: Pratt, Sara K
Subject: RC-2

Is michelle still here?

From: Pratt, Sara K [mailto:RC-1]
Sent: Thursday, December 08, 2011 09:08 PM
To: Perez, Thomas E (CRT)
Subject: RC-2

I hear that....

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Sent: Thursday, December 08, 2011 09:07 PM
To: Pratt, Sara K
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To: Perez, Thomas E (CRT)
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Yep.

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Sent: Thursday, December 08, 2011 08:41 PM
To: Pratt, Sara K
Subject: RC-2

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Sent: Thursday, December 08, 2011 08:35 PM
To: Perez, Thomas E (CRT)
Subject: RC-2

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From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Thursday, December 08, 2011 09:27 AM
To: Pratt, Sara K
Subject: RC-2

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Tom

From: Pratt, Sara K [mailto:RC-1]
Sent: Sunday, December 04, 2011 6:01 PM
To: Perez, Thomas E (CRT)
Subject: RC-2

202-RC-1 [redacted]. Just left you a message.

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Sunday, December 04, 2011 05:41 PM
To: Pratt, Sara K
Subject: RC-2

Can u give me a shout at 202-RC-1 [redacted] if you get a chance.

Thx

From: Pratt, Sara K [mailto:RC-1]
Sent: Wednesday, November 30, 2011 11:00 AM
To: Perez, Thomas E (CRT)
Subject: RC-2

RC-2: Non-responsive text in multi-subject document.

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Sent: Wednesday, November 30, 2011 10:30 AM
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Sent: Tuesday, November 29, 2011 08:39 AM
To: Perez, Thomas E (CRT); Schultz, Vicki (CRT)
Subject: RC-2

RC-2: Non-responsive text in multi-subject document.

Sara

Sara K. Pratt
Deputy Assistant Secretary for Enforcement and Programs
Department of Housing and Urban Development
451 Seventh Street, SW
Room RC-1
Washington, D.C. 20410
202-RC-1 (direct line)

RC-1

From: Perez, Thomas E (CRT)
Sent: Friday, December 09, 2011 1:08 PM
To: Sara Pratt
Subject: Re: Next week

Right now works

----- Original Message -----

From: Pratt, Sara K [mailto:RC-1]
Sent: Friday, December 09, 2011 01:04 PM
To: Perez, Thomas E (CRT)
Subject: RE: Next week

Very excellent call. Are you available for me to call you?

-----Original Message-----

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Friday, December 09, 2011 1:03 PM
To: Pratt, Sara K
Subject: Re: Next week

Did u get chance to talk to them?

----- Original Message -----

RC-2: Non-responsive text in multi-subject document.

Tom

From: Srinivasan, Sri (OSG)
To: Perez, Thomas E (CRT)
Sent: 12/12/2011 8:58:52 AM
Subject: Re: Magner

Let me know if we should speak before our 1230 mtg. I'll be at the Ct from about 930-1015 but otherwise in the office.

----- Original Message -----
From: Perez, Thomas E (CRT)
Sent: Saturday, December 10, 2011 11:15 PM
To: Srinivasan, Sri (OSG)
Subject: Re: Magner

I will call u tomorrow. I will be in my office most of the day

----- Original Message -----
From: Srinivasan, Sri (OSG) (JMD)
Sent: Saturday, December 10, 2011 11:14 PM
To: Perez, Thomas E (CRT)
Subject: Re: Magner

Tom, have been out of town and out of pocket most of the day. Am back tomorrow and will give a call. My cell is **RC-1**.

-- Sri.

----- Original Message -----
From: Perez, Thomas E (CRT)
Sent: Saturday, December 10, 2011 10:12 AM
To: Srinivasan, Sri (OSG)
Subject: Re: Magner

I was not clear in my question. Do u have cell and I will clarify

----- Original Message -----
From: Srinivasan, Sri (OSG) (JMD)
Sent: Saturday, December 10, 2011 09:57 AM
To: Perez, Thomas E (CRT)
Subject: Re: Magner

I think quite slim if the basis for dismissal would be the proposed reg. I said yesterday that its happened before where a reg was pending during the Ct's consideration of a case and became final before the opinion, but was remiss in not noting that it in fact happened this Term in the Douglas (California Medicaid) case. The Ct asked for supplemental briefing on the impact of the reg. I will speak with the attys principally responsible for the case, but I don't know of a material difference at this point, and my instinct all along as you know is that the reg here would not afford a basis for dismissal. There are also other considerations to take into account, which we can discuss.

----- Original Message -----
From: Perez, Thomas E (CRT)
Sent: Saturday, December 10, 2011 07:36 AM
To: Srinivasan, Sri (OSG)
Subject: Re: Magner

Hypothetical question for you: If the petitioners move to dismiss the petition, what is likelihood of it being granted?

----- Original Message -----
From: Srinivasan, Sri (OSG) (JMD)
Sent: Friday, December 09, 2011 11:27 PM
To: Perez, Thomas E (CRT)
Subject: Magner

Also, wanted to follow up very quickly on the mtgs today on one item. Although I do think the calculus changes a bit if the pltfs move to dismiss the petn, I still have doubts about whether we'd weigh in in support of dismissal based on the proposed reg. We can discuss, but just wanted to let you know my intuition. Thanks Tom.

-- Sri.

From: Line Attorney 2
Sent: Monday, December 12, 2011 9:53 AM
To: Branda, Joyce (CIV) <RC-1 [redacted]>; Line Attorney 1
(Line Attorney 1 [redacted])
Subject: FW: Saint Paul

John Lundquist, the City's counsel, would like to discuss all three cases tomorrow (*Newell, Ellis and Gallagher*). We, of course, only know a little about *Gallagher*.

From: Line Attorney 3
Sent: Monday, December 12, 2011 9:49 AM
To: Line Attorney 2
Cc: Line Attorney 4; Line Attorney 1
Subject: Saint Paul

John just called—it sounds like they want to discuss all three cases tomorrow, although they are understandably still digesting the new one.

Line Attorney 3
Assistant United States Attorney
612. RC-1 [redacted]

RC-1

From: Pratt, Sara K [RC-1]
Sent: Monday, December 12, 2011 2:05 PM
To: Perez, Thomas E (CRT)
Subject: RE: Next week

I agree and yes... I am going into a union mtg right now but am free from 2:30 to 4:30 or call me at home tonight.

-----Original Message-----

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Monday, December 12, 2011 2:03 PM
To: Pratt, Sara K
Subject: Re: Next week

Maybe after you meet with them tomorrow, you can patch me in telephonically and we can talk to them. We need to talk them off the ledge.

Can we talk before you meet with them.

----- Original Message -----

From: Pratt, Sara K [mailto:RC-1]
Sent: Monday, December 12, 2011 01:21 PM
To: Perez, Thomas E (CRT)
Subject: RE: Next week

I meet with them tomorrow at 9 am and have reserved two hours for the meeting. I understand that their meeting with civil is at 2:00.

According to Helen, there is no need for me to meet with civil today.

-----Original Message-----

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Monday, December 12, 2011 1:21 PM
To: Pratt, Sara K
Subject: Re: Next week

What time is your meeting tomorrow and what time is their next meeting with doj if you know?

----- Original Message -----

From: Pratt, Sara K [mailto:RC-1]
Sent: Sunday, December 11, 2011 09:27 PM
To: Perez, Thomas E (CRT)
Subject: Re: Next week

Yep I imagine so.

----- Original Message -----

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Sunday, December 11, 2011 09:14 PM
To: Pratt, Sara K
Subject: Re: Next week

I would like to figure out a way to have them come to my office at the end of the day and meet with you and me. If I can arrange that, are you able?

----- Original Message -----

From: Pratt, Sara K [mailto:RC-1]
Sent: Sunday, December 11, 2011 09:09 PM
To: Perez, Thomas E (CRT)
Subject: Re: Next week

Thanks. I am around pretty much all day tomorrow and also in the evening....

----- Original Message -----

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Sunday, December 11, 2011 08:59 PM
To: Pratt, Sara K
Subject: Re: Next week

Thx and good luck

----- Original Message -----

From: Pratt, Sara K [mailto:RC-1]
Sent: Sunday, December 11, 2011 08:54 PM
To: Perez, Thomas E (CRT)
Subject: Re: Next week

City is Tuesday at 9 am. Civil hopefully tomorrow.

----- Original Message -----

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Sunday, December 11, 2011 08:33 PM
To: Pratt, Sara K
Subject: Re: Next week

Do you have a meeting with the city tomorrow? If so, can we talk beforehand? Thx

----- Original Message -----

From: Pratt, Sara K [mailto:RC-1]
Sent: Sunday, December 11, 2011 07:19 PM
To: Perez, Thomas E (CRT)
Subject: Re: Next week

RC-2: Non-responsive text in multi-subject document.

----- Original Message -----

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Sunday, December 11, 2011 07:18 PM
To: Pratt, Sara K
Subject: Re: Next week

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From: Pratt, Sara K [mailto:RC-1]
Sent: Sunday, December 11, 2011 07:12 PM
To: Perez, Thomas E (CRT)
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----- Original Message -----

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Sunday, December 11, 2011 06:29 PM
To: Pratt, Sara K
Subject: Re: Next week

RC-2: Non-responsive text in multi-subject document.

Thx

Tom

----- Original Message -----

From: Pratt, Sara K [mailto:RC-1]
Sent: Friday, December 09, 2011 01:04 PM
To: Perez, Thomas E (CRT)
Subject: RE: Next week

Very excellent call. Are you available for me to call you?

-----Original Message-----

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Friday, December 09, 2011 1:03 PM
To: Pratt, Sara K
Subject: Re: Next week

Did u get chance to talk to them?

----- Original Message -----

RC-2: Non-responsive text in multi-subject document.

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EXECUTIVE

STENO NOTEBOOK

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Gregg Ruled

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recycled materials



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Notes of [Line Attorney 1]

12-13-2011

City of St. Paul mtg
they had mtg w/ SG's ofc. - btm City + DOJ
USA - MN was on the call
Seal deadline - 1-13-2012 - City knows that
white paper - policy argu - don't sue
a city
Section 3 is econ. disadvantaged
As ex rel Ellis v. City St. Paul
City approached CIV Rights Div. + HUD
VCA - Voluntary Compliance Agreement
ASST AG CIV Rights spoke to T. West - City
sees a connection to the Gallagher case
CIV Rights made a rec. to SG's ofc. in Gallagher
CIV Rights would us if we can pick the
case down the road a bit

Case present:

12-13-2011

Sam - City Attorney
John Lingquist + lid - David
Paul ^{Mayor Deputy} Whins & Cooney

Mayor - City St. Paul Leys.

Social challenges: income, housing,
achievement gap - City been recognized
by fed govt - City did indep. audit - City
complied w/ audit's suggestions
entered a UCA

w/ stack us agnst any other community
EPA award last week

John Lingquist - City takes section 3 v. seriously
legal framework: No section 3 FCA brought on
the stand is vague + flexible - pursued
to greatest extent feasible 2) section 3 difficult
to enforce - see OIG's 8yr. old report - standards are
vague F. Erikson criticized the stand 3)
with flexibility stand St. Paul acted reasonably
8th Cir. Hickson - if D interprets statute
in a reasonable manner it cannot be found
to violate it - as long as City's intent feasible

4) section 3 does not trump other laws such as econ
opp laws - city had small businesses
fr. 1984 found city believed by addressing
women + minorities, ^{DVES} you were addressing
section 3 - see VCA language 5) city's other
pamphlet targeted minority groups
J. Millsap lawsuits brought agt city + HUD
HUD responded in RAGs what it had done to
comply w/ section 3 6) current VCA is the
current model others shd use 7) express cuts
are prospective 8) implied cuts
9) West Cluster case - other - conditions of
payment Other - Netnet - confirmed the
distinction 10) scienter - no evil
see Global Tech decision 11) City did a
great job - city was not motivated or
incentivized to skirt section 3 12) annual
HUD inspections 13) HUD in Millsap suggested
the City 14) Congressional says only 4%
grant recipients have complied

David - we have not received a copy of the
complaint history

1977 - set aside pgr

1980 - amended to address women, minorities
+ dbes

1984 - 1st VCA - assure good faith compliance
1st source employment pgr

1990 - Chap. 31 - set aside pgr - revised - to
assist economically distressed businesses

1994 - in-depth study - completed 1998

Increasing the No. of contracts

Mayor Ranly Kelly - audit by Hall legal
Team

VCA dated February 2010

17.5K in 3d + 4th years

City doing well under the VCA

875 section 3 residents Certified

stats on city's website - 11.35% of contracts

Sarah Pratt - Asst Secty HUD - I am

convinced you guys are doing a great job
under the VCA.

City is now doing training w/ HUD
discussed w/ Pratt - training for medical
emergency personnel -
in target for stage

AECIO - pgn w/ high schools

- goal of section 3 is to address low income
indiv
- expanded VCA shd vindicate the City

Rgt: intervene for purposes of settlement

- City has committed resources to sue
- Section 3 has charged enforcement
under his administration

- Gallagher - was is the

all 3 cases relate to HUD + subj matter

- SG's ofc. led a call w/ Gallagher

Hutz points:

1. quitam's direct the investigative resources
2. all FCA As are not bad companies
3. even if we declined you'd be facing a lawsuit + if we settled there needs to be a percentage share to relator
4. anything we did w/ minorities + women sld get no credit

Requests:

1. Want copy of complaint
2. Investigation + what it has shown

Joyce:

we may give credit for the VCA but tough to resolve FCA w/o any payment

City:

- Cannot separate race from socio-econ. issues
- Core belief of City - we tried to focus on socio-economic issues
- maybe a technical violation

city's brief due Dec.

disparate impact under FHA

AAG - cd St. Paul move to w/d the
petition

LL says City's enforcement of FHA ^{too} strong

City - Ms. Pratt connected w/ HUD
w/ be helpful to expand VCA
cd city w/d petition?

late Fri. - USAO provided redacted
copy of complaint

if City cd wrap up all matters
w/ HUD - we wd w/d

declining

USA Todd Jones will change his mind
Jones spoke w/ West - so we shall prepare
a declination memo

Joyce would still like HUD to address
the question we have asked.

USAO-Minn. - city St. Paul call 12/23/201
Todd, Tom, Tony all connected last
~~wed~~ Wed a - USAO-Mn refreshed
Tom Perez called Greg Broke yesterday
(Thurs) - Perez was announcing the BOA-
Countrywide case
Perez - I want to explain how I have been
involved in all this - Tom Frazer - must be
involved in City of St. Paul for city
Tom innocently called Frazer +
Frazer said my partner Lilli heoz is
involved in the question
- Perez said yesterday - I told City
that you've got to win on the merits
+ not wheel and deal

12/13/2011

H-07-2

Line Attorney 1

Brouda

HUD Line Emp.

HUD Line Emp.

Lundquist, Littlepage

Sara Greening

Paul Williams - Dept Mayor

Mayor

Line Attorney 3

Greg

Line Attorney 4

Been Mayor for 6 years

City has taken extraordinary efforts to address

poverty housing race

achievement gap etc

Recognized for good works

In § 3, women, business, minority - extraordinary efforts

Internal reviews -

They were doing well - but, 2 areas to do better - and City did that

DOE -

HUD - VCA - to reach further

low income, minority, small bus, women

Want how hard they have worked to be taken into account in this area

- Pursuant to VCA - been done
good on §3
- On new project - 30% central
consider
- Transportation

Don't think other cities have done any better

City takes §3 seriously - City's leadership is very interested and concerned

Civil Rights contact as well

Legal Framework

- Never been an FCA §3 case
 - Good reason
 - based on a standard that is vague and flexible
 - "Greatest extent feasible"
 - Leg. hist. says - flexibility is important
- every city can be different

- Difficult to enforce - cause of vagueness

*
- Reg specific
- Not compelling
if there had
been some
effort §3

- OIG report 8 years ago criticized

- City has acted reasonably and in good faith
- for last 20 years

- 8th Cir. law - Hickson FCA case
If A inturps stat. in a reasonable fashion -
it cannot be found to have violated FCA
- City inturp. is reasonable

§3 - to be inturp. consistently w/ other state and Federal laws

§3 does not trump other economic opportunities
Women
Small
disadvantaged

• Plenty of room to do §3 as well as small, bus. & minority

From 1984 forward City believed
that by doing
W, S, M - it was complying
with § 3

VCA - says how - race etc.
Ignores compliance plan

W, M, S is what you should do

After that lots of programs to
target

* women & small minority

(1991) Millsap law suit
- HUD pleadings

City did comply w/ § 3 of
decrees

City did not file § 3 forms
Some of

Good prog. complied,
shouldn't be sued under
FCA

Under new VCA they are
the model for everyone
else

Recitation
of
history
ignores
what we
were told
by city
witnesses after
city
witness
who told
as they
were doing
nothing to
comply
with
§ 3

- Prospective certifications -
not false unless there is no
present intention not to
- Implied certification
wealth of programs to
comply w/ § 3

Conditions of payment and
conditions of participation
Netnet 5th Circuit

Westchester - clear standard

Scienter -

- * - No proof city acted knowingly
- ~~none~~ willful blindness
- No recklessness

City getting codes from HUD

No reason for City to try to
avoid § 3

Instructions w/ HUD reinforced
what they did

2516 forms filed
Not 2600 forms
Regularly filed

HUD in Mill sep said City doing good

My reading of Hall - § 3
status city
not comply
New fact

Hall audit -
Hall audit ~~set~~ - Hall interviewed § 3 and HUD said they were complying

David - Particular Programs

- 35 years worth of efforts
- Shooting a little bit in the dark - don't have a copy of the complaint

Pete McCall
comple by
Mistake

1977 Set aside program 10% to econ. distressed businesses

- focused later, women, minority and handicapped bus.
- These are the very bus. That would be § 3

City witnesses have said they now understand that minority, women small bus are not § 3

1986 - added staff to set aside program

City repeatedly
told it was
not
complying
with § 3

City was not
complying w/
Section 3

Section 3 is not:

Minority, Women and
Small businesses

Nonetheless the City
repeatedly certified it
was in compliance
and repeatedly drew
down grant funds
w/out complying w/ § 3

City has been doing wonderful
on § 3

- City has exceeded all the goals
in VCA

- Frog Town project 27.87%
is § 3

- Another prog. 11.3% § 3

- City has neighbour hood ~~renew~~
stabilization
100% to

Met w/ Sarah Pratt - HUD

Depty Asst. Sec.

"You guys are doing a great job
w/ § 3"

We would not be having disc.

if I was not so impressed

- extend VCA a year

- Make target 15%

Through out

- Good faith efforts to provide
training to § 3 residents

- EMT Training program

City in tough financial

- prepared to find partners
to extend EMT

- AFZ CIO - Apprenticeship
program to train people in
construction

An expanded VCA would vindicate
DOJ and HUD

Interim for Settlement -
and accept expanded VCA

Prepared to litigate -

DNK why we would single out
§3
§3 not a priority for HUD
our years

- 1.5 FTE directing §3 program

- Don't need to reinstate a §3 FCA
case

- Civil rights - reached out to City to discuss Gallagher
- Topics overlapping a little
- New qui tam is closer to this case
- Civil Rights reached out to St. Paul
- All cases relate to HUD and fair housing
- Represented by Conington & Burling
- Want to wrap all matters with HUD
- Want to wind up Ellis too

Mike

This is a qui tam - so we devote resources to that

Can't separate race from
Socio-economic issues in this
Society

There has never been a moment when
City was not concerned about
low income residents

The suggestion that there was a
willful intent to violate § 3 is
not true

They were not trying to screw the
gov't out of §

Didn't see race and economics
as separate issues

Beyond perplexing - to be accused
of this
given all of the work they have
done to support
race & economics
They have reached out and
done much

Insult to decades of work
by the City

Minnesota and the City of St Paul are
leaders in this area
for low-income communities of
color

This Mayor particularly pushing these
issues

Secretary of HUD and
DOE Level the City
Models of cooperation and
collaboration.

Can't imagine how this would be a
good test case

- Post w/ out Hertz

12/13/2011

- Magner

Disparate impact - Supreme Court

Tom Perez - Civil Rights

asked if they can settle Magner

TP reached out to them

Other issues w/ HUD

TP put them w/ Pratt

to consider expansion of
VCA

City willing to w/ draw Magner

if all matters w/ HUD

can be w/ drawn

Civil Rights -

Prof. solution

interim for purpose of settlement

Declining § 3 would be helpful

- Joyce - risk assoc. w/
intervening to settle
and fairness hearing

- Tom

City hurt by resolution of the
Minnesota lay off problems

Brief due on the 22nd

Don't think
Civil Division and
Civil Rights Division
one of the same mind

want the two divisions to
totally resolve the cases
- so they want us to get back

Problem they have
disparate impact case

If they leave matter
dangling us good

They would consider a
disposition deal if we
present it

HOD wants to see a deal

12-14-11

RC-2: Non-responsive text in multi-subject document.

Civil

Mike - St. Paul, MN - Gelbach -
 fair housing - disparate impact theory -
 met w/ SG's Jan
 - also quit Jan - quiet - what US
 should intervene - mid Jan date
 - Tom Perez urges settlement of fair housing -
 cert. petition ~~pending~~ granted?
 our brief in SCt - Dec. 29 -
 HUD agrees settlement appropriate
 - decline interview -

ask
 Bill
~~SG's~~
 when
 15

RC-2: Non-responsive text in multi-subject document.

RC-1

From: Perez, Thomas E (CRT)
Sent: Friday, December 16, 2011 8:04 AM
To: Sara Pratt
Subject: RC-2

I am well aware of that. We will figure it out.

From: Pratt, Sara K [mailto:RC-1]
Sent: Friday, December 16, 2011 06:13 AM
To: Perez, Thomas E (CRT)
Subject: RC-2

We should talk; the Tuesday afternoon meeting did NOT go well at all.

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Friday, December 16, 2011 12:44 AM
To: Pratt, Sara K
Subject: RC-2

Any word from your end?

From: Pratt, Sara K [mailto:RC-1]
Sent: Thursday, December 08, 2011 08:52 PM
To: Perez, Thomas E (CRT)
Subject: RC-2

Yep.

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Thursday, December 08, 2011 08:41 PM
To: Pratt, Sara K
Subject: RC-2

Can we talk before I have to leave. I cannot stay too much longer.

From: Pratt, Sara K [mailto:RC-1]
Sent: Thursday, December 08, 2011 08:35 PM
To: Perez, Thomas E (CRT)
Subject: RC-2

Seeing you across the room...coming over to have a conversation.....

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Thursday, December 08, 2011 09:27 AM
To: Pratt, Sara K
Subject: RE:RC-2

The trial atty assigned to the matter is Line Attorney 2. He reports to Line Attorney 1, who can be reached at 202-RC-1. Line Attorney 1 in turn reports to Joyce Branda, I am told, who can be reached at 202-RC-1. My instinct would be to start with Line Attorney 1, and see how it goes. I do not know any of these folks.

Thx again for agreeing to conduct an independent review of this matter.
Tom

From: Pratt, Sara K [mailto:RC-1]
Sent: Sunday, December 04, 2011 6:01 PM
To: Perez, Thomas E (CRT)
Subject: RC-2

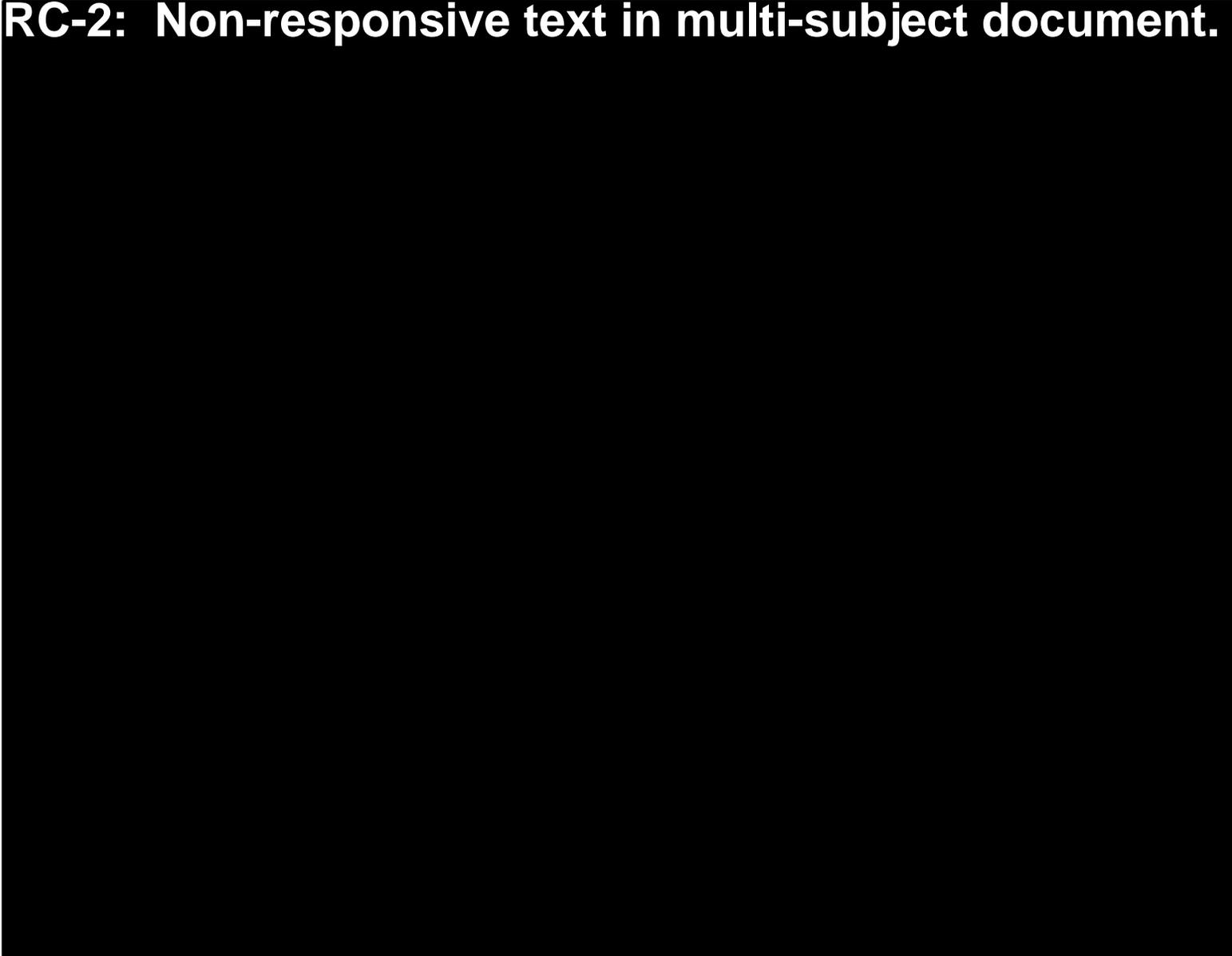
202RC-1 . Just left you a message.

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Sunday, December 04, 2011 05:41 PM
To: Pratt, Sara K
Subject: RC-2

Can u give me a shout at 202RC-1 if you get a chance.

Thx

RC-2: Non-responsive text in multi-subject document.



From: Pratt, Sara K [RC-1]
Sent: Friday, December 16, 2011 9:01 AM
To: Perez, Thomas E (CRT)
Subject: Fw: SECTION 3

From: Lillehaug, David [mailto:RC-1]
Sent: Wednesday, December 14, 2011 12:46 PM
To: Pratt, Sara K
Cc: 'Sara Grewing' <RC-1>; Lundquist, John <RC-1>
Subject: RE: SECTION 3

Sara -- Thank you again for a productive meeting yesterday. All three officials of the City of Saint Paul appreciated your suggestions and your approach.

Unfortunately, our meeting in the afternoon did not go as well. The possibility of an expanded VCA did not seem to be given much weight by the representatives of the DOJ's Civil Division, who described their job as "bringing in money to the U.S. Treasury." (By contrast, we appreciated the constructive role played by HUD representative HUD Line Emp. who attended the meeting.)

