UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA ex rel. and ANDREW MITCHELL, and ANDREW MITCHELL, Individually, Plaintiffs-Relators, v. CIT BANK, N.A. D/B/A ONEWEST BANK, and CIT GROUP INC., Defendants.	CASE NO. 4:14-cv-833-ALM JUDGE AMOS L. MAZZANT, III **ORAL HEARING REQUESTED**

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 56 AND MEMORANDUM IN SUPPORT

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PRELIMINARY STATEMENT

Relator Andrew Mitchell's Second Amended Complaint (the "Complaint" or "SAC") contends that OneWest[1] violated the False Claims Act ("FCA") by submitting false claims to the government to obtain payment under three different government loan-modification programs: the Treasury Department's Home Affordable Modification Program ("HAMP"); the Department of Housing and Urban Development's ("HUD") Federal Housing Administration ("FHA") mortgage insurance program; and the Department of Veterans Affairs's ("VA") mortgage insurance program. The government makes payments to loan servicers like OneWest under each of these programs, and Mitchell contends that OneWest certified to these agencies that it was in material compliance with relevant laws and regulations, while (Mitchell says) OneWest knew that it was in fact not in legal compliance. Mitchell asserts that these allegedly false certifications caused the government to make payments to OneWest that it would not otherwise have made.

Because OneWest's participation in Treasury HAMP did not include FHA or VA loans, Mitchell effectively asserts three different FCA claims based on three different allegedly false statements: (i) alleged false statements to Treasury regarding OneWest's servicing of non-government loans in the Treasury HAMP program; (ii) alleged false statements to HUD regarding OneWest's servicing of FHA loans; and (iii) alleged false statements to VA regarding OneWest's servicing of VA loans. OneWest is entitled to judgment as a matter of law as to each of these claims based on the undisputed facts, for at least four reasons.

First, the court lacks jurisdiction to consider any of Mitchell's claims under the FCA's first-to-file bar. That jurisdictional provision precludes a relator from filing an FCA claim

[1] "OneWest" refers collectively to CIT Bank, N.A., CIT Group Inc., and OneWest Bank N.A. (f/k/a OneWest Bank, FSB), unless otherwise specified. All emphasis is added and all citations and quotations are omitted unless otherwise noted.

substantially similar to a claim already asserted in a pending complaint. Here, Mitchell and Michael Fisher—a former relator in this action who was dismissed in 2019—filed this complaint in December 2014. But Fisher alone had already filed a complaint in New York five months earlier that included the same allegations. The first-to-file bar precludes Mitchell from acting as a relator in these circumstances, so his complaint must be dismissed.

Second, Mitchell's Treasury HAMP claim fails as a matter of law. The evidence would show that OneWest's certifications of legal compliance were true because it was in material compliance with applicable laws and regulations. But even if Mitchell could show these representations were false, he cannot satisfy two other elements of the FCA: materiality and scienter. As to materiality, Mitchell must prove that had the government known about the allegedly false statements, it would not have made incentive payments to OneWest. As the Supreme Court recently held in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016), materiality is a "rigorous" requirement. As *Escobar* and many other cases have made clear, a false statement is likely immaterial as a matter of law when the government knew of the allegedly false statement but continued to make payments anyway. That is what happened here—the government itself stated in a 2018 submission to this Court explaining its decision not to intervene that it investigated Mitchell's allegations in this case; but the government never withheld a single payment from OneWest, and continued making those payments through 2020 when the HAMP program ended. Mitchell cannot overcome this evidence of non-materiality.

As to scienter, Mitchell cannot establish a genuine dispute of material fact in light of record evidence of OneWest's extensive compliance efforts, its repeated communications with Treasury seeking guidance as to compliance, and the feedback it received from the government consistently indicating that OneWest was one of the best mortgage servicers with respect to

HAMP. No reasonable juror could conclude that OneWest was knowingly making false certifications of legal compliance when it was maintaining robust compliance procedures, seeking guidance from the very agency to which it was allegedly lying, and achieving excellent performance according to external audits and servicer rankings.

Third, summary judgment is likewise warranted as to Mitchell's claim based on FHA's mortgage-insurance program because Mitchell cannot demonstrate either materiality or scienter. As explained in detail below, FHA engaged in two extensive audits of OneWest's loan servicing practices—one in 2010 and one in 2015—and found numerous violations. But despite having found such violations, FHA did not withhold payment under the program. Instead, it took other remedial steps short of withholding, and worked with OneWest to improve its compliance. That shows that Mitchell's allegedly false certification of legal compliance was immaterial to the government's payment decision. And the fact that FHA's audits involved substantial back and forth between the agency and OneWest—with OneWest repeatedly admitting non-compliance and seeking FHA's guidance about improving its performance—negates any plausible inference of scienter.

Fourth, OneWest is entitled to summary judgment with respect to Mitchell's VA claim. Most obviously, Mitchell fails to even allege, let alone provide any evidence of, any certification by OneWest to the VA. Accordingly, he cannot demonstrate a false statement or fraudulent conduct, and the Court should grant summary judgment in CIT's favor.

ISSUES PRESENTED

1. Is Mitchell's complaint, which includes all the same allegations as a complaint filed earlier by a different relator, barred by the FCA's "first-to-file" bar?

2. Does Mitchell's FCA claim related to Treasury HAMP fail when the undisputed evidence demonstrates that the government continued to make incentive payments despite

knowledge of his allegations, and when the record demonstrates that OneWest acted without the requisite scienter under the FCA?

3. Does Mitchell's FCA claim related to FHA HAMP fail because the undisputed evidence demonstrates that the government continued to make incentive payments despite knowledge of the violations Mitchell alleges in his complaint, and because the record demonstrates that OneWest acted without the requisite scienter under the FCA?

4. Does Mitchell's FCA claim related to VA HAMP fail because he has adduced no evidence of any false statements related to that program?

FACTUAL BACKGROUND

I. Overview of OneWest Bank's Loan Servicing Operations

On July 11, 2008, the Office of Thrift Supervision ("OTS") closed IndyMac Bank, F.S.B. ("IndyMac Bank") and the Federal Deposit Insurance Corporation ("FDIC") was named receiver. Ex. 27 (FDIC July 11, 2008 Press Release). The FDIC, as conservator, transferred substantially all the assets of IndyMac Bank F.S.B. to IndyMac Federal Bank FSB ("IndyMac Federal") with the intention to market the new institution for sale. *Id.* OneWest was formed in 2009 to acquire certain assets and operations of IndyMac Federal from the FDIC as conservator, including a portfolio of residential mortgage loans. OneWest completed that purchase in March 2009. Dkt. No. 157-21 (FDIC Bank Closing Information for IndyMac Bank) at 1.

OneWest serviced this portfolio of mortgage loans until November 2013, when it sold the bulk of its servicing portfolio to Ocwen Financial Corporation. Ex. 70 (Ocwen 8-K). OneWest continued to service some loans following this transaction, but its servicing operations were significantly curtailed. In 2015, OneWest Bank N.A. merged with CIT Bank, became a subsidiary of CIT Group Inc., and changed its name to CIT Bank, N.A., Ex. 69 (July 21, 2015

Merger Approval Letter). In 2018, CIT transferred its remaining loans to a sub-servicer. *See* Ex. 71 (CIT 8-K).

OneWest participated in three federal mortgage-related programs relevant to this case—Treasury HAMP, the FHA mortgage-insurance program, and the VA mortgage-insurance program—the background of which is described in the following three sections, with further details set forth in the Statement of Undisputed Material Facts. As set forth below, OneWest's participation in Treasury HAMP did not include its servicing of FHA and VA loans. Of the over 560,000 loans in OneWest's portfolio, approximately 3,600 (or 0.6%) were FHA loans, Dkt. No. 157-3 (June 7, 2010 Letter to HUD) at 1-2, and approximately 200 were VA loans, SAC ¶ 138.

II. Treasury HAMP

Treasury established HAMP, part of the Making Home Affordable Program ("MHA"), in 2009, in the wake of the 2008 financial crisis, with the goal of preventing avoidable foreclosures by incentivizing servicers to modify home loans. *See* 12 U.S.C. § 5201; Ex. 31 (HAMP Supplemental Directive 09-01) at 1. As a voluntary program, Ex. 67 (COP Oct. 2009 Report) at 44, HAMP required the participation of both loan investors and loan servicers (i.e., entities, like OneWest, that investors hired to administer the loans). HAMP thus sought to "create a partnership between the government and [these] private institutions" to reduce the monthly mortgage payments of at-risk homeowners. *Id.* at 43. To encourage HAMP participation, Treasury paid incentives to investors (to induce them to allow servicers to modify their loans rather than foreclosing), borrowers (to encourage them to remain current on their monthly payments), and servicers (to encourage them to perform modifications and reward them for helping to keep borrowers current). *See* Ex. 31 (HAMP Supplemental Directive 09-01) at 22-24.

