IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PERRY CAPITAL LLC, Plaintiff, v. JACOB J. LEW, *et al.*, Defendants.	Civil Action No. 1:13-cv-1025-RCL

PLAINTIFF PERRY CAPITAL LLC'S MOTION FOR SUPPLEMENTATION OF DEFENDANTS' ADMINISTRATIVE RECORDS

Plaintiff Perry Capital LLC hereby respectfully moves for entry of an order requiring supplementation of the administrative record submissions produced by both sets of Defendants. Plaintiff also respectfully requests that the Court schedule a status conference, at the Court's earliest convenience, to address the issues raised by this motion. In support of this motion, Plaintiff has filed an accompanying memorandum of law (with supporting exhibits) and a declaration by Matthew D. McGill.

Pursuant to Local Civil Rule 7(m), Plaintiff discussed this motion with counsel for Defendants. Defendants indicated that they will oppose this motion.

Dated: September 18, 2014

Respectfully submitted,

/s/ Theodore B. Olson

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FOR THE DISTRICT OF COLUMBIA

PERRY CAPITAL LLC, Plaintiff, v. JACOB J. LEW, *et al.*, Defendants.	Civil Action No. 1:13-cv-1025-RCL

PLAINTIFF PERRY CAPITAL LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUPPLEMENTATION OF DEFENDANTS' ADMINISTRATIVE RECORDS

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INTRODUCTION

In July 2013, Plaintiff Perry Capital LLC ("Perry Capital") filed this action under the Administrative Procedure Act against the Department of Treasury and the Federal Housing Finance Agency ("FHFA") to vacate the Sweep Amendment, which requires Fannie Mae and Freddie Mac (collectively, "the Companies") to give Treasury every cent of their net worth each quarter. Other parties filed similar actions in this Court and those actions have been coordinated with Perry Capital's action.

In December 2013, Treasury filed its administrative record (the "Administrative Record"), which included several presentations and certain projections that purport to justify Treasury's decision to execute the Sweep Amendment. Also, in December 2013, FHFA filed with this Court certain documents that purportedly support FHFA's execution of the Sweep Amendment. However, FHFA asserted that it was not required to compile or to file an "Administrative Record"; instead, FHFA filed a self-styled "Document Compilation" that did not purport to satisfy the requirements for an administrative record. For ease of reference, the Administrative Record and the Document Compilation are referred to collectively as the "Record."[1]

In February 2014, one set of plaintiffs to the coordinated actions, Fairholme Funds, Inc., et al., (collectively "Fairholme"), moved this Court for supplementation of the Record and for limited discovery on the completeness of the Record. Perry Capital did not at that time join Fairholme's motion, but noted in its opening memorandum in support of its motion for summary judgment that "if the Court orders Defendants to supplement the inadequate administrative

[1] As noted above, FHFA has styled its filing as a "Document Compilation" and has admitted that the filing does not comply with the requirements for compiling an administrative record. *See* Pls.' Reply 26-29, Dkt. 47. Despite these defects, for simplicity's sake, Perry Capital will refer to FHFA's filing as a "Record."

records they have submitted thus far," "even more evidence . . . is likely to be disclosed." Pls.' Mem. of Law in Opp'n to Defs.' Mots. to Dismiss and Mots. for Summ. J. and in Supp. of Pls.' Cross-Mot. for Summ. J. on Administrative Procedure Act Claims 51 n.19 (Dkt. 37) ("APA Opening Br.").

In light of recent events, Perry Capital now joins Fairholme's motion.

At the end of July, a document emerged that clearly belongs in Treasury's Administrative Record—a presentation to Treasury by Blackstone Advisors dated a year prior to the date of the Sweep Amendment on the state of the Companies and possible avenues for reforming them. *See* Discussion Materials, Presented by Blackstone Advisors to the Department of Treasury ("Blackstone Presentation").[2] The Blackstone Presentation undermines key arguments that Treasury and FHFA have advanced in this litigation to justify the Sweep Amendment. The government's possession of the Blackstone Presentation raises serious questions about the adequacy of the Record filed in this case, and why certain documents, including the Blackstone Presentation, have been omitted. At the same time, in Fairholme's parallel litigation before the U.S. Court of Federal Claims (the "Federal Claims Case") (which Perry Capital has not joined), the court has ordered the government to provide Fairholme with discovery relevant to Treasury's and FHFA's decision to execute the Sweep Amendment. Over the last several months, the government has undertaken to review its files, and it is expected to produce 800,000 pages of documents, many of which likely should have been included in the Record submitted to this Court last year.

