

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,)	
<i>EX REL.</i> , VICTOR E. BIBBY AND)	
BRIAN J. DONNELLY,)	
)	
RELATORS/PLAINTIFFS,)	
)	DOCKET NO. 1:06-CV-0547-AT
-VS-)	DOCKET NO. 1:12-CV-4020-AT
)	
WELLS FARGO BANK, N.A.,)	
ET AL.,)	
)	
DEFENDANTS.)	

TRANSCRIPT OF MOTIONS PROCEEDINGS
BEFORE THE HONORABLE AMY TOTENBERG
UNITED STATES DISTRICT COURT JUDGE
WEDNESDAY, JUNE 11, 2014

APPEARANCES:

ON BEHALF OF THE UNITED STATES OF AMERICA:

PARIS A. WYNN, ESQ.
ALAN GALE, ESQ.

ON BEHALF OF THE RELATORS/PLAINTIFFS BIBBY/DONNELLY:

JAMES E. BUTLER, JR., ESQ.
BRANDON L. PEAK, ESQ.
LEIGH M. MAY, ESQ.
MARLAN B. WILBANKS, ESQ.
ANNA W. HOWARD, ESQ.
JOEL O. WOOTEN, JR., ESQ.
JOSEPH M. COLWELL, ESQ.

ON BEHALF OF THE DEFENDANT WELLS FARGO BANK:

AMY P. WILLIAMS, ESQ.
CHARLES T. HUDDLESTON, ESQ.
NOAM A. KUTLER, ESQ.

ON BEHALF OF THE DEFENDANT MORTGAGE INVESTORS CORPORATION:

MICHAEL Y. KIEVAL, ESQ.
MATTHEW R. ROSENKOFF, ESQ.

ELISE SMITH EVANS, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
ATLANTA, GEORGIA

ELISE SMITH EVANS, RMR, CRR

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1 (Wednesday, June 11, 2014; Atlanta, Georgia.)

2 THE COURT: Good morning. Please have a seat.

3 All right. I know lots of people at the table, but
4 not -- not everybody. So, why don't we just do a roll call
5 starting from this side, from the defendants' side, starting with
6 Mr. Huddleston.

7 MR. HUDDLESTON: Your Honor, Charles Huddleston, local
8 counsel for Wells Fargo.

9 MS. WILLIAMS: Your Honor, Amy Williams with K & L
10 Gates here for Wells Fargo, and with me from our firm's
11 Washington, D.C. office is Noam Kutler.

12 MR. ROSENKOFF: Matthew Rosenkoff with Taylor
13 English --

14 THE COURT: All right. You will have to speak louder
15 unless you --

16 MR. ROSENKOFF: Oh. Matthew Rosenkoff, local counsel
17 for MIC.

18 MR. KIEVAL: Michael Kieval from Weiner Brodsky Kider
19 for Mortgage Investors Corporation.

20 THE COURT: Thank you.

21 MR. WYNN: Assistant United States Attorney Paris Wynn
22 for the United States.

23 MR. GALE: Alan Gale, trial attorney, Department of
24 Justice, Washington, D.C., for the United States.

25 THE COURT: Good to see you and not just have a voice.

1 MR. GALE: Yes, and you, Your Honor.

2 MR. BUTLER: Your Honor, James Butler, Leigh May,
3 Brandon Peak, Joel Wooten, Marlan Wilbanks, Anna Howard, here for
4 the Relators, ex rel., the United States of America. Also the --
5 Joseph Colwell, Beth Glen, and the Relators Victor Bibby and
6 Brian Donnelly.

7 THE COURT: All right. First of all, let me take care
8 of some housekeeping matters. As you know, I issued an order
9 last night with respect to the subpoena of Mr. LaBriola. And I
10 want to just say that based on the order, I'm at least granting
11 the Relators' Motion to Quash to the extent that it sought to
12 preclude Mr. LaBriola's testimony here today.

13 The subpoena also sought a production of various
14 documents for which a broad set of privileges and work product
15 doctrine have been -- claims have been asserted. I know that
16 Relators and Mr. LaBriola have spent a fair -- good amount of
17 time trying to amass the documents identified and comply with the
18 directive I gave last Friday, and I also had agreed that they
19 could be produced essentially this week.

20 I also indicated in the phone conference that we had on
21 Monday that I was granting their Motion to Continue and it was
22 really not going to be considered expressly at this hearing. I
23 considered that whole issue of the documents and the privileges
24 asserted to be ones that we will deal with separate from this
25 hearing, but I will address that at the conclusion of the

1 hearing, how we want to proceed there.

2 All right. Also, I have received several single-spaced
3 so-called bench briefs from the Relators' counsel by e-mail, with
4 copies to defense counsel. I would like, if the -- the Relators
5 to go ahead and file those in conformity with the local rules so
6 that they are officially on the record.

7 And to the extent that any of you are seeking to have
8 the record supplemented by your letter briefs to me, just simply
9 file a notice of filing, and then you can attach your letters as
10 an exhibit. And probably just so we have a record that's clear,
11 you should indicate that it's notice of filing of correspondence,
12 e-mail, prior to the Wednesday, June 11th hearing. Of course,
13 you don't need to mention Wednesday, but, anyway, the June 11th
14 hearing.

15 All right. A substantial number of the issues that the
16 Relators have identified in their bench brief, so to speak, was
17 what is relevant evidence and what is not relevant evidence. I
18 want to just say, consistent with my order, my focus still here
19 is expressly whether or not the Motion to Dismiss based on the
20 violation of the seal is warranted. And I know that the
21 Defendant Wells Fargo has urged that I adopt the Sixth Circuit
22 per se standard. If I were to adopt the Sixth Circuit per se
23 standard, we obviously would not need to have a hearing. So, let
24 me just say I'm obviously more inclined at this moment to adopt
25 the Ninth Circuit standard in Lujan. Therefore, that's why I

1 called the hearing and that is the purpose of the hearing as to
2 that issue.

3 So, let's look at the factors that are in Lujan and
4 proceed to discuss those factors. There's no point in your
5 arguing the Sixth -- why the Sixth Circuit standards are correct
6 because I've read your briefs. Now, if there's something you
7 want to add that I -- that you don't have in your briefs that --
8 some decision that was issued in the last number of weeks that
9 has adopted the Sixth Circuit standards, you're welcome to do so,
10 but you might as well just simply point that out to me in a
11 notice of recent authority, because I'm not going to be able to
12 look at it today anyway.

13 All right. This is the Defendant Wells Fargo's motion,
14 and I know that MIC also has a motion, but we're going to deal
15 with the main motion first and then I'll get to these other
16 issues.

17 MS. WILLIAMS: Your Honor, I will move to the podium if
18 that's all right.

19 THE COURT: Thank you.

20 MS. WILLIAMS: Your Honor, last night's order, which I
21 don't have a copy of with me --

22 THE COURT: Do you want me to produce it for you?

23 MS. WILLIAMS: -- because I don't have a printer --

24 THE COURT: Do you want me to print one for you?

25 MS. WILLIAMS: It's okay, as long as I get it right.

1 THE COURT: All right.

2 MS. WILLIAMS: I'm sure you'll tell me if I get it
3 wrong.

4 THE COURT: All right.

5 MS. WILLIAMS: As I understand it, the Court wanted
6 Wells Fargo to start today with an outline of the evidence that
7 we would intend to put on that goes to the factors that the Court
8 is interested in --

9 THE COURT: Correct.

10 MS. WILLIAMS: -- in connection with the Motion to
11 Dismiss.

12 THE COURT: Correct.

13 MS. WILLIAMS: And I'm prepared to do that, Your Honor.

14 While the Court has some documents in its possession to
15 prove a long-running and egregious series of seal violations by
16 the Relators, Wells Fargo subpoenaed the Relators to come today
17 and prepared for this hearing as an evidentiary hearing in order
18 to prove that there were additional seal violations that are not
19 reflected in the e-mails that the Court has. The e-mails
20 indicate, and Wells Fargo thinks that it can prove, that there
21 were also face-to-face meetings, there were phone calls, and
22 there were additional e-mails that have since apparently been
23 lost or destroyed over time that would also constitute violations
24 of the seal.

25 Wells Fargo, we think, is also entitled to find out if

1 Relators gave other documents to Fox News in connection -- when
2 they were meeting with them face-to-face or through the mail, not
3 necessarily just e-mail, and to put on additional evidence
4 regarding the fact that the Relators were on notice of the seal
5 and, just as importantly, on notice of the significance of the
6 seal. And we have evidence that we're prepared to put forth on
7 that today, Your Honor.

8 I can't emphasize this enough, Your Honor. We prepared
9 for this hearing as if it were going to be an evidentiary
10 hearing. The Relators have filed, I've lost count now, nine or
11 ten additional briefs since the last time Wells Fargo filed its
12 reply in connection with the Motion to Dismiss. We didn't take
13 any steps to seek to file some of these additional documents
14 because we understood this was going to be an evidentiary hearing
15 this morning. And if that's going to change at the last minute,
16 I would submit that that does prejudice our right to put forth
17 our argument and the evidence that we understood the Court wanted
18 to receive that goes, in particular, to the severity prong and
19 the willfulness prong.

20 I will also add that I understand the Court's ruling in
21 its order of last night. Wells Fargo respectfully, but I think
22 strongly, disagrees that the Relators post-unsealing cover-up
23 conduct is not somehow relevant to willfulness, to their bad
24 faith, and to the question of whether any sanction less than
25 removing them from the case is appropriate. We think that there

1 isn't a case out there with facts, I would submit, that are as
2 egregious as these, and so no court has had to look at it. But
3 if there is evidence of a cover-up, that's evidence of bad faith
4 and willfulness and it goes to the question, it goes to the
5 argument over whether a lesser sanction, a monetary sanction, is
6 sufficient to punish and to deter others from engaging in that
7 conduct.

8 And, so, to that point we would have put on, for
9 example, the interrogatory responses this morning. And I may
10 make a proffer as to that, but I understand that the Court is not
11 interested in that. Our focus is on --

12 THE COURT: Well, I'm just saying if you want to have a
13 hearing on the sanctions based on those issues, I need to have
14 the evidence properly teed up. I'm not saying it's not ever
15 relevant. I'm just saying it is not properly teed up for this
16 hearing.

17 MS. WILLIAMS: And I guess the point I'm trying to
18 make, Your Honor, is that I understand there are other
19 consequences perhaps to their conduct during the course of the
20 case, but that conduct also goes to their mind-set and to the
21 appropriateness of what to do about the seal violations. I think
22 that those are two separate issues and they could be taken up at
23 separate times.

24 For example -- let me give you an example of that, Your
25 Honor. I would not have expected the Court to decide that any

1 documents in that list of 22 that are in a log and that the Court
2 has in camera ought to be produced or made available to Wells
3 Fargo today. That's not what we were seeking. But each one of
4 those documents, as I read the privilege log, is in fact another
5 seal violation or maybe multiple seal violations. And, so, the
6 existence of that is relevant to the question of the issues that
7 come to the Court on the Motion to Dismiss.

8 They are also relevant to the issue of harm in that it
9 appears that there's confidential information that originated
10 with the Government that's in those documents that we would not
11 try to seek even at a later date. So, it's not a matter of
12 trying to get those documents today, Your Honor, or get a ruling
13 that the way -- that any kind of privilege has been waived today.
14 It is a matter of having those documents available because in and
15 of themselves they're separate evidence of seal violations and
16 separate evidence of the severity of the seal violations.

17 THE COURT: Well, that's a whole other issue than what
18 you're talking about as to post-lifting of the seal conduct. All
19 right?

20 MS. WILLIAMS: So, I mean, what we would propose to do,
21 Your Honor, is to call each Relator to the stand. We have a
22 total of about 15 exhibits between the two of them that I would
23 intend to question them about, along with related questions of
24 meetings and contacts and seal violations that aren't reflected
25 in the documents. And then we would -- my proposal is that we

1 would then come back and argue the law after the Court has had an
2 opportunity to hear all the evidence.

3 THE COURT: And are the 15 documents ones that have
4 already been shown to the Court?

5 MS. WILLIAMS: They -- with -- with two exceptions,
6 Your Honor. The -- we are going to use -- we have Mr. Donnelly's
7 affidavit that was filed with this Court in connection with the
8 Motion to Dismiss in which he makes certain sworn statements
9 about the seal and his understanding of the seal at the time of
10 his bankruptcy. We also have a document that Mr. Donnelly filed
11 in his bankruptcy case, a publicly available document that Mr.
12 Donnelly filed, that attaches the original retainer agreement
13 between Mr. Donnelly and Mr. Bibby and Mr. Wilbanks' firm,
14 because that document that they signed has statements about the
15 seal and the importance of respecting the seal.

16 THE COURT: All right.

17 MS. WILLIAMS: All of the other documents, I believe,
18 that we have come from or are the 175 pages that the Court has.

19 THE COURT: Now, do you intend to ask either of the
20 Relators regarding their communications with their counsel?

21 MS. WILLIAMS: No, Your Honor. I do intend to ask
22 them, not with respect to counsel, but who else knew, who else
23 did you tell beyond the people that we can see in this -- in this
24 set of documents. I have presumed all along that that did not
25 include any of their lawyers.

1 THE COURT: And do you intend to ask whether they had
2 any communications with Government counsel?

3 MS. WILLIAMS: I did not intend to ask them any
4 questions about their communications with the Government.

5 THE COURT: All right. Well, let me --

6 MS. WILLIAMS: I did want to get them to authenticate
7 the privilege log, but I didn't intend to ask them any questions
8 about it.

9 THE COURT: How would they authenticate the privilege
10 log?

11 MS. WILLIAMS: Well, I want to ask them if they
12 recognize that they were parties to these communications. I do
13 want that privilege log to somehow be in the record, Your Honor,
14 and I don't know how to get it in other than to ask them about it
15 or ask the Court to take judicial notice.

16 THE COURT: Maybe counsel will stipulate to it. I
17 mean, it's obviously a privilege log that has been developed by
18 counsel.

19 MS. WILLIAMS: Well, will you all stipulate?

20 MR. BUTLER: It's part of the record already. It's
21 been submitted to the Court and provided -- served on Ms.
22 Williams and Wells Fargo.

23 MS. WILLIAMS: Which is why we have it, but --

24 THE COURT: I think --

25 MS. WILLIAMS: -- those are the documents that we would

1 intend to use today.

2 THE COURT: All right. Well, I don't think it really
3 makes sense to ask them to verify the privilege log because they
4 didn't develop it, but I think that it can be filed as a exhibit
5 here if you want.

6 MS. WILLIAMS: That's -- that's fine, Your Honor.

7 THE COURT: It sounds like the Relators do not object
8 to that, but if you do, let me know.

9 MR. BUTLER: We do not. It's already --

10 THE COURT: All right.

11 MR. BUTLER: I've lost track, but it's filed as an
12 exhibit to one of our briefs, I think.

13 THE COURT: All right.

14 MR. BUTLER: Already part of the record.

15 THE COURT: All right. So you plan to call the
16 Relators, and then anything else?

17 MS. WILLIAMS: No, Your Honor, that's it.

18 THE COURT: Okay. Let me hear from Relators as to the
19 evidence issue.

20 MR. BUTLER: Thank you, Your Honor. The Relators are
21 here. And the Relators and their counsel have no objection to
22 anybody or any participant in this hearing who has a legitimate
23 interest in asking them questions asking them questions. But the
24 only participants in this hearing that have a legitimate interest
25 in asking them questions are the Court, whose orders were

1 violated, and the Government, for whom the seal exists, for whose
2 benefit the seal exists.

3 As we -- the fundamental problem with Ms. Williams'
4 request -- and we do object to Wells Fargo or MIC cross-examining
5 the Relators at this hearing. The fundamental problem with Ms.
6 Williams' request is the same one that existed when Wells Fargo
7 filed its Motion to Dismiss. As we stated in the first
8 paragraph, I believe the first sentence of our April 18 response
9 to that Motion to Dismiss, Wells Fargo avoids the real issue
10 before the Court. The fact that there's -- there is no evidence
11 Relators' disclosures prior to the case being unsealed caused any
12 harm to the Government's investigation or decision to intervene.

13 To put it in a colloquialism, Wells Fargo as a matter
14 of law simply does not have a dog in this fight. The proper
15 objection to -- country lawyers would say the proper objection to
16 Ms. Williams' request is NUNYA, as in none of your business.
17 They're not -- don't have any interest in the seal violation.
18 And we've briefed that and I won't repeat the briefs. We
19 believe, as we've written to the Court, that this is all about an
20 improper attempt to shift -- to shift the focus of this action
21 from Wells Fargo's own fraud to the Relators.

22 We've provided to the Court the bench brief, and I
23 won't repeat all that. I mean, Ms. Williams' attempts to depict
24 the Relators as people who have done bad things is irrelevant as
25 a matter of law because this is -- this is an ex rel. case.

1 Relators could be bad people, but it doesn't provide Wells Fargo
2 any protection for Wells Fargo's fraud, even if they are -- I
3 won't recite all those cases. We've stated all those cases.

4 The Government is the real party in interest here. The
5 Supreme Court has so held in the Eisenstein case. As a matter of
6 fact, courts have consistently held that even if the relators
7 themselves are guilty of the same fraud of which the defendant is
8 accused, it makes no difference to an -- an FCA case brought ex
9 rel.

10 There is simply no point in whipping up on the
11 Relators. They have -- their counsel have disclosed the
12 violations. The Relators have stipulated the violations
13 occurred. They've stipulated the -- they shouldn't have done it
14 and that it was wrong to do it and it was a violation of the
15 court orders. Respectfully, we don't see any point in whipping
16 up on them any more than that, because that's what tells the
17 Court whether the Court ought to impose a penalty or enables the
18 Court to decide whether the Court ought to impose a penalty, and
19 that also tells the Court, or should inform the Court, what kind
20 of penalty is appropriate. Wells Fargo has no interest in what
21 penalty is appropriate.

22 The -- with respect to the -- Wells Fargo's claim that
23 its interest arises because it has filed a "Motion to Dismiss,"
24 that claim respectfully is totally illegitimate. As a matter of
25 fact, so far as we can tell, this hearing appears to be

1 unprecedented. So far as we can tell, no court has ever
2 dismissed Relators from an FCA case where it was a
3 non-intervention case and where the Government stipulated there
4 is no harm and where the Government stipulated dismissal was
5 unwarranted.

6 Here the only party with an interest in the seal
7 violation are the Relators and the Government. Wells Fargo has
8 no authority and cites no authority for the proposition that it
9 as the party defendant can get these Relators dismissed, no
10 matter what the Relators have done or claim to have done.

11 THE COURT: So, I know you have read Wells Fargo's
12 briefs, and Wells Fargo maintains that essentially this issue has
13 never been directly confronted. And, indeed, in all of the other
14 cases dealing with these issues, the court did not rely on the
15 lack of standing of the entity moving. It hasn't just been the
16 Government moving it, that the party defendant has been a moving
17 party. And, yet, this has never been a ground for a decision,
18 one you urge, lack of -- that -- urge here, that this is --
19 they're not the real party in interest. There certainly are
20 discussions about who is the real party in interest in evaluating
21 the totality of evidence or in some of these other cases that
22 you've cited that deal with discovery, but it's not the -- the
23 grounds for decision in any of the other cases.

24 MR. BUTLER: Well, I'm sorry. What is not the grounds
25 for decision? I apologize, Your Honor.

1 THE COURT: That the defendant is not the real party in
2 interest.

3 MR. BUTLER: The -- in some of those cases, standing
4 was not raised with respect to the seal violation consideration
5 by the court or the seal violation. But our court is very
6 specific. This case is a case in which the Government decided
7 not to intervene. It's a case in which the Government has
8 stipulated that there was no harm, and the Government has
9 stipulated that it does not agree with dismissal. And we don't
10 find a case where any court prior, previously entertained a
11 motion to dismiss from the defendant in such a case, because what
12 that amounts to is Wells Fargo telling this Court that in a case
13 where the -- which the Government has said it does not want to
14 prosecute, Wells Fargo ought to be able to pick its opponent, to
15 pick its adversary, to kick the Relators and their counsel out of
16 the case.

17 Now, there's an obvious reason Wells Fargo wants to do
18 that, and that is because the Government chose not to intervene.
19 And Wells Fargo hopes that will make the case go away totally. I
20 think that's a unique situation, Your Honor.

21 Relators do not dispute that the Relators violated the
22 seal. So far as we know, the Court has all the documents Ms.
23 Williams plans to question the Relators about, other than those
24 that are attorney/client privileged. I don't know that Ms.
25 Williams really answered the Court's question. The Court asked

1 Ms. Williams a question about whether or not all the documents
2 she intended to interrogate the Relators about had been provided
3 to the Court, and I'm not sure we got an answer, but --

4 THE COURT: I understood there was an answer and that
5 it was all the documents that had already -- in the hundred --
6 group of 175, except for Mr. Donnelly's affidavit and -- filed in
7 his bankruptcy, in connection with his explanation of the
8 bankruptcy case and response to MIC's Motion for Summary
9 Judgment, as well as the retainer agreement he had with his
10 counsel.

11 MR. BUTLER: Well, that's important to have that in the
12 record, and I appreciate that clarification of the Court.

13 THE COURT: Well, let me just respond here again. All
14 right? In Lujan, which is the Ninth Circuit case that of course
15 the Relators urge that the Court observe as the prevailing
16 standard for assessing whether a sanction is appropriate here and
17 the sanction of dismissal in particular, it was Hughes Aircraft
18 that filed the motion to dismiss. You know, it may not have been
19 raised, the standing issue, but it is Hughes that filed the
20 motion. The district court granted the motion to dismiss, as you
21 know. And, then, the Ninth Circuit reversed that, but basically
22 said the district court should have considered other evidence,
23 and it clearly was going back for the consideration of that
24 evidence. That's why I determined that evidence would be
25 relevant. And that's why I am in some ways confounded by your

1 position.

2 I do understand absolutely that Wells Fargo is not the
3 real -- actual real party in interest; that objectives here of
4 the seal are intended to protect the Government and to protect it
5 for the purpose of promoting litigation of qui tam claims in an
6 appropriate way, in giving them the freedom to investigate and to
7 have the claims pursued and then balancing those -- those
8 interests against variety of other issues here or factors. But
9 Lujan clearly said, for instance, that good faith or bad faith is
10 a factor. And if I'm to determine good faith or bad faith, isn't
11 their testimony relevant so long as it is properly tailored
12 and -- and relevant?

13 MR. BUTLER: Your Honor, I have to confess that it's
14 been a while since I read those cases because we've been working
15 on other stuff. And -- but I -- the point I was making is that
16 here we have a non-intervention case. The Government stipulates
17 no harm. The Government stipulates the dismissal is
18 inappropriate, and Wells Fargo persists in seeking dismissal.
19 And the only purpose for doing so is so they can choose the
20 adversary and hope the case will disappear.

21 THE COURT: All right. Well, I have that point.

22 MR. BUTLER: Yes, Judge.

23 THE COURT: And I also understand the enormous stakes
24 involved.

25 MR. BUTLER: Okay.

1 THE COURT: And I'm going to hear from the Government
2 about that issue, as well as anything else.

3 MR. BUTLER: Yes, ma'am.

4 THE COURT: You are a repository of notes from your
5 co-counsel.

6 MR. BUTLER: I'm getting educated as I stand here. See
7 how quickly I can absorb it.

8 The -- this is from Ms. Howard. Lujan stands for the
9 proposition that the district court can impose sanctions, but not
10 the defendants. Lujan didn't dismiss, so there's not a
11 holding -- I don't understand the rest of her note, but the first
12 part of it I do understand.

13 And the answer to the Court's question about whether
14 good faith or bad faith is a factor, as I said and I'll state it
15 again, Relators have no objection to the Court or the Government
16 interrogating Relators because those are the participants in this
17 hearing who have a legitimate interest in what penalty, if any,
18 should be imposed for the admitted seal violations. And if the
19 Court is interested in exploring the good faith or bad faith of
20 Relators or the Government is, no objection from us.

21 THE COURT: All right.

22 MR. BUTLER: Our objection is as to -- as to Wells
23 Fargo, which has no legitimate interest in doing so.

24 And, Your Honor, with respect to -- let me add to that,
25 as a matter of fact, we would invite the Court to ask the

1 Relators a question which relates to good faith or bad faith, I
2 think. I think it might be useful for the Court to ask the
3 Relators on the stand under oath why did you do it. I asked them
4 that question yesterday and I heard their answers, and I told
5 them that's all I want to hear. If the Court asks the
6 question --

7 THE COURT: I have every intention of asking them.

8 MR. BUTLER: Pardon?

9 THE COURT: I did have every intention of asking them.

10 MR. BUTLER: Yeah. I hope the Court will ask that
11 question. And we stopped the conversation once we heard the
12 answers because we want you to hear the same answers we did or
13 something close to it.

14 With respect to the request or the statement Ms.
15 Williams made about some additional evidence she wants to ask the
16 Relators about, you know -- and she said that the reason Wells
17 Fargo has not filed any additional documents is because we
18 understood this was going to be an evidentiary hearing. Relators
19 and their counsel are entitled to notice what the issues are
20 going to be at this hearing. If Wells Fargo contends there were
21 additional seal violations other than those which have been
22 disclosed to the defendants and the Court or log -- on the
23 privilege log provided to the Court and subsequently produced
24 last Friday to the Court, then we're entitled to notice of that
25 and we're entitled to prepare for that.

1 I think what we're seeing here is ambush tactics.
2 There's no question that that's the intention is to -- that's why
3 Wells Fargo hadn't filed anything. The real reason is because
4 they didn't want to give Relators or their counsel any notice of
5 what they plan to do at this hearing. But those -- those
6 conclude my remarks in response to the Court's questions. We
7 object to any interrogation by Wells Fargo or MIC.