As a result, we will have to put VCA drafting on the back burner while the City assesses whether it is possible to make any progress with the Civil Division. In the meantime, of course, the City's vigorous efforts on Section 3 will continue unabated.

Please feel free to give me a call if you have any questions or further thoughts.

David Lillehaug
Fredrikson & Byron, P.A.
612-RC-1

From: Pratt, Sara K [mailto:RC-1]
Sent: Tuesday, December 13, 2011 12:20 PM
To: Lillehaug, David
Subject: SECTION 3

This is what I have so far (also attached as a document).

INTRODUCTION

On February 2, 2010, the City of St. Paul, Minnesota (City) entered into a Voluntary Compliance Agreement (VCA) with the Department of Housing and Urban Development to resolve a complaint that alleged that the City had failed to comply with Section 3 of the Housing and Community Development Act of 1968, 12 U.S.C. 1701. A review of the city's Section compliance efforts under the VCA indicates achievement of compliance with the VCA to date as well as accomplishment of several key additional objectives, including, but not limited to, the following:

In 2010,

- The City's Office of Planning and Economic Development (PED) exceeded all first-tier subcontracting Section 3 goals for large housing and economic development projects (i.e. Frogtown Square).
- PED awarded 100% of Neighborhood Stabilization Program (NSP) residential rehabilitation projects to Section 3 certified general contractors.
- Approximately \$1.5 million in NSP funds were awarded to Section 3 general contractors.
- 517 Saint Paul residents received Section 3 certification.
- 26 Section 3 businesses received work related to PED's NSP projects

Information about Section 3 hires for 2010 to be added

The City having demonstrated significant efforts in achieving Section 3 compliance, it has committed to undertaking additional efforts beyond the scope of the existing VCA to make further progress in providing job and job training opportunities to covered Section 3 individuals and businesses.

Terms of the Agreement

General

1. Nothing in this Agreement waives or modifies any obligation undertaken by the City or by the Department of Housing and Urban Development in the February 2, 2010 Voluntary Compliance Agreement except as explicitly stated here.

Definitions

1. The definitions provided in the February 2, 2010 Voluntary Compliance Agreement shall apply to this document.

Term of the Agreement

1. The February 2, 2010 Voluntary Compliance Agreement is extended by one year and shall be in effect for a period of five years from its effective date.

Specific Provisions

1. **Expanded Contract Coverage:** The City will amend its written Section 3 plan to establish mechanisms to ensure to the maximum extent feasible that a minimum of 15% of the total dollar amount of all Section 3 covered contracts for building trades work arising in connection with housing rehabilitation, housing construction and other public construction be awarded to Section 3 business concerns. Those mechanisms shall include:
2. **Expanded Training Opportunities:** The City will take the following steps to make Section 3 residents a preference group for its successful EMS Training Academy, which provides a 14 week training curriculum to provide college credit and train individuals as EMTs and in Firefighter Awareness, successful completion of which results in the award of National Emergency Medical Technician Certification.
 - a. The City agrees to market the EMS Training Academy to Section 3 residents through introductory meetings held in neighborhoods within a Section 3 service area.

- b. The City agrees to identify Section 3 residents who attend this program and provide available job opportunity information to successful graduates, including positions with the City's Fire Department and other City positions, should such positions be available.
3. **PROPOSED** The City agrees to fund its Scholarship fund to be used by Section 3 residents to be used as financial assistance for the payment of items such as union initiation fees or dues, tools, equipment, and work clothing in the amount of _____ to cover the longer term of this agreement.
4. ~~More expanded training/apprenticeship opportunities to be discussed~~

CONFIDENTIAL/DELIBERATIVE/DISCUSSION DRAFT AND WORK PRODUCT

Sara K. Pratt
Deputy Assistant Secretary for Enforcement and Programs
Department of Housing and Urban Development
451 Seventh Street, SW
Room **RC-1**
Washington, D.C. 20410
202. **RC-1** (direct line)

From: Line Attorney 1
Sent: Saturday, December 17, 2011 3:10 PM
To: Line Attorney 2; Civil Division Line Attorney
<Civil Division Line Attorney >
Subject: Re: Newell

I think it means this: Hertz told HUD to provide a new analysis and explanation for its changed position. So, we need to get that and incorporate it into our memo.

From: Line Attorney 2
Sent: Friday, December 16, 2011 12:31 PM
To: Line Attorney 1; Civil Division Line Attorney
Subject: Newell

FYI – I just got back in the inter-office my Newell approval memo with no action by the higher-ups – not sure what that means?

* * * * *

Line Attorney 2
*Senior Trial Counsel
Civil Division, Commercial Litigation Branch, Frauds Section
United States Department of Justice
Patrick Henry Building
Room RC-1
601 D. Street, N.W.
Washington, D.C. 20004*
RC-1

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From: Line Attorney 1
To: HUD Line Emp.
CC: Line Attorney 3; Line Attorney 2
Sent: 12/20/2011 4:38:21 PM
Subject: U.S. ex rel. Newell v. City of St. Paul, MN

HUD Line
Emp.

: per Mike Hertz's request to you on December 13, please provide us HUD's written position on the election decision. We have a looming intervention deadline and need to move this matter forward.

Thank you. -- Line Attorney 1

Line Attorney 1

Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: Line Attorney 1
Sent: Tuesday, December 20, 2011 4:44 PM
To: Branda, Joyce (CIV) <RC-1>
Cc: Line Attorney 2; Granston, Michael (CIV) <RC-1>
Subject: FW: U.S. ex rel. Newell v. City of St. Paul, MN

Joyce: the USAO is inquiring about the status of our position. It is not withdrawing its recommendation to intervene, HUD does not seem inclined to give us its position in writing short of the email it sent that states, "HUD has reconsidered its support for intervention by the government in the St. Paul qui tam matter. HUD has determined that intervention is not necessary because St. Paul's programmatic non-compliance has been corrected through a Voluntary Compliance Agreement with HUD". Mike Hertz told [redacted] at the conclusion of the meeting on December 13 that this was not a reason to decline a qui tam and asked [redacted] to follow-up with a formal position. In the meantime, Mike Hertz sent the authority memo back to our office. We are in a difficult position because we have an intervention deadline of January 13 and the USAO does not know what, if anything, it is being asked to do at this point.

I sent the below email to HUD to confirm its position.

Line Attorney 1

Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

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To: HUD Line Emp.
Cc: Line Attorney 3; Line Attorney 2
Subject: U.S. ex rel. Newell v. City of St. Paul, MN
HUD Line Emp.

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Thank you. -- Line Attorney 1

Line Attorney 1

Assistant Director
U.S. Department of Justice

From: Branda, Joyce (CIV)
</O=USDOJ/OU=CIVIL/CN=RECIPIENTS/CN=MAILBOXES/CN=JBRANDA>
Sent: Tuesday, December 20, 2011 4:54 PM
To: Line Attorney 1
Cc: Line Attorney 2; Granston, Michael (CIV)
<RC-1>
Subject: RE: U.S. ex rel. Newell v. City of St. Paul, MN

We need to have HUD articulate its reasons. If they won't let me know. I take it there is no talk of an agreement with Civil Rights that we need to help facilitate?

I guess the other issue we need to flesh out better (hopefully with HUD) is the extent to which they had a reasonable belief that their compliance with the other requirements for minorities and women satisfied section 3, which is what I think troubled Mike (and to some extent I see the problem as well). The memo may need to address that more fully (as I recall we did address it to an extent but they really focused on this at the meeting and HUD has not said anything directly in response so far as I know). HUD certainly can address it from their perspective.

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I sent the below email to HUD to confirm its position.

Line Attorney 1
Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.

From: Line Attorney 1
Sent: Tuesday, December 20, 2011 5:00 PM
To: Line Attorney 2
Subject: RE: U.S. ex rel. Newell v. City of St. Paul, MN

Just left him a message. This is ridiculous. I have no control over any of this. Why are higher level people making phone calls?

Line Attorney 1

Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: Line Attorney 2
Sent: Tuesday, December 20, 2011 4:57 PM
To: Line Attorney 1
Subject: FW: U.S. ex rel. Newell v. City of St. Paul, MN

Will you talk to HUD Line Emp. again, particularly as to Joyce's second point. Do you want me to participate?

From: Branda, Joyce (CIV)
Sent: Tuesday, December 20, 2011 4:54 PM
To: Line Attorney 1
Cc: Line Attorney 2; Granston, Michael (CIV)
Subject: RE: U.S. ex rel. Newell v. City of St. Paul, MN

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To: Branda, Joyce (CIV)
Cc: Line Attorney 2; Granston, Michael (CIV)
Subject: FW: U.S. ex rel. Newell v. City of St. Paul, MN

From: Line Attorney 2
Sent: Tuesday, December 20, 2011 5:02 PM
To: Line Attorney 1
Subject: RE: U.S. ex rel. Newell v. City of St. Paul, MN

It feels a little like "cover you head" ping pong. Do we need to suggest that the big people sit in a room and then tell us what to do? I kinda think Perez, West, Helen and someone from the Solicitor's office need to make a decision.

From: Line Attorney 1
Sent: Tuesday, December 20, 2011 5:00 PM
To: Line Attorney 2
Subject: RE: U.S. ex rel. Newell v. City of St. Paul, MN

Just left him a message. This is ridiculous. I have no control over any of this. Why are higher level people making phone calls?

Line Attorney 1

Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
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Cc: Line Attorney 2; Granston, Michael (CIV)
Subject: RE: U.S. ex rel. Newell v. City of St. Paul, MN

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RC-1

From: Pratt, Sara K [RC-1]
Sent: Tuesday, December 20, 2011 5:34 PM
To: Perez, Thomas E (CRT)
Subject: RE: Checking in

Am trying to find out. I sent to HUD Line Emp. but didn't hear back from him. Helen has them both and she could send them too...but I can't.

-----Original Message-----

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Tuesday, December 20, 2011 4:56 PM
To: Pratt, Sara K
Subject: Re: Checking in

Did the memo go to civil

----- Original Message -----

From: Pratt, Sara K [mailto:RC-1]
Sent: Tuesday, December 20, 2011 04:21 PM
To: Perez, Thomas E (CRT); Kanovsky, Helen R [RC-1]
Subject: RE: Checking in

Helen is calling you...

-----Original Message-----

RC-2: Non-responsive text in multi-subject document.

From: Hertz, Michael (CIV) </O=USDOJ/OU=CIVIL/CN=RECIPIENTS/CN=MAILBOXES/CN=MHERTZ>
Sent: Tuesday, December 20, 2011 6:03 PM
To: Branda, Joyce (CIV) <RC-1 [REDACTED]>
Subject: RE: U.S. ex rel. Newell v. City of St. Paul, MN

I agree we should do nothing unless Civil Rights comes to us. There may be more activity before the government's brief is due in the Sp. Ct., which I believe maybe Dec 29th. Thereafter, if nothing happens by then, I think the next step will be for us to ask for an extension of the intervention deadline.

From: Branda, Joyce (CIV)
Sent: Tuesday, December 20, 2011 5:05 PM
To: Hertz, Michael (CIV)
Subject: FW: U.S. ex rel. Newell v. City of St. Paul, MN

HUD evidently is refusing to give us its reasoning on recommending declination. We have not been asked to do anything to facilitate a deal. Do you want to call Helen? The USAO wants to intervene notwithstanding HUD. I feel we have a case but I also think HUD needs to address the question St. Paul is so fixated on, i.e. was their belief they satisfied Section 3 by doing enough with minorities and women reasonable?

As it stands we won't have anything from HUD and we have an intervention date of 1/13. I am not inclined to call Civil Rights – they can come to us if there is some deal they need us to act on.

From: Line Attorney 1 [REDACTED]
Sent: Tuesday, December 20, 2011 4:58 PM
To: Branda, Joyce (CIV)
Cc: Line Attorney 2 [REDACTED]; Granston, Michael (CIV)
Subject: RE: U.S. ex rel. Newell v. City of St. Paul, MN

So far, HUD Line Emp. [REDACTED] has not been instructed to draft a memo per Mike Hertz's request and it does not appear we will be getting a memo such as this from HUD. Therein lies the problem. What do we do now? HUD Line Emp. [REDACTED] has been told that Justice will take care of this so he is looking to us. Apparently the City of St. Paul's briefs before the Supreme Court are due on Thursday and Dane thinks Justice is going to work out some deal in time. Are we supposed to initiate something with Perez or the Solicitor's Office?

Line Attorney 1
Assistant Director
U.S. Department of Justice

Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite 9004
Washington, DC 20004
(202) RC-1

From: Branda, Joyce (CIV)
Sent: Tuesday, December 20, 2011 4:54 PM
To: Line Attorney 1
Cc: Line Attorney 2 ; Granston, Michael (CIV)
Subject: RE: U.S. ex rel. Newell v. City of St. Paul, MN

We need to have HUD articulate its reasons. If they won't let me know. I take it there is no talk of an agreement with Civil Rights that we need to help facilitate?

I guess the other issue we need to flesh out better (hopefully with HUD) is the extent to which they had a reasonable belief that their compliance with the other requirements for minorities and women satisfied section 3, which is what I think troubled Mike (and to some extent I see the problem as well). The memo may need to address that more fully (as I recall we did address it to an extent but they really focused on this at the meeting and HUD has not said anything directly in response so far as I know). HUD certainly can address it from their perspective.

From: Line Attorney 1
Sent: Tuesday, December 20, 2011 4:44 PM
To: Branda, Joyce (CIV)
Cc: Line Attorney 2 ; Granston, Michael (CIV)
Subject: FW: U.S. ex rel. Newell v. City of St. Paul, MN

Joyce: the USAO is inquiring about the status of our position. It is not withdrawing its recommendation to intervene, HUD does not seem inclined to give us its position in writing short of the email it sent that states, "HUD has reconsidered its support for intervention by the government in the St. Paul qui tam matter. HUD has determined that intervention is not necessary because St. Paul's programmatic non-compliance has been corrected through a Voluntary Compliance Agreement with HUD". Mike Hertz told HUD Line Emp. at the conclusion of the meeting on December 13 that this was not a reason to decline a qui tam and asked HUD Line Emp. to follow-up with a formal position. In the meantime, Mike Hertz sent the authority memo back to our office. We are in a difficult position because we have an intervention deadline of January 13 and the USAO does not know what, if anything, it is being asked to do at this point.

I sent the below email to HUD to confirm its position.

Line Attorney 1
Assistant Director
U.S. Department of Justice

Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: Line Attorney 1
Sent: Tuesday, December 20, 2011 4:38 PM
To: HUD Line Emp.
Cc: Line Attorney 3 ; Line Attorney 2
Subject: U.S. ex rel. Newell v. City of St. Paul, MN

HUD Line Emp. per Mike Hertz's request to you on December 13, please provide us HUD's written position on the election decision. We have a looming intervention deadline and need to move this matter forward.
Thank you. --Line Attorney 1

Line Attorney 1
Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: HUD Line Emp.
Sent: Tuesday, December 20, 2011 6:21 PM
To: Branda, Joyce (CIV) <RC-1>
Cc: Kanovsky, Helen R <RC-1>; HUD Line Emp.
<HUD Line Emp.>
Subject: U.S. ex rel. Newell v. St. Paul
Attach: U.S. ex rel. Newell v. St. Paul - declination.pdf

Ms. Branda,

Attached please find HUD's memorandum in support of its recommendation that the government decline to intervene in the referenced *qui tam* lawsuit.

Thank you,

HUD Line Emp.

HUD Line Emp.

U.S. Department of Housing and Urban Development
Office of General Counsel
Office of Program Enforcement
1250 Maryland Avenue, S.W.
Suite RC-1
Washington, DC 20024
Tel. RC-1



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-0500

OFFICE OF GENERAL COUNSEL

December 20, 2011

MEMORANDUM FOR: Joyce R. Branda, Director, Commercial Litigation Branch, U.S. Department of Justice

HUD Line Emp.

FROM:

CONCERNING: HUD's recommendation against intervention in *U.S. ex rel. Frederick Newell v. City of Saint Paul, Minnesota*, 09-SC-001177 (D. Minn.)

On December 1, 2011, HUD notified the Department of Justice that HUD was recommending against intervention by the U.S. Government in the above-referenced matter. In response to the Justice Department's request for a fuller explication of HUD's position, HUD provides the following.

As you know, Mr. Newell, the relator in the referenced case, submitted administrative complaints to HUD's Office of Fair Housing and Equal Opportunity (FHEO) in June of 2008, before he filed suit under the *qui tam* provisions of the False Claims Act.¹ The administrative case, like the False Claims Act case, alleged that the City of St. Paul had failed to comply with Section 3 of the Housing and Urban Development Act of 1968, 12 U.S.C. § 1701u (2000) (amended 2006).

FHEO conducted a broad investigation of the City's compliance with Section 3, which addressed not only the allegations in the administrative complaints, but extended to all aspects of the City's compliance with the contracting provisions of Section 3 over a number of years. Following the completion of that investigation, FHEO worked closely with the City to craft a voluntary compliance agreement (VCA) with the City to resolve the City's Section 3 violations. The VCA, which was executed by St. Paul and HUD in February of 2010, is a comprehensive document that broadly addresses St. Paul's Section 3 compliance, including the compliance problems at issue in the False Claims Act case. The VCA also requires St. Paul to expend city funds, including \$650,000 to support certain Section 3 initiatives, as well

¹ HUD also notes that it is wary of supporting the relator, Frederick Newell, who is a disgruntled bidder with a history of propounding baseless lawsuits and administrative complaints against St. Paul and others for, *inter alia*, violating Section 3. These matters include an administrative complaint concerning a contract upon which Newell and his companies did not even bid, and that, therefore, caused them no harm. They also include repeated lawsuits against the City, brought in spite of well-established law providing Mr. Newell and his companies neither standing nor a private right of action under Section 3. Given this, HUD regards the referenced False Claims Act suit as little more than a means for Mr. Newell, after years of unsuccessful litigation, to finally extract monies from a cash-starved City that has already remedied the noncompliance at issue.

as additional monies to develop systems for Section 3 administration and to hire personnel to oversee VCA compliance.

In the twenty-two months since the VCA was executed, HUD has closely monitored St. Paul to ensure its compliance with Section 3 and the terms of the VCA. Throughout this period, St. Paul has met and, in fact, exceeded those requirements. The City's voluntary execution of the VCA and the City's significant strides to provide training and employment to Section 3 residents and businesses not only vindicate its past non-compliance, but constitute a significant achievement for St. Paul and for HUD. HUD's mission is to create strong, sustainable, inclusive communities, and the City's Section 3 activities are directed squarely at accomplishing this goal in the St. Paul community.

Given the City's success in ensuring that its low- and very low-income residents are receiving economic opportunities generated by federal housing and community development funding, as required by Section 3, and the financial and other investments that the City has made and is continuing to make from its own resources to accomplish this, HUD considers it imprudent to expend the limited resources of the federal government on this matter. HUD is particularly concerned that this lawsuit will require HUD to expend extensive resources for further investigation, litigation, discovery and testimony, at a time when HUD's resources are in short supply and its programmatic concerns have been rectified.

From: Line Attorney 1
Sent: Wednesday, December 21, 2011 7:13 AM
To: Branda, Joyce (CIV) <JBranda@CIV.USDOJ.GOV>; Line Attorney 2
<Line Attorney 2 >
Subject: Re: U.S. ex rel. Newell v. St. Paul

Well that was a fast change of heart.

From: Branda, Joyce (CIV)
Sent: Tuesday, December 20, 2011 06:32 PM
To: Line Attorney 1 ; Line Attorney 2
Subject: Fw: U.S. ex rel. Newell v. St. Paul

?

From: HUD Line Emp.
Sent: Tuesday, December 20, 2011 06:21 PM
To: Branda, Joyce (CIV)
Cc: Kanovsky, Helen R <RC-1 >; HUD Line Emp.
Subject: U.S. ex rel. Newell v. St. Paul

Ms. Branda,

Attached please find HUD's memorandum in support of its recommendation that the government decline to intervene in the referenced *qui tam* lawsuit.

Thank you,

HUD Line Emp.

HUD Line Emp.
U.S. Department of Housing and Urban Development
Office of General Counsel
Office of Program Enforcement
1250 Maryland Avenue, S.W.
Suite RC-1
Washington, DC 20024
Tel. 202:RC-1

From: Line Attorney 1
Sent: Wednesday, December 21, 2011 7:36 AM
To: Branda, Joyce (CIV) <RC-1>; Line Attorney 2
<Line Attorney 2>
Subject: RE: U.S. ex rel. Newell v. St. Paul

Okay, just reviewed it. I guess HUD Line Emp. [redacted] felt pressured to draft something in response to my repeated requests yesterday to get something responsive to Mike Hertz's request. Notably, it is signed by HUD Line Emp. [redacted] and not the General Counsel. It says, there is a VCA, Newell is disgruntled, and HUD doesn't want to spend further resources. Are we supposed to incorporate this into our memo and send up our joint recommendation with the USAO that we intervene?

Line Attorney 1
Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: Branda, Joyce (CIV)
Sent: Tuesday, December 20, 2011 6:32 PM
To: Line Attorney 1 ; Line Attorney 2
Subject: Fw: U.S. ex rel. Newell v. St. Paul

?

From: HUD Line Emp.
Sent: Tuesday, December 20, 2011 06:21 PM
To: Branda, Joyce (CIV)
Cc: Kanovsky, Helen R <RC-1>; HUD Line Emp.
Subject: U.S. ex rel. Newell v. St. Paul

Ms. Branda,

Attached please find HUD's memorandum in support of its recommendation that the government decline to intervene in the referenced *qui tam* lawsuit.

Thank you,

HUD Line Emp.

HUD Line Emp.
U.S. Department of Housing and Urban Development
Office of General Counsel
Office of Program Enforcement
1250 Maryland Avenue, S.W.
Suite RC-1
Washington, DC 20024
Tel. 202-RC-1

From: Branda, Joyce (CIV)
</O=USDOJ/OU=CIVIL/CN=RECIPIENTS/CN=MAILBOXES/CN=JBRANDA>
Sent: Wednesday, December 21, 2011 7:51 AM
To: Line Attorney 1; Line Attorney 2
<Line Attorney 2>
Subject: Re: U.S. ex rel. Newell v. St. Paul

It doesn't address the question I have.

Do they agree their belief was reasonable about section 3 compliance? Nothing about the merits.

From: Line Attorney 1
Sent: Wednesday, December 21, 2011 07:36 AM
To: Branda, Joyce (CIV); Line Attorney 2
Subject: RE: U.S. ex rel. Newell v. St. Paul

Okay, just reviewed it. I guess [redacted] felt pressured to draft something in response to my repeated requests yesterday to get something responsive to Mike Hertz's request. Notably, it is signed by [redacted] and not the General Counsel. It says, there is a VCA, Newell is disgruntled, and HUD doesn't want to spend further resources. Are we supposed to incorporate this into our memo and send up our joint recommendation with the USAO that we intervene?

Line Attorney 1
Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: Branda, Joyce (CIV)
Sent: Tuesday, December 20, 2011 6:32 PM
To: Line Attorney 1; Line Attorney 2
Subject: Fw: U.S. ex rel. Newell v. St. Paul

?

From: HUD Line Emp.
Sent: Tuesday, December 20, 2011 06:21 PM
To: Branda, Joyce (CIV)
Cc: Kanovsky, Helen R <RC-1>; HUD Line Emp.
Subject: U.S. ex rel. Newell v. St. Paul

Ms. Branda,

Attached please find HUD's memorandum in support of its recommendation that the government decline to intervene in the referenced *qui tam* lawsuit.

Thank you,

From: Branda, Joyce (CIV)
</O=USDOJ/OU=CIVIL/CN=RECIPIENTS/CN=MAILBOXES/CN=JBRANDA>
Sent: Wednesday, December 21, 2011 9:17 AM
To: Hertz, Michael (CIV) <RC-1>
Subject: FW: U.S. ex rel. Newell v. St. Paul
Attach: U.S. ex rel. Newell v. St. Paul - declination.pdf

So HUD did decide to send a letter which talks only about the compliance agreement, the relator (disgruntled), and resources. They do not address the merits. We are asking them to do so.

From: HUD Line Emp.
Sent: Tuesday, December 20, 2011 6:21 PM
To: Branda, Joyce (CIV)
Cc: Kanovsky, Helen R; HUD Line Emp.
Subject: U.S. ex rel. Newell v. St. Paul

Ms. Branda,

Attached please find HUD's memorandum in support of its recommendation that the government decline to intervene in the referenced *qui tam* lawsuit.

Thank you,

HUD Line Emp.

HUD Line Emp.
U.S. Department of Housing and Urban Development
Office of General Counsel
Office of Program Enforcement
1250 Maryland Avenue, S.W.
Suite RC-1
Washington, DC 20024
Tel. 202-RC-1

From: Hertz, Michael (CIV)
</O=USDOJ/OU=CIVIL/CN=RECIPIENTS/CN=MAILBOXES/CN=MHERTZ>
Sent: Wednesday, December 21, 2011 10:57 AM
To: West, Tony (CIV) <RC-1>
Subject: FW: U.S. ex rel. Newell v. St. Paul
Attach: U.S. ex rel. Newell v. St. Paul - declination.pdf

Tony-- I hadn't seen this email with HUD's explanation in favor of declination when we spoke. Still principally focuses on the prospective relief. We still await a further recommendation from the USAO.

From: Branda, Joyce (CIV)
Sent: Wednesday, December 21, 2011 9:17 AM
To: Hertz, Michael (CIV)
Subject: FW: U.S. ex rel. Newell v. St. Paul

So HUD did decide to send a letter which talks only about the compliance agreement, the relator (disgruntled), and resources. They do not address the merits. We are asking them to do so.

From: HUD Line Emp.
Sent: Tuesday, December 20, 2011 6:21 PM
To: Branda, Joyce (CIV)
Cc: Kanovsky, Helen R; HUD Line Emp.
Subject: U.S. ex rel. Newell v. St. Paul

Ms. Branda,

Attached please find HUD's memorandum in support of its recommendation that the government decline to intervene in the referenced *qui tam* lawsuit.

Thank you,

HUD Line Emp.

HUD Line Emp.
U.S. Department of Housing and Urban Development
Office of General Counsel
Office of Program Enforcement
1250 Maryland Avenue, S.W.
Suite RC-1
Washington, DC 20024
Tel. 202-RC-1

From: Perez, Thomas E (CRT)
Sent: Thursday, December 22, 2011 3:21 PM
To: Jones, B Todd (USAMN)
Subject: RE: Minnesota Case

Nice catching up with you yesterday. Don't know how you are doing both jobs, although I do know you have a great staff in Minnesota, which helps immensely. Greg Brooker in particular is a gem, among many gems.

If you are able to forward the memos we discussed yesterday asap to relevant main justice components, that would be great. Your voice is critical.

Merry Christmas and happy holidays

Tom

From: Jones, B Todd (USAMN)
Sent: Tuesday, December 20, 2011 6:04 PM
To: Perez, Thomas E (CRT)
Subject: Minnesota Case
Importance: High

Please call me about the *Magner v. Gallager* case. As you know the SCOTUS has granted cert and the briefs are due Thurs.

- BTJ

From: Line Attorney 1
Sent: Thursday, December 22, 2011 4:45 PM
To: Brooker, Greg (USAMN) <RC-1>; Line Attorney 3
Line Attorney 3; Line Attorney 4
Cc: Line Attorney 2
Subject: City of St. Paul

Minn folks: do the memos from HUD on either/both cases change your office's position at all? Just checking. Thanks. -- Line Attorney 1

Line Attorney 1

Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: HUD Line Emp.
Sent: Thursday, December 22, 2011 6:01 PM
To: Line Attorney 1
Cc: HUD Line Emp.
Subject: St. Paul: recommendation against intervention

Line Attorney 1

HUD's Office of Fair Housing and Equal Opportunity has determined that the City of St. Paul is not only in compliance with the VCA, but is also in compliance with its Section 3 obligations at this time. As described in our December 20, 2001 memo, HUD does not wish to proceed with the False Claims Act case. It is possible that notification to MBEs, WBEs, and SBEs could result in compliance with Section 3 requirements, in which case the existence or non-existence of Section 3 notification procedures would essentially be the basis for technical assistance, not a finding of a violation.

