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November 21, 2017

Mr. Henry Kerner
Special Counsel
U.S. Office of Special Counsel
1730 M Street, NW, Suite 300
Washington, DC 20036

Re: Darrell Whitman Whistleblowing Disclosure and Complaint

Dear Special Counsel Kerner:

This submission is an emergency request for Mr. Whitman's pending Whistleblower Protection Act (WPA) complaint. More specifically, it reinforces his request for a stay of his termination. It also supplements his pending whistleblowing disclosure pursuant to 5 USC 1213. His prior 2015 and 2016 filings are attached as Exhibits 1 and 2, respectively. Until his May 2015 dismissal, Mr. Whitman was a whistleblower rights investigator for the Department of Labor (DOL) Occupational Safety and Health Administration (OSHA)'s Directorate of Whistleblower Protection Programs (DWPP) Region 9 Bay Area (California) office.

Prior to his termination, Mr. Whitman made repeated disclosures through all available DOL channels that Region 9 management systematically violated the agency's authoritative Whistleblower Investigations Manual (WIM), as well as abuses of authority that crudely disrespected whistleblowers' rights when seeking protection, and gross mismanagement that actually made DWPP's actions in the region an obstacle to the agency mission. The internal disclosures led to harassment and a hostile work environment, convincing him to file a WPA complaint and disclosures in January 2015 with the OSC, and to go public with his charges, which in February 2015 were featured on the John Stewart Daily Show in addition to in-depth local NBC network investigative journalism. In May, the agency responded by terminating him, literally on the basis of charges previously proposed and withdrawn.

This supplement is necessary for several reasons. First, the emergency is Mr. Whitman's deteriorating medical condition. He suffers from diabetic, eyesight, nerve and other ailments that have become extremely painful, debilitating and dangerous. He is stranded abroad in Moldova, living on a subsistence income. He already is suffering irreparable harm, which will worsen unless his salary and benefits are restored so that he can come home and obtain medical treatment.

The second, is that the evidence is overwhelming, and OSC action now will have maximum policy impact to improve a troubled program during a leadership transition. One reason for the nearly three-year delays in this case is due to the massive volume of the record, and the broad scope of charges. Uncontestable events and developments in the meantime, however, make further investigation unnecessary to merit a stay and referral for investigation under section 1213. The agency has rejected prior efforts to mediate, because the OSC has not shown any support for Mr. Whitman. While intensive work may be necessary for a prohibited personnel practice report, it is necessary for support through interim relief and a disclosure referral under 5 USC 1213(c) that could make a difference, both for Mr. Whitman and public policy impact. As discussed below, there is ample evidence to justify the Board's standards for temporary relief in an OSC stay petition, and with Moldova's winter approaching Mr. Whitman badly needs to come home. With respect to his disclosure under section 1213, ordering an investigation now would make improvements in the DWPP whistleblower program a priority issue for new agency leadership.

In connection with Mr. Whitman's disclosure, this submission also provides requested DWPP Whistleblower Investigations Manual citations corresponding to alleged misconduct. Retaliation and Disclosure Unit co-chief Karen Gorman requested specific WIM citations. Those references are integrated into the stay analysis below on "substantial likelihood of success."[1]

This submission does not duplicate the record from Mr. Whitman's 2016 amended complaint and disclosure. Exhibit citations in this brief incorporate by reference those in the document. This submission supplements the overall case record with –

* Mr. Whitman's comprehensive matrix of legal references to all his prohibited personnel practice and whistleblowing issues;

* Mr. Whitman's further disclosures of DWPP misconduct connected with financial whistleblowers at Wells Fargo and JP Morgan;

* his analysis of current Whistleblower Investigations Manual modifications that vindicate his earlier concerns of abuse of authority, and explicitly permit the disclosures to complainants, for which the agency in part fired Mr. Whitman;

* eight representative affidavits out of 15 affidavits or reports of interview informally submitted to the OSC since April 2016 when Mr. Whitman amended his complaint;[2]

* thirty electronic and print media stories about Mr. Whitman's, and his clients', disclosures;

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[1] For clarity, the original disclosure charges will be repeated with WIM references, as well as some modifications for how issues are framed.

[2] In some cases, the affidavits are supporting evidence for specific issues in Mr. Whitman's disclosures. Overall, without further investigation they demonstrate consistent support for his concerns by peers ranging from supervisory personnel to a litany of complainants. These witnesses also testified that he was credible, professional, and that knowledgeable peers could share his views, the standard for protected whistleblowing in 5 USC 2302(b)(under-view).

* Mr. Whitman's detailed brief rebutting charges used to justify his termination; and

* Mr. Whitman's August 23, 2017 signed statement about his medical condition.

A full list of exhibits is attached.

GROUNDS FOR STAY

The OSC may petition to stay any personnel action if the OSC has a reasonable belief the action is the result of a prohibited personnel practice. 5 U.S.C. § 1214(b)(l)(A). The Merit Systems Protection Board will then evaluate if the facts, as alleged, "fall within the range of rationality." *Matter of Kass*, 2 M.S.P.R. 79, 96 (1980). In *Gergick v. General Services Administration*, 43 MSPR 651 (1990), the Merit Systems Protection Board listed the criteria to evaluate a stay request: 1) substantial likelihood of success on the merits; 2) irreparable harm; 3) lack of prejudice to the agency; and 4) the public interest. Each is analyzed below.

