IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiff paints this case as having "extraordinary" implications for the balance of power among the branches of our government. In fact, it is easily resolved by well-established legal principles. To begin, the executive branch's enforcement decisions, including the decision to settle, are presumptively unreviewable. Plaintiff falls far short of rebutting that presumption here. Although Congress may limit the Attorney General's settlement power through a "clear and unambiguous" statutory directive, Plaintiff identifies no such directive. Its principal argument — that Section 951 of FIRREA bars the Attorney General from imposing an administrative fine — fails because the settlement was a contract between willing parties. The settlement did not "impose" anything on JPMorgan, administratively or otherwise.

Plaintiff's separation of powers claim is a naked attempt to dress its statutory claims in constitutional garb. Defendants' opening brief showed that the decision whether to initiate an enforcement action is constitutionally committed to the executive branch under Article II. Thus, the executive's decision to settle a dispute — and thereby end any case or controversy justiciable under Article III — does not intrude on the judicial power. Plaintiff ignores these arguments, save for a footnote. It cites no case even hinting that an agency's decision to settle undermines the judicial power. And Plaintiff's assertion that this case is an "extraordinary" one hardly warrants jettisoning these principles on an ad hoc basis. Such a nebulous standard would provide no manageable line for the executive to follow or the Court to enforce.

But the Court need not reach these issues, for Plaintiff's claims fail for a more basic reason: lack of standing. Plaintiff has an abstract policy concern, not a cognizable injury. Even if the settlement does not match Plaintiff's policy preferences, nothing in it prevents Plaintiff from pursuing its mission "to promote settlements" that do, and Plaintiff fails to show that any alleged expenditures prompted by the settlement exceeded its normal operating costs or diverted

it from its mission. Moreover, Plaintiff offers only speculation that its injuries would be redressed if the settlement were invalidated, given the uncertainty whether DOJ would file suit or could again come to terms with JPMorgan.

To be sure, Plaintiff firmly disagrees with the Attorney General's exercise of his enforcement discretion. But it was not concretely harmed by it. That is the classic generalized grievance — not a case or controversy over which the Court has jurisdiction.

ARGUMENT

I. THE COURT LACKS JURISDICTION BECAUSE PLAINTIFF LACKS STANDING.

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

A. Plaintiff Fails To Establish Any Cognizable Injury.

Defendants' opening brief established that none of the varieties of injury asserted in the complaint amounts to a cognizable injury sufficient to support standing. Plaintiff's opposition casts no doubt on that conclusion.

Plaintiff begins by acknowledging that, to establish organizational standing, it must show not only a direct conflict with its mission, but also that its activities have been impeded. Pl.'s Opp'n 25. Despite its lengthy regurgitation of allegations from the complaint, it fails to do so. Plaintiff reiterates that its mission is to "'advocate[] for greater transparency, accountability, and oversight in the financial system,'" id. at 26 (quoting Compl. ¶ 26), and insists that the terms of the settlement fail to live up to its policy ideals, id. at 26-29. But, critically, it never identifies any concrete way in which the challenged conduct — DOJ's decision to settle its claims against JPMorgan — actually disrupted Plaintiff's day-to-day activities.

Cribbing from its informational injury argument, Plaintiff suggests that its activities were

impaired because the settlement "deprived" it of information it would like to have, such as a complaint and a judicial assessment of the settlement. Pl.'s Opp'n 27-29. But even if the settlement does not match Plaintiff's policy preferences, nothing in it prevents Plaintiff from pursuing its mission "to promote settlements" that do. Plaintiff's ability to carry out its mission was thus the same the day after the settlement was signed as it was the day before.

Plaintiff's reliance on Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), is therefore misplaced. See Pl.'s Opp'n 24-25. In that case, the Supreme Court held that the defendant's "racial steering" violated the Fair Housing Act, and directly interfered with the plaintiff organization's "ability to provide counseling and referral services for low-and moderate-income home-seekers." Id. at 379-80. But "Havens Realty . . . [is] distinguishable from the present case because [it] involved organizations which suffered concrete injury due to their inability to provide a service to their members." U.S. Women's Chamber of Commerce v. U.S. Small Bus. Ass'n, No. 04-1889, 2005 WL 3244182, at *6 (D.D.C. Nov. 30, 2005). Here, by contrast, Plaintiff makes no showing that the challenged conduct resulted in any "'inhibition of [its] daily operations.'" Id. (citation omitted).

Second, Plaintiff fails to show that any expenditures made in response to DOJ's decision to settle went beyond its normal operating costs or diverted it from its mission. Pl.'s Opp'n 30-32. Although Plaintiff argues that it has been "forced to expend resources advocating on its website and through the media" to "neutralize the harmful effects of DOJ's actions," id. at 30, it identifies no such "expenditures" other than the seven blog entries, press releases, or interviews listed in Defendants' opening brief, see Defs.' Br. 14-15 nn.4-6. It appears to concede that three of those "expenditures" simply advertise this lawsuit and are properly considered litigation expenses, see Pl.'s Opp'n 31, which cannot support standing, see Defs.' Br. 14 (citing, inter alia, Nat'l Taxpayers Union, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (an "'organization cannot . . .

manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit")). As for the others, Plaintiff makes no showing that they were for "'operational costs beyond those normally expended' to carry out its advocacy mission." Nat'l Ass'n of Home Builders v. EPA, 667 F.3d 6, 12 (D.C. Cir. 2011) (citation omitted).

