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UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., ET AL.,)
Plaintiffs,) Case No.
vs.) 13-465C
THE UNITED STATES OF AMERICA,)
Defendant.)

Courtroom 4
Howard T. Markey National Courts Building
717 Madison Place, N.W.
Washington, D.C.
Thursday, June 19, 2014
11:00 a.m.
Defendant's Motion for Protective Order

BEFORE: THE HONORABLE MARGARET M. SWEENEY

Elizabeth M. Farrell, CERT, Digital Transcriber

1 APPEARANCES:

2 ON BEHALF OF THE PLAINTIFFS:

3 CHARLES J. COOPER, ESQ.

4 VINCENT J. COLATRIANO, ESQ.

5 BRIAN BARNES, ESQ.

6 PETER PATTERSON, ESQ.

7 NICOLE J. MOSS, ESQ.

8 Cooper & Kirk, PLLC

9 1523 New Hampshire, NW

10 Washington, DC 20036

11 (202) 220-9600

12 ccooper@cooperkirk.com

13

14 ON BEHALF OF THE DEFENDANT:

15 KENNETH MICHAEL DINTZER, ESQ.

16 GREGG M. SCHWIND, ESQ.

17 ELIZABETH M. HOSFORD, ESQ.

18 U.S. Department of Justice

19 Post Office Box 480

20 Ben Franklin Station

21 Washington, DC 20044

22 (202) 616-0385

23 kenneth.dintzner@usdoj.gov

24

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1 P R O C E E D I N G S

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3 (Proceedings called to order at 11:01 a.m.)

4 LAW CLERK: The United States Court of Federal
5 Claims is now in session. Fairholme Funds, Incorporated vs.
6 the United States, Case Number 13-465, the Honorable Margaret
7 M. Sweeney presiding.

8 THE COURT: Good morning. Please be seated.

9 (Chorus of good mornings.)

10 THE COURT: Will counsel in the courtroom please
11 identify themselves for the record?

12 MR. COOPER: Certainly, Your Honor, Charles Cooper
13 for the Plaintiffs. With me today are two of my colleagues,
14 Brian Barnes and Vince Colatriano.

15 MR. COLATRIANO: Good morning, Your Honor.

16 MR. COOPER: I'd also like to note for the Court
17 that two of my colleagues are joining us by phone, Nicole
18 Moss and Peter Patterson. And, Your Honor, if I may, I would
19 like to introduce to the Court one of my clients, Mr. Bruce
20 Berkowitz. He's the president of the Fairholme Fund.

21 THE COURT: Thank you very much. Good morning to
22 all of you.

23 And for the United States?

24 MR. DINTZER: Good morning, Your Honor. Kenneth
25 Dintzer for the Department of Justice representing the United

1 States. And with me at counsel table are Elizabeth Hosford
2 and Gregory Schwind.

3 MR. SCHWIND: Good morning, Your Honor.

4 THE COURT: Good morning. Well, on this morning's
5 agenda, we have Defendant's motion. Are you ready to begin?

6 MR. DINTZER: We are, Your Honor. Ms. Hosford will
7 be speaking for the United States.

8 THE COURT: Thank you.

9 MS. HOSFORD: Good morning, Your Honor, may it
10 please the Court. We filed our motion for protective order
11 for two reasons. First, we've asked the Court to limit the
12 time frame of discovery into the future of the enterprises to
13 documents that predate execution of the third amendment.

14 Second, we would ask the Court to limit the scope
15 of discovery to the issues that were actually identified in
16 the Court's February 26th order.

17 I'll first address the issue of the future of the
18 enterprises. Plaintiffs' requests that are focused on the
19 termination of the conservatorships and future profitability
20 seek virtually all internal Treasury and FHFA documents that
21 discuss the future of Fannie Mae and Freddie Mac with
22 virtually no ending. If Treasury and FHFA are required to
23 respond to these requests without a cutoff date, the
24 Government would suffer substantial and potentially
25 insurmountable harm in three ways.

1 First, potential disclosure of internal discussions
2 about the future of the conservatorships would, to quote
3 Director Watt's declaration, "have extraordinarily
4 deleterious consequences on the conservator's conduct to be
5 ongoing in future operations of the conservatorships."

6 That's --

7 THE COURT: Let me ask you this, if there's a
8 protective order in place which provides for the sealing of
9 all such documents, how is the conservator harmed? There
10 will be no release of documents.

11 MS. HOSFORD: First, Section 4617(f), which is part
12 of the Housing and Economic Recovery Act of 2008 --

13 THE COURT: Yes, I don't agree. I know you're
14 going to say that the Court has no ability to have any -- to,
15 in any way, impact FHFA, and I disagree with that. I don't
16 believe that is a blanket insulation. If FHFA enters into
17 contracts and there's a dispute and there's a breach of
18 contract -- and the agency breaches the contract, I don't
19 think they can invoke that -- the agency can invoke that
20 provision to insulate itself. And, also, I think here -- I'm
21 not trying to control the conservatorship, I'm not trying to
22 influence it in any way, I'm just trying to allow citizens to
23 have every opportunity to meet the jurisdictional hurdle that
24 the Plaintiff -- excuse me, that the Government has asserted.

25 The Government has said that the conservators are

1 not part of the United States and, therefore, the Defendant
2 is not implicated here. Now, on the other hand, by
3 requesting these documents, the Government is saying, no, I'm
4 sorry, you're not entitled to any of these documents because
5 the conservators are part of the United States. So, it's a
6 government entity and, therefore, you're asking for
7 deliberative process documents.

8 So, it seems to me the Government is trying to have
9 it both ways and, so, I don't accept that argument. And as I
10 said, you know, I understand and can appreciate the bar of --
11 or the -- not the bar, but the -- that Congress intended that
12 courts do not meddle in the business of the conservators.
13 That's not my goal or desire. I have enough on my plate
14 without trying to run the conservatorships. But I do want
15 the Plaintiffs to have an opportunity to meet the
16 jurisdictional challenge that's been raised by the
17 Government.

18 MS. HOSFORD: Your Honor, we are not asking the
19 Court to bar all discovery in this case. We are merely
20 asking for a cutoff date for the issue of whether the -- when
21 and how the conservatorships will end and what their future
22 profitability will be. And there are very serious policy and
23 operational concerns for the conservatorships that are at
24 risk here, as our -- as the Government officials who provided
25 the declarations in this case pointed out, if internal

1 discussions about the future of Fannie Mae and Freddie Mac,
2 both ongoing and in recent times, are divulged to the public
3 or even in advertently disclosed under a protective order, it
4 could literally affect interest rates. It could have an
5 effect on the market and the economy.

6 THE COURT: And I took that very seriously. Those
7 would be grave and dire consequences. And I know in Judge
8 Wheeler's AIG case, there was a leak, and I believe -- not to
9 imply that Mr. Dintzer was the leak or -- certainly would not
10 be, I just -- so, he's aware of that case and I believe is
11 heavily involved in that case as one of the litigators on
12 behalf of the Government. But -- and no judge wants a leak.
13 But I think I've been able to come up with some judicial
14 caulk that I would put in place in the case and it would be
15 this. We'd have a protective order. Documents would be
16 produced to Plaintiffs, and if any portion of a document is
17 leaked, that document would not be able to be used in this
18 litigation, period. That's very serious for these Plaintiffs
19 in this case.

20 I doubt that the Government would try to sabotage
21 the Plaintiffs' case because if the Government leaks the
22 documents, then it would have to go back to Mr. Watt and the
23 other conservators and explain why it decided to do that
24 which the conservators were most concerned with, which was
25 protecting this internal information.

1 I think having such a severe sanction would inspire
2 the Plaintiffs, if they aren't already inspired, to make sure
3 that nothing was divulged, because if they did, their
4 client's case would go right down the tubes and they would
5 have very angry co-counsel, they would have very angry
6 clients, and that is one option that I'm considering, in
7 addition to their bar license being -- again, they'd have to
8 be identified. But in addition to losing their bar license
9 because I certainly would refer this internally in this Court
10 and then make a referral -- I mean, once it was identified
11 who the individual was, make a referral to wherever they're
12 barred to begin disbarment proceedings.

13 MS. HOSFORD: Your Honor, we don't have any doubt
14 that Plaintiffs' counsel will make every effort under a
15 protective order to protect the documents that we're talking
16 about. But what we're talking about here is good faith
17 inadvertent disclosure. These things do happen. We cited
18 four different cases in our brief, in our reply brief,
19 setting forth where despite counsel's best efforts, leaks
20 were made.