Substantial likelihood of success

Protected activity

As will be discussed below, this is the only element that requires any advocacy besides undisputed facts, which prove Mr. Whitman's claim as a matter of law. Evidence and citations are summarized below for his specific concerns. Larger scale events, however, have demonstrated there is a substantial likelihood that Mr. Whitman is right conceptually in his conclusion that the DWPP program has systematically broken down. Last fall DWPP's six-year delay acting on the Wells Fargo cases led to a congressional and media spotlight, because the delays also contributed to the fraud continuing unchecked during that time.

In response, Secretary Perez opened a "top to bottom" review of the DWPP program on the Wells Fargo and related cases, to assess the adequacy of DWPP's program.[3] Mr. Whitman contributed to the record, as well as numerous whistleblowers who have supported his disclosure. Unfortunately, after the election all activity and progress with witnesses ended. In a real sense, Mr. Whitman's disclosure now seeks an OSC order to resume the same work that was begun last fall and halted for political reasons. The Department's prior initiative demonstrates that his concerns meet the "substantial likelihood" standard, both for purposes of a disclosure under §1213(c), and for the protected speech element of his retaliation claim. Analysis of specific allegations is below.

1) *Assigning enforcement of whistleblower laws to unqualified staff without necessary training, qualifications or expertise*. This misconduct ranged from nongovernment interns assigned to conduct initial legal screening whether complaints justified investigation who were unqualified for legal assessments and failed to communicate with complainants; to OSHA management "second opinions" at Mr. Paul's request that overruled investigative merits findings despite managers' lack of subject matter expertise or experience in whistleblower cases. (Exh. 2 at 3, and associated citations) To illustrate, the latter occurred in

[3] https://www.thestreet.com/story/13754053/1/wells-fargo-whistleblower-claims-get-new-scrutiny-in-labor-review.html.

EmLabs P&K v. Madry, where Regional Supervisory Investigator Joshua Paul removed Mr. Whitman from the case and behind his back sent the merit finding to the Assistant Regional Administrator Wulff, who is not trained or qualified for such whistleblower cases. Mr. Paul then reversed Whitman's merit finding without consulting him. This action caused another six-month delay before the National Office overruled Mr. Paul and Wulff. (Exh. 2, at 6 and associated references; Exh. 14, at 12-15)

Citations:[4] 5 USC 552a(b) ban on interns receiving, evaluating or recording complainant's Privacy Act information; WIM Chapter (Ch.) 1, IX, X.A.1. and 2. (Responsibility of regional administrator and supervisor to assure that all personnel working on whistleblower cases are trained and have an understanding of the law)

2) *Inexcusable delays in resolving cases.* After investigators finished Reports Of Investigation (ROI), often with merit findings against ongoing retaliation, final approval was postponed for up to five more years of delay. Investigators had to wait up to a year for feedback on completed ROI's. To illustrate, the Madry case was delayed for a year after Mr. Paul ordered four rewrites, and then another five months while the National Office reviewed and overturned Region 9. In *Lockheed Martin v. Stookey,* the case was delayed by three years due to Mr. Paul's orders to keep re-investigating it. (Exh. 2, at 7-8) In the *Wells Fargo* and JP Morgan cases, the whistleblowers' rights gathered dust for up to five years, because Mr. Paul took personal charge of the complaints and did not act on them. (Exhs. 4 and 6) Part of the reason for delays is that Region 9 did not enforce the regulatory timelines for its own work. It also failed to enforce the requirements for employer responses, ignoring deadlines for timely filings and granting open-ended extensions to rebut merit findings, such as in *Lockheed Martin v. Stookey*. (Exh. 2, at 7-8; Exh. 3, at 10; Exh. 4, at 1-2; Exh. 6, at 2, 4-5; Exh. 12, at 15; Exh. 13, at 8)

Individual cases are illustrative. With whistleblower Benjamin Heckman, the 14-month delay between Mr. Whitman's final Investigative Report (FIR) merit finding and the formal DWPP order allowed the employer to avoid accountability by filing bankruptcy. (Exh. 9, at 2) In the Burris case, after successively removing Mr. Whitman and DWPP investigator Susan Kamlet from the investigation, Mr. Paul took it over without action for over three more years. Even after the SEC issued a $376 million fine based in part on Mr. Burris' disclosures, Mr. Paul declined to communicate. He did not resume working on the case until the Wells Fargo media scandal and after Mr. Burris protested to Secretary Perez. (Exh. 7, at 5-6)

Citations: For examples of DWPP 60-day deadline for initial decision, *see* 49 USC 42121(b)(2)(A) (AIR 21 60-day deadline for initial decisions, which is incorporated by reference in other corporate whistleblower laws such as Sarbanes Oxley); for corporate response deadlines, WIM Ch. 2, p. 2-13; for timely action on FIR's, Ch. 4, IV.4.2.

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[4] All the specific issues also allege abuse of authority, gross mismanagement and substantial and specific danger to public health or safety except for financial fraud cases. The grounds for those misconduct categories already have been explained in detail. This submission provides citations to laws, rules or regulations violated by the misconduct.