8 Thank you, Your Honor.

9 THE COURT: Thank you. Mr. Wynn or Mr. Gale, do you
10 have a position that you want to share with the Court on behalf
11 of the Government?

12 MR. GALE: Alan Gale for the Department of Justice for
13 the United States, Your Honor.

14 I'd just like to address this specific issue that the
15 Court is obviously very interested in. The Court's correct that,
16 as far as we are aware, the standing issue has never been the
17 basis for a denial of a -- of one of these motions. And I'm not
18 aware that the issue has been -- has even been briefed or
19 considered by any court, although the Court obviously has an
20 obligation sua sponte to decide whether somebody has standing to
21 raise a particular issue.

22 The difficulty in these cases where the Government
23 doesn't intervene, of course, is that without the defendant
24 bringing the issue forward or pressing the issue, most likely the
25 facts are never going to be fully before the Court for the Court

1 to make a informed decision about what sanction, if any, is
2 appropriate, whether it be dismissal under the -- the -- the
3 summary standards which -- from the Sixth Circuit, which to be
4 clear the Government does not support. But even under the Lujan
5 standard, whether dismissal is an appropriate result as a result
6 of a combination of the three factors. And, again, in this case
7 the Government is not arguing for dismissal.

8 My point is simply that if it is the case that there is
9 no standing other than for the Government to raise this issue and
10 to -- or for the Court sua sponte to do it, it's going to be very
11 difficult to develop a record for the Court to make a fully
12 informed decision. And I can -- I can't add any more than that
13 because it has not been an issue that I've seen ever briefed or
14 raised as a -- as a basis for denial of a -- of a motion which,
15 as the Court recognizes, is almost invariably brought by the
16 defendant.

17 THE COURT: Thank you very much.

18 All right. I have just a few questions for you, Ms.
19 Williams, before we begin --

20 MS. WILLIAMS: Sure.

21 THE COURT: -- if you would come back.

22 Are there any documents today that you intend to
23 introduce that you have not shown to Relators?

24 MS. WILLIAMS: The documents -- the only two documents
25 that don't come from the 175 is Mr. Donnelly's own affidavit

1 filed with this Court, which --

2 THE COURT: That's fine. That's fine. They have seen
3 it --

4 MS. WILLIAMS: I mean, they have seen it. They filed
5 it. They drafted it.

6 THE COURT: Right. That's not an issue.

7 MS. WILLIAMS: Signed it in front of presumably one of
8 their notaries. And, similarly, Mr. Donnelly's -- I mean, they
9 have the retainer agreement.

10 THE COURT: That's fine. Are there any --

11 MS. WILLIAMS: That's it.

12 THE COURT: -- documents other than those?

13 MS. WILLIAMS: There are -- the rest of the documents
14 are all -- the rest of the exhibits all come from the 175.

15 THE COURT: Okay. Then I just have some other
16 foundation-level questions to ask you. My understanding from
17 reading Wells Fargo's briefs is that it does not assert that it
18 learned about the pendency of the qui tam action prior to the
19 lawsuit's partial unsealing.

20 MS. WILLIAMS: That is correct, Your Honor.

21 THE COURT: All right. So, that issue is off the
22 table, in other words? Wells Fargo admits and agrees that it did
23 not learn of the pendency of the lawsuit until it was partially
24 unsealed?

25 MS. WILLIAMS: That is correct, Your Honor.

1 THE COURT: All right.

2 MS. WILLIAMS: We have other arguments about harm --

3 THE COURT: All right.

4 MS. WILLIAMS: -- but we'll get there.

5 THE COURT: Does Wells Fargo maintain that it learned
6 of any details of the investigation conducted by the Government
7 prior to the full unsealing of the case, other than by
8 discussions with the Government?

9 MS. WILLIAMS: Not as a result of the actions of the
10 Relators, Your Honor. To -- it now feels like a very long time
11 ago and it predates my involvement in the case, but the complaint
12 was partially unsealed to Wells Fargo by the -- I think with
13 permission of the Court.

14 THE COURT: In May of '09.

15 MS. WILLIAMS: In May of -- well, it was later than
16 that.

17 THE COURT: The partial unsealing?

18 MS. WILLIAMS: The partial unsealing was in 2011.

19 THE COURT: No, that was --

20 MS. WILLIAMS: It was six months before the --

21 MR. BUTLER: May 29, 2009, Your Honor.

22 MS. WILLIAMS: The -- that's earlier than I had
23 understood it, Your Honor.

24 THE COURT: I mean, that's what the docket reflects.

25 MS. WILLIAMS: All right. That might be a document

1 entry that I don't have access to, Your Honor. We don't have
2 access to a lot of the docket entries before 2011.

3 My understanding was that it was not that late because
4 there was a meeting with the Department of Justice, and I don't
5 know whether Mr. Gale can speak to that.

6 MR. BUTLER: June 23, 2009, Your Honor.

7 THE COURT: Mr. Gale, is that --

8 MR. GALE: Your Honor, there may have been a lag
9 between the partial unsealing order in this case and disclosure
10 to Wells Fargo. I cannot recall with precision the order in
11 which the defendants were made aware of the case. My vague
12 recollection -- and, again, this was handled by an Assistant
13 U. S. Attorney who's no longer with the office. But my
14 understanding that different defendants may have learned about
15 the case at a different time. I couldn't tell you with precision
16 today at what point Wells was given a copy of or made aware of
17 the complaint.

18 MS. WILLIAMS: Your Honor, that's not a question that I
19 was prepared to answer today. If I could have the opportunity to
20 find that out from Wells Fargo's perspective and get back to the
21 Court. My recollection is that it was much later, but that there
22 was a meeting here in Atlanta with Mr. Caldwell and some others,
23 and at that time a partial copy -- a partially unsealed copy of
24 the complaint was provided. But that is something that I can
25 clear up --

1 THE COURT: All right. If you would.

2 MS. WILLIAMS: -- after this hearing and perhaps submit
3 a letter to the Court on that issue.

4 THE COURT: Well, why don't you file something rather
5 than just a letter to the Court?

6 MS. WILLIAMS: With a notice of filing?

7 THE COURT: That's right. I mean, do you think you
8 have the information available to you?

9 MS. WILLIAMS: Yes. One of my law partners will have
10 the information available.

11 THE COURT: All right.

12 MS. WILLIAMS: And then we can confirm it with our
13 client, Your Honor. I just -- I wasn't involved at that time, so
14 I have a -- in my mind I have a very clear understanding, but I
15 don't -- I want to check with them before I give the Court a
16 date.

17 THE COURT: All right. In all the documents that have
18 been submitted to me, I have never seen evidence that the actual
19 complaint or amended complaint in this matter was disclosed to
20 these third parties. Are you maintaining that there -- that the
21 complaint, the amended complaint, was disclosed?

22 MS. WILLIAMS: I don't have access to the privilege
23 log. The Court's saying that it wasn't among those documents
24 there. The e-mails reference --

25 THE COURT: Well, I'm not sure the complaint or amended

1 complaint are privileged, and I cannot imagine that the
2 Relator --

3 MS. WILLIAMS: I just don't know whether --

4 THE COURT: -- asserted a privilege as to that.

5 MS. WILLIAMS: I don't know whether they're attached to
6 something that's in one of those documents. But this is one of
7 the reasons why we have questions for the Relators today, Your
8 Honor, because the -- the e-mails reference meetings. And a
9 document that is as bulky as a complaint or stacks of HUD-1s or
10 anything else of any substance, one could imagine might have been
11 handed off at a meeting.

12 THE COURT: All right. Does Wells Fargo contend that
13 every contact with a third party made by the Relators regarding
14 mortgage practices in the United States and the practices of the
15 VA are impermissible disclosures, regardless of whether they
16 dealt with the specific issues raised in the qui tam case?

17 MS. WILLIAMS: Let me answer that question with respect
18 to what we know from the documents. Certainly if there is a
19 reference to a whistleblower complaint or a sealed complaint,
20 those kinds of words, we would contend that that is a seal
21 violation.

22 With respect to the ongoing and sort of continuous
23 communications with Fox News, once the Relators told Fox News
24 about the qui tam case and then was giving updates about the
25 case, there are other communications with Fox News that may not

1 expressly reference the case, but it's all about the issues
2 involved in this case. We would contend that every single one of
3 those communications is necessarily a seal violation because it's
4 in the context of they know about this case, they're getting
5 updates about the case, or they're getting updates about facts or
6 allegations related to the case.

7 There is another set of communications, Your Honor,
8 that again are referenced in these e-mails, but unless I -- I
9 can't -- I don't know whether those communications were only
10 about fee practices in general, in which case that may not be a
11 seal violation, or whether there were oral communications in
12 which the existence of the lawsuit was also disclosed, and
13 hand-in-hand with that there were questions being asked about
14 mortgage practices.

15 THE COURT: All right.

16 MS. WILLIAMS: I'll give you one example that I believe
17 the Court understands. The very last document that was produced,
18 which was produced later than the rest, appears to have been an
19 e-mail back and forth with a third party over some videos that
20 appear to be about fee practices. But it also appears from the
21 e-mail that the person with whom the Relators were e-mailing also
22 knew about this case.

23 THE COURT: All right. Simply to guide you a little
24 bit about your questioning, I think that the Relators would have
25 a -- their own independent right to discuss with the news media

1 issues relating to the largest mortgage and housing crisis,
2 virtually, in United States history. And obviously they were
3 individuals who are informed about some of the practices and
4 issues that were at play. And, so, there's a broader context of
5 information that they could be interviewed about and they could
6 share information. I don't think a qui tam relator, by virtue of
7 filing a qui tam lawsuit, forfeits for years on end his ability
8 to and right to discuss the broader issues that are central to
9 the life of this country and certainly were in 2009.

10 At the same time, you know, I -- obviously the Relators
11 also here were discussing issues that were specific to the qui
12 tam case. And it's sometimes a fine line. Sometimes it's not.
13 But I want you to keep that in mind as you're doing the
14 questioning the way the Court views that, and that I think that
15 if we start going too far afield, you're going to sort of run
16 into a area that I think is not relevant.

17 I think the court in the Katrina case that was cited by
18 defendants, and I've looked at the -- by Relators and I looked at
19 that, had to deal with this in the context of Katrina issues.

20 I'll give you the --

21 MS. WILLIAMS: Yes, Your Honor, that's --

22 THE COURT: And I think --

23 MS. WILLIAMS: Yeah.

24 THE COURT: And that's --

25 MS. WILLIAMS: That -- and, I mean, I think actually in

1 that case the court ended up concluding that there were only
2 three seal violations by the lawyer and none by the Relators.

3 THE COURT: Right. But the Relators had engaged in an
4 ongoing stream of conversations about the issues that were in
5 play both in the qui tam case and at large with the filing of
6 claims by Liberty and the handling of it by insurance agencies
7 for Liberty Mutual, specifically, and others as well. And I
8 think that same problem will bedevil us a little bit here, too,
9 so I just want to warn you about that. And, obviously, also
10 there's evidence here that there was a independent lawsuit filed
11 in 2008 that also challenged some of Wells Fargo's practices that
12 would be a public document. And I don't think they were
13 precluded from discussing those specifically, even though they
14 are very close, some of their own issues.

15 MS. WILLIAMS: I understand the Court's point. I mean,
16 the document that we're going to focus on are documents that are
17 specifically about this case.

18 THE COURT: All right.

19 MS. WILLIAMS: I do have some questions based on some
20 e-mails about whether some e-mails are about that case or some
21 e-mails are about this case.

22 THE COURT: All right. Well, I'm going to allow the
23 Relators to be called subject to my reining in the examination
24 for relevance and other considerations, such as privilege, work
25 product, if that's where you're going. But I will tightly

1 control it. All right?

2 MS. WILLIAMS: I understand, Your Honor. Let me shift
3 paper here.

4 Your Honor, Wells Fargo would call Victor Bibby to the
5 stand.

6 VICTOR E. BIBBY,
7 having been duly sworn, was examined and testified as follows:

8 MR. BUTLER: Your Honor, could we ask for our copies of
9 the document that Ms. Williams intends to ask the witness about?

10 THE COURT: Yes.

11 MR. BUTLER: So he can follow along.

12 MS. WILLIAMS: I was --

13 THE COURT: About to do that?

14 MS. WILLIAMS: -- about to do that. I was about to
15 hand them out before --

16 THE COURT: Wonderful.

17 MS. WILLIAMS: -- handing them up, Your Honor. And I
18 have, Your Honor, one for the witness and two for the Court, if
19 that's -- if that suits.

20 THE COURT: That's fine.

21 MS. WILLIAMS: And not having been here before, I
22 should hand them to?

23 THE COURT: Ms. McConochie.

24 MS. WILLIAMS: Ms. McConochie. All right.

25 And, then, I have to get Mr. Kutler's help

1 distributing.

2 CROSS EXAMINATION

3 BY MS. WILLIAMS:

4 Q. Mr. Bibby, my name is Amy Williams, and I represent the
5 Defendant Wells Fargo Bank in this case.

6 And I wanted to start by asking you a couple of
7 questions to understand what your e-mail address was in 2009 and
8 2010. Am I correct that you were the owner of U. S. Financial
9 Services dba Veterans Mortgage?

10 A. Yes.

11 Q. And you -- is it all right if I refer to that entity as USFS?

12 A. Yes.

13 Q. Did you -- you formed USFS in 2001; is that right?

14 A. That's correct.

15 Q. And when did USFS go out of business?

16 A. We went dormant in 2008 and officially closed the company in
17 2013.

18 Q. You had an e-mail address at USFS?

19 A. I did.

20 Q. And what was that?

21 A. Vbibby@usfinancialsvcs.com.

22 Q. And did you continue to have that e-mail address after 2008?

23 A. Yes. It was in existence.

24 Q. Okay. When did that e-mail address go out of existence?

25 A. I don't know the specific date.

1 Q. Is it in existence now?

2 A. No.

3 Q. Did you use it in 2010, 2011?

4 A. I don't recall.

5 Q. You also set up an e-mail account at gmail called
6 documents.va@gmail.com; is that right?

7 A. I did.

8 Q. And you set that account so that when e-mails went out from
9 that account, the recipient of that e-mail would receive -- it
10 would be labeled as anonymous; is that correct?

11 A. Correct.

12 Q. And when did you set up that account?

13 A. I don't recall a specific date.

14 Q. But you set it up before July of 2009; is that right?

15 A. I -- I don't know.

16 Q. Does that account still exist?

17 A. Not to my knowledge.

18 Q. When did you shut it down?

19 A. I don't know a specific date.

20 Q. You don't remember whether it was before or after the seal
21 was lifted in this case?

22 A. I don't.

23 Q. Did Mr. Donnelly participate in setting up that account with
24 you?

25 A. I don't recall.

1 Q. Did you both use the account to send e-mails and receive
2 e-mails?

3 A. No.

4 Q. Did you copy Mr. Donnelly on the e-mails that went out from
5 that account?

6 A. Possibly. I don't recall.

7 Q. Did Mr. Donnelly work with you in drafting the e-mails that
8 went out on that account?

9 A. No, not to my knowledge.

10 Q. Mr. Donnelly knew about the existence of that account,
11 though; right?

12 A. Yes.

13 Q. Other than Mr. Donnelly, and focusing on the time period
14 prior to October 4th, 2011, who else knew about the existence of
15 that account at gmail, the documents.va@gmail.com account?

16 A. Dale Russell.

17 Q. What about Mindy Larcom?

18 A. Possibly. I don't -- I don't recall.

19 Q. And the other persons whom you e-mailed from that account
20 presumably would at least be aware of it even if they didn't know
21 who you were; is that right?

22 A. I don't recall e-mailing anyone else from that address.

23 MS. WILLIAMS: Your Honor, if I could approach?

24 THE COURT: Yes.

25 Q. (BY MS. WILLIAMS): Mr. Bibby, I'm handing you an exhibit

1 that's marked Defense Exhibit 2.

2 A. Uh-huh.

3 Q. Is Defendant's Exhibit 2 an e-mail from your anonymous
4 documents.va@gmail.com address?

5 A. It is.

6 Q. And was this printed from your USFS e-mail account?

7 A. Was it -- can you ask that again?

8 Q. Yeah. Let me ask it a different way. This document in the
9 upper left-hand corner has your name on it; correct?

10 A. Correct.

11 Q. What computer would you have used to print this e-mail out
12 that your name would show up in the upper left-hand corner?

13 A. That would have been it, probably. I don't know.

14 Q. You don't -- you don't know?

15 Did you have a computer at USFS?

16 A. I did.

17 Q. And after USFS shut down, what happened to that computer?

18 A. Any computers that were obsolete or no longer in use were
19 destroyed.

20 Q. Did that include your computer at USFS?

21 A. It did.

22 Q. And when did you destroy that computer?

23 A. I don't recall a specific date.

24 Q. Do you recall a year?

25 A. I don't.

1 Q. Was it prior to the unsealing of this complaint?

2 A. I don't know.

3 Q. Was it after this complaint was filed in 2006?

4 A. Yes.

5 Q. Did you do anything to preserve or maintain the documents or
6 data that was on that computer?

7 A. Yes.

8 Q. And what did you do?

9 A. The e-mail account was backed up, whatever could be
10 recovered.

11 Q. And that -- would that be on a tape, would that be the right
12 terminology? The e-mails backed up on a -- is it on a hard drive
13 or tape or --

14 A. Hard drive.

15 Q. And that hard drive still exists today?

16 A. It does.

17 Q. What about your personal computer at home? Did you have a
18 personal computer in February of 2010 at home?

19 A. I did.

20 Q. And do you still have that same computer?

21 A. I do.

22 Q. And have you taken steps to protect the information that's on
23 that computer from being deleted or destroyed?

24 A. There has been a copy made of it.

25 Q. Do you remember when that copy was made?

1 A. I do not.

2 Q. Do you know whether it was made before or after February 5th
3 of 2010?

4 MR. BUTLER: Your Honor, we object. This is a
5 discovery fishing expedition. Ms. Williams told the Court she
6 wanted to ask about specific documents reflecting seal
7 violations. The Court asked Ms. Williams are there any documents
8 other than ones that have been produced. She identified two.
9 And all she's doing is asking about the history of this man's
10 maintaining of computers.

11 MS. WILLIAMS: Your Honor --

12 MR. BUTLER: Now, this is exactly the fishing
13 expedition and the targeting that we've been discussing. And
14 it's got nothing to do with the subject matter of this hearing.

15 THE COURT: Ms. Williams, I have given you some
16 latitude here, but I am starting -- I was starting to wonder
17 myself.

18 MS. WILLIAMS: I will bring it back to this e-mail.

19 THE COURT: Okay.

20 Q. (BY MS. WILLIAMS): Mr. Bibby, do you recognize Defendant's
21 Exhibit 2 as an e-mail that you sent from your gmail.com --

22 A. I do.

23 Q. -- your anonymous gmail account?

24 A. Yes.

25 Q. And you wrote this e-mail; is that right?

1 A. I did.

2 Q. And you sent this e-mail to *MSNBC Investigates*; is that
3 right?

4 A. That's correct.

5 Q. And you also sent it to -- is that the *Countdown* program on
6 MSNBC?

7 A. Correct.

8 Q. Is that right?

9 A. Uh-huh.

10 Q. So, someone at those news organizations would have received
11 an e-mail from you, that is -- that is Defendant's Exhibit 2; is
12 that right?

13 A. I would presume. We had no response to it.

14 Q. So you did not hear back on this e-mail?

15 A. No.

16 Q. In Defendant's Exhibit 2, you are referring to this
17 lawsuit -- correct -- when you reference the fact that you were a
18 federal whistleblower involved in an ongoing federal
19 investigation?

20 A. That's correct.

21 Q. I'm going to hand you what's been marked Defendant's Exhibit
22 1, Mr. Bibby, and I'm going to draw your attention to the --

23 A. Uh-huh.

24 Q. Is this the -- Defendant's Exhibit 1 is a pleading filed in
25 the bankruptcy case of Mr. Donnelly. Are you familiar with that

1 document --

2 A. I am not.

3 Q. -- as the pleading?

4 Take a look at Exhibit B to the pleading. And what's
5 Exhibit B to the pleading entitled?

6 A. Relator authorizes counsel. Oh, Exhibit B? Joint Retainer
7 Agreement.

8 Q. Correct. On or around the time of the filing of this
9 lawsuit, did you and Mr. Donnelly enter into a retainer agreement
10 with Mr. Wilbanks and his firm?

11 A. We did.

12 Q. Okay. If you could take a moment and page through to the end
13 of that document and find your signature.

14 Do you recognize your signature on that document?

15 A. I do.

16 Q. And is that in fact the retainer agreement that you entered
17 into with Mr. Wilbanks' firm?

18 A. It is.

19 Q. And if you look at paragraph G on page 2 of that agreement,
20 do you see it down at the bottom of page 2 and goes over to the
21 top of page 3?

22 A. I do.

23 Q. When you signed that agreement, you were put on notice that
24 when the lawsuit was filed, it was going to be under seal; isn't
25 that right?

1 A. That is correct.

2 Q. And that agreement tells you how important the seal is,
3 doesn't it?

4 A. It does.

5 Q. And it tells you it's important to respect the seal, doesn't
6 it?

7 A. It does.

8 Q. And it also tells you specifically that among the people that
9 you should not contact about the lawsuit while it's under seal
10 are members of the press; is that right?

11 A. Uh-huh.

12 Q. Did you read that document before you signed it in 2006?

13 A. I did.

14 Q. Your lawyers have indicated in a filing with this Court that
15 there were 18 seal extensions entered prior to the lifting of the
16 seal in October of 2011. Were you aware that the seal was being
17 extended when it was extended?

18 A. Yes.

19 Q. So, every time the seal was extended you received notice of
20 that; is that right?

21 A. That is correct.

22 Q. Mr. Bibby, I'm going to hand you what I have marked as
23 Defendant's Exhibit 3. Do you recognize Defendant's Exhibit 3 as
24 an e-mail from your e-mail account at U. S. Financial Services?

25 A. I do.

1 Q. And did you type Defendant's Exhibit 3?

2 A. My correspondence part of it, yes.

3 Q. Okay. And this was sent on August 3rd, 2010; is that right?

4 A. Yes.

5 Q. So, at least as of August 3rd, 2010, your U. S. Financial
6 Services e-mail address was still working; is that right?

7 A. That's correct.

8 Q. And this e-mail was sent to Dale Russell. Is that Dale
9 Russell of Fox News?

10 A. It is.

11 Q. Do you recall or do you know whether, when you were e-mailing
12 Mr. Russell, you routinely would cc Mr. Donnelly? I'm sorry --

13 A. Yes.

14 Q. -- blind copy Mr. Donnelly.

15 A. Blind copy, no. It would have been cced most of the time, I
16 would imagine.

17 Q. Mr. Bibby, I'm going to hand you what's been marked as
18 Defendant's Exhibit 3A. Is Defendant's 3A a copy of Defendant's
19 3, but it shows Mr. Donnelly as blind copied?

20 A. Yes.

21 Q. And, in fact, a number of the e-mails produced in this case,
22 when you look at the version that has the metadata that shows the
23 blind copy, would show that Mr. Donnelly was blind copied even if
24 the e-mail came from you; is that right?

25 A. Correct.

1 Q. I want to show you a few more e-mails with Mr. Russell, Mr.
2 Bibby. This document is marked as Defendant's Exhibit No. 5. Do
3 you recognize Defendant's Exhibit 5 as an e-mail from you to Mr.
4 Russell dated July 27th, 2009?

5 A. I do.

6 Q. And I'll represent to you, Mr. Bibby, that this is the
7 earliest dated e-mail that we located in the documents produced
8 in this case. But this e-mail indicates that you had had contact
9 with Mr. Russell prior to July 27th, 2009; is that right?

10 A. Yes.

11 Q. How much -- how much before July of 2009 had you been in
12 touch with Mr. Russell?

13 A. Myself, I don't recall a specific date, but it was pretty
14 close to that date.

15 Q. Did you meet with Mr. Russell before this e-mail went out?

16 A. I don't know.

17 Q. Did you have a telephone conversation with him before this
18 e-mail went out?

19 A. Yes.

20 Q. Had you had other e-mails with Mr. Russell before this e-mail
21 went out?

22 A. I don't know.

23 Q. In that conversation with Mr. Russell, did you tell Mr.
24 Russell or bring his attention to the class-action lawsuits
25 involving veterans?

1 A. Yes. That's what this is referencing.

2 Q. And did you also tell him about this lawsuit?

3 A. At this time, I don't know that he knew that or not.

4 Q. My --

5 MR. BUTLER: Now this lawsuit, you're referring to the
6 qui tam case --

7 MS. WILLIAMS: Yes.

8 MR. BUTLER: -- for the record?

9 Q. (BY MS. WILLIAMS): My question was whether you had --
10 whether as of July 27th, 2009, you had told Mr. Russell about
11 this qui tam lawsuit.

12 A. I do not recall what date it was.

13 Q. But you told him about it in or around the summer of 2009; is
14 that right?

15 A. I don't recall.

16 Q. You don't have any recollection of when you first told Mr.
17 Russell about the existence of this qui tam lawsuit?

18 A. I don't.

19 Q. You do acknowledge that you told him about it; right?

20 A. Yes.

21 Q. And you acknowledge that you regularly blind copied Mr.
22 Russell on communications with your counsel about this case? And
23 by this case, I mean the qui tam lawsuit. Is that right?

24 A. Yes.

25 Q. And you also forwarded to Mr. Russell documents that you had

1 received from your lawyer about this -- about this qui tam case;
2 is that right?

3 A. I did.

4 Q. Mr. Bibby, I'm going to hand you what has been marked as
5 Defendant's Exhibit 4. Do you recognize Defendant's Exhibit 4 as
6 an e-mail from you to Mindy Larcom at Fox News?

