15-496-cv(L)

15-499-cv (CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA *ex rel.* EDWARD O'DONNELL,

Plaintiffs-Appellee,

v.

COUNTRYWIDE BANK, FSB; COUNTRYWIDE HOME LOANS, INC.; BANK OF AMERICA, N.A.; AND REBECCA MAIRONE,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York, No. 12-cv-1422 (The Honorable Jed S. Rakoff)

BRIEF OF BETTER MARKETS, INC. AS *AMICUS CURIAE* IN SUPPORT OF UNITED STATES OF AMERICA, EX REL. EDWARD O'DONNELL, AND IN SUPPORT OF AFFIRMANCE

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July 29, 2015

CORPORATE DISCLOSURE STATEMENT

Better Markets is a non-profit corporation. It has no parent corporation, and there is no publicly held corporation that owns 10% or more of the stock of Better Markets.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

LEGISLATIVE HISTORY

OTHER AUTHORITIES

IDENTITY AND INTEREST OF BETTER MARKETS[1]

Better Markets, Inc. ("Better Markets") is a non-profit organization that promotes the public interest in the financial markets. It advocates for greater transparency, accountability, and oversight in the financial system through a variety of activities, including public advocacy, litigation, and independent research. One of Better Markets' core objectives is the establishment of a regulatory framework that is capable of preventing another financial crisis like the one that swept over the nation in 2008.

That crisis was the worst financial disaster since the Great Crash of 1929, and it produced the worst economy our nation has seen since the Great Depression of the 1930s. It crippled our financial system, destroyed millions of jobs, triggered a tidal wave of home foreclosures, and wiped out the savings of countless American households. The costs have been staggering: $20 trillion in lost GDP and inestimable human suffering, much of which continues to this day.[2]

Stabilizing our financial system and avoiding a recurrence of such a devastating crisis requires two essential reforms—stronger regulations and stronger

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[1] All parties consent to the filing of this brief. Amicus states that no party or party's counsel authored this brief in whole or in part. Further, no party, party's counsel, or any person other than amicus or its counsel contributed money intended to fund preparing or submitting this brief.

[2] *The Cost of The Crisis: $20 Trillion and Counting*, Better Markets (July 2015), *available at* http://www.bettermarkets.com/costofthecrisis ("COC Report").

enforcement of those regulations. Better Markets has used its advocacy to advance both of those goals. For example, it has promoted stronger regulatory standards of conduct in accordance with the reforms that Congress established in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), Public Law No. 111-203, 124 Stat. 1376 (July 21, 2010), to address systemic risks and reduce the likelihood of another financial crisis and recession. To that end, Better Markets has submitted over 170 comment letters to the Securities and Exchange Commission ("SEC"), the Federal Reserve, and other financial regulators to help ensure that the rules implementing the Dodd-Frank Act reflect the letter and spirit of the law.[3]

Recognizing that no regulatory framework can achieve its intended goals without strong enforcement, Better Markets has also called upon regulators and the Department of Justice ("Justice Department" or "DOJ") to impose much stiffer penalties and other sanctions against financial institutions that violate the law; to pursue individual executives responsible for fraud; and to ensure greater transparency and accountability in the process. For example, as an amicus and sometimes as a party, Better Markets has challenged settlements between the government and the largest Wall Street banks on the ground that those agreements

[3] *See* Comment Letters, *available at* http://www.bettermarkets.com/rulemaking.

concealed too much information from the public, prevented a meaningful assessment of whether the punishment fit the crime, or were never subjected to independent judicial review to determine if the settlements were fair, adequate, reasonable, and in the public interest. *See* Brief of Better Markets as *Amicus Curiae*, *SEC v. Citig*roup, 752 F.3d 285 (2d Cir. Aug. 21, 2012); *Better Markets v. U.S. DOJ*, 2015 U.S. Dist. LEXIS 33814 (D.D.C. Mar. 18, 2015).[4]

Better Markets has an interest in this case because one of the most important enforcement tools available to the Justice Department for combatting financial fraud hangs in the balance: Section 951 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1833a ("Section 1833a"). If the appellants ("Banks") prevail, then the application of this important enforcement tool in FIRREA will be dramatically limited, as it will no longer apply to even the most egregious acts of fraud perpetrated by banks themselves. And the threat of meaningful monetary penalties will also be dramatically limited, at precisely the time when more robust enforcement, not weaker measures, are

[4] To support its advocacy, Better Markets has also studied the costs of the financial crisis extensively to provide an accurate assessment of the toll that de-regulation, coupled with Wall Street's financial recklessness and criminal conduct, has taken on the financial markets, the U.S. economy, and most importantly, the taxpayers and everyday citizens of the U.S. *See* COC Report (estimating the cost at $20 trillion in terms of actual losses in GDP plus losses in GDP avoided due to massive taxpayer bailouts and other government backstops).

necessary.

