IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*,	)	
	)	Civil Action No. 1:12-cv-00361-RMC
Plaintiffs,	)	
	)	
v.	)	**Intervention, temporary restraining order, preliminary injunction, and a hearing requested**
	)	
BANK OF AMERICA CORP., et al.,	)	
	)	
Defendants.	)	
	)	
	)	

RAYMOND WRAY'S MOTION TO INTERVENE, PETITION FOR A TEMPORARY RESTRAINING ORDER, AND MOTION FOR A PRELIMINARY INJUNCTION

Here comes Petitioner-Intervenor, Raymond Wray, a retired staff sergeant in the United States Army, on behalf of himself and all similarly-situated men and women serving in the United States Armed Forces, who hereby moves to intervene pursuant to Rule 24(a) of the Federal Rules of Civil Procedure and 50 App. U.S.C. § 597 of the Servicemembers Civil Relief Act (SCRA); petitions the Court for a temporary restraining order; and moves for a preliminary injunction.

Wray seeks to intervene here for the limited purpose of moving the Court to alter or amend its Consent Judgment (Dkt. No. 12) as to Defendants Citigroup Inc., Citibank, N.A., and CitiMortgage, Inc. (collectively, "Citi") so as to strike that portion of the Consent Judgment that permits Citi to solicit the release of all SCRA claims from members of the proposed class of United States service men and women in the case captioned Wray v. CitiMortgage, Inc., Case No. 3:12-3628-CMC (the "Wray action"), pending before the United States District Court for the District of South Carolina. SSG Wray would respectfully show the Court as follows:

FACTS

1. This civil action was filed on March 12, 2012, by Plaintiffs, the United States and 49 states, against five major mortgage servicers alleging violations of numerous federal and state laws arising from misconduct related to the servicers' origination and servicing of single family residential mortgages.

2. On April 4, 2012, this Court approved five settlements memorialized by consent judgments entered by the Plaintiffs and the respective servicers.

3. One of the five consent judgments (hereinafter the "Consent Judgment") settled the claims of the United States and the states against Defendants Citigroup Inc., Citibank, N.A., and CitiMortgage, Inc. (collectively, "Citi"). See Consent J., Apr. 4, 2012, Dkt. No. 12.

4. The Consent Judgment released Citi from liability to the United States and the states for a number of federal and state-law violations, including the SCRA.

5. Specifically, the Consent Judgment states that "[t]he United States and Defendant have agreed to resolve certain claims arising under the [SCRA] in accordance with the terms provided in Exhibit H." Consent J., ¶11.

6. Exhibit H to the Consent Judgment establishes a number of "USDOJ Servicemembers Civil Relief Act Settlement Provisions" as consideration for

> a full release of the United States' potential civil claims under the [SCRA …] with respect to the servicing of residential mortgages, under the provisions of the SCRA related to (a) mortgage foreclosure and (b) *the prohibition against charging more than 6% interest on SCRA-covered mortgage debt after a valid request by a servicemember to lower the interest rate and receipt of orders*[.]

Consent J., Ex. H, p. H-2, Dkt. No. 12-1 (emphasis added and footnote omitted).

7. For example, § I requires Citi to "comply with all the 'Protections for Military Personnel' provisions in the Settlement Agreement ('Article V')." Id. (referencing the

"Settlement Term Sheet" containing extensive servicing standards for SCRA loans). Section II(a) provides a procedure whereby Citi is required to identify illegal SCRA foreclosures and compensate the service men and women injured. See id. at H-2 – H-5. Section III establishes SCRA Compliance Policies and § IV establishes a Training and Monitoring Program. See id. at H-8 – H-12.

8. Sections I, II(a) & III of Exhibit H of the Consent Judgment are not at issue here.

9. Wray does seek to intervene to move the Court for reconsideration of § II(b) of Exhibit H of the Consent Judgment, which authorizes Citi to solicit the release of SCRA claims from service men and women who suffered a financial loss as a result of Citi applying an interest rate in excess of six percent to their mortgages.

10. Section II(b) establishes a procedure whereby the Department of Justice (DOJ) can determine, based on the review of a consultant, whether Citi violated Section 527 of the SCRA. Id. at H-6 – H-7. When DOJ determines that a mortgage loan was not serviced in compliance with Section 527, Citi is required to refund all interest and fees charged above 6 percent and provide an additional payment of $500 or triple the amount of the interest refund, whichever is larger. Id. at H-7 – H-8.

11. Once an injured SCRA borrower is identified, the § II(b) procedure allows Citi to solicit by letter a release of the servicemember's SCRA claims in exchange for an amount of money determined using the DOJ review and the formula above. Id. at H-7 – H-8. This procedure asks servicemembers (and their co-borrowers) to

> release and forever discharge *all* claims, arising prior to the entrance of this Order, related to the facts at issue in the litigation referenced above and related to the alleged violation of Section 527 of the Servicemembers Civil Relief Act, that I may have against the Defendant[.]

Id. at H-30 (emphasis added).

12. The letter soliciting this release fails to notify servicemembers of their rights under the SCRA, including but not limited to, their right intervene in this action, their right to bring an independent action, or their right to recover consequential and punitive damages, among others.

13. The letter also fails to notify servicemembers of the consequences of signing the release and releasing their SCRA claims, including that they may have lost significant equity in their homes as a result of Citi's illegal policy and that signing the release will forever discharge their right to be compensated for this injury.

14. In short, the release, just a single paragraph long, asks the Nation's service men and women to make an uninformed decision to release of their statutory rights based on an *ex parte* communication from the corporation that violated their rights while they were busy answering the Nation's call to serve.

15. On December 21, 2012, Wray filed a class action complaint in the United States District Court for the District of South Carolina on behalf of himself and all similarly-situated service men and women with a CitiMortgage mortgage from November 1, 2002 to the present, who were entitled to SCRA relief, and who suffered a financial loss as a result of CitiMortgage applying an interest rate in excess of six percent to their mortgages. Cmpl. ¶ 17, Wray v. CitiMortgage, Inc., Case No. 3:12-3628-CMC, Dkt. No. 1 (D.S.C.).[1]

16. At the time the Wray action was filed, Wray was unaware of this Court's Consent Judgment or that it authorized Citi to solicit the release of the claims at issue in the Wray action.

[1] Pursuant to Local Rule 7(j), the Wray Complaint, attached here as **Exhibit A**, more fully sets forth the claims for which intervention is sought. As explained more fully below and in the memorandum of law accompanying this motion, the relief sought here is necessary in order to preserve the claims at issue in the Wray action.

17. Wray alleged that he was injured by CitiMortgage's illegal policy not only because it charged him interest in excess of the statutory 6 percent cap, but also because CitiMortgage's policy caused him to "consistently pa[y] less principal towards his home over the last ten years than that to which he was legally entitled and [he] now enjoys substantially less equity in his home than he would had CitiMortgage adhered to the law." Id. at ¶16.

18. Wray seeks to recover for himself and the class, not just the difference between what he should have paid each month and what he actually paid, but also the consequential loss of equity that he and the class suffered, in addition to punitive damages, costs, and attorneys' fees. Id. at ¶¶ 36 et seq.

19. October 1, 2013, Ten months after the Wray action was filed, Wray received a supplemental production of 142 pages of discovery documents from CitiMortgage. Included in these documents is what appears to be Exhibit H of the Consent Judgment.

20. The version provided was without the preceding attachments, without the Consent Judgment itself, and without explanation from CitiMortgage. The version provided by CitiMortgage also did not include the Clerk's ECF stamp or any other information identifying it as having been filed with this Court or any other court.

21. On November 5, 2013, Wray served CitiMortgage with discovery seeking the production of "any and all reports, documents, records, or other information generated by any review, audit, or analysis of the practices and/or procedures utilized by CitiMortgage, Inc. to implement the six percent interest rate provisions [of the SCRA] from January 1, 2002 to the present." Pl's. 3rd Req. Prod., Req. No. 1,

22. On November 15, 2013, Wray deposed a corporate representative identified by of CitiMortgage as capable of testifying about the manner in which SCRA loans are handled, the

National Mortgage Settlement, and the "review process" being conducted by an independent consultant pursuant to the settlement.

23. CitiMortgage's designated witness demonstrated CitiMortgage's awareness of this action but otherwise refused to provide direct testimony as to any ongoing DOJ review. See Kathy Fogle Dep. 67:15-74:9, 154:2-155:25, Nov. 15, 2013, Wray, supra (excerpts attached as **Exhibit B**).