7 A. Yes.

8 Q. And you had copied Mr. Donnelly on this e-mail; is that
9 right?

10 A. I did.

11 Q. And this e-mail is dated October of 2009; is that right?

12 A. It is.

13 Q. As of the time that you had sent this e-mail, you had in fact
14 told Ms. Larcom and Mr. Russell about the existence of this qui
15 tam lawsuit; isn't that right?

16 A. I -- I do not know.

17 Q. Well, in the body of this e-mail, you say to Ms. Larcom that
18 you don't think it would be in your best interest to provide any
19 more information to her, and that if you had to do it all over
20 again, you wouldn't have contacted her in the first place. Isn't
21 that right?

22 A. That's correct.

23 Q. Wasn't this an e-mail indicating to her that you had second
24 thoughts about whether you should have revealed the qui tam
25 lawsuit to she and Mr. Russell?

1 A. From -- from my recollection of this e-mail, it was -- it was
2 more I didn't feel like we should have told them or gave them any
3 assistance on the story that they were running at the time, which
4 was on the class-action lawsuit.

5 Q. Well, why would you have had second thoughts about giving
6 information about a class-action lawsuit that you weren't
7 involved in?

8 A. Because I didn't want to particularly talk to any media.

9 Q. You didn't particularly want to talk to any media?

10 A. That's correct.

11 Q. In October of 2009?

12 A. That's correct.

13 Q. And it wasn't because you had told them about this qui tam
14 lawsuit and now you were having second thoughts about it?

15 A. I don't know what date that -- that was that we informed them
16 of the qui tam.

17 Q. Mr. Bibby, I'm going to hand you Defendant's Exhibit 6. Can
18 you identify Defendant's Exhibit 6 as another e-mail from your
19 anonymous gmail account?

20 A. I do.

21 Q. And this one you sent out on March -- on -- excuse me. This
22 one you received, actually, on March 9th, 2010; is that right?

23 A. Correct.

24 Q. And you wrote on the bottom half of this document where it
25 says "Anonymous wrote: Update colon." The words that appear

1 after that on Defendant's Exhibit 6, you typed that; is that
2 right?

3 A. Correct.

4 Q. And you typed that sometime before March 9th, 2010, at 2:07.
5 And on March 9, 2010, at 2:07 in the afternoon, Mr. Scott was
6 responding to you; is that right?

7 A. Correct.

8 Q. So in March of 2010, you were e-mailing Mr. Scott again about
9 your inside knowledge of a pending investigation; is that right?

10 A. That's correct.

11 Q. And in that e-mail, you accused the VA of covering up fraud;
12 is that right?

13 A. That's correct.

14 Q. You indicated that this was an update. And had you
15 previously e-mailed Mr. Scott before this e-mail?

16 A. No.

17 Q. Did you e-mail Mr. Scott again after March 9th, 2010?

18 A. No, not to my recollection.

19 Q. Why does the re line up at the top say, "Re: I am the person
20 who tipped you off on the banks ripping off veterans story," if
21 you hadn't contacted him before March 9th of 2010?

22 A. Where are you seeing that? Excuse me?

23 Q. Look up at the top at the subject line, Mr. Bibby. Do you
24 see that?

25 A. Yes.

1 Q. Do you see what it says there, "Re: I am the person who
2 tipped you off on the banks ripping off veterans story"?

3 A. Uh-huh.

4 Q. Doesn't that seem to indicate that you had e-mail with Mr.
5 Scott prior to March 10th of 2010?

6 A. Possibly, yes.

7 Q. You just don't remember?

8 A. I don't remember.

9 Q. Mr. Bibby, I'm handing you Defendant's Exhibit 7. Can you
10 identify Defendant's Exhibit 7 as an e-mail from your U. S.
11 Financial Services account that was also sent on March 9th, 2010;
12 is that right?

13 A. I do.

14 Q. And you sent this e-mail to Mr. Russell?

15 A. I did.

16 Q. And you copied Mr. Donnelly on it?

17 A. I did.

18 Q. So, on the same day that you're e-mailing Mr. Scott about
19 this qui tam case, you're also e-mailing with Mr. Russell about
20 this case, this qui tam case; is that right?

21 A. That is correct.

22 Q. Okay. Did you contact Mary Williams Walsh of the *New York*
23 *Times*?

24 A. We did not.

25 Q. You've never e-mailed her or spoken to her?

1 A. Not to my knowledge, no.

2 Q. Okay. Who is Jason who's referenced in this e-mail?

3 A. Jason Crawford.

4 Q. And who is Jason Crawford?

5 A. He's an attorney.

6 Q. And did you also tell Mr. Crawford about the existence of
7 this qui tam lawsuit?

8 A. Did not.

9 Q. You did not?

10 A. Did not.

11 THE COURT: Are you saying you were his attorney? In
12 what capacity?

13 THE WITNESS: He was an attorney.

14 THE COURT: He was an attorney. He was not your
15 attorney.

16 Q. (BY MS. WILLIAMS): He was not your attorney; right?

17 A. Correct.

18 Q. Okay. Was he counsel in one of the class-action cases?

19 A. He was.

20 Q. And you were in touch with Mr. Crawford; is that right?

21 A. I had -- I had spoke to Mr. Crawford previously, yes.

22 Q. But he didn't represent you; right?

23 A. Correct.

24 Q. And did you speak with him about this qui tam lawsuit?

25 A. I did not.

1 Q. Did you speak with him about VA loans more generally?

2 A. Yes.

3 Q. Did you provide him with information about VA loans?

4 A. I did.

5 Q. Did you provide him with any HUD-1s of your customers?

6 A. Not to my recollection.

7 Q. Do you know whether Mr. Russell called Ms. Walsh as you
8 reference in this e-mail?

9 A. I don't believe so. I don't know.

10 Q. Mr. Bibby, you had -- in addition to your e-mail
11 correspondence back and forth with Mr. Russell and Ms. Larcom,
12 you met with them in person as well; is that right?

13 A. I did.

14 Q. And you spoke with them over the telephone?

15 A. Yes.

16 Q. And in those conversations and in those meetings, you
17 discussed this qui tam lawsuit; isn't that right?

18 A. Yes.

19 Q. And without getting into the details, you discussed the
20 progress of the lawsuit; is that right?

21 A. That's correct.

22 Q. And did you also discuss information that -- again, don't
23 tell me the content, but you also discussed information that the
24 Government had provided to your lawyers about this -- their
25 investigation in this lawsuit. Is that right?

1 A. I don't recall.

2 Q. You don't recall giving them information that had originated
3 from the Government?

4 A. I don't recall --

5 THE COURT: Wait. Excuse me one second. Recall giving
6 it to them in person or by e-mail? I don't want to just sort of
7 have --

8 MS. WILLIAMS: I'll specify, Your Honor.

9 Q. (BY MS. WILLIAMS): You gave Mr. Russell and Ms. Larcom
10 information about the Government's investigation by e-mail;
11 correct?

12 A. I told them about the case via e-mail, correct.

13 Q. And sometimes you forwarded e-mails that either referenced or
14 originated from the Government and its investigation?

15 A. I do not recall that. I don't know if I did or not. I can't
16 recall.

17 Q. All right. Well, we'll get to that in a moment.

18 Separate and apart from the e-mails, how many times --
19 let's talk about face-to-face meetings. How many times did you
20 meet personally with Mr. Russell or Ms. Larcom about the qui tam
21 case?

22 A. Mr. Russell, once. And Ms. Larcom, that same meeting and one
23 other time.

24 Q. And at those meetings, did you give them copies of any of the
25 complaints in this qui tam case?

1 A. I don't recall.

2 Q. You don't remember whether you gave them a copy of the
3 complaint in this case?

4 A. I don't.

5 Q. Do you recall giving them copies of other documents
6 pertaining to this case?

7 A. Yes.

8 Q. Did you give them copies of HUD-1s of your customers?

9 A. I don't recall.

10 Q. Did you give them copies of memoranda that your lawyers had
11 prepared for you?

12 A. Yes.

13 Q. Did you give them copies of memoranda that your lawyers had
14 prepared for the Government?

15 A. Yes.

16 Q. Did you give them copies of the documentation that your
17 lawyers provided to the Government before this lawsuit was filed?

18 A. I don't recall.

19 Q. You do understand that your lawyers provided the Government
20 with documentation and some sort of letter or memoranda before
21 the lawsuit was filed; right?

22 A. I would assume, yes.

23 Q. And you don't remember whether you gave copies of those items
24 to Mr. Russell or Ms. Larcom?

25 A. I don't recall.

1 Q. But you -- you are testifying that you gave them documents
2 about this case at your face-to-face meetings?

3 A. No. I don't recall what I -- what I particularly gave them
4 face-to-face. I don't know that any documents exchanged hands
5 face-to-face.

6 Q. You don't remember?

7 A. I don't remember.

8 Q. Did you talk on the telephone with Mr. Russell and Ms. Larcom
9 on a regular basis?

10 A. Yes.

11 Q. And in those conversations, did you provide them with the
12 same informational updates that your lawyers were providing you?

13 A. Yes.

14 Q. And did you provide them with information updates that your
15 lawyers were obtaining from the Government?

16 A. I'm not sure.

17 Q. Those face-to-face meetings and telephone conversations --
18 well, when did the face-to-face meetings take place?

19 A. I do not recall. I would imagine it was around the July --
20 around this first e-mail.

21 Q. All right. So, it was around July of 2009 that you met with
22 them?

23 A. Would be my guess, yes.

24 Q. All right. And your correspondence certainly continued with
25 them up until the unsealing of the case?

1 A. It did.

2 Q. Would you agree with me? Yes?

3 A. Yes.

4 Q. Would you also agree with me that of the 175 pages that were
5 produced in this case, there were other e-mails that didn't get
6 produced because they had been lost over time?

7 A. I don't believe so.

8 Q. So you think that every e-mail that existed you've produced
9 in this case?

10 A. To the best of my knowledge, yes.

11 Q. And let me clarify that. Every e-mail between you and Mr.
12 Russell or Ms. Larcom?

13 A. I believe so, yes.

14 Q. Did all those e-mails come from your hard drive from your
15 USFS computer?

16 A. Yes.

17 Q. Did you all retain and copy the hard drive of Mr. Donnelly's
18 USFS computer?

19 MR. BUTLER: Your Honor, we object again. This is
20 beyond the scope of the request --

21 THE COURT: All right. I understand your objection.
22 You're reaffirming your prior objection about this type of
23 matter --

24 MR. BUTLER: Yes, ma'am.

25 THE COURT: -- inquiry. What's the relevance?

1 MS. WILLIAMS: I was trying to determine whether there
2 were e-mails from Mr. Donnelly that were preserved that haven't
3 been produced.

4 MR. BUTLER: That wasn't anything remotely like the
5 question she asked, Your Honor. This is a fishing expedition.
6 Maintain our objection.

7 THE COURT: All right. Your objection is sustained.
8 If you have a specific question that's going to illuminate what
9 Mr. Donnelly did, that's acceptable. Curtail yourself to that.

10 MS. WILLIAMS: I will -- well, I'll --

11 Q. (BY MS. WILLIAMS): Let me ask you this, Mr. Bibby. Did Mr.
12 Donnelly send out e-mails to Mr. Russell -- Mr. Russell and Ms.
13 Larcom?

14 A. Not to my knowledge. I did most of that correspondence.

15 Q. All right. And he was copied on your e-mails?

16 A. Yes.

17 Q. Okay. Other than the anonymous gmail account and your
18 USFS -- Financial Services account, did you use any other e-mail
19 accounts to send out e-mails about this qui tam lawsuit?

20 A. I don't recall if that was the only one or not. But that --
21 all the correspondence we had are from here, so I would -- we may
22 have set one up and never used it. I don't know. I can't
23 recall.

24 Q. Other than Mr. Russell and Ms. Larcom, did you tell any other
25 employees of Fox News about the existence of this qui tam lawsuit

1 before it was unsealed?

2 A. No.

3 Q. Other than Mr. Larcom -- Ms. Larcom, Mr. Russell, Larry
4 Scott, MSNBC, NBC, and your spouse, did you tell anyone else
5 about this qui tam lawsuit prior to the time that it was
6 unsealed?

7 A. In passing to my cousin.

8 Q. Your cousin? Is that Mr. Haesly?

9 A. It is.

10 Q. You told him about the existence of this qui tam lawsuit in
11 passing?

12 A. Yeah. Most of the correspondence with Mr. Haesly was on the
13 class-action suit. I didn't really delve into the qui tam
14 matter.

15 Q. But you told him that it existed; is that right?

16 A. I said there was some action.

17 Q. Mr. Bibby, I'm handing you a document that I have marked
18 Defendant's Exhibit 8. And I will -- I'll represent to you that
19 Defendant's Exhibit 8 is a letter from your counsel to me and
20 counsel for Mortgage Investors Corporation, and that it has been
21 previously filed with the Court. I'm not trying to ask you about
22 any of your communications with your counsel, but have you seen
23 this letter before?

24 A. I have not.

25 Q. If you turn to the fourth page of this document, have you

1 seen this chart before?

2 A. I have.

3 Q. You have not; is that right?

4 A. I have.

5 Q. Oh, you have?

6 A. Uh-huh.

7 Q. Okay. So you're familiar with this chart?

8 A. With this chart, yes.

9 Q. Yes. Now, I don't want you to tell me anything at all about
10 the contents of the documents that are listed in this chart other
11 than to confirm some recipients and some senders. Do you
12 understand?

13 A. Sure.

14 Q. Am I correct that this chart lists a series of e-mails in
15 which you were either a sender or a recipient and either your
16 spouse or, for most of them, Ms. Larcom or Mr. Russell end up
17 getting the e-mail; is that right?

18 A. Yes.

19 Q. Okay. Am I correct that in some of these e-mails, you were
20 forwarding on to Mr. Russell or Ms. Larcom information that your
21 lawyer had gotten from the Government?

22 A. I -- I would have to see them. I don't recall.

23 Q. You were certainly sending on information that you were
24 receiving from your lawyer? You'd agree with me about that?

25 A. Yes.

1 Q. Can you take a look on this privilege chart --

2 MS. WILLIAMS: Bear with me, Your Honor. I'm just
3 trying to find a particular entry. It's not jumping out at me.

4 (A pause in the proceeding was had.)

5 Q. (BY MS. WILLIAMS): If you take a look at the second-to-last
6 page on the chart. In fact, it has a number 1 by it. Look for
7 the entry that has a handwritten number 1 pound sign beside it.

8 A. Okay.

9 Q. Do you see that entry?

10 A. I do.

11 Q. Do you know who Mr. Caldwell is who's referenced there?

12 A. Yes.

13 Q. And who is he?

14 A. He was an attorney for the U. S. Government.

15 Q. That's right. And, so, there was correspondence between your
16 counsel and Mr. Caldwell that you then sent on to Ms. Larcom and
17 Mr. Russell; is that right?

18 A. Correct.

19 Q. #4 down below, that also indicates correspondence with
20 employees of the United States Government; isn't that right?

21 A. Yes.

22 Q. And that information was forwarded on to Ms. Larcom and Mr.
23 Russell; isn't that right?

24 A. Appears so, yes.

25 Q. And, so, in addition to the name of the U. S. Attorney

1 working on this matter, you also provided the name of other
2 government employees who were working on the confidential
3 investigation of this qui tam case; is that right?

4 A. I don't understand the question. Can you say that again?

5 Q. All right. You provided the name of Ms. Davis to Ms. Larcom
6 and Mr. Russell by forwarding this e-mail. Would you agree with
7 me about that?

8 A. I -- I don't know.

9 Q. Look at #4.

10 A. Uh-huh.

11 Q. Go over to the third --

12 A. Her name is on there, yes.

13 Q. You see that her name is on there?

14 A. Uh-huh.

15 Q. As a U. S. investigator?

16 A. Yes.

17 Q. Did you have permission from the United States Government to
18 provide that information to --

19 A. No --

20 THE COURT: All right. I'm going to stop you at this
21 juncture. I already discussed this chart.

22 MS. WILLIAMS: Okay. I --

23 THE COURT: And I think that -- I don't even know
24 whether we'll get competent testimony because it is -- the --
25 this column is prepared by Relators' counsel. So, I mean, we're

1 just sort of going far afield. I don't know anything about his
2 knowledge as to each of these individuals.

3 MS. WILLIAMS: He -- it -- I asked a few extra
4 questions, Your Honor, because he indicated that he was -- he had
5 seen the chart before. So, I assumed he was familiar with it
6 given that he's the sender or recipient of a lot of the e-mails,
7 but I will stop now and move on.

8 THE COURT: All right. Thank you.

9 MR. BUTLER: For the record, our objection is the
10 document speaks for itself. It wasn't prepared by this
11 gentleman. And I don't understand the import of these questions.
12 It's totally inappropriate for this hearing.

13 MS. WILLIAMS: If you'll bear with me, Your Honor --

14 THE COURT: Sure.

15 MS. WILLIAMS: -- I'm trying to see if I can wrap this
16 up.

17 (A pause in the proceeding was had.)

18 MS. WILLIAMS: Your Honor, I've got the -- all 175
19 pages. I was just going to get Mr. Russell [verbatim] to
20 identify them in case there's any question about them being in
21 the record. And there's one document in here that I wanted to
22 ask him about. I will note that these documents unredacted
23 contained the HUD-1 with borrower information, and we have
24 redacted that --

25 THE COURT: All right.

1 MS. WILLIAMS: -- in this version.

2 Q. (BY MS. WILLIAMS): Mr. Bibby, I'm handing you Defendant's
3 Exhibit 13. If you could take a moment and thumb through those.
4 Do you understand that those are 175 pages of documents that your
5 lawyers produced to Wells Fargo in this case in March?

6 MR. BUTLER: Your Honor, we object to the question. He
7 won't know that. He's not the one that prepared the documents or
8 produced the documents on March 21, 2014, or again on March 24,
9 2014.

10 THE COURT: Can't the parties stipulate --

11 MR. BUTLER: We went -- we went through the documents
12 to confirm that it is what it is, and she can tender it into the
13 record, but this is a waste of time.

14 THE COURT: Can't you just agree that -- on what the
15 documents were that were produced and submit them?

16 MS. WILLIAMS: Yeah --

17 MR. BUTLER: For the record, they're already part of
18 the record. I mean, I don't --

19 THE COURT: All right. Well, she's entitled to perfect
20 the record as she sees fit, but anyway.

21 MS. WILLIAMS: That's all -- excuse me, Your Honor.
22 That's all I'm trying to do.

23 THE COURT: All right. So you're seeking to introduce
24 Exhibit 13 as a reflection --

25 MS. WILLIAMS: I'm seeking to introduce Defendant's

1 Exhibit 13 as documents produced by the Relators.

2 THE COURT: On?

3 MS. WILLIAMS: On March 24th, to Wells Fargo, Your
4 Honor.

5 THE COURT: Do you have any objection?

6 MR. BUTLER: Are they the same documents that were
7 produced on March 21 as well?

8 MS. WILLIAMS: No, because those were produced by USFS
9 and they have a different Bates number.

10 MR. BUTLER: Okay. So these are the March 24
11 documents. Subject to the physical exercise of going through
12 them and making sure they're correctly photocopied, no objection.

13 THE COURT: All right. They're -- Exhibit 13 of the
14 Defendant is admitted subject to the right of the Relators'
15 counsel to go through them to make sure that they are in fact
16 accurate photocopies of what was produced.

17 Q. (BY MS. WILLIAMS): Let me ask you a question. If you could
18 turn to the bottom right-hand corner of the document, there's a
19 Bates number that says Relators vs. Wells Fargo 13004. If you
20 could turn to 10 -- I'm sorry, 13004.

21 This particular e-mail says that -- it indicates that
22 it's from you to Mr. Wilbanks, copying Mr. Bridges and Mr.
23 Donnelly. Do you see that?

24 A. I do.

25 Q. And did you also blind copy either Mr. Russell or Ms. Larcom

1 on this e-mail?

2 A. I do not know.

3 Q. Take a look a couple of pages later to 13008. That's an
4 e-mail from you to Ms. Larcom and Mr. Russell; is that right?

5 A. That's correct.

6 Q. Okay. Let's use this page. In this page you were responding
7 to a question that they had for you about IRRRL loans; is that
8 right?

9 A. Yes.

10 Q. And down below is an e-mail from you to -- you to your
11 counsel; is that right?

12 A. That's correct.

13 Q. And, then, do you recall whether attached to that e-mail was
14 also a HUD-1 of your customer?

15 A. I do not know. It's not on here.

16 Q. Do you recall giving HUD-1s of your customers to Fox News?

17 A. They observe -- they looked at them, but they did not take
18 copies of them.

19 Q. So you showed them HUD-1s?

20 A. I did.

21 Q. And when you showed them to them, did you redact the personal
22 information of your customers?

23 A. I did.

24 Q. Excuse me?

25 A. I did.

1 Q. You did?

2 MS. WILLIAMS: Your Honor, I understand that the Court
3 does not want me to get into the discovery responses in this
4 case. Just for the purposes of preserving the record, if I were
5 permitted to at this point, I would have asked him to verify
6 those responses, and I would have asked some questions about
7 that. I don't want to be -- have it said that I waived the right
8 to do that at some point.

9 THE COURT: All right.

10 MS. WILLIAMS: But I don't want to --

11 THE COURT: You can make a proffer if you want, but
12 before you do that, would you go ahead and properly tender so I
13 can get into evidence or not the -- all the other exhibits?

14 MS. WILLIAMS: Right. Yes, Your Honor. Because I went
15 out of order, if the Court will bear with me.

16 THE COURT: Yes.

17 MS. WILLIAMS: Defendants move to admit into evidence
18 Defendant's Exhibits 1, 2, 3, 3A, 4, 5, 6, 7, 8, and I believe
19 we've already moved into evidence Exhibit 13.

20 THE COURT: Any objections?

21 MR. BUTLER: Your Honor, respectfully, we would like to
22 preserve our objections until we do the Direct Examination,
23 and -- because there's a couple of them in there that we may
24 object to based on relevance.

25 THE COURT: All right. We'll get to them, then.

1 Did you want to make your proffer?

2 MS. WILLIAMS: Yes, Your Honor.

3 Q. (BY MS. WILLIAMS): Mr. Bibby, I'm handing you what's been
4 marked as Defendant's Exhibit 11. And the face page of
5 Defendant's Exhibit 11 is entitled Relators' Response to
6 Defendant Wells Fargo's First Set of Interrogatories and First
7 Request for Production of Documents to Relators. Do you see
8 that?

9 A. I do.

10 THE COURT: All right. I'm not clear how this is a
11 proffer.

12 MS. WILLIAMS: Well, I was just going to get him to
13 identify his signature and then --

14 THE COURT: Oh, I think you don't need to do that. I
15 think the point was that you were going to proffer what the
16 evidence is that you were going to tender if I had permitted you
17 to go into this area.

18 MS. WILLIAMS: All right. Your Honor, what I would --
19 what I would intend to do is have -- because this is not filed,
20 have him verify his signature and then have him verify --

21 THE COURT: Is there any dispute as to the signature?

22 MR. BUTLER: None from us, Your Honor.

23 MS. WILLIAMS: Have him verify the response to
24 Interrogatory Number 15.

25 THE COURT: No. I think you just have to go ahead and

1 make the proffer, you would show this, that this is what was
2 provided, because I've said that this is proper for another
3 proceeding when it's properly presented to the Court.

4 MS. WILLIAMS: Right. Your Honor, what I would have --
5 what I would have done is put forth that the response to
6 Interrogatory 15 would go directly to the people who he's
7 identified in his testimony who are not listed in response to
8 Exhibit 15, and the fact that he identified people with whom he
9 had post-unsealing communications about this complaint, but he
10 did not identify those individuals with whom he only had
11 pre-sealing -- pre-unsealing communications. And that would be
12 the purpose, that and the related document request that would
13 have called for the 175 to be produced.

14 THE COURT: Thank you.

15 MS. WILLIAMS: So that concludes our questions for Mr.
16 Bibby, Your Honor.

17 THE COURT: Do you have any questions?

18 MR. BUTLER: Yes, Your Honor. Thank you.

19 THE COURT: All right. I'm sorry. One moment. We
20 need a 5 minute restroom break.

21 (A recess was had.)

22 THE COURT: Please have a seat.

23 MR. BUTLER: Thank you, Your Honor.

24 THE COURT: You're welcome.
25

DIRECT EXAMINATION

1
2 BY MR. BUTLER:

3 Q. Mr. Bibby, what is your age?

4 A. 49.

5 Q. This suit was filed in March of 2006. Does that sound about
6 right?

7 A. Sounds about right.

8 Q. I didn't look it up again. That's over eight years ago?

9 A. Correct.

10 Q. I want you to -- I reorganized those exhibits in the order
11 that I wanted to ask the questions about them, and the one that's
12 on top ought to be Defendant's Exhibit No. 3. Do you see that?

13 A. I do.

14 Q. Now, this is an e-mail stream between you and Mr. Russell?

15 A. Yes.

16 Q. Look at the second e-mail down, the one --

17 THE COURT: I'm sorry. Which exhibit are we talking
18 about?

19 MR. BUTLER: Pardon?

20 THE COURT: Which exhibit are we talking about?

21 MR. BUTLER: Defense Exhibit 3, Your Honor .

22 THE COURT: Okay. Thank you.

23 MR. BUTLER: I'm sorry, Your Honor. I wasn't thinking.
24 I would have reorganized the Court's.

25 THE COURT: That's all right. All right. I have it.

1 Q. (BY MR. BUTLER): Look at the second e-mail down. Mr.
2 Russell wrote to you: Victor, wow. Seems like they are finally
3 taking stops -- I guess he meant steps -- to stop these thieves.

4 Do you see that?

5 A. I do.

6 Q. Who were y'all talking about?

7 A. Wells Fargo.

8 Q. Now, this -- as Ms. Williams pointed out, you were forwarding
9 to Mr. Russell at Fox some document from VA. Correct?