3) *Obstruction of investigations*: Mr. Paul and other supervisors ordered investigators to rewrite reports up to three to four times after initial merit recommendations. They arbitrarily reversed merit findings without explanation or analysis. Region 9 management rewrote ROI's without having engaged in fact-finding. Without knowledge of the investigator, they re-interviewed witnesses seeking to change their testimony by withdrawing or diluting support for the whistleblower; and again without knowledge of investigators intervened to communicate with corporate counsel. (Exh. 2, at 7-8; Exh. 7, at 5; Exh. 13, at 9; Exh. 14, at 15) Investigators were not allowed to make final reviews of or sign their reports, as required by procedure. (Exh. 2, at 1-3; Exh. 3, at 14; Exh. 13, at 10)

Citations: For examples of requirement to investigate, which is in every one of the 22 statutes enforced by DWPP, 49 USC § 42121(b)(2)(A). For requirement to keep investigating until a valid finding, *see* WIM Ch. 4, VI(B)(7); WIM Ch. 3 VI.L.2; for requirement to make a record of contacts with respondents, Ch. 3, VI, E; for investigator to make final reviews and sign reports, Ch. E VI L.2; for requirement that supervisors discuss merits of cases with investigator, Ch. 4 II B.

4) *Violation of whistleblowers' rights*. Violations ranged from orders to close cases without interviewing complainants who had properly filed their lawsuits; orders that investigators not communicate with complainants about their rights, remedies or relevant evidence; reversal of merit findings after the whistleblower complained about delays; and breaches of confidentiality for whistleblowers who complained about delays, in one instance where physical danger was at issue. (Exh. 2, at 6-8; Exh. 3, at 10, 13-14; Exh.4, Exh. 6; Exh. 12, at 12-19; Exh. 13, at 8-11) To further illustrate, in the Dan Forrand case Mr. Paul reversed a merit finding, due to the whistleblower receiving a commendation, of which he was unaware and had not been contacted about by DWPP, all of which followed Mr. Paul's ex parte communications with company counsel. (Exh. 8, at 2)

In the Burris case, Mr. Paul removed Mr. Whitman and Ms. Kamlet, then took it over personally after both Mr. Whitman and Ms. Kamlet found merit, and did nothing for a year, until the SEC action, congressional interest and media scandals made action imperative. He then ruled in Mr. Burris' favor, but only provided back pay for a month and a half of multi-year unemployment and denied Mr. Burris preliminary reinstatement as required by law. As basis, he accepted a JPMorgan argument it had randomly discovered Burris had misrepresented himself on stationery as acting for the bank when he took private clients, and that they would have fired him for the new grounds six weeks after they actually did. Mr. Paul accepted this reasoning to justify a termination, which never actually occurred, and all without communicating with Mr. Burris who could have confirmed the company had explicitly approved his stationery. (Exhibit 7) *See also* referenced media articles on Burris in Exhibit 15, *infra.*

Citations: WIM Ch. 2, III.A.1; Ch. 3, VI.B, Ch. 3, VI.D; Ch. 3, VI.K; (all preceding citations reference mandatory communications between DWPP staff and complainant) Ch. 4, II.B. (Mandatory communications between supervisor and investigator)

5) *Favoritism to corporate defendants*. Mr. Paul, other Region 9 supervisors, and the DOL Office of the Solicitor, acted to protect and/or limit companies from accountability for violations of whistleblower law. This included: giving corporate defendants permission to delay responses up to a year while whistleblowers were without relief; without investigators' knowledge, actively communicating with corporate counsel without investigators' knowledge; arranging for meetings between corporate counsel and regional management and then reversing merit findings without consulting the investigators. For example, in *FedEx v. Forrand,* Mr. Paul reversed a merit finding based on *ex parte* communications with corporate counsel without the knowledge or participation of the investigator, and then reversed the investigator's merit finding. An Administrative Law Judge subsequently ruled in Mr. Forrand's favor. (Exh. 2, at 6-7; Exh. 3, at 13, 17; Exh. 6, at 4) In the Wells Fargo case, Mr. Paul not only granted an indefinite extension in July 2010, but failed to rule against the bank when it didn't provide an answer. As a further illustration, in *Lockheed Martin v. Stookey,* after objections by company counsel to Mr. Whitman's merit finding Mr. Paul granted the company an indefinite extension to respond, secretly re-interviewed witnesses without Mr. Whitman's knowledge seeking to recant their prior supporting statements for the whistleblower, then reversed the merit finding. (Exh. 2, at 7-8.)

Citations: WIM Ch. 2 (p2-13) (corporate deadlines to respond); Ch. 3, VI, E (ex parte contacts); Ch. 4, II.B (mandatory communications between DWPP investigator and supervisor); Ch. 6, VI (enforcement of settlements). *See also* relevant citations for issue 3, obstruction of investigations, *supra*.

6) *Falsification and censorship of the record in final Reports of Investigation*. Mr. Paul repeatedly removed evidence from ROI's supporting merit findings, or ordered investigators to include text contradicted by facts developed during the investigation. In one instance, when Mr. Whitman protested that violated the law, Mr. Paul responded he understood and would do it himself. He then proceeded to falsely attribute Mr. Whitman as author of the falsified Report of Investigation. (Exh. 3, at 7)

Citations: 18 USC 1001; WIM Ch. 1, XI; Ch. 3, II; Ch. 3, VI (all on integrity of record)