24. On December 5, 2013, the Honorable Cameron McGowan Currie, United States District Court Judge, held a telephone hearing over whether CitiMortgage had to disclose information passed between the DOJ's independent consultant and CitiMortgage. Counsel alluded to the DOJ "review process" and "it's the intent at the appropriate time to bring this issue to the attention of the court via motion[,]" but declined to explain CitiMortgage's position with respect to the Consent Judgment's impact on the Wray action. See Mot. Hr. Tr. 10-11, Dec. 5, 2013, Wray, supra (excerpts attached as **Exhibit C**).

25. On December 11, 2013, CitiMortgage served Wray with objections to his November 5, 2013 discovery request and asserted the attorney-client privilege and work product doctrine as grounds for withholding information concerning the DOJ's review.

26. Wray moved to compel disclosure on December 20, 2013.

MOTION TO INTERVENE

27. Wray, on behalf of himself and the proposed class of servicemembers he seeks to to represent, respectfully moves the Court for leave to intervene pursuant to Rule 24(a) of the Federal Rules of Civil Procedure and 50 App. U.S.C. § 597.

PETITION FOR A TEMPORARY RESTRAINING ORDER
(As to Defendants Citigroup Inc., Citibank, N.A., and CitiMortgage, Inc. (collectively, "Citi"))

28. Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Wray petitions the Court to enter a temporary restraining order to prohibit Citi from soliciting SCRA releases from the proposed Wray class until this Court can hold a hearing on the motion for a preliminary injunction.

29. A temporary restraining order is necessary to maintain the status quo and protect the Wray class from the irreparably harm it will suffer if Citi is permitted to solicit an uninformed and unjust release of the class members SCRA claims pursuant to § II(b) of Exhibit H of the Consent Judgment.

MOTION FOR A PRELIMINARY INJUNCTION
(As to Defendants Citigroup Inc., Citibank, N.A., and CitiMortgage, Inc. (collectively, "Citi"))

30. Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Wray moves the Court for a preliminary injunction to prohibit Citi from soliciting SCRA releases from the proposed Wray class until this Court issues an order resolving Wray's proposed motion to alter or amend the Consent Judgment.

31. A preliminary injunction is necessary to maintain the status quo and protect the Wray class from the irreparably harm it will suffer if Citi is permitted to solicit an uninformed and unjust release of the class members SCRA claims pursuant to § II(b) of Exhibit H of the Consent Judgment.

LEAVE TO MOVE TO ALTER OR AMEND THE CONSENT JUDGMENT

32. Wray requests the aforementioned relief for the limited purpose of moving this Court pursuant to Rule 60 of the Federal Rules of Civil Procedure to alter or amend the Consent

Judgment (Dkt. No. 12) by striking from it § II(b) of Exhibit H and invalidating any SCRA release obtain pursuant to it.

33. Wray's proposed motion to alter or amend is attached at **Exhibit D**.

34. An affidavit from Wray's South Carolina counsel attesting to the fact contained herein is attached as **Exhibit E**.

35. Wray's memorandum of law setting forth the grounds for granting all of the relief sought here is being filed contemporaneously with this motion.

36. Wray respectfully requests a hearing on this matter.

37. Prior to filing this motion, the undersigned conferred with counsel the DOJ who was unable to indicate the United States' position with respect to this motion prior to filing. Counsel unsuccessfully attempted to confer with counsel for Citi prior to filing.

[signature page follows]

Respectfully submitted by:

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UNITED STATES OF AMERICA, *et al.*,	)	
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BANK OF AMERICA CORP., et al.,	)	
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Defendants.	)	
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Intervenor's Memorandum of Law in Support of Motion to Intervene, Petition for a Temporary Restraining Order, Motion for a Preliminary Injunction, and Motion to Alter or Amend the Consent Judgment

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Petitioner-Intervenor, Raymond Wray, a recently retired staff sergeant in the United States Army, on behalf of himself and all similarly-situated men and women serving in the United States Armed Forces, respectfully moves the Court for leave to intervene in this action, pursuant to Rule 24(a) of the Federal Rules of Civil Procedure and 50 App. U.S.C. § 597 of the Servicemembers Civil Relief Act (SCRA), for the limited purpose of moving the Court to alter or amend its Consent Judgment (Dkt. No. 12) as to Defendants Citigroup Inc., Citibank, N.A., and CitiMortgage, Inc. (collectively, "Citi") by striking § II(b) from Exhibit H of the Consent Judgment, which permits Citi to solicit the release of SCRA claims from the putative class of service men and women in the case captioned Wray v. CitiMortgage, Inc., Case No. 3:12-3628-CMC (the "Wray action"), presently pending before the United States District Court for the District of South Carolina.

Wray and the service men and women whose rights he seeks to vindicate, have a right under the SCRA to intervene in this action. 50 App. U.S.C. § 597(c). Notwithstanding this express statutory right, Wray and the class had no opportunity to participate in negotiating the terms of the Consent Judgment and had no opportunity to offer this Court argument with respect to its impact on them. Nor did they receive notice of the Consent Judgment. Wray only inadvertently learned about the Consent Judgment after 11 months of litigation in the Wray action in South Carolina.

As demonstrated below, the compensatory scheme approved in the Consent Judgment fails to fully apprise Wray and the class of their rights under SCRA or to fully compensate them for their injuries, but would nevertheless allow Citi to solicit the release of those claims. Wray now moves this Court for leave to intervene and an opportunity to be heard.

Wray also moves pursuant to Rule 65 of the Federal Rules of Civil Procedure for a temporary restraining order and preliminary injunction prohibiting Citi from soliciting SCRA releases from the class. As described below, injunctive relief is necessary to prevent irreparable harm to the proposed class.

If permitted, Wray will file his proposed motion to alter or amend the Consent Judgment so as to strike that portion of the Consent Judgment that authorizes Citi to seek SCRA releases from the proposed Wray class.

In the interest of judicial efficiency, the factual and legal reasons for granting *all* of the relief Wray seeks for himself and the class of service men and women he seeks to represent are set forth herein.

FACTUAL AND PROCEDURAL BACKGROUND

On December 21, 2012, Wray initiated a class action in the United States District Court for the District of South Carolina on behalf of himself and all similarly-situated service men and women with a CitiMortgage mortgage from November 1, 2002 to the present, who were entitled to SCRA relief, and whose mortgage bore interest in excess of six percent. Cmpl. ¶ 17, Wray v. CitiMortgage, Inc., Case No. 3:12-3628-CMC, Dkt. No. 1 (D.S.C.). Wray alleged that he was injured by CitiMortgage's illegal policy not only because it charged him interest in excess of the statutory 6 percent cap, but also because CitiMortgage's policy caused him to "consistently pa[y] less principal towards his home over the last ten years than that to which he was legally entitled and [he] now enjoys substantially less equity in his home than he would had CitiMortgage adhered to the law." Id. at ¶16.

The significance of this injury to Wray and the proposed class is best illustrated by comparing two loan amortization schedules and their respective effect on the borrower's equity. For the purpose of this example, consider two standard 30-year $250,000 loans, one bearing interest at 6 percent and another bearing interest at 12.99 percent. As would be expected, the

total interest paid on the 12.99 percent loan is significantly higher over the life of the loan.

6% 30 Year Fixed Loan

	Enter values
Loan amount	$ 250,000.00
Annual interest rate	6.00 %
Loan period in years	30.00
Number of payments per year	12
Start date of loan	1/1/1999

	Loan summary
Scheduled payment	1,498.88
Scheduled number of payments	360
Actual number of payments	360
Total early payments	-
Total interest	289,595.47

