Sovereign Bank

v.

Fidelity and Deposit Company of Maryland

Case No. 002834 (May Term, 2008)
Court of Common Pleas of Philadelphia County

Report of Ronald H. Clark, Ph.D., J.D.
10/28/09

SIGNATURE:_____

I. Introduction

I have been retained on behalf of defendant Fidelity and Deposit Company of Maryland ("Fidelity") by the law firm of Hangley Aronchick Segal & Pudlin to offer an expert opinion relating to the case of *Sovereign Bank v. Fidelity and Deposit Company of Maryland,* Court of Common Pleas of Philadelphia County, May Term, 2008, Case No. 002834. Specifically, I was requested to offer an expert opinion regarding the reasonableness of the settlement negotiated by Sovereign Bank (the plaintiff in this action) ("the bank") in an action brought against it (as successor in interest to Main Street Bank) by the United States Department of Justice ("DOJ"), under the federal False Claims Act, 31 U.S.C. §§ 3729-33 ("FCA"), relating to a Small Business Administration ("SBA") form submitted to the government.[1/] The government alleged the form was knowingly submitted by Sovereign Bank and contained misleading and incomplete information which fraudulently caused the government to advance funds to a third party in connection with a SBA program.

After addressing the background of the present litigation and my own experience with the FCA, and offering a brief summary of my conclusions, my report addresses two major topics. First, I provide an assessment of the reasonableness of the settlement that Sovereign Bank negotiated in its FCA case with the government. Next, I discuss my disagreements with some of the

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[1/] *United States v. Torkelsen et al.*, Civil Action No. 6-CV-05674 (JG), E.D.Pa.(filed 12/29/08).

contentions asserted by Marc Raspanti, Esq., plaintiff's expert, in his report.

II. Nature of the Present Litigation

Plaintiff's expert, Marc Raspanti, Esq., has generally discussed the background facts to the present litigation in his expert's report at pages 1-10.[2/] I will not repeat that exposition but will add some additional facts throughout my report. I do believe, however, that Mr. Raspanti's recounting of facts is in error in several regards which I mention now. First, on page 2 of his report, Mr. Raspanti asserts that Mr. Morrow, who signed off on the pertinent SBA form, "knew" it was going to be submitted to the SBA. However, in his deposition (at 123), Mr. Morrow testified that he only "assumed" the form would be submitted, since the form had no instructions or cover letter from the SBA attached to it.

Secondly, Mr. Raspanti at pages 8 & 22 of his report, discusses a January 24, 2007, a Bank of America (as successor to Summit Bank) settlement with the United States. Mr. Raspanti is in error in several regards in his analysis. First, the settlement agreement does not relate to "false claims" but to false documents that allegedly had been submitted. Next, Mr. Raspanti assumes that SBA forms submitted by Summit were also SBA Forms 860, but the settlement agreement (SOV-000197-205) nowhere confirms this assumption. Nonetheless, Mr.Raspanti concludes (at page 22) that the two cases involved "virtually identical False Claims Act allegations." As I discuss below (at 31-2), I decline to engage in this manner of

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[2/] For a detailed account of the alleged Torkelsen SBA frauds, see Ms. Golub's May 16, 2007 memorandum, Golub depo. Ex. 14, at 1-12.

speculation.

Finally, Mr. Raspanti on page 9 of his report discusses the June 18, 2009, consent judgment between Mr. Torkelsen and the government. Mr. Raspanti simply assumes that the SBA form at issue in this settlement was another SBA Form 860. But the settlement itself identifies no precise SBA form. Moreover, many alleged illegal actions in addition to the submission of a false SBA form were identified in the settlement agreement. *See* the settlement agreement at paragraph II, C [Torkelsen Depo. Ex. 4]. Nor is Mr. Raspanti correct in pointing to Mr. Torkelsen's statement of offense and plea colloquy. Nowhere in either document is the Sovereign Bank Form 860 identified. Moreover, as Mr. Torkelsen made abundantly clear in his deposition (at 65, 74, 101 & 103), his prosecution, plea agreement, and admission of offense related only to a SBA Form 856, not a SBA Form 860 like the one signed off on by Mr. Morrow which was the centerpiece of the FCA action.[3/] In fact, Mr. Torkelsen testified that the only form even mentioned to him in connection with his criminal action and plea was the Form 856 he had submitted.

III. Background and Pertinent Experience

In December, 2008, I retired from my partnership in the health, government contracts and litigation groups at Arent Fox LLP in Washington, D.C. I joined

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[3/] This confusion of forms was the same oversight manifested by Sovereign Bank, when it took Mr. Torkelsen's deposition. *See* 100-101. The bank also appeared to misunderstand the government's FCA theory. *See* Cavey depo., 184.

Arent Fox in 1995 after 15 years in the United States Department of Justice, including two years as an Assistant United States Attorney ("AUSA") in the District of New Jersey (1982-84), and 11 years (1984-1995) as Trial Attorney and later Senior Trial Counsel in the Civil Fraud Section, Commercial Litigation Branch, Civil Division, at Main Justice in Washington. This is the DOJ component that brought the FCA action against Sovereign Bank. I first began working with the FCA while an AUSA. When I shifted to Washington, I worked almost exclusively on FCA cases relating to all manner of governmental programs. Principally I was involved in defense procurement fraud cases and Medicare cases, although I also handled FCA cases relating to the Departments of Education, Agriculture, Veterans Affairs and other agencies, including the SBA. In 1986, I participated in the amendment of the FCA, including helping to redraft one section.

Beginning on or about 1988, I undertook initial supervision of all health care fraud cases in the Civil Fraud Section, including cases initiated by the Department as well as an increasing number of *qui tam* cases. As part of my responsibilities as Senior Trial Counsel, I supervised cases handled by the various U.S. Attorneys' offices across the nation, trained Assistant U.S. Attorneys in a number of offices, and helped write the internal Civil Division FCA manual that is used by United States Attorneys' offices and Main Justice.

An important dimension of my responsibilities as Senior Trial Counsel involved the evaluation of new FCA cases, whether originated by the Department or filed by *qui tam* relators. That process involved assessing the alleged violation of

government rules and regulations, the damages accruing to the government as a result, and the applicability of the FCA's treble damages and penalty provisions. Based upon this analysis, I formulated recommendations to my superiors and to the appropriate agency Inspector General ("OIG").