In order to participate in the Treasury HAMP program, servicers were required to execute a Servicer Participation Agreement ("SPA"), as well as annual certifications. Dkt. No. 1-1

(SPA); Ex. 33 (Supplemental Directive 10-06). These certifications, which provided a regulatory basis for Treasury to monitor compliance with HAMP, required servicers to represent that their servicing activities under the program were in "material compliance" with all applicable laws, regulations, and guidance. *See, e.g.*, Ex. 33 (HAMP Supplemental Directive 10-06) at Ex. A, 1-2. Treasury required "material" rather than absolute compliance because HAMP marked a significant change to the mortgage servicing business. Before HAMP, mortgage servicing was mostly focused on payment processing tasks—such as sending mortgage statements, receiving and crediting payments, and remitting payments for taxes and insurance—rather than underwriting tasks such as analyzing borrower's income and assets. Ex. 34 (MHA Report July 2011) at 16. Treasury thus understood and expected that servicers were not, and in the near future were unlikely to be, in compliance with all HAMP guidelines and other rules and regulations. *See id*.

Originally, the program covered only non-government, non-Government Sponsored Entity ("non-GSE") loans; FHA and VA loans were not eligible. *Id.* Though Treasury later expanded HAMP to include FHA loans, OneWest did not opt in to that program and therefore never received incentives from Treasury for FHA loans. *See, e.g.*, Ex. 44 (MHA Report Sept. 2013) at 22 (excluding OneWest from the list of Treasury FHA-HAMP participants). Moreover, Treasury never expanded HAMP to cover VA loans. *See* Ex. 29 (MHA Handbook v. 5.2) at 3. OneWest's certifications to Treasury thus covered only its servicing of non-FHA, non-VA loans.

III. FHA Mortgage-Insurance Program

HUD's FHA insurance program provides mortgage insurance that pays claims to lenders when borrowers default on their mortgage payments on HUD-insured loans. The program, which was created in 1934, was designed to expand home ownership by encouraging lenders to lend to borrowers who otherwise would not qualify for loans. *See* Ex. 66 (FHA Overview) at 1-2.

To minimize losses to HUD from the FHA-insurance program, HUD established a loss-mitigation program (predating HAMP) in which servicers are required to participate. As of July 30, 2009, one of the steps in HUD's loss-mitigation program was FHA-HAMP, HUD's version of HAMP. Under FHA-HAMP, servicers review borrowers for modifications in addition to other loss-mitigation options for defaulted FHA loans. Ex. 63 (HUD Mortgagee Letter 2009-23). As explained above, although Treasury ultimately created a Treasury FHA-HAMP program to pay incentives on FHA modifications, OneWest did not participate in that program and so received payments on FHA loans only from HUD. HUD mandated its own annual certifications from participating servicers. In their certifications, servicers were required to represent to HUD that they were in compliance with a broad range of laws and regulations. *See* Ex. 64 (Lender Recertification Statements).

IV. VA Mortgage-Insurance Program

OneWest also participated in the VA mortgage insurance program for the approximately 200 VA-insured loans it purchased from the FDIC as conservator of IndyMac Federal. Like the FHA mortgage-insurance program, the VA program provides mortgage insurance that pays claims to lenders when borrowers default on their mortgage payments on VA-insured loans. The VA also implemented a loss-mitigation program to reduce losses from the program. *See* Ex. 65 (VA Servicer Guide) § 5. The VA program, however, did not include a certification requirement.

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. OneWest's Participation in Treasury's HAMP Program

A. The SPA and Annual Certifications

1. OneWest, like all servicers participating in HAMP, was required to execute an SPA contract to participate in the program. OneWest executed its SPA on August 18, 2009, and an amended SPA on March 17, 2015. Dkt. No. 1-1 (SPA); Dkt. No. 1-2 (Amended SPA).

2. The SPA also required OneWest to submit annual certifications. OneWest represented in those certifications, as amended by Supplemental Directive 10-06, that, "[i]n connection with the Programs" encompassed by the certification, it:

- was "in material compliance with, and certifie[d] that all Services have been materially performed in compliance with, all applicable Federal, state and local laws, regulations, regulatory guidance, statutes, ordinances, codes and requirements"; and
- "has materially complied with" HAMP requirements, including performing HAMP "in accordance with the practices, professional standards of care, and degree of attention used in a well-managed operation, and no less than that which the Servicer exercises for itself under similar circumstances," and using "qualified individuals with suitable training, education, experience and skills to perform the [MHA] Services," although:
- "Notwithstanding the above, [OneWest] may have inadvertently violated any of the above, but has taken or will take all necessary actions to rectify any such violation or lack of compliance."

Ex. 33 (HAMP Supplemental Directive 10-06), at Ex. A, 1-2 (initial certification); *see also id.* at Ex. B (subsequent certifications); Ex. 13-20 (executed certifications).

3. At the time that OneWest joined the program, Treasury HAMP covered only non-government (i.e. loans that were not part of the FHA and VA programs), non-GSE loans. *Id.* Though Treasury later expanded HAMP to include FHA loans, servicers were required to execute a service schedule to opt in to that expanded program, and OneWest did not do so. *See* Ex. 32 (HAMP Supplemental Directive 10-03) (announcing the creation of Treasury FHA-HAMP); Dkt. No. 1-2 (Amended SPA) (showing that OneWest did not execute an additional servicer schedule to participate in Treasury FHA-HAMP); Ex. 44 (MHA Report Sept. 2013) at 22 (excluding OneWest from the list of Treasury FHA-HAMP participants). Moreover, Treasury never expanded HAMP to cover VA loans and never paid incentives as to those loans. *See* Ex. 29 (MHA Handbook v. 5.2) at 3. Accordingly, OneWest's certifications to Treasury only covered its servicing of non-FHA, non-VA loans.

B. The SPA's Compliance Mechanisms

4. Treasury designated Fannie Mae as a financial agent responsible for "implementing HAMP guidelines and policies, serving as a point of contact for participating mortgage servicers . . . , serving as paying agent to calculate subsidies and compensation . . . and coordinating with Treasury and other parties toward achievement of the program's goals." Ex. 68 (COP Dec. 2010 Report) at 74. Treasury also designated Freddie Mac as "the HAMP compliance agent, responsible for ensuring that participating servicers satisfy their obligations under the HAMP SPAs." *Id.* at 79. Freddie Mac created a separate division known as Making Home Affordable-Compliance ("MHA-C") to "evaluate servicer performance through reviews of program compliance." Ex. 34 (MHA Report July 2011) at 17.

5. The SPA grants Treasury the right to conduct both onsite and offsite formal and informal audits of participating servicers. MHA-C conducted approximately 75 audits of OneWest to examine a wide range of servicer activities. Through these audits, MHA-C reviewed, among many other things, the tools and systems that OneWest used to review borrowers for HAMP modifications as well as OneWest's policies, practices, procedures, and training materials. *See* Dkt. No. 1-1 (SPA); Dkt. No. 1-2 (Amended SPA) at Financial Instrument § 3; Ex. 74 (Defendant's Jan. 15, 2021 Interrogatory Responses & Objections) at 12-14; Ex. 30 (MHA Handbook v. 5.3) at § 2.1.

6. The SPA authorizes Treasury to pursue various remedial actions against a noncompliant servicer. *See* Dkt. No. 1-2 (Amended SPA) at 6.B. Noncompliance does not require the government to withhold incentive payments or obtain reimbursement of prior payments. Rather, the government can choose to "take any, all, or none" of a range of actions that includes additional oversight, submission of information, and terminating the servicer from

the program, in addition to "withhold[ing] some or all of the Servicer's portion of the [incentive payment] until, in Fannie Mae's determination, [the] Servicer has cured the default." *Id.*

C. OneWest Had Extensive Internal Controls and Processes To Ensure HAMP Compliance

7. OneWest had a robust HAMP Internal Control Program Review Procedure to support its annual certifications, including a HAMP Internal Controls Program Review Matrix—a detailed checklist of the control objectives identified by Treasury with a description of how OneWest ensured that the control objective is satisfied and supporting documentation. *See* Ex. 1 (Third Quarter 2011 HAMP Internal Control Program Review Matrix).

