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December 6, 2019

Ms. Patricia S. Connor  
Clerk of the Court  
U.S. Court of Appeals for the Fourth Circuit  
1100 East Main Street, Suite 501  
Richmond, Virginia 23219

Re: *Mayor and City Council of Baltimore v. BP p.l.c., et al.*; Case No. 19-1644  
Defendants-Appellants Chevron Corporation and Chevron U.S.A., Inc.'s Response to  
Fed. R. App. P. 28(j) Letter

Dear Ms. Connor:

I write in response to Plaintiff-Appellee's letter regarding the denial of certiorari in *Rheinstein v. Attorney Grievance Comm'n of Md.*, 140 S. Ct. 226 (Mem) (Oct. 7, 2019). Contrary to Plaintiff-Appellee's suggestion, an order denying certiorari is *not* a decision on the merits and thus has no bearing on the question presented here regarding the scope of appellate review under 28 U.S.C. § 1447(d).

In *Rheinstein*, the pro se defendant-appellant removed attorney disciplinary claims under 28 U.S.C. §§ 1331, 1441, 1442, and other removal statutes. No. 17-2127, 750 F. App'x 225, 225-26 (4th Cir. 2019) (per curiam) (unpublished). The district court remanded, and *Rheinstein* appealed, arguing that removal was proper on every ground. Notably, neither party briefed the scope of appellate review under § 1447(d).<sup>1</sup> In fact, that issue was addressed *for the first time* in *Rheinstein*'s Petition for Writ of Certiorari. No. 19-140, 2019 WL 3496290 (U.S. July 25, 2019). The Supreme Court routinely denies petitions raising issues that were never pressed below. Moreover, the Supreme Court often denies certiorari where resolution of the question presented would not affect the outcome of the case, and *Rheinstein*'s argument that the attorney disciplinary claims somehow presented a federal question was unlikely to succeed even if this Court reviewed the entire remand order. In

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<sup>1</sup> *Rheinstein*'s Opening Brief contained a single sentence stating that "this Court may review and consider all the legal issues" of the remand order, and the Commission did not argue this Court lacked jurisdiction over any portion of the appeal. See **Exhibits A** (Opening Br.), **B** (Appellee Br.) and **C** (Reply Br.) attached.

# GIBSON DUNN

Ms. Patricia S. Connor  
December 6, 2019  
Page 2

short, the Court's denial of certiorari indicates nothing about its views on the scope of review under § 1447(d).

Moreover, as Defendants-Appellants have noted, *Rheinstein* does not demonstrate this Court's fealty to the "rule" expressed in *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976), because *Rheinstein* did not even cite *Noel*. ECF No. 110 at 7. And in all events, Supreme Court authority and legislative enactment have effectively abrogated *Noel*. See ECF No. 73 at 7-13. Accordingly, this Court may review the entire remand order.

Sincerely,

Theodore J. Boutrous Jr.  
GIBSON, DUNN & CRUTCHER LLP

*Counsel for Defendants-Appellants  
Chevron Corporation and Chevron U.S.A.*

cc: All counsel of record (via ECF)

# EXHIBIT A

2018 WL 2218900 (C.A.4) (Appellate Brief)  
United States Court of Appeals, Fourth Circuit.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND, Plaintiff-Appellee,  
v.  
Jason Edward RHEINSTEIN, Defendant-Appellant.

No. 17-2127.  
May 11, 2018.

On Appeal from the United States District Court for the District  
of Maryland at Baltimore, (Marvin J. Garbis, District Judge)

**Corrected Opening Brief of Appellant**

Jason E. Rheinstein, P. O. Box 1369, Severna Park, MD 21146, (410) 647-9005, Defendant-Appellant Pro Se.

**\*I UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS**

Disclosures must be filed on behalf of *all* parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

Pursuant to [FRAP 26.1](#) and Local [Rule 26.1](#), Jason Edward Rheinstein (name of party/amicus) who is *Appellant* (appellant/appellee/petitioner/respondent/amicus/intervenor), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES X NO

2. Does party/amicus have any parent corporations?  YES X NO

If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES X NO

If yes, identify all such owners:

\*II 4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local [Rule 26.1\(a\)\(2\)\(B\)](#))?  YES X NO

If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)  YES X NO

If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?  YES  NO

If yes, identify any trustee and the members of any creditors' committee:

Signature: \_\_\_\_\_

Counsel for: *Appellant*

Date: *April 11, 2018*

### \*i TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	viii
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF ISSUES .....	3
STATEMENT OF CASE .....	5
A. Overview of the Parties .....	6
B. Overview of the Plaintiff's Complaint .....	9
C. Relevant Background Regarding the Underlying Litigation .....	11
1. Background Leading to the Qui Tam Cases .....	11
2. Government Investigation and the QTI Parallel Criminal Cases .....	15
3. The Moores' Bankruptcy and the Settlement Agreement .....	17
4. The Qui Tam Cases Survive the Settlement Agreement .....	19
D. Defendant Attempts Removal at the Outset of this Case Based upon the Face of the Complaint Itself .....	21
E. The State Court Proceeding Resumes and the Defendant Requests and Obtains Discovery from Plaintiff that Provides New Facts Which Support Defendant's Prior Theory of Removal as Well as New Grounds of Removal .....	22
1. Defendant Obtains Discovery Responses Establishing, <i>inter alia</i> , that Plaintiff Alleges Defendant Violated MLRPC 3.1 (and other Rules) by Filing the Qui Tam Cases after All .....	23
*a. Deposition Testimony of Marianne Lee .....	23
b. Interrogatory Answers and Schedule A .....	24
2. Defendant Obtains Deposition Testimony and Documents Indicating, <i>inter alia</i> , the Hjortsberg Grievance Had Been Dismissed on March 20, 2014 and that this Case Would Not Have Occurred but for Work Defendant Did to Assist the Trustee in Preserving the Estate's Interests in the Qui Tam Cases .....	26
a. Deposition Testimony of Linda Lamone .....	26
b. Documents Produced on August 7, 2017 .....	27
F. Based upon the Discovery Responses, Defendant Files a Notice of Removal in accordance with the "Other Paper" Provision of 28 U.S.C. § 1446(b)(3) .....	31
1. The Second Notice of Removal .....	31
2. Proceedings in the Second Removal Case .....	33
3. The Notice of Appeal .....	35
SUMMARY OF ARGUMENT .....	36
ARGUMENT .....	37
I. Based on the Discovery Responses, Defendant Properly and Timely Removed the Case, in accordance with 28 U.S.C. § 1446(b)(3) .....	37
A. Attorney Disciplinary Proceedings are Subject to the Removal Statutes .....	37
B. Defendant Promptly Filed the Second NOR after Receiving Discovery from Plaintiff, which Provided Different Grounds for Removal .....	38

* <b>iii</b>	1. The Discovery Established New Facts that Supported the Same Theory of Removal Espoused by the Defendant in the First Removal Case .....	38
2.	The Discovery Established a Different Set of Facts Supporting a New Ground for Removal .....	39
3.	Removal Was Timely Under <a href="#">28 U.S.C. § 1446(b)(3)</a> .....	39
II.	The District Court Had Subject Matter Jurisdiction Pursuant to <a href="#">28 U.S.C. § 1442(a)(1)</a> , the Federal Officer Removal Statute (FORS) .....	40
A.	Overview of the FORS .....	40
1.	The FORS is to be Liberally Construed in Favor of Jurisdiction .....	41
2.	The FORS Overcomes the Well-Pleaded Complaint Rule by Permitting a Federal Defense to Serve as the Federal Question Enduing the Court with Jurisdiction; the Defense Need Only Be Plausible and Need Only Apply to One Claim to Remove the Case .....	42
3.	The FORS Authorizes Removal by Private Persons Acting as “Agents” or “Contractors” of the Government .....	43
B.	Defendant Satisfied all Three Elements for Removal by a Private Person under the FORS .....	44
1.	The Defendant Satisfies the First Element for Removal under the FORS for Two Alternative Reasons .....	44
a.	An FCA Relator and His Attorney are a Type of Government Contractor Who Act under and assist the Executive in Recovering Lost money for the Government Via the Filing of Qui Tam Litigation .....	44
* <b>iv</b>	b. The Direct Proximate Cause of this Case was the Work the Defendant Performed While Acting Under the Trustee to Preserve the Estate's Interests in the Qui Tam Cases .....	49
2.	The Defendant Satisfies the Second Element for Removal under the FORS Because He Pled Multiple Colorable Federal Defenses in the Second NOR .....	51
a.	As to Operative Claim No. 1, Defendant Has a Colorable Federal Defense Arising under the FCA because Defendant Asserts and there is Substantial Evidence to Suggest that Qui Tam I Was Not Frivolous .....	52
i.	The Defense that Qui Tam I was “Not Frivolous” is a Federal Defense Involving a Question Arising under the FCA .....	52
ii.	Given the Undisputed Facts Surrounding the Filing of Qui Tam I and the Government's Subsequent Pursuit of the QTI Parallel Criminal Cases, the Defense that Qui Tam I Was “Not Frivolous” is Clearly Colorable .....	53
b.	As to Operative Claim No. 2, Defendant Also Has a Colorable Defense Arising under the FCA .....	57
c.	As to Plaintiff's Claim about the Government's NonIntervention Decision in the Qui Tam Cases, Defendant Has a Colorable Defense under the FCA, Since, as a matter of law, an Intervention Decision is Not Relevant to Any Consideration Regarding the Merits of a Qui Tam Case .....	58
d.	As to Plaintiff's Claims Regarding Actions Taken in the District Court (including Operative Claim Nos. 1 and 2), Defendant Has Colorable Defenses Arising under the Federal RPC and Preemption .....	59
e.	As to Plaintiff's Claims Regarding Allegedly Frivolous Filings (including Operative Claim Nos. 1 and 2), Defendant Has a Colorable Defense Arising under, <i>inter alia</i> , the Due * <b>v</b> Process Clause of <a href="#">U.S. Const., amend. XIV</a> and <a href="#">42 U.S.C. § 1983</a> Because the Allegations Have Been Left Unconstitutionally Vague as Part of a Prosecution Strategy Intended to Enable Plaintiff to Use the Defendant's Trial to Fill in any Holes in its Case .....	60
i.	Procedural Due Process Requires, the Initial Charging Document to Contain Factual Allegations, which if proven, Would Render the Conduct Complained of an Offense .....	61
ii.	The Complaint Lacks Facts that that Could Establish Any of the Filings at Issue were “Frivolous” .....	64
iii.	Plaintiff's Repetitive Circular Allegations Regarding “Frivolous” filings Demonstrate an Illicit Prosecution Strategy that Exploits the Procedural Rules in Attorney Disciplinary Proceedings in Maryland .....	66
f.	As to Plaintiff's Claims Regarding Allegedly Frivolous Filings (including Operative Claim Nos. 1 and 2), Defendant Has a Colorable Defense under the Equal Protection Clause of <a href="#">U.S. Const., amend. XIV, § 1</a> Because there is Overwhelming Evidence They are Sham Allegations Asserted as a Predicate to Prosecute the Defendant for Protected Speech in his Private Email Communications .....	68
g.	As to all of Plaintiff's Claims in this Case, Defendant Has a Colorable Defense under <a href="#">U.S. Const., amend. V</a> and the Due Process Clause of <a href="#">U.S. Const., amend. XIV, § 1</a> Because Lawless' Failure to Disclose the March 21st Arrangement Summarily Divested the Defendant Forever .....	78

of His Rights to Participate in Proceedings, the Outcome of Which, Lawless Intended to (and Actually Did) Use to Make an Official Decision about the Defendant .....	80
h. As to all of Plaintiff's Claims in this Case, Defendant Has a Colorable Defense under the Supremacy Clause Because this Case is the Product of a Litigation Strategy on the Part *vi of Hjortsberg to Defend the Boomerang Defendants in the Qui. Tam Cases by Restraining the Defendant from Pursing Them via an In Personam Action in State Court .....	81
3. The Defendant Satisfies the Third and Final Element for Removal under the FORS Because there is Clearly a Nexus Between Plaintiff's Claims and the Defendant's Service in Connection with the Qui Tam Cases; and in any Event, Defendant's Actions in Assisting the Trustee Were the Direct Proximate Cause of this Case .....	81
III. The District Court Alternatively Had Subject Matter Jurisdiction Over this Case Pursuant to 28 U.S.C. § 1441, the General Removal Statute, 28 U.S.C. § 1331 and 28 U.S.C. § 1367 .....	83
A. Plaintiff's MLRPC 3.1 Claims Surrounding the Development and Filing of the Qui Tam Cases Hinge upon a Substantial Question Arising under the FCA .....	83
B. All of Plaintiff's Claims Pertaining to Actions Taken in the District Court Raise a Federal Question Because the State's Code of Professional Conduct Does Not Directly Apply in the District Court; the District Court's Own Code Applies and the Interpretation of that Code is a Matter of Federal Law .....	83
C. Plaintiff's Remaining State Law Claims Are Subject to the Supplemental Jurisdiction of the District Court .....	84
IV. The District Court Erred in Stating that it Would Apply Abstention Principles Even if It Had Found Jurisdiction .....	84
A. Jurisdiction is Mandatory in Cases Removed under the FORS .....	85
B. Even if Jurisdiction Were Not Mandatory, the Younger Abstention Doctrine, which was Cited by the District Court, Would Not be Applicable in this Case .....	85
*vii 1. The First Prong of Younger Can Never Be Satisfied in a Removal Case .....	86
2. The Third Prong of Younger is Not Satisfied in this Case .....	87
3. In any Event, this Case Implicates the Younger Exceptions of Bad Faith, Harassment and Other Extraordinary Circumstances .....	88
V. The District Court Erred in Holding that It Lacked Authority to Reconsider, Recall or Stay the September 20th Order Because 28 U.S.C. § 1447(d) Explicitly Authorized Review of that Order ..	88
CONCLUSION .....	89
REQUEST FOR ORAL ARGUMENT .....	90
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT .....	92
CERTIFICATE OF SERVICE .....	93

#### \*viii TABLE OF AUTHORITIES

<b>Cases</b>	
<i>Alsup v. 3-Day Blinds</i> , 435 F. Supp. 2d 838, 846 (S.D. Ill. 2006) .....	82
<i>Ankenbrandt v. Richards</i> , 504 U.S. 689, 705 (1992) .....	87
<i>Atty. Griev. Comm'n. of Md. v. Rheinstein</i> , 2017 U.S. Dist. LEXIS 38481 at *5 (D. Md., Mar. 17, 2017) ("Rheinstein I") .....	22, 82
<i>Atty. Griev. Comm'n. v. Alison</i> , 349 Md. 623, 641 (1998) .....	65
<i>Atty. Griev. Comm'n. v. Costanzo</i> , 432 Md. 233, 256 (2013) .....	61, 62
<i>Atty. Griev. Comm'n. v. Donnelly</i> , 2018 Md. LEXIS 61 at *104-05 (2018) .....	52
<i>Atty. Griev. Comm'n. v. Fezell</i> , 361 Md. 234, 247 (2000) .....	65
<i>Atty. Griev. Comm'n. v. Herman</i> , 380 Md. 378, 397 (2004) .....	8
<i>Atty. Griev. Comm'n. v. Link</i> , 380 Md. 405, 425 (2004) .....	69
<i>Atty. Griev. Comm'n. v. Myers</i> , 333 Md. 440, 444-45 (1994) .....	62
<i>Atty. Griev. Comm'n. v. Rand</i> , 411 Md. 83, 101-104 (2009) .....	69
*ix <i>Atty. Griev. Comm'n. v. Stanalonis</i> , 445 Md. 129 (2015) .....	63, 69
<i>Atty. Griev. Comm'n. v. Stewart</i> , 285 Md. 251, 259 (1979) .....	61
<i>Atty. Griev. Comm'n. v. Walman</i> , 280 Md. 453, 463-64 (1977) .....	62, 63
<i>Atty. Griev. Comm'n. v. Young</i> , 445 Md. 93, 105-06 (2015) .....	69
<i>Barlow v. Colgate-Palmolive Co.</i> , 772 F.3d 1001, 1007 (4th Cir. 2015) .....	37

<i>Barlow v. John Crane-Houdaille, Inc.</i> , 2015 U.S. Dist. LEXIS 138536 at *49 (D. Md. 2015) .....	72
<i>Bd. of Trs. v. Mayor &amp; City Council of Balt. City</i> , 317 Md. 72, 88 (1989) .....	79, 80
<i>Bell Atlantic v. Twombly</i> , 550 U.S. 554, 565 n. 10 (2007) .....	64
<i>Bell v. Thornburg</i> , 743 F.3d 84, 88 (5th Cir. 2014) .....	41, 49
<i>Bond v. Hughes</i> , 671 Fed. Appx. 228 (4th Cir. 2016) .....	47
<i>Bowyer v. Countrywide Home Loans Servicing LP</i> , 2009 U.S. Dist. LEXIS 74474 at *6-7 (S.D. W.Va. 2009) .....	38
<i>Brockovich v. Cnty. Med. Ctrs.</i> , 2007 U.S. Dist. LEXIS 21355 at *16-17 (E.D. Ca. 2007) .....	45
<i>Cain v. CVS Pharmacy, Inc.</i> , 2009 WL 539975, at *2 (N.D. W.Va. 2009) .....	38
* <sup>x</sup> <i>Canova v. State</i> , 278 Md. 483, 499 (1976) .....	63
<i>Ciolli v. Iravani</i> , 625 F. Supp. 2d 276, 295 (E.D. Pa. 2009) .....	69
<i>Colonial First Props., LLC v. Henrico County</i> , 166 F. Supp. 2d 1070, 1084 (E.D. Va. 2001) .....	86
<i>Cord v. Smith</i> , 338 F.2d 516, 524 (9th Cir. 1964) .....	84
<i>Dacon v. Transue</i> , 441 Mich. 315 (1992) .....	64
<i>Decatur Hosp. Auth. v. Aetna Health, Inc.</i> , 854 F.3d 292, 296 (5th Cir. 2017) .....	3
<i>Devazier v. Caruth</i> , 2016 U.S. Dist. LEXIS 92231 (E.D. Ark. 2016) ..	81
<i>DeWolfe v. Richmond</i> , 434 Md. 444, 448 n. 1 (2013) .....	79
<i>Donovan v. City of Dallas</i> , 377 U.S. 408, 413 (1964) .....	80
<i>Durham v. Lockheed Martin Corp.</i> , 445 F.3d 1247 (9th Cir. 2006) ....	41
<i>Employers Resource Mgmt. Co. v. Shannon</i> , 65 F.3d 1126, 1134 (4th Cir. 1995) .....	85
<i>Grable &amp; Sons Metal Products v. Darue Eng'g, &amp; Mfg.</i> , 545 U.S. 308 (2005) .....	83
<i>Greenberg v. Chrust</i> , 297 F.Supp.2d 699, 705 (S.D.N.Y. 2004) .....	69
* <sup>xi</sup> <i>Harris v. State</i> , 107 Md. App. 399 (1995), <i>rev'd. on other grounds</i> , 344 Md. 497 (1997) .....	79
<i>Hawaii Housing Authority v. Midkiff</i> , 467 U.S. 229, 236 (1984) .....	85
<i>Hudson v. Moore Business Forms, Inc.</i> , 836 F.2d 1156, 1159 (9th Cir. 1987) .....	72
<i>In re GTI Capital Holdings, L.L.C.</i> , 399 B.R. 247 (Bnkr. D. Az. 2008) .....	49
<i>In Re Lowe</i> , 102 F.3d 731, 736 (4th Cir. 1996) .....	35, 88, 89
<i>In re Lusk</i> , 2016 U.S. Dist. LEXIS 100583 at *11-12 (C.D. Cal. 2016) .....	37
<i>In re Roneika S.</i> , 173 Md. App. 577, 600 (2007) .....	63
<i>In re Ruffalo</i> , 390 U.S. 544, 550-51 (1968) .....	60, 61, 63, 67
<i>In re Snyder</i> , 472 U.S. 634, 645 n. 6 (1985) .....	59
<i>Isaacson v. Dow Chem. Co.</i> , 517 F.3d 129, 133 (2d. Cir. 2008) .....	41
<i>Jamison v. Wiley</i> , 14 F.3d 222, 239 (4th Cir. 1994) .....	85
<i>Kolibash v. Committee on Legal Ethics of West Virginia Bar</i> , 872 F.2d 571, 575 (4th Cir. 1989) .....	37, 85
<i>Lloyd v. GMC</i> , 397 Md. 108, 120 (2007) .....	63
* <sup>xii</sup> <i>Lu Junhong v. Boeing Co.</i> , 792 F.3d 805, 811 (7th Cir. 2015) ....	3
<i>Matthews v. Eldridge</i> , 424 U.S. 319, 333 (1976) .....	61
<i>McCallum v. CSX Transp., Inc.</i> , 149 F.R.D. 104, 108 (M.D. N.C. 1993) .....	60
<i>Mesa v. California</i> , 489 U.S. 121, 136 (1989) .....	42, 51
<i>Middlesex Cnty. Ethics Comm. v. Garden State Bar Assn.</i> , 457 U.S. 423 (1982) .....	86
<i>Moore v. Svehlak</i> , 2013 U.S. Dist. LEXIS 97329 at *56 (D. Md. 2013) .....	72, 73
<i>Nguyen v. City of Cleveland</i> , 121 F. Supp. 2d 643 (N.D. Oh. 2000) ....	47

<i>Paul Revere Life Ins. Co. v. Jafari</i> , 206 F.R.D. 126, 127 (D. Md. 2002) .....	76
<i>Phillips v. Wash. Legal Found.</i> , 524 U.S. 156, 164 (1998) .....	78
<i>Reis v. Walker</i> , 491 F.3d 868, 870 (8th Cir. 2007) .....	69
<i>Revson v. Cinque &amp; Cinque</i> , 221 F.3d 71, 79-80 (2d. Cir. 2000) .....	69
<i>Riley v. St. Luke's Episcopal Hosp.</i> , 252 F.3d 749, 753 (5th Cir. 2001) .....	46
<i>Sawyer v. Foster Wheeler, LLC</i> , 860 F.3d 249 (4th Cir. 2017) .....	passim
* <sup>xiii</sup> <i>Sheppard v. Rees</i> , 909 F.2d 1234, 1237 (9th Cir. 1990) .....	67
<i>Sosa v. DirecTV</i> , 437 F.3d 923 (9th Cir. 2006) .....	69
<i>Stephenson v. Nassif</i> , 160 F. Supp. 3d 884, 887-88 (E.D. Va. 2015) ....	42
<i>Strickland v. Washington</i> , 466 U.S. 668) (1984) .....	67
<i>Tapscott v. State</i> , 106 Md. App. 109, 134 (1995) .....	62
<i>Taylor v. Rodriguez</i> , 238 F.3d 188, 193 (2d. Cir. 2001) .....	61
<i>Thanos v. State</i> , 282 Md. 709, 714-16 (1978) .....	62, 63
<i>United States ex rel. Kelly v. Boeing Co.</i> , 9 F. 3d 743 (9th Cir. 1993) .....	46
<i>United States ex rel. Mergent Servs. v. Flaherty</i> , 540 F.3d 89 (2d. Cir. 2008) .....	47
<i>United States ex rel. Moore v. Cardinal Fin. Co., L.P.</i> , 2017 U.S. Dist. LEXIS 46983 at *4-11 (D. Md., Mar. 28, 2017) .....	14, 15, 20, 54
<i>United States ex rel. Radcliffe v. Purdue Pharma, L.P.</i> , 737 F.3d 908, 914 (4th Cir. 2013) .....	14
<i>United States ex rel. Stillwell v. Hughes Helicopters, Inc.</i> , 714 F. Supp. 1084 (C.D. Cal. 1989) .....	46
<i>United States ex rel. Touhy v. Ragen</i> , 340 U.S. 462 (1951) .....	58
* <sup>xiv</sup> <i>United States ex rel. Ubl v. IIF Data Solutions</i> , 650 F.3d 445, 447 (4th Cir. 2011) .....	54, 58
<i>United States v. DeWitt</i> , 265 F.2d 393 (5th Cir. 1959) .....	55
<i>United States v. Eghbal</i> , 475 F. Supp.2d 1008 (C.D. Cal. 2007) .....	55
<i>United States v. J.M. Taylor</i> , 166 F.R.D. 356, 361-62 (M.D.N.C. 1996) .....	76
<i>United States v. Klein</i> , 230 F. Supp. 426 (W.D. Pa. 1964) .....	55
<i>United States v. Stevens</i> , 2014 U.S. Dist. LEXIS 160837 at *2 (E.D. N.C. 2014) .....	58
<i>United States v. Todd</i> , 245 F.3d 691, 693-94 (8th Cir. 2001) .....	43, 51
<i>United States v. Wiseman</i> , 445 F. 2d 792 (2d. Cir. 1971) .....	68
<i>Va. ex rel. Kilgore v. Bulgartabac Holding Group</i> , 360 F. Supp. 2d 791, 796-97 (E.D. Va. 2005) .....	86, 87
<i>Valentine v. On Target, Inc.</i> , 353 Md. 544, 549 (1999) .....	63
<i>Village of DePue v. Exxon Mobil Corp.</i> , 537 F.3d 775, 783 (7th Cir. 2008) .....	87
<i>vonRosenberg v. Lawrence</i> , 781 F.3d 731, 734 (4th Cir. 2015) .....	37
<i>Vt. Agency of Natural Res. v. United States ex rel. Stevens</i> , 529 U.S. 765, 773 (2000) .....	46
* <sup>xv</sup> <i>Watson v. Phillip Morris Cos., Inc.</i> , 551 U.S 142, 147-53 (2007) .....	40, 41, 44
<i>Wayte v. United States</i> , 470 U.S. 598, 608 (1985) .....	68
<i>Wilson v. Gottlieb</i> , 821 F. Supp. 2d 778 (D. Md. 2011) .....	37
<i>Wingo v. State Farm Fire &amp; Cas. Co.</i> , 2013 U.S. Dist. LEXIS 104135 (W.D. Mo., Jul. 25, 2013) .....	89
<i>Yocom v. CBS Corp.</i> , 2017 U.S. Dist. LEXIS 66097 at *10 (C.D. Cal. 2017) .....	41
<i>Younger v. Harris</i> , 401 U.S. 37 (1971) .....	86
<i>Zeringue v. Crane Co.</i> , 846 F.3d 785, 789 (5th Cir. 2017) .....	41, 42, 43
 <b>*xvi Federal Constitutional Provisions</b>	
<i>U.S. Const., amend. V</i> .....	78
<i>U.S. Const., amend. XIV, § 1</i> .....	1, 51, 77
<i>U.S. Const., art. IV, ¶2</i> .....	2

**Federal Statutes**

18 U.S.C. § 242 .....	68
28 U.S.C. § 1291 .....	3
28 U.S.C. § 1331 .....	<i>passim</i>
28 U.S.C. § 1367 .....	2, 84
28 U.S.C. § 1441 .....	2
28 U.S.C. § 1442 .....	<i>passim</i>
28 U.S.C. § 1446(b)(3) .....	31, 39
28 U.S.C. § 1447(d) .....	3, 5, 36, 89
31 U.S.C. § 3729 <i>et seq.</i> .....	<i>passim</i>
31 U.S.C. § 3730(b)(2) .....	19
31 U.S.C. § 3730(e)(4) .....	20
42 U.S.C. § 1983 .....	1, 67, 68

**\*xvii Maryland Rules**

Md. Rule 16-711(h)(9) .....	9
Md. Rule 16-712(b)(5) .....	9
Md. Rule 16-731 .....	8
Md. Rule 16-731(b) .....	7
Md. Rule 16-731(c)(1) .....	71
Md. Rule 16-731(d) .....	8
Md. Rule 16-741 .....	29
Md. Rule 16-751 .....	5
Md. Rule 16-757 .....	6
<b>Md. Rule 2-214(a)</b> .....	78
<b>Md. Rule 2-412(d)</b> .....	23

**Administrative & Procedural Guidelines of the Attorney Grievance Commission of Maryland (APGs)**

APGs §§ 4.3-4.15 .....	7
APGs § 4.14 .....	71
APGs § 4.4 .....	7, 8
APGs § 4.5 .....	8, 9

**\*1 JURISDICTIONAL STATEMENT**

On September 1, 2017, Defendant Jason Edward Rheinstein (the “*Defendant*”) properly removed this case to the United States District Court for the District of Maryland (the “*District Court*”), in accordance with the Federal Officer Removal Statute (the “*FORS*”), [28 U.S.C. § 1442\(a\)](#).

The case involves claims resulting from the Defendant and a former client’s decision to accept an invitation from Congress, as outlined in the federal False Claims Act ([31 U.S.C. § 3729 \*et seq.\*](#)) (the “*FCA*”), to become government contractors by filing two *qui tam* cases under seal in the District Court in summer 2012. Furthermore, the direct proximate cause of the case was work the Defendant performed while acting under a bankruptcy trustee in his official capacity to help effectuate a settlement agreement for the benefit of his former client’s bankruptcy estate and preserve that estate’s interests in the FCA cases at issue. In his Notice of Removal, Defendant stated numerous colorable federal defenses, which raise questions arising under, *inter alia*, the FCA, the Due Process and Equal Protection Clauses of [U.S. Const., amend. XIV, § 1](#), [42 U.S.C. § 1983](#), the Federal Court’s Rules of **\*2 Professional Conduct** (the “*Federal RPC*”), preemption, and the Supremacy Clause (U.S. Const., art. IV, ¶2).

In addition to removing the case under the FORS, the Defendant removed the case, in the alternative, under the general removal statute (the “*GRS*”), [28 U.S.C. § 1441](#), with the jurisdictional basis of [28 U.S.C. § 1331](#) and [28 U.S.C. § 1367](#), as some of Plaintiff’s claims directly raise questions of federal law, and all of Plaintiff’s claims form one case or controversy under Article III of the United States Constitution.

On September 20, 2017, the District Court issued an order (the “*September 20th Order*”)<sup>1</sup> remanding this case to the court from which it was removed (the “*State Court*”). The Defendant then filed an alternative motion for reconsideration and motion for stay pending appeal, which the District Court denied on September 22, 2017 (the “*September 22nd Order*”). On September

25, 2017, Defendant filed a timely Notice of Appeal from the September 20th Order and the \*3 September 22nd Order. This Court has jurisdiction to review the orders, as final judgments, pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1447(d).<sup>2</sup>

Because review of the remand order in this case is explicitly authorized by 28 U.S.C. § 1447(d), this Court may review and consider all the legal issues therein. *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015); *Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017).

### STATEMENT OF ISSUES

1. Whether the District Court erred in concluding that it did not have subject matter jurisdiction over this action under the Federal Officer Removal Statute (FORS).

a. Whether the District Court erred by strictly, rather than liberally, construing the FORS in analyzing the applicability of the federal officer removal statute in this case.