Having learned little from the financial crisis, Wall Street continues to flaunt the law, engaging in illegal activities ranging from money laundering to tax evasion to manipulation of the foreign currency markets. *See* discussion *infra* at 22-26. Unless our government can effectively punish and deter this behavior, the financial industry will continue to exploit the markets for their own gain at the expense of the broader economy, with the very real possibility that another financial crisis will befall our nation again.

ARGUMENT

I. The district court correctly ruled that Section 1833a of FIRREA applies to fraud by banks, not only fraud by others that affects banks.

The district court's ruling in this case finds overwhelming support under all of the relevant legal authorities: the plain language of the law, the cases that have uniformly validated the "self-affecting" interpretation of Section 1833a, and Congress's clear desire to rein in abuses by and against federally insured financial institutions. Far from a tortured interpretation of FIRREA, the district court's reading of the law is **especially** appropriate in cases such as this, where a bank has committed fraud so pervasive that it threatened the viability of the institution and contributed to a wider crisis necessitating massive taxpayer bailouts. And the Banks' argument that allowing the Justice Department to pursue banks for fraud under Section 1833a will imperil a delicate prudential regulatory regime is nonsense.

The Banks offer no support whatsoever for their conjecture, and the facts show quite the opposite: The potential for DOJ enforcement under FIRREA actually promotes comprehensive and coordinated enforcement actions and settlements involving regulators and law enforcement agencies alike.

A. The district court's summary rejection of the Banks' interpretation of FIRREA is supported by the statutory language and structure, the case law, and the statutes' underlying purpose.

The district court correctly held that Section 1833a can easily be applied to self-affecting acts of fraud by banks. The court harbored no doubt about the issue, observing that validation of the Government's interpretation "requires nothing more than straightforward application of the plain words of the statue." *United States v. Countrywide Fin. Corp.*, 961 F. Supp. 2d 598, 605 (S.D.N.Y. 2013) (*Countrywide I*). In its brief, the Government has persuasively demonstrated that this decision should be affirmed, not only on the basis of the statutory text but also in light of the structure of the statute, the case law, and the purposes underlying FIRREA. The analysis is straightforward and compelling.

The plain meaning of the statute. Section 1833a of FIRREA provides that "whoever" violates certain enumerated sections of Title 18 shall be subject to a civil penalty, where the violation is one "affecting" a federally insured financial institution. The two operative terms—"whoever" and "affecting"—are unquestionably broad, and Section 1833a contains no language limiting or

conditioning their plain meaning. As the district court observed, "The key term, 'affect,' is a simple English word, defined in Webster's as 'to have an effect on.' The fraud here in question had a huge effect on BofA itself (not to mention its shareholders)." *Id.* (internal citation omitted). And according to Webster's Dictionary, "whoever" means "any person at all," a term that encompasses banks and non-banks alike. Merriam-Webster's Dictionary, *available at http://www.merriam-webster.com/dictionary/whoever*. "If Congress had wanted to limit civil penalties to cases in which the financial institution was the victim, it obviously could have done so; instead it chose a singularly broad term." *United States v. Bank of N.Y. Mellon*, 941 F. Supp. 2d 438, 452 (S.D.N.Y. 2013).

The case law. The only other courts to have addressed this issue have also squarely held that under Section 1833a, banks may be liable for acts of fraud that affect themselves, based on the clear language and the underlying purposes of Section 1833a. *See United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 630 (S.D.N.Y. 2013); *Mellon*, 941 F. Supp. 2d at 462. In addition, other courts have concluded, when interpreting similar statutory language, that "affects" can be self-inflicted by a financial institution. *See United States v. Bouyea*, 152 F.3d 192, 195 (2d Cir. 1998) (quoting *United States v. Pelullo*, 964 F.2d 193, 215-16 (3d Cir. 1992)); *United States v. Heinz*, ___ F.3d ___, No. 13-3119, 2015 U.S. App. LEXIS 9292, at *4-5 (2d Cir. Jun. 4, 2015) (quotation marks omitted).