Plaintiff thus fails to establish that it has "'divert[ed] significant time and resources from its core activities,'" Conservative Baptist Ass'n of Am., Inc. v. Shinseki, — F. Supp. 2d —, No. 1301762, 2014 WL 2001045, at *5 (D.D.C. May 16, 2014) (citation omitted), or that the settlement "forced [it] to expend resources in a manner that keeps [it] from pursuing its true purpose of monitoring the government's . . . practices," Nat'l Taxpayers Union, 68 F.3d at 1434. Rather, any resources Plaintiff expended "were in the normal course of [its] operations, and it cannot convert its ordinary activities and expenditures . . . into an injury-in-fact." Conservative Baptist Ass'n, 2014 WL 2001045, at *5 (citation omitted).

Third, Plaintiff's argument that "FIRREA creates a statutory right to information" sufficient to establish informational standing is meritless. "Informational standing arises 'only in very specific statutory contexts' where a statutory provision has 'explicitly created a right to information.'" Ass'n of Am. Physicians & Surgs., Inc. v. FDA, 539 F. Supp. 2d 4, 15 (D.D.C. 2008) (citation omitted). For example, in Havens Realty, informational standing was based upon two provisions of the Fair Housing Act. 455 U.S. at 373. The first made it unlawful "[t]o misrepresent the availability of a dwelling for rent or sale to any person on the basis of race, color, religion, sex, or national origin." Id. at 373 (quoting 42 U.S.C. § 3604(d)). The second made that right enforceable through the creation of an "explicit cause of action." Id. (citing 42 U.S.C. § 3612(a)). Congress thus "conferred on all 'persons' a legal right to truthful information about available housing." Id.

Similarly, in Federal Election Commission v. Akins, 524 U.S. 11 (1998), informational

standing was grounded in the specific provisions of the Federal Election Campaign Act. That Act required "political committees" to comply with "extensive recordkeeping and disclosure requirements," such as filing "reports that include lists of donors giving in excess of $200 per year." Id. at 14-15 (citing §§ 432-34 of the Act). The purpose of these disclosures was "to help voters understand who provides which candidates with financial support." Id. at 20. And the Act provided that "'any person who believes a violation of this Act . . . has occurred, may file a complaint with the Commission,'" and, if that complaint is dismissed, "'may file a petition' in district court seeking review." Id. at 19 (quoting § 437g(a)(1), (8)(A) of the Act).

Plaintiff's reliance on American Society for Prevention of Cruelty to Animals v. Feld Entertainment, Inc., 659 F.3d 13 (D.C. Cir. 2011), does not advance its cause. In that case, the organizational plaintiff sued under Section 9 of the Endangered Species Act, which prohibits the "taking" of an endangered animal without a permit, but asserted standing under Section 10(c), which requires the public disclosure of information in permit applications. Id. at 17, 22. The D.C. Circuit rejected that theory because Section 9 did not "directly entitle" the plaintiff to any information, and the defendant had not submitted a permit application triggering the disclosure requirements of Section 10(c). Id. at 23. The court noted, however, that if the defendant later did submit a permit application, and the agency refused to make the information public, then the plaintiff "might have informational standing to bring suit for violations of section 10." Id. Following Feld, this Court has held that a violation of Section 10(c) will support informational standing. Safari Club Int'l v. Salazar, 281 F.R.D. 32, 41-42 (D.D.C. 2012) (Howell, J.).

However, like the statutes in Havens Realty and Akins, Section 10(c) of the Endangered Species Act explicitly creates a public right to information. It provides that "[t]he Secretary shall publish notice in the Federal Register of each application for an exemption or permit which is made under this section. . . . Information received by the Secretary as a part of any application

shall be available to the public as a matter of public record at every stage of the proceeding." 16 U.S.C. § 1539(c). The purpose of this provision is to "allow interested parties to comment on and assist the Secretary's evaluation of permit applications." Feld, 659 F.3d at 24. And the Act includes a "a citizen-suit provision [that] permits 'any person' to commence a civil suit to enjoin alleged violations of the Act." Id. at 19 (quoting 16 U.S.C. § 1540(g)(1)).

In each of these cases, the underlying statute "explicitly create[s] a right to information." Ass'n of Am. Physicians, 539 F. Supp. 2d at 15. Section 951 of FIRREA does no such thing. It does not speak of information or disclosure. It does not mention the public. And it does not create a private right of action. It provides only that, if a civil action is filed, then it must be by the Attorney General. 12 U.S.C. § 1833a(e). In short, Plaintiff's "overly expansive interpretation of the concept of informational standing" should be rejected. Am. Farm Bureau v. EPA, 121 F. Supp. 2d 84, 98 (D.D.C. 2000) (collecting cases).

Fourth, Plaintiff's claim of procedural standing is a nonstarter. "Not all procedural-rights violations are sufficient for standing; a plaintiff must show that 'the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.'" Ctr. for Law & Educ. v. Dep't of Educ., 396 F.3d 1152, 1157 (D.C. Cir. 2005) (citation omitted). Accordingly, organizational plaintiffs must show that the procedures in question were "designed to protect 'some threatened concrete interest of' the organizations" themselves. Id. That is a high bar that Plaintiff cannot meet, and the Court need not look further than Center for Law & Education to see why. In that case, several organizations challenged the makeup of a rulemaking committee convened under the No Child Left Behind Act, id. at 1153, which required the agency to:

> select individuals to participate in such process from among individuals or groups that provided advice and recommendations . . . in such numbers as will provide an equitable balance between representatives of parents and students and representatives of educators

and educational officials.

Id. at 1157 (quoting 20 U.S.C. § 6571(b)(3)(B)). The D.C. Circuit soundly rejected the organizational plaintiffs' claim of procedural standing, explaining that, although the statute mentions parents, students, educators, and education officials, "[n]owhere does the Act make mention of advocacy organizations' interests." Id. Indeed, even if the organizations could be considered "representatives" of parents and students, "the interests to be protected are those of the parents and students, not of the organizations." Id.