7) *Abuse of settlement process*. Mr. Paul repeatedly took over settlement negotiations without the knowledge of investigators, until the whistleblowers complained. Often his interventions were after *ex parte* communications with corporate counsel, and included threats to reverse merit findings if the complainant did not accept a nuisance settlement or other relief significantly lower than allowed by law and the Whistleblower Protection Manual. By pressuring for settlements instead of merit findings, Mr. Paul prevented referrals to regulatory agencies to address issues raised by the whistleblowers. Those notifications do not occur after a settlement, and this exacerbated substantial and specific dangers to public health and safety by preventing referrals to agencies, such as the Nuclear Regulatory commission (NRC), the Environmental Protection Agency (EPA), and the Federal Aviation Administration (FAA). (Exh. 2, at 6-8; Exh. 8, at 2; Exh. 12, at 15-17, 19-23) In *Copper Basin Railroad v. Lawson*, when the company violated an OSHA settlement by engaging in further harassment immediately upon the whistleblower's return, Mr. Paul refused to enforce the settlement and instead substituted a lengthy, new case, after which he reversed the investigator's merit finding. (Exh. 2, at 7)

Citations: Ch. 4, VI.B.3. Ch. VI, IV.B, IV.B.f, IV.B.j; IV.C; VI. (All on standard to seek and enforce fair, make whole settlements)

8) *Rewriting whistleblower statutes to deny protection.* Mr. Paul personally assumed the role Congress rejected for the Federal Circuit Court of Appeals when Congress enacted the Whistleblower Protection Enhancement Act of 2012. For individual cases, he arbitrarily added prerequisites that qualified a whistleblower for protection, which were not in the statute, as well as loopholes to cancel eligibility for statutory rights. (*See, e.g.*, *FedEx v. Forrand*, where Mr. Paul dismissed a merit finding on grounds that an award to the whistleblower acted as an "intervening event" cutting off company liability for retaliation. Similarly, he ordered Mr. Whitman to close Dr. Kot's case in *EMLabs v. Kot and Madry* for failure to prove that asbestos is harmful. But there is no requirement to prove asbestos is harmful in the whistleblower provision of the asbestos control law. In the *Stookey* case, he reversed a merit finding on grounds the whistleblower had been mistaken, although the law protects all communications about alleged infractions without even a "reasonable belief" standard. Contrary to WIM requirements, Region 9 regularly refused to accept hostile work environment, blacklisting, threats and constructive discharge as discrimination, which could be challenged. (Exh. 2, at 7-8; Exh. 3, at 11-12; Exh. 8, at 2-3)

Citations: 49 USC 42121(a) and 412121(b)(2)(B); 15 USC 2651(a); WIM Ch. 3, VI. A.

9) *Rewriting statutory burdens of proof.* Mr. Paul consistently failed to permit cases to be determined by the Whistleblower Protection Act's (WPA) legal burdens of proof, which have governed all DOL-administered whistleblower laws since 1992. Instead of the "contributing factor" test for a prima facie case, he imposed the far more difficult "primary motivating factor" test. Instead of requiring employers to prove an independent justification by "clear and convincing evidence," he permitted them to prevail if they met the far easier "preponderance of the evidence" standard. These most commonly appeared in cases where statutes required preliminary reinstatement, such as: *Copper Basin Railroad v. Lawson*, *Lockheed-Martin v. Stookey* and *Hawaii Air Ambulance v. Stone*, all of which require preliminary reinstatement of the whistleblower as a statutory remedy. (Exh. 2, at 7-8, Exh. 3, at 11-13)

Citations: 42 USC §5851(b)(3); 49 USC §20109(d)(2)(A)(i); 49 USC §42121(b)(2)(B); WIM Ch. 3, V. and VI; *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016) (en banc); WIM Ch. 3, VI (legal standards for field investigations).

In short, the record of Mr. Whitman's disclosures far exceeds the "reasonable belief" standard for protected speech to justify a stay, and the "substantial likelihood" standard for a referral under 5 USC §1213(c).

Knowledge

This element should be undisputed. Mr. Whitman regularly blew the whistle to his supervisor Mr. Paul, regional management and other employees, as well as to OSHA DWPP leadership, OSHA DWPP investigators, Secretary Perez, the DOL Office of Inspector General, members of Congress, and the media. To illustrate the latter, as seen below there currently are 30 electronic or print media reports on his concerns. An index of 30 representative media stories on his concerns or the cases he investigated, with web links or electronic copies of articles, is

attached as Exhibit 15.

Nexus

1. Knowledge-timing test. Legislative history and U.S. Merit Systems Protection Board precedents dictate the test is met if a personnel action is taken within a year of protected activity, and recent Board precedents have extended that time frame to between one and two years. 145 *Cong Rec.* 29,335 (statement of Rep. McCloskey). Generally, any action within one to two years of the same performance evaluation period would normally be considered within a reasonable time. *Kewley v. DHHS, 153 F.3d 1357, 1363 (Fed. Cir. 1998; Boyd v. Dep't of Homeland Sec.,* 2015 MSPB LEXIS 5631, p. 10 (June 25, 2015); *Chavez v. Department of Veterans Affairs,* 120 M.S.P.R. 285, p. 27 (2013); *Shibuya v. USDA,* 2013 MSPB LEXUS 44, p.24; *Gonzalez v. Department of Transportation,* 109 M.S.P.R. 250, p. 20 (2008); *Redschlag v. Department of the Army,* 89 M.S.P.R. 589, p. 87 (2001). Significantly, the knowledge/timing test is dispositive as a matter of law to satisfy the nexus element. This is the case, even if an examination of the whole record would not support a conclusion protected activity was a contributing factor to the challenged personnel action. *Schnell v. Dep't Army,* 114 M.S.P.R. 83 (2010), 2010 MSPB LEXUS 67, p. 21; *Carey v. DVA,* 93 M.S.P.R. 676 (2003).