21 You have to remember that here, we're not
22 talking -- in AIG, what we're talking about is past events,
23 documents referring to the past. Here, we're talking about
24 ongoing housing reform, ongoing operation and management of
25 the conservatorships. Under no circumstances should those

1 documents be disclosed and under no circumstances should the
2 Government have to even respond to requests that are asking
3 for nothing more than deliberative process and documents that
4 restrain the conservator's ability to run the
5 conservatorships.

6 Even if we had this protective order in place, we'd
7 have to deal with sealed documents, with redactions. It's
8 possible that Plaintiffs' clients, who are very active
9 participants in the market for Fannie Mae and Freddie Mac
10 stock, would try to read inferences into (inaudible)
11 notwithstanding Plaintiffs' counsel's best efforts to redact.
12 There is absolutely no way that we can guarantee that these
13 documents that can have a devastating effect on our economy
14 and on the housing reform effort will not be disclosed. And
15 for that reason, we're only asking for a cutoff date of the
16 third amendment, which is August 17th, 2012, which is --

17 THE COURT: Well, there are three different dates
18 you've given. I mean, yes, or I think it's 1A and for
19 requests -- is it 6 through 10?

20 MS. HOSFORD: Right, we're only talking about 6
21 through 10 and 1A on our cutoff date. The other --

22 THE COURT: That's correct. The other dates you
23 have --

24 MS. HOSFORD: The other days have to do with scope.
25 The other days have to do with what we perceive to be the

1 Court's -- the scope of the discovery that the Court ordered.
2 With respect to 1A and 6 through 10, we recognize that the
3 Court ordered discovery within the dates that we're asking
4 for the cutoff on, but what we're asking for is a protective
5 order relieving us from responding from August 17th, 2012 on,
6 because of the extreme harm that it would do to our economy
7 and to the conservator.

8 THE COURT: Well, what I will -- what I'm going to
9 -- what I'm inclined to do at the moment is to allow waves of
10 discovery and, perhaps, adopt some of the dates that you've
11 proposed. And if that will provide Plaintiff -- after
12 they've reviewed those documents that they receive, if there
13 are other documents that they believe that they need, we can
14 go back and revisit discovery. But I want, at least, an
15 initial wave of discovery to go forward.

16 MS. HOSFORD: Well, just bear in mind, Your Honor,
17 that even if an initial wave of discovery goes forward, most
18 of these documents are not going to be produced nonetheless.
19 The only reason we asked for the protective order was so that
20 we wouldn't have to respond at all just in case there was
21 some sort of inadvertent disclosure. So, there's -- it's not
22 -- Plaintiffs are not going to receive most of the documents
23 that would be responsive to the issue of when and how the
24 conservatorships will end because they are categorically
25 deliberative under deliberative process privilege and the

1 conservator will invoke 4617(f) to say that they shouldn't
2 have to produce any documents that will interfere with their
3 ability to manage conservatorships.

4 So, it's not a matter of producing the documents
5 and then entrusting a protective order to protect them.
6 There's nonetheless, going to be assertions of privilege
7 and --

8 THE COURT: No, I understand that.

9 MS. HOSFORD: Okay.

10 THE COURT: And then we'll have -- you'll produce a
11 privilege log and --

12 MS. HOSFORD: But I would also like to make the
13 point that what we're talking about here are ongoing
14 operations and deliberations in housing reform. We're not
15 talking about a decision that took place in the past and
16 there's just a generic concern that it will -- that, you
17 know, release of deliberations and frank discussions and
18 proposals will somehow chill future deliberations. We're
19 talking about ongoing current deliberations.

20 Treasury is currently deliberating, FHFA is
21 currently operating the conservatorships and, right now,
22 Plaintiffs' requests have absolutely no end date. So, the
23 obligation of these two agencies is to preserve and
24 potentially disclose every single document relating to
25 housing reform and future of the conservatorships from now

1 until no -- absolutely no ending.

2 THE COURT: Well, that's not going to happen. I
3 mean, I have no intention of ordering that. I understand
4 that.

5 MS. HOSFORD: Well, I mean, obviously, we would ask
6 that the cutoff date be the August 17th, 2012 date because
7 notwithstanding the fact that the ripeness issue is out
8 there, as we explained in our briefs, it's clear just by
9 picking up the newspaper that there has been no decision made
10 about the future of the conservatorships. So, therefore, the
11 question of ripeness can be decided on the briefs without
12 having discovery.

13 But that said, if the Court thinks discovery is
14 warranted, we really do have to have that cutoff date. And
15 the cutoff date is not unprecedented. There have been courts
16 who have imposed cutoff dates in cases involving attorney-
17 client work product where they say, you know what, it's fine
18 to have to log those documents up to a certain date, but
19 after that date it's ridiculous to have a chilling effect on
20 every single decision or discussion that's had within counsel
21 -- or in this case, within the Government.

22 THE COURT: Indeed. That's why I said there would
23 be a cutoff date.

24 MS. HOSFORD: Okay. Well, we would suggest that
25 the cutoff date be August 17th, 2012.

1 THE COURT: The date of the third amendment?

2 MS. HOSFORD: Yes.

3 Moving on to the second issue that we raised in our
4 motion, we would ask that the Court limit the proposed scope
5 of discovery to the issues that were actually raised in the
6 February 26th order. And as we've set forth in our motion
7 and in the chart that we attached to our reply, we have
8 agreed to provide documents on whether FHFA was an agent and
9 arm of the Treasury in response to requests 1, 11, 14 and 16.
10 But the other requests that are grouped under requests
11 relating to whether FHFA is the United States vastly exceed
12 the scope of that issue.

13 Like we are willing to produce anything that bears
14 on the relationship between the two agencies, but we are not
15 going to respond to any and all documents reflecting
16 communications between Treasury and the Justice Department,
17 which has no relevance to that issue, or documents relating
18 to whether -- FHFA's determination that it's obligated to
19 maximize Treasury's return on its investment.

20 Obviously, many of those documents are also going
21 to be privileged, but they're not even responsive to the
22 Court's order, which was a pre -- you know, the Court ordered
23 this discovery, as the Court knows, in advance of a motion to
24 dismiss. And by definition, in advance of a motion to
25 dismiss, discovery should be limited to the narrow scope of

1 the issues on which the discovery is required. This is not
2 the normal situation under Rule 26 where you -- you know, all
3 relevant documents to the case should be produced.

4 So, therefore, we've suggested that we will respond
5 to request 1A and request 4 and for the date range of July 1
6 to December 31st, 2008.

7 The question about whether FHFA -- I'm sorry. On
8 the question of the solvency of the enterprises and
9 expectations of profitability at the time of the
10 conservatorship, we would respond to requests 1A and 4
11 because they're directly responsive to the Court's order.
12 The first one is financial projections in the possession of
13 FHFA and/or Treasury in connection with the conservatorship,
14 and the second one is documents relating to the decision to
15 leave the GSE's existing capital structure in place. That's
16 exactly what the Court ordered in the order and that's
17 exactly what we're willing to produce documents on, and
18 within a reasonable time frame, July 1st to December 31st,
19 2008.

20 Now, in their opposition brief, Plaintiffs claim
21 that they had actually suggested that they were looking for
22 documents regarding the solvency of the enterprises, not only
23 in 2008, but throughout basically the conservatorships and
24 focusing on 2012. But if you read their motion for discovery
25 and the declaration attached thereto, there was no mention of

1 any dates other than the time that the conservatorships were
2 entered into. Plaintiffs have indicated that they mentioned
3 it in their reply brief, but it did not appear in the Court's
4 order and we had no chance to respond to dates set forth the
5 first time in Plaintiffs' reply brief.

6 So, on the issue of the solvency of Fannie Mae and
7 Freddie Mac, like I said, we're okay with request 1A and
8 request 4, but requests 2, 3 and 5 go far beyond that topic.
9 Two goes to the decision to compensate Treasury through 79.9
10 percent warrants. That doesn't really go to profitability,
11 and if it does, it's satisfied by 1A. Three goes to the
12 valuation of the warrants from 2008 to 2013. As I mentioned,
13 that's not within the scope of the dates. And five, were
14 they ask about government stock dividends, that's not even
15 related to profit because the dividends were fixed at 10
16 percent.

17 So, Plaintiffs are essentially trying to use this
18 pre-motion to dismiss decision discovery to get full-blown
19 discovery, and we think that is not warranted under the
20 circumstances of the case and not warranted in light of the
21 substantial harms and the statute that we -- that I made
22 reference to earlier.

23 Just getting back to the statute, again, briefly,
24 there is precedent for courts to find that discovery should
25 not be produced in reliance on 4617(f). Like I said, we're

1 not asking the Court not to exercise jurisdiction over the
2 case except in the context for a motion to dismiss, which we
3 understand is deferred. But 4617(f) is an important tool to
4 protect the conservator from the type of second guessing and
5 invasive, intrusive discovery that will have a deleterious
6 effect on its ability to manage the enterprises.