As soon as a *qui tam* complaint arrived alleging fraud, it was assigned for evaluation to one of the fraud section's Trial Attorneys I supervised. Almost immediately, copies of the pertinent materials were dispatched to the appropriate OIG, because it was that agency that usually conducted the investigation leading to a recommendation regarding whether the United States should intervene in the action. On occasion, investigative resources from other agencies were utilized, including the FBI, Defense Criminal Investigative Service, and the Office of Management and Budget. At any point during my tenure as Senior Trial Counsel, I coordinated approximately 90-100 cases with OIGs.

Following the investigation stage, the OIG would make a recommendation as to whether the United States should intervene in the case. OIG also, as the client agency, would submit recommendations about proposed settlements or complaints. During my tenure, I received four Health and Human Services OIG Integrity Awards based on my work with that office in prosecuting healthcare fraud cases. I also received commendation letters from several other agencies as well.

If a case were being negotiated with the actual or potential defendant(s), I would often participate with the Trial Attorneys and Assistant U.S. Attorneys assigned to the matter. I would oversee the drafting of the "suit authorization"

memorandum when litigation was contemplated. If a proposed settlement were reached, I oversaw all memos that would go forward seeking settlement approval. I handled my own cases as well, which required me to analyze the potential damages to the government, evaluate acceptable settlement options, and devise appropriate litigation strategy. During my period at DOJ, I handled several cases relating to fraud against the SBA, and spent considerable time at the SBA headquarters in Washington.

One of my primary responsibilities as Senior Trial Counsel was to train Civil Fraud Section Trial Attorneys and AUSA's in how to evaluate FCA fraud cases, assess government losses, and develop negotiating positions. In order to effectively negotiate a settlement, or secure authorization to litigate a case, it was essential that DOJ personnel accurately analyze a potential case, both as to legal theories as well as to what would be necessary to make the government whole.

In April 1995, I joined Arent Fox LLP, first as Counsel and beginning in 1997 as an equity partner. My practice was almost exclusively related to defensive FCA and *qui tam* matters. Most of my FCA cases involved healthcare and government contracting issues. Once again, my primary responsibilities in representing defendants included assessing potential damages the government might seek to recover, resolving regulatory issues pertaining to pertinent statutes and policies, and developing litigation strategies. Since many of my cases involved negotiations with the Department of Justice, I maintained contact with current DOJ thinking regarding theories of liability, methods for computing FCA damages and penalties,

and new variations of FCA legal and negotiation strategies. In fact, with the exception of Mr. Strauss, I worked with, trained, or have had cases with every one of the DOJ personnel involved in litigating the FCA case against Sovereign Bank.

As a result of both my extensive service in the Department of Justice, and my tenure in private practice since 1995, I am abundantly qualified to address the issues raised in the present litigation. I have a through and well-grounded background in the FCA and DOJ procedures, techniques, and strategies. I have worked with the FCA since 1982 , have written extensively on it, and have personally been involved in the entire range of government fraud matters. Most importantly, for my entire period working with the FCA I have been required to evaluate the financial dimensions to FCA cases–including theories of recovery, losses to the government, and the appropriate role of multiple damages and penalties. And I previously have testified as an expert on FCA damages issues.

Attached to my report, as **Exhibit A**, is my current webpage resume, including FCA web articles, reported FCA-related federal decisions, and my general background. Also included is a listing of my published articles, book chapters and book, including those relating to the FCA.[4/]

IV. Summary of Conclusions

I discuss the specific support for my opinions in detail below. However, it seems appropriate at this point to state my overall conclusion as a preface to the more

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[4/] My fees for this assignment are $520 per hour.

detailed discussion that follows. I have attached as **Exhibit B** a listing of the materials I consulted in formulating my opinions.

The central issue that I focused on was the reasonableness of the settlement obtained by Sovereign Bank in the FCA case in light of my own experience both defending and prosecuting FCA cases.

The issue is did Sovereign Bank fail to achieve a reasonable settlement for the bank. I believe that Sovereign Bank did not attain a reasonable settlement outcome in the FCA case. I believe the bank's strategy was flawed and that had it employed a more appropriate approach in dealing with DOJ, it is likely the bank could have achieved a substantially better result, including possible dismissal of the case. In my opinion, the bank made a crucial miscalculation is directing a complicated FCA case with insufficient expertise and experience. Based on my years in the Civil Fraud Section, as well as 13 years defending cases against DOJ, FCA defendants need to retain counsel who are experienced in this highly technical area.

While I am familiar with Mr. Raspanti's reputation as a relator or whistleblower's attorney, I could locate no case in which he represented a defendant in a FCA action.[5/] And that is the key issue here: effective representation of a FCA *defendant*. I have engaged in such representation consistently for the last 13 years. I have written articles on this topic; one is attached as **Exhibit C** to this report. I

[5/] I do understand from Mr. Raspanti's firm webpage that he does represent *criminal* defendants. However, it appears that a major area of his firm's practice is devoted to bringing *qui tam* cases on behalf of relators, *not* defending them.

believe I have a solid basis for offering opinions upon the bank's handling of the FCA litigation.

V. Assessment of Reasonableness of Sovereign Bank's FCA Settlement

After reading the pertinent depositions (and their exhibits), documents produced by Sovereign Bank and Fidelity in this litigation, discovery responses, conducting some legal research, and drawing upon my own experience of 13 years prosecuting FCA cases at DOJ and 14 years of defending them in private practice, the following are the fundamental miscalculations that in my opinion Sovereign Bank committed in defending itself against the government's FCA allegations:

A. Immediately Making a Settlement Offer to DOJ

In his deposition, Mr. Weir recounted that very early in the negotiations he made an offer in settlement of $250,000 to the government.[6/] Later, on September 29, 2006, he increased his offer to $500,000.[7/] Experienced private counsel who deal with DOJ frequently on FCA cases will tell you that putting money on the table at an early stage of the case usually is a poor strategy.[8/] From my own experience at DOJ, having chaired dozens of such meetings with opposing counsel, DOJ tends to

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[6/] Yet, in an December 29, 2006 email to Richard A. Toomey (General Counsel and Executive Vice President of Sovereign Bank), Mr. Deutsch wrote: "I believe that there are numerous factual and legal defenses to the claim..." Deutsch depo., Ex . 10.