Here, even if Plaintiff were correct that Section 951 of FIRREA requires the Attorney General to file a civil action — and it is not — it cannot conceivably show that that provision was "designed" to protect the interests of advocacy organizations, given that it makes no "mention" of their interests. See id. In any event, Plaintiff alleges no cognizable procedural injury because, as explained in Defendants' opening brief, it has no legally protected "right" to intervene or participate as an amicus, or to obtain the information it seeks. Defs.' Br. 17.

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

Plaintiff argues that, to establish standing, it is enough to show that it is merely "possible" or "conceivable" that the relief sought will redress its alleged injuries. Pl.'s Opp'n 39. That is incorrect. It is well established that a plaintiff generally must show that it is "'likely,' as opposed to merely 'speculative,' that [its] injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).[1] Plaintiff cannot meet this burden.

Plaintiff concedes that, if the settlement were invalidated, it is entirely "possible" that

[1] To be sure, "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability,'" and has standing "if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." Massachusetts v. EPA, 549 U.S. 497, 517-18 (2007) (citation omitted). But this is not such a case, for Plaintiff has established no procedural right here. See supra at 6-7.

DOJ could determine not to file a lawsuit, or that the parties might fail to reach a meeting of the minds on a proposed consent decree. Pl.'s Opp'n 39. But it argues that these possibilities are "unrealistic" because DOJ has "pecuniary" and "reputational" interests in pursuing its claims against JPMorgan. Id. at 40. Such speculation cannot satisfy the requirements of Article III.

Plaintiff asks the Court to set aside the settlement and to enjoin DOJ from enforcing it "unless and until" it is submitted to a court for approval. Compl. ¶ 130(a)-(b). Plaintiff would have a reviewing court conduct a wide-ranging inquiry into DOJ's decisionmaking process, including the contours of the investigation, the conclusions reached by the government, and what areas were bargained away during settlement negotiations and why. Defs.' Br. 33-34 (citing Compl. ¶ 67). Moreover, as a condition of settlement, Plaintiff would require JPMorgan to admit liability. Id. (citing Compl. ¶ 67(m)). If the Court were to endorse Plaintiff's theory, there is no telling how DOJ and JPMorgan would weigh their respective interests, or how their recalculations would affect the possibility of suit or settlement.

Any proposed consent decree would, of course, require JPMorgan's assent, and "[w]hen redress depends on the cooperation of a third party, 'it becomes the burden of the [plaintiff] to adduce facts showing that those choices have been or will be made in such manner as to . . . permit redressability of injury.'" U.S. Ecology, Inc. v. U.S. Dep't of Interior, 231 F.3d 20, 24-25 (D.C. Cir. 2000) (citation omitted). Equally problematic for Plaintiff is its concession that DOJ has no obligation to file a complaint. See Compl. ¶ 90 (acknowledging that "DOJ may have the authority to decide whether to bring an enforcement action in the first instance"); cf. Wilderness Soc'y v. Norton, 434 F.3d 584, 591 (D.C. Cir. 2006) (order requiring agency to forward its recommendations would not redress plaintiff's injuries where "Congress has no obligation to . . . act upon them").

At bottom, "any inquiry into whether Plaintiff's [alleged] injuries are redressable by this

Court would involve substantial guesswork." Peterson v. Bd. of Govs. of Fed'l Reserve Sys., — F. Supp. 2d —, No. 14-1053, 2014 WL 2810559, at *2 (D.D.C. June 20, 2014). The Court should decline Plaintiff's invitation to play this guessing game.

II. DOJ'S DECISION TO ENTER INTO A SETTLEMENT AGREEMENT IS IMMUNE FROM JUDICIAL REVIEW

Defendants' opening brief established that an executive branch agency's decision to enter into a settlement agreement is presumptively unreviewable. Plaintiff's opposition offers nothing to overcome that presumption.[2]

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

Under Heckler v. Chaney and its progeny, an agency's decision to enter into a settlement agreement is presumptively unreviewable. Defs.' Br. 19-21 (citing Heckler v. Chaney, 470 U.S. 831 (1985)). In short, Chaney held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is . . . generally committed to agency discretion" and

[2] Defendants note that their opening brief described the presumption of nonreviewability as a jurisdictional issue warranting dismissal under Rule 12(b)(1), based on a line of D.C. Circuit precedent explicitly so holding. See Defs.' Br. 20 (citing Baltimore Gas & Elec. Co. v. FERC, 252 F.3d 456, 458 (D.C. Cir. 2001) ("The ban on judicial review of actions 'committed to agency discretion by law' is jurisdictional."); see also Ass'n of Irritated Residents v. EPA, 494 F.3d 1027, 1030 (D.C. Cir. 2007); N.Y. State Dep't of Law v. FCC, 984 F.2d 1209, 1220 (D.C. Cir. 1993). Defendants have since become aware of a conflicting line of precedent dismissing claims seeking review of actions "committed to agency discretion" under Rule 12(b)(6). In Sierra Club & Valley Watch, Inc. v. Jackson, 648 F.3d 848 (D.C. Cir. 2011), the D.C. Circuit recognized this conflict, and clarified that "a complaint seeking review of agency action 'committed to agency discretion by law,' 5 U.S.C. § 701(a)(2), has failed to state a claim under the APA, and therefore should be dismissed under Rule 12(b)(6), not under the jurisdictional provision of Rule 12(b)(1)." Id. at 854.