10 A. No. This was from AllRegs, which is basically a
11 underwriting --

12 Q. Okay.

13 A. -- guideline.

14 Q. But it references a -- new requirement amounts by VA?

15 A. Yes.

16 Q. What was the new requirement? Is that the one that was on
17 the second page?

18 A. It's on that, yeah, second page.

19 Q. All right.

20 A. Title services.

21 Q. Now, in this Defense Exhibit 3, if you look at the first
22 e-mail at the top, looking at the third line or -- let's see.
23 The fifth line down, the sentence begins, "Again, the seal is to
24 be lifted at the end of November."

25 Do you see that?

1 A. I do.

2 Q. Was the seal lifted at the end of November 2010?

3 A. It was not.

4 Q. Pardon?

5 A. I don't believe so, no.

6 Q. All right. Now, when you -- when you and Mr. Donnelly talked
7 to Dale Russell and Mindy Larcom, did you ask them not to
8 publicly disclose the fact that the qui tam action existed?

9 A. We did.

10 Q. Did they agree to that?

11 A. They did.

12 Q. Did they stick to that agreement?

13 A. They did.

14 Q. Did they honor that agreement?

15 A. They did.

16 Q. Did anybody at Fox ever disclose publicly the existence of
17 the qui tam action?

18 A. They did not.

19 Q. Did anybody else that you ever told about the existence of
20 the qui tam action while it was under seal ever publicly disclose
21 the existence of the qui tam action?

22 A. They did not.

23 Q. Did anybody that Mr. Donnelly, so far as you know, ever told
24 about the existence of the qui tam action ever publicly disclose
25 the existence of the qui tam action before it was -- while it was

1 under seal?

2 A. They did not.

3 Q. Now, to reiterate what you told Ms. Williams with respect
4 to -- most of these e-mails are with Dale Russell and/or Mindy
5 Larcom; correct?

6 A. Correct.

7 Q. To reiterate what you told Ms. Williams, you met with Dale
8 Russell one time personally?

9 A. Correct.

10 Q. Mindy Larcom two times --

11 A. Correct.

12 Q. -- personally? Is that right?

13 A. Correct.

14 Q. Now, Ms. -- look at Defense Exhibit No. 6. This is an e-mail
15 with --

16 THE COURT: All right.

17 Q. (BY MR. BUTLER): -- with Larry Scott, Founder and Editor of
18 VA Watchdog; correct?

19 A. That's correct.

20 Q. Do you know him?

21 A. I do not.

22 Q. Is that a private organization, nonprofit, profit, or do you
23 know?

24 A. I do not know.

25 Q. But it's a private organization?

1 A. It is.

2 Q. It's not a government entity?

3 A. That's correct.

4 Q. Now, from the way this e-mail is organized, does it look like
5 to you that your first e-mail to Larry Scott was what's down here
6 under update where it says "anonymous wrote"?

7 A. Yes.

8 Q. Pardon?

9 A. I believe so, yes.

10 Q. You need to speak up.

11 A. Yes.

12 Q. Did you have any other e-mails with this Larry Scott?

13 A. Never.

14 Q. Now, his e-mail back to you says, "I only work by e-mail.
15 That way I have a record of all communication."

16 Correct?

17 A. Yes.

18 Q. That's March 9, 2010, 2:07 p.m. After you received that
19 e-mail from Larry Scott, did you ever have any further
20 communications with Larry Scott?

21 A. No.

22 Q. Now, I want you to read into the record, if you would, what
23 you first wrote to Larry Scott of VA Watchdog where it says,
24 "Update colon."

25 A. I would like to speak with --

1 MS. WILLIAMS: Your Honor, just in the interest of
2 time, is that necessary? The document's in evidence.

3 THE COURT: Are you going to ask a question about --

4 MR. BUTLER: Oh, yes, ma'am.

5 THE COURT: -- what he wrote? Well, I can read it. Go
6 ahead and ask the question.

7 MR. BUTLER: All right. Thank you, Your Honor.

8 Q. (BY MR. BUTLER): Let me ask this question about it. The
9 second sentence reads as follows, "This has been going on for
10 over 20 years and has cost the veterans and the
11 taxpayers/government hundreds of millions of dollars in
12 fraudulent claims."

13 Did I read that correctly?

14 A. You did.

15 Q. Again, I have inside knowledge that I can share with you on
16 how the VA is covering up this fraud by the major banks and has
17 been aware of this for over four years, closed quote

18 Did I read that correctly?

19 A. You did.

20 Q. That is in 2010; correct?

21 A. Correct.

22 Q. Four years prior to March of 2010 was March 2006; correct?

23 A. Correct.

24 Q. That's when you filed suit?

25 A. Correct.

1 Q. That's when the Government found out about the allegations?

2 A. They knew beforehand.

3 Q. What had been done in those four years by the United States
4 Government with respect to the allegations?

5 A. Zero.

6 MR. WYNN: Your Honor, I object. To my knowledge
7 there's no affirmative defense for these seal violations. There
8 is no excuse for them. To the extent they're trying to establish
9 that, I would object on the grounds of relevance.

10 THE COURT: What is the relevance?

11 MR. BUTLER: Why -- this, Your Honor.

12 Q. (BY MR. BUTLER): Why did you violate the seal?

13 A. We were trying to stop the fraud.

14 Q. You understand that you were wrong to violate this Court's
15 orders, do you not?

16 A. We do, yes.

17 Q. As a matter of fact, I want to refer back to Defendant's
18 Exhibit No. 1, if I could. That's the bankruptcy court filing
19 that has your contract with Mr. Wilbanks. Do you remember that?

20 A. I do.

21 Q. Look at paragraph G. In that contract that you've signed, is
22 it correct that Mr. Wilbanks told you in writing, quote, Relator
23 under -- and you agree -- "Relator understands that Relator is
24 precluded by law from discussing the substance or existence of
25 the lawsuit with any third party, which may include, but is not

1 limited to, all members of the press."

2 Did I read that correctly?

3 A. You did.

4 Q. Mr. Donnelly also signed this document?

5 A. He did.

6 Q. Is that his signature?

7 A. It is.

8 Q. How long have you and Mr. Donnelly been in business together?

9 A. 15 years, yeah. A long time.

10 Q. Now, so there was a -- there was another e-mail in here with

11 *MSNBC Investigations and Countdown* at MSNBC, Defendant's Exhibit

12 No. 2. Do you remember that one --

13 A. I do.

14 Q. -- Ms. Williams asked you about?

15 A. Yes, sir.

16 Q. Did you get any response to this -- to this e-mail that you

17 sent to those two e-mail addresses?

18 A. No, sir.

19 Q. Did you ever have any further communications with anybody at

20 either of those two organizations?

21 A. Did not.

22 Q. So, the disclosures that were made were to wives and your

23 cousin; right?

24 A. Correct.

25 Q. Plus Dale Russell and Mindy Larcom of FOX 5?

1 A. Correct.

2 Q. Plus this e-mail to MSNBC?

3 A. Correct.

4 Q. Plus one e-mail to Larry Scott of VA Watchdog; correct?

5 A. Correct.

6 Q. Ms. Williams asked you about Defendant's Exhibit No. 7.

7 That's the e-mail between you and Dale Russell, copied to Mr.

8 Donnelly of -- somebody at the *New York Times* named Mary Williams

9 Walsh. Do you remember that discussion with Ms. Williams?

10 A. I do.

11 Q. Have you ever talked to Mary Williams Walsh?

12 A. No.

13 Q. Ever e-mailed with her?

14 A. No.

15 Q. Did you ever ask -- did you ask Dale Russell to talk to her?

16 A. Possibly. I don't know.

17 Q. Do you know whether or not Dale Russell ever talked to her?

18 A. I don't.

19 Q. To your knowledge, did Mary Williams Walsh or the *New York*

20 *Times* ever publicly disclose the existence of this qui tam

21 lawsuit while it was under seal?

22 A. No.

23 Q. Now, there was discussion -- well, with respect to this

24 e-mail, this one-page Plaintiff's Exhibit -- Defendant's Exhibit

25 No. 7, does it say anything about the qui tam action?

1 A. No.

2 Q. Does it have Mr. Wilbanks' name in it anywhere?

3 A. No.

4 Q. It does have a lawyer's name in it, doesn't it?

5 A. It does.

6 Q. Whose name is that?

7 A. Jason Crawford.

8 Q. Was FOX 5 actively covering the news story of the
9 class-action lawsuits that had been filed against Wells Fargo by
10 Jason Crawford?

11 A. Yes.

12 THE COURT: And you were holding up what exhibit?

13 MR. BUTLER: No. 7, Your Honor. I'm sorry.

14 Q. (BY MR. BUTLER): Was USFS subpoenaed in one or both of those
15 class-action lawsuits filed by Mr. Crawford against Wells Fargo?

16 A. Yes.

17 Q. And if you would also look at Defense Exhibit No. 5. This is
18 another e-mail, this one from Mr. Russell to you; correct?

19 A. Correct.

20 Q. You see in -- the sentence in the e-mail, Mr. Russell says,
21 "If you can send that lawsuit via e-mail and contact numbers
22 and/or addresses for plaintiffs, we'd go ahead and get started"?

23 A. Correct.

24 Q. Are you aware of there being anybody in this qui tam lawsuit
25 who has called "plaintiffs"?

1 A. No.

2 Q. Does this e-mail refer to the class action?

3 A. It does.

4 MR. BUTLER: Thank you, Your Honor. Thank you, Mr.
5 Bibby.

6 THE COURT: Mr. --

7 MS. WILLIAMS: Oh, I'm sorry, Your Honor. Wells Fargo
8 doesn't have any more questions. I don't know whether anyone
9 else does.

10 THE COURT: Mr. --

11 MR. WYNN: Your Honor, we don't have any questions.

12 THE COURT: All right. Mr. Butler -- thank you very
13 much, Mr. Wynn.

14 Mr. Butler you asked the Court to ask the Relator why
15 he did this. Do you feel like you have covered that?

16 MR. BUTLER: With Mr. Bibby, yes, Your Honor.

17 THE COURT: All right.

18 MR. BUTLER: But I have no objection to the Court
19 asking him again. He may want to expound on it.

20 THE COURT: Well, Mr. Bibby, I had an -- actually a
21 different question. Did your firm specialize in veterans'
22 mortgages?

23 THE WITNESS: We did.

24 THE COURT: Can you explain that a little more fully?
25 And be sure to talk into the microphone.

1 THE WITNESS: We specialized in VA refinance loans.

2 THE COURT: And did that mean that VA-financed loans
3 were 80 percent, 90 percent, or a hundred percent of your
4 business?

5 THE WITNESS: 99 percent of our business.

6 THE COURT: 99 percent of the business. All right.
7 And how long had that been so?

8 THE WITNESS: Since the -- since the company was
9 founded in 2001.

10 THE COURT: All right. Well, I'm going to put forth
11 the question more expressly to you. Given the fact that you
12 understood pursuant to your agreement with your counsel that you
13 had an obligation of keeping information regarding the lawsuit
14 itself confidential, why is it that you decided to take things
15 into your own hands and share any information regarding the
16 pendency of the lawsuit?

17 THE WITNESS: The burden just became too much to
18 handle, just crumbled. You know, to sit -- to sit idly by and
19 watch hundreds of veterans that you interact with getting taken
20 advantage of was just too much.

21 THE COURT: Approximately how many veterans' loans
22 would you deal with in a typical year?

23 THE WITNESS: It would depend on the year. Some years
24 we did thousands.

25 THE COURT: And did you interface with the veterans

1 when there would be a default or not?

2 THE WITNESS: When there was a default?

3 THE COURT: On payment on the loans.

4 THE WITNESS: Only if it was within the first 90 days
5 or so of that.

6 THE COURT: I see. What was your understanding with
7 the reporters from Fox News about when they would actually report
8 on the qui tam lawsuit?

9 THE WITNESS: Their main emphasis was on the class
10 action. They told us that they would hold any -- any other
11 information confidential until the seal was lifted.

12 THE COURT: Are there other firms that specialize in
13 veterans' loans --

14 THE WITNESS: Yes.

15 THE COURT: -- or mortgages --

16 THE WITNESS: Yes.

17 THE COURT: -- in this state?

18 THE WITNESS: Yes, Your Honor.

19 THE COURT: All right. To what extent was the
20 information that the reporters gained -- did the -- let me say
21 that again. All right?

22 Did -- were the reporters seeking information about the
23 industry as a whole from you or about the particular class-action
24 lawsuit, about your qui tam lawsuit, or about all three or
25 something else?

1 THE WITNESS: The majority of the information that they
2 were seeking was understanding of the VA refinance program and
3 how it worked.

4 THE COURT: And did you provide that background
5 information?

6 THE WITNESS: I did.

7 THE COURT: Did they run a -- any type of news feature
8 or program on the qui tam lawsuit once the seal was completely
9 lifted, to your knowledge?

10 THE WITNESS: After it was lifted, yes, they did.

11 THE COURT: Any other questions occasioned by mine?

12 MR. BUTLER: Yes, Your Honor. I just realize the hole
13 in the record. I failed to do something.

14 DIRECT EXAMINATION (Continued)

15 BY MR. BUTLER:

16 Q. In 2010 -- I asked you about one of those exhibits dated
17 2010. Were you and Mr. Donnelly still closing VA refinance IRRRL
18 loans?

19 A. In 2010?

20 Q. Uh-huh.

21 A. I cannot recall what date that we stopped.

22 Q. 2009 were you?

23 A. Yes.

24 Q. 2008 were you?

25 A. Yes.

1 Q. 2007 were you?

2 A. Yes.

3 Q. In the years after -- you said that Mr. Wilbanks as your
4 attorney had informed the Government of the fraud by Wells Fargo
5 before the lawsuit was actually filed?

6 A. Yes.

7 Q. All right. In the years following Mr. -- your attorney, Mr.
8 Wilbanks, informing the Government about Wells Fargo's fraud, and
9 in the years following the filing of this qui tam action under
10 seal in March of 2006, did you and Mr. Donnelly continue closing
11 loans for Wells Fargo just as you had been before you disclosed
12 that fraud to the Government?

13 A. Yes. We did so under the direction of the Government.

14 Q. Now, tell the Court about that. Were you directed by the --
15 by the Government itself to continue doing business just as you
16 had even after you had reported to the Government that that
17 business was fraudulent?

18 A. Yes.

19 MS. WILLIAMS: Objection, Your Honor, to relevance.

20 THE COURT: What is this relevance?

21 MR. BUTLER: I think it's highly relevant, Your Honor,
22 to the -- the question before the Court, and the Lujan balancing
23 factors, the question of good faith or bad faith, and what was
24 happening to these two gentlemen. We're not excusing what they
25 did and they don't excuse what they did. But if the Court asked

1 the question itself, and that's what brought it to mind, it's
2 important to understand where these guys' heads were. I think
3 this is crucial.

4 THE COURT: All right.

5 MS. WILLIAMS: Well --

6 THE COURT: I will admit it for whatever value it has
7 for that purpose.

8 Did you have anything more that you were going to offer
9 or explain to me as to the exhibits that you said you were
10 withholding your position on until you could examine --

11 MR. BUTLER: No --

12 THE COURT: -- Mr. Bibby?

13 MR. BUTLER: -- if I can go back -- I'll go back and
14 get them and look through them right quick.

15 THE COURT: All right.

16 MR. BUTLER: Make sure there's no objection, but --

17 THE COURT: Are there any questions --

18 MR. BUTLER: I had one more question, Your Honor, if I
19 could.

20 THE COURT: All right. Go ahead.

21 Q. (BY MR. BUTLER): Who was it -- did you -- did somebody from
22 the Government tell you within your hearing to continue doing
23 business as you had been?

24 A. Within my hearing, yes.

25 Q. Who was that?

1 A. I believe it was Sally Yates. I can't recall exactly the
2 name, but --

3 Q. Was there a meeting at the United States Attorney's Office?

4 A. There was.

5 Q. Was that the instruction given to you and Mr. Donnelly?

6 A. It was.

7 MR. BUTLER: Thank you, sir. Thank you, Your Honor.

8 MS. WILLIAMS: Very briefly, Your Honor.

9 THE COURT: Yes.

10 RE CROSS EXAMINATION

11 BY MS. WILLIAMS:

12 Q. Mr. Bibby, earlier in your testimony this morning, I thought
13 you had indicated that your company essentially shut down in
14 2008?

15 A. We for the most part went dormant in 2008, which means we
16 only handled a small amount of business after that point.

17 Q. Okay. So you really weren't closing very many loans in 2009
18 and 2010, which is the time frame of the communications that we
19 have been looking at this morning; isn't that right?

20 A. I would have to go back and check my records, but I would
21 imagine it was still in the hundreds.

22 Q. In the hundreds? In 2008 -- in 2009 and 2010?

23 But that volume was tremendously down from 2007; is
24 that what you're saying?

25 A. Correct.

1 Q. All right. Did you have any other source of income in 2009
2 and 2010 other than this business?

3 A. No.

4 MS. WILLIAMS: That's all, Your Honor.

5 MR. BUTLER: Your Honor, in answer to the Court's
6 questions, no objections to the documents tendered by Ms.
7 Williams.

8 THE COURT: Mr. Wynn, did you have any objections to
9 the documents? And I will give you an opportunity to ask any
10 questions.

11 MR. WYNN: I don't have any objections to the
12 documents. I did want to ask a couple of questions.

13 THE COURT: All right. The documents, then, are
14 admitted that have been tendered by the --

15 MR. WYNN: Mr. Bibby --

16 THE COURT: Excuse me just one second.

17 MR. WYNN: Sure.

18 THE COURT: By Ms. Williams on behalf of Wells Fargo.
19 I haven't admitted Exhibit 11, though. Were you tendering 11 at
20 this time?

21 MS. WILLIAMS: I don't believe I've tendered 11 yet.

22 THE COURT: All right. All right.

23 CROSS EXAMINATION

24 BY MR. WYNN:

25 Q. Mr. Bibby, at some point in time, I think it was 2006, you

1 initiated a qui tam lawsuit against several banks having to do
2 with IRRRL loans; is that correct?

3 A. We did.

4 Q. And at a certain point in time, did you become aware that if
5 you were successful in these lawsuits, you stood to recover
6 certain sums of money?

7 A. Possibly, yes.

8 Q. Okay. And when did you become aware of that?

9 A. When I met with the counsel, with my counsel.

10 Q. And have you filed for bankruptcy in the past four years?

11 A. I have not.

12 Q. Have you ever filed for bankruptcy?

13 A. No, sir.

14 Q. Okay. And when you violated the seal of -- as you've
15 admitted -- you have admitted violating the seal; is that
16 correct?

17 A. Correct.

18 Q. Okay. Were you at all frustrated that the Government was
19 delaying your eventual paydays?

20 A. No.

21 Q. Not at all?

22 A. No.

23 Q. Okay. So your testimony is that you were wholly motivated to
24 violate the seal in order to protect veterans?

25 A. Solely, sir.

1 MR. WYNN: Okay. Thank you.

2 THE COURT: Thank you very much. I know we just took a
3 break, but the cafeteria, to the extent that it exists, closes at
4 two. And since it doesn't look like we're going to be through by
5 two so you could go some place more ample in its offerings, I
6 think I should take a break at this point. Is 45 minutes going
7 to be sufficient for everybody? I know that, Mr. Gale, you've
8 got a plane. I don't know that you're going to make it.

9 MR. GALE: I will make other arrangements, Your Honor.

10 THE COURT: All right.

11 MR. GALE: I always wanted to spend another night in
12 Atlanta.

13 THE COURT: Well, the planes go between here and D.C.
14 very frequently is my experience, having had to do that commute.

15 All right, sir. You can step down. Thank you very
16 much. We'll resume at 2:00.

17 (A luncheon recess was had.)

18 THE COURT: Please have a seat.

19 All right. Ms. Williams, who's going to be your next
20 witness, if we have one?

21 MS. WILLIAMS: Yes, Your Honor. We call Mr. Donnelly
22 to the stand, please.

23 BRIAN J. DONNELLY,
24 having been duly sworn, was examined and testified as follows:
25

CROSS EXAMINATION

1
2 BY MS. WILLIAMS:

3 Q. Mr. Donnelly, my name is Amy Williams and I'm a lawyer who
4 represents Wells Fargo in this case.

5 Were you an employee of U. S. Financial Services, Inc.,
6 dba Veterans Mortgage?

7 A. Yes.

8 Q. And is it all right if I refer to that organization as USFS?

9 A. Yes.

10 Q. And can you tell us what your e-mail address at USFS was?

11 A. It was bdonnelly@usfinancialsvcs.com.

12 Q. And do you know how long -- from when to when was that e-mail
13 account active?

14 A. From 2001 probably through 2009 or '10.

15 Q. Is it correct that Veterans Mortgage began -- or the volume
16 of loans originated by Veterans Mortgage went down dramatically
17 in 2008?

18 A. I'd say yes.

19 Q. And in 2008, did you have any other source of income other
20 than your occupation at Veterans Mortgage?

21 A. No, I did not.

22 Q. And you filed for Chapter 7 bankruptcy protection at the end
23 of October 2008; isn't that right?

24 A. Yes.

25 Q. You filed Chapter 7, which is a liquidation proceeding?

1 A. Yes.

2 Q. You were in the courtroom earlier today and heard the
3 testimony regarding the documents.va@gmail.com e-mail address; is
4 that right?

5 A. I'm sorry. What was that?

6 Q. Are you familiar with the gmail account
7 documents.va@gmail.com?

8 A. Yes.

9 Q. And that's an account that Mr. Bibby set up; is that right?

10 A. Yes.

11 Q. But you were aware of that at the time he set it up; correct?

12 A. Yes.

13 Q. And you didn't object to his setting it up, did you?

14 A. No.

15 Q. Did you ever object to him sending out anonymous e-mails --

16 A. No.

17 Q. -- on that account?

18 Including the e-mails that told third parties about the
19 existence of this qui tam lawsuit?

20 A. No.

21 Q. You didn't object to any of that, did you?

22 A. No.

23 Q. In fact, you agreed with him that he should send them out?

24 A. Yes.

25 Q. Did you use any e-mail accounts other than the usfs.com

1 e-mail account yourself to e-mail about this qui tam lawsuit
2 prior to its unsealing?

3 A. No.

4 Q. Other than Mr. Russell -- other than yourself, Mr. Bibby, Mr.
5 Russell and Ms. Larcom, who else knew about the existence of the
6 anonymous gmail account?

7 A. Nobody.

8 Q. And do you know when that account became inactive?

9 A. No.

10 Q. Do you know whether e-mails from that account are still
11 available today?

12 A. No.

13 Q. You started telling Fox News about this case in July of 2009;
14 is that right?

15 A. No.

16 Q. When did you first tell Fox News about the existence of this
17 qui tam?

18 A. I'm not sure. I know it was a couple of months before that.

19 Q. It was a couple of months before July of 2009?

20 A. Yes.

21 Q. Okay. Take a look at the -- you've got a stack of exhibits
22 in front of you that I think are in numerical order. Is Exhibit
23 1 on top? Does it say -- I'm sorry.

24 A. Yes.

25 Q. And if you could take a look at the document that's at the

1 end of Exhibit 1 and identify that, that's your joint retainer
2 agreement with Mr. Wilbanks' law firm, isn't it?

3 A. Yes, it is.

4 Q. And your signature appears on that document?

5 A. Yes, it does.

6 Q. And you read that document before you signed it; right?

7 A. Yes.

8 Q. So you were aware that it was important that this qui tam
9 lawsuit remain under seal while -- until the seal was lifted by
10 the Court; isn't that right?

11 A. Yes.

12 Q. You understood that was a legal requirement?

13 A. Yes.

14 Q. And you understood that it violated the law to talk about
15 this case with third parties; right?

16 A. Yes.

17 Q. Including members of the press; right?

18 A. Yes.

19 Q. Mr. Donnelly, I'm handing you a document that's marked
20 Defendant's Exhibit 14. Do you recognize that as an affidavit
21 that you filed in this case?

22 A. Yes, I did.

23 Q. And the actual affidavit -- if you could turn to it, it's at
24 the end of the document. If you could look at the second page of
25 your affidavit. Do you have it there?

1 A. Okay.

2 Q. You understood when you signed this affidavit that you were
3 signing it under oath?

4 A. Yes.

5 Q. And you swore to tell the truth in this document; right?

6 A. Yes.

7 Q. In paragraph 3, you admit, don't you, that in 2008 you
8 experienced a steep decline in your income as a mortgage broker;
9 is that right?

10 A. Yes.

11 Q. But you stated to this Court that you did not reveal the
12 existence of the qui tam case to the bankruptcy court because of
13 the seal. Is that what you said in this affidavit?

14 A. Yes.

15 Q. So, in October and November of 2008, you did not reveal the
16 existence of this qui tam in any fashion to the bankruptcy court
17 on the basis that you understood how important the seal was; is
18 that right?

19 A. Yes.

20 Q. And, yet, a couple of months before July of 2009, you began
21 revealing the existence of this qui tam to members of the press?

22 A. Yes.

23 Q. And that was shortly after you had to file Chapter 7?

24 A. Yes.

25 Q. Did you have any source of income in 2009 other than as a

1 mortgage broker?

