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May 6, 2013

The Honorable Representative Jim Jordan
Chairman
Subcommittee on Economic Growth, Job Creation & Regulatory Affairs
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Representative Matt Cartwright
Ranking Minority Member
Subcommittee on Economic Growth, Job Creation & Regulatory Affairs
Committee on Oversight and Government Reform
2471 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Representative Trent Franks
Chairman
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Representative Jerold Nadler
Ranking Minority Member
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
B-351 Rayburn House Office Building
Washington, D.C. 20515

Re: Declination by the United States Department of Justice in *United States* ex rel. *Newell v. City of St. Paul*, Civil No. 09-SC-001177 (D.Minn.)

Dear Messrs. Jordan, Cartwright, Franks, and Nadler:

I am writing in advance of the Committee's May 7, 2013 hearing regarding the Department of Justice's declination of the False Claims Act *qui tam* cases, *United States* ex rel. *Newell v. City of St. Paul, Minnesota*, Civil No. 09-SC-001177 (D.Minn.), and *United States* ex rel. *Ellis v. City of St. Paul*, Civil No. 11-CV-0416 (D.Minn.), to provide my comments on certain of the conclusions reached in the Joint Staff Report, *DOJ's* Quid Pro Quo *with St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law* (April 15, 2013). I appreciate the opportunity to address the Committee.

For most of my twenty years practicing law, I have handled investigations and cases brought under the False Claims Act, 31 U.S.C. §§ 3729, *et seq.* Early in my career, I served for eight years as a Trial Attorney in the Fraud Section of the Commercial Litigation Branch of the Department of Justice's Civil Division. In that capacity, I handled dozens of False Claims Act cases involving numerous federal agencies, including the Department of Housing and Urban Development (HUD). I left the Fraud Section to be a prosecutor in the Criminal Division where, in 2005 I received a John Marshall Award from the Department of Justice, and the National Exploited Children's Award from the National Center for Missing and Exploited Children.

That same year, I joined Covington & Burling LLP, initially focusing on the defense of False Claims Act investigations and suits. I started my own firm in 2009, in part to have the flexibility of

representing whistleblower clients as well as defendants. I have filed numerous *qui tam* suits, and I am now litigating some of those, including a major case against a long-term care pharmacy for prescriptions reimbursed by Medicare Part D. In addition to my work on these cases, I have made presentations on the False Claims Act and related statutes, and I write the best-read legal blog on the topic, www.falseclaimscounsel.com.

I have had no professional involvement in the *Newell* or *Ellis* cases, and have not spoken about them with any of the persons described in the Joint Staff Report. I have, however, reviewed that Report, its attached documents, the Democratic Staff's Report on the same topic (April 14, 2013), and certain of the documents publicly available on the District Court for the District of Minnesota's PACER website.

As one of the few attorneys in private practice with significant Department of Justice experience who represents both defendants and whistleblowers, I read these documents with great interest. With all due respect to the Joint Staff, however, I feel compelled to write to take issue with certain of their factual conclusions. I will limit my comments to those that I feel are critical to assessing the conduct of Department of Justice officials involved in these cases.

Merits of the Newell *case*

Because the documents do not treat the *Ellis* case as a significant factor in the Department's decision-making, I have not undertaken to analyze the merits of that matter. Let me also preface my remarks by stating that I do not intend this letter to disparage Mr. Newell or his counsel. The Department of Justice appears to have largely corroborated his allegations and his *qui tam* complaint is well-drafted.

I disagree, however, with the Joint Staff's conclusion that "The Department of Justice Sacrificed a Strong Case Alleging a 'Particularly Egregious Example of Fraud." *See* Joint Staff Report at 37. Instead, I believe that the documents evidence significant bases for skepticism by Department of Justice officials.

The Joint Staff's conclusion rests in large part on its rejection of statements by Department of Justice supervisors that whether or not to intervene in *Newell* was a "close call," and its reliance instead on earlier positions in support of intervention taken by the trial attorney and others assigned to the case. But the draft memorandum urging intervention acknowledges several significant potential problems with the case – problems that clearly rebut the conclusion that the case was a "strong" one, as the Joint Staff asserts.

Newell's most prominent weakness was the potential difficulty in proving that St. Paul's non-compliance with Section 3 was material to the decision of HUD to make grant payments. The trial attorney handling the case candidly admitted that there was litigation risk regarding materiality:

> 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 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 HUD's 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 comments), and that it is unfair to require a City to make 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.

Draft Intervention Memo at 7. Although the trial attorney was optimistic that these arguments could be overcome, there can be no doubt that significant concerns about proving materiality of the City's noncompliance were evident long before the alleged *quid pro quo*.

Reliability of the Draft Intervention Memorandum's Damages Calculation

I also respectfully disagree with the Joint Staff's assertion that the Department of Justice's decision to intervene in the case cost taxpayers a significant opportunity to recover over $200 million. *See* Joint Staff Report at 61. This, too, significantly overstates the strength of *Newell*.