\*4 b. Whether the District Court erred in concluding that a *qui tam* relator or a person who assisted a bankruptcy trustee in the performance of his official duties could not satisfy the “acting under” prong of the FORS.

c. Whether the District Court overlooked numerous federal defenses that were clearly plausible, as pled, by Defendant in his notice of removal.

d. Whether the District Court erroneously applied a strict causation requirement that is wholly divorced from the post-2011 version of 28 U.S.C. § 1442(a)(1) and this Court's decision in *Sawyer v. Foster Wheeler, LLC*, 860 F.3d 249 (4th Cir. 2017).

2. If the answer to Question No. 1 is no, whether the District Court erred in concluding that it did not have subject matter jurisdiction over any of Plaintiff's claims pursuant to 28 U.S.C. § 1331.

3. If the answer to Question No. 1 or Question No. 2 is yes, whether the District Court erred in declaring that it would apply *Younger* abstention principles even if it found subject matter jurisdiction in the case *sub judice*.

\*5 4. Whether the District Court erred in concluding that it lacked jurisdiction to review or recall its remand order even though review of that Order was expressly authorized by 28 U.S.C. § 1447(d).

### STATEMENT OF CASE

On February 17, 2016, Plaintiff Attorney Grievance Commission of Maryland (“Plaintiff”) initiated this litigation with the filing of a *Petition for Disciplinary or Remedial Action* (the “Complaint”) against Defendant in the Court of Appeals of Maryland (“COA”).<sup>3</sup> COA then entered an Order assigning the case to a judge at the Circuit Court for Anne Arundel County (“CCAAC”) to hold an evidentiary hearing and \*6 make factual findings and conclusions of law pursuant to Md. Rule 16-757.<sup>4</sup> Defendant was served on April 22, 2016.<sup>5</sup>

#### A. Overview of the Parties

Defendant is an attorney licensed to practice law in Maryland and several other jurisdictions.<sup>6</sup> Plaintiff is an administrative agency in the judicial branch of Maryland State Government, which oversees the discipline of Maryland attorneys.<sup>7</sup> At the top

of the agency is a 12-member commission appointed by COA (the “*Commission*”).<sup>8</sup> During the relevant period, the agency and attorney disciplinary proceedings were governed by Title 16, Chapter 700 of the Maryland Rules and the \*7 April 4, 2008 revision of the Administrative and Procedural Guidelines of the AGC (the “*APGs*”), a copy of which appear at JA 1230-48. Annually, the agency receives approximately 2,000 complaints against Maryland attorneys.<sup>9</sup> These are screened by employees at the Office of Bar Counsel (“*OB*C”), a unit of the agency, led by an attorney holding the position of “*Bar Counsel*.<sup>10</sup> If determined not to be facially frivolous or unfounded, a formal complaint file is opened for the complaint and it is further investigated by OBC employees.<sup>11</sup> The opening of a formal complaint file for a complaint is also known as “docketing the complaint.”<sup>12</sup> Each complaint and file is associated with a unique identification number known as a “*BC Docket No.*”<sup>13</sup> The Maryland Rules envision a given complaint may be docketed by OBC only once, as the docketing of a complaint triggers formal administrative proceedings \*8 the time schedules and final disposition of which are controlled by the Commission.<sup>14</sup> The investigation of a docketed complaint must be completed within 90 days, unless extended by the Commission.<sup>15</sup> The agency has a general policy of abjuring involvement in ongoing litigation (the “*Abjurement Policy*”),<sup>16</sup> and there exists a “*Deferred Docket*,” for complaints pertaining to such litigation. During the relevant period, the Deferred Docket was governed by Md. Rule 16-731(d) and APGs § 4.5.<sup>17</sup> The Deferred Docket is controlled by the Commission, and OBC employees are *not* empowered to defer action on any complaint themselves.<sup>18</sup> Rather, OBC may request the Commission place a complaint on the Deferred Docket, and the Commission, at its discretion, may do so.<sup>19</sup> For any complaint on the Deferred Docket, OBC \*9 must provide regular updates to the Commission, and it must promptly notify the Commission when the related litigation concludes.<sup>20</sup> The Commission may then remove the complaint from the Deferred Docket and direct whatever other action or disposition as it deems appropriate.<sup>21</sup> There are several potential final dispositions for the administrative proceedings ranging from, dismissal of the complaint to the filing of public charges.<sup>22</sup> If public charges are filed, the agency is generally represented by OBC attorneys in the ensuing litigation.<sup>23</sup>

#### ***B. Overview of the Plaintiff's Complaint***

The Complaint alleged it was based upon complaint originally filed with the Plaintiff on March 21, 2012 by Matthew G. Hjortsberg (“*Hjortsberg*”),<sup>24</sup> an attorney at Bowie & Jensen, LLC in Towson, \*10 Maryland who had been hired to represent a private lender named Imagine Capital, Inc. (“*Imagine*”), its principals, Robert S. Svehlak (“*Svehlak*”) and Neil D. Roseman (“*Roseman*”), and related entities<sup>25</sup> in state court litigation against Defendant’s clients, Charles E Moore (“*Moore*”) and Felicia W. Moore (“*FWM*”),<sup>26</sup> arising out of a September 2008 loan transaction in which Imagine purported to loan \$200,000 to the Moores.<sup>27</sup> The Complaint mentioned nine court proceedings, an overview of which appear on Line Nos. 1-9 of Table 2.<sup>28</sup>

\*11 Following a one-sided and highly-disputed “background” that went unresolved in the underlying litigation,<sup>29</sup> the Complaint attempts to presuppose everything Defendant did on the Moores’ behalf was “frivolous.”<sup>30</sup> It then alleges that Defendant violated various Maryland Lawyers’ Rules of Professional Conduct (“*MLRPC*”) by (1) developing complex factual and legal theories; (2) initiating litigation (including two FCA cases) based on such theories; and (3) arguing different aspects of his theories in court filings and private email communications.<sup>31</sup> Paragraphs 8, 32, 36, 66, and 67 contained allegations relevant to the Qui Tam Cases.<sup>32</sup>

#### ***C. Relevant Background Regarding the Underlying Litigation***

### 1. Background Leading to the *Qui Tam* Cases

In October 2011, Defendant was retained to represent the Moores in the Confessed Judgment Case, which involved a dispute over the \*12 September 2008 transaction.<sup>33</sup> On October 31, 2011, Imagine filed a response to motions Defendant had filed, on the Moores' behalf, and attached, among other things, a suspicious exhibit ("IC Exhibit 20")<sup>34</sup> purporting to show that, in connection with the April 29, 2010 resale of a property conveyed by Moore to Boomerang months earlier,<sup>35</sup> it had paid a 56.34% real estate commission and therefore had lost money on the transaction.<sup>36</sup> Defendant and Moore were suspicious, as the transaction was financed by a mortgage insured by the Federal Housing Administration ("FHA"); they did not believe FHA would have approved such an exorbitant commission.<sup>37</sup> Their suspicions ultimately led them to discover the transaction involved fraud on FHA and that the purported buyer, Stephanie O. Mballa ("Mballa"), had been a straw \*13 buyer who had never actually occupied the property.<sup>38</sup> It would confirm their suspicious that the version of the HUD-1 received by HUD (the "FHA HUD-I") materially differed from IC Exhibit 20.<sup>39</sup> After discovering the HSP Transaction, Defendant, working with and on Moore's behalf, commissioned a data collection and analysis project that entailed mining, extracting and analyzing data from numerous public information sources, including, but not limited to, land records, court records, tax assessment records and permit files, regarding hundreds of real estate transactions surrounding Imagine and other parties associated with the HSP Transaction.<sup>40</sup> Among other things, this led to the discovery of 26 additional transactions that directly followed the same pattern as the HSP Transaction.<sup>41</sup> Those 26 transactions, together with the HSP Transaction, were the basis for Qui Tam I, which \*14 was filed on June 20, 2012, in accordance with the FCA,<sup>42</sup> which Congress had then-recently amended as part of the Patient Protection and Affordable Care Act of 2010 (the "PPACA") to, among other things, encourage putative whistleblowers who discover fraud against the Government in the course of state court litigation to file *qui tam* lawsuits.<sup>43</sup>

Additional transactions, discovered during the same project, by application of the same methodology used to identify the transactions in Qui Tam I, served as the basis for Qui Tam II, which was filed on July 13, 2012.<sup>44</sup> In filing the Qui Tam Cases, Defendant and Moore complied with all the requirements enumerated in the FCA.<sup>45</sup>

### \*15 2. Government Investigation and the QTI Parallel Criminal Cases

The Defendant and Moore assisted the government officials in, *inter alia*, understanding the allegations in the cases and the methodology used to identify the transactions at issue.<sup>46</sup> On September 20, 2012, the Defendant and Moore attended a Relator's meeting (the "Relator's Meeting") with the then-assigned Assistant U.S. Attorney and various government agents assigned to investigate the cases.<sup>47</sup>

The Government ultimately declined intervention in the Qui Tam Cases in November 2014, at which point they were unsealed.<sup>48</sup> On November 12, 2014, Assistant United States Attorney Roann Nichols ("AUSA Nichols") sent the Defendant a letter (the "Nichols Letter") enumerating various instructions and requirements for handling the Qui Tam Cases.<sup>49</sup>

\*16 After Qui Tam I was filed in June 2012, the Government pursued three criminal cases in connection with the scheme and transactions at issue in that case. These are shown on Lines 10-12 of Table 2 and are sometimes collectively referred to

hereafter as the “*QTI Parallel Criminal Cases*.<sup>50</sup> The QTI Parallel Criminal Cases each resulted in a guilty plea and final judgment by the District Court.<sup>51</sup> The District Court’s final judgment in *Agodio* conclusively established the existence of the scheme and fraudulent nature of 26 of the 27 transactions (including the HSP Transaction) at issue in Qui Tam I.<sup>52</sup> According to Assistant U.S. Attorney Jefferson M. Gray (“*AUSA Gray*”), the prosecutor who handled the QTI Parallel Criminal Cases, the scheme turned out to be the largest mortgage fraud scheme ever prosecuted in the District of Maryland, with total losses of approximately \$3.25 million.<sup>53</sup>

#### \*17 3. *The Moores’ Bankruptcy and the Settlement Agreement*

During the time the Qui Tam Cases remained under seal and while the other litigation remained pending, on February 20, 2013, the Moores, through bankruptcy counsel, filed a Joint Voluntary Petition under Chapter 7 of the United States Bankruptcy Code, giving rise to the Bankruptcy Case.<sup>54</sup> Marc H. Baer was appointed Chapter 7 Trustee (the “*Trustee*”) of the Moores’ Bankruptcy Estate (the “*Estate*”). On April 1, 2013, the Moores appeared at a 341 Meeting of Creditors in the Bankruptcy Case (the “*341 Meeting*”), which was attended by, *inter alia*, Hjortsberg’s co-counsel, Jason Brino (“*Brino*”).<sup>55</sup> During the 341 Meeting, while Brino was present, Moore generally disclosed the existence of the Qui Tam Cases.<sup>56</sup>

Thereafter, the Trustee appointed David Daneman (“*Daneman*”) and the law firm of Whiteford, Taylor & Preston, LLP (“*WTP*”) to succeed the Defendant in representing what had been the Moores’ interests in the Confessed Judgment Case and the Private Fraud \*18 Action.<sup>57</sup> The Defendant remained in place as counsel of record for the relator’s interests in the Qui Tam Cases and provided regular updates to the Trustee and Daneman.<sup>58</sup>

After receiving assistance from the Defendant to come up to speed, the Trustee and Daneman negotiated a global settlement of all claims pertaining to the Confessed Judgment Case and the Private Fraud Action with the defendants in the Private Fraud Action paying the Estate an aggregate sum of \$137,000.<sup>59</sup> The agreement memorializing the settlement (the “*Settlement Agreement*”) contained an explicit carveout for the Qui Tam Cases with language the Defendant assisted in drafting.<sup>60</sup> It became final on March 17, 2014, upon approval by the Bankruptcy Court, thereby mooted and purportedly ending the Confessed Judgment Case and the Private Fraud Action.<sup>61</sup> As of March 17, 2014, when it became mooted by the settlement, no opinion had \*19 issued in the Confessed Judgment Appeal (which had been taken from a decision in the Confessed Judgment Case), as the matter had been stayed by the filing of the Bankruptcy Case.<sup>62</sup>

#### 4. *The Qui Tam Cases Survive the Settlement Agreement*

The Estate’s interests in the Qui Tam Cases survived the Settlement Agreement, and much later in June 2015, as part of a negotiated arms-length agreement, they were assigned to the Defendant in partial satisfaction of indebtedness then-owed to him by the Estate.<sup>63</sup>

The Defendant decided to pursue Qui Tam I, and in December 2015, filed a First Amended Complaint (“*FAC*”) in that case.<sup>64</sup> In so doing, he followed specific instructions articulated in the Nichols Letter and complied with 31 U.S.C. § 3730(b)(2).<sup>65</sup>

In Qui Tam I, the Boomerang Defendants were represented by Brino, and attempted to use the existence of this case, to their \*20 advantage, as much as possible.<sup>66</sup> In a decision with which the Defendant firmly disagrees,<sup>67</sup> in March 2017, the Court in Qui Tam I decided in favor of the defendants primarily on the basis of the pre-amendment and post-amendment versions of the public disclosure bar codified at 31 U.S.C. § 3730(e)(4).<sup>68</sup> The Court in Qui Tam I **did not** conclude the case had been “frivolous” or that it had been filed in bad faith nor did any of the defendants pursue motions for sanctions or attorneys’ fees claiming as much.<sup>69</sup>

The Defendant ultimately opted not to pursue Qui Tam II, and with the consent of AUSA Nichols and the Court, the case was voluntarily dismissed without prejudice in April 2017.<sup>70</sup>

#### **\*21 D. Defendant Attempts Removal at the Outset of this Case Based upon the Face of the Complaint Itself**

On May 23, 2016, Defendant filed a timely Notice of Removal (the “First NOR”) pursuant to, *inter alia*, 28 U.S.C. § 1446(b) (1) and 28 U.S.C. § 1442(a), giving rise to the First Removal Case.<sup>71</sup> Defendant believed initially he satisfied the elements for removal under the FORS because (1) he had read the Complaint to suggest Plaintiff was alleging he violated MLRPC 3.1 and other rules for having filed the Qui Tam Cases;<sup>72</sup> (2) he maintains the cases were not frivolous, and that he acted properly in filing them (thereby giving him plausible federal defenses under the FCA, the Federal RPC and preemption);<sup>73</sup> and (3) a private person who files *qui tam* litigation acts as an agent and contractor of the federal Government.<sup>74</sup>

On July 12, 2016, Plaintiff filed a *Motion for Remand for Lack of Federal Jurisdiction* (the “First MFR”) and effectively **denied alleging violations of MLRPC 3.1 in connection with the filing of the Qui Tam Cases.**<sup>75</sup> Defendant opposed the motion.<sup>76</sup> On March 17, 2017, the District Court entered an order granting the First MFR (the “First Remand Order”)<sup>77</sup> along with an opinion concluding, *inter alia*, that **the fact Plaintiff was alleging violations of any rules in connection with the Defendant’s filing of (or anything else related to) the Qui Tam Cases was NOT ascertainable from the face of the Complaint itself.**<sup>78</sup>

#### **E. The State Court Proceeding Resumes and the Defendant Requests and Obtains Discovery from Plaintiff that Provides New Facts Which Support Defendant’s Prior Theory of Removal as Well as New Grounds of Removal**

The parties resumed litigation in the State Court Proceeding, and in July 2017, Defendant served Plaintiff with, *inter alia*, a First Set of \*23 Interrogatories (the “Interrogatories”) along with a Notice to Take Video Deposition (the “Deposition Notice”) enumerating topics on which Plaintiff was to prepare a designee in accordance with Md. Rule 2-412(d).<sup>79</sup> On August 7, 2017, Defendant deposed two designees offered by Plaintiff: (1) Marianne J. Lee, Esquire (“Lee”), its Executive Secretary; and (2) Linda H. Lamone, Esquire (“Lamone”), its Chairman.<sup>80</sup>

1. *Defendant Obtains Discovery Responses Establishing, inter alia, that Plaintiff Alleges Defendant Violated MLRPC 3.1 (and other Rules) by Filing the Qui Tam Cases after All*

a. *Deposition Testimony of Marianne Lee*

Lee was Plaintiff's designee regarding the factual basis for Plaintiff's claims. She testified that **Plaintiff is alleging** that, **by filing Qui Tam I**, under seal, in the District Court on June 20, 2012, **Defendant violated** four rules, including MLRPC 3.1.<sup>81</sup> When asked if Plaintiff was specifically alleging that Qui Tam I was "frivolous," Lee \*24 effectively responded in the affirmative by stating "Well, 3.1 is captioned meritorious claims and contentions."<sup>82</sup> Lee was unable to provide specifics as to why Plaintiff alleges that the filing of Qui Tam I violated Rule 3.1 or other rules;<sup>83</sup> she testified on several occasions that it would be necessary to have and review the entire case file to ascertain why a filing is "frivolous."<sup>84</sup>

b. *Interrogatory Answers and Schedule A*

On August 30, 2017, Plaintiff supplied Defendant with signed Answers to the First Set of Interrogatories (the "*Interrogatory Answers*") together with an attached document identified as "*Schedule A*" and hereinafter referred to by that name.<sup>85</sup> Plaintiff incorporated \*25 Schedule A by reference into the Interrogatory Answers and made it a part thereof.<sup>86</sup> Schedule A listed each averment from the Complaint in tabular format and included next to each one a second column with the heading "MLRPC" (hereinafter referred to as the "*MLRPC Column*").<sup>87</sup> The MLRPC Column contained the following choices of entries: (1) "n/a"; or (2) a list of one or more specific Rules allegedly violated by the event at issue in the corresponding averment.<sup>88</sup> Schedule A was entirely consistent with Lee's testimony. With respect to the filing of Qui Tam I, for example, Schedule A clearly indicated that Plaintiff was alleging Defendant violated MLRPC 3.1 and three other rules.<sup>89</sup> The Answer to \*26 Interrogatory No. 1 indicated Lawless supplied the information on Plaintiff's behalf.<sup>90</sup>

2. *Defendant Obtains Deposition Testimony and Documents Indicating, inter alia, the Hjortsberg Grievance Had Been Dismissed on March 20, 2014 and that this Case Would Not Have Occurred but for Work Defendant Did to Assist the Trustee in Preserving the Estate's Interests in the Qui Tam Cases*

a. *Deposition Testimony of Linda Lamone*

Lamone was Plaintiff's designee with respect to topics related to the Hjortsberg Grievance and the Deferred Docket.<sup>91</sup> Her testimony indicated that the Hjortsberg Grievance was dismissed on March 20, 2014, three days after the Bankruptcy Court approved the Settlement Agreement ending the Confessed Judgment Case and Private Fraud Action.<sup>92</sup>

\*27 b. *Documents Produced on August 7, 2017*

On August 7, 2017, Plaintiff also produced documents showing that, although previously unbeknownst to him, Lawless and Hjortsberg had been in regular contact about the Defendant over a several-year period.<sup>93</sup> They established why, even though the Hjortsberg Grievance had been dismissed on March 20, 2014, that the case *sub judice* came to be.<sup>94</sup> In an email exchange on March 21, 2014, Lawless effectively entered into an arrangement with Hjortsberg implying that if he was later successful in obtaining a final opinion (hereinafter the "*Advisory Opinion*") in the Confessed Judgment Appeal, she would "reactivate" the

Hjortsberg Grievance.<sup>95</sup> At the time, Hjortsberg did not disclose the existence of the Qui Tam Cases to Lawless, and likewise, Lawless did \*28 not disclose the Commission's March 20th actions or the existence of the March 21st Arrangement to the Defendant.<sup>96</sup>

Based upon opposed filings, Hjortsberg succeeded in obtaining an Advisory Opinion in his client's favor in November 2014.<sup>97</sup> He then emailed Lawless,<sup>98</sup> and still **without telling her about the existence of the Qui Tam Cases**, effectively called the March 21st Arrangement.<sup>99</sup> After Hjortsberg sent several emails asking about updates and next steps by her office, in January 2015, Lawless, apparently **under the mistaken impression that all litigation was complete**,<sup>100</sup> she booked a new complaint (the "*Lawless Grievance*") on the records of Plaintiff and listed Hjortsberg as the "complainant."<sup>101</sup> In a subsequent email to Defendant's former counsel, she implied the \*29 Hjortsberg Grievance had just been removed from the Deferred Docket by the Commission.<sup>102</sup>

Among other things, the documents further demonstrated:

(1) On March 4, 2015, Hjortsberg sent Lawless an email (the "March 4th Email") had forwarding her a copy of the indictment from the Agodio Case, which described the scheme at issue in Qui Tam I; in the March 4th Email, he explicitly told her that, as part of that scheme, his client had sold a property (the HSP) to a straw buyer;<sup>103</sup>

(2) As of July 31, 2015, the business day immediately prior to August 3, 2015, the date Lawless issued the Statement of Charges ("SOC") in which she effectively certified her investigative findings and conclusions, regarding the Lawless Grievance, to the Commission,<sup>104</sup> she still had not received complete files pertaining to the Underlying \*30 Litigation;<sup>105</sup> as such, she requested and received seven factually and legally complex filings (the "*Late Requested Filings*"),<sup>106</sup> she then purported to conclude in the SOC that each of the Late Requested Filings was "frivolous";<sup>107</sup>

(3) After the SOC was issued, Hjortsberg and Lawless remained in regular contact and he continued to press her to advance the matter in an apparent attempt to use the exitance of this case for his client's benefit in Qui Tam I;<sup>108</sup> and

(4) During the litigation of Qui Tam I and the First Removal Case, Hjortsberg and Lawless appeared to be closely coordinating.<sup>109</sup>

**\*31 F. Based upon the Discovery Responses, Defendant Files a Notice of Removal in accordance with the "Other Paper" Provision of 28 U.S.C. § 1446(b)(3)**

1. *The Second Notice of Removal*

On September 1, 2017, *two days after receiving the signed Interrogatory Answers*, Defendant, pursuant to 28 U.S.C. § 1446(b)(3), Defendant filed another Notice of Removal (the "*Second NOR*") in the District Court.<sup>110</sup> In the Second NOR, Defendant

pled, *inter alia*, the new facts he gleaned from the Lee Deposition, the Interrogatory Answers, and Schedule A in support of his prior theory of removal.<sup>111</sup> Based upon the facts discovered from the Lamone Deposition and the documents produced in August 2017 (*i.e.*, that the Lawless Grievance and not the Hjortsberg Grievance gave rise to this matter), Defendant also asserted a new theory supporting federal jurisdiction.<sup>112</sup>

Defendant asserted and pled facts in support of numerous federal defenses, including, *inter alia*, the FCA, the Federal RPC, preemption, \*32 due process, equal protection, the Supremacy Clause.<sup>113</sup> Defendant alleged the vague allegations in this case are the product of a prosecution strategy (the “*Lawless Strategy*”),<sup>114</sup> which exploits a “loophole” in the state court’s procedural rules governing attorney disciplinary proceedings, as to effectively render the notice requirements of constitutional due process nugatory and ineffectual and enable free, unrestricted and continuous amendment of misconduct charges at any time up through the post-trial oral argument hearing that occurs before COA in each case.<sup>115</sup> Defendant provided an example of and substantial evidence from a highly-similar case (the “*Dyer Case*”)<sup>116</sup> in which he alleges the strategy was on full demonstration.<sup>117</sup> Defendant also alleged facts suggesting Plaintiff’s assertions about “frivolous” filings are merely sham allegations, which were made as a predicate to prosecute him for uncivil communications.<sup>118</sup> Defendant \*33 pled facts and offered evidence to show the filings at issue (including the filings in the Qui Tam Cases) were not “frivolous,”<sup>119</sup> and that this case had been the product of a litigation strategy (on the part of Hjortsberg) to benefit the Boomerang Defendants in the Qui Tam Cases.<sup>120</sup>

## 2. Proceedings in the Second Removal Case

The Second NOR gave rise to the Second Removal Case.<sup>121</sup> On September 5, 2017, Plaintiff filed a *Motion for Remand for Lack of Federal Jurisdiction* (the “Second MFR”), which it supplemented on September 7, 2017.<sup>122</sup> Thereafter, Defendant opposed the Second MFR.<sup>123</sup>

On September 20, 2017, the District Court issued the September 20th Order granting the Second MFR, along with an opinion stating its \*34 rationale.<sup>124</sup> The Court referenced the First Remand Opinion and included only a cursory analysis and discussion in which it strictly construed the FORS and held it could not apply on the basis that a *qui tam* relator “cannot be equated to that of a federal prosecutor or federal agent taking direction from a Government officer.”<sup>125</sup> It further held the FORS would not be available to a defendant in a case arising out of acts performed while assisting a bankruptcy trustee either.<sup>126</sup> The Court did not analyze any of the federal defenses asserted by Defendant.<sup>127</sup>

The District Court also rejected Defendant’s secondary basis of jurisdiction, which was the GRS and 28 U.S.C. § 1331.<sup>128</sup> Finally, the Court noted that, even if it had found jurisdiction, it would apply *Younger* abstention principles and decline to hear the case.<sup>129</sup> The \*35 Court concluded, without analysis, that none of the exceptions to *Younger* were applicable. *Id.*

Later on September 20, 2017, Defendant filed the Motion for Reconsideration asserting the Court had appeared to overlook, among other things, this Court’s June 2017 decision in *Sawyer*.<sup>130</sup> Plaintiff did not file a response or substantively address that motion, but after a teleconference hearing on September 22, 2017 with the parties,<sup>131</sup> citing this Court’s decision in *In Re*

*Lowe*, 102 F.3d 731, 736 (4th Cir. 1996), the Court concluded it could not reconsider the September 20th Order in any event,<sup>132</sup> and entered an order denying the motion.<sup>133</sup>

### 3. The Notice of Appeal

On September 25, 2017, Defendant filed a Notice of Appeal as to both the September 20th Order and the September 22nd Order.<sup>134</sup> No \*36 further litigation has occurred since the District Court's entry of the orders.

## SUMMARY OF ARGUMENT

Defendant properly removed this case on September 1, 2017 from CCAAC to the District Court, and the Court erred in holding that it did not have subject matter jurisdiction over this case. This case arises out of Defendant's role as an attorney for a qui tam relator. This case was properly removed under 28 U.S.C. § 1442(a) because Defendant satisfies all three prongs required for a private person to remove a case under the FORS. This Court may review all aspects of the September 20th Order, and the District Court also erred in determining that it did not have subject matter jurisdiction over any of the Plaintiff's under 28 U.S.C. § 1331. The District Court further erred in stating that it would apply *Younger* abstention principles to decline jurisdiction in this case even if it had found jurisdiction. Finally, the District Court erred in its determination that § 1447(d) barred it from reconsidering the September 20th Order because the statute specifically allows review of an Order in a § 1442 case.

## \*37 ARGUMENT

Whether subject matter jurisdiction exists is a question of law that this Court reviews *de novo*. See *Barlow v. Colgate-Palmolive Co.*, 772 F.3d 1001, 1007 (4th Cir. 2015). This Court also reviews *de novo* “whether a case satisfies the basic requirements of abstention.” *von Rosenberg v. Lawrence*, 781 F.3d 731, 734 (4th Cir. 2015) (internal brackets omitted).

### I. Based on the Discovery Responses, Defendant Properly and Timely Removed the Case, in accordance with 28 U.S.C. § 1446(b)(3)

#### A. Attorney Disciplinary Proceedings are Subject to the Removal Statutes

Attorney disciplinary proceedings, like all other proceedings commenced in a state court or any other forum that functions like a court, are subject to the removal statutes. *Kolibash v. Committee on Legal Ethics of West Virginia Bar*, 872 F.2d 571, 575 (4th Cir. 1989); *In re Lusk*, 2016 U.S. Dist. LEXIS 100583 at \*11-12 (C.D. Cal. 2016); see also *Wilson v. Gottlieb*, 821 F. Supp. 2d 778 (D. Md. 2011).

#### \*38 B. Defendant Promptly Filed the Second NOR after Receiving Discovery from Plaintiff, which Provided Different Grounds for Removal

While this case had been previously removed unsuccessfully, it is well-settled that a subsequent removal attempt based upon a “different ground” is permissible. *Bowyer v. Countrywide Home Loans Servicing LP*, 2009 U.S. Dist. LEXIS 74474 at \*6-7 (S.D. W.Va. 2009). The phrase “different grounds” can mean “a different set of facts that state a new ground for removal” or “new facts in support of the same theory of removal.” *Cain v. CVS Pharmacy, Inc.*, 2009 WL 539975, at \*2 (N.D. W.Va. 2009).

**1. The Discovery Established New Facts that Supported the Same Theory of Removal Espoused by the Defendant in the First Removal Case**

Here, **the discovery clearly established new facts**, not readily ascertainable from the Complaint itself, **that supported the same theory of removal espoused by the Defendant in the First Removal Case** (*i.e.*, Plaintiff alleges after all that Defendant violated MLRPC 3.1 (and other rules) by developing and filing each of the Qui Tam Cases on behalf of his former client, something the District Court \*39 itself explicitly noted in the First Remand Opinion was not ascertainable from the face of the Complaint itself).

**2. The Discovery Established a Different Set of Facts Supporting a New Ground for Removal**

The Lamone deposition testimony and emails produced on August 7, 2017 also established a different set of facts that supported a new ground for removal. Namely, the Hjortsberg Grievance did not give rise to this case. Rather, the direct proximate cause of this case was the work Defendant did later while acting under the Trustee to help effectuate the Settlement Agreement and preserve the Estate's interests in the Qui Tam Cases, which resulted in the Lawless Grievance. The discovery responses provided other facts that supported additional new grounds for removal.<sup>135</sup>

**3. Removal Was Timely Under 28 U.S.C. § 1446(b)(3)**

Here, **removal was timely because all the discovery upon which Defendant relied was received in the 30 day-period preceding Defendant's filing of the Second NOR on September 1, \*40 2017**. Deposition transcripts became available **August 23, 2017**,<sup>136</sup> signed Interrogatory Answers were received **August 30, 2017**, and copies of relevant emails were received **August 7, 2017**.

**II. The District Court Had Subject Matter Jurisdiction Pursuant to 28 U.S.C. § 1442(a)(1), the Federal Officer Removal Statute (FORS)**

*A. Overview of the FORS*

The FORS authorizes removal to federal court of any civil action or criminal prosecution commenced in a state court against any officer of the United States or of any agency thereof (**or of any person acting thereunder**), in an official or individual capacity, for or relating to any act under color of such office. *Sawyer v. Foster Wheeler, LLC*, 860 F.3d 249, 254 (4th Cir. 2017) (quoting 28 U.S.C. § 1442(a)(1)). **The purpose of the statute is to protect federal officials, agents and contractors who carry on the business of the United States from being brought to trial in State courts for acts performed under the authority of the Federal Government.** See *Watson v. Phillip Morris Cos., Inc.*, 551 U.S. 142, 147-53 (2007); see also *Sawyer*, 860 F.3d at 254 (“[T]he statute aims to protect the Federal Government \*41 from interference with its operations, primarily by providing a federal forum for a federal defense”) (*emphasis added; internal quotation marks, citations and ellipsis omitted*); *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 133 (2d. Cir. 2008).