HUD Line Emp.

HUD Line Emp.

U.S. Department of Housing and Urban Development
Office of General Counsel
1250 Maryland Avenue, SW
Suite RC-1
Washington, D.C. 20024
Tel.: 202-RC-1
Fax: 202-401-5153

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

From: Jones, B Todd (USAMN)
To: Brooker, Greg (USAMN)
Sent: 12/22/2011 6:12:08 PM
Subject: FW: Minnesota Case

FYI.

There appears to be a sense of urgency about this.

From: Perez, Thomas E (CRT) [mailto:**RC-1**]
Sent: Thursday, December 22, 2011 2:21 PM
To: Jones, B Todd (USAMN)
Subject: RE: Minnesota Case

Nice catching up with you yesterday. Don't know how you are doing both jobs, although I do know you have a great staff in Minnesota, which helps immensely. Greg Brooker in particular is a gem, among many gems.

If you are able to forward the memos we discussed yesterday asap to relevant main justice components, that would be great. Your voice is critical.

Merry Christmas and happy holidays

Tom

From: Jones, B Todd (USAMN)
Sent: Tuesday, December 20, 2011 6:04 PM
To: Perez, Thomas E (CRT)
Subject: Minnesota Case
Importance: High

Please call me about the *Magner v. Gallagher* case. As you know the SCOTUS has granted cert and the briefs are due Thurs.

- BTJ

From: Line Attorney 1
Sent: Friday, December 23, 2011 9:35 AM
To: Line Attorney 2
Cc: Branda, Joyce (CIV) <RC-1>; Granston, Michael (CIV) <RC-1>
Subject: FW: St. Paul: recommendation against intervention

This comes after my conversation with Dane yesterday about seeing if HUD could address Joyce/Mike's concerns. Joyce, we have heard nothing at all from USAO-Minn. It seems as though everyone is waiting for someone else to blink. In the meantime, we have a seal deadline in January. I will draft something for the Friday report in case you want to send it.

Line Attorney 1

Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: HUD Line Emp.
Sent: Thursday, December 22, 2011 6:01 PM
To: Line Attorney 1
Cc: HUD Line Emp.
Subject: St. Paul: recommendation against intervention

Line Attorney 1

HUD's Office of Fair Housing and Equal Opportunity has determined that the City of St. Paul is not only in compliance with the VCA, but is also in compliance with its Section 3 obligations at this time. As described in our December 20, 2001 memo, HUD does not wish to proceed with the False Claims Act case. It is possible that notification to MBEs, WBEs, and SBEs could result in compliance with Section 3 requirements, in which case the existence or non-existence of Section 3 notification procedures would essentially be the basis for technical assistance, not a finding of a violation.

HUD Line Emp.

HUD Line Emp.

U.S. Department of Housing and Urban Development
Office of General Counsel
1250 Maryland Avenue, SW
Suite RC-1
Washington, D.C. 20024
Tel.: 202-RC-1
Fax: 202-401-5153

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

From: Line Attorney 1
Sent: Friday, December 23, 2011 9:59 AM
To: Brooker, Greg (USAMN) <RC-1>, Line Attorney 4
<Line Attorney 4>, Line Attorney 3
<Line Attorney 3>
Cc: Line Attorney 2
Subject: FW: St. Paul: recommendation against intervention

Fyi..

Line Attorney 1
Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: HUD Line Emp.
Sent: Friday, December 23, 2011 9:43 AM
To: Line Attorney 1
Subject: Re: St. Paul: recommendation against intervention

Yes

From: Line Attorney 1
Sent: Friday, December 23, 2011 09:35 AM
To: Silverman, Melissa B
Cc: HUD Line Emp.
Subject: RE: St. Paul: recommendation against intervention

HUD Line Emp. is this responsive to the question you and I discussed yesterday? Thank you.

Line Attorney 1
Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: HUD Line Emp.
Sent: Thursday, December 22, 2011 6:01 PM
To: Brooker, Renee (CIV)
Cc: HUD Line Emp.

From: Line Attorney 1
Sent: Friday, December 23, 2011 3:47 PM
To: Branda, Joyce (CIV) <RC-1>; Line Attorney 2
<Line Attorney 2>
Cc: Granston, Michael (CIV) <RC-1>
Subject: RE: Friday Report

I thought our marching orders were to draft a declination memo and to concur with the USAO-Minn. USAO-Minn. called me today (Greg Brooker, Line Attorney 3, Line Attorney 3, Line Attorney 4). Tony West, Todd Jones, and Tom Perez have apparently had conversations about this. Everything I have is third hand. Tom Perez called Greg Brooker directly yesterday. We discussed this plan today and the USA blessed the idea of L.A. 2 and L.A. 3 reaching out to defendant. The clear implication is that this is what should happen, but certainly I have not heard this directly from Tony West or Perez. Let us know if we should not do this.

Line Attorney 1
Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: Branda, Joyce (CIV)
Sent: Friday, December 23, 2011 3:39 PM
To: Line Attorney 1, Line Attorney 2
Cc: Granston, Michael (CIV)
Subject: Fw: Friday Report

Line Attorneys 1 and 2: Who raised the settlement issue? The usao? Civil rights? Why are we trying to do the deal - is the sg and civil rights involved and will they be on the calls with lillehaug? Are we ready to decline the affh case? I take it all this happened today?

From: Granston, Michael (CIV)
Sent: Friday, December 23, 2011 03:32 PM
To: Hertz, Michael (CIV)
Cc: Branda, Joyce (CIV); Anderson, Dan (CIV)
Subject: Friday Report

- Tan-Todd & Tony call
position of our USAO - Todd Jones
close call for us to recommend interests
great side of HUD not as thrilled
HUD dropped these 2 memos on us.
- it's a fluid situation - interested to
declaration - USAO Min does not want to
be the first to flip
 - this case is jointly handled - we are
joined
 - if higher-ups decide they want to cut a deal
we understand this is amending order
- Line Attorney 4
is case - we have problems w/ us getting
- 1/13 - deadline up to June
 - should we re-write memos - do we have a
signal from City of St. Paul
 - how do we make this deal?
 - Perez's call was to convince us to be
concerned about the Supreme Ct decision

From: Line Attorney 1
Sent: Friday, December 23, 2011 4:11 PM
To: Branda, Joyce (CIV) <RC-1>; Line Attorney 2
<Line Attorney 2>
Cc: Granston, Michael (CIV) <RC-1>
Subject: RE: Friday Report

By the way, when the district called me this morning to discuss this case, I did not tell them I knew that their USA was planning to decline (as we discussed I would not tell them). It was a difficult conversation to be honest, me playing dumb and them clearly feeling me out to see I had been told about the conversation with their USA. Eventually they got around to telling me, but clearly they were hoping not to be the first office to say "we will decline." I did tell them that I felt confident that we would concur with their declination and that our offices would not be split on this question (of course I know that was our position). This really seems extremely odd and inefficient. Why are hire-ups having numerous one on one conversations instead of us all having a conference call with Tony West, Perez and the USA so we can get perfectly clear on what we are to do.

Line Attorney 1
Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: Branda, Joyce (CIV)
Sent: Friday, December 23, 2011 3:59 PM
To: Line Attorney 1; Line Attorney 2
Cc: Granston, Michael (CIV)
Subject: Re: Friday Report

I haven't heard anything. My concern is that we are talking settlement about a case we have nothing to do with. I will talk to the district Tuesday. All I was asked about is whether we could comfortably decline the one case, not both, and was not told we should do anything about settlement. Something may have happened after my talk with Mike.

From: Line Attorney 1
Sent: Friday, December 23, 2011 03:47 PM
To: Branda, Joyce (CIV); Line Attorney 2
Cc: Granston, Michael (CIV)
Subject: RE: Friday Report

I thought our marching orders were to draft a declination memo and to concur with the USAO-Minn. USAO-Minn. called me today (Greg Brooker, Line Attorney 3)

From: Hertz, Michael (CIV) </O=USDOJ/OU=CIVIL/CN=RECIPIENTS/CN=MAILBOXES/CN=MHERTZ>
Sent: Tuesday, December 27, 2011 11:23 AM
To: Branda, Joyce (CIV) <RC-1 [REDACTED]>; Granston, Michael (CIV) <RC-1 [REDACTED]>
Cc: Anderson, Dan (CIV) <RC-1 [REDACTED]>
Subject: RE: Friday Report

1) No insight.

From: Branda, Joyce (CIV)
Sent: Tuesday, December 27, 2011 10:03 AM
To: Hertz, Michael (CIV); Granston, Michael (CIV)
Cc: Anderson, Dan (CIV)
Subject: RE: Friday Report

1. Yes. Mike, the below is news to me but ^{Line Attorney 1} [REDACTED] indicated that it came from the U.S. Attorney's office as the direction. I am uncomfortable with it as I don't think we want a written agreement and in any event don't see why we are involved in negotiating for a dismissal of the City's petition as opposed to Civil Rights, the SG. We are going to call the USAO, unless you have some insight about all this.

2. **RC-2: Non-responsive text in multi-subject document.**

From: Hertz, Michael (CIV)
Sent: Tuesday, December 27, 2011 9:44 AM
To: Granston, Michael (CIV)
Cc: Branda, Joyce (CIV); Anderson, Dan (CIV)
Subject: RE: Friday Report

1) Is the City of St. Paul the Petitioner in the Sp. Ct.?

2. **RC-2: Non-responsive text in multi-subject document.**

From: Granston, Michael (CIV)
Sent: Monday, December 26, 2011 7:03 PM
To: Hertz, Michael (CIV)
Cc: Branda, Joyce (CIV); Anderson, Dan (CIV)
Subject: Re: Friday Report

Mike,

Here is an addendum to last week's Friday report:

RC-2: Non-responsive text in multi-subject document.

From: Granston, Michael (CIV)
Sent: Friday, December 23, 2011 03:32 PM
To: Hertz, Michael (CIV)
Cc: Branda, Joyce (CIV); Anderson, Dan (CIV)
Subject: Friday Report

From: Granston, Michael (CIV)
Sent: Friday, December 23, 2011 2:00 PM
To: Granston, Michael (CIV) (RC-1 [REDACTED])
Subject: Friday Report

1. U.S. ex rel. Newell v. City of St. Paul, Minn (Section 3 case) and U.S. ex rel. Ellis et al. v. City of Minneapolis (AFFH case): The USAO-Minn and our office plan to reach out to the City of St. Paul early next week to see if we can reach an agreement whereby the government declines intervention in both cases and the City agrees to withdraw its petition before the Supreme Court. With the USAO's concurrence, we intend to submit for consideration a memo that recommends declination based on the issues recently raised by HUD, the City, the litigation risks, and any agreement, if one is reached, on the Supreme Court case.

2. **RC-2: Non-responsive text in multi-subject document.**

RC-2: Non-responsive text in multi-subject document.

3.

4.

5.

6.

RC-2: Non-responsive text in multi-subject document.

7.

8.

Have a nice weekend.

Michael D. Granston
Deputy Director
Fraud Section, Civil Division
U.S. Department of Justice
Tel: 202-RC-1
Email: RC-1

Greg Brooker 612-
Source

RC-1

12/28/2011

Line Attorney 2

- J. Trying to clarify when we are
- declining in Newell case
- Gallagher - Civil Rights / SG decision

After meeting w/ City

Line Attorney 3

& Greg told Todd -
and filled him in on Supreme Court
bomb - nexus between Gallagher
and Newell

Line Attorney 4

had a draft declaration memo
- ext. to June
Newell - Jan. 13 deadline

Apparently Tom Perez involved
meeting w/ vnet sec

Todd talked to Tom Perez

Todd sent Tony, Todd and Perez
all spoke

Todd say we should talk
Wed. or Thurs. next week

Todd ~~XXXXXX~~ -

knew about Newell

" about HUD letters re
declining

Todd -

Civil Rights very concerned about
Gallagher

HUD abandoning shop

- may have been lobbied

- there is a VCA

What kind of resources to support
from HUD

I would like to recommend
declination

Open and clear about declining
the Newell case

Discuss every thing

Todd also said

- Dog of a case - she should
resurrect - could get that
out

Perez calls Greg

Perez - I want to give you
some background

I know Tom Frazer - rep. in
Sup. Ct.

Perez reached out to Frazer

Does City really want to kill disparate
impact

Frazer says - City has HUD issues -

Perez becomes aware of QTs

" talks to Litchner

Perez told them they have to win on

the merits of the QTs

Can't talk about the Sup. Ct case

so much

Explain how they got to QT

Big thing - arbitrary deadline

Greg, Line Attorney 4 & Line Attorney 3 -

Talked

conv. w/ Line Attorney 1

- Have marching orders as to what
US Atty wants them to do

- Who is talking to City of St. Paul
what does city really want

Group consensus

If Line Attorney 3 ask - would you consider
declinations

City - said - we would consider that

Hypothetical conv.

Would City entertain -
broader discussion

I have no authority

City said "we would be open to that"

Joyce:

Concerned about - no role for us
in resolution of Gallagher

If we are motivated by " - doesn't
Supreme Ct. how to rule

Game Plan - USAO

Line Attorney 3

return next week:

- memo coming to us
- will refer to Sup. Ct. case
- discuss HUD case

Ellis case - to be declined

Get drafts ready to go

No one has mentioned the SG in these discussions

Greg Brooker - St Paul

12-28-11

APW are most of city are filled in Todd
Nexus between Newell + SCT case

Line Attorney 4 - Ellis - extension motion filed (now 6/12-
deadline)

Newell 1/13 deadline

We told Todd that ~~that~~ Perez was involved

Todd called Perez - traded calls
Next day Todd said Tony, Todd + Perez
talked

Todd told Greg we should talk
told Greg later Tony is travelling but
Todd wants to see

Todd → When someone moves me within it
was a close call. HUD support was there
(wishing wishing)
Todd had background

We also told Todd about HUD letters /
responses / VRA w/ St Paul

→ Todd says it seems to me that CR is
concerned about Callagher. HUD is
now a boundary shop - may be lobbied
by St Paul

But even tho FORT is past conduct, with HTD gone, I want + reviewed declaration

Very transparent about SCL case - in memo
Write a new memo - throw everything into pot

Line Attorney 3 is over

Even tho **Line Attorney 4** has Elias - reviewed the document + got sent out

Tom Perez emails Greg that day + we traded calls - I know him well
Unusual tho for him to call me

Perez told Greg that I know Tom Francis (representing City of St Paul in SCL case) they had a discussion about whether they would work on the case

Arar tells Perez - I know City has HTD issues, Perez learns of quit time - is repored + collecting

Perez says to Greg - I told them they had to wait on full merits of the quit time + don't mention the SCL case

I told Perez it is still fluid

Perez said 12/22 (that day) was fluid

Next day I brought in **Line Attorneys 3 and 4**

I have marching orders from Todd - **Line Attorney 1** said
I am unable to hear

moving to dismiss? They are not comfortable with
that

Comments - let's see what reacts at to City of St.

Paul - **Line Attorney 3** talked to Lindquist or L. Heberg -
we could consider declining

(Hypothetical - could city entertain
proposed disbursement (CWS rights) on
SCT case

decline vs. intervene → they said they
could be open to
that.

Plan

Line Attorney 3 will write a new memo recommending
decline - mention SCT case at end

In email - she will write on ~~down~~ memo

[Is SG involved? Greg doesn't know -
Perez didn't say

CIV DIV SR STAFF - JAN 2012

Jan 3, 2012

COMMERCIAL

I. St. Paul

- City: we've learned that as settlement city means they'll just withdraw the petition → still haven't rec'd the USAO recommendation

RC-2: Non-responsive text in multi-subject document.

Appellate

RC-2: Non-responsive text in multi-subject document.

FED PROG

RC-2: Non-responsive text in multi-subject document.

RC-2: Non-responsive text in multi-subject document.

1-4-12

Genl Mtg

Mike -

St. Paul - in SCT -

final brief -

St. Paul was going to settle to make a case go away - now not settling - just withdrawing

HUD reconfirms that we decline 2 hours cases - so they will settle -

- can they withdraw their petition? - St. Paul petitions

Tony needs to decide - is the party dead? - need US Atty office rec.

Mike -

Odd ~~to~~

- looks like buying off St. Paul should be whether there are legit reasons to decline or to part practice

Follow up talk to Tony -

RC-2: Non-responsive text in multi-subject document.

From: Taylor, Elizabeth G. (OAAG)
To: Perrelli, Thomas J. (OAAG)
Sent: 1/5/2012 3:43:12 PM
Subject: another issue from civil mtg

Mike Hertz brought up the St. Paul "disparate impact" case in which the SG just filed an amicus brief in the Supreme Court. He's concerned about the recommendation that we decline to intervene in two qui tam cases against St. Paul. Apparently, this will be before Tony soon for his decision. Have you talked to Tony about it? If not, let's discuss when you get a few minutes.

Greg,

Line Attorney 3

Line Attorney 2

Line Attorney 1

1/6/2011

Calls from Tom Perez.

~~AGREEMENT MADE TO CALL PEREZ~~
~~AGREEMENT~~

Perez called ~~me~~ Greg

- Where are we on these cases
- Multiple conv. - but we had some concerns

Who has lead negotiating ~~resp.~~ resp.

Tom P. said he agrees he needs to start doing this

Perez said - what are the details

Lots of Q on Q1 procedure

Suggestion to call ~~them~~ Tony West

Line Attorney 3

Line Attorney 4

1/6/2012

Line Attorney 2

Line Attorney 1

Perez

spoke w/ Tony West
couldn't get Tadel

Tony is thanking Minu. doesn't
want to decline
But Perez said oh - no - ~~no~~
Fed. Cir. and

Meeting on Monday -
Can we get declaration memo
up by then

Notes of [Line Attorney 1]

Line Attorney 2/Line Attorney 3

Todd - gives light to have
reach out to the city + get their pulse
comprehensive memo rec declining that
includes everything incl. the Supreme Ct.
case
Todd says he doesn't know why

St. Paul, MN

~~PS~~ 1/6/2012

Tom Perez called G. Brooker on 1/5/2012
in evening. Brooker told ~~the~~ Tom we
spoke w/ Brandon + asked who is taking
the lead on the settlement. Perez sd he
will take the lead. Todd asked a lot
of ques. about qui tams - Todd asked
wh. we cd interview + move to dismiss.
one deadline is next week. Brooker took
him through all the qui tam procedures
and the like.

Perez sd he does not envision a written
agmt w/ the city or moving toward
petition

Greg kept urging him to call Tony West.
Perez said he would call Tony.

- got can always intervene for good cause
at a later time } Tony said make
sure Perez understands this.

Call w/ Greg Brooks et al. 1-6-2012

Tony thinks Minn does not want to
decline

Perez is meeting Mon w/ Hartz + West - can
USA meet + get the decline memo
out - to gather a proposal to make to
the City

REDACTED

Newell case

call w/ Greg et al.

met w/ Todd Sunday morning

mtg w/ Perez + West only Ma
+ w/ Hertz

Minn wants a very comprehensive
memo that discusses the Supreme Ct case

~~Well~~ Greg stressed we want transparency
get a reason related about how much
time

REDACTED

Newell - mtg w/Tayce
decline the second case first
do not say there is a quid pro quo
settlement
settlement is not contingent on declining

Per Plan A - Contact Ps to dismiss
the dist ct case
Plan B - dismiss the petition

USAO ~~wants~~ shd send that memo fwd.
Hick emphasized a relata corp proceed
w/ the meritorious case

USAO's reaction w/Likhsong's offer was neg.

Joyce on Newell
Acad to Tony West - Greg thinks we shd
interview + give the City two weeks to
settle.

Call Lillehaug about settling for dollars

Newell 1-19-2012

Con call w/ Joyce + USAO-MN

Tony sd in response to Lillehaug - Greg spoke to Perez

Greg: Perez has called Greg frequently. Perez asked wh. we wd decline w/o mentioning Supreme Ct. case

Perez taking lead on negotiating w/ Lillehaug
Ds rejected hypothetical proposal - we decline + they w/d cert. petition

Lille - wants us to interview to settle a case that was his proposal to Perez + City has a little bit of money to pay relator

Line Attorney 3

one yr. ext. VCA + No add'l money to be value - modest ant attr'n fee for relator's counsel
- No possibility of declination

From: Line Attorney 1
Sent: Friday, January 6, 2012 11:52 AM
To: Branda, Joyce (CIV) <RC-1>
Cc: Line Attorney 2
Subject: City of St. Paul Heads up

Line Attorney 2

and I just spoke with the USAO-Minn. Greg Brooker received a call yesterday from Tom Perez. It sounds like Tom Perez agreed to take the lead on the negotiations with the City of St. Paul, in terms of negotiating a withdraw by the City of the cert petition. The USAO-Minn is standing by until they get more explicit instruction that a deal has been made. Tom Perez may be calling Tony West about this today. The seal deadline is next Friday (1/13). Perez expressed some interest in the government declining on that date to keep pressure on the City. Nothing has been decided or requested. L.A. 2 and I can brief you more this afternoon on the call between Greg Brooker and Tom Perez if you like, but I wanted to give you this notice since you are at Main now.

Line Attorney 1
Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: Line Attorney 1
Sent: Monday, January 9, 2012 1:53 PM
To: Branda, Joyce (CIV) <RC-1>
Subject: Significant Cases Chart

Joyce: as an after-thought, I wondered whether you wanted to add the City of St. Paul cases even though the dollar value is not high. If so, here is the information.

U.S. ex rel. Frederick Newell v. City of Saint Paul, Minnesota, (D.Minn.) (Under Seal) Relator alleges that the City of St. Paul knowingly and falsely certified that it was in compliance with Section 3 of the Housing Act (incentives for low and very low income citizens) when it obtained HUD community development block grants (CDBG program, etc.).

U.S. ex rel. Ellis v. City of St. Paul, Minn, et al. (Under Seal) Relator alleges that the City of St. Paul failed to affirmatively further fair housing, when it obtained HUD community development block grants (CDBG program, etc.).

The Major of the City of St. Paul has met with Mike Hertz. We are working toward declining both matters. It appears the AAG for Civil Rights (Tom Perez) is working with the City on a deal to withdraw its petition before the Supreme Court in the Gallagher case in exchange for the government's declination in both cases. HUD concurs with declination.

Line Attorney 1

Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

From: Branda, Joyce (CIV)
Sent: Monday, January 09, 2012 11:56 AM
To: Anderson, Dan (CIV); Line Attorney 1; Davis, Pat (CIV); Granston, Michael (CIV); Hilmer, Tracy (CIV); Kleinburd, Alan (CIV); McLean, Sara (CIV); Rabinowitz, Judith (CIV); Tingle, Michal (CIV); Yavelberg, Jamie (CIV)
Subject: FW: Significant Cases Chart

We have been asked to identify cases over \$250 million in damages that are in litigation, or settlement negotiations, or under investigation and to the point where we know they have merit and are that large, to identify for the front office and Department higher ups. See attached.

Please send me the info to include in the attached chart ASAP.

RC-1

From: Perez, Thomas E (CRT)
Sent: Tuesday, January 10, 2012 9:52 AM
To: Brooker, Greg (USAMN)
Subject: Re:

I left you a detailed voice mail. Call me if you can after you have a chance to review voice mail.

From: Brooker, Greg (USAMN)
Sent: Tuesday, January 10, 2012 09:42 AM
To: Perez, Thomas E (CRT)
Subject: RE:

Sorry. I have been out sick three days with a bad case of influenza. I will try to reach you today.
Greg

Greg Brooker
Chief, Civil Division
U.S. Attorney's Office
600 U.S. Courthouse
300 South Fourth Street
Minneapolis MN 55415
(612) RC-1 (direct dial)
(612) 664-5788 (fax)

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Monday, January 09, 2012 10:55 AM
To: Brooker, Greg (USAMN)
Subject: Re:

Could you give me a call asap at 202 RC-1. I will have my blackberry with me for the next 30 minutes and then must give it up for 3 hours because I will be RC-2

Tom

From: Brooker, Greg (USAMN)
Sent: Thursday, January 05, 2012 06:38 PM
To: Perez, Thomas E (CRT)
Subject:

Hi Tom,
I just left a message on your cell. Please call me on my cell at your convenience: 612 RC-1.
Thanks
Greg Brooker

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Thursday, January 05, 2012 5:25 PM

To: Brooker, Greg (USAMN)

Subject: Can you give me a call if you have a free moment

My cell is 202-RC-1

Happy New Year

Tom Perez

1/11/2012

Line Attorney 1

Line Attorney 2

Gregg

Line Attorney 3

Line Attorney 4

- Meeting on Monday
- Todd on standby - but didn't participate
- Tuesday AM
 - Message from Perez
 - When you are working on memos - make sure you don't talk about Sp. Ct. case
 - Concern for Greg
 - Reel flag
- Greg left message - saying the Sp. Ct. info. will be in the memo
- No memos yet from Minn. yet
- If there are memos Gallagher will be in it

From: Line Attorney 1
Sent: Wednesday, January 11, 2012 10:56 AM
To: Branda, Joyce (CIV) <RC-1>; Granston, Michael (CIV) <RC-1>
Cc: Line Attorney 2
Subject: City of St. Paul qui tams update

L.A. 2 and I spoke with Minn. AUSAs Greg and L.A. 3 this morning. Greg last spoke with his USA on Sunday morning and voiced his objection to the apparent inclination of AAGs West and Perez to not include a discussion of the Supreme Court case as a reason for declining the Newell qui tam, which Greg described as a close judgment call on the election decision. Greg expressed his strong view that the reasons for the election decision of both offices should be transparent from a discussion in the memo. The USA seems to agree. Therefore, until this issue is resolved with West/Perez, Greg's office will not begin to draft a memo on the election decision. Joyce, for what it is worth to you, L.A. and I feel the same way. We believe transparency is very important.

As for the seal extension request. Given the relator's objection, USAO-Minn will be judicious in the amount of time it asks the court to extend the seal.

Line Attorney 1
Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

RC-1

From: Perez, Thomas E (CRT)
Sent: Wednesday, January 11, 2012 3:51 PM
To: Brooker, Greg (USAMN)
Subject: Re:

Just left a message for you. My cell is 202-RC-1

Tom

From: Brooker, Greg (USAMN)
Sent: Wednesday, January 11, 2012 10:06 AM
To: Perez, Thomas E (CRT)
Subject: RE:

Sorry, I have been out sick – only made it a couple of hours in the office yesterday. I left you a message this morning. At some point we all should talk.

Thanks

Greg

Greg Brooker
Chief, Civil Division
U.S. Attorney's Office
600 U.S. Courthouse
300 South Fourth Street
Minneapolis MN 55415
(612) RC-1 (direct dial)
(612) 664-5788 (fax)

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Tuesday, January 10, 2012 1:45 PM
To: Brooker, Greg (USAMN)
Subject: Re:

Were u able to listen to my message?

