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Asian American-Owned Banks Do Count: No Wrongful Jailing of Abacus Bank

Chloe Chung

ABSTRACT

The 2008 financial crisis, described as the worst U.S. economic disaster since the Great Depression, resulted in the criminal prosecution of just one, singular bank: Abacus Federal Savings Bank. This small, family-run community bank based in NYC's Chinatown, catering primarily to Chinese immigrants, never invested in the mortgage-backed securities nor originated the subprime mortgages that were at the root of the financial crisis. Moreover, institutions such as Abacus provide critical services to underbanked populations and support the economic prosperity of minority communities. Yet, the Manhattan District Attorney aggressively prosecuted Abacus Bank with a 184-count indictment. Ultimately, after a four-month jury trial and 10 million dollars in defensive litigation costs, Abacus Bank was found not guilty on all counts. Today, Abacus Bank, a bank deemed "small enough to jail" as opposed to "too big to fail," remains the only U.S. bank indicted for mortgage fraud related to the 2008 crisis. Manhattan District Attorney Cyrus R. Vance pushed the boundaries in his aggressive pursuit of a lowest hanging fruit minority bank. This analysis addresses why Abacus Bank did not attempt to allege selective prosecution to quash the DA's case and also never brought a suit against the government in connection with the aggressive prosecution tactics used by the DA. The Abacus Bank trial still serves as a lesson for prosecutors to understand and use as future guidance in how they should remain aware of cultural context and implicit biases when exercising their discretion in targeting businesses that cater to underserved minority communities.

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Chloe Gunther Chung obtained a JD from UCLA School of Law in 2021 and a BA in Psychology from the College of Arts & Sciences of Cornell University in 2016. The author wishes to thank Professor James Park and the editors of APALJ for their thoughtful comments and invaluable feedback. The author also wishes to give special thanks to Sarah Aberg of Sheppard, Mullin, Richter, Hampton LLP, who agreed to be quoted in this article and whose insight into the defense of Abacus Bank was indispensable to the completion of this article.

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INTRODUCTION

In the fall of 2008, interest rates, easy and available credit, scant regulation, and toxic mortgages culminated in the collapse of the housing bubble and ultimately, full-blown financial crisis.¹ When the housing bubble burst, hundreds of billions of dollars in losses in mortgages and mortgage-related securities shook markets as well as financial institutions around the world.² The financial crisis resulted in 489 bank failures from 2008 through 2013.³ Abacus Federal Savings Bank (Abacus Bank or Abacus), a family-run community bank based in NYC's Chinatown catering primarily to Chinese immigrants, was not amongst these failed institutions.⁴ Abacus Bank also was not an institution that required financial assistance from the government in the wake of the burst of the housing bubble.⁵ Abacus avoided the fallout of

1. FIN. CRISIS INQUIRY COMM'N, THE NAT'L COMM'N ON THE CAUSES OF THE FIN. & ECON. CRISIS IN THE U.S., THE FINANCIAL CRISIS INQUIRY REPORT, xvi (2011).

2. *Id.*

3. FED. DEPOSIT INS. CORP., CRISIS AND RESPONSE: AN FDIC HISTORY, 2008–2013, xxv (2017), <https://www.fdic.gov/bank/historical/crisis/crisis-complete.pdf>.

4. *Failed Bank List*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/resources/resolutions/bank-failures/failed-bank-list> (last visited May 7, 2021); *An Examination of the Decline of Minority Depository Institutions and the Impact on Underserved Communities: Hearing Before the Subcomm. on Consumer Prot. & Fin. Insts. Of the Comm. on Fin. Servs.*, H.R. 116-62, 2 (Oct. 22, 2019) (testimony of Jill Sung, CEO & President, Abacus Fed. Savings Bank, on behalf of the Indep. Cmty. Bankers of Am.) [hereinafter Testimony of Jill Sung].

5. Gretchen Morgenson, *A Tiny Bank's Surreal Trip Through A Fraud Prosecution*,

the crash because it never invested in mortgage-backed securities, nor did it ever originate any subprime mortgages.⁶

Nevertheless, on May 31, 2012, the New York County District Attorney's Office (DA) announced criminal charges against Abacus Bank in a 184-count indictment.⁷ The media was treated to a spectacle as the indicted Chinese-American Abacus employees were handcuffed, chained together, and marched by law enforcement down the narrow hallway of the New York City courthouse in front of cameras.⁸ Prosecutors alleged that Abacus and nineteen of its employees had systematically defrauded the Federal National Mortgage Association (Fannie Mae) by allowing borrowers to lie about their income and assets on the government-sponsored mortgage company's proof-of-employment forms.⁹ Ultimately, after a five year investigation by the DA and four-month long jury trial, Abacus Bank was found not guilty on all charges.¹⁰ To date, Abacus Bank remains the only financial institution criminally prosecuted in connection with the 2008 financial crisis.¹¹ Manhattan District Attorney Cyrus R. Vance has been met with harsh criticism that he pushed the boundaries in his aggressive pursuit of a "lowest hanging fruit" family-run bank that fills a necessary void by catering to the Chinese American minority community.¹² It is important that the consequences of the litigation brought against Abacus Bank are remembered and studied, so as to hold prosecutors such as Vance accountable for the ways in which they exercise prosecutorial discretion, and to encourage prosecutors to remain aware of cultural context and implicit biases when targeting businesses that cater to underserved minority communities.

NY TIMES (July 17, 2015), <https://www.nytimes.com/2015/07/19/business/a-tiny-banks-surreal-trip-through-a-fraud-prosecution.html>.

6. Jeri Zeder, *Scapegoats*, B.C. L. SCH. MAG., Winter 2018, <http://lawmagazine.bc.edu/2018/01/scapegoats>.

7. Indictment, *People v. Abacus Fed. Savings Bank*, No. 2480/2012 (N.Y. Sup. Ct. May 31, 2012).

*Filings from No. 2480/2012 have been sealed. The author of this paper obtained filings such as the Indictment, Motions in Limine, and Recommendation of Dismissal, directly from Abacus Bank's Defense team at Sheppard, Mullin, Richter, & Hampton LLP.

8. Zeder, *supra* note 6.

9. Press Release, N.Y. Cty. District Att'ys Off., *Abacus Bank and 19 Individuals Charged in Large-Scale Mortgage Fraud Conspiracy* (May 31, 2012), <https://www.fdicog.gov/press-release/abacus-bank-and-19-individuals-charged-large-scale-mortgage-fraud-conspiracy>.

10. *Abacus: Small Enough to Jail* (PBS television broadcast Sept. 12, 2017).

11. Testimony of Jill Sung, *supra* note 4sup, at 2; MATT TAIBBI, *THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP* 4 (2014).

12. Paul Blest, *Cy Vance Represents Everything Wrong with the Justice System*, OUTLINE (Oct. 13, 2017, 2:18 PM), <https://theoutline.com/post/2398/cy-vance-represents-everything-wrong-with-the-justice-system?zd=1&zi=7xh2tqrp>.

I. THE 2008 FINANCIAL CRISIS

A. *The Crisis*

The events of 2007 and 2008 constituted a financial upheaval that wreaked havoc across the United States of America.¹³ The root of the crisis can be traced back to banks making too many risky investments throughout the 2000s, specifically in subprime mortgage loans.¹⁴ To resist recession following a stock market peak in 2000, the Federal Reserve lowered the federal funds rate 11 times — from 6.5 percent in May 2000 to 1.75 percent in December 2001 — creating a flood of liquidity in the economy.¹⁵ In this environment, lenders made loans to households without adequate income or assets to service the mortgages.¹⁶ For decades the down payment for a prime mortgage had been twenty percent, however from 2000 on, lenders began accepting smaller down payments.¹⁷ As the decade proceeded, underwriting standards for subprime mortgages continued to deteriorate.¹⁸ Piggyback mortgages allowed borrowers to buy homes with essentially zero down payments.¹⁹ Lenders also began requiring less information from borrowers, and from 2000 to 2007 low/no documentation loans²⁰ skyrocketed from less than 2 percent to roughly 9 percent of all outstanding loans.²¹

Lenders made loans that they knew borrowers could not afford and then sold those loans to Wall Street banks.²² These major financial institutions ineffectively sampled the loans they were purchasing to package

13. FIN. CRISIS INQUIRY COMM'N, *supra* note 1, at 15.

14. MARTIN NEIL BAILY, ROBERT E. LITAN, & MATTHEW S. JOHNSON, INITIATIVE ON BUS. AND PUB. POL'Y AT BROOKINGS, *The Origins of the Financial Crisis* 41 (2008).

15. William Poole, *Causes & Consequences of the Financial Crisis of 2007–2009*, 33 HARV. J.L. & PUB. POL'Y 421, 424 (2010); Manoj Singh, *The 2007–08 Financial Crisis in Review*, INVESTOPEDIA (May 9, 2019), <https://www.investopedia.com/articles/economics/09/financial-crisis-review.asp>; *Open Market Operations Archive*, FEDERAL RESERVE, https://www.federalreserve.gov/monetarypolicy/openmarket_archive.htm (last updated November 15, 2013).

16. Poole, *supra* note 15, at 424.

17. FIN. CRISIS INQUIRY COMM'N, *supra* note 1, at 109. In other words, the loan-to-value ratios increased. *Id.*

18. Poole, *supra* note 15, at 424; FIN. CRISIS INQUIRY COMM'N, *supra* note 1, at 110. Across securitized subprime mortgages, the average combined loan-to-value ratio rose from 79 percent to 86 percent between 2001 and 2006. *Id.*

19. FIN. CRISIS INQUIRY COMM'N, *supra* note 1, at 110. The lender would offer a first mortgage for perhaps 80 percent of the home's value and a second mortgage for another 10 percent or even 20 percent. *Id.*

20. *Id.* A low/no documentation loan allows a potential borrower to apply for a mortgage while providing little or no information regarding their employment, income, or assets. *Id.* These loans originated for people with fluctuating or hard-to-verify incomes, such as the self-employed, or to serve longtime customers with strong credit. *Id.* Around 2005, the character of these loans changed, and lenders offered low/no-documentation loans to borrowers for the convenience of quicker decisions in return for a higher interest rate. *Id.*

21. *Id.*

22. *Id.* at xxii.

and sell to investors.²³ They knew a significant percentage of the sampled loans did not meet their own underwriting standards or those of the originators and nonetheless, they pooled the loans and sold those securities to investors.²⁴ Shaky loans with high loan-to-value ratios and little documentation had been bundled together with more reliable loans, creating complex investment products in ways that “seemed to give investors the best of both worlds—high-yield, risk-free.”²⁵ After relaxing the net capital requirement for the five largest investment banks in 2004,²⁶ the Securities and Exchange Commission’s (SEC) loosened oversight, failed to restrict these banks’ risky activities, and did not require them to hold adequate capital and liquidity for their activities.²⁷

Amidst these risky lending practices, interest rates started rising and home ownership reached a saturation point.²⁸ Then, in early 2006 home prices started to fall and many subprime borrowers now could not withstand the higher interest rates and started defaulting on their loans.²⁹ By fall of 2008, trillions of dollars in these risky mortgages had already become embedded throughout the financial system and when they began to default at unexpected rates, the market for complex investment securities backed by those mortgages abruptly failed.³⁰ Commercial banks began to show signs of strain, ushering in massive losses throughout the financial system and the failure of major financial institutions, culminating in the collapse of the housing bubble.³¹ When the housing bubble burst, hundreds of billions of dollars in losses in mortgages and mortgage-related securities shook markets around the world, resulting in full blown financial crisis.³²

The big investment banks failed,³³ but so did many commercial banks, large and small, despite the relatively stronger regulatory and supervisory

23. *Id.*

24. *Id.*

25. *Id.* at 6.

26. *Id.* at xix, 151–53. Bear Stearns, Goldman Sachs, Lehman Brothers, Merrill Lynch, and Morgan Stanley. *Id.*

27. *Id.* at 155.

28. Singh, *supra* note 15. By 2004, U.S. home ownership had peaked at 69.2 percent. *Id.*

29. *Id.*

30. FIN. CRISIS INQUIRY COMM’N, *supra* note 1, at xvi, 27; *Abacus: Small Enough to Jail*, *supra* note 10. Big Banks issued \$4.8 trillion in fraudulent loans in connection with the 2008 financial crisis. *Id.*

31. FIN. CRISIS INQUIRY COMM’N, *supra* note 1, at xv–xvi.

32. *Id.*

33. FED. DEPOSIT INS. CORP., *supra* note 3, at xxxvii. In May 2008, JP Morgan bought struggling Bear Stearns, facilitated by the U.S. government in the form of a \$29 billion loan from the Federal Reserve Bank of New York. *Id.* at xiii. On September 15, 2008, Lehman Brothers filed Chapter 11 bankruptcy. *Id.* at xxxvii. Also in September 2008, the multinational insurance corporation American International Group (AIG) was rescued with an \$85 billion credit facility, also from the Federal Reserve Bank of New York. *Id.* at xiii.

regime imposed upon commercial banks compared to investment banks.³⁴ In June 2008, IndyMac failed, remaining the most expensive failure in the history of the Federal Deposit Insurance Corporation (FDIC) with losses of about \$12 billion.³⁵ In September 2008, Washington Mutual, with \$307 billion in assets, became the largest bank failure in U.S. history to date.³⁶ Although these and other large banks failed, most of the failed institutions were community banks.³⁷ From 2008 through 2013, 489 banks failed at a cost of approximately \$73 billion to the Deposit Insurance Fund.³⁸ Between March 2008 and year-end 2009, the number of problem banks rose from 90 to just over 700.³⁹ Problem banks would peak in early 2011 at almost 900, constituting nearly 12 percent of all FDIC-insured institutions.⁴⁰

Unconnected financial firms failed for the same reason and at roughly the same time because they had the same problem: large housing losses.⁴¹ The result of these compounding forces was that the challenges faced by the U.S. economy in 2008 were of a scale not seen since the Great Depression.⁴²

B. *Regulation and Enforcement Following The Crisis*

When the financial crisis did hit, public officials were not prepared to confront it.⁴³ Time and again, from the spring of 2007 on, policy makers and regulators were caught off guard as the contagion spread and there was no comprehensive and strategic plan for containment.⁴⁴ As financial institutions across the nation failed, a host of legislative, regulatory, enforcement, litigation, and political responses were spurred, first as policy makers and regulators attempted to mitigate the crisis through stabilization of the economy, and later through regulatory reform to prevent future crises.⁴⁵

As 2008 unraveled, the government responded by designing and implementing programs to arrest the financial panic and stimulate the economy.⁴⁶ On October 3, 2008, a \$700 billion financial-sector rescue plan was passed into law by the United States Congress, authorizing the United States Treasury Department (Treasury) to buy risky and nonperforming debt from various

34. FIN. CRISIS INQUIRY COMM'N, *supra* note 1, at 430.

35. FED. DEPOSIT INS. CORP., *supra* note 3, at xiii.

36. *Id.* at xiii–xiv.

37. *Id.* at xiv.

38. *Id.* at xiii, xxv.

39. *Id.* at xiv.

40. *Id.*

41. FIN. CRISIS INQUIRY COMM'N, *supra* note 1, at 433.

42. Anthony Reyes, *The Financial Crisis Five Years Later: Response, Reform, and Progress in Charts*, U.S. DEPT. OF THE TREASURY (Sept. 11, 2013).

43. FIN. CRISIS INQUIRY COMM'N, *supra* note 1, at xxi.

44. *Id.*

45. PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, *The Financial Crisis 10 Years Later: Lessons Learned*, PAUL WEISS 6–8 (Sept. 15, 2018), <https://www.paulweiss.com/media/3978004/14sept18-financial-crisis.pdf>.