7 THE COURT: Was there anything else?

8 MS. HOSFORD: Nothing else, Your Honor.

9 THE COURT: I just have a question for you. Could
10 you please explain the litigation position or what I see as a
11 conflict with -- or an inconsistency with, on the one hand,
12 the Government are saying Plaintiffs lack standing, this
13 Court lacks jurisdiction because the conservatorship is not
14 part of the Government, it's not a Government entity. And,
15 yet, when Plaintiffs seek discovery, it's the position of the
16 United States that any documents generated by the
17 conservatorship are subject to the deliberative process
18 privilege?

19 MS. HOSFORD: Yes, Your Honor. First of all, there
20 is case law out there, and we cite it in our brief,
21 acknowledging that FHFA does enjoy the deliberative process
22 privilege even when it's acting as conservator. Even setting
23 that aside, in the context of this case, it's very important.
24 If the Court were ultimately to find that the FHFA is the
25 United States -- or is not the United States, I'm sorry, and

1 previously they had had to disclose documents that would have
2 been subject to deliberative process privilege, we have a
3 potential waiver situation there and we have disclosure of a
4 lot of documents that can be very harmful to the agency under
5 the assumption that they are the United States when it could
6 ultimately be determined that they are not the United States.

7 So, FHFA is merely trying to protect its rights at
8 this point. Because the issue is still open, they are not
9 willing to just give up on the deliberative process
10 privilege. So, that's the situation.

11 THE COURT: No, I -- I -- okay. Thank you.

12 MS. HOSFORD: Okay. Thank you, Your Honor.

13 MR. COOPER: Good morning again, Judge Sweeney.

14 THE COURT: Good morning.

15 MR. COOPER: Your Honor, let me just preface the
16 points I plan to make in response to counsel's presentation.
17 Contrary to counsel's claim, we have attempted truly to
18 tether very tightly to this Court's February discovery order
19 and the Court's articulation of the issues that have been
20 placed in dispute by the Government, jurisdictional, ripeness
21 and reasonable expect -- investment-backed expectation
22 issues, carefully tried to tether them to those issues. And
23 we believe that every one of the requests that we've made is
24 carefully and tightly tethered to those issues.

25 Let me first address the blanket exemptions or

1 privilege or relief that counsel seeks for producing a
2 particular range of documents, not just time-limited, but in
3 terms of subject matter. Their first point, Your Honor, is
4 that for the Courts to order this discovery, it would
5 inevitably impact and affect -- restrain and affect the
6 exercise of the powers or functions of the conservator. As
7 the Court mentioned, the provision, in and of itself on its
8 face, doesn't reach something like discovery in a lawsuit
9 brought for damages in the Court of Federal Claims. There's
10 precedent on this subject, as the Court knows, from the
11 FIRREA example which provided the precise model for this
12 provision.

13 But, Your Honor, more importantly, the language of
14 the statute itself makes clear that what is contemplated
15 there is some type of judicial order that would restrain the
16 ability -- the ability of the conservator to exercise its
17 discretionary powers and functions. There is -- it's
18 inconceivable that a discovery order could affect the ability
19 of the conservator to exercise his powers. To be sure, it's
20 conceivable that it could affect or influence how the
21 conservator exercised his discretion with respect to those
22 powers. That is conceivable. But that's not what the
23 statute is designed, by any means, to reach.

24 But the Court has cut through all of this with the
25 obvious and complete cure or protection for all of the

1 Government's concerns, which is a protective order. And Your
2 Honor has identified and we welcome the sanction that the
3 Court has suggested and we don't need it because we're
4 officers of the court. We've done this many, many times, as
5 has the Government. It has engaged in protective orders in
6 countless cases. Countless cases, Your Honor.

7 THE COURT: I thought it would -- I thought a bit
8 of increased security by fashioning what I mentioned a few
9 minutes ago, because of the leak that occurred in Judge
10 Wheeler's case -- we handle bid protest cases involving
11 millions and millions of dollars every day and we don't have
12 leaks. And attorneys representing a Plaintiff have direct
13 access to the opposing clients', the Defendant/Intervenor's,
14 proprietary information, information that is so sensitive it
15 could make or break a corporation and we don't have leaks.
16 But there was a leak in Judge Wheeler's case and it seemed to
17 me that instead of perhaps economics driving it, it could
18 have been either somewhat politically motivated or -- I mean,
19 I don't know. I'm just speculating and judges shouldn't
20 speculate.

21 But it occurred to me that if I had this caulk in
22 place, this severe sanction looming, that when counsel is
23 tapping various associates or paralegals or whomever to
24 assist in a review of documents, the fear of God would be put
25 in that individual that there would not be a leak because it

1 will be so -- the sanction will be swift and so severe that
2 that person would lose their job and in addition to facing
3 other sanctions that I could fashion, that, you know, their
4 direct employer, Plaintiffs' counsel, would come down on them
5 like a ton of bricks and that you would just emphasize the
6 importance of -- which I'm sure you do in every case, but you
7 would emphasize the importance of the sanctity of that
8 protective order.

9 MR. COOPER: To be sure, Your Honor.

10 THE COURT: And I have no doubt all of the counsel
11 in this room, in front of the bar, for that matter behind the
12 bar, would never do anything to violate a protective order.
13 But in case someone on Plaintiffs' side might be so
14 sympathetic for the Plaintiff that their heart would overcome
15 common sense and they would do something unprincipled, they
16 would think twice before they did it.

17 MR. COOPER: Yes, Your Honor. But, of course --
18 and, Your Honor, that is a complete protection for the
19 interest the Government has advanced and that it has
20 supported with its declarations. That interest is founded on
21 one concern. One concern. Public disclosure. Public
22 disclosure of the information that is exchanged in discovery.
23 That is what it found -- it bases its request for this
24 sweeping exemption essentially from discovery and what it
25 bases its request for these time limitations. Public

1 disclosure. The protective order completely protects against
2 that -- against that possibility, Your Honor.

3 Let's really just pause for a moment and consider
4 what it is the Government is claiming here. They're claiming
5 a privilege -- a sweeping and blanket privilege that flows,
6 they say, from this statutory provision that just doesn't
7 exist, one that basically says, in discovery, in a case
8 properly brought before this Court for money damages, not for
9 equitable injunction type relief, but for money damages,
10 there can be no discovery, period. It's a new privilege
11 essentially, governmental privilege that they're inventing.
12 And it, Your Honor, just doesn't exist. But even if it did,
13 it would be completely addressed by the protective order.

14 Let me move to the deliberative process privilege
15 claim that counsel makes, and it directs this claim as well
16 to the discovery requested with respect to profitability in
17 requests 1 through 5, and the requests made with respect to
18 when, whether and how the conservatorships may be terminated,
19 requests 6 through 10. I want to make two threshold points
20 on that.

21 First, there is no blanket categorical privilege
22 for deliberative process or any other privilege. Documents
23 are privileged standing in their own shoes, each document.
24 In a claim of privilege, the burden is on the party asserting
25 a privilege to establish that a document or information or,

1 you know, the answer to a deposition question, whatever it
2 may be, is privileged information. And that's true of the
3 deliberative process privilege. It's true of the executive
4 privilege. It's true of every privilege. And, so, there's
5 no blanket -- there's no blanket exemption from having to go
6 through the document-by-document process and to provide a log
7 to the other side so those claims can -- can at least, at
8 that level, be verified as being reasonable.

9 Now, the second point, Your Honor, the Court put
10 your finger on it, is that the Government, first, concedes --
11 and there's certainly no dispute between the parties here --
12 that Fannie and Freddie are private corporations. So, no
13 matter what else they may claim, they're not claiming that
14 documents in Fannie and Freddie's possession are privileged,
15 and it's obvious that they can't be. But they're going
16 farther and they're saying specifically that FHFA, as
17 conservator for Fannie and Freddie, and they say this in
18 terms, is not the United States, it is Fannie and Freddie.
19 It is as though we are seeking relief in this case and
20 seeking discovery from the management of private
21 corporations. That's their argument, Your Honor, as the
22 Court points out.

23 And, Your Honor, we've said to be sure, no, FHFA is
24 a Government agency, this Court has got Tucker Act
25 jurisdiction over our claim against the Government for the

1 conduct of Treasury and FHFA together in imposing the third
2 amendment, the Net Worth Sweep. And in response to their
3 claim that that's not true, of course, we asked for
4 discovery. Well, we think it's true. We think your public
5 statements essentially make that true and our discovery
6 request cites specific public documents that -- you know,
7 through our discovery requests. We give an example of a
8 public document that is of the ilk that we're requesting.