From: Brooker, Greg (USAMN)
Sent: Tuesday, January 10, 2012 09:42 AM
To: Perez, Thomas E (CRT)
Subject: RE:

Sorry. I have been out sick three days with a bad case of influenza. I will try to reach you today.
Greg

Greg Brooker
Chief, Civil Division
U.S. Attorney's Office
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Sent: Thursday, January 05, 2012 5:25 PM
To: Brooker, Greg (USAMN)
Subject: Can you give me a call if you have a free moment

My cell is 202RC-1

Happy New Year

Tom Perez



From: postmaster@msgsvr.voip.usa.doj.gov [mailto:postmaster@msgsvr.voip.usa.doj.gov]
Sent: Thursday, January 12, 2012 5:58 PM
To: Greg Brooker
Subject: Voice Message Attached from 2025-RC-1 - DIST OF COLUMBI

Time: Jan 12, 2012 5:58:05 PM
[Click attachment to listen to Voice Message](#)

RC-1

From: Perez, Thomas E (CRT)
Sent: Friday, January 13, 2012 12:45 PM
To: Brooker, Greg (USAMN)
Subject: RE:

I will let you know as soon as I have word

From: Brooker, Greg (USAMN)
Sent: Friday, January 13, 2012 12:35 PM
To: Perez, Thomas E (CRT)
Subject: RE:

Thanks for the update Tom. We are ready to roll upon your word.
Greg

From: Line Attorney 2
Sent: Friday, January 13, 2012 4:00 PM
To: Line Attorney 1
Subject: Newell Development

L.A. 3 called. He talked to the City's counsel who called him.

Lillehaug says they have been thinking about it, and the City feels pretty strongly that it can win the Gallagher case in the Supreme Court, and will win back at the trial court when it is remanded. The City is concerned that getting us to decline does not really get them what they want – they would still have to deal with the case. The City wants us to consider an arrangement where we agree to a settlement where it will extend the VCA for another year, value that as an alternative remedy, and it would add a small amount of cash for relator's attorney fees, and a small relator's share. They say this has to be a very modest amount of money. In exchange we would have to intervene and move to dismiss.

I'm not sure how this would really work. If we settle, we don't need to intervene and move to dismiss. Nonetheless, this is what they want us to consider.

L.A. 3's instinct is that the relator will not go for this. L.A. 3 reiterated that he, L.A. 4 and Greg feel strongly that declination is one thing, but that dismissal is another.

I told L.A. 3 we would discuss this development and get back to them. I told him it would not be before Tuesday because I was not sure if people were here still.

Should I set up a call on Tuesday? Would 11:00 AM eastern work for you?

* * * * *

Line Attorney 2
*Senior Trial Counsel
Civil Division, Commercial Litigation Branch, Frauds Section
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From: Line Attorney 1
Sent: Friday, January 13, 2012 7:52 PM
To: Branda, Joyce (CIV) <RC-1>; Line Attorney 2
<Line Attorney 2>
Subject: RE: Newell Development

My guess is that USAO-Minn will be on the same page with us.

From: Branda, Joyce (CIV)
Sent: Friday, January 13, 2012 5:35 PM
To: Line Attorney 2; Line Attorney 1
Subject: Re: Newell Development

This is so not what was discussed with tom perez as what the plan was - basically we were to decline elis first and use that as the good faith government gesture to get them to dismiss the petition (and civil rights was trying to talk to plaintiffs about a deal where they would settle the whole case).

We can talk tuesday but my reaction is quite negative. Besides, what is the consideration for dismissing ellis? How would we "value" the vca (also very bad precedent)? This strikes me as lillihaag doing his bullying thing. On the other hand if there is real consideration paid (assuming we could come up with damages calculation in both cases) we could consider a standard settlement. But this proposal is far afield from anything that has been talked about.

From: Line Attorney 2
Sent: Friday, January 13, 2012 04:43 PM
To: Branda, Joyce (CIV); Line Attorney 1
Subject: Newell Development

Joyce –David Lillehaug, called the Newell AUSA today. Lillehaug told L.A. 3 that the City feels strongly it can win *Gallagher* in the Supreme Court, and that it will win back at the District court when the case is remanded. The City is concerned a declination in *Newell* does not really get the City what it needs – because there would still be a case. The City wants us to consider the following settlement: The City extends its HUD VCA for an additional year. A value is assigned to that extension as an alternative remedy. The City adds a small amount of cash for relator’s attorney fees, and a small relator’s share. The City says this has to be a very modest amount of money. In exchange, the government intervenes and moves to dismiss *Newell* and *Ellis*. L.A. 3 has asked for our reaction. His instinct is that the relator will not go for this unless there is a significant amount of money.

- Line Attorney 2

* * * * *
Line Attorney 2
*Senior Trial Counsel
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Washington, D.C. 20004*

RC-1

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RC-1

From: Perez, Thomas E (CRT)
Sent: Wednesday, January 18, 2012 10:21 AM
To: West, Tony (CIV)
Subject: RE: Happy New Year

If it is possible to talk today to confirm whether you are ok with the approach as outlined, it would be very helpful, as the clock is ticking fast and the team would need to get right on it.

Sorry to bother you.

Tom

From: West, Tony (CIV)
Sent: Friday, January 13, 2012 4:14 PM
To: Perez, Thomas E (CRT)
Subject: Re: Happy New Year

Just landed in las vegas for a speech. Call me when you're done: 202-RC-1.

From: Perez, Thomas E (CRT)
Sent: Friday, January 13, 2012 03:39 PM
To: West, Tony (CIV)
Subject: Re: Happy New Year

I have a meeting that will last til 430. Can we talk today. I now know state of play and we need to talk asap

Tom

From: West, Tony (CIV)
Sent: Wednesday, January 11, 2012 07:17 PM
To: Perez, Thomas E (CRT)
Subject: Re: Happy New Year

Just left you a message. I'm on my cell: 202-RC-1.

From: Perez, Thomas E (CRT)
Sent: Wednesday, January 11, 2012 05:51 PM
To: West, Tony (CIV)
Subject: Re: Happy New Year

If you have a chance to catch up for 2 minutes, let me know

From: West, Tony (CIV)
Sent: Thursday, January 05, 2012 02:25 PM
To: Perez, Thomas E (CRT)
Subject: Re: Happy New Year

Sure thing. Will try you after this meeting w/tom perrelli.

From: Perez, Thomas E (CRT)
Sent: Thursday, January 05, 2012 01:18 PM
To: West, Tony (CIV)
Subject: Re: Happy New Year

If we are able catch up in the next day, that would be great.

From: West, Tony (CIV)
Sent: Tuesday, January 03, 2012 04:41 PM
To: Perez, Thomas E (CRT)
Subject: Re: Happy New Year

Happy New Year to you too! Was able to spend a lot of time with family, which was wonderful.

I'll try to give you a call this evening or tomorrow about our case. --TW

From: Perez, Thomas E (CRT)
Sent: Tuesday, January 03, 2012 03:26 PM
To: West, Tony (CIV)
Subject: Happy New Year

Tony

RC-1

I was hoping we could follow up to continue our discussion we had before the holidays about the fair lending matter. If you could give me a shout at your convenience, or let me know a time when we could talk, I would be most grateful.

Tom

From: Line Attorney 2
Sent: Wednesday, January 18, 2012 4:06 PM
To: Branda, Joyce (CIV) <RC-1>; Line Attorney 1
(Line Attorney 1)
Subject: Additional Discussion with USAO re Newell

I told L.A. 3 that we were waiting for more information at this end. He reemphasized the situation as we know it, and that the City is waiting for a response. Much of what he said was duplicative of what we have already passed to you, but he was more emphatic about where he thinks we are.

He says he understood that West, Perez and Hertz had had a meeting and that the resulting go forward was the plan to decline Ellis, resolve Gallagher and then decline Newell. The 60 day extension in Newell was supposed to be part of that plan. He explained and asked me to emphasize to you, that subsequently, however, the City called and said they are no longer willing to accept the decline two qui tams and dismiss Gallagher deal. That they will not withdrawal Gallagher on that basis, that they are only willing to do the new deal they propose, which is:

The City would:

- Extend the Section 3 VCA a year, and we would assign a value to that extension.
- Settle the Newell Case, with the City's payment being a) credit for the value of the VCA extension, plus b) some small amount of cash to pay a relator's share and attorney fees.
- Withdrawal its petition in Gallagher.

In exchange the United States would:

- Intervene in and dismiss Newell.
- Intervene in and dismiss Ellis.

If we are unwilling to accept this deal, they said they will not dismiss Gallagher. Chad says the ball is in our court to get back to the City with a response to the offer. L.A. 3 says he would expect the Relator to object to this deal.

I told L.A. 3 we are waiting for you to get a chance to talk to Tony.

The USAO does not have an official position yet. L.A. 3 and I agreed, however, that if this deal is not going forward we will need to make an decision in Newell and Ellis independent of Gallagher to move forward.

The current intervention deadline in Ellis is June 18, 2012. The Newell deadline extension request is to March 13, 2012. We have no word from the Court on our request yet. The deadline was last Monday.

* * * * *
Line Attorney 2
*Senior Trial Counsel
Civil Division, Commercial Litigation Branch, Frauds Section
United States Department of Justice
Patrick Henry Building
Room RC-1
601 D. Street, N.W.
Washington, D.C. 20004
RC-1*

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1/19/2012

Greg, [Line Attorney 4], [Line Attorney 3],
[Line Attorney 2], [Line Attorney 1], Joyce

Tony reports to Joyce

- Greg got message from Lillehang
- Intervene, 2 weeks to settle, if not go forward with case

Greg and Perez have talked a lot

Perez said - get declaration memo
lean out Gallagher

Broker called back and said no

[Line Attorney 3]

rejected City's proposal
Perez says - Lillehang wants us to
intervene to settle the case
Lillehang - says a little bit of \$
to settle the case

[Line Attorney 3]

Terms from Lillehang

- Get ~~a~~ a 1 year ext. of VSA -
That is what goes to govt
- Value of that -

Relator share based on that
Very modest amount of atty fees

Declining - no possibility any more

Greg -

looks like

Supreme Court will probably have to
wade in

Intervention motion came in -

Perez trying to talk to Tom

Haven't been able to talk

Must have committed yesterday

- Give it a college try to try to
negotiate

- Threat that we will intervene in
Newell and litigate

Perez - do well, we tried, may have to go
forward, City not willing to put in
some money

Working on VCA - non-starter

But we can talk about a traditional
~~City~~ Settlement with the City

If any remaining uncertainty
- about forget the idea

Notes of [Line Attorney 1]

Call Lillehaug about settling for dollars

Newell 1-19-2012

Con call w/ Joyce + USAO-MN

Tony sd in response to Lillehaug - Greg spoke to Perez

Greg: Perez has called Greg frequently. Perez asked wh. we wd decline w/o mentioning Supreme Ct. case

Perez taking lead on negotiating w/ Lillehaug
Ds rejected hypothetical proposal - we decline + they w/d cert. petition

Lille - wants us to interview to settle a case that was his proposal to Perez + City has a little bit of money to pay relator

Line Attorney 3

one yr. ext. VCA + No add'l money to be value - modest ant attr'n's fee for relator's counsel
- No possibility of declination

- Not much response fr. Lilleburg
Perry was trying to get a hold of Tony West
Perry sd yesterday: Lille. Not willing to kick
in much money. We may/may not intervene
- if Supreme Ct thing is off the plate
 - Perry sounded like he might be throwing
in the towel
 - Forge rghts Org to schedule a mtg w/ all
players
 - keep posted about seal deadline
 - relata will be unlikely to accept a small out.
 - Tell Lille. valuing. The VCA is not okay
 - get HUD's analysis ^{that} included the City
did not "get credit" fr
 - Set up a call w/ HUD Line Emp.
 - Summarize conversation w/ USAO-Minn,
incl. we discussed if uncertainty
w/ CIV rghts - we arng call w/ both all
principals.

- FCA settlement - decline - filled Todd in
Fri. night
- Perez called Bowen - Perez led mtg
w/ the Mayor of St. Paul
- Todd did not attend Henry Lillchog - Mayor -
Perez mtg. @ 10:00 am. Fri - 2/3/2012
- Perez sd there is a deal - ~~and~~
- City ready to file stip in Sugrue et al.
by Wed.
 - we need to decline L.A. 3 case
 - ~~asked~~ Tony West sd don't worry about my
people
 - Greg + Todd spoke Fri night re Perez phone
call and ...
 - Todd said we wait interview
 - Perez today 2/4/2012 tried to call Tony West
who did not return Perez's phone calls
fr. this weekend
 - Greg wants to bring
 - City Council mtg on Wed. - closed session -
to move to w/d cut. pet.

- city accepted offer of declination to be filed
- City non-negotiable:
must be comprehensive memo, incl.
Hrs letters
- Perry did not say what exactly has been agreed to

JF Paul

1-19

Craig B. /

Line Attorney 3

Line Attorney 1

Line Attorney 2

Perez has called me frequent-ly

Perez called & said can you get declaration memos ready w/out Gallagher reviewed

G said no

Perez is responsible w/ Lillibridge + Lindquist

Perez called Craig & said he heard Lillibridge is rejecting the proposal to declare w/e & they dismiss G.

[Lillchans proposed to P.
to inquire to settle the
now + said city has
a little bit of \$

Line Attorney 3

talked to Lillchans -
terms would be one
get an extension
of 1 year of VCA +
that would be considera-
tion to gov't - no add'l
money

There would be add'l
fine of VCA + nonetice
fine + modest
a. fees.

→ No penalty of backaction
(from Lillchans)

Lilichang rejects the demand
Peter says we may have
to come to fight another
day - he realizes this
is not much of a
response from Lilichang

Yesterday Peter tried to call
me - he was trying to
call TW - we haven't
been able to talk.
must have connected
yesterday

Peter says we can try
to get the - but it
doesn't look good

There is the threat we
will attack Newell

That may be where he
got the idea of
not returning to Legate
the case

Greg - I am going on what
L. McHenry told me

WD - We now have an extension
days Back where we started.

by extension request in Newell

RC-1

From: Perez, Thomas E (CRT)
Sent: Wednesday, January 18, 2012 9:39 PM
To: Brooker, Greg (USAMN)
Subject: Re: Civil Frauds

Spoke with lillehaug. Call me if u want an update

From: Brooker, Greg (USAMN)
Sent: Wednesday, January 18, 2012 05:57 PM
To: Perez, Thomas E (CRT)
Subject: Civil Frauds

Tom,
FYI: Civil Frauds has asked Minnesota to have a call with them tomorrow at 9:30 Eastern. They seem to be confused as to the next move.

Greg

Greg Brooker
Chief, Civil Division
U.S. Attorney's Office
600 U.S. Courthouse
300 South Fourth Street
Minneapolis MN 55415
(612) RC-1 (direct dial)
(612) 664-5788 (fax)

RC-1

From: Perez, Thomas E (CRT)
Sent: Wednesday, January 18, 2012 10:01 PM
To: Brooker, Greg (USAMN)
Subject: Fw: Happy New Year

Just got this from tony west. I think your leadership tomorrow morning will be critical in getting us to the next step.

Thx

From: West, Tony (CIV)
Sent: Wednesday, January 18, 2012 09:44 PM
To: Perez, Thomas E (CRT)
Cc: West, Tony (CIV)
Subject: Re: Happy New Year

Spoke to Joyce Branda. She's touching base with Greg at the USAO to discuss how they can accomplish the proposal consistent with prior practice. I'll circle back with you once I've heard from her (although you may hear from Greg first).

On Jan 18, 2012, at 7:20 AM, "Perez, Thomas E (CRT)" <RC-1> wrote:

If it is possible to talk today to confirm whether you are ok with the approach as outlined, it would be very helpful, as the clock is ticking fast and the team would need to get right on it.

Sorry to bother you.

Tom

From: West, Tony (CIV)
Sent: Friday, January 13, 2012 4:14 PM
To: Perez, Thomas E (CRT)
Subject: Re: Happy New Year

Just landed in las vegas for a speech. Call me when you're done: 202RC-1

From: Perez, Thomas E (CRT)
Sent: Friday, January 13, 2012 03:39 PM
To: West, Tony (CIV)
Subject: Re: Happy New Year

I have a meeting that will last til 430. Can we talk today. I now know state of play and we need to talk asap

Tom

From: West, Tony (CIV)
Sent: Wednesday, January 11, 2012 07:17 PM
To: Perez, Thomas E (CRT)
Subject: Re: Happy New Year

Just left you a message. I'm on my cell: 202-RC-1

From: Perez, Thomas E (CRT)
Sent: Wednesday, January 11, 2012 05:51 PM
To: West, Tony (CIV)
Subject: Re: Happy New Year

If you have a chance to catch up for 2 minutes, let me know

From: West, Tony (CIV)
Sent: Thursday, January 05, 2012 02:25 PM
To: Perez, Thomas E (CRT)
Subject: Re: Happy New Year

Sure thing. Will try you after this meeting w/tom perrelli.

From: Perez, Thomas E (CRT)
Sent: Thursday, January 05, 2012 01:18 PM
To: West, Tony (CIV)
Subject: Re: Happy New Year

If we are able catch up in the next day, that would be great.

From: West, Tony (CIV)
Sent: Tuesday, January 03, 2012 04:41 PM
To: Perez, Thomas E (CRT)
Subject: Re: Happy New Year

Happy New Year to you too! Was able to spend a lot of time with family, which was wonderful.

I'll try to give you a call this evening or tomorrow about our case. --TW

From: Perez, Thomas E (CRT)
Sent: Tuesday, January 03, 2012 03:26 PM
To: West, Tony (CIV)
Subject: Happy New Year

Tony

RC-1

I was hoping we could follow up to continue our discussion we had before the holidays about the fair lending matter. If you could give me a shout at your convenience, or let me know a time when we could talk, I would be most grateful.

Tom

From: [Redacted] **Line Attorney 2**
Sent: Friday, January 27, 2012 11:04 AM
To: [Redacted] **Line Attorney 1**
Subject: Newell Ongoing Discussions

L.A. 3 is very concerned about the fact that the meeting has been moved to next week. He wonders if we can act before a meeting.

He reports that Lillehaug has called to emphasize that need for speed. There have been no discussions about the City's offer with Newell. L.A. 3 expects a negative response from relator if we were to raise it.

L.A. 3 reports Greg talked to Perez yesterday, and Perez is irritated at Lillehaug (who could have had declinations, and got greedy). Perez reports he may have another avenue to try to get rid of the Gallagher case. L.A. 3 believes Perez just wants us to fish or cut bait as to whether or not the City's settlement is possible, or if a traditional FCA settlement is possible, and does not feel strongly either way as to how that should come out.

L.A. 3 has not talked to Todd.

L.A. 3 wonders if we can go back to the City now with our counter – can we say no on their settlement, and ask if they will they do a traditional FCA settlement.

I told L.A. 3 that with a meeting scheduled, this office would likely not be comfortable acting before the meeting, but I told him I would forward his request.

Finally, L.A. 3 does not believe we should oppose the relator's objection to our extension request, because he doesn't believe there is much we can say. I am a little uncomfortable with no response, but I agree there would not be much to say beyond asserting that it is our seal. We cannot really deny that our investigation is done.

Should we report any of this to Joyce? What do you think about going back to the City?

* * * * *

Line Attorney 2

Senior Trial Counsel
Civil Division, Commercial Litigation Branch, Frauds Section
United States Department of Justice
Patrick Henry Building
Room RC-1
601 D. Street, N.W.
Washington, D.C. 20004
RC-1

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From: Kappelhoff, Mark (CRT)
Sent: Sunday, January 29, 2012 11:09 PM
To: Perez, Thomas E (CRT)
Subject: Re: Fyi

Thx. Let's chat tomorrow.

----- Original Message -----

From: Perez, Thomas E (CRT)
Sent: Sunday, January 29, 2012 12:28 PM
To: Kappelhoff, Mark (CRT)
Subject: Fyi

The call was made friday by mondale that we discussed

From: Perez, Thomas E (CRT)
Sent: Monday, January 30, 2012 12:09 PM
To: West, Tony (CIV)
Subject: Re: St. Paul

Thx

From: West, Tony (CIV)
Sent: Monday, January 30, 2012 11:47 AM
To: Perez, Thomas E (CRT)
Subject: FW: St. Paul

fyi

From: West, Tony (CIV)
Sent: Monday, January 30, 2012 11:47 AM
To: Branda, Joyce (CIV)
Subject: St. Paul

Joyce, as we discussed, I'm fine with making one more attempt at trying to get the parties to settle before we make any intervention decisions. Let's try to put some time parameters around it, though—something like 10-14 days. Thanks. --
TW

From: Line Attorney 2
Sent: Monday, January 30, 2012 5:18 PM
To: Line Attorney 1; Branda, Joyce (CIV)
<RC-1>
Subject: Newell Settlement Talks Appear to be Done Already (I hope these are not famous last words)

Lillehaug was upset and surprised we are not willing to accept the City's good offer. Lillehaug warned L.A. 3 that Mr. Perez is going to be angry with us. Right after the call with L.A. 3 Lillehaug tried to reach Perez. Perez then called and told Greg he was not inclined to call Lillehaug back right away.

L.A. 3 told Lillehaug that we are rejecting the City's offer. L.A. 3 told him we continue to be willing to discuss a traditional FCA settlement, but discussions would have to move quickly. Lillehaug asked if his "value the VCA" concept as consideration could be part of an FCA settlement. L.A. 3 said no, that the settlement would have to involve the payment of money. L.A. 3 emphasized we can always take ability to pay, and the fact that the defendant is a public entity into account, but there would have to be a money. Lillehaug asked if we have a demand. L.A. 3 told him that our understanding is that the City is not willing to put more any significant money on the table, and so, in our judgment, any number we could give to them would be a non-starter. L.A. 3 asked him to tell us if the City's position changes.

L.A. 3's conclusion is that we are no longer on a settlement track, and we should move forward with our decision making process.

Line Attorney 1 – I guess we need to get to HUD L.E. to see if this changes HUD's mind.

RC-1

From: Perez, Thomas E (CRT)
Sent: Monday, January 30, 2012 8:23 PM
To: Brooker, Greg (USAMN)
Subject: Re: Civil Frauds

Let's catch up when you get a chance.

From: Brooker, Greg (USAMN)
Sent: Thursday, January 26, 2012 11:17 PM
To: Perez, Thomas E (CRT)
Subject: RE: Civil Frauds

I think we should all move forward with the call without Tony. I will suggest that to Todd and Joyce Branda in the morning.
Greg

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Thursday, January 26, 2012 11:15 PM
To: Brooker, Greg (USAMN)
Subject: Re: Civil Frauds

I just found out that today's call, which was postponed to tomorrow, has now been postponed by civil to next tuesday due to tony scheduling problems. We must follow up tomorrow. Can we speak in the morning.

From: Perez, Thomas E (CRT)
Sent: Wednesday, January 25, 2012 05:23 PM
To: Brooker, Greg (USAMN)
Subject: Re: Civil Frauds

Was he able to make the call and get through to him

From: Perez, Thomas E (CRT)
Sent: Tuesday, January 24, 2012 03:30 PM
To: Brooker, Greg (USAMN)
Subject: Re: Civil Frauds

Any progress to report?

From: Brooker, Greg (USAMN)
Sent: Friday, January 20, 2012 12:16 PM
To: Perez, Thomas E (CRT)
Subject: RE: Civil Frauds

Tom,
Could you please call me at your convenience?
Thanks
Greg Brooker
Cell: 612 RC-1

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Thursday, January 19, 2012 3:59 PM
To: Brooker, Greg (USAMN)
Subject: Re: Civil Frauds

Fyi, David L. looks forward to hearing from L.A. 3 in the next 24 hours

Tom

From: Brooker, Greg (USAMN)
Sent: Wednesday, January 18, 2012 05:57 PM
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Subject: Civil Frauds

Tom,

FYI: Civil Frauds has asked Minnesota to have a call with them tomorrow at 9:30 Eastern. They seem to be confused as to the next move.

Greg

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(612) 664-5788 (fax)

RC-1

From: Perez, Thomas E (CRT)
Sent: Friday, February 03, 2012 1:15 AM
To: Brooker, Greg (USAMN)
Subject: Re: Civil Frauds

Can I talk to you and your colleague in the morning before my meeting. I need to ask a couple questions.

Tom

From: Brooker, Greg (USAMN)
Sent: Thursday, February 02, 2012 09:50 AM
To: Perez, Thomas E (CRT)
Subject: Re: Civil Frauds

Still trying to reach Todd.
Greg

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Wednesday, February 01, 2012 11:55 PM
To: Brooker, Greg (USAMN)
Subject: Re: Civil Frauds

Any update on todd availability

From: Brooker, Greg (USAMN)
Sent: Thursday, January 26, 2012 11:17 PM
To: Perez, Thomas E (CRT)
Subject: RE: Civil Frauds

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Greg Booker

Line Attorney 1

Line Attorney 2

Line Attorney 4

2/6/2012

~~XXXXXX~~

Perez called earlier in week
to invite Todd Jones to
go to meeting w/ Mayer
Todd declined to go to meeting

Fri. 4th
AM

Likelaug was there

Fri. pm -

Perez left VM - and then talked to Greg

We have a deal
Things are moving quickly

Back to where we were -

City accept declaration
Moving quickly

City will be ready to file stip.
on Wed

Need a declaration in §3
first

- §3 - declined
- Supreme Court - dismissed
- Ellis dismissed

Tony said - don't worry about my people

Perez said - I'll tell Tony

Greed talked to ~~Jimmy~~ Todd

Todd said This is better -
but if these are declarations
Sup. Ct. is important

Perez called:

Mon. AM

- left messages for Tony over weekend
- haven't connected

City Council Session

- Closed ~~meeting~~ on
~~Tuesday~~ Wednesday

- Mayor will then to appear
bringing down mail case

- They have agreed to get landlord
on board

Greg - wants us to explain
where we are on our memos

Non-negotiable

- how to refer to Supreme Ct. case
- Memo talks about (HJ) memos

From: Line Attorney 1
Sent: Monday, February 6, 2012 2:58 PM
To: Branda, Joyce (CIV) <RC-1>
Cc: Line Attorney 2
Subject: City of St. Paul update

Joyce: Greg informed me and L.A. 2 this afternoon of a few additional facts (see email below):

1. On Friday, 2/5 @ 10:00am, Lillehog, the Mayor, and Perez had a meeting at which they agreed the government would decline intervention on the Newell case (now) and the AFFH case (later) and the City would withdraw its cert petition asap.
2. The City Council is meeting in a closed session to approve the above action on Wed.
3. Perez gave no further details to Greg about the purported agreement, and there are more questions than answers to how this would play out and whether any such agreement would be in writing.
4. Perez called Tony West repeatedly this weekend to give Tony this update, and presumably, to get Tony's approval, but Tony did not return Perez's phone calls as of an hour or two ago.
5. Perez wants declination approval by Wednesday, but there is no apparent basis for that deadline.
6. USA-MN considers it non-negotiable that its office will include a discussion of the Supreme Court case and the policy issues in its declination memo.
7. Neither me/L.A. 2 nor the USAO has agreed to forward any authority memo until we get further instruction from Tony West or you.
8. Greg is calling his USA to see if we can have an all-hands conference call w/West, Perez, Todd Jones.

Line Attorney 1
Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite RC-1
Washington, DC 20004
(202) RC-1

2-7-12 Tom Perez

TW

USAO - Mn.

Line Attorney 2

, JB

Ch of St Paul has announced for withdrawal petition in major case - Mayor's member is Mandate & he called him & was offended at prospect of losing major case

Preparing to file a motion to withdraw the petition - SG assured me we will grant it & case goes away

We had followed (Greg, Mike) etc

- declination in Newell
- declination later in other case

Request to settle Newell - they are now off of town

We could commit to a simple declaration & cases will go as they will

- this week, the Seche 3 case
- other case, may not be an issue (?)

Anything in works? TPerez: no, just oral discussions
would you you bond

Hope is Seche 3 case - more forward of a declaration this week - can't be sure not ruled on motion

Bringing their entry correct tomorrow -

Greg B: Mon. → report is not in writing?

TPover: that's correct

Talked to Todd Jones - memo will be very transparent / comprehensive

JTB: not sure if good over intervention

TP: Lillchung did not mention this ↑

I just learned city is flying tomorrow.