46. Randall Guynn, *A Survey of Current Regulatory Trends*, INT'L BAR ASS'N'S TASK FORCE ON THE FIN. CRISIS 28–38 (Oct. 2010), https://www.davispolk.com/files/uploads/FIG/Financial_Crisis_Report_US.pdf.

lending institutions.⁴⁷ Before the crisis was over, taxpayers had committed trillions of dollars through various programs to prop up the nation's largest financial institutions.⁴⁸ In effect, the federal government bailed out the largest financial institutions that were deemed "too big to fail."⁴⁹ Meanwhile hundreds of community banks were allowed to fail.⁵⁰

More than two years after the crash, the economy continued to experience the aftershocks with millions of Americans jobless, homeless, and struggling to rebound.⁵¹ The government responded by making changes to the regulatory framework, and on July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) was enacted

47. Marc Davis, *U.S. Government Financial Bailouts*, INVESTOPEDIA (Apr. 27, 2020), <https://www.investopedia.com/articles/economics/08/government-financial-bailout.asp>; Troy Segal, *Troubled Asset Relief Program (TARP)*, INVESTOPEDIA, <https://www.investopedia.com/terms/t/troubled-asset-relief-program-tarp.asp> (last updated Sept. 29, 2020).

48. FIN. CRISIS INQUIRY COMM'N, *supra* note 1, at 23; Guynn, *supra* note 46, at 28. The US Programs designed to battle the financial panic consisted primarily of the following: the Troubled Asset Relief Program (TARP) implemented by the Treasury under the Emergency Economic Stabilization Act of 2008 (EESA), as amended by the American Recovery and Reinvestment Act of 2009 (ARRA); various programs implemented by the Federal Reserve under its traditional discount window authority for commercial banks and Section 13(3) of the Federal Reserve Act; the FDIC's use of its Deposit Insurance Fund to provide critical assistance to the banking system, including resolving failed banks and thrifts, temporarily increasing deposit insurance coverage to \$250,000 per person per institution and its Temporary Liquidity Guarantee Program (TLGP); and the Treasury's rescue of Fannie Mae and Freddie Mac pursuant to the authority granted by the Housing Economic Recovery Act of 2008 (HERA). *Id.*

49. FIN. CRISIS INQUIRY COMM'N, *supra* note 1, at 23, 374–75. On October 3, 2008, Congress authorized \$700 billion to fund TARP and about \$245 billion of that would be used to support financial institutions. *Id.* at 372. On October 13, 2008, a small group of major financial institutions was selected to receive capital injections via the newly formed Capital Purchase Program and \$125 million dollars was allocated to nine firms: the four largest commercial bank holding companies (Bank of America, Citigroup, JP Morgan, and Wells), the three remaining large investment banks (Goldman and Morgan Stanley, which were now bank holding companies, and Merrill, which Bank of America had agreed to acquire), and two important clearing and settlement banks (BNY Mellon and State Street). *Id.* at 374. Together, these nine institutions held more than \$11 trillion in assets, or about 75 percent of all assets in U.S. banks. *Id.* at 373. The Treasury later opened TARP to qualifying healthy and viable banks, thrifts, and holding companies under the same terms that the first nine firms had received. *Id.* at 374. The program was intended not only to restore confidence in the banking system but also to provide banks with sufficient capital to fulfill their "responsibilities in the areas of lending, dividend and compensation policies, and foreclosure mitigation." *Id.* Ultimately, the Treasury would invest \$205 billion in 707 financial institutions through the Capital Purchase Program. *Id.* at 375. TARP was only one of more than two dozen emergency programs put in place during the crisis to stabilize the financial system. *Id.*

50. James R. Barth, Apanard Prabha, & Philip Swagel, *Just How Big is the Too Big To Fail Problem?*, Milken Institute 5 (Mar. 2012).

51. FIN. CRISIS INQUIRY COMM'N, *supra* note 1, at xi.

resulting in heavier future regulation of financial institutions, meant to reduce the likelihood and magnitude of future financial panics.⁵²

While the government passed legislation focused on economic stabilization and regulatory reform, the Department of Justice (DOJ), prudential regulators, and other various federal and state authorities focused on enforcement and litigation.⁵³ SEC enforcement actions addressing misconduct that led to or arose from the financial crisis were ultimately brought against 204 entities and individuals resulting in payout of over \$3.75 billion in penalties, disgorgement, and other monetary relief.⁵⁴ The Federal Reserve, FDIC, Office of Comptroller of the Currency (OCC), and the National Credit Union Administration brought 1,795 enforcement actions in 2010, compared to 582 in 2007.⁵⁵

Congress held numerous hearings designed to grill and shame executives of financial institutions and created the Financial Crisis Inquiry Commission (FCIC) to examine the causes of the crisis and conduct a massive investigation which included the interviews of over 700 witnesses, 19 days of public hearings, and the review of millions of pages of documents, culminating in a 633 page report.⁵⁶ On November 17, 2009, President Obama established by Executive Order an inter-agency Financial Fraud Enforcement Task Force, led by the DOJ to increase coordination and fully utilize the resources and expertise of the government's law enforcement and regulatory apparatus, holding accountable those who helped bring about the financial meltdown.⁵⁷ The task force resulted in the "largest federal-state civil settlement ever obtained" in February 2012 when the DOJ, Department of Housing and Urban Development, and 49 state attorneys general secured a \$25 billion agreement with the five largest mortgage loan servicers — Bank of America, J.P. Morgan, Wells Fargo, Citigroup, and Ally Financial.⁵⁸

Separate from the task force, state attorneys general also filed numerous civil lawsuits against financial institutions over mortgage-related securities and secured hundreds of millions of dollars in settlements.⁵⁹ In New York, former Attorney General Eric T. Schneiderman recovered at least \$3.7 billion in cash and consumer relief—more than any other state—from mortgage-backed securities related settlements in the aftermath of

52. Guynn, *supra* note 46, at 39.

53. PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, *supra* note 45, at 8–9.

54. *SEC Enforcement Actions Addressing Misconduct That Led to or Arose From the Financial Crisis*, SEC. AND EXCH. COMM'N (Oct. 7, 2016), <http://www.sec.gov/spotlight/enf-actions-fc.shtml>.

55. PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, *supra* note 45, at 9.

56. *Id.* at 10; FIN. CRISIS INQUIRY COMM'N, *supra* note 1, at xi–xii.

57. Press Release, U.S. Dep't of Justice, President Obama Establishes Interagency Financial Fraud Enforcement Task Force (Nov. 17, 2009), <https://www.justice.gov/opa/pr/president-obama-establishes-interagency-financial-fraud-enforcement-task-force>.

58. PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, *supra* note 45, at 10.

59. James O'Toole, *Still No Charges for Wall Street Execs Five Years After Crash*, CNN (Sept. 15, 2013, 10:10 AM), <https://money.cnn.com/2013/09/15/news/economy/financial-crisis-cases/index.html?iid=EL>.

the financial crisis, including a \$500 million settlement with the Royal Bank of Scotland.⁶⁰ The DOJ and various attorneys general also brought claims under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) against a number of large banks, securing billions of dollars in cash and non-cash consideration through out-of-court settlements.⁶¹ Moreover, private litigants filed thousands of civil lawsuits under federal and state law, such that a decade after the crash, courts were still wading through the fallout of the crisis.⁶² From 2009 to 2015, 49 financial institutions paid various government entities and private plaintiffs nearly \$190 billion in fines and settlements.⁶³ A large number in theory, yet the money was paid by shareholders, and not individual bankers (since settlements were levied on corporations, not specific employees, and paid out as corporate expenses — in some cases, tax deductible ones).⁶⁴

In light of the massive settlements secured following the crisis, it was widely believed that the government knew it had criminal cases.⁶⁵ However, following the crash, while the DOJ filed criminal charges against hundreds of ordinary Americans for financial fraud, no criminal prosecutions of corporations, nor the executives in charge of the corporations, were announced.⁶⁶ Questioned at a 2009 Senate hearing about why there had not yet been any high-level prosecutions, then-Assistant Attorney General Lanny Breuer responded that such cases were “being pursued and investigated.”⁶⁷

The FCIC report released in January 2011 concluded that “dramatic breakdowns of corporate governance, profound lapses in regulatory oversight, and near fatal flaws in our financial system [and] a series of choices and

60. Press Release, N.Y. State Office of the Attorney General, A.G. Schneiderman Announces \$500 Million Settlement with Royal Bank of Scotland Over Misconduct Leading up to Financial Crisis (Mar. 6, 2018), <https://ag.ny.gov/press-release/ag-schneiderman-announces-500-million-settlement-royal-bank-scotland-over-misconduct>.

61. PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, *supra* note 45, at 11. Out-of-court settlements: Bank of America paid \$16.65 billion (described by the government as the “largest civil settlement with a single entity in American history”); J.P. Morgan, \$13 billion; Deutsche Bank, \$7.2 billion; Citigroup, \$7 billion; Credit Suisse, \$5.28 billion; Goldman Sachs, \$5.06 billion; RBS, \$4.9 billion; Morgan Stanley, \$2.6 billion; Wells Fargo, \$2.09 billion and Barclays, \$2 billion. *Id.* The DOJ also brought FIRREA claims against Standard & Poor’s, ultimately achieving a \$1.375 billion settlement. *Id.*

62. *Id.* at 9.

63. William Cohan, *How Wall Street’s Bankers Stayed Out of Jail*, THE ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368>.

64. *Id.*

65. O’Toole, *supra* note 59.

66. Peter Schweizer, *Obama’s DOJ and Wall Street: Too Big for Jail?*, FORBES (May 7, 2012), <https://www.forbes.com/sites/realspin/2012/05/07/obamas-doj-and-wall-street-too-big-for-jail/#7344380322ca>; Gretchen Morgenson & Louise Story, *In Financial Crisis, No Prosecutions of Top Figures* (Apr. 14, 2011), NYTIMES <https://www.nytimes.com/2011/04/14/business/14prosecute.html>.

67. O’Toole, *supra* note 59.

actions led us toward a catastrophe for which we were ill prepared.”⁶⁸ The report made eleven criminal referrals to the DOJ against nine individuals and identified additional potentially illegal activity at fourteen corporations.⁶⁹ Amidst public outcries for prosecution, the DOJ announced a joint state and federal task force in January 2012, focused specifically on investigations related to mortgage-backed securities.⁷⁰

Despite these promises, while firms paid out hundreds of billions of dollars in fines, the people running these investment banks and mortgage lenders went untouched, with only one singular U.S. banker ever facing jail time for his role in the financial crash.⁷¹ The DOJ failed to obtain any criminal convictions of any of the individuals or corporations named in the FCIC referrals.⁷² Obama’s interagency Financial Fraud Enforcement Task Force similarly did not produce any criminal prosecution of the corporations or business executives responsible for the crash.⁷³

The expression “too big to jail” has been used to refer to this overarching failure to criminally prosecute the large corporations and their executives following the financial crisis.⁷⁴ After the collapse of Enron in 2001, a jury convicted Enron’s accounting firm, Arthur Andersen, resulting in the total collapse of the company.⁷⁵ The concept that overzealous prosecution could put thousands of people out of work grew from there, and a cultural shift in the legal and business world took place, with many arguing that the Justice Department should go easier on companies to avoid far reaching collateral consequences.⁷⁶ By the time of the crash, prosecutors were faced with a large fear of the backlash that would be produced should the 2008 crash-related high-profile cases end in disaster.⁷⁷ Confronted with the astonishing resources that the corporations could mobilize in their defenses and massive pressure by the public to solve these cases expediently, prosecutors negotiated deals with lenient fines in the form of deferred prosecution or non-prosecution

68. FIN. CRISIS INQUIRY COMM’N, *supra* note 1, at xxvii–xxviii.

69. Senator Elizabeth Warren, *Dep’t of Justice Referral Letter to the Honorable Michael Horowitz*, (Sep. 15, 2016), https://www.warren.senate.gov/files/documents/2016-9-15_Referral_DOJ_IG_letter.pdf.

70. O’Toole, *supra* note 59.

71. Joe McGrath, *The Making of a Mismarker: The Case of the Only Banker Jailed in the U.S. for His Role in the Financial Crash* by Joe McGrath, U. CHI. L. REV. ONLINE (Jan. 7, 2020), <https://lawreviewblog.uchicago.edu/2020/01/07/the-making-of-a-mismarker-the-case-of-the-only-banker-jailed-in-the-u-s-for-his-role-in-the-financial-crash-by-joe-mcgrath>.

72. Senator Elizabeth Warren, *supra* note 69.

73. Schweizer, *supra* note 66.

74. BRANDON GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* (2016).

75. JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* (2017).

76. *Id.*; TAIBBI, *supra* note 11, at 17–19.

77. GARRETT, *supra* note 74.

agreements.⁷⁸ Many who were widely considered to be “corporate criminals” were allowed to avoid criminal conviction entirely.⁷⁹

Ultimately, criminal charges were brought against only one bank in the aftermath of the financial crash.⁸⁰ Abacus Bank, a Chinese American, family-owned bank that had successfully prevented failure in connection with the 2008 financial crisis, as a result of avoiding dealing in risky mortgage-backed securities.⁸¹

II. ABACUS BANK

A. *About Abacus Bank*

Abacus Bank is a privately held community bank that provides deposit services, safe deposit boxes, and loans for both residential and commercial real estate properties.⁸² Abacus was founded in 1984 by a group of business leaders from the Chinese community of New York City.⁸³ Thomas Sung, the bank’s principal organizer, was born in Shanghai, China in 1935 and immigrated to the United States through Ellis island in 1952.⁸⁴ Sung earned a bachelor and master’s degree in agricultural economics from the University of Florida in 1959 and graduated from Brooklyn Law School in 1964.⁸⁵ He practiced immigration law in NYC’s Chinatown, where no Chinese-owned bank dedicated to serving Chinese people existed at the time.⁸⁶ When Sung attempted to purchase a small real property, he was denied loans by numerous Chinatown banks, and he heard from others in Chinatown who shared the same experience.⁸⁷ Sung thought it was unfair that people in the Chinatown community deposited millions of dollars in mainstream banks and yet were still refused loans.⁸⁸ So Sung founded Abacus, headquartered in Chinatown, with the purpose of providing financial services to Chinese immigrants and local residents of lower Manhattan.⁸⁹ Sung specifically wanted to be able to help Chinese immigrants obtain loans for homes and small businesses.⁹⁰ From its inception, Abacus has focus on financing real estate, and today the

78. *Id.*

79. *Id.*

80. TAIBBI, *supra* note 11, at 46.

81. Zeder, *supra* note 6.

82. *About Abacus Federal Savings Bank*, ABACUS BANK, <https://www.abacusbank.com/about-us> (last visited May 7, 2021).

83. *Id.*

84. Testimony of Jill Sung, *supra* note 4, at 1; Interview by Anne Chao & Patricia Wong with Thomas Sung, Founder of Abacus Bank, in N.Y.C., N.Y. (Oct. 11, 2018), https://scholarship.rice.edu/bitstream/handle/1911/105132/wrc09043_transcript.pdf.

85. Chao & Wong, *supra* note 84.

86. *Id.*

87. Testimony of Jill Sung, *supra* note 4, at 1.

88. Chao & Wong, *supra* note 84.

89. *About Abacus Federal Savings Bank*, *supra* note 82.

90. *Id.*

majority of Abacus' lending remains on residential mortgages, particularly with first-time homebuyers.⁹¹

In the 90's, trade between U.S. and China grew exponentially and Abacus Bank saw the need to establish contacts internationally to serve its customers who now include a broad segment of companies and individuals doing business with China.⁹² Abacus established correspondent relationships with banks in China, Hong Kong, and Taiwan to facilitate the flow of credit and funds between China and the United States.⁹³ Since that time, Abacus has expanded its services to include offering insurance and securities through its subsidiaries, Abacus Insurance Agency Corporation and Abacus International Capital Corporation.⁹⁴

The bank continues to be family run and Thomas Sung's daughter, Jill Sung, as the CEO & President, is responsible for managing all aspects of the bank including loan production and serving, deposits, financial management, legal and regulatory compliance, trade financing, and broker-dealer businesses.⁹⁵ As of 2009, Abacus Bank possessed \$245 million in assets, was servicing 4,390 loans for \$755 million, and delivered 100 percent of agency eligible business⁹⁶ to Fannie Mae.⁹⁷ Today, the federally chartered bank continues to operate six branches in ethnic Chinese communities in Manhattan, Brooklyn, Queens, Philadelphia, and Edison, NJ, while retaining its original mission "to provide financial services to immigrants and local residents of lower Manhattan."⁹⁸

B. *Abacus Bank Caters To The Chinese American Community*

Abacus Bank fills a necessary void in Chinatown where it tailors its services to the community and is committed to seeing the neighborhood thrive. Like African Americans, Chinese immigrants are historically unwelcome banking clients.⁹⁹ Banking was completely inaccessible to Chinese Americans for a long period of U.S. history since the Chinese Exclusion Act that prevented further Chinese immigration did not fully end until 1965, and even

91. Testimony of Jill Sung, *supra* note 4, at 1.

92. *About Abacus Federal Savings Bank*, *supra* note 82..