8. OneWest implemented numerous policies and guideline documents, including (i) an "HLS HAMP Guideline" with "Foreclosure Sale Suspension Criteria" tracking the requirements of HAMP then in effect, *see* Ex. 21 (HLS HAMP Guidelines, Doc. No. 02866) at CIT3-01523985; (ii) an "HLS Foreclosure Policy," published September 9, 2011, *see* Ex. 22, and a "Foreclosure Referral Review Procedure," published July 27, 2011, *see* Ex. 23; (iii) HLS HAMP Eligible Loan Foreclosure Hold Standards governing foreclosure holds for HAMP-eligible loans, which OneWest periodically updated to reflect changes to HAMP rules and which explicitly prohibited dual tracking, *see* Ex. 24 (HLS HAMP Eligible Loan Foreclosure Hold Standards (May 3, 2012), Doc. No. 03418) at 3; and (iv) checklists to assist in ensuring that foreclosures were handled properly, *see, e.g.*, Ex. 25 (HLS Default Risk Management – Pre Foreclosure Sale Checklist (May 5, 2011), Doc. No. 03035).

9. OneWest conducted quarterly internal testing of its processes, with results provided to MHA-C. *See* Ex. 9 (MHA-C Final Exit Notes, Foreclosure Sales and Referrals Audit) at CIT3-00179342 ("At the direction of MHA-C, the servicer's QA function reviews up to 25 foreclosure referrals per month . . . and assesses compliance with specified Handbook

requirements."). OneWest's Loan Review department performed monthly testing of loans denied modifications and scrutinized compliance with HAMP foreclosure rules. Ex. 1 (Third Quarter 2011 HAMP Internal Control Program Review Matrix) at 5-7.

10. OneWest used proprietary Enterprise Loss Model (ELMo) software to ensure calculations including capitalization were done properly. Ex. 21 (HLS HAMP Guidelines) at 3.

11. OneWest also repeatedly sought and received guidance from Treasury in an effort to ensure its compliance with HAMP's evolving requirements. For example, an April 2011 Treasury Servicer Issue Resolution Report shows that OneWest communicated with Treasury regarding an exclusion permitting scheduled foreclosures to proceed if an escalation is received within thirty days of the sale, and Treasury responded that it intended to update its guidance to allow such foreclosures. Ex. 2 (April 1, 2011 Servicer Issue Report) at 12. Similarly, OneWest sought guidance on extending the 30-day period to evaluate loss-mitigation applications to ensure sufficient time is allowed to perform the evaluation and received a response from Treasury explaining when it would be permissible to stop the evaluation period. *See* Ex. 3 (July 6, 2015 Servicer Issue Report) at 1.

D. Notwithstanding Industrywide Difficulties, OneWest Performed Well

12. From the beginning of HAMP, servicers had difficulty complying with all of its requirements, many of which changed repeatedly and with little notice. These difficulties are documented in reports by the Congressional Oversight Panel ("COP") and the Special Inspector General for the Troubled Asset Relief Program ("SIGTARP")—the two government entities charged with HAMP oversight. *See, e.g.*, Ex. 67 (COP Oct. 2009 Report) at 107; Ex. 68 (COP Dec. 2010 Report) at 64–65; Ex. 49 (SIGTARP: Quarterly Report to Congress, Jan. 2011) at 12-13; Ex. 50 (SIGTARP: Quarterly Report to Congress, July 2015) at 108–09, 112-13.

13. But despite industrywide challenges, Treasury's publicly available servicer assessments show that OneWest was one of the highest-rated servicers participating in HAMP and MHA. From August 2009 through November 2013, at which point OneWest sold the bulk of its servicing portfolio to Ocwen, OneWest received the highest MHA service rating for eight consecutive quarters, and was the only servicer to do so. *See* MHA Reports (Ex. 37 (Jan. 2012) at 20; Ex. 38 (Apr. 2012) at 21; Ex. 39 (July 2012) at 21; Ex. 40 (Oct. 2012) at 20, Ex. 41 (Jan. 2013) at 20, Ex. 42 (Apr. 2013) at 21; Ex. 43 (July 2013), at 21; Ex. 45 (Oct. 2013) at 18). Treasury also reported that, as of November 2013, OneWest had the best record of reaching out to delinquent borrowers to encourage them to apply for HAMP and of completing evaluations received. Ex. 46 (MHA Report Nov. 2013) at 12. The same report indicated that OneWest led all major servicers in converting HAMP trial plans to permanent loan modifications. *Id.* at 14. Meanwhile, Treasury's September 2013 report ranked OneWest as one of the quickest servicers to respond to and resolve borrower inquiries and disputes escalated to MHA Support Centers over a four-quarter period. Ex. 44 (MHA Report Sept. 2013) at 17. OneWest also scored highly with respect to Treasury's agreement with its determinations of borrower eligibility for MHA programs, with a July 2013 report showing that OneWest was among the top performers for nine consecutive quarters. Ex. 43 (MHA Report July 2013) at 22. For eight of those nine quarters, Treasury reported a 0% rate of disagreement with OneWest's eligibility determinations. *Id.* at 25.

14. Audits by MHA-C, which included reviews of waterfall processes such as capitalization, found no evidence of improper capitalization by OneWest. *See, e.g.*, Ex. 8 (July 25-29, 2011 Incentive Payment Review Final Exit Notes).

15. Third-party audits and reviews further confirm OneWest's strong performance. The FDIC Office of Inspector General ("OIG") evaluated OneWest in 2010-2011 and found

material compliance with HAMP, determining that "OneWest administered loan modifications in accordance with HAMP. OneWest appropriately solicited borrowers for and processed loan modifications more than 98 percent of the time based on our review of a random sample of 260 loans." Dkt. No. 60-11 at 3 (July 2011 FDIC OIG Executive Summary). A 2013 SIGTARP report found that OneWest was tied for the lowest re-default rate among other major servicers, resulting in fewer homeowners having to seek limited foreclosure alternatives after re-defaulting on permanent HAMP modifications. Ex. 56 (SIGTARP Rising Redefaults Report) at 13.

16. During this time, OneWest entered into a Consent Order with OTS, its primary federal regulator, under which an independent consultant conducted a Foreclosure Review of OneWest's foreclosure and loss mitigation practices. Dkt. No. 60-2 (2011 Consent Order). The Foreclosure Review analyzed a sample of all loans subject to a foreclosure proceeding during 2009 or 2010 and found that OneWest conducted foreclosure and loss mitigation correctly 99.42% of the time. Ex. 69 (July 21, 2015 Merger Approval Letter) at 36.

E. Treasury Consistently Paid HAMP Incentive Payments to OneWest Until Treasury HAMP Expired

17. While Treasury had the power to withhold incentives for HAMP non-compliance, *see supra* ¶ 6—and did choose to temporarily withhold incentives from other servicers pending remediation of compliance issues, *see, e.g.*, Ex. 35 (MHA Report Oct. 2011) at 18 (withholding incentives from JPMorgan Chase because its HAMP compliance required "substantial improvement")—Treasury never withheld incentives from OneWest. *See, e.g.*, *id.*; Ex. 39 (MHA Report July 2012) at 21; Ex. 42 (MHA Report Apr. 2013) at 21; Ex. 45 (MHA Report Oct. 2013) at 18.

18. Treasury consistently paid servicer incentives under the Treasury HAMP program to OneWest until those incentives expired in 2020. *See* Ex. 52 (Jan. 2020 TARP Report); Ex. 53

(Dec. 2020 TARP Report); Ex. 76 (MHA Incentives Chart) (showing that OneWest received servicer incentives of $10,445.88 in 2020); *see also* Ex. 48 (MHA Compensation Matrix) at 3 (indicating that servicer incentives are paid in years 1-3 of a loan modification); Ex. 47 (MHA Report Q3 2017) at 2 ("The MHA Program closed to new applicants on December 31, 2016."). Treasury has also continued paying borrower incentives to this day. *See* Ex. 54 (Jan. 2021 TARP Report); Ex. 55 (May 2021 TARP Report); Ex. 76 (MHA Incentives Chart) (showing Treasury paid $376,780.62 in borrower incentives to OneWest between January and May 2021).