12.99% 30 Year Fixed Loan

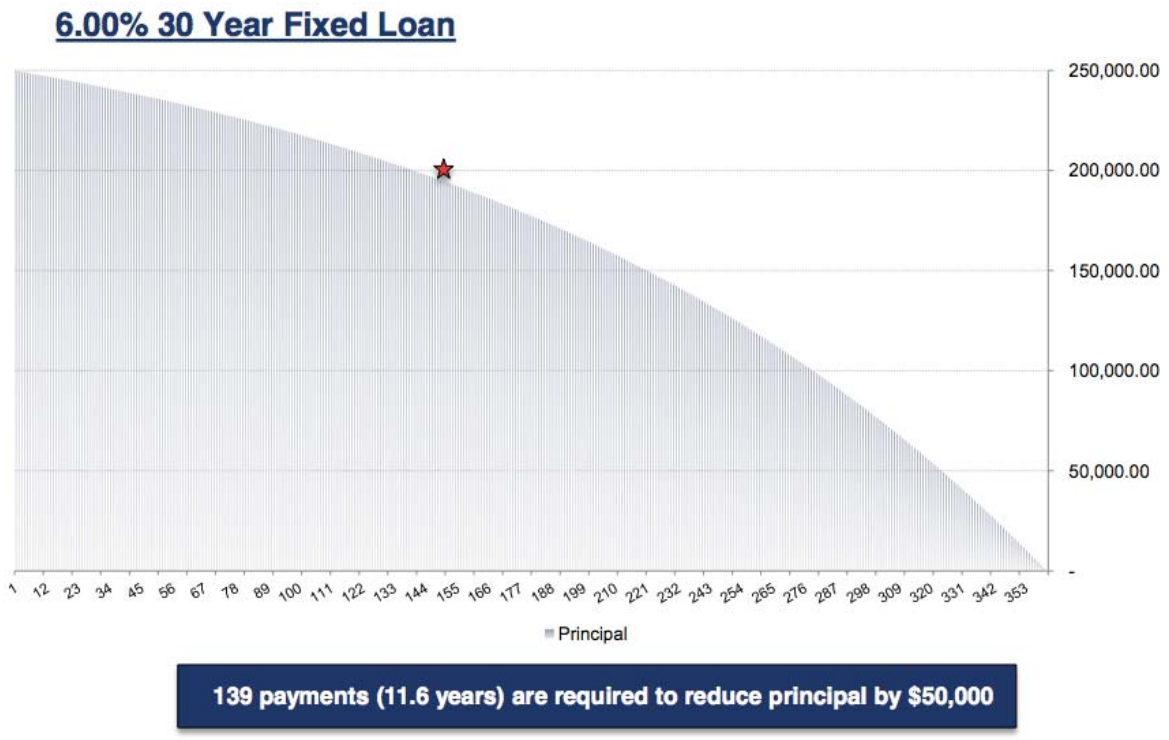
	Enter values
Loan amount	$ 250,000.00
Annual interest rate	12.99 %
Loan period in years	30.00
Number of payments per year	12
Start date of loan	1/1/1999

	Loan summary
Scheduled payment	2,763.54
Scheduled number of payments	360
Actual number of payments	360
Total early payments	-
Total interest	744,876.15

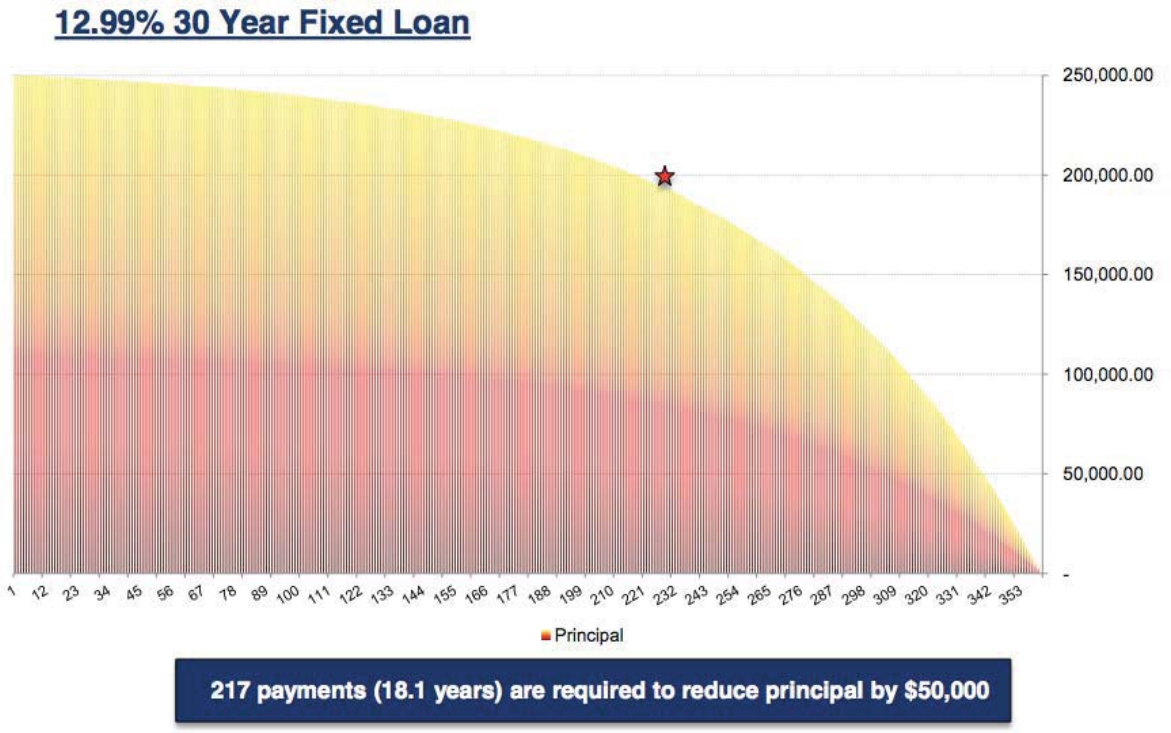
The 12.99% loan results in:

- **$1,265 additional payments per month**
- **$455,281 additional total payments (all interest)**

Since both loans share the same 30-year period (360 monthly payments) the 12.99 percent loan necessarily allocates a greater portion of each monthly payment to paying interest as compared to the 6 percent loan. Put differently, the 6 percent loan pays down principle more quickly. The graph below charts the reduction in principle over the life of the 6 percent loan. Note that the hypothetical borrower reduces principal by $50,000 after just 11.6 years of payments.



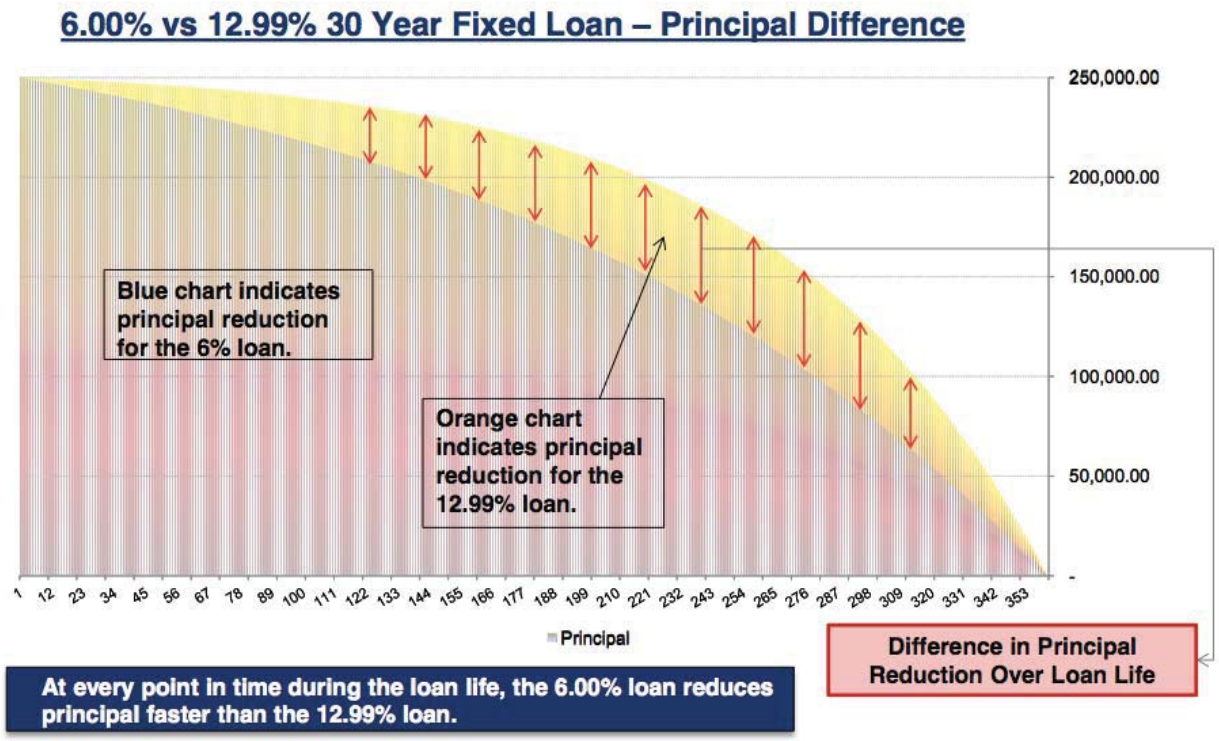
By comparison, it takes the borrower with a 12.99 percent loan significantly longer to reduce principal by the same amount. The graph below charts the reduction in principle over the life of the 12.99 percent loan. Here, the hypothetical borrower only reduces principal by $50,000 after 18.1 years—more than six years and 78 payments after the hypothetical 6 percent borrower.