9 But, Your Honor, our point is the Government can't
10 both say our client, FHFA, is not the United States; it's not
11 an arm or an agent of Treasury; it wasn't acting for the
12 benefit of the taxpayers. All of the metrics that the Court
13 itself identified in the discovery order don't exist as a
14 matter of fact. They can't say that on the one hand and then
15 say, but we can't -- we're not going to give you the
16 information going to that issue because we're relying on a
17 uniquely government privilege that they've just excluded
18 their client from claiming with their own position. They
19 can't do both of those --

20 THE COURT: And so far, I haven't gotten -- I
21 haven't received a good answer from the Government. Counsel
22 is very able. But counsel has expressed concern of what
23 could happen if certain documents are released, which I do
24 not want to see happen, but counsel didn't answer to my
25 satisfaction the discrepancy between sort of using the

1 deliberative process as sword and shield. On one hand, FHFA
2 is a government entity, you know, for purposes of booting the
3 Plaintiffs out of court and not part of the Government, but
4 for purposes of forwarding discovery, all of a sudden
5 deliberative process is appropriate because they are part of
6 the Government. So, it's a schizophrenic approach and I'm
7 just waiting to hear a reasonable explanation.

8 MR. COOPER: Well, Your Honor, I don't think you'll
9 find one, particularly in light of the fact that, as I
10 mentioned, it is the Government's burden to establish its
11 entitlement to the privilege. And out of its own mouth, it
12 disqualifies it -- disqualifies itself from the very
13 privilege that they seek, that uniquely governmental
14 privilege not available to private parties and certainly not
15 available to the conservator if the conservator is not the
16 United States as they maintain.

17 The other thing I'd like to address on this is
18 counsel's claims made in their briefing to the Court and here
19 again and emphasized here, that what we're seeking is
20 information relating to ongoing deliberations within the
21 agencies with respect to how, whether and when the
22 conservatorships will be terminated. That's --

23 THE COURT: Well, I do have a -- I do have a
24 concern about that. Here's why and why I'd like to see
25 discovery in waves. I -- right now, at this juncture, we're

1 not here to determine whether or not a taking occurred. What
2 we are determining is whether the Plaintiffs can meet the
3 United States' jurisdictional challenge, which is these --
4 the conservators, the conservatorship, is not part of the
5 United States. It's not a government agency, excuse me.
6 It's not a government agency. Therefore, the Plaintiffs are
7 not properly before this Court because in this Court, the
8 only entity that can be sued is the United States Government.

9 MR. COOPER: Your Honor, that --

10 THE COURT: So, some of the requests seem to get
11 into merits arguments.

12 MR. COOPER: Yes.

13 THE COURT: And that concerns me because I'm not
14 allowing, I think -- as the breadth of discovery that
15 Plaintiff seeks, I think, and I understand why advocates do
16 it, they're looking for too much. But I think the Government
17 is offering too little.

18 MR. COOPER: Well, Your Honor, on that point, I
19 want to -- first of all, I want to agree with the Court's
20 point, but to add this, and that's their jurisdictional
21 claim, isn't only that FHFA is not the United States; it is
22 also that this case is not ripe for your consideration. And
23 that is the claim under which they seek to shield and to
24 prevent discovery with respect to profitability, these
25 profitability projections that we have sought and they've

1 agreed to provide, at least with respect to those narrow time
2 ranges and -- and on that, let me just go ahead and make the
3 point before I lose it, which is that they've basically said,
4 okay, we'll give you this information, the information
5 relating to profitability projections and when, whether and
6 how the conservatorships will be terminated, we'll give you
7 that for two narrow time ranges.

8 One, the seven-and-a-half months before the third
9 amendment, that is from, I think, January 1st, 2012 to August
10 17th, 2012, when the Net Worth Sweep was adopted. Those
11 seven-and-a-half months, we'll give you that. And we'll give
12 you that information with respect to the period of time when
13 the conservatorships were put in place. And, again, their
14 claim for not giving us any of the information relating to
15 those two ripeness issues in between is -- it's not clear.
16 I'm not sure what it is.

17 Because, Your Honor, how is it going to be -- how
18 do they support the proposition that this is -- what they're
19 willing to give us is deliberative process -- is not
20 deliberative process and is not a threat to the ongoing
21 management of conservatorships, but what they're not willing
22 to give us between those two dates somehow is. The only
23 possible claim has to be that it's just too burdensome, and
24 they haven't made that claim. They haven't made that
25 argument.

1 But, Your Honor, on the ripeness issue, the issue
2 here is not -- or at least let me put it this way. Counsel
3 argues emphatically that this relates to ongoing
4 deliberations within the Government, within the agencies
5 about how, whether and when the conservatorships will
6 terminate. And they say that isn't and can't be known
7 because it will be Congress that terminates those --
8 terminates those conservatorships if and when they ever are
9 terminated.

10 Your Honor, the issue isn't before this Court,
11 isn't what decision is Congress going to make. If that were
12 the question, there would never be a ripe case before this
13 Court, because every case that is brought before this Court,
14 Congress can change it like that with legislation. It can --
15 if Congress enacted a measure that would repeal the Net Worth
16 Sweep, which they could certainly do, well, my case would be
17 transformed substantially in this courtroom. It could do
18 that. It could do any number of things.

19 But what Congress may or may not do is not the
20 question here. It's whether or not the Government has made a
21 policy decision with respect to when, whether and how the
22 conservatorships will terminate, and it clearly has, or at
23 least our point is that there's a wealth of public
24 information and statements to support the proposition that it
25 has. And in the face of their denial that it has, we're

1 entitled to discovery to bring information to this Court to
2 prove that this case is ripe. It is ripe.

3 The Government has basically made the decision --
4 the policy decision that the Government, the FHFA, will never
5 end the conservatorships. They have said -- and they will
6 not be ended unless and until Congress does so, and they say
7 that in their papers. We anticipate, they say over and over,
8 that Congressional action will be what ultimately resolves
9 the question about Fannie and Freddie and the
10 conservatorships.

11 And, so, they've made the decision that the
12 conservatorships will continue in kind of a state of
13 perpetual servitude, Fannie and Freddie, to the Government as
14 the Government extracts from Fannie and Freddie all of their
15 earnings and the OMB, and a document attached to our appendix
16 projects profitability projection. And by the way, I asked
17 my colleagues to find out how many public reports the
18 Government, FHFA, Treasury, OMB have published that include
19 projections of the profitability of the future financial
20 performance of Fannie and Freddie. We've been able to come
21 up with 83. That's that stack right there, are public
22 profitability reports, Your Honor.

23 The notion that information with respect to
24 profitability is so sensitive is difficult to take in the
25 light of that. But --

1 THE COURT: Then do you have what you need?

2 MR. COOPER: Your Honor, not --

3 THE COURT: There's always more, is that what
4 you're going to tell me?

5 MR. COOPER: In the light of their ripeness
6 argument, no, I don't. Their ripeness argument --

7 THE COURT: You don't think you have enough to meet
8 their ripeness argument with those 83 documents?

9 MR. COOPER: Your Honor, I do believe, Your Honor,
10 that their claim about the -- about the conjectural
11 speculative nature of Fannie and Freddie's future
12 profitability is belied by what they told the public. I do
13 believe that, yes. But, still, they do maintain what they're
14 saying about this Court's jurisdiction and ripeness. And
15 they've placed that issue into dispute and, Your Honor, I
16 believe that we're entitled to take discovery as the Court --
17 as the Court specifically held in its February order on that.

18 And on the termination of the conservatorships, the
19 Government has said it will not -- that Fannie and Freddie
20 will not be allowed to rebuild capital and to return to their
21 former status -- former corporate status, said that the
22 Government has basically made the decision or has a
23 commitment to wind them down, has made clear that every
24 dollar of earnings will be used for the benefit of taxpayers,
25 has made clear that it has a commitment -- in an internal

1 document, by the way, produced elsewhere -- that -- produced
2 in 2010 -- I mean, written in 2010, that the agencies -- the
3 Government has a commitment that the private equity will
4 never be allowed access to positive earnings --

5 THE COURT: Well, let me ask you this, with the
6 documents, what about just taking the depositions of
7 conservators?

8 MR. COOPER: Well, we are looking forward to doing
9 --

10 THE COURT: Wouldn't that just resolve it? You
11 wouldn't have to then ask for any internal documents?

12 MR. COOPER: With respect to --

13 THE COURT: I mean, do you get what you need to
14 meet the ripeness argument?

15 MR. COOPER: With respect to profitability or with
16 respect to terminating the --

17 THE COURT: Both.

18 MR. COOPER: Well, Your Honor --

19 THE COURT: And take one at a time, your choice.

20 MR. COOPER: Yes. But, Your Honor, we do
21 anticipate taking depositions and we're -- and we've
22 identified and the Government has identified individuals to
23 us who have the relevant information in their possession.
24 Before we take a deposition, you know, we believe that the
25 discovery that the Court has authorized is a necessary

1 element of that.