[7/] Weir depo., 99, 124.

[8/] Ms. Cavey, who much later reviewed the case for Zurich Insurance Co., was surprised that a dollar amount had been recommended by Sovereign Bank to the government "so quickly." Cavey depo., 66. She opined that this initial offer created a "floor" impacting on subsequent negotiations. *Id.*, 118.

see such an offer as a sign of weakness. This is because many inexperienced defense counsel, when confronted with the penalty and multiple damages provisions of the FCA, as well as a determined DOJ team,[9] just want to get out of the case as quickly as possible.[10] Therefore, such counsel are not contemplating a vigorous defense but just want to buy their client out of difficulty. In my opinion, Sovereign Bank early on made the decision that its sole strategy would be settlement. For example, the bank did not request preparation of a litigation budget at any time.[11] It does not appear to me that the bank seriously prepared to negotiate the case or engage in the usual techniques of negotiating with DOJ. Moreover, it appears that from an early point, Sovereign Bank was so focused on settlement that he never prepared to litigate the case if necessary.[12] As I discuss below, Sovereign Bank never seriously

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[9] I worked with and helped train Pat Davis, the immediate supervisor on the case. I also have had a major case with her while in private practice, Ms. Bentley joined the fraud section after I had departed; but I had a major case with her, involving prolonged negotiations, while I was in private practice. They both are excellent FCA attorneys and tough negotiators. However, both are also open to persuasion if you can make your case. In my case with Ms. Bentley, after many substantive FCA presentations and written memoranda ("white papers"), DOJ significantly reduced its settlement demands and the case was resolved.

[10] In an October 3, 2006 email to Mr. Deutsch (and Blank Rome), Mr. Weir wrote in part: "My inclination is to come to a bottom line as quickly as possible. That is to say, we should tell them what our bottom line is and that our bottom line is not an invitation for them to counter-offer." SOV-000565. This email is interesting in several regards. It demonstrates the determination of Sovereign Bank to achieve an early settlement of the dispute. The statement also manifests the bank's lack of familiarity with DOJ negotiations: it is totally inadvisable to ever assert a "take it or leave it" position because DOJ will "leave it."

[11] Deutsch depo., 62, 65; Pfeiffer depo., 55-56.

[12] For example, I can find no indication that any joint defense agreement was even contemplated with the bank's co-defendants.

contemplated filing a motion to dismiss the FCA complaint, a decision that any experienced FCA defense counsel would consider to be highly ill-advised. The opportunity through trial preparation to develop persuasive arguments that could be employed in negotiations was thereby sacrificed.

B. Failure Seriously to Consider Filing a Motion to Dismiss

Virtually any experienced FCA practitioner will file almost automatically a motion to dismiss a government or whistleblower complaint. I recommend this in my article on defending *qui tam* actions. *See* **Exhibit C** attached hereto. On January 10, 2007, Mr. Weir had a telephone conversation with Mr. Strauss. The DOJ attorney inquired as to whether Mr. Weir wanted to set a stipulated briefing schedule. Mr. Weir was puzzled by the question. "I asked what he was talking about and was told that he thought we would be filing motions either for greater specificity or to dismiss, and he was looking to get a briefing schedule in place."[13/]

As Mr. Strauss' comment indicates, the most frequently employed predicate for such a motion is Rule 9(b) of the Federal Rules of Civil Procedure. It specifies that any allegations of fraud must "allege with particularity the circumstances constituting fraud...." How much specific and detailed information a district judge will consider adequate varies. Usually what happens is that if the court grants a 9(b) motion to dismiss, it will allow the government to replead its complaint. However, if again the amended complaint fails to pass muster, in my experience the

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[13/] Weir depo. Ex. 8: SOV-000363.

district judge then becomes amenable to the argument that the complaint should be dismissed *with prejudice* because there is no way the government will be able to satisfy the 9(b) particularity standard. Many FCA complaints are dismissed in just this way.[14/] Clearly the government recognized some Rule 9(b) vulnerability existed in its complaint and anticipated the customary filing of a Rule 9(b) motion. In my opinion, the DOJ complaint contains a number of possible 9(b) targets.[15/]

The failure of Sovereign Bank to file a motion to dismiss was particularly critical because, as I explain below at 16-18, it could well be argued that the absence of any certification executed by Mr. Morrow on the Form 860 meant that Sovereign Bank had committed no FCA violation. Had the district court agreed in passing upon a motion to dismiss, the case would have been terminated at that point.

Blank Rome also suggested an ingenious legal argument that, if successful, could equally have terminated the litigation at the motion to dismiss stage. As explained in their memorandum to Mr. Weir, "the security interest that [Sovereign Bank] allegedly failed to disclose was invalid at the time the form was submitted to the SBA, and the failure to disclose the security interest did not render the SBA Form 860 false or misleading."[16/] This was because neither Mr. Torkelsen nor Acorn

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[14/] *See, e.g.*, one of my cases: *United States ex rel. King v. Alcon Laboratories,* 232 F.R.D. 568 (N.D. Tex. 2005).

[15/] *See, e.g.*, FCA complaint (Ex. C to the complaint in this action), ¶¶ 30-34, 36, 40, 51, 75, 84-86, 89-93, 98, 100, 101, and 104.

[16/] *See* SOV-000468.

Technical Fund had secured SBA permission to pledge Acorn's assets. Therefore, the loan guaranty was void *ab initio*. Blank Rome buttressed its argument by quoting from a decision in a related case by the very same judge to which the FCA case was assigned.[17] If correct, this contention would have removed ¶ 99 of the FCA complaint, the key allegation against the bank.

Despite the availability of these two arguments which might well have terminated the case, Ms. Golub testified that she was never asked to prepare a memo on the viability of filing a motion to dismiss.[18] I discuss several other possible grounds for motions to dismiss and/or summary judgment later in this report. Sovereign Bank, however, declined to contemplate such motions.[19]

C. Lack of Familiarity with DOJ Negotiation Techniques

There is an informal established "protocol" for negotiations with the Civil Fraud Section, well known to experienced practitioners.[20] First, DOJ contacts the proposed defendant for preliminary negotiations prior to filing a complaint. This is a crucial time because what usually occurs with experienced counsel at this point is an exchange of "white papers" and other materials to try and convince DOJ that its position is erroneous. I was talked out of asserting FCA allegations while I was at DOJ; I have persuaded DOJ to eliminate or narrow proposed cases during my period

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[17] *United States v. Acorn Tech. Fund, L.P.*, 295 F. Supp.2d 494, 513 (E.D. Pa. 2003).