93. *Id.*

94. *Id.*; Testimony of Jill Sung, *supra* note 4, at 1.

95. Motions in Limine, *People v. Abacus Fed. Savings Bank*, No. 2480/2012 (N.Y. Sup. Ct. July 24, 2009).

96. See *Selling Guide*, FANNIE MAE, <https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B2-Eligibility/Chapter-B2-1-Mortgage-Eligibility/Section-B2-1-5-Other-Loan-Attributes-and-Related-Policies/1032996881/B2-1-5-02-Loan-Eligibility-09-02-2020.htm> (last updated May 5, 2021). Not every loan is eligible for delivery to Fannie Mae. *Id.* The lender may only deliver loans with data and documents that meet the eligibility criteria established by Fannie Mae. *Id.*

97. Motions in Limine, *supra* note 95.

98. *About Abacus Federal Savings Bank*, *supra* note 82; Testimony of Jill Sung, *supra* note 4, at 2.

99. Helen Avery, *Financial inclusion: The paradox of the city*, EUROMONEY (May 30, 2018), <https://www.euromoney.com/article/b18f8vjg70010j/financial-inclusion-the-paradox-of-the-city>.

after that racial prejudice towards Chinese immigrants remained rife.¹⁰⁰ The legacy of these structural inequities continues still. According to the most recent data from the New York City government, Asians are still amongst the poorest populations in the city as of 2018 — 21.7 percent of Asians in New York are in poverty by municipal standards.¹⁰¹

By catering to an underserved minority community, Abacus fulfills an important role: it not only addresses a business need but also remedies a racial injustice. Abacus Bank is a minority depository institution (MDI) as defined by the FDIC.¹⁰² The FDIC has long recognized the important role of MDIs in promoting the economic viability of minority and underserved communities.¹⁰³ Without MDIs, individuals in low- and moderate-income communities might not have access to banking services.¹⁰⁴ Accordingly, Section 308 of FIRREA, enacted by Congress in 1989, deliberately established goals to promote the success of MDIs.¹⁰⁵ The FDIC continually seeks to identify initiatives that help to carry out its commitment to preserving existing MDIs, providing technical assistance to prevent insolvency of institutions, and maintaining the minority character of institutions in cases of merger or acquisition.¹⁰⁶

As made clear by Section 308 of FIRREA, while providing financial services to minority communities is critical to the functioning of the financial system, this task is accompanied by unique challenges.¹⁰⁷ For example, serving communities that are often dominated by first-generation immigrants, is accompanied by a language barrier.¹⁰⁸ Abacus must hire and fully train staff from within the community to be able to explain to its primarily

100. *Id.*

101. *NYC Government Poverty Data Tool*, CITY OF NEW YORK, <https://www1.nyc.gov/site/opportunity/poverty-in-nyc/data-tool.page> (last visited May 7, 2021).

102. Statement of Policy Regarding Minority Depository Institutions, FED. DEP'T INS. CORP., <https://www.fdic.gov/regulations/laws/rules/5000-2600.html#fdic5000policyso>. “Minority” as defined by Section 308 of FIRREA means any “Black American, Asian American, Hispanic American, or Native American.” *Id.* “Minority depository institution” as defined by Section 308 of FIRREA means any Federally insured depository institution where 51 percent or more of the voting stock is owned by one or more “socially and economically disadvantaged individuals.” *Id.*

An FDIC-insured commercial bank or savings association may qualify for minority depository institution status if it is a federal insured depository institution for which (1) 51 percent or more of the voting stock is owned by minority individuals; or (2) a majority of the board of directors is minority and the community that the institution serves is predominantly minority. *Id.* Ownership must be by U.S. citizens or permanent legal U.S. residents to be counted in determining minority ownership. *Id.*

103. FED. DEP'T INS. CORP., PRESERVATION AND PROMOTION OF MINORITY DEPOSITORY INSTITUTIONS: REPORT TO CONGRESS FOR 2016 (2016).

104. Jelena McWilliams, Chairman, Fed. Dep't Ins. Corp., Remarks to the National Bankers Association 92nd Annual Convention (Oct. 2, 2019), <https://www.fdic.gov/news/speeches/spoct0219.html>.

105. *Id.*; Pub. L. No. 101–73; 103 Stat. 183.

106. McWilliams, *supra* note 104.

107. 103 Stat. 183, *supra* note 105.

108. Testimony of Jill Sung, *supra* note 4, at 2.

non-English speaking clientele complicated regulatory concepts and forms.¹⁰⁹ Additionally, MDIs must accommodate the socio-political and economic cultural background of their customers.¹¹⁰ The first-generation immigrants that Abacus serves have chosen to leave their country where the government is all-powerful, and they often have a natural distrust of government and institutions in general.¹¹¹ Moreover, minority customers' understanding of money and the building of wealth often differs from non-immigrant consumers, as many are merely trying to survive on a daily basis and are supremely conservative with their savings, preferring to keep their funds in cash.¹¹²

As a minority bank, Abacus must understand the cultural differences between most U.S. banking customers and the Chinese immigrants it serves, and it must tailor its services appropriately.¹¹³ Treading the line between a mainstream business model and one that is culturally competent requires certain accommodations. A significant portion of the population Abacus serves demands traditional banking products that cannot be offered over technological platforms.¹¹⁴ For instance, while most banks have eliminated the passbook savings account, Abacus Bank still provides this option.¹¹⁵ It allows customers to deposit and withdraw funds via in-person transactions that are documented in the customer's passbook.¹¹⁶ Although passbook savings accounts are not routinely used in the United States, they are more common among certain demographics, including the elderly and new immigrants who often come from nations such as China that customarily utilize this sort of account.¹¹⁷ For an individual immigrating from a country with unstable banks and who has seen their accounts frozen, having a passbook in the United States provides proof that there is fact money in the account.¹¹⁸ This is a solution for someone who may not have a permanent address at which to receive statements, and/or for a person who wants personal contact with bank employees.¹¹⁹ Moreover, passbooks savings accounts require a low initial deposit making them accessible to low-income people.¹²⁰ As Abacus recognizes, offline passbook services are of particular importance to its Chinese-American clientele, many of whom immigrated from an authoritarian regime and who may have

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 3.

113. *Id.*; see also Alan Yu, *After 2008 Financial Crisis, Only One Bank Faced Criminal Charges. Why?*, WHY.ORG (June 9, 2017), <https://why.org/articles/after-2008-financial-crisis-only-one-bank-faced-criminal-charges-why>.

114. Testimony of Jill Sung, *supra* note 4, at 3.

115. *Id.*; Yu, *supra* note 113.

116. See sources cited *supra* note 115.

117. See sources cited *supra* note 115; Dana Hedgpeth, *Recall the Passbook?*, WASH. POST (Sept. 15, 2002), <https://www.washingtonpost.com/archive/business/2002/09/15/recall-the-passbook/52f4934b-11e7-4f55-9989-a308daeb374e>.

118. Hedgpeth, *supra* note 117.

119. Testimony of Jill Sung, *supra* note 4, at 3.

120. Hedgpeth, *supra* note 117.

fear and distrust towards the FDIC and government generally.¹²¹ However, this product cannot be automated, and thus the cost of providing such product is high, squeezing Abacus' profit margins.¹²²

Similarly, the community Abacus serves often prefers to use safety deposit boxes, as immigrant community members are migratory and may not feel secure leaving their personal belongings at home.¹²³ To meet this demand, Abacus must maintain safe deposit boxes, more than other banks of similar asset size.¹²⁴ Safe deposit box serves are labor intensive, requiring bank personnel to escort customers to and from their boxes, so like the passbook savings accounts, this service comes at a cost to Abacus' profit margins.¹²⁵

One important nuance of Chinatown's Chinese-American immigrant community is that it is largely cash-based.¹²⁶ For the small mom-and-pop businesses that make up the community, the fees for accepting credit cards can determine whether or not a business survives.¹²⁷ Cash therefore is king, which means many residents of Chinatown do not have credit profiles.¹²⁸ Without W-2 forms, tax returns, and other standard documents that establish credit, the Chinatown residents that are today served by Abacus Bank, were once automatically ruled out for small business loans and mortgages.¹²⁹ Without access to these traditional banking products that cannot be offered over technological platforms, the minority community Abacus serves is at risk of slipping into the un-banked population.¹³⁰

Despite the unique challenge it must face as an MDI, Abacus' delinquency rates have always been under 1 percent, and in most years less than ½ percent.¹³¹ Even during the 2008 financial crisis, the residential mortgage portfolio Abacus originated and serviced for Fannie Mae, which at its height reached over \$1 billion (almost 6,000 loans), never had a delinquency rate higher than 0.60 percent.¹³² Abacus attributes these unusually low delinquency rate to its conservative lending policy and its deep understanding of its customers.¹³³ Abacus believes that to build a lasting and strong community, homeownership must be sustainable, and accordingly the bank has built

121. Testimony of Jill Sung, *supra* note 4, at 2–3; Yu, *supra* note 103.

122. Testimony of Jill Sung, *supra* note 4, at 3.

123. *Id.*

124. *Id.*

125. *Id.*

126. Avery, *supra* note 99. See generally Shanel Thompson, *Hundreds of Paper Lanterns Adorn Street in Hopes of Helping Chinatown Businesses*, NBC NEW YORK (Jan. 26, 2021), <https://www.nbcnewyork.com/news/local/hundreds-of-paper-lanterns-adorn-street-in-hopes-of-saving-chinatown-businesses/2838193> (discussing the fact that Chinatown businesses are mostly cash-based in the context of COVID-19 relief).

127. Avery, *supra* note 99.

128. *Id.*

129. *Id.*; *Abacus: Small Enough to Jail*, *supra* note 10.

130. Testimony of Jill Sung, *supra* note 4, at 3.

131. *Id.* at 1.

132. *Id.* at 1–2.

133. *Id.* at 2.

conservative credit practices both at the origination and portfolio management level.¹³⁴ According to Thomas Sung, Abacus Bank and the Sung family “know the people in the neighborhood in a way that can provide us with information regarding loan risk that is beyond a credit score that large banks focus on.”¹³⁵ Abacus worked with Fannie Mae to ensure that qualified borrowers could document their creditor-worthiness in a way that would meet Fannie Mae guidelines, despite lacking traditional credit records.¹³⁶ Abacus Bank thus provided a vital service to an underrepresented minority community while still complying with regulatory standards.¹³⁷

III. *PEOPLE V. ABACUS BANK*¹³⁸

On May 31, 2012, the New York County DA’s Office indicted Abacus Bank and eleven¹³⁹ of its former employees in an alleged false document mortgage fraud scheme resulting in the sale of hundreds of millions of dollars’ worth of fraudulent loans to Fannie Mae.¹⁴⁰

A. *The DA’s Investigation*

The DA’s case against Abacus Bank grew out of an incident that the bank itself reported to the authorities.¹⁴¹ The bank’s alleged misconduct first came to light on Friday, December 11, 2009, during a routine real estate closing at Abacus Bank’s Chinatown branch.¹⁴² The borrower, Ariel Chi, asked the bank’s closing attorney, Vera Sung, daughter of Thomas Sung and a director of Abacus Bank, about extra checks she had written to the loan officer, Ken Yu.¹⁴³ Vera Sung was suspicious that these checks did not appear on the disclosure statement which should reflect all payments made in connection with a loan, so she suspended the loan and reported the discrepancy to the bank’s president and CEO, Jill Sung.¹⁴⁴ Jill Sung immediately cancelled

134. *Id.*

135. Avery, *supra* note 99; *Abacus: Small Enough to Jail*, *supra* note 10.

136. Zeder, *supra* note 6. For example, by submitting borrowers’ telephone bills, other utility bills, and rent payments if they did not have traditional credit records. *Id.*

137. Motions in *Limine*, *supra* note 95. Fannie Mae required written permission to request copies of federal tax returns from the IRS when the lender was using copies of the tax returns to document the borrower’s income. *Id.* Following a policy change effective September 1, 2009, Fannie Mae required lenders to obtain a 4506-T tax return form from all borrowers at application and closing. *Id.*

138. *People v. Abacus Fed. Savings Bank*, No. 2480/2012, (N.Y. Sup. Ct. May 31, 2012).

139. Recommendation for Dismissal by DA, *People v. Abacus Fed. Savings Bank*, No. 2480/2012 (N.Y. Sup. Ct. Sept. 9, 2015). In total, the DA charged nineteen Abacus Bank employees. *Id.*; Indictment, *supra* note 7. Eleven employees were charged in the indictment; one employee was charged by separate felony complaint; and seven employees waived indictment and plead guilty. *Id.*

140. Press Release, N.Y. Cty. DA’s Office dated May 31, 2012, *supra* note 9.

141. TAIBBI, *supra* note 11, at 46.

142. Motions in *Limine*, *supra* note 95.

143. *Id.*; *Abacus: Small Enough to Jail*, *supra* note 10.

144. Motions in *Limine*, *supra* note 95.

the closing and ordered an internal inquiry into the events.¹⁴⁵ The following business day Jill Sung fired Ken Yu, despite the fact that he had been a solid producer while working at the bank for approximately four years.¹⁴⁶

Abacus Bank promptly notified law enforcement of the incident in January 2010.¹⁴⁷ Abacus also launched its own investigation into its banking practices, hiring a former Federal prosecutor as an outside consultant in February 2010, and a second outside consultant in July 2010.¹⁴⁸ The bank's external investigation uncovered that Yu had been masterminding a fraudulent scheme which included misrepresentation of borrower income details and falsification of documentation, in return for payment.¹⁴⁹ The investigation also discovered two other low level loan officers engaged in wrongdoing similar to Yu's, but less extensive.¹⁵⁰ They were subsequently fired.¹⁵¹ In March 2010, Abacus referred the case to its compliance officer at its regulator, the Office of Thrift Supervision (OTS), which did an extensive examination of the bank beginning April 19, 2010.¹⁵² In April 2010, Abacus Bank notified Fannie Mae which began its own investigation, including reviewing the loans it purchased from Abacus and auditing the bank's lending policies and procedures.¹⁵³ The OTS review culminated in a detailed Report of Examination issued in October 2010.¹⁵⁴ Like the bank's external investigation, the OTS review uncovered similar falsifications of borrower information submitted as part of mortgage applications.¹⁵⁵ The OTS issued a cease and desist order on February 16, 2011 and designated a committee to monitor and coordinate Abacus Bank's compliance with the order.¹⁵⁶ The order required Abacus to, among other things, revise its Bank Secrecy Act and Anti Money Laundering compliance program and engage a third party to conduct a review of its managers' qualifications.¹⁵⁷ Importantly, the OTS did not impose a fine, nor did it demand any wholesale changes to senior management.¹⁵⁸

145. *Id.*

146. *Id.*; *Abacus: Small Enough to Jail*, *supra* note 10.

147. Motions in *Limine*, *supra* note 95.

148. *Id.* Abacus hired Vitale AML Consultants, Inc., led by Anne Vitale, a former Federal prosecutor, and Mercadien P.C. *Id.*; *Abacus: Small Enough to Jail*, *supra* note 10.

149. *Abacus: Small Enough to Jail*, *supra* note 10.

