IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BETTER MARKETS, INC.,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Defendants.

Civil Action No. 14-190 (BAH)

DEFENDANTS' MOTION TO DISMISS

Defendants, the United States Department of Justice and Eric H. Holder, Jr., in his official capacity as Attorney General of the United States, hereby move the Court to dismiss this action in its entirety. See Fed. R. Civ. P. 12. The grounds for this motion are set forth in the accompanying memorandum of law.

Dated: May 19, 2014

Respectfully submitted,

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BETTER MARKETS, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, et al., Defendants.	Civil Action No. 14-190 (BAH)

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

In the years leading up to the 2008 financial crisis, JPMorgan Chase & Co. ("JPMorgan") bought billions of dollars of residential mortgages from lending institutions. It pooled those mortgages and packaged them into securities, known as residential mortgage–backed securities, or RMBS, whose value depended on homeowners' ability to make their mortgage payments. It marketed and sold those securities to the public, telling investors that the underlying mortgages complied with underwriting guidelines used by the original lenders to assess creditworthiness and minimize the risk of default. But many of those mortgages did not, in fact, comply with underwriting guidelines — making the securities far riskier than advertised. Ultimately, when the housing market faltered in 2006, the value of the securities plummeted, helping to spark the financial crisis.

Authorities at all levels of government soon began investigating abuses in the RMBS market, both on behalf of troubled homeowners and on behalf of investors left holding the toxic securities. Many of those investigations were overlapping, resulting in scores of enforcement actions and lawsuits scattered across the country. In November 2013, the Department of Justice — together with the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, the National Credit Union Administration, and the attorneys general of California, Delaware, Illinois, Massachusetts, and New York — announced a "global settlement" of civil claims against JPMorgan arising out of its RMBS practices. In short, JPMorgan agreed to pay $13 billion, including $4 billion in consumer relief, to settle a defined set of claims — including those at issue in nineteen separate federal and state lawsuits, which have since been dismissed with prejudice.

In this case, Plaintiff asks the Court to invalidate this global settlement, thus removing billions of dollars from the federal treasury — and from the wallets of troubled homeowners across the nation. Plaintiff also asks the Court to enjoin the Department of Justice from enforcing the global settlement "unless and until" it files a lawsuit and submits the settlement for judicial review and approval, presumably in the form of a proposed consent decree. There is no basis for either request.

The crux of Plaintiff's complaint is clear: It believes that the Department of Justice should have driven a harder bargain, so it wants a court to second-guess the terms of the settlement. But it is well established that an executive branch agency's decision to enter into a settlement agreement is presumptively unreviewable. Indeed, the Attorney General has plenary power to settle claims of the United States, and as the Supreme Court has explained, that includes "the power to make erroneous decisions as well as correct ones." Swift & Co. v. United States, 276 U.S. 311, 331-32 (1928). Thus, Plaintiff's claim that DOJ's decision to settle was arbitrary and capricious, or an abuse of discretion, must fail.

Plaintiff's statutory claims fare no better. Although Congress may limit the Attorney General's settlement discretion by a "clear and unambiguous" statutory directive, Plaintiff identifies no such directive here. Nothing in Section 951 of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C. § 1833a, purports to require the Attorney General to bring a civil penalty action under any particular circumstances. And the provision of the Administrative Procedure Act ("APA") addressing the imposition of sanctions, 5 U.S.C. § 558(b), has no bearing here because no sanction was "imposed": the settlement agreement was a contract between willing parties, and JPMorgan's obligation to pay the settlement amount was not imposed by law or governmental compulsion, but assumed voluntarily.

Plaintiff's remaining attempts to overcome the presumption of nonreviewability are equally meritless. The contention that DOJ "abdicated" its statutory responsibilities by settling with JPMorgan — after conducting an investigation, drafting a complaint, engaging in settlement negotiations, and securing the largest civil settlement in history — deprives that term of any meaning. The argument that DOJ encroached on the judicial power by settling "without filing a lawsuit and seeking judicial review" also has no basis in constitutional principle. In fact, the decision whether to initiate an enforcement action is constitutionally committed to the executive branch under Article II. Thus, the executive's decision to settle a dispute — and thereby end any case or controversy justiciable under Article III — does not intrude on the judicial power. Moreover, as a practical matter, federal agencies routinely settle claims without seeking court approval. If Plaintiff's vision of the separation of powers takes root, the federal courts would be overwhelmed with reviewing the settlement of virtually every claim made by the Department of Justice.

But the Court need not even reach these issues, because Plaintiff's claims fail for a more basic reason: lack of standing. Plaintiff alleges no cognizable injury to itself as an organization. Its assertion that the settlement "conflicts" with its mission to promote stronger regulation of the financial industry is the classic abstract policy concern that cannot confer standing, and Plaintiff fails to show that any resources spent criticizing the settlement have diverted it from its mission. Regardless, the remedies Plaintiff seeks will not redress its alleged injuries. If the settlement were set aside, the parties' rights and obligations under that contract would be thrust into uncertainty. It is unclear whether DOJ would file a lawsuit — a step that Plaintiff acknowledges it could not compel — or whether the parties would again reach a meeting of the minds. Thus, Plaintiff can only speculate that it would ultimately obtain either a complaint with the information it seeks or a judicial assessment of any settlement. Therefore, whether for lack of standing or for failure to overcome the presumption of nonreviewability, Plaintiff's claims should be dismissed under Rule 12(b)(1) for lack of jurisdiction.

In the alternative, Plaintiff's claims should be dismissed under Rule 12(b)(7) for failure to join indispensable parties. In asking the Court to invalidate the settlement agreement, Plaintiff seeks to extinguish the rights of all parties to that contract — including California, Delaware, Illinois, and Massachusetts — but has not and likely cannot join them in this action, leaving their interests at substantial risk.

For any or all of these reasons, the Court should dismiss this action in its entirety.

BACKGROUND

A. Investigation of JPMorgan

The following facts come from the complaint and documents incorporated therein by reference, which are taken as true for purposes of this motion. Between 2005 and 2008, DOJ conducted investigations of the packaging, marketing, sale, and issuance of RMBS by JPMorgan and its affiliates. Compl. ¶¶ 8, 67(a); Settlement Agreement ("SA") ¶ A (attached as Ex. 1). As part of that investigation, attorneys in the U.S. Attorney's Office for the Eastern District of California, in Sacramento, with the help of a whistleblower, "amassed nationwide evidence of fraudulent activity" by JPMorgan. Id. ¶ 74(b). Although the parties had discussed settlement, those talks had reached an impasse, with JPMorgan offering a payment of only $3 billion. See id. ¶ 74(g).

With negotiations stalled, DOJ prepared to file a civil lawsuit against JPMorgan and, on September 23, 2013, sent a draft complaint to the bank's CEO, Jamie Dimon. Id. ¶ 74(c). The next day, shortly before DOJ planned to announce its filing of the complaint, Mr. Dimon telephoned Associate Attorney General Tony West and offered to increase JPMorgan's settlement payment by billions of dollars to resolve the potential claims. Id. ¶¶ 19, 74(d)-(e). A day or two later, Mr. Dimon met directly with the Attorney General. Id. ¶¶ 19, 74(g).

Over the course of the next two months, Mr. Dimon spoke with the Attorney General approximately five times to negotiate settlement terms. Id. ¶ 74(g). The parties ultimately agreed on a total payment of $13 billion, and signed the settlement agreement on November 13, 2013. Id. Associate Attorney General Tony West signed on behalf of the United States.[1]

B. Terms of the Settlement Agreement

As is common in settlement agreements, JPMorgan did not admit to any violation of law. Compl. ¶¶ 8, 66(c); SA ¶ 18; see, e.g., SEC v. Citigroup Global Mkts., Inc., 673 F.3d 158, 166 (2d Cir. 2012) ("It is commonplace for settlements to include no binding admission of liability."). It did, however, acknowledge the following facts. SA ¶ G.[2]

"Between 2005 and 2007, JPMorgan purchased loans for the purpose of packaging and selling" RMBS. SA, Annex 1, at 1. Before purchasing the loans, "employees at JPMorgan

[1] See 28 C.F.R. § 0.161(b) ("The Deputy Attorney General or the Associate Attorney General, as appropriate, is authorized to exercise the settlement authority of the Attorney General as to all claims asserted by or against the United States."); cf. id. § 0.160 ("Assistant Attorneys General are authorized, with respect to matters assigned to their respective divisions, to . . . [a]ccept offers in compromise of claims asserted by the United States in all cases in which the difference between the gross amount of the original claim and the proposed settlement does not exceed $2,000,000 or 15 percent of the original claim, whichever is greater.").