**1. The FORS is to be Liberally Construed in Favor of Jurisdiction**

Unlike the general removal statute (28 U.S.C. § 1441), **the FORS is to be liberally construed in favor of jurisdiction**. *Yocum v. CBS Corp.*, 2017 U.S. Dist. LEXIS 66097 at \*10 (C.D. Cal. 2017) (citing *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247 (9th Cir. 2006)) “[A]lthough the principle of limited federal court jurisdiction ordinarily compels us to resolve any doubts about removal in favor of remand, courts have not applied that tiebreaker when it comes to the federal officer removal statute in light of its broad reach.” *Zeringue v. Crane Co.*, 846 F.3d 785, 789 (5th Cir. 2017) (*emphasis added*). See also *Bell v. Thornburg*, 743 F.3d 84, 88 (5th Cir. 2014) (citing *Watson*, 551 U.S. at 147) (“Although the [Supreme] Court held § 1442(a)(1)

was unavailable to Philip Morris, it reiterated previous decisions' guidance that the statute be "liberally \*42 construed" (emphasis added); *Stephenson v. Nassif*, 160 F. Supp. 3d 884, 887-88 (E.D. Va. 2015).

## ***2. The FORS Overcomes the Well-Pleaded Complaint Rule by Permitting a Federal Defense to Serve as the Federal Question Enduing the Court with Jurisdiction; the Defense Need Only Be Plausible and Need Only Apply to One Claim to Remove the Case***

The FORS is a **pure jurisdictional statute** in which **the raising of a federal question in the defendant's removal petition constitutes the federal law under which the action arises** for Article III purposes. *Zeringue*, 846 F.3d at 789-90 (citing *Mesa v. California*, 489 U.S. 121, 136 (1989)). The FORS "permits a federal defense, which is generally statutorily impotent to establish subject matter jurisdiction, to serve as the federal question that endues the court with jurisdiction." *Id.* The FORS "serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged." *Mesa*, 489 U.S. at 136. "As with a federal claim that creates federal question jurisdiction, a federal defense fulfilling this same function does not need to be 'clearly sustainable,' as § 1442 does not require a federal official, or a person acting under an official, to win his case before he can \*43 have it removed, but rather the defense needs only to be colorable." *Zeringue*, 846 F.3d at 789-90 (emphasis added; internal quotation marks omitted).

A "non-colorable federal defense is a defense that is immaterial and made solely for the purpose of obtaining jurisdiction or that is wholly insubstantial and frivolous." *Id.* Thus, a colorable federal defense is a defense that is material and not made solely for the purpose of obtaining jurisdiction or that is not wholly insubstantial and frivolous. *See Id.* Put another way, "[f]or a defense to be considered colorable, it need only be plausible; § 1442(a)(1) does not require a court to hold that a defense will be successful before removal is appropriate." *United States v. Todd*, 245 F.3d 691, 693-94 (8th Cir. 2001) (emphasis added). A federal defense need not "be justified as to all claims asserted in the plaintiffs' complaint; rather, the defense need only apply to one claim to remove the case." *Sawyer*, 860 F.3d at 257 (emphasis added).

## ***3. The FORS Authorizes Removal by Private Persons Acting as "Agents" or "Contractors" of the Government***

The FORS may be invoked by a private defendant to remove a state court action arising out of acts performed by the defendant as an \*44 agent or contractor of the Government. The FORS authorizes removal of a case by a private person who satisfies three elements: (1) that the person "acted under" a federal officer or agency; (2) that the person has a colorable federal defense; and (3) that the charged conduct was carried out for or in relation to the official authority. *Sawyer*, 860 F.3d at 254.

### ***B. Defendant Satisfied all Three Elements for Removal by a Private Person under the FORS***

#### ***1. The Defendant Satisfies the First Element for Removal under the FORS for Two Alternative Reasons***

In the context of the FORS, "the phrase 'acting under' is 'broad' and is to be 'liberally construed' in favor of the [party] seeking removal." *Sawyer*, 860 F.3d at 255 (citing *Watson*, 551 U.S. at 153--54).

##### ***a. An FCA Relator and His Attorney are a Type of Government Contractor Who Act under and assist the Executive in Recovering Lost money for the Government Via the Filing of Qui Tam Litigation***

In *Sawyer*, this Court concluded that the "acting under" prong of § 1442(a) is satisfied anytime a private person is sued in connection with work performed on behalf of the Government pursuant to a contract. The Court noted in relevant part:

\*45 ...When a private entity is involved, the Supreme Court has interpreted the phrase "acting under" to contemplate a relationship where the government exerts some "subjection, guidance, or control,"

and where the private entity engages in an effort “to assist, or to help carry out, the duties or tasks of the federal superior.

\* \* \*

[T]he record shows that during Morris' tenure as an employee at the Sparrows Point Shipyard, Foster Wheeler manufactured boilers under contracts with the U.S. Navy for use on its vessel. Given the Supreme Court's direction that we construe the statute liberally...Foster Wheeler's status as a Navy contractor readily satisfies the requirement that it have acted under the Navy.

[860 F.3d at 255](#) (emphasis added; internal citations and quotation marks omitted).

An FCA relator, like the boiler manufacturer in *Sawyer*, is just another form of government contractor. The FCA relator acts under the Executive. See *Brockovich v. Cnty. Med. Ctrs.*, 2007 U.S. Dist. LEXIS 21355 at \*16-17 (E.D. Ca. 2007) (“Qui tam statutes generally have important procedural safeguards, since they involve “the delegation of some sovereign attributes” from the government to the private citizen...the Executive Branch must retain control over a qui \*46 tam relator to satisfy the Take Care Clause of the United States Constitution...”) (emphasis added); see also *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (“The Executive retains significant control over litigation pursued under the FCA by a qui tam relator”); *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084 (C.D. Cal. 1989) (“The relator is subject to a host of controls designed to permit the reassertion of executive litigative authority.”) (emphasis added).

Rather than manufacturing something to assist the Government, the FCA relator initiates and pursues litigation to assist the Government in recovering monies lost through fraud. The contract between the Government and the FCA relator is created by the statute itself upon the filing of a *qui tam* action. *United States ex rel. Kelly v. Boeing Co.*, 9 F. 3d 743 (9th Cir. 1993) (“[T]he FCA's *qui tam* provisions operate as an enforceable unilateral contract. The terms and conditions of the contract are accepted by the relator upon filing suit”) (emphasis added); see also *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) (Holding relators have Article III standing in *qui tam* cases because the FCA \*47 effects a partial contractual assignment of the Government's damages claim). An attorney for an FCA relator also functions as a type of government contractor and effectively doubles as an attorney for the Government, which is why all courts to have considered the issue have held that relators who are not attorneys cannot represent themselves in *qui tam* litigation. See e.g., *Bond v. Hughes*, 671 Fed. Appx. 228 (4th Cir. 2016); *United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89 (2d. Cir. 2008).

It comports with the FORS' purpose for an FCA relator, sued in connection with his service, to be availed of a federal forum. See *Nguyen v. City of Cleveland*, 121 F. Supp. 2d 643 (N.D. Oh. 2000) (“In a *qui tam* action, the relator sues on behalf of the government as well as himself...[T]he policies that favor district court jurisdiction are like the policies behind 28 U.S.C. § 1442(a)... the protection of agents of the government when they do the government's business”) (emphasis added).

With respect to Plaintiff's claims regarding the Qui Tam Cases, Defendant and his client satisfy the “acting under” prong. After receiving information in state court litigation that the Government was \*48 being defrauded, they decided to accept Congress' offer to become a contractor by preparing and filing the Qui Tam Cases to assist the Government in recovering for losses sustained by the fraud they discovered. In responding to Congress' offer (*i.e.*, the FCA), they followed all of the specifications enumerated therein. After the cases were filed, they assisted the assigned Government officials with their review and investigation of the matters. The Defendant continued to remain in contact with and assist the Government, throughout the almost 2.5-year period the cases remained under seal, and effectively under the Government's exclusive control. After the Government noticed its intervention decision in November 2014, it maintained significant control over the cases, as seen in, *inter alia*, the Nichols Letter,<sup>137</sup> in which the Government provided instructions for Defendant to follow regarding further

prosecution of the cases, including instructions for attempting to settle the case or filing an amended complaint therein. Later, when Defendant filed the FAC in Qui Tam I, he followed the instructions outlined in paragraph 5 of the Nichols Letter. When the Defendant ultimately decided not to pursue Qui Tam \*49 II and sought to dismiss it without prejudice, the consent of AUSA Nichols was required. In sum, with respect to the Qui Tam Cases, the Defendant was a type of government contractor who readily satisfies the “acting under” element necessary for removal under the FORS.

***b. The Direct Proximate Cause of this Case was the Work the Defendant Performed While Acting Under the Trustee to Preserve the Estate's Interests in the Qui Tam Cases***

The District Court erred when it said: “[Defendant's] role in assisting a “Bankruptcy Trustee” is also insufficient to confer federal jurisdiction.”<sup>138</sup> The Court failed to recognize the reach of the FORS.<sup>139</sup> A bankruptcy trustee is a considered a federal official who may be availed of the FORS. See e.g., *Bell*, 743 F.3d at 88 (“We hold that Thornburg is a “person acting under” an officer of the United States who may invoke § 1442(a)(1) of the federal officer removal statute...”) (emphasis added); see also *In re GTI Capital Holdings, L.L.C.*, 399 B.R. 247 (Bnkrt. D. Az. 2008) (“As an officer... the trustee may remove any state action against him or her to ‘the district court of the United States for the district and division \*50 embracing the place wherein it is pending’ ”) (emphasis added). Thus, the first prong of the FORS can be satisfied by a private defendant who is sued because of acts performed while acting under a bankruptcy trustee to assist him in discharging his official duties.

Defendant alleged that, based upon facts discovered from the Lamone deposition and emails produced by Plaintiff on August 7, 2017, the proximate cause of this case was work he did while acting under the Trustee to help effectuate the settlement and preserve the Estate's interests in the Qui Tam Cases.<sup>140</sup> This case occurred as the result of the undisclosed March 21st Arrangement and the Lawless Grievance; Defendant asserts that neither would have occurred but for Hjortsberg's having learned, through events in the Bankruptcy Case (such as Brino's attendance at the 341 Meeting and the subsequent negotiation and inclusion of carveout language originally proposed and drafted by the Defendant in the Settlement Agreement), that there existed whistleblower litigation surviving the Settlement Agreement. Hence, Defendant asserts he would not have faced exposure for any of the events at issue had he not acted under the Trustee by assisting him in \*51 discharging his official duties; and therefore, that he satisfies the “acting under” element of the FORS, in any event.<sup>141</sup>

***2. The Defendant Satisfies the Second Element for Removal under the FORS Because He Pled Multiple Colorable Federal Defenses in the Second NOR***

A “federal defense” is any defense that raises a question “arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made under their authority.” See *Mesa*, 489 U.S. at 136 (quoting U.S. Const., Art. III, § 2, cl. 1). A federal defense is colorable so long as its plausible. See *Todd*, 245 F.3d at 693-94.

In the Second NOR, the Defendant pled, *inter alia*, colorable federal defenses arising under the FCA, the Federal RPC, preemption, the Due Process and Equal Protection Clauses of U.S. Const., amend. XIV, § 1, and the Supremacy Clause.<sup>142</sup>

***\*52 a. As to Operative Claim No. 1, Defendant Has a Colorable Federal Defense Arising under the FCA because Defendant Asserts and there is Substantial Evidence to Suggest that Qui Tam I Was Not Frivolous***

Defendant pled facts and generally asserted a plausible federal defense arising under the FCA (*i.e.*, that Defendant did not violate MLRPC 3.1 by filing Qui Tam I because that case was not “frivolous”).<sup>143</sup> In developing and filing Qui Tam I, Defendant and his client did exactly what Congress invited and even encouraged them to do, when it specifically amended the FCA, as part of the PPACA in 2010, to enable putative whistleblowers who come across information about fraud against the Government, during the course of state court litigation, to file *qui tam* lawsuits.

**i. The Defense that Qui Tam I was “Not Frivolous” is a Federal Defense Involving a Question Arising under the FCA**

The only way that filing Qui Tam I could have violated MLRPC 3.1 is if Qui Tam I was “frivolous.” *Atty. Griev. Comm'n. v. Donnelly*, 2018 Md. LEXIS 61 at \*104-05 (2018) (“A case is frivolous where the lawyer is unable either to make a good faith argument on the \*53 merits of the case...[t]he hearing judge's conclusion that Donnelly violated MLRPC 3.1 by filing the complaint in the Partition Case...is not supported by clear and convincing evidence...There is no evidence that, in the complaint, Donnelly was unable to make [a] good faith argument as to the merits of the Partition Case”) (emphasis added).<sup>144</sup>

Whether Qui Tam I was “frivolous” is strictly a question arising under the FCA. Thus, the defense that Qui Tam I was “not frivolous” is a federal defense.

**ii. Given the Undisputed Facts Surrounding the Filing of Qui Tam I and the Government's Subsequent Pursuit of the QTI Parallel Criminal Cases, the Defense that Qui Tam I Was “Not Frivolous” is Clearly Colorable**

This Court has held an evaluation of frivolousness in the FCA context involves answering the question “whether the relator's claim, when viewed objectively, clearly had no reasonable chance of success” (emphasis added and internal quotation marks omitted). \*54 *United States ex rel. Ubl v. IIF Data Solutions*, 650 F.3d 445, 447 (4th Cir. 2011). Since Plaintiff explicitly mentioned in its Complaint the naming of Svehlak as a defendant in Qui Tam I, Defendant will focus discussion on the FCA claims against Svehlak in that case. Defendant proffers the evidence against the Boomerang Defendants was overwhelming at the time the Defendant and his client filed Qui Tam I. The case involved claims pertaining to 27 different real estate transactions financed by allegedly fraudulent mortgages insured by FHA, but the Boomerang Defendants were parties only to claims pertaining to one of those transactions, the HSP Transaction.<sup>145</sup> With respect to the HSP Transaction, the Defendant and Moore had discovered significant information regarding the transaction from investigative efforts and discovery during the Confessed Judgment Case, which was prompted by Imagine's voluntary filing of IC Exhibit 20, a document purporting to claim a 56.34% real estate commission on a transaction financed with a mortgage insured by FHA, in the case.<sup>146</sup> By the time Qui Tam I was filed, the Defendant and Moore had amassed evidence suggesting that, among other things, (1) the \*55 mortgage that financed the HSP Transaction was in default (and thus had caused losses to the Government); (2) the purported buyer (Mballa) had been a straw buyer who never occupied the property; (3) the transaction involved the sale of a property at an inflated price; (4) that Svehlak had executed all of the real estate transaction documents on behalf of the seller, Boomerang;<sup>147</sup> and (5) Svehlak had made false certifications in connection with the documents he executed.<sup>148</sup>

This evidence was more than sufficient to assert plausible claims for violation of the FCA against the Boomerang Defendants for the HSP Transaction. See e.g., *United States v. Eghbal*, 475 F. Supp.2d 1008 (C.D. Cal. 2007); *United States v. Klein*, 230 F. Supp. 426 (W.D. Pa. 1964); *United States v. DeWitt*, 265 F.2d 393 (5th Cir. 1959).

The plausibility of the defense surrounding the non-frivolousness of Qui Tam I and the theory underpinning it is strengthened even more considering the Government's pursuit of the three QTI Parallel \*56 Criminal Cases and the outcome in those cases. The District Court's final judgment in the *Agodio* Case conclusively established the existence of the scheme and fraudulent nature of 26 of the 27 transactions at issue Qui Tam I, including the HSP Transaction. The fact that the mortgage fraud scheme alleged in Qui Tam I was conclusively confirmed to exist in *Agodio* is substantial evidence that the theory underpinning the case was reasonable. The fact that 26 of the 27 transactions at issue in Qui Tam I were conclusively confirmed as having been fraudulent and a part of the scheme, is strong evidence that the methodology employed by the Defendant and Moore to identify the transactions at issue and formulate the allegations in Qui Tam I was objectively reasonable.

In sum, the Defendant has a plausible federal defense under the FCA with respect to Plaintiff's claims surrounding Operative Claim No. 1.

**\*57 b. As to Operative Claim No. 2, Defendant Also Has a Colorable Defense Arising under the FCA**

Plaintiff alleges the filings in both Qui Tam Cases demonstrate the same theory,<sup>149</sup> and since the Defendant clearly has a colorable federal defense under the FCA surrounding Plaintiff's claims pertaining to the development and filing of Qui Tam I, it follows that Defendant also has a colorable federal defense under the FCA as to Operative Claim No. 2, especially since it is irrefutable the same methodology was used to identify the transactions at issue and formulate the allegations in both cases.<sup>150</sup> This is further supported by the Government's investigation of Qui Tam II for almost 2.5 years and the communications the Defendant had with the Government agents after the cases were initially filed in 2012 and throughout the period of time the cases were under investigation.<sup>151</sup> In sum, Defendant has a \*58 colorable federal defense under the FCA with respect to Plaintiff's claims regarding the development and filing of Qui Tam II.<sup>152</sup>

**c. As to Plaintiff's Claim about the Government's NonIntervention Decision in the Qui Tam Cases, Defendant Has a Colorable Defense under the FCA, Since, as a matter of law, an Intervention Decision is Not Relevant to Any Consideration Regarding the Merits of a Qui Tam Case**

As a matter of law, “[t]he government's decision not to intervene in an FCA action does not mean that the government believes the claims are without merit, and the government's decision not to intervene therefore is not relevant in an FCA action brought by a private party.” *Ubl*, 650 F.3d at 457 (emphasis added). Nonetheless, in formulating its claims, Plaintiff misread the significance of that decision and placed great weight on it.<sup>153</sup> Schedule A unequivocally revealed that Plaintiff asserts claims against the \*59 Defendant for violation of MLRPC 3.1 and other rules because he was not successful in obtaining the Government's intervention in the Qui Tam Cases.<sup>154</sup> As to such claims, Defendant has a colorable federal defense arising out of the FCA.<sup>155</sup>

**d. As to Plaintiff's Claims Regarding Actions Taken in the District Court (including Operative Claim Nos. 1 and 2), Defendant Has Colorable Defenses Arising under the Federal RPC and Preemption**

Neither MLRPC 3.1 nor any other rule, by its own terms, applies directly to any action taken by an attorney in federal court, including the filing of the Qui Tam Cases. See *In re Snyder*, 472 U.S. 634, 645 n. 6 (1985) (“The state code of professional responsibility does not by its own terms apply to sanctions in the federal courts. Federal courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of federal law”) (emphasis added). Although the District Court, via Local Rule 704, has adopted the state code of professional conduct, this does not necessarily mean that the interpretation or application of any given \*60 rule will always be the same in the federal court as it is in the state court. *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 108 (M.D. N.C. 1993). In sum, questions arising under the Federal RPC are questions of federal law whereas questions arising under the state's MLRPC are questions of state law. *Id.* Thus, in the first instance, all claims and defenses with respect to actions taken in federal court (such as the filing of Qui Tam I) present questions of federal law. As noted *supra*, Defendant has pled and there is evidence to suggest the Qui Tam Cases were not ‘frivolous.’ Hence, among others, he has a colorable defense under Federal RPC 3.1 and preemption to Operative Claims Nos. 1 and 2, because to the extent of any conflict, the federal RPC would govern.

**e. As to Plaintiff's Claims Regarding Allegedly Frivolous Filings (including Operative Claim Nos. 1 and 2), Defendant Has a Colorable Defense Arising under, inter alia, the Due Process Clause of U.S. Const., amend. XIV and 42 U.S.C. § 1983 Because the Allegations Have Been Left Unconstitutionally Vague as Part of a Prosecution Strategy Intended to Enable Plaintiff to Use the Defendant's Trial to Fill in any Holes in its Case**

Attorney disciplinary cases are “**adversary proceedings of a quasi-criminal nature.**” *In re Ruffalo*, 390 U.S. 544, 550-51 (1968) (emphasis added). Defendants in grievance proceedings are “entitled to \*61 the basic elements of due process -- notice and the opportunity to defend in a full and fair hearing.” *Atty. Griev. Comm'n. v. Stewart*, 285 Md. 251, 259 (1979). Hearings must be held “at a meaningful time and in a meaningful manner.” *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). “A hearing is not meaningful if a [defendant] is given inadequate information about the basis of the charges against him.” *Taylor v. Rodriguez*, 238 F.3d 188, 193 (2d. Cir. 2001). For a hearing to be meaningful, “**the charge must be known before the proceedings commence.**” *Ruffalo*, 390 U.S. at 550-51 (emphasis added). “[A]bsence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprive [the accused] of procedural due process.” *Atty. Griev. Comm'n. v. Costanzo*, 432 Md. 233, 256 (2013) (citing *Ruffalo*, 390 U.S. at 551).

**i. Procedural Due Process Requires, the Initial Charging Document to Contain Factual Allegations, which if proven, Would Render the Conduct Complained of an Offense**

To satisfy the requirements of procedural due process, the charging document commencing a disciplinary proceeding must specify \*62 (a) the RPC alleged to have been violated;<sup>156</sup> and (b) “**the factual allegations against which the attorney must defend.**” *Atty. Griev. Comm'n. v. Myers*, 333 Md. 440, 444-45 (1994). The factual allegations against which the attorney must defend are those “which must be proved [by clear and convincing evidence] to make the act [s] complained of [an offense].” *Thanos v. State*, 282 Md. 709, 714-16 (1978). See also *Atty. Griev. Comm'n. v. Walman*, 280 Md. 453, 463-64 (1977); Md. Rule 16-757(b). The “**facts which must be proved to make the act complained of [an offense]**” comprise what is known as the “**character of the offense.**” *Thanos*, 282 Md. at 714-16 (emphasis added); see also *Tapscott v. State*, 106 Md. App. 109, 134 (1995).

All facts comprising the “character of the offense” must be known before the proceedings commence. *Thanos*, 282 Md. at 714. The proceedings “**become a trap when, after they are underway, the charges are amended**” in a manner that has the effect of altering the “character of the offense;” such amendment, if performed without the defendant’s consent, would violate his “constitutional right to be informed of the accusation against him in time to prepare his defense.” \*63 See *Ruffalo*, 390 U.S. at 551; *Thanos* 282 Md. at 716; *Walman*, 280 Md. at 463-64; see also *Atty. Griev. Comm'n. v. Stanalonis*, 445 Md. 129, 142 (2015).

“[L]egal conclusions and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements are not factual allegations.” *Manning v. Edmonds*, 2018 U.S. Dist. LEXIS 18940 at \*11 (W.D. Va. 2018) (emphasis added; internal quotation marks omitted). See also *Lloyd v. GMC*, 397 Md. 108, 120 (2007). Because conclusory charges are not facts; they are not sufficient to afford a defendant notice. “It is not sufficient to merely assert conclusory allegations suggesting that the elements are in fact present in the controversy.” *Valentine v. On Target, Inc.*, 353 Md. 544, 549 (1999). In other words, “a [charging document] which charges the accused with the act prohibited by the statutory language. and does nothing more, would be fatally defective in failing to allege such other facts as would enable the accused to prepare his defense.” *Canova v. State*, 278 Md. 483, 499 (1976) (emphasis added). See also *In re Roneika S.*, 173 Md. App. 577, 600 (2007).

**\*64 ii. The Complaint Lacks Facts that that Could Establish Any of the Filings at Issue were “Frivolous”**

As in the Dyer Case, Plaintiff purports to challenge effectively everything the Defendant did in the underlying litigation.<sup>157</sup> However, “[b]y literally alleging everything, [the Plaintiff] alleges nothing.” *Dacon v. Transue*, 441 Mich. 315, 330 (1992) (emphasis added). With respect to the charges about “frivolous” filings and violations of MLRPC 3.1, the Complaint “make[s] **conclusory allegations, which do not provide reasonable notice to the [D]efendant.**” See *Id. at 328* (emphasis added). Indeed, “[a] defendant seeking to respond to [P]laintiffs’ conclusory allegations...would have little idea where to begin.” *Bell Atlantic v. Twombly*, 550 U.S 554, 565 n. 10 (2007) (emphasis added).

The Complaint is circular, like one that alleges “defendant is guilty of negligent driving because he was driving negligently.”<sup>158</sup> It assumes the truth of what it seeks to prove; *i.e.*, *petition principii* - begging the question. In paragraph 8, Plaintiff alleges, “**As outlined below, [the Defendant]...filed countless frivolous papers ...**” \*65 (emphasis added). Then, some 14 filings from various proceedings are baldly alleged to have been “frivolous” by merely labeling them as such.<sup>159</sup> An additional six filings are implicitly alleged to be frivolous.<sup>160</sup> With respect to these allegations, the Complaint is devoid of “operative facts” (*i.e.*, facts which, if proven, would render the filings at issue “frivolous” or enable it to be reasonably inferred).<sup>161</sup>

Thus, the Complaint does not provide notice about the character of the offense and leaves completely open for speculation what facts are truly at issue regarding the allegedly “frivolous” filings. Hence, the allegations are unconstitutionally vague.

**\*66 iii. Plaintiff's Repetitive Circular Allegations Regarding “Frivolous” filings Demonstrate an Illicit Prosecution Strategy that Exploits the Procedural Rules in Attorney Disciplinary Proceedings in Maryland**

In the Second NOR, Defendant alleged that the bald allegations in this case are the product of the Lawless Strategy,<sup>162</sup> an illicit prosecution strategy that exploits a “loophole” in the state court procedural rules governing attorney disciplinary proceedings in Maryland.<sup>163</sup> The Lawless Strategy was on full demonstration in the Dyer Case, and as a result, the defendants in that case were forced to endure a **torturous 16-day trial** during which neither they nor the Court could figure out what it was they were actually accused of having done wrong.<sup>164</sup>

The strategy allows the prosecutor to fill in any holes in her case with facts that are not subjected to proper adversarial testing by \*67 enabling free and continuous amendment of the charges up through and including the time of the post-trial oral argument hearing before COA, which occurs in each case.<sup>165</sup> “[S]uch procedural violation of due process would never pass muster in any normal civil or criminal litigation,” and they do not pass muster in these proceedings either. *Ruffalo*, 390 U.S. at 551 (emphasis added). The Lawless Strategy is nothing more than a scheme to intentionally deny the defendant his constitutional rights to notice and opportunity to defend the allegations in a full and fair trial. Because the prosecutor is a state official who acts under color of law, her employment of the Lawless Strategy, as alleged by the Defendant, constitutes a violation of **42 U.S.C. § 1983** for the same fundamental reason that the defendants in \*68 *United States v. Wiseman*, 445 F.2d 792 (2d. Cir. 1971), were held to have violated **18 U.S.C. § 242**, the criminal parallel of § 1983.<sup>166</sup>

**f. As to Plaintiff's Claims Regarding Allegedly Frivolous Filings (including Operative Claim Nos. 1 and 2), Defendant Has a Colorable Defense under the Equal Protection Clause of U.S. Const., amend. XIV, § 1 Because there is Overwhelming Evidence They are Sham Allegations Asserted as a Predicate to Prosecute the Defendant for Protected Speech in his Private Email Communications**

A prosecution decision may not be based upon a defendant's decision to exercise connotationally-protected rights, such as the First Amendment right to free speech. *Wayte v. United States*, 470 U.S. 598, 608 (1985) (“The decision to prosecute may not be deliberately based upon an unjustifiable standard such as ...the exercise of protected statutory and constitutional rights”) (emphasis added). Here, there is overwhelming evidence to suggest Plaintiff's claims about frivolous filings are mere sham allegations made for the sole and explicit purpose of seeking to punish the Defendant for his protected speech by attempting to shoehorn, \*69 into violations of ethics rules, protected communications, in which Defendant expressed his opinions and arguments (albeit at times uncivilly) about factual and legal theories regarding the Underlying Litigation<sup>167</sup> For example, threatening or filing a lawsuit has been held to be a constitutionally-protected activity unless the threatened claims are “frivolous.”<sup>168</sup> Likewise, attempting to leverage settlement is a proper purpose for making a demand or filing a lawsuit,<sup>169</sup> unless the threatened claims are “frivolous.”<sup>170</sup> Here, Plaintiff's strategy for shoehorning the communications into violations of ethics rules is to presuppose the Defendant's court filings are \*70 “frivolous,” and then assert that otherwise protected

communications were part of a sanctionable “course of conduct” or “crusade...” *See e.g.*, JA 332 (“[T]he violation of the Rules rests on a course of conduct -- developing an elaborate conspiracy theory...and embarking on a crusade to prove his theory”) (emphasis added; internal brackets and quotation marks omitted). It is irrefutable the alleged “crusade” entailed nothing more than the Defendant arguing factual and legal theories in email communications and court filings. Hence, **absent the court filings being frivolous, the alleged “crusade” included no sanctionable conduct.** Defendant alleges this is the reason for Plaintiff’s bald allegations about “frivolous” filings, and that the evidence suggesting these are sham allegations includes, but is not limited to the following:

(1) No court has ever found any of the Defendant’s filings “frivolous;” there was never even any issue or claim in the Underlying Litigation itself that the Defendant’s filings were “frivolous,” and the Hjortsberg Grievance had not even been about “frivolous” filings, but rather email communications;

\*71 (2) Prior to the filing of the SOC, the Defendant was never told he was suspected of or under investigation for having made any “frivolous” court filings as would have been required by Md. Rule 16-731(c)(1) and APGs § 4.14 if there had been a *bona fide* investigation into the Defendant on such basis;

(3) All of Plaintiff’s allegations about “frivolous” court filings are bald, circular and conclusory; Plaintiff alleges no facts in support of its conclusions;

(4) Despite making conclusory allegations about 20 different court filings (including the 14 filings explicitly labeled and alleged to have been “frivolous” and 6 filings implicitly alleged to have been “frivolous”), Plaintiff has been unable to articulate the factual basis for such contention with respect to even a single filing;<sup>171</sup>

\*72 (5) Plaintiff alleges the entire PFA Complaint was “frivolous” even though (a) the case was taken over by the Trustee and Daneman and settled with the defendants paying the Estate an aggregate sum of \$137,500; (b) a highly-qualified U.S. District Court Judge concluded that at least one of the claims in the PFA Complaint was potentially viable;<sup>172</sup> (c) Plaintiff has admitted that it does not allege the Defendant falsified facts or made any misrepresentations in connection with the Underlying Litigation;<sup>173</sup> (d) there is no evidence of Plaintiff having also charged the Trustee and/or Daneman with pursuing frivolous litigation;

\*73 (6) Plaintiff alleges the motion to remand Defendant filed in the PFAFC was frivolous,<sup>174</sup> even though the District Court found the motion to be meritorious and granted it<sup>175</sup> and even though the interpretations of the then-recently enacted *Jurisdiction and Venue Clarification Act* of 2011 (the “JVCA”), as advocated by the Defendant, in that motion and adopted by the Court in its opinion,<sup>176</sup> have been cited with approval by other courts numerous times;<sup>177</sup>

(7) Lee admitted, on behalf of Plaintiff, that (a) it would be necessary to have and review the entire records of a case to ascertain why (and hence whether) any particular filing was “frivolous;”<sup>178</sup> and (b) Lawless was the person, upon whose conclusions the Plaintiff relied, to formulate its allegations about \*74 “frivolous” court filings in this case,<sup>179</sup> it does not appear that Lawless could have drawn any such conclusions in good faith, as of Monday, August 3, 2015, the date she effectively certified them as her *bona fide* conclusions, since (a) as of the afternoon of Friday, July 31, 2015, she admitted she had never had complete copies of the files from the Underlying Litigation and thus requested (and received) the copies of the factually and legally complex Late Requested Filings;<sup>180</sup> and (b) even assuming that Lawless had access to the entire records from the Underlying Litigation as of the close of business on July 31, 2015 (something that was not actually possible),<sup>181</sup> there simply would not have \*75 been sufficient time between when Lawless received the seven Late Requested Filings on Friday afternoon and when she purported to conclude each was frivolous on Monday for her to have actually reviewed, digested and researched any relevant law concerning them such as to have been able to draw the *bona fide* conclusion in good faith;<sup>182</sup>

(8) The allegations in the SOC and Complaint have indicia suggesting they were drafted by someone who had a general lack of familiarity with the records of the Underlying Litigation;<sup>183</sup>

(9) Plaintiff's lack of a qualified and independent expert capable and willing to testify that, based upon his or her independent assessment and review of the records from the Underlying Litigation, he or she found the Defendant's court filings to be "frivolous," and the reasons why,<sup>184</sup>

\*76 (10) Notwithstanding Lee's testimony that Plaintiff's allegations relied on Lawless' conclusions about "frivolous" filings, Lawless herself later attempted to disclaim responsibility for them, claiming they were not based upon the opinions or conclusions of any person,<sup>185</sup> and thereby suggesting they were manufactured contentions for which there had not been a factual basis;<sup>186</sup>

(11) The dismissal of the Hjortsberg Grievance on March 20, 2014,<sup>187</sup> three days after the Bankruptcy Court approved the Settlement Agreement,<sup>188</sup> followed by Lawless' undisclosed entry into the March 21st Arrangement;<sup>189</sup> and her subsequent attempt \*77 to pass off the Lawless Grievance as the Hjortsberg Grievance;<sup>190</sup> and

(12) Lawless' unexplained departure from the Abjurement Policy,<sup>191</sup> her assertion of claims pertaining to the merits of the Qui Tam Cases, without having all the relevant information, before those cases could even be litigated; and her apparent close coordination with Hjortsberg during the early pendency of this case and the litigation of Qui Tam I.<sup>192</sup>

In sum, because there is overwhelming evidence that Plaintiff's claims about "frivolous" filings are merely sham allegations being asserted to prosecute the Defendant for the email communications, Defendant has a colorable defense under the Equal Protection Clause of U.S. Const., amend. XIV, § 1.