Accordingly, to ensure that the Court has the complete Record before it when ruling on the parties' dispositive motions, this Court should order supplementation of the Record. Because

[2] The Blackstone presentation is attached as Exhibit A of the Decl. of Matthew D. McGill (Sept. 18, 2014).

the government is already reviewing and producing its files in the Federal Claims Case, supplementation of the Record will not impose any additional burden on the government and will help to promote judicial efficiency.

BACKGROUND

A. Proceedings Before This Court

Plaintiff Perry Capital filed suit in this case on July 7, 2013, challenging under the Administrative Procedure Act ("APA") Treasury's and FHFA's decisions to execute the Sweep Amendment. Other plaintiffs filed related cases that objected to the Sweep Amendment on a variety of grounds, including a suit by Fairholme raising APA and other challenges.[3]

On December 17, 2013, Treasury filed an Administrative Record (*see* Dkt. 26) and FHFA filed a "Document Compilation" (*see* Dkt. 27).[4] In its case, No. 13-cv-1053, Fairholme moved to supplement the Record and for limited discovery regarding its completeness. *See* Mem. of P. & A. in Supp. of Pls.' Mot. for Supplementation of the Administrative R., for Limited Disc., for Suspension of Briefing on Defs.' Dispositive Mots., and for a Status Conference, *Fairholme Funds*, No. 13-cv-1053, Dkt. 32 (D.D.C. Feb. 12, 2014) ("Fairholme Mot. to Supplement")[5]; *see also* Pls.' Reply in Supp. of Their Mot. for Supplementation of the Administrative Rs., for Limited Disc., for Suspension of Briefing on Defs.' Dispositive Mots., and for a Status Conference, *Fairholme Funds, Inc. v. FHFA*, No. 13-cv-1053, Dkt. 36 (D.D.C. Mar. 13, 2014)

[3] The related cases filed before this Court—*Fairholme Funds, Inc. v. FHFA*, No. 13-cv-1053 (D.D.C.); *Arrowood Indemnity Co. v. Federal National Mortgage Association*, No. 13-cv-1439 (D.D.C.); *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations*, 13-mc-1288 (D.D.C.)—have not been consolidated, but the briefing on dispositive motions has been coordinated.

[4] Except as otherwise noted, all docket numbers refer to docket entries in this case (No. 13-cv-1025).

[5] Exhibit B of the Decl. of Matthew D. McGill (Sept. 18, 2014).

("Fairholme Reply").[6] Perry Capital did not at that time join Fairholme's motion, which remains pending before this Court.

Meanwhile, Treasury and FHFA moved to dismiss the APA and other claims. *See* Treasury Defs.' Mem. in Supp. of Their Mot. to Dismiss, or in the Alternative, for Summ. J. 21-36 (Dkt. 31-1) ("Treasury Opening Br."); FHFA Defs.' Mem. in Supp. of Mot. to Dismiss All Claims and, in the Alternative, for Summ. J. as to Pls.' Arbitrary and Capricious Claims 19-32 (Dkt. 32) ("FHFA Opening Br."). In the alternative, they moved for summary judgment on the APA claims, relying on the Record. *See* Treasury Opening Br. 36-55; FHFA Opening Br. 63-70. Plaintiffs filed a cross-motion for summary judgment on the APA claims. *See* APA Opening Br. Briefing on the dispositive motions concluded on June 2, 2014. *See* Treasury Defs.' Reply (Dkt. 40) ("Treasury Reply"); FHFA Defs.' Reply (Dkt. 42) ("FHFA Reply"); Pls.' Reply (Dkt. 47) ("APA Reply"). Oral argument has not yet been scheduled.

B. Proceedings Before The U.S. Court Of Federal Claims

Around the same time that the cases challenging the Sweep Amendment were filed in this Court, Fairholme and others filed related suits against the government in the Court of Federal Claims. *See* Compl., *Fairholme Funds, Inc. v. United States*, No. 13-cv-465, Dkt. 1 (Fed. Cl. July 9, 2013).[7] Those plaintiffs allege that the government's imposition of the Sweep Amendment was a taking without just compensation, in violation of the Fifth Amendment, and seek money damages. *See id.* ¶¶ 76-88. Perry Capital has not joined those suits.