In this case, retaliatory investigations began within weeks to months of Mr. Whitman's protected disclosures. The first of four disciplinary hearings held against Mr. Whitman occurred some ten weeks after he reported wrongdoing by Mr. Paul, with Mr. Paul acting as the primary architect of the hearing and the hearing itself based wholly on issues arising out of Mr. Whitman's report. The second disciplinary hearing occurred three months later, and similarly was based wholly on issues raised by Mr. Whitman in June 2012 regarding Mr. Paul's wrongdoing. The third disciplinary hearing, which occurred in July 2013, came a year after the first hearing, seven months after the second hearing, and in the context of Mr. Whitman's requests for documents and testimony from Region 9 made in conjunction with his EEO complaint. Then, the fourth hearing, which occurred in December 2014, came seven months after Mr. Whitman's protected disclosures to Secretary Perez, five months after his and other Region 9 investigators protected disclosures to OSHA in July 2014, and within a month of Mr. Whitman's report of potential wronging to the DOL/OIG. Decisively, this fourth hearing focused exclusively on Mr. Whitman's earlier protected disclosures to Secretary Perez and OSHA. Further, the Agency's 2015 proposal to remove Mr. Whitman occurred in the context of his congressional disclosures, disclosures and complaint to the OSC, and his January 2015 interview with NBC, about which the agency received notice. The agency gagged Mr. Whitman in February 2015, the month after NBC aired its program and the Daily Show picked it up nationally, and a month after his OSC disclosure. Then, the Agency's May 2015 Order of Removal occurred in the context of Mr. Whitman's ongoing public disclosures throughout the spring of 2015. On balance, within six months of Mr. Whitman's 2014 public disclosures, the agency twice proposed his removal, gagged him, placed him on administrative leave, canceled his access to the internet, demanded his return of case files, and terminated him.

2. Circumstantial evidence: For three decades, it has been the standard that nexus can be established through circumstantial evidence. Principal criteria include: the employer's reaction to protected disclosures, failure to act on the employee's evidence of misconduct, discriminatory treatment compared to before making the disclosure, extent of disclosures, significance of the charges, motive to retaliate, adverse comments about the disclosures, patterns of prior harassment against the employee or other whistleblowers, and the chilling effect. *See, e.g., Valerino v. Department of Health and Human Services,* 7 M.S.P.R. 347 (1981); *Fellhoelter v. Dep 't Agriculture,* 568 F. 3d 965, 971 (Fed. Circ. 2009)*; Sheehan v. Dep't Navy,* 230 F.3d 1009, 1014 (2001)*; Webster v. Dep't of the Army,* 911 F.2d 689, 690 (Fed. Cir. 1990)

All criteria are satisfied. To illustrate, when Mr. Whitman first made disclosures to the National OWPP, Mr. Atha's subsequent explanations to then DWPP Director Beth Slavet and Assistant Secretary Richard Fairfax ignored Whitman's program concerns. Instead, in written responses he told both of them Mr. Whitman had been giving the region trouble and disciplinary action was being prepared. (Exh. 2, at 11) The extent of Mr. Whitman's disclosures was to clients, all relevant internal agency officials, Congress and the media. The significance of his disclosures was that misconduct was systematically violating the Agency's whistleblower protection mission, repeatedly violating the rights of whistleblowers who sought protection, and exposing the public to significant consequences including: environmental pollution, financial fraud, and public health or safety threats. Public exposure of Mr. Whitman's disclosures created the agency's motive to terminate him through any means as quickly as possible, even if it required relying on previously discredited and withdrawn charges. His disclosures to the OSC and the media subjected the Agency to two NBC investigative news programs and a national comedy television show, among other public exposure. His charges since have been highlighted in the national media scandals on Wells Fargo and JP Morgan. (*Id.*)

The retaliation against Mr. Whitman also was consistent with complaints by other Region 9 whistleblowers. During the relevant 2012-15 time-frame, there were ten union grievances challenging Mr. Paul's hostile work environment or other retaliation, eight disciplinary hearings, four group grievances, a suspension and three proposed terminations. Today, out of five attorney-investigators in Region 9 in 2012, all have engaged in protected activity, and all are gone through adverse actions or resignations to escape harassment. (*Id.*)

Independent justification[5]

Mr. Whitman's 2015 removal was so crudely pretextual it can't pass a "substantial evidence" test, let alone "clear and convincing evidence" test as required by 5 USC 1214. The criteria for independent justification are summarized in *Whitmore v. Department of Labor,* 680 F.3d 1353 (Fed. Cir. 2012): strength of the evidence for the independent reason;

[5] This submission summarizes Mr. Whitman's detailed rebuttal, on July 19 forwarded for the record with supporting exhibits. His brief is attached as Exhibit 16.

motive to retaliate; and discriminatory treatment compared to those who did not engage in protected activity. The latter two criteria can be addressed neatly - the Agency's motive to retaliate was discussed in connection with the nexus element for Mr. Whitman's *prima facie* case.