TP: I think we (TP) have "a good relationship of trust"

If declaration isn't Thurs - Fri
it will be ok

TP: No of cases are more to intervene? JTB - few

- but we file brackets - extra side
- reserve right to intervene for
good ones

We will send std notice to TP

Send bulk memo to **L.A. 3**/Greg

WordPerfect Document Compare Summary

Original document: K:\My Documents\1 CASES\Newell\2012.01.10 Newell Action Memo - Declination.wpd

Revised document: K:\My Documents\1 CASES\Newell\2012.02.07 Newell Action Memo - Declination.wpd

Deletions are shown with the following attributes and color:

~~Strikeout~~, Blue RGB(0,0,255).

Deleted text is shown as full text.

Insertions are shown with the following attributes and color:

Double Underline, Redline, Red RGB(255,0,0).

The document was marked with 74 Deletions, 53 Insertions, 0 Moves.

U.S. Department of Justice

Civil Division

Washington, D.C. 20530

MEMORANDUM FOR TONY WEST
ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

Re: *U.S. ex rel. Newell v. City of St. Paul, Minnesota*,
Case No. 09-SC-001177 (D. Minn.)

DJ No. 46-39-955

REQUEST FOR AUTHORITY TO DECLINE TO INTERVENE

TIME LIMIT:	Before January February 13 ² , 2012, which is the intervention deadline.
NATURE OF CLAIMS:	Qui tam action under the False Claims Act, 31 U.S.C. §§ 3729-3733, alleging that defendant, the City of St. Paul, Minnesota, falsely certified it was in compliance with Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. § 1701u) (Section 3) in order to obtain tens of millions of dollars from the Department of Housing and Urban Development (HUD) in the form of community development grants that require compliance with Section 3.
AMOUNT OF CLAIMS:	The total HUD grants the City obtained based on its false certifications were \$86,363,362.
CRIMINAL ACTIONS:	There was no criminal investigation.
RECOMMENDATION:	The United States Attorney's Office for the District of Minnesota (Att. A) and HUD (Att. B) recommend that we decline to intervene. We concur.

This False Claims Act (FCA) *qui tam* action was filed in 2009 against the City of St. Paul, Minnesota. Relator, a St. Paul small business owner, alleges that the City failed to comply with Section 3, and that in its annual consolidated federal grant applications, the City falsely certified to HUD that it was in compliance with Section 3. Relator alleges that based on this false certification, the City was given \$86 million in federal community development grants.

HUD recommends we decline to intervene. That recommendation is based on the facts that the City has recently implemented a substantial Section 3 program, and that if the government intervenes, the lawsuit would require HUD to devote substantial resources for further investigation, litigation, discovery and testimony, at a time when HUD's resources are limited, and where its administrative concerns already have been addressed.

HUD had previously recommended that we intervene in this action. Based on that original recommendation and our joint investigation, and although it was a close call, the District of Minnesota and this office previously recommended that we intervene believed intervention was warranted. Now, based on arguments raised by the City in recent discussions, on HUD's change of mind, on a new policy consideration related to the *Gallagher* case in the United States Supreme Court which is discussed below recommendation, and the litigation risks enumerated here, both the District of Minnesota and we recommend that the United States decline to intervene.

BACKGROUND

A. Section 3 of the Housing and Development Act of 1968 (Section 3)

Section 3 requires that employment and other economic opportunities generated by certain HUD financial assistance housing and community development grant programs be directed, to the greatest extent feasible, and consistent with existing Federal, State and local law, to low- and very low-income persons, particularly those who are recipients of government assistance for housing; and to business concerns which provide economic opportunities for low- and very low-income such persons. —

Section 3 applies to public housing authorities, and to other grant recipients (recipients) who get funds from certain HUD housing and community development grant programs. — Section 3 only applies to funding for projects that involve the construction or rehabilitation of housing, or other public construction. Section 3 applied to grants made to the City during the relevant time period.

Section 3 is race and gender neutral. Preferences are based on income-level and location. HUD's Section 3 regulations require recipients of HUD funding to direct new employment, training, and contracting opportunities to low-income residents, and to businesses that employ them, without regard to race or gender. — The City's current Section 3 web page, set up after recent HUD administrative action, explicitly acknowledges: — "Section 3 is both race and gender neutral. The preferences provided under this regulation are based on income level and location." —

Section 3's requirements apply to recipients of community development assistance exceeding \$200,000 from all sources in any year, and to contractors and subcontractors working for such grant recipients that get contracts in excess of \$100,000. HUD's regulations establish numerical goals for grant recipients and contractors. Thirty percent of new hires on covered projects have to be Section 3 residents, ten percent of the dollars awarded for covered contracts have to be awarded to Section 3 businesses, and three percent of the dollars awarded for non-construction Section 3 contracts (i.e. professional services contracts awarded in connection with Section 3 contracts) have to be awarded to Section 3 businesses. These numerical goals are minimums. If a recipient or contractor meets the goals, they are considered in compliance with Section 3; absent evidence to the contrary. If recipients or contractors fail to meet the goals, they have to document the efforts they took to try to meet them.

Grant recipients have to comply with Section 3 in their own operations, and to ensure compliance in the operations of by their contractors and subcontractors. Recipients have to establish procedures to: notify Section 3 residents about Section 3 training and employment opportunities; notify Section 3 business concerns about Section 3 contracting opportunities; notify contractors about Section 3 requirements; include the required Section 3 contract clause in all solicitations and contracts; facilitate the training and employment of Section 3 residents and the award of contracts to Section 3 businesses; assist and actively cooperate with HUD in obtaining the compliance of contractors and subcontractors; document actions taken to comply with Section 3; and, retain compliance records for HUD review. Each recipient also has to submit an annual Form HUD 60002 report to allow HUD to evaluate the effectiveness of Section 3.

To qualify for federal grants, and to draw funds from such grants, fund recipients have to certify each year, in HUD

Action Plans, that they “will comply with Section 3.”

B. Results of Our Investigation

The City was required to comply with Section 3. It did not do so. The City did implement programs to provide business opportunities for small, minority-owned and women-owned businesses. The City says that it believed these programs satisfied Section 3. ~~The City says, and that HUD was aware of, and approved, the City’s belief.~~ The City says it did not knowingly violate Section 3, and that any failure to comply was inadvertent.

In recent discussions with the City, it makes the additional argument that because minority-owned, women-owned and small businesses often employ low-income individuals, historical analysis could reveal that the City complied with Section 3’s numerical requirements even though it made no effort to do so directly. More precisely, the City argues that the United States has not yet proven that the City failed to comply with Section 3’s numerical thresholds in any particular year. HUD tells us its analysis contradicts the City’s position that ~~it~~ the City may have fortuitously complied with Section 3. ~~It is not clear how HUD made this determination.~~

Our investigation reveals that the City did not track data that would have allowed it to determine whether it was in compliance with Section 3’s numerical goals; did not have procedures to notify Section 3 residents or business concerns about training, employment or contracting opportunities; did not have programs to facilitate Section 3 training or employment or the award of Section 3 contracts; made little effort to obtain the compliance of contractors with Section 3; and, did not maintain required documentation or submit the required HUD annual report. On a limited number of occasions, the City did include a reference to Section 3 in its contracts or bid papers related to City projects, but HUD’s regulations require use of specific language, and we never found that language in any of the City’s agreements.

C. The City’s Section 3 History

In 1983, James Milsap filed a ~~letter-complaint with HUD~~ HUD complaint alleging that St. Paul was in violation of Section 3 and Title VI of the Civil Rights Act of 1964 (Title VI). HUD’s resulting investigation found Section 3 and Title VI violations. In 1984, the matter was resolved when the City and HUD entered into a Voluntary Compliance Agreement (1984 VCA) and associated plan of compliance (1984 Section 3 Plan). The 1984 VCA provided, in part:

It is agreed that ~~[the City of St. Paul] shall comply with the requirements of [various Executive Orders regarding equal employment and equal protection] and contracting opportunities, and that...~~ [the City] shall adopt appropriate procedures and requirements to assure good faith compliance with the statutory directive of Section 3... (The race and sex of employees, trainees and businesses shall be identified in all progress reports for the purpose of this agreement. . . .).

1984 VCA ¶ 1 (citation omitted). The City asserts that based on this reference to tracking data related to the sex and race of employees, trainees and businesses, it reasonably believed that its efforts related to economic opportunity based on gender and race satisfied Section 3.

In July of 1984, the City sent HUD a Section 3 Compliance Plan that ~~it~~ the City said would be incorporated into the City’s Compliance User’s Manual and would be implemented by the City. That Plan focussed on low- and very-low income residents and businesses, established a detailed procedure for City contracting to implement and track Section 3 requirements, to document its Section 3 efforts, and to monitor contracts for compliance.

In 1985, HUD conducted an investigation in response to a Section 3 complaint by a Mr. William Davis, and

concluded that the City was complying with Section 3.

In 1989, James Milsap filed a second federal lawsuit against HUD and the City alleging that the City continued to be in violation of Section 3. Moving to dismiss the suit, the City directed the Court to its 1984 Section 3 Plan of Compliance. The case was eventually dismissed on procedural grounds and based on the fact that because there is no private right of action under Section 3. The Court did not reach the question of the City's compliance with Section 3.

During the 1989 litigation both HUD and the City submitted affidavits and interrogatory responses that affirmed that as of that time, the City was in compliance with Section 3. According to the City, HUD's discovery responses in the Milsap litigation confirmed that HUD understood and approved of the City's understanding that its efforts directed at women-owned, minority-owned and small businesses were sufficient under Section 3. The City notes that HUD affirmatively asserted that the City was in compliance with Section 3 at that time.

In 2003, Mr. Edward McDonald, a City employee, told the City in an e-mail and in reports, that the City "may not" have "completely complied with . . . federal Section 3..." In our interview of Mr. McDonald, he said he told his managers that the City was not complying with Section 3, but that his Managers were uninterested and took no action. Mr. McDonald was fired by the City shortly after these events.

Most recently, Nails Construction Company, a company owned by Frederick Newell, our relator, sued the City in federal court in 2009, alleging that the City was out of compliance with Section 3, and submitted a parallel administrative complaint to HUD alleging the same failure. The lawsuit was dismissed on the grounds that there was no private right of action under Section 3. Again, there was no finding as to whether the City was in compliance with Section 3.

In the administrative proceeding that was the result of the Nails Construction HUD complaint, HUD determined the City was out of compliance with Section 3. The City initially contested that finding, but dropped its challenge in order to renew its eligibility to compete for and secure discretionary stimulus HUD funding. The City agreed to enter into a new, comprehensive Voluntary Compliance Agreement, under which it agreed to make a number of reforms to bring it into compliance with Section 3.

We interviewed project managers, who would have been responsible for implementing Section 3 on various projects. Most acknowledged they did little if anything to specific to comply with Section 3. Many were unaware of Section 3's requirements during the relevant time period. Some of the City's employees, including the City counsel responsible for HUD regulatory compliance and various senior managers, told us they understood that the City's efforts to comply with minority- and woman- owned contracting initiatives also complied with the requirements of Section 3.

Although the City did not complete and send to HUD each year the required Section 3 Form 60002 report, it did submit other required HUD forms that, among other things, identified some of the City's community development contractors as Section 3 contractors.

HUD has publically acknowledged, that for a significant period of time it was not focussed on Section 3 compliance anywhere in the country. HUD employees conducted annual reviews of St. Paul and regularly approved the City's Action Plans and Consolidated Annual Performance and Evaluation Reports, and conducted on site performance reviews, but did not notice or flag the City's Section 3 deficiencies. As described above, however, in the 1980's and again in 2010, when HUD did focus on Section 3 and St. Paul, it found the City to be out of compliance. Since it implemented the second Section 3 VCA in 2010, HUD has held St. Paul out as a model Section 3 jurisdiction.

D. Damages

The total HUD awarded to the City in development grants is over \$86 million. A substantial portion of that money was devoted to construction projects subject to Section 3. The precise amount is not tracked by HUD and would have to be obtained from the City. Of course, because the City is a public municipality, the burden of an FCA judgment against the City would ultimately fall on City taxpayers.

DISCUSSION

Although our investigation reveals that the City did not comply with Section 3, the City has a number of legal, factual and policy arguments that support a decision not to intervene in the case. Given these arguments, and HUD's lack of support for the case, we recommend against intervention.

Lack of Requisite Intent/Knowledge/Scienter: The City says it reasonably believed minority- and women-owned business programs satisfied Section 3. The City asserts that it has a long history of trying to address poverty and discrimination in the City. The City points to multiple programs and its sustained efforts in support of populations in the City that often include low-income residents. In support of its argument the City points to the 1984 VCA it entered into with HUD, which makes reference to tracking data related to minorities and women, and HUD's statements in the Milsap litigation that the City was complying with Section 3.

The City's arguments ignore HUD's general statements to program participants that Section 3 is gender and race neutral, other warnings the City got from its own employees that it was not complying with Section 3, and the detailed plan the City entered into in 1989, which explicitly told the City how to comply with Section 3. Despite all of this, while we believe there is evidence the City knew, or should have known, of its race and gender free Section 3 obligations, some of the witnesses we interviewed did support say they thought the City's position that it believed it was complying with Section 3 by providing support for women-owned and minority-owned businesses.

Government Knowledge/Materiality: The City argues that even if it was violating Section 3, its violation cannot form the basis for an FCA claim because HUD was aware of its failures, and did nothing to address the problem. In 1985, HUD did conclude that the City was complying with Section 3 in response to the Davis complaint. In a HUD affidavit in the 1989 Milsap litigation, HUD further said that the City was doing an adequate job of complying with Section 3. The City also explains argues that even if HUD did not say it explicitly in the years between 1989 and 2009, HUD's silence over those many years is tacit approval of the City's belief it was in compliance.

We will have to admit that the City was failing to comply with Section 3 in ways that should have been apparent to HUD. The City did not send HUD its HUD 60002 forms each year. HUD never objected to this failure. The City will argue that HUD was so unconcerned with Section 3 compliance that the City's failure to comply did not affect, or could not have affected a HUD decision to pay.

The City will argue that HUD's failure to monitor its Section 3 compliance was consistent with HUD's general lack of oversight of Section 3 during the relevant period. The City has already noted that previous federal administrations were not concerned with Section 3 (a position with support in recent HUD public comments), and that it is unfair to require a City to make a boilerplate certification each year, ignore the City's non-compliance year-after-year, and then seek FCA relief when a new administration comes in that is more concerned with Section 3 compliance.

with Section 3.

Although silence is not approval, and although this program is designed as a self-monitoring program, with the City responsible for its own compliance, HUD's lack of attention would not be helpful to a case against the City.

Prospective Certifications, and Not a Condition of Payment: The City will argue that its certifications were only that it "will" comply, not that it had done so.

In *United States ex. rel. Vigil v. Nelnet*, 2011 WL 1675418 (8th Cir. May 5, 2011), the Eighth Circuit distinguished between false statements made to induce the payment of a claim, and those made to qualify for a government program. The Court drew a distinction between conditions of payment and conditions of participation. The Appeals Court held that the former could be the basis for an FCA claim but the latter could not.

In *Vigil*, the defendant had to comply with certain Department of Education ("DOE") regulations to qualify to participate in a program where it could make government subsidized student loans. The *Vigil* relator alleged that when the defendant lender submitted claims for interest subsidies on student loans it made, and for default insurance related to such loans, without being in compliance with the participation regulations, those claims were false. Under the relevant DOE regulations, however, once a lender was enrolled in the program, their eligibility continued until after a contrary decision in a contested termination proceeding. The lender explicitly continued to be eligible under the program until the termination proceeding was complete. In addition, under the regulations termination did not affect a lender's rights or responsibilities related to its prior loans. In these circumstances, the Court held that the lender's certification that it was an eligible lender was a condition of participation, not payment.

The Section 3 regulations provide procedures for compliance reviews, and administrative complaints, procedures and time lines for cure of identified deficiencies, and sanctions for continuing failure or refusal by a recipient or contractor to comply with HUD's regulations, including remedies under the CDBG or HOME programs (which include contested administrative hearings), debarment, suspension or limited denial of participation. Given these procedures there is a risk a trial court in the Eighth Circuit will consider the annual certifications in this case to be conditions of participation that will not support an FCA claim.

Administrative Remedies: The City will argue that if HUD finds that a grantee is out of compliance with Section 3, it has a number of administrative options and procedures to deal with the non-compliance, including suspension and debarment. The City will argue that permitting FCA liability in this context is akin to transforming a discretionary administrative remedy into a mandatory and harsh penalty.

We believe this argument is not well taken. The FCA provides a remedy that is distinct from and designed to be supplemental to any available administrative remedies. We are concerned, however, that an FCA case, which is a case to recover money, not a request for injunctive relief, is a blunt tool in the context presented. Rather than taking money out of a financially challenged American city, the right approach here may well be an administrative approach to fixing the City's programs, not an effort to punish the City for past behavior and a trier of fact may well agree. Here, HUD says it has already take the required administrative

action, and that the City is now in compliance with Section 3. Indeed, HUD holds St. Paul up, now, as a model Section 3 participant.

Vagueness: The City will argue that the phrase “to the greatest extent feasible” is vague and ambiguous, and that it cannot provide the basis for an FCA claim. We do not believe this is a strong argument for the City. The argument ignores HUD’s regulations. Although the broad statement in the statute and in the first paragraph of the regulations is general, most of HUD’s Section 3 regulations are more specific, weakening the vagueness argument. In addition, we take the position that where a claimant believes regulations are vague, they have an obligation to seek clarification from the government, not to default on their obligations unilaterally. Nonetheless, the language of the regulation pointed to by the City is not a model of clarity, and there is some risk that pursuing a case here will result in bad Section 3 law.

Policy Considerations: ~~The City has repeatedly pointed out that there has never been a Section 3 FCA case, because such a claim is inappropriate given the lack of precision in the “to the greatest extent feasible” requirement.~~

The City argues that an FCA case, which if successful will burden St. Paul taxpayers, is undesirable. The City argued that it has been a constructive HUD partner over the years, and should not be punished here. The City believes a claim is particularly unattractive given that when its Section 3 deficiencies were identified in the recent administrative action, the City entered into a VCA and is now held up by HUD as a model Section 3 participant, and as a model for other jurisdictions.

OTHE GALLAGHER CASER CONSIDERATIONS

In February 2010, the Eighth Circuit Court of Appeals issued a decision in *Gallagher v. Manger*, 619 F.3d 823 (8th Cir. 2010). That case involves claims by a number of current and former owners of rental properties in St. Paul, against the City and numerous City housing inspectors, alleging that the manner in which the City enforced housing codes was discriminatory and in violation of the Fair Housing Act (FHA). The City allegedly had been focusing aggressive code enforcement efforts on “problem properties” that tended to be rented primarily to low-income, African-American families. The City argued that there were particular health and safety issues that justified their focus on low-income properties, that they need to act decisively to protect its citizens. The District Court for the District of Minnesota granted summary judgment dismissing the claims. The Eighth Circuit reversed in part and remanded, holding that the plaintiffs had established a prima facie case of disparate impact under the FHA, but that a fact issue remained as to whether the City had viable alternative means to achieve its legitimate policy objective of protecting health and safety in rental properties without discriminatory effects. *En banc* rehearing was denied. The City appealed and the United States Supreme Court granted certiorari on November 7, 2011.

The Supreme Court has not decided whether the FHA allows for recovery based on a disparate-impact theory. ~~The Assistant Attorney General for We understand that the Civil Rights Division, Thomas Perez has told us that his Division does not want this issue to be decided in the Gallagher case. Apparently Civil Rights is concerned that there is a significant risk that of bad law will be developed on this question in the context of a case where FHA interests are being~~

balanced against the Court rules on the question of whether the City's health and safety considerations. The City tells us that Mr. Perez reached out to them and asked them to withdraw the *Gallagher* petition. The City responded that they would be willing to do so, only if the United States declined to intervene in this case, and in *U.S. ex rel. Ellis v. the City of St. Paul et al.* The Civil Rights division believes that the FHA policy interests at issue here are significant enough to justify such a deal. The *Gallagher* policy interests add another consideration to be weighed in deciding whether or not to intervene in this case.

SETTLEMENT

We have offered to enter into settlement discussions about the *Newell* case with the City on a number of occasions. The City's final position is that if a settlement will require the payment of funds, the City is not interested in an agreement.

CONCLUSION

efforts here justify a departure from the mandates of the FHA. The City has indicated that it will dismiss the *Gallagher* petition, and declination here will facilitate the City's doing so. Under the circumstances, we believe this is another factor weighing in favor of declination.

CONCLUSION

Given all of the factors described above, the fact that HUD does not support the case, the fact that the City may be able to convince a jury that it was in good faith compliance with Section 3, the other legal and factual issues the arguments presented above, and that declination would serve important policy interests in the *Gallahger* case, we recommend that we the United States decline to intervene in this case.

Joyce R. Branda
Director
Commercial Litigation Branch

Attachments

Reviewer: **Line Attorney 1**

Senior Trial Counsel: **Line Attorney 2**

AUSA: **Line Attorney 3**

MEMORANDUM FOR FILE

Re: *U.S. ex rel. Newell v. City of St. Paul, Minnesota,*
Case No. 09-SC-001177 (D. Minn.)

DJ No. 46-39-955

Authority is hereby granted to decline to intervene in the above-referenced *qui tam* action.

Tony West
Assistant Attorney General
Civil Division

Dated: _____

SUMMARY

Section 3 of the Housing and Urban Development Act of 1968 (Section 3) requires that employment and other economic opportunities generated by certain Department of Housing and Urban Development (HUD) financial assistance programs be directed, to the greatest extent feasible, and consistent with existing Federal, State and local law, to low- and very-low-income persons, particularly those who are recipients of certain government assistance for housing, and to business concerns which provide economic opportunities for low- and very low-income persons.

The City of St. Paul, Minnesota, was required to comply with Section 3 but did not do so. The City argues, however that it had a good faith belief that it was complying with Section 3 when it put into place women-owned, minority-owned and small business programs, because many of the participants in those programs were also low-income residents. A case against the City based on its failure to comply with Section 3 would further be complicated because HUD may have been aware of, and previously had approved of the City's Section 3 efforts, because HUD likely would have given the community development grants even if had known about the City's Section 3 failures and so the City's Section 3 certifications were not a condition of payment, and because the regulations at issue are arguably vague.

In addition, ~~declination in this case is part of an arrangement that would result in the City~~ is dismissing a Supreme Court appeal in the *Gallagher v. Manger* case. ~~As a result the Civil Rights Division is anxious to achieve. Declination here would facilitate that result which, we are advised, is in the interests of the United States.~~

For these reasons we recommend that the United States decline to intervene in this action.

RELATOR'S COUNSEL

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Bonner & Borhart LLP
1950 US Bank Plaza
220 South Sixth Street
Minneapolis, Minnesota 55402
(612) 313-0735

DEFENDANT'S COUNSEL

John W. Lundquist
David L. Lillehaug
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000 Minneapolis, MN 55402-1425
(612) 492-7000

From: Line Attorney 2
Sent: Tuesday, February 7, 2012 7:17 PM
To: Branda, Joyce (CIV) <RC-1 [Redacted]>; Line Attorney 1
(Line Attorney 1 [Redacted])
Subject: Follow Up With L.A. 3

I did not talk to L.A. 3 but we traded messages. I will talk to him tomorrow. Based on his message, the two items Lillehaug mentioned he thought were also to be included in the deal that is not a deal are:

- (1) HUD will provide material to the City in support of their motion to dismiss on original source grounds;
- (2) Civil rights will file an Amicus brief in "the other case." I'm not sure what the "other" case is.

If this is Lillehaug fishing, I guess that is not a surprise. If these were part of Tom Perez's discussions with the City I am disappointed we were not told.

It seems odd HUD would consider such a role, if in fact it is.

* * * * *
Line Attorney 2

Senior Trial Counsel
Civil Division, Commercial Litigation Branch, Frauds Section
United States Department of Justice
Patrick Henry Building
Room RC-1
601 D. Street, N.W.
Washington, D.C. 20004

RC-1 [Redacted]

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From: Branda, Joyce (CIV)
</O=USDOJ/OU=CIVIL/CN=RECIPIENTS/CN=MAILBOXES/CN=JBRANDA>
Sent: Wednesday, February 8, 2012 9:31 AM
To: Line Attorney 3
Cc: Brooker, Greg (USAMN) <RC-1>; Line Attorney 2
<Line Attorney 2>
Subject: st. paul

Line Attorney 3 Did you hear anything from Lillehaug regarding the two other conditions he said HUD had agreed to?

Joyce R. Branda
Director
Commercial Litigation Branch
Civil Division
(202) RC-1

From: Branda, Joyce (CIV)
</O=USDOJ/OU=CIVIL/CN=RECIPIENTS/CN=MAILBOXES/CN=JBRANDA>
Sent: Wednesday, February 8, 2012 9:36 AM
To: West, Tony (CIV) <RC-1 [REDACTED]>; Martinez, Brian (CIV)
<RC-1 [REDACTED]>
Subject: St. Paul development

Tony, Brian:

FYI. I spoke to L.A. 3 last night when he could not reach L.A. 2. Lillehaug had called the AUSA about the 2 items below. I told L.A. 3 to call Lillehaug back and tell him we were aware of no such other conditions and we were not making any promises; all we were doing was processing the declination in Newell at this point. We have not contacted Tom Perez about this.

From: Line Attorney 2
Sent: Tuesday, February 07, 2012 7:17 PM
To: Branda, Joyce (CIV); Line Attorney 1
Subject: Follow Up With L.A. 3

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* * * * *

Line Attorney 2

Senior Trial Counsel
Civil Division, Commercial Litigation Branch, Frauds Section
United States Department of Justice
Patrick Henry Building
Room RC-1
601 D. Street, N.W.
Washington, D.C. 20004

RC-1

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From: Line Attorney 3
Sent: Wednesday, February 8, 2012 9:40 AM
To: Branda, Joyce (CIV) <RC-1 >
Cc: Brooker, Greg (USAMN) <RC-1 >; Line Attorney 2
<Line Attorney 2 >
Subject: Re: st. paul

No, he just said he was going to call Tom. Nothing since then.

From: Branda, Joyce (CIV) [mailto:RC-1]
Sent: Wednesday, February 08, 2012 09:30 AM
To: Line Attorney 3
Cc: Brooker, Greg (USAMN); Line Attorney 2
Subject: st. paul

Line Attorney 3: Did you hear anything from Lillehaug regarding the two other conditions he said HUD had agreed to?

Joyce R. Branda
Director
Commercial Litigation Branch
Civil Division
(202) RC-1

From: West, Tony (CIV)
</O=USDOJ/OU=CIVIL/CN=RECIPIENTS/CN=MAILBOXES/CN=TWEST>
Sent: Wednesday, February 8, 2012 9:48 AM
To: Branda, Joyce (CIV) <RC-1 [REDACTED]>; Martinez, Brian (CIV)
<RC-1 [REDACTED]>
Subject: Re: St. Paul development

Thanks. Brian, can you chk w/tom's office to see when he's available for a call this am? Thanks.

From: Branda, Joyce (CIV)
Sent: Wednesday, February 08, 2012 09:35 AM
To: West, Tony (CIV); Martinez, Brian (CIV)
Subject: St. Paul development

Tony, Brian:

FYI. I spoke to L.A. 3 last night when he could not reach L.A. 2. Lillehaug had called the AUSA about the 2 items below. I told L.A. 3 to call Lillehaug back and tell him we were aware of no such other conditions and we were not making any promises; all we were doing was processing the declination in Newell at this point. We have not contacted Tom Perez about this.