On December 9, 2013, the government moved to dismiss Fairholme's complaint in the Court of Federal Claims, raising both jurisdictional and merits objections. Def.'s Mot. to

[6] Attached as Exhibit C to the Decl. of Matthew D. McGill (Sept. 18, 2014).

[7] Those suits include other plaintiffs before this Court. *See, e.g.*, *Arrowood Indemnity Co. v. United States*, No.13-cv-698 (Fed. Cl.); *Cacciapalle v. United States*, No. 13-cv-466 (Fed Cl.); *Fisher v. United States*, No. 13-cv-608 (Fed. Cl.); *Washington Federal v. United States*, No. 13-cv-385 (Fed. Cl.).

Dismiss, *Fairholme Funds*, No. 13-cv-465, Dkt. 20 (Fed. Cl. Dec. 9, 2013). In response, Fairholme asked the court to suspend briefing to allow discovery. Pls.' Mot. for a Continuance to Permit Disc., *Fairholme Funds*, No. 13-cv-465, Dkt. 22 (Fed. Cl. Dec. 20, 2013). Fairholme argued that it needed discovery to respond to factual disputes with the government about allegations in the complaint and jurisdictional facts, such as the government's assessment of the Companies' future profitability at the time of the Sweep Amendment. *Id.* at 27-28.

On February 26, 2014, Judge Margaret M. Sweeney granted Fairholme's motion for discovery. *See Fairholme Funds, Inc. v. United States*, 114 Fed. Cl. 718 (2014). She first determined that Fairholme was entitled to discovery about information that was in the sole possession of the government that was needed to establish jurisdiction. *See id.* at 721. Specifically, Judge Sweeney ordered discovery on the future profitability of the Companies, on when and how the conservatorships will end, and on whether FHFA had acted as an agent and arm of Treasury. *See id.* Moreover, Judge Sweeney agreed that the government's arguments under Rule 12(b)(6) rested on factual assertions beyond or contrary to the complaint. *See id.* She therefore ordered discovery on the Companies' solvency, on the reasonableness of investors' expectations about their future profitability, and on why the government allowed the Companies' preexisting capital structure and shareholders to remain in place (including whether this decision was based on the partial expectation the Companies would return to profitability). *See id.* at 722.

Fairholme and the government proceeded to exchange discovery requests and negotiate over the terms of that discovery. In the midst of this process, the government moved for a protective order to preclude certain discovery. Def.'s Mot. for Protective Order, *Fairholme Funds*, No. 13-cv-465, Dkt. 49 (Fed. Cl. May 30, 2013). On July 16, 2014, Judge Sweeney denied the motion in large part, granting it only to the extent that it sought a protective order

restricting access to and disclosure of confidential information the government was ordered to produce. *See Fairholme Funds, Inc. v. United States*, No. 13-cv-465, 2014 WL 3511639 (Fed. Cl. July 16, 2014).

In its motion, the government had first sought to limit the time frame of requests regarding the termination of the conservatorships and about the future profitability of the Companies to those documents created before the Sweep Amendment. The government argued that disclosure of materials relating to these issues *after* execution of the Sweep Amendment would interfere with the operations of the conservatorships and potentially destabilize the housing market. Def.'s Mot. for Protective Order 7-10. Judge Sweeney pointedly disagreed:

> With respect to defendant's claim that the court lacks the authority to affect the exercise of the FHFA's powers or functions, the court agrees with the case law of the United States Court of Appeals for the Ninth Circuit, which states that the "FHFA cannot evade judicial review . . . simply by invoking its authority as conservator." *County of Sonoma v. Fed. Hous. Fin. Agency*, 710 F.3d 987, 994 (9th Cir. 2013); *Leon County v. Fed. Hous. Fin. Agency*, 700 F.3d 1273, 1278 (11th Cir. 2012) ("The FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp."). Thus, rather than turning a blind eye to a case and immediately dismissing it from its docket merely because the case concerns the FHFA, the proper approach is for a court to examine the factual underpinnings and legal contentions presented by the complaint, in order to determine whether the exercise of its jurisdiction is proper. *County of Sonoma*, 710 F.3d at 994 ("Analysis of any challenged action is necessary to determine whether the action falls within the broad, but not infinite, conservator authority."). Indeed, "Congress did not intend that the nature of the FHFA's actions would be determined based upon the FHFA's self-declarations . . . ." *Leon County*, 700 F.3d at 1278. For purposes of the instant motion, there is no request by plaintiffs that would potentially restrain or affect the exercise of powers or functions of the FHFA as conservator. Consequently, blanket assertions concerning the court's ability to conduct these proceedings, especially as they pertain to a discovery matter related to the question of jurisdiction, hold no merit.