[2] Plaintiff's contention that JPMorgan "acknowledged" but did not "admit" these facts, Compl. ¶¶ 68-72, is semantic hairsplitting. See, e.g., Random House Dictionary of the English Language 17 (2d ed. 1987) (defining "acknowledge" as "to admit to be real or true").

conducted 'due diligence' to confirm," among other things, that the "loans were originated consistent with specific origination guidelines provided by the seller." Id. During the "due diligence process, JPMorgan employees were informed . . . that a number of the loans included in at least some of the loan pools that it purchased and subsequently securitized did not comply with the originators' underwriting guidelines." Nevertheless, "JPMorgan represented to investors in various offering documents that loans in the securitized pools were originated 'generally' in conformity with the loan originator's underwriting guidelines." Id. But, "in certain instances, at the time these representations were made to investors, the loan pools being securitized contained loans that did not comply with the originators' underwriting guidelines." Id.

In particular, during the due diligence process, before purchasing the loans, "JPMorgan contracted with industry leading third party due diligence vendors to re-underwrite the loans it was purchasing from loan originators." Id. at 3. "The vendors assigned one of three grades to each of the loans they reviewed. An Event 1 grade meant that the loan complied with underwriting guidelines. An Event 2 meant that the loans did not comply with underwriting guidelines, but had sufficient compensating factors to justify the extension of credit. An Event 3 meant that the vendor concluded that the loan did not comply with underwriting guidelines and was without sufficient compensating factors to justify the loan." Id. at 3. Event 3 loans included, for example, "loans with high loan-to-value ratios (some over 100 percent); high debt-to-income ratios; inadequate or missing documentation of income, assets, and rental/mortgage history; stated incomes that the vendors concluded were unreasonable; and missing appraisals." Id. at 4. JPMorgan then "reviewed loans scored Event 3 by the vendors" and "made the final purchase decisions." Id. at 3-4.

"JPMorgan directed that a number of the uncured Event 3 loans be 'waived' into the pools . . . which then went into JPMorgan inventory for securitization." Id. at 4. Some Event 3 loans were waived in on a case-by-case basis, but "JPMorgan due diligence managers also ordered 'bulk' waivers" in some circumstances "without analyzing these loans on a case-by-case basis." Id. "Further, even though the Event 3 rate in the random samples indicated that the un-sampled portion of a pool likely contained additional" problematic loans, "JPMorgan purchased and securitized the loan pools without reviewing and eliminating those loans from the un-sampled portions of the pools." Id. at 4-5.

Meanwhile, in its marketing materials, JPMorgan "represented that the originators had a 'solid underwriting platform' and . . . that before purchasing a pool, a 'thorough due diligence is undertaken to ensure compliance with [underwriting] guidelines.'" Id. at 3. Its "salespeople marketed its due diligence process to investors . . . through presentations given at industry conferences" and via "oral communications that were often scripted by internal sales memoranda." Id. And in offering documents, JPMorgan represented that any "exceptions were made based on 'compensating factors,' determined after 'careful consideration' on a 'case-by-case basis.'" Id. at 2.

Despite these representations, although "employees of JPMorgan . . . received information that, in certain instances, loans that did not comply with underwriting guidelines were included in the RMBS sold and marketed to investors," "JPMorgan . . . did not disclose this to securitization investors." Id. at 1.

To resolve claims arising out of its conduct, JPMorgan agreed to pay a total of $13 billion. SA ¶¶ 1, 2. Of that amount:

- $4 billion will be disbursed by JPMorgan as consumer relief, such as loan forgiveness and interest rate reductions for troubled homeowners. SA ¶ 2; Annex 2.

- $4 billion was paid to resolve claims of the Federal Housing Finance Agency as conservator of Fannie Mae and Freddie Mac, including the claims at issue in four federal lawsuits alleging that JPMorgan made false or misleading statements in registration and marketing materials in violation of the federal Securities Act of 1933 and various state securities laws. SA ¶¶ D, 1(B); Ex. B ¶¶ 5(b)-(c).

- $2 billion was paid to the U.S. Department of Justice as a civil monetary penalty under FIRREA. SA ¶ 1(A)(i).

- $1.4 billion was paid to resolve claims of the National Credit Union Administration as the liquidating agent of five insolvent federal credit unions, including the claims at issue in four federal lawsuits alleging violations of federal and state securities laws. SA ¶¶ E, 1(A)(ii); Ex. C at 1-2, 6.

- $515 million was paid to resolve claims of the Federal Deposit Insurance Corporation as receiver for six failed banks, including the claims at issue in five federal lawsuits and five state lawsuits alleging violations of federal and state securities laws. SA ¶¶ F, 1(A)(iii); Ex. D at 2-4 & n.2.

- $613 million was paid to resolve claims of the State of New York, including a state lawsuit alleging violations of New York fraud laws. SA ¶¶ C, 1(G); Ex. A.

- And $454 million was paid to resolve potential claims of the States of California, Delaware, and Illinois, and the Commonwealth of Massachusetts. SA ¶¶ B, 1(C)-(F).

In exchange for JPMorgan's promises to pay the full settlement amount, including the consumer relief, and to cooperate fully in further federal investigations, the United States released certain claims against JPMorgan. That release covered any claims that the Civil Division of the Department of Justice had the actual and present authority to assert and compromise under 28 C.F.R. § 0.45 — including claims under FIRREA, the False Claims Act, the Program Fraud Civil Remedies Act, the Racketeer Influenced and Corrupt Organizations Act, the Injunctions Against Fraud Act, and various common law theories of liability. SA ¶ 5. But it covered only activities that the settlement agreement defined as "Covered Conduct." SA ¶ 3.

For example, it covered only conduct before January 1, 2009. Id.[3] It covered only residential mortgage–backed securities, not other collateralized debt obligations or derivative securities. Id. It covered only JPMorgan and its corporate affiliates, not individual employees. SA ¶ 11(b). And it covered only civil claims — not criminal ones. SA ¶ 11(a), (c).

C. Performance of the Settlement Agreement

In accordance with the settlement agreement, JPMorgan has already paid out $9 billion — the entire settlement amount aside from the consumer relief. In turn, each of the nineteen lawsuits mentioned above has already been dismissed, with prejudice, as to JPMorgan. See Compl. ¶ 77; cf. id. ¶ 48(c). The consumer relief will be disbursed over the next three years under the supervision of an independent monitor. SA ¶ 2; Annex 2.

D. This Action

Plaintiff's complaint brings seven counts. Counts 1 through 5 assert claims under the APA, 5 U.S.C. § 501 et seq. Count 1 alleges that DOJ violated the separation of powers doctrine by entering the settlement agreement "without filing a lawsuit and seeking judicial review and approval." Compl. ¶ 105. Count 2 alleges that DOJ lacked any statutory authority to enter the settlement agreement. Id. ¶ 108. Count 3 alleges that (a) this case presents "extraordinary circumstances" rendering it "arbitrary and capricious" for DOJ to enter the settlement agreement without seeking judicial review, and that (b) DOJ has "abdicat[ed] its responsibility to enforce the law" by "declaring its intention to use the Agreement as a template in future cases." Id. ¶ 111-12. Count 4 alleges that DOJ violated FIRREA by collecting a $2 billion settlement

[3] Plaintiff's allegation that "DOJ does not even clearly state the period for which it is granting [JPMorgan] immunity" is plainly incorrect. Compl. ¶ 8. In the settlement agreement, the United States releases JPMorgan from liability for only "Covered Conduct," SA ¶ 5, which is defined to include only "RMBS issued prior to January 1, 2009," id. ¶ 3.

payment "without any court involvement." Id. ¶ 115. Last, Count 5 alleges that DOJ violated 5 U.S.C. § 558(b) by "imposing" a monetary sanction. Id. ¶ 119.

Counts 6 and 7 assert entitlement to injunctive and declaratory relief, but no further substantive claims. Id. ¶¶ 122-29. Plaintiff asks the Court to declare that "[t]he $13 Billion Agreement is unlawful and invalid in whole or in part." Id. ¶ 130(a)(vi). It also asks the Court to enjoin DOJ from enforcing the agreement "unless and until the DOJ submits the $13 Billion Agreement to a court so that such court may review all the facts and circumstances, enlarge the record supporting the $13 Billion Agreement as it deems necessary, and determine whether the $13 Billion Agreement meets the applicable standard of review." Id. ¶ 130(b).

LEGAL STANDARDS

To survive a motion to dismiss under Rule 12(b)(1), a plaintiff must establish the court's jurisdiction by a preponderance of the evidence. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). When considering a motion under Rule 12(b)(1), the Court must accept all well-pleaded allegations as true. See Am. Nat'l Ins. Co. v. FDIC, 642 F.3d 1137, 1139 (D.C. Cir. 2011). The Court need not, however, accept inferences that are unsupported by facts alleged in the complaint or that amount to mere legal conclusions. See Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002). In evaluating subject-matter jurisdiction, the court may, when necessary, look beyond the complaint to "undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Herbert v. Nat'l Acad. of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992).

ARGUMENT

The Court should dismiss this case under Rule 12(b)(1) for lack of jurisdiction for two independent reasons: (1) because Plaintiff fails to establish standing and (2) because agency enforcement decisions are presumed unreviewable, and Plaintiff fails to rebut that presumption. Alternatively, the Court should dismiss this case under Rule 12(b)(7) for failure to join indispensable parties.