II. OneWest's Participation in the FHA Insurance Program

A. FHA Certifications

19. Like Treasury, HUD required servicers participating in the FHA Insurance Program to "submit an annual certification on a form prescribed by the Secretary." 24 C.F.R. § 202.5. The certification requires program participants to represent their compliance with a broad range of regulations: the lender must certify "to the best of [its] knowledge and after conducting a reasonable investigation" that it was in compliance with HUD-FHA regulations, handbooks, Mortgagee Letters, Title I letters, and policies. Ex. 64 (Lender Recertification Statements). A lender's failure to comply with its certification authorizes HUD to initiate an administrative action before the Mortgagee Review Board and impose any of the following remedies: (i) "issu[ing] a letter of reprimand … describ[ing] actions the mortgagee should take to correct the violation"; (ii) "plac[ing] a mortgagee on probation for a specified period of time" and imposing certain "additional requirements" during the probation period, including FHA "supervision of the mortgagee's activities," "periodic reporting," or "audits"; (iii) "temporarily suspending" the mortgagee from the program for up to a year; (iv) "withdrawing" a mortgagee from the program; or (v) settling with the mortgagee. 12 U.S.C. § 1708(c)(3)(A)–(E); *see* 24 C.F.R. § 25.6(g).

20. HUD expects servicers to review borrowers for loss mitigation within 90 days of delinquency and initiate foreclosure within six months of default unless the borrower qualifies for loss mitigation. Ex. 62 (HUD Mortgagee Letter 2000-05) at 9–10. Among other things, HUD's loss-mitigation program requires servicers to consider delinquent borrowers for loss mitigation in a specific priority order. *Id.*

21. HUD regulations give HUD the right to (i) audit servicers' operations to ensure compliance with HUD/FHA rules and (ii) require servicers to correct any deficiencies or violations the audit identifies. Ex. 59 (HUD Handbook 4000.1) at § V.c1-2 (enacted Sept. 14, 2015); Ex. 60 (HUD Handbook 4330.1) at § 1-2 (enacted 1994).

22. As explained above, OneWest received incentives on loans that received FHA-HAMP modifications solely from HUD, not from Treasury. *See supra* ¶ 3.

B. OneWest's FHA Servicing Vendor

23. Before OTS closed IndyMac Bank and transferred its assets to IndyMac Federal, IndyMac Bank hired a HUD-approved vendor, LoanCare, to perform servicing and loss-mitigation activities for IndyMac Bank's FHA loans. IndyMac Bank retained LoanCare because IndyMac Bank lacked FHA loss-mitigation expertise. LoanCare was responsible for reviewing delinquent borrowers and their loans to determine whether they could qualify for assistance under the applicable HUD guidelines. Dkt. No. 157-3 (June 7, 2010 Letter to HUD) at 2.

24. Shortly after OneWest acquired IndyMac Federal's servicing assets and operations from the FDIC, OneWest determined that LoanCare was not complying with the HUD/FHA rules. As a result, OneWest transitioned FHA loss-mitigation activities from LoanCare to an internal OneWest team. As of January 1, 2010 (nine months after OneWest was formed and purchased IndyMac Federal's servicing assets), LoanCare was no longer providing FHA loss-mitigation services to OneWest. *See id.* at 6.

C. HUD Audits of OneWest's Loss-Mitigation Compliance

25. In January 2010 and June 2015, HUD's Quality Assurance Division—the HUD department tasked with reviewing servicers for compliance with HUD's FHA regulations—conducted comprehensive on-site reviews of OneWest Bank's "level of compliance with HUD/FHA loan servicing and loss mitigation requirements," including examining OneWest's "loan servicing policies, procedures and practices for FHA-insured loans to determine if [OneWest's] policies, procedures and practices are timely, proper, and effective in mitigating losses to the FHA insurance fund." Dkt. No. 157-2 (April 5, 2010 HUD Letter) at 1; Ex. 6 (September 10, 2015 HUD Letter) at 1.

26. In these audits, HUD closely examined OneWest's FHA loss mitigation, identified specific instances of noncompliance with HUD's rules, and required OneWest to remedy the identified noncompliance. Each audit resulted in a detailed letter describing the issues HUD identified. *See, e.g.*, Dkt. No. 157-2 (April 5, 2010 HUD Letter).

1. 2010 HUD Audit

27. In its January 2010 audit, HUD identified violations of HUD's loss-mitigation rules including (among other things) that:

- OneWest and its vendor LoanCare "failed to perform loss mitigation evaluation in accordance with HUD/FHA requirements." HUD identified 48 loans where LoanCare had failed to evaluate borrowers for loss mitigation in accordance with HUD's requirements. This included failing to discuss loss-mitigation options with borrowers, failing to obtain necessary financial information, and incorrectly advising borrowers that they were not eligible for loss mitigation assistance. The specific loans that HUD identified included loans for which LoanCare offered borrowers loan modifications with 40-year terms, even though HUD rules dictated that modified loans' terms could be no longer than 30 years. *Id*. at 2.

- LoanCare "failed to offer the loss mitigation options [to borrowers] in the priority order required by HUD." Relatedly, the audit also found that OneWest failed to consider any borrowers for two of the required loss-mitigation options. *Id.*

- LoanCare did not collect information from borrowers regarding their circumstances, intentions, and financial condition within the required period. *Id.*

- OneWest failed to collect information from borrowers within the required time period and did not "evaluate each defaulted loan and consider all loss mitigation options . . . prior to the loan becoming 90-days delinquent." *Id.* at 3.

- LoanCare incorrectly advised borrowers they were ineligible for loss mitigation assistance, even though the borrowers were eligible. *Id.* at 5.

- After approving 20 borrowers for loan modifications, OneWest failed to implement the approved loan modification, including 19 cases in which the borrowers had returned executed loan modification agreements. *Id.* This included loans where the returned executed modification agreements showed that LoanCare had improperly approved the borrowers for a 40-year modification. *Id.*

- After OneWest failed to implement modifications that LoanCare had approved, LoanCare placed those borrowers in "unrealistic forbearance agreements" for four months before re-evaluating them for loss mitigation under the FHA-HAMP program. *Id.* at 6. As HUD explained in its letter, this was inconsistent with the HUD/FHA rules, which permit borrowers to receive FHA-HAMP loss mitigation if they fail to qualify for other HUD/FHA loss-mitigation options. *Id.*

- LoanCare "provided the [borrower] with formal forbearance agreements and informal repayment plans that did not comply with the HUD/FHA requirements." *Id.* HUD's audit identified 31 loans where OneWest approved the borrower for a forbearance agreement but "did not perform a financial analysis to verify the [borrower's] ability to pay" or conducted an incorrect analysis. *Id.* at 6-7.

- LoanCare's "analysis of the [borrower's] financial information did not include a calculation of the surplus income percentage." *Id.* at 14. HUD requires servicers to determine surplus income to analyze the borrower's "current and future ability to meet the monthly mortgage obligation" and determine the appropriate loss-mitigation option under HUD's rules. *Id.*

- OneWest failed to comply with HUD foreclosure rules by, for example, failing "to include the management review for foreclosure in the file" or "to follow the requirements of [HUD's] pre-foreclosure sale program." *Id.* at Attachment A.

28. On June 7, 2010, OneWest responded to the audit findings detailed above, acknowledging OneWest's and LoanCare's failures to follow HUD rules. OneWest explained that, after determining that LoanCare's performance was unsatisfactory, it had transitioned to

performing all loss mitigation internally as of January 1, 2010. Dkt. Nos. 157-3, 157-4 (June 7, 2010 Letter to HUD) at 2, 6.

29. OneWest agreed with HUD's finding that OneWest (acting through LoanCare) had (i) failed to perform loss-mitigation evaluations in accordance with HUD/FHA requirements, (ii) provided borrowers with forbearance agreements and payment plans that did not comply with HUD/FHA requirements; (iii) failed to calculate surplus income when reviewing borrowers; and (iv) failed to follow HUD pre-foreclosure sale guidelines. In addition, OneWest agreed that it had failed (i) to finalize loan modifications that it had approved and (ii) to follow the HUD foreclosure procedure. *Id.* at 6-12.

30. OneWest also identified in Appendix B of its letter specific loans for which HUD had paid claims that went to foreclosure, including where (i) "borrowers aggressively pursued and applied for a modification, but the review [by OneWest] wasn't completed within 90 days of delinquency despite repeated phone calls from borrowers to check status of the mod"; (ii) "[n]o HUD [loss-mitigation] options were pursued" or discussed, despite the borrowers calling in and "the required FC checklist was not completed prior to referral"; and (iii) the "[b]orrower should have been given a . . . [special forbearance] . . . but it [did not] appear that the borrower was ever put on such a plan. *Id.* at CIT00108616; CIT00108610; CIT00108613.