**\*78 g. As to all of Plaintiff's Claims in this Case, Defendant Has a Colorable Defense under U.S. Const., amend. V and the Due Process Clause of U.S. Const., amend. XIV, § 1 Because Lawless' Failure to Disclose the March 21st Arrangement Summarily Divested the Defendant Forever of His Rights to Participate in Proceedings, the Outcome of Which, Lawless Intended to (and Actually Did) Use to Make an Official Decision about the Defendant**

The Fifth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that no person shall be deprived of "life liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V, "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to "existing rules or understandings that stem from an independent source such as state law." *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998).

In Maryland, a person is entitled to intervene as of right in an ongoing judicial proceeding, as a matter of right, whenever the person claims an interest in the subject of the action, and the person is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest. Md. Rule 2-214(a). "[A]n applicant need merely show that he might be \*79 disadvantaged by the disposition of the action in which he sought to intervene." *Bd. of Trs. v. Mayor & City Council of Balt. City*, 317 Md. 72, 88 (1989) (emphasis added). Intervention may occur in a trial or appellate court proceeding.<sup>193</sup>

Given the Commission's final actions on the Hjortsberg Grievance on March 20, 2014, and the subsequent March 21st Arrangement, it is obvious the Defendant would be disadvantaged if the Advisory Opinion came out in favor of Hjortsberg's clients rather than the Defendant's clients. Thus, as a matter of right, he could have intervened in the litigation had he known about the March 21st Arrangement.

By denying the Defendant notice about the March 21st Arrangement, Lawless summarily divested the Defendant, without just compensation or due process of law, of his rights to intervene in a proceeding in which he had a property interest. Had she not done so, \*80 the outcome of the Confessed Judgment Appeal likely would have been very different and this case would never have occurred. <sup>194</sup>

***h. As to all of Plaintiff's Claims in this Case, Defendant Has a Colorable Defense under the Supremacy Clause Because this Case is the Product of a Litigation Strategy on the Part of Hjortsberg to Defend the Boomerang Defendants in the Qui Tam Cases by Restraining the Defendant from Pursing Them via an In Personam Action in State Court***

It is well-settled “[s]tate courts are completely without power to restrain federal-court proceedings in in personam actions.” *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964) (emphasis added). Defendant alleges the emails produced on August 7, 2017 demonstrated that this case exists because Hjortsberg, having learned about the existence of the Qui Tam Cases through events in the Bankruptcy Case, continued to push it after the Hjortsberg Grievance was dismissed on March 20, 2014, as part of a litigation strategy to restrain the Defendant and benefit his clients in the Qui Tam Cases. Thus, as to all the claims in this case, Defendant has a plausible defense under the Supremacy Clause for the same principal reasons as the attorney \*81 defendants in *Devazier v. Caruth*, 2016 U.S. Dist. LEXIS 92231 (E.D. Ark. 2016).

In sum, the Defendant has numerous plausible federal defenses and readily satisfies the second element for removal under the FORS.

***3. The Defendant Satisfies the Third and Final Element for Removal under the FORS Because there is Clearly a Nexus Between Plaintiff's Claims and the Defendant's Service in Connection with the Qui Tam Cases; and in any Event, Defendant's Actions in Assisting the Trustee Were the Direct Proximate Cause of this Case***

To satisfy the third element for removal under the FORS, a defendant need only show that there is a causal connection between the charged conduct and the federal office (i.e., what the defendant did for the Government). In *Sawyer*, this Court noted in relevant part:

The district court imposed a stricter standard of causation than that recognized by the statute. It concluded that because no federal officer provided any direction regarding whether to warn Foster Wheeler's workers... Foster Wheeler has not established the necessary causal nexus between their actions and the plaintiffs' claims. In demanding a showing of a specific government direction, however, the district court went beyond what § 1442(a)(1) requires, which is only that the charged conduct relate to an act under color of federal office.

\*82 860 F.3d at 258 (emphasis added; internal quotation marks omitted). Here, the District Court also erroneously applied a strict causation standard that is divorced from the post-RCA version of the FORS. <sup>195</sup> In sum, under the post-RCA version of the FORS, there need only be a nexus between the charged conduct and the act performed under color of office. With respect to Operative Claim Nos. 1 and 2, this prong is clearly satisfied. Developing and filing qui tam cases are clearly acts that Congress has expressly authorized private parties to do on behalf of the Government. Hence, these claims have a nexus to what Defendant was authorized to (and did) do on behalf of the Government.

Furthermore, the proximate cause of this case was the Defendant's actions in assisting the Trustee with the performance of his official duties to, *inter alia*, preserve the Estate's interests in the Qui \*83 Tam Cases. Hence, there is a nexus between all of Plaintiff's claims in this case and acts performed under color of office.

### **III. The District Court Alternatively Had Subject Matter Jurisdiction Over this Case Pursuant to 28 U.S.C. § 1441, the General Removal Statute, 28 U.S.C. § 1331 and 28 U.S.C. § 1367**

#### ***A. Plaintiff's MLRPC 3.1 Claims Surrounding the Development and Filing of the Qui Tam Cases Hinge upon a Substantial Question Arising under the FCA***

Defendant avers that Plaintiff's MLRPC 3.1 claims surrounding the development and filing of the Qui Tam Cases and the Government's non-intervention decision (*Cmplt.*, ¶¶8, 32, 36, 66) hinge upon a substantial question of federal law, and as such, the District Court also had jurisdiction over those claims pursuant to 28 U.S.C. § 1331. See *Grable & Sons Metal Products v. Darue Eng'g. & Mfg.*, 545 U.S. 308 (2005).

#### ***B. All of Plaintiff's Claims Pertaining to Actions Taken in the District Court Raise a Federal Question Because the State's Code of Professional Conduct Does Not Directly Apply in the District Court; the District Court's Own Code Applies and the Interpretation of that Code is a Matter of Federal Law***

For the same reasons Defendant has a federal defense with respect to each of Plaintiff's claims pertaining to conduct that occurred \*84 in federal court,<sup>196</sup> each of those claims arise under federal law, and thus, the District Court also had subject matter jurisdiction over them pursuant to 28 U.S.C. § 1331. With respect to claims surrounding conduct that occurred in federal court, the Defendant is entitled to have such conduct judged by that Court in the first instance. See *Cord v. Smith*, 338 F.2d 516, 524 (9th Cir. 1964) ("When an attorney appears before a federal court, he is acting as an officer of that court, and it is that court which must judge his conduct") (emphasis added).

#### ***C. Plaintiff's Remaining State Law Claims Are Subject to the Supplemental Jurisdiction of the District Court***

This matter forms one case or controversy under Article III of the United States Constitution, and therefore, all of Plaintiff's remaining state law claims are subject to the supplemental jurisdiction of the District Court under 28 U.S.C. § 1337.

### **IV. The District Court Erred in Stating that it Would Apply Abstention Principles Even if It Had Found Jurisdiction**

The District Court further erred in concluding that even if it had found the ability to exercise jurisdiction in this case, it would abstain in \*85 this matter.<sup>197</sup> First, it is well-settled that "abstention from the exercise of federal jurisdiction is the exception, not the rule." *Employers Resource Mgmt. Co. v. Shannon*, 65 F.3d 1126, 1134 (4th Cir. 1995) (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984)).

#### ***A. Jurisdiction is Mandatory in Cases Removed under the FORS***

"[T]he removal jurisdiction granted by § 1442(a)...is mandatory, not discretionary, and a district court has no authority to abstain from the exercise of that jurisdiction..." *Jamison v. Wiley*, 14 F.3d 222, 239 (4th Cir. 1994) (emphasis added). Very simply, "discretionary abstention in the context of § 1442(a)(1) removal is not available." *Id.* (quoting *Kolibash*, 872 F.2d at 575) (emphasis added; internal ellipses omitted).

***B. Even if Jurisdiction Were Not Mandatory, the Younger Abstention Doctrine, which was Cited by the District Court, Would Not be Applicable in this Case***

The specific abstention doctrine cited by the District Court in this case is frequently was the “Younger abstention doctrine,” derived from \*86 the Supreme Court’s decision in *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny.<sup>198</sup> For *Younger* abstention to be appropriate, three conditions must be satisfied: (1) **there is an ongoing state judicial proceeding**, (2) the proceeding implicates important state interests, and (3) **there is an adequate opportunity to present the federal claims in the state proceeding**. *Va. ex rel. Kilgore v. Bulgartabac Holding Group*, 360 F. Supp. 2d 791, 796-97 (E.D. Va. 2005). *Younger* further does not apply in the event of four enumerated exceptions: (1) bad faith; (2) harassment; (3) flagrantly or patently unconstitutional law; and (4) other extraordinary circumstances. *Colonial First Props., LLC v. Henrico County*, 166 F. Supp. 2d 1070, 1084 (E.D. Va. 2001).

***1. The First Prong of Younger Can Never Be Satisfied in a Removal Case***

“[O]nce the notice of removal is filed, the state court is divested of any jurisdiction over the action. [A]fter removal, nothing remains in the state court because all orders issued in the state court before removal travel to the federal court in the removal \*87 proceeding... Thus, as of the time of removal, the removed action is not pending in the state court. It is extant only in the federal court to which it was removed. For that reason, the removed case cannot satisfy the threshold facet of *Younger* abstention”. *Bulgartabac*, 360 F. Supp. 2d at 797 (emphasis added). See also *Village of DePue v. Exxon Mobil Corp.*, 537 F.3d 775, 783 (7th Cir. 2008) (citing *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992)) (“Removal under 28 U.S.C. § 1441 simply does not leave behind a pending state proceeding that would permit *Younger* abstention”) (emphasis added).

***2. The Third Prong of Younger is Not Satisfied in this Case***

As discussed *supra* in the section on the federal defense surrounding procedural due process, due to the bifurcation of the proceedings between two courts and the loophole in the state court procedural rules governing the proceedings, there is no way in the state court system to vindicate one’s constitutional right not to be forced to trial on legally insufficient charges with inadequate notice. Thus, the third prong of *Younger* is not satisfied.

***\*88 3. In any Event, this Case Implicates the Younger Exceptions of Bad Faith, Harassment and Other Extraordinary Circumstances***

Although it purported to conclude, without any analysis, in the September 20th Opinion that this case does not implicate any of the exceptions to *Younger*, the District Court failed to make any factual findings or consider any of the allegations and evidence presented by the Defendant, which suggested otherwise.<sup>199</sup> Defendant asserts that for many of the same reasons as indicated *supra* in the discussion on federal defenses, this case implicates the *Younger* exceptions of bad faith, harassment and other extraordinary circumstances.

***V. The District Court Erred in Holding that It Lacked Authority to Reconsider, Recall or Stay the September 20th Order Because 28 U.S.C. § 1447(d) Explicitly Authorized Review of that Order***

Citing this Court’s decision in *Lowe, supra*, 102 F.3d at 736, the District Court erred in holding that it lacked authority to reconsider, recall, or otherwise stay the September 20th Order once that order had issued. This Court’s holding in *Lowe* was predicated on the “otherwise” language in § 1447(d)’s generally bar against review of remand orders. \*89 See *Id.* (Indisputably, “otherwise” in § 1447(d) includes reconsideration by the district court”). Where (as here) the plain language of § 1447(d) expressly authorizes review of the order “on appeal or otherwise,” the District Court clearly retains jurisdiction to reconsider,

recall or stay a remand order even after it had been issued and certified to the State Court. See e.g., *Wingo v. State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 104135 (W.D. Mo., Jul. 25, 2013) (holding court retained jurisdiction to recall remand order where review of order was expressly authorized by CAFA).<sup>200</sup>

## CONCLUSION

For the reasons set forth herein, the September 20th Order and the September 22nd Order should be reversed and this matter should proceed in federal court.

### \*90 REQUEST FOR ORAL ARGUMENT

Defendant Jason Edward Rheinstein believes that oral argument would assist the Court in understanding the jurisdictional issues presented in this appeal. See Fed. R. App. P. 34 (a)(1); 4th Cir. L.R. 34 (a)(1).

\*91 Respectfully submitted,

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### Footnotes

<sup>1</sup> See *Corrected Joint Appendix* (“JA”) at page 752. Hereafter, citations to the *Corrected Joint Appendix* appear in the form “JA #” where “#” represents the page number in the Corrected Joint Appendix. Additionally, this Brief includes five tables and one figure, appearing in the attachment entitled “Tables and Figure for the Corrected Opening Brief of Appellant.”

<sup>2</sup> In the Removal Clarification Act of 2011 (the “RCA”), Congress amended 28 U.S.C. § 1447(d) to provide for appellate review of remand orders in cases removed pursuant to 28 U.S.C. § 1442.

<sup>3</sup> JA 310-28.

<sup>4</sup> JA 295, ¶3. Table 1 presents an overview of the proceedings related to this case. As it existed in the state court, the case is hereinafter referred to as the “*State Court Proceeding*.” Each of the proceedings listed in Table 1 is sometimes referred to individually hereinafter by its “short name” as listed in the Table. For example, “Second Removal Case” is the short name for the proceeding on Line No. 4 of Table 1: *Atty. Griev. Comm'n. of Md. v. Jason Edward Rheinstein*, Civil Action No. 1:17-cv-2550-MJG (D. Md.), the proceeding from which this appeal was taken.

<sup>5</sup> JA 872.

<sup>6</sup> JA 346, ¶2.

<sup>7</sup> See <http://www.courts.state.md.us/attygrievance/about.html> (last accessed Nov. 23, 2017).

8 *Id.*

9 See AGC 42nd Ann. Rpt. at p. 21, available at <http://www.courts.state.md.us/attygrievance/docs/annualreport17.pdf> (last accessed Nov. 23, 2017).

10 See JA 1237-39 (APGs §§ 4.3-4.15).

11 Md. Rule 16-731(b).

12 See JA 1237 (APGs § 4.4); 42nd Ann. Rpt. at p. 21.

13 See JA 1237 (APGs § 4.4).

14 See Md. Rule 16-731; JA 1237 (APGs § 4.4).

15 Md. Rule 16-731(d).

16 JA 149.

17 See JA 1237.

18 *Atty. Griev. Comm'n. v. Herman*, 380 Md. 378, 397 (2004) (“If the prosecuting Bar Counsel feels that he or she needs to delay the investigation, he or she **must** go [to] the [Commission] and make a case for it”) (emphasis added).

19 *Id.*

20 JA 1237 (APGs § 4.5).

21 *Id.*

22 Md. Rule 16-711(h)(9); *see also* Md. Rule 16-734

23 Md. Rule 16-712(b)(5).

24 Hereafter, the complaint filed by Hjortsberg is referred to as the “*Hjortsberg Grievance*.” The Hjortsberg Grievance was docketed on or about July 31, 2012 and assigned BC Docket No. 2013-026-02-19. See JA 322, 1226. The Hjortsberg Grievance did not pertain to “frivolous” court filings. See JA 952, ¶9.

25 Among these was Boomerang Properties, LLC (“Boomerang”). See JA 367-68, 376-79. Collectively, Boomerang and Svehlak are sometimes referred to hereafter as the “*Boomerang Defendants*.”

26 Collectively, Moore and FWM are hereafter sometimes referred to as the “*Moores*.”

27 See generally JA 310-14.

28 Each of the cases in Table 2 may sometimes be referenced individually hereafter by its “short name” as listed therein. For example, “*Qui Tam I*” is the short name for the case on Line No. 7: *United States ex rel. Moore v. Cardinal Financial Co., L.P., et al.*, Civil Action No. 1-12-cv-1824-CCB (D. Md.). Hereinafter, Qui Tam I and Qui Tam II are sometimes collectively referred to as the “*Qui Tam Cases*.” The term “*Underlying Litigation*” refers generally and collectively to the proceedings on Line Nos. 1-9 of Table 2.

29 Compare JA 310 (Cmplt., ¶¶3-7) with JA 953-73 (Ans., ¶¶3-7).

30 See JA 311-12, ¶8. Table 3 presents an overview of all the Court filings in various proceedings that Plaintiff alleges were “frivolous.”

31 See generally JA 310-28.

32 See Table 4.

33 JA 346, ¶3.

34 JA 363-64.

35 *Id.* The property at issue was located at 2138 Hollins Street, Baltimore, MD 21223 and is hereinafter referred to as the “*HSP*.” JA 347, ¶7.

36 JA 363; JA 399, ¶34.

37 JA 347, ¶¶8-9. Hereafter, the version of the HUD-1 to which IC Exhibit 20 was equivalent is referred to as the “*Non-FHA HUD-1*.”

38 See generally JA 348-56. The April 29, 2010 transaction in which Boomerang conveyed the HSP to Mballa is hereinafter referred to as the “*HSP Transaction*.”

39 See Figure 1 (*A Comparison of the Two HUD-1 Statements for the HSP Transaction*).

40 JA 356, ¶38.

41 *Id.*

42 JA 356, ¶38. See also *United States ex rel. Moore v. Cardinal Fin. Co., L.P.*, 2017 U.S. Dist. LEXIS 46983 at \*4-11 (D. Md., Mar. 28, 2017) (Summarizing the allegations in Qui Tam I and background leading to the case).

43 *United States ex rel. Radcliffe v. Purdue Pharma, L.P.*, 737 F.3d 908, 914 (4th Cir. 2013) (“[T]he amendments expand the number of private plaintiffs entitled to bring *qui tam* actions by including plaintiffs who learn of the underlying fraud through disclosures in state proceedings or reports”) (emphasis added).

44 JA 356-70, ¶39.

45 *Id.*; *see also* JA 659-65; JA 735-37.

46 See e.g., JA 659-65; JA 735-37.

47 See JA 659-65; JA 1135:20-1136:3.

48 See JA 22, ¶22; see also *Cardinal, supra*, 2017 U.S. Dist. LEXIS 46983 at \*12.

49 JA 451-53.

50 See Table 2. These are shown on Lines 10-12 of Table 2. Collectively, they are referred to hereafter as the “*QTI Parallel Criminal Cases*.”

51 See Table 2, Lines 10-12.

52 JA 1043, ¶66.

53 JA 1170:20-25; JA 1178:18-25.

54 See Table 2, Line No. 9; see also JA 325, ¶59.

55 JA 1116.

56 JA 1135:14 -- JA 1137:4.

57 JA 325, ¶61.

58 JA 32, ¶38.

59 JA 326, ¶63.

60 JA 32, ¶39.

61 JA 326, ¶63.

62 See JA 363, ¶63.

63 JA 1044-45.

64 JA 357-60.

65 *Id.*

66 See JA 33-34.

67 JA 20, n. 15 (summarizing reasons Defendant disagreed with the opinion).

68 See generally *Cardinal, supra*, 2017 U.S. Dist. LEXIS 46983.

69 See JA 952.

70 JA 24, n. 20.

71 JA 1303-07.

72 JA 1304, ¶2.

73 JA 1305, ¶¶3-4.

74 JA 1306, ¶5.

75 JA 941 (ECF No. 12); JA 11, n. 5 (quoting *First MFR Memo.* at 10) (Plaintiff asserted, “[T]he question is not one of federal law or the merits of the qui tam proceedings...”) (emphasis added).

76 JA 942 (ECF Nos. 22, 25, 28-29).

77 JA 937.

78 Atty. Griev. Comm'n. of Md. v. Rheinstein, 2017 U.S. Dist. LEXIS 38481 at \*5 (D. Md., Mar. 17, 2017) (“*Rheinstein I*” or “*First Remand Opinion*”) (Noting “the ethical misconduct claims asserted by the Complaint were not based on the fact that [the Defendant] was counsel in federal qui tam litigation...”) (emphasis added).

79 JA 669-79; JA 1204-48.

80 JA 153, 198.

81 JA 175:7-11. She also testified Defendant violated the same rules when he filed Qui Tam II. JA 189:8-12.

82 JA 175:12-16.

83 JA 177-78. Lee was also unable to provide specifics about the factual basis for Plaintiff's allegations for all the other filings about which she was asked questions. See JA 162-81. She testified that the person, upon whose review and conclusions the Plaintiff relied in making its claims about “frivolous” filings, was Lydia E. Lawless (“Lawless”), an employee of Plaintiff, who by her own admission, does not practice in federal court, and who, during the relevant period, held the relatively junior-level position at OBC of Assistant Bar Counsel. JA 163:13 -- 165:18; JA 167:21 - 169:17; JA 865:1-2.

84 See e.g., JA 162:1-12; JA 180:6-12.

85 JA 40; see also JA 43-59; JA 61-81.

86 JA 54 (Ans. to Int. No. 17).

87 JA 61-81.

- 88 *Id. See also* JA 576. Per Plaintiff's Answer to Interrogatory No. 19, each time a rule appeared in Schedule A, it was alleged to have been violated on a separate and distinct occasion. JA 55.
- 89 JA 69, ¶32. *See also* Table 4. Hereafter, Plaintiff's claim that Defendant violated MLRPC 3.1 by filing Qui Tam I is sometimes referred to as "Operative Claim No. 1," and Plaintiff's claim that Defendant violated MLRPC 3.1 by filing Qui Tam II is sometimes referred to as "Operative Claim No. 2."
- 90 JA 46.
- 91 *See generally* JA 202-21.
- 92 Lamone testified that on November 5, 2012, the Commission placed the Hjortsberg Grievance on the Deferred Docket and that it received updates about it on eight occasions thereafter between January 2, 2013 and (8) March 7, 2014. JA 202:21 - 204:10. Per Lamone, the Commission removed the Hjortsberg Grievance from the Deferred Docket on March 20, 2014, which was also the date of its final action thereon. JA 204:11-19; JA 221:7-13. This necessarily implied the Hjortsberg Grievance was dismissed on March 20, 2014. *See* JA 729, n. 35.
- 93 *See* JA 33, ¶42.
- 94 *See* JA 729-31.
- 95 *See* JA 729-31. Hereinafter, this arrangement is referred to as the "*March 21st Arrangement*."
- 96 *Id.*
- 97 *Id.; see also* JA 1267.
- 98 *See* JA 729-31.
- 99 *Id.*
- 100 *See* JA 209:2 -- 210:3.
- 101 The Lawless Grievance was assigned BC Docket No. 2015-0268. *See e.g.*, JA 227.
- 102 *See* JA 209:2 -- 210:3. She disclosed neither the Commission's March 20, 2014 actions on the Hjortsberg Grievance nor the subsequent March 21st Arrangement. *Id.*
- 103 JA 225.
- 104 The SOC was the end-product of Lawless' purported "investigation." *See* Md. Rule 16-741. It was materially identical to the Complaint that later commenced this case. *Compare* JA 227-43 (SOC) with JA 310-28 (Complaint).
- 105 JA 246 ("**I know Matt was trying to spare me by not sending everything in the file**") (emphasis added). *Id.*
- 106 *Compare* JA 245-48 with JA 227-43 (SOC, ¶¶21, 22, 24, 28, 46, 51, 53); *see also* JA 29-30. Each of the Late Requested Filings is identified in Table 3 by an asterisk next to its Line No.
- 107 *See* Table 3.
- 108 *See e.g.*, JA 287 ("We referred to the [Complaint] at the end of the memorandum...").
- 109 *See e.g.*, JA 287-93.
- 110 JA 8-38.
- 111 *See e.g.*, JA 8-38 (¶¶4-5, 19-22, 26-32).
- 112 JA 33-34, ¶¶37-42.
- 113 *See generally* JA 8-38.
- 114 For a full explanation of the Lawless Strategy, *see* JA 120-42.
- 115 JA 13-14, ¶8.
- 116 *Compare e.g.*, JA 89-98, ¶¶23-76 with JA 311-27, ¶¶8-67.
- 117 *See* JA 13-14.
- 118 *See* JA 9-14, 17-30.
- 119 *See e.g.*, JA 17-30.; JA 343-61.
- 120 *See e.g.*, JA 10, n. 2; JA 25-33.
- 121 JA 1-7.
- 122 JA 4 (ECF Nos. 68 and 70).
- 123 JA 5-6 (ECF Nos. 65 and 82-1)
- 124 JA 752; JA 738-51 (the "Second Remand Opinion").
- 125 JA 748.
- 126 *Id.*
- 127 *See* JA 747-49.

- 128 JA 741-49.
- 129 JA 749-50.
- 130 *See JA 754, ¶2.*
- 131 JA 758-62.
- 132 *See JA 860-70.*
- 133 JA 758-62.
- 134 JA 6 (ECF No. 91). Among these is that Plaintiff makes bizarre claims Defendant violated four rules because he was unsuccessful securing the Government's intervention in the Qui Tam Cases. *See JA 81, ¶66.*
- 135 *See JA 195, 223.*
- 136 JA 451-53.
- 137 JA 748.
- 138 *Id.*
- 139 JA 32-34, ¶¶37-42; *see also JA 729-31.*
- 140 *Id.*
- 141 *See generally JA 8-38.*
- 142 JA 17-29. Indeed, when asked whether Plaintiff contends Qui Tam I was "frivolous," Lee answered affirmatively by noting that Rule 3.1 is captioned "meritorious claims and contentions."
- 143 *See Cardinal*, 2017 U.S. Dist. LEXIS 46983 at \*5-7.
- 144 JA 363.
- 145 *See e.g.*, JA 388-90 (Deed and Assignment); JA 445 (Amendment/Addendum to Contract Sale Price); JA 439-42 (Non-FHA HUD-1); JA 446-49 (FHA HUD-1); JA 443 (Addendum to HUD-1 Settlement Statement).
- 146 *See e.g.*, Figure 1 (*A Comparison of the Two HUD-1 Statements for the HSP Transaction*).
- 147 *See e.g.*, JA 333 ("[Defendant's] Qui Tam filings demonstrate and are part of his elaborate conspiracy theory") (emphasis added).
- 148 *See JA 356-57, ¶¶38-39.*
- 149 *See e.g.*, JA 735-37 (Noting Custer and the HUD agent followed the disclosure statement and intended to "dig deeper into some of the most questionable loan[s] and see if we can find some people willing to talk about what happened" (emphasis added)); JA 659-665.
- 150 Note the witnesses with the most relevant information for resolving Plaintiff's claims about the Qui Tam Cases are the agents who investigated them, a key reason to have the trial in federal court, since there is no guarantee these witnesses would be available in the state court. *See United States v. Stevens*, 2014 U.S. Dist. LEXIS 160837 at \*2 (E.D. N.C. 2014) (citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)).
- 151 *See e.g.*, JA 326 (Plaintiff's bold section heading regarding the nonintervention decision).
- 152 JA 21. The defense is made even more plausible by the Nichols Letter. *See JA 451, ¶1.*
- 153 *Costanzo*, 432 Md. at 256.
- 154 *See JA 460.*
- 155 *See JA 120-34.*
- 156 *See Table 3.* The proper way to allege a filing is "frivolous" and/or that it violates Rule 3.1 is not with a conclusory label, but rather to allege facts from which the conclusion may be inferred. *See Atty. Griev. Comm'n. v. Fezell*, 361 Md. 234, 247 (2000) (citing *Atty. Griev. Comm'n. v. Alison*, 349 Md. 623, 641 (1998)). The exhibit at JA 585-658 presents four examples of complaints that do this.
- 157 *See Table 3.*
- 158 JA 311. The Complaint includes many allegations about email communications, but none are relevant to whether any of the court filings were "frivolous."
- 159 *See JA 120-42* (fully describing the Lawless Strategy).
- 160 The "loophole" is there is no mechanism in the state court for a defendant to secure meaningful and independent *pre-trial* judicial review into the adequacy of notice and legal sufficiency of the charges. *See JA 14 n. 11; JA 122-23 n. 57.* Thus, the prosecutor effectively has unchecked power to allege anything and force the defendant to trial on all the allegations. *See JA 121-25.*
- 161 *See e.g.*, JA 123-24; JA 458.