The draft intervention memo very briefly describes only one damages theory, which the trial attorney characterizes as "aggressive": that the damages under the False Claims Act were the entire amount of the Section 3 construction project grants (which was some unknown fraction of the overall $86 million in HUD grants). That "aggressive" theory is an unsettled area of law, however, and the Joint Staff's reliance on it in calculating the cost to taxpayers of declining to intervene in the suit is dubious.

For much of the False Claims Act's 150-year history, computing damages was relatively straightforward: the fact-finder calculated the difference between what the Government actually paid and the value of the goods or services it received. *See United States v. Bornstein*, 423 U.S. 303, 316 n. 13 (1976). When a third-party, and not the Government is the intended recipient of the tangible benefit from the outlay of federal funds, this approach arguably breaks down. The traditional "benefit-of-the-bargain" approach is strained further when the false claim relates not to quality of the goods or services received by the third-party, but to the fund recipient's satisfaction of some other condition intended to benefit society more generally. The *Newell* case falls into this category: the city receives Section 3 funds to improve housing, and allegedly false claims relate to its compliance with a condition unrelated to the quality of that work.

The Courts have struggled with these issues, and four Courts of Appeals – for the Second,[1] Fifth,[2] Seventh,[3] and Ninth[4] Circuits – have chosen to follow the "aggressive" approach the trial attorney described. The District of Columbia[5] and Third[6] Circuits instead continue to employ the "benefit-of-the-bargain" approach, which might result in a very low damages calculation in a case such as *Newell*. I am not aware of any controlling precedent on this issue in the Eighth Circuit, in whose jurisdiction *Newell* was filed.

Given the unsettled nature of this area and the imprecision in the Draft Intervention Memorandum's damages figure, $86 million represented only a theoretical upper limit on the Government's damages for St. Paul's alleged violations. The Department of Justice trial attorney acknowledged the limitations of this approach, writing in the Draft Intervention Memorandum: "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." *Id.* at 5.

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[1] *See United States* ex rel. *Feldman v. van Gorp*, 697 F.3d 78, 86-91 (2d Cir. 2012).
[2] *See United States* ex rel. *Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 473 (5th Cir. 2009) (cited in the Draft Intervention Memorandum at 5).
[3] *See United States v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008).
[4] *See United States v. Mackby*, 339 F.3d 1013, 1018-19 (9th Cir. 2003).
[5] *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1279 (D.C.Cir. 2010).
[6] *United States v. Hibbs*, 568 F.3d 347 (3rd Cir. 2007).

Even if the Department of Justice had intervened and secured a judgment against the City on False Claims Act liability, moreover, there is a significant risk that the District Court or the Court of Appeals for the Eighth Circuit would, under the facts of this case (including HUD's apparent disregard of Section 3 enforcement, and the defendant's status as a taxpayer-funded entity) reject the "aggressive" approach of seeking to recoup all Section 3 grants. Such a decision would hinder the Government and relators in future False Claims Act cases in the Eighth Circuit's jurisdiction.

The Risk of Newell's *Dismissal on Public Disclosure Grounds*

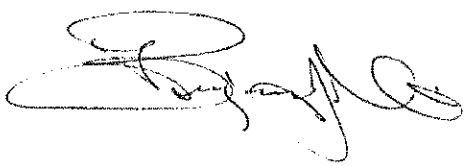
The Joint Staff Report also criticizes the Department's declination on the grounds that it exposed Mr. Newell to dismissal of his *qui tam* suit on grounds that the Court lacked jurisdiction under the False Claims Act's public disclosure bar. *See* Joint Staff Report at 58; 31 U.S.C. § 3730(e)(4)(A) (2010). I respectfully disagree with the premise of this criticism, which is that the Department of Justice does, or should, evaluate the potential success of a motion to dismiss on public disclosure grounds.

In my experience, both at the Department and in private practice, the Government does not typically investigate the common grounds on which declined qui tam suits founder: public disclosure and particularity under Fed. R. Civ. P. 9(b). Although I, as a whistleblower attorney, would prefer that the Department investigate these possible grounds for dismissal prior to deciding whether to decline or intervene a case, there are sound reasons for not doing so: the Department of Justice has inadequate resources to investigate the merits of the fraud allegations; routinely investigating the public disclosures that might lead to the dismissal of a declined *qui tam* would ultimately detract from the Department's ability to carry out the False Claims Act's core mission of detecting and remedying fraud.

Certainly no one has done more than Senator Grassley to encourage whistleblowers to assist the Government in uprooting fraud. The recent amendment to the public disclosure bar demonstrates well his interest in improving enforcement of the Act. I nevertheless believe that Congress could best improve whistleblowers' involvement in fraud enforcement by addressing more significant problems besetting them (such as the application of Fed. R. Civ. P. 9(b) to False Claims Act complaints, which is by far the most common grounds for dismissal of declined *qui tam* cases)

In conclusion, after reviewing the publicly available materials on the Department of Justice's decision to decline to intervene in *United States* ex rel. *Newell v. City of St. Paul*, I believe that Department officials acted well within the scope of their discretion in declining to intervene in that case. I must respectfully disagree with the contrary conclusions the Joint Staff reached in its Report. I appreciate your consideration.

Truly yours,



Benjamin J. Vernia