The structure of FIRREA. An analysis of the different subsections of Section 1833a makes clear that Congress added the qualifier "affecting a federally insured financial institution" not to immunize banks for their fraudulent acts—a counterintuitive notion on its face—but to reasonably limit the otherwise open-ended scope of Section 1833a(c)(2). Without the stated nexus to "affects" on financial institutions, the provision would cover "nearly any fraud by any person." Gov't Br. at 32. The other relevant subsections, 1833a(c)(1) and (3), did not require the "affecting" limitation, since they were already inherently limited to "crimes against financial institutions or false statements to regulators." Gov't Br. at 31. The modifier was thus necessary to prevent subsection 1833a(c)(2) from applying to an unlimited universe of actors, not to insulate banks from the consequences of their fraud.

Legislative history and purpose. Finally, weighing heavily against the Banks' position is the underlying purpose of FIRREA. The statute was enacted in 1989, following an epidemic of misconduct that triggered a financial crisis in the savings and loan industry. In response, Congress sought to "strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors." Pub. L. No. 101-73, § 101(10) ("Purposes" clause of FIRREA). The focus of the legislation was on creating enhanced enforcement authority to preserve the stability of financial institutions and protect depositors and

ultimately taxpayers who must pay the price when a bank fails. As noted in *Mellon*: "The legislative history shows who Congress truly believed were the victims of the S&L crisis and whom Congress sought to protect through FIRREA: S&L depositors and the federal taxpayers put at risk by the thrifts' fraudulent behavior." 941 F. Supp. 2d at 455. The Government's application of Section 1833a to the Banks' fraud in this case was clearly appropriate in light of these purposes: The Banks' illegal activity not only damaged and destabilized the Banks, it also harmed taxpayers by contributing to the financial crisis that necessitated huge bailouts.

B. The financial crisis of 2008 dramatically confirms that the application of Section 1833a is appropriate when a bank engages in fraud so pervasive that it imperils its own stability and requires taxpayer bailouts.

The Banks' attempt in this case to limit the scope of Section 1833a ignores one of the most important lessons of the financial crisis: Fraud committed **by** a bank, especially where it is pervasive or systemic, can cause far more harm to the bank itself than any type of fraud committed **against** the bank by an outside third party or rogue insider. Fraud on a grand scale is almost certain to injure not just the intended victims of the scheme, but ultimately the perpetrator itself.

The history of the crisis is littered with examples of large financial institutions engaging in widespread, institutionalized fraud and reckless conduct that destabilized them to the point of collapse and inevitable bankruptcy, necessitating massive bailouts by taxpayers—the people that FIRREA was enacted to protect.

Thus, far from being an anomalous or extreme interpretation of FIRREA, the government's approach reflects a highly appropriate application of the statute in the aftermath of the financial crisis.

This history supplies the answer to an argument drawn by the Banks' amici. They note that the DOJ's use of FIRREA expanded substantially after the financial crisis, and they suggest that this change resulted from an aggressive new reading of the statute by the government. Amici Br. at 2. But in fact, the increased use of FIRREA by DOJ was not the result of a new, aggressive, or strained interpretation of the law; it was due to an avalanche of major new cases, borne of the financial crisis, in which the application of Section 1833a to address bank fraud was especially appropriate.

This case illustrates the point. Countrywide and Bank of America, along with many other financial institutions, engaged in such damaging and pervasive fraud that, in addition to victimizing countless investors and parties such as Fannie Mae and Freddie Mac, they also imperiled their own survival and brought the entire financial system to the brink of collapse—a collapse avoided only because of the trillions of dollars in bailouts and backstops that taxpayers were compelled to pay or stand behind. Bailout Recipients, Pro Publica, *available at* https://projects.propublica.org/bailout/list (detailing bailouts to hundreds of

financial institutions, including Bank of America and Countrywide) (last updated July 13, 2015); *see also* COC Report at 66-69.

The extraordinary damage inflicted on **all** American taxpayers by the crisis represents the ultimate example of what FIRREA was intended to address: bank fraud that destabilizes not only the bank itself, but the entire financial industry, thereby injuring a huge swath of the American public.[5] As the court in *Mellon* noted, the savings and loan crisis bankrupted the Federal Savings and Loan Insurance Corporation, "resulting in a taxpayer-funded bailout that some projected at the time as exceeding $100 billion." 941 F. Supp. 2d at 455. By comparison, the 2008 financial crisis necessitated taxpayer bailouts and other forms of support in the trillions of dollars. *See* COC Report at 67. It is difficult to imagine a more appropriate use of FIRREA than its deployment in this type of case.