From: Line Attorney 2
Sent: Tuesday, February 07, 2012 7:17 PM
To: Branda, Joyce (CIV); Line Attorney 1 [REDACTED]
Subject: Follow Up With L.A. 3

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* * * * *

Line Attorney 2
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601 D. Street, N.W.
Washington, D.C. 20004*

RC-1 [REDACTED]

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From: Branda, Joyce (CIV)
</O=USDOJ/OU=CIVIL/CN=RECIPIENTS/CN=MAILBOXES/CN=JBRANDA>
Sent: Wednesday, February 8, 2012 10:38 AM
To: Brooker, Greg (USAMN) <RC-1 [REDACTED]>
Cc: Line Attorney 2 [REDACTED]; Line Attorney 4 [REDACTED];
<Ann.Bildtsen@usdoj.gov>; Line Attorney 3 [REDACTED];
<Line Attorney 3 [REDACTED]>
Subject: RE: st. paul

Greg: Yes, they are talking at 11:45. I recommended that Tony tell Tom we should not agree to provide information outside the normal course, i.e. Touhy and discovery; and they should not commit to filing a brief (I assume in the Ellis case?) as even if Civil Rights had something to say we may need to review such a position to be sure it is not inconsistent with any position we might take on the FCA. So in short, make no more promises.

From: Brooker, Greg (USAMN)
Sent: Wednesday, February 08, 2012 10:35 AM
To: Branda, Joyce (CIV)
Cc: Line Attorney 2 [REDACTED]; Line Attorney 4 [REDACTED]; Line Attorney 3 [REDACTED]
Subject: RE: st. paul

Joyce,
I apologize for the delay in responding to all of these emails. The RC-1 [REDACTED] late yesterday afternoon took me out of commission for awhile. I am now back in the office. I am glad to hear that Tony will call Tom. I can also call Tom once Todd gives me the green light.
Greg

Greg Brooker
Chief, Civil Division
U.S. Attorney's Office
600 U.S. Courthouse
300 South Fourth Street
Minneapolis MN 55415
(612) RC-1 [REDACTED] (direct dial)
(612) 664-5788 (fax)

From: Branda, Joyce (CIV) [mailto:RC-1 [REDACTED]]
Sent: Wednesday, February 08, 2012 8:49 AM
To: Line Attorney 3 [REDACTED]
Cc: Brooker, Greg (USAMN); Line Attorney 2 [REDACTED]
Subject: RE: st. paul

Looks like Tony will call Tom this a.m. about this.

From: Blumenfield, Chad (USAMN)
Sent: Wednesday, February 08, 2012 9:40 AM
To: Branda, Joyce (CIV)

Cc: Brooker, Greg (USAMN); [REDACTED] **Line Attorney 2**
Subject: Re: st. paul

No, he just said he was going to call Tom. Nothing since then.

From: Branda, Joyce (CIV) [mailto:[REDACTED]]
Sent: Wednesday, February 08, 2012 09:30 AM
To: [REDACTED] **Line Attorney 3**
Cc: Brooker, Greg (USAMN); [REDACTED] **Line Attorney 2**
Subject: st. paul

L.A. 3: Did you hear anything from Lillehaug regarding the two other conditions he said HUD had agreed to?

Joyce R. Branda
Director
Commercial Litigation Branch
Civil Division
(202) [REDACTED] RC-1

From: Pratt, Sara K [RC-1]
Sent: Wednesday, February 08, 2012 12:39 PM
To: Perez, Thomas E (CRT)
Subject: RE: District Court decision

Yes, will do.

From: Perez, Thomas E (CRT) [mailto:RC-1]
Sent: Wednesday, February 08, 2012 12:35 PM
To: Pratt, Sara K
Subject: Re: District Court decision

Can you call me if you get a chance. I am tied up til 130 and then free til 3

From: Pratt, Sara K [mailto:RC-1]
Sent: Friday, January 13, 2012 05:10 PM
To: Perez, Thomas E (CRT)
Subject: District Court decision

Nails Construction Co. v. City of St. Paul

UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA

February 6, 2007

NAILS CONSTRUCTION COMPANY, NEWELL ABATEMENT SERVICES, INC., LEAD INVESTIGATIVE SERVICES, INC., DERRICK WOODSON, AND FREDERICK NEWELL, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,
v.
THE CITY OF ST. PAUL, DEFENDANT.

The opinion of the court was delivered by: Joan N. Ericksen United States District Judge

ORDER

This is a putative class action brought by Nails Construction Company, Newell Abatement Services, Inc. (Newell Abatement), Lead Investigative Services, Inc. (Lead Investigative), Derrick Woodson, and Frederick Newell (collectively, Plaintiffs) against the City of St. Paul (City). Plaintiffs seek declaratory, injunctive, and monetary relief to redress the City's alleged violations of Section 3 of the Housing and Urban Development Act of 1968, 12 U.S.C. § 1701u (2000) (amended 2006). The case is before the Court on Plaintiffs' motion for a preliminary injunction and the City's motion for summary judgment. The City contends that Plaintiffs lack standing and that no private right of action to enforce section 1701u exists. For the reasons set forth below, the Court denies Plaintiffs' motion and grants the City's motion.

I. BACKGROUND

Plaintiffs include three Minnesota corporations owned in part by Newell. Nails Construction provides carpentry services. Newell formed Nails Construction in 2004 and owns 50% of its shares. Newell Abatement was established in 1995 and has been a Minnesota corporation since 1999. It engages in lead and asbestos abatement, demolition services, and lead-risk assessment. Lead Investigative was formed in 2001, and it engages in hazardous waste remediation, Brownfield clean-up, and lead-risk assessment. Newell and his two brothers own both Newell Abatement and Lead Investigative.

The purpose of Section 3 is "to ensure that the employment and other economic opportunities generated by Federal financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed toward low- and very low-income persons." 12 U.S.C. § 1701u(b). The City receives assistance covered by Section 3.

Plaintiffs claim to be business concerns or low-income or very low-income persons within the meaning of Section 3. See *id.* § 1701u(e). As such, Plaintiffs assert that they are entitled to enjoy the economic benefits set forth in Section 3. See *id.* § 1701u(c)-(d). They allege that the City has failed to comply with Section 3 in numerous ways: (1) failure to award a sufficient percentage of contracts to Section 3 business concerns; (2) failure to exercise oversight over contractors hired with Section 3 funds to assure that the contractors provide training, employment, and contracting opportunities to Section 3 persons and business concerns; (3) failure to meet Section 3's reporting requirements; (4) failure to "seek out and identify Section 3 [b]usiness [c]oncerns about contracting opportunities"; (5) failure to notify Section 3 persons about training and employment opportunities; (6) failure to train and employ Section 3 persons; (7) failure to provide preferences to Section 3 persons in training and contracting opportunities; (8) failure to provide preferences to Section 3 business concerns in contracting opportunities; and (9) failure to file form HUD-60002.

II. DISCUSSION

A. The City's motion

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party "bears the initial responsibility of informing the district court of the basis for its motion," and must identify "those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party satisfies its burden, Rule 56(e) requires the party opposing the motion to respond by submitting evidentiary materials that designate "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In determining whether summary judgment is appropriate, a court must look at the record and any inferences to be drawn from it in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

1. Standing

The Court first considers whether Plaintiffs lack standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."); *Young Am. Corp. v. Affiliated Computer Servs. (ACS), Inc.*, 424 F.3d 840, 843 (8th Cir. 2005) (stating that plaintiff's lack of standing leaves district court without subject matter jurisdiction). To satisfy constitutional requirements of standing, a plaintiff must establish three elements:

First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court."

Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61 (citations and footnote omitted); see *Young Am.*, 424 F.3d at 843. "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. The Court turns to whether Plaintiffs have submitted evidence to demonstrate their standing.

The Court first considers the corporate plaintiffs. Nails Construction, Newell Abatement, and Lead Investigative do not identify any opportunities covered by Section 3 that they sought or will seek from the City.*fn1 Nor is there any evidence that Nails Construction, Newell Abatement, and Lead Investigative asked the City to recognize them as Section 3 business concerns. Finally, Nails Construction, Newell Abatement, and Lead Investigative do not explain how the City's alleged violations of Section 3's reporting requirements injured them. Viewed in the light most favorable to Nails Construction, Newell Abatement, and Lead Investigative, the record reveals that they have not experienced an injury in fact that is fairly traceable to the City. The Court therefore concludes that they lack standing. Cf. *id.* at 573-74 (stating that plaintiff's assertion of a "generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly

and tangibly benefits him than it does the public at large—does not state an Article III case or controversy"); *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220 (9th Cir. 1992) (per curiam) ("There is a long line of cases . . . that hold that a plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit."); *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 55-57 (D.C. Cir. 1991) (holding organizational plaintiff lacked standing to challenge government's alleged failure to extend Indian hiring preference to positions for which members did not apply).

The same conclusion is warranted with regard to the individual plaintiffs. Neither Woodson nor Newell identifies any opportunities covered by Section 3 that he sought or will seek from the City. There is no evidence that Woodson or Newell sought the City's recognition as a Section 3 person.² Finally, there is no evidence that the City's alleged reporting violations injured Woodson or Newell. Viewed in the light most favorable to Woodson and Newell, the record reveals that they have not experienced an injury in fact that is fairly traceable to the City. The Court therefore concludes that they lack standing.

2. Private Cause of Action

If Plaintiffs were able to demonstrate standing, the City would be entitled to summary judgment because no private right to enforce section 1701u exists. Plaintiffs contend that they may enforce section 1701u under 42 U.S.C. § 1983 (2000) or an implied right of action. Different inquiries determine whether a statute may be enforced pursuant to section 1983 and whether a statute implies a private right of action. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). The inquiries, however, "overlap in one meaningful respect":

[I]n either case [a court] must first determine whether Congress intended to create a federal right. Thus, [the Supreme Court has] held that "[t]he question whether Congress . . . intended to create a private right of action [is] definitively answered in the negative" where a "statute by its terms grants no private rights to any identifiable class." For a statute to create such private rights, its text must be "phrased on terms of the persons benefited."

Id. at 283-84 (citation omitted). "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Id.* at 286.

In *Gonzaga*, the Supreme Court offered Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 as examples of statutes that create individual rights "because those statutes are phrased 'with an unmistakable focus on the benefited class.'" *Id.* at 284 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 691 (1979)). Title VI provides: "No person in the United States shall . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2000) (emphasis added). Title IX states: "No person in the United States shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a) (2000) (emphasis added). Where a statute lacks "this sort of explicit 'right- or duty-creating language,' [a court] rarely impute[s] to Congress an intent to create a private right of action." *Gonzaga*, 536 U.S. at 284 n.3; see *Lankford v. Sherman*, 451 F.3d 496, 508-09 (8th Cir. 2006) ("[T]he statute must focus on an individual entitlement to the asserted federal right, rather than on the aggregate practices or policies of a regulated entity, like the state."). The Court turns to whether section 1701u creates private rights.

Section 1701u begins with congressional findings. 12 U.S.C. § 1701u(a). Briefly summarized, Congress found that certain federal assistance produces significant employment and other economic opportunities that should be directed to low- and very-low income persons. *Id.* Section 1701u continues with an announcement of congressional policy:

It is the policy of the Congress and the purpose of this section to ensure that the employment and other economic opportunities generated by Federal financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed toward low- and very-low income persons, particularly those who are recipients of government assistance for housing.

Id. § 1701u(b). To carry out that policy, section 1701u repeatedly directs the Secretary of Housing and Urban Development to take certain actions with regard to recipients of certain assistance. In general terms, section 1701u directs the Secretary (1) to require that housing agencies, and their contractors and subcontractors, make their best efforts, consistent with other laws and regulations, to give opportunities generated by certain assistance to low- and very-low income persons, and (2) to ensure that recipients and beneficiaries of certain assistance, to the greatest extent feasible and consistent with other laws and regulations, extend opportunities to low- and very-low income persons.³

Section 1701u seeks to benefit low- and very-low income persons, but "it is rights, not the broader or vaguer 'benefits' or 'interests,' that may be enforced" pursuant to section 1983 or an implied right of action. *Gonzaga*, 536 U.S. at 283. Section 1701u focuses not on an individual entitlement to the opportunities generated by federal financial assistance for housing and community development programs, but rather on the Secretary of Housing and Urban Development. See 12 U.S.C. § 1701u(f) (directing Secretary to consult with other agencies "to carry out" section 1701u). Again, the Secretary is charged with ensuring that "best efforts, consistent with existing Federal, State, and local laws and regulations" are made and that opportunities are extended "to the greatest extent feasible, and consistent with existing Federal, State, and local laws and regulations." Thus, the focus of section 1701u is at least two steps removed from the interests of individual low- or very-low income persons. Accordingly, Section 1701u does not create individual rights. See *Gonzaga*, 536 U.S. at 287; *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981))). Moreover, the standards set forth in section 1701u—"best efforts, consistent with existing Federal, State, and local laws and regulations"; "to the greatest extent feasible, and consistent with existing Federal, State, and local laws and regulations"; and "[w]here feasible"—are too general to confer individual rights.⁴

Cf. *Lankford*, 451 F.3d at 509 ("The only guidance Congress provides in the reasonable-standards provision is that the state establish standards 'consistent with [Medicaid] objectives'- an inadequate guidepost for judicial enforcement.").

In short, section 1701u does not contain language that creates rights. Rather than focusing on individual entitlements, its provisions focus on the Secretary and set forth broad standards. Accordingly, the Court concludes that section 1701u does not create rights enforceable under either section 1983 or an implied right of action.⁵ See *Gonzaga*, 536 U.S. at 290 ("In sum, if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action.").

B. Plaintiffs' Motion

Because Plaintiffs lack standing, the Court denies their motion for a preliminary injunction. If Plaintiffs were able to establish standing, the Court would deny their motion because they may not enforce section 1701u under either section 1983 or an implied right of action. See *Newton County Wildlife Ass'n v. United States Forest Serv.*, 113 F.3d 110, 113 (8th Cir. 1997) ("If a plaintiff's legal theory has no likelihood of success on the merits, preliminary injunctive relief must be denied.").

III. CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Plaintiffs' motion for a preliminary injunction [Docket No. 7] is DENIED.
2. The City's motion for summary judgment [Docket No. 9] is GRANTED.
3. This case is DISMISSED for lack of subject matter jurisdiction.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Sara K. Pratt
Deputy Assistant Secretary for Enforcement and Programs
Department of Housing and Urban Development
451 Seventh Street, SW
Room **RC-1**
Washington, D.C. 20410
202. **RC-1** (direct line)

From: Brooker, Greg (USAMN) </O=USDOJ/OU=COAR/CN=RECIPIENTS/CN=DOJ MDS CONTACTS/CN=USA/CN=GBROOKER>
Sent: Wednesday, February 8, 2012 4:01 PM
To: Branda, Joyce (CIV) <RC-1 [REDACTED]>
Cc: Jones, B Todd (USAMN) <RC-1 [REDACTED]>
Subject: U.S. ex rel. Newell v. City of St. Paul, Case No. 09-SC-001177
Attach: 2012.02.07 Newell Action Memo - Declination.wpd

Re: *U.S. ex rel. Newell v. City of St. Paul, Minnesota*, Case No. 09-SC-001177 (D. Minn.).

B. Todd Jones, the United States Attorney for the District of Minnesota, concurs with the recommendation that the United States decline to intervene in the above-reference *qui tam* action under the False Claims Act.

Greg Brooker
Chief, Civil Division
U.S. Attorney's Office
600 U.S. Courthouse
300 South Fourth Street
Minneapolis MN 55415
(612) RC-1 [REDACTED] (direct dial)
(612) 664-5788 (fax)

From: Civil Division Admin. Employee
Sent: Thursday, February 9, 2012 5:45 PM
To: Branda, Joyce (CIV) <RC-1>
Cc: Line Attorney 1
Subject: Newell
Attach: 20120209_AAG Memo re U.S. ex rel. Newell v City of St. Paul, Mn..pdf

Joyce,

Tony West signed the attached memo this afternoon.

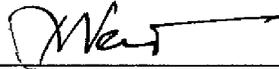
Civil Division Admin. Employee

MEMORANDUM FOR FILE

Re: U.S. ex rel. Newell v. City of St. Paul, Minnesota,
Case No. 09-SC-001177 (D. Minn.)

DJ No. 46-39-955

Authority is hereby granted to decline to intervene in the above-referenced *qui tam* action.



Tony West
Assistant Attorney General
Civil Division

Dated: February 9, 2012

RELATOR'S COUNSEL

Thomas F. DeVincke
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DEFENDANT'S COUNSEL

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SUMMARY

Section 3 of the Housing and Urban Development Act of 1968 (Section 3) requires that employment and other economic opportunities generated by certain Department of Housing and Urban Development (HUD) financial assistance programs be directed, to the greatest extent feasible, and consistent with existing Federal, State and local law, to low- and very-low-income persons, particularly those who are recipients of certain government assistance for housing, and to business concerns which provide economic opportunities for low- and very low-income persons.

The City of St. Paul, Minnesota, was required to comply with Section 3 but did not do so. The City argues, however that it had a good faith belief that it was complying with Section 3 when it put into place women-owned, minority-owned and small business programs, because many of the participants in those programs were also low-income residents. A case against the City based on its failure to comply with Section 3 would further be complicated because HUD may have been aware of, and previously had approved of the City's Section 3 efforts, because HUD likely would have given the community development grants even if had known about the City's Section 3 failures and so the City's Section 3 certifications were not a condition of payment, and because the regulations at issue are arguably vague.

In addition, the City is dismissing a Supreme Court appeal in the *Gallagher v. Manger* case, a result the Civil Rights Division is anxious to achieve. Declination here would facilitate that result which, we are advised, is in the interests of the United States.

For these reasons we recommend that the United States decline to intervene in this action.



U.S. Department of Justice

Civil Division

Washington, D.C. 20530

MEMORANDUM FOR TONY WEST
ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

Re: U.S. ex rel. Newell v. City of St. Paul, Minnesota,
Case No. 09-SC-001177 (D. Minn.)

DJ No. 46-39-955

REQUEST FOR AUTHORITY TO DECLINE TO INTERVENE

TIME LIMIT: February 10, 2012.

NATURE OF CLAIMS: Qui tam action under the False Claims Act, 31 U.S.C. §§ 3729-3733, alleging that defendant, the City of St. Paul, Minnesota, falsely certified it was in compliance with Section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. § 1701u) (Section 3) in order to obtain tens of millions of dollars from the Department of Housing and Urban Development (HUD) in the form of community development grants that require compliance with Section 3.

AMOUNT OF CLAIMS: The total HUD grants the City obtained were \$86,363,362, but we have not determined how much of those grants was devoted to projects subject to Section 3.

CRIMINAL ACTIONS: There was no criminal investigation.

RECOMMENDATION: The United States Attorney's Office for the District of Minnesota (Att. A) and HUD (Att. B) recommend that we decline to intervene. We concur.

This False Claims Act (FCA) *qui tam* action was filed in 2009 against the City of St. Paul, Minnesota. Relator, a St. Paul small business owner, alleges that the City failed to comply with Section 3, and that in its annual consolidated federal grant applications, the City falsely certified to HUD that it was in compliance with Section 3. Relator alleges that based on this false certification, the City was given \$86 million in federal community development grants.

HUD recommends we decline to intervene. That recommendation is based on the facts that the City has recently implemented a substantial Section 3 program, and that if the government intervenes, the lawsuit would require HUD to devote substantial resources for further investigation, litigation, discovery and testimony, at a time when HUD's resources are limited, and where its administrative concerns already have been addressed.

HUD previously recommended that we intervene in this action. Based on that recommendation and our joint investigation, and although it was a close call, the District of Minnesota and this office believed intervention was warranted. Based on arguments raised by the City in recent discussions, on HUD's change of recommendation, and the litigation risks enumerated here, both the District of Minnesota and we recommend that the United States decline to intervene.

BACKGROUND

A. Section 3 of the Housing and Development Act of 1968 (Section 3)

Section 3 requires that employment and other economic opportunities generated by certain HUD housing and community development grant programs be directed, to the greatest extent feasible, consistent with Federal, State and local law, to low- and very low-income persons, and to business concerns that provide opportunities for such persons. Section 3 applies only to funding for projects that involve construction or rehabilitation of housing, or other public construction. Section 3 applied to grants made to the City during the relevant period.

Section 3 is race and gender neutral. Preferences are based on income-level and location. HUD's Section 3 regulations require recipients of HUD funding to direct new employment, training, and contracting opportunities to low-income residents, and to businesses that employ them, without regard to race or gender.

Section 3's requirements apply to recipients of community development assistance exceeding \$200,000 from all sources in any year, and to contractors and subcontractors working for such grant recipients that get contracts in excess of \$100,000. HUD's regulations establish numerical goals for grant recipients and contractors. Thirty percent of new hires on covered projects have to be Section 3 residents, ten percent of the dollars awarded for covered contracts have to be awarded to Section 3 businesses, and three percent of the dollars awarded for non-construction Section 3 contracts (i.e. professional services contracts awarded in connection with Section 3 contracts) have to be awarded to Section 3 businesses. These numerical goals are minimums. If a recipient or contractor meets the goals, they are considered in compliance with Section 3. If recipients or contractors fail to meet the goals, they have to document the efforts they took to try to meet them.

Grant recipients have to comply with Section 3 in their own operations, and to ensure compliance by their contractors and subcontractors. Recipients have to establish procedures to: notify Section 3 residents about Section 3 training and employment opportunities; notify Section 3 business concerns about Section 3 contracting opportunities; notify contractors about Section 3 requirements; include the required Section 3 contract clause in all solicitations and contracts; facilitate the training and employment of Section 3 residents and the award of contracts to

Section 3 businesses; assist and actively cooperate with HUD in obtaining the compliance of contractors and subcontractors; document actions taken to comply with Section 3; and, retain compliance records for HUD review. Each recipient also has to submit an annual Form HUD 60002 report to allow HUD to evaluate the effectiveness of Section 3.

To qualify for federal grants, and to draw funds from such grants, fund recipients have to certify each year, in HUD Action Plans, that they “will comply with Section 3.”

B. Results of Our Investigation

The City was required to comply with Section 3. It did not do so. The City did implement programs to provide business opportunities for small, minority-owned and women-owned businesses. The City says it believed these programs satisfied Section 3, and that HUD was aware of, and approved, the City’s belief. The City says it did not knowingly violate Section 3, and that any failure to comply was inadvertent.

In recent discussions with the City, it makes the additional argument that because minority-owned, women-owned and small businesses often employ low-income individuals, historical analysis could reveal that the City complied with Section 3’s numerical requirements even though it made no effort to do so directly. More precisely, the City argues that the United States has not yet proven that the City failed to comply with Section 3’s numerical thresholds in any particular year. HUD tells us its analysis contradicts the City’s position that the City may have fortuitously complied with Section 3.

Our investigation reveals that the City did not track data that would have allowed it to determine whether it was in compliance with Section 3’s numerical goals; did not have procedures to notify Section 3 residents or business concerns about training, employment or contracting opportunities; did not have programs to facilitate Section 3 training or employment or the award of Section 3 contracts; made little effort to obtain the compliance of contractors with Section 3; and, did not maintain required documentation or submit the required HUD annual report. On a limited number of occasions, the City did include a reference to Section 3 in its contracts or bid papers related to City projects, but HUD’s regulations require use of specific language, and we never found that language in any of the City’s agreements.

C. The City’s Section 3 History

In 1983, James Milsap filed a HUD complaint alleging that St. Paul was in violation of Section 3 and Title VI of the Civil Rights Act. HUD’s resulting investigation found Section 3 and Title VI violations. In 1984, the matter was resolved when the City and HUD entered into a Voluntary Compliance Agreement (1984 VCA) and associated plan of compliance (1984 Section 3 Plan). The 1984 VCA provided, in part:

It is agreed that . . . [the City] shall adopt appropriate procedures and requirements to assure good faith compliance with the statutory directive of Section 3. (The race and sex of employees, trainees and businesses shall be identified in all progress reports for the purpose of this agreement. . . .)

1984 VCA ¶ 1 (citation omitted). The City asserts that based on this reference to tracking data related to the sex and race of employees, trainees and businesses, it reasonably believed that its efforts related to economic opportunity based on gender and race satisfied Section 3.

In July of 1984, the City sent HUD a Section 3 Compliance Plan that the City said would be incorporated into the City's Compliance User's Manual and would be implemented by the City. That Plan focussed on low- and very-low income residents and businesses, established a detailed procedure for City contracting to implement and track Section 3 requirements, to document its Section 3 efforts, and to monitor contracts for compliance.

In 1985, HUD conducted an investigation in response to a Section 3 complaint by a Mr. William Davis, and concluded that the City was complying with Section 3.

In 1989, James Milsap filed a second federal lawsuit against HUD and the City alleging the City continued to be in violation of Section 3. Moving to dismiss the suit, the City directed the Court to its 1984 Section 3 Plan of Compliance. The case was eventually dismissed on procedural grounds and because there is no private right of action under Section 3. The Court did not reach the question of the City's compliance with Section 3. During the 1989 litigation both HUD and the City submitted affidavits and interrogatory responses that affirmed that as of that time, the City was in compliance with Section 3. According to the City, HUD's discovery responses in this litigation confirmed that HUD understood and approved of the City's understanding that its efforts directed at women-owned, minority-owned and small businesses were sufficient under Section 3.

In 2003, Mr. Edward McDonald, a City employee, told the City in an e-mail and in reports, that the City "may not" have "completely complied with . . . federal Section 3..." In our interview of Mr. McDonald, he said he told his managers that the City was not complying with Section 3, but that his Managers were uninterested and took no action. Mr. McDonald was fired by the City shortly after these events.

Most recently, Nails Construction Company, a company owned by Frederick Newell, our relator, sued the City in federal court in 2009, alleging that the City was out of compliance with Section 3, and submitted a parallel administrative complaint to HUD alleging the same failure. The lawsuit was dismissed on the grounds that there was no private right of action under Section 3. Again, there was no finding as to whether the City was in compliance with Section 3.

In the administrative proceeding that resulted from the Nails Construction HUD complaint, HUD determined the City was out of compliance with Section 3. The City initially contested that finding, but dropped its challenge in order to renew its eligibility to compete for and secure discretionary stimulus HUD funding. The City agreed to enter into a new, comprehensive Voluntary Compliance Agreement, under which it agreed to make a number of reforms to bring it into compliance with Section 3.

We interviewed project managers, who would have been responsible for implementing Section 3 on various projects. Most acknowledged they did little if anything specific to comply with Section 3. Many were unaware of Section 3's requirements during the relevant time period. Some of the City's employees, including the City counsel responsible for HUD regulatory

compliance and various senior managers, told us they understood that the City's efforts to comply with minority- and woman- owned contracting initiatives also complied with the requirements of Section 3.

Although the City did not complete and send to HUD each year the required Section 3 Form 60002 report, it did submit other required HUD forms that, among other things, identified some of the City's community development contractors as Section 3 contractors.

HUD has publicly acknowledged, that for a significant period of time it was not focussed on Section 3 compliance anywhere in the country. HUD employees conducted annual reviews of St. Paul and regularly approved the City's Action Plans and Consolidated Annual Performance and Evaluation Reports, and conducted on site performance reviews, but did not notice or flag the City's Section 3 deficiencies. Since it implemented the second Section 3 VCA in 2010, HUD has held St. Paul out as a model Section 3 jurisdiction.

D. Damages

The total HUD awarded to the City in development grants is over \$86 million. A substantial portion of that money was devoted to construction projects subject to Section 3. The precise amount is not tracked by HUD and would have to be obtained from the City. Of course, because the City is a public municipality, the burden of an FCA judgment against the City would ultimately fall on City taxpayers.

DISCUSSION

Although our investigation reveals that the City did not comply with Section 3, the City has a number of factual and legal arguments that support a decision not to intervene. Given these arguments, and HUD's lack of support for the case, we recommend against intervention.

Lack of Requisite Knowledge/Scienter: The City says it reasonably believed minority- and women-owned business programs satisfied Section 3. The City asserts that it has a long history of trying to address poverty and discrimination in the City. The City points to multiple programs and its sustained efforts in support of populations in the City that often include low-income residents. In support of its argument the City points to the 1984 VCA it entered into with HUD, which makes reference to tracking data related to minorities and women, and HUD's statements in the Milsap litigation that the City was complying with Section 3.