I. THE COURT LACKS JURISDICTION BECAUSE PLAINTIFF LACKS STANDING.

To establish Article III standing, an organization suing on its own behalf must meet the familiar standing requirements that apply to individuals: (1) injury in fact; (2) causation; and (3) redressability. See, e.g., Nat'l Taxpayers Union, Inc. v. United States, 68 F.3d 1428, 1433 (D.C. Cir. 1995). As the party invoking the Court's jurisdiction, Plaintiff bears the burden "clearly to allege facts demonstrating" each of these three elements. Warth v. Seldin, 422 U.S. 490, 518 (1975). The necessary facts "must affirmatively appear in the record" and "cannot be inferred argumentatively from averments in the pleadings." FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990). The standing inquiry is "'especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013) (citation omitted).

Here, Plaintiff fails to establish either that DOJ's decision to settle caused it a cognizable harm, or that the relief it seeks will redress its alleged injuries. Therefore, Plaintiff lacks standing, and the Court lacks jurisdiction.

A. Plaintiff Fails To Establish Any Cognizable Injury.

In this case, Plaintiff was not the object of any government regulation, adjudication, or policy. Rather, its principal claim of injury is that the settlement "conflicts" with its mission to promote stronger regulation of the financial industry. That is precisely the type of abstract policy concern that is insufficient to confer standing.

The federal courts do not sit to air arguments "at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences," Sierra Club v. Morton, 405 U.S. 727, 740 (1972), or to resolve "generalized grievances more appropriately addressed in the representative branches," Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (citation omitted). Thus, a "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem," is insufficient to create standing. Sierra Club, 405 U.S. at 739. As the Supreme Court has explained:

> [I]f a 'special interest' in [a] subject were enough to entitle [one organization] to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization however small or short-lived. And if any group with a bona fide special interest could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

Id. Accordingly, it is well established that an "'organization's mere abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Article III.'" Spann v. Colonial Village, Inc., 899 F.2d 24, 27 (D.C. Cir. 1990) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 (1976)).

To establish Article III injury, an organization must demonstrate a "'concrete and demonstrable injury to the organization's activities — with [a] consequent drain on the organization's resources — constituting . . . more than simply a setback to the organization's abstract social interests.'" Nat'l Taxpayers Union, 68 F.3d at 1433 (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982)). "Such a showing requires 'more than allegations of damage to an interest in "seeing" the law obeyed or a social goal furthered.'" Id. (quoting Am. Legal Found. v. FCC, 808 F.2d 84, 92 (D.C. Cir. 1987)). Rather, "'the organization must allege that discrete programmatic concerns are being directly and adversely affected'" by the challenged action. Id. (citation omitted).

Plaintiff offers five varieties of alleged injury, but none meets this test. Its principal assertion — that the settlement agreement conflicts with its mission — is plainly insufficient. Specifically, Plaintiff alleges that the settlement "conflict[s] with [its] mission" "to promot[e] settlements in enforcement actions that are transparent, based on an adequate record, strong enough . . . and . . . subjected to judicial review," because the settlement "has none of those attributes." Compl. ¶ 103(a) (emphasis omitted; capitalization altered). But "'[c]onflict between a defendant's conduct and an organization's mission is alone insufficient to establish Article III standing. Frustration of an organization's objectives is the type of abstract concern that does not impart standing.'" Ctr. for Law & Educ. v. Dep't of Educ., 396 F.3d 1152, 1161-62 (D.C. Cir. 2005) (quoting Nat'l Treas. Employees Union v. United States, 101 F.3d 1423, 1429 (D.C. Cir. 1996)) (emphasis added). Rather, "[t]o claim organizational standing, [a] plaintiff must allege that its 'activities have been impeded,' not just that its 'mission has been compromised.'" Am. Sports Council v. U.S. Dep't of Educ., 850 F. Supp. 2d 288, 299 (D.D.C. 2012) (citing Abigail Alliance for Better Access v. Eschenbach, 469 F.3d 129, 133 (D.C. Cir. 2006)). Here, Plaintiff remains entirely free to pursue its mission "to promote settlements" that meet its policy goals. Nothing in this settlement changes that. And the mere fact that this settlement does not meet Plaintiff's ideal is the quintessential "abstract concern" that does not confer standing.

Plaintiff's second alleged injury — that it has been forced to "expend significant resources" to "counteract the harmful effects" of the settlement — gets it no further. Compl. ¶ 103(c) (emphasis omitted). Although Plaintiff spills much ink on this point, the only "expenditures" it even vaguely identifies are an unspecified number of unidentified "blog posts, press statements, and interviews" advocating that the settlement agreement was not strong or transparent enough. Id. ¶ 103(c)(i). That, too, is insufficient. To begin, an "'organization cannot . . . manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit.'" Nat'l Taxpayers Union, 68 F.3d at 1434 (quoting Spann, 899 F.2d at 27); see also id. ("'The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.'") (citation omitted). Plaintiff's website suggests that, since the settlement agreement was signed on November 19, 2013, Plaintiff has written three blog entries,[4] three press releases,[5] and conducted a single interview[6] regarding the settlement — almost half of which simply advertise this lawsuit.

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[4] Better Markets Blog, Suing DOJ to Require Transparency & Accountability (Mar. 10, 2014, 12:01 pm); Fact Sheet: Better Markets Files Lawsuit Challenging the Record-Setting $13 Billion Settlement Agreement Between the Department of Justice and JP Morgan Chase (Feb 10, 2014, 12:00 pm); What the Public Still Does Not Know about the JP Morgan Chase Settlement (Nov. 26, 2013, 2:52 pm), available at http://bettermarkets.com/blogs/better-markets-blog#.U3BDd6EpCmQ (last visited May 11, 2014).

[5] Press Release, Better Markets, Inc., Better Markets Files Lawsuit Challenging the U.S. Department of Justice's Unlawful, Unprecedented and Unilateral Agreement Granting JP Morgan Chase Blanket Immunity In Exchange for $13 Billion (Feb. 10, 2014, 12:00 pm); What the Public Still Does Not Know about the JP Morgan Chase Settlement (Nov. 26 2013, 12:27 pm); If It's Not an Indefensible Sweetheart Settlement, Why Did DOJ Fail to Disclose Key Information about It? (Nov. 19, 2013, 6:35 pm), available at http://bettermarkets.com/reform-news/press-releases#.U3BGXKEpCmQ (last visited May 11, 2014).

Regardless, even if these press activities were entirely unrelated to this litigation, Plaintiff's supposed "expenditures" on them would not amount to a cognizable injury, because Plaintiff cannot show that they were for "'operational costs beyond those normally expended' to carry out its advocacy mission." Nat'l Ass'n of Home Builders v. EPA, 667 F.3d 6, 12 (D.C. Cir. 2011) (quoting Nat'l Taxpayers Union, 68 F.3d at 1434). Plaintiff has written dozens upon dozens of blog posts and press releases about financial regulatory matters since the settlement was signed. It alleges no facts to establish that the settlement has "forced [it] to expend resources in a manner that keeps [it] from pursuing its true purpose of monitoring the government's . . . practices." Nat'l Taxpayers Union, 68 F.3d at 1434. Nor could it. Whatever funds Plaintiff has spent criticizing DOJ's decision to settle out of court have not been diverted from Plaintiff's "true purpose" but, rather, have directly advanced that mission: to promote greater transparency and stronger punishments. "[O]rganizational plaintiffs cannot convert an ordinary program cost — lobbying for their interests — into an injury in fact." Humane Soc'y of United States v. Vilsack, — F. Supp. 2d —, No. 12–1582, 2013 WL 5346065, at *16 (D.D.C. Sept. 25, 2013).

Third, Plaintiff's claim of informational injury also fails. Plaintiff alleges that the out-of-court settlement deprived it of "valuable information" — namely, a complaint with "detailed . . . allegations" and a "judicial assessment" of the settlement — that it needs "to promote strong enforcement of the laws governing financial regulation." Compl. ¶ 103(b). In particular, Plaintiff seeks "allegations setting forth the fraudulent conduct; the specific violations of law that resulted; [and] the individuals responsible for those violations." Id. ¶ 103(b)(ii). But the D.C.

[6] Interview by Betty Liu with Dennis Kelleher, CEO, Better Markets, Inc. (Nov. 22, 2013), available at http://bettermarkets.com/reform-news/video#.U3BI4KEpCmQ (last visited May 11, 2014).

Circuit has squarely rejected this theory of standing: "To hold that a plaintiff can establish injury in fact merely by alleging that he has been deprived of the knowledge as to whether a violation of the law has occurred would be tantamount to recognizing a justiciable interest in the enforcement of the law. This we cannot do." Common Cause v. FEC, 108 F.3d 413, 418 (D.C. Cir. 1997); see also Judicial Watch v. FEC, 180 F.3d 277, 278 (D.C. Cir. 1999) (such an "'injury' is no more than a generalized 'interest in enforcement of the law,' and does not support standing").