The SCRA entitles active duty servicemembers to a mortgage that bears interest at no more than 6 percent. 50 App. U.S.C. § 527(a)(1)(A). But when servicemembers like Wray went on active duty and invoked their SCRA rights to a 6 percent loan, CitiMortgage refused to re-amortize loans in excess of 6 percent. Instead, CitiMortgage maintained the borrower's original interest rate and applied an "interest subsidy" as a credit toward the borrower's monthly payment.[2] This caused borrowers entitled to SCRA protection to continue to make payments according to an amortization schedule that reduced their principal more slowly that they would be entitled to under a 6 percent SCRA loan. This injury is best illustrated by the chart below which overlays the 6 percent amortization of principal (blue graph) on top of the 12 percent

[2] This still did not result in a legal monthly mortgage payment. For example, Wray's payment on a 6 percent SCRA loan before the subsidy procedure was implemented was approximately $418. After CitiMortgage adopted the subsidy procedure, CitiMortgage recast his 6 percent SCRA loan according to its original 12.99 percent interest rate and applied a $250 monthly interest subsidy. This resulted in a $512 monthly payment, still in excess of the legal 6 percent rate.

amortization (orange). The difference represents the reduction in principal that a hypothetical SCRA borrower would lose as a result of CitiMortgage's refusal to re-amortize the borrower's loan at 6 percent once the servicemember seeks SCRA benefits.



The losses arising from the failure to properly amortize SCRA loans are substantial and accrue in two ways. First, servicemembers denied proper SCRA treatment will enjoy less equity in their homes because they were denied the opportunity to pay down their principal more quickly under a 6 percent loan. Second, because serviemembers denied SCRA treatment paid less in principle than they should have, they will necessarily pay CitiMortgage more interest over the life of their loan. This conclusion necessarily follows from the simple proposition that each dollar in principal reduction reduces future interest payments relative to the interest rate.[3] By refusing to provide servicemembers with a 6 percent loan, CitiMortgage prevented its future

[3] For example, if a borrower paid the loan off in full during the second payment period, the borrower would eliminate *all* future interest paid on the loan.

interest payments from being reduced by the reduction of principal that would necessarily occur pursuant to a SCRA loan. With respect to Wray, he presently enjoys more than $11,000 less in equity in his home than he would have under a proper application of the SCRA.

Wray alleged, and has since confirmed through discovery, that CitiMortgage applied this same illegal policy to the vast majority of its SCRA loans. Accordingly, Wray seeks to recover for himself and the proposed class not just the difference between what he should have paid each month and what he actually paid, but also the consequential loss of equity that he and the class have suffered (in addition to punitive damages, costs, and attorneys' fees). Compl. at ¶¶ 36 et seq., Wray, supra.

This Court entered a Consent Judgment in this action between the Plaintiffs and Citigroup Inc., Citibank, N.A., and CitiMortgage, Inc. (collectively, "Citi") that released Citi from liability to the United States and 49 states for alleged violations of a number of state and federal laws, including two types of SCRA violations. See generally, Consent J., Apr. 4, 2012, Dkt. No. 12. Specifically, the Consent Judgment states that "[t]he United States and Defendant have agreed to resolve certain claims arising under the [SCRA] in accordance with the terms provided in Exhibit H." Id. at ¶11. Exhibit H establishes a number of USDOJ Servicemembers Civil Relief Act Settlement Provisions as consideration for

> a full release of the United States' potential civil claims under the [SCRA …] with respect to the servicing of residential mortgages, under the provisions of the SCRA related to (a) mortgage foreclosure and (b) *the prohibition against charging more than 6% interest on SCRA-covered mortgage debt after a valid request by a servicemember to lower the interest rate and receipt of orders*[.]

Consent J., Ex. H, p. H-2, Dkt. No. 12-1 (emphasis added and footnote omitted). For example, § I requires Citi to "comply with all the 'Protections for Military Personnel' provisions in the Settlement Agreement ('Article V')." Id. (referencing the "Settlement Term Sheet," Ex. A, pp.

A-32 – A-35, containing extensive servicing standards for SCRA loans). Section II(a) provides a procedure whereby Citi is required to identify illegal SCRA foreclosures and compensate the service men and women injured. See id. at H-2 – H-5. Section III establishes SCRA Compliance Policies and § IV establishes a Training and Monitoring Program. See id. at H-8 – H-12.

These provisions are not at issue here. SGG Wray seeks no relief with respect to the servicing, compliance, and training and monitoring provisions or the provisions concerning illegal foreclosures. Nor does Wray take issue with the discharge of any claim held by the United States or the 49 states.

However, Wray does seek to intervene to move the Court for reconsideration of that portion of the Consent Judgment that authorizes Citi to solicit the release of SCRA claims from service men and women who suffered a financial loss as a result of Citi applying an interest rate in excess of six percent to their mortgages. Respectfully, the procedure established by the Consent Judgment fails to provide constitutionally adequate notice to servicemembers and authorizes Citi to solicit the uninformed and unjust release of servicemembers' SCRA claims.

Specifically, § II(b) of Exhibit H establishes a procedure whereby the Department of Justice (DOJ) can determine, based on the review of a consultant, whether Citi violated Section 527 of the SCRA. Id. at H-6 – H-7.

> Where DOJ determines that a mortgage loan was not serviced in compliance with Section 527, Servicer shall: (1) refund (with interest, as calculated pursuant to 28 U.S.C. § 1961) all interest and fees charged above 6%; and (2) provide an additional payment of $500 or triple the amount of the refund referenced in subsection (1), whichever amount is larger. […] DOJ will submit lists or electronic links to the Servicer of identified servicemembers or coborrowers to be compensated, and Servicer must notify each identified servicemember or co-borrower (using best efforts to locate each person) by letter (using Exhibit 2 or a modified version mutually agreeable to Servicer and DOJ) within 60 days of receiving this list of servicemembers or co-borrowers to be compensated. […] Servicer shall issue and mail compensation checks no later than 21 days of *receipt of a signed release from the servicemember or co-borrower aggrieved person*.

Id. at H-7 – H-8 (emphasis added and footnotes omitted). This compensation scheme fails to account for, or even contemplate, the substantial loss of equity caused by Citi's illegal conduct. The above-referenced release asks servicemember recipients (and their co-borrowers) to

> release and forever discharge *all claims*, arising prior to the entrance of this Order, related to the facts at issue in the litigation referenced above and related to the alleged violation of Section 527 of the Servicemembers Civil Relief Act, that I may have against the Defendant[.]

Id. at H-30 (emphasis added). Significantly, the letter soliciting this release fails to fully and accurately alert servicemembers of their possible loss of equity in their homes; notify servicemembers of their rights under the SCRA, including their right to move this Court for intervention, pursuant to 50 App. U.S.C. § 597(c); or apprise them of their right to consequential and punitive damages arising from SCRA violations. See id. at H-28.

Wray's action on behalf of himself and the proposed class of service men and women is now more than one year old, primarily due in part to protracted discovery disputes arising from CitiMortgage's effort to obfuscate and delay the prosecution of the Wray action. Not once during the year-long Wray litigation has CitiMortgage notified Wray or the District Court that it would be sending an *ex parte* communication to Wray's proposed class soliciting the release of their SCRA claims. Nor has CitiMortgage raised the Consent Judgment in any of its pleadings, motions, or memoranda filed with the Court.

Instead, 10 months after filing the Wray action, on October 1, 2013, Wray received a supplemental production of 142 pages of discovery documents, mostly concerning SCRA compliance procedures. Included in these documents is what appears to be Exhibit H of the Consent Judgment. However, Exhibit H was provided without the preceding attachments, without the Consent Judgment itself, and without explanation. Nor did the version provided by

CitiMortgage have the Clerk's ECF stamp that would have identified the document as having been filed with this Court (and provided a case number with which to locate it).

On November 5, 2013, Wray served CitiMortgage with discovery seeking the production of

> any and all reports, documents, records, or other information generated by any review, audit, or analysis of the practices and/or procedures utilized by CitiMortgage, Inc. to implement the six percent interest rate provisions specified in 50 App. USC 527 of the Servicemembers Civil Relief Act from January 1, 2002 to the present.