As a practical matter, this distinction makes no difference here. Because the record supports dismissal under the presumption of nonreviewability, the Court may dismiss Plaintiff's claims on that basis under Rule 12(b)(6). Peckmann v. Thompson, 966 F.2d 295, 297 (7th Cir. 1992) ("If a defendant's Rule 12(b)(1) motion is an indirect attack on the merits of the plaintiff's claim, the court may treat the motion as if it were a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted."); see also Sierra Club, 648 F.3d at 854; Malloy v. Ass'n of State & Terr. Solid Waste Mgmt. Officials, 955 F. Supp. 2d 50, 54 (D.D.C. 2013); Highland Renovation Corp. v. Hanover Ins. Grp., 620 F. Supp. 2d 79, 82 (D.D.C. 2009).

is therefore "presumed immune from judicial review." 470 U.S. at 831-32. The D.C. Circuit has squarely "held that the Chaney presumption of nonreviewability extends not just to a decision whether to bring an enforcement action, but to a decision to settle." Baltimore Gas, 252 F.3d at 459. And while that presumption is not irrebuttable, the burden of establishing "an exception to Chaney" falls on the plaintiff. Block v. SEC, 30 F.3d 1078, 1082 (D.C. Cir. 1995). Plaintiff fails to meet that burden.

Plaintiff argues that, on the contrary, under the APA there is "strong presumption of reviewability" that Defendants have "failed to overcome." Pl.'s Opp'n 8. That misstates the law. To be sure, the APA grants a cause of action to those aggrieved by agency action, 5 U.S.C. § 702, and in that sense can be said to establish a general presumption of reviewability of agency action. But the APA withdraws that cause of action — and any presumption of reviewability — "to the extent that . . . agency action is committed to agency discretion by law." Id. § 701(a)(2). Chaney places agency enforcement decisions in this latter category, holding that such decisions are "presumed immune from judicial review under § 701(a)(2)." 470 U.S. at 831-32. Thus, the APA's general presumption of reviewability does not apply in the specific context of agency enforcement decisions. Instead, in such cases, Chaney establishes a presumption of nonreviewability, which it is Plaintiff's burden to overcome.

The cases cited by Plaintiff do not come close to rebutting this presumption, as they deal not with agency enforcement decisions, but with alleged failures to obey statutory mandates. For example, in Robbins v. Reagan, 780 F.2d 37 (D.C. Cir. 1985) (per curiam), the court considered whether the agency's decision to rescind funding for a homeless shelter was consistent with the purpose of the underlying statute, noting the "strong presumption that agency action outside of the enforcement arena is reviewable." Id. at 43, 47 & n.15 (emphasis added). In Delta Air Lines, Inc. v. Export-Import Bank, 718 F.3d 974 (D.C. Cir. 2013), the court weighed whether the

agency's decision to extend a loan guarantee to a foreign company took proper account of a statutory directive to consider the effect of the decision on domestic industries and jobs. Id. at 977. In COMSAT Corp. v. FCC, 114 F.3d 223 (D.C. Cir. 1997), the court asked whether the agency's revision of a regulatory fee schedule complied with statutory guidelines. Id. at 226-27. In Ramah Navajo School Board v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996), the court considered whether the agency's allocation of funds to Indian tribes was consistent with statutory requirements. Id. at 1344. And in In re Aiken County, 725 F.3d 255 (D.C. Cir. 2013), the court weighed whether the agency was required to meet a statutory deadline to issue a report. Id. at 257-58. Because these cases fall outside the context of agency enforcement decisions, they are inapposite here.[3]

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

In its opposition, Plaintiff attempts to establish only the first exception to the presumption of nonreviewability: that "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." Chaney, 470 U.S. at 833; see Pl.'s Opp'n 9-15. Plaintiff falls far short of meeting its burden.

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

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

Defendant's opening brief established that Congress has vested the Attorney General

[3] Indeed, in the portion of In re Aiken County to which Plaintiff cites, Judge Kavanaugh emphasized the distinction between cases concerning agency enforcement decisions, such as this one, and those concerning statutory mandates: Although "[p]rosecutorial discretion does not include the power to disregard . . . statutory requirements to issue rules, or to pay benefits, or to implement or administer statutory projects or programs," it does "encompass[] the Executive's power to decide whether to initiate charges for legal wrongdoing and to seek punishment, penalties, or sanctions against individuals or entities who violate federal law." 725 F.3d at 266 (opinion of Kavanaugh, J.) (internal citation omitted).

with plenary power to settle claims of the United States. This power is incident to the Attorney General's statutory authority to supervise litigation involving the federal government, 28 U.S.C. §§ 516, 519; Swift & Co. v. United States, 276 U.S. 311 (1928), and it unquestionably "includes the power to enter into consent decrees and settlements," United States v. Hercules, Inc., 961 F.2d 796, 798 (8th Cir. 1992). Plaintiff's claim in Count 2 that DOJ lacked any statutory authority to enter into the settlement agreement must therefore be dismissed. Defs.' Br. 22-23.

Plaintiff attempts to distinguish Swift and Hercules, arguing that those cases dealt with consent decrees, not settlement agreements, and thus the government did "what DOJ failed to do here: file a complaint." Pl.'s Opp'n 15. That is a distinction without a difference. As the D.C. Circuit has explained, "The lack of a complaint does not render inapplicable Chaney. . . . We find no principled reason to treat [an agency's] decision to secure compliance by settlement in lieu of litigation differently than its decision to initiate and subsequently settle litigation." Irritated Residents, 494 F.3d at 1035.

Notably, Plaintiff cites no case suggesting that the Attorney General lacks the authority to settle a claim falling under his supervision, see Pl.'s Opp'n 15, and we are aware of none. Thus, as courts have uniformly found in the wake of Swift, the Attorney General's settlement authority "is not diminished without a clear and unambiguous directive from Congress." Hercules, 961 F.2d at 798 (collecting cases).

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

Nothing in FIRREA contains any expression of congressional intent — let alone a "clear and unambiguous" one — to require the Attorney General to bring a civil action in any particular instance. Rather, the statute simply indicates that, if a civil action is brought, then it must be by the Attorney General (rather than another regulatory agency) and the penalty will be set by the

Court. Thus, Plaintiff's claim in Count 4 that Section 951 of FIRREA limits the Attorney General's settlement authority must be dismissed. Defs.' Br. 23-27.