Even if Plaintiff's informational-injury allegations could be read to assert a broader interest, they would still fail. "Informational standing arises 'only in very specific statutory contexts' where a statutory provision has 'explicitly created a right to information.'" Ass'n of Am. Physicians & Surgs., Inc. v. FDA, 539 F. Supp. 2d 4, 15 (D.D.C. 2008). In general, to support standing, an injury in fact must be not only "concrete and particularized, and . . . actual or imminent," but also an "invasion of a legally protected interest." Lujan, 504 U.S. at 560 (citations and internal quotation marks omitted); see Salt Inst. v. Leavitt, 440 F.3d 156, 158-59 (4th Cir. 2006) (distinguishing between the two inquiries). There is "no general common law right to information from agencies." Salt Inst., 440 F.3d at 158. Thus, for "a plaintiff to successfully claim standing based on an informational injury, he must allege that he is directly deprived of information that must be disclosed under a statute" creating such a right. Citizens for Responsibility & Ethics v. U.S. Dep't of Treasury, — F. Supp. 2d —, No. 13-732, 2014 WL 7728982014, at *4 (D.D.C. Feb. 27, 2014) (emphasis added) (citing, inter alia, ASPCA v. Feld, 659 F.3d 13, 23 (D.C. Cir. 2011) ("For purposes of informational standing, a plaintiff 'is injured-in-fact . . . because he did not get what the statute entitled him to receive.'") (emphasis added)). Here, Plaintiff identifies no statute that "confer[s] a broad, legally enforceable right to [the] information" it seeks. Id. (citation omitted). Thus, it establishes no cognizable informational injury, however its interest in that information is framed.

Fourth, Plaintiff's claim that the out-of-court settlement prevented it from pursuing its advocacy in a "public forum," while creative, is unavailing for similar reasons. Specifically, Plaintiff alleges that the settlement deprived it of a "public forum" where it could have exercised its "right," as an intervenor or amicus, to press for a more "complete record" and advocate for "sanctions that would adequately punish" JPMorgan. Compl. ¶ 103(d). But Plaintiff has no legally protected "right" to force a party to file a lawsuit so that its policy preferences may be aired. See Lujan, 504 U.S. at 560. And, had a lawsuit been filed, Plaintiff would have had no legally protected "right" to intervene or file an amicus brief. See Fed. R. Civ. P. 24(a) (party must be permitted to intervene as "of right" where, for example, it is "given an unconditional right to intervene by a federal statute"); Fed. R. App. P. 29(a) (amicus brief permitted only with consent of "all parties" or "by leave of court").[7] In any event, it is difficult to see how DOJ's decision to settle out of court has, in fact, deprived Plaintiff of a public forum. That decision led to this lawsuit, which, if anything, has given Plaintiff a far more visible opportunity to press for its policy goals.[8]

Plaintiff's final contention — that it faces a "[t]hreatened exacerbation" of these injuries because DOJ may use the settlement as a "template" to resolve potential claims against other big

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[7] See also SEC v. Citigroup Global Mkts., Inc., No. 11-7387 (S.D.N.Y. Nov. 9, 2011) (order denying Better Market's motion to intervene under Fed. R. Civ. P. 24(a)-(b) to object to proposed settlement "substantially for the reasons stated in the S.E.C.'s memorandum in opposition"); SEC v. Citigroup Global Mkts., Inc., No. 11-5227 (2d Cir. Jan. 22, 2013) (order denying Better Market's motion for an "enhanced role" as amicus with rights equivalent to the appellee for purposes of briefing and argument).

[8] See, e.g., Ben Protess, Lawsuit Challenges Government's $13 Billion Deal With JPMorgan, N.Y. Times, Feb. 11, 2014, at B3, available at http://dealbook.nytimes.com/2014/02/10/justice-department-sued-over-13-billion-jpmorgan-pact (last visited May 11, 2014).

banks, Compl. ¶ 103(e) — is quickly dispatched. To begin, this allegation asserts no distinct injury, but merely piggybacks off of those already discussed. Because each of those is insufficient, their hypothetical repetition adds nothing to Plaintiff's claim to standing. Moreover, this argument relies on the mere "threat" of a conjectural future harm, rather than an "actual or imminent" one, and is thus deficient on its face. See Lujan, 504 U.S. at 560; Clapper, 133 S. Ct. at 1147 (a "'threatened injury must be certainly impending to constitute injury in fact'") (citation omitted).

Because Plaintiff alleges no cognizable injury, it fails to establish standing, and the Court lacks jurisdiction.

B. Plaintiff Fails To Show that the Requested Relief Would Redress its Alleged Injuries.

It is perhaps even clearer that Plaintiff cannot establish redressability. It seeks two forms of relief: (1) a declaration that the settlement agreement is "invalid" and (2) an injunction barring DOJ from enforcing it "unless and until" it is submitted to a court for approval. Compl. ¶ 130(a)-(b). Neither would redress its alleged injuries.

If the settlement agreement were invalidated, one thing is clear: the parties' obligations under that contract — which, for the most part, have already been performed — would be called into grave doubt. Beyond that, however, nothing is certain. It is unclear whether DOJ would file a lawsuit and, if so, what the charges would be or what information the complaint would contain. As Plaintiff appears to concede, it could not force DOJ's hand on that score. See Compl. ¶ 90 (acknowledging that "DOJ may have the authority to decide whether to bring an enforcement action in the first instance"). It is likewise unclear whether, some six months after the fact, the parties would again reach a meeting of the minds and, if so, whether they would agree to submit a proposed consent decree for court approval, as Plaintiff hopes. It is further unclear that, in any such proceeding, Plaintiff would be permitted to intervene, let alone to participate as an amicus. And, critically, if forced to a trial, it is unclear whether DOJ would ultimately prevail and recover anything at all.

Thus, Plaintiff can only speculate that setting aside the settlement agreement would eventually produce, for example, a complaint with the detailed information it seeks, a "public forum" to air its views, a judicial assessment of the settlement — or, indeed, any settlement at all, let alone one that meets its ideals. Such speculation does not suffice. See Lujan, 504 U.S. at 560. Invalidating the settlement agreement would be sure to increase uncertainty, but not to redress any of Plaintiff's alleged injuries.

Thus, even if Plaintiff could demonstrate a cognizable injury, it still lacks standing, and the Court lacks jurisdiction.

II. THE COURT LACKS JURISDICTION TO REVIEW DOJ'S DECISION TO ENTER INTO A SETTLEMENT AGREEMENT.

In Counts 1–5, Plaintiff raises a mixture of constitutional, statutory, and abuse-of-discretion arguments in an effort to void the settlement agreement under the APA. Each must be dismissed for lack of jurisdiction. It is well established that an executive branch agency's decision to enter into a settlement agreement is presumptively unreviewable. Plaintiff fails to overcome that presumption at each turn.

A. An Agency's Decision To Enter into a Settlement Agreement Is Presumptively Unreviewable.

The APA grants a cause of action to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. It withdraws that cause of action "to the extent that . . . agency action is committed to agency discretion by law." Id. § 701(a)(2). In Heckler v. Chaney, 470 U.S. 831

(1985), the Supreme Court held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is . . . generally committed to agency discretion" and is therefore "presumed immune from judicial review under § 701(a)(2)." Id. at 831-32. "The ban on judicial review of actions 'committed to agency discretion by law' is jurisdictional." Baltimore Gas & Elec. Co. v. FERC, 252 F.3d 456, 458 (D.C. Cir. 2001).

The Chaney Court identified three reasons for the presumption of nonreviewability. First, an agency's decision not to enforce involves "a complicated balancing of a number of factors which are peculiarly within [an agency's] expertise." 470 U.S. at 831. An agency:

> must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.

Id. "The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." Id. Second, "when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts are often called upon to protect." Id. at 832. "Third, and perhaps most importantly, an agency's decision not to enforce resembles a prosecutor's prerogative not to indict — 'a decision which has long been regarded as the special province of the Executive Branch.'" Baltimore Gas, 252 F.3d at 459 (quoting Chaney, 470 U.S. at 832).

The D.C. Circuit "has held that the Chaney presumption of nonreviewability extends not just to a decision whether to bring an enforcement action, but to a decision to settle." Id. at 459. That is true whether an agency decides to settle after initiating an enforcement proceeding, or before. For example, in Schering Corp. v. Heckler, 779 F.2d 683 (D.C. Cir. 1985), the court held that Chaney required dismissal of a third-party challenge to the FDA's decision to settle a lawsuit against a drug manufacturer, noting that "[w]e can no sooner question the soundness of this bargain than we could a unilateral agency decision not to prosecute ab initio." Id. at 687; see also N.Y. State Dep't of Law v. FCC, 984 F.2d 1209, 1214 (D.C. Cir. 1993) (agency's "decision to settle or dismiss an enforcement action is nonreviewable under Heckler v. Chaney"); Baltimore Gas, 252 F.3d at 460 (agency's "decision to settle . . . , and its consequent decision not to see its enforcement action through to fruition, is a paradigmatic instance of an agency exercising its presumptively nonreviewable enforcement discretion").