Pl's. 3rd Req. Prod., Req. No. 1. On November 15, 2013, Wray deposed Kathy Fogle, manager of CitiMortgage's special loans group since 2006 produced by CitiMortgage as its Rule 30(b)(6) designee to testify about the manner in which SCRA loans are handled, the National Mortgage Settlement, and the "review process" being conducted by an independent consultant pursuant to the settlement. Attempts by Wray's South Carolina counsel to obtain information about this action and the independent consultant's review were largely unproductive. Ms. Fogle clearly demonstrated that CitiMortgage was aware of this action:

> Mr. Harpootlian: She says, As you know, we're currently reviewing all of our clients with SCRA benefits to see if any further refunds are owed. Once we have completed this research and received a determination from the Department of Justice, we -- we will ensure that SSG Wray is refunded any monies owed as determined by the DOJ. Now, what she's talking about here in terms of DOJ? Do you know?
>
> Ms. Fogle: She's talking about the National Mortgage Settlement.
>
> Mr. Harpootlian: The National Mortgage Settlement, the $25 billion big deal?
>
> Ms. Fogle: The settlement as it relates to -- I believe SCRA was one component of that.

Fogle Dep. 67:15-68:2, Wray, supra; see also id. at 154:2-155:25 (testifying that she had "seen the Exhibit H.").[4] But counsel's follow up questions were largely met with obfuscation as the witness repeatedly refused to answer the question asked. See id. at 68:2-74:9. Without ever mentioning the Consent Judgment as the cause, Ms. Fogle eventually conceded that all SCRA loans were converted to a stated six percent in April 2013. Id. at 73:19-74:9.

Then on December 5, 2013, the Honorable Cameron McGowan Currie, District Judge, held a telephone hearing on a discovery dispute over whether CitiMortgage had to disclose information passed between the DOJ's independent consultant and CitiMortgage. Counsel alluded to the "quote-unquote audit report" and DOJ "review process" in an effort to explain that the audit discussed by Ms. Fogle was not an internal audit conducted by CitiMortgage, but the audit of the independent consultant. Mot. Hr. Tr. 10-11, Wray, supra.[5] CitiMortgage's counsel suggested that somehow Wray should have known what Ms. Fogle's opaquely-worded testimony was referring to, explaining:

> Ms. Nale: In addition, and this is all through publicly available documents, that quote-unquote audit is really a memo because what it is referring to is a review process. The Department of Justice is going to be using an independent consultant, so this is ongoing. And it's the intent at the appropriate time to bring this issue to the attention of the court via motion.
>
> In any event, an independent consultant is doing an individual borrower-by-borrower review and assessment and as to whether or not there was ever a payment in excess of the six percent limitation. *That's ongoing. That review is not complete. That review has not yet resulted in a quote-unquote audit report. It's an ongoing process.* It's being overseen by the Department of Justice and it's been out there and publicly known since when the settlement was announced as part of the national settlement back in 2012.

[4] Excerpts attached to motion as **Exhibit B.**
[5] Excerpt attached to motion as **Exhibit C.**

Id. at 11 (emphasis added). Significantly, CitiMortgage failed to inform the District Court and counsel that the Consent Judgment authorized Citi to contact class members and solicit SCRA releases. Nor did CitiMortgage alert the District Court as to the Consent Judgment's possible impact on the Wray action. Instead of acting with this modicum of candor to the tribunal, CitiMortgage's counsel arrogantly stated her intention to inform the District Court of "this issue" at "the appropriate time[.]"

On December 11, 2013, CitiMortgage served Wray with objections to his November 5, 2013 discovery request and asserted the attorney-client privilege and work product doctrine as grounds for withholding information concerning the DOJ's review. Wray moved the District Court to compel disclosure on December 20, 2013.

This motion followed.

ARGUMENT

Wray objects to Citi being permitted to solicit releases from the proposed Wray class members and respectfully seeks leave to intervene in this action for the limited purpose of moving the Court to alter or amend its judgment by striking § II(b) from Exhibit H of the Consent Judgment and voiding any release by a member of the proposed class of servicemembers in Wray v. CitiMortgage, Inc., Case No. 3:12-3628-CMC (D.S.C.). Specifically, Wray seeks (1) leave to intervene, (2) a temporary restraining order, (3) a preliminary injunction, and (4) an order amending this Court's Consent Judgment by striking § II(b) from Exhibit H.

Section II(b) of Exhibit H should be struck from this Court's Consent Judgment as the product of a negotiation between the DOJ and Citi, the corporate wrongdoer, that negotiates the terms for discharging servicemembers' claims in their absence and without any of the procedural safeguards that typically guard the due process rights of an injured class. As set forth more fully

below, the absence of a representative protecting the interest of servicemembers' has resulted in terms that are both substantively inadequate and prejudicial to servicemembers' statutory rights. Shockingly, the DOJ petitioned this Court to allow Citi to send servicemembers a letter that reads, *in its entirety*:

> We write to inform you that _____ ("the Bank"), entered into a settlement on _____, with the United States Department of Justice regarding alleged violations of the Servicemembers Civil Relief Act ("SCRA"). This settlement resolves the Department of Justice's allegations that the Bank charged servicemembers interest higher than six percent on mortgage loans that the servicemembers originated prior to entering active duty, despite receiving requests for interest rate relief and orders.
>
> In connection with this settlement, the Department of Justice identified you as a person who may be eligible for financial compensation with respect to your loan [add loan number(s)].
>
> Please read and carefully review the declaration attached to this letter. If it is accurate, please sign and return to us the release and declaration attached to this letter in the enclosed postage paid envelope. After we receive these documents, we will send you a check in the amount of [insert amount]. This amount includes any interest charges in excess of six percent and monetary damages. In addition, the Bank will request that all major credit bureaus remove any negative entries on your credit report resulting from the higher interest rate. This release and declaration must be returned by _____ .
>
> You should be aware that the money you are eligible to receive may have consequences with respect to your federal, state, or local tax liability, as well as eligibility for any public assistance benefits you may receive. Neither the Bank nor the Department of Justice can advise you on tax liability or any effect on public assistance benefits. You may wish to consult with a qualified individual or organization about any possible tax or other consequences resulting from your receipt of this payment.
>
> If you have any questions concerning the declaration, release or settlement, please contact [Insert Independent Consultant Name] at [Insert Contact Information including a phone number].
>
> We deeply appreciate your service to our country. We are committed to serving the financial needs of our customers who serve in the military, and we regret any error that may have occurred on your account.

Consent J., Ex. H, p. H-28, Dkt. No. 12-1. This communication is inherently misleading as it offers to settle class members' claims without also notifying them of this action, without notifying them of their right to pursue their own lawsuit or consult with an attorney, without notifying them of their right to recover consequential and punitive damages, without notifying them that they may have lost significant equity in their homes as a result of Citi's illegal policy, and without explaining that signing the enclosed release will preclude *any* of the foregoing. The release, just a single paragraph long, is likewise void of any information that would allow servicemembers to make an informed decision about their rights.

The arguments in favor of granting the relief sought here are each considered in turn.

I. Wray is entitled to intervene as a matter of right.

Wray should be permitted to intervene in this action, on behalf of himself and the putative class he represents in Wray v. CitiMortgage, as a matter of right. Rule 24(a) of the Federal Rules of Civil Procedure requires that,

> On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). Subsections (1) and (2) both apply here.

When the Attorney General brings a civil action pursuant to the SCRA, as he has done here, the Act expressly reserves a servicemember's right to intervene in that action upon timely motion. 50 App. USCA § 597(c); see also Gordon v. Pete's Auto Serv. of Denbigh, Inc., 637 F.3d 454, 457-58 (4th Cir. 2011) (discussing Congress' decision to amend the SCRA to make its private cause of action explicit). As such, Wray has a statutory right to intervene as contemplated

by Rule 24(a)(1). Alternatively, Wray is entitled to intervene pursuant to subsection (2). In order to succeed under Rule 24(a)(2), a movant must show timeliness, a cognizable interest, impairment of that interest, and lack of adequate representation by the existing parties. Smoke v. Norton, 252 F.3d 468, 470 (D.C. Cir. 2001).

A. Wray's motion is timely because he received no prior notice of the Consent Judgment and filed this motion expeditiously upon discovering its existence and impact on the Wray action.

Both grounds for mandatory intervention require the movant to make a "timely" motion. This motion meets the timeliness requirement under both of Rule 24(a)'s subsections. When discerning whether a motion to intervene is timely after judgment is entered, this Court must consider:

> all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case.