Fairholme Funds, 2014 WL 3511639, at *2 (omissions in original).

In its motion, the government also sought to protect documents regarding these same topics and time frames by invoking the deliberative-process privilege, despite the government's failure to offer a privilege log. *See* Def.'s Mot. for Protective Order 10-18. Again rejecting the

government's argument, Judge Sweeney concluded that the government was required to justify privilege claims on a document-by-document basis; "general claims concerning the sensitive nature of the documents, and the adverse consequences that would result from divulging them," did not suffice. *Fairholme Funds*, 2014 WL 3511639, at *2; *see also id.* ("In essence, defendant asserts that the court should merely take its word that the documents—some of which defendant, itself, has not reviewed—are privileged. This suggestion is contrary to law."). She also noted that the deliberative-process privilege is not absolute, but rather is qualified, so a plaintiff may overcome the privilege by showing that its need for the document outweighs the harm of disclosure. *See id.*

Judge Sweeney then ordered phased discovery tied to particular time periods. *See id.* at *3. The first phase of discovery covers requests for information concerning: the nine months surrounding the imposition of conservatorship (April 1 to December 31, 2008); the fifteen months leading up to the Sweep Amendment (June 1, 2011, to August 17, 2012); and (aside from requests about the future profitability of the Companies or when the conservatorships might end) the six weeks after the Sweep Amendment (August 18 to September 30, 2012). *See id.* To assert any privilege, the government must prepare a "detailed" privilege log. *Id.*[8]

On the same day, Judge Sweeney issued a "Protective Order" to govern the treatment of confidential materials—termed "protected information"—produced in that litigation. *See* Protective Order, *Fairholme Funds*, No. 13-cv-465, Dkt. 73 (Fed. Cl. July 16, 2014). Under that Order, "protected information" includes "proprietary, confidential, trade secret, or market sensitive information." *Id.* ¶ 2. But documents "available under applicable law"—presumably

[8] Under a revised scheduling order, discovery is schedule to close on March 27, 2015. *See* Order, *Fairholme Funds*, No. 13-cv-465, Dkt. 92 (Fed. Cl. Sept. 8, 2014).

meaning documents available under the Freedom of Information Act—are not considered "protected information." *Id.* Protected information can be accessed only by counsel to the parties in the *Fairholme* Court of Federal Claims action (plus a limited class of support personnel and other individuals), and it may be used only in that case. *See id.* ¶¶ 3-6. Thus, neither Perry Capital nor its counsel will have immediate access to those documents produced by the government that the government deems protected information. Although the Protective Order appears to permit disclosure of documents that are otherwise discoverable, *see id.* ¶ 2, the government may initially designate all of its documents as "protected information," *id.*, and that designation will be reversed only if Fairholme objects and pursues a seemingly lengthy dispute-resolution process, *see id.* ¶¶ 17, 19. In other words, even as to documents for which there is no substantial concern for confidentiality, public access is uncertain. This restricted access could prohibit Perry Capital from viewing a significant volume of documents, as press reports suggest that the government is expected to produce approximately 800,000 documents to Fairholme. *See* Trey Garrison, *Former Fannie CFO Joins Fairholme Funds in GSE Investor Lawsuit*, Housingwire.com (Sept. 8, 2014), http://www.housingwire.com/articles/31295-former-fannie-cfo-joins-fairholme-funds-in-gse-investor-lawsuit.

C. Disclosure Of The Blackstone Presentation

On July 29, 2014, the website TheStreet, a financial news and services website, published a PowerPoint presentation that Blackstone, a global investment and advisory firm, and the law firm Skadden, Arps, Slate, Meagher & Flom LLP presented to Treasury on June 13, 2011. *See* Dan Freed, *Fannie and Freddie Investor Blackstone Also Sought Advisory Role*, TheStreet (July 29, 2014), http://www.thestreet.com/story/12823463/1/fannie-and-freddie-investor-blackstone-also-sought-advisory-role.html (follow link in second paragraph to "pitch documents provided to TheStreet"). Neither Record filed with this Court includes the Blackstone Presentation, even

though on its face it constitutes a document that was before the administrative decisionmaker at the relevant time.