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[5] To be sure, much more modest damage to a financial institution justifies the imposition of penalties under Section 1833a. For example, "[a]ny federally insured entity that commits [the covered] offenses automatically exposes itself to potential civil and criminal liabilities as a matter of law. Such potential liability is enough to satisfy FIRREA . . . ." *United States v. Countrywide Fin. Corp.*, 996 F. Supp. 2d 247, 249 (S.D.N.Y. 2014) (*Countrywide II*) (citations omitted). Other forms of harm that suffice for purposes of Section 1833a include loan repurchase demands, higher credit losses, legal expenditures, shareholders losses, and reputational damage. Gov't Br. at 40; *Wells Fargo,* 972 F. Supp. 2d at 630-31. Many if not all of those harms were among the Banks' self-inflicted wounds in this case—in addition to their contribution to the much larger impact on the financial industry and taxpayers.

C. The Government's application of FIRREA actually promotes effective and coordinated regulatory enforcement, rather than undermining it.

The Banks and their amici both argue that applying Section 1833a as a punitive measure **against** banks will interfere with the application of regulatory penalty provisions found elsewhere in FIRREA, specifically under Section 1818. They even suggest that the Government's interpretation of Section 1833a could undermine efforts by the prudential regulators to supervise banks in an appropriately cooperative fashion and reach settlements with them. Bank of America Br. at 36-38; Amici Br. at 16-20. This contention is wrong.

First, as the Government points out, Sections 1818 and 1833a actually do create overlapping enforcement authority. Gov't Br. at 33-34 (employees of financial institutions, as well as financial institutions themselves, can be subject to penalties under both Section 1818 and parts of Section 1833a). This fact belies the Banks' insistence that Congress strictly segregated the two sets of remedies. Furthermore, the legislative history makes clear that Section 1833a was intended to create a penalty that was cumulative with other remedies. *Mellon,* 941 F. Supp. 2d at 462 & n. 137.

But more importantly, the Banks and their amici appear to ignore the multi-layered approach to enforcement that is the norm in this country. As a general matter, the regulation of financial market participants is handled by multiple state and federal agencies with overlapping civil and criminal enforcement jurisdiction.

Thus, for example, the SEC has regulatory enforcement authority over broker-dealers and investment advisers, yet at the same time, state securities regulators may bring civil or criminal enforcement actions against those same entities for the same acts of fraud that the SEC is empowered to address. Moreover, the securities acts expressly criminalize violations of virtually all of their provisions, creating an entire additional layer of enforcement for those laws. 15 U.S.C. §§ 77x; 78ff; 80a-48; and 80b-17. And, even with respect to civil enforcement, the securities laws expressly state that "[t]he actions authorized by this subsection [allowing for civil penalties] may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring." 15 U.S.C. § 77t.

Thus, contrary to the Banks' argument, reading Section 1833a as granting the DOJ enforcement authority against the banks in addition to the regulatory enforcement powers conferred by Section 1818, is fully consistent with the layered approach to enforcement that ordinarily applies under state and federal law. Indeed, in light of this concurrent jurisdiction that typifies our regulatory and law enforcement framework, it would be a jarring departure from the status quo to hold that Section 1833a precludes enforcement by the DOJ against banks.

The Banks' contrived arguments are also unsupported by the facts. In the first instance, neither they nor their amici cite a single example where the imagined interference with supervisory authority has actually materialized—no instance

where the application of multiple and supposedly overbearing sanctions imperiled the stability of an institution, or where the threat of enforcement by DOJ under Section 1833a spoiled a promising settlement arranged by the prudential regulators under Section 1818.

The facts actually support the opposite conclusion. Financial institutions have generally thrived under our system of concurrent state, federal, civil, and criminal regulation and enforcement. Moreover, the Banks' argument runs afoul of numerous cases in which the Justice Department has successfully used FIRREA as the centerpiece of a settlement that simultaneously resolved the claims of multiple federal and state regulators. A review of the cases involving DOJ's use of Section 1833a of FIRREA reveals at least these examples:

- On November 19, 2013, the Justice Department, the National Credit Union Administration (NCUA), the Federal Deposit Insurance Corporation (FDIC), the Federal Housing Finance Agency (FHFA), and several states entered into a settlement agreement with JPMorgan Chase for its role in the fraudulent sale of residential mortgage-backed securities (RMBS). As part of the settlement agreement, the bank agreed to a $2 billion civil

penalty under Section 1833a, as well as other amounts to the other participating federal and state agencies. *See* Settlement Agreement.[6]