Discriminatory treatment is clear. All five attorney/investigators who engaged in protected activity faced harassment analogous to Mr. Whitman, and were either removed or left to avoid mistreatment. The only investigator who did not engage in protected conduct, Mark Marcione, a non-attorney investigator, was appointed RSI even though he lacked significant legal training. Even more significant, Mr. Whitman was fired primarily for allegedly violations of the Whistleblower Investigation Manual, charges he fiercely denies and defends by pointing to the provisions of the Manual itself. Rather, Mr. Whitman's whistleblowing disclosures were that Mr. Paul was violating the WIM crudely, regularly, and with impunity.

With respect to the third criterion, strength of the merits, Mr. Whitman's responses are summarized below:

Conceptually, the 2015 basis for removal cannot withstand scrutiny because it was based on the same alleged misconduct charged and abandoned six times beginning in 2012. (Exh. 2, at 12) Each time the agency withdrew the charges after Mr. Whitman's responses, and in a display of determined multiple jeopardy, the Agency removed Mr. Whitman for those same stale, discredited allegations after he expanded his whistleblowing outside the chain of command.

With respect to specifics, the Agency's primary accusation was Mr. Whitman made unauthorized disclosures to complainants of case information and evidence. However, Mr. Whitman provided specific citations from the WIM, which not only permit, but in some instances require disclosures in order to responsibly resolve cases. His disclosures to parties were consistent with this training. Also, the Agency charged Mr. Whitman with associated misconduct, although it failed to provide him with prior counseling on the boundaries for disclosures to parties, and ignored his repeated requests for specific guidance concerning disclosures after the allegations first arose in 2012. There simply is no merit to charges Mr. Whitman violated the WIM by discussing the investigation with either party. The Whistleblower Investigations Manual in effect, in Ch. I, IV stated,

> While a case is under investigation or appeal, information contained in the case file *will be disclosed* [emphasis added] to the parties in order to resolve the complaint; we refer to these as non-public disclosures. Once a case is closed at the agency level, any and all records not otherwise protected from disclosure may be disclosed to the parties, upon their request.

If there were any doubt, the Agency has reinforced this transparency and due process right to disclosure for both whistleblowers and employers in the current January 2016 WIM edition. (Exh. 5) Less than a year after terminating Mr. Whitman, the agency

defined his alleged misconduct as a standard practice in its new Non-Public Disclosure Policy:

> A non-public disclosure is release by OSHA of material from a whistleblower investigation case file to a party in the whistleblower investigation to aid in the investigation of resolution of the whistleblower complaint.

(Exh. 5, at 5)

The agency also accused Mr. Whitman of identifying himself as a government official in public statements posted on an internet website. This allegation is ineligible for any lawful personnel action, because it was the product of Mr. Paul's retaliatory investigation. (Exh. 2, at 12). Further, Mr. Whitman disclosed his government position only for identification purposes, and did not in any way hint he was speaking for the Department of Labor. He did not intend publication or know his name had been publicly posted, and after receiving notice he had it promptly removed. (*Id.*)

The Agency also accused Mr. Whitman of false charges on his commuter travel card. This charge illustrates the pretexts to remove Mr. Whitman were contrived to the point of being an embarrassment. As with other charges, it had been raised and rejected previously, but was revived after he went public. When they were resurrected for his removal, the allegations were 1.5-2.5 years old. Also, there is no evidence any of the overcharges were intentional rather than a mistake, which makes it appear the Agency was setting him up. The commuter system was new to him and to Region 9, and Agency declined to give him training or counseling despite his repeated requests. Further, the dispute only cumulatively involved some $110.00, a sum Mr. Whitman promptly repaid when informed of the discrepancy. (*Id.*)

The only new charge in 2015 was that Mr. Whitman lied when defending himself during the fourth hearing. There was no evidence offered of intent. In fact, the only basis for the charge is the agency disagreed with him on the interpretation of nonpublic disclosures. This tactic would mean it would be misconduct for an employee to defend themselves, rather than surrender when charged with any offense. It is not only invalid as an independent justification, but on its face violates 5 USC 2302(b)(9) as retaliation for exercise of appeal rights, and it is incompatible with a free society to punish citizens for defending themselves against charges. This abuse of power is particularly outrageous, since the Agency did not offer any new evidence to support the charges, and had on its own judgment withdrawn them previously. (Exh. 2, at 12-13)

Mr. Whitman can provide detailed navigational assistance in the massive record to provide additional, more precise citations for those in above summary, as well as further testimony. The record is deep, and it easily passes the legal merits test to stay ongoing retaliation against Mr. Whitman while the OSC investigates his case.

Irreparable harm

Other than frustration, irreparable harm is the main reason Mr. Whitman seeks a stay at this time. He faces irreparable harm due to medical consequences from being without insurance and adequate health care due to his removal. As covered fully in his EEO action,[6] Mr. Whitman has long suffered from diabetes, high blood pressure, and asthma. Since his termination, Mr. Whitman has been without medical insurance. He is 72 years old, living on subsistence income in Moldova. He does not have the income to return home, obtain insurance, or resume needed medical care.