31. OneWest's letter further disclosed that it had not begun to build internal FHA loss mitigation capabilities until late in the third quarter of 2009 and detailed the steps it had taken to do so. *Id.* at 3, 6.

32. OneWest also disclosed that, notwithstanding its increased compliance efforts, as of June 2, 2010, 1,009 FHA loans in OneWest's portfolio (roughly 28%) were at least one

payment past due. *Id.* at 6. In contrast, the nationwide default rate on FHA loans at the time was significantly lower at 8.3%. Ex. 61 (June 2010 FHA Single-Family Outlook).

33. On December 3, 2010, after reviewing documentation OneWest submitted to resolve HUD's audit findings, HUD responded to OneWest's June 7, 2010 letter. Dkt. Nos. 157-5, 157-6 (December 3, 2010 HUD Letter). HUD closed the LoanCare related findings but directed OneWest to review HUD rules regarding OneWest's responsibility for its vendors' (i.e., LoanCare's) actions. *Id.* at 5. HUD declined to close its finding that OneWest failed to complete approved loan modifications and required OneWest to provide further information regarding the escrow amounts and foreclosure fees. *Id*. at Attachment B p. 19.

34. After OneWest submitted additional information on January 14, 2011, showing that borrowers did not incur any additional fees as a result of these violations, HUD closed these findings, too. Dkt. No. 157-7 (January 14, 2011 Letter) at 1; Dkt. No. 157-8 (January 31, 2011 Letter) at 3.

2. 2015 HUD Audit

35. HUD's 2015 audit examined OneWest's loss mitigation and servicing of FHA loans. Among other things, HUD obtained detailed loan-level information for 44 loans that it selected, including two years of payment history, collection history notes, property inspection reports, correspondence with borrowers regarding loss mitigation, and all correspondence sent to OneWest by the borrowers. Ex. 4 (May 22, 2015 Letter from HUD) at 1; *see also* Ex. 5 (list of 44 loans), at CIT3-00339852.

36. In a September 10, 2015 letter, HUD identified several areas of non-compliance, including concerns (i) about the training and knowledge of OneWest's loss-mitigation personnel, (ii) that OneWest was holding up loss mitigation by "chasing down minor documentation," and

(iii) that modified FHA-HAMP payments were not within HUD guidelines. Ex. 6 (September 10, 2015 HUD Letter) at 1-3, Attachment B. pp. 11-12.

37. OneWest responded, contesting many of HUD's findings. Ex. 10 (October 26, 2015 Letter from OneWest to HUD); Ex. 11 (November 4, 2015 Letter from OneWest to HUD). After reviewing the information, HUD ultimately required OneWest to adopt action plans to address HUD's concerns, required OneWest to refund HUD approximately $25,000 for claims made on one loan, and sought indemnification from OneWest for insurance claims on three loans. Ex. 12 (Nov. 25, 2015 Letter to HUD); Ex. 7 (Feb. 29, 2016 E-mail to HUD) at CIT00408908 (confirming receipt of refund).

D. HUD Consistently Paid FHA Mortgage-Insurance Payments to OneWest

38. HUD continued to pay insurance and incentive claims submitted by OneWest despite the 2010 and 2015 audits. *See* Ex. 74 (Defendant's Jan. 15, 2021 Interrogatory Responses & Objections) at 6, 9 (referencing dataset at CIT00871510). OneWest continued to collect payments from HUD until March 19, 2018, at which point its remaining loans were transferred to a sub-servicer. *Id.*

III. OneWest's Participation in the VA Insurance Program

39. Treasury never paid incentive payments with respect to VA loans; accordingly, OneWest received payments as to these loans solely from VA. Ex. 29 (MHA Handbook v. 5.2) at 3. VA paid claims to OneWest on only 46 loans. Ex. 74 (Defendant's Jan. 15, 2021 Interrogatory Responses & Objections) at 6, 9 (referencing dataset at CIT00871510). VA did not require servicers to execute certifications, and Relator Andrew Mitchell has confirmed that he is not aware of any such certification requirement. Ex. 75 (Mitchell Deposition) at 72:24-73:2.

40. OneWest performed VA loan modifications with effective dates in Summer 2011. *See, e.g.*, Ex. 26 (VA Loan Modification Agreement).

IV. Relator Andrew Mitchell and Procedural History of This Litigation

41. Relator Andrew Mitchell worked as a loss-mitigation specialist at OneWest from November 2009 until mid-2011, when he took another job at OneWest unrelated to loss mitigation. SAC ¶ 15. Mitchell briefly worked with GSE (Fannie Mae and Freddie Mac) loans during his initial training period and, during his time in loss mitigation, worked solely with FHA and VA loans; he thus never had experience with loans for which OneWest received servicer incentives through Treasury HAMP. Ex. 75 (Mitchell Deposition) at 21:15-22:3; 116:21-117:5 (Mitchell conceded that he never observed "any noncompliance at OneWest Bank concerning anything outside of FHA loans, VA loans, or GSE loans"); Dkt. No. 157-27 (Relator's September 1, 2020 Supplemental Objections and Responses to First Set of Interrogatories).

42. In December 2012, Michael Fisher filed a suit in the Southern District of New York, alleging that OneWest made false certifications in connection with its participation in Treasury HAMP. Dkt. No. 60-7 (Fisher 2012 Complaint). The Complaint was unsealed on April 8, 2014. *See U.S. ex rel. Fisher v. OneWest Bank*, 12-cv-9352 (S.D.N.Y.) (ECF No. 11).

43. On July 25, 2014, Fisher filed an amended complaint adding allegations concerning OneWest's FHA and VA loss mitigation. *See* Ex. 72 (Fisher July 25, 2014 Compl.). This amended complaint included the same basic allegations as the original complaint filed in this Court, including that OneWest violated the FCA with respect to Treasury HAMP, the FHA insurance program, and VA mortgage insurance program. *See* Ex. 77 (redline showing overlap between the complaints). Fisher attributed the FHA- and VA-related allegations to Mitchell, but did not add Mitchell as a relator. *See, e.g.*, Ex. 72 (Fisher July 25, 2014 Compl.) at ¶ 3 n.4.

44. Fisher subsequently filed a notice seeking to voluntarily dismiss the SDNY action, but that action remained pending until January 9, 2015, when it was dismissed by the New York district court. *See* Ex. 73 (Dismissal Order). Meanwhile, Fisher filed a new action on

December 23, 2014—five months after his amended SDNY complaint, but while the SDNY action was still pending—this time adding Mitchell as a Relator. Dkt. No. 1.

45. The government has twice declined to intervene in this action. Dkt. Nos. 10, 43. On February 22, 2018, the government explained that it had made the "decision not to intervene in this action for cause based on its investigation of the allegations in the Relators' Amended Complaint." Dkt. No. 43 at 1.

46. In fall 2019, Fisher withdrew as a Relator, leaving Mitchell as the sole Relator. Dkt. No. 51. On October 11, 2019, Mitchell filed the operative Second Amended Complaint (the "Complaint" or "SAC"). Dkt. No. 52.

ARGUMENT

"[S]ummary judgment is proper if, viewing the evidence and inferences drawn from that evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *U.S. ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 173 (5th Cir. 2004); *see* Fed. R. Civ. P. 56(a). "Where the nonmovant bears the burden of proof, the movant may discharge its burden by showing that there is an absence of evidence to support the nonmovant's case." *United States v. Ocwen Loan Servicing, LLC*, 2016 WL 2992229, at *3 (E.D. Tex. 2016).

"In determining whether liability attaches under the FCA," Mitchell bears the burden of demonstrating that "(1) . . . there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a claim)." *Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 475 (5th Cir. 2012) (internal quotation marks omitted). Mitchell's complaint alleges three sets of FCA claims: one involving Treasury HAMP, one involving FHA insurance, and one involving VA insurance. For the reasons explained in

detail below, he cannot establish one or more of the required elements as to each claim. And even setting aside these substantive failings, Mitchell's complaint is also subject to the "first-to-file" bar, a jurisdictional impediment independently requiring dismissal. OneWest is accordingly entitled to judgment as a matter of law on the undisputed facts as to all claims.

I. Mitchell's Complaint Must Be Dismissed For Lack Of Jurisdiction Under The First-to-File Bar

The FCA's first-to-file bar provides that "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). Under that rule, "if the later-filed complaint alleges the same material or essential elements of fraud described in a pending *qui tam* action, the § 3730(b)(5) jurisdictional bar applies." *U.S. ex rel. Fisher v. Ocwen Loan Servicing, LLC*, 2015 WL 4039929, at *5 (E.D. Tex. 2015) (Mazzant, J.); *see also U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009) (first-to-file bar is jurisdictional).