150. *Id.*

151. *Id.*

152. Jenny Chou & James Glasser, *Abacus Federal Savings Bank and the Dangers of Cooperation Without Representation*, NYLAW J. ONLINE (Sept. 28, 2015 at 12:00 AM), https://www.wiggin.com/wp-content/uploads/2019/09/33068_070101511wiggin.pdf. The OTS was eliminated and its jurisdiction taken over by the OCC on July 21, 2011. *Id.*; *see also Abacus: Small Enough to Jail*, *supra* note 10; Morgenson, *supra* note 5; Motions in *Limine*, *supra* note 95.

153. *Abacus: Small Enough to Jail*, *supra* note 10; Motions in *Limine*, *supra* note 95.

154. Motions in *Limine*, *supra* note 95.

155. *Id.*; Recommendation for Dismissal, *supra* note 139.

156. Chou & Glasser, *supra* note 152.

157. *Id.*

158. *Id.*

Upon learning in December 2009 that Ariel Chen had lost her \$72,000 down deposit to the property seller, Vera Sung instructed Chen to file a police report.¹⁵⁹ In January 2010, Ariel Chen filed a complaint at the N.Y.P.D.'s Fifth Precinct.¹⁶⁰ This report is what sparked the government's subsequent 2.5-year investigation into Abacus Bank. Beginning in January 2010, the investigation culminated in the May 31, 2012 indictment of the bank and its employees.¹⁶¹

Initially, the DA's investigation focused solely on the employee who had been accused of theft, Ken Yu.¹⁶² When the DA opened the investigation, the Sung family fully cooperated, voluntarily providing the DA with over 600,000 pages of documents.¹⁶³ The Sung family had complied with the 2011 OTS cease and desist order and did not think the bank itself was at risk of criminal charges.¹⁶⁴ After all, when suspicious activity was discovered by the bank's senior leadership, Abacus had stopped the activity, terminated the responsible employees, self-reported the events, and took the appropriate remedial steps proscribed by the regulatory agencies.¹⁶⁵ However, Manhattan District Attorney Cyrus R. Vance Jr. argued that the fraud was widespread enough to warrant an investigation into the bank itself.¹⁶⁶ In addition to the document review, the in-depth investigation resulted in interviews of more than 23 Abacus Bank employees, directors, and officers; 30 Abacus bank borrowers; numerous Fannie Mae representatives; two of the bank's internal auditors; personnel from the OTS; and the authors of the OTS-mandated investigation.¹⁶⁷ Officials from the OCC, Fannie Mae, IRS Criminal Investigations, the FDIC, Federal Housing Finance Agency, and the Federal Housing Finance Agency Office of the Inspector General all contributed to the DA's investigation.¹⁶⁸ Upon concluding the investigation, the DA's office was convinced that the corruption of the Abacus Bank loan department reached a level of bank personnel high enough to make the bank legally responsible.¹⁶⁹

B. *The DA's Charges*

In May 2012, a grand jury voted to indict Abacus Bank and nineteen current and former employees alleged to be involved in the mortgage fraud scheme.¹⁷⁰ Two of these employees were supervisors; seventeen were low-

159. *Abacus: Small Enough to Jail*, *supra* note 10.

160. *Id.*

161. Press Release, N.Y. Cty. DA's Office dated May 31, 2012, *supra* note 9; John Kennedy, *Abacus Bank Cleared of all Charges in Mortgage Fraud Case*, LAW360 (June 4, 2015), <https://www.law360.com/articles/663989/abacus-bank-cleared-of-all-charges-in-mortgage-fraud-case>.

162. *Abacus: Small Enough to Jail*, *supra* note 10.

163. *Id.*

164. Zeder, *supra* note 6.

165. Motions in Limine, *supra* note 95.

166. *Abacus: Small Enough to Jail*, *supra* note 10.

167. Recommendation for Dismissal, *supra* note 139.

168. Press Release, N.Y. Cty. DA's Office dated May 31, 2012, *supra* note 9.

169. *Abacus: Small Enough to Jail*, *supra* note 10.

170. Kennedy, *supra* note 161.

er-level loan officers, loan processors, and loan underwriters. By the time the 184-count indictment was announced on May 31st, seven¹⁷¹ former employees from Abacus Bank's loan department, including Ken Yu,¹⁷² had already waived indictment and admitted their guilt in connection with the conspiracy.¹⁷³ The twelve remaining defendants listed in the indictment were Abacus Bank, two of the bank's senior managers, and nine former lower level employees who worked in various capacities for the Bank's lending business.¹⁷⁴ One additional employee was charged by separate felony complaint.¹⁷⁵ No Sung family member was ever charged, including CEO Jill Sung.¹⁷⁶ Charges in the indictment included conspiracy, scheme to defraud, grand larceny, residential mortgage fraud, falsifying business records, and Martin Act violations.¹⁷⁷

The DA's case focused on thirty-two of the more than three thousand loans that Abacus Bank sold to Fannie Mae during the time period relevant to the indictment.¹⁷⁸ The DA alleged that from May 2005 to February 2010, Abacus Bank employees engaged in a conspiracy to falsify and fabricate loan application documents, thus allowing unqualified borrowers to obtain mortgages backed by Fannie Mae.¹⁷⁹ The details of the scheme alleged by the DA were as follows.

Eleven Abacus Bank loan officers regularly falsified borrower information on residential mortgage application documents.¹⁸⁰ They instructed prospective borrowers to make misrepresentations on their loan applications,¹⁸¹ including income, asset, and job title inflation and falsified Verification of Employment forms.¹⁸² The loan officers allegedly also created false Gift Letters that misrepresented down payment funds as "gifts" from borrowers'

171. Press Release, N.Y. Cty. DA's Office dated May 31, 2012, *supra* note 9; Recommendation for Dismissal, *supra* note 139. The DA's May 31, 2012 Press Release and the DA's Recommendation for Dismissal both misstate that eight, rather than seven, former employees waived indictment and admitted their guilt in connection with the conspiracy. *Id.*

172. Chao & Wong, *supra* note 84. Ken Yu pleaded guilty to grand larceny, fraud, and falsifying business records; he apparently was taking kickbacks for falsifying mortgage applications. *Id.*

173. Press Release, N.Y. Cty. DA's Office dated May 31, 2012, *supra* note 9. Seven of these defendants pled guilty to one count of falsifying business records in the first degree; three defendants pled guilty to one count of scheme to defraud in the first degree; and one defendant pled guilty to one count of grand larceny in the third degree. *Id.*

174. Recommendation for Dismissal, *supra* note 139, at 3. Two indicted defendants subsequently plead guilty and entered into cooperation agreements with the DA. *Id.*

175. Press Release, N.Y. Cty. DA's Office dated May 31, 2012, *supra* note 9.

176. *Abacus: Small Enough to Jail*, *supra* note 10.

177. Indictment, *supra* note 7.

178. Motions in Limine, *supra* note 95.

179. *Abacus Bank Indicted for Alleged Mortgage Fraud*, 9 No. 4 Westlaw J. Bankr. 10 (June 21, 2012); Indictment, *supra* note 7, at 4.

180. Press Release, N.Y. Cty. DA's Office dated May 31, 2012, *supra* note 9.

181. *Id.*

182. *Id.*

family members.¹⁸³ This obscured the source of the borrowers' down payments and disguised borrowers' liabilities as assets.¹⁸⁴ By ensuring that otherwise unqualified borrowers would receive loans, the Defendants earned "many millions of dollars" in commissions and fees according to the DA.¹⁸⁵

Three Abacus Bank loan processors allegedly helped the loan officers concoct inflated incomes for borrowers by manipulating loan origination software that calculated how much income borrowers needed to show to qualify for loans.¹⁸⁶ The processors allegedly also facilitated the falsification of borrowers' employment information by providing bank Verification of Employment forms to loan officers and loan applicants instead of mailing the forms directly to employers.¹⁸⁷ Three Abacus Bank loan underwriters allegedly approved loans they knew contained falsehoods and knowingly failed to conduct adequate scrutiny of obviously false documents.¹⁸⁸

Finally, two Abacus Bank supervisors—Yiu Wah Wong, the bank's Chief Creditor Officer, Vice President, and Underwriting Supervisor, and Wai Hung Tam, the bank's Loan Origination Supervisor—trained the lower level employees in these practices.¹⁸⁹ Specifically, the Defendant supervisors allegedly taught employees that the accuracy of borrower information on loan applications was immaterial, and falsified information should be made to be believable in the eyes of the OTS and Fannie Mae.¹⁹⁰ Despite the misrepresentations in borrower loan applications, Abacus Bank represented to Fannie Mae that the loan documents were accurate and truthful.¹⁹¹ Fannie Mae then bundled the allegedly fraudulent loans into mortgage-backed securities and sold them to outside investors.¹⁹² The DA alleged that as a result of charging hundreds of millions of dollars in fraudulent loans, Abacus Bank earned millions of dollars in loan origination, purchasing, and servicing fees.¹⁹³

183. Memorandum of Law in Support of the People's Response to the Defendants' Motions in Limine to Preclude Reliance on Or Reference to Third Party Investigations, *People v. Abacus Fed. Savings Bank*, No. 2480/2012 (N.Y. Sup. Ct. Aug. 21, 2014).

184. *Id.*

185. Indictment, *supra* note 7, at 4.

186. Press Release, N.Y. Cty. DA's Office dated May 31, 2012, *supra* note 9.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*; *Abacus: Small Enough to Jail*, *supra* note 10.

193. Press Release, N.Y. Cty. DA's Office dated May 31, 2012, *supra* note 9; Indictment, *supra* note 7. For this conduct, The DA charged Abacus Bank with Conspiracy in the Fourth Degree, a class E felony, 1 count (violation of Penal Law § 105.10(1)); Scheme to Defraud in the First Degree, a class E felony, 1 count (violation of Penal Law § 190.65(1)(b)); Violation of New York General Business Law § 352-C(5) (Martin Act), a class E felony, 1 count; Violation of New York General Business Law § 352-C(6) (Martin Act), a class E felony, 27 counts; Grand Larceny in the First Degree, a class B felony, 1 count (violation of Penal Law § 155.42); Grand Larceny in the Second Degree, a class C felony, 27 counts (violation of Penal Law § 155.40(1)); Falsifying Business Records in the First Degree, a class E felony, 100 counts (violation of Penal Law § 175.10); Attempted Grand Larceny in the Second

C. *The DA's Case*

The law is clear in virtually all jurisdictions in the United States that a corporation may be held criminally liable.¹⁹⁴ In New York, the standard was codified in 1965 as New York Penal Law § 20.20. This code specifically provides that a corporation is criminally liable where: “(a) the conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; (b) the conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or a high managerial agent acting within the scope of his employment and in behalf of the corporation; (c) the conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation, and the offense is (i) a misdemeanor or a violation, (ii) one defined by a statute which clearly indicates a legislative intent to impose such criminal liability on a corporation, or (iii) any offense set forth in title twenty-seven of article seventy-one of the environmental conservation law.”¹⁹⁵ The statute defines a “high managerial agent” as “an officer of a corporation or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees.”¹⁹⁶ At trial, Prosecution proceeded on a theory of corporate liability based upon (b) and (c) above.¹⁹⁷

Several pre-trial motions were heard, including a *Clayton* motion (a motion to dismiss in the interest of justice), a severance motion, and insufficiency motions on all charges.¹⁹⁸ The motion for severance was granted and trial was split into two phases.¹⁹⁹ Abacus Bank and the two Defendant supervisors were scheduled for trial in January 2015 (*Abacus I* Trial), while the seven remaining Defendant employees were scheduled for separate trial later in September (*Abacus II* trial).²⁰⁰ Defendant Abacus Bank’s motion to dismiss the Martin Act counts was also granted.²⁰¹ Passed in 1921 and codified under Article 23-A of New York’s General Business Law, the Martin Act prohibits all deceitful practices and false promises related to the offer, sale,

Degree, a class D felony, 1 count (violation of Penal Law §§ 110, 155.40(1)); Residential Mortgage Fraud in the First Degree, a class B felony, 1 count (violation of Penal Law § 187.25); Residential Mortgage Fraud in the Second Degree, a class C felony, 14 counts (violation of Penal Law § 187.20); Attempted Residential Mortgage Fraud in the Second Degree, class D felony, 1 counts (violation of Penal Law §§ 110, 187.20). *Id.*

194. See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909).

195. N.Y. Penal Law § 20.20(2) (McKinney 2021).

196. *Id.* § 20.20(1).

197. Motions in *Limine*, *supra* note 95, at 12.

198. 2018 NAPABA Convention, A Struggle for Equal Justice: The Abacus Bank Trial, https://cdn.ymaws.com/www.napaba.org/resource/resmgr/2018_napaba_con/call_for_programs/cle_course_materials/201_cle_materials.pdf.

199. *Id.*

200. Recommendation for Dismissal, *supra* note 139.

201. 2018 NAPABA Convention, *supra* note 198, at 21.

or purchase of securities and commodities within or from New York.²⁰² The law is remedial in nature and requires only that the conduct was (1) engaged in to induce or promote the purchase or sale of a security, and (2) a misrepresentation or omission that is (3) material.²⁰³ Despite the broad interpretation that courts apply to Martin Act claims, claims made under the Act necessarily must involve activity with securities.²⁰⁴ Unlike the larger banks involved in the 2008 financial crisis that had the capacity to bundle mortgages in-house, such as Bank of America, Abacus, sold only *individual* mortgages to Fannie Mae, who then pooled together batches of thousands of mortgages into securities.²⁰⁵ The charges against Abacus Bank related only to the bank's sale of whole mortgages, and an individual mortgage is not a security.²⁰⁶ Thus, because Abacus Bank never created nor sold a security, Martin Act claims were inapplicable.²⁰⁷

On January 12, 2015, the bank and the two Defendant supervisors, Wong and Tam, went to trial on eighty remaining counts in the New York Supreme Court, New York County, before the Honorable Roger S. Hayes.²⁰⁸ The Prosecution's charges were based on Abacus Bank's alleged false statements contained in two documents: the Verification of Employment and the Gift Letter.²⁰⁹ The Prosecution identified thirty-two loans upon which all of the charges against the bank, including the primary charge of grand larceny, were based.²¹⁰ In support of its case, the Prosecution called on loan originators and borrowers to testify that they had colluded on loans to overstate the income and exaggerate the job titles of mortgage applicants.²¹¹

The DA's case relied on Fannie Mae as a key player. During her summation on May 20, 2015, lead prosecutor Rachel Hochhauser stated, "Fannie Mae is the victim in this case . . . They are the victim because it was a crime

202. Harold Gordon, *Enforcement Proceedings Under New York's Martin Act*, PRACTICAL LAW THE JOURNAL, 22 (2015).

203. DANIEL FETTERMAN & MARK GOODMAN, DEFENDING CORPORATIONS AND INDIVIDUALS IN GOVERNMENT INVESTIGATIONS, § 11:11 (2020); State v. Rachmani Corp., 71 N.Y.2d 718, 725–26 (1988). See generally *New York State's Martin Act: A Primer*, DECHERT, LLP (Jan. 15, 2004), <https://www.dechert.com/knowledge/onpoint/2004/1/new-york-state-s-martin-act-a-primer.html>.

204. *Id.*

205. Sarah Aberg*

*Sarah Aberg, Defense attorney for Abacus Bank agreed to be quoted for use in this paper. (Sarah Aberg denotes a quote)

206. *Id.*

207. *Id.*

208. Recommendation for Dismissal, *supra* note 139; Press Release, Sheppard, Mullin, Richter & Hampton, Acquittal on All Counts in Abacus Federal Savings Bank Trial (June 8, 2015), <https://www.sheppardmullin.com/pressrelease-413>; James C. McKinley Jr., *Abacus Bank Found Not Guilty of Mortgage Fraud and Other Charges*, NY TIMES (June 5, 2015), <https://www.nytimes.com/2015/06/05/nyregion/abacus-bank-found-not-guilty-of-mortgage-fraud-and-other-charges.html>.

209. 2018 NAPABA Convention, *supra* note 198.