165 During the Dyer Case, Lawless admitted she had kept the charges vague to avoid “**limiting [her]self in what will ultimately be presented at trial.**” JA 513:15-17 (emphasis added). *But see Sheppard v. Rees*, 909 F.2d 1234, 1237 (9th Cir. 1990) (citing *Strickland v. Washington*, 466 U.S. 668) (1984)) (“[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding....”) (emphasis added; internal quotation marks omitted). Apparently believing it is acceptable to use the trial to fill in any holes in her case, she told the Court that, in her view, the purpose of the trial is to “**develop the facts to substantiate the rule violations charged**” (emphasis added). JA 523:8-10.

166 In *Wiseman*, the Second Circuit upheld the conviction of two defendants who had employed a scheme to obtain judgments against victims by intentionally denying them notice and opportunity to defend in violation of the victims’ 5th and 14th amendment rights.

167 Mere lack of civility is not a violation of any ethics rules nor is making a statement one has a demonstrable basis for believing even if it later proves to be incorrect. *Atty. Griev. Comm’n. v. Rand*, 411 Md. 83, 101-104 (2009); *Atty. Griev. Comm’n. v. Link*, 380 Md. 405, 425 (2004); *Stanalonis*, 445 Md. at 146.

168 *See Sosa v. DirecTV*, 437 F.3d 923 (9th Cir. 2006) (Unless threatened lawsuit is frivolous, prelitigation demand letters are protected by the First Amendment Petition Clause).

169 *Reis v. Walker*, 491 F.3d 868, 870 (8th Cir. 2007); *Greenberg v. Chrust*, 297 F.Supp.2d 699, 705 (S.D.N.Y. 2004); *Revson v. Cinque & Cinque*, 221 F.3d 71, 79-80 (2d. Cir. 2000).

170 *See e.g., Ciolfi v. Iravani*, 625 F. Supp. 2d 276, 295 (E.D. Pa. 2009) (emphasis added); *Atty. Griev. Comm’n. v. Young*, 445 Md. 93, 105-06 (2015).

171 Lee was unable to explain why any of the filings at issue were alleged to be “frivolous.” *See e.g.*, JA 162-81. Plaintiff also refused to provide the information in its interrogatory answers. As in the Dyer Case, **Plaintiff attempted to use the work product doctrine as a smokescreen to avoid answering questions on the subject.** Compare JA 139 (showing Plaintiff’s Ans. to Int. No. 3 refusing to provide factual basis for claims about alleged “frivolous” filings in the Dyer Case) with JA 54-55 (Ans. to Int. Nos. 17 & 18 refusing to provide factual basis for claims about alleged “frivolous” filings in this case).

172 *Moore v. Svehlak*, 2013 U.S. Dist. LEXIS 97329 at \*56 (D. Md. 2013) (“[T]here remains a “glimmer of hope” that plaintiffs have a viable claim against ETS Maryland”). *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1159 (9th Cir. 1987) (“[T]he key question in assessing frivolousness is whether a complaint states an arguable claim”) (emphasis added); *Barlow v. John Crane-Houdaille, Inc.*, 2015 U.S. Dist. LEXIS 138536 at \*49 (D. Md. 2015) (Absent a party falsifying facts, where a claim was sufficient to secure remand, it was not “frivolous” and not sanctionable).

173 JA 57-58 (Ans. to Int. Nos. 23 and 28).

174 *See JA 78, ¶54* (noting Plaintiff alleges a violation of MLRPC 3.1 for filing the motion).

175 *See generally Moore, supra*, 2013 U.S. Dist. LEXIS 97329

176 *See e.g., Id.* at \*41 (“[I]t is reasonable to interpret the statute as [the Defendant does]”).

177 *See e.g., Id.* (Shepard’s Report as to HN 13).

178 *See e.g.*, JA 162:1-12; JA 180:6-12.

179 JA 163:13 - 165:18; JA 167:21 - 169:17.

180 JA 245-48.

181 Lawless could not have had access to the entire records of the proceedings from the Underlying Litigation because large portions of the records in the Qui Tam Cases were under seal at the District Court. *See JA 26, n. 24*. Lawless also could not have had access to the disclosure statements that accompanied the Qui Tam Cases, as they were only provided to the Government. *See JA 356-57, ¶¶38-39; JA 735-37; JA 659-65*. These were the key documents describing the methodology used to identify the transactions at issue and formulate the allegations therein. *Id.* Plaintiff has also tacitly admitted it never had such information. *See JA 1286-94* (Objections to Deposition Topics #’s 38, 39, 40, 68, 69 noting Plaintiff did not have information requested).

182 *See Table 3. One of the Late Requested Filings*, which is identified on Line No. 16 of Table 3, appears without its exhibits at JA 250-85.

183 *See e.g.*, JA 973, n. 33.

184 *See JA 48* (Ans. to Int. No. 3). To the extent Lawless purported to play the role of the independent expert on Plaintiff’s behalf, Defendant alleges she did not conduct a *bona fide* review, and that she was not qualified to do so in any event. *See e.g.*, JA 103-19; JA 483 (Regarding Lawless, Judge Silkworth noted in the Dyer Case, “[I]nstead of viewing the evidence independently and objectively, [she] simply adopts the arguments of [the opposing party] and ignores the totality of the evidence and circumstances”).

185 *See JA 56* (Ans. to Int. No. 20); *see also JA 47-48* (Ans. to Int. No. 3).

186 *But see Paul Revere Life Ins. Co. v. Jafari*, 206 F.R.D. 126, 127 (D. Md. 2002) (quoting *United States v. J.M. Taylor*, 166 F.R.D. 356, 361-62 (M.D.N.C. 1996)) (“The attorney for the [agency] is not at liberty to manufacture the [agency]’s contentions. Rather, the [agency] may designate a person to speak on its behalf and it is this position which the attorney must advocate”) (emphasis added).

- 187 JA 202-21; *see also* JA 729-31.
- 188 JA 326, ¶63.
- 189 *See* JA 729-31.
- 190 *See e.g.*, JA 209:16 -- 210:2.
- 191 *See* JA 144-49.
- 192 *See e.g.*, JA 287-93.
- 193 *C.f.*, *DeWolfe v. Richmond*, 434 Md. 444, 448 n. 1 (2013) (“[W]e granted the State of Maryland's motion to intervene as a defendant”); *Harris v. State*, 107 Md. App. 399 (1995), *rev'd. on other grounds*, 344 Md. 497 (1997) (“We granted Koenig's motion to intervene in the appeal”).
- 194 *See* JA 965, n. 23; JA 966, n. 27; JA 1039-41; JA 1267 (Explaining why Defendant maintains the Advisory Opinion was legally incorrect). Defendant would also have had the right to further appeal the Advisory Opinion if necessary. *See e.g.*, *Bd. of Trs., supra*, 317 Md. at 92.
- 195 JA 748 (“For reasons discussed more fully in [*Rheinstein I*]...”); *Rheinstein I*, 2017 U.S. Dist. LEXIS 38481 at \*5 (citing *Alsup v. 3-Day Blinds*, 435 F. Supp. 2d 838, 846 (S.D. Ill. 2006)) (“[Defendant] has failed to show that he was required by the government to take actions that subjected him to liability under state law”) (internal quotation marks omitted).
- 196 *See* Tables 4 and 5.
- 197 JA 957.
- 198 The District Court cited *Middlesex Cnty. Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423 (1982). *See* JA 749. The case was inapposite because, *inter alia*, it was not a removal case.
- 199 *See* JA 749-50.
- 200 The District Court stated in the September 22nd Opinion that *Wingo* was not relevant. JA 761. The Court erroneously retrieved and cited a different *Wingo* opinion from August 2013.

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# EXHIBIT B

2018 WL 5806834 (C.A.4) (Appellate Brief)  
United States Court of Appeals, Fourth Circuit.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND, Appellee,  
v.  
Jason Edward RHEINSTEIN, Appellant.

No. 17-2127.  
October 29, 2018.

On Appeal from the United States District Court for the District of Maryland (Marvin J. Garbis, District Judge)

### Brief of Appellee

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### TABLE OF CONTENTS

JURISDICTIONAL STATEMENT .....	1
ISSUE PRESENTED FOR REVIEW .....	2
STATEMENT OF THE CASE .....	2
Petition for Disciplinary Action .....	3
Allegations in the Petition for Disciplinary Action .....	3
Direct Appeal and Two Petitions for Writ of Certiorari .....	4
Abusive Threats Seeking to Coerce Settlement or Advantage in Litigation .....	8
<i>Moore v. Svehlak</i> .....	11
Two Qui Tam Actions .....	12
The Moores' Bankruptcy .....	13
Charges Alleged in the Petition .....	15
Procedural History .....	16
First Notice of Removal and Remand .....	17
Second Notice of Removal .....	18
The District Court's Decision .....	20
SUMMARY OF ARGUMENT .....	22
ARGUMENT .....	23
I. THE STANDARD OF REVIEW IS DE NOVO .....	23
*ii II. DISTRICT COURT CORRECTLY DETERMINED THAT REMOVAL WAS NOT AUTHORIZED UNDER 28 U.S.C. § 1442(A)(1) WHERE MR. RHEINSTEIN WAS NEITHER A FEDERAL OFFICER NOR ACTING UNDER A FEDERAL OFFICER IN REPRESENTING THE QUI TAM RELATORS .....	24
A. The Lower Court Correctly Determined That Mr. Rheinstein Did Not Act Under Any Federal Officer Including the Bankruptcy Trustee .....	26
B. Mr. Rheinstein Has Not Pleaded a Colorable Federal Defense Arising Out of a Federal Officer's Official Duties, a Federally Imposed Duty, or an Immunity from Suit .....	33
C. Mr. Rheinstein Has Failed to Establish That the Charged Conduct Was Carried Out for, or in Relation to, Asserted Official Authority .....	38
III. THE DISTRICT COURT CORRECTLY DETERMINED THAT REMOVAL WAS NOT AUTHORIZED UNDER 28 U.S.C. §§ 1331 AND 1446(B)(3) .....	40
A. Where the State Disciplinary Proceeding Raised No Question of Federal Law, the District Court Properly Remanded the Case .....	40
B. Where the District Court Correctly Found No Federal Jurisdiction and Properly Remanded the Case, this Court Need Not Reach Issues Involving Younger Abstention and Reconsideration .....	44
CONCLUSION .....	45

CERTIFICATE OF COMPLIANCE WITH RULE 32(A) .....	45
CERTIFICATE OF SERVICE .....	46

**\*iii TABLE OF AUTHORITIES**  
**Cases**

<i>Alaska Bar Ass'n v. Dickerson</i> , 240 F. Supp. 732 (D. Alaska 1965) .....	44
<i>American Civil Liberties Union v. Holder</i> , 673 F.3d 245 (4th Cir. 2011) .....	31
<i>Arizona v. Manypenny</i> , 451 U.S. 232 (1981) .....	35
<i>Attorney Grievance Comm'n of Md. v. Harrington</i> , 367 Md. 36 (2001) .....	34
<i>Attorney Grievance Comm'n of Md. v. O'Leary</i> , 433 Md. 2 (2013) .....	34
<i>Attorney Grievance Comm'n of Md. v. Penn</i> , 431 Md. 320 (2013) .....	43
<i>Attorney Grievance Comm'n of Md. v. Rheinstein</i> , 2017 WL 1035831 (D. Md. Mar. 17, 2017) .....	17, 18
<i>Attorney Grievance Comm'n of Md. v. Ucheomumu</i> , 450 Md. 675 (2016) .....	34
<i>Attorney Grievance Comm'n of Md. v. Worsham</i> , 441 Md. 105 (2014) .....	34
<i>Attorney Grievance Comm'n v. Culver</i> , 381 Md. 241 (2004) .....	16
<i>Attorney Grievance Comm'n v. McDonald</i> , 437 Md. 1 (2014) .....	37
<i>Attorney Grievance Comm'n v. Myers</i> , 333 Md. 440 (1994) .....	37
<i>Attorney Grievance Comm'n v. Pak</i> , 400 Md. 567 (2007) .....	42
*iv <i>Auffmordt v. Hedden</i> , 137 U.S. 310 (1890) .....	26
<i>Bald Head Ass'n v. Curnin</i> , 2010 WL 1904268 (E.D.N.C. May 10, 2010) .....	27
<i>Boyle v. United Techs. Corp.</i> , 487 U.S. 500 (1988) .....	30
<i>Dixon v. Coburg Dairy, Inc.</i> , 369 F.3d 811 (4th Cir. 2004) .....	40, 41
<i>Franchise Tax Bd. v. Construction Laborers Vacation Tr.</i> , 463 U.S. 1 (1983) .....	40
<i>Friedman v. Rite Aid Corp.</i> , 152 F. Supp. 2d 766 (E.D. Pa. 2001) .....	27
<i>Grievance Adm'r; Attorney Grievance Comm'n, Mich. v. Fieger</i> , 409 F. Supp. 2d 858 (E.D. Mich. 2005) .....	42, 44
<i>Hughes Aircraft Co. v. United States ex rel. Schumer</i> , 520 U.S. 939 (1997) .....	30
<i>In re Blackwater Sec. Consulting, LLC</i> , 460 F.3d 576 (4th Cir. 2006) .....	43
<i>In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.</i> , 790 F.3d 457 (3d Cir. 2015) .....	38, 39
<i>In re Lowe</i> , 102 F.3d 731 (4th Cir. 1996) .....	45
<i>In Re Snyder</i> , 472 U.S. 634 (1985) .....	21, 42
<i>Isaacson v. Dow Chem. Co.</i> , 517 F.3d 129 (2d Cir. 2008) .....	29, 35
<i>Jamison v. Wiley</i> , 14 F.3d 222 (4th Cir. 1994) .....	35, 37
*v <i>Jefferson County v. Acker</i> , 527 U.S. 423 (1999) .....	24, 25, 36
<i>Kolibash v. Committee on Legal Ethics of W. Va. Bar</i> , 872 F.2d 571 (4th Cir. 1989) .....	36
<i>League of Women Voters of N.C. v. North Carolina</i> , 769 F.3d 224 (4th Cir. 2014) .....	24
<i>Leite v. Crane Co.</i> , 749 F.3d 1117 (9th Cir. 2014) .....	26
<i>Lontz v. Tharp</i> , 413 F.3d 435 (4th Cir. 2005) .....	42
<i>Merrell Dow Pharm. Inc. v. Thompson</i> , 478 U.S. 804 (1986) .....	40

<i>Mesa v. California</i> , 489 U.S. 121 (1989) .....	35, 36
<i>Middlesex County Ethics Comm. v. Garden State Bar Assoc.</i> , 457 U.S. 423 (1982) .....	42
<i>Mulcahey v. Columbia Organic Chem. Co.</i> , 29 F.3d 148 (4th Cir. 1994) .....	40, 41
<i>Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC</i> , 865 F.3d 181 (4th Cir. 2017) .....	23
<i>Pinney v. Nokia, Inc.</i> , 402 F.3d 430 (4th Cir. 2005) .....	43
<i>Riley v. St. Luke's Episcopal Hosp.</i> , 252 F.3d 749 (5th Cir. 2001) .....	26
<i>Ripley v. Foster Wheeler LLC</i> , 841 F.3d 207 (4th Cir. 2016) .....	23, 25, 35
<i>Sawyer v. Foster Wheeler LLC</i> , 860 F.3d 249 (4th Cir. 2017) .....	25, 38, 39
<i>State v. Ivory</i> , 906 F.2d 999 (4th Cir. 1990) .....	36
* <i>vi Tatum v. RJR Pension Inv. Comm.</i> , 761 F.3d 346 (4th Cir. 2014) .....	24
<i>United States ex rel. Farrell v. SKF, USA, Inc.</i> , 32 F. Supp. 2d 617 (W.D.N.Y. 1999) .....	30
<i>United States ex rel. Kelly v. Boeing Co.</i> , 9 F.3d 743 (9th Cir. 1993) .....	29
<i>United States ex rel. Long v. SCS Bus. &amp; Tech. Inst., Inc.</i> , 173 F.3d 870 (D.C. Cir.) .....	30
<i>United States v. Bell</i> , 901 F.3d 455 (4th Cir. 2018) .....	44
<i>United States v. Delfino</i> , 510 F.3d 468 (4th Cir. 2007) .....	24
<i>United States v. Germaine</i> , 99 U.S. 508 (1878) .....	26
<i>Unites States ex rel. Taxpayers Against Fraud v. General Elec. Co.</i> , 41 F.3d 1032 (6th Cir. 1994) .....	27
<i>Vermont Agency of Nat. Res. v. United States ex rel. Stevens</i> , 529 U.S. 765 (2000) .....	29
<i>Watson v. Philip Morris Co., Inc.</i> , 551 U.S. 142 (2007) .....	22, 23, 24, 25, 27, 28, 32
<i>Wheeldin v. Wheeler</i> , 373 U.S. 647 (1963) .....	35
<i>Willingham v. Morgan</i> , 395 U.S. 402 (1969) .....	24, 25, 35
<i>Younger v. Harris</i> , 401 U.S. 37 (1971) .....	44

**Statutes**

28 U.S.C. § 1331 .....	1, 18, 20, 22, 40, 41, 44, 45
28 U.S.C. § 1367 .....	1, 18, 20, 22, 40, 41, 44
* <i>vii 28 U.S.C. § 1441</i> .....	1, 17, 18
28 U.S.C. § 1441(a) .....	22
28 U.S.C. § 1442 .....	1, 2, 17
28 U.S.C. § 1442(a) .....	1, 17, 18, 22, 26, 44, 45
28 U.S.C. § 1442(a)(1) .....	25, 27, 38
28 U.S.C. § 1446 .....	41
28 U.S.C. § 1446(b)(3) .....	1, 18, 20, 22, 40, 41, 44
28 U.S.C. § 1446(d) .....	19
28 U.S.C. § 1447(d) .....	2
31 U.S.C. § 3730(b) .....	29
31 U.S.C. § 3730(b)(1) .....	29
31 U.S.C. § 3730(b)(2) .....	26

**Rules**

<i>Md. Rule 8-112(c)</i> .....	5
<i>Md. Rule 8-303(b)</i> .....	5
Maryland Lawyers' Rules of Professional Conduct .....	5
Rule 1.1 (Md. Rule 19-301.1) .....	15
Rule 3.1 (Md. Rule 19-303.1) .....	15, 16
Rule 3.2 (Md. Rule 19-303.2) .....	16
Rule 3.4 (Md. Rule 19-303.4) .....	16
Rule 4.4 (Md. Rule 19-304.4) .....	16
Rule 8.4 (Md. Rule 19-308.4) .....	10, 16

Rule 8.5 (Md. Rule 19-308.5) .....

21, 42

## JURISDICTIONAL STATEMENT

In this action, filed under [28 U.S.C. §§ 1331, 1367, 1441](#), and [1442\(a\), 1446\(b\)\(3\)](#), Jason Edward Rheinstein removed to federal court an attorney disciplinary proceeding brought against him by the Attorney Grievance Commission of Maryland. (J.A. 8-38.) The district court had subject matter jurisdiction under [28 U.S.C. §§ 1331, 1441, 1442](#) and [1447](#) to determine federal question and federal \*2 officer jurisdiction and, having found none, remanded the case to state court. (J.A. 741-49.) This Court has jurisdiction under [28 U.S.C. § 1447\(d\)](#) to review the district court's final order, dated September 20, 2017, remanding the case to the state court "from which it was removed pursuant to section 1442 or 1443 of this title." [28 U.S.C.A. § 1447\(d\)](#). On September 25, 2017, Mr. Rheinstein filed a timely notice of appeal of the district court's September 20, 2017 remand order and September 22, 2017 order denying reconsideration. (J.A. 763, 758-62.)

## ISSUE PRESENTED FOR REVIEW

Did the district court correctly remand the attorney disciplinary case to state court for lack of federal jurisdiction where Mr. Rheinstein was neither a federal officer nor acting under a federal officer, and the case presented no question of federal law?

## STATEMENT OF THE CASE

Jason Edward Rheinstein challenges two rulings of the district court: (1) the granting of the Attorney Grievance Commission's motion to remand the attorney disciplinary case to state court and (2) the denial of his motion for reconsideration of that order. (J.A. 763-64.) In granting the motion for remand, the district court determined that the state disciplinary proceeding raised no question of federal law and that removal was likewise unavailable under the federal-officer-removal statute. (J.A. 741-49.)

### \*3 Petition for Disciplinary Action

Jason Edward Rheinstein was admitted to the bar of Maryland on December 15, 2005. (J.A. 310.) On February 17, 2016, the Attorney Grievance Commission of Maryland, through Bar Counsel, filed a petition for disciplinary or remedial action against him in the Court of Appeals of Maryland.<sup>1</sup> (J.A. 310-28.) The petition alleged that Mr. Rheinstein violated the Maryland Lawyers' Rules of Professional Conduct, now codified at Title 19, chapter 300 of the Maryland Rules, and "exceeded the bounds of zealous advocacy" by engaging in a pattern of excessive conduct as reflected in seven cases and numerous emails. (J.A. 311-27.) The petition arose out of Mr. Rheinstein's representation of husband-and-wife Charles and Felicia Moore.

### Allegations in the Petition for Disciplinary Action

The Moores retained Mr. Rheinstein in October 2011. They sought his assistance in seeking to vacate a confessed judgment entered against them in June 2009 after they defaulted on a construction loan agreement with Imagine Capital, Inc. ("Imagine").<sup>2</sup> (J.A. 310-12.)

\*4 More than two years after the confessed judgment was entered, on October 18, 2011, Mr. Rheinstein filed a motion to vacate the judgment based on allegations that the judgment was obtained by the perpetration of a fraud. (J.A. 312.) In November 2011, Mr. Rheinstein filed a complaint with the Attorney Grievance Commission against Imagine's counsel Jeffrey Tapper; one week before the scheduled motions hearing, Mr. Tapper withdrew his appearance based on a conflict due to the grievance. *Id.*

Imagine then retained Troy Swanson as successor counsel. *Id.* During the motions hearing, Mr. Rheinstein made unsubstantiated accusations against Imagine and its officers regarding an elaborate fraud scheme and led the court to believe that Imagine and its officers were under investigation by the Department of Justice. *Id.* Mr. Svehlak, one of two officers for Imagine, invoked his Fifth Amendment right to remain silent.<sup>3</sup> At the conclusion of the hearing, the court vacated the confessed judgments. *Id.*

### **Direct Appeal and Two Petitions for Writ of Certiorari**

In December 2011, Imagine retained Matthew Hjortsberg and the firm of Bowie & Jensen and subsequently appealed the order vacating the confessed \*5 judgment to the Court of Special Appeals of Maryland, the State's intermediate appellate court.<sup>4</sup> (J.A. 313.)

On April 16, 2012, Mr. Rheinstein filed a petition for writ of certiorari in the State's highest court, the Court of Appeals. The petition sought review of the order vacating the confessed judgments and argued that the case was an "extraordinary case of public policy" with an "almost unbelievable record ... arguably the most shocking confessed judgment action to ever appear in Maryland's appellate courts."<sup>5</sup> (J.A. 314-15.) Contrary to [Maryland Rules 8-112\(c\)](#) and [8-303\(b\)](#), Mr. Rheinstein included substantial material from outside the record. (J.A. 315.) On May 21, 2012, the Court of Appeals denied the petition for writ of certiorari. (J.A. 316.)

On April 20, 2012, Mr. Rheinstein filed in the Court of Special Appeals a motion to dismiss the appeal based on the argument that the appeal was from a non-appealable interlocutory order. (J.A. 315.) The Court of Special Appeals stayed the appeal pending resolution of the petition for writ of certiorari. *Id.* Despite the stay and pending petition, Mr. Rheinstein filed (1) a second motion to dismiss the appeal arguing that Imagine had failed to order transcripts and to ensure the timely transmittal of the record; and (2) a 49-page "Preliminary Brief of the Appellees and \*6 Memorandum in Support of Motion to Dismiss Appeal." (J.A. 315-16.) After the Court of Appeals denied the certiorari petition, Mr. Rheinstein then filed a "renewed" motion to dismiss in the Court of Special Appeals. (J.A. 316.)

On July 6, 2012, the Court of Special Appeals dismissed as premature the appeal of the order vacating the confessed judgment. Imagine moved for reconsideration. (J.A. 318.)

On July 27, 2012, the Court of Special Appeals granted Imagine's motion for reconsideration and vacated the July 6, 2012 order dismissing the appeal. On August 8, 2012, Mr. Rheinstein filed a motion to reconsider the order granting Imagine's motion. (J.A. 322.)

On August 22, 2012, Mr. Rheinstein sent a 16-page letter to the Chief Judge of the Court of Special Appeals accusing Mr. Hjortsberg, his associate, and non-attorney members of his staff of having "ex parte" communications with the clerk's office in an attempt to "manipulate the trial court record" and "manufacture arguments for appellate review surrounding the void, erroneously-issued and unrecorded May 20, 2011 Order." (J.A. 323.)

On September 14, 2012, the Court of Special Appeals denied Mr. Rheinstein's motion for reconsideration. *Id.*

\*7 Mr. Rheinstein then filed a second petition for writ of certiorari in the Court of Appeals.<sup>6</sup> (J.A. 323.) On October 11, 2012, Mr. Rheinstein filed a "Supplemental Petition for Writ of Certiorari" in the Court of Appeals and attached a copy of the record extract filed in the Court of Special Appeals that was the subject of his pending motion to strike. (J.A. 323-24.)

Contemporaneously, he filed a “Motion to Replace Defective and Non-Compliant Record Extract” in the Court of Special Appeals. (J.A. 324.) On November 19, 2012, the Court of Appeals denied the second petition for writ of certiorari. (J.A. 324.)

On December 12, 2012, the Court of Special Appeals heard oral argument in the case. (J.A. 324.) Before the Court of Special Appeals issued its ruling, on February 20, 2013, the Moores filed a voluntary Chapter 7 bankruptcy petition and the Court of Special Appeals matter was stayed. (J.A. 325.)

On November 17, 2014, the Court filed an unreported opinion reversing the circuit court finding and remanding the case for further proceedings. (J.A. 326.)

On December 18, 2014, Mr. Rheinstein filed (1) a motion for rehearing and reconsideration; (2) a motion requesting that the opinion be reported, and (3) a motion for leave to file amicus paper in the Court of Special Appeals. By order dated January 14, 2015, all three motions were denied. (J.A. 326.)

#### \*8 Abusive Threats Seeking to Coerce Settlement or Advantage in Litigation

Beginning January 25, 2012, Mr. Rheinstein corresponded with Bowie & Jensen and (1) threatened to sue the firm; (2) threatened to report Mr. Hjortsberg and his associate to the Attorney Grievance Commission if the appeal in the Court of Special Appeals was not dropped; and (3) launched an ad hominem attack on Mr. Svehlak's character. (J.A. 313.) Because of the threats, Bowie & Jensen retained Ward B. Coe, III as counsel. (J.A. 314.) Mr. Coe requested that Mr. Rheinstein cease threatening the firm and advised him that threatening attorney grievance complaints to gain an advantage in litigation violates the Maryland Lawyers' Rules of Professional Conduct. (J.A. 314.) On March 21, 2012, Mr. Hjortsberg filed a complaint against Mr. Rheinstein with the Attorney Grievance Commission. (J.A. 314.)

On May 28, 2012, Mr. Rheinstein advised Mr. Coe that he intended “to sue Mr. Hjortsberg personally for defamatory statements” made in a March 21, 2012 letter accusing Mr. Rheinstein “of knowingly false ethical violations for allegedly misrepresenting something about ‘investigations’ to a trial court during a December 2011 Motion Hearing.” (J.A. 316.) Mr. Rheinstein requested “reasonable compensation, an apology letter, and an agreement that Mr. Hjortsberg will not intentionally defame me again.” *Id.*

\*9 On May 29, 2012, Mr. Rheinstein sent a pre-filing offer seeking \$5 million to settle an anticipated suit to be filed in the state circuit court. In that letter, he stated,

[T]he way I look at it, there are two potential law firm insurance policies ... swanson's and [Bowie & Jensen's] ... if they are big enough ... we can avoid a suit, but if not ... we can't .... That was before you made the same mistakes as those guys .... Although everything we have is also with feds, I still think [sic] its [sic] better to settle (especially for Roseman) and get my guy out now.

(J.A. 316-17.)

On July 13, 2012, after the Court of Special Appeals dismissed the appeal as premature, Mr. Rheinstein wrote to Mr. Coe and advised that “Mr. Hjortsberg and Bowie & Jensen, LLC are now liable for” five counts ranging from civil conspiracy to abuse of process and enquired whether there was an interest in settling. (J.A. 318.) Later that day, he sent a follow up email asking whether the clients would be interested in discussing settlement possibilities and advising that they could review “compelling evidence with respect to Imagine Capital's Ponzi scheme and shell property mortgage fraud scam, and the fact that we believe Mr. Hjortsberg, Tina Gentile, and perhaps Lisa Sparks conspired with Imagine Capital, Svehlak and Roseman to cover it up.” (J.A. 318-19.)

On July 18, 2012 Mr. Rheinstein emailed Mr. Hjortsberg and asked Mr. Hjortsberg and Bowie & Jensen, LLC “to resign from representation of Imagine Capital, Robert Svehlak and Neil Roseman, effective immediately, following the \*10 withdrawal

of your Motion and dismissal of Imagine Capital's appeal." (J.A. 319.) Mr. Rheinstein accused Mr. Hjortsberg of attempting to "conceal your client's criminal conduct in an extension of a wrongful civil proceeding that was initiated, at least in part, to obtain money to service debt on fraudulent mortgages and stave off potential exposure of the mortgages themselves." (J.A. 319.)

On July 20, 2012, Mr. Rheinstein emailed Mr. Coe an abusive email in which he stated, "Please pardon my French but I can't wait to see matt hjortsberg's balls shoved down his fucking threat [sic] ... pardon me again, we could turn hjortsberg fucking upside down, chew him up and spit him out in so many pieces you cannot imagine ... again excuse my French, he was 'sooo smart, a real fuckin genius ....'" (J.A. 320.) On July 24, 2012, Mr. Coe advised Mr. Rheinstein that his "email was laced with invective and profanity, and included expressions which could be interpreted as threatening physical violence" and that his conduct was "prejudicial to the administration of justice under Rule 8.4 of the Rules of Professional Conduct, and must cease immediately." (J.A. 321.)

On August 10, 2012, Mr. Coe again wrote to Mr. Rheinstein and catalogued his numerous threats and inappropriate conduct and demanded that he cease threatening Bowie & Jensen, its attorneys and employees. (J.A. 323.)

On December 28, 2012, Mr. Rheinstein sent Mr. Coe a 13-page letter outlining the "fallacies" of Mr. Hjortsberg's legal strategy, alleging that Mr. Hjortsberg was \*11 "complicit in the very same fraud as [his] clients," threatening to re-file the motion for disqualification of counsel and enquiring whether Mr. Hjortsberg would be interested in discussing settlement. (J.A. 325.)