2 A. No.

3 Q. Did you have any income in 2010 other than as a mortgage
4 broker?

5 A. No.

6 Q. Can you take a look at the stack of documents there and turn
7 to Defendant's Exhibit 4?

8 THE COURT: Are you tendering 14 into evidence?

9 MS. WILLIAMS: Oh, yes, Your Honor. I'm tendering 14
10 into evidence.

11 THE COURT: Are there any objections?

12 MR. BUTLER: None, Your Honor.

13 THE COURT: Mr. Wynn, do you have any?

14 MR. WYNN: None, Your Honor.

15 THE COURT: 14's admitted.

16 MS. WILLIAMS: Thank you, Your Honor.

17 Q. (BY MS. WILLIAMS): Do you have Exhibit 4 in front of you?

18 A. I do.

19 Q. You're blind -- or excuse me. You're copied on this e-mail
20 from Mr. Bibby to Ms. Larcom; is that right?

21 A. Yes.

22 THE COURT: I'm sorry. Which document are we looking
23 at now?

24 MS. WILLIAMS: We're on Defendant's Exhibit 4, Your
25 Honor. Oh, is the Court all right?

1 THE COURT: Uh-huh.

2 MS. WILLIAMS: I was just waiting until I knew you had
3 it first.

4 THE COURT: That's fine.

5 Q. (BY MS. WILLIAMS): You sent this e-mail in -- this e-mail
6 was sent, excuse me, in October 2009; right?

7 A. Yes.

8 Q. So, roughly four or five months after you had begun telling
9 Fox News about this qui tam lawsuit; is that right?

10 A. Yes.

11 Q. And isn't the purpose of this e-mail to ask Fox News not to
12 run a story on this qui tam lawsuit because you were worried
13 about the repercussions of running it?

14 A. No.

15 Q. No?

16 Why else would you want to put a hold on a story
17 with -- that Fox News was getting ready to run if it wasn't about
18 this qui tam lawsuit?

19 A. We just -- we just -- at that time just didn't think it
20 was -- we wanted to go down that road. We didn't think we were
21 doing the right thing.

22 Q. You didn't think you were doing the right thing in having
23 violated the seal?

24 A. Yes.

25 Q. And, yet, between October of 2009 and October of 2010, you

1 all repeatedly provided information to Fox News not only about
2 this qui tam lawsuit, but about the Government's investigation;
3 isn't that right?

4 A. Yes.

5 Q. And is it correct that you, in addition to e-mails, had a
6 number of phone calls with either Mr. Russell or Ms. Larcom about
7 this lawsuit between 2009 and 2010?

8 A. Yes.

9 Q. Fair to say you spoke with them on a regular basis that was
10 about this lawsuit?

11 A. On a regular basis? No.

12 Q. Yes.

13 Did you speak to them every time you had an update from
14 your lawyer?

15 A. No.

16 Q. Did you speak to them most of the time when you had an update
17 from your lawyer?

18 A. No.

19 Q. Mr. Donnelly, I'm handing you an exhibit that's marked as
20 Defendant's Exhibit 9. The bottom e-mail on Defendant's Exhibit
21 9 is an e-mail from Mr. Russell to actually the anonymous e-mail
22 address; is that right?

23 A. Yes.

24 Q. And that's the gmail address that we talked about before that
25 Mr. Bibby set up?

1 A. Yes.

2 Q. The top e-mail is from Mr. Bibby to Mr. Russell, but it
3 indicates that it's from you as well. Do you see that?

4 A. No.

5 Q. Do you see how it's signed Vic and Brian?

6 A. I do.

7 Q. Does the e-mail ask Mr. Russell to give you all a call so
8 that you can give him an update from Marlan?

9 A. It does.

10 Q. So, is this an example of when you were giving Mr. Russell
11 e-mail -- updates from your lawyers?

12 A. Not necessarily, no.

13 Q. Well, why would Mr. Bibby put your name on it if you hadn't
14 authorized him to send the e-mail?

15 A. I didn't have to authorize him to send an e-mail.

16 Q. So he was sending this out on behalf of both of you?

17 A. Yes.

18 Q. Yes. And it says that you all are going to give Mr. Russell
19 an update on what Mr. Wilbanks told you?

20 A. Yes.

21 Q. And did you do that after this e-mail went out?

22 A. I imagine that happened, yes.

23 THE COURT: Is 9 already in the record?

24 MS. WILLIAMS: I'd like to move to admit 9, yes,
25 please.

1 THE COURT: Any objections?

2 MR. WYNN: No.

3 MR. BUTLER: No objection, Your Honor.

4 THE COURT: 9 is admitted.

5 Q. (BY MS. WILLIAMS): Mr. Donnelly, I'm handing you an e-mail
6 marked Defendant's Exhibit 10. Is this an e-mail you're copied
7 on?

8 A. Yes, it is.

9 Q. And this is an e-mail from November 2010; is that right?

10 A. Yes. No, November 16th.

11 Q. November 16th, 2010?

12 A. Yes.

13 Q. And this is from Mr. Bibby to Ms. Larcom, but you're copied
14 on this e-mail; is that right?

15 A. Yes.

16 Q. And does the e-mail from Mr. Bibby indicate that you all plan
17 on touching base with Mr. Wilbanks on the 29th and that you'll be
18 back in touch with Ms. Larcom after that?

19 A. Yes.

20 Q. In fact, it says, "So that we can update you on the DOJ and
21 Marlan's plan of attack," doesn't it?

22 A. Yes.

23 Q. So this is another instance when you were e-mailing Ms.
24 Larcom to let them know that after you get an update from your
25 lawyer, this time about the Government's plans, you will update

1 her?

2 A. Yes.

3 THE COURT: And is 10 in the record?

4 MS. WILLIAMS: I'd like to move to admit 10, yes,
5 please.

6 MR. BUTLER: No objection.

7 MR. WYNN: No objection.

8 THE COURT: 10's admitted.

9 Q. (BY MS. WILLIAMS): Do you recall meeting with Mr. Russell or
10 Ms. Larcom about this qui tam?

11 A. Yes.

12 Q. Meeting with them face-to-face, I mean?

13 A. Yes.

14 Q. And at that meeting, did you provide them with documents?

15 MR. BUTLER: I'm sorry. I missed that question.
16 Provide a copy of what?

17 Q. (BY MS. WILLIAMS): At that meeting, did you provide them
18 with documents?

19 A. Which meeting are you referring to?

20 Q. Well, let's start with the first meeting. Do you remember
21 when the first meeting was with Mr. Russell and Ms. Larcom?

22 A. Yes.

23 Q. When was that?

24 A. It was over the phone with Mindy Larcom.

25 Q. And when was your first face-to-face meeting with either of

1 them?

2 A. I'd have to say sometime in July. I'm really not sure of the
3 date.

4 Q. So July of 2009?

5 A. Yes.

6 Q. And would that have been with both Mr. Russell and Ms.
7 Larcom?

8 A. Yes.

9 Q. And do you recall bringing documents to that meeting?

10 A. No.

11 Q. Did you meet again with Ms. Larcom at some other occasion?

12 A. No. Just phone conversations.

13 Q. Phone conversation -- so you had telephone conversations from
14 then on out?

15 MR. BUTLER: I'm sorry. Did we get an answer to that
16 question?

17 MS. WILLIAMS: I --

18 THE COURT: What was the question? Articulate what the
19 question was, Ms. Williams.

20 MS. WILLIAMS: Yes, I will restate the question.

21 Q. (BY MS. WILLIAMS): So you met with -- you personally met
22 with Ms. Larcom once; is that your testimony?

23 A. Once or twice.

24 Q. So you met with Ms. Larcom once or twice?

25 A. Yes.

1 Q. And your testimony is that you met with Mr. Russell how many
2 times?

3 A. I think twice.

4 Q. So you met with both of them twice?

5 Was Mr. Bibby with you on both occasions?

6 A. Yes.

7 Q. And in addition to those face-to-face meetings, I think we've
8 covered this, you and Mr. Bibby together sent a number of e-mails
9 to Mr. Russell and Ms. Larcom during the years 2009 and 2010?

10 A. I didn't.

11 Q. But you were copied on a lot of those e-mails?

12 A. Yes.

13 Q. And you were aware that they were going out?

14 A. After the fact on a lot of them.

15 Q. And did you ever object to Mr. Bibby -- to his sending those
16 e-mails?

17 A. No.

18 Q. Tell -- now, turning to telephone conversations, did you
19 participate in telephone conversations with Mr. Russell?

20 A. No -- I don't believe so.

21 Q. Did you participate in telephone conversations with Ms.
22 Larcom?

23 A. Yes.

24 Q. And there were multiple conversations; is that correct?

25 A. Yes.

1 Q. And those were in 2009 and 2010; is that correct?

2 A. Yes.

3 Q. And those conversations concerned this qui tam lawsuit; is
4 that correct?

5 A. Not all of them, not initially.

6 Q. But at some point you began talking about this qui tam
7 lawsuit?

8 A. Yes.

9 Q. And we've just looked at a couple of e-mails that indicate
10 that you were getting ready to call them about this qui tam
11 lawsuit?

12 A. Yes.

13 Q. You'll agree with me about that?

14 A. Yes.

15 MS. WILLIAMS: That's all I have, Your Honor. I think
16 I've moved to admit both of the new exhibits; right?

17 THE COURT: I think so. You have two exhibits you
18 added, 4 and 9 or 9 and 10?

19 MS. WILLIAMS: 9, 10, and 14.

20 THE COURT: And 14. All right.

21 MS. WILLIAMS: Okay. Thank you.

22 MR. BUTLER: I'll be very brief, Your Honor.

23 DIRECT EXAMINATION

24 BY MR. BUTLER:

25 Q. Mr. Donnelly, are you a veteran?

1 A. I am.

2 Q. Of what branch of service?

3 A. The U. S. Army.

4 Q. How long were you in the U. S. Army?

5 A. Three years.

6 Q. What was your rank?

7 A. Specialist 4.

8 Q. What was your duty?

9 A. I was military police.

10 Q. And what was the nature of your discharge?

11 A. Honorable.

12 Q. Did you serve in the -- what years did you serve?

13 A. I went in in 1977 and spent three years.

14 Q. Did you serve the National Guard after that?

15 A. Yes.

16 Q. For how long?

17 A. Two years.

18 Q. Of all the banks with which your company did business in
19 veteran refinance loans, with respect to the fraud that you've
20 alleged in the qui tam action, which of those banks was the worst
21 offender?

22 A. Wells Fargo.

23 MS. WILLIAMS: Objection, Your Honor. Relevance.

24 THE COURT: Is this going towards his motivation?

25 MR. BUTLER: I think it does. That was the end of that

1 inquiry, though, Your Honor.

2 THE COURT: All right. It's allowed.

3 Q. (BY MR. BUTLER): And why did you violate the Court's orders
4 sealing this qui tam action during the years 2009, 2010?

5 A. I was fed up with seeing the fraud committed against
6 veterans. We were committing the fraud on loans that we were
7 writing. And we were seeing them from third parties when we'd
8 get HUD-1 settlement statements. It just wasn't us that was
9 doing it. Wells Fargo, Mortgage Investors, Chase, all those
10 banks were doing it. Nothing was happening as far as we were
11 supplying all sorts of documentation showing the fraud. And
12 after four years, it -- it beat us up.

13 Q. Do you -- do you agree and admit that what you did was wrong?

14 A. Oh, yes.

15 Q. Do you apologize to this Court?

16 A. I do.

17 Q. Now, Ms. Williams asked you about Defendant's Exhibit 14,
18 which is the notice of filing of your bankruptcy petition. Would
19 you get that out?

20 A. Yes.

21 Q. Turn, if you would, to the affidavit of Brian J. Donnelly,
22 page 2, paragraph 5. Ms. Williams referenced this. This is your
23 affidavit that you signed?

24 A. Yes, it was.

25 Q. And she didn't quote paragraph 5. And I want to make sure

1 this is part of the record, "The only reason I did not disclose
2 the existence of the qui tam case was because the case was under
3 seal. It was my understanding that no public disclosure of the
4 case could be made."

5 Did I read that right?

6 A. Yes.

7 Q. Was that your affidavit testimony?

8 A. Yes.

9 Q. Did FOX 5 ever make any public disclosure of the existence of
10 this qui tam -- of this qui tam case prior to this -- the case
11 being unsealed?

12 A. No.

13 Q. To the best of your knowledge, did anybody whom you or I --
14 either you or Mr. Bibby told about the existence of this qui tam
15 case during the time period it was under seal ever publicly --
16 ever publicly disclose the existence of this qui tam case while
17 it was still under seal?

18 A. No.

19 Q. Turn to the next page, if you would, paragraph 8, "After the
20 case was reopened, I filed a status report in the bankruptcy on
21 November 15, 2011, which include -- which included the disclosure
22 of the qui tam case."

23 Did I read that correctly?

24 A. Yes.

25 Q. That was the month after this case was unsealed; correct?

1 A. Yes.

2 Q. And paragraph 11, it states in there that, "It is my
3 understanding that if any Relator's award is granted on the basis
4 of my claims, the bankruptcy trustee will take possession of the
5 funds and will pay my bankruptcy creditors."

6 Is that what happened?

7 A. Yes, it is.

8 Q. Look at Defendant's Exhibit No. 4 that Ms. Williams went over
9 with you. And my question is this: Did Dale Russell and Mindy
10 Larcom agree with you and Mr. Bibby to keep the existence of the
11 qui tam action secret?

12 A. Yes, they did.

13 Q. And not to disclose it publicly until after the seal was
14 lifted?

15 A. Yes, they did.

16 Q. Did they -- did they keep to that agreement?

17 A. Yes.

18 Q. Did they honor that agreement?

19 A. Yes.

20 MR. BUTLER: That's all I have. Thank you, Mr.
21 Donnelly. Thank you, Your Honor.

22 MS. WILLIAMS: I'm going to have a couple of questions,
23 Your Honor, depending on the order the Court --

24 THE COURT: Let me let Mr. Wynn or Mr. Gale ask any
25 questions they might have.

1 MR. GALE: Thank you, Your Honor.

2 CROSS EXAMINATION

3 BY MR. GALE:

4 Q. Mr. Donnelly, I'm Alan Gale. If you haven't heard earlier,
5 I'm an attorney with the Justice Department representing the
6 United States.

7 Mr. Donnelly, you -- in your affidavit to -- your
8 bankruptcy affidavit, part of Exhibit 14, you discuss how there
9 was a steep decline in your income --

10 A. Yes.

11 Q. -- as a result of the crashing of the housing market; is that
12 correct?

13 A. Yes.

14 Q. When did that steep decline begin?

15 A. 2008.

16 Q. And your income was coming from USFS up until that point;
17 correct?

18 A. Yes.

19 Q. And you and Mr. Bibby were the co-owners of that company; is
20 that correct?

21 A. Yes.

22 Q. Was it 50/50?

23 A. No.

24 Q. Could you tell me what the ownership split was?

25 A. I had 10 percent.

1 Q. Did you discuss with Mr. Bibby prior to your filing your
2 bankruptcy your financial condition?

3 A. No.

4 Q. Did you discuss it with him after you filed your bankruptcy?

5 A. No.

6 Q. Did you ever have discussions with Mr. Bibby about USFS's
7 business drying up in 2008?

8 A. Yes.

9 Q. Compared to say 2006, what percentage of your business do you
10 think you had lost by the time you filed your bankruptcy?

11 A. 30, 40 percent.

12 Q. Did you hope through your disclosures of the existence of the
13 qui tam in violation of the seal to ultimately bring pressure on
14 the Government in order to more quickly make an intervention
15 decision?

16 A. No.

17 Q. That would have been to your financial advantage, however,
18 wouldn't it?

19 A. Possibly.

20 MR. GALE: No further questions.

21 THE COURT: Ms. Williams?

22 RE CROSS EXAMINATION

23 BY MS. WILLIAMS:

24 Q. Did you have any written agreement with Fox News that they
25 wouldn't publish information about the qui tam case before it was

1 unsealed?

2 A. No.

3 Q. You just had their word for it; right?

4 A. Pardon?

5 Q. You only had their oral word for it?

6 A. Yes.

7 Q. Is that right?

8 Did you have an agreement then or do you have an
9 agreement now with Fox News that they will not publish
10 confidential information about the Government's investigation
11 that you received from your lawyer?

12 A. No.

13 MS. WILLIAMS: I apologize. Are we up to 16?

14 And I apologize, Your Honor. I don't have -- these are
15 more bankruptcy documents, Your Honor, and I did not intend to
16 use these, but they are documents from Mr. Donnelly's bankruptcy
17 case.

18 THE COURT: Have you shown them --

19 MS. WILLIAMS: And I will show them now.

20 THE COURT: -- to Mr. Butler and the Government
21 counsel?

22 MS. WILLIAMS: They're not even marked.

23 (A pause in the proceeding was had.)

24 Q. (BY MS. WILLIAMS): I'm going to hand you at the same time,
25 Mr. Donnelly, Defendant's Exhibits 16 and 17.

1 MR. WYNN: Ms. Williams, I don't mean to interrupt
2 you --

3 THE COURT REPORTER: I couldn't hear you, Mr. Wynn.

4 MR. WYNN: I just asked Ms. Williams if she had
5 additional copies of these exhibits.

6 MS. WILLIAMS: I apologize, Your Honor. I don't. I'll
7 make --

8 MR. BUTLER: You can have ours.

9 MR. WYNN: All right. Thank you.

10 Q. (BY MS. WILLIAMS): Defendant's Exhibit 16 is the handwritten
11 document that you filed on November 2nd, 2011, reopening your
12 case; is that right?

13 A. Yes.

14 Q. And you filed this in order to notify the bankruptcy court of
15 an additional creditor; isn't that right?

16 A. Yes -- well, no. It was to reopen the case.

17 Q. It says to reopen our Chapter 7 bankruptcy case and add a
18 creditor; is that right? In fact, let me rephrase that.

19 The first page of Defendant's 16 says in handwritten
20 notes in the middle of the page: Would like to reopen our
21 Chapter 7 bankruptcy - case number 08-23093 - to add a creditor;
22 is that right?

23 A. She was already a creditor. I don't know why it says that.
24 I was given instructions by the court how to fill it out.

25 Q. So you reopened this case, according to this document, to add

1 a creditor, but your testimony is she was already a creditor?

2 A. Yes.

3 Q. Then the next document is a document also filed in your
4 bankruptcy case on November 15th, 2011. Do you see that?

5 A. Which one is that?

6 Q. This is 17, Defendant's Exhibit 17.

7 A. Okay.

8 Q. Do you see that?

9 A. Yes.

10 Q. Okay. And that's a status report regarding bankruptcy case
11 administration. Do you see that?

12 A. Yes.

13 Q. And isn't this the document that notified the bankruptcy
14 court of the existence of this qui tam case?

15 A. Yes.

16 Q. And that was filed, if you look up at the top, the afternoon
17 of November 15th, 2011. Is that right?

18 A. Yes.

19 MS. WILLIAMS: Your Honor, we'd like to take judicial
20 notice that MIC's Motion for Summary Judgment was filed a couple
21 of hours before this document, that summary judgment motion that
22 sought to rely on Mr. Donnelly's bankruptcy. And that's all we
23 have.

24 I would move to admit 16 and 17, Your Honor.

25 THE COURT: Are there objections?

1 MR. BUTLER: I'm sorry, Your Honor.

2 THE COURT: Are there objections to either 16 or 17?

3 MR. BUTLER: Relevancy, Your Honor. Relators would
4 contend it's totally irrelevant.

5 MR. WYNN: No objection, Your Honor, but we'd like to
6 receive copies at some point in the near future.

7 THE COURT: I'm going to allow 16 and 17 in. And I'm
8 not sure, really, precisely their relevance without further
9 discussion, but I'm going to allow them into the record at this
10 time.

11 MR. BUTLER: May I ask a couple of questions about
12 them, then, Your Honor?

13 THE COURT: Yes.

14 REDIRECT EXAMINATION

15 BY MR. BUTLER:

16 Q. Well, Mr. Donnelly, have you got No. 16 up there, the
17 handwritten one?

18 A. 16? Sorry. Yeah, here it is. I do.

19 Q. Whose handwriting is that?

20 A. My wife's.

21 Q. What's her name?

22 A. Nancy.

23 Q. Were you and your wife representing yourself when this was
24 filed with the bankruptcy court?

25 A. Yes, we were.

1 Q. The date was November 2, 2011?

2 A. Yes.

3 Q. Had you ever personally filed anything representing yourself
4 with the bankruptcy court?

5 A. No.

6 Q. Was your intention on November 2, 2011, to reopen the
7 bankruptcy action to give notice of the qui tam case?

8 A. Yes.

9 Q. Now, November 2 is of course before November 15th, isn't it?

10 A. Yes.

11 Q. November 15th -- well, Ms. Williams -- Defense Wells Fargo's
12 Exhibit No. 17, the date on that is November 15th; correct?

13 A. Yes.

14 Q. That's filed by a lawyer named George Geeslin?

15 A. Yes.

16 Q. In Atlanta?

17 A. Yes.

18 Q. Is he a bankruptcy lawyer?

19 A. He is.

20 Q. Between November 2, 2001, when you filed the Defense Exhibit
21 No. 16 pro se and November 15, 2011, when Mr. Geeslin filed
22 Defense Exhibit No. 17, did you retain Mr. Geeslin as your
23 lawyer?

24 A. I did.

25 MR. BUTLER: That's all I have. Thank you, Your Honor.

1 Thank you, Mr. Donnelly.

2 THE COURT: All right. I just had to ask you a
3 clarifying question. You indicated in your testimony that your
4 contact prior to July of 2009 with Fox News had been by phone?

5 THE WITNESS: Yes.

6 THE COURT: You hadn't met in person before then?

7 THE WITNESS: No.

8 THE COURT: And was that a phone contact with Mindy
9 Larcom?

10 THE WITNESS: Yes.

11 THE COURT: So, I heard you testify in one part of your
12 testimony that way. Then, later on in response to Ms. Williams'
13 questions, you indicated in the beginning you weren't talking
14 about the qui tam case. So, what were you talking about prior to
15 the official partial lifting of the seal in July of 2008?

16 THE WITNESS: The class action. And, you know,
17 originally told them that, you know, I didn't want -- they wanted
18 me to go on camera. Mr. Bibby didn't know about any of this.

19 THE COURT: About the class action?

20 THE WITNESS: No, he didn't know that I was even going
21 to them.

22 THE COURT: Okay.

23 THE WITNESS: And they didn't want to do anything
24 because we wouldn't go on camera. And not till later, you know,
25 did I tell Mr. Bibby what I was doing, contacted them again and,

1 you know, at that point decided to tell them. At that point they
2 had more interest in what was going on.

3 THE COURT: All right. Your first contacts were about
4 the class action in which Mr. Crawford was counsel?

5 THE WITNESS: Yes.

6 THE COURT: Is that right?

7 THE WITNESS: Yeah.

8 THE COURT: And advising about that? And that's what
9 your discussion was?

10 THE WITNESS: Yes. Him and the general fraud, also,
11 but nothing about the case at first.

12 THE COURT: All right. Did you get into discussing the
13 case after that July e-mail; is that what you're saying?

14 THE WITNESS: Yes. I'm not sure of the exact date,
15 Your Honor, but somewhere around then.

16 THE COURT: Okay. All right.

17 Any questions occasioned by my question?

18 MR. BUTLER: Just one, Your Honor.

19 REDIRECT EXAMINATION (Continued)

20 BY MR. BUTLER:

21 Q. Mr. Donnelly, so was it you that first talked to FOX 5 about
22 anything having to do with veterans' loans?

23 A. Yes.

24 Q. Not Mr. Donnelly -- I mean, not Mr. Bibby?

25 A. Yes.

1 MR. BUTLER: Thank you, sir. Thank you, Your Honor.

2 THE COURT: Anything else, Ms. Williams?

3 MS. WILLIAMS: No, Your Honor.

4 THE COURT: All right.

5 THE WITNESS: Thank you.

6 THE COURT: You can take a seat.

7 And I know I have seen these class action filings that
8 Mr. Crawford did. I think they were among the materials
9 provided; is that right?

10 MR. PEAK: I know we provided the cites, Your Honor. I
11 believe we provided the complaints, but we'll double-check.

12 THE COURT: All right. I just -- for purposes of
13 making the record complete, I think we ought to have -- I know
14 that it was filed originally in Superior Court and then it
15 appeared to have been -- I don't know what happened in Superior
16 Court, and then it was filed in this court after that. Is that
17 right?

18 MR. PEAK: The -- both class action complaints we
19 understand are on file in this case, Your Honor. They are in the
20 record.

21 MR. BUTLER: But to respond to the Court's question,
22 there was one in Clayton County and there was one up here that
23 was removed to this court.

24 THE COURT: All right. So those were two separate
25 cases?

1 MR. BUTLER: I think --

2 MR. PEAK: Judge Martin --

3 MR. BUTLER: Yes, Judge Martin. Two separate cases,
4 yes.

5 THE COURT: All right. Were they both brought by Mr.
6 Crawford?

7 MR. BUTLER: Yes. Isn't that right? Yes.

8 THE COURT: All right.

9 MR. BUTLER: That was 2008, December. One of them was
10 filed December 12th, 2008.

11 THE COURT: That was the Superior Court one, I believe.

12 MR. PEAK: *Gaston vs. Wells Fargo*, Your Honor, was
13 filed in the State Court of Clayton County December 17, 2008.
14 *Wynn vs. Wells Fargo Bank*, civil action number 1:09-cv-00165 was
15 filed in the Northern District, according to our notes --

16 MR. BUTLER: No. I think it was removed, wasn't it?

17 THE COURT: It says it was filed.

18 MR. PEAK: January 20, 2009. That's the date we have.
19 And those are filed as exhibits to Relators' response to
20 Defendant Wells Fargo's Motion to Dismiss.

21 THE COURT: All right. All right. Do you have any
22 other further evidence, more testimony you want to present, Ms.
23 Williams?

24 MS. WILLIAMS: No, Your Honor. We don't have any more
25 evidence to present.

1 THE COURT: Does the Relator have any evidence that you
2 wish to present or any testimony?

3 MR. BUTLER: Nothing further than we've already
4 presented, Your Honor.

5 THE COURT: All right. And I assume you want me to
6 consider any of the other exhibits that are attached to the
7 response, then, to the Motion to Dismiss?