[18] Golub depo., 101.

[19] Weir depo., 66, 82-83.

[20] I am speaking here only of Main Justice, not the various U.S. Attorneys' offices.

in private practice. I could locate no white paper analysis submitted to DOJ by Sovereign Bank.[21] Instead, by immediately putting money on the table (as discussed above), Sovereign Bank in my opinion short-circuited the process and weakened its bargaining position.

D. Additional FCA Defenses that were not Recognized by Sovereign Bank

There are several further applicable FCA defenses which Sovereign Bank never researched or employed in negotiating with DOJ. These arguments could have been utilized in white papers and other negotiations with DOJ, or in motions to dismiss or for summary judgment.[22]

1. Mistake

It is well established that mistake cannot serve as the foundation for a violation of the FCA. "The Act is concerned with ferreting out 'wrongdoing', not ... errors." *Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992). *See also United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) ("innocent mistake" is a defense). "Innocent mistakes or negligence are not actionable." *Hindo v. University of Health Sciences/The Chicago Medical School*, 65

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[21] It is evident from the email exchanges between the Weir firm and Blank Rome, that the Blank Rome attorneys pushed for such a memorandum to be developed and submitted to the government. While Mr. Weir indicated in response that a memorandum was being prepared, the bank apparently made the decision not to submit it to DOJ. *See, e.g.*, SOV-0002363, 2392, 2407-8. Thus, a vital opportunity to persuade DOJ was squandered away.

[22] I am surprised that the bank rejected suggestions for filing a motion to dismiss or even, ultimately, one for summary judgment, because absolutely no discovery was done by the bank which could serve as the basis for reaching such a decision. Weir depo., 82, 122, 195.

F.3d 608, 613 (7th Cir. 1995).

Based on Mr. Morrow's deposition testimony, in my opinion, a good argument could be made that he simply mistakenly thought he could modify the form and return it to Mr. Torkelsen. Mr. Morrow testified that he did not recognize any obligation to disclose encumbrances on the modified form.[23/] He further testified he had no cover letter from the SBA with instructions; had received no training from his employer in dealing with government forms; that the bank had no rules relating to filling out such forms; he had never seen any SBA form before; that the form appeared to be "generic" to him; that he felt inserting "NA" or "none" in some blanks would possibly be misleading; and Mr. Torkelsen gave him no instructions as to how to fill out the form.[24/]

2. Absence of certification on the SBA form

The SBA Form 860 at issue contains no certification executed by Mr. Morrow. And this is quite important in the world of FCA litigation. In fact, Mr. Weir noticed this absence, but chose not to pursue it.[25/] It is well established that the mere failure to comply with administrative regulations or statutes does not constitute a violation of the FCA. *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265-67 (9th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997) ("Violations of laws, rules, or regulations

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[23/] Morrow depo., 41, 51, 56.

[24/] *Id.*, 19, 23, 37, 52-3, 55, 58-9, 63, 121-2, 126. *See also,* Torkelsen depo., 41-43, 93, 99, 102.

[25/] Weir depo., 120. Mr. Weir characterized the form as a "routine audit request."

alone do not create a cause of action under the FCA"). Otherwise, every breach of a federal contract would be transformed into a FCA violation.

In *Hopper*, the Ninth Circuit held it was "the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit." 91 F.3d at 1266 (emphasis in original). The District Court granted summary judgment to the defendant upon finding that it had made no certification of compliance with regulations to the government and no such compliance was a prerequisite to receiving payment from the government. *Id.* at 1267. *See also United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 463 (9th Cir. 1999), *cert. denied*, 530 U.S. 1228 (2000) (reasonableness of interpretation of "technical and complex" federal regulations may be relevant to determining "knowing" submission of false claim).

It is well recognized that only if an express written certification has been made, falsely attesting to compliance with particular regulations, statutes, or rules, and such certification is necessary for payment, has a viable claim been asserted or a fraudulent document submitted in violation of the FCA. *Mikes v. Strauss*, 274 F.3d 687, 696-99 (2d Cir. 2001). No such certification appears on the pertinent Form 860.[26/] The fact that Mr. Morrow may have filled out the Form 860 in a manner that violated SBA rules or regulations (if any) directing how the form was to be executed, cannot standing alone constitute a violation of the FCA. In my opinion this would

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[26/] A copy of the document is attached to Deutsch depo. Ex. 2 at SOV-000234-5.

have been an excellent argument to raise with DOJ in negotiations or upon which to predicate a motion to dismiss. It appears the bank's determination to resolve the case via early settlement foreclosed it from exploring thoroughly this and other possible defenses.

3. Materiality

Almost every circuit that has considered the issue has held that materiality is an element of the FCA, even though it is not articulated in the statute. That is, the government would have to prove that the Form 860 had an impact on the payment decisions made by the SBA. Several considerations lead me to believe this might be a possible weakness in the government's case.

For one thing, nobody at SBA ever contacted Mr. Morrow to discuss the form which clearly he had modified by placing the caption across the top.[27/] If SBA relied on the form, and it was incorrectly filled out, it seems likely SBA would have contacted Mr. Morrow. In addition, my own experience representing SBA while at DOJ indicated that while its employees are dedicated federal servants, often the mass of paper flow and schedule demands overwhelmed them and they did not review applications as closely as they might. Finally, Mr. Weir testified in his deposition that Progress Bank subsequent to the submission of Mr. Morrow's Form 860 had itself submitted two further Forms 860 in connection with Mr. Torkelsen, neither of which contained a Morrow-like disclaimer and which also left portions of

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[27/] Morrow depo., 52-53; 59.

the forms blank.[28] Which forms did the SBA rely upon, that from Mr. Morrow or those from Progress Bank? In my opinion, this issue should have been somewhat vigorously pursued in negotiations with the government..