2 THE COURT: Well, discovery -- obviously, it
3 includes the depositions. But what I want to -- what I'm
4 trying to pare down is the breadth of the discovery for a
5 jurisdictional determination, the two elements. Is the case
6 ripe? Do you -- is this entity -- is FHFA an entity within
7 the United States?

8 MR. COOPER: Yes, Your Honor, those two
9 jurisdictional issues.

10 THE COURT: So, couldn't -- so, those -- if you --
11 once you -- if you establish that, then we get into the
12 merits of the case.

13 MR. COOPER: Well, Your Honor, what the public
14 information that we have cited to the Court does is raise the
15 factual issue between the parties with respect to the truth
16 of that matter. It casts into question the accuracy of the
17 claim the Government has made that the agencies and the
18 Government has made no decision with respect to the
19 conservatorship. It may well be that they will -- they will
20 return them to private -- to private control. Your Honor, we
21 don't -- we think that the information that we're entitled to
22 have will demonstrate that that isn't the case and that they
23 have made a decision, a final decision that's not subject to
24 the information about which is subject to discovery because
25 it is not, as the Government claims, an ongoing deliberation

1 pre-decisional. They say everything --

2 THE COURT: But the best person to ask would be the
3 conservators.

4 MR. COOPER: Yes, Your Honor, and we will want to
5 do that, certainly.

6 THE COURT: So, why --

7 MR. COOPER: But we would like to have information
8 in our hands that is produced through this -- under this
9 Court's order, to substantiate and to ask those questions
10 about.

11 THE COURT: It seems more merits discovery to me at
12 this stage than it is discovery in aid of jurisdiction -- of
13 establishing the Court's jurisdiction.

14 MR. COOPER: Well, Your Honor, certainly the part
15 of the profitability issue that goes to the reasonableness of
16 the Plaintiffs' and other investors' expectations --

17 THE COURT: Expectations -- and best expectations.

18 MR. COOPER: -- that does go to the merits,
19 absolutely. And, in that sense, overlaps with the
20 jurisdictional issues. And, in fact, the Government, in its
21 chart, says that with respect to information that would be
22 responsive to request 1A, that information relates both to
23 the jurisdictional issues, that is the ripeness issue, and
24 the merits issue regarding reasonableness of our investment-
25 backed expectations.

1 But, Your Honor, as the Court's order is clear, the
2 ripeness question is before the Court because the Government
3 has contradicted allegations in our complaint supported by at
4 least some information publicly available that the
5 Government's fully assessing Fannie and Freddie's future
6 profitability as very bright as far as the eye can see. As I
7 mentioned, OMB says they expect these entities to generate
8 over \$210 billion in revenue for the Treasury over the course
9 of the next 10 years, on top of the over \$200 billion that
10 Fannie and Freddie has already repaid to the Government.

11 So, Your Honor, again, I would urge the Court to
12 hold to its discovery order and permit the discovery order
13 we're seeking to go forward, even in this layered approach
14 that the Court is suggesting.

15 If I could address counsel's argument with respect
16 to the claim that our discovery requests are outside of the
17 scope -- the legitimate scope of this Court's order. Counsel
18 has focused, for example, on our requests 2, 3 and 5, and
19 those requests, Your Honor, do go to profitability. Request
20 number 2, for example, asks for any and all documents
21 relating to the decision to compensate Treasury for its
22 financial commitment by awarding warrants to purchase 79.9
23 percent of the company's common stock.

24 Your Honor, we think that goes directly to the
25 Government's assessment of profitability because the

1 Government was, at that point, taking an 80 percent stake in
2 the future profits of these entities. And subsequent
3 valuations by Treasury of the value of those warrants are, by
4 definition, a statement with respect to profitability.

5 Again, our request, Your Honor, we have attempted
6 to cue very carefully and tightly to the scope of the issues
7 that the Court has permitted discovery on. And, Your Honor,
8 I believe I've made the points I'd like to make in response
9 to counsel's presentation. If the Court has any additional
10 questions, I'd be happy to address them.

11 THE COURT: No, thank you. Thank you, Mr. Cooper.

12 MR. COOPER: Thank you, Your Honor.

13 MS. HOSFORD: May I approach, Your Honor?

14 THE COURT: Certainly.

15 MS. HOSFORD: Thank you.

16 Your Honor, I'd first like to address the
17 inconsistency issue, whether FHFA is entitled to assert the
18 deliberative process privilege in light of the Government's
19 argument that it is not the United States. I would first
20 point out that the inconsistency was originally created by
21 the Plaintiffs. They're the ones who, in filing their
22 complaint, alleged that FHFA is the United States. Now, when
23 we're embarking on discovery in advance of a decision on our
24 motion to dismiss, they're saying, no, since FHFA is not the
25 United States, you should not be able to assert the

1 deliberative process privilege. So, there's been
2 inconsistency on the Plaintiffs' part.

3 And even setting that side, if we're right and FHFA
4 is not the United States and the Court doesn't have
5 jurisdiction, then they're not -- they're absolutely not
6 entitled to any materials of any kind in the context of this
7 action. If we're wrong and FHFA is the United States, and
8 that has not yet been decided, then FHFA is entitled to
9 deliberative process privilege.

10 So, by waiving the privilege at this time, the FHFA
11 puts it in an untenable position -- itself in an untenable
12 position. It either -- it would be disclosing documents that
13 would never have been disclosed if the Court finds it's not
14 the United States or it could be disclosing documents that
15 would be subject to deliberative process privilege if the
16 Court finds that it is the United States. So, FHFA just
17 cannot waive the deliberative process privilege at that time.
18 It just cannot happen.

19 Moving on to some of Fairholme's counsel's
20 comments, in their reply, and again today, Plaintiffs claim
21 that the Government is looking for blanket relief and that
22 there is absolutely no way that that relief is within the
23 scope of Section 4617(f). I would just point out that the
24 plain language of 4617(f) is very broad and it's within the
25 context of very comprehensive authority and exclusive

1 authority that's provided to the conservator when the
2 enterprises are in conservatorship.

3 Once the enterprise -- if the enterprises were to
4 be put in receivership -- and, obviously, no decision has
5 been made on that and that's down the road -- there may be
6 certain rights that the receiver -- that the shareholders
7 would have to look for -- to seek a liquidation preference or
8 some sort of claim. At this point, they have no rights under
9 4617(b)(2), and that is one basis for our motion to dismiss,
10 obviously. But you can't divorce 4617(f) from the totality
11 of the statute which puts exclusive authority on the
12 conservator and prevents any sort of second guessing or
13 interference with conservator's operation of the
14 conservatorships.

15 In fact, the Eighth Circuit in the Dittmer case has
16 said that with respect to an analogous provision in FIRREA,
17 it's almost identical, that the provisions to prohibit any
18 interference, direct or indirect, the functions of a
19 conservator or a receiver. There, what had happened was FDIC
20 had sold a note to another entity and then there was a suit
21 on that note, and that suit was precluded because it would
22 have an indirect effect on FDIC.

23 So, we feel strongly that 4617(f) is applicable to
24 this case, and in light of the serious harms that were
25 outlined in the declarants -- declarations, that Plaintiffs

1 should not be able to seek discovery from August 17th, 2012
2 on for 1A and 6 through 10. And I would just point out that
3 the title of 6 through 10 of the requests for documents is
4 termination of the conservatorships. All they are looking
5 for is ongoing thinking about what will happen to the
6 conservatorships.

7 And just getting to -- then moving on to counsel's
8 points about whether or not a decision has been made with
9 respect to the future of the conservatorships and whether or
10 not there should be depositions here, we have three sworn
11 statements by government officials, including the director of
12 the FHFA and counselor to the Secretary of the Treasury for
13 housing finance who have said definitively, we have not made
14 a decision yet. There has been no decision made. Congress
15 will ultimately have to take some sort of action.

16 What Plaintiffs seem to be implying is that there
17 is some sort of bad faith on the fact of these declarants who
18 are saying this unequivocally and we absolutely would not
19 agree to depositions of these high officials at this point in
20 the case, particularly since their declarations are so clear.
21 There's no question about the fact that there's been no
22 decision made. Therefore, the Plaintiffs' claim is not
23 right. If, however, a decision has been made, as the
24 Plaintiffs allege, then they don't need discovery, they have
25 this wealth of public information that they've made reference

1 to, and the Court can just decide the issue.