210. Motions in Limine, *supra* note 95.

211. McKinley, *supra* note 208.

to misrepresent material facts to Fannie Mae and thereby induce Fannie Mae to give the bank their money.”²¹² According to the indictment, “Fannie Mae Standards” in place during the time frame of the alleged conspiracy required bank employees to verify the loan application information presented on the borrowers’ Verification of Employment forms and Gift letters.²¹³ This was to ensure loans were made at an appropriate risk level, minimizing the possibility of financial harm.²¹⁴ The Prosecution argued that “Fannie Mae relied on lenders to follow the Standards, so that lenders could assess and report accurately and honestly the borrowers’ creditworthiness and qualifications for Fannie Mae’s programs.”²¹⁵ Abacus’ misrepresentations about the quality of the loans were an attempt to avoid the Standards and commit fraud by selling mortgages with false information.²¹⁶

Although the DA acknowledged that the Abacus Bank loans performed and as a result, Fannie Mae suffered no long-term financial loss, the DA maintained that whether the mortgages ultimately performed was not relevant to the question of whether a larceny had occurred.²¹⁷ Rather, the DA’s theory of the case was that the loss occurred at the time of the “taking.”²¹⁸ The Prosecution claimed that when the alleged victim, Fannie Mae, purchased those loans from Abacus, the purchase price (amounting to the principal amount of the loan) was stolen because the loan files contained false information about the borrower’s income.²¹⁹ The Prosecution claimed that Abacus intended to “permanently deprive” Fannie Mae of the monies it paid to purchase the loans.²²⁰

At trial, five of the former bank employees who had entered into cooperation agreements testified for the Prosecution pursuant to those agreements.²²¹ The Prosecution relied on these former employee witnesses to testify

212. *Id.*

213. Indictment, *supra* note 7, at 3.

214. *Id.* Mandatory underwriting standards, lending criteria, and verification and due diligence procedures (Standards) were used to assess the creditworthiness of prospective borrowers on all mortgages expected to be purchased by Fannie Mae. *Id.* The Standards mandated the use of specific residential mortgage loan application forms (1003 Forms among others). *Id.*

215. *Id.*

216. *Id.* at 5. “The conspiracy turned the mortgage process upside down, in that borrowers were instructed exactly what information needed to be included in their applications for them to qualify for desired loans. *Id.* As the conspirators well knew and believed, in legitimate lending institutions, customers provide banks with information pertaining to their income and assets, and banks decide whether the customers qualify for loans. *Id.* In sharp contrast, at Abacus Bank, loan processors often started by ascertaining how much money customers wanted to borrow, and then reverse-calculated the income and asset figures in order to justify the loan amounts.” *Id.*

217. Recommendation for Dismissal, *supra* note 139.

218. *Id.*

219. 2018 NAPABA Convention, *supra* note 198.

220. *Id.*

221. Recommendation for Dismissal, *supra* note 139; Motions in Limine, *supra* note 95. Ken Yu, Jane Huang, Lily Quach, Andy Chen, and Julie Chen testified pursuant to

to the routine and pervasive nature of the falsifications and the widespread knowledge of the misconduct within the bank.²²² The Prosecution presented a seating chart of the Abacus loan department to show that indicted loan officers were scattered around the floor, with Defendant Tam sitting somewhere in the middle.²²³ The Prosecution argued that Defendant Tam must thus have been aware of behavior happening on a daily basis around him.²²⁴ Further, the Prosecution argued that the documents were so obviously false that Tam, Wong, and the bank's other underwriters should have caught the misrepresentations.²²⁵ Extrapolating from this evidence, the Prosecution argued that the high managerial agents of the bank must have known of the systematic fraud occurring at the bank.²²⁶ Despite Abacus' reports of the misconduct to law enforcement, the OTS, and Fannie Mae, as well as the bank's own investigation with two external consultants, the DA said Abacus' actions were "too little, too late" to avoid implication in the scheme.²²⁷

D. ABACUS BANK'S DEFENSE

In a jury trial in New York Supreme Court on June 3–4, 2015, after a four-month trial and nine days of jury deliberation, Abacus Bank was found "not guilty" on all eighty remaining counts.²²⁸ The jury also found the two defendant bank supervisors, Wong and Tam, not guilty of all charges against them.²²⁹ Abacus Bank's Defense team, namely, partner Kevin Puvalowski and associate Sarah Aberg, prevailed upon a showing that the DA's case depended on unreliable witness testimony and failed to prove that Fannie Mae suffered any losses as a result of the bank's alleged conspiracy.²³⁰ Additionally, following Abacus Trial I and before Abacus Trial II, the DA filed a Recommendation for Dismissal with the court.²³¹ The DA acknowledged that "the People believe that we cannot prove these charges beyond a reasonable doubt at a second trial. Furthermore, no additional appellate law has emerged to serve as a basis to re-argue these issues."²³²

cooperation agreements with the DA's Office. *Id.*

222. Recommendation for Dismissal, *supra* note 139.

223. *Abacus: Small Enough to Jail*, *supra* note 10.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. Press Release, Sheppard, Mullin, Richter & Hampton dated June 8, 2015, *supra* note 208.

229. Karen Freifeld, *Abacus Bank Acquitted of All Charges in N.Y. Mortgage Fraud Trial*, REUTERS (June 4, 2015), <https://www.reuters.com/article/us-abacus-federal-acquittal/abacus-bank-acquitted-of-all-charges-in-n-y-mortgage-fraud-trial-idUSKBN0OK21620150604>.

230. Recommendation for Dismissal, *supra* note 139.

231. See *Id.*

232. *Id.*

During *Abacus I* Trial, the Defense focused on the fact that Fannie Mae, the “victim,” never suffered losses or raised flags to the government.²³³ With no losses, there could be no fraud.²³⁴ Abacus showed in court that all of its loans came with large down payments from borrowers, and very few of the bank’s loans went into default.²³⁵ During the five-year period covered by the indictment, Abacus sold a little over 3,660 mortgages to Fannie Mae.²³⁶ The number of defaults totaled just nine, making the bank’s default rate 0.3 percent, 1/20th the nation’s average.²³⁷

As opposed to the “thousands” of fraudulent loans claimed in the indictment, the DA was only able to identify thirty-two allegedly fraudulent loans, despite five years of intensive investigation leading up to trial.²³⁸ This included the Ariel Chen loan that sparked the DA’s investigation in the first place, and was never sold to Fannie Mae.²³⁹ Moreover, Fannie Mae recovered the principal for the thirty-one loans it did purchase, and actually profited from the loans.²⁴⁰ The Defense introduced a chart at trial showing that Fannie Mae had in fact received transaction fees from each of those thirty-one loans, adding up to approximately \$130,000–\$140,000 in profit.²⁴¹ In addition, another Defense chart showed that Fannie Mae had received almost \$2.5 million in interest from just those thirty-one loans.²⁴² This evidence supported the Defense’s argument that, rather than losing its purchase price as a result of larceny or fraud, Fannie Mae actually made millions of dollars over and above the principal amount of the loans.²⁴³

At the beginning of the trial, the Prosecution called Susan Roma, a Fannie Mae executive, as a representative of the purported victim of Abacus Bank’s alleged misconduct.²⁴⁴ In cross examination, Roma expressly acknowledged that the Abacus loans performed, Fannie Mae lost no money, and in

233. 2018 NAPABA Convention, *supra* note 198.

234. *Abacus: Small Enough to Jail*, *supra* note 10. As stated by Defense during opening statements,

“Historians tell us that Abraham Lincoln loved riddles. And one of his favorites went like this. If you call a tail a leg, how many legs does a dog have? And the answer is four because calling a tail a leg doesn’t make it a leg. Calling Fannie Mae a victim of grand larceny and fraud is like calling a dog’s tail a leg. We have no loss. We have no harm. We have no larceny. We have no fraud.

Id.; 2018 NAPABA Convention, *supra* note 198.

235. Dave Lindorff, *Abacus Bank Fought the Law and Won, but It Came at a Cost*, CRAIN’S N.Y. BUSINESS (June 24, 2015), <https://www.crainnewyork.com/article/20150624/FINANCE/306219999/abacus-bank-fought-the-law-and-won-but-it-came-at-a-cost>.

236. Motions in Limine, *supra* note 95.

237. 2018 NAPABA Convention, *supra* note 198.

238. Motions in Limine, *supra* note 95.

239. *See* Indictment, *supra* note 7, counts 133–136; 2018 NAPABA Convention, *supra* note 198.

240. 2018 NAPABA Convention, *supra* note 198.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

fact Fannie Mae received every penny that it was entitled to under its contract with Abacus, including millions of dollars in interest.²⁴⁵ Notwithstanding the indictment's allegation that Abacus sold Fannie Mae "thousands" of fraudulent loans for "hundreds of millions" of dollars, Roma acknowledged that Fannie Mae did not ask Abacus to repurchase the vast majority of the thousands of loans sold during that five year period.²⁴⁶ Those loans were still performing at the time of the trial.²⁴⁷

The court rejected the legal theory advanced by the DA that larceny is committed at the time of the "taking."²⁴⁸ Instead, the Court agreed with Defense. It instructed the jury that "if the alleged victim received the economic value or benefit that it bargained for in the relevant transaction, there is no wrongful taking, and therefore, no larceny."²⁴⁹ The jury subsequently found that the alleged victim, Fannie Mae, *did* receive the economic benefit for which it bargained.²⁵⁰

The Defense also challenged the Prosecution's claim that the borrowers' actual income information was falsely inflated on the Verification of Employment forms.²⁵¹ Evidence presented by the Defense at trial suggested that a number of borrowers were able to make their mortgage payments because their actual income was considerably higher than what they had reported on their tax returns.²⁵² The Defense showed that some borrowers' purported low income was only what was reported to the IRS; since those borrowers were able to timely make their substantially higher mortgage payments, their unknown actual income had to be higher.²⁵³ The credibility of the Prosecution's borrower witnesses was considerably damaged by the contradiction between their claims that their real income matched what they were reporting to the IRS, and the evidence presented by the Defense.²⁵⁴ For example, Dong Lin, a borrower, conceded on cross examination that his actual income exceeded the number he gave the Abacus loan officer as reported on his tax return.²⁵⁵ Thus, the "misrepresentations" on the loan application alleged by the DA were not all actually misrepresentations, because certain borrowers were misreporting income on IRS returns.

Moreover, the DA's allegations that loans were put forth as unencumbered gifts were not fully supported during trial. The Defense argued that the line between "gifts" and "loans" is blurry in Chinese culture, and testimony of borrowers like Dong Lin suggested they were unable to distinguish loans

245. *Id.*

246. *Id.*

247. *Id.*

248. Recommendation for Dismissal, *supra* note 139, at 6.

249. *Id.*

250. *Id.*

251. 2018 NAPABA Convention, *supra* note 198.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

from gifts.²⁵⁶ Witness testimony at trial additionally supported the Defense's argument that funds reported on gift letters were mostly either real gifts or the borrower's own money— not, as the Prosecution claimed, loans that had to be paid back.²⁵⁷

Importantly, the DA misstated the Fannie Mae Standards that Abacus Bank had allegedly violated.²⁵⁸ The Defense advanced alternative, more accurate interpretations of the applicability, specificity, and consistency of the Fannie Mae Standards.²⁵⁹ The Standards referenced by the DA had come into effect after the financial crisis and did not apply to the period in the indictment.²⁶⁰ For instance, the DA told the jury that the loan officers were required to actively verify loan application information, when this was not true during the period covered by the indictment.²⁶¹ In fact, the Fannie Mae Standards did not require gift letters for the kind of loans that Abacus was selling to Fannie Mae.²⁶² Moreover, Roma conceded in her testimony that at the time Fannie Mae purchased each one of the loans from Abacus, no one from Fannie Mae was basing the purchase decision on any review of or reliance on a Verification of Employment or Gift Letter.²⁶³ Thus, Fannie Mae did not even rely upon the alleged misrepresentations Abacus Bank made to it.²⁶⁴

Additionally, although there was improper activity occurring by lower level loan officers as uncovered by Abacus' own internal investigation in 2010, Defense was able to show that the loan officers took steps to hide their misconduct from the underwriters and more senior officials at the bank.²⁶⁵ Witness testimony revealed that employees engaged in misconduct would stop talking when an underwriter came to the floor.²⁶⁶ They would forge signatures to make sure the signatures matched and everything looked normal to an underwriter when he or she looked at the file.²⁶⁷ Lily Quach, a former Abacus Bank loan officer, was one of several of the Prosecution's witnesses who confirmed the bank management's lack of knowledge of the alleged wrongdoing.²⁶⁸ She testified that the lower-level loan officers alerted the borrower to tell his employer to be prepared in order to deceive higher level underwriters as to the reliability of the Verification of Employment.²⁶⁹ The seating chart presented by Prosecution did not account for these work routines, which rebutted the DA's argument that Tam must have known about the

256. *Id.*

257. *Id.*

258. Recommendation for Dismissal, *supra* note 139, at 5.

259. *Id.*

260. Zeder, *supra* note 6.

261. Recommendation for Dismissal, *supra* note 139, at 5.

262. 2018 NAPABA Convention, *supra* note 198.

263. *Id.*

264. *Id.*

265. 2018 NAPABA Convention, *supra* note 198.

266. *Abacus: Small Enough to Jail*, *supra* note 10.

267. *Id.*

268. 2018 NAPABA Convention, *supra* note 198.

269. *Id.*

misconduct unraveling around him on the floor.²⁷⁰ Instead, it supported that Abacus Bank had been caught off guard by a small group of rogue employees who hid their misconduct from the bank's higher executives.²⁷¹

Defense argued that Fannie Mae, equipped with some of the best underwriters in the country, did not detect the misrepresentations in the loan files, and neither had Tam, Wong, the bank's other underwriters, or any of the Sung family.²⁷² The misrepresentations were difficult to detect because often-times the borrowers were themselves making false statements to the bank.²⁷³ Defense was able to provide evidence to the court that these borrowers made the same false statements on other mortgage papers with other banks.²⁷⁴ Although the DA argued that Abacus Bank did "too little, too late" to investigate the fraud, the Bank had taken proactive efforts after the Sung family discovered Ken Yu's fraud in 2010. Ultimately, the DA could not establish that the high managerial agents of the bank "must have known" of the systematic fraud occurring at the bank.²⁷⁵

Finally, a combination of witness and evidentiary issues made it impossible for the DA to prove its case against Abacus Bank beyond a reasonable doubt.²⁷⁶ The DA's case primarily rested on testimony from Ken Yu, the same loan originator associated with Ariel Chen's botched loan that sparked the DA's Prosecution of Abacus Bank in the first place.²⁷⁷ Ken Yu's testimony was riddled with lies.²⁷⁸ The DA's key cooperator with "the most thorough knowledge" of the alleged conspiracy was thus wholly uncredible.²⁷⁹ The DA's other cooperating witnesses, former employees of Abacus, also failed to testify to the routine and pervasive nature of the falsifications as well as the widespread knowledge of the misconduct within the bank.²⁸⁰ Additionally, the cooperating witnesses could not provide detailed and specific testimony in regards to the date, time, place, and circumstances as to be admissible by the court.²⁸¹

270. *Abacus: Small Enough to Jail*, *supra* note 10.

271. Morgenson, *supra* note 5.

272. *Id.*

273. Sarah Aberg.

274. *Id.*

275. Freifeld, *supra* note 229.

276. Recommendation for Dismissal, *supra* note 139, at 3.

277. *Id.* at 4.

278. *Abacus: Small Enough to Jail*, *supra* note 10.

279. Recommendation for Dismissal, *supra* note 139, at 4–5.

280. *Id.*

281. *Id.*; 2018 NAPABA Convention, *supra* note 198.