8 MR. BUTLER: Yes. Yes, Your Honor. We would tender
9 those -- well, those are exhibits in the record already.

10 THE COURT: All right.

11 MR. BUTLER: But we would deem them to be evidence.

12 THE COURT: Do you object to my considering any of the
13 evidence that they attached to their response to your Motion to
14 Dismiss, Ms. Williams?

15 MS. WILLIAMS: Your Honor, give me one moment so that I
16 can look at it.

17 (A pause in the proceeding was had.)

18 MS. WILLIAMS: Do I understand that that's just the two
19 complaints?

20 THE COURT: I don't know what other exhibits there are.
21 I didn't go check. I'm trying to -- that's why I'm trying to get
22 some clarity about what your -- whether there's any objection or
23 how many documents there were. I didn't go look.

24 MS. WILLIAMS: If my copy is correct, and it was just
25 copies of the two complaints, I mean, I would object on the

1 grounds relevance, but beyond that I don't have an objection on
2 that.

3 THE COURT: Are there any other exhibits attached to
4 the response?

5 MR. BUTLER: I couldn't understand the Court's
6 question.

7 THE COURT: Are there any other exhibits attached to
8 the Relators' response that you're seeking to have introduced
9 beyond those two class-action complaints?

10 MR. PEAK: Not with respect to the response, Your
11 Honor. We would seek to tender into evidence the March 25, 2014
12 letter from Relators' counsel, which is part of Wells Fargo's
13 materials, that notifies the Court of the existence of the seal
14 violation.

15 THE COURT: All right. Are there any objections?

16 MS. WILLIAMS: No, Your Honor. I had understood that
17 all the attachments to our motion would be in the record as well.
18 I believe that's one of them.

19 THE COURT: All right. Well, they can resubmit.

20 MR. BUTLER: May we tender Mr. Brandon Peak's March 25,
21 2014 letter to the Court as Plaintiff's Exhibit No. 1, Your
22 Honor?

23 THE COURT: Yes.

24 MR. BUTLER: Thank you, Your Honor.

25 THE COURT: It's admitted. And I think that the two

1 class-action complaints relating to Wells -- to mortgage
2 practices attached to defendant's response to the Motion to
3 Dismiss are also sufficiently relevant to be admitted. And
4 they're admitted by reference to that -- the attachments.

5 MS. WILLIAMS: Your Honor, could I make a very brief
6 proffer that relates to the discovery responses that we talked
7 about earlier?

8 THE COURT: Yes.

9 MS. WILLIAMS: I would simply -- and if it's all right,
10 I will do it from here.

11 THE COURT: Yes.

12 MS. WILLIAMS: I would proffer the Relators' first
13 supplemental responses to our interrogatories, which were served
14 August 30th, 2013, and did not amend or supplement to add the
15 names that were missing from the first set of interrogatory
16 responses that they served.

17 They filed -- they served a second supplemental
18 response on December 20th, 2013. Also did not amend their
19 response to Interrogatory 15 to add the names that were not
20 disclosed the first two times.

21 And, then, I would proffer their March 24th, 2014
22 supplement, which was intended to address this matter and did so
23 by referencing the Bates number of the 175 pages rather than
24 listing out names of people whom they had contacted about the
25 case.

1 MR. BUTLER: May I make a statement for the record?

2 THE COURT: Yes.

3 MR. BUTLER: And we'll have to supplement this record
4 with the -- with the exhibits. We'll identify these next
5 exhibits. We don't have them with us here today because we
6 didn't anticipate the possibility Ms. Williams might make the
7 statement she just made.

8 We're going to identify these for the record as
9 Plaintiff's Exhibit 2A through however many there are. But I
10 would like to note for the record, Ms. Williams has discussed the
11 supplemental responses to discovery that Relators have provided.
12 To this date, June 11, 2014, Wells Fargo's never filed the first
13 supplemental response to discovery, despite several requests.
14 The exhibits will be our request for that supplementation.

15 MS. WILLIAMS: Well, Your Honor, I object. I was
16 making a proffer, which the Court has not accepted as I
17 understand it, and I live with that. But to then have other
18 documents come into evidence doesn't seem particularly fair.

19 THE COURT: Well, I -- I'm not going to judge this on a
20 tit for tat basis anyway. I don't think it's necessary to -- for
21 you to submit them. If you want to make a proffer of them,
22 you're certainly welcome to, just as I have had her make the
23 proffer.

24 MR. BUTLER: Your Honor, it's not tit for tat. It's a
25 counteroffer with a response to the criticism just made of

1 Relators, which we think is manifestly inappropriate. We
2 disclosed -- as we have said over and over again, we disclosed
3 the seal violations when we found out about them.

4 THE COURT: And you certainly did. And I don't think
5 that the papers were so voluminous that it would be difficult to
6 identify from them or from the Bates numbers the names of the
7 individuals who were communicating with. So, I'm not exactly
8 overwhelmed by that whole discussion, let me just put it that
9 way.

10 But I have said before, if we're going to get into the
11 question of discovery abuse, we'll deal with that separately. I
12 do understand the defendant's position that it's -- that Mr.
13 Bibby and Mr. Donnelly's failure to identify the names on a
14 prompt basis to counsel so that they could be included in their
15 interrogatory answers is a reflection of bad faith, but I think
16 that really I'm trying to focus on the breach of the -- of the
17 seal. And I understand the argument. And I have tried not to
18 end up making this proceeding be uncontained by allegations
19 regarding discovery abuse that really are sufficiently -- seem to
20 be sufficiently extensive and separate and apart that it was
21 going to end up, I think, prejudicing the way I could conduct
22 this proceeding.

23 All right. Has everyone perfected the record the way
24 they want? I haven't heard from the Government whether they
25 wanted to present anything.

1 MR. WYNN: Your Honor, we don't have anything further
2 at this point.

3 THE COURT: All right. Well, let me hear any argument
4 you'd like to present, but please don't repeat your briefs
5 because I've read them over many times. I really am just trying
6 to hear from you about something that you think I need to know
7 that you think based on this evidence that you haven't made clear
8 before. And I have some questions as to each of you.

9 MS. WILLIAMS: Your Honor, I have a visual aid that I'd
10 like to hand up. This is not evidence. It is a visual aid.

11 THE COURT: All right.

12 MS. WILLIAMS: And -- but I do think, particularly with
13 respect to the dates which line up with e-mails, I'm sometimes a
14 visual learner and it helps me to look at things.

15 This is -- just to explain it, it is a timeline. And
16 the timeline starts from when the seal order was entered on the
17 left and goes through early April. The orange bubbles correspond
18 to e-mails or e-mail chains that are in the 175 documents. You
19 then got the grey triangle which shows the order unsealing the
20 case. And on that point, Your Honor, I do want to get the
21 information.

22 I believe the last time that we were here, we were
23 asked to file a statement as to when the case was unsealed as to
24 Wells, and that we did so. But I have the docket and I couldn't
25 find it, so --

1 THE COURT: Well, I'm just going to tell you, the
2 docket reflects the date that's been revealed, May 29th, 2009.
3 So, if it's otherwise, I need to have something else besides --

4 MS. WILLIAMS: Yes.

5 THE COURT: -- that would be concrete that would
6 actually reflect a different date, because I have no reason to
7 believe it's anything other than what is in the docket expressly.

8 MS. WILLIAMS: And I understand that, Your Honor. And
9 I will get the Court a filing on that distinct point, because I'm
10 95 percent certain that it was the spring of 2011 when there was
11 a meeting. But we'll get something on file on that.

12 So, visually what this depicts, Your Honor, is all the
13 seal violations going on prior to the unsealing of the case to
14 the world; the various discovery events, which I understand the
15 Court isn't interested in that occur after that; and then brings
16 us up to modern day.

17 We talk about Summers in our papers and I'm not going
18 to repeat that. I do think that the cost benefit analysis point
19 that the Summers court makes in talking about why harm shouldn't
20 be necessary in order to dismiss a case for a seal violation is
21 particularly appropriate here. However, that same factor can be
22 utilized under the Lujan approach and calls frankly for these
23 Relators to be dismissed from this case.

24 I do want to be clear -- I think we're clear in our
25 papers -- the requests that we are making is that the Relators be

1 removed from this case and not that the case be dismissed as a
2 whole. We understand the Government will step in to pursue the
3 case if the Relators are no longer in the case. I think there
4 may have been some confusion about that in some of the papers, so
5 we want to be -- we want to be clear that that's been Wells
6 Fargo's understanding from the moment we filed this motion.

7 As the Court is well aware, the Lujan approach calls
8 for the Court to balance the three factors; the harm, separately
9 the severity, and separately again the presence or absence of bad
10 faith or willfulness.

11 In this instance, we've talked about the fact that --
12 and Wells Fargo would have to concede that the harm -- there is
13 no harm pre-unsealing in terms of the Government's investigation
14 or putting Wells Fargo or the other defendants on notice of the
15 existence of the action. But, I do submit, Your Honor, that all
16 of the Government information that is apparently in the hands of
17 Fox News, according to that privilege log and according to some
18 of the testimony that we've heard, that that in and of itself
19 constitutes harm. I recognize that that's not harm that's
20 present in these other cases, but these other cases didn't have
21 these facts. That set of behavior and that information ending up
22 in the hands of the media, and is apparently still there, makes
23 this case unique in that respect.

24 What also makes this case unique, turning to the other
25 factors -- and I would also point out -- and I'm going to steal a

1 word from the Government's brief. It was serendipitous that
2 there was no harm here. I understand there was an oral agreement
3 not to publish from the Government's perspective, but the fact
4 that none of these people ended up publicizing what was provided
5 to them is chance and not much more than chance, I would submit.

6 THE COURT: I think that many reporters might disagree.

7 MS. WILLIAMS: Well, it's analogous --

8 THE COURT: I mean, I'm just saying to you, it's not
9 exactly serendipity, because many times reporters trade in
10 confidences and they don't get sources otherwise. It doesn't
11 really -- that's just a reality point rather than a legal point,
12 but I don't think it just makes it total serendipity.

13 MS. WILLIAMS: But that information is still out there
14 is the point that I would make, and it's not ever going to not be
15 out there.

16 Turning to the severity and the bad faith, we obviously
17 strongly believe that both of those factors support dismissal.
18 And that they are so severe in this case, that this case is so
19 extraordinary in that regard that dismissal is the appropriate
20 sanction, regardless of the harm issues.

21 The testimony shows today that our timeline shows only
22 a portion of the seal violations. There were phone calls, there
23 were at least one and perhaps two meetings depending on the
24 recollections of the Relators. The phone calls, it appears based
25 on the e-mail and based on -- which reference them, and based on

1 the testimony convey confidential Government information in
2 addition to that that's in the e-mails that's in the privilege
3 log.

4 In terms of the severity of just -- it's the number,
5 it's the content, and frankly even on those e-mails that didn't
6 go anywhere, the accusation that the Government's acting in bad
7 faith or conducting a cover-up, I would submit, also adds to the
8 severity of the seal violations.

9 THE COURT: Why?

10 MS. WILLIAMS: Excuse me?

11 THE COURT: Why? I mean, what if the Government -- I
12 mean, let's just get out of the scope of this case. If you had a
13 whistleblower about the VA medical situation right now and they
14 said I -- you know, I -- and they had a qui tam case, and they
15 were fearful of retaliation as well, but they -- they were so
16 concerned because people were dying, they would be still
17 breaching the seal, and it would be very serious. But the fact
18 that somebody says to others the Government has concealed this,
19 it's not acting on -- is protecting itself, it's -- from
20 embarrassment, why does that make it reflect bad faith on the
21 Relators' part?

22 MS. WILLIAMS: I would say two reasons, Your Honor.
23 First -- and this is where I'm handicapped because I don't have
24 the information. I don't know that those are true statements in
25 this instance.

1 THE COURT: I don't know either, and I -- that's why
2 I'm trying to get you out of that --

3 MS. WILLIAMS: I think it is -- I think it's very
4 self-serving for those e-mails to say that --

5 THE COURT: -- context.

6 MS. WILLIAMS: -- when in fact the timing -- and this
7 gets into some of the other evidence we've heard about today.
8 The timing of those e-mails is they were sent out at a time when
9 both Relators were experiencing extreme financial distress. Mr.
10 Donnelly had been through a Chapter 7. He'd lost everything.
11 They both testified that their only income was from USFS. They
12 both testified that the loan volume was way down. And I think
13 the can take judicial notice that the refinance market in 2009
14 and 2010 was almost nonexistent. The company went out of
15 business according to their testimony. They had no money.

16 So, the notion that they were doing this out of concern
17 for veterans, I -- the Court heard the testimony herself and you
18 can make your own judgment about the credibility of that, but I
19 just don't think it holds up when you look at the financial
20 realities that they were facing and the fact that they were
21 complaining, and I will say continued to complain about delay in
22 what they filed before the Court. Both the response to the
23 motion and the reply to the Government, in my view -- and this is
24 now moving a bit to bad faith and willfulness --

25 THE COURT: Well, I just want to get -- clarify this.

1 MS. WILLIAMS: Sure.

2 THE COURT: I'm just -- you started out by saying per
3 se to say that the Government -- for them to say that they felt
4 that the Government was not acting on this in a prompt way was
5 evidence of bad faith. And now you're telling me that it's
6 because, actually, of your evaluation of the evidence -- and
7 that's fine -- and the way that you view them as basically not
8 credible. That's a perfectly legitimate argument. But that's a
9 different argument than saying per se if you say the Government
10 is not acting on your complaint and that these are serious
11 issues, I don't know that that is evidence by itself of bad
12 faith.

13 MS. WILLIAMS: The -- well, I guess -- you're right.
14 And they are two different points, Your Honor. And going back to
15 the first point that I made, those e-mails are attempting -- I
16 would argue that those e-mails are attempting to somehow put
17 pressure on or speed up the Government, which is not necessarily
18 consistent with supporting the Government's investigation. And I
19 think that, together with the content, particularly the
20 confidentiality and confidential information that was apparently
21 regularly forwarded to the media, that constitutes the severity,
22 along with the sheer number. And, so, now I'm going to move on
23 to the bad faith and the willfulness component.

24 Absolutely no question here that, first of all, the
25 Relators knew -- and this is an important component under Lujan,

1 I think -- knew that the seal was there, knew that it had been
2 extended, and knew that it had not been lifted as to anyone other
3 than perhaps certain defendants. And that establishes a knowing
4 violation. Their testimony establishes a knowing violation.

5 Their conduct at the time is consistent with people who
6 are trying to hide what they're doing. The establishment of an
7 anonymous e-mail account, not being interested in corresponding
8 on the record with Larry Scott. The October 14th, 2009 e-mail in
9 which I submit shows some second guessing on their part and an
10 acknowledgment that they shouldn't have done what they did. And,
11 yet, they continued to do it all through the next year.

12 The statements that -- the inherent contradictions
13 between the statements in Mr. Donnelly's affidavit that he filed
14 with this Court about why he kept his bankruptcy case -- why he
15 did not disclose this in his bankruptcy case and the timing of
16 that with the subsequent seal violations that he engaged in.

17 And to follow up on that point, Your Honor, he filed
18 that affidavit in this court, which is yet another opportunity
19 for him to let somebody know that while he may not have told his
20 bankruptcy judge or his bankruptcy trustee, he told a lot of
21 other people about this qui tam lawsuit.

22 This case -- I don't -- I think the Court has read
23 Lujan carefully. If the Court has questions about it or
24 questions about any other case, I'm happy to answer them. But it
25 seems to me that this is a situation that is not likely to be

1 repeated any time soon because it is so extreme in the severity
2 and the bad faith components of these three factors, Your Honor.
3 And so that for those reasons, we think under Lujan and certainly
4 under Summers, the appropriate remedy here is to dismiss the
5 Relators and allow the Government to intervene.

6 I will make a note that the -- the point about -- we
7 haven't talked about Rule 41 today. I think the Court can take
8 action under Rule 41 whether Wells Fargo had raised it or not.
9 But I also think that it's appropriate for the Court to consider
10 Rule 41, regardless of the Relators' position on that, given the
11 number of filings that Relators have made in the interim since we
12 filed our reply. I firmly believe that in the face of a standing
13 argument, which has never been made before, to raise an
14 alternative basis for the Court to act was entirely proper.

15 But to the extent that the Court has any concerns about
16 that coming up on reply, the Relators have not only filed a
17 surreply, but they have filed a number of papers since, all of
18 which go, really, to the substance of the Motion to Dismiss. And
19 they're all on record and the Court has accepted all of them. So
20 I don't know if the Court wanted to talk about Rule 41 at all --

21 THE COURT: No --

22 MR. WILLIAMS: -- or any other case.

23 THE COURT: -- I don't want to talk about 41.

24 MS. WILLIAMS: 41 --

25 THE COURT: I don't really -- my view, basically, of --

1 is this, is that if it's -- hasn't been clear already, which I
2 thought it was. If I'm going to proceed to consider dismissal as
3 a sanction, separate and apart from the specific motion for
4 dismissal based on the seal violation, I would feel as a matter
5 of fairness and due process that I would give notice to everybody
6 of my intent, that this is a hearing for this purpose, that the
7 Court is considering dismissal based on X, Y and Z. And I know
8 that I could conceivably have authority by referencing other
9 issues that you have brought up in your brief. I don't doubt
10 that.

11 But in this court, I really think for myself it's very
12 important to be clear with the parties regarding the process I'm
13 undertaking and giving people fair notice that I'm considering
14 this pursuant to a Rule 41 or pursuant to the discovery abuse.
15 And that's the way I prefer to go, because we may be here for
16 some time together with each other for years ahead, whether or
17 not the Relators are here as a party. I just want to make it
18 clear that's how I operate.

19 MS. WILLIAMS: I understand, Your Honor.

20 THE COURT: All right.

21 MS. WILLIAMS: If the Court has any other questions on
22 this -- the standing argument, you know, that was discussed
23 earlier today. The Court heard from the Government on that
24 issue. I didn't stand up and say the same thing. But in all of
25 these cases, the movant was the defendant, including all the

1 cases that are in footnote 3 of the Government's brief, all those
2 district court cases. Standing seems like an unusual concept to
3 me once we're all in court and we're talking about this kind of
4 situation where there's this body of case law supporting the
5 notion that a -- that a defendant can bring this kind of motion,
6 but if the Court has any questions about that, be happy to answer
7 them.

8 THE COURT: I think I had a full colloquy about that,
9 but I had some other questions for you instead.

10 MS. WILLIAMS: Okay.

11 THE COURT: You recognize that Lujan really requires a
12 careful balancing calibration on the part of the Court and with
13 the Court also considering the objectives of the qui tam statute.
14 And one concern here, given the significance of the alleged
15 misconduct on the part of Wells Fargo as well as the
16 co-defendants who have already settled, is that should Wells
17 Fargo be the beneficiary of a motion -- the breach of the seal,
18 the -- the misconduct on the part of the Relators? In other
19 words, do you get to pick your opponent or do you, even if the
20 Government decides not to intervene, basically get a windfall by
21 virtue of this?

22 MS. WILLIAMS: Your Honor, the Government is not going
23 to decide not to intervene in this case.

24 THE COURT: Well, I'm going to ask them that question.

25 MS. WILLIAMS: I don't know whether they've said that

1 officially, but it's very clear to me that they will continue to
2 pursue this case. And it -- I am of a mind that the Court
3 could -- this would be uncharted territory, but I'm not convinced
4 that the Court couldn't order that under 37(3). Certainly even
5 if the Court were to dismiss this case, it would not be with
6 prejudice as to the Government. The Government could refile.
7 So, I don't view this as a windfall for Wells Fargo for the case
8 to continue, only for it to continue with the entity who's the
9 real party in interest with the Department of Justice as its
10 lawyers and their resources.

11 I would also point out, just in terms of thinking about
12 the case, you know, we've produced the documents at this point,
13 so there are -- now I'm going to forget how many there are.
14 There's over 50,000 ESI documents, which doesn't include Excel
15 spreadsheets. There's 19.4 gigabytes of information that we've
16 produced, so all that is available. That work is done. I don't
17 see -- I guess I don't understand the concept of a windfall here
18 if the case is going to continue. The question is --

19 THE COURT: Well, let's just say it's going to
20 continue.

21 MS. WILLIAMS: To me the question is should it continue
22 with these Relators at its helm or with the Government at its
23 helm.

24 THE COURT: All right. So let me ask you a slightly
25 different version of the question. If the Government were to

1 intervene and the Relators were able to stay as parties, would
2 this address the concerns, because one of the -- I can see one of
3 the issues here for the Government is simply having to catch up
4 with an extraordinary amount of detailed discovery that has
5 already occurred to date, having to replicate an enormous amount
6 of work that the Relators' counsel has already done, and the
7 sheer cost to the taxpayers of that occurring, because really if
8 I -- if I go ahead and dismiss the Relators' counsel, they have
9 absolutely no obligation to do one more iota of work on the case.

10 MS. WILLIAMS: I don't know how much work has been done
11 on their part in the case. I'm sure you're going to hear from
12 Mr. Butler that lots of work has been done. But, for example, we
13 still don't have a list of loans with a list of alleged fee
14 defects.

15 THE COURT: All right. Just assume that there has been
16 a significant amount of work.

17 MS. WILLIAMS: So, but, you know -- you know, if
18 they've done that, then I guess I don't understand why the
19 Government wouldn't get the benefit of that work.

20 THE COURT: Well, they may get the benefit of it, but
21 you don't get it simply by -- you of all people know what it's
22 like to walk into a complex case where basically you can't get
23 the assistance on a day-to-day basis of the firm that was
24 handling the case beforehand.

25 MS. WILLIAMS: I do understand that. I guess I feel

1 uncomfortable answering that --

2 THE COURT: All right.

3 MS. WILLIAMS: -- because I feel like I'm answering it
4 for the Government. And I would think that they would have the
5 resources to do that. And that if one focuses -- and, again,
6 this is -- Wells Fargo is an advocate. If you focus on the real
7 issues in this case, it's far narrower than where we are right
8 now.

9 THE COURT: And, finally, let me just say that I know
10 that you -- Wells Fargo filed a notice of -- that it was --
11 received the complaint in 2011. There's something like that on
12 the record. I just don't know what the -- the actual basis of
13 that filing was.

14 MS. WILLIAMS: As I recall, the reason for the filing
15 was that you had asked a question in the last hearing. I don't
16 know the date. I can tell you -- and I can have someone who was
17 at the meeting provide an affidavit to this effect, Your Honor.
18 Wells Fargo was not aware of this lawsuit prior to the date of a
19 meeting. Whatever date that was that you see in the filing,
20 there was a meeting here in Atlanta with Mr. Caldwell, perhaps
21 one or more representatives from the Department of Justice, and
22 one or two of my law partners. And it was at that meeting that a
23 redacted copy of the -- whatever complaint was in existence at
24 that point in time was provided to Wells Fargo. And prior to
25 that date, Wells Fargo was not aware of the existence of this

1 lawsuit.

2 THE COURT: All right. Well, the Government can
3 respond to this as well. Thank you.

4 MR. BUTLER: Your Honor, ready for me?

5 THE COURT: Yes.

6 MR. BUTLER: Consistent with your instructions, we'll
7 be as brief as possible. There were a lot of different issues
8 that we thought might come up today, and with the Court's
9 permission, I'm going to talk about some of the issues that have
10 come up during the hearing today and Mr. Peak will discuss Lujan
11 or -- I don't know how you pronounce it -- very briefly, if
12 that's all right.

13 THE COURT: That's fine.

14 MR. BUTLER: Thank you, Your Honor.

15 I never thought I would utter the next words I'm about
16 to utter in the weeks that have preceded this hearing, but as it
17 turns out, because of the argument just made, I'm glad we had
18 this hearing. There are going to be some issues spawned by what
19 was said today that I won't address now, consistent with the
20 Court's directive about just focusing on the issues presented by
21 this Court's May 12 order. But I will say this because it's
22 relevant, I think, to the issues before the Court today, which
23 include what kind of punishment or penalty and how much, if any.
24 That's the real issue teed up by the parties with an interest in
25 the seal violations, which are the Court, the Government, and

1 Relators.

2 And I make specific reference to the Government's
3 court-ordered response to Wells Fargo's Motion to Dismiss where
4 the Government proposed two things. Number one, a penalty of
5 some, oh -- what is in real dollars about \$6,000,000 per Relator.
6 And number two, to reduce any future Relators' share to the
7 minimum allowed by the law.

8 Ms. Williams just said, quote, we understand the
9 Government intends -- let's see. Let me read my writing. We
10 understand that the Government will step in to pursue the case if
11 the Relators are dismissed. I checked with Ms. May and Mr. Peak.
12 We're unaware of any source for that understanding.

13 Ms. Williams also said, "The Government is not going to
14 decide not to intervene," if the Relators are dismissed. She
15 then said, "That's very clear to me." Apparently there have been
16 communications between Wells Fargo and the Government about --

17 THE COURT: I don't know that's true. I think that's
18 just -- that could well be her best estimate as a seasoned
19 litigator. But I'll hear from the Government on that.

20 MR. BUTLER: Well, we propose in the future to find
21 out. But it's important, I think, because it raises the
22 question -- or several questions. One is: Why does Wells Fargo
23 so badly want the Government pursuing this case rather than the
24 Relators and Relators' counsel? And the answer is windfall.

25 It's been interesting to note in this hearing that

1 Wells Fargo's lawyers and the Government's lawyers basically took
2 the same tack. Both of them cross-examined Mr. Bibby and Mr.
3 Donnelly, attempting to show that contrary to what Relators
4 testified to, their motivation was to hasten their own payday.

5 This case has been afflicted by problems since 2006,
6 and the primary problem has always been non-cooperation from the
7 Veterans Administration. I won't go back over what's in our
8 briefs, but that non-cooperation continues. And now Relators
9 confront what appears to us to be the active hostility to the
10 case of the Department of Justice, the same entity that Ms.
11 Williams says Wells Fargo wants to take over the case.