Likewise, in Association of Irritated Residents v. EPA, 494 F.3d 1027 (D.C. Cir. 2007), the court held that Chaney required dismissal of a third-party challenge to EPA's decision to settle potential claims against feed lot operators without initiating either administrative proceedings or lawsuits. Id. at 1029, 1031. It explained: "The lack of a complaint does not render inapplicable Chaney and Schering. . . . We find no principled reason to treat [an agency's] decision to secure compliance by settlement in lieu of litigation differently than its decision to initiate and subsequently settle litigation." Id. at 1035. Indeed, the court noted that "[s]ettlement without any court record is not uncommon in administrative law, because the agency may attempt negotiation before proceeding to court. If the parties succeed in negotiating a mutually agreeable resolution to the violations, the matter will not end up in court." Id.

This case is indistinguishable, and the Court therefore presumptively lacks jurisdiction to review DOJ's decision to settle.

B. Plaintiff Fails To Rebut the Presumption of Nonreviewability Here.

To be sure, "[t]he presumption against judicial review in Chaney is not irrebuttable." Block v. SEC, 30 F.3d 1078, 1082 (D.C. Cir. 1995). The Supreme Court has identified three circumstances in which a Plaintiff might overcome the presumption of nonreviewability. Baltimore Gas, 252 F.3d at 460 & n.2. None is present here.

1. The Attorney General has plenary power to settle claims of the United States, and no statute purports to limit that discretion.

First, the presumption of nonreviewability may be overcome "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." Chaney, 470 U.S. at 833. "Congress may limit an agency's enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." Id. The key inquiry is whether "the statute . . . lay[s] out any circumstances in which the agency is required to undertake or to continue an enforcement action." N.Y. State, 984 F.2d at 1215; Baltimore Gas, 252 F.3d at 460. An agency retains its enforcement discretion where the statute gives no "indication that the violators must be pursued in every case, or that one particular enforcement strategy must be chosen over another." Irritated Residents, 494 F.3d at 1033 (citation omitted). The touchstone is congressional intent. See Chaney, 470 U.S. at 838.

Plaintiff makes three statutory arguments. In Count 2, it alleges that DOJ lacked any statutory authority to enter into the settlement agreement. Compl. ¶ 108. In Counts 4 and 5, it alleges that Section 951 of FIRREA, and an APA provision addressing the imposition of sanctions, 5 U.S.C. § 558(b), limited DOJ's discretion to settle claims. Id. ¶¶ 115, 119. Plaintiff is mistaken.

a. The Attorney General's plenary power to settle claims can be overcome only by a "clear and unambiguous" directive from Congress.

Plaintiff's suggestion in Count 2 that DOJ lacked any statutory authority to enter into the settlement agreement is plainly wrong. It is well settled that Congress has vested the

Attorney General with plenary power to settle claims of the United States. This power is incident to the Attorney General's statutory authority to supervise litigation involving the federal government, 28 U.S.C. §§ 516, 519; Swift & Co. v. United States, 276 U.S. 311 (1928), and it unquestionably "includes the power to enter into consent decrees and settlements," United States v. Hercules, Inc., 961 F.2d 796, 798 (8th Cir. 1992).[9] The Supreme Court's decision in Swift illustrates "the breadth of this power." Id. There, the Court rejected a third-party challenge to the Attorney General's authority to enter into a consent decree, explaining that it did "not find in the statutes defining the power and duties of the Attorney General any such limitation on the exercise of his discretion." 276 U.S. at 331. The Attorney General's discretion to settle, the Court stated, includes "the power to make erroneous decisions as well as correct ones." Id. at 331-32. In the wake of Swift, courts have uniformly found that the Attorney General's settlement authority "is not diminished without a clear and unambiguous directive from Congress." Hercules, 961 F.2d at 798 (collecting cases).

b. FIRREA contains no "clear and unambiguous" expression of Congress's intent to limit the Attorney General's settlement authority.

Plaintiff are equally mistaken in Count 4 to suggest that FIRREA purports to limit the Attorney General's settlement authority. Congress enacted FIRREA in the midst of the savings and loan crisis of the 1980s. Wells Fargo Bank N.A. v. FDIC, 367 F.3d 953, 954 (D.C. Cir. 2004). Designed to protect depositors against the failure of financial institutions, the Act dramatically restructured federal regulation of the savings and loan industry, abolishing some federal agencies and creating others with new responsibilities. Id. For example, it established

[9] Settlement agreements are private contracts, enforceable upon breach. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994). Consent decrees are judicial orders, which may be enforced immediately by contempt and may be modified over the objections of the parties. See United States v. Swift & Co., 286 U.S. 106 (1932).

the Office of Thrift Supervision, the Resolution Trust Corporation, and the Federal Housing Finance Board. Pub. L. No. 101-73, §§ 301, 501, 702 (1989). It also abolished the insolvent Federal Savings and Loan Insurance Corporation and shifted its responsibilities to the FDIC, which it empowered to take over failed banks and act as receiver. Wells Fargo, 367 F.3d at 954; Auction Co. of Am. v. FDIC, 132 F.3d 746, 751 (D.C. Cir. 1997).

In addition, FIRREA "strengthen[ed] 'the enforcement powers of Federal regulators of depository institutions' and 'the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors.'" Pharaon v. Bd. of Govs. of Fed. Reserve Sys., 135 F.3d 148, 154 (D.C. Cir. 1998) (quoting Pub. L. No. 101-73, § 101(9), (10)). For example, the Act expanded regulators' ability to assess civil monetary penalties, prohibited individuals convicted of crimes involving dishonesty from participating in the affairs of federally insured banks, and authorized the FDIC to take enforcement action against savings associations. Pub. L. No. 101-73, §§ 907, 910, 912.

In the provision at issue here, Section 951 of FIRREA, 12 U.S.C. § 1833a, Congress authorized the Attorney General to seek civil penalties from those who violate certain predicate criminal statutes. Subsection (a) provides:

> (a) In general. Whoever violates any provision of law to which this section is made applicable by subsection (c) shall be subject to a civil penalty in an amount assessed by the Court in a civil action under this section.

12 U.S.C. § 1833a(a). Subsection (c), in turn, lists the predicate criminal offenses:

> (c) Violations to which penalty is applicable. This section applies to a violation of . . .
>
> > (1) section 215, 656, 657, 1005, 1006, 1007, 1014, or 1344 of title 18, United States Code;
> >
> > (2) section 287, 1001, 1032, 1341 or 1343 of title 18, United States Code, affecting a federally insured financial institution; or
> >
> > (3) section 16(a) of the Small Business Act (15 U.S.C. 645(a)).

Id. § 1833a(c). And subsection (e) provides:

> (e) Attorney General to bring action. A civil action to recover a civil penalty under this section shall be commenced by the Attorney General.

Id. § 1833a(e).

Plaintiff's contention that Section 951 provides a "clear and unambiguous" expression of Congress's intent to limit the Attorney General's settlement authority is meritless. Plaintiff argues that subsection (e) "requires the Attorney General to file a civil action to recover a civil penalty" and that subsection (a) "require[s] a court to assess" any such penalty. Compl. ¶¶ 79, 80. But nothing in the statutory text purports to require the Attorney General to bring a civil action in any particular instance. See, e.g., Irritated Residents, 494 F.3d at 1033 (discretion not curtailed where statute gives no "indication that the violators must be pursued in every case"). Rather, the statute simply indicates that, if a civil action is brought, then it must be by the Attorney General (rather than another regulatory agency) and the penalty will be set by the Court.

The Supreme Court and D.C. Circuit have consistently declined to attribute sweeping meaning to such unremarkable statutory language. For example, in Chaney, the Supreme Court rejected the argument that a Food, Drug, and Cosmetic Act provision stating that certain offenders "shall be imprisoned . . . or fined" would "mandate[] criminal prosecution of every violator of the Act." 470 U.S. at 835. The Court noted that there was "no indication in case law or legislative history that such was Congress' intention in using this language" — the same language that is "commonly found" throughout the criminal code, where it is understood that the prosecution of every offender is not required. Id. (citing, inter alia, 18 U.S.C. §§ 1001 (false statement), 1341 (mail fraud)). So too here, particularly given that the predicate offenses for Section 951 are also part of the criminal code administered by the Attorney General. See, e.g., 12 U.S.C. § 1833a(c)(2) (citing, inter alia, 18 U.S.C. §§ 1001 (false statement), 1341 (mail fraud)).

Chaney also illustrates that FIRREA does not limit DOJ's enforcement discretion by offering a contrasting example of a statute that does. As Chaney explains, the statute at issue in an earlier case, Dunlop v. Bachowski, 421 U.S. 560 (1975), provided that, upon the filing of a complaint by a unionmember, the Secretary of Labor "'shall investigate such complaint and, if he finds probable cause to believe that a violation . . . has occurred . . . he shall . . . bring a civil action.'" Chaney, 470 U.S. at 833 (quoting 29 U.S.C. § 482). That statutory language, the Court in Chaney explained, "quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." Id. at 834. Even there, however, the Court held that the Secretary retained "a degree of discretion to select cases" based on his "subjective judgment," and required only that he set forth a statement of reasons for not bringing suit, subject to review for arbitrariness. Dunlop, 421 U.S. at 571-73. Here, by contrast, no comparably clear language purports to limit the Attorney General's discretion whatsoever.