#### ***Moore v. Svehlak***

On May 30, 2012, Mr. Rheinstein filed a 30-count complaint in the Circuit Court for Baltimore City against 28 defendants. The complaint alleged that Imagine, acting in concert with other defendants, engaged in an elaborate fraud scheme and sought millions of dollars in compensatory and punitive damages.<sup>7</sup> (J.A. 317.) On September 12, 2012, the defendants removed the case to the United States District Court for the District of Maryland. (J.A. 324.) Mr. Rheinstein moved to remand, and the defendants filed a series of motions to dismiss and for summary judgment. *Id.*

On December 12, 2012, while Mr. Rheinstein and Mr. Hjortsberg were in the Court of Special Appeals waiting for the Moores' case to be called for argument, Mr. Rheinstein sent Mr. Hjortsberg an email of his 68-page "Memorandum in Support of Plaintiffs' Emergency Motion to Disqualify the Imagine Defendants' Counsel, *et al.*" to be filed in district court in the removed case, *Moore v. Svehlak*. \*12 (J.A. 324.) He also sent a copy of the motion to Mr. Coe and asked whether Mr. Hjortsberg "is leaving the federal case voluntarily." *Id.*

On December 14, 2012, Mr. Rheinstein filed the motion and 68-page memorandum arguing that Mr. Hjortsberg and Bowie & Jensen are potential co-conspirators and, therefore, disqualified from representing the defendants. *Id.* On December 17, 2012, the district court found that the motion and memorandum violated the page length limits prescribed by Local Rule 105.3, and accordingly, struck the filings. (J.A. 325.)

By memorandum opinion dated July 11, 2013, the district court remanded the case to the Circuit Court for Baltimore City. (J.A. 326.)

#### **Two Qui Tam Actions**

On June 20, 2012, Mr. Rheinstein filed a qui tam action in the United States District Court for the District of Maryland. The action named 10 defendants and alleged mortgage fraud and violations of the False Claims Act.<sup>8</sup> (J.A. 318.) Less than a month later, on July 13, 2012, Mr. Rheinstein filed a second qui tam action in the same court, which named 24 defendants, including

Mr. Svehlak, Mr. Roseman \*13 and Imagine Capital.<sup>9</sup> In November 2014, the United States declined to intervene in both qui tam actions. (J.A. 326.)

### The Moores' Bankruptcy

On February 20, 2013, the Moores, represented by Craig L. Holcomb, filed a voluntary Chapter 7 bankruptcy petition.<sup>10</sup> (J.A. 325.) Marc H. Baer was appointed trustee of the bankruptcy estate.

On February 25, 2013, Mr. Rheinstein advised Mr. Hjortsberg by email that he was “prepared to take the depositions of Robert S. Svehlak and Neil D. Roseman as soon as possible.” (J.A. 325.) Mr. Rheinstein did not advise Mr. Hjortsberg that his clients had filed for bankruptcy, that all litigation was automatically stayed and that the litigation interests had become property of the bankruptcy estate. Subsequently, David Daneman of Whiteford, Taylor & Preston, LLP was appointed as special counsel to the trustee and entered his appearance in *Imagine Capital v. Moore* (confessed judgment action then pending in Court of Special Appeals) and *Moore v. Svehlak* (30-count complaint remanded to state court). (J.A. 325.)

\*14 On December 11, 2013, the trustee moved for approval of the settlement and compromise reached between Mr. Daneman and the defendants in *Moore v. Svehlak* and the appellants in *Imagine v. Moore*. (J.A. 326.) The settlement provided that in exchange for the defendants' payments in the aggregate amount of \$137,500, the trustee would dismiss *Moore v. Svehlak*. The agreement further provided that the stay would be lifted in the Court of Special Appeals to allow the opinion and mandate to issue in *Imagine v. Moore* and that following the issuance of the court's opinion the parties would dismiss all claims asserted by or against any party in the confessed judgment case. (J.A. 326.) On March 17, 2014, the bankruptcy court granted the trustee's motion and approved the settlement and compromise. Following the issuance of the Court of Special Appeals' opinion and mandate, the circuit court confessed judgment action was dismissed on December 19, 2014. (J.A. 326.)

During the pendency of the bankruptcy proceeding, Mr. Rheinstein filed five proofs of claim against the debtors' estate arising out of his representation of the Moores totaling \$85,604.61. (J.A. 327.) Both the trustee and the Moores objected. On May 21, 2015, the trustee assigned the bankruptcy estate's qui tam claims to Mr. Rheinstein in exchange for withdrawal of his claims against the Estate. (J.A. 327.)

### \*15 Charges Alleged in the Petition

Based on these facts, the petition alleged that Mr. Rheinstein engaged in a pattern of conduct that included, among other things, filing repeated meritless motions, ignoring stays, filing excessive and repetitive papers, threatening to sue a law firm, threatening to file a complaint against an attorney with the Commission if an appeal was not dropped, using the threat of an attorney grievance complaint to gain an advantage in litigation, repeatedly filing motions that did not comply with the Maryland Rules and the Federal Rules of Civil Procedure, accusing counsel of unethical conduct and threatening to sue him, repeatedly filing and threatening to file motions to disqualify counsel, and using coercive and offensive means in an attempt to effect a settlement, including emails “laced with invective and profanity” that contained “expressions which could be interpreted as threatening physical violence.” (J.A. 312-22 ¶¶ 15, 20, 21, 23-27, 37-38, 41). Mr. Rheinstein was alleged to have “developed an elaborate conspiracy theory involving Imagine, its principals, attorneys, lenders and other associates”; “embarked on a crusade to prove his theory”; and “exceeded the bounds of zealous advocacy” by “threatening those he believed to be co-conspirators, fil[ing] countless frivolous papers, and general[ly] engag[ing] in vexatious litigation.” (J.A. 311-12 ¶ 8.)

The petition further alleged that Mr. Rheinstein engaged in professional misconduct and violated Rule 1.1 (Competence), Rule 3.1 (Meritorious Claims and \*16 Contentions), Rule 3.2 (Expediting Litigation), Rule 3.4 (Fairness to Opposing Party and Counsel), Rule 4.4 (Respect for Rights of Third Persons), and Rule 8.4 (Misconduct) in connection with his acts and omissions

relating to these cases and communications. (J.A. 327-28.) *See e.g., Attorney Grievance Comm'n v. Culver*, 381 Md. 241, 279 (2004) (upholding finding that attorney violated Rules 3.1 and 3.2 where attorney “engaged in a pattern of conduct of obstruction and delay to interfere in the client's suit against him by filing suit against the client, alleging defamation, then failing to file written answers to discovery and evading attempts to be deposed.”); Comment 1 to Rule 19-303.1 (“The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed....”).

### Procedural History

By Order dated February 19, 2016, the Court of Appeals of Maryland transmitted the petition to the Circuit Court for Anne Arundel County for an evidentiary hearing.<sup>11</sup>

#### \*17 First Notice of Removal and Remand

On May 23, 2016, Mr. Rheinstein filed a notice of removal in the federal District Court for the District of Maryland. The notice of removal asserted jurisdiction under 28 U.S.C. § 1441 (federal question) and 28 U.S.C. § 1442 (federal officer).<sup>12</sup> *Attorney Grievance Comm'n of Md. v. Rheinstein*, 2017 WL 1035831, at \*1 (D. Md. Mar. 17, 2017). On March 17, 2017, the district court granted the Commission's motion to remand. Noting that the case presented “claims arising under the Maryland Lawyer's Rules of Professional Conduct,” that the Court of Appeals of Maryland is “the ‘ultimate arbiter’ of claims of Maryland attorneys' misconduct,” and that the “cause of action [was] created by state law,” the court concluded that merely because “some of Rheinstein's alleged unethical actions occurred in a number of federal cases “does not render the instant case one presenting claims based upon federal law.” *Id.*

The district court likewise rejected Mr. Rheinstein's claim that as counsel for a relator in a qui tam he was a federal officer entitled to removal under 28 U.S.C. § 1442(a). The court concluded that although “counsel for a relator is an agent for the Government for standing purposes in [a False Claims Act] case, counsel is not subject to the same type of control that a federal prosecutor is and does not take \*18 direction from a Government officer.” *Id.* at \*2. The court observed that “[t]he ethical misconduct claims asserted by the AGC Complaint are not based on the fact that Rheinstein was counsel in federal qui tam litigation” but instead grounded in the contention that Mr. Rheinstein “engaged in a course of unethical conduct in regard to related state and federal cases.” *Id.* at \*3. The court then explained that, “[e]ven if this Court were found to have the ability to exercise jurisdiction over the instant case, it would abstain to exercise that jurisdiction.” *Id.*

Following remand, the Commission and Mr. Rheinstein engaged in discovery that included interrogatories, document production, and depositions. Trial was scheduled to begin in the circuit court on Tuesday September 5, 2017, following Labor Day. (J.A. 805.)

### Second Notice of Removal

One business day before the scheduled trial date, on Friday September 1, 2017, Mr. Rheinstein filed a second notice of removal under 28 U.S.C. §§ 1331, 1367, 1441, 1442(a), and 1446(b)(3). The notice alleged that the Commission's answers to interrogatories gave rise to different grounds for removal than those he had raised previously. (J.A. 8, 11, 805.) Specifically, it alleged that the answers to interrogatories “conclusively establish that [the Commission] is attempting to try the merits of Qui Tam I, currently still pending before this Court, in the State Court Proceeding,” and, therefore, concern a federal question. (J.A. 13, ¶8.) \*19 Mr. Rheinstein further asserted that he “assisted Mr. Daneman [special counsel] in drafting a provision that explicitly carved out the Qui Tam cases” from the bankruptcy settlement agreement and that, “[b]ut for the Settlement Agreement, and a provision therein that enabled Imagine to pursue and obtain an advisory opinion from the Court of Special

Appeals on an unopposed motion in October 2014, this [attorney disciplinary] action would not have been brought, thereby subjecting [Mr. Rheinstein] to liability.”<sup>13</sup> (J.A. 33.) Upon filing written notice in the state circuit court of the second notice of removal, the state court was deprived of authority to proceed “unless and until the case is remanded.” 28 U.S.C. § 1446(d).

On Tuesday September 5, 2017, the first business day after the notice was filed and the day trial was scheduled to begin, the Commission moved for remand and the district court conducted a telephone conference to hear argument on the motion. (J.A. 294-328; 766-859.) In compliance with the abbreviated briefing schedule set at the conference, the Commission filed a supplemental memorandum in support of the motion. The Commission's memorandum explained that the interrogatory responses did not provide a basis for asserting federal jurisdiction or raise a federal question of law and that Mr. Rheinstein was not a federal officer within the meaning of the federal-officer-removal statute. (J.A. 329-42.) In his \*20 opposition to the motion for remand, Mr. Rheinstein argued that he was acting as a statutorily designated agent of the Government as counsel for a relator in a qui tam, and therefore, covered by the federal-officer-removal statute (J.A. 581), and that the deposition testimony and interrogatory answers demonstrate that the merits of the qui tam actions are at issue in the disciplinary proceeding and, therefore, raise a question of federal law. (J.A. 570-80.) The Commission filed a reply (J.A. 680-94) and Mr. Rheinstein filed a supplemental memorandum of law in support of his opposition to the remand motion. (J.A. 695-773.)

### The District Court's Decision

On September 20, 2017, the district court granted the motion for remand. (J.A. 738-52.) The district court determined that removal was improper under 28 U.S.C. §§ 1331 and 1446(b)(3) because the case raised no federal question. (J.A. 41-48.) To the extent that Mr. Rheinstein alleged “different grounds for removal” in his second notice - purportedly based on the Commission's responses to Mr. Rheinstein's interrogatories, and the August 7, 2018 deposition testimony allegedly demonstrating the Commission's intent to litigate the merits of the qui tam cases - the court found that the interrogatory answers “simply allege that the filing of the qui tam actions is part of the conduct constituting a violation of several MLRPC Rules, including the rule regarding frivolous pleadings by attorneys.” (J.A. 744-45.) Thus, “[t]he plain purpose of these Averments is to demonstrate the \*21 existence or pattern of attorney misconduct, not to litigate the merits of a federal qui tam action.” (J.A. 746.)

Nor did the district court find any merit to the claim that “the interpretation and application of state ethical rules in federal court is a question of federal law.” (J.A. 747.) The court explained that *In Re Snyder*, 472 U.S. 634 (1985), which held that the imposition of a federal sanction for the violation of federal rules is a federal question, did not “remove a state court's ability to reply upon its own professional responsibility rules and interpretations for disciplining its own attorneys.” (J.A. 747 (citing Md. Rule 19-308.5.)). The court likewise rejected the notion that federal defenses relating to “procedural due process, substantive due process, and equal protection” were enough to confer federal jurisdiction. (J.A. 747-48.)

Nor was removal available under the federal-officer-removal statute because Mr. Rheinstein's “role as a relator in the qui tam actions cannot be equated to that of a federal prosecutor or federal agent taking direction from a Government officer” and allegedly providing “assistance” to the bankruptcy trustee was likewise insufficient to confer jurisdiction. (J.A. 748.) Noting the “loss of time and duplication of effort” of restarting the proceeding in federal court on the eve of trial, the court stated that even if it were to have jurisdiction, the court would abstain and remand the case to state court so that the trial may proceed. (J.A. 750.)

\*22 On September 20, 2017, Mr. Rheinstein filed an “Emergency Motion to Stay Remand Order Pending Filing of Notice of Appeal; or In The Alternative, Emergency Motion for Reconsideration; or In The Alternative; Motion for Appropriate Relief.” (J.A. 753-57.) On September 22, 2017, following a telephonic hearing (J.A. 860-71), the district court denied the motion. (J.A. 758-62.)

On September 25, 2017, Mr. Rheinstein filed a timely appeal of the district court's final judgment. (J.A. 213.)

### SUMMARY OF ARGUMENT

A defendant may remove an action to federal court that is brought against him or her as an “officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office.” [28 U.S.C. § 1442\(a\)](#). A defendant may also remove an action that arises “under the Constitution, laws, or treaties of the United States” to federal court under [28 U.S.C. §§ 1331](#) and [1441\(a\)](#). But a remand to the state court is required where, as here, the defendant is neither a federal officer nor acted under a federal officer, and the removed proceeding raises no question of federal law.

Removal is not authorized under the federal-officer-removal statute based on one's role as a relator in a qui tam case. This is because qui tam relators are not officers of the United States, and removal is authorized for non-officers only if the person “was ‘acting under’ any ‘agency’ or ‘officer’ of ‘the United States.’” \*[23 Watson v. Philip Morris Co., Inc.](#), 551 U.S. 142, 147 (2007). Mere compliance with the requirements of the Federal Claims Act, and the assistance provided to the special counsel in drafting a carve-out of the qui tam claims in the bankruptcy settlement, fall far short of “the help or assistance necessary to bring a private person within the scope of the statute.” *Id.*, at 151. The lack of a federal defense arising out of an officer's official duties, a federally imposed duty or an immunity from suit, and a connection between the conduct that is the subject of the action and “asserted official authority” likewise preclude removal under this statute.

Nor do the cited “different grounds for removal” support federal question jurisdiction. Where discovery confirmed that the filing of the qui tam actions was part of the pattern and course of conduct constituting a violation of the Maryland Lawyers' Rules of Professional Conduct, “including the rule regarding frivolous pleadings by attorneys,” adjudication of the rule violations raise no federal question. (J.A. 744-45.)

## ARGUMENT

### I. THE STANDARD OF REVIEW IS DE NOVO.

This Court reviews de novo the grant of a motion to remand for lack of jurisdiction under the federal-officer-removal statute. [Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC](#), 865 F.3d 181, 186 (4th Cir. 2017) (citing [Ripley v. Foster Wheeler LLC](#), 841 F.3d 207, 209 (4th Cir. 2016)).

\*[24](#) The Court reviews the denial of a motion for reconsideration for abuse of discretion. [Tatum v. RJR Pension Inv. Comm.](#), 761 F.3d 346, 370 (4th Cir. 2014). “A district court abuses its discretion when it ... fails to consider judicially recognized factors constraining its exercise of discretion ... ,” [United States v. Delfino](#), 510 F.3d 468, 470 (4th Cir. 2007), or otherwise “misapprehends or misapplies the applicable law,” [League of Women Voters of N.C. v. North Carolina](#), 769 F.3d 224, 235 (4th Cir. 2014) (citation omitted).

### II. DISTRICT COURT CORRECTLY DETERMINED THAT REMOVAL WAS NOT AUTHORIZED UNDER [28 U.S.C. § 1442\(A\)\(1\)](#) WHERE MR. RHEINSTEIN WAS NEITHER A FEDERAL OFFICER NOR ACTING UNDER A FEDERAL OFFICER IN REPRESENTING THE QUI TAM RELATORS.

The Supreme Court has long held that the federal-officer-removal statute is intended to protect the United States from the “interference with its ‘operations’” that would occur if a state were able to arrest and bring to trial in state court the “officers and agents” of the Government “acting ... within the scope of their authority.” [Watson](#), 551 U.S. at 150-51 (2007) (quoting [Willingham v. Morgan](#), 395 U.S. 402, 406 (1969)). The removal statute, therefore, protects against local prejudice “against unpopular federal laws or federal officials,” a “delay [in] federal revenue collection or the enforcement of other federal law,” and the deprivation “of a federal forum in which to assert federal immunity defenses.” *Id.* (internal citations omitted). See [Jefferson County v. Acker](#), 527 U.S. 423, 447 (1999) (Scalia, J., \*[25](#) concurring in part and dissenting in part) (observing that “the main point” of the federal-officer-removal statute “is to give officers a federal forum in which to litigate the merits of immunity

defenses"); *Willingham*, 395 U.S. at 407 ("[O]ne of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court.").

In its current formulation, the statute authorizes removal to federal court of any "civil action or criminal prosecution" commenced in a state court against any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office. 28 U.S.C. § 1442(a)(1). Having unsuccessfully argued in his first removal petition that, as a relator in a qui tam suit, he was an officer of the United States, Mr. Rheinstein has now recast this argument to allege that he was a government contractor acting under and for, alternatively, the Government and the bankruptcy trustee. Appellant's Br. 48-55.

A private defendant who seeks to remove a case under § 1442(a)(1), must show that (1) he "act[ed] under" a federal officer, see, e.g., *Watson*, 551 U.S. at 147; *Ripley*, 841 F.3d at 209; (2) he has "a colorable federal defense," *Acker*, 527 U.S. at 431; and (3) the charged conduct was carried out for or in relation to the asserted official authority, 28 U.S.C. § 1442(a)(1). *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017).

#### \*26 A. The Lower Court Correctly Determined That Mr. Rheinstein Did Not Act Under Any Federal Officer Including the Bankruptcy Trustee.

For two reasons, the lower court correctly concluded that "[Mr.] Rheinstein's role as a relator in the qui tam actions cannot be equated to that of a federal prosecutor or federal agent taking direction from a Government officer." (J.A. 748.)<sup>14</sup> First, it is well established that *qui tam* relators are not officers of the United States because "an 'officer' encompasses, at a minimum, a continuing and formalized relationship of employment with the United States Government." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757-58 (5th Cir. 2001) (citing *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (holding merchant appraiser was not an "officer" for purposes of the Appointments Clause where his position was without tenure, duration, continuing emolument, or continuous duties)); \*27 *United States v. Germaine*, 99 U.S. 508, 511-12 (1878) (holding surgeon appointed by Commissioner of Pensions was not an "officer" where his duties were not continuing and permanent)). See also *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994) (stating that the relator's position is "without tenure, duration, continuing emolument or continuous duties"); *Friedman v. Rite Aid Corp.*, 152 F. Supp. 2d 766, 771 (E.D. Pa. 2001) ("[A] relator in a qui tam action is merely a representative agent of the Government, not an appointed 'officer.'")

Second, Mr. Rheinstein, as the attorney for the relator, "was not acting subject to [or under] the guidance, tutorship, or direction of any federal officer." *Bald Head Ass'n v. Curnin*, 2010 WL 1904268, at \*4 (E.D.N.C. May 10, 2010), aff'd in part, appeal dismissed in part, 429 F. App'x 360 (4th Cir. 2011). Section 1442(a)(1) permits removal only if, when engaging in the conduct that is the subject of the disciplinary petition, Mr. Rheinstein "was 'acting under' any 'agency' or 'officer' of 'the United States.'" *Watson*, 551 U.S. at 147. "[A]cting under" a federal officer or agency contemplates a relationship that "involves 'acting in a certain capacity, considered in relation to one holding a superior position or office,'" involves "subjection, guidance, or control" by the federal superior, and "must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 151-52 (citations omitted) (emphasis in original).

\*28 In declining in *Watson* to find that the regulation of private entities justified removal under the statute, the Supreme Court explained that "the help or assistance necessary to bring a private person within the scope of the statute does *not* include simply *complying* with the law." *Id.* at 152. Instead, "[t]he assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks." *Id.* Thus, the private contractor "is helping the Government to produce an item that it needs," and the contractor performs "a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." *Id.* at 153-54.

Mr. Rheinstein's effort to expand federal-officer-removal jurisdiction to include a qui tam relator (and his attorney), based on the characterization of the Federal Claims Act "as effecting a partial assignment of the Government's damages claim," finds no

support in the statute and founders on a selective misreading of the case law. Appellant's Br. 49-50. Plainly, neither a qui tam plaintiff nor his attorney is a government contractor.

In analyzing whether a relator had standing to bring suit under Article III, the Supreme Court described the Federal Claims Act "as effecting a partial assignment of the Government's damages claim" and, applying the principle that the assignee of a claim has standing to assert the injury in fact suffered by the assignor, concluded that the United States' injury in fact conferred standing on the qui tam plaintiff. \*29 *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). The Ninth Circuit had previously observed that "[u]nder this theory of standing, the [Federal Claims Act's] qui tam provisions operate as an enforceable unilateral contract." *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993). Far from creating a cognizable federal contractor relationship, however, this holding and dicta merely provide an analytical framework for evaluating Article III standing. (J.A. 760 ("Defendant picks a choice quote from the part of the opinion that discusses whether a qui tam plaintiff has standing to sue under the False Claims Act, which is not at issue here."))

Instead, the relationship between the United States and a relator is governed by statute, not contract. 31 U.S.C. § 3730(b)(1) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government.") Thus, unlike the chemical companies that contracted with the Government to produce Agent Orange and, therefore, "'assist[ed]' and 'help [ed] carry out[ ] the duties or tasks of' officers at the Department of Defense," neither Mr. Rheinstein nor his client contracted with the Government to produce any product or provide any service. *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008) (citations omitted). Nor were they selected or engaged under the Federal Claims Act to represent the Government in the qui tam proceedings. See 31 U.S.C. § 3730(b). There was no request for proposal, performance specifications, or \*30 competitive bid process.<sup>15</sup> Thus, no "contract between the Government and the FCA relator [was] created [...] upon the filing of a qui tam action." Appellant's Br. 49.

Moreover, courts have rejected any notion that an attorney for a relator "functions as a type of government contractor" and "doubles as an attorney for the Government." Appellant's Br. 50. "It is therefore not possible to contend that the False Claims Act is an open-ended letter of engagement from the government as client to a posse of prospective attorneys." *United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 886 (D.C. Cir.), supplemented, 173 F.3d 890 (D.C. Cir. 1999) (citing *United States ex rel. Farrell v. SKF, USA, Inc.*, 32 F. Supp. 2d 617, 617 18 (W.D.N.Y. 1999)) ("rejecting contention by *qui tam* defendant that, since the relator is only the United States' lawyer and the United States always remains a party litigant, the defendant was entitled to discovery from the United States even though the United States had not intervened in the suit"). "That a qui tam suit is brought by a private party 'on behalf of the United States,' does not alter the fact that a relator's interests and the Government's do not necessarily coincide." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 n.5 (1997).

\*31 Here, "[t]he record makes clear that the alleged actions that led to" Mr. Rheinstein's disciplinary charges "were not performed or omitted by [Mr. Rheinstein] pursuant to the direction of the [Department of Justice or United States' Attorney] or any other federal officer or agency." *Bald Head*, at \*5; J.A. 311-12, 319-22. Indeed, that Mr. Rheinstein "developed an elaborate conspiracy theory involving Imagine, its principals, attorneys, lenders and other associates," "embarked on a crusade to prove his theory," and repeatedly made threats and engaged in abusive behavior is not attributable to the direction of any federal officer. Mr. Rheinstein has alleged no more than he complied with the technical requirements of the Federal Claims Act in filing the cases under seal,<sup>16</sup> and communicating with the Government while the cases were under seal. After the Government declined to intervene, he filed an amended complaint in one suit "in accordance with directions he received in a November 2014 letter" from an Assistant United States Attorney (J.A. 23 ¶ 24), and sought to dismiss the other suit without prejudice. Appellant's Br. 52.

Far from demonstrating that he acted under the authority of a federal officer, the facts alleged in the removal notice (and brief) reflect only compliance with the \*32 requirements of the Federal Claims Act. This does not establish federal jurisdiction because "the help or assistance necessary to bring a private person within the scope of the statute does *not* include simply complying with the law." *Watson*, 551 U.S. at 152. Moreover, the November 13, 2014 letter from Assistant United States Attorney Nichols does not, as Mr. Rheinstein seems to suggest, contain any directive or other assertion of authority or control

over Mr. Rheinstein or his client. (J.A. 451-53.) Instead, the letter identifies certain regulatory and statutory provisions governing discovery, service of pleadings, amended complaints and settlement and advises Mr. Rheinstein of certain requirements with respect to releases and mandatory language in settlement agreements. *Id.* Mr. Nichols's informative letter fails to establish that Mr. Rheinstein was “acting under” the authority, guidance or control of a federal officer.

As the district court correctly held, Mr. Rheinstein's claim regarding “his role in assisting a ‘Bankruptcy Trustee’ in Bankruptcy Court is also insufficient to confer federal jurisdiction.” (J.A. 748.) In the notice of removal, Mr. Rheinstein alleged that he “assisted and acted under the supervision of the Bankruptcy Trustee and special counsel [David Daneman] ... in connection with both the Qui Tam Cases and the other litigation.” (J.A. 32.) Mr. Rheinstein contended that he “provided assistance” to the appointed special counsel “to facilitate his ability to come up to speed in the case” and assisted special counsel in drafting a provision carving the \*33 Qui Tam cases out of the settlement agreement entered into by the bankruptcy estate. (J.A. 32-33.) Again, far from demonstrating that he acted under the authority of a federal officer, the facts alleged in the removal notice demonstrate that Mr. Rheinstein assisted special counsel in drafting a carve-out provision to preserve his own interests - the attorneys' fees to which he claimed entitlement as reflected by the five proofs of claim he filed against the debtors' estate arising out of his representation of the Moores. (J.A. 327 (“The trustee assigned the claims to [Mr. Rheinstein] in exchange for withdrawal of his claims against the Estate.”) Irrespective of his motivation, providing “assistance in drafting” a carve out provision to the appointed special counsel falls far short of assisting a federal officer in carrying out his federal duties. Appellant's Br. 54. Nor is there any support for his assertion that “the direct proximate cause of this [disciplinary proceeding] was the work [Mr. Rheinstein] did while acting under the Trustee to help effectuate the settlement of the Confessed Judgement Case and the Private Fraud action and preserve the Estate's interests in the Qui Tam Cases.” Appellant's Br. 41, 30.

#### **B. Mr. Rheinstein Has Not Pleading a Colorable Federal Defense Arising Out of a Federal Officer's Official Duties, a Federally Imposed Duty, or an Immunity from Suit.**

Despite clear precedent articulating the public policy underpinning the federal-officer-removal statute - to give officers a federal forum in which to litigate the merits of immunity defenses - Mr. Rheinstein contends that he has pleaded \*34 multiple colorable federal defenses under the False Claims Act, and the due process and equal protection clauses of the Fourteenth Amendment, sufficient to support removal under the statute. (J.A. 55, 36 ¶ 46.) Under the guise of demonstrating a federal defense, Mr. Rheinstein seeks to litigate the merits of the qui tam actions here and presses this Court to find that the qui tam actions were not frivolous. Appellant's Br. 56-65. That issue is not before this Court because, as the district court correctly observed, “Attorney disciplinary proceedings do not litigate the merits of the underlying cases that gave rise to those proceedings,” and ultimately whether Mr. Rheinstein's pattern of conduct violated the Maryland Rules of Professional Conduct is a question of state, not federal law.<sup>17</sup> (J.A. 745 (citing *Attorney Grievance Comm'n of Md. v. Ucheomumu*, 450 Md. 675, 711 (2016) (finding a violation of Rule 3.1 without resolving the underlying defamation claim); *Attorney Grievance Comm'n of Md. v. Worsham*, 441 Md. 105, 128 (2014) (finding Rule 3.1 violation without resolving the underlying tax litigation); J.A. 742, 746-47.)

\*35 Although courts “have imposed few limitations on what qualifies as a colorable federal defense,” this prong of the removal analysis “requires that the defendant raise a claim that is ‘defensive’ and ‘based in federal law.’” *Isaacson v. Dow Chemical Co.*, 517 F.3d 129, 138 (2d. Cir. 2008) (quoting *Mesa v. California*, 489 U.S. 121, 129-30 (1989)). The defense must also “aris[e] out of [the party or federal officer's] official duties.” *Arizona v. Manypenny*, 451 U.S. 232, 241 (1981). See also *Jamison v. Wiley*, 14 F.3d 222, 238 (4th Cir. 1994) (quoting *Mesa*, 489 U.S. at 133) (removal permitted where officer “can allege a ‘colorable’ defense to that action ‘arising out of [his] duty to enforce federal law.’”); *Willingham*, 395 U.S. at 406-07 (removal “‘cover[s] all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law’”). Thus, federal law “supplies the defense, if the conduct complained of was done pursuant to a federally imposed duty, or immunity from suit.” *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) (citations omitted).

This Court, therefore, has permitted removal under the federal-officer-removal statute where the party has asserted a federal defense arising out of his or her official duties, a federally imposed duty or immunity from suit. *Ripley*, 841 F.3d at 211 (reversing remand under federal-officer-removal statute where government-contractor immunity defense was a colorable federal defense

available in failure-to-warn case); *Jamison*, 14 F.3d at 238 (allegation that federal employee was acting \*36 within the scope of his employment gave rise to “a colorable claim of absolute immunity under the Westfall Act”); *Kolibash v. Committee on Legal Ethics of W. Va. Bar*, 872 F.2d 571, 574-75 (4th Cir. 1989) (alleged negligent supervision of a subordinate by the United States Attorney implicated official immunity defense and “federal interest in protecting federal officials in the performance of their federal duties”). See also *Acker*, 527 U.S. at 431 (holding that claim that local tax fell on “the performance of federal judicial duties in Jefferson County” and “risk[ed] interfering with the operation of the federal judiciary” in violation of the intergovernmental tax immunity doctrine presented a colorable federal defense).

Likewise, this Court has declined to permit removal of a state criminal prosecution where a marine failed to allege “anything in the conduct of his federal responsibilities which justified his violation of these [state traffic] laws” while driving in a truck convoy. *State v. Ivory*, 906 F.2d 999, 1001-02 (4th Cir. 1990). See *Mesa*, 489 U.S. at 133 (holding that federal-officer removal not available for postal mail truck drivers violating state traffic laws).