12 I think in response to the argument that was made by
13 Ms. Williams about the Relators having passed along to FOX 5
14 government documents and the statement by the Relators in one
15 e-mail that the Government was involved in a cover-up, that the
16 Court has nailed the issue with respect to that. It may be that
17 the Government was protecting itself from an embarrassment, but
18 the fact remains that with knowledge of what was in the -- the
19 seal violation documents, the Government has stipulated that it
20 has suffered no harm.

21 I don't understand the dynamics, where after the
22 Government -- only because this Court ordered it to respond --
23 says it knows of no harm, we have to listen to a Wells Fargo
24 lawyer argue that the Government is wrong about whether the
25 Government was harmed.

1 It's important for the Court to know -- and I don't
2 really know all the facts about this partial lifting of the seal,
3 but as a matter of record, the Government requested and got from
4 Judge --

5 THE COURT: Shoob. I believe Shoob.

6 MR. BUTLER: Shoob. I'm sorry. I had a senior moment,
7 Your Honor. A partial lifting of the seal on May 29, 2009, as to
8 Wells Fargo and some other banks.

9 On June 23, 2009, there was a meeting here in Atlanta
10 with Mr. Wilbanks, Mr. Bridges, Ms. Berne, and Mr. Caldwell and
11 they discussed this case with VA representatives by video. And
12 the VA had in 2008 and -- 2008 and 2009 conducted its own
13 investigation with an eye on Wells Fargo. And the VA
14 representatives reported --

15 MR. GALE: Your Honor, may I be heard before we have
16 any further breaches of the joint prosecution and common interest
17 privilege from Mr. Butler? I think it's completely inappropriate
18 for him at this point to start going into these issues. If he's
19 going to start talking about meetings with the Government, with
20 the VA, what was said, what was done in the investigation --

21 MR. BUTLER: I'll withdraw my comments.

22 MR. GALE: Thank you.

23 MR. BUTLER: The partial unlifting of the seal was May
24 29th, 2009. The first documented seal violation by the Relators
25 was July 29, 2009. Now, Mr. Donnelly said he had started talking

1 to FOX 5 about veterans' loans issues generally and the class
2 action a couple of months before that, but that the first
3 disclosure of the existence of the qui tam action was in July of
4 2009.

5 I would respectfully submit to the Court that the only
6 seal violations that matter are those that are direct disclosures
7 of the existence of the qui tam -- pending qui tam action or the
8 contents or nature of that action. Mere discussions by Relators
9 with the press or anybody else about the veterans' loans or fraud
10 by Wells Fargo or even cover-up by VA generally, even though
11 that's involved in the qui tam action, that's not a seal
12 violation because that's the business these gentlemen were in.

13 I would also point out that the -- there -- there is no
14 evidence, no evidence whatsoever, that the seal violations by
15 these Relators ever resulted in a public disclosure of the
16 existence or contents of the qui tam action. Now, again, we
17 state that only because it's relevant to the issue of what
18 punishment, if any, how much punishment, and not as excuse.
19 These gentlemen do not offer any excuse for their misconduct.
20 They readily admit it.

21 We would -- we would submit that the -- the Department
22 of Justice's demand is exorbitant and outrageous, both of them,
23 the monetary --

24 THE COURT: Why?

25 MR. BUTLER: Because it's too much money, Your Honor.

1 THE COURT: Well, I know you think it's too much money.
2 That's another way of saying exorbitant. But why isn't the
3 measure that they propose an appropriate one?

4 MR. BUTLER: The what, Your Honor?

5 THE COURT: The measure of determining what an
6 appropriate fine that they propose, why isn't that not an
7 appropriate one?

8 MR. BUTLER: I didn't see a measure, Your Honor.

9 THE COURT: Well, they basically said the difference
10 between the minimum share of 25 percent and the 28 percent
11 that --

12 MR. BUTLER: Because there's -- we see no nexus
13 whatsoever between the Relators' share and these seal violations,
14 none whatsoever. What's the connection between the two? The
15 seal violations occurred -- all the work that was done by
16 Relators and their counsel to obtain the settlements that have
17 already been obtained or obtained was done thereafter, it was
18 unhindered, uninfluenced in any way whatsoever by the fact there
19 had been seal violations, when there's seal violations that occur
20 that cause no harm. What's the net effect of telling these
21 Relators, all right, it's \$12,000,000 for you guys, plus we're
22 going to cut you in the future? I mean, that is totally contrary
23 to the False Claims Act, the very purpose of the False Claims
24 Act, which is to encourage relators to prosecute these kind of
25 cases. If the Court --

1 THE COURT: Well, what in your mind is an appropriate
2 measure for determining a monetary sanction, if I should go that
3 way, that would be -- make it a very significant sanction, but
4 not punitive, because that's what I have to do. I'm not
5 instituting criminal proceedings here. I'm imposing a civil -- I
6 would be imposing a civil sanction.

7 MR. BUTLER: Your Honor, that's an excellent question.
8 And I'm an officer of the Court and I should have an answer for
9 you, but I don't. We can reflect upon that, but I've thought
10 about it some and have not personally been able to come up with
11 an answer. I don't know -- this is uncharted territory.

12 The only thing I would suggest to the Court that -- is
13 that a punishment of the scale the DOJ seeks necessarily is going
14 to have an impact upon these Relators and their counsel and
15 future relators and their counsel in other FCA cases I think all
16 out of proportion to the offenses committed. It's just totally
17 disproportionate, so much so that it seems to me to raise some
18 basic constitutional issues.

19 We were outside in the hall before the hearing started
20 today and Mr. Donnelly pointed this out to me. There's the --
21 the Bill of Rights is engraved out there. It reads excessive
22 bail shall not be allowed, nor excessive fines imposed, nor cruel
23 and unusual punishments inflicted. We would respectfully submit
24 that \$6,000,000 per Relator, plus cutting future Relators' shares
25 to the minimum, is excessive. It's so excessive that --

1 THE COURT: Well, let's say I did it simply on this
2 case. What's wrong with saying that it could not possibly exceed
3 the 25 percent rate because of the conduct? Why wouldn't that be
4 an -- why wouldn't the conduct be an appropriate sanction?

5 MR. BUTLER: \$12,000,000, Your Honor?

6 THE COURT: No. I said what if I were to basically
7 make clear that the sanction in this case could not --
8 essentially that the Relators could not collect more than the --
9 the minimum allowed? And if you were proceeding alone, that
10 would be 25 percent.

11 MR. BUTLER: You mean --

12 THE COURT: In the instant case involving --

13 MR. BUTLER: Oh, future recovery or past recovery?

14 THE COURT: That's right, on the future recovery.

15 MR. BUTLER: And the question is would that inhibit
16 relators' ardor in future FCA cases?

17 THE COURT: Right.

18 MR. BUTLER: Relative to the fact in this case the
19 Relators have committed seal violations. I see the Court's
20 point.

21 The problem -- we have two fundamental problems. It's
22 not just the -- the future penalty the Government seeks to
23 impose, but it's also the fact that there -- the Government wants
24 these gentleman to pay back 2.7 million -- pay 2.7 million
25 dollars each which is after-tax dollars, and the money they got,

1 there were attorney's fees deducted therefrom. We think -- we
2 think asking them to pay \$6,000,000 each is exorbitant.

3 We suggested, as the Court knows, in -- the payment of
4 \$250,000, which in after-tax dollars is about 300 and -- I did
5 this math one time, but I forgot it. It's about \$375,000, I
6 think.

7 THE COURT: Well, one of the things --

8 MR. BUTLER: I take it back, Your Honor.

9 THE COURT: One of the factors the Eleventh Circuit
10 counsels that I have to consider is the financial resources of
11 the Relators, but the Relators had to have received a very
12 sizeable chunk of funds in connection with the resolution on all
13 these other cases. So, that's why I don't feel very constrained
14 by the financial -- their financial status at this juncture,
15 because I can calculate myself that they made a significant
16 amount of money, even if they had to pay attorney's fees. But --

17 MR. BUTLER: Let me correct what --

18 THE COURT: But you can correct me if I'm wrong, if
19 they in fact didn't receive substantial.

20 MR. BUTLER: I was going to correct me first. You are
21 correct. I was correcting me. I said that the Government wanted
22 2.7 million dollars --

23 THE COURT: Well, they want more than that.

24 MR. BUTLER: They want \$2.7 million dollars each -- or
25 2.7 million dollars total from both Relators. And I messed that

1 up.

2 THE COURT: All right.

3 MR. BUTLER: So they want a total of \$6,000,000.

4 You know, I -- the honest truth -- answer is that
5 it's -- relative to what they earned from the -- from the
6 previous recoveries, how much is enough proportionate to the
7 offenses is a matter of opinion, and there's only one person in
8 the court -- in the room whose opinion really matters. We think
9 \$250,000 is appropriate.

10 THE COURT: All right.

11 MR. BUTLER: But we understand that opinion doesn't
12 matter.

13 We would raise this additional point. Relators want to
14 raise the question of why, per the Government's recommendation,
15 any money ought to be paid into the registry of the Government --
16 or paid to the Government. The Government has stipulated it was
17 not harmed. The Court's orders are what were violated. And we
18 would raise the issue where the money ought to be paid, whether
19 it ought to be paid to the Government or into the registry of the
20 court.

21 THE COURT: Well, I think if it's paid into the
22 registry of court, let me say, it would be viewed typically as a
23 criminal penalty at that point. So, I'm not looking at it -- I
24 think it's -- in that vein, but I'm not -- going to get over that
25 nicety. Do you mind sharing with me what the percentage would be

1 paid to the attorney's of the recovery?

2 MR. BUTLER: Let me make sure I've got that right.

3 THE COURT: I don't want to --

4 MR. BUTLER: Can we do that in camera?

5 THE COURT: Yes.

6 MR. BUTLER: All right. We will do that.

7 Mr. Peak, if it please the Court.

8 MR. WYNN: Your Honor, can the Government respond to
9 those points before we get into discussion of the one case?

10 THE COURT: Yes.

11 MR. GALE: Thank you, Your Honor. I'm going to address
12 a number of points and Assistant U. S. Attorney Wynn will jump in
13 and clean up a few additional points.

14 Beginning with the idea that it is somehow
15 constitutionally unreasonable that the Relators in this case
16 should be sanctioned in an amount that would put them in a place
17 which by statute they could have been put by this Court, and
18 which the United States would have argued for had it been aware
19 of the misconduct of the breach of the seal, seems to be a
20 non-starter. How can it be unconstitutional or a violation of
21 the Relators' rights to simply say they'll be paid, in effect,
22 the minimum that Congress has said is a permissible relators'
23 share in a case that the Government has not intervened. I would
24 like to start -- so I'll start there.

25 THE COURT: I think that makes sense. The one question

1 I have is the fact that we're using a measure of a sanction that
2 would be based on a prior recovery -- that's my only concern --
3 and still keeping this compensatory in nature. And I welcome you
4 to address that.

5 MR. GALE: Well, I must admit I've not thought about --
6 the Court mentioned when Mr. Butler was up here that a payment to
7 the court would be a -- considered a criminal --

8 THE COURT: It might be as an indicia.

9 MR. GALE: That is something that I had not considered.
10 I don't have an opinion on it today. I could -- if the Court is
11 interested --

12 THE COURT: All right.

13 MR. GALE: -- I could brief it for the Court.

14 THE COURT: All right.

15 MR. GALE: Turning to the issue of the evidence today,
16 and I want to respond to a couple of things. Mr. Butler says
17 that the Relators' acknowledge their wrong and they take personal
18 responsibility. And, of course, both of them said those words on
19 the stand today as one would expect. But we did not hear them
20 taking personal responsibility. We heard them making
21 explanations about why they willfully violated the seal. There's
22 no question in this case that the seal was willfully violated,
23 but they tried to say it's because the Government was too slow.

24 When the Government investigates qui tams and when it
25 is required to go to the court to seek extensions of the seal, as

1 was done in this case, the Government always checks with
2 relators' counsel to see if there are objections by the relators
3 to an extension of the seal. And, of course, the United States
4 then notes that in its applications. That is a matter of policy.
5 And although the Court's docket is sealed in this case, the Court
6 probably can take judicial notice of what was done in this case.

7 It is interesting to note that the time that the
8 Relators began violating the seal corresponds with their
9 financial difficulty. I think that is a logical explanation of
10 the true motivation here, or at least part of the true
11 motivation, for the Relators to have done what they did. And I
12 don't think they take responsibility for that even to this day.

13 So, we have a willful misconduct involving a number of
14 breaches over a significant period of time, which is quite
15 severe. I think those two -- those two prongs of the Lujan test
16 were clearly satisfied.

17 But the Government takes the position that based on
18 what we know, based on what has been disclosed, based on what
19 we've heard today, there's been no prejudice to the Government,
20 so we do not seek dismissal. But we do think it is important
21 that the misconduct that occurred here be taken seriously,
22 because if it is not, if the Relators receive a slap on the
23 wrist -- on their wrists, the Court will be sending an
24 unfortunate message to the relators' bar that this type of
25 conduct will be tolerated, and that if the relators are lucky

1 enough not to cause critical damage to the Government's
2 investigation, they are free to violate the court's orders and
3 violate the statutory seal. That is a very untenable position.
4 It will compromise government investigations in ways that
5 probably will never be able to be proven because it is
6 extraordinarily difficult, even when we know that the defendants
7 have learned of seal violations, to prove specific harm to the
8 Government.

9 We take this matter quite seriously. We recognize that
10 the Relators have brought an important case. We recognize that
11 the Relators' counsel have done work in this case that is to be
12 commended and has been commended. But that does not excuse the
13 misconduct that occurred here and which, in the Government's
14 view, must be strongly discouraged if it is not to be repeated in
15 case after case after case.

16 I also want to address -- and I know the Court is
17 interested in the comment that was made by Wells Fargo's counsel
18 that the Government is going to intervene in this case if the
19 Relators are dismissed. I will tell the Court I have had no such
20 discussions with Wells Fargo's counsel and I'm not aware of
21 anyone else in the Government who has had any such conversation
22 with Wells Fargo telling them what the Government will or will
23 not do. It is beyond my authority to make any representation
24 about what position the Government will take. I will have to
25 make a recommendation to an official far above me who will have

1 to make a decision in the event that the Relators were dismissed
2 about what position the Government will take.

3 THE COURT: Does the Justice Department ever decide to
4 join a case after it has elected not to intervene if the relators
5 remain as parties? In other words, is that an option?

6 MR. GALE: Your Honor, the Government does on occasion
7 after even making a declamation decision. In this case no
8 declamation -- no formal declamation was filed. A decision that
9 we are not intervening at the time was filed. But the Government
10 does -- even in cases that have been declined, when new
11 information is presented or when circumstances change, the
12 Government has in the past for good cause moved to intervene and
13 has intervened in the case while the relators and their counsel
14 remained in the case. That, of course, usually ends up in a
15 argument about whether the relator shares should be in the 15 to
16 25 percent range or a 25 to 30 percent range, but it is something
17 that happens.

18 THE COURT: Is that something you think the Government
19 would consider here? And I don't want to invade your
20 relationship with your client either.

21 MR. GALE: Right. Right. Well --

22 THE COURT: But -- so I -- you're free to, you know,
23 hedge your --

24 MR. GALE: Yeah. I will completely hedge this and say
25 I have no authority to bind the Government to any action with

1 regard to intervention or non-intervention in the future in this
2 case. And, of course, it's our hope that it will be unnecessary
3 for the Government to do that because we are not urging the Court
4 to dismiss the Relators. In fact, we've taken the contrary
5 position here despite the severity of what we view as the
6 misconduct that occurred.

7 Having said that, clearly the Government in the event
8 that the Relators were dismissed would consider that issue very
9 closely and make a informed decision about whether to intervene.
10 Intervening, whether or not the Relators and their counsel can
11 continue on in the case, would of course put a tremendous burden
12 on the Government to come up to speed on matters that, while we
13 monitor the activities of the case, we are not involved in the
14 day-to-day litigation, we are not down into the weeds of
15 discovery. And, of course, it would require us additional time
16 to come up to speed whether or not the Relators remained in the
17 case. Obviously if the Relators remained in the case, that would
18 be of assistance. But even with them in the case, there's a
19 substantial investment -- assuming the Government were to decide
20 to intervene, there's a substantial investment in time to come up
21 to speed. There's no question about it.

22 THE COURT: What did you make of Ms. Williams'
23 suggestion that I have the authority to direct the Government to
24 intervene?

25 MR. GALE: I never like telling judges that they don't

1 have the authority to do something. Every time I've tried to
2 suggest that, I've been corrected. It's an interesting question.

3 I mean, the Government always has the option to dismiss
4 a qui tam, so it almost becomes a moot point. I mean, the
5 Court -- if the Court has authority to order the Government to
6 intervene, and I've never heard of that happening and I haven't
7 researched it, the Government I suppose would have a number of
8 options. One, intervene. Two, object and seek some sort of
9 review of it. Or, three, intervene and dismiss if it really was
10 unhappy with prosecution of the case. I hope certainly it won't
11 come to that, Your Honor.

12 THE COURT: I hope so, too.

13 Are you or your co-counsel going to speak to the issue
14 of how you came up -- how you calibrate those Lujan values,
15 because on one hand you absolutely say the Relator shouldn't be
16 dismissed and that you -- it would seem that you think the
17 preeminent value here is that there has been -- or factor here is
18 that there has been no prejudice to the Government. Is that --
19 is there anything more than that that you want to provide to the
20 Court in guidance?

21 MR. GALE: Can I consult with counsel?

22 (A pause in the proceeding was had.)

23 MR. GALE: Your Honor, I think -- I think all the
24 Government would add that's not already in its papers is that the
25 conduct here is -- is egregious, but the harm is absent. It

1 becomes -- it becomes difficult to -- to argue for a dismissal
2 absent any evidence of prejudice. So, we just think that without
3 that here -- there may be an appropriate case, and maybe this one
4 comes close to the line, where you have so much bad faith and
5 such severe violations and such flouting that there may be an
6 appropriate case where, even totally absent harm to the
7 Government because of fortuitous events, it's appropriate to get
8 rid of a relator. We don't think this is that case, but I don't
9 want to minimize what the Government views as the severity of the
10 willful misconduct that occurred here.

11 MR. WYNN: And, Your Honor, if I could just make a
12 couple of clean-up points.

13 THE COURT: All right.

14 MR. WYNN: I think when you were talking --

15 THE COURT: And then we're going to take a little
16 break. All right?

17 MR. WYNN: Oh, yes, Judge.

18 THE COURT: And if I cut you off, you can come right
19 back up.

20 MR. WYNN: I'll be very brief. But I think when you
21 were talking to Ms. Williams, you asked about the hypothetical
22 what is a relator to do if they suspect a wide-spread, unlikely
23 cover-up by the Government of embarrassment or falling down on
24 the job. And my response to that is that they should go to a
25 federal judge. They have a full opportunity to do that, and they

1 should avail themselves of that, as opposed to going to the news
2 media and violating the law. They have ample opportunity, ample
3 hearings. I know full well that this Court holds us to the fire
4 in conducting these investigations. If they had a concern, this
5 Court would have been receptive to it. Why they didn't avail
6 themselves of that opportunity instead of violating the seal, I
7 still don't have a clear answer.

8 THE COURT: All right. And I really was trying to put
9 it more in the sense is it per se a suspicion that the Government
10 or an accusation that the Government had covered up something,
11 was that -- why was that per se evidence of bad faith. But I
12 agree with you, there are other avenues. And I also agree that
13 there were avenues of -- relating to actively opposing an
14 extension. And there were many -- too many -- I've learned from
15 this case, but I wasn't here at the beginning. Let me put it
16 that way.

17 MR. WYNN: Thank you. My second point is in response
18 to a point Mr. Butler made about the chilling effect on relators
19 being meritorious conduct -- excuse me, meritorious cases if
20 there is, you know, a high penalty imposed in this case. We
21 would hope and expect that relators are deterred by your ruling
22 from future violations of the seal, and we think it would be left
23 at that. We don't think that every relator files a case with an
24 eye towards violating the seal and they're going to be deterred
25 from bringing meritorious cases because they know if they violate

1 the seal, they would be in trouble. That doesn't make a lot of
2 sense to me.

3 And just to clarify on our proposal as far as what the
4 damages or sanction would be, I think we're asking for a sanction
5 up to the amount of 2.7 million dollars, and that's with respect
6 to both Relators. We're not asking for that not to be doubled.
7 That's for both Relators and that's the single --

8 THE COURT: In combination?

9 MR. WYNN: Correct.

10 THE COURT: So the total would be 2.7 million dollars?

11 MR. WYNN: That's correct.

12 THE COURT: All right.

13 MR. WYNN: And that money came from the U. S. Treasury
14 and not the court. We would ask for the money be returned to the
15 U. S. Treasury, not be a court fund.

16 THE COURT: All right. Thank you very much. I know as
17 always that everyone has something more to say, but it's humanity
18 day at the moment for all those who are working here. So, we're
19 going to take a 10 minute break for everyone to take care of
20 their own needs.

21 (A recess was had.)

22 THE COURT: Please have a seat.

23 All right. Since I was putting you, Mr. Wynn, under
24 exigency, did you have anything else you wanted to add or were
25 you finished?

1 MR. WYNN: Not at this time, Your Honor. Thank you.

2 THE COURT: All right. And, Mr. Peak, did you have
3 more to say since I let the Government interrupt?

4 MR. PEAK: I will be very brief, Your Honor. I was
5 told that the best sound a judge ever hears is the briefcases
6 closing and the feet heading towards the door. So, I do want to
7 make just a few points in response to what's been said. And I do
8 think it's important for the Court -- I know the Court's read the
9 brief -- to just note a few things about how the seal language
10 came into effect back in 1986. And I just want to reference the
11 Court's attention to a few cases.

12 The first one is the *Milam vs. Regents of the*
13 *University of California* case, and there's some important
14 language in that case that there's no suggestion in the
15 legislative history that the provision was intended to benefit
16 the defendant in any way. The reason I think that case is
17 important, Your Honor, is because dismissing the Relators from
18 this case at this juncture would undoubtedly benefit Wells Fargo.

19 The Court's noted the enormous amount of work, or the
20 work that has taken place. And I will stand in place and say
21 it's been an enormous amount of work. And there's no doubt
22 whatsoever that Wells Fargo would be the beneficiary of the
23 Relators' dismissal and the American taxpayers would be the ones
24 who are punished.

25 The other case I want to cite the Court's attention to

1 is the Summers case, but one --

2 THE COURT: Did you give me the citation or is it in
3 your brief?

4 MR. PEAK: The Summers case?

5 THE COURT: No, the Summers -- no, the *Milam vs.*
6 *Regents.*

7 MR. PEAK: Oh, Milam? Your Honor, it is in our brief.
8 It's 912 F.Supp. 868, and the pinpoint is 890. That's a District
9 of Maryland case from 1995.

10 The one portion of Summers, Your Honor, that I wanted
11 to bring your attention to is a provision on page 297 and 298
12 from the Summers case. And it states, and I quote, Your Honor:
13 The legislative history of the 1986 amendment reveals that
14 Congress was concerned not with punishing plaintiffs for
15 publicizing the claims, but rather with ensuring that the
16 Government was given a fair chance to evaluate those claims at a
17 time when it could be certain that the status quo had not been
18 disturbed by the defendant's knowledge the lawsuit had been
19 filed. And, Your Honor, with respect to that quote, it's clear
20 on its face that the congressional intent was not to punish the
21 plaintiff relator.

22 But it's equally important to know that the
23 congressional intent behind the seal provision was served in this
24 case. The Government had this case under seal for over five
25 years in which it had time to investigate and make an

1 intervention decision. The statute provides 60 days. Your
2 Honor, I'll submit, and the record is clear, that if the
3 Government wanted to intervene, it had plenty of time to make
4 that decision. And nothing that the Relator did, the Government
5 has admitted in terms of the seal violations, prejudiced its
6 investigation while the case was under seal.

7 The only other two things I want to address is the
8 second factor of the Lujan test, severity, and then briefly draw
9 the Court's attention to a few cases with respect to what, if
10 anything, the Court should be -- should do about the seal
11 violations. Counsel for both the Government and Wells Fargo has
12 just made statements that the violations were severe. And what I
13 say is not intended to diminish anything that's been said about
14 Relators' admissions of knowing what they were doing was wrong.
15 And we admit that the Relators should not have done what they
16 did. But just saying something is severe does not make it so,
17 Your Honor.

18 There was no harm suffered by anyone in terms of the
19 Government as a result of the violation. And Ms. Williams has a
20 chart -- I didn't bring a chart -- but all that chart does is
21 highlight a number of communications. But the vast majority of
22 those communications, save two or three, are with the same
23 people, Mindy Larcom and Dale Russell, and they discuss in
24 general concepts about the fraud that was being committed, in
25 some instances the qui tam case, Your Honor. We're not running

1 from that. But the severity of the violation relative to the
2 harm is zero. There was no harm. And thus, while they did have
3 a number of communications with the reporters at FOX 5, Your
4 Honor, nothing came from that that harmed the Government, Wells
5 Fargo, or anybody else in any appreciable way.

6 So, we have a different thought process, Your Honor,
7 frankly, with respect to the severity of the violations. Yes,
8 they did occur. But the Lujan court didn't talk about the number
9 of violations. It talked about the relative severity of the
10 violations. And in most of the cases where there's a dismissal,
11 it's as a result of the relator taking some action to either
12 immediately serve the defendant, file the case on the public
13 docket so it's not under seal, or do something to tip off the
14 defendant, thereby inhibiting the Government's investigation. In
15 that case, the seal violation is severe, Your Honor, because it
16 keeps the Government from being able to do what it should be able
17 to do to investigate and make an intervention decision.

18 So, we respectfully submit, Your Honor, that the number
19 of violations is not the issue. The Court should take notice of
20 the people who the violations were to and what was ultimately
21 done with them.