- On July 14, 2014, the Justice Department, the FDIC, and several states entered into a settlement agreement with Citigroup for its role in the fraudulent sale of RMBS. As part of the settlement agreement, the bank agreed to a $4 billion civil penalty under Section 1833a. In addition, while FHFA was not a party to the settlement, its Office of the Inspector General assisted in the investigation. *See* Settlement Agreement.[7]
- On August 21, 2014, the Justice Department and several states entered into a settlement agreement with Bank of America for its role in the fraudulent sale of RMBS. As part of the settlement agreement, Bank of America agreed to a $5 billion penalty under Section 1833a—the largest FIRREA penalty in history. In addition, the FDIC and the SEC settled claims against the bank, and the FHFA, the Federal Housing Administration, and

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[6] *Available at* http://www.justice.gov/iso/opa/resources/6952013111919124694195 8.pdf.

[7] A*vailable at* http://www.justice.gov/iso/opa/resources/471201471413656848428.pdf; *see also* Justice Department, Federal and State Partners Secure Record $7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages, *available at* http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement.

Ginnie Mae all assisted with the investigation. *See* Settlement Agreement.[8]

- On March 19, 2015, the Justice Department, the New York Attorney General, the SEC, and the Department of Labor entered into settlements with the Bank of New York Mellon for its role in fraudulent foreign currency transactions to the detriment of the bank's customers. As part of the settlement agreement, the bank agreed to pay a $167.5 civil penalty under Section 1833a, along with other amounts bringing the total to $714 million. *See* Stipulation and Order of Settlement and Dismissal, *United States v. The Bank of New York Mellon*, 11-civ-06969 (S.D.N.Y. Mar. 23, 2015).

In short, there is no evidence that the threat of enforcement against banks by the Justice Department under Section 1833a has interfered with the supervision and enforcement efforts of the prudential regulators. On the contrary, as the settlements reviewed above suggest, that enforcement power has apparently facilitated the joint resolution of enforcement actions between prudential regulators and the institutions they oversee.

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[8] *Available at* http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading.

II. The district court also correctly ruled that the penalties imposed under Section 1833a should be calculated using gross, rather than net, gains and losses.

The penalty calculation that the district court applied follows from the statutory language, which includes no indication that Congress intended to limit penalties to net gains or net losses. The Banks' principal argument rests on the odd misconception that Section 1833a concerns the award of damages rather than the imposition of a penalty—a view unsupported by any credible authority or evidence. Eliminating all doubt is the obvious fact that using gross gains and gross losses as the benchmark for the penalty maximizes the punitive and deterrent effect of the sanction, and thus most effectively advances Congress's goals in FIRREA.

A. The plain language supports this calculation.

The starting point of the analysis is again the plain meaning of the statutory language. Section 1833(b)(3)(A) provides that—

> If any person derives pecuniary gain from the violation, or if the violation results in pecuniary loss to a person . . . the amount of the civil penalty . . . may not exceed the amount of such gain or loss.

As observed by the Government, pecuniary gain and pecuniary loss are general terms that do not incorporate the concept of netting or offsets. Gov't Br. at 76. Moreover, Congress chose not to include any express language limiting the gains and losses to "net" amounts, as it could have. *See, e.g.*, 18 U.S.C. §

981(a)(2)(A) (civil forfeiture not limited to the net gain or profit realized from the offense.)

Additional language in Section 1833a supports this reading. The operative phrase is this: "If any person derives pecuniary gain **from the violation** . . . ." (emphasis added). This proviso narrowly focuses on gain from the fraudulent act, irrespective of other business arrangements, expenditures, recoveries, or offsets that may be present in a given case. Such gain "from the violation" will invariably be whatever amount the defendant induced the victim to pay as a result of the fraud. In this case, the gain from the fraud is the amount that Fannie Mae and Freddie Mac paid for the bad loans that were represented to be of investment quality—without regard for what the banks may have paid for the loans at a point in time far removed from the fraudulent misrepresentations.