In the notice of removal Mr. Rheinstein alleged that he had “federal defenses relating to procedural due process, substantive due process and equal protection” and that a person who initiates a qui tam action “acts as a statutorily-designated [sic] agent of the Government.” (J.A. 36, ¶ 46.) In his brief, he alleges additional “federal defenses”: that the False Claims Act provides its own defense to the assertion that \*37 he filed frivolous motions and pleadings, his conduct must be analyzed under the “Federal Court’s Code of Professional Conduct,” and he has a defense under the Supremacy Clause on a theory of federal preemption. Appellant’s Br. 58-65, 72-75, 77.

Mr. Rheinstein does not, and he cannot, cite any case where due process and equal protection challenges to state disciplinary rules have been found to constitute “a colorable defense arising out of [a federal officer’s] duty to enforce federal law,” a federally imposed duty, or an immunity from suit. *Jamison*, 14 F.3d at 238. See Appellant’s Br. 65-76.

That the Maryland Rules governing attorney disciplinary proceedings provide for notice pleading in the petition and do not permit dismissal based on an alleged deficiency in the petition, provides no federal defense that could support removal. Appellant’s Br. 65-70 (alleging a lack of pretrial review of the adequacy of notice and the legal sufficiency of the charges). See *Attorney Grievance Comm’n v. McDonald*, 437 Md. 1 (2014) (stating that it is settled law that a petition in a disciplinary matter is a notice pleading); *Attorney Grievance Comm’n v. Myers*, 333 Md. 440, 445 (1994) (“The notice to which the attorney is entitled is of the factual allegations against which the attorney must defend.”) (internal citations omitted).

Mr. Rheinstein has undertaken no federally imposed duty or responsibility, either contractually or acting under a federal officer, that supports the assertion of \*38 any federal defense. Mr. Rheinstein simply misreads “colorable federal defense” to mean a challenge to any aspect of the state disciplinary proceeding based on a federal statute or constitution. As the case law makes clear, the federal defense must arise out of the officer’s official duties, a federally imposed duty, or an immunity from suit. Here, Mr. Rheinstein has failed to allege any federal duty imposed on him by virtue of his status as the attorney for a qui tam relator.

### **C. Mr. Rheinstein Has Failed to Establish That the Charged Conduct Was Carried Out for, or in Relation to, Asserted Official Authority.**

Nor has Mr. Rheinstein alleged sufficient facts to establish that “the charged conduct was carried out for or in relation to the asserted official authority [of the federal officer under color of office].” *Sawyer*, 860 F.3d at 258 (citing 28 U.S.C. § 1442(a)(1)). He offers instead only the conclusory assertion that “it is plainly obvious that all of [his] claims surrounding the Qui Tam Cases have an association or nexus to what [he] did on behalf of the Government.” Appellant’s Br. 78.

Having failed to demonstrate that he acted under a federal officer when he developed “an elaborate conspiracy theory involving Imagine, its principals, attorneys, lenders and other associates,” “embarked on a crusade to prove his theory,” and repeatedly made threats and engaged in abusive behavior, he likewise cannot establish that this conduct was connected in any way to “asserted official authority.” (J.A. 311-12, 319-22.) See e.g., \*39 *In re Commonwealth’s Motion to Appoint Counsel Against*

*or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 471-72 (3d Cir. 2015), as amended (June 16, 2015) (interpreting the statute to require “a ‘connection’ or ‘association’ between the act in question and the federal office”)

This Court has found a sufficient “connection or association” where “the Navy dictated the content of warnings on [the contractor’s] boilers, and [the contractor] complied with the Navy’s requirements.” *Sawyer*, 860 F.3d at 258. “That relationship was sufficient to connect the plaintiffs’ claims, which fault warnings that were not specified by the Navy, to the warnings that the Navy specified and with which [the contractor] complied. These claims undoubtedly “relat[e] to” all warnings, given or not, that the Navy determined in its discretion.” *Id.* Here, however, Mr. Rheinstein filed the qui tam actions and related litigation, and engaged in a pattern of conduct, without any involvement, direction or control of the Government or a federal officer. It was only after the actions were filed (originally under seal) that Mr. Rheinstein alleged he “assisted” the Government by providing information and, after the Government declined to intervene, by complying with the requirements of the False Claims Act in filing an amended complaint under seal.

For the same reasons, no connection or association arises out of Mr. Rheinstein’s alleged “work” for the bankruptcy trustee. Appellant’s Br. 78. Compare *In re Commonwealth’s Motion*, 790 F.3d at 471-72 (where motion concerned whether Federal Community Defender had violated the federal authority \*40 granted to it “the acts complained of undoubtedly “relate to” acts taken under color of federal office.”) Mr. Rheinstein has failed to demonstrate that he acted under the bankruptcy trustee and likewise failed to demonstrate any connection between his conduct cited in the petition and any “asserted official authority” of the bankruptcy trustee.

### **III. THE DISTRICT COURT CORRECTLY DETERMINED THAT REMOVAL WAS NOT AUTHORIZED UNDER 28 U.S.C. §§ 1331 AND 1446(B)(3).**

#### **A. Where the State Disciplinary Proceeding Raised No Question of Federal Law, the District Court Properly Remanded the Case.**

“[A] case may arise under federal law ‘where the vindication of a right under state law necessarily turn[s] on some construction of federal law,’” *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (quoting *Franchise Tax Bd. v. Construction Laborers Vacation Tr.*, 463 U.S. 1, 9 (1983)), but “only [if] ... the plaintiff’s right to relief necessarily depends on a substantial question of federal law.” *Franchise Tax Bd.*, 463 U.S. at 28 (emphases added). Thus, a defendant seeking to remove a case on this basis must establish “(1) that the plaintiff’s right to relief necessarily depends on a question of federal law, and (2) that the question of federal law is substantial.” *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004).

The right to relief depends on a question of federal law only when every legal theory supporting the claim requires the resolution of a federal issue. \*41 *Mulcahey v. Columbia Organic Chem. Co.*, 29 F.3d 148, 153 (4th Cir. 1994) (“[I]f a claim is supported not only by a theory establishing federal subject matter jurisdiction but also by an alternative theory which would not establish such jurisdiction, then federal subject matter jurisdiction does not exist.”). Thus, if the plaintiff can support the claim “with even one theory that does not call for an interpretation of federal law, his claim does not ‘arise under’ federal law for purposes of § 1331.” *Dixon*, 369 F.3d at 816-17.

Here, the district court correctly determined that removal was improper under 28 U.S.C. §§ 1331 and 1446(b)(3) because the case raised no federal question.<sup>18</sup> (J.A. 741-48.) See *Mulcahey*, 29 F.3d at 151. Having previously determined in the first remand action that the case presented “claims arising under the Maryland Lawyer’s Rules of Professional Conduct (“MLRPC”),” the Court of Appeals of Maryland is “the “ultimate arbiter” of claims of Maryland attorneys’ misconduct,” and the “cause of action [was] created by state law,” the district court concluded that merely because “some of Rheinstein’s alleged unethical actions occurred in a \*42 number of federal cases “does not render the instant case one presenting claims based upon federal law.” (J.A. 742.) That is because “state law complaints usually must stay in state court when they assert what appear to be state law claims,” *Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005), and attorney disciplinary proceedings are “not founded on a claim or right arising under the Constitution, treaties or laws of the United States, inasmuch as attorney disciplinary proceedings are brought

to vindicate the state's interest in maintaining and assuring professional conduct of the attorneys its licenses.” *Grievance Adm'r, Attorney Grievance Comm'n, Mich. v. Fieger*, 409 F. Supp. 2d 858, 865 (E.D. Mich. 2005) (citing *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423 (1982)).

Thus, as the district court correctly found, there is no merit to the claim that the application of state ethical rules to attorney conduct in “federal court is a question of federal law.” (J.A. 746.) Appellant's Br. 80. On the contrary, as the Supreme Court made clear in *In Re Snyder*, when a federal court sanctions an attorney under the federal rules, federal standards apply. *472 U.S. 634, 645 (1985)*. But that does not, as the district court correctly observed, “remove a state court's ability to rely upon its own professional responsibility rules and interpretations for disciplining its own attorneys.” (J.A. 747 (citing *Attorney Grievance Comm'n v. Pak*, 400 Md. 567, 600 (2007); Md. Rule 19-308.5 (“[A]n attorney admitted by the [Maryland] Court \*43 of Appeals to practice in this State is subject to the disciplinary authority of this State, regardless of where the attorney's conduct occurs.”)).

To the extent that Mr. Rheinstein alleged “different grounds for removal” in his second notice of removal - purportedly based on the Commission's responses to Mr. Rheinstein's interrogatories and the August 7, 2018 deposition testimony allegedly demonstrating the Commission's intent to litigate the merits of the qui tam cases - the court found that that interrogatory answers “simply allege that the filing of the qui tam actions is part of the conduct constituting a violation of several MLRPC Rules, including the rule regarding frivolous pleadings by attorneys.” (J.A. 744-45.) Appellant's Br. 40-41. Where “[a]n attorney can engage in a pattern of misconduct by committing a number of acts in order to achieve a common goal,” *Attorney Grievance Comm'n of Md. v. Penn*, 431 Md. 320, 345 (2013) (citation omitted), the district court correctly found that “[t]he plain purpose of these Averments is to demonstrate the existence or pattern of attorney misconduct, [and] not to litigate the merits of a federal qui tam action.” (J.A. 746.)

Mr. Rheinstein's alleged “federal defenses relating to procedural due process, substantive due process, and equal protection” are likewise inadequate to confer federal jurisdiction because “a case may not be removed to federal court on the basis of a federal defense.” (J.A. 747-48 (citing *Pinney v. Nokia, Inc.*, 402 F.3d 430, 446 (4th Cir. 2005)). See See also \*44 *In re Blackwater Sec. Consulting, LLC*, 460 F.3d 576, 584 (4th Cir. 2006) (explaining that “§ 1331 federal question jurisdiction is limited to actions in which the plaintiff's well-pleaded complaint raises an issue of federal law; actions in which defendants merely claim a substantive federal defense to a state-law claim do not raise a federal question”); *Fieger*, 409 F. Supp. 2d at 865-66 (holding that removal of attorney disciplinary action not warranted on basis that attorney raised First Amendment defense to allegations of professional misconduct); *Alaska Bar Ass'n v. Dickerson*, 240 F. Supp. 732, 733 (D. Alaska 1965) (“An action does not arise under federal law if a federal question enters only by way of a defense.”)).

#### **B. Where the District Court Correctly Found No Federal Jurisdiction and Properly Remanded the Case, this Court Need Not Reach Issues Involving Younger Abstention and Reconsideration.**

Where, as here, it is clear that the district court correctly found no federal jurisdiction under §§ 1442(a) and 1331, this Court need not reach the district court's alternate ruling applying the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971). See e.g., *United States v. Bell*, 901 F.3d 455, 472 (4th Cir. 2018) (where alleged error in career-offender classification would provide no relief from statutory sentence, Court declined to reach that issue).

Likewise, this Court need not reach whether the district court properly declined to reconsider its remand ruling based on this Court's holding that “a federal court loses jurisdiction over a case as soon as its order to remand the case is entered. \*45 From that point on, it cannot reconsider its ruling ....” (J.A. 761 (quoting *In re Lowe*, 102 F.3d 731, 736 (4th Cir. 1996).) Even if the district court retained authority to reconsider its remand order, which it did not, the court correctly determined that removal was not authorized under §§ 1442(a) and 1331.

#### **CONCLUSION**

The judgment of the United States District Court for the District of Maryland should be affirmed.

Respectfully submitted,

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#### Footnotes

- <sup>1</sup> Misc. Docket AG No. 77, Sept. Term, 2015.
- <sup>2</sup> *Imagine Capital, Inc. v. Charles E. Moore, et al.*, Circuit Court for Baltimore City, Case No. 24-C-09-003634 (“*Imagine v. Moore*”).
- <sup>3</sup> Imagine's other corporate officer was Neil Roseman. (J.A. 310.)
- <sup>4</sup> *Imagine Capital, Inc. v. Charles E. Moore, et ux.*, Court of Special Appeals of Maryland, Case No. 2445, September Term 2011,
- <sup>5</sup> *Charles E. Moore, et ux. v. Imagine Capital, Inc.*, Court of Appeals of Maryland, Petition No. 104, September Term 2012.
- <sup>6</sup> *Charles E. Moore, et ux. v. Imagine Capital, Inc.*, Court of Appeals of Maryland, Petition Docket No. 409, Sept. Term, 2012.
- <sup>7</sup> *Moore v. Svehlak, et al.*, Circuit Court for Baltimore City, Case No. 24-C-12-335) (“*Moore v. Svehlak*”).
- <sup>8</sup> *United States of America Ex rel. Charles E. Moore v. Cardinal Financial Company, L.P et al.*, United States District Court for the District of Maryland, Case No. 1:12-cv-01824) (“Qui Tam I”). On March 28, 2017, the district court dismissed the qui tam complaint. ECF No. 128 and No. 129. On December 4, 2017, the district court denied Mr. Rheinstein's motion to alter/amend judgment. ECF No. 146.
- <sup>9</sup> *United States of America ex rel. Charles E. Moore v. Robert S. Svehlak, et al.*, United States District Court for the District of Maryland, Case No. 1:12-cv-02093 (“Qui Tam II”). On April 18, 2017, the district court granted Mr. Rheinstein's pro se motion for voluntary dismissal without prejudice. ECF No. 50.
- <sup>10</sup> *In re: Charles E. Moore, Felicia Moore*, United States Bankruptcy Court for the District of Maryland (Baltimore Division), Case No. 13-12841-NVA.
- <sup>11</sup> *Attorney Grievance v. Rheinstein*, Circuit Court for Anne Arundel County, Case No. C-02-CV-16-000597.
- <sup>12</sup> *Attorney Grievance Comm'n v. Rheinstein*, United States District Court for the District of Maryland, Civil Action No. 1:16-cv-1591-MJG.
- <sup>13</sup> Mr. Rheinstein did not, however, reference the bankruptcy trustee or the alleged but-for causation as a basis for removal in the notice. (J.A. 34-37.)
- <sup>14</sup> Although Mr. Rheinstein cited [28 U.S.C. § 1442\(a\)](#) as a basis for removal in his notice of removal, he did not allege that either he, his client, or the relator, were acting under a particular federal agency or officer (other than the bankruptcy trustee). He alleged that he filed an amended complaint under seal in accordance with instructions in a 2014 letter from an Assistant United States Attorney

and in compliance with 31 U.S.C. § 3730(b)(2), that a qui tam relator is a “statutorily-designated [sic] agent of the Government,” and that the relator and his attorney “are subject to a host of strict controls that ensure the statute does not violate the Take Care Clause.” (J.A. 23 ¶ 24, 34.) Mr. Rheinstein therefore has failed to allege facts in support of this basis for removal jurisdiction. See e.g., *Leite v. Crane Co.*, 749 F.3d 1117, 1122 (9th Cir. 2014) (“Like plaintiffs pleading subject-matter jurisdiction under Rule 8(a)(1), a defendant seeking to remove an action may not offer mere legal conclusions; it must allege the underlying facts supporting each of the requirements for removal jurisdiction.”) (citations omitted).

15 Despite his claimed government contractor status, Mr. Rheinstein does not allege that he has, or could have, asserted a federal government contractor defense in his notice of removal, which undercuts any claim of federal interest implicated in his state disciplinary proceeding. See e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988) (stating that the imposition of liability on governmental contractors directly affects the interests of the United States).

16 See e.g., *American Civil Liberties Union v. Holder*, 673 F.3d 245, 254 (4th Cir. 2011) (“[T]he seal provisions limit the relator only from publicly discussing the filing of the qui tam complaint. Nothing in the FCA prevents the qui tam relator from disclosing the existence of the fraud.”)

17 Because the Court of Appeals of Maryland “has original and complete jurisdiction over attorney discipline proceedings in Maryland” and “the ultimate authority to decide whether a lawyer has violated the professional rules,” whether Mr. Rheinstein violated those Rules is a question of Maryland law. *Attorney Grievance Comm'n of Md. v. O'Leary*, 433 Md. 2, 28 (2013); *Attorney Grievance Comm'n of Md. v. Harrington*, 367 Md. 36, 49 (2001).

18 Section 1331 provides that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C.A. § 1331. Likewise, § 1446(b)(3) provides that “a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.” 28 U.S.C.A. § 1446.

# EXHIBIT C

2019 WL 233558 (C.A.4) (Appellate Brief)  
United States Court of Appeals, Fourth Circuit.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND, Plaintiff-Appellee,  
v.  
Jason Edward RHEINSTEIN, Defendant-Appellant.

No. 17-2127.  
January 14, 2019.

On Appeal from the United States District Court for the District  
of Maryland at Baltimore, (Marvin J. Garbis, District Judge)

**Corrected Reply Brief of Appellant**

Jason E. Rheinstein, P. O. Box 1369, Severna Park, MD 21146, jason@jer-consulting.com, (410) 647-9005, Defendant-Appellant Pro Se.

**\*i TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	iii
INTRODUCTION .....	1
ARGUMENT .....	5
I. The Federal Courts Have Jurisdiction Over this Case Pursuant to the Federal Officer Removal Statute .....	5
A. The “Acting Under” Element of the FORS is Satisfied in this Case .....	5
1. Plaintiff Fails to Recognize the “Acting Under” Element of the FORS is to be Liberally Construed in Favor of Jurisdiction .....	5
2. The Record Amply Provides Support for Defendant’s Allegation that He Satisfies the “Acting Under” Element in the Alternative Because the Proximate Cause of this Case Was the Tasks He Performed While Acting Under the Bankruptcy Trustee to Preserve the Estate’s Interests in the <i>Qui Tam</i> Cases .....	9
B. The “Federal Defense” Element of the FORS is Satisfied in this Case .....	11
1. Plaintiff Attempts to Impose a Fictitious Standard for the Type of Federal Defense that Satisfies the Second Element of the FORS; the Element May Be Satisfied with any Colorable Federal Defense to an Eligible Claim; in any Event, Defendant Has Alleged Colorable Federal Defenses that Satisfy Plaintiff’s Standard .....	12
2. Plaintiff’s Attempts to Marginalize Defendant’s First Two Federal Defenses by Falsely Asserting the “Merits” of the <i>Qui Tam</i> Cases are Not Implicated by the Operative Claims .....	15
*ii 3. Plaintiff Mischaracterizes Several of the Defenses that Are Asserted by Defendant .....	18
4. Removal of this Case Comports with the Policy Objectives of the FORS .....	20
5. Plaintiff’s Attempt to Frame its Allegations in Terms of a “Course of Conduct” Further Demonstrates this Action Should Be Tried in Federal Court Because Plaintiff’s Entire Case Actually Hinges upon the Operative Claims .....	22
a. The Email Communications Were Not Sanctionable Conduct Unless the Potential Claims Articulated Therein Were “Frivolous” .....	24
b. Plaintiff Admits the Same Theory that Underpinned the Email Communications Was Demonstrated by the <i>Qui Tam</i> Cases; thus, so long as that Theory Was Reasonable, the Email Communications Are Not Sanctionable .....	26
C. The “For or Relating to” Element is Satisfied Because the Asserted Official Authority and the Charged Conduct are One in the Same; in any Event, the Proximate Cause of this Case Was the Work Defendant Performed on Behalf of the Bankruptcy Trustee .....	27
II. The Federal Courts Also Have Federal Question Jurisdiction Pursuant to 28 U.S.C. § 1331 .....	28

III. The Plaintiff Does Not Dispute the District Court Erred with Respect to its Decisions Surrounding the <i>Younger</i> Abstention Doctrine and the MFR .....	30
CONCLUSION .....	30
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT .....	32
CERTIFICATE OF SERVICE .....	33

### \*iii TABLE OF AUTHORITIES

#### Cases

<i>Arizona v. Manypenny</i> , 451 U.S. 232, 241 (1981) .....	12
Atty. Griev. Comm'n. v. <i>Donnelly</i> , 458 Md. 237, 314 (2018) .....	17, 29
Atty. Griev. Comm'n. v. <i>Link</i> , 380 Md. 405, 425 (2004) .....	24
Atty. Griev. Comm'n. v. <i>Mixter</i> , 441 Md. 416, 471 (2015) .....	2
Atty. Griev. Comm'n. v. <i>Rand</i> , 411 Md. 83, 101-104 (2009) .....	24
Atty. Griev. Comm'n. v. <i>Stanalonis</i> , 445 Md. 129, 146 (2015) .....	24
Atty. Griev. Comm'n. v. <i>Ucheomumu</i> , 450 Md. 675, 711 (2016) .....	15, 16
Atty. Griev. Comm'n. v. <i>Young</i> , 445 Md. 93, 105-06 (2015) .....	25
<i>Ciolli v. Iravani</i> , 625 F. Supp. 2d 276, 295 (E.D. Pa. 2009) .....	25
<i>Cord v. Smith</i> , 338 F.2d 516, 524 (9th Cir. 1964) .....	29
<i>Cunningham v. Hamilton Co., Ohio</i> , 527 U.S. 198, 204 (1999) .....	17
<i>Devazier v. Caruth</i> , 2016 U.S. Dist. LEXIS 92231 (E.D. Ark. 2016) .....	19
*iv <i>Dixon v. Coburg Diary, Inc.</i> , 369 F.3d 811 (4th Cir. 2004) .....	29
<i>Greenberg v. Chrust</i> , 297 F.Supp.2d 699, 705 (S.D.N.Y. 2004) .....	25
<i>Isaacson v. Dow Chem. Co.</i> , 517 F.3d 129, 133 (2d. Cir. 2008) .....	20
<i>Merrell Dow Pharm. Inc. v. Thompson</i> , 478 U.S. 804, 808 (1986) .....	29
<i>Mesa v. California</i> , 489 U.S. 121 (1989) .....	13
<i>Mulcahey v. Columbia Organic Chem. Co.</i> , 29 F.3d 148, 153 (4th Cir. 1994) .....	29
<i>Nat'l Inst. of Family &amp; Life Advocates v. Becerra</i> , 138 S. Ct. 2361, 2374 (2018) .....	25
<i>Nguyen v. City of Cleveland</i> , 121 F. Supp. 2d 643 (N.D. Oh. 2000) .....	20
<i>Reis v. Walker</i> , 491 F.3d 868, 870 (8th Cir. 2007) .....	24
<i>Revson v. Cinque &amp; Cinque</i> , 221 F.3d 71, 79-80 (2d. Cir. 2000) .....	25
<i>Riffin v. Balt. Co. Cir. Ct.</i> , 190 Md. App. 11, 34 (2010) .....	17
<i>Sawyer v. Foster Wheeler, LLC</i> , 860 F.3d 249 (4th Cir. 2017) .....	8, 28
<i>SEC v. Smith</i> , 710 F.3d 87, 95 (2d. Cir. 2013) .....	17
*v <i>Sosa v. DirecTV</i> , 437 F.3d 923 (9th Cir. 2006) .....	24
<i>United States ex rel. Kelly v. Boeing Co.</i> , 9 F. 3d 743 (9th Cir. 1993) .....	6
<i>United States ex rel. Mergent Servs. v. Flaherty</i> , 540 F.3d 89, 92-93 (2d. Cir. 2008) .....	6
<i>United States ex rel. Touhy v. Ragen</i> , 340 U.S. 462 (1951) .....	22
<i>United States v. Onan</i> , 190 F.2d 1, 6-7 (8th Cir. 1951) .....	7
<i>United States v. Stevens</i> , 2014 U.S. Dist. LEXIS 160837 at *2 (E.D. N.C. 2014) .....	22
<i>Vt. Agency of Natural Res. v. United States ex rel. Stevens</i> , 529 U.S. 765, 773 (2000) .....	6
<i>Watson v. Philip Morris Cos.</i> , 551 U.S. 142, 147 (2007) .....	8
<i>Wilson v. Workman</i> , 577 F.3d 1284, 1291 (10th Cir. 2009) .....	2
<i>Zeringue v. Crane Co.</i> , 846 F.3d 785 (5th Cir. 2017) .....	8, 13, 23

#### Federal Constitutional Provisions

U.S. Const., amend XIV, § 1 .....	14, 19
U.S. Const., art. III .....	30

#### \*vi Federal Statutes

28 U.S.C. § 1331 .....	<i>passim</i>
28 U.S.C. § 1367 .....	30
28 U.S.C. § 1441 .....	3, 4, 28
28 U.S.C. § 1442(a) .....	<i>passim</i>
28 U.S.C. § 1446(b)(3) .....	1, 3
28 U.S.C. § 1447(d) .....	4
31 U.S.C. § 3729 <i>et seq.</i> .....	<i>passim</i>

#### Federal Rules of Appellate Procedure

Fed. R. App. P. 32(a)(5) .....	32
--------------------------------	----

Fed. R. App. P. 32(a)(6) .....	32
Fed. R. App. P. 32(a)(7)(B) .....	32
Fed. R. App. P. 32(f) .....	32
<b>Maryland Lawyers' Rules of Professional Conduct (MLRPC)</b>	
MLRPC 3.1 .....	1, 2, 17
<b>Other Authorities</b>	
Black's Law Dictionary (8th ed. 2004) .....	2

## \*1 INTRODUCTION

In his Opening Brief,<sup>1</sup> Defendant established Plaintiff asserts claims against him because, after receiving information in the course of state court litigation suggesting the federal government was being defrauded, he and a former client accepted an invitation from Congress, as outlined in the FCA, to become government contractors by filing two *qui tam* cases under seal in the District Court in summer 2012 against parties who they then-believed (and some of whom were later confirmed to have) defrauded the federal government.

Defendant removed this case, in accordance with [28 U.S.C. § 1446\(b\)\(3\)](#), after Plaintiff provided deposition testimony and interrogatory responses conclusively establishing, among other things, it asserts (i) a claim Defendant violated MLRPC 3.1 by developing and filing *Qui Tam I* in the District Court on June 20, 2012 (“*Operative Claim No. 1*”); and (ii) a claim Defendant violated MLRPC 3.1 by \*2 developing and filing *Qui Tam II* in the District Court on July 13, 2012 (“*Operative Claim No. 2*”).<sup>2</sup>

Because an FCA relator and his attorney are a type of government contractor who act under the Executive in filing and prosecuting FCA cases and because he has several colorable defenses to the Operative Claims arising under federal law, Defendant readily satisfies the three elements necessary for removal under the FORS. Based upon other facts ascertained from Plaintiff's discovery responses, including its document production on August 7, 2017,<sup>3</sup> Defendant had an alternate \*3 basis for removal under the FORS. Namely, notwithstanding any of the claims Plaintiff purports to make in its Complaint,<sup>4</sup> the actual proximate cause of this case was work Defendant performed, while acting under the Bankruptcy Trustee, to preserve the interests of his former client's bankruptcy estate in the *Qui Tam* Cases.

Among others, the Operative Claims hinge solely upon questions of federal law; thus, there was an alternate basis for federal jurisdiction and removal of this case under [28 U.S.C. § 1441](#), the general removal statute (“GRS”) and [28 U.S.C. § 1331](#).

\*4 The District Court erred in concluding it would apply *Younger* abstention principles and decline to accept this case even if it had found jurisdiction. Finally, the District Court erred in concluding it did not have authority to reconsider the September 20th Order remanding the case to the state court because review of the remand order in this case was explicitly authorized by [28 U.S.C. § 1447\(d\)](#).

Nothing in Plaintiff's response undermines Defendant's arguments that this case was properly removed to federal court, pursuant to the FORS, or in the alternative, pursuant to the GRS and [§ 1331](#). Further, nothing in the Plaintiff's response undermines or rebuts Defendant's arguments regarding *Younger* abstention and the Motion for Reconsideration (the “MFR”).

In attempting to challenge the removal of this case, the Plaintiff, *inter alia*, improperly purports to lump distinct claims together and frame its allegations in terms of a “course of conduct” to cause unnecessary confusion and complexity, repeatedly mischaracterizes Defendant's arguments and legal positions, articulates erroneous and fictitious legal standards for satisfying

the three prongs of the FORS, and attempts to divorce itself from its own discovery responses in an \*5 effort to detract from, among other things, the fact it asserts the Operative Claims.

In sum, the decision of the District Court should be reversed, and this case should proceed in federal court.

## ARGUMENT

### I. The Federal Courts Have Jurisdiction Over this Case Pursuant to the Federal Officer Removal Statute

#### A. *The “Acting Under” Element of the FORS is Satisfied in this Case*

In the Opening Brief, Defendant offered two alternative reasons the “acting under” element of the FORS is satisfied in this case. Nothing in the Plaintiff’s response legitimately undermines these.<sup>5</sup>

##### **1. Plaintiff Fails to Recognize the “Acting Under” Element of the FORS is to be Liberally Construed in Favor of Jurisdiction**

Plaintiff overlooks the overwhelming number of authorities that clearly dictate the FORS and its “acting under” element are to be liberally construed in favor of jurisdiction. *See generally Resp. Br.* at \*6 27. Plaintiff argues FCA relators and their attorneys are not government contractors. *Resp. Br.* at 28. It purports to marginalize the holding of *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000), which was that the reason relators have standing in FCA cases is because they are partial contractual assignees of the Government’s damages claim. *See also United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993) (“[T]he FCA’s *qui tam* provisions operate as an enforceable unilateral contract. The terms and conditions of the contract are accepted by the relator upon filing suit”) (emphasis added).

Furthermore, Plaintiff erroneously states that courts have rejected the notion that an attorney for an FCA relator doubles as an attorney for the Government. *Resp. Br.* at 30. Plaintiff ignores the holdings of the many Circuits to have considered the issue, which concluded that an attorney for an FCA relator does double as an attorney for the Government, and thus, relators who are not attorneys are not permitted to represent themselves in *qui tam* litigation. *See United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 92-93 (2d. Cir. 2008) (quoting \*7 *United States v. Onan*, 190 F.2d 1, 6-7 (8th Cir. 1951)) (“Congress could [not] have intended to authorize a layman to carry on such suit as attorney for the United States but must have had in mind that such a suit would be carried on in accordance with the established procedure which requires that only one licensed to practice law may conduct proceedings in court for anyone other than himself”) (emphasis added); *see also Op. Br.* at 50 (and cases cited therein).

Plaintiff erroneously argues that the FORS would only permit removal of this case if, at the time Defendant developed and filed the *Qui Tam* Cases, he was acting pursuant to the “subjection, guidance, or control [of] a federal superior.” *Resp. Br.* at 27. Plaintiff then reasons that the “alleged actions that led to [the] disciplinary charges” (*i.e.*, the developing and filing of the *Qui Tam* Cases) “were not performed...by [Defendant] pursuant to the direction of the [Department of Justice or United States’ Attorney] or any other federal officer or agency.” *Id.* at 31. Plaintiff misstates the standard required to satisfy the “acting under” element of the FORS. It is satisfied where a private person engages in “**an effort to assist, or to help carry out, the duties or tasks of [a] federal superior**” (emphasis added). *Zeringue v. Crane* \*8 *Co.*, 846 F.3d 785, 792 (5th Cir. 2017) (*citing Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007)). Very importantly, “[d]irect oversight of the specific acts that give rise to a plaintiff’s complaint is not required to satisfy this part of § 1442.” *Id.* (emphasis added). *See also Sawyer v. Foster Wheeler, LLC*, 860 F.3d 249, 255 (4th Cir. 2017) (the “acting under” element is satisfied anytime a private person is sued in connection with work performed on behalf of the Government pursuant to a contract).