While we believe there is evidence the City knew, or should have known, of its race and gender free Section 3 obligations, some of the witness we interviewed did say they thought the City was complying with Section 3 by providing support for women-owned and minority-owned businesses.

Government Knowledge/Materiality: The City argues that even if it was violating Section 3, its violation cannot form the basis for an FCA claim because HUD was aware of its failures, and did nothing to address the problem. In 1985, HUD did conclude that the City was complying with Section 3 in response to the Davis complaint. In a HUD affidavit in the 1989 Milsap litigation, HUD further said that the City was doing an adequate job of complying with

Section 3. The City also argues that even if HUD did not say it explicitly in the years between 1989 and 2009, HUD's silence over those many years is tacit approval of the City's belief it was in compliance.

We will have to admit that the City was failing to comply with Section 3 in ways that should have been apparent to HUD. The City did not send HUD its HUD 60002 forms each year. HUD never objected. The City will argue that HUD was so unconcerned with Section 3 that the City's failure to comply did not affect, or could not have affected a HUD decision to pay.

The City will argue that HUD's failure to monitor its Section 3 compliance was consistent with HUD's general lack of oversight of Section 3. The City has already noted that previous federal administrations were not concerned with Section 3 (a position with support in recent HUD public comments), and that it is unfair to require a City to make a boilerplate certification each year, ignore the City's non-compliance year-after-year, and then seek FCA relief when a new administration comes in that is more concerned with Section 3 compliance.

Although silence is not approval, and although this program is designed as a self-monitoring program, with the City responsible for its own compliance, HUD's lack of attention would not be helpful to a case against the City.

Prospective Certifications, and Not a Condition of Payment: The City will argue that its certifications were only that it "will" comply, not that it had done so.

In *United States ex. rel. Vigil v. Nelnet*, 2011 WL 1675418 (8th Cir. May 5, 2011), the Eighth Circuit distinguished between false statements made to induce the payment of a claim, and those made to qualify for a government program. The Court drew a distinction between conditions of payment and conditions of participation. The Appeals Court held that the former could be the basis for an FCA claim but the latter could not.

In *Vigil*, the defendant had to comply with certain Department of Education ("DOE") regulations to qualify to participate in a program where it could make government subsidized student loans. The *Vigil* relator alleged that when the defendant lender submitted claims for interest subsidies on student loans it made, and for default insurance related to such loans, without being in compliance with the participation regulations, those claims were false. Under the relevant DOE regulations, however, once a lender was enrolled in the program, their eligibility continued until after a contrary decision in a contested termination proceeding. The lender explicitly continued to be eligible under the program until the termination proceeding was complete. In addition, termination did not affect a lender's rights or responsibilities related to its prior loans. In these circumstances, the Court held that the lender's certification that it was an eligible lender was a condition of participation, not payment.

The Section 3 regulations provide procedures for compliance reviews, and administrative complaints, procedures and time lines for cure of identified deficiencies, and sanctions for continuing failure or refusal by a recipient or contractor to comply with HUD's regulations, including remedies under the CDBG or HOME programs (which include contested administrative hearings), debarment, suspension or limited denial of participation. Given these

procedures there is a risk a trial court in the Eighth Circuit will consider the annual certifications in this case to be conditions of participation that will not support an FCA claim.

Administrative Remedies: The City will argue that if HUD finds that a grantee is out of compliance with Section 3, it has a number of administrative options and procedures to deal with the non-compliance, including suspension and debarment. The City will argue that permitting FCA liability in this context is akin to transforming a discretionary administrative remedy into a mandatory and harsh penalty.

We believe this argument is not well taken. The FCA provides a remedy that is distinct from any available administrative remedies. We are concerned, however, that an FCA case, which is a case to recover money, not a request for injunctive relief, is a blunt tool in the context presented. Rather than taking money out of a financially challenged American city, the right approach here may well be an administrative approach to fixing the City's programs, not an effort to punish the City for past behavior and a trier of fact may well agree. Here, HUD says it has already taken the required administrative action, and that the City is now in compliance with Section 3. Indeed, HUD holds St. Paul up, now, as a model Section 3 participant.

Vagueness: The City will argue that the phrase "to the greatest extent feasible" is vague and ambiguous, and that it cannot provide the basis for an FCA claim. We do not believe this is a strong argument for the City. The argument ignores HUD's regulations. Although the broad statement in the statute and in the first paragraph of the regulations is general, most of HUD's Section 3 regulations are more specific, weakening the vagueness argument. In addition, we take the position that where a claimant believes regulations are vague, they have an obligation to seek clarification from the government, not to default on their obligations unilaterally. Nonetheless, the language of the regulation pointed to by the City is not a model of clarity, and there is some risk that pursuing a case here will result in bad Section 3 law.

Policy Considerations: The City argues that an FCA case, which if successful will burden St. Paul taxpayers, is undesirable. The City argued that it has been a constructive HUD partner over the years, and should not be punished here. The City believes a claim is particularly unattractive given that when its Section 3 deficiencies were identified in the recent administrative action, the City entered into a VCA and is now held up by HUD as a model Section 3 participant, and as a model for other jurisdictions.

OTHER CONSIDERATIONS

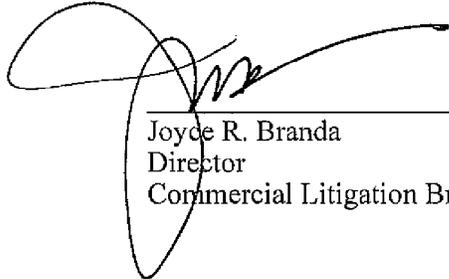
In February 2010, the Eighth Circuit Court of Appeals issued a decision in *Gallagher v. Manger*, 619 F.3d 823 (8th Cir. 2010). That case involves claims by a number of current and former owners of rental properties in St. Paul, against the City and numerous City housing inspectors, alleging that the manner in which the City enforced housing codes was discriminatory and in violation of the Fair Housing Act (FHA). The City allegedly had been focusing aggressive code enforcement efforts on "problem properties" that tended to be rented primarily to low-income, African-American families. The City argued that there were particular health and safety issues that justified their focus on low-income properties, that they need to act decisively to protect its citizens. The District Court for the District of Minnesota granted summary judgment dismissing the claims. The Eighth Circuit reversed in part and remanded, holding that the

plaintiffs had established a prima facie case of disparate impact under the FHA, but that a fact issue remained as to whether the City had viable alternative means to achieve its legitimate policy objective of protecting health and safety in rental properties without discriminatory effects. *En banc* rehearing was denied. The City appealed and the United States Supreme Court granted certiorari on November 7, 2011.

The Supreme Court has not decided whether the FHA allows for recovery based on a disparate-impact theory. We understand that the Civil Rights Division is concerned that there is a risk of bad law if the Court rules on the question of whether the City's health and safety efforts here justify a departure from the mandates of the FHA. The City has indicated that it will dismiss the *Gallagher* petition, and declination here will facilitate the City's doing so. Under the circumstances, we believe this is another factor weighing in favor of declination.

CONCLUSION

Given all of the factors described above, we recommend that the United States decline to intervene in this case.



Joyce R. Branda
Director
Commercial Litigation Branch

Attachments

Reviewer: **Line Attorney 1**

Senior Trial Counsel: **Line Attorney 2**

AUSA: **Line Attorney 3**

From: Martinez, Brian (CIV)
Sent: Thursday, February 09, 2012 7:24 PM
To: Perez, Thomas E (CRT)
Subject: RE: Follow up

Tom -

I know that Tony already communicated this to you, but I wanted to make good on my promise to tell you when he signed the St. Paul memo. I know it happened a couple of hours ago, but it's done.

Brian

-----Original Message-----

From: Perez, Thomas E (CRT)
Sent: Thursday, February 09, 2012 4:00 PM
To: Martinez, Brian (CIV)
Subject: Re: Follow up

Thx.

----- Original Message -----

From: Martinez, Brian (CIV)
Sent: Thursday, February 09, 2012 03:58 PM
To: Perez, Thomas E (CRT)
Subject: Re: Follow up

We now have the memo in the front office. Tony has been tied up, so he hasn't signed it yet. I will let you know.

----- Original Message -----

From: Perez, Thomas E (CRT)
Sent: Thursday, February 09, 2012 03:50 PM
To: Martinez, Brian (CIV)
Subject: Re: Follow up

Any word?

----- Original Message -----

From: Martinez, Brian (CIV)
Sent: Tuesday, February 07, 2012 05:27 PM
To: Perez, Thomas E (CRT)
Subject: Re: Follow up

Yes, I was with Tony during the call. I am glad that you all were able to talk and hopefully get closer to wrapping this up. The **RC-2** went well. Thanks again.

----- Original Message -----

From: Perez, Thomas E (CRT)
Sent: Tuesday, February 07, 2012 03:24 PM
To: Martinez, Brian (CIV)

Subject: Re: Follow up

Thx for your help. Call occurred as planned and was productive.

----- Original Message -----

From: Martinez, Brian (CIV)
Sent: Monday, February 06, 2012 11:35 PM
To: Perez, Thomas E (CRT)
Subject: Re: Follow up

RC-2

----- Original Message -----

From: Perez, Thomas E (CRT)
Sent: Monday, February 06, 2012 11:06 PM
To: Martinez, Brian (CIV)
Subject: Re: Follow up

Thx! What time is RC-2

----- Original Message -----

From: Martinez, Brian (CIV)
Sent: Monday, February 06, 2012 11:04 PM
To: Perez, Thomas E (CRT)
Subject: Re: Follow up

No problem at all, Tom. I've had my fair share of e-mail glitches in the past. Connie and I will try to set something up for tomorrow. Talk to you soon.

Brian

----- Original Message -----

From: Perez, Thomas E (CRT)
Sent: Monday, February 06, 2012 10:57 PM
To: Martinez, Brian (CIV)
Subject: Re: Follow up

probably my fault Brian that you did not get this. So sorry. Thx for your help in setting this up. We need no more than 30 minutes. RC-1 knows my schedule. Thx again

Tom

----- Original Message -----

From: Martinez, Brian (CIV)
Sent: Monday, February 06, 2012 10:40 PM
To: Civil Rights Scheduler; Perez, Thomas E (CRT); Brooker, Greg (USAMN); West, Tony (CIV)
Subject: Re: Follow up

Thank you, RC-1. As you noted, I didn't receive the prior messages below. I will follow up with you separately to try to find a time tomorrow for this conference call.

----- Original Message -----

From: **Civil Rights Scheduler**

Sent: Monday, February 06, 2012 08:47 PM

To: Perez, Thomas E (CRT); Brooker, Greg (USAMN); West, Tony (CIV); Martinez, Brian (CIV)

Subject: Re: Follow up

My last email didn't make it to Brian. Resending with Brian's correct email address.

Thanks,

Civil Rights Scheduler

----- Original Message -----

From: **Civil Rights Scheduler**

Sent: Monday, February 06, 2012 08:33 PM

To: Perez, Thomas E (CRT); Brooker, Greg (USAMN); West, Tony (CIV); **Brian Martinez**

<**RC-1**>

Subject: Re: Follow up

Tom is free anytime before 12pm eastern tomorrow.

Thanks,

Civil Rights Scheduler

----- Original Message -----

From: Perez, Thomas E (CRT)

Sent: Monday, February 06, 2012 07:55 PM

To: Brooker, Greg (USAMN); West, Tony (CIV); **Brian Martinez**

Cc: **Civil Rights Scheduler**

Subject: Follow up

Greetings:

I just spoke with Tony and we are confident we can come to closure with a brief conversation tomorrow. Brian, can you possibly identify a time after Tony's speech when we can all talk, along with Joyce. **Civil Rights Scheduler** will let you know when I am available. This should take no more than 30 minutes. It would be very helpful for us to have this tomorrow.

Thx

Tom

From: Perez, Thomas E (CRT)
Sent: Saturday, February 11, 2012 10:58 AM
To: Sara Grewing
Subject: Re: Follow Up

Your reference to Candyland brings back many fond memories. We have graduated to crazy 8s.

If you are in DC, give me a shout and I would love to have lunch or a drink. We will obviously stay in touch in the weeks ahead. I have a thought or two I wanted to run by you.

Thx again!

Tom

From: Sara Grewing [mailto:[RC-1](#)]
Sent: Saturday, February 11, 2012 10:20 AM
To: Perez, Thomas E (CRT)
Subject: Follow Up

Hi Tom - thanks so much for the kind voicemail yesterday. My three year old and I were involved in a vicious Candyland battle and somehow I missed your message until late in the evening.

I am so happy we were able to work everything out on the Magner withdrawal and we look forward to working with you in the future. A million thanks for your time and dedication to this process. Have a wonderful weekend.

Best,
Sara Grewing

Saint Paul City Attorney

RC-1

From: Goldberg, Stuart (ODAG)
Sent: Monday, March 12, 2012 7:38 AM
To: Cole, James (ODAG); O'Neil, David (ODAG)
Subject: FW: Civil Division -- Significant Affirmative Matters
Attachments: Civil Division--Significant Ongoing Affirmative Matters 03-08-12.xlsx

Stuart M. Goldberg
Principal Associate Deputy Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Room RC-1
Washington, D.C. 20530
(202) RC-1

From: Martinez, Brian (CIV)
Sent: Sunday, March 11, 2012 5:50 PM
To: Goldberg, Stuart (ODAG); Axelrod, Matthew (ODAG)
Cc: Olin, Jonathan F. (CIV)
Subject: Civil Division -- Significant Affirmative Matters

Stuart and Matt –

Attached please find an updated version of the chart that Tony first provided to your office in January 2012. If you have any questions, please contact Jon Olin (copied here).

Thanks,
Brian

Brian Martinez
Chief of Staff
Civil Division
U.S. Department of Justice
(202) RC-1
RC-1

Significant Affirmative Civil and Criminal Matters

Updated March 8, 2012

Party USAO Subject Status as of March 8, 2012

RC-2: Non-responsive text in multi-subject document.

RC-2: Non-responsive text in multi-subject document.

<p>U.S. v. City of St. Paul, Minn. (involves two different qui tam cases)</p>	<p>D. Minn.</p>	<p>Mortgage fraud</p>	<p>Relators allege in Newell that the City of St. Paul falsely certified that it was in compliance with Section 3 of the Housing Act (incentives for low and very low income citizens) when it obtained HUD community development block grants (CDBG program, etc.). The Ellis case alleges that the City of Minneapolis is inappropriately condemning and knocking down low-income housing, which has a disparate racial impact. Government declined to intervene in Newell, and has agreed to decline to intervene in Ellis, in exchange for defendants withdrawal of cert. petition in Gallagher case (a civil rights action).</p>
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RC-2: Non-responsive text in multi-subject document.

RC-2: Non-responsive text in multi-subject document.

Department of Housing and Urban Development Documents

[REDACTED]

From: [REDACTED]
Sent: Tuesday, November 29, 2011 8:12 PM
To: [REDACTED]
Subject: Fw: St. Paul

FYI

— Original Message —

From: [REDACTED]
Sent: Tuesday, November 29, 2011 08:06 PM
To: [REDACTED]
Subject: St. Paul

[REDACTED] Can we discuss tomorrow? There is a change of position. Thanks [REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, December 01, 2011 10:08 AM
To: [REDACTED]
Cc: Aronowitz, Michelle
Subject: St. Paul Qui Tam

[REDACTED] This is to confirm our telephone conversation of Tuesday night in which I informed you that HUD has reconsidered its support for intervention by the government in the St. Paul qui tam matter. HUD has determined that intervention is not necessary because St. Paul's programmatic non-compliance has been corrected through a Voluntary Compliance Agreement with HUD.

If you have any questions, please feel free to contact me. [REDACTED]

From: [REDACTED]
Sent: Friday, December 02, 2011 5:41 PM
To: [REDACTED]
Subject: RE: Minneapolis / St. Paul

Don't make me answer that.

From: [REDACTED]
Sent: Friday, December 02, 2011 4:38 PM
To: [REDACTED] Pratt, Sara K
Cc: [REDACTED]
Subject: RE: Minneapolis / St. Paul

Is he involved in the litigation against the city of St. Paul that's going to the Supreme Court.

From: [REDACTED]
Sent: Friday, December 02, 2011 4:37 PM
To: Pratt, Sara K; [REDACTED]
Cc: [REDACTED]
Subject: RE: Minneapolis / St. Paul

Sure, I'll will handle this. If you get any calls from with Andrew Ellis or John Shoemaker in MN, just forward those calls to me, too.

From: Pratt, Sara K
Sent: Friday, December 02, 2011 4:10 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: Minneapolis / St. Paul

I got a phone message today from a Mike Blodgett (cell phone [REDACTED]) asking about metropolitan planning issues in Minneapolis/St. Paul, particularly in connection with pre-emption of local building codes by state codes and the Fair Housing Act, and disparate impact on protected classes. That's what he said, I don't know what it really is about specifically. Could you call him back on my behalf to find out what his concerns are?

Thanks,

Sara

Sara K. Pratt
Deputy Assistant Secretary for Enforcement and Programs
Department of Housing and Urban Development
451 Seventh Street, SW
Room [REDACTED]
Washington, D.C. 20410
202. [REDACTED] (direct line)

Pratt, Sara K

From: Perez, Thomas E (CRT) [REDACTED]
Sent: Monday, December 12, 2011 2:03 PM
To: Pratt, Sara K
Subject: Re: Next week

Maybe after you meet with them tomorrow, you can patch me in telephonically and we can talk to them. We need to talk them off the ledge.

Can we talk before you meet with them.

----- Original Message -----

From: Pratt, Sara K [mailto:REDACTED]
Sent: Monday, December 12, 2011 01:21 PM
To: Perez, Thomas E (CRT)
Subject: RE: Next week

I meet with them tomorrow at 9 am and have reserved two hours for the meeting. I understand that their meeting with civil is at 2:00.

According to Helen, there is no need for me to meet with civil today.

-----Original Message-----

From: Perez, Thomas E (CRT) [mailto:REDACTED]
Sent: Monday, December 12, 2011 1:21 PM
To: Pratt, Sara K
Subject: Re: Next week

What time is your meeting tomorrow and what time is their next meeting with doj if you know?

----- Original Message -----

From: Pratt, Sara K [mailto:REDACTED]
Sent: Sunday, December 11, 2011 09:27 PM
To: Perez, Thomas E (CRT)
Subject: Re: Next week

/ep I imagine so.

----- Original Message -----

From: Perez, Thomas E (CRT) [mailto:REDACTED]
Sent: Sunday, December 11, 2011 09:14 PM
To: Pratt, Sara K
Subject: Re: Next week

I would like to figure out a way to have them come to my office at the end of the day and meet with you and me. If I can arrange that, are you able?

----- Original Message -----

From: Pratt, Sara K [mailto:REDACTED]
Sent: Sunday, December 11, 2011 09:09 PM
To: Perez, Thomas E (CRT)
Subject: Re: Next week

Thanks. I am around pretty much all day tomorrow and also in th evening....

----- Original Message -----

From: Perez, Thomas E (CRT) [mailto: [REDACTED]]
Sent: Sunday, December 11, 2011 08:59 PM
To: Pratt, Sara K
Subject: Re: Next week

Thx and good luck

----- Original Message -----

From: Pratt, Sara K [mailto: [REDACTED]]
Sent: Sunday, December 11, 2011 08:54 PM
To: Perez, Thomas E (CRT)
Subject: Re: Next week

City is tuesday at 9 am. Civil hopefully tomorrow.

----- Original Message -----

From: Perez, Thomas E (CRT) [mailto: [REDACTED]]
Sent: Sunday, December 11, 2011 08:33 PM
To: Pratt, Sara K
Subject: Re: Next week

Do you have a meeting with the city tomorrow? If so, can we talk beforehand? Thx

[REDACTED]

From: [REDACTED]
Sent: Thursday, December 22, 2011 12:01 PM
To: [REDACTED]
Subject: St. Paul's Vendor Outreach Program

Importance: High

[REDACTED] came across news articles reporting on lawsuits against the City of St. Paul in/around 2007 alleging that the City was not awarding contracts to minorities and women, notwithstanding the Vendor Outreach Program (VOP).

On November 2, 2007, a District Court Judge ordered the City to enforce the City's VOP – a program designed to remedy past discrimination and prevent future discrimination against minority-owned businesses. The Court's order incorporated earlier findings from an order it issued on July 24th, 2007, which acknowledged additional lapses in the City's enforcement of the VOP.

Additionally, according to one news source, an independent audit of St. Paul found that "fewer than 7 percent of \$220 million worth of contracts in 2006 went to minority- and woman-owned businesses."

So, just because St. Paul had a VOP doesn't mean it met the goals of the VOP or Section 3.

000222

Pratt, Sara K

From: Pratt, Sara K
Sent: Thursday, December 22, 2011 2:24 PM
To: [REDACTED]
Subject: RE: St. Paul's Vendor Outreach Program

Yes, I'm treading carefully here.

Will send you a draft in a few minutes.

From: [REDACTED]
Sent: Thursday, December 22, 2011 2:16 PM
To: Pratt, Sara K
Subject: St. Paul's Vendor Outreach Program
Importance: High

Sara,

As you know, DOJ has asked HUD whether HUD believes that the City of St. Paul, through its Vendor Outreach Program (VOP), ultimately (substantially) complied with Section 3. This statement would be true if the City, in serving the MBEs, WBEs and DBEs that participate in its VOP, ultimately provided contracting opportunities to the companies of low and very-low income individuals at/near the levels provided for by Section 3. The relevant time period is 2000-2010.

In verifying this, I came across news reports about private citizens' lawsuits against the City of St. Paul in/around 2007, alleging that the City was not awarding contracts to minorities and women notwithstanding the VOP (a program initiated to remedy past discrimination against minority-owned businesses).

On November 2, 2007, a state court judge ordered the City to enforce the City's VOP. The Court's order incorporated earlier findings, from an order it issued on July 24th, 2007, that acknowledged additional lapses in the City's enforcement of the VOP. (See article below.)

Additionally, an independent audit of St. Paul, issued in November 2007, found that fewer than 7 percent of \$220 million worth of contracts in 2008 went to minority- and woman-owned businesses. MBEs received less than 3% of contract dollars. The audit also found that the office that was responsible for processing more than half of those contracts had failed to adopt the provisions of the City's VOP and Affirmative Action in Employment ordinances, that there was a "lack of monitoring and enforcement procedures and practices" relating to VOP contracting, and that "n[o] one [on the City's staff took] responsibility for monitoring and enforcement of the VOP and AA [contracting] requirements."

Following is one report:

State Judge Directs the City of Saint Paul to Enforce Provisions of the Vendor Outreach Program Targeted to Minority-owned Businesses

ST. PAUL, Minn., Nov. 13 /PRNewswire-USNewswire/ -- On November 2,

District Court Judge Kathleen Weirin ordered the City of Saint Paul to enforce the City's Vendor Outreach Program (VOP) -- a program designed to remedy past discrimination and prevent future discrimination against minority-owned businesses.

The ruling followed a bench trial before Judge Weirin with testimony from the plaintiff, Brian Gonzalez, and city officials who argued the VOP was

city contracts. Conover, owner of Abel Trucking, alleged that he was unable to contract with the City on numerous occasions because city officials failed to follow the mandatory provisions of the VOP that were enacted to promote increased participation of qualified, minority-, women-, and small-owned businesses.

Prior to filing this action, Conover had bid on at least 22 projects with the City and was rejected each time without any explanation. The VOP requires that prime contractors notify unsuccessful bidders, such as Conover, about the basis for the rejection. The court concluded that the City's failure to "ensure that this is done by prime contractors.... violates the Vendor Outreach Program." Furthermore, the court acknowledged that the lack of explanation results "in these bidders not developing the necessary skills in preparing their bids so that they can be successful."

On the rare occasion Conover was invited to bid on a project, the invitation came the day before the bid was due, even though the VOP requires certified vendors to be contacted at least 10 days prior to the bid opening date. According to the judge, the City's current practice does not afford bidders adequate time to prepare a competitive bid and further discourages them from submitting a bid.

"We want to make sure the City treats all of its citizens fairly by enforcing both the letter and spirit of the Vendor Outreach Program," said Tricia G. Jefferson, an attorney representing Conover from the Lawyers' Committee for Civil Rights. Conover is also represented by local counsel, Stephen L. Smith, and Blair Jacobs and Kathleen Lahrstein-Bertocci from Sutherland, Asbill & Brennan LLP, located in Washington, D.C.

The court's order incorporates earlier findings from an order it issued on July 24th, which acknowledged additional lapses in the City's enforcement of the VOP. The City must now act expeditiously to implement the combined orders, which include, among other things, providing timely notification of bids and an explanation of rejected bids.

The Lawyers' Committee is a nonpartisan, nonprofit civil rights legal organization, formed in 1963 at the request of President John F. Kennedy to provide legal services to address racial discrimination.

For more information on the Lawyers' Committee, visit us at <http://www.lawyerscommittee.org>.

SCIRCS Lawyers' Committee for Civil Rights

[REDACTED]

From: [REDACTED]
Sent: Thursday, December 22, 2011 2:57 PM
To: [REDACTED]
Subject: FW: City of St. Paul
Attachments: 3595_001.pdf

Sara's attachment is the City's "position paper" setting forth reasons why the City thinks the Govt should decline to intervene. Among other things, the City references the Hall audit's review of its VOP, but says nothing other than: "overall, the results were largely positive."

This is just not true. The Hall audit reports the small percentages of contracting dollars directed toward MBEs and WBEs (Included in my earlier email) and describes a lack of responsibility, enforcement, etc.

From: Pratt, Sara K
Sent: Thursday, December 22, 2011 2:39 PM
To: [REDACTED]
Subject: FW: City of St. Paul

fyl

From: Lundquist, John [mailto:[REDACTED]]
Sent: Thursday, December 22, 2011 1:45 PM
To: Pratt, Sara K
Subject: City of St. Paul

Dear Ms. Pratt,

Thank-you for your call this morning. We are working on getting you the materials you requested. In the meantime, I am enclosing a copy of the Position Paper we submitted to DOJ. Pages 4-11 describe some of the City's programs.

Thank you.

John W. Lundquist
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Direct Dial: 612. [REDACTED]
Main Phone: 612. [REDACTED]
Fax: 612.492.7077
[REDACTED]

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[REDACTED]

From: [REDACTED]
Sent: Thursday, December 22, 2011 3:58 PM
To: Aronowitz, Michelle
Cc: [REDACTED]
Subject: RE: St. Bernard Parish: Judge Orders Occupancy, Threatens Fines In St. Bernard Housing Battle

Michelle,

DOJ doesn't appear to like the basis for declining the Section 3 case. [REDACTED] asked [REDACTED] whether HUD believes that the City of St. Paul, through its Vendor Outreach Program (VOP), ultimately (substantially) complied with Section 3. If so, DOJ would like to rely upon a statement from HUD to this effect.

We spoke to Sara Pratt about this, and she appears to be working on a response.

This statement could be true if the City, in serving the MBEs, WBEs and DBEs that participate in its VOP, ultimately provided contracting opportunities to the companies of low and very-low income individuals at/near the levels provided for by Section 3. The relevant time period is 2000-2010.

Unfortunately, in verifying this, I came across news reports about private citizens' lawsuits against the City of St. Paul in/around 2007, alleging that the City was not awarding contracts to minorities and women notwithstanding the VOP (a program initiated to remedy past discrimination against minority-owned businesses).

On November 2, 2007, a state court judge ordered the City to enforce the City's VOP. The Court's order incorporated earlier findings, from an order it issued on July 24th, 2007, that acknowledged additional lapses in the City's enforcement of the VOP. (See article below.)