4. Causation

Causation is another element the government must prove to sustain an allegation under the FCA. *United States v. Eghbal*, 548 F.3d 1281, 1284-5 (9th Cir. 2008), *cert. denied*, 2009 WL 1725899 (Oct. 05, 2009). While what the appropriate test of causation is disputed, the Third Circuit held that false statements in applying for a Government grant are sufficient to establish causation. *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402, 417 (3d Cir. 1999), *cert. denied*, 531 U.S. 880 (2000). Ms. Golub alluded to causation in several key strategy memos she authored for the bank team.[29] Yet there is a real question of how thoroughly the bank researched this issue. [30] In my opinion, causation was a real issue in the Sovereign Bank litigation.[31] The amount of material that was submitted to the SBA in connection with the Torkelsen companies' application was substantial. Could the government demonstrate that the Morrow Form 860 really caused, even in part, the

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[28] Weir depo., 88-89. *See also,* Deutsch depo., 79, 170-71. If accurate, this contention would also raise substantial causation issues.

[29] See below at 24-27.

[30] As Mr. Deutsch testified, "Yes, I think they had some research into it. But I don't think that we had nailed down–nailed it down from all sides." Deutsch depo., 98; *see also,* 122; 133; 210.

[31] Nonetheless, when DOJ made the rather surprising assertion to Sovereign Bank that "superceding cause" was not accepted under the FCA, apparently the bank chose not to challenge that statement or ask for supporting case authority. Deutsch depo., 171-72.

application to be approved and the government to suffer damages?[32] As Ms. Golub recognized, causation in this case merges into materiality. Yet, I see no evidence that causation was argued vigorously with DOJ.[33] Instead, the focus remained almost exclusively on an early settlement.[34]

E. Sovereign Bank's Misinterpretation of the Bank of America Settlement

Prior to the DOJ case against Sovereign Bank, a similar case had been resolved with the Bank of America on January 24th, 2007. That settlement (SOV-000197) was in the amount of $1,100,000. Due to the lack of FCA and Main Justice experience which hampered Sovereign Bank, including its assistant general counsel Mr. Deutsch,[35] the Bank of America settlement generated confusion within the bank's team. For example, Mr. Deutsch thought a provision of the settlement

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[32] Mr. Weir had some interesting contentions in this regard. *See* Weir depo., 91-93. It is not clear how vigorously he pressed his argument. Moreover, in an April 27, 2007, email to Blank Rome, Mr. Weir states: "Interesting fact just came out in our negotiations. The SBA filed [sic] out the form 860, not Torkelson." This is the only reference I recall to this contention; it clearly relates to causation. SOV-002314.

[33] For example, when Mr. Strauss laid out the government's causation theory in an September 22, 2006 email to Mr. Weir, despite its obvious weaknesses, I can find no indication that the bank challenged this theory or demanded that Mr. Strauss support his theory with appropriate case authority. *See* SOV-000578-9.

[34] Ms. Cavey of Zurich Insurance Co. made several references to causation issues in her deposition testimony (at 102; 184-85; 201). However, by the point she learned the facts relating to the Sovereign Bank settlement, the negotiations were near completion. *See* Pfeiffer depo., 43-44; 50-51; 61-63; 66-83; 87-88, and Pfeiffer depo. Exs. 8; 10; 12; 14-20. Or, as Robert Eblin of Bailey Cavalieri LLC, counsel to Fidelity, characterized the situation in an October 16, 2007 letter to Mr. Weir, the settlement was presented to Fidelity "as a *fait accompli*." F&D 0151.

[35] Deutsch depo., 36, 47, 96, 122, 145 (mistaken assumption re DOJ procedure).

established a floor for related settlements, such as the Sovereign Bank case.[36/] Such a provision would be contrary to DOJ policy; there is no such provision in the Bank of America settlement.

The bank also became confused when confronted with DOJ's argument that it felt whoever settled a matter first should get the best deal. According to Mr. Weir's testimony, Trial Attorney Jordan Strauss used this argument to contend that Sovereign Bank would have to pay more in settlement than B of A.[37/] Unfortunately, the bank was not familiar enough with DOJ practices to counter with the argument that this policy *only* applied in the *same* case as to multiple defendants. Bank of America was a separate case, so the policy was inapplicable. Unfortunately, the bank proceeded under the incorrect assumption that Sovereign Bank would have to exceed the Bank of America settlement amount to resolve its case. As a result, the bank forfeited an opportunity to defuse a key DOJ contention and decrease its eventual settlement obligation.

F. Sovereign Bank's Lack of Knowledge Regarding DOJ Litigation Practices

Sovereign Bank being unacquainted with DOJ and its practices made several assumptions which in my opinion adversely affected its negotiation position. For example, Mr. Weir continually advised his client that settlement was preferable because if a trial eventually resulted, it would be difficult to persuade a jury of the

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[36/] Deutsch depo., 188-89.

[37/] Weir depo., 94.

bank's position.[38] Mr. Weir did not know that seldom does DOJ request a jury trial in a FCA case which it initiates (as contrasted with a *qui tam* case). I never asked for a jury trial in any case I had while at DOJ. The feeling there was the issues were too complicated for a jury and a judicial determination would be superior. And in fact when DOJ filed its complaint in December of 2006, it did not request a jury trial.[39]

Sovereign Bank in my opinion also overestimated DOJ's proclivity for actually trying FCA cases. It appears Blank Rome tried to point this out to the bank,[40] while arguing that the government's case was weak, but the bank apparently rejected this advice. The Fraud Section always is overwhelmed with cases it must handle. The number of *qui tam* cases in particular continues to grow exponentially. DOJ attorneys are, therefore, encouraged to settle cases, and not get involved in extensive trials which would consume their energies for long periods. Blank Rome also recognized this consideration as well.[41] Very few FCA cases ever actually go to

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[38] *See* Deutsch depo., 70, 193, 195. Sovereign Bank was perhaps overly pessimistic about its chances in front of a jury. For example, Mr. Weir recounted in his deposition one jury strategy I thought held much promise: the "truly innocent third party" argument. Weir depo., 147. That is, Sovereign Bank had nothing to do with the Morrow form 860; it was only a defendant because subsequently it had purchased some Main Street Bank branches.

[39] *See* DOJ's complaint, the E.D.Pa. docket sheet, and the Cavey depo., 76.

[40] *See*, e.g., SOV-0002430.