The district court correctly embraced this reading of the statute, as reflected in its illustration involving the fraudulent sale of a sick cow. The court observed that the person who sold the cow by falsely portraying it as healthy nevertheless incurred some expense to acquire the cow in the first place, suggesting that net gain might be the proper formula for a penalty against the vendor. However, the court rejected this approach and instead focused exclusively on the pecuniary advantage gained from the fraud itself, which is the full sale price:

> But since you would never have purchased the cow from me if you knew that it had foot-and-mouth disease or that I had intentionally lied

> to you in trying to induce you to part with your $100, the $100 I received, that is, my gross gain, is far more reflective of the essential nature of my fraudulent conduct than my "net" gain.

United States ex rel. O'Donnell v. Countrywide Home Loans, Inc., 33 F. Supp. 3d 494, 501 (S.D.N.Y. 2014) (*Countrywide III*). In short, the simple statutory references to "pecuniary gain" and "pecuniary loss" derived "from the violation" preclude the netting of a perpetrator's costs or a victims recoveries when penalties are calculated under Section 1833a.

B. The Banks' netting argument is based on the concept of damages, which has no relevance to FIRREA's penalty provisions.

The Banks' argument is largely based on the false premise that the penalties set forth in Section 1833a should be regarded as damages, where netting may have a role. Clearly, however, the government is seeking penalties, not damages, in this case. First, Section 1833a is entitled "Civil Penalties," not "Civil Damages." Second, this proceeding is a governmental enforcement action brought under a quasi-criminal statute, which bears no resemblance to a civil action to recover damages for injury at the hands of another party.[9]

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[9] As the district court noted, "A FIRREA penalty, in contrast to a court's calculation of damages caused to the Government in an ordinary False Claims Act case, is calibrated to deter and punish, not to restore a victim to the status quo ante." *Countrywide III*, 33 F. Supp. 3d at 500 n. 6.

Furthermore, the statute makes clear in its text and its legislative history that the fundamental goal of the law is to enhance the sanctions and penalties at the government's disposal. Section 101(10) of FIRREA lists the purposes of the law, and they include:

> (9) To strengthen the enforcement powers of Federal regulators of depository institutions.
> (10) To strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors.

The legislative history echoes the point:

> This Title gives the regulators and the Justice Department the tools which they need and the responsibilities they must accept, to **punish** culpable individuals, to turn this situation around, and to prevent these tremendous losses to the Federal deposit insurance funds from ever again recurring (emphasis added).

H.R. Rep. 101-54(I) at 466.

As a penalty provision, Section 1833a would not be expected to allow for the offsets or netting adjustments that the Banks seek. Criminal fines are not subject to caps based on net gains or losses. *See, e.g.,* 18 U.S.C. § 3571. And the same is typically true in the civil enforcement context. For example, under the Securities Act of 1933, the SEC has the authority to impose "Money penalties in civil actions" in three tiered amounts, depending on the gravity of the offense. All of the amounts are expressed in terms of either a fixed dollar sum or the "**gross** amount of pecuniary gain to such defendant." 78 U.S.C. § 77t (emphasis added). And even in the context

of remedial provisions that provide for disgorgement, defendants may be precluded from netting out the costs associated with their illegal acts. For example, violators under the Federal Trade Commission Act, 15 U.S.C. § 53, who are required to pay disgorgement awards for restitution, are "not entitled to deduct costs associated with committing their illegal acts." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 375 (2d Cir. 2011) (internal quotations omitted).

C. Using gross gains and losses to calculate penalties under Section 1833a best serves the punitive and deterrent purposes of FIRREA.

The district court correctly concluded that using the Government's gross gain and gross loss formula would serve the "punitive and deterrent purposes" of FIRREA, and therefore, "gain and loss should be viewed simply in terms of how much money the defendants fraudulently induced the victims to pay them." *Countrywide III*, 33 F. Supp. 3d at 501.

As demonstrated above, there is no doubt that the purpose of FIRREA is to enhance penalties for fraud and other violations of law that damage insured depository institutions. Because the gross gain and gross loss formula results in the highest possible penalty amount, it most effectively advances these goals.

In addition, this approach avoids uncertainty and eliminates anomalies that a netting approach can create in the imposition of monetary penalties. First, netting out a wrongdoer's costs or a victim's recoveries from gains or losses is not only a burdensome task for courts, it is also an inherently uncertain and speculative

exercise. In RICO forfeiture cases, for example, courts have observed that the "difference between gross and net profits [specifically referring to overhead] is often so 'speculative' and so much a function of 'bookkeeping conjecture,' that 'using net profits as the measure for forfeiture could tip [certain] business decisions in favor of illegal conduct.'" *Advance Pharm., Inc. v. United States*, 391 F.3d 377, 400 (2d Cir. 2004), quoting *United States v. Lizza Indus., Inc.*, 775 F.2d 492, 498-99 (2d Cir. 1985).