Among other things, the Presentation laid out potential ways that Treasury could create value and stability for the Companies, principally by restructuring Fannie's and Freddie's stock. *See* Blackstone Presentation 34-40. It also gave an overview of the Companies' situation, including their overall financial health and the White House's emphasis on winding down the Companies. *See* Blackstone Presentation 27-33.

ARGUMENT

Perry Capital now joins Fairholme's requests to this Court for supplementation of the Record. *See* Fairholme Mot. to Supplement 14-27; Fairholme Reply 9-22. The APA requires courts to review the "whole record," 5 U.S.C. § 706, meaning "neither more nor less than what was before the agency at the time it made its decision." *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C. 2010) (citing *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997)). The Record filed here, however, has gaping holes. As Fairholme has explained, some of those gaps are known: key financial projections and associated records referenced by other documents, the missing Freddie Mac projections, materials from the Department of Justice, and privilege logs to justify any documents that Treasury and FHFA have withheld. *See* Fairholme Mot. to Supplement 17-20; Fairholme Reply 10-17. The government's filings here suggest other gaps as well, further justifying supplementation of the filed Record. *See* Fairholme Mot. to Supplement 20-27; Fairholme Reply 17-22.

Now, the recent revelation of the Blackstone Presentation further bolsters Fairholme's request for relief. It is clear that the document should have been included in Treasury's Administrative Record all along. As a Treasury spokesman explained, the Blackstone Presentation was a "part of the policy making process." Freed, *supra* ("'As part of the policy

making process, Treasury routinely engages with key stakeholders, market participants and consumer advocates. Treasury did not issue a Request for Proposals, and no contract was awarded,' [a Treasury spokesman] said Tuesday in an e-mailed statement."). And while Treasury included other financial analyses of the Companies in the Record it filed, those documents purport to support the government's arguments by showing gloomier outlooks. *See* Treasury 3285 (Moody's Presentation to Treasury: Fannie Mae and Freddie Mac Capital Positions (Apr. 4, 2012)); *see also, e.g.*, Treasury 1893 (Moody's: Plan to Raise Fannie Mae and Freddie Mac Guarantee Fees Raises Question of Support (Sept. 26, 2011)); Treasury 3248 (Deutsche Bank: The Outlook in MBS and Securities Products (Mar. 14, 2012)).

The omission of the Blackstone Presentation is particularly troubling because it undermines at least four key arguments that Treasury and FHFA have made so far in this case. *Cf. Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984) (remanding after agency's initial record failed to disclose key documents, including those "quite critical" of the key agency study, and recognizing that when there is "no check upon the failure of the agency to disclose information adverse to it, the normal pressures towards inclusion of all relevant material in the record before the court are absent").

First, FHFA and Treasury have maintained that they never considered—and need not have considered—the tens of billions of dollars in deferred tax assets held by the Companies, even though those assets were recognized immediately after the Sweep Amendment and resulted in a dividend to Treasury of more than $50 billion. *See* Treasury Reply 47; FHFA Reply 56; *see also* APA Opening Br. 17 & n.6, 72-73, 77-78; APA Reply 41-42. Indeed, FHFA's litigating declaration asserts that the agency never "discuss[ed]" the deferred tax assets while considering the Sweep Amendment and that neither FHFA nor Treasury "envision[ed]" the quick recognition

of those assets. FHFA 0009-0010. Yet the Blackstone Presentation suggests a way that "[t]he GSE's could experience a build-up of capital": "[i]ncreased *capitalization of tax attributes*." Blackstone Presentation 35 (emphasis in original). Therefore, Treasury at least knew the importance of the deferred tax assets more than a year before the Sweep Amendment.