Additionally, an independent audit of St. Paul, issued in November 2007, found that fewer than 7 percent of \$220 million worth of contracts in 2006 went to minority- and woman-owned businesses. MBEs received less than 3% of contract dollars. The audit also found that the office that was responsible for processing more than half of those contracts had failed to adopt the provisions of the City's VOP and Affirmative Action in Employment ordinances, that there was a "lack of monitoring and enforcement procedures and practices" relating to VOP contracting, and that "n[o] one [on the City's staff took] responsibility for monitoring and enforcement of the VOP and AA [contracting] requirements."

I conveyed this to Sara. We are currently awaiting her statement (about accomplishing Section 3's goals/ objectives through the VOP program).

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, December 22, 2011 4:11 PM
To: Aronowitz, Michelle
Subject: FW: St. Paul issue

Michelle, attached is Sara's draft response to DOJ's question about whether the City (unintentionally) complied with Section 3 through its Vendor Outreach Program.

From: Pratt, Sara K
Sent: Thursday, December 22, 2011 4:07 PM
To: [REDACTED]
Subject: St. Paul issue

This is a draft. Please take a look and see what you think.

RECRUITMENT OF WOMEN AND MINORITY OWNED BUSINESSES AS PART OF SECTION 3 COMPLIANCE

I have been asked whether recruitment of women and minority owned business by a city, specifically that conducted through St. Paul's Vendor Outreach Program, constitutes compliance with Section 3 requirements.

On its face, the two activities are separate and analytically different. Recruitment of women owned businesses, minority owned businesses and disadvantaged small businesses is not the same as recruitment or outreach for Section 3 purposes. However, notification of these types of businesses about Section 3 contracting opportunities could result in notification of Section covered business concerns. FHEO would not be likely to make a finding based on technical non compliance with such a provision if our review found that the efforts made with minority and women owned businesses, and economically disadvantaged businesses, although not technically referred to as Section 3 outreach, reached appropriate Section 3 businesses and notified them of contracting opportunities with a Section 3 recipient.

The current Section 3 regulations broadly state that there should be procedures to notify Section 3 business concerns about contracting opportunities generated by section 3 covered assistance. The regulations do not mandate what those procedures are or should be, leaving open various interpretations of the obligations of a section 3 recipient in this respect. In the absence of more detailed specifications, there may be some risk to saying that any particular procedure or strategy of notification is right or wrong. FHEO is currently in the final stages of drafting substantive amendments to these regulations in part because they may lack the requisite specificity to hold section 3 recipients liable for their failure to comply with various components of Section 3.

Sara K. Pratt
Deputy Assistant Secretary for Enforcement and Programs
Department of Housing and Urban Development
451 Seventh Street, SW
Room [REDACTED]
Washington, D.C. 20410
202 [REDACTED] (direct line)

000233

[REDACTED]

From: Aronowitz, Michelle
Sent: Thursday, December 22, 2011 4:57 PM
To: [REDACTED] Pratt, Sara K, [REDACTED]
Subject: RE: St. Paul issue

I'm not sure we need to provide a long response. If we respond at all, why wouldn't we just reiterate that HUD does not want to proceed with the false claims for the reasons stated in our letter, the city is compliance with HUD's section 3 VCA, and it is possible that compliance with MBE, etc, requirements could result in compliance in Section 3.

From: [REDACTED]
Sent: Thursday, December 22, 2011 4:42 PM
To: Pratt, Sara K; [REDACTED]
Cc: Aronowitz, Michelle
Subject: RE: St. Paul Issue

I just talked to Michelle and think that we could tell DOJ the following:

It is possible that a city's efforts to recruit women-owned, minority-owned and disadvantaged small businesses for construction and rehabilitation contracts *could* result in compliance with Section 3 requirements. While recruitment of WBEs, MBEs and DBEs is not the same as recruitment or outreach for Section 3 purposes, notification to these types of businesses about Section 3 contracting opportunities could result in notification to the appropriate individuals/businesses of Section covered business concerns. HUD's Office of Fair Housing and Equal Opportunity would be unlikely to make a finding of non-compliance if it found that a grantee's efforts with respect to WBEs, MBEs and DBEs, although not technically referred to as Section 3 outreach, reached appropriate Section 3 businesses and notified them of contracting opportunities with a Section 3 recipient.

Without additional information about the specific WBEs, MBEs and DBEs that participated in St. Paul's Vendor Outreach Program (VOP) during the relevant period, however, HUD cannot conclude that St. Paul's VOP reached Section 3 businesses and notified them of contracting opportunities.

From: Pratt, Sara K
Sent: Thursday, December 22, 2011 4:07 PM
To: [REDACTED]
Subject: St. Paul issue

This is a draft. Please take a look and see what you think.

RECRUITMENT OF WOMEN AND MINORITY OWNED BUSINESSES AS PART OF SECTION 3 COMPLIANCE

I have been asked whether recruitment of women and minority owned business by a city, specifically that conducted through St. Paul's Vendor Outreach Program, constitutes compliance with Section 3 requirements.

On its face, the two activities are separate and analytically different. Recruitment of women owned businesses, minority owned businesses and disadvantaged small businesses is not the same as recruitment or outreach for Section 3 purposes. However, notification of these types of businesses about Section 3 contracting opportunities could result in notification of Section covered business concerns. FHEO would not be likely to make a finding based on technical non compliance with such a provision if our review found that the efforts made with minority and women owned businesses,

and economically disadvantaged businesses, although not technically referred to as Section 3 outreach, reached appropriate Section 3 businesses and notified them of contracting opportunities with a Section 3 recipient.

The current Section 3 regulations broadly state that there should be procedures to notify Section 3 business concerns about contracting opportunities generated by section 3 covered assistance. The regulations do not mandate what those procedures are or should be, leaving open various interpretations of the obligations of a section 3 recipient in this respect. In the absence of more detailed specifications, there may be some risk to saying that any particular procedure or strategy of notification is right or wrong. FHEO is currently in the final stages of drafting substantive amendments to these regulations in part because they may lack the requisite specificity to hold section 3 recipients liable for their failure to comply with various components of Section 3.

Sara K. Pratt
Deputy Assistant Secretary for Enforcement and Programs
Department of Housing and Urban Development
451 Seventh Street, SW
Room [REDACTED]
Washington, D.C. 20410
202. [REDACTED] (direct line)

Pratt, Sara K

From: [REDACTED]
Sent: Thursday, December 22, 2011 8:01 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: St. Paul: recommendation against intervention

[REDACTED]

HUD's Office of Fair Housing and Equal Opportunity has determined that the City of St. Paul is not only in compliance with the VCA, but is also in compliance with its Section 3 obligations at this time. As described in our December 20, 2001 memo, HUD does not wish to proceed with the False Claims Act case. It is possible that notification to MBEs, WBEs, and SBEs could result in compliance with Section 3 requirements, in which case the existence or non-existence of Section 3 notification procedures would essentially be the basis for technical assistance, not a finding of a violation.

[REDACTED]

[REDACTED]

U.S. Department of Housing and Urban Development
Office of General Counsel
1250 Maryland Avenue, SW
Suite [REDACTED]
Washington, D.C. 20024
Tel.: [REDACTED]
Fax: 202-401-5153

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

[REDACTED]

From: [REDACTED]
Sent: Thursday, December 22, 2011 5:57 PM
To: [REDACTED]
Subject: Re: St. Paul

An email.

From: [REDACTED]
Sent: Thursday, December 22, 2011 05:55 PM
To: [REDACTED]
Subject: RE: St. Paul

As a memo? Or simply an email?

From: [REDACTED]
Sent: Thursday, December 22, 2011 5:50 PM
To: [REDACTED]
Subject: Fw: St. Paul

Go ahead and send it to Renee.

From: Aronowitz, Michelle
Sent: Thursday, December 22, 2011 05:44 PM
To: Pratt, Sara K; [REDACTED]
Subject: RE: St. Paul

This looks good to me. Lets send it.

From: Pratt, Sara K
Sent: Thursday, December 22, 2011 5:43 PM
To: [REDACTED]
Cc: Aronowitz, Michelle
Subject: St. Paul

FHEO has determined that the City of St. Paul is not only in compliance with the VCA but it is also in compliance with its Section 3 obligations at this time. As described in our December 20, 2001 memo, HUD does not wish to proceed with the false claims case. It is possible that notification of MBEs, WBEs, and SBEs could result in compliance with Section 3 requirements, in which case the existence or non existence of Section 3 notification procedures would essentially be the basis for technical assistance, not a finding of a violation.

Sara K. Pratt
Deputy Assistant Secretary for Enforcement and Programs
Department of Housing and Urban Development
451 Seventh Street, SW
Room [REDACTED]
Washington, D.C. 20410
202. [REDACTED] (direct line)

[REDACTED]

From: [REDACTED]
Sent: Friday, December 23, 2011 12:32 PM
To: [REDACTED]
Subject: FW: St. Paul: recommendation against intervention

Have you discussed this with Renee?

From: [REDACTED] (CIV) [mailto:[REDACTED]]
Sent: Friday, December 23, 2011 9:35 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: St. Paul: recommendation against intervention

Dane: is this responsive to the question you and I discussed yesterday? Thank you.

[REDACTED]
Assistant Director
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
Fraud Section
601 D Street N.W.
Suite [REDACTED]
Washington, DC 20004
(202) [REDACTED]

From: [REDACTED] [mailto:[REDACTED]]
Sent: Thursday, December 22, 2011 6:01 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: St. Paul: recommendation against intervention

[REDACTED]

HUD's Office of Fair Housing and Equal Opportunity has determined that the City of St. Paul is not only in compliance with the VCA, but is also in compliance with its Section 3 obligations at this time. As described in our December 20, 2001 memo, HUD does not wish to proceed with the False Claims Act case. It is possible that notification to MBEs, WBEs, and SBEs could result in compliance with Section 3 requirements, in which case the existence or non-existence of Section 3 notification procedures would essentially be the basis for technical assistance, not a finding of a violation.

[REDACTED]

[REDACTED]
U.S. Department of Housing and Urban Development
Office of General Counsel
1250 Maryland Avenue, SW
Suite [REDACTED]
Washington, D.C. 20024
Tel.: [REDACTED]
Fax: 202-401-5153

Kanovsky, Helen R

From: Donovan, Shaun
Sent: Tuesday, February 07, 2012 9:24 PM
To: Kanovsky, Helen R
Subject: Re: Magnier/disparate impact rule

Fantastic - thank you for the great news.

On Feb 7, 2012, at 8:48 PM, "Kanovsky, Helen R" <[REDACTED]> wrote:

> In case you are in need of good news from another quarter, I just spoke to Tom Perez. The petition to the Supreme Court in Magnier will be withdrawn by St Paul this week. Disparate Impact theory in Fair Housing survives for now and the issuance of our final rule shortly will bolster it further.

Kanovsky, Helen R

From: Donovan, Shaun
Sent: Friday, February 10, 2012 11:15 PM
To: Kanovsky, Helen R
Subject: Re: Magner

Spoke to Tom and Sara. Will call the St Paul mayor over the weekend too.

On Feb 10, 2012, at 3:45 PM, "Kanovsky, Helen R" <[REDACTED]> wrote:

We just received confirmation from the SG's Office, this matter has been dismissed from the Supreme Court's docket. Sara Pratt was very helpful in making this happen. You may also want to call Tom Perez and congratulate him.

Helen R. Kanovsky
General Counsel
US Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410
202-[REDACTED]
[REDACTED] (cell)

[REDACTED]
From: [REDACTED]
Sent: Friday, February 10, 2012 1:54 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: FW: Magner being dismissed!

Magner (disparate impact case before the supreme court) will be dismissed.

-----Original Message-----

From: [REDACTED]
Sent: Friday, February 10, 2012 1:11 PM
To: Branch, Chandra; [REDACTED]
Subject: FW: Magner being dismissed!

Yippee!!!

-----Original Message-----

From: [REDACTED]
Sent: Friday, February 10, 2012 1:10 PM
To: [REDACTED] Aronowitz, Michelle
Subject: FW: Magner being dismissed!

In case you hadn't heard.

----- Original Message -----

From: Lauren Saunders [mailto:[REDACTED]]
Sent: Friday, February 10, 2012 01:04 PM
To: [REDACTED]
Subject: Magner being dismissed!

Lauren K. Saunders
Managing Attorney
National Consumer Law Center(r)
1001 Connecticut Avenue, NW, Suite 510
Washington, DC 20036
(202) [REDACTED]

[REDACTED] (note new email)
www.nclc.org

From: Stuart Rossman
Sent: Friday, February 10, 2012 11:28 AM
To: Advocates_PLUS
Subject: Unbelievable (Good) News

000253

**The City of St. Paul, MN, has given up in the Magner case pending in the United States Supreme Court and is withdrawing its petition (whew).
Disparate impact litigation under the FHA lives another day!**

Stuart T. Rossman

Director of Litigation

National Consumer Law Center

7 Winthrop Square, 4th Fl.

Boston, MA 02110

[REDACTED]

From:
Sent:
To:

Friday, February 10, 2012 3:34 PM

Murphy, Donna (CRT); Lynn.M.Gottschalk@frb.gov; Seward, Jon (CRT); abeshara@fdic.gov; Bowman, John B.; larbrown@fdic.gov; kchu@fdic.gov; rclougherty@fdic.gov; jacoburn@fdic.gov; stecohen@fdic.gov; scornell@fdic.gov; jagordon@fdic.gov; jnorcom@fdic.gov; dnordenberg@fdic.gov; toxday@fdic.gov; lpatmon@fdic.gov; krodwell@fdic.gov; lrushing@fdic.gov; aisampson@fdic.gov; ithompson@fdic.gov; mvaldez@fdic.gov; robert.b.avery@frb.gov; neil.bhutta@frb.gov; kenneth.brevoort@frb.gov; gcanner@frb.gov; jason.l.dietrich@frb.gov; carol.a.evans@frb.gov; giovanna.parades@frb.gov; surge.sen@frb.gov; maureen.c.yap@frb.gov; lhosken@ftc.gov; miuppino@ftc.gov; brows@ftc.gov; cwheeler@ftc.gov; Armstrong, Joel D; Aronowitz, Michelle; Cheung, Kee N; Comeau, John P; Gums, Eathen; Garcia, Michelle T; Kannan, Akila; Lambert, Timothy C; Liu, Feng; Norfleet, Eddy F; Pennington, Kathleen M; Reeder, William J; Suain, Scott J; Zhou, Jian A; Do, Chau; Ho, Rose; Worth, Nancy; Campbell, Linda; theresa.diventi@fhfa.gov; Everson.Hull@fhfa.gov; sylvia.martinez@fhfa.gov; brantley@ncua.gov; icchocki@ncua.gov; ftreasman@ncua.gov; Campos, Marta (CRT); Shou.Wang@treasury.gov; Christine.Ladd@treasury.gov; Rebecca.Gelfond@treasury.gov; Katherine.Worthman@treasury.gov; Cunningham, James (CRT); Postert, Anthony (CRT); mbachman@fdic.gov; Kenneth.Lannon@occ.treas.gov; mark.hotz@occ.treas.gov; lyn.abrams@fhfa.gov; pejohnston@fdic.gov; sarcampbell@fdic.gov; KErnst@fdic.gov; David.Adkins@occ.treas.gov; Richard.bennett@treasury.gov; Worden, Jeanine M; Malden, Reginal M; Irothfarb@ftc.gov; Brian.doherty@fhfa.gov; Hajime.H.Hadeishi@frb.gov; Surge.Sen@frb.gov; Moran, Timothy (CRT); Parr, Elizabeth (CRT); David.Gossett@cfpb.gov; clare.harrigan@cfpb.gov; katherine.worthman@cfpb.gov
Subject:
Magner v Gallagher is dismissed

Folks,

The city has withdrawn its cert petition in Magner v. Gallagher and the parties have jointly asked the Court to dismiss the case. This is obviously welcome news. Thanks to all who helped with our brief, and we will keep you posted if the subject arises again.

Attorney, Appellate Section
Civil Rights Division
U.S. Department of Justice
(202)

000253

Aronowitz, Michelle

From: Aronowitz, Michelle
Sent: Friday, February 10, 2012 3:40 PM
To: Kanovsky, Helen R
Subject: Fw: Magner dismissed

From the SG's office

From: [REDACTED]
Sent: Friday, February 10, 2012 03:29 PM
To: [REDACTED]

Aronowitz, Michelle;

Subject: Magner dismissed

For anyone who hasn't heard yet, the parties in Magner v. Gallagher have agreed to dismiss the case. It will therefore no longer be on the Court's docket and (obviously) won't be argued on the 29th. Thanks for all your work on this case.

[REDACTED]
[REDACTED] can you please spread the word to the full group of financial-agency folks? Thanks!

[REDACTED]
Office of the Solicitor General
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530
(202) [REDACTED]

City of St. Paul Documents

Lundquist, John

From: Pratt, Sara K <[REDACTED]>
Sent: Thursday, December 22, 2011 12:47 PM
To: Lundquist, John
Subject: RE: City of St. Paul

Thank you.

From: Lundquist, John [mailto:[REDACTED]]
Sent: Thursday, December 22, 2011 1:45 PM
To: Pratt, Sara K
Subject: City of St. Paul

Dear Ms. Pratt,

Thank-you for your call this morning. We are working on getting you the materials you requested. In the meantime, I am enclosing a copy of the Position Paper we submitted to DOJ. Pages 4-11 describe some of the City's programs.

Thank you.

John W. Lundquist
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Direct Dial: 612. [REDACTED]
Main Phone: 612. [REDACTED]
Fax: 612. [REDACTED]
[REDACTED]@fredlaw.com

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Lundquist, John

From: Lundquist, John
Sent: Thursday, December 22, 2011 2:37 PM
To: Sara K. Pratt
Subject: St. Paul MBE/WBE/SBE Programs

Dear Ms. Pratt,

I want to call your attention to several sources of information on the City's website which may be helpful.

The City commissioned an audit (the "Hall Audit") in 2007 and a Disparity Report in 2008 to address, among other things, the success of its VOP outreach programs. The City still maintains webpages containing the Hall Audit Report and the Disparity Study on its website. The URL's for those websites are as follows:

Hall Audit: <http://www.stpaul.gov/index.aspx?NID=2566>

Disparity Study: <http://www.stpaul.gov/index.aspx?NID=1224>

Our White Paper (the document I sent to you earlier today) included information from both the Hall Audit and the Disparity Study that relates to St. Paul's success in recruiting MBE/WBE/SBE business participation. Section 10 of the Disparity Study contains findings and recommendations about the City's M/WBE utilization. It should be noted that the Study's authors commended St. Paul on its M/WBE programs.

Additionally, the "HRA / PED Report Cards" may be found at: <http://www.stpaul.gov/index.aspx?NID=683>

Please let me know if this is the sort of information you are seeking. We are also reviewing other materials that may be responsive to your request.

Thank you for your patience.

John W. Lundquist
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Direct Dial: 612-
Main Phone: 612-
Fax: 612-
@fredlaw.com

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Lundquist, John

From: Lundquist, John
Sent: Thursday, December 22, 2011 3:16 PM
To: Sara K. Pratt
Subject: More Information -- Section 3 / VOP List and MBDR Reports
Attachments: Section 3 Business List.pdf

Dear Ms. Pratt,

I am attaching a recent listing of the City's Section 3 businesses. It cross references those that are also on the VOP list. This confirms the overlap between the two populations, which would also have existed in earlier years.

The MBDR Annual Reports, which contain information about the City's M/WBE utilization rates, may be found at:

<http://www.stpaul.gov/index.aspx?NID=3952>

We hope this information is helpful.

John W. Lundquist
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425

Direct Dial: 612 [REDACTED]

Main Phone: 612 [REDACTED]

Fax: 612 [REDACTED]

[REDACTED]@fredlaw.com

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Lundquist, John

From: Lundquist, John
Sent: Friday, December 23, 2011 2:05 PM
To: Sara K. Pratt
Subject: More Information on St. Paul Programs

Dear Ms. Pratt,

Below is additional information. We hope this, and the other information provided yesterday, meet your needs. Please let me know.

Thanks.

John

I. The City of Saint Paul awarded over* \$72.5 million dollars to WBEs & MBEs from 2005 - 2009 as follows:

2005	\$ 7.5 million
2006	\$ 9.2 million
2007	\$14 million
2008	\$19.8 million
2009	\$22 million

* Above figures include HRA/PED construction projects only. They do not include city construction amounts e.g., Fire, Parks, Police, Public Works, etc.

Additional funds were committed to WBEs & MBEs in the form of commercial loans.

II. Minority Business Development & Retention (MBDR) program

The City expended \$250,000 per year since 2003 towards the capacity building, development, and retention of WBEs & MBEs. This program is unique in the state. No other jurisdiction had committed funds targeted solely for this purpose. The reports for the MBDR program were submitted to you yesterday, which report on other achievements.

III. Socially Responsible Investment Funds (SRIF)

The City places a corpus of funds, historically \$10 million, spread amongst a few banks for the purpose of leveraging the banks' funds to issue loans in our economically challenged neighborhoods. Loans include commercial and personal loans. The banks, in turn, report to us the number of loans that were issued in our targeted neighborhoods. These figures are found in the MBDR reports.

IV. Capital Investment Budget

In 2008 (prior to the VCA), the City committed \$300,000 to broaden Section 3 activities through the Small Business Assistance Program.

John W. Lundquist
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Direct Dial: 612. [REDACTED]
Main Phone: 612. [REDACTED]
Fax: 612. [REDACTED]
[REDACTED]@fredlaw.com

****This is a transmission from the law firm of Fredrikson & Byron, P.A. and may contain information which is privileged, confidential, and protected by the attorney-client or attorney work product privileges. If you are not the addressee, note that any disclosure, copying, distribution, or use of the contents of this message is prohibited. If you have received this transmission in error, please destroy it and notify us immediately at our telephone number (612) [REDACTED]****

Lillehaug, David

From: Perez, Thomas E (CRT) [REDACTED]
Sent: Friday, February 10, 2012 2:38 PM
To: Lillehaug, David
Subject: Re: RELEASE: City of Saint Paul seeks to dismiss Unites States Supreme Court case Magner vs. Gallagher

Thx for the idea. Had a very nice chat.

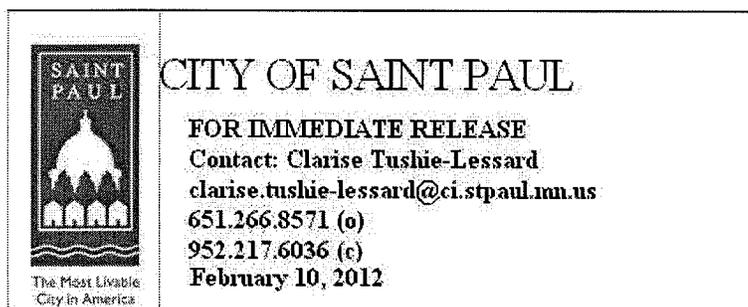
From: Lillehaug, David [REDACTED]
Sent: Friday, February 10, 2012 02:43 PM
To: Perez, Thomas E (CRT)
Subject: FW: RELEASE: City of Saint Paul seeks to dismiss Unites States Supreme Court case Magner vs. Gallagher

Here's the City's press release. Other than an unfortunate typo in the headline, I think you'll find it good reading.

Best regards.

David Lillehaug
Fredrikson & Byron, P.A.
612-[REDACTED]

From: Joe Campbell [REDACTED]
Sent: Friday, February 10, 2012 1:22 PM
To: Sara Grewing
Subject: Fwd: RELEASE: City of Saint Paul seeks to dismiss Unites States Supreme Court case Magner vs. Gallagher



City of Saint Paul seeks to dismiss Unites States Supreme Court case *Magner vs. Gallagher*

Scope of court's decision could have adverse effects on housing, civil rights

Today, the City of Saint Paul requested that the United States Supreme Court dismiss the city's petition to hear the pending case of *Magner v. Gallagher*. The case is a lawsuit brought by landlords who oppose the city's vigorous enforcement of the city's housing code. The city's

efforts were focused on eliminating conditions such as rodent infestation, missing dead bolt locks, inoperable smoke detectors, poor sanitation, and inadequate heat. While Saint Paul likely would have won in the United States Supreme Court, a victory could substantially undermine important civil rights enforcement throughout the nation. The city fully expects to win the case later at trial.

The City of Saint Paul, national civil rights organizations, and legal scholars believe that, if Saint Paul prevails in the U.S. Supreme Court, such a result could completely eliminate "disparate impact" civil rights enforcement, including under the Fair Housing Act and the Equal Credit Opportunity Act. This would undercut important and necessary civil rights cases throughout the nation. The risk of such an unfortunate outcome is the primary reason the city has asked the Supreme Court to dismiss the petition.

“As we saw recently with the United States Department of Justice’s settlement against Countrywide Mortgage, which provided \$335 million of relief to homeowners who have been discriminated against, disparate impact analysis is an important tool in fighting predatory lending and economic injustice,” Mayor Chris Coleman said. “Yet we still remain firm in our resolve that, when our city protects tenants from substandard housing, such enforcement enhances – not undermines – civil rights and human dignity.”

“The Mayor’s and the City Council’s thoughtful decision should not be cause for these landlords to celebrate, but instead highlights the city’s belief that it will be successful in defending its code enforcement actions in any court,” said Saint Paul City Attorney Sara Grewing, whose office is defending the case. “The city is confident we will achieve the same result in trial that we would have through the completion of the appeal. We look forward to cross-examining these landlords in front of a jury and we will try the case to win – an outcome the city expects.”

###



Questions? [Contact Us](#)

STAY CONNECTED:



Lillehaug, David

From: Pratt, Sara K [REDACTED]
Sent: Friday, February 10, 2012 2:21 PM
To: Lillehaug, David
Cc: 'Sara Grewing'
Subject: RE: City of St. Paul

David--This is very good news and I am particularly glad to hear that the other side has consented. We also look forward to working with you on a variety of issues.

Sara

From: Lillehaug, David [REDACTED]
Sent: Friday, February 10, 2012 2:56 PM
To: Pratt, Sara K
Cc: 'Sara Grewing'
Subject: City of St. Paul

Sara -- Breaking news: the City of St. Paul just moved to dismiss its petition in *Magner v. Gallagher*. (The other side has consented, so the odds are good that the Supreme Court will grant the motion.)

Attached is the City's press release. Please give me a call if you have any questions.

City Attorney Sara sends her best regards. I know the City looks forward to working with you and your colleagues at HUD on all civil rights issues.

Have a good weekend!

David Lillehaug
Fredrikson & Byron, P.A.
612 [REDACTED]

REDACTED

From: Pratt, Sara K [REDACTED]
Sent: Friday, December 09, 2011 10:47 AM
To: Lillehaug, David; 'Sara.Greuning [REDACTED]'
Subject: Follow up to our discussion

Thank you for a helpful discussion this morning. I look forward to meeting you on Tuesday at 9:00 am. My direct contact information is below and my blackberry number is 202 [REDACTED]

HUD's new business registry website
<http://portal.hud.gov/hudportal/HUD?src=/section3businessregistry>

Sara

Sara K. Pratt
Deputy Assistant Secretary for Enforcement and Programs
Department of Housing and Urban Development
451 Seventh Street, SW
Room [REDACTED]
Washington, D.C. 20410
202. [REDACTED] (direct line)

REDACTED

From: Tom Perez [REDACTED]@verizon.net
Sent: Saturday, December 10, 2011 10:03 PM
To: Lillehaug, David
Subject: Re: From CAO-Copy4

David

I am in the office Monday and then out the rest of the week. If your clients want to stop in Monday late afternoon, early evening, I am happy to do my best to answer questions, and assuage at least some concerns.

tom

On Dec 10, 2011, at 2:49 PM, Lillehaug, David wrote:

>

>

> ----- Original Message -----

> From: [REDACTED]@cl.stpaul.mn.us [mailto:[REDACTED]@cl.stpaul.mn.us]

> Sent: Saturday, December 10, 2011 08:50 AM

> To: Lillehaug, David

> Subject: From CAO-Copy4

>

> <SKMBT_C65011121014490.pdf>