United States v. AT&T, 642 F.2d 1285, 1295 (D.C.Cir. 1980) (allowing intervention after judgment). Additionally, this Court has distilled the inquiry with respect to the passage of time down to the fundamental question of how long the movant knew of his or her legal interest in a proceeding before seeking leave to intervene. See Rubin v. Islamic Republic of Iran, 270 F.R.D. 7, 11 (D.D.C. 2010) (citing Catanzano v. Wing, 103 F.3d 223, 232 (2d Cir. 1996)); see also Georgia v. U.S. Army Corps of Engineers, 302 F.3d 1242, 1259 (11th Cir. 2002) (considering how long the proposed intervenor knew or should have known of his interest and in the case and noting that "timeliness is not a word of exactitude or of precisely measurable dimensions" and must have "flexibility" in order to serve the interest of justice).

Here, Wray filed this motion less than 20 days after learning that CitiMortgage plans to use the Consent Judgment to undermine the SCRA class in the Wray action. As noted above, not

once during the year-long Wray litigation has CitiMortgage notified Wray or Judge Currie that this Court's order authorizes *ex parte* communications with the Wray class for the express purpose of obtaining the release of their claims. Based on the representations of CitiMortgage's counsel to Judge Currie during the December 5 hearing, it appears that CitiMortgage planned to pick-off members of the proposed class unbeknownst to the District Court and counsel. Having just now learned of the Consent Judgment and its potentially adverse effect on the class, Wray has moved this Court with all deliberate speed.

Moreover, the fact that this Court has already signed and entered the Consent Judgment does not make this motion untimely as this Circuit has regularly approved interventions sought after judgment is entered. For example, in Smoke v. Norton, 252 F.3d 468 (D.C.Cir. 2001), representatives of a Native American tribe moved for intervention after the district court granted summary judgment against the United States in a proceeding where the government was representing the tribe's interests. Id. at 469. When the government indicated it would not pursue an appeal, the tribe's representatives moved to intervene. Id. The district court denied the motion reasoning that the tribe's representatives should not be permitted to "inject additional arguments and materials into a very narrow review of agency action that had already proceeded to the next stage." Id. at 470. The D.C. Circuit reversed, explaining that while "[t]he district court has much latitude in assessing the timeliness of a motion, [ ] it must properly take account of the considerations relevant to that determination." Id. at 471 (quoting United States v. AT&T, 642 F.2d at 1295). The district court's refusal to grant intervention was clear error because it failed to take into account the circumstances of the post-judgment motion, namely, that "the potential inadequacy of representation came into existence only at the appellate stage." Id. (quoting Dimond v. District of Columbia, 792 F.2d 179, 193 (D.C.Cir. 1986)).

Conversely, this Court's decision in Rubin v. Islamic Republic of Iran, 270 F.R.D. 7 (D.D.C. 2010), illustrates the circumstances under which a motion to intervene will be found untimely. In Rubin, plaintiffs sued Iran under the Foreign Sovereign Immunities Act (FSIA) for injuries arising from a terrorist attack. Id. at 8. Iran failed to appear and a default judgment was entered. Id. Plaintiffs brought attachment proceedings against two museums outside of this district seeking to attach Iranian artifacts on loan to those museums. Id. The museums asserted Iran's sovereign immunity as a defense. Id. While those actions were pending, Congress amended the FSIA so as to strip judgment debtors of their sovereign immunity if the debtor state was responsible for terrorist acts. Id. at 8-9. The plaintiffs moved to strip Iran of its immunity. While the museums were concerned that an order stripping Iran of its immunity would adversely affect the attachment proceedings they failed to move for intervention, electing instead to mail a letter to the clerk and fax a letter to chambers. Id. After this Court granted plaintiff's motion to reform the judgment, the museums moved to intervene in order to petition the Court for reconsideration and to preserve an appeal. Id. This Court rejected the museums' motions as untimely reasoning that the museums were aware of their interest in the matter pending before this Court for far too long and failed to act at several junctures. Id. at 11 (explaining that the museums were aware of their possible interest three years before plaintiffs' motion and took no action for two months after plaintiffs filed their motion before sending a letter).

By comparison, Wray sought intervention as soon as he discovered the threat posed by the Consent Judgment. This discovery was made only after CitiMortgage's counsel vaguely alluded to its intent to use the Consent Judgment offensively against the proposed class during the December 5 telephone hearing and thus alerted both Wray and the District Court in South Carolina of this action's possible impact on the Wray class. The Smoke intervenors had actual

knowledge of the action in that case but instead chose instead to allow the United States to litigate their interest. Here, Wray had no knowledge of Citi's intent to utilize the Consent Judgment to neutralize his claims and has been consistently frustrated in his efforts to discover its possible impact on the Wray action.

Unlike Smoke, this action arose pursuant to several Federal False Claims Act (FCA) suits filed under seal. See 31 U.S.C. § 3730(b)(2). The United States negotiated a global settlement of those actions while they were under seal then filed this action for the purpose of resolving multiple previously-sealed cases initiated by FCA relators. Compare Cmpl., Mar. 1, 2012, Dkt. No. 1, with Consent J., Apr. 4, 2012 (filed just 33 days later). In other words, the docket in this case was only publically available for just over one month before the Court entered the Consent Judgment.

Moreover, even if Wray did have knowledge of this action(s), in a general sense, once the seal was lifted, there is no reason why he should have known or suspected that the DOJ had negotiated in his absence for the resolution of servicemembers' *individual* SCRA claims. In fact, the publically-disseminated information concerning this case states precisely the opposite. The National Mortgage Settlement website provides the public with a readily accessible explanation of the settlement and its effect on consumers. After describing "Key Provisions of the Settlement," the website features a section that reads in relevant part:

> **BANKS ARE STILL ACCOUNTABLE FOR OTHER CLAIMS NOT COVERED BY THIS SETTLEMENT**
>
> This agreement holds the banks accountable for their wrongdoing on robo-signing and mortgage servicing. This settlement does not seek to hold them responsible for all their wrongs over the years and the agreement and its release preserve legal options for others to pursue.
>
> Specifically, this settlement **does not**:

[…]

Release any private claims by individuals or any class action claims.

National Mortgage Settlement website (last visited Dec. 20, 2013), available at: http://www.nationalmortgagesettlement.com/about (emphasis in original). While this statement may be true for the vast majority of the relief approved by the Court, it is simply not the case with respect to § II(b) of Exhibit H which establishes a damages model and procedure by which Citi can obtain the release of SCRA claims.

In short, this motion presents the quintessential circumstances in which even though significant time has passed since the Court entered judgment, the intervenors' motion remains timely. Citi is unable to point to a single instance in which Wray knew or should have known that his rights were at stake here but failed to act. In light of the foregoing, this motion is timely and Wray should be permitted to intervene pursuant to Rule 24(a)(1).

B. This motion meets the remaining criteria necessary for Rule 24(a)(2) intervention.

Since § 527(c) of the SCRA confers a statutory right to intervene and since this motion is timely, this motion should be granted pursuant to Rule 24(a)(1). Additionally, Wray is also entitled to intervene pursuant to Rule 24(a)(2) because, in addition to being timely, he holds a cognizable interest that will be impaired if he is not permitted to intervene, and his interests and those of his proposed class are not adequately represented by the existing parties. See Smoke, 252 F.3d at 470.

To meet the cognizable interest requirement, an intervenor merely needs to "allege a legally sufficient claim or defense as the focus is not whether the application is likely to prevail on the merits." People for Ethical Treatment of Animals v. Babbitt, 151 F.R.D. 6, 7-8 (D.D.C. 1993) (internal quotations omitted). Wray clearly meets this standard since he has a private right

of action under the SCRA. Wray also meets the impairment requirement for the reasons previously discussed.

Finally, with respect to whether Wray's interests are adequately represented by the United States, they are not. While some circuits apply a presumption of adequacy when the proposed intervenor attempts to intervene on the same side as the United States, see e.g., Arakaki v. Cayetano, 324 F.3d 1078, 1087 (9th Cir. 2003), this reasoning cannot prevail here.

Congress has already determined that even when the Attorney General brings a SCRA action, servicemembers have a statutory right of intervention. 50 App. USCA § 597(c). In light of the range of remedies afforded by the SCRA, Congress gave servicemembers the right to determine for themselves whether the government's action adequately vindicated their rights. With all due respect to the DOJ here, the terms of the Consent Judgment do not constitute adequate compensation. Wray and the class have a better chance of being made whole by the Wray action, which, unlike the terms negotiated by the DOJ in the servicemembers' absence, accounts for the equity they have lost in their homes as a result of Citi's conduct.