Here, Mitchell (along with Fisher) filed a new complaint in this Court in December 2014. Statement of Undisputed Material Facts ("SOUMF") ¶ 44. But Fisher's prior New York complaint was still pending when Mitchell's complaint in this Court was filed. *Id.* And because Mitchell's new complaint contained substantially similar allegations to Fisher's still-pending complaint, *id.* ¶ 43, Mitchell's filing of the complaint in this Court was an impermissible attempt to "bring a related action based on facts underlying the pending action," 31 U.S.C. § 3730(b)(5).

It does not matter that Fisher was also a party to Mitchell's new complaint. To be sure, this Court held in the *Ocwen* and *Homeward* cases that the first-to-file rule does not bar adding new relators to an existing action if they add new allegations, but the rule *does* bar "adding a new relator when the relator was simply joining into previously asserted allegations, and not asserting any new allegations or claims." *Ocwen*, 2015 WL 4039929, at *5 (citing *U.S. ex rel. Nowak v.*

Medtronic, Inc., 806 F. Supp. 2d 310, 327 (D. Mass. 2011), and *U.S. ex rel. Manion v. St. Luke's Reg'l Med. Ctr. Ltd.*, 2008 WL 906022, at *6–7 (D. Idaho 2008)); *see also U.S. v. Homeward Residential, Inc.*, 2015 WL 3776478, at *4 (E.D. Tex. 2015) (citing *U.S. ex rel. Precision Co. v. Koch Indus., Inc.*, 31 F.3d 1015, 1017 (10th Cir. 1994)).[2]

Mitchell's claims cannot withstand the first-to-file bar under the *Ocwen/Homeward* rule for two reasons. First, rather than joining an existing complaint as a relator as in *Ocwen* and *Homeward*, Mitchell brought a *new action*. This case thus does not raise the question whether joining an existing complaint amounts to impermissible "intervention" under the first-to-file bar and instead runs headlong into the statute's prohibition on "bring[ing] a related action." § 3730(b)(5). Second, as already explained, Mitchell added no new allegations when he became a relator. SOUMF ¶ 43; *Branch Consultants*, 560 F.3d at 378 ("A relator cannot avoid § 3730(b)(5)'s first-to-file bar by simply adding factual details or geographic locations to the essential or material elements of a fraud claim against the same defendant described in a prior compliant."); *Health Choice*, 2018 WL 3637381, at *11; *Capshaw*, 2017 WL 3841611, at *5. It is true that, in the New York complaint, Fisher attributed to Mitchell many of the allegations that now comprise Mitchell's current complaint, *id.*, but that also does not matter—the first-to-file bar is a jurisdictional limitation, and it requires a relator to actually file an FCA complaint before

[2] *See also Health Choice Grp., LLC v. Bayer Corp.*, 2018 WL 3637381, at *11 (E.D. Tex. 2018) (new relator barred by first-to-file rule where his allegations "only add[ed] detail to the previously alleged fraud allegations asserted by [the first relator]"), *report and recommendation adopted*, 2018 WL 3630042 (E.D. Tex. 2018); *Capshaw v. White*, 2017 WL 3841611, at *5 (N.D. Tex. 2017) (first-to-file rule barred new relators where they "d[id] not add additional allegations that satisfy the essential facts or material elements standard" (internal quotation marks omitted)), *reconsideration granted on other grounds*, 2017 WL 11511289 (N.D. Tex. 2017). While the *Ocwen*/*Homeward* rule does not salvage Mitchell's complaint for the reasons set forth above, OneWest reserves the right to contest the validity of this rule, aspects of which have been questioned by other courts. *See, e.g.*, *Capshaw*, 2017 WL 3841611, at *5 & n.3.

someone else does. *See, e.g.*, *U.S. ex rel. Duxbury v. Ortho Biotech Prod., L.P.*, 579 F.3d 13, 33 (1st Cir. 2009) ("The first-to-file rule is exception-free." (internal quotation marks omitted)). The question is not when the relator provided the relevant information but when he "intervene[d] [in] or br[ought] a related action." 31 U.S.C. § 3730(b)(5). And because Mitchell did not bring any action until months after the same allegations on which he relies were set forth in an FCA complaint that remained pending, Mitchell is jurisdictionally barred from maintaining this action.

Summary judgment is separately warranted for the non-jurisdictional reasons below.

II. OneWest Is Entitled to Summary Judgment As To The Treasury HAMP Allegations

Though Mitchell's loss mitigation work at OneWest did not involve loans eligible for Treasury HAMP, the Complaint includes a handful of threadbare allegations relating to OneWest's Treasury HAMP servicing. *See* SAC ¶¶ 148-167. The evidence would show that Mitchell's Treasury HAMP claim lacks merit because OneWest's certifications to Treasury were truthful: given OneWest's record of excellent performance in the Treasury HAMP program, *see* SOUMF ¶¶ 12-16, OneWest was never in material violation of Treasury's requirements. But even assuming that Mitchell could show a false statement to Treasury, his Treasury HAMP claim nevertheless fails as a matter of law for two reasons. First, the evidence shows that even if OneWest's certifications to Treasury were false, the false statements were not material to the government's payment decision. Second, Mitchell cannot make the requisite showing of scienter.[3] Summary judgment as to this claim is thus required.

[3] As set forth in OneWest's separate Motion for Partial Summary Judgment, OneWest is also entitled to partial summary judgment as to this claim under the public disclosure bar.

A. Any False Statements Fail To Satisfy The FCA's Materiality Requirement.

Even if Mitchell could prove that any Treasury certification was false, his claim fails as a matter of law because he cannot carry his burden of showing that any such false statements were material to the government's decision to pay HAMP incentives to OneWest.

The Supreme Court has recently clarified the contours of the materiality requirement in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016). The Court explained that "materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation," in this case, the government. *Id.* at 2002 (cleaned up). As the Fifth Circuit has explained, *Escobar* "understands materiality to turn on whether the government would pay the claim or not if it knew of the claimant's violation." *U.S. ex rel. Patel v. Cath. Health Initiatives*, 792 F. App'x 296, 301 (5th Cir. 2019).

Notably, the *Escobar* Court emphasized repeatedly that the materiality standard is "demanding" and "rigorous," *Escobar*, 136 S. Ct. at 1996, 2002-03, and that it is readily amenable to resolution at summary judgment, *id.* at 2004 n.6. That is why the Fifth Circuit has interpreted *Escobar* as having "heightened the standard for finding materiality under the FCA." *U.S. ex rel. Lemon v. Nurses To Go, Inc.*, 924 F.3d 155, 161 n.24 (5th Cir. 2019); *see also U.S. ex rel. Harman v. Trinity Indus.*, 872 F.3d 645, 662 (5th Cir. 2017) (observing that "*Escobar* hammered home the 'rigorous' nature of materiality"). And the Court provided guidance to assist lower courts in applying that heightened standard. For example, the Court held that it is "[in]sufficient for a finding of materiality that the Government would have the *option* to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial." *Escobar*, 136 S. Ct. at 2003. And, critically, the Court made clear that "if the Government pays a particular claim in full despite its actual

knowledge that certain requirements were violated, that is *very strong evidence* that those requirements are not material." *Id.* at 2003.

Mitchell's claim fails under this demanding standard. The evidence makes clear that the government was aware of the purported HAMP violations Mitchell alleges, but continued to pay OneWest's claims until the expiration of the program. That is exactly the sort of "very strong evidence" of non-materiality that *Escobar* identified. 136 S. Ct. at 2003; *see also Harman*, 872 F.3d at 663 ("[T]hough not dispositive, continued payment by the federal government after it learns of the alleged fraud substantially increases the burden on the relator in establishing materiality.").

It is undisputed that Treasury has not skipped a single incentive payment to OneWest since the beginning of the HAMP program. SOUMF ¶ 17. Indeed, Treasury continued to make servicer incentive payments for years after this lawsuit was initiated, with record evidence demonstrating payments through 2020. *Id.* ¶ 18.