[41] *Id.*, SOV-002430-31.

trial in my experience.[42/]

Finally, any experienced FCA counsel will tell you never, but never, to refer to a settlement offer as "nuisance value" or characterize the case as a "nuisance law suit." No DOJ action can be taken without extensive memos having been written and approved up the line of senior supervisors. These suit memos articulate facts, law and judgment which DOJ believes support institution of an action. To suggest that a case is just a "nuisance" action and that an offer is just for "nuisance value," is the quickest way I know of to see DOJ's settlement demands escalate and a defendant's chances of ending up in court become enhanced. Yet, this is exactly what Sovereign Bank did while negotiating with DOJ.[43/]

G. Underestimation of Effectiveness of Mr. Morrow as a Witness

In my opinion, Sovereign Bank substantially underestimated the impact of Mr. Morrow as a witness. This may have resulted from the fact that the bank only interviewed Mr. Morrow once, and that was by telephone.[44/] It also may have resulted from the bank's faulty assumption that if the matter went to trial, it would be before a jury. What is most puzzling is that both Mr. Weir and Ms. Golub were most favorably impressed by Mr. Morrow during his interview. As Mr. Weir

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[42/] Moreover the fact that Mr. Strauss, a more junior trial attorney, assumed responsibility from Ms. Bentley for running the case is a further indication in my opinion that DOJ was not eager to try the case in court.

[43/] Weir depo, 95.

[44/] Weir depo., 73; Golub depo., 61; Weir depo. Ex. 2.

recounted: "...he was being candid with us, that he was being forthright and honest, and that he had a fairly good recollection of what has transpired. And he was able to communicate to me in an articulate fashion the context in which these events had occurred and what his intentions were, what his thought process was, and why he did what he did."[45/]

I found Mr. Morrow to be a capable witness as well in his deposition.[46/] In my opinion, Mr. Weir could have utilized Mr. Morrow to his client's benefit in the negotiations. This is a tactic I often employed when negotiating with DOJ–let them question a key player to set their concerns at rest. In any regard, DOJ could depose Mr. Morrow if litigation ensued (or took a Civil Investigative Demand deposition prior to the complaint being filed),[47/] so no tactical disadvantage would ensue. Certainly, the bank should have done much more work with Mr. Morrow in anticipation of a possible trial and to gain additional insights to utilize in its negotiations with DOJ.[48/]

H. The Two Key Memos Relied upon by the Bank Team

The two key memoranda discussing FCA issues relied upon by Sovereign Bank

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[45/] Weir depo., 73; *see also*, Golub depo., 106.

[46/] *See, e.g.*, pp. 15, 19, 22, 37, 41, 52-3, 59, 76, 120, 126.

[47/] *See* 31 U.S.C. § 3733.

[48/] I want to make it explicit that I am offering no opinions as to whether Mr. Morrow deliberately tried to mislead the SBA or what his intentions were. I am assessing him solely from the standpoint of being an effective witness.

were both written by Ms. Golub, a Weir Firm partner. As I explain below,[49] Ms. Golub had no prior experience with the FCA. She testified that she neither reviewed any FCA treatises nor consulted anyone with FCA expertise in studying the statute.[50] Therefore, despite the fact that Blank Rome was co-counsel with the Weir firm, and had extensive familiarity with the FCA, the bank chose instead an inexperienced colleague to do the fundamental FCA research and author the two key memoranda.

In my judgment, the more important memo is that dated May 16, 2007,[51] because it was used to justify the proposed settlement to Mr. Deutsch and his superior, Mr. Trout, at the bank. Actually, however, this was but the final version of previous memos Ms. Golub had written as early as March 28, 2006 (Golub Exs. 2 & 3) and June 15, 2006 (Golub Ex. 7), at the very beginning of the case when the important issues had only begun to emerge in the negotiations. Ms. Golub testified, as did Mr. Weir, that she employed a "cut and paste" technique.[52] Fundamentally, therefore, her analysis and language remained remarkably similar in all three memos which guided the bank throughout its negotiations with DOJ.

After an extensive factual history, much of the remainder of the May 16th memo consists of long quotes from the FCA (pp. 13-14). While Ms. Golub recognizes Rule

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[49] *Infra* at 28.

[50] Golub depo., 33-34.

[51] Golub depo. Ex. 14.

[52] Golub depo., 34; Weir depo. 180.

9(b) (at p. 15), she did not appreciate its tactical significance and devotes only a single sentence to it. She also evidences some possible confusion as to the difference between 31 U.S.C. § 3729 (a) (1)[false claims] and (a)(2) [using a false document to secure payment of a false claim].[53] This is unfortunate since the primary claim against Sovereign Bank was an (a)(2) violation involving causing the submission of a fraudulent SBA Form 860.

However, Ms. Golub (on p. 15) does raise a very important point which she later addressed in a separate memorandum–that of materiality under the FCA. On the next page, she identifies another important consideration, causation under the FCA.[54] A third significant issue is addressed briefly in her discussion of "certification theory."[55] As is evident from this report, I consider all three of these concepts important tactical weapons that should have been used extensively in negotiations with the government. But the memo only addresses them in passing in footnotes; there never was (with the exception of materiality) any further research or attention paid to them by the bank. Moreover, as far as I can tell, the potential of these arguments was never explored with bank; rather, the clear message of the memo was "take the DOJ settlement."[56] Finally, Ms. Golub writes: "In our opinion,

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[53] *Id.* at 15, n. 7 ("However, not all false statements made to the government are claims within the meaning of the act"). But see fuller discussion at *id.*, 20-21.

[54] *Id.*,16, n. 9.

[55] *Id.*, 17, n. 10.

[56] "Based on the foregoing, we recommend that the Bank accept this settlement." F & D 0237.

if this case goes to trial, it would make it to the jury."[57] Once again, this reflects Sovereign Bank's lack of familiarity with DOJ procedures which, as explained above, seldom call for requesting a jury.

Ms. Golub's second memo, dated November 24, 2006,[58] deals with materiality as an element of the FCA. I found this memorandum to be a solid discussion of the issue, citing the pertinent cases and discussing the key issues. Mr. Golub was correct that the Third Circuit had declined to determine whether materiality was an element under the FCA.[59] But virtually every other circuit as of the time of her memo had incorporated a materiality element into the statute.[60] Ms. Golub pointed to the most recent circuit to adopt a materiality requirement[61] and reviewed its arguments. I certainly would have given consideration to raising materiality in the DOJ negotiations.[62] The clear trend was to include it as a FCA component.