In light of the foregoing, Wray respectfully submits that he is entitled to intervene in this action as a matter of right and his motion for intervention should be granted.

II. A temporary restraining order and preliminary injunction are necessary to protect the interests of the proposed class pending the Court's consideration of Wray's motion to alter or amend the Consent Judgment.

The Court should issue a temporary restraining order and preliminary injunction enjoining Citi from soliciting the release of SCRA claims prior to this Court ruling on Wray's motion for intervention and proposed motion to alter or amend. Rule 65 of the Federal Rules of Civil Procedure provides that:

> The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

> (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
>
> (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

Fed. R. Civ. P. 65(b).[6]

A temporary restraining order is properly "restricted to serving [its] underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty., 415 U.S. 423, 439 (1974). Accordingly, a temporary restraining order should only remain in place until the issuing court can hold a hearing which must be set for "the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character." Fed. R. Civ. P. 65(b)(2)-(3).

> To warrant preliminary injunctive relief, a moving party must show: (1) that there is a substantial likelihood that it will succeed on the merits of its claims; (2) that it will suffer irreparable harm in the absence of an injunction; (3) that an injunction would not substantially harm the defendant or other interested parties (balance of harms); and (4) that the public interest would be furthered, or at least not adversely affected, by the injunction.

Sterling Commercial Credit--Michigan, LLC v. Phoenix Indus. I, LLC, 762 F. Supp. 2d 8, 12 (D.D.C. 2011).[7] This case meets that standard. This Circuit applies the same test when discerning whether to grant a petition for a temporary restraining order. Id. Since the necessary elements of

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[6] Counsel's affidavit reiterating the facts set forth above attached to the motion as **Exhibit**

[7] The D.C. Circuit has recently explained that these four factors should "be viewed as a continuum, with more of one factor compensating for less of another." Sterling, 762 F. Supp. 2d at 12 (citing Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1291–92 (D.C. Cir. 2009)). For example, injunctive relief may be justified by a strong likelihood of success on the merits despite a slight showing of irreparable harm or, conversely, "when the other three factors strongly favor interim relief, a court may grant injunctive relief when the moving party has merely made out a 'substantial' case on the merits." Id.

a temporary restraining order and preliminary injunction are identical, Wray will address them simultaneously.

A. Wray's proposed Rule 60(b) motion to alter or amend the Consent Judgment is likely to succeed.

Prior to granting a temporary restraining order and preliminary injunction, this Court must first decide whether Wray is likely to succeed in obtaining the underlying, substantive relief sought such that it is appropriate and necessary to maintain the status quo by enjoining Citi from soliciting the SCRA releases in the interim. The underlying substantive relief at issue here is Wray's proposed Rule 60(b) motion asking the Court to alter or amend its Consent Judgment by striking § II(b) of Exhibit H. If Wray is likely to succeed in that motion, then he satisfies the first requirement for injunctive relief. Respectfully, his Rule 60(b) motion is likely to succeed. In the interest of judicial efficiency, Wray has fully set forth the reasons for granting his Rule 60(b) motion below prior to considering the remaining grounds for granting injunctive relief.

* * *

The Court should grant Wray's proposed Rule 60(b) motion. Rule 60(b) & (c) of the Federal Rules of Civil Procedure provides that:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect; […]
>
> or (6) any other reason that justifies relief.
>
> (c) Timing and Effect of the Motion.
>
> (1) Timing. A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

> (2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

Wray submits that but-for subsection (c)(1)—requiring that motions pursuant to subsections (b)(1), (2), and (3) be made within no more than one year after the entry of the judgment—Wray would be entitled to relief from the Consent Judgment due to "surprise" as contemplated in subsection (b)(1). Accordingly, Wray submits that this motion should be granted pursuant to subsection (b)(6), which allows relief for "any other reason that justifies [it]."

Bituminous Casualty Corp. v. Garcia, 223 F.R.D. 308 (N.D. Tex. 2004), is instructive as to why Wray should prevail here. In Bituminous, an insurance company sought a declaratory judgment that the employee of its insured was not a permissive user of the insured's vehicle and thus was not covered by the policy when he struck and killed two people. Id. at 310. When the federal declaratory judgment action was filed, the employee's status as a permissive or non-permissive driver under the policy was a contested question being litigated in a state court tort proceeding brought by the personal representatives of the decedents against the employee-driver. Id. While the insurance company filed a notice with the federal court that the personal representatives had an interest in the federal action, it failed to serve the personal representatives or otherwise notify them. Id. The employee-driver, serving time for vehicular manslaughter, failed to answer and the clerk entered a default judgment that the insurer had no duty to indemnify the employee-driver. Id. The personal representatives learned of the default judgment from counsel for the employer and petitioned the district court for leave to intervene to move the court to set aside the judgment. Id.

After concluding that the personal representatives were entitled to intervene, the district court also granted the intervenors' motion to set aside the judgment by applying reasoning that this Court should adopt here. The Bituminous court explained that the "Intervenors essentially

argue that it just wasn't fair for [the insurer] to address the permissive use question in this proceeding, knowing that [the employee-driver] was unsophisticated, and without advising his counsel in the [state court action] of the pendency of this action." Id. at 311-12. Since the intervenors failed to specify which of the provision of Rule 60(b) they relied on, the district court considered them all. Id. After noting that subsections (2) – (5) were facially inapplicable, the court reasoned that the intervenors were entitled to prevail under subsection (1) because the existence of the federal action was clearly a "surprise" to them. Id. at 312-13 (finding a dearth of case law construing "surprise" as grounds for relief and thus giving the word its plain and ordinary meaning). The circumstances merited granting relief because,

> [t]he practical effect of the judgment here is that Intervenors' claim of permissive use has been resolved against them on a default judgment. […] The default here took place without any notice to Intervenors, without any negligence or carelessness by Intervenors, not as a result of any ignorance of the law on the part of Intervenors or their attorneys, was not a result of an intentional choice by Intervenors, and the instant motion is not made in lieu of an appeal. Intervenors are significantly prejudiced here because their ability to recover insurance proceeds for their injuries from [the employee-driver's] potential insurer is adversely affected. The prejudice to [the insurer] from granting relief is minimal, because it will simply be required to prove its case on the merits in an adversarial forum, rather than obtaining a windfall judgment by forfeit.

Id. at 313. The court explained that if Rule 60(b)(1) were not grounds for relief, then "[f]or the same reasons stated above with regard to Rule 60(b)(1), the Court believes that Intervenors would be entitled to relief under Rule 60(b)(6) *if Rule 60(b)(1) were inapplicable*." Id. (emphasis added).

The same reasoning should apply here. Like the default judgment in Bituminous, the Consent Judgment's entry took place without any notice to Wray and, to his knowledge, without notice to *any* member of the Wray class. It is simply unjust to have included terms for releasing the Wray class's *individual* SCRA claims in the Consent Judgment because the negotiation of

that agreement occurred in the absence of any representation for the servicemembers themselves. As explained above, the existence of this action, and its possible effect on the Wray action, is clearly a surprise to Wray through no fault of his. Like the insurance company, CitiMortgage has deliberately attempted to conceal this action and delay informing counsel and the District Court in South Carolina until a time of its choosing, presumably while it surreptitiously picks-off the individual Wray class members. Like Bituminous, the practical effect of allowing the Consent Judgment to stand without amendment is to effectively resolve the Wray action in the absence of the servicemembers themselves. This is a grossly unjust result that this Court surely did not intend nor would have condoned had it been apprised as to the inadequacy of the Consent Judgment's compensation scheme for members of the Wray class.

Unlike the Wray action, the DOJ was not acting as servicemembers' fiduciary when it negotiated terms for the release of their claims because this action lacked the numerous due process notice protections imposed by Congress on class actions pursuant to Rule 23. Wray is better situated to represent the interests of the class because, unlike the DOJ's negotiation, Rule 23 imposes numerous procedural requirements on Wray as a class representative that are specifically designed provide the class with due process protections. For example, Rule 23(a)(4) requires that "representative parties will fairly and adequately protect the interests of the class." This means that named plaintiff must have not only a similar interest and injury as the class but also a "sufficient willingness, interest and ability to pursue claims on behalf of the class." Daskalea v. Washington Humane Soc., 275 F.R.D. 346, 377 (D.D.C. 2011). In other words, the named plaintiff (and his counsel) must act as a fiduciary for the absent class and the district court is empowered to supervise that named plaintiff's execution of this duty. See Shelton v. Pargo, Inc., 582 F.2d 1298, 1306 (4th Cir.1978).