Plaintiff's principal argument to the contrary is that the plain text of Section 951 requires "that a civil action (not an administrative action) to recover a FIRREA penalty must be commenced by the Attorney General." Pl.'s Opp'n 9 (emphasis Plaintiff's). In other words, Plaintiff argues, "FIRREA does not give DOJ discretion to impose the civil penalty administratively." Id. (emphasis added). But the flaw in Plaintiff's argument is plain. Here, DOJ did not "impose" a fine on JPMorgan, through an administrative action or otherwise. As Defendants have explained, the settlement agreement is a contract, one that the parties agreed was "not a final order of any court or governmental agency" and that they entered "freely and voluntarily." SA ¶¶ 18, 19; see Defs.' Br. 28-29.

The cases Plaintiff cites are not to the contrary. Only one deals with FIRREA, and none addresses the Attorney General's discretion to settle claims out of court. Plaintiff states that, in United States v. Meisinger, No. 11-896, 2011 WL 4526082 (C.D. Cal. Aug. 26, 2011), "DOJ itself . . . argued, and a court agreed, that the plain language of Section 1833a(a) requires a court to assess a FIRREA civil penalty." Pl.'s Opp'n 10. That mischaracterizes the government's argument. In Meisinger, the government brought a civil action to recover a FIRREA penalty. 2011 WL 4526082, at *1. The defendant moved to dismiss, arguing in part that FIRREA violates the Eight Amendment's prohibition on excessive fines. Id. at *2. The government contended that the defendant's Eighth Amendment argument was premature because the court had not yet assessed a penalty, and the court agreed. Id. at *5-6. But the government did not argue that FIRREA limits the Attorney General's discretion to settle claims, and the court did not so hold. See id.

The other cases Plaintiff cites are even further afield. In American Bus Association v.

Slater, 231 F.3d 1 (D.C. Cir. 2000), the agency promulgated a rule authorizing itself to levy administrative fines on bus companies that failed to provide boarding assistance to disabled passengers as required by the Americans with Disabilities Act. Id. at 2-3. The court invalidated the rule, holding that Congress intended fines to be recovered only through a civil action, and had not authorized such an administrative scheme. Id. at 5. Conversely, in United States v. Haun, 124 F.3d 745 (6th Cir. 1997), the agency in fact brought a civil action to recover a penalty for failure to register as a livestock dealer under the Packers and Stockyards Act, but the district court dismissed, believing that the government could simply impose an administrative fine. The Sixth Circuit reversed, agreeing with the agency that the statute did not authorize such an administrative scheme. But neither American Bus nor Haun has any application here because, as explained above, DOJ did not "impose" an administrative fine on JPMorgan. And neither case casts any doubt on an agency's discretion to settle claims out of court — a procedure that the D.C. Circuit has explained is commonplace: "Settlement without a court record is not uncommon in administrative law, because the agency may attempt negotiation before proceeding to court. If the parties succeed in negotiating a mutually agreeable resolution to the violations, the matter will not end up in court." Irritated Residents, 494 F.3d at 1035.

Plaintiff's selective reading of FIRREA's legislative history adds nothing to its claim. Plaintiff notes that, during the congressional hearings, the American Bankers Association submitted a statement supporting the Act's heavy fines "because they would be judicially, rather than administratively, imposed." Pl.'s Opp'n 12 (citation omitted; emphasis Plaintiff's). Putting aside the danger of inferring legislative intent from the statement of not even a single legislator, but of an industry group, cf. N. Col. Water Conservancy Dist. v. FERC, 730 F.2d 1509, 1518 (D.C. Cir. 1984) ("'[T]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.'") (citation omitted), this snippet gets Plaintiff nowhere because,

again, the settlement cannot be understood to "impose" anything on JPMorgan.

Plaintiff also attributes great significance to the fact that an earlier version of the provision that was ultimately codified at 18 U.S.C. § 1833a(e) stated:

> (d) Mode of Recovery. —The Attorney General may in a civil action recover a civil penalty under this section.

H.R. Rep. No. 101-54, Part I, at 255 (1989) (cited in Pl.'s Opp'n 12).[4] The enacted version, by contrast, stated:

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

12 U.S.C. § 1833a(e). Plaintiff contends that the replacement of "may" with "shall" was intended to require the Attorney General to bring a civil action, and to eliminate his power to settle claims out of court, see Pl.'s Opp'n 12, but it cites nothing in the legislative history to illuminate why this change was made. In fact, the legislative history undermines Plaintiff's argument. As Defendants have explained, both the Committee Report accompanying the earlier version of the bill and the Conference Report accompanying the enacted version indicate that the Attorney General is authorized, but not required, to bring a civil action. See Defs.' Br. 26-27.[5] Moreover, the Supreme Court and D.C. Circuit have consistently declined to attribute sweeping

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[4] Plaintiff also cites, albeit incompletely, a provision of the parallel Senate bill, S. 774, which stated in part: "The Attorney General may bring a civil action against any person who violates the provisions of this section." S. Rep. No. 101-19, at 261 (1989) (cited at Pl.'s Opp'n 12); see also id. at 262-70. The House bill discussed in the text, H.R. 1278, was passed in lieu of the Senate bill. Plaintiff cites nothing in the legislative history to explain why, let alone to suggest that the differences in the wording of this particular provision were a motivating factor.