*It must be noted that in large part, Abacus Bank was able to succeed with this litigation because the N.Y. law, unlike federal law, does not hold a corporate entity criminally responsible for a felony for the conduct of its agents. *Id.* Abacus Bank would likely have been criminally liable under federal law which uses a civil respondeat superior theory to hold a corporation criminally liable for the act of any agent without any consideration of or concern for whether the management of the corporate entity had any knowledge of or involvement in the misconduct. *Id.*

IV. INEQUITY

Today, Abacus Bank, a bank deemed “small enough to jail” as opposed to “too big to fail,” remains the only United States bank criminally indicted for mortgage fraud related to the 2008 crisis.²⁸² Despite the “success” the Sung family achieved in the litigation by being found not guilty on all counts, the Sung family faced many negative consequences as a result of the DA’s choice to prosecute.²⁸³ The Sung family expended \$10 million on litigation costs but also lost time and resources that could have been dedicated to serving the community’s needs.²⁸⁴ After DA Vance announced the indictment of Abacus in 2012, Fannie Mae abruptly discontinued its selling relationship with the bank.²⁸⁵ Abacus was no longer able to transfer new mortgage loans that it originated from the community to Fannie Mae.²⁸⁶ In a 2018 interview, Thomas Sung stated: “During the prosecution, we lost all our major third-party relationships, such as Fannie Mae . . . Instead of making money from normal business, we couldn’t make business. We were actually coasting along and losing business and money.”²⁸⁷ Fannie Mae and Abacus Bank’s relations were restored in 2015 after Abacus defeated Vance’s claims.²⁸⁸ Nevertheless, the bank has never fully recovered.²⁸⁹ In 2017, Abacus originated just 276 loans, as compared to the 1,500 loans it serviced in high volume years prior to the indictment.²⁹⁰ Thomas Sung estimates the total monetary loss to Abacus resulting from DA Vance’s case to be around \$25 million.²⁹¹ A still more far-reaching repercussion is the denial of low interest rate housing loans to the NYC Chinese community, especially since the bank was a major lender and supporter of housing loans at the time of the indictment.²⁹² Using a leverage capital ratio of ten percent, Abacus has calculated that the cost to the Chinatown community was \$100 million of loans not given to first-time homebuyers and small businesses.²⁹³

Abacus Bank never brought a suit against the government in connection with the aggressive prosecution tactics used by the DA.²⁹⁴ Similarly,

282. *Abacus: Small Enough to Jail*, *supra* note 10; TAIBBI, *supra* note 11, at 49. According to Matt Taibbi, Abacus was “officially deemed small enough to destroy.” *Id.*

283. Avery, *supra* note 99.

284. *Id.*

285. Press Release, Abacus Fed. Savings Bank, Abacus Bank’s Relationship with Fannie Mae Has Been Restored (Sept. 1, 2015), <https://www.abacusbank.com/loans/fannie-mae-news>. Abacus Bank had had a contractual relationship to sell and service loans with Fannie Mae for over 25 years. *Id.*

286. *Id.*

287. Avery, *supra* note 99.

288. Press Release, Abacus Federal Savings Bank dated Sept. 1, 2015, *supra* note 285.

289. Avery, *supra* note 99.

290. *Id.*; Press Release, Abacus Federal Savings Bank dated Sept. 1, 2015, *supra* note 285.

291. Avery, *supra* note 99.

292. Press Release, Abacus Federal Savings Bank dated Sept. 1, 2015, *supra* note 285.

293. Testimony of Jill Sung, *supra* note 4, at 2.

294. Sarah Aberg.

Abacus Bank did not attempt to allege selective prosecution to quash the DA's case.²⁹⁵ Could it have? Ultimately, Abacus Bank's Defense team advised Abacus against pursuing either avenue.²⁹⁶

A. *Malicious Prosecution*

To plead a viable malicious prosecution claim under 42 USC § 1983, a plaintiff must demonstrate (1) a violation of its Fourth Amendment rights²⁹⁷, and (2) and that it can establish the elements of a malicious prosecution claim under New York law.²⁹⁸ The elements of a malicious prosecution claim under New York law are: (1) the initiation or continuation of a criminal proceeding against Abacus; (2) termination of the proceeding in Abacus' favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions.²⁹⁹ A grand jury indictment, such as the that of Abacus Bank in 2012, creates a presumption of probable cause.³⁰⁰ Moreover, Abacus Bank's omnibus motion to dismiss had been denied (with the exception of the Martin Act claims), and the jury took two weeks to deliberate on the charges, confirming that there was probable cause for finding that Abacus Bank had committed the crimes charged by the DA.³⁰¹ As a result, Defense would not be able to satisfy the third element.³⁰²

Absolute immunity would also operate to bar any malicious prosecution claim asserted by Abacus Bank against the DAs in their individual capacities.³⁰³ “[A] prosecutor is entitled to absolute immunity for actions taken within the scope of his or her official duties in initiating and pursuing a criminal prosecution and in presenting the People's case.”³⁰⁴ Prosecutorial immunity is broad and absolute immunity protects a prosecutor's decision to prosecute, even if that decision was motivated by bad faith.³⁰⁵ Further, Eleventh Amendment immunity protects a DA acting in his or her official capacity from a suit for damages.³⁰⁶ Although state officials acting in their

295. *Id.*

296. *Id.*

297. U.S. CONST. amend. IV (The right against unreasonable searches and seizures).

298. *Manganiello v City of New York*, 612 F.3d 149, 160–161 (2d Cir. 2010).

299. *Broughton v. State of New York*, 37 N.Y.2d 451, 457 (1975), *cert. denied sub nom*; *Schanbarger v. Kellogg*, 423 U.S. 929 (1975).

300. *Leung v. City of New York*, 216 A.D.2d 10, 11 (1st Dept. 1995). “That presumption may be rebutted only by evidence that the indictment was procured by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith.” *Manganiello*, 612 F.3d at 162.

301. Sarah Aberg.

302. *Id.*

303. *Lam v. N.Y.C.*, 2018 N.Y. Slip Op. 31473, 12 (N.Y. Sup. Ct. 2018).

304. *Spinner v County of Nassau*, 103 AD3d 875, 877 (2d Dept 2013)

305. *See e.g. Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994). “Absolute immunity protects a prosecutor from § 1983 liability for virtually all acts, regardless of motivation, associated with his function as an advocate.”

306. *Ying Jing Gan v. City of New York*, 996 F.2d 522, 529 (2d Cir. 1993). “To the extent that a state official is sued for damages in his official capacity, such a suit is deemed to be a suit against the state, and the official is entitled to invoke the Eleventh Amendment

official capacities may be sued for injunctive or prospective relief, Abacus Bank did not have allegations of an ongoing violation that would qualify for such relief.³⁰⁷

In fact, one loan officer who was indicted with Abacus Bank, did file suit against the DA for malicious prosecution.³⁰⁸ She alleged that “the DA’s office “bullied” Abacus Bank, which is a “small community bank servicing the Chinese community,” to build a reputation as being “tough on ‘white collar’ crime.”³⁰⁹ Her complaint argued that, “[t]he malicious prosecution was initiated by defendants without legal justification and without probable cause, in that defendants caused the commencement and continuation of criminal proceedings against Plaintiff, the proceedings terminated in favor of Plaintiff, and in that the action was commenced and continued intentionally and with malice and deliberate indifference to Plaintiff’s rights.”³¹⁰ This suit was defeated at the early motion to dismiss stage, based on the probable cause and absolute immunity issues discussed above.³¹¹

B. *Selective Enforcement*

In New York, to state a cause of action for violation of equal protection based upon a claim of selective enforcement of a statute or regulation, the plaintiff must allege that “first, a person (compared with others similarly situated) is selectively treated; and second, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.”³¹² The claim of unequal protection is treated not as an affirmative defense to criminal prosecution or the imposition of a regulatory sanction but rather as a motion to dismiss or quash the official action.³¹³ Although the Abacus Defense team considered the use of this strategy, prior to trial the court granted the DA’s motion in limine to preclude any reference to other financial institutions.³¹⁴ Without the ability to even bring in evidence of the failure rate of other banks during the financial crisis, Defense decided the theory’s chances of success were low.³¹⁵

Even if any potential viability of pleading selective enforcement remained, the Defense team did not advise Abacus to pursue the theory because Defense knew that as a practical matter, Abacus Bank would likely waste resources and still not be able to establish its claim for selective

immunity belonging to the state.”; *see also* *Giaquinto v. Commissioner of N.Y. State Dept. of Health*, 11 N.Y.3d 179, 187.

307. *Giaquinto*, 11 N.Y.3d at 188.

308. *Lam*, 2018 N.Y. Slip Op. 31473.

309. *Id.* at 3.

310. *Id.* at 5.

311. *Id.* at 10–15.

312. *Bower Assocs. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 631 (2004) (citing *Harlen Assoc. v. Inc. Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001)).

313. *People v. Goodman*, 31 N.Y.2d 262, 268–69 (1972).

314. *Sarah Aberg*.

315. *Id.*

prosecution against the government as the doctrine is stacked against odds of success.³¹⁶ According to the New York high court, “common sense and public policy” dictate that the burden of proving a claim of selective enforcement to quash a DA’s case is “a weighty one.”³¹⁷ The presumption for this higher burden of proof is that the enforcement of laws is undertaken in good faith and without discrimination.³¹⁸ Moreover, courts hold that latitude must be accorded to authorities charged with making decisions related to legitimate law enforcement interests, at times permitting them to proceed with an unequal hand.³¹⁹ Nevertheless, despite the Sung family’s ultimate decision not to pursue the claim, this was arguably an example of selective prosecution of an Asian American company in the context of corporate criminal liability. Discussing the prosecutorial discretion displayed by Vance and the NY District Attorney’s office in deciding to target Abacus Bank thus remains valuable as a source of guidance to encourage prosecutors to use their power wisely and also promote accountability when prosecutors use their power abusively.

C. *Similarly Situated and Selectively Treated*

First, Abacus, compared to other similarly situated financial institutions, was selectively treated. Selective prosecution violates the premise of the constitutional guarantee of equal protection, which provides that all persons similarly situated must be treated alike.³²⁰ The test for selective prosecution is “whether a prudent person, looking objectively at the incidents, would think them roughly equivalent.”³²¹ As discussed in depth at Subpart I(i), the lender practice of issuing fraudulent loans that borrowers could not afford and that could cause massive losses to investors in mortgage securities, was widespread.³²² Abacus Bank was arguably “similarly situated” to any other financial institution suspected of issuing fraudulent mortgages during the 2008 financial crisis, yet it was the only bank criminally prosecuted.³²³

For example, LibertyPointe Bank (LibertyPointe), a New York bank with 3 branches and assets of \$216.5 million as of 2009, was similarly situated to Abacus but was not criminally prosecuted.³²⁴ On July 16, 2009, federal and state regulators issued LibertyPointe a consent order to cease and desist using unsafe or unsound banking practices related to bad real estate loans.³²⁵

316. *Id.*

317. 303 W. 42nd St. Corp. v. Klein, 46 N.Y.2d 686, 694 (1979).

318. *Id.*; see, e.g., United States v. Falk, 479 F.2d 616, 620 (7th Cir. 1973).

319. See 303 W. 42nd St. Corp., 46 N.Y.2d at 694.

320. Bower Assocs., 2 N.Y.3d at 630.

321. *Id.* at 631 (quoting Penlyn Dev. Corp. v. Inc. Vill. of Lloyd Harbor, 51 F. Supp. 2d 255, 264 (E.D.N.Y. 1999)).

322. See *supra* Subpart I(i).

323. See TAIBBI, *supra* note 11, at 47–49.

324. David Jones, *Boymelgreen’s LibertyPointe Bank shut down*, The Real Deal (Mar. 11, 2010), <https://therealdeal.com/2010/03/11/shaya-boymelgreen-liberty-pointe-bank-shut-down-by-state-department-of-banking-assets-sold-to-valley-national-bank>.

325. In the Matter of LibertyPointe Bank, New York, New York, Order to Cease

LibertyPointe was ordered to, among other things, cease and desist from operating with excessive risk in relation to the kind and quality of assets held by the bank; operating with inadequate management supervision and oversight by the board of directors of LibertyPointe to prevent unsafe or unsound practices as well as violations of law and regulation; operating with an excessive level of adversely classified loans and/or delinquent loans; operating with inadequate capital in relation to the kind and quality of assets held by the bank; and operating with inadequate loan policies, processes, and procedures.³²⁶ The final order issued against LibertyPointe on October 20, 2009, disclosed the undercapitalized institution's total risk-based capital ratio³²⁷ to be 7.77 percent.³²⁸ On March 11, 2010, at a cost of \$24.8 million to the FDIC, New York City's LibertyPointe Bank was shut down by the N.Y.S. Dept. of Banking without having faced criminal prosecution.³²⁹

Countrywide Financial (Countrywide) is another, larger example of a federally chartered depository institutions similarly situated to Abacus that was not criminally prosecuted in connection to the 2008 financial crisis. In 2009 the SEC brought an enforcement action against Countrywide and former CEO Angelo Mozilo, resulting in Mozilo paying a \$22.5 million penalty, the SEC's largest-ever financial penalty against a public company's senior executive.³³⁰ The charges stemmed from 2005 to 2007, during which Countrywide engaged in an unprecedented relaxation of its underwriting standards and was writing increasingly risky loans, which senior executives were warned could ultimately inhibit the company's ability to sell them.³³¹ As early as September 2004, Countrywide executives recognized that many of the loans they were originating could result in "catastrophic consequences."³³² However, they did not stop.³³³ To the public, Countrywide portrayed itself as underwriting mainly prime quality mortgages using high underwriting standards, but it concealed its true nature as an increasingly reckless

and Desist, FDIC (July 16, 2009), *available at*: <https://www.fdic.gov/bank/individual/enforcement/2009-07-12.pdf>.

326. *Id.* at 2–3.

327. FED. DEPOSIT INS. CORP., CAPITAL, <https://www.fdic.gov/regulations/safety/manual/section2-1.pdf>. Under the Dodd-Frank Act, each bank is required to have a total risk-based capital ratio of 8 percent. *Id.*

328. Supervisory Prompt Corrective Action Directive, FED. DEPOSIT INS. CORP. (October 20, 2009), <https://www.fdic.gov/bank/individual/enforcement/2009-10-73.pdf>.

329. *Failed Bank List*, *supra* note 4; Aaron Elstein, *FDIC Playing Dangerous Game of Kick the Can With Problem Banks*, *Critic Says*, INVESTMENT NEWS (March 29, 2010), <https://www.investmentnews.com/fdic-playing-dangerous-game-of-kick-the-can-with-problem-banks-critic-says-27247>.

330. Press Release, SEC, Former Countrywide CEO Angelo Mozilo to Pay SEC's Largest-Ever Financial Penalty Against a Public Company's Senior Executive (Oct. 15, 2010), <https://www.sec.gov/news/press/2010/2010-197.htm>.

331. Press Release, SEC, SEC Charges Former Countrywide Executives With Fraud (June 4, 2009), <https://www.sec.gov/news/press/2009/2009-129.htm>.

332. FIN. CRISIS INQUIRY COMM'N, *supra* note 1, at xxii.

333. *Id.*

lender.³³⁴ Mozilo privately described one Countrywide product as “toxic,” and said another’s performance was so uncertain that Countrywide was “flying blind.”³³⁵

Despite being similarly situated to other financial institutions that never faced criminal prosecution in connection with the financial crisis, Abacus Bank alone was criminally charged. As discussed in depth at Subpart I(ii), all financial institutions (with the noted exception of Abacus), went criminally unpunished in connection with the 2008 financial crisis.³³⁶ The fact that only Abacus bank faced criminal charges constitutes selective treatment.