Even more problematic, using a netting approach has the potential of severing any rational relationship between the nature and gravity of the misconduct that has occurred and the monetary penalty imposed, all based on purely fortuitous circumstances. For example, as the district court and the Government both noted, a fraud victim who could mitigate the harm done, whether through diligence or good fortune, might substantially lower the allowable penalty amount through offsets, conceivably to zero. *Countrywide III*, 33 F. Supp. 3d at 501, n.8; Gov't Br. at 79. Yet, the essential nature of the violation would not have changed, and the wrongdoer would be no less deserving of punishment or in need of deterrence. This haphazard approach to penalties for serious violations of the law would thwart Congress' goal of bringing stronger and more certain punishments to bear for fraud affecting financial institutions.

III. Stronger, not weaker, enforcement of FIRREA is necessary to help combat Wall Street's continued lawlessness and to prevent another financial crisis.

As the Government has shown, a straightforward legal analysis of the statutory language, applicable case law, and legislative history shows clearly that Section 1833a of FIRREA covers self-affecting acts of fraud by a bank and allows the imposition of penalties based on gross gains and losses derived from those acts. Perhaps less clear but equally important in the analysis are the far-reaching and adverse consequences of limiting the tools available to the Justice Department in its fight against financial fraud and abuse. The Banks' unjustifiably narrow interpretation would prevent the DOJ from applying FIRREA where it is needed most: against the large banks that continue to engage in serious, repeated, and damaging violations of the law that will inevitably undermine their own stability. Ultimately at stake is the government's power to deter Wall Street from the lawlessness that, unless reined in with strong enforcement, may lead to another financial crisis and the taxpayer bailouts that will inevitably accompany it.

Wall Street's thirst for profit and its penchant for illegal schemes continue unabated, extending far beyond the mortgage loan market. For example, recent investigations have shown that the banks have willfully committed or aided and abetted tax evasion, money laundering, and the manipulation of key benchmark

interest rates and foreign exchange markets. The following high profile cases illustrate the point:

Manipulation of the Foreign Currency Market. In May of 2015, the Justice Department announced that Citigroup, JPMorgan, Barclays, and the Royal Bank of Scotland had agreed to plead guilty to charges of conspiring to manipulate the price of U.S. dollars and euros exchanged in the foreign currency spot market. Together, the banks agreed to pay criminal fines of more than $2.5 billion. Attorney General Loretta Lynch referred to their conduct as "egregious." Another official castigated the banks for "undermining the integrity and competitiveness of foreign currency exchange markets." *See* Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015).[10]

Aiding and abetting tax evasion. In May of 2014, Credit Suisse pled guilty to charges of conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents. The plea agreement required that the Swiss corporation pay a total of $2.6 billion, to be divided between the DOJ, the Federal Reserve, and the New York State Department of Financial Services. *See* Credit Suisse Pleads

[10] *Available at* http://www.justice.gov/atr/public/press_releases/2015/314165.htm.

Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns (May 19, 2014).[11]

Money laundering. In December of 2012, HSBC admitted to money laundering violations, and agreed to pay $1.9 billion in a settlement with federal, state, and international authorities. According to the Department of the Treasury, the banks' breakdown in anti-money laundering compliance enabled hundreds of millions of dollars of Mexican drug money to flow through accounts in the United States. What's more, the bank violated a number of U.S. sanctions by conducting transactions on behalf of customers in Cuba, Iran, Libya, Sudan, and Burma. *See* Treasury Department Reaches Landmark Settlement with HSBC (Dec. 11, 2012).[12]

Manipulation of the LIBOR benchmark interest rate. Since 2012, international authorities have been investigating a widespread plot by multiple banks—most notably Deutsche Bank, Barclays, UBS, Rabobank, JPMorgan, and the Royal Bank of Scotland—to manipulate the London Interbank Offered Rate, or LIBOR, for profit. LIBOR underpins over $300 trillion worth of loans worldwide, and the scandal has shaken trust in the global financial system. Investigations continue today, and so far regulators in the United States, the UK, and the European

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[11] *Available at* http://www.justice.gov/opa/pr/credit-suisse-pleads-guilty-conspiracy-aid-and-assist-us-taxpayers-filing-false-returns.