2 I would also point out that Plaintiffs claim that
3 the secret plan is that FHFA and the Government will never
4 end the conservatorships. FHFA doesn't even have authority
5 to maintain Fannie Mae and Freddie Mac in conservatorship in
6 perpetuity. I mean, it's an indefinite, but not a permanent
7 state that they're in now. The authority of the conservator
8 is to reorganize or rehabilitate or wind up the enterprises.
9 It does not have authority to just keep it in conservatorship
10 state forever. And, so, Plaintiffs' statement in their brief
11 and their statements today to that effect are just flat out
12 wrong. And the declarations back that up and we don't need
13 any further discovery on the question of whether the -- what
14 will happen to the conservatorships. We know that nobody
15 knows at this point what will happen.

16 Plaintiffs said, well, the decision is that
17 Congress has to make that decision. Well, that's not a
18 decision. Congress hasn't made a decision. Theoretically,
19 FHFA could put the enterprises in receivership if they -- if
20 their financial condition deteriorates substantially,
21 regardless of whether Congress makes a decision. At this
22 point in time, it's thought that Congress may take action
23 first, but nobody knows for sure what is going to happen, and
24 that is the point of this whole housing reform effort.

25 Getting to the issue of scope and Plaintiffs say,

1 well, you know, you can't have a blanket categorical
2 privilege. Well, as I mentioned earlier, yes, you can have a
3 blanket categorical privilege when it relates to ongoing
4 documents and future documents that are subject to, in this
5 case, the deliberative process privilege or the protection
6 under 4617(f). A cutoff date is perfectly appropriate and
7 the cutoff date that we have proposed here is perfectly
8 appropriate and we cannot overstate the harms that will occur
9 if -- through deposition transcripts or documents getting out
10 about the future of the conservatorships that somehow
11 interest rates spiked or some other economic harm took place.

12 THE COURT: I do have a question for you. With the
13 documents that you are willing to produce --

14 MS. HOSFORD: Mm-hmm.

15 THE COURT: -- as set forth in your chart, Document
16 60 -- I guess it's page 22 of 23 -- are any of these
17 documents -- do you want any of these documents subject to a
18 protective order? Do we need the protective order in place
19 so that all these documents are under seal?

20 MS. HOSFORD: Yes, we do need a protective order
21 and we have been working on a draft protective order and we
22 were hoping to present it to the Plaintiffs within the next
23 few days. But the protective order we're talking about is
24 not the same type of protective order that we're asking the
25 Court to grant. It's the more typical protective order.

1 THE COURT: Of course, yes. That was my question,
2 yes. I understand that the protective order that you've
3 moved for in your motion is to be relieved of the obligation
4 to respond to discovery. That didn't escape my notice.

5 MS. HOSFORD: Okay.

6 THE COURT: My question was -- my question was --
7 and you've actually -- I wanted to know if you were going to
8 need a protective order, the traditional type you would find
9 in Form -- I think it's 8, of our rules. Do you think you
10 can get a proposed form order filed by next Tuesday by 5:00
11 p.m.?

12 MS. HOSFORD: Your Honor --

13 THE COURT: That obviously is a question. It isn't
14 a directive. Do you think that's possible? I mean, is that
15 possible?

16 MS. HOSFORD: We would make every effort to do so.
17 Obviously, I can't make the decision myself, but we would
18 work as hard as we could to meet that deadline. But I can't
19 -- I can't stand here and say, yes, we --

20 THE COURT: Okay. Well, I'm going to give that as
21 a deadline. If you need to enlarge the deadline, I will
22 grant it. But I -- the way I run my cases and keep things on
23 track is I have deadlines in place, and then I can -- you
24 will tell me if you can meet it. If you can, great. If you
25 need more time because you're negotiating terms, that's fine,

1 too. But I like to have deadlines in place.

2 MS. HOSFORD: Okay.

3 THE COURT: It's my housekeeping method.

4 MS. HOSFORD: And, Your Honor, we would just note
5 that to the extent that Court -- I think the Court made
6 reference to waves of discovery and that a cutoff date would
7 be imposed, we would respectfully ask, if the Court was
8 willing to do so, that the Court allow us to comment on a
9 draft of the order before it's actually issued and
10 potentially, you know, provide further justification for
11 different dates and --

12 THE COURT: No, I won't do that, but what I will do
13 is when I -- I will -- I don't have a date certain, but I
14 will be entering an order sometime in the near future, I'll
15 put it that way, and you can -- what I will say is it will
16 not go into -- that you will have, say, 10 days to file
17 for reconsideration and explain -- and this goes for both
18 sides -- why you need more time or -- why more time is
19 appropriate or why less time is appropriate.

20 MS. HOSFORD: Okay. Just one last thing,
21 Plaintiffs' counsel, in responding to our chart, really did
22 seem to only take issue with one request and that is --

23 THE COURT: It was my impression he was -- that
24 wasn't my impression of what --

25 MS. HOSFORD: Well, I obviously think that they

1 expect responses to 6 through 10, but in talking about the
2 scope issues, whether or not the discovery is within the
3 scope of what the Court ordered, which is a separate issue
4 from 6 to 10. It's definitely within the scope, but we say
5 that because it forces them to (inaudible) privilege, it
6 shouldn't be produced.

7 But he mentions number 2, decision to compensate
8 Treasury through 79.9 percent warrants. As I said earlier,
9 that warrant issue is not -- does not go directly to the
10 solvency of the enterprises in 2008, and as we said, it would
11 be captured by 1A. So, unless the Court has other
12 questions...

13 THE COURT: No, thank you very much.

14 MR. COOPER: Your Honor, would the Court indulge me
15 just for a moment?

16 THE COURT: Please.

17 MR. COOPER: Thank you. The first point I want to
18 make is that counsel hasn't in any way explained why a
19 protective order, one even including the caulking that the
20 Court has mentioned, is adequately protective of the
21 documents that are of the same ilk as the documents that they
22 want a blanket, essentially, privilege from this Court, to
23 keep from producing it all, why it's good enough for the
24 documents that they say they are willing and agreed to
25 produce, but it isn't good enough to protect their interest

1 with respect to the documents that they want you to simply
2 grant them a pass on.

3 The other thing I'd like to quickly do is just
4 to --

5 THE COURT: Well, I think it goes to the magnitude
6 of the damage that can be -- or havoc that can be wreaked if
7 certain documents are released to the public. So, I
8 understood -- I'm sure Defense counsel will tell me whatever
9 she wants to tell me. And if I have misunderstood her
10 position, she can set me right, but I think it goes to the
11 magnitude of harm.

12 So, I think it goes to damage control, frankly. I
13 think that's what it --

14 MR. COOPER: Not the --

15 THE COURT: -- not damage control in terms of
16 liability, but damage control in terms of if certain
17 documents are released to the public, it could create, as the
18 affiants explained, wreak havoc in the market, it could cause
19 interest rates to spike. And that certainly is not the
20 reason we're going through this exercise.

21 MR. COOPER: Your Honor, the other point I'd like
22 to -- I'd like to emphasize is that my reference to request
23 numbers two and three specifically was to illustrate my point
24 that every one of our requests are tightly tethered to the
25 subjects, the specific subjects, that the Court ordered that

1 we're entitled to discovery on. And I don't want my -- and I
2 can trudge through every one of them if the Court would like
3 me to.

4 THE COURT: No, no. I did not construe your
5 silence with respect to other requests as a waiver of the
6 necessity for discovery. I understood that.

7 MR. COOPER: And, so, we do not agree with the
8 limitations that counsel for the Government has identified in
9 this chart. We don't agree with the time frames and
10 certainly not with the limits, for example, on the requests
11 11 through 18 that go directly to this question whether or
12 not FHFA is the United States or it was acting for the
13 benefit of the United States in the Net Worth Sweep. Every
14 one of those requests, we would submit to you, is tightly
15 tethered to that question and to the questions, which the
16 Court correctly noted are directly relevant to that, that
17 issue is a context-specific issue, as the Court correctly
18 relied on Slattery, binding authority from the Federal
19 Circuit, to hold.

20 And it requires inquiry into the purposes, FHFA's
21 purposes in entering the Net Worth Sweep, as whether
22 information concerning whether Treasury or any other
23 Government agency was exercising some type of undue influence
24 and it was acting, therefore, at the behest of those
25 agencies. So, we believe those requests are very tightly

1 tethered to those inquiries. And the relevance appears on
2 the face of the requests, we would submit, Your Honor. So,
3 thank you.

4 THE COURT: Thank you, Mr. Cooper.
5 Counsel?

6 MS. HOSFORD: If I can just make one comment, Your
7 Honor.

8 THE COURT: Certainly.

9 MS. HOSFORD: Your Honor, you correctly stated one
10 of the concerns that the Government has about responding to
11 the discovery requests numbers 6 through 10, which had to do
12 with termination of conservatorships, the future of Fannie
13 Mae and Freddie Mac and future profitability. But another
14 equally important -- it's not just about whether documents
15 will be disclosed. It's also about the specter of
16 disclosures effect on the ongoing housing reform effort.