Moreover, Plaintiff's argument is refuted, rather than reinforced, by the legislative history. Plaintiff cites the following passage from a Report issued by the House Committee on Banking, Finance, and Urban Affairs:

> The Committee believes that the enhancement of the regulatory powers and criminal justice provisions should go far in restoring public confidence in the nation's financial system and serve to protect the public interest. 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 [due to the savings and loan crisis] from ever again recurring. . . . The Attorney General recovers the civil penalty through a civil action brought in a United States district court.

Compl. ¶ 81 (quoting H.R. Rep. No. 101-54, Part I, at 465-66, 472 (1989)) (emphasis and ellipsis Plaintiff's).[10] Notably, the ellipsis in that passage spans six pages and omits a key sentence: "This section authorizes the Attorney General to recover a civil penalty for conduct violating specified provisions of title 18, United States Code, involving financial institutions." H.R. Rep. No. 101-54, Part I, at 472 (1989) (emphasis added).

Further, the passage on which Plaintiff relies is absent from the final Conference Report. The Conference Report does, however, retain language authorizing — but not requiring — the Attorney General to bring a civil action: "Section 951 authorizes the Attorney General to bring a civil action to recover a civil penalty for conduct that violates any of 10 banking-related offenses in title 18 of the United States Code." H.R. Rep. No. 101-222, at 445 (1989) (emphasis added); see also H.R. Rep. No. 101-209, at 450 (1989) (earlier version of Conference Report containing same language).

Thus, there is no indication in either the statutory text or the legislative history of Section 951 of FIRREA — let alone a "clear and unambiguous" directive — that Congress intended to limit the Attorney General's plenary authority to settle claims of the United States.

c. 5 U.S.C. § 558(b) contains no "clear and unambiguous" expression of Congress's intent to limit the Attorney General's settlement authority.

Plaintiff's invocation of 5 U.S.C. § 558(b) in Count 5 gets it no further. That provision states that "[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b). In other words, it stands for the unremarkable proposition that an agency must act within its statutory

[10] Four other House Committees also issued Reports on the bill: the Committee on Ways and Means, H.R. Rep. No. 101-54, Part II (1989); the Committee on Rules, H.R. Rep. No. 101-54, Part IV (1989); the Committee on the Judiciary, H.R. Rep. No. 101-54, Part V (1989); and the Committee on Government Operations, H.R. Rep. No. 101-54, Part VI (1989).

authority when imposing a sanction — as indeed it must whenever it acts. Cf. 5 U.S.C. § 706(2)(C) (providing for review of final agency action "in excess of statutory jurisdiction, authority, or limitations"). According to the Attorney General's Manual on the APA — a source that the D.C. Circuit gives "considerable weight"[11] — the "purpose of [§558(b)] is, evidently, to assure that agencies will not appropriate to themselves powers Congress has not intended them to exercise." U.S. Dep't of Justice, Attorney General's Manual on the APA, at 88 (1947). Thus, the provision "merely restates existing law." Id. (citing S. Rep. No. 79-752, at 43 (1945)).

As explained above, Congress has plainly vested the Attorney General with plenary power to settle claims of the United States. Because § 558(b) "merely restates existing law," it does not place an independent limit on that power. It adds nothing to Plaintiff's complaint.

Moreover, by its own terms, § 558(b) has no application here, because the settlement agreement — which the parties voluntarily signed — cannot be understood to "impose" anything on JPMorgan. See 5 U.S.C. § 558(b); id. § 551(10) (defining "sanction" to include an agency's "imposition of [a] penalty or fine" or "taking other compulsory or restrictive action"). As Plaintiff repeatedly alleges, the settlement agreement is a "mere contract." Compl. ¶¶ 2, 7, 61, 62; see, e.g., Kaktovik v. Watt, 689 F.2d 222, 230 (D.C. Cir. 1982) ("An agreement to settle a legal dispute is a contract."). And it is axiomatic that "'one need not enter into the obligation of a contract with another save by one's own free will.'" Tom Hughes Marine, Inc. v. Am. Honda Motor Co., 219 F.3d 321, 325 (4th Cir. 2000) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 1, at 4 (5th ed. 1984)). By definition, then, any obligations

[11] Pacific Gas & Electric Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 n.17 (D.C. Cir. 1974) (Attorney General's Manual "is entitled to considerable weight because of the very active role that the Attorney General played in the formulation and enactment of the APA"); see also Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (Attorney General's Manual is the "Government's own most authoritative interpretation of the APA," which the Supreme Court has "repeatedly given great weight").

undertaken in the settlement agreement were not imposed by law or governmental compulsion, but assumed voluntarily. See Jaguar Land Rover N. Am. LLC v. Manhattan Imported Cars, Inc., 477 Fed. App'x 84, 90 (4th Cir. 2012) (unpublished) (a party's "obligation to comply with duties that it freely assumed by contract cannot constitute 'requirement' or 'coercion' within the meaning of the statute"). Indeed, the parties explicitly recognized as much in the settlement agreement itself. See SA ¶ 18 (agreement "is not a final order of any court or governmental authority"); id. ¶ 19 (each party "represents that it freely and voluntarily enters into this Agreement without any degree of duress or compulsion").

By agreeing to settle, the Attorney General no more "imposed" a sanction on JPMorgan than JPMorgan forced the Attorney General not to file suit. Section 558(b) has no effect on the Attorney General's settlement authority here.

2. DOJ's decision to settle was not based on a mistaken belief that it lacked jurisdiction to bring an enforcement action.

The presumption of nonreviewability may also be overcome where an agency "refus[es] . . . to institute proceedings based solely on the belief that it lacks jurisdiction." Chaney, 470 U.S. at 833 n.4. Plaintiff makes no such allegation here. On the contrary, Plaintiff alleges that DOJ was fully prepared to file a complaint against JPMorgan. Compl. ¶ 74(c). Indeed, that is the outcome that Plaintiff hopes for here. Id. ¶ 130(b). And DOJ has, in fact, filed suit against other large banks for matters arising out of their RMBS practices. See United States v. Bank of America Corp., No. 3:13-cv-446 (W.D.N.C.) (complaint filed Aug. 9, 2013). Thus, there is no concern that DOJ declined to file a lawsuit because it mistakenly believed that it lacked jurisdiction. See Irritated Residents, 494 F.3d at 1036.

3. DOJ's decision to settle does not amount to an "abdication" of its statutory responsibilities.

Finally, the presumption of nonreviewability may be overcome where "the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." Chaney, 470 U.S. at 833 n.4 (quoting Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). In Count 3(b), Plaintiff alleges that DOJ has "abdicat[ed] its responsibility to enforce the law" by "declaring its intention to use the [Settlement] Agreement as a template in future cases involving the handful of the largest too-big-to-fail Wall Street banks that caused or significantly contributed to the Financial Crisis." Compl. ¶¶ 101, 111-12. This argument, too, is meritless.

As an initial matter, DOJ has not "consciously and expressly adopted" any such policy, Chaney, 470 U.S. at 833 n.4, and Plaintiff's allegations do not demonstrate otherwise. Tellingly, Plaintiff identifies no agency rule or other guidance setting forth such an enforcement policy. Although DOJ officials have commented — in press interviews — that the settlement agreement could serve as a "template" for future agreements,[12] such comments hardly amount to the "express adoption" of the sort of "general policy" that would bind the agency's enforcement discretion in future cases. Cf. Crowley Caribbean Transp. v. Pena, 37 F.3d 671, 676 (D.C. Cir. 1994) (an "agency's statement of a general enforcement policy may be reviewable for legal

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[12] See, e.g., Danielle Douglas, Tony West Negotiated That $13 Billion JP Morgan Settlement, Wash. Post, Nov. 21, 2013 (interview transcript) ("Could the settlement be used as a template for other agreements? [Associate Attorney General Tony West:] I think so."), available at http://www.washingtonpost.com/blogs/wonkblog/wp/2013/11/21/tony-west-negotiated-that-13-billion-jpmorgan-settlement-heres-what-he-has-to-say-about-it (last visited May 12, 2014); Chris Arnold, DOJ Signals JPMorgan Deal Could Be Model For Other Cases, National Public Radio, Nov. 20, 2013 (interview transcript) ("[Tony West]: We do believe this can be a template that we can use with other financial institutions who have been engaging in the same conduct that we believe needs to be addressed."), available at http://www.npr.org/2013/11/20/246264919/doj-signals-jpmorgan-deal-could-be-model-for-other-firms (last visited May 12, 2014).

sufficiency where the agency has expressed the policy as a formal regulation after the full rulemaking process . . . or has otherwise articulated it in some form of universal policy statement"). Moreover, the fact that DOJ has filed suit against Bank of America in another RMBS case belies the notion that any such "general policy" exists. See United States v. Bank of America Corp., No. 3:13-cv-446 (W.D.N.C.) (complaint filed Aug. 9, 2013).