DA Vance sent subpoenas to Wall Street banks such as Goldman Sachs, showing that they were on his radar and he was aware of their involvement in the 2008 financial crisis.³³⁷ But instead, Vance chose to use a small, globally non-consequential Chinatown bank as the scapegoat for the financial crisis.³³⁸ Abacus Bank was the 2651st largest bank in the U.S., with just \$300 million in assets, and had never trafficked in the questionable mortgages that had brought down the U.S. and world economies.³³⁹ Abacus Bank’s founder, Thomas Sung, subjected the bank’s loan practices to rigorous examination and standards.³⁴⁰ Through the financial crisis, the residential mortgage portfolio Abacus originated and served for Fannie Mae, never had a delinquency rate higher than 0.60 percent.³⁴¹ Moreover, the Sung family uncovered the fraud at the bank itself, reported it to law enforcement, the OTS, and Fannie Mae, and fired the employee in question.³⁴² The Bank even hired its own external auditors to ferret out internal fraud.³⁴³ Abacus was more than amenable to accepting greater regulatory and compliance oversight when on February 16, 2011, the OTS issued an order to cease and desist and designated a committee to monitor and coordinate Abacus Bank’s compliance with the order.³⁴⁴ Abacus was never subject to an SEC enforcement action nor any private civil litigation in connection with its banking activities during the financial crisis.³⁴⁵

334. Press Release, SEC dated June 4, 2009, *supra* note 331.

335. *Id.*

336. *See supra* Subpart I(i)

337. TAIBBI, *supra* note 11, at 4, 49.

338. *Id.* at 5.

339. Zeder, *supra* note 6.

340. *Abacus: Small Enough to Jail*, *supra* note 10; Testimony of Jill Sung, *supra* note 4, at 1–2.

341. Testimony of Jill Sung, *supra* note 4, at 1–2.

342. *Abacus: Small Enough to Jail*, *supra* note 10; Motions in Limine, *supra* note 95.

343. *Id.*

344. In the Matter of Abacus Federal Savings Bank, Order to Cease & Desist, OFFICE OF THRIFT SUPERVISION (February 16, 2011), available at: <https://occ.gov/static/ots/enforcement/97602.pdf>; Zeder, *supra* note 6.

345. *Abacus: Small Enough to Jail*, *supra* note 10; *SEC Enforcement Actions Addressing Misconduct That Led to or Arose From the Financial Crisis*, *supra* note 54. Conversely the SEC brought enforcement actions in connection with the financial crisis against 204 entities and individuals and 94 CEOs, CFOs, and other Senior Corporate Officers charged. *Id.* Yet, Abacus Bank, against whom the SEC filed no enforcement actions in connection with the financial crisis, was charged by the DA under the theory that management “must have

Abacus Bank did not fail.³⁴⁶ Neither did it require assistance from the U.S. government as so many financial institutions did in connection with the 2008 financial crisis.³⁴⁷ Nevertheless, unlike other financial institutions that did fail or require financial assistance from the government after the crash, Abacus Bank was not even offered a deferred prosecution agreement by the state.³⁴⁸ The DA selectively treated Abacus and dedicated massive government resources to vigorously prosecuting the community bank.³⁴⁹

D. *Impermissible Considerations*

Second, the DA's treatment of Abacus Bank was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure the corporation. The test for impermissible considerations requires the plaintiff to demonstrate that the defendants acted "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances" or that "defendants maliciously singled out its application [for a multi-purpose project] with the intent to injure [the plaintiff]."³⁵⁰ Ordinarily, a strong inference of illicit motive will be all that can be expected because admission of intentional discrimination is likely to be rare; law enforcement officials are unlikely to avow that their intent was to practice constitutionally proscribed discrimination.³⁵¹ Proof of intent nevertheless may appear from a convincing showing of a grossly disproportionate incidence of nonenforcement against others similarly situated in all relevant respects save for that which furnishes the basis of the claimed discrimination.³⁵² The more convincing is the demonstration of the "unequal hand" — the grosser the disparity of enforcement, and the greater the similarity between those prosecuted and those not prosecuted — the stronger will be the inference of illicit motive, since conscious discrimination may then stand out as the only reasonable explanation for the pattern of enforcement.³⁵³ Importantly, because the importance of the right to be free from impermissible selective enforcement must be of more than theoretical value, the burden of demonstrating a violation, albeit heavy, must not be so heavy as to preclude any realistic opportunity for success. "Latitude should be allowed in this complex area of proof."³⁵⁴

known." *Id.*

346. *Failed Bank List*, *supra* note 4; Testimony of Jill Sung, *supra* note 4, at 2.

347. Morgenson, *supra* note 5.

348. TAIBBI, *supra* note 11, at 46–49.

349. *Id.*

350. *Masi Mgt. v. Town of Ogden*, 273 A.D.2d 837, 838 (2000) (citations omitted).

351. *See* 303 W. 42nd St. Corp. v. Klein, 46 N.Y.2d 686, 695 (1979).

352. *cf.* *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

353. *See* 303 W. 42nd St. Corp., 46 N.Y.2d at 695.

354. *People v. Walker*, 14 N.Y.2d 901, 902 (1964).

According to Jill Sung, it is “pretty transparently clear that race bias against Asian Americans, Chinese Americans played a role We saw it in the way they approach the case; we saw it in the way they approached their witnesses; we saw it in the way they approached our employees,” she said.³⁵⁵ From start-to-finish of the litigation, Abacus Bank and nineteen of its Asian American employees were prosecuted in a uniquely aggressive manner.³⁵⁶ For example, on May 31, 2012, when charges were announced, nine Abacus employees, mostly women, were chained together and marched into court in front of the row of media in a perp walk that created a media frenzy.³⁵⁷ “Reporters . . . were treated to this extraordinary photo opportunity, this almost Stalinist looking chain gang” of Asian Americans, says journalist Matt Taibbi, who wrote about the early stages of the prosecution in his 2014 book *The Divide*.³⁵⁸ “It was like a scene out of Bagram or Guantanamo Bay - all that was missing were the hoods.”³⁵⁹ Among the arrested were two loan-department employees who had already been arraigned and posted bail but still were asked by prosecutors to show up at the courthouse.³⁶⁰ According to Thomas Sung, “They had to go through the whole process again, including mug shots and fingerprinting . . . This time for the cameras.”³⁶¹ These two employees were later tried and acquitted.³⁶² This chain-gang display was very different from the painstaking measures that are typically taken to cover the defendant’s handcuffs to prevent a presumption of guilt.³⁶³ DA Vance says there were security issues behind the decision to march the former employees through the court’s hallways in handcuffs.³⁶⁴ “It was very unfortunate, but it happened,” said Vance.³⁶⁵ However, Puvalowski, head of Abacus’ Defense team, stated that the Abacus employees were “humiliated for no good reason.”³⁶⁶

From the start of the litigation, prosecution used prejudicial language to describe Abacus Bank’s behavior. It claimed in the indictment that Abacus had sold Fannie Mae “thousands of fraudulent mortgages” despite the prosecution’s own discovery materials and bill of particulars only identifying 31 allegedly fraudulent loans.³⁶⁷ The prosecution also claimed “Abacus Bank sold hundreds of millions of dollars’ worth of Fraudulent Mortgages to Fannie

355. Yu, *supra* at 113.

356. *Abacus: Small Enough to Jail*, *supra* note 10.

357. *Id.*

358. Patrice Taddonio, *After the Crash, Big Banks Got Bailouts. Abacus Faced Charges*, FRONTLINE (Sept. 12, 2017), <https://www.pbs.org/wgbh/frontline/article/after-the-crash-big-banks-got-bailouts-abacus-faced-charges>; *Abacus: Small Enough to Jail*, *supra* note 10.

359. TAIBBI, *supra* note 11, at 6.

360. Lindorff, *supra* note 235.

361. *Id.*

362. *Id.*

363. Yu, *supra* at 113.

364. Taddonio, *supra* at 358; *Abacus: Small Enough to Jail*, *supra* note 10.

365. See sources cited *supra* note 364.

366. *Abacus: Small Enough to Jail*, *supra* note 10.

367. Motions in Limine, *supra* note 95.

Mae” despite the fact that the bill of particulars disclosures state that allegedly fraudulent mortgage loans total only \$12,363,000.³⁶⁸ The indictment’s unsupported comments suggesting a huge magnitude of allegedly fraudulent loans was inconsistent with the District Attorney’s own disclosures in the bill of particulars.³⁶⁹ However, this gross exaggeration insinuating Abacus Bank’s guilt was consistent with the District Attorney’s general aggressive prosecution tactics used against Abacus. These statements which were completely without support served only to unjustly prejudice the Defendants.³⁷⁰

The prejudicial consequences that resulted from Vance’s aggressive prosecution of Abacus were apparent from the press’s limited coverage of the case, in which the press mostly upheld the notion that the Abacus Bank indictment was aimed at the head of the financial crisis.³⁷¹ For instance, a New York Times article issued the same day as Vance’s press release announcing the indictment, stated: “The indictment against the bank and its employees describes the sort of scheme that led to the financial crisis of 2008, when the risk of mortgages to borrowers was disguised and passed on to investors.”³⁷² Vance’s grandiose claims in regards to Abacus’ alleged wrongdoing set up Abacus as the fall guy for the crisis, and gave Vance bragging rights for bringing the first indictment in New York of a bank since the BCCI crisis in 1991.³⁷³ Later, in papers like the Wall Street Journal, James was referred to as the DA who “indicted a bank for mortgage fraud.”³⁷⁴

In his quest for a trophy in the form of prosecuting a bank in connection with the 2008 crisis, Vance failed to take into account the cultural context surrounding the suit against Abacus Bank. Abacus Bank’s practices are largely influenced by the community the bank primarily serves.³⁷⁵ Abacus Bank understood the cash economy in which their customers operate and the significance of cash flow as a form of collateral. Fannie Mae itself had written to Abacus acknowledging Chinese customers’ cultural and socioeconomic need for informal and flexible lending practices, stating in an email from 2012: “We recognize that you have very unique needs that are closely linked to the borrowers you serve. While doing anything customized in this environment is very difficult, the team is committed to doing whatever we can to develop solutions that meet the needs of your culturally unique clientele.”³⁷⁶ According to Defense, Fannie Mae itself was conceding here that Abacus is in Chinatown, where there are first-generation Americans, special

368. *Id.*

369. *Id.*

370. *Id.*

371. TAIBBI, *supra* note 11, at 6.

372. Russ Buettner, *Abacus Bank Charged With Mortgage Fraud*, NY TIMES (May 31, 2012), <https://www.nytimes.com/2012/06/01/nyregion/abacus-bank-charged-with-mortgage-fraud.html>.

373. TAIBBI, *supra* note 11, at 5, 11.

374. *Id.* at 7.

375. Testimony of Jill Sung, *supra* note 4.

376. *Abacus: Small Enough to Jail*, *supra* note 10.

needs individuals, and thousands of small businesses, and that the bank thus serves the unique challenges faced by the demographics of its community.³⁷⁷

Chinese culture influenced the banking practices of Abacus and while this was acknowledged by Fannie Mae itself, it was lost on the DA in its case against the bank. Abacus Bank illustrates the importance of informal and flexible lending practices to bringing the unbanked and underbanked members of racial and ethnic minorities into the formal market for financial services and credit, a notion known as “the democratization of credit.”³⁷⁸ In failing to understand the cultural context of an ethnic minority bank and its customers, the United States government ultimately exploits and reinforces economic stereotypes and biases about them.³⁷⁹

Abacus Bank was the first bank indicted in New York City since 1991.³⁸⁰ The infrequency of corporate indictments reflects the general concern of collateral consequences — the idea that indicting a corporation often leads to the demise of the entire business, thus harming many innocents—including customers, creditors and uninvolved employees.³⁸¹ U.S. courts have thus avoided overzealous prosecution of companies after the collapse of Enron and its accounting firm Arthur Andersen in 2001.³⁸² Additionally, in 1989 Section 308 FIRREA established the goal to preserve the number of MDIs, which would include Abacus Bank.³⁸³ In consideration of this, DA Vance’s aggressive prosecution of Abacus was unusual, especially when it could have destroyed Abacus. DA Vance risked the failure of a minority-owned institution catering to the Chinese American community, though he had not been willing to risk the failure of any other of the numerous financial institutions tied to the 2008 financial crisis. And Abacus Bank’s failure was a real possibility. Following the indictment, the FDIC, the OCC, and the DA were worried about a run occurring at Abacus.³⁸⁴ After the DA’s aggressive May 31, 2012 press release, the probability of Abacus Bank’s failure was so high that the OCC and FDIC had staff on site of the Bank in the days following the indictment, prepared to close and liquidate the bank.³⁸⁵ This demonstrates how both state and federal authorities were concerned that prosecution of the community bank would result in bank failure, job losses, and other collateral damage.³⁸⁶ Nevertheless, the DA proceeded with his prosecutorial decision that the alleged fraud was rampant enough that the institution Abacus Bank

377. *Id.*

378. Regina Austin, “*Abacus: Small Enough to Jail*”: A Minority Bank, Racial Bias, and the Democratization of Credit, UPENN LAW (Feb. 26, 2017), <https://www.law.upenn.edu/live/news/6864-abacus-small-enough-to-jail-a-minority-bank-racial#sthash.MWNyr3KN.dpbs>.

379. *Id.*

380. Taddonio, *supra* at 358.

381. GARRETT, *supra* note 74; TAIBBI, *supra* note 11, at 14–18.

382. EISINGER, *supra* note 75.

383. *See* 103 Stat. 183, *supra* note 105.

384. TAIBBI, *supra* note 11, at 49.

385. 2018 NAPABA Convention, *supra* note 198.

386. *Id.*

itself, and not just the individuals, needed to face criminal charges, even if it meant the demise of the Chinatown-based community bank. In light of the necessity of banks in the United States that are dedicated to serving minority communities, which otherwise would be without access to banking capabilities, and of the high risk of failure posed by prosecution of the bank, the DA's failure to take the cultural influences at play with Abacus's banking practices into account during trial amounted to selective prosecution based on the impermissible consideration of race.

The DA's grossly disproportionate incidence of nonenforcement against others similarly situated to Abacus Bank in all relevant respects save its minority status may be in part explained by the concept of "Whiteness of Property." In her article, "Whiteness as Property," Cheryl Harris examines how whiteness, initially constructed as a form of racial identity, evolved into a form of property that is historically and presently protected in American law.³⁸⁷ Following the period of slavery and conquest, whiteness became the basis of racialized privilege—a type of status in which white racial identity provided the basis for allocating societal benefits both private and public in character.³⁸⁸ These arrangements were ratified and legitimated in law as a type of status property.³⁸⁹ Even after legal segregation was overturned, whiteness as property continued to serve as a barrier to effective change as the system of racial classification protected entrenched power.³⁹⁰ "Whiteness as property" may explain the white privilege, the race-neutral perception of other banks, compared to an Asian American or minority-owned bank. The core characteristic of whiteness as property is the legal legitimation of expectations of power and control, which enshrines the status quo of defining the privileged white majority as a neutral baseline to which other ethnicities are compared.³⁹¹ However, minority-owned banks such as Abacus are excluded from certain privileges enjoyed by businesses within the circle of whiteness, such as clientele familiar and comfortable with U.S. financial practices.³⁹² Moreover, MDIs receive criticism from the general perception that they are risky, low-performing and ill-advised banking alternatives.³⁹³ MDIs suffer from the same racially driven perceptual biases that convince investors to label minority businesses as "risky," despite data indicating otherwise.³⁹⁴ Unlike large banks who have easy access to capital and can

387. Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 8, 1707–1791 (June 1993).

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.* at 1715.

392. Testimony of Jill Sung, *supra* note 4.

393. Salem Zelalem, *Minority-Owned Banks: Doing More with Less*, UVA DARDEN IDEAS TO ACTION (Apr. 2, 2020), <https://ideas.darden.virginia.edu/minority-owned-banks-more-with-less>.