Rule 23's class certification and settlement procedures provide further protection to the class by requiring notice upon class certification or settlement, a hearing as to the fairness of any settlement, an opportunity for individual class members to opt-out, and an opportunity for class members to object. See Fed. R. Civ. P. 23(c) & (e). The settlement negotiated by Citi and the DOJ denies servicemembers all of these protections. In fact, the prejudicial nature of the release solicitation at issue here (quoted fully above) is perhaps the single greatest example of the DOJ's inadequacy in looking out for the best interest of the Wray class.

This Court should revise its Consent Judgment to prohibit the solicitation of SCRA claims under such unequal and inadequate terms. As the Eleventh Circuit has explained:

> In view of the tension between the preference for class adjudication and the individual autonomy afforded by exclusion, it is critical that the class receive accurate and impartial information regarding the status, purposes and effects of the class action. […] The "best practicable notice" envisioned by the Rule is notice that conveys objective, neutral information about the nature of the claim and the consequence of proceeding as a class. Unsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. The damage from misstatements could well be irreparable.

Kleiner v. First Nat. Bank of Atlanta, 751 F.2d 1193, 1202-03 (11th Cir.1985) (internal citations omitted); see also Gulf Oil Co. v. Bernard, 452 U.S. 89, 99-102 (1981) (explaining the district court's role in policing communications to the class is to ensure they "further[ ], rather than hinder[ ], the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23[,]" and that the communication from plaintiffs' counsel should have been allowed to help the class decide whether to accept a back pay offer that required class members to sign a release). While the Eleventh Circuit's reasoning in Kleiner was offered in the context of a Rule 23 action, its application is even more appropriate here where there was no representative party available to

alert this Court to the incomplete and misleading nature of the proposed *ex parte* communication submitted by Citi and DOJ.

Finally, the judgment must be amended to address the inadequacy of the compensation model. With all due respect to the independent consultant, Wray is particularly concerned that the Consent Judgment provides no mechanism to examine or challenge the determination of the independent consultant with respect to the individuals injured and the extent of their injury. The absence of a representative acting on behalf of the servicemembers renders the compensation procedure inadequate consideration for the release of all SCRA claims. Disallowing these releases will not cause Citi any prejudice, it will merely require Citi to justify the proposed compensation in an adversarial forum rather than receiving a potential windfall from unilateral, ex parte solicitation of SCRA releases from an uninformed and unrepresented class. See Bituminous, 223 F.R.D. at 313 (insurer not entitled to a windfall from default).

For these reasons, Wray respectfully submits that he is likely to succeed in obtaining Rule 60(b) relief and that the Court should grant that motion if given leave to file it.

B. The Wray class is likely to suffer irreparable harm.

The Court should issue a temporary restraining order and preliminary injunction to prohibit Citi from soliciting SCRA releases from servicemembers until the Court rules on Wray's motion to intervene and proposed motion to alter or amend the Consent Judgment. Citi's plan to solicit *ex parte* releases from the class will irreparably harm the individual class members by seeking the release of their SCRA rights without fully apprising them of their rights and the legal options those rights afford them. For example, if permitted to solicit members of the proposed class with the incomplete and misleading letter and release included in Exhibit H, some class members will certainly release their claims for the sum promised when they might have

preferred instead either the Wray action or an individual lawsuit to vindicate their rights. This is precisely the sort of irreparable injury that the Eleventh Circuit reasoned must be avoided. See Kleiner, 751 F.2d at 1202-03. Moreover, due process has always required that the disposition of class claims be predicated on full and fair notice to the affected class members so they have an opportunity to present their objections to the proposed settlement *before* it is approved. See Cobell v. Salazar, 679 F.3d 909, 922 (D.C. Cir. 2012) cert. denied, 133 S. Ct. 543 (2012); Hecht v. United Collection Bureau, Inc., 691 F.3d 218, 224 (2d Cir. 2012); Fidel v. Farley, 534 F.3d 508, 513 (6th Cir.2008). DOJ and Citi's negotiated resolution of servicemembers' SCRA claims in this case simply fails meet this basic constitutional threshold and thus presents an imminent risk of harm to the Nation's servicemembers.

Absent an injunction, a servicemembers' purported release will also be made based on incorrect information as to what they are entitled to recover since the solicitation and release misrepresents what servicemembers are entitled to recover. The Consent Judgment merely entitles the class to a refund of interest and fees charged above 6% plus either $500 or an amount three times the refund, whichever is larger. Consent Judgment, Ex. H, p. H-7. But the SCRA allows servicemembers to recover consequential and punitive damages. See 50 App. U.S.C. § 527. This failure to account for a possible recovery of consequential or punitive damages is highly prejudicial. See Cox Nuclear Med. v. Gold Cup Coffee Services, Inc., 214 F.R.D. 696, 699 (S.D. Ala.2003) (noting that "[t]he failure recognize the existence of a putative class action, however, could be abusive […] if the class action sought recovery in excess of that proposed by the defendant").

In light of the total lack of procedural safeguards designed to protect servicemembers' individual rights from being opportunistically discharged by Citi, injunctive relief is necessary to

prevent irreparable harm to the Wray class while the Court considers whether to amend the Consent Judgment.

C. Maintaining the status quo by granting injunctive relief will not prejudice Citi.

When weighing the equities presented by this petition and motion, the Court should conclude that the equities tip decidedly in favor of granting injunctive relief because doing so will not cause any harm to Citi. First, Citi's planned solicitation of SCRA releases is not in the ordinary scope of Citi's business and thus will not interfere with its daily enterprise.

Upon information and belief, Citi has not yet solicited or obtained any releases from the SCRA class. Wray has not received a letter from Citi pursuant to this Court's Consent Judgment. Based on the representations of CitiMortgage's counsel to Judge Currie, the DOJ audit identifying aggrieved servicemembers is "ongoing" and thus no solicitations have been mailed. See Mot. Hr. Tr. 10-11, Wray, supra. This audit can continue, uninterrupted, even after the Court enters temporary injunctive relief.

At the worst, Citi will merely be forced to postpone sending the correspondence until this Court has an opportunity to rule on Wray's motion to intervene and motion to alter or amend the Consent Judgment. If the Court denies these motions, Citi can seek the releases. Conversely, the irreparable harm posed to the class is clear as the release releases and forever discharges servicemembers' SCRA claims. Because the equities lean heavily in favor of Wray, a temporary restraining order and preliminary injunction are appropriate.

D. Injunctive relief is in the public interest.

Finally, there is an obvious public interest in protecting servicemembers from making an uninformed release of their SCRA rights in exchange for inadequate or partial compensation. This conclusion is clear in light of Congress' purpose in adopting the SCRA, namely:

> to provide for, strengthen, and expedite the national defense through protection extended by this Act [said sections] to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation.

50 App. U.S.C. § 502(1). Discharging servicemembers' rights in exchange for inadequate or partial relief frustrates this public policy because it forces servicemembers to accept or reject the settlement offer based on incomplete information.

There is also a public interest in furthering the federal policy in favor of allowing class action claims under Rule 23 as a fair and efficient way to resolve numerous claims sharing common issues. Federal courts have long rejected efforts to frustrate the class procedure by "picking off" class members. See e.g., Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 329 (1980) (rejecting a credit card company's effort to pick off the named plaintiffs by tendering the maximum amount each plaintiff could have hoped to recover, including interest and costs), Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1249 (10th Cir. 2011), Weiss v. Regal Collections, 385 F.3d 337, 339-40 (3d Cir. 2004). While such pick-off tactics typically target named plaintiffs, Citi's reverse pick-off, if permitted here, would have the same effect: affording a wrongdoer a discount price to discharge it liability.

As such, the public interest weighs heavily in favor of issuing a temporary restraining order and preliminary injunction.

CONCLUSION

For the reasons set forth above, Wray respectfully requests that the Court (1) grant his motion to intervene; (2) issue a temporary restraining order enjoining Citi from seeking SCRA releases until a hearing can be held; (3) enter a preliminary injunction enjoining Citi from the same; (4) amend its Consent Judgment by striking § II(b) from Exhibit H; and (5) ordering any such further relief as the Court deems just and proper.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*,	)	
	)	Civil Action No. 1:12-cv-00361-RMC
Plaintiffs,	)	
	)	
v.	)	**CERTIFICATE OF SERVICE**
	)	
BANK OF AMERICA CORP., et al.,	)	
	)	
Defendants.	)	
	)	
_____	)	

I hereby certify that on December 24, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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