Surprisingly, despite this sound memorandum, as far as I can tell materiality was never raised in the bank's negotiations with the government. Perhaps this was because by this point in time, Sovereign Bank had already made two settlement

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[57] *Id.*, 22.

[58] Golub. depo. Ex. 11.

[59] *Id.*, 7.

[60] *See United States v. Bourseau,* 531 F.3d 1159, 1170-71 (9th Cir. 2008), *cert. denied,* 129 S. Ct. 1524 (2009).

[61] *United States ex rel. A+ Homecare Inc v. Medshares Management Group, Inc.,* 400 F.3d 428, 442-3 (6th Cir. 2005).

[62] Apparently, Blank Rome gave consideration to raising this issue as well. *See* SOV-002392-94.

offers to DOJ and the "settlement only" strategy was in full gear. It appears that the rush to settle foreclosed the development of key substantive issues which could have been argued by the bank and possibly reduced DOJ's settlement demands.

I. Placing Reliance upon Inexperienced FCA Counsel

In my opinion, an important factor at play was the bank's decision to rely primarily upon inexperienced FCA counsel in the Weir firm rather than counsel with more extensive FCA experience in charting and executing strategy. Mr. Weir himself explained in his deposition why Blank Rome's involvement was essential: "they were local to Washington, D.C. They knew the playing field down at DOJ much better than I did...they had dealt with the DOJ on an ongoing basis, which I did not."[63/] Mr. Weir's statement bears careful examination. Blank Rome knew the DOJ "playing field" and had "dealt with DOJ on an ongoing basis." This is a highly significant observation.

In my opinion, the bank's lead counsel was seriously inexperienced in handling major FCA cases. Ms. Golub testified that she had no prior FCA involvement and the FCA was not her area of expertise.[64/] Mr. Weir testified that he had handled a few Medicare FCA cases, but they had not involved dispositive motions, or trials. He had made no FCA lecture presentations, nor written any articles on the FCA. He

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[63/] Weir depo., 24. *See also* Deutsch depo., 52.

[64/] Golub depo., 10-11, 13-15, & 17.

also testified that nobody in his firm had greater FCA expertise than he did.[65/]

Despite the bank's lack of experience with the FCA, and its lack of familiarity with Main Justice negotiation strategies, it made the decision to place less reliance upon Blank Rome, designating it as second chair counsel.[66/] Blank Rome did not attend the vital initial meeting with DOJ in Washington on June 19, 2006.[67/] The first meeting is always critical because the DOJ attorneys what to "size up" opposing counsel as to their FCA knowledge and experience in handling FCA cases. Blank Rome's recommendation as to settlement offers was overridden, and it was not even consulted on the initial $250,000 offer.[68/] It appears that Blank Rome was only notified as to settlement offers to the government *after* they had been made.[69/] Nor was it present at the mediation session conducted by a Magistrate Judge.[70/] Blank Rome's recommendations as to an expert to assist in arguing Sovereign Bank's position were not implemented; in fact no expert apparently was ever retained.[71/] Ms. Golub, who drafted the two key memos relied upon by the bank, did not recall

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[65/] Weir depo., 8, 13-14 & 21.

[66/] "My understanding was that they would second chair in the case..." Weir depo., 119.

[67/] Deutsch depo., 117.

[68/] Weir depo., 126.

[69/] *See, e.g.,* Weir depo., 213.

[70/] *Id.,* 142.

[71/] Weir depo., 136-139.

ever having any direct dealings with the Blank Rome attorneys.[72] In fact, Blank Rome had to get a copy of the government's complaint from Assistant Branch Director Pat Davis at DOJ.[73] In my opinion, the apparent reluctance more extensively to involve more experienced FCA counsel in the planning and execution of negotiation strategy somewhat impaired the ability of Sovereign Bank to achieve a reasonable settlement result in its negotiations with DOJ.

VI. Mr. Raspanti's Mistaken Contentions

A. Sovereign Bank had more than Two Alternatives

The fundamental disagreement I have with Mr. Raspanti is his apparent contention that Sovereign Bank and its counsel had only two alternatives to choose from in charting a strategy in the FCA litigation. These alternatives are portrayed as (1) immediately settle the case for a reasonable sum; or (2) face expensive and prolonged litigation with substantial risk of losing the case. As did the bank, Mr. Raspanti ignores a third alternative, the one I believe the bank should have followed.

As I indicate above, I think it was ill-advised for the Sovereign Bank to immediately put a settlement figure on the table. Rather, in my opinion, the better approach would have been to negotiate with DOJ in the appropriate fashion–utilizing carefully researched white papers, drawing more extensively upon

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[72] Golub depo., 46.

[73] SOV-002554.

Blank Rome's FCA and DOJ expertise, and working to undermine the government's confidence in its own case. There always will be the option to settle the case; indeed, while DOJ first made contact with Sovereign Bank on or around February 16, 2006, settlement in the case was not finalized until October, 2007, after a complaint had been filed. The question is, did Sovereign Bank make the best use of this time in negotiating the best possible settlement? There was ample time to do comprehensive FCA research, to exchange white papers, to file a motion to dismiss, and to raise some of the defenses I mentioned above. This is how most experienced FCA practitioners would proceed; in my opinion, it is how Sovereign Bank should have proceeded. So Sovereign Bank was not limited to two alternative strategies at all.

B. The Bank of America and Sovereign Bank Cases Were not Identical

At page 22 of his report, Mr. Raspanti declares that the Bank of America settlement referenced above resolved allegations that were "virtually identical" with those made against Sovereign Bank. The only problem with this contention is that the present record does not support it. Apparently no complaint was filed in that matter; at least the settlement agreement references no complaint.[74/] And the details articulated in the agreement describing the "covered conduct" are sparse.[75/] The settlement agreement does not identify what "standard government form" was

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[74/] SOV-000197

[75/] *Id.* at SOV-000197-000198 ("Recitals").

submitted by Summit Bank; who at the bank submitted it; whether the bank "knowingly submitted" a misleading government form; and how the form failed to disclose how the Torkelsen entities' funds were "encumbered." The settlement also records that the bank denied it had engaged in any wrongdoing. Mr. Raspanti may feel it "reasonable" to surmise a world of facts beyond those specified in the agreement–I dispute the propriety of such speculation.