394. *Id.* MDI and non-MDI institutions perform with equivalent efficiency in terms of return on assets. *Id.*; See also MORGAN STANLEY, THE GROWING MARKET INVESTORS ARE MISSING (2018), <https://www.morganstanley.com/content/dam/msdotcom/mcil/growing-market-investors-are-missing.pdf>.

afford to leverage that capital to take on more risk to increase their potential for return, as a small, family-owned bank catering to Chinese immigrants, Abacus has limited access to outside capital, and its only reliable source of capital is retained earnings.³⁹⁵ Abacus must face the high cost of operating in a community where education and per capita income is disproportionate to loan demand.³⁹⁶ This further challenges its ability to survive and attract customers that meet the regulatory agencies' lending guidelines.³⁹⁷ Abacus could therefore not maintain these standards that are expected of the larger, more powerful financial institutions which cater to serve mostly Caucasian clients.³⁹⁸ Whiteness as property continues to stand in the way of the advancement of Asian American minority members, as seen by how expected and requisite banking practices operate to protect entrenched white power.³⁹⁹

Ultimately the indictment put on trial not just the bank itself, but the reputation of Chinese immigrants and the cash culture of Chinatown.⁴⁰⁰ The litigation had social consequences for the reputation of the bank and the Chinese American community at large. For Thomas Sung, the indictment of the bank "cast a shadow" on the entire community, and he feared that the evidence presented over the course of the long trial suggested that "everyone the bank deals with is a liar" and that "Chinese people are not law-abiding."⁴⁰¹

CONCLUSION

While Abacus may not have been able to establish selective enforcement or malicious prosecution in a courtroom because of the way the doctrines are stacked, the Abacus Bank trial still serves as a potential lesson for future prosecutors to understand and use as guidance in their decision making.

When the financial institutions came under fire after the market crash in 2007, too-big-to-fail institutions like Morgan Stanley, Goldman Sachs, JPMorgan, Chase, and Citicorp had issued \$4.8 trillion in fraudulent mortgages and had received a \$700 billion government bailout, paid a total of \$110 billion in fines, and were given deferred prosecution and non-prosecution agreements.⁴⁰² DA Vance admits in the film that he considers much of what the big banks did leading up to the financial crisis as "less than ethical," but he did not seek any indictments against them.⁴⁰³ Essentially, he says that it would have been too hard to prove charges against the big banks.⁴⁰⁴ The

395. Testimony of Jill Sung, *supra* note 4, at 5.

396. *Minority Banks*, INDEP. COMM. BANKERS OF AM., <https://www.icba.org/advocacy/our-positions-a-z/minority-banks>.

397. *Id.*

398. Testimony of Jill Sung, *supra* note 4.

399. Harris, *supra* note 387.

400. Jiayan Fan, *The Accused*, THE NEW YORKER (Oct. 5, 2015), <https://www.newyorker.com/magazine/2015/10/12/the-accused-jiayang-fan>.

401. Austin, *supra* note 378.

402. *Abacus: Small Enough to Jail*, *supra* note 10.

403. *Id.*

404. *Abacus: A Little Bank in the Midst of a Global Catastrophe*, LAW OFFICE OF

former U.S. Attorney for the Southern District of New York, Preet Bharara, has said the same thing on numerous occasions.⁴⁰⁵ The FCIC's chairman Phil Angelides cited the lack of action as sending a message to Wall Street that consequences for individuals would be minimal.⁴⁰⁶ Amidst this environment, DA Vance wanted to send the message that in fact, there would be consequences for some corporations and individuals.⁴⁰⁷

Vance chose the "right case," but the "wrong bank," according to Puvalowski.⁴⁰⁸ Unlike the banks that foreclosed or required bailout in connection with the crisis, Abacus never invested in mortgage-backed securities, nor did it ever originate any subprime mortgages.⁴⁰⁹ Rather, Abacus continued about its business.⁴¹⁰ While many larger institutions had pulled back from residential lending after the financial crisis, Abacus Bank was keeping its loan spigot open.⁴¹¹ Abacus Bank held one of the nation's lowest default rates and in late 2009 Abacus's default rate was just one-twentieth of the national average rate of 6.26 percent.⁴¹²

Nevertheless, at the press conference announcing the indictment, DA Vance directly linked Abacus Bank's alleged conduct to the financial crisis, stating: "The lessons of the financial crisis are still being learned. The public must have confidence that when a bank issues a loan that it later re-sells to Fannie Mae, and by extension the nation's investors, it will engage in honest and ethical practices and follow the rules set by regulators."⁴¹³ The DA charged Abacus Bank by arguing that the loans that triggered the DA's case against the bank were just like the subprime loans that triggered the 2008 financial crisis, although they had not yet defaulted in the first few years, they were likely to go bad later on.⁴¹⁴

Repeatedly, DA Vance pushed the prosecution against Abacus too far. The indictment itself acknowledges that Abacus Bank never dealt in securities, yet the DA chose to pursue Martin Act claims, which clearly require actions involving securities.⁴¹⁵ Even more alarmingly, DA Vance filed this case even though his investigation found that Fannie Mae had incurred few or no losses on the loans.⁴¹⁶ Indeed, Prosecution conceded the lack of loss during

SAM WINSTON (Feb. 28, 2018), <https://samwinstonlaw.com/abacus-little-bank-midst-global-catastrophe>.

405. *Id.*

406. Lydia DePillis, 10 Years After the Financial Crisis, Have We Learned Anything?, CNN (Sept. 13, 2018), <https://money.cnn.com/2018/09/13/news/economy/financial-crisis-10-years-later-lehman/index.html>.

407. *Id.*

408. Freifeld, *supra* note 229.

409. Morgenson, *supra* note 5.

410. *Id.*

411. *Id.*

412. *Id.*

413. Press Release, N.Y. Cty. DA's Office dated May 31, 2012, *supra* note 9.

414. 2018 NAPABA Convention, *supra* note 198.

415. Indictment, *supra* note 7.

416. Motions in Limine, *supra* note 95; Recommendation for Dismissal, *supra* note

trial.⁴¹⁷ Fannie Mae, the alleged “victim,”⁴¹⁸ had profited by more than \$100 million from loans originated by Abacus Bank. One must seriously question why a DA would prosecute an institution for larceny, when there was never any financial loss suffered.

The charges against Abacus Bank were announced in a flashy press conference with DA Vance assuring the public that “Loan schemes based on fraud inevitably will unravel, as this one did. Today’s indictment reaffirms our commitment to transparency and straight dealing in the financial markets. We cannot settle for less.”⁴¹⁹ The DA portrayed Abacus Bank as having caused the 2008 financial crisis when in fact the DA was aware that this was not true. By the time Abacus Bank was charged by the DA in connection with the 2008 financial crisis, the Financial Crisis Inquiry Report had already been released a year earlier establishing the causes of the financial crisis, and the financial institutions deemed “too big to fail” had already been effectively bailed out by the government.⁴²⁰

While some have accused the DA’s office of racial bias, others have argued that the evidence does not really stand up, as it appears that the Sung family was singled out not for their ethnic origins, but because they were an easy target.⁴²¹ DA Vance himself has stated that he thinks “the characterizations that this was somehow a cultural bias on the office’s part — entirely misplaced and entirely wrong I felt that our handling of the bank was consistent with how we would have handled the bank if we were investigating a bank that serviced the South American community or the Indian community.”⁴²² At the end of the day, DA Vance may simply have believed, albeit incorrectly, that this case would be an easy win because of the bank’s small, minority status. According to the director of *Abacus: Small Enough to Jail*, Vance’s judgment was “seriously clouded” by his ambition “to be a DA

139, at 6.

417. Recommendation for Dismissal, *supra* note 139, at 6. In its Recommendation for Dismissal, the DA confirmed that “[t]he People were always aware, as was the Grand Jury, that the Abacus Bank loans performed and, as a result, Fannie Mae suffered no long-term financial loss.” *Id.*

418. Importantly, prosecution’s “victim,” Fannie Mae, itself contributed to the crisis and top executives of Fannie Mae were sanctioned by the SEC for bad practices during the 2008 financial crisis after telling investors in 2007 that it had less than \$5 billion in subprime loans on its books, when the true figure was closer to \$43 billion. *SEC Enforcement Actions Addressing Misconduct That Led to or Arose From the Financial Crisis*, *supra* note 54; FIN. CRISIS INQUIRY COMM’N, *supra* note 1; Jason M. Breslow, *Too Big To Jail? The Top 10 Civil Cases Against the Banks*, PBS (Jan. 22, 2013), <https://www.pbs.org/wgbh/frontline/article/too-big-to-jail-the-top-10-civil-cases-against-the-banks>.

419. Press Release, N.Y. Cty. DA’s Office dated May 31, 2012, *supra* note 9.

420. FIN. CRISIS INQUIRY COMM’N, *supra* note 1.

421. Stephen Dalton, *Abacus: Small Enough to Jail: Film Review*, THE HOLLYWOOD REPORTER (Sept. 12, 2016), <https://www.hollywoodreporter.com/news/general-news/abacus-small-jail-review-928175>.

422. *Abacus: Small Enough to Jail*, *supra* note 10. Interestingly, Vance did not state that the handling of the bank was consistent with how the DA would have handled the bank if it serviced the mainstream population as opposed to a minority community. *Id.*

who prosecuted a bank in the wake of the crisis of 2008 because none the big banks were prosecuted,” so that he brought “a case that had no business being brought.”⁴²³

DA Vance’s determination to garner a guilty plea from a bank following the crisis is demonstrated by his refusal to make a deferred prosecution offer to Abacus.⁴²⁴ Unlike other financial institutions involved in the 2008 financial crisis, Abacus Bank was not given the opportunity to walk away with only a fine.⁴²⁵ No deferred prosecution or non-prosecution agreements were on the table.⁴²⁶ Instead, Thomas Sung was given the option of accepting a guilty plea to criminal felonies and paying the associated \$6 million in fines, or fighting the litigation at his own monetary expense.⁴²⁷ The DA made clear that he would not bargain with Abacus and would insist on a guilty plea.⁴²⁸ Pleading guilty was not an option for Abacus as that would have meant the bank would lose the operation to operate with the OCC.⁴²⁹ The Abacus Defense team maintains that given the timing in combination with the DA’s press release and public statements, it was clear that the Abacus case was motivated, at least in part, by the DA’s desire to appear as if they were involved in prosecuting the financial crisis.⁴³⁰

DA Vance’s seemingly selective prosecution of Abacus did not go unnoticed by the public. After the ruling came down, DA Vance faced negative criticism in the media.⁴³¹ This was not the first time Vance was accused of unequal prosecution tactics.⁴³² One article observed that throughout both of this terms Vance had “shied away from prosecuting powerful people . . . even when the cases are solid, and . . . chosen repeatedly to go after less- influential people when the cases are suspect or the crimes committed didn’t hurt anyone.”⁴³³ One former prosecutor for the Manhattan DA’s office complained to the *New Yorker* about Vance’s willingness to try to make an example out of this small, obscure bank: “This case just involved a terrible example of poor judgment by the prosecutor.”⁴³⁴ The rigorous way the DA’s office pursued this criminal case was criticized by journalist Matt Taibbi in his

423. Ted Johnson, *PopPolitics: ‘Abacus’ Director on How a Small Bank Became a Political Scapegoat*, VARIETY (Feb. 20, 2018), <https://variety.com/2018/politics/news/abacus-steve-james-cyrus-vance-1202705310>.

424. Sarah Aberg.

425. *Id.*

426. *Id.*; TAIBBI, *supra* note 11, at 48.

427. Zeder, *supra* note 6.

428. Sarah Aberg.

429. *Id.*

430. *Id.*

431. Blest, *supra* note 12; see Matthew Goldstein, *Recent Setbacks Cast Harsh Light On Cyrus Vance, the Manhattan Prosecutor*, NY Times (Nov. 17, 2015), <https://www.nytimes.com/2015/11/18/business/dealbook/recent-setbacks-cast-harsh-light-on-cyrus-vance-the-manhattan-prosecutor.html>.

432. Blest, *supra* note 12.

433. *Id.*

434. *Id.*

2014 book *The Divide: American Injustice in the Age of the Wealth Gap*, and later in Steve James's documentary *Abacus: Small Enough to Jail*.⁴³⁵ The film, which follows the Sung family through the *People v. Abacus* trial, premiered at the Toronto International Film Festival in 2016, was broadcast on PBS Frontline in 2017, won an Emmy, and was nominated for an Oscar in 2018.⁴³⁶ As stated by James, the film's director, it "became clear to everyone...the Sung family and us as filmmakers, that this case was so important to [Vance] because he wanted to be the prosecutor who took down a bank in the wake of this crisis, whether this bank had anything to do with that crisis or whether they were innocent or guilty."⁴³⁷

Both the range of prosecutors' discretionary decisions and the breadth of their discretion in making those decisions are vast.⁴³⁸ Moreover, so long as prosecutors act lawfully, their highly discretionary decisions are often unreviewable, meaning that their decisions are beyond the courts' power to overrule them.⁴³⁹ Arguably, no government official in these United States has as much unreviewable power and discretion as the prosecutor.⁴⁴⁰ Prosecutors' discretionary decisions have enormous impact on individuals and communities, and unfortunately, prosecutors often exercise their vast power and discretion in questionable ways.⁴⁴¹ DA Vance's prosecution of Abacus Bank in connection with the 2008 financial crisis is arguably one of these occasions.

Specific cases of misguided decision making by Das such as Vance shed increased light on prosecutorial discretion and its at times troubling uses, helping to bring the subject more attention.⁴⁴² In recent years, there has been growing literature on unconscious biases and their effect on legal decisions of prosecutors.⁴⁴³ Today, there is fairly extensive academic literature concerning the desirability of controlling or limiting prosecutorial discretion.⁴⁴⁴ There is no consensus on what changes should be implemented to try to reduce the influence of prosecutors' unconscious impermissible conditions.⁴⁴⁵ Many

435. See sources cited *supra* note 282.

436. <https://www.abacusmovie.com>. (last visited May 7, 2021).

437. Kai Ryssdal & Tommy Andres, *Abacus: The Only Bank Charged in the Financial Crisis*, MARKETPLACE (May 22, 2017), <https://www.marketplace.org/2017/05/22/abacus-only-bank-charged-financial-crisis>.

438. Bruce Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICKINSON L. REV. 589, 597 (2019).

439. *Id.*

440. Stephano Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, 157 U. PA. L. REV. 59, 960 (Apr. 2009).

441. Green, *supra* note 438, at 589.

442. *Id.* at 601; see e.g., Radley Balko, *The Untouchables: Misbehaving Prosecutors, and the System That Protects Them*, HUFFINGTON POST (Aug. 1, 2013), <https://bit.ly/2xgWvtF> [<https://perma.cc/2SN4-XHAT>].

443. See, e.g., Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512 (2007).

444. See, e.g., *Controlling Prosecutorial Discretion*, available at: <https://law.jrank.org/pages/1867/Prosecution-Prosecutorial-Discretion-Controlling-prosecutorial-discretion.html>.

445. Green, *supra* note 438, at 614.

have proposed schemes for regulating and reforming prosecutorial discretion, or for authorizing judicial review of prosecutorial decisions.⁴⁴⁶ For example, it has been argued that prosecutors, like other administrative or executive agencies entrusted with substantial delegated power, should be required to adopt formal regulations governing their decisions, or that they should be required to state their reasons for particular actions.⁴⁴⁷ Victims' rights advocates have proposed that victims should be given at least a consultative role and perhaps even a veto power over prosecutors' charging and plea-bargaining decisions.⁴⁴⁸

While no generally accepted view has emerged as to changes that should be implemented to protect prosecutorial decision making from the effects of biases, the public should still continue to scrutinize prosecutors' decision-making and endeavor to hold prosecutors accountable when they do make decisions badly or abusively.⁴⁴⁹ As seen by victims of prosecutorial discretion such as Abacus Bank, the public cannot rely on courts to hold prosecutors accountable for exercising their discretion unwisely.⁴⁵⁰ To ensure prosecutors use their power conscientiously, attention must be given to the instances in which prosecutors overstep their discretionary boundaries, particularly when formal sanctions are not applicable, as was the case with Abacus and DA Vance. Public and professional discussion of prosecutorial discretion is essential to holding prosecutors responsible for how they use their vast power.⁴⁵¹ Informed public inquiry and discourse will both encourage prosecutors to use their power wisely and promote accountability when prosecutors use their power abusively.⁴⁵² Therefore, the Abacus case should be discussed and studied broadly in order to serve as a cautionary tale to future prosecutors who may otherwise consider bringing charges for mere publicity or glory.

446. *Controlling Prosecutorial Discretion*, *supra* note 444.

447. *Id.*

448. *Id.*

449. Green, *supra* note 438, at 622.

450. *Id.*

451. *Id.* at 595.

452. *Id.* at 624.