17 As Dr. Stegman indicated in his declaration, if
18 there is the possibility that ongoing discussions -- frank
19 discussions, maybe radical proposals, all of which are
20 predecisional and not disclosed -- not subject to discovery,
21 if there's some possibility that in the future they may be
22 disclosed, then that's going to stymie the housing reform
23 effort that's under way. I mean, in the declaration, it
24 states Treasury personnel are unlikely to feel at liberty to
25 offer their opinions. Other agencies may cease communicating

1 freely with Treasury.

2 And, you know, rationales for Treasury policies and
3 decisions will sort of -- the whole process of coming up with
4 policy could be severely impaired. And the same thing
5 applies to FHFA. If there -- if there's the threat that any
6 decision they make about the future of the conservatorships
7 could be subject to potential disclosure, then they won't be
8 able to effectively make those decisions and bring about the
9 type of housing reform that will help us overcome the
10 financial crisis that we -- that happened in 2008 and that we
11 want to avoid in the future.

12 THE COURT: Thank you.

13 MR. COOPER: Forgive me, Your Honor, with this
14 footnote. I think it's important not to lose sight of the
15 fact that their request for this blanket exception under
16 deliberative process privilege rubric for producing any
17 information, for example, after August 17th, 2012, clearly
18 can't stand up to the simple reality that there are many
19 documents in that -- undoubtedly in the Government's files
20 that are not privileged at all by definition, documents that
21 they -- the Government has exchanged in communications with,
22 for example, Congress, outside -- outside -- of the Executive
23 Branch are -- according to longstanding precedent in this
24 Court and in the DC Circuit and any other communications with
25 third parties outside the agency or outside the Executive

1 Branch are clearly not privileged, so they would have to
2 identify -- produce those documents in any event.
3 Information that goes to the subjective motivations of FHFA
4 in entering into the Net Worth Sweep, they put that into --
5 into issue.

6 And, Your Honor, the cases are clear that that
7 eliminates their ability to then claim a privilege to prevent
8 inquiry into those subjective motivations, the question that
9 this Court identified. Purpose. What -- was FHFA acting,
10 you know, under the influence and duress of another
11 Government agency. These things are simply not privileged at
12 all, and the Government can't -- they can't refuse to produce
13 them. Thank you.

14 THE COURT: Thank you. And it looks like there's
15 one more note coming from Mr. Drisser (phonetic).

16 I will say this, given everything that's been said
17 today -- of course I haven't heard any evidence as yet, but
18 just based upon counsel's arguments, what I've heard so far
19 tends to suggest that FHFA is -- I don't want to say joined
20 at the hip with Treasury -- but it doesn't sound like they're
21 necessarily an independent entity that's just not -- has no
22 connection to the Government. But having said that, I'm
23 keenly sensitive to the deliberative part, because that
24 would, then, clearly bring into play legitimately the
25 deliberative process.

1 And I am very sensitive to the terrible
2 ramifications that will flow from the disclosure of sensitive
3 documents. So, I'm very sensitive to that, and that's
4 because I, again, just from the arguments that have been
5 made, it certainly tends to suggest that -- haven't taken
6 evidence yet -- but that FHFA is, in fact -- could be
7 construed as a Executive agency for purposes of making the
8 United States liable -- if, in fact, a taking has occurred.

9 But, you know, I haven't made a decision on that.
10 I'm just saying based upon counsel's -- Government counsel's
11 arguments that have been tremendous advocacy on the part of
12 the Government, but, again, if you're saying that FHFA is
13 dealing directly and is taking guidance from or working hand
14 and glove with Treasury, that -- and they're helping --
15 assisting with setting policy, that tends to show that they
16 are, in fact, an entity of the United States. And I see Mr.
17 Drisser getting out his pen, so there may be two, which is
18 perfectly fine. I'll let you finish writing your note to
19 your co-counsel, and then you can ask me whatever you like.

20 MS. HOSFORD: Your Honor, in response to the
21 statement you just made, we would just make the point that
22 FHFA does not act in just one capacity. There's FHFA acting
23 as regulator, and then there is FHFA acting as a conservator.
24 We have argued that FHFA acting as the conservator is not the
25 United States, and there is ample case law to support that

1 position, but we do not -- we're not imply -- we don't mean
2 to imply or state that FHFA never acts as the United States.

3 THE COURT: I really -- thank you for that
4 clarification, because that certainly wasn't coming through.
5 And I understand the distinction. I don't know if it will
6 necessarily carry the day. I haven't decided it yet. But
7 thank you, because that point was not coming through at all.

8 MR. COOPER: Thank you, Your Honor.

9 THE COURT: Thank you. I'm also curious before
10 counsel -- if you wouldn't mind coming back. You've
11 suggested the cutoff date -- well, actually, there are three
12 cutoff dates for the discovery that -- in your chart. What
13 are the beginning dates of discovery? Do you accept
14 Plaintiffs' --

15 MS. HOSFORD: Those are also in the chart.

16 THE COURT: Pardon?

17 MS. HOSFORD: They're are also in the chart.

18 THE COURT: Oh, I apologize.

19 MS. HOSFORD: That's okay.

20 THE COURT: Let me -- I should have looked at it
21 before. I thought I had -- oh, thank you very much.

22 Oh, yes, I'm sorry. Is there any -- would you
23 agree to the enlargement of any of these dates?

24 MS. HOSFORD: I can't stand here and say that we
25 would agree to enlargement of the dates. With respect to the

1 Government's current assessment of future profitability, no,
2 that's our -- that's where we say that the -- at 4617(f) and
3 the deliberative process privilege preclude anything after
4 August 17th, 2012. I think there has been some negotiation
5 on the other -- on the other dates, and it may be subject to
6 further negotiation.

7 THE COURT: Well, I don't -- I don't want to
8 look -- well --

9 MS. HOSFORD: We're not negotiating any further on
10 those dates. I'm sorry.

11 THE COURT: All right. The other issue that I do
12 recall, there was some issue with regard to search terms.
13 Have you all reached agreement? And I realize your colleague
14 may have --

15 MS. HOSFORD: Ask Mr. Schwind to address that.

16 THE COURT: Mr. Schwind, would you like to --

17 MR. SCHWIND: Yes.

18 THE COURT: Have you reached agreement on -- with
19 regard to search terms?

20 MR. SCHWIND: Well, thank you, Your Honor. And,
21 no, I'm happy to report we have reached agreement on search
22 terms --

23 THE COURT: Congratulations. Good.

24 MR. SCHWIND: -- and custodians. The one aspect of
25 the search that we have not been able to reach agreement on

1 is with respect to the date range.

2 THE COURT: Sure.

3 MR. SCHWIND: And that's why we proposed the date
4 ranges in our motion that we have, and we think those ranges
5 are appropriate for the subjects that the Court has
6 identified in its order.

7 THE COURT: Very good. And I'm going to ask Mr.
8 Cooper, with regard to -- let's say that I accept the end
9 dates, just hypothetically, that the Government proposes. Do
10 you agree with the start dates? It looked from your
11 discovery requests it would precede -- just looking at the
12 columns, the July 1st of 2008 and the January 1st of 2012 for
13 the latter two boxes, or am I mistaken?

14 MR. COOPER: Your Honor, we -- in the discussions
15 that Mr. Colatriano has headed up for our team with the
16 Government, we have not agreed to these date ranges, no.

17 THE COURT: Very good.

18 MR. COOPER: And --

19 THE COURT: With regard to the date ranges, with
20 regard to when the search would begin, let's say I accept the
21 end date proposed by the Government. What does the Plaintiff
22 suggest for the start dates?

23 MR. COOPER: May I --

24 THE COURT: And then you have your colleague --

25 MR. COOPER: Yeah, may I ask Mr. Colatriano to

1 address that?

2 THE COURT: Certainly.

3 MR. COLATRIANO: Good afternoon, Your Honor, may it
4 please the Court.

5 THE COURT: Yes.

6 MR. COLATRIANO: We have -- Mr. Schwind is correct.
7 As of yesterday, we have agreement on search terms and
8 custodians, but we don't have agreement on the entire date
9 ranges. With respect -- we've taken a somewhat different
10 approach than the Government has in its chart where they list
11 it by topic. What we have done is we have proposed with
12 respect to different search terms have different date ranges.

13 And for most of those search terms, we have started
14 a few months earlier than the Government did in 2008. They
15 say July 1; we have suggested to them April 1, 2008, through
16 December 31, 2008, for certain terms. And then we have
17 proposed a second period with respect to those search terms,
18 a second date range that again begins a few months before the
19 January 1, 2012 date that they've proposed. And actually it
20 goes beyond by a few months the September 30th date. I don't
21 think we're talking about huge differences there, but we are
22 talking about some differences of a few months.