[5] The Committee Report states: "This section authorizes the Attorney General to recover a civil penalty for conduct violating specified provisions of title 18, United States Code, involving financial institutions." H.R. Rep. No. 101-54, Part I, at 472 (1989) (emphasis added). Likewise, the Conference Report states: "Section 951 authorizes the Attorney General to bring a civil action to recover a civil penalty for conduct that violates any of 10 banking-related offenses in title 18 of the United States Code." H.R. Rep. No. 101-222, at 445 (1989) (emphasis added); see also H.R. Rep. No. 101-209, at 450 (1989) (earlier version of Conference Report containing same language).

meaning to such ordinary language, which is common throughout the criminal code, where the predicate offenses for Section 951 are codified, and where it is understood that prosecution of every offender is not required. See Defs.' Br. 25-26.

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

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

Defendants' opening brief established that 5 U.S.C. § 558(b) — which provides that "[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law" — adds nothing to Plaintiff's complaint. Because that provision merely restates existing law, it provides no independent limit on the Attorney General's settlement authority, and regardless, the settlement agreement cannot be understood to "impose" anything on JPMorgan. Thus, Plaintiff's claim in Count 5 that § 558(b) curtails the Attorney General's settlement discretion must be dismissed. Defs.' Br. 27-29.

Plaintiff makes no attempt to respond to this argument, and it should be treated as conceded. See, e.g., St. John v. Napolitano, — F. Supp. 2d —, No. 10-216, 2013 WL 5912526, at *22 n.16 (D.D.C. Nov. 5, 2013) (Howell, J.) ("'It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.'") (citation omitted).

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

The presumption of nonreviewability may also be overcome where an agency "refus[es]

. . . to institute proceedings based solely on the belief that it lacks jurisdiction." Chaney, 470 U.S. at 833 n.4. Defendants' opening brief showed that there is no such concern here, particularly given that DOJ has filed suit against other large banks for matters arising out of their RMBS practices. See Defs.' Br. 29. Plaintiff offers no response to this argument, and it should also be treated as conceded. See, e.g., St. John, 2013 WL 5912526, at *22 n.16.

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

Finally, the presumption of nonreviewability may be overcome where "the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." Chaney, 470 U.S. at 833 n.4 (citation omitted). Defendants' opening brief demonstrated that DOJ has adopted no such general policy, and that its decision to settle claims against a single bank cannot be considered abdication by any reasonable measure. Plaintiff fails to respond to this argument, and it, too, should be treated as conceded. See, e.g., St. John, 2013 WL 5912526, at *22 n.16.

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

Plaintiff's claim that that DOJ's decision to settle "without filing a lawsuit and seeking judicial review and approval" encroached on the judicial power, Compl. ¶ 105, is not colorable. In fact, the decision whether to initiate an enforcement action is constitutionally committed to the executive branch under Article II. Thus, the executive's decision to settle a dispute — and thereby end any case or controversy justiciable under Article III — does not intrude on the judicial power. There being no "colorable claim . . . that the agency's refusal to institute proceedings violated any constitutional rights" of Plaintiff, dismissal under the presumption of nonreviewability remains appropriate. Chaney, 470 U.S. at 838; see Defs.' Br. 32-38.

Plaintiff argues that its separation of powers claim is, in fact, colorable, and that dismissal under the presumption of nonreviewability is therefore inappropriate. Pl.'s Opp'n 16 (citing, inter alia, Webster v. Doe, 486 U.S. 592 (1988)). But Plaintiff's ipse dixit is not enough. As explained below, its separation of powers claim is nothing more than a repackaging of its statutory arguments in constitutional wrapping. Cf. De Araujo v. Gonzales, 457 F.3d 146, 154 (1st Cir. 2006) ("[A] petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking an . . . argument in constitutional garb . . . . To be colorable in this context . . . the claim must have some possible validity.") (citation omitted). Plaintiff cites no case even hinting that an agency's decision to settle a claim out of court undermines the judicial power, and we are aware of none.

Even if Plaintiff's separation of powers claim were colorable, however, it fails to state a claim for which relief may be granted, and should be dismissed on that basis under Rule 12(b)(6). See supra at 9 n.2 (citing, inter alia, Peckmann, 966 F.2d at 297).

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

Defendants' opening brief established that one of the principles animating Chaney's presumption of nonreviewability is that the decision whether to initiate an enforcement action is constitutionally committed to the executive branch, as both the Supreme Court and D.C. Circuit have explained. Thus, Plaintiff's theory — which would force the executive to file a lawsuit, and then have a reviewing court second-guess the terms of any consent decree — would infringe on the executive's exclusive power under Article II to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3; see Defs.' Br. 33-35 (citing Baltimore Gas, 252 U.S. at 459, and United States v. Microsoft Corp., 56 F.3d 1448, 1462 (D.C. Cir. 1995)).

Plaintiff addresses this argument only in a footnote. Pl.'s Opp'n 23 n.4. Although it acknowledges that "Microsoft held that the district court exceeded its authority by inquiring into

certain aspects of the settlement," Plaintiff appears to argue that such scrutiny is justified here because the "gaps" in the settlement agreement are "significantly more serious than those at issue in Microsoft." Id. And Plaintiff ignores Baltimore Gas entirely, including its warning that "Chaney's recognition that the courts must not require agencies to initiate enforcement actions may well be a requirement of the separation of powers commanded by our constitution," 252 U.S. at 459; indeed, Plaintiff continues to insist that it is "critical" here for DOJ to "file[a] complaint and a consent decree [with] the district court for approval." Id. Plaintiff's arguments cannot be squared with Microsoft or Baltimore Gas, which place these decisions within the exclusive province of the executive. See Defs.' Br. 33-35; see also SEC v. Citigroup Global Mkts., 752 F.3d 285, 297 (2d Cir. 2014) ("The exclusive right to choose which charges to levy against a defendant rests with the S.E.C.") (citing Microsoft and Chaney).