The question, then, is whether the government knew of the alleged violations Mitchell alleges when it decided to continue making those payments. The answer is yes. Mitchell's first complaint in this Court, filed on December 23, 2014, indisputably disclosed all of his allegations to the government. To be sure, this Court has previously drawn a distinction between "mere awareness" of allegations and "actual knowledge of the fraud." *See U.S. ex rel. Fisher v. JPMorgan Chase Bank N.A.*, 2020 WL 3265060, at *8 (E.D. Tex. 2020); *see also U.S. ex rel. Escobar v. Universal Health Servs., Inc.*, 842 F.3d 103, 112 (1st Cir. 2016). Here, however, the government was much more than "merely aware" of the substance of Mitchell's allegations. Rather, the government made clear in this case that it *has* investigated the allegations in the complaint, explaining in a February 26, 2018 filing in this Court that it declined to intervene "for

cause based on its investigation of the allegations in the Relators' Amended Complaint." SOUMF ¶ 45. Otherwise said, the government itself has affirmed that it has investigated the allegations, and yet not only declined to intervene but, more importantly, *continued to make incentive payments*. *See id.* ¶ 18 (showing payments well past February 2018).

In *Escobar*'s wake, courts in this Circuit and others have routinely awarded defendants judgment on materiality grounds on the basis of such evidence.[4] The same result is required here.

B. Mitchell Cannot Satisfy the Scienter Requirement.

To impose liability under the FCA, a relator must not only prove the existence of a material false statement but also that a defendant had "actual knowledge," "act[ed] in deliberate ignorance," or "act[ed] in reckless disregard" of the statement's falsity. 31 U.S.C. § 3729(b)(1). Like materiality, this scienter requirement is "rigorous" and must be "strict[ly] enforce[d]." *Escobar*, 136 S. Ct. at 2002. The requirement "is not met by mere negligence or even gross negligence," *U.S. ex rel. Farmer v. City of Houston*, 523 F.3d 333, 338 (5th Cir. 2008), and "a

[4] *See, e.g.*, *Harman*, 872 F.3d at 670; *U.S. ex rel. Porter v. Magnolia Health Plan, Inc.*, 810 F. App'x 237, 242 (5th Cir. 2020) (finding no materiality where, "[e]ven after Plaintiff-Appellant's suit was unsealed, [the government] awarded Magnolia a contract for the fourth time"); *Abbott v. BP Expl. & Prod., Inc.*, 851 F.3d 384, 388 (5th Cir. 2017) (awarding summary judgment to defendants on the basis of government's continued payment "after a substantial investigation into Plaintiffs' allegations"); *D'Agostino v. ev3, Inc.*, 845 F.3d 1, 7 (1st Cir. 2016) ("The fact that [the Government] has not denied reimbursement . . . in the wake of [the relator's] allegations casts serious doubt on the materiality of the fraudulent representations that [the realtor] alleges."); *U.S. v. Sanford-Brown, Ltd.*, 840 F.3d 445, 447 (7th Cir. 2016) (No materiality where government had "already examined [the enterprise in question] multiple times over and concluded that neither administrative penalties nor termination was warranted."); *U.S. ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 334 (9th Cir. 2017) (in light of government's continued acceptance of noncompliant reports and consistent payment, "no reasonably jury" could find materiality); *U.S. ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1034 (D.C. Cir. 2017) "([W]e have the benefit of hindsight and should not ignore what actually occurred: the [government] investigated [the relator's] allegations and did not disallow any charged costs. In fact, [the vendor] continued to receive an award fee for exceptional performance . . . even after the Government learned of the allegations."); *U.S. ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017) (FDA's continued approval of challenged conduct after relator disclosed his allegations and decision not to intervene in FCA suit showed absence of materiality).

relator . . . cannot survive summary judgment merely by submitting evidence of false claims; she must have evidence that the defendants knowingly or recklessly cheated the government," *U.S. ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 232 (5th Cir. 2008).

Mitchell falls far short of making this demanding showing. The Treasury HAMP legal-compliance certifications that Mitchell says were false represented that OneWest was not "in *material* compliance" with applicable laws and regulations, and further provide that "inadvertent[] violat[ions]" do not run afoul of the certification as long as OneWest "has taken or will take all necessary actions to rectify any such violation or lack of compliance." SOUMF ¶ 2. Thus, to prevail on his FCA theory, Mitchell bears the burden of proving that OneWest either actually knew, recklessly disregarded, or acted in deliberate ignorance of having been in *material* violation of the law or HAMP regulations, and of failing to take action to rectify any inadvertent noncompliance, when it signed its certifications. 31 U.S.C. § 3729(b)(1). He cannot do so.

The extensive policies, procedures, and controls put in place by OneWest to ensure compliance and support its annual certifications are incompatible with a finding of the necessary scienter. *See* SOUMF ¶¶ 7-11. As described in detail above, OneWest implemented numerous guidelines and tools to maintain compliance with HAMP, which it routinely updated to track evolving requirements and ensure that it properly conducted its servicing activities. *Id.* ¶¶ 7-8. OneWest supplemented these policies and procedures with quarterly internal testing of its processes, providing the results to MHA-C, as well as monthly testing by the Loan Review department. *See id.* ¶ 9. OneWest also used proprietary Enterprise Loss Model (ELMo) software to ensure calculations including capitalization were done properly. *See id.* ¶ 10. These extensive controls negate any plausible inference that OneWest knew it was in material non-compliance with HAMP rules and regulations.

Record evidence that OneWest repeatedly sought and received guidance from Treasury to ensure its compliance with the evolving requirements of HAMP likewise forecloses any possibility that Mitchell can bear his burden of showing scienter. *Id.* ¶ 11. No reasonable jury could conclude that OneWest knowingly submitted false certifications of legal compliance to the government at the same time that it was seeking advice from the government about whether its conduct was compliant, particularly when the certifications specifically provide that "inadvertent[] violat[ions]" are permissible as long as the servicer takes all necessary measures to come into compliance. *Id.* ¶ 2. On the contrary, "[s]uch dialogue with the government is probative of a lack of scienter." *U.S. ex rel. Howard v. Caddell Constr. Co., Inc.*, 2021 WL 1206584, at *28 (E.D.N.C. 2021); *see United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 682 (5th Cir. 2003) (en banc) (Jones, J., specially concurring) ("Where the government and a contractor have been working together, albeit outside the written provisions of the contract, to reach a common solution to a problem, no claim arises.").

Finally, any suggestion that OneWest acted with the requisite scienter is belied by the fact that external evaluations and audits routinely indicated that OneWest was among the best servicers in the Treasury HAMP program. As explained in detail above, Treasury's publicly available servicer assessments show that OneWest was consistently one of the highest-rated servicers, including as to overall performance, record of reaching out to borrowers and completing evaluations, converting trial plans to permanent modifications, speed of response and resolution of inquiries and disputes, and rate of Treasury's agreement with its determinations of borrower eligibility. *See* SOUMF ¶ 13. Third-party audits and reviews likewise confirmed OneWest's strong performance. The FDIC OIG 2010-2011 audit and the Foreclosure Review found that OneWest performed loss mitigation correctly 98% and 99.42% of the time,

respectively, while a 2013 SIGTARP report found that OneWest was tied for the lowest re-default rate among other major servicers. *See id.* ¶¶ 15-16. And repeated audits by MHA-C, which included reviews of waterfall processes such as capitalization, found no evidence of wrongdoing. *See id.* ¶ 14. Given the government's heavy scrutiny of OneWest's servicing practices and its consistent feedback that OneWest's performance was outstanding and that it was in compliance, no reasonable juror could conclude that OneWest actually knew (or was in reckless disregard) that it was in fact in material violation of HAMP rules. *See Harman*, 872 F.3d at 660 (stating that "[t]here is a strong argument that a reasonable jury could not have found" the requisite scienter where the defendant acted in reasonable reliance on expert judgment). Because Mitchell cannot make the required scienter showing, this Court should grant summary judgment to OneWest as to the Treasury HAMP claim.

III. OneWest is Entitled to Summary Judgment As To The FHA Allegations.

A. Mitchell Cannot Show Materiality.

As with Treasury HAMP, Mitchell cannot make the requisite "rigorous" showing of materiality as to his FHA-based claim. *Escobar*, 136 S. Ct. at 2002. Again, Mitchell is unable to overcome the "very strong evidence" of non-materiality in the record: namely, that HUD continued to pay OneWest's FHA insurance claims and incentives notwithstanding its in-depth actual knowledge of the violations alleged in Mitchell's Complaint. *Id.* at 2003.