[12] *Available at* http://www.treasury.gov/press-center/press-releases/Pages/tg1799.aspx.

Union have fined banks more than $9 billion. UBS's actions were particularly egregious, and to date, they alone have settled for $1.52 billion in penalties. An assistant attorney general referred to the scandal as "epic in scale, involving people who have walked the halls of some of the most powerful banks in the world."[13]

More reckless derivatives trading: the London Whale. In May of 2012, JPMorgan revealed that it had sustained an estimated $2 billion in losses associated with a series of credit default swap transactions made through its London branch. It later became apparent that the losses totaled at least $6.2 billion. The trader most directly involved in these transactions (known as "the London Whale") is not facing criminal prosecution, but his former boss and a junior trader were indicted in 2013 for committing securities fraud by hiding the true extent of the losses from senior management. Due to the investigation of a U.S. Senate subcommittee, in September 2013, JPMorgan agreed to pay a combined $920 million in penalties to U.S. and

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[13] *See* McBride, J., et al., *Understanding the Libor Scandal*, COUNCIL ON FOREIGN RELATIONS (May 21, 2015), *available at* http://www.cfr.org/united-kingdom/understandinglibor-scandal/p28729; Ovaska, M. & Patrick, M., *The Libor Settlements*, THE WALL STREET JOURNAL, *available at* http://www.wsj.com/articles/SB10001424127887324616604578302321485831 88; UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-running Manipulation of LIBOR Benchmark Interest Rates, (Dec. 19, 2012), *available at* http://www.justice.gov/opa/pr/ubs-securities-japan-co-ltd-plead-guilty-felony-wire-fraud-long-running-manipulation-libor.

U.K. authorities for engaging in "unsafe and unsound practices." The following month the bank agreed to pay $100 million in fines to the CFTC because, by pursuing an aggressive trading strategy, its "traders recklessly disregarded" the principle that markets should set prices. The scandal is particularly worrisome because it shows that only a few years after 2008, JPMorgan was once again engaging in the type of large-scale and high-risk proprietary trading in complex derivatives that contributed to the financial crisis.[14]

The banks have engaged in these illegal schemes notwithstanding the high-profile enforcement initiatives by the DOJ aimed at addressing the widespread fraud in the RMBS market that fueled the financial crisis. Wall Street's continued participation in a wide array of serious illegal activities shows that our current system of punishment for crimes by financial institutions needs to be made stronger, not weaker. The American people deserve more oversight, more transparency, and above all more accountability for Wall Street's biggest banks and top executives—

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[14] *See* Silver-Greenberg, J. & Craig, S., *JPMorgan Trading Loss May Reach $9 Billion*, THE NEW YORK TIMES, *available at* http://dealbook.nytimes.com/2012/06/28/jpmorgan-trading-loss-may-reach-9-billion/; Hurtado, P., *The London Whale*, BLOOMBERG VIEW (Apr. 23, 2015), *available at* http://www.bloombergview.com/quicktake/the-london-whale; Isodore, C. & O'Toole, J., *JPMorgan fined $920 million in 'London Whale' trading loss*, CNN MONEY, *available at* http://money.cnn.com/2013/09/19/investing/jpmorgan-london-whale-fine/; Viswanatha, A., *JPMorgan to pay $100 million in latest 'London Whale' fine*, REUTERS (Oct. 16, 2013), *available at* http://www.reuters.com/article/2013/10/16/us-jpmorgan-cftcidUSBRE99F0JW20131016.

not less. Narrowing the scope of FIRREA so it cannot be used against banks that commit fraud, and substantially reducing the allowable penalties through the netting formula, will pave the way for even more lawlessness on Wall Street. Our markets and our economy can ill afford the near-term costs of these predations, let alone the devastating impact of another financial crisis. This Court should help avoid these outcomes by rejecting the Banks' attempt to immunize themselves from liability under Section 1833a of FIRREA.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: July 29, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Appellate Rules of Civil Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 6,142 words, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as computed by Microsoft Word 2013, the word processing system used to prepare this brief. The undersigned also certifies that this brief complies with the type-face requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using 14-point Times New Roman typeface, is double-spaced (except for quotations exceeding two lines, headings, and footnotes), and is proportionally spaced.

/s/ Dennis M. Kelleher
Dennis M. Kelleher

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2015, I caused the foregoing brief to be filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. Counsel for all parties and *amici* are registered CM/ECF users and will be served by the appellate CM/ECF system.

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