22 Finally, I just want to point the Court's attention to
23 a few cases with respect to what should be done about the seal
24 violations. One case in particular I'd like to draw the Court's
25 attention to is U. S., ex rel., Downy, D-o-w-n-y, vs. Corning,

1 Incorporated. The cite is 118 F.Supp. 2d 1160, and the pages I'm
2 referring to are 1163 and 1164. These are also in our materials,
3 Your Honor. But I want to quote: As the Ninth Circuit pointed
4 out in Lujan, nothing in the FCA indicates that the penalty for
5 violation of the seal requirement should be dismissal of the
6 case. Instead, such a severe sanction should be reserved for
7 cases involving great harm to the interests promoted by the seal
8 provision, end quote. And the Downy court went on to conclude in
9 a quote: Due to the absence of any prejudice to the Government,
10 the court will not dismiss the case as a sanction for relator's
11 premature service of the complaint upon the defendants.

12 The Downy court is not alone in its analysis in that if
13 the point of the seal is to allow the Government time to
14 investigate and protect its intervention decision and there's no
15 harm caused to that, it doesn't make a tremendous amount of sense
16 to enter the ultimate sanction of dismissal where the very
17 purpose of the seal is not impacted in any appreciable way, Your
18 Honor.

19 The other cases I would simply draw the Court's
20 attention to, the Court previously mentioned the Rigsby decision.
21 That was the State Farm case down in Mississippi.

22 THE COURT: Right.

23 MR. PEAK: You know, in that case there were actually
24 public disclosures that were made, and in that case the court
25 came back to the thought process. And the judge in that case,

1 Your Honor, said on page 10 of the WestLaw citations, quote: I
2 see no evidence in the record that would support a finding that
3 these disclosures hampered the Government's investigation or
4 otherwise compromised the Government's ability to make its
5 investigation.

6 And respectfully, Your Honor, that's what we would
7 submit that we have here. We have admitted seal violations. We
8 take exception with Mr. Gale's comments about whether Relators
9 are genuinely sorry for what has happened. We believe that they
10 certainly are. But the point, Your Honor, is that the seal
11 violations cause no appreciable harm to the Government. And when
12 evaluating what sanction, if any, would be appropriate in light
13 of the disclosures that are present in this case, we certainly
14 don't believe that dismissal would be appropriate.

15 The final thing I'd like to say is just in response to
16 Mr. -- what Mr. Wynn had to say with respect to responding to
17 this Court's question about the -- the VA. And Mr. Wynn made the
18 comment to the effect that Relators have had other avenues. And
19 we don't dispute that, Your Honor. But the reality in this case,
20 as the Court is well aware, is there has been not much
21 cooperation at all from the VA, even in light of this Court's
22 request that there be such cooperation. That is just a matter of
23 fact and where we are in this case right now.

24 And Relators, again, admit what they did was wrong, are
25 sorry that they have done it, and we respectfully request that

1 the Court not grant Wells Fargo's motion and provide a windfall
2 to Wells Fargo for what the Relators have done.

3 THE COURT: I know it's Mr. Butler who spoke to the
4 amount of fine, but -- or the amount of the sanction, and perhaps
5 you had the same understanding he did, that the Government was
6 seeking a sanction of close to \$6,000,000 as opposed to 2.7
7 million dollars. Is that -- or perhaps you didn't. But I'm just
8 trying to understand, now knowing that what they were suggesting
9 is something up to 2.7 million dollars, does that change your
10 view regarding the proportionality and fairness of the sanction
11 measure that they have proposed?

12 MR. BUTLER: Where I misspoke as I was standing here
13 trying to think and talk at the same time, I was thinking they
14 were asking for 2.7 per Relator. It's 2.7 total. But it's in --
15 we did the math in a footnote in our brief. 2.7 total is 6
16 million real dollars. That's a fact, if you take into
17 consideration the tax rates and attorney's fees. So, when the
18 Government says -- when the United States Government says it
19 wants 2.7 million dollars total, that Government, which is the
20 taxing authority, is ignoring the tax impact. 2.7 million
21 dollars from these Relators' total is \$6,000,000. That's just a
22 fact. And we think that's exorbitant and --

23 THE COURT: Well, when you -- are you -- when you
24 requested to file your information as to your fee agreement, did
25 you want -- were you proposing that that be only for my review,

1 for an in camera review, or just simply under seal for the
2 record?

3 MR. BUTLER: In camera, Your Honor.

4 THE COURT: All right. Well, why don't you
5 nevertheless -- you can still identify what the proportion of
6 attorney's -- of taxes were taken out of that.

7 MR. BUTLER: We did as a footnote, but you can do the
8 math and figure out what are our attorney's fees because we
9 didn't hide it. We'll submit the fee agreement in camera. But
10 in the footnote, we used a 35 percent federal tax rate --

11 THE COURT: All right.

12 MR. BUTLER: -- for 2012 and 2013, although in one of
13 those two years, one of the Relators -- I forget as I stand here
14 now which one -- paid a higher tax rate. We used the lower. We
15 figured an average 35 percent tax rate. That was the minimum.
16 One of them actually paid more than that. And a 60 percent
17 Georgia rate, so that's 41 percent. So 2.7, you do the math --

18 THE COURT: I'm sorry. What Georgia -- are the rates
19 in the brief, because I just didn't see it.

20 MR. BUTLER: Yes, ma'am, there's a footnote.

21 MR. PEAK: I believe it's footnote 1, Your Honor, in
22 our response to the Government's brief.

23 MR. BUTLER: And --

24 MR. PEAK: Unless the Court has any further questions,
25 I will hush and sit down.

1 THE COURT: All right. Well, I'm just trying to
2 under -- one last thing, Mr. Butler. So if I were to consider
3 the -- what the tax rate was and the actual amount of money
4 received by the Relator, would you consider that proportional?
5 Whatever sum ended up being, and I don't think -- I don't know
6 where the \$250,000 ended up being.

7 MR. BUTLER: I'm not sure -- I'm sorry, Your Honor.

8 THE COURT: All right. If I do your calculation, I'm
9 still going to come up with more than \$250,000 of recovery,
10 aren't I?

11 MR. BUTLER: I'm not sure what you're referring to as
12 my calculation. I apologize, Your Honor. The -- the only thing
13 we said in footnote 1 is that the real value of 2.7 million
14 dollars is 6,070,850 -- \$6,070,859.

15 THE COURT: I understand.

16 MR. BUTLER: I apologize, Your Honor. I just didn't
17 catch the Court's question.

18 THE COURT: I'm just trying to see your footnote.

19 MR. BUTLER: I've got it right here, Your Honor. I can
20 hand you a copy. You can look at that.

21 THE COURT: Thank you.

22 MR. BUTLER: Somebody better at math than --

23 THE COURT: All right. My question is what if I
24 were -- out of the 2.7 million dollars, were to account for the
25 fact that 35 percent of that had to be paid in taxes, for

1 instance? Would you agree that that sum was more proportional
2 and fair?

3 MR. BUTLER: 2.7 reduced -- it's really -- by 41
4 percent tax rate and by attorney's fees, I don't think that would
5 be disproportionate or unfair, Your Honor.

6 THE COURT: All right.

7 MR. BUTLER: I haven't had a chance to talk to my
8 clients about it. They may have a different view.

9 THE COURT: All right.

10 MR. BUTLER: They are, to be perfectly frank with the
11 Court, pretty worn out.

12 THE COURT: All right. Thank you very much.

13 MR. BUTLER: Thank you, Your Honor.

14 THE COURT: All right. I know that there was a -- the
15 Relators had filed a Partial Motion to Strike or, in the
16 alternative, Motion for Permission to File Surreply to Wells
17 Fargo Bank's New Rule 41 Motion. And that was filed because
18 the -- as I -- the Rule 41 argument was a new argument raised in
19 the response filed by Wells Fargo. As all the briefs have
20 already been done, I'm just going to allow the new brief to be
21 filed rather than the surreply brief to be filed, which is at
22 document 418.

23 Now, there may have been some misunderstanding when
24 counsel spoke to Ms. McConochie about some outstanding motions.
25 Is there -- was there some issue about a motion for a protective

1 order?

2 MR. PEAK: No, Your Honor.

3 THE COURT: All right. Okay. Now, we have MIC's
4 motion in front of us -- me as well in which I've read the
5 argument on. I'm just -- but I have to say that I am confused as
6 to what MIC is now saying it wants, after having read the
7 Government's brief. And I'm also confused that you never -- that
8 why MIC never got together with the Government to discuss what
9 you wanted when that offer was made.

10 MR. KIEVAL: Your Honor, briefly, we have --

11 THE COURT: Can you just come up, because we don't have
12 the best sound system here.

13 MR. KIEVAL: Yes, Your Honor. Briefly, to address the
14 Court's point, Mortgage Investors -- I did confer with the
15 Government at length prior to filing the motion. We have,
16 however, also continued to confer since that time including
17 today, and I believe that the Government and Mortgage Investors
18 have reached an understanding that we'd like to present to the
19 Court --

20 THE COURT: All right.

21 MR. KIEVAL: -- concerning how to proceed with this
22 motion. And Mr. Wynn can correct me if I'm wrong, or I guess we
23 could address the Court together.

24 THE COURT: All right. Very good.

25 MR. WYNN: Yes, Your Honor. Our arguments on the MIC

1 motion are fully set forth in our brief and we stand by those
2 arguments. However, in the interest of reaching an
3 accommodation, we have agreed, subject to the Court's order, to
4 provide MIC with copies of the docket sheet which would include
5 the entries under seal. We also have no problem giving them
6 copies of the sealing orders and the notices of motions with
7 respect to extension of the seal.

8 THE COURT: Tell me what you just said, the last item
9 that you said you didn't have any objection to.

10 MR. WYNN: The notices that went out to Relators of
11 when the Government files extensions of the seal.

12 THE COURT: All right.

13 MR. WYNN: We'll let them review those. We want them
14 to be subject to the existing protective order in the case. And,
15 then, they want two weeks to review the docket sheet in order to
16 figure out if they want to ask the Court to allow them access to
17 other documents. We are not waiving our right to object to their
18 request for additional documents. Our position is there is no
19 reason to disclose Government work product in response to that
20 motion.

21 MR. KIEVAL: And, Your Honor, we -- without waiving any
22 of our arguments, not having seen the docket sheet presents a
23 principal difficulty for us. And seeing it, we've agreed that --

24 THE COURT: All right.

25 MR. KIEVAL: -- that if we are going to, we would

1 notify the Court and the parties within two weeks of receiving
2 the docket sheet and the other documents whether we continue to
3 seek additional documents subject to this motion or whether the
4 motion is resolved.

5 THE COURT: All right. So, the motion remains open
6 pending your notification to the Court in two weeks?

7 MR. KIEVAL: That -- yes, Your Honor. But we do
8 believe that there would need to be a court order --

9 THE COURT: Right.

10 MR. KIEVAL: -- permitting the disclosure of these
11 materials.

12 THE COURT: All right. Well, that's acceptable. Let
13 me just say with -- hopefully not breaching any seal myself, that
14 typically all of the submissions of the Government in this case,
15 which I have looked at, though I was not the presiding judge, are
16 remarkably bland and uninformative, so.

17 MR. WYNN: I accept that, Your Honor. Thank you.

18 MR. KIEVAL: Thank you, Your Honor.

19 MR. BUTLER: Your Honor, can we get a copy of whatever
20 is provided to Mortgage Investors?

21 THE COURT: Certainly.

22 MR. WYNN: No objection.

23 MS. WILLIAMS: And, Your Honor, I was going to ask the
24 same for Wells Fargo.

25 MR. WYNN: That's fine.

1 THE COURT: All right. And I only say that so that
2 given all the energies in this case that were spent, that's
3 probably one of the less problem -- likely fruitful ones, but you
4 have to make that decision yourself, obviously, and are entitled
5 to make that yourself.

6 If any of the parties have some additional authority,
7 whether on the issue of -- the sanctions issue, the
8 proportionality issues that I raised, the compensatory purposes
9 of the -- of any sanction award or on any of the substantive
10 issues that you want me to consider, I would ask you to file that
11 by next Tuesday. I'm not looking for a brief. I just -- if you
12 have any authority.

13 MS. WILLIAMS: Your Honor, I apologize. I just didn't
14 hear the trail end of that. So one could send in cites, but no
15 argument?

16 THE COURT: That's right.

17 MS. WILLIAMS: Okay.

18 THE COURT: If I could have rendered a decision from
19 the bench, I would have, so I could have also -- more
20 productively also addressed the amendment and the request for the
21 five interrogatories. But I think that I -- I can easily address
22 that in writing. I wasn't looking for argument. I understood
23 that Relators' counsel had some document you wanted me to look at
24 in connection. Tell me what the document is.

25 MS. MAY: Yes, Your Honor. And it's just something,

1 whether you want it or not. I prepared a notebook that had some
2 of the information that I was prepared to discuss in argument
3 today, which were some of the exhibits and some additional
4 documents. It's a small notebook.

5 THE COURT: Nothing's small in this case.

6 MS. MAY: It's a smallish notebook, and it's got some
7 documents that are tabbed and highlighted. I have a copy for --

8 THE COURT: What is the nature of the documents?

9 MS. MAY: Basically it's got some -- Wells Fargo's
10 internal documents that deal with reasonable and customary fees.
11 And it shows that Wells Fargo internally had a methodology in
12 place for determining when title fees were excessive and exceeded
13 the reasonable, customary amount. So, I've got a copy for the
14 Court and also one for Wells Fargo and the Government. To the
15 extent that the Court would like it, it's here, but I'll just
16 leave that up to you if you would like me to leave a copy with
17 you or not.

18 THE COURT: So this is evidence in support of the
19 requested amendment?

20 MS. MAY: Yes, Your Honor.

21 THE COURT: Are there objections to its submission?

22 MS. WILLIAMS: Yes, they are, Your Honor.

23 THE COURT: All right. And what's the grounds?

24 MS. WILLIAMS: Well, I haven't seen it, and so we'd
25 want a chance to make our own submissions. But the bigger issue,

1 Your Honor, is using materials obtained in discovery to seek to
2 broaden the scope of the complaint this far into the case. I'd
3 want the opportunity to brief that. I think we have maybe two
4 sentences on it. But they submitted stuff in reply after our
5 response. So, if information like that's going to be submitted,
6 I'd like the chance to at least put in a one or two page brief on
7 the issue.

8 THE COURT: Well, I'm inclined not to have it only
9 because I know what I'm prepared to do, and I don't know that it
10 would be very helpful at this juncture, and I've thought about it
11 a good deal. So, I just want to -- I don't think it's necessary,
12 even though I hate to have burned up -- you have burned up those
13 trees.

14 MS. MAY: That's all, Your Honor.

15 THE COURT: So were there any sort of loose motions --
16 (An off-the-record discussion was had.)

17 THE COURT: And, then, Ms. Williams, you're going to
18 give me some evidentiary basis of -- regarding that 2011 date?

19 MS. WILLIAMS: Yes, Your Honor.

20 THE COURT: All right. Does the Government have
21 information about that 2011 date, because I'm not -- you know, I
22 have no basis for disputing that Ms. Williams said they learned
23 only in a meeting and that happened in 2011. It's just a little
24 odd when the docket shows to me that there was an unsealing --
25 you know, permission for unsealing in 2009.

1 MR. GALE: Let me try to address that, Your Honor. I
2 don't have information as I'm standing in front of you today. I
3 wasn't at the meeting that's being discussed. I -- and Assistant
4 U. S. Attorney Wynn will look into that. But just as a general
5 matter, the Government sometimes gets a seal lift and doesn't
6 always immediately go to each -- sometimes doesn't go immediately
7 to any defendant in a multi-defendant case. Sometimes we'll wait
8 until another portion of the investigation is finished before
9 doing that, and sometimes goes to defendants in different orders.
10 So, it would not be completely out of the realm of possibility
11 that a partial lift seal order was granted at date X and then the
12 defendant or a defendant doesn't learn about that case until date
13 X plus some period of time.

14 THE COURT: All right. Is there -- do the Relators in
15 any way contend that they -- that counsel advised Mr. Bibby and
16 Mr. Donnelly when the partial seal was formally lifted? Would
17 they have known that?

18 MR. BUTLER: Would the Relators have known?

19 THE COURT: Well, I know that counsel -- I know that
20 counsel would have known.

21 MR. BUTLER: That was two years before we got in the
22 case.

23 THE COURT: I understand that.

24 MR. BUTLER: I will have to ask Mr. Wilbanks. The
25 question is did the Relators know back in May of 2011?

1 THE COURT: That's right.

2 MS. WILBANKS: Your Honor --

3 THE COURT: Let me just give Mr. Wilbanks permission to
4 come up and do this as he was counsel at that time and --

5 MR. WILBANKS: Yes. Good afternoon, Your Honor.

6 I would -- I'd just have to say from speculation that
7 I'm sure that I would have told the Relator when that was
8 entered, because you always want the Relator to know when there's
9 going to be a partial lifting of the seal because that's going to
10 be the time ostensibly when the defendant finds out about it.
11 And routinely -- I can't say for sure in this one, and if Mr.
12 Caldwell was here, he could back this up. Routinely, that
13 partial lifting of the seal, there would be a dialogue with the
14 DOJ where there'll be some redactions if there's any concern that
15 the defendant might know who the relator is or that. In this
16 case I can't remember, but I'm sure I would have told my client
17 there was a partial lifting of the seal.

18 THE COURT: All right. Thank you.

19 Is there anything else any of the parties wants me to
20 consider at this time?

21 MR. WYNN: Your Honor, I would make one final point. I
22 don't mean to be too contentious, but to the extent the Relators,
23 who are recent millionaires, are pleading poverty and talking
24 about --

25 THE COURT: You have to come up. I don't know that

1 they're pleading poverty. I hope not.

2 MR. WYNN: To the extent -- I'm sorry, Your Honor. To
3 the extent that they are pleading poverty and talking about tax
4 burden in connection with the potential sanction, it might be a
5 good idea to have financial statements in addition to the counsel
6 fee papers submitted in chambers.

7 THE COURT: All right. Well, I'll consider that. I
8 don't know that it's necessary. I can see what they would have
9 gained, and I doubt that that was a creative suggestion that the
10 Government proposed, you know, how it -- whether I decide to go
11 that way is one question, and then if I -- instead of dismissal.
12 And secondly, how I use that as a baseline for determining how to
13 proceed is another. But I thought it was a useful suggestion,
14 and I appreciate the Government's having made it.

15 MR. WYNN: Thank you, Your Honor.

16 MR. BUTLER: Is the request from the Government that
17 the Relators submit financial statements to the Court?

18 THE COURT: That was a suggestion. And I don't know
19 that it's necessary, unless you're -- unless the Relators are --
20 are in fact making a contention that they do not have the
21 financial resources.

22 MR. BUTLER: To quote Mr. Wynn, Your Honor, "the
23 Relators do not plead poverty." He referred to them as
24 millionaires. I ask the Court to take notice that -- of what
25 we've confronted in this case because I think that's relevant to

1 the Court's decision. We have got neither cooperation by the VA
2 and this mocking hostility from the Department of Justice.
3 Respectfully, as a taxpayer I find it disturbing.

4 THE COURT: Well --

5 MR. WYNN: Your Honor --

6 THE COURT: -- I'm -- we're not going to have a
7 conversation about that. I'm not -- I think that the Department
8 of Justice has -- is entitled to make its arguments as are you.
9 I'm not going to impute that as a reflection on what happened
10 with the 18 or -- plus or minus extensions in the case of the
11 seal. I will say in general -- I know that Mr. Wilbanks knows
12 this because I think he's counsel on some other cases in front of
13 me -- is it's a bedeviling issue about the extensions since all
14 of you deal with these issues, because one -- as a judge, I want
15 the Government to have every opportunity to do a proper
16 investigation, and at the same time, it can take sometimes too
17 much time. And so I have -- my own practice now in this court is
18 to have a lot of status conferences and to really try to manage
19 them.

20 Having inherited a lot of these cases from other judges
21 when I came on, and seeing how -- what would happen -- and that's
22 no criticism of them. I think people had extraordinary caseloads
23 and that's what happens, and probably some people in the Justice
24 Department did, too. But qui tam cases as a whole obviously are
25 still done in the public interest and should be handled in all

1 respects in a manner that is consistent with the public interest
2 and the integrity of the judicial process.

3 I thank everyone for all the preparations and all of
4 the -- your willingness and capacity to be available at a
5 moment's notice. And we'll look for your authority and try to
6 get out a decision before July 4th. And that decision, one way
7 or the other, will also dispose of the issue of the Motion to
8 Amend and the five interrogatories.

9 Let me ask you this question. Is anything happening
10 right this moment on discovery or has the case ground to a halt
11 in terms of work?

12 MS. WILLIAMS: Your Honor, we have concluded our
13 production of documents, of ESI documents. We were able to send
14 out the last round just recently. We are on the finishing
15 touches of a substantial privilege log as well as a substantial
16 log of the nonresponsive documents. That turned out to be very,
17 very time consuming because of the need to describe the general
18 nature of each of those documents. And that should be going out
19 in the next week or so. And then we'll be supplementing our
20 discovery responses.

21 But from our perspective, that's where that stands. I
22 had held off seeking some information informally from the VA
23 until we saw where we stood in connection with the case and had
24 held off taking some other actions until we saw where we stood in
25 the case.

1 THE COURT: And is there a issue about supplementing
2 the discovery responses?

3 MS. WILLIAMS: Well, what we were going to do is
4 supplement the discovery responses once we were done with
5 document production, because what we didn't want to do is
6 supplement discovery responses and then discover more documents
7 and have to supplement again. So, we wanted to do it in one fell
8 swoop and it's -- again, there are a lot of interrogatories.
9 We're being very thorough about it so it's taking longer than I
10 thought that it would. It's a matter of taking into account,
11 making sure we have done all the right searches so that we
12 understand what's in the 50,000 particularly ESI documents.

13 THE COURT: All right.

14 MS. WILLIAMS: So that's what's underway right now.

15 THE COURT: And Relators? From your perspective, is
16 discovery proceeding in your work on the case?

17 MR. BUTLER: No, Your Honor. We've been pretty well
18 dead in the water for three months as a result of this -- these
19 motions. And pending the Court's decision, we probably ought to
20 remain in that status.

21 THE COURT: All right.

22 MR. KIEVAL: Your Honor, with respect to Mortgage
23 Investors, we -- there's been some third-party discovery with
24 respect to USFS and I believe another -- another party. The
25 concern that we have as the Court considers what to do with

1 discovery going forward is that we don't have the list of loans
2 and the reasons for the loans that are at issue in this case, the
3 reasons why those loans are allegedly at issue. And we need to
4 be able to defend ourselves based on that knowledge. And, so, I
5 just ask the Court to take that into consideration as we move
6 forward.

7 I'm happy to discuss more in depth if the Court is
8 inclined to extend discovery at this point, or at the appropriate
9 time in the near future if the Court wants to await decision on
10 these motions.

11 THE COURT: All right.

12 MR. BUTLER: Your Honor, there are significant
13 discovery issues with respect to MIC that have got to be teed up
14 for consideration at some point. One is the -- and Ms. May needs
15 to respond to what the gentleman from MIC just said. The other
16 is we've requested financial information for MIC, because they've
17 gone out of business. They were trying to sell the company. And
18 without getting into a lot of detail now because there's no
19 decision pending from the Court, there's an open question of --
20 pending receipt of financial information about what their status
21 is.

22 THE COURT: All right.

23 MR. BUTLER: But Ms. May can respond to the issue
24 about -- that the gentleman just raised.

25 MR. KIEVAL: Your Honor, this is the first time I'm

1 hearing of this, but I do -- and I apologize. I do want to note
2 that we would strenuously object to the characterization in the
3 motion for extension of discovery that references over 270,000
4 loans with respect to the issue of HUD-1s because those are loans
5 originated, not claims. The numbers are not those numbers. And,
6 again, we would be happy to address that at the appropriate time.

7 MS. MAY: And, Your Honor, the only extra thing that
8 I'll add is that we have a very serious issue with MIC not
9 retaining many of its loan files and it is missing many of the
10 loan files for us to review. That issue is not obviously before
11 the Court, but that is a very serious issue that at some point
12 we're going to have to get the Court's input on.

13 THE COURT: All right. Well, if the Relators remain a
14 party in this case, we'll figure out how you can properly get the
15 issue in front of me with all the information necessary.

16 Would the Government and MIC mind preparing a proposed
17 court order on those documents that you've agreed can be lifted
18 on the seal?

19 MR. WYNN: I will do that, Your Honor.

20 THE COURT: Thank you very much.

21 All right. Anything else?

22 MR. BUTLER: Have a great evening.

23 THE COURT: Have fun going into 5:00 traffic.

24 MS. WILLIAMS: Thank you, Your Honor.

25 (End of proceedings.)

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
CERTIFICATE OF REPORTER

I do hereby certify that the foregoing pages are a true and correct transcript of the proceedings taken down by me in the case aforesaid.

This the 16th day of June, 2014.

ELISE SMITH EVANS, RMR, CRR
OFFICIAL COURT REPORTER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

_____)	
)	
Plaintiff(s))	
)	Case No. _____
V.)	
)	
_____)	
Defendant(s))	

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Date	Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

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)	
<u>USA, ex rel., Victor E. Bibby, Brian J. Donnelly,</u>)	
Plaintiff(s))	
)	
)	
VS.)	Case No. <u>1:12cv4020-AT</u>
)	
)	
<u>Wells Fargo Bank, N.A., et al.,</u>)	
Defendant(s))	
)	

VERIFICATION OF FINANCIAL ARRANGEMENTS

Proceeding Type: Motions proceeding

Proceeding Date: 6/11/2014

Volume Number: _____

Date Transcript Filed: 6/17/2014

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Paris A. Wynn, Michael Y. Kieval

6/18/2014
Date

Elise Evans
Court Reporter