As with Treasury HAMP, the government investigated Mitchell's allegations relating to FHA HAMP before declining to intervene in this case, *see* SOUMF ¶ 45, and thus had knowledge of the alleged violations for these reasons already discussed. Moreover, as explained in detail above, *see id.* ¶¶ 25-37, HUD knew of, and exhaustively investigated, OneWest's alleged violations of HUD's rules for servicing FHA insured loans. The violations that Mitchell claims to have uncovered had already been identified by HUD through its January 2010 audit:

HUD's correspondence with OneWest regarding that audit leaves no doubt that HUD (i) had actual knowledge that OneWest had violated HUD's loss-mitigation rules, (ii) understood the specific alleged violations that the complaint attributed to Mitchell, and (iii) amply investigated those violations to draw its own conclusions about the extent of any violation. Indeed, HUD's April 5, 2010 letter detailing OneWest's numerous FHA loss-mitigation rule violations raised all of the violations that Mitchell alleges in his complaint:

- OneWest and its vendor LoanCare "failed to perform loss mitigation evaluation in accordance with HUD/FHA requirements," SOUMF ¶ 27; *compare, e.g.*, SAC ¶¶ 97-98, 135-136. HUD identified specific loans as to which OneWest was noncompliant, including by offering 40-year loan modification terms when HUD rules dictated terms of no more than 30 years. SOUMF ¶ 27; *compare, e.g.*, SAC ¶¶ 99, 101, 103.

- OneWest failed to offer loss mitigation options in the *required* priority order or to consider anyone for two of the required options. SOUMF ¶ 27; *compare, e.g.*, SAC ¶¶ 99, 129. ¶

- OneWest failed to collect information from borrowers within the required time period and did not "evaluate each defaulted loan and consider all loss mitigation options . . . prior to the loan becoming 90-days delinquent." SOUMF ¶ 27; *compare, e.g.*, SAC ¶¶ 121-122, 124, 136.

- OneWest incorrectly advised borrowers they were ineligible for loss mitigation. SOUMF ¶ 27; *compare, e.g.*, SAC ¶¶ 131-132, 135.

- OneWest failed to implement some approved loan modifications. SOUMF ¶ 27; *compare, e.g.*, SAC ¶¶ 101, 103.

- OneWest placed borrowers in unrealistic forbearance agreements for four months, despite HUD rules permitting borrowers to receive FHA-HAMP loss mitigation if they fail to qualify for other options. SOUMF ¶ 27; *compare, e.g.*, SAC ¶ 135.

- OneWest provided forbearance agreements and repayment plans that failed to comply with requirements or correctly perform the required financial analysis. SOUMF ¶ 27; *compare, e.g.*, SAC ¶¶ 128-133.

- OneWest failed to calculate the borrower's surplus income percentage, as required. SOUMF ¶ 27; *compare, e.g.*, SAC ¶ 130.

- OneWest violated HUD foreclosure rules, including by failing to include the management review for foreclosure in the file and follow the requirements of the pre-foreclosure sale program. SOUMF ¶ 27; *compare, e.g.*, SAC ¶¶ 110, 122, 135.

In its June 7, 2010 letter to HUD, OneWest agreed with many of HUD's findings, acknowledging OneWest's and LoanCare's failures to follow HUD rules. SOUMF ¶ 28. OneWest agreed with HUD's conclusion that OneWest (acting through LoanCare) had failed to satisfy numerous HUD/FHA requirements. *Id.* ¶ 29. OneWest's letter also brought to HUD's attention specific loans for which HUD had paid claims and for which OneWest's loss mitigation activities were noncompliant; explained the steps OneWest was taking to develop its internal FHA loss mitigation capabilities; and disclosed that roughly 28% of FHA loans in its portfolio were at least one payment past due—much higher than the nationwide default rate on FHA loans at that time. *Id.* ¶¶ 30-32. After receiving several rounds of additional documentation from OneWest, HUD ultimately closed its audit findings. *Id.* ¶¶ 33-34.

HUD also found additional violations in its 2015 audit. In a September 10, 2015 letter, HUD identified several areas of noncompliance, including concerns about the training and knowledge of OneWest's loss-mitigation personnel and that modified FHA-HAMP payments were not within HUD guidelines. *Id.* ¶ 36. After reviewing the information, HUD ultimately required OneWest to adopt action plans to address HUD's concerns, required OneWest to refund HUD approximately $25,000 for claims made on one loan, and sought indemnification from OneWest for insurance claims on three loans. *Id.* ¶ 37.

Despite this knowledge of the violations alleged in Mitchell's complaint, HUD did not deny payment of incentives or insurance claims; nor did it require OneWest to leave the FHA program. On the contrary, HUD consistently continued to pay incentives and insurance claims. *Id.* ¶ 38. When HUD determined that remedial measures were appropriate, it took them—including requesting tailored refunds and indemnification based on issues it uncovered in its 2015 audit. *Id.* ¶ 37. Yet HUD never denied payment. There is thus no need to guess "whether

the government would pay the claim or not if it knew of the claimant's violation." *Patel*, 792 F. App'x at 301. The government answered that question through its conduct, furnishing "very strong evidence" that such violations were immaterial to the government's payment decision. *Escobar*, 136 S. Ct. at 2003; *see also supra* note 4 (citing cases).

Indeed, the fact that the government took remedial action *other than* withholding payment only underscores the lack of materiality. The Fifth Circuit has repeatedly held that "the Government's ability to seek a range of remedies in the event of noncompliance suggests that payment is not conditioned on a certification of compliance." *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 270 (5th Cir. 2010); *accord U.S. ex rel. Spicer v. Westbrook*, 751 F.3d 354 (5th Cir. 2014); *U.S. ex rel. Marcy v. Rowan Cos., Inc.*, 520 F.3d 384, 389-90 (5th Cir. 2008). The fact that the government in this case took advantage of those other options in light of its knowledge of non-compliance demonstrates beyond doubt that the non-compliance was not material to its payment decision. And holding OneWest liable under the FCA despite the government's remedial decision would amount to improper judicial interference with HUD's regulatory function. *See Harman*, 872 F.3d at 662 ("[T]he FCA exists to protect the government from paying fraudulent claims, not to second-guess agencies' judgments about whether to rescind regulatory rulings.").

B. Mitchell Cannot Satisfy the Scienter Requirement

For many of the same reasons, Mitchell cannot satisfy the scienter element. The extensive correspondence between OneWest and HUD regarding HUD's audit findings, including OneWest's acknowledgment of numerous violations and its cataloging of ongoing efforts to come into compliance, negate any possibility that Mitchell will be able to show the necessary scienter. *See Southland*, 326 F.3d at 682; *United States v. Bollinger Shipyards*, 775 F.3d 255, 263 (5th Cir. 2014) (recognizing that government knowledge can negate the scienter required for an

FCA violation); *see also U.S. ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 327 (9th Cir. 1995) (lack of scienter where a defendant engaged in "dialogue" with government and "cooperated and shared all information during . . . testing"). Plainly, far from acting with "actual knowledge," "deliberate ignorance," or "reckless disregard" of the falsity of its certifications to HUD, OneWest was in open communication with HUD regarding its violations and lacked the necessary mental state for FCA fraud, requiring summary judgment in favor of OneWest. *See Farmer*, 523 F.3d at 338.

IV. OneWest is Entitled to Summary Judgment As To The VA Allegations

Mitchell padded his Complaint with a handful of allegations regarding purported false statements by OneWest in connection with its participation in the VA mortgage insurance program. *See* SAC ¶¶ 138–140. Critically, however, Mitchell fails to allege that OneWest made any certification to VA with respect to its participation in this program, and confirmed at his deposition that he is not aware of any such certification. SOUMF ¶ 39. OneWest's SPA with Treasury did not encompass its VA loan servicing activity. SOUMF ¶ 3. Absent any allegation or evidence of a purportedly false certification, Mitchell's claim fails.

Even if Mitchell could point to a false statement, undisputed record evidence makes clear that OneWest undertook VA loan modification in 2011 and closed modifications in the summer of 2011. *See* SOUMF ¶ 40. Mitchell no longer worked in loss mitigation in OneWest after 2011 and can adduce no evidence that OneWest was improperly handling VA loans after that time. Because Mitchell's claim turns on the allegation that OneWest failed to engage in loan mitigation for VA loans, *see* SAC ¶¶ 138-139, the claim lacks viability post-2011, entitling OneWest to summary judgment at least as to that period.

CONCLUSION

OneWest's motion for summary judgment should be granted.

Dated: June 24, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this notice was served on all counsel of record who have consented to electronic service as this district requires in accordance with Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by e-mail on this 24th day of June, 2021.

/s/ Claire Henry
Claire Henry