Regardless, the D.C. Circuit has cast serious doubt on the notion that an agency's decision to settle a particular case — in contrast to a decision to decline to enforce a statute altogether — could ever amount to an "abdication" of responsibility. In Baltimore Gas, for example, the court rejected a power company's claim that FERC's settlement with a competitor was too lenient, even though no money damages were obtained. 252 F.3d at 457, 461. It explained: "[W]e cannot say that settlement is an 'extreme' policy that amounts to an 'abdication of [an agency's] statutory responsibilities" given that "federal agencies . . . routinely approve settlement agreements in enforcement proceedings." Id. at 461. Similarly, in New York State Department of Law, the court held that there was no abdication where the FCC "had two arrows in its quiver and chose to draw only one" at the settlement table, even though its monetary recovery was reduced. 984 F.2d at 1216-17.

The same is true when an agency pursues a single settlement strategy against an entire industry, much like Plaintiff alleges DOJ may do here. In Irritated Residents, the EPA was charged under the Clean Air Act and other statutes with regulating feed lots whose emissions exceeded a certain threshold, but there was no accepted method to measure those emissions. 494 F.3d at 1028-29. To solve that problem, the EPA struck a bargain with the feed lots: the EPA agreed not to pursue enforcement actions for a period of time (while it conducted a study), and feed lots, though not admitting any violations of law, agreed to pay civil penalties in proportion to their size (which served as a proxy for emission levels). Id. at 1029. Although "several thousand" feed lots signed identical consent agreements, the D.C. Circuit squarely rejected the notion that EPA's agreement not to sue was an abdication of responsibility; on the contrary, it endorsed that agreement as a permissible "quid pro quo" in the agency's enforcement strategy. Id. at 1029, 1035-36.

This case is not meaningfully different from Irritated Residents. Here, it cannot "justifiably be found" that, by settling its claims against JPMorgan, DOJ "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." Chaney, 470 U.S. at 833 n.4. As Plaintiff itself acknowledges, "almost all" enforcement actions by financial regulators "are resolved through the settlement process." Compl. ¶ 33. What is "routine" cannot also be "extreme." Baltimore Gas, 252 F.3d at 461. And DOJ's efforts in conducting an investigation, drafting a complaint, engaging in settlement negotiations, and securing the largest civil settlement in history cannot amount to "abdication" by any reasonable measure.

C. The Presumption of Nonreviewability Stands Absent a Colorable Constitutional Claim, and Plaintiff's Separation of Powers Claim Is Not Colorable.

Even where a plaintiff has standing, absent a "colorable claim . . . that the agency's refusal to institute proceedings violated any constitutional rights" of the plaintiff, the presumption of nonreviewability stands, and dismissal for lack of jurisdiction remains appropriate. Chaney, 470 U.S. at 838. Plaintiff makes no colorable separation of powers claim here.

Plaintiff alleges in Count 1 that DOJ's decision to settle "without filing a lawsuit and seeking judicial review and approval" encroached on the judicial power. Compl. ¶ 105. That is clearly mistaken. In fact, the decision whether to initiate an enforcement action is constitutionally committed to the executive branch under Article II. And the executive's decision to settle a dispute — and thereby end any case or controversy justiciable under Article III — does not intrude on the judicial power.

1. Adopting Plaintiff's theory would intrude on the executive power.

As the Supreme Court has explained, the "basic principle" underlying the separation of powers doctrine is that "one branch of the Government may not intrude upon the central prerogatives of another." Loving v. United States, 517 U.S. 748, 757 (1996). A branch may not "arrogate power to itself" or "impair another in the performance of its constitutional duties." Id. Under Article II, the power to "take care that the laws be faithfully executed" is "entrusted to the executive branch — and only to the executive branch." Baltimore Gas, 252 U.S. at 459 (citing U.S. Const. art. II, § 3). "One aspect of that power is the prerogative to decline to enforce a law, or to enforce the law in a particular way." Id. Thus, "[w]hen the judiciary orders an executive agency to enforce the law it risks arrogating to itself a power that the Constitution commits to the executive branch." Id. Indeed, the D.C. Circuit has explained that "Chaney's recognition that the courts must not require agencies to initiate enforcement actions may well be a requirement of the separation of powers commanded by our constitution." Id.

That is reason enough to reject Plaintiff's separation of powers argument. But here, Plaintiff offers more, for it would have the judiciary intrude even further into the executive power. Plaintiff seeks not only to compel the Attorney General to file a lawsuit, but also for a reviewing court to second-guess the terms of any consent decree to which the executive might ultimately agree. Indeed, the complaint makes clear that Plaintiff envisions an invasive inquiry into DOJ's decisionmaking process, including:

- The nature, scope, and thoroughness of DOJ's investigation, including its duration and the number of documents reviewed and witnesses interviewed, Compl. ¶ 67(a);

- JPMorgan's conduct, including the number, type, and content of its misrepresentations and when they occurred, id. ¶ 67(b);

- A calculation of the monetary harm that JPMorgan's conduct imposed on mortgagors, investors, the markets, and the economy as a whole, as well as a calculation of any monetary gains that accrued to JPMorgan, id. ¶ 67(e)-(f);

- How the total settlement amount was calculated, how the payments to different parties were apportioned, and why DOJ believes that those sums are adequate to punish JPMorgan and to deter future wrongdoing, id. ¶ 67(g), (i)-(j);

- Why DOJ elected not to pursue other forms of relief, such as a settlement term forcing JPMorgan to change its business practices going forward, id. ¶ 67(k);

- Whether JPMorgan will face collateral regulatory consequences or will be granted immunity from such consequences, id. ¶ 67(*l*); and

- Admissions by JPMorgan that it actually violated specific provisions of law, id. ¶ 67(m).

The D.C. Circuit has firmly held that such inquiries fall outside the judicial role. To be sure, when asked to approve a consent decree, a court must determine that it is fair under the circumstances and consistent with the public interest. See Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983). "But, when the government is challenged for not bringing as extensive an action as it might, a district judge must be careful not the exceed his or her constitutional role." United States v. Microsoft Corp., 56 F.3d 1448, 1462 (D.C. Cir. 1995).

The Microsoft case is instructive. There, the district court refused to enter an consent decree in an antitrust case after the government declined to provide it with details strikingly similar to those sought by Plaintiff here, such as (a) the "broad contours of the investigation, i.e., the particular practices of the defendant that were under investigation along with the nature, scope and intensity of the inquiry"; (b) the "conclusions reached by the Government" about those practices; (c) why "areas were bargained away" during settlement discussions "and the reasons for their non-inclusion" in the decree; and (d) what the government's future investigative plans were. Id. at 1455. The D.C. Circuit reversed — and reassigned the case — explaining that the district "judge's demand that he be informed [of these matters] indicates that the judge impermissibly arrogated to himself the President's role to 'take care that the laws be faithfully executed.'" Id. at 1457 (quoting U.S. Const. art. II, § 3). The D.C. Circuit specifically condemned the district court's (a) efforts "to seek . . . information concerning the government's investigation and settlement negotiations," id. at 1459; (b) attempts "to evaluate claims that the government did not make and to inquire as to why they were not made," id.; and (c) "criticism of [the defendant] for declining to admit that [its] practices . . . actually violated the antitrust laws," id. at 1461. Each of these is a duty that Plaintiff would assign to a reviewing court here.

At bottom, Plaintiff would like to force the executive to file a lawsuit, see Baltimore Gas, 252 U.S. at 459, and then have the reviewing court "assume the role of Attorney General" in second-guessing the terms of any consent decree, Microsoft Corp., 56 F.3d at 1462. This Court should not endorse an approach that raises such serious separation of powers concerns.

2. An agency's decision to settle does not encroach on the judicial power.

In any event, an agency's decision to settle a dispute does not intrude on the judicial power. In considering alleged encroachments on the judicial power, the Supreme Court has specifically identified the danger that another branch will "'impermissibly threaten[] the institutional integrity of the Judicial Branch.'" Mistretta v. United States, 488 U.S. 361, 383 (1989) (quoting CFTC v. Schor, 478 U.S. 833, 851 (1986)). Under Article III, the judicial power is limited to the resolution of "cases" and "controversies." Hein v. Freedom from Religion Found., 551 U.S. 587, 597 (2007) (quoting U.S. Const. art. III, § 2). Within those bounds, it is the settled province of the judiciary "to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). Relatedly, the coordinate branches may not interfere with the "total and absolute independence of judges in deciding cases or in any phase of the decisional function." Chandler v. Judicial Council of Tenth Circuit, 398 U.S. 74, 84 (1970) (emphasis added). Nor may Congress "vest review of the decisions of Article III courts in officials of the Executive Branch" or "command[] the federal courts to reopen final judgments." Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995).

An agency's decision to settle a dispute without seeking court approval does not undermine these core judicial functions. As an initial matter, a "court's authority to review [a case] depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place." Microsoft, 56 F.3d at 1459-60. Thus, where an agency never brings a case, the court's authority is never triggered. See id. That is precisely the situation here.