As noted in the Opening Brief, when Defendant and his former client developed and filed the *Qui Tam* Cases, they were responding to an offer from Congress to become government contractors who assist the Executive in recovering monies the Government lost through fraud. This was more than sufficient to satisfy the liberal “acting under” prong.<sup>6</sup>

**\*9 2. The Record Amply Provides Support for Defendant's Allegation that He Satisfies the “Acting Under” Element in the Alternative Because the Proximate Cause of this Case Was the Tasks He Performed While Acting Under the Bankruptcy Trustee to Preserve the Estate's Interests in the Qui Tam Cases**

Plaintiff does not dispute that a person who is sued because of acts performed to assist a bankruptcy trustee with his official duties satisfies the “acting under” element of the FORS. Rather, Plaintiff tries to marginalize the tasks that Defendant performed while acting under the Trustee and effectively asserts Defendant assisted the Trustee because he also had an interest in preserving the cases as assets for the Estate and/or that he did not do enough to help the Estate to satisfy the “acting under” prong. *Resp. Br.* at 32-33. It is of no import whether Defendant also had an interest, as a creditor of the Estate, in seeing that the Estate's interests in the *Qui Tam* Cases was preserved. It is further of no import to what extent the Estate ultimately benefited from the assistance provided by Defendant. What matters is that the proximate cause of this case was the assistance provided to the Estate.

Next, the Plaintiff asserts there is no support for the notion that the proximate cause of this case was the assistance Defendant provided to the Trustee. *Resp. Br.* at 33. Plaintiff is wrong. Defendant alleged, \*10 based upon the Lamone deposition and emails produced by Plaintiff on August 7, 2017, that had there been no *Qui Tam* Cases or had Defendant not acted under the Trustee to preserve the Estate's interests throughout the Bankruptcy Case, this case would never have occurred because the Hjortsberg Grievance was dismissed by the Commission on March 20, 2014, three days after the Bankruptcy Court approved the Settlement Agreement.

This case resulted from the Lawless Grievance, which was opened in early 2015 in response to Hjortsberg's calling of the March 21st Arrangement, something Defendant alleges would not have occurred but for Hjortsberg's having discovered, through events in the Bankruptcy Case, the existence of the *Qui Tam* Cases while they remained under seal. Hjortsberg's incentive for entering the March 21st Arrangement and continuing to push for this case was that he was planning to (and ultimately did) use this case as part of a defense strategy for his clients in the-then unresolved *Qui Tam* Cases. Thus, notwithstanding what the Complaint says, Defendant would not have faced exposure for the claims therein had he not acted under the Trustee by assisting him in his official duties during the Bankruptcy \*11 Case.<sup>7</sup> Thus, even if this Court holds that the “acting under” element of the FORS is not satisfied by virtue of Defendant's role as a government contractor in developing and filing the *Qui Tam* Cases, the “acting under” element is satisfied in the alternative because the case would not have occurred but for work Defendant did while acting under the Trustee in his official capacity.<sup>8</sup>

**B. The “Federal Defense” Element of the FORS is Satisfied in this Case**

In the Opening Brief, Defendant offered eight alternative defenses, which are colorable and arise under federal law, that address relevant claims of the Plaintiff and that satisfy the second element for removal under the FORS. *See Op. Br.* at 55-77. Nothing in the Plaintiff's response undermines these defenses or Defendant's arguments that the second element for removal is satisfied. Indeed, \*12 Plaintiff does not lodge any meaningful challenge to the viability of any of these alternative federal defenses presented by Defendant.

**1. Plaintiff Attempts to Impose a Fictitious Standard for the Type of Federal Defense that Satisfies the Second Element of the FORS; the Element May Be Satisfied with any Colorable Federal Defense to an Eligible Claim; in any Event, Defendant Has Alleged Colorable Federal Defenses that Satisfy Plaintiff's Standard**

Misreading the Supreme Court's decision in *Arizona v. Manypenny*, 451 U.S. 232, 241 (1981) and other authorities, Plaintiff erroneously concludes that "this prong of the removal analysis requires...the federal defense must arise out of the officer's official duties, a federally imposed duty, or an immunity from suit." Plaintiff's conclusion is wholly divorced from the holding of any case. In *Manypenny*, the Supreme Court explained in dicta that "[h]istorically, removal under § 1442 (a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties." 451 U.S. at 242. The Court, however, did not hold that, in order to satisfy the second element for removal under the FORS, "[t]he defense must also 'aris[e] out of [the party or federal officer's] official duties.'" *Resp. Br.* at 35. Plaintiff's argument also ignores that subsequently in \*13 *Mesa v. California*, 489 U.S. 121 (1989), the Supreme Court held that the FORS is a "pure jurisdictional statute" that dispenses with the well-pleaded complaint rule and endues a federal court with jurisdiction when a federal question is raised in a defendant's removal petition. *Zeringue*, 846 F.3d at 789-90 (citing *Mesa*, 489 U.S. at 136). The upshot is that *Mesa* and its progeny make clear that a qualifying federal defense is any defense raising a question of federal law to an eligible claim, which is a claim for which the first and third elements of the FORS are satisfied (namely, a claim against a federal officer or person acting thereunder that is "for or related to" the asserted official authority). Here, the Operative Claims are eligible claims, and thus, any defense raising a question of federal law to those claims suffices to satisfy the second element for removal under the FORS.

Here, Defendant asserts some federal defenses that do arise directly from the performance of the asserted official authority, and therefore satisfy Plaintiff's standard. For example, the first and second defenses alleged by Defendant (*Op. Br.*, pp. 56-64) are the effective equivalent of immunity defenses. The crux of these defenses is that the *Qui Tam* Cases were not "frivolous," and thus, Defendant asserts he \*14 was expressly authorized under the FCA and federal law to file them, and thus, he could not have violated any state law in doing so. The fourth defense (*Op. Br.*, pp. 71-72), fifth defense (*Op. Br.*, pp. 72-75), and eighth defense (*Op. Br.*, p. 77) are also examples of defenses arising directly from the performance of the asserted official authority.

Defendant has also asserted federal defenses to eligible claims that exist because of specific circumstances unique to this case that are wholly independent of the asserted official authority itself. An example is the third defense, which appears on pages 65-70 of the Opening Brief. This defense exists because Plaintiff is asserting eligible claims so vague and lacking in notice that they implicate the Due Process Clause of U.S. Const., amend XIV, § 1. Even though this defense does not itself directly arise from the asserted official authority (*i.e.*, developing and filing a *qui tam* case), it still satisfies the second element for removal under the FORS because, as noted *supra*, it is a federal defense to eligible claims. The same thing is true with respect to the sixth defense (*Op. Br.*, pp. 75-76), and the seventh defense (*Op. Br.*, p. 76).

**\*15 2. Plaintiff's Attempts to Marginalize Defendant's First Two Federal Defenses by Falsely Asserting the "Merits" of the Qui Tam Cases are Not Implicated by the Operative Claims**

Plaintiff does not dispute any material facts, as alleged by Defendant, surrounding the development or filing of either *Qui Tam I* or *Qui Tam II*. For that reason, Plaintiff cannot challenge the plausibility of Defendant's first two defenses, which hinge upon a question arising under the FCA (*Op. Br.*, p. 76). Rather, Plaintiff tries to marginalize these defenses by miscasting the Operative Claims, and therefore, implicitly argues that the proffered defenses are not responsive. Although it is alleging the *Qui Tam* Cases were "frivolous"<sup>9</sup> and although a question of "frivolousness" is inherently a question about the "merits" of something, Plaintiff argues that there are no questions inuring to the merits of the *Qui Tam* Cases at issue. To advance its argument, Plaintiff attempts to misplace reliance on *Atty. Griev. Comm'n. v. Worsham*, 441 Md. 105, 127 (2014) and *Atty. Griev. Comm'n. v. Ucheomumu*, 450 Md. 675, 711 (2016), for the proposition \*16 that no issue related to the "merits" of the *Qui Tam* Cases could be presented here because "[a]ttorney misconduct proceedings do not litigate the merits of the underlying cases that gave rise to the proceedings." *Resp. Br.* at 34. Although it is true in those cases that Rule 3.1 violations were found without litigating any issues pertaining to the "merits" of the underlying litigation, it is because the original reviewing federal courts had already found the filings at issue by the defendant attorneys to have been "frivolous." In other words, the question of "frivolousness" was not actually at issue in either *Worsham* or *Ucheomumu* because it had already been resolved prior to the commencement of either disciplinary case.

Unlike *Worsham* or *Ucheomumu*, here, the notion that either of the *Qui Tam* Cases was “frivolous” was not the finding of any court, but merely the apparent opinion and conclusion of Lawless.<sup>10</sup>

\*17 The issue of “frivolousness” is hotly-contested in this case, and because a question of “frivolousness” is inherently a question about the merits of an action taken,<sup>11</sup> Plaintiff is wrong that Operative Claim Nos. 1 and. 2 do not implicate questions about the merits of the *Qui Tam* Cases. In sum, with its assertion of the Operative Claims, Plaintiff has put the merits of the *Qui Tam* Cases at issue, and as such, Plaintiff is wrong in its implicit assertion that Defendant’s first two federal defenses, as presented in the Opening Brief, do not address an issue \*18 that is “before this Court.” This Court must therefore determine whether those defenses are sufficiently colorable as to satisfy the second element for removal under the FORS.

### **3. Plaintiff Mischaracterizes Several of the Defenses that Are Asserted by Defendant**

Plaintiff completely mischaracterizes several of the defenses presented by Defendant. E.g., Plaintiff states, “[Defendant] alleges...that the [FCA] provides its own defense to the assertion that he filed frivolous motions and pleadings...” *Resp. Br.* at 36-37. This mischaracterizes the first two defenses presented by Defendant. *Op. Br.* at 56-65. Defendant alleges the *Qui Tam* Cases were not “frivolous,” and as such, that he has plausible defenses raising questions arising under the FCA to the Operative Claims.

Plaintiff states, “[Defendant alleges] he has a defense under the Supremacy Clause on a theory of federal preemption.” *Resp. Br.* at 37. That is not what Defendant alleges. He alleges he has a plausible federal defense to the Operative Claims on a preemption theory based upon the notion the *Qui Tam* Cases were not “frivolous” and he did not violate the Federal RPC in filing them. *Op. Br.* at 72-75. He further alleges he has a plausible federal defense arising under the Supremacy \*19 Clause to all the Plaintiff’s claims in this case (including the Operative Claims) for the same reason as in *Devazier v. Caruth*, 2016 U.S. Dist. LEXIS 92231 (E.D. Ark. 2016). *Op. Br.* at 77. In sum, the alleged preemption and Supremacy Clause defenses are wholly distinct and based upon different operative facts.

Plaintiff also mischaracterizes Defendant’s defenses surrounding the due process and equal protection clauses of U.S. Const., amend XIV, § 1. Plaintiff erroneously states Defendant alleges “due process and equal protection challenges to state disciplinary rules.” *Resp. Br.* at 37. Defendant is not challenging any state disciplinary rules. Rather, Defendant asserts that, with respect to the Operative Claims (as well as other claims), Plaintiff’s allegations are vague, circular and conclusory and do not confer sufficient notice as to satisfy the requirements of procedural due process. *Op. Br.* at 65-70. Defendant also alleges a second due process defense (*Op. Br.* at 76) and an equal protection defense (*Op. Br.* at 75-76) to the same claims.

In sum, Plaintiff’s mischaracterizations of the defenses noted *supra* do not undermine or rebut Defendant’s argument that they are colorable and satisfy the second element of the FORS.

### **\*20 4. Removal of this Case Comports with the Policy Objectives of the FORS**

Plaintiff insinuates the Government has no interest in protecting FCA relators and their attorneys, and thus, that permitting removal of this case does not comport with the policy objectives of the FORS. See e.g., *Resp. Br.* at 33; *Id.* at 30 n. 15. *Au contraire*, permitting removal of this case fits squarely with the policy interests of the FORS. A primary purpose of the FORS is “protecting persons who, through contractual relationships with the Government, perform jobs that the Government would have performed” (emphasis added). *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 133 (2d. Cir. 2008). An FCA relator and his attorney clearly perform a service for the federal Government. Indeed, the policies behind the FCA itself are the very same ones that favor district court jurisdiction in § 1442(a) cases. See *Nguyen v. City of Cleveland*, 121 F. Supp. 2d 643, 646 (N.D. Oh. 2000).

Here, Defendant and his client provided a benefit to the Government in filing the *Qui Tam* Cases. With respect to *Qui Tam I*, for example, the Government pursued and ultimately obtained guilty pleas from defendants in the three QTI Parallel Criminal Cases. In the \*21 *Agodio* case, the Government obtained a money judgment for the losses it sustained in 26 of the 27 transactions at issue in *Qui Tam I*.<sup>12</sup>

The Government has an interest in protecting FCA whistleblowers and their attorneys by offering a federal forum for a federal defense in subsequent litigation such as this, which arises from a defendant's role in an FCA case,<sup>13</sup> especially in cases, such as this, where a defendant may not have an adequate opportunity to defend the claims against him in anything other than a federal forum due to the unavailability of critical witnesses and information necessary to resolve the claims and defenses at issue. For example, large portions of the records from the *Qui Tam* Cases remain **sealed at the District Court** (e.g., records related to the investigation of the relator's claims). These are critical to Defendant's defense to the Operative Claims. Furthermore, the witnesses with the most relevant information for resolving the \*22 Operative Claims are the federal agents who investigated the relator's allegations in the *Qui Tam* Cases. There is no guarantee they would be available in the state court, since they are not subject to the subpoena power of the state court. *See United States v. Stevens*, 2014 U.S. Dist. LEXIS 160837 at \*2 (E.D. N.C. 2014) (citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)) ("The doctrine of sovereign immunity precludes a state court...from exercising jurisdiction to compel a government employee to testify contrary to agency instructions"). In sum, it fully comports with the FORS' purpose **to allow removal of this case, so Defendant may be afforded a trial in a forum where all evidence and witnesses necessary** to put on his defenses are guaranteed to be available.

#### **5. Plaintiff's Attempt to Frame its Allegations in Terms of a "Course of Conduct" Further Demonstrates this Action Should Be Tried in Federal Court Because Plaintiff's Entire Case Actually Hinges upon the Operative Claims**

Nearly half of Plaintiff's brief repeats allegations from its Complaint apart from the Operative Claims. It then purports to frame the Operative Claims in terms of a "course of conduct." *See e.g., Resp. Br.* at 23 (Arguing discovery confirmed the filing of the *Qui Tam* Cases "was part of the pattern and course of conduct constituting a violation of \*23 the [MLRPC]"). This a red herring that does not change whether the Operative Claims satisfy the elements of removal.<sup>14</sup> Further, Plaintiff tacitly admits its entire case rests upon the Operative Claims themselves.

Plaintiff alleges Defendant's "course of conduct" was simply developing a theory involving mortgage fraud and arguing it in court filings (including the *Qui Tam* complaints) and (sometimes uncivil) private email communications. In the **absence of the court filings** (and the theory they demonstrated) **being "frivolous," the emails constituted constitutionally-protected speech, and the alleged "course of conduct" included nothing sanctionable.**<sup>15</sup>

#### **\*24 a. The Email Communications Were Not Sanctionable Conduct Unless the Potential Claims Articulated Therein Were "Frivolous"**

Plaintiff makes several allegations regarding email communications in which Defendant argued potential claims in the Private Fraud Action premised on the same theory as the *Qui Tam* Cases (*i.e.*, Svehlak *et al.* were involved in fraudulent mortgage transactions). Such emails could only have been sanctionable if the theory underpinning them was "frivolous."

Mere lack of civility is not sanctionable nor is making a statement one has a demonstrable basis for believing, even if it later proves to be incorrect. *Atty. Griev. Comm'n. v. Rand*, 411 Md. 83, 101-104 (2009); *Atty. Griev. Comm'n. v. Link*, 380 Md. 405, 425 (2004); *Atty. Griev. Comm'n. v. Stanalonis*, 445 Md. 129, 146 (2015). Attempting to leverage settlement is a proper purpose for making a demand or filing suit and these are constitutionally-protected activities unless the threatened lawsuit is "frivolous." *Sosa v. DirecTV*, 437 F.3d 923 (9th Cir. 2006) (Holding unless threatened lawsuit is frivolous, prelitigation demand letters are protected by the First Amendment Petition Clause); *Reis v. Walker*, 491 F.3d 868, 870 (8th Cir. 2007) ("[B]ecause \*25 settlements are favored, commencing a lawsuit or adding a claim to gain leverage for a settlement, or in the expectation of a

settlement, is not an abuse of that process"); *see also Greenberg v. Chrust*, 297 F.Supp.2d 699, 705 (S.D.N.Y. 2004); *Revson v. Cinque & Cinque*, 221 F.3d 71, 79-80 (2d. Cir. 2000). *See also Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018) ("[T]his Court's precedents have long protected the First Amendment rights of professionals").

Only where threatened claims are "frivolous" have they sometimes been deemed sanctionable. *See Ciolfi v. Iravani*, 625 F. Supp. 2d 276, 295 (E.D. Pa. 2009) ("[C]ases recognizing settlement as an improper purpose involve the filing of nuisance suits to...coerce the defendant into settling the baseless claim rather than deal with the expense of litigation..."); *Atty. Griev. Comm'n v. Young*, 445 Md. 93, 105-06 (2015) (Attorney violated various MLRPC by threatening and then filing frivolous lawsuits).

**\*26 b. Plaintiff Admits the Same Theory that Underpinned the Email Communications Was Demonstrated by the Qui Tam Cases; thus, so long as that Theory Was Reasonable, the Email Communications Are Not Sanctionable**

Plaintiff asserts the problem with the *Qui Tam* Cases is that those cases demonstrate a theory (*i.e.*, the same one espoused in the emails),<sup>16</sup> which Plaintiff apparently believes to be unreasonable.<sup>17</sup> Defendant maintains the theory was objectively reasonable as demonstrated by, *inter alia*, the District Court's final judgment in the *Agodio* case, which confirmed the existence of the scheme and the fraudulent nature of 26 of the 27 transactions at issue in *Qui Tam I*, including the HSP Transaction in which Svehlak was involved.<sup>18</sup> *See generally Op. Br.*, pp. 58-65.

**\*27** Summarizing, Plaintiff's entire case hinges on whether filing the *Qui Tam* Cases was reasonable, even more reason this case should be tried in federal court.

**C. The "For or Relating to" Element is Satisfied Because the Asserted Official Authority and the Charged Conduct are One in the Same; in any Event, the Proximate Cause of this Case Was the Work Defendant Performed on Behalf of the Bankruptcy Trustee**

Plaintiff asserts that Defendant offers only the conclusory assertion that the charged conduct in this case was carried out "for or in relation" to the asserted official authority. *Resp. Br.* at 38. Here, the asserted official authority was the developing and filing of the *Qui Tam* Cases, the very conduct that Plaintiff asserts, in the Operative Claims, \*28 constituted a violation of state law. The charged conduct and the asserted official authority are one in the same. This is sufficient to satisfy the nexus element of the FORS. *Op. Br.* at 77-78 (citing *Sawyer*, 860 F.3d at 254-58).

Defendant also asserts the nexus element is readily satisfied here because, as explained *supra*, the proximate cause of this entire case was acts performed by Defendant to assist the Trustee with his official duties. Thus, all the claims in this case satisfy the nexus element because but for what Defendant did to assist the Trustee, the case would not have occurred.

**II. The Federal Courts Also Have Federal Question Jurisdiction Pursuant to 28 U.S.C. § 1331**

Nothing in Plaintiff's response undermines the Defendant's argument that, among others, the Operative Claims were subject to removal under the GRS and § 1331. The authorities cited by Plaintiff in support of its arguments regarding § 1331 jurisdiction all support the conclusion the Operative Claims arise under federal law because, for the reasons noted *supra* and in the Opening Brief, they necessarily turn on questions arising under the FCA. There is no theory upon which Plaintiff can succeed on the Operative Claims that does not require \*29 resolution of a question arising under federal law.<sup>19</sup> *See Donnelly, supra*, 458 Md. at 314.<sup>20</sup>

As noted in his Opening Brief and *supra*, federal jurisdiction exists for all the other claims pertaining to conduct that occurred in federal court, and Defendant merely seeks to and is entitled to have such conduct judged by that Court in the first instance.

See *Cord v. Smith*, 338 F.2d 516, 524 (9th Cir. 1964) (“When an attorney appears before a federal court, he is acting as an officer of that court, and it is that court which must judge his conduct”) (emphasis added).<sup>21</sup>

\***30** Plaintiff does not rebut the Defendant's argument that all the remaining state-law claims in this case form one case or controversy under Article III of the U.S. Constitution, and therefore, they are subject to the supplemental jurisdiction of the District Court under 28 U.S.C. § 1367.

### **III. The Plaintiff Does Not Dispute the District Court Erred with Respect to its Decisions Surrounding the *Younger* Abstention Doctrine and the MFR**

With respect to Defendant's arguments surrounding *Younger* abstention and the MFR, Plaintiff has opted to rest wholly on its erroneous arguments regarding the jurisdictional issues and effectively concedes Defendant is right about the District Court erring on these issues for the reasons stated on pages 82-89 of the Opening Brief.

### **CONCLUSION**

For these and the reasons set forth in the Opening Brief, the District Court's remand order should be reversed, and the case should proceed in federal court.

\***31** Respectfully submitted,

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#### **Footnotes**

<sup>1</sup> All capitalized terms not otherwise defined herein shall have the same meaning as in the Opening Brief. References herein to Tables are to those in the Attachment to the Opening Brief (ECF No. 57). As in the Opening Brief, the cases in Table 2 are referred to herein by their “short name” as listed in that Table.

<sup>2</sup> A “claim” is “[t]he aggregate of operative facts giving rise to a right enforceable by a court.” See *Wilson v. Workman*, 577 F.3d 1284, 1291 (10th Cir. 2009) (quoting Black's Law Dictionary (8th ed. 2004)). There is a separate and distinct right of enforcement as to each separate and distinct occasion on which an ethics rule is violated. MLRPC 3.1 is violated each time an attorney files a “frivolous” paper in a court of law. *Atty. Griev. Comm'n. v. Mixter*, 441 Md. 416, 471 (2015). Plaintiff alleges violations of MLRPC 3.1 with

respect to 20 separate court filings based upon the purported review and conclusions of its employee, Lydia E. Lawless ("Lawless"). See JA 162-175; *see also* Table 3; JA 61-81 (Schedule A); JA 55 (Ans. to Int. No. 19). Among these are Operative Claims No. 1 and 2, which are sometimes referred to collectively hereafter as the "Operative Claims."

- 3 The documents demonstrated, *inter alia*, that as of July 31, 2015, the business day immediately prior to August 3, 2015, the date Lawless effectively certified her investigative findings and conclusions, regarding the Lawless Grievance, to the Commission in the form of a Statement of Charges ("SOC"), she still had not received complete files pertaining to the Underlying Litigation, and as such, she requested and received seven factually and legally complex filings (the "Late Requested Filings"); she then purported to conclude on August 3rd that each of the Late Requested Filings was "frivolous". JA 227-43, 246; *see also* Table 3. The documents established that, after the SOC was issued, Hjortsberg and Lawless remained in regular contact and he continued to press her to advance the matter in an apparent attempt to use the existence of this case for his client's benefit in *Qui Tam I*. *See e.g.*, JA 287. The documents also demonstrated, *inter alia*, that Hjortsberg and Lawless appeared to be closely coordinating during the litigation of *Qui Tam I* and the First Removal Case. *See e.g.*, JA 287-93.
- 4 Plaintiff spends a large portion of its brief (pp. 3-16) reciting allegations from its Complaint. This removal was predicated upon discovery responses, under § 1446(b)(3), and not the Complaint. Thus, it is not pertinent whether federal jurisdiction may be ascertained from the face of the Complaint, but rather from the discovery responses at issue. Most of Plaintiff's recitation was therefore irrelevant.
- 5 Note Plaintiff dedicated nearly two pages in its Brief to the argument that an FCA relator is not a "federal officer." *Resp. Br.* at 26-27. The argument was irrelevant as Defendant has never asserted an FCA relator is a "federal officer."
- 6 Plaintiff mistakenly asserts Defendant failed to plead he acted under a particular federal agency or officer (other than the Bankruptcy Trustee). *Resp. Br.* at 26 n. 1. Defendant alleged a relator acts under the Executive in preparing and filing an FCA action. *See JA 34-35, ¶43.*
- 7 JA 32-34 (¶¶37-42); *see also* JA 549-51.
- 8 Plaintiff has not disputed any of the material facts at issue with respect to Defendant's allegation about the true proximate cause of this case. Furthermore, the District Court failed to hold any evidentiary proceedings and make any findings on the subject. If this Court believes additional factual findings are necessary to resolve Defendant's allegations on this point, it should remand this case to the District Court to make such findings.
- 9 Recall when asked in deposition whether it is explicitly alleging *Qui Tam I* was "frivolous," Plaintiff's designee, Marianne Lee, answered in the affirmative stating, "Well, 3.1 is captioned meritorious claims and contentions." JA 175:12-16.
- 10 Note this is a highly-unique disciplinary case because it involves allegations of "frivolous" filings based solely upon the opinions and conclusions of a single person who Defendant alleges (a) did not even review the filings at issue before purporting to formulate her conclusions (*see e.g.*, note 3 *supra*); and (b) was wholly unqualified to draw any conclusions regarding the filings at issue. *See JA 29-30, ¶33; JA 103-19; JA 483* (Regarding Lawless, a judge noted, "[I]nstead of viewing the evidence independently and objectively, [she] simply adopts the arguments of [the opposing party] and ignores the totality of the evidence and circumstances"). Defendant has been unable to locate a single disciplinary case from any jurisdiction where, as here, an attorney was charged with Rule 3.1 violations in the absence of allegations involving falsified facts or a prior finding that a filing was "frivolous" by the original reviewing court. Neither exist here.
- 11 *Atty. Griev. Comm'n. v. Donnelly*, 458 Md. 237, 314 (2018) ("A case is frivolous where the lawyer is unable either to make a good faith argument on the merits of the case...[t]he hearing judge's conclusion that Donnelly violated MLRPC 3.1 by filing the complaint in the Partition Case...is not supported by clear and convincing evidence...There is no evidence that, in the complaint, Donnelly was unable to make [a] good faith argument as to the merits of the Partition Case") (emphasis added); *Riffin v. Balt. Co. Cir. Ct.*, 190 Md. App. 11, 34 (2010) ("To decide whether a litigant's filings are frivolous or harassing, courts should examine both the number and content of the filings. Indeed, the [litigant's] claims must not only be numerous, but also be patently without merit") (emphasis added); *SEC v. Smith*, 710 F.3d 87, 95 (2d. Cir. 2013) (citing *Cunningham v. Hamilton Co., Ohio*, 527 U.S. 198, 204 (1999)) (noting sanctions orders implicate the merits of the underlying proceeding).
- 12 *See e.g.*, JA 1168-1202.
- 13 Recall Plaintiff put great weight on the Government declining intervention in the *Qui Tam* Cases, something that has no bearing on the merits of those cases (*See Op. Br.* at 71-72). The prospect that a relator's attorney could be subjected to disciplinary action in a state court because of a misreading of the Government's intervention decision could have a chilling effect on the filing of future FCA cases.
- 14 Each claim must be analyzed independently; a defendant need only satisfy the elements for removal as to one claim to remove the case. *Zeringue*, 846 F.3d at 794.
- 15 JA 332 ("[T]he [alleged] violation[s] of the Rules rests on a course of conduct -- developing an elaborate conspiracy theory...and embarking on a crusade to prove his theory") (emphasis added; internal brackets and quotation marks omitted). Whether any court

filings were “frivolous” is a question wholly independent of the emails. The emails do not provide insight as to whether the court filings were “frivolous.”

- 16 See e.g., JA 246 (“[Defendant's] *Qui Tam* filings demonstrate and are part of his elaborate conspiracy theory”) (emphasis added).
- 17 Speaking about *Qui Tam* I, Lawless stated on the record, “the pleadings in the [Qui Tam Cases] are merely to provide the color...to evaluate the actions [Defendant] took, the tone that [Defendant] took, the comments that [Defendant] made... What the papers say...is that... [Defendant] developed this incredible and unbelievable conspiracy theory, and it's evidenced by his actions in the underlying cases, which includes the *qui tam* action...” JA 816-18 (emphasis added).
- 18 Speaking of the same mortgage fraud scheme at issue in *Qui Tam* I, during the plea hearing in *Agodio*, AUSA Gray noted, “If this matter had proceeded to trial, the government would have proved that commencing in about June 2009, the defendant entered a conspiracy...to carry out various acts of wire fraud, in particular that relate to fraud in connection with obtaining home mortgage loans” (emphasis added). During the sentencing hearing, AUSA Gray noted in relevant part: “[Yes], it's a very extensive scheme” (emphasis added). JA 965. At the same hearing, the Court noted in relevant part, [T]he defendant was a smart guy and had the capacity to carry on a complex fraud scheme. And as a consequence it ballooned and mushroomed and got larger and larger. And in the end, caused some very significant losses, up in the neighborhood of \$3.5 million” (emphasis added). JA 985:18-24. *See also generally* JA 964-69 (Recognizing there were other people in the penumbra who were not criminally prosecuted).
- 19 Plaintiff cited *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986), *Mulcahey v. Columbia Organic Chem. Co.*, 29 F.3d 148, 153 (4th Cir. 1994), and *Dixon v. Coburg Diary, Inc.*, 369 F.3d 811 (4th Cir. 2004). *See generally* Resp. Br. at 40-41.
- 20 Note Plaintiff asserts its allegations about the *Qui Tam* Cases “simply allege[s] that the filing of [those cases] is part of the conduct constituting a violation of several MLRPC Rules, including the rule regarding frivolous pleadings by attorneys.” Resp. Br. at 43. This is a roundabout way of saying Plaintiff alleges the *Qui Tam* Cases were “frivolous” because unless those cases were “frivolous,” their filing could not be “part of the conduct constituting a violation of...the rule regarding frivolous pleadings by attorneys.” *Donnelly, supra*, 458 Md. at 314.
- 21 Plaintiff argues none of the federal defenses offered by Defendant are relevant to the § 1331 analysis. Resp. Br. at 43-44. This argument is wholly irrelevant because Defendant never asserted the federal defenses were relevant to the § 1331 analysis. Defendant alleged them because they were relevant to the FORS analysis. *See* JA 790:2-6.

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