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

Defendants' opening brief also established that an agency's decision to settle a dispute does not intrude on the judicial power. In short, because a "court's authority to review [a case] depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," Microsoft, 56 F.3d at 1459-60, where, as here, an agency never brings a case, the court's authority is never triggered. Moreover, even where an agency does bring a case, the parties generally remain at liberty to settle their dispute, and when those efforts are successful, the judicial power is extinguished, for there is no longer any case or controversy. See Defs.' Br. 35-36 (citing, inter alia, Atlanta Gas Light Co. v. FERC, No. 93-1614, 1997 WL 255285, at *1 (D.C. Cir. Apr. 14, 1997)).

Plaintiff simply ignores these arguments. See Pl.'s Opp'n 17-23. Although it complains at length that to permit agencies to settle claims out of court places too much power in the executive, Pl.'s Opp'n 17-18, at no point does Plaintiff explain how this infringes any core

judicial function or "'impermissibly threatens the institutional integrity of the Judicial Branch.'" Mistretta v. United States, 488 U.S. 361, 383 (1989) (citation omitted). Indeed, Plaintiff fails to identify any case supporting the proposition that an agency's decision to settle a claim out of court runs afoul of separation of powers principles.

Plaintiff's opposition makes clear that its separation of powers claim rests on statutory arguments, not constitutional ones. Plaintiff describes its first argument as follows: "[B]y imposing a FIRREA civil penalty on JPMorgan in an out-of-court [s]ettlement, DOJ usurped for itself a power that Congress expressly gave to the judicial branch. . . . DOJ may not contract around this statutory requirement." Pl.'s Opp'n 19-20. But the "basic principle" of the separation of powers is that each branch has a set of "central prerogatives" upon which another "branch may not intrude." Loving v. United States, 517 U.S. 748, 757 (1996). If Congress "gave" the judicial branch the power to assess a FIRREA penalty, as Plaintiff claims, then Congress could just as easily take that power away. That makes it a creature of statute, not a core constitutional function.

The cases that Plaintiff cites underscore its confusion on this point. Three of those cases — Burnside-Ott Aviation Training Ctr. v. Dalton, 107 F.3d 854 (Fed. Cir. 1997), Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982), and Journal of Commerce, Inc. v. U.S. Dep't of Treas., No. 86-1075, 1987 WL 4922 (D.D.C. Mar. 30, 1988), see Pl.'s Opp'n 20 — stand for the unremarkable proposition that a government contract must generally comply with federal statutes. The others — Railway Labor Exec. Ass'n v. Nat'l Mediation Bd., 29 F.3d 655 (D.C. Cir. 1994), Michigan v. EPA, 268 F.3d 1075 (D.C. Cir. 2001), and FDA v. Brown & Williamson, 529 U.S. 120 (2000), see Pl.'s Opp'n 19 — illustrate only that an agency must act within its statutory authority, an issue Defendants have already addressed. See supra at 11-16.

Plaintiff's second separation of powers argument "is that, given the extraordinary,

unprecedented nature of this case, DOJ had a duty to seek judicial review of the [s]ettlement, regardless of whatever statutory authority DOJ may have claimed." Pl.'s Opp'n 20. Yet, again, Plaintiff identifies no core, constitutionally established judicial power that the settlement supposedly infringed. Plaintiff begins by suggesting that this settlement was "so extraordinary" that "judicial review was essential to subject the Executive Branch to oversight and ultimately to ensure that the public interest was served." Id. But oversight of the executive branch is generally understood to be a function of the legislature, not the judiciary, see Goland v. CIA, 607 F.2d 339, 346 (D.C. Cir. 1978) (noting that "Congress exercises oversight authority over the various federal agencies"); indeed, Congress is exercising oversight over this very issue.[6] Moreover, the "job of determining whether [settlement] best serves the public interest . . . rests squarely with the [agency]." Citigroup, 752 F.3d at 296 (reversing district court's rejection of consent decree in RMBS case). "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: Our Constitution vests such responsibilities in the public branches." Id. (citations and internal quotation marks omitted). These principles hold true in big cases as well as small ones, and Plaintiff cannot bootstrap its way into a constitutional claim by insisting that this case is "extraordinary" — an amorphous standard that provides no guidance about which settlements would require judicial review and which would not.

Plaintiff next observes that, in certain categories of cases, judicial review of settlements "is required by statute or rule" — for example, by the Tunney Act in antitrust cases, by Rule 23 in class actions, and by Rule 66 in actions in which a receiver has been appointed. Pl.'s Opp'n

[6] See, e.g., Press Release, House Committee on Oversight and Government Reform, Oversight Requests Justice Department Documents on Mortgage-Backed Securities Settlements (July 24, 2014), available at http://oversight.house.gov/release/oversight-requests-justice-department-documents-mortgage-backed-securities-settlements.

20-21. But this short list demonstrates only that court review of settlements is the exception, not the rule, and that in those rare cases, it is required by statute or rule — not the Constitution.

Plaintiff also points to three cases in which district courts have asserted the "inherent authority" to review settlement agreements or contingent fee agreements for fairness. See Pl.'s Opp'n 21 (citing In re Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d. 488, 491 (E.D.N.Y. 2006), and 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006), In re Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 611-12 (E.D. La. 2008), and In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708, 2008 WL 682174, at *59-60 (D. Minn. Mar. 7, 2008)). Each was a mass tort case that the court deemed a "quasi–class action," and in each, the court derived its authority from Rule 23, which provides that a class action may be settled only with the court's approval, and that the court may award reasonable attorney's fees. See Fed. R. Civ. P. 23(e), (h). Regardless, whatever "inherent authority" a court has, it exists only in cases that have actually been filed, not in hypothetical cases that have not. Microsoft, 56 F.3d at 1459-60 (a "court's authority to review [a case] depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place").