Moreover, even where an agency does bring a case, the parties generally remain at liberty to settle their dispute — in fact, judicial policy explicitly encourages them to do so. See, e.g., Autera v. Robinson, 419 F.2d 1197, 1199 (D.C. Cir. 1969) ("Voluntary settlement of civil controversies is in high judicial favor."); Fed. R. Civ. P. 16; LCvR 16.3(c).[13] And when those efforts are successful, the judicial power is extinguished, for there is no longer any case or controversy. See Atlanta Gas Light Co. v. FERC, No. 93-1614, 1997 WL 255285, at *1 (D.C. Cir. Apr. 14, 1997) ("As a result of the parties' settlement, there no longer exists a case or controversy as to these parties that can be resolved by this court."); accord Jones v. McDaniel, 717 F.3d 1062, 1067 (9th Cir. 2013); Kent v. Dep't of Air Force, 524 Fed. App'x 614, 616 (Fed. Cir. 2013). Regardless of the scenario, then, settlement cannot be understood to interfere with the judicial power. Plaintiff's separation of powers argument thus fails.

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[13] Cf., e.g., Fed. R. Civ. P. 23(e) (in class actions, claims of a certified class "may be settled, voluntarily dismissed, or compromised only with the court's approval").

D. Plaintiff's Abuse-of-Discretion Claim is Unreviewable.

Plaintiff's only remaining substantive claim is Count 3(a), which alleges that this case presents "extraordinary circumstances" that rendered it "arbitrary, capricious," or "an abuse of discretion" for DOJ to enter into the settlement agreement without seeking judicial review. Compl. ¶ 111. As explained above, an executive branch agency's decision to enter into a settlement agreement is presumptively unreviewable, and Plaintiff fails to overcome that presumption. Thus, the Attorney General's plenary power to settle claims of the United States is undiminished, and that includes "the power to make erroneous decisions as well as correct ones." Swift, 276 U.S. at 331-32. Accordingly, Plaintiff's claim that DOJ's decision to settle was arbitrary and capricious, or an abuse of discretion, must also fail. See id.

There is another reason to reject Plaintiff's abuse-of-discretion claim: the "extraordinary circumstances" standard that Plaintiff urges provides no judicially manageable standard for the Court to apply. Plaintiff offers varying descriptions of its proposed standard, which it says is triggered whenever the matter has a "profound, historic, and unprecedented impact on the public interest," Compl. ¶ 34(b), or alternatively, is "extraordinarily complex and far-reaching in [its] impact on a large number of injured parties, an important industry, or the wider public interest," id. ¶ 93. But the lack of a consistent definition is merely a symptom of a larger problem. Plaintiff concedes that, in the run of cases, the executive need not submit a settlement agreement to judicial review. See id. ¶ 34. Yet its I-know-it-when-I-see-it approach provides no clear line for the executive to follow or the Court to enforce.

Indeed, the D.C. Circuit has expressed doubt that a standard that turns on a court's perception of the public interest, as Plaintiff's proposal does, could ever "supply a judicially manageable standard for review." Microsoft Corp., 56 F.3d at 1459 (citing Maryland v. United

States, 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting from summary affirmance)). Moreover, on the other side of the scale, "a settlement, particularly in a major case" like this one, "will allow the Department of Justice to reallocate necessarily limited resources." Id. "There is no standard by which the benefits to the public from a 'better' settlement of a lawsuit than the Justice Department has negotiated can be balanced against the risk of an adverse decision, the need for a speedy resolution of the case, the benefits obtained in the settlement, and the availability of the Department's other resources." Maryland, 460 U.S. at 1005 (Rehnquist, J., dissenting from summary affirmance). Thus, both the "impossibility of deciding without an initial policy decision of a kind clearly for nonjudicial discretion" and the "lack of judicially discoverable and manageable standards" in Plaintiff's proposed standard make its abuse-of-discretion claim particularly unsuited to judicial review. Cf. Baker v. Carr, 369 U.S. 186, 217 (1962).

E. Plaintiff's Claims for Declaratory and Injunctive Relief Provide No Independent Source of Jurisdiction, and Must Be Dismissed.

Counts 6 and 7 assert entitlement to declaratory and injunctive relief, but no substantive causes of action. Compl. ¶¶ 122-29. "Declaratory relief is not an independent cause of action, and does not provide an independent source of federal jurisdiction." Yancey v. District of Columbia, — F. Supp. 2d —, No. 10-1953, 2013 WL 5931543, at *6 n.6 (D.D.C. Nov. 6, 2013) (citing Ali v. Rumsfeld, 649 F.3d 762, 778 (D.C. Cir. 2011)). Likewise, "a request for injunctive relief is a remedy and not a separate cause of action." Anderson v. Gates, — F. Supp. 2d —, No. 12-1243, 2013 WL 6355385, at *10 (D.D.C. Dec. 06, 2013) (citing Coe v. Holder, No. 13-184, 2013 WL 3070893, at *2 n.4 (D.D.C. June 18, 2013), and Goryoka v. Quicken Loan, Inc., 519

Fed. App'x 926, 929 (6th Cir. 2013) (unpublished)).[14] Thus, Counts 6 and 7 must also be dismissed.

III. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED FOR FAILURE TO JOIN INDISPENSABLE PARTIES.

In the alternative, even if Plaintiff could establish standing and overcome the presumption of nonreviewability, its claims should be dismissed under Rule 12(b)(7) for failure to join indispensable parties under Rule 19. In asking the Court to invalidate the settlement agreement, Plaintiff seeks to extinguish the rights of all parties to that contract — including JPMorgan, California, Delaware, Illinois, and Massachusetts — but has failed to join them in this action.

Rule 19 generally requires a court to address three questions: (a) whether a party is required to be joined; (b) if so, whether joinder is feasible; and (c) if joinder is not feasible, whether the action should nevertheless proceed among the existing parties or should instead be dismissed. See Fed. R. Civ. P. 19; Republic of Philippines v. Pimentel, 553 U.S. 851, 862 (2008). Here, however, the D.C. Circuit has already answered the first and third questions, holding that "an action seeking rescission of a contract must be dismissed unless all parties to the contract, and others having a substantial interest in it, can be joined." Naartex Consulting Corp. v. Watt, 722 F.2d 779, 788 (D.C. Cir. 1983). Thus, the only remaining question is whether joinder of each of JPMorgan, California, Delaware, Illinois, and Massachusetts is feasible. If not, this case must be dismissed. See id.

It appears that joinder of California, Delaware, Illinois, and Massachusetts is infeasible due to a lack of personal jurisdiction. See 4 James Wm. Moore et al., Moore's Federal Practice

[14] Moreover, even if an injunction were appropriate under the APA, it "would need to be limited only to vacating the unlawful action, not precluding future agency decisionmaking." Hill Dermaceuticals, Inc. v. FDA, 709 F.3d 44, 46 n.1 (D.C. Cir. 2013).

¶ 19.04[2] (3d ed. 2009) ("[I]f the absentee cannot be brought within the personal jurisdiction of the district court, joinder is infeasible."). A court may exercise jurisdiction over an out-of-state defendant consistent with the due process clause where (a) "the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (that is, "specific jurisdiction") or — rarely — where (b) the defendant's contacts with the forum state are "so continuous and systematic as to render [it] essentially at home" there ("general jurisdiction"). Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851, 2854 (2011).[15] Here, there is nothing to suggest that either circumstance is present. In the settlement agreement, these states exchanged promises with JPMorgan, a Delaware corporation with its principal place of business in New York. The settlement agreement contains a forum selection clause providing that the Eastern District of California has "exclusive jurisdiction and venue" over any disputes arising out of the contract. Cf. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 482 (1985) (where defendant agreed to forum selection clause, he "availed himself of the benefits and protections" of the selected forum). Thus, there is no indication that, by settling with JPMorgan, these states purposefully established "minimum contacts" in the District of Columbia such that they should have "reasonably anticipate[d] being haled into court" here. Id. at 475.

[15] "In order for a court to properly assert personal jurisdiction over a nonresident defendant, service of process over the nonresident must be authorized by statute and be within the limits set by the due process clause." Founding Church of Scientology v. Verlag, 536 F.2d 429, 432 (D.C. Cir. 1976). "Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." Daimler AG v. Bauman, 134 S. Ct. 746, 753 (2014) (citing Fed. R. Civ. P. 4(k)(1)(A)). Under the District of Columbia's long-arm statute, D.C. courts "may exercise personal jurisdiction over a person . . . as to a claim for relief arising from the person's . . . transacting any business in the District of Columbia," D.C. Code § 13-423(a)(1), a provision that "has been interpreted to be coextensive with the Constitution's due process limit," First Chicago Int'l v. United Exchange Co., 836 F.2d 1375, 1378 (D.C. Cir. 1988).

Because these states are indispensable parties, yet cannot be joined to an action in this district, the Court should dismiss this case under Rule 12(b)(7).

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion to dismiss and dismiss this case in its entirety.

Dated: May 19, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2014, I filed the foregoing document with the Clerk of Court via the CM/ECF system, causing it to be served electronically on Plaintiff's counsel of record.

/s/ *Eric Beckenhauer*
ERIC B. BECKENHAUER