Recent deteriorations in Mr. Whitman's health mean his ongoing lack of income is currently causing irreparable harm. To summarize a real and desperate situation, his diabetic condition has deteriorated sharply, causing neuropathy (nerve damage) to spread from his feet to other parts his body. This nerve damage creates numbness, pain and is accompanied by electric shock sensations. It makes sleeping and working difficult, and could result in the amputation of affected limbs. His worsening diabetic condition also puts Mr. Whitman at high risk of kidney failure, heart disease, and renal deterioration, which leads to blindness. These threats are made more critical because he is unable to monitor his condition and receive the medical care required to avoid complications and/or remedy conditions. Further, his eyesight has deteriorated, resulting in several serious falls, and the lack of allergy medicine has produced prolonged and threatening asthmatic attacks. Most recently, Mr. Whitman had troubling indications of possible heart problems, with swelling in his lower legs, ankles and feet, consistent with the onset of heart disease. In short, he already is suffering irreparable harm, which will get dangerously worse unless he gets home and gets treatment. Mr. Whitman's August 23 signed statement providing more detail is enclosed as Exhibit 17.[7]

Harm to the agency

In terms of the agency mission, there can be no harm to putting Mr. Whitman back on the job, as soon as his health permits. The complainants whose cases he investigated consistently assessed his work as a credit to the agency. From the perspective of those whom DWPP is supposed to serve, Mr. Whitman's removal undermined the agency mission. Examples of their assessments are below.

Johnny Burris, the JP Morgan whistleblower whose disclosure led to a major SEC enforcement action, stated,

> Mr. Whitman … was unbiased and ethical from day one. As an investigator, he was gathering information required to do a full and fair investigation into my allegations against JP Morgan. He acted in a professional, trustworthy and credible manner the entire time. Unfortunately, Mr. Whitman was terminated from OSHA during the

[6] As context for his WPA claim, Mr. Whitman's April 6, 2016 affidavit included relevant EEO issues.

[7] On November 19, Mr. Whitman submitted this statement for the record, as well as medical documentation from when he last had access to a doctor.

review process of my case.

(Exh. 7, at 5)

Air safety whistleblower Dan Forrand stated, "Whitman responded immediately to my complaint. He kept me informed of his progress and ensured my complaint properly investigated. Whitman thoroughly documented his work and shared his findings with me." (Exh. 8, at 2)

Trucking safety whistleblower Benjamin Heckman stated,

> Mr. Whitman seems to be an honorable man that is simply trying to do his job well: to protect the American public whose safety is compromised by bad companies.... I have always enjoyed my communications with Mr. Whitman. He has a professional demeanor that is friendly and easy to get along with, accompanied by integrity, intelligence, and a subtle sense of humor. Mr. Whitman has always treated me well. When he was unable to answer my questions regarding the status of the case, it was clear that things were being held up beyond his control. Even in those times he maintained a professional demeanor regarding the behavior of his colleagues, and did his best to assure me that the process, though extremely slow moving, was underway.

(Exh. 9, at 1-2) Comparing Mr. Whitman's performance with Region 9 management, he added,

> I am thoroughly appalled by OSHA and the U.S. Department of Labor's lack of responsibility and respect for the Whistleblower, as well as their lack of transparency and consistency in their operations. In my own case, I witnessed the Department of Labor:
> • Ordering reinstatement against the Investigator's recommendation vii
> • Releasing my address to Respondents against my expressed wishes,
> • Unnecessarily inflating my lost income estimates,""
> • Firing Mr. Whitman for doing his job, the one person I saw actually following through on
> the Whistleblower Protection Program's mission and
> • Delaying, not responding to progress update requests, and threatening to dismiss my case....

(Exh. 9., at 3)

Asbestos testing whistleblower Michael Madry stated,

> I was astonished to find out that on May 5, 2014, Mr. Whitman was terminated from his employment at DOL-OSHA. I found Mr. Whitman to be a fair-minded professional. He conducted an unbiased investigation of my complaint of retaliation by EM Lab for reporting fabrication of asbestos results.... Mr. Paul, on the other hand, demonstrated a consistent pattern of bias in favor of EMLab P&K/TestAmerica. He went to great lengths to drag out the resolution of my case in an obvious attempt to force a private settlement. It was clear all along that he had no regard for my interests or rights as a whistleblower, or the larger implications of my disclosures insofar as the public health

and safety are concerned. His tactics were unprofessional and reflect poorly on DOL-OSHA. Frankly, I am shocked that it was Mr. Whitman who was terminated, and not Mr. Paul.

(Exh. 12, at 22-23)

Air safety whistleblower Aaron Stookey stated,

I found Mr. Whitman to be very good about communicating, and he was very punctual in keeping appointments. While his investigation was exhaustive and impartial, he was a good educator. He made sure I understood the process and what was going on with my case. He took note of the fact that I was able to provide a three-page list of peers willing to come forward and speak on my behalf. Over the course of our dealings, I gained a great deal of respect for Mr. Whitman, and came to realize what an enormous asset he was to the Department of Labor. I knew he would not cut me any slack, but I felt confident he would give me a fair shake....

I was stunned to learn that on May 5, 2014, Mr. Whitman was terminated from his employment at DOL-OSHA. In my experience, Mr. Whitman is a consummate, larger than-life professional who follows the facts where they lead and pulls no punches in his findings. The Department of Labor has let go of a great man with an even hand, and it should seriously reconsider its ill-advised decision to part ways....

Mr. Paul's intervention in the professional investigation being conducted by Mr. Whitman made a bad joke of my rights, and has cost my trust in the Department of Labor's enforcement of whistleblower rights. Mr. Paul sat on my case for two years, had private discussions with company lawyers, tried to get my supporting witnesses to change their minds, and then ruled against me for not having any evidence while ignoring the extensive record Mr. Whitman had compiled.