Finally, Plaintiff argues that courts are "especially concerned with review of settlements in cases involving the public interest," and suggests that this concern justifies review of the "extraordinary" settlement here. Pl.'s Opp'n 22. But in both of the cases it cites, an action had already been filed, and the parties expressly asked the court to review and approve the settlement. See Disability Law Ctr. v. Mass. Dep't of Corrs., 960 F. Supp. 271, 277 (D. Mass. 2012) ("[T]he parties reported that they had reached a settlement and requested the court's approval of their Agreement."); Bragg v. Robertson, 54 F. Supp. 2d 653, 661 (S.D.W. Va. 1999) (the "parties have presented for approval a Settlement Agreement"), aff'd in part, rev'd in part sub nom. Bragg v. W. Va. Coal Ass'n, 248 F.3d 275 (4th Cir. 2001). Plaintiff cites no case in

which a district court has reached out to review a settlement agreement in an action that has never been filed, least of all in the name of the separation of powers.

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

Plaintiff's only remaining substantive claim is that this case presents "extraordinary circumstances" that rendered it "arbitrary, capricious," or "an abuse of discretion" for DOJ to enter into the settlement agreement without seeking judicial review. Compl. ¶ 111. Defendants' opening brief established that, because Plaintiff fails to overcome the presumption of nonreviewability, the Attorney General's plenary power to settle claims of the United States is undiminished, and that includes "the power to make erroneous decisions as well as correct ones." Swift, 276 U.S. at 331-32. Thus, Plaintiff's claim in Count 3(a) that DOJ's decision to settle was arbitrary and capricious, or an abuse of discretion, must also fail. Defs.' Br. 37. Moreover, the "extraordinary circumstances" standard that Plaintiff urges provides no judicially manageable standard for the Court to apply to this claim, making it particularly unsuited to judicial review. Id. at 37-38 (citing, inter alia, Microsoft Corp., 56 F.3d at 1459 (expressing doubt that a standard that turns on a court's perception of the public interest, as Plaintiff's proposal does, could ever "supply a judicially manageable standard for review")). Plaintiff offers no response to these arguments, and they should be treated as conceded. St. John, 2013 WL 5912526, at *22 n.16.

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

Defendants' opening brief demonstrated that Counts 6 and 7 — which assert entitlement to declaratory and injunctive relief, but no substantive causes of action, Compl. ¶¶ 122-29 — do not provide an independent source of federal jurisdiction, and must therefore be dismissed. Plaintiff does not respond to this argument, and it should also be treated as conceded. See, e.g., St. John, 2013 WL 5912526, at *22 n.16.

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

Plaintiff argues that dismissal for failure to join undispensable parties is unwarranted because, under the public rights exception to Rule 19, JPMorgan and the states need not be joined. Pl.'s Opp'n 41-43. That exception does not apply here.

The "'exact contours of the public interest exception have not been defined.'" Kickapoo Tribe of Indians v. Babbitt, 43 F.3d 1491, 1500 (D.C. Cir. 1995) (citation omitted). Generally, however, it "applies where 'what is at stake are essentially issues of public concern,'" rather than the private interests of the parties, "'and the nature of the case would require joinder of a large number of persons.'" Id. (citation omitted). "Further, although the litigation may adversely affect the absent parties' interests, the litigation must not 'destroy the legal entitlements of the absent parties.'" Kescoli v. Babbitt, 101 F.3d 1304, 1311 (9th Cir. 1996) (citation omitted).

These requirements are not met here. First, this case "does not require the joining of an infeasibly large number of parties," Kickapoo Tribe, 43 F.3d at 1500, given that there are only six parties to the settlement agreement. Cf. Nat'l Res. Def. Council v. Berklund, 458 F. Supp. 925, 933 (D.D.C. 1978) (applying exception where judgment would affect 183 widely dispersed parties). Second, the relief Plaintiff seeks — invalidation of the settlement agreement — would extinguish the rights of all parties to that contract, including JPMorgan and the states, and would thus "'destroy the legal entitlements of the absent parties.'" Kescoli, 101 F.3d at 1311.

Because the public rights exception does not apply, the joinder issue is controlled by Naartex Consulting Corp. v. Wyatt, 722 F.2d 779, 783 (D.C. Cir. 1983), which instructs that "an action seeking rescission of a contract must be dismissed unless all parties to the contract, and others having a substantial interest in it, can be joined." Thus, the only remaining question under Rule 19 is whether joinder of the absent parties is feasible. Plaintiff offers no substantive

response to Defendants' suggestion that it is not, due to a lack of personal jurisdiction. See Defs.' Br. 39-40; Pl.'s Opp'n 41 n.12.

Plaintiff's argument that Naartex is distinguishable because it dealt with the "rescission" of a contract, whereas Plaintiff merely seeks to enjoin DOJ "from enforcing the Settlement 'unless and until' it is submitted to a court for approval," Pl.'s Opp'n 44 (quoting Compl. ¶ 130(b)), ignores the obvious: that Plaintiff also asks the Court to declare that the settlement is "invalid in whole or in part," Compl. ¶ 130(a). And Plaintiff's suggestion that there is "no alternative forum" in which the absent parties could be joined makes little sense in light of the settlement agreement's forum selection clause, which vests the Eastern District of California with "exclusive jurisdiction and venue" over any disputes.

CONCLUSION

For the foregoing reasons, in addition to those set forth in Defendants' opening brief, the Court should grant Defendants' motion to dismiss and dismiss this case in its entirety.

Dated: August 21, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2014, I filed the foregoing document with the Clerk of Court via the CM/ECF system, causing it to be served electronically on Plaintiff's counsel of record.

/s/ Eric Beckenhauer
ERIC B. BECKENHAUER