C. Mr. Torkelsen's Perjury Conviction is Irrelevant

At two points in his report (pp. 10 & 21), Mr. Raspanti discusses the 2008 conviction of Mr. Torkelsen for perjury in the Eastern District of Pennsylvania. At page 10, Mr. Raspanti recounts his review of the key documents connected with Mr. Torkelsen's criminal plea. I too have reviewed the same documents. My conclusion is that this conviction is irrelevant to this litigation for two reasons. First, the case involved allegations that Mr. Torkelsen had submitted fraudulent statements to various federal courts regarding his compensation as an expert witness. None of these allegations had any connection whatsoever to the Sovereign Bank FCA litigation.

Second, Mr. Raspanti argues that Mr. Torkelsen would have had "limited credibility before any fact finder." Presumably, Mr. Raspanti is suggesting that this was another reason that Sovereign Bank was correct to follow the strategy it did. I reject this contention. If Sovereign Bank had followed a more effective negotiation strategy, as discussed above, in my opinion, it could have decreased the government's settlement demands and avoided any trial. Mr. Torkelsen's perjury

plea is simply irrelevant to the present litigation.

D. The Settlement Amount does not Represent "Single Damages"

At page 22 of his report, Mr. Raspanti states: "In my opinion, having litigated false claims cases across the country, the $1.101 million settlement in this case represents single damages, and does not include exemplary, punitive or multiple damages." Mr. Raspanti could not be more incorrect, and this statement demonstrates that he is not conversant with internal DOJ procedures and policies as he suggests in his report.

DOJ never specifies in any FCA settlement what percentage of the settlement amount represents single damages, multiple damages or penalties.[76/] The only place where such an allocation would be discussed would be in the internal settlement authorization memo; I reviewed or wrote hundreds of these memos. But these memos are internal DOJ documents, are privileged, and are never released to the public. Unless Mr. Raspanti has reviewed the settlement memo prepared by Ms. Bentley and Mr. Strauss, and approved by Ms. Davis, he is speculating without foundation. Moreover, while DOJ will not articulate in the settlement agreement what the allocation is, as to multiple damages and penalties, it will never give a FCA release in such an agreement unless it considers a portion of the settlement amount to represent multiple damages and/or penalties. The Sovereign Bank

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[76/] My understanding is that DOJ many, many years ago did do this, but the Internal Revenue Service got upset and the Department modified its policy.

settlement agreement contains such a release;[77] therefore by definition, an unspecified portion (or even possibly the bulk or entirety) of the paid settlement amount represents multiple damages and/or FCA penalties.

Conclusion

Based upon my nearly 27 years working with the False Claims Act, both as a prosecutor and defense counsel, it is my opinion to a reasonable degree of professional certainty, that Sovereign Bank did not obtain a reasonable settlement outcome in the FCA litigation. This was due to the bank's failure to employ the most appropriate strategy and tactics in negotiating with and confronting the Department of Justice. A number of miscalculations combined to cause the bank to pay more than it had to.

What is significant in my analysis is that I have not simply one or two fundamental disagreements with the bank's strategy, but the whole pattern of how the bank handled the case is rife with inappropriate tactical decisions. At the outset, the bank incurred significant disadvantage when it took on a complex false claims case with insufficient familiarity with the FCA and DOJ practices. The bank's fundamental strategy of seeking an early settlement to the exclusion of other more suitable alternatives further hampered its efforts. The bank's failure to comprehensively contest the government's factual and legal allegations, via white papers for example, or even to undertake discovery after the complaint was filed,

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[77] *See* ¶ III, 2 at SOV- 000192.

seriously weakened its bargaining position. Because it focused so heavily on settlement, the bank did not undertake the development of defenses (*e.g.*, mistake, certification, materiality and causation) it could assert in negotiations and litigation.

The bank's exclusive focus upon early settlement hamstrung it in other regards as well. For example, the bank declined seriously to prepare for a trial should that be necessary by, for example, taking no discovery to probe the government's case. The bank, moreover, never gave serious consideration to filing a motion to dismiss even though it was aware of causation, certification, and materiality problems inherent in the government's case which might have persuaded the district court to terminate the litigation at that point. It is also evident that the bank froze its legal analysis at a very early point in the case, in several memos which were not updated as the issues emerged more clearly as negotiations developed. Finally, the bank was terrified of going to trial principally because of the fear of a jury trial, when it should have been aware that seldom does DOJ so request–and in fact did not seek a jury trial when it filed its complaint.

Few FCA cases are actually tried–most are settled. Reasonable settlement is usually an important strategy in difficult cases for defendants. But that does not mean that defendants must simply accept DOJ's arguments and contentions and pay what the government demands. DOJ expects actual informed negotiations will occur as each side contests the factual and legal assertions of the other. It most certainly is not a situation where either an early settlement is consummated or litigation and trial ensue. In the FCA case, DOJ sent its initial allegation letter to

the bank in February, 2006. It did not file its complaint until late December of that year. Mediation did not occur until late April, 2007. The settlement itself was finalized in late October of that year. In my opinion, the bank did not use that considerable amount of time (approximately 20 months) to its best advantage in undertaking efforts to either reduce the government's settlement demands, file a motion to dismiss, or convince it to drop the matter all together.

Adding all these factors together, as well as the other points I identify in my report, the bank did not end up with a reasonable result, because it simply pursued an inappropriate strategy, which severely handicapped the bank in defending itself. In my opinion, the bank needed to start out with a far better strategy than the one it ended up pursuing.

EXHIBIT B

In connection with the preparation of my report, I have reviewed and relied upon the following:

-All the sources identified in Mr. Raspanti's Exhibit A to his report

-The deposition of Ms. Erin Pfeiffer and its exhibits

-All exhibits attached to my report

-John T. Boese, *Civil False Claims and Qui Tam Actions* (3d. Ed.)

-Robert Salcido, *False Claims Act and the Healthcare Industry*

-James Helmer, Jr., *False Claims Act: Whistleblower Litigation*

-The expert report filed in this action of Mr. Raspanti and the sources identified therein

-The Complaint in this Action

-Any and all other sources cited in my report