(Exh. 13, at 7-10)

Mr. Whitman's peers shared the complainants' high marks. Mr. Blake Wu, another Region 9 investigator who occasionally supervised Mr. Whitman as the Acting Regional Supervisory Investigator, said, although he never supervised Whitman long enough to prepare the performance appraisal,

If I evaluated him, I would have said that he provided exceptional customer service, had good writing/analysis, and was efficient in turning in non-merit cases and submitting merit cases. Mr. Whitman was productive and a good investigator.

(Exh. 14, at 8)

It should be clear that in terms of the agency mission, Mr. Whitman's reinstatement would strengthen the agency interests rather than cause any harm to legitimate interests. Mere animus is not a legitimate interest or reason to exile a whistleblower from the workplace, but that

should not be an issue in this case. Both Messrs. Paul and Atha no longer work supervising Region 9 whistleblower rights investigators. Mr. Whitman also is open to a home duty station or reasonable reassignment.

Public interest

The public interest stakes for the disclosure and stay in this case are unsurpassed, due to both immediate consequences and the structure for government accountability. In terms of immediate impact, the cases Mr. Whitman worked concerned severe misconduct in financial integrity that sparked a national crisis; the integrity of national asbestos testing, nuclear power safety; air safety; and ground transportation safety, among significant consequences.

More fundamentally, the public interest in this case mirrors the reason Congress unanimously has passed 22 whistleblower statues enforced by the Department of Labor and unanimously enacted the Whistleblower Protection Enhancement Act of 2012. Whistleblowers are the life-blood for effective law enforcement. Studies consistently confirm whistleblowers are the most effective resource that exists against corporate crime, more than compliance departments, audits and law enforcement combined.[8] It is a public policy imperative corporate employees have well-founded confidence that the Department of Labor will enforce the law when employers violate their whistleblower rights. To achieve that goal, there must be safe channels for them to confront breaches of the public trust.

DWPP investigators such as Mr. Whitman are the indispensable human factor to turn the rights in whistleblower laws into reality. In this case, action under the WPA is necessary to shield those who enforce corporate whistleblower laws. If investigators are retaliated for defending the rights of whistleblowers, those laws will not be legitimate. Mr. Whitman's case is highly visible, and his termination has had a chilling effect. Indeed, all other Region 9 investigators left after his departure; some due to parallel retaliation, but others like Mr. Wu in part because they had given up on being able to perform their duties professionally. (Exh. 14, at 1) OSC support for Mr. Whitman would send a powerful message that DWPP investigators have the right safely to defend whistleblowers' rights.

Secretary Perez's investigation last fall should remove any doubt about the public interest in restoring DWPP credibility and legitimacy. It was terminated only due to the result of a political election. As an institution whose mission is independent of politics, OSC action now can maximize the Office's ability to make a difference. Leadership for enforcement of corporate whistleblower laws is in transition, with Secretary Acosta and confirmation hearings imminent for leadership of DWPP's parent the Occupational Safety and Health Administration. OSC action, both for the disclosure and stay, will mean that restoring a credible DWPP program must be a priority for new leadership.

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[8] See, e.g., PricewaterhouseCoopers and Martin Luther University Economy and Crime Research Center, *Economic Crime: People, Culture and Controls: The 4th Biennial Global Economic Crime Survey* (2007), http://www.pwc.com/en_GX/gx/economic-crime-survey/pdf/pwc_2007gecs.pdf. , at 10; Society of Certified Fraud Examiners, *2008 Report to the Nation on Occupational Fraud and Abuse* (2008), at 4, 30.

On balance, Mr. Whitman's case has been pending for three years, during which he has steadily developed an overwhelming record. The agency has explained it will not respond to mediation efforts until there is OSC action. Mr. Whitman should not be required to pursue his rights by starting over at the MSPB with an Individual Right of Action. Due to his dire medical condition and the agency's leadership transition, now is the time for the Special Counsel to act with a clear message to restore the integrity of the Labor Department's whistleblower program. Mr. Whitman requests the opportunity for counsel to brief the Special Counsel on this request.

Respectfully submitted,

Tom Devine
Counsel for Mr. Whitman

INDEX FOR EXHIBITS IN WHITMAN SUPPLEMENTAL STAY REQUEST AND AMENDED WHISTLEBLOWING DISCLOSURE

1. January 20, 2015 Memorandum from Darrell Whitman to US Office of Special Counsel (summarizing evidence in original Whistleblower Protection Act complaint and disclosure)

2. April 6, 2016 supplement to Mr. Whitman's WPA complaint and amended whistleblowing disclosure

3. November 1, 2017 OSC Investigation Matrix by Mr. Whitman

4. July 31, 2017 disclosure from Mr. Whitman on financial fraud whistleblower cases

5. Modifications to DWPP Whistleblower Investigations Manual (effective January 28, 2016)

6. Mr. Whitman's July 25, 2017 Grand Jury Declaration on Wells Fargo and financial fraud whistleblower cases.

7. Affidavit of Johnny Burris

8. Affidavit of Dan Forrand

9. Affidavit of Benjamin Heckman

10. Affidavit of Randy John

11. Affidavit of Susan Kamlet

12. Affidavit of Michael Madry

13. Affidavit of Aaron Stookey

14. Affidavit of Blake Wu

15. Representative media disclosures and coverage

16. Mr. Whitman's July 19, 2017 rebuttal brief to charges in proposed termination

17. Mr. Whitman's November 19, 2017 statement on critical health care issues