23 And then with respect to the third category, we do
24 -- do not agree with either the beginning date or the end --

25 THE COURT: Certainly the end date, yes.

1 MR. COLATRIANO: And, so, it might be because we've
2 taken a somewhat different approach, because way -- it might
3 be that it might make sense for us to maybe explain our
4 reasoning for this. We could do a short -- submit a short
5 filing describing our proposed date ranges and the rationale
6 behind them. And then that would be the only outstanding
7 thing relating to ESI because we have come to an agreement on
8 the custodians and the search terms, but we can explain some
9 of our reasoning here.

10 One concern that we do have is that, you know, it's
11 important to keep in mind that our proposal is not premised
12 on the notion that only documents in those date ranges are
13 the only relevant documents. Instead, what we've tried to do
14 is reduce the burden on the Government by focusing in on some
15 date ranges that are probable -- probably will have the
16 highest concentration of relevant documents. But to give an
17 example, under the Government's approach, as I understand it,
18 there's a document that's relevant to the solvency of the
19 enterprises at the time of conservatorship, as of 2008, but
20 that document was itself created in 2012, it's sort of
21 recounting, for example, what the solvency was and the
22 expectations were then. Then the Government wouldn't produce
23 that to us because it wasn't created during the relevant time
24 period, even though it's directly relevant to that time
25 period.

1 We think that that's not the proper approach here.
2 Once you do the searches with these date ranges, if it's
3 relevant to these issues, as the Court has decided or will
4 decide what the scope of discovery will be, it should be
5 produced regardless of when it was created if it turns up in
6 one of these searches. So, that's somewhat of a nuance on
7 the proposals here, but what I would propose is if you would
8 like us to sort of walk through the date ranges that we think
9 are more appropriate and the rationale for them, we'd be
10 happy to submit a short filing in the coming days to do that
11 -- just that.

12 THE COURT: Well, could you do that by Monday?

13 MR. COLATRIANO: Yes.

14 THE COURT: Great, Monday at 9:00 a.m. Is that --
15 okay.

16 MR. COLATRIANO: Yes.

17 THE COURT: Monday. All right. What time on
18 Monday can you get it to me?

19 MR. COLATRIANO: We'll try to get it done by
20 9:00 a.m. We'll certainly get it done before noon, but
21 certainly --

22 THE COURT: Okay. Well, let's say noon. Let's say
23 noon on Monday.

24 MR. COLATRIANO: Okay.

25 THE COURT: That's fine.

1 MR. COOPER: Your Honor, if I may, I just want to
2 make sure that everything is clear in terms of the record
3 with Mr. Colatriano's point here. The date ranges for
4 searches that we're negotiating over is different from the
5 date ranges that they are proposing to the Court that they
6 want protection --

7 THE COURT: No, I do --

8 MR. COOPER: -- with respect to -- okay. So, one
9 is here's the date range that you can limit your search to,
10 but anything that is returned by that search that would be
11 relevant, we get. They're saying no, that's not the case.
12 If it was a document that's returned by the search but it
13 falls outside of the date range that they're asking for
14 protection for.

15 THE COURT: Understood.

16 MR. COOPER: Okay. All right. Thank you.

17 MR. SCHWIND: Your Honor, just to try to simplify
18 this, we appreciate Plaintiffs' offer to file yet another
19 submission on this, but I'd just point out that the parties
20 have agreed to search terms and to custodians. And, so, if
21 the Court provides the last piece of that, what date ranges,
22 then, essentially, we have a stack of documents on the table
23 that we're going to review for privilege and responsiveness.
24 Okay, it's just really how to generate that stack of
25 documents.

1 Plaintiffs have had this complicated -- and I'm not
2 trying to be disparaging -- but they have a different view of
3 how to reach that stack, and they say, well --

4 THE COURT: That usually happens in discovery, but
5 -- this is not uncommon.

6 MR. SCHWIND: It just really gets into the weeds,
7 Your Honor, when they say, well, for this search term we want
8 this date range, but for this search term, we want that date
9 range. It almost becomes, in our view, unworkable. For this
10 nuance that counsel raised, I suspect we can resolve that. I
11 actually don't recall hearing that. Maybe I didn't -- maybe
12 I didn't understand correctly, but I think we can probably
13 resolve that nuance as far as, you know, if the document
14 comes up in 2012 that has to do with solvency back in 2008 is
15 the Government going to produce it. I mean, I think we can
16 probably reach agreement on that.

17 THE COURT: If you do, I'd ask you to do the same
18 thing by noon on Monday, file a status report, please,
19 Defendant's status report, and just let me know if, in fact,
20 you have been able to resolve the search terms and this
21 particular nuance with regard to when -- what's going to be
22 caught when you run the search.

23 MR. SCHWIND: Right. And, again, we have reached
24 agreement on search terms. That's why I'm a little confused
25 by what Plaintiff has proposed to file on Monday, because,

1 again, the only piece of the search that's left out there is
2 the date ranges that we're going to apply the search terms
3 and the custodians to. So, they're saying, well, maybe this
4 search term in this date range, and we -- or this search term
5 -- and, I mean, again, to us, it just seems unnecessary when
6 the only thing that's out there is the date ranges that we're
7 going to search. I hope that makes sense.

8 MR. COOPER: And I appreciate Counsel's suggestion
9 here. I misunderstood perhaps counsel earlier to have said
10 that with respect to these dates there's no more negotiation.
11 And perhaps you weren't talking about the date ranges for the
12 search terms.

13 MR. SCHWIND: Right.

14 MR. COOPER: Okay.

15 MR. SCHWIND: One -- no, we feel like we are at
16 impasse on the date ranges themselves, but what Mr.
17 Colatriano brought up was, well, what if one document comes
18 up in this second range that looks like it's responsible to
19 an issue that's for another date range. That's a different
20 issue. We do believe and we would respectfully request that
21 the Court provide us guidance on what date ranges the Court
22 feels is appropriate to be searched. That will greatly
23 assist the parties.

24 THE COURT: Oh, I certainly will do that. I mean,
25 it's my -- the impression that I have, and I'd appreciate

1 it if Plaintiffs' counsel will correct me on this -- is
2 that let's say just hypothetically I would accept the
3 particular -- for particular terms the date range of July 1st
4 through December 31st of 2008, what the Defendant has
5 suggested. And what I understand Plaintiffs' counsel to say
6 is that a document generated during that particular time span
7 could have been discussed in later documents and expounded
8 upon in a document created in January 2014 and Plaintiff
9 would want that document. Is that what I understand you to
10 say?

11 MR. COLATRIANO: That is basically right. If we
12 have -- if there's search terms that are run against agreed
13 dates or Court-ordered dates, if it's -- if that generates
14 any document that's relevant to any of these issues, even if
15 it's an issue that focuses on something that happened in
16 2008, if that document is relevant to that, we would expect
17 it to be produced, even if it was created later. That's the
18 issue.

19 THE COURT: And I will tell you now, I'm going to
20 give -- I think I have a clear grasp of the nature of the
21 dispute that we have right now, and it's the Plaintiffs'
22 ability to meet the jurisdictional challenge brought by the
23 Defendant. And there's going to be more -- a more narrow
24 date range. I don't think if a document was created on July
25 1st of 2008, you know, what you all have agreed to here or

1 proposed, and the fact that that same document was later
2 discussed on May 20th, 2014, the May 20th, 2014 document is
3 not going to be produced.

4 I mean, there's got to be -- for purposes of the
5 nature of this inquiry and this discovery request, it's going
6 to be more narrowly focused. We're taking a surgical
7 approach. But I want the Plaintiffs to have -- I mean, their
8 day in court may be that they'd prevail all the way to the
9 Supreme Court. I'm not coming down one way or the other, but
10 it's important for the Plaintiffs to have access to
11 information so that they have the ability, if possible, to
12 establish this Court's jurisdiction. And that's all I'm
13 dealing with at the moment.

14 Merits from the Government -- Plaintiffs'
15 perspective will come later; from the Government's
16 perspective, we won't need to go there. So, we'll just have
17 to see who prevails. But the Plaintiffs will have the
18 ability to make the best case they can to establish the
19 Court's jurisdiction. And with that, I'll say good
20 afternoon. Thank you.

21 ALL: Thank you, Your Honor.

22 (Whereupon, at 12:41 p.m., the hearing was
23 adjourned.)

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CERTIFICATE OF TRANSCRIBER

I, Elizabeth M. Farrell, court-approved
transcriber, certify that the foregoing is a correct
transcript from the official electronic sound recording of
the proceedings in the above-titled matter.

DATE: 6/20/14

ELIZABETH M. FARRELL, CERT