Second, FHFA's and Treasury's defense of the Sweep Amendment rests largely on their "downward spiral" narrative. They claim that without the Sweep Amendment, the Companies would have continually borrowed to pay Treasury's dividends and soon exhausted Treasury's funding commitment. *See, e.g.*, FHFA Opening Br. 22-26; Treasury Opening Br. 16-18, 27. They have disputed Plaintiffs' charge that, since the Companies' finances were improving, the narrative is fiction. *See* FHFA Reply 7-10; Treasury Reply 43-47; *see also* APA Opening Br. 67-68. Treasury did not disclose that, a year before it executed the Sweep Amendment, the Blackstone Presentation provided a road map for the Companies to pay the Treasury dividends without new borrowing from Treasury, while remaining solvent. Blackstone Presentation 34-40. The Presentation suggested that "[t]he GSE's are showing improved financial performance and stabilized loss reserves" and that "Treasury funding for the GSE's continues to slow." *Id.* at 28-29. The Blackstone Presentation contradicts the arguments FHFA and Treasury have made so far regarding the need for the Sweep Amendment.

Third, and relatedly, FHFA and Treasury have disputed that there were reasonable alternative solutions to the Sweep Amendment, contending that no alternative would have solved the purported "downward spiral." *See* Treasury Reply 48-52; FHFA Reply 1, 7-10, 55-56; *see also* APA Opening Br. 79-82. Yet the Blackstone Presentation proposed a variety of methods to restructure the Companies whereby the restructured Companies would not require additional Treasury Funding. *See* Blackstone Presentation 34-42. Although the proposed restructuring

would have diluted the publicly held preferred stock, the Companies could have been profitable, while eliminating the circular payments to, and borrowings from, Treasury, thereby providing potential profit to holders of the publicly held preferred stock. Even though Blackstone proposed several methods to restructure the Companies, Treasury apparently failed to consider any of the suggestions as a substitute for the Sweep Amendment.

Fourth, FHFA has denied that it improperly acted at Treasury's direction when it decided to execute the Sweep Amendment. *See* FHFA Reply 10-11; *see also* APA Opening Br. 51. Plaintiffs previously noted that "[e]ven more evidence supporting this conclusion [that FHFA acted at Treasury's direction] is likely to be disclosed if the Court orders Defendants to supplement the inadequate administrative records they have submitted thus far." APA Opening Br. 51 n.10. Now, the Blackstone Presentation does exactly that. It shows that Treasury was the sole recipient of the Blackstone Presentation setting forth strategies to restructure the Companies, with FHFA—the agency purportedly running the Companies—nowhere to be found. This evidence supports the conclusion that FHFA was merely acting at the behest of Treasury, instead of independently analyzing the Sweep Amendment, which it must do to meet its obligations as a conservator for the Companies.

Given the apparent gaps that Fairholme already identified in the Record, and the further doubts about the completeness of the Record raised by the Blackstone Presentation, Perry Capital requests that this Court order Treasury and FHFA to produce a full and complete Record immediately. The government is reviewing many of its documents anyway in response to the Fairholme discovery requests in the Federal Claims Case and is expected to produce 800,000 pages—nearly 200 times the size of the Record filed by Treasury and FHFA. This review and production will undoubtedly reveal documents that should have been included in the Record

filed in this case. The government will suffer no added burden by producing the legally required, complete Record in this case. The Record should therefore be supplemented to enable the Court to review the full and proper Record when ruling on the parties' dispositive motions.

Finally, if this Court agrees that the government must supplement the Record, this Court should not tie the deadline for production of the supplemented Record to the discovery deadlines in the Federal Claims Case. Unlike discovery in the Federal Claims Case, the Record here was due long ago. FHFA and Treasury should correct the clear deficiencies as soon as possible, and the Court should proceed with a hearing on the dispositive motions promptly.

CONCLUSION

For the foregoing reasons, Perry Capital respectfully requests that the Court enter an order requiring supplementation of the Record filed by Treasury and FHFA.

Dated: September 18, 2014

Respectfully submitted,

/s/ Theodore B. Olson

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PERRY CAPITAL LLC, Plaintiff, v. JACOB J. LEW, *et al.*, Defendants.	Civil Action No. 1:13-cv-1025-RCL

[PROPOSED] ORDER FOR SUPPLEMENTATION OF DEFENDANTS' ADMINISTRATIVE RECORDS

Upon consideration of Plaintiff Perry Capital LLC's Motion for Supplementation of Defendants' Administrative Records, it is hereby **ORDERED** that:

1. Plaintiff Perry Capital LLC's Motion for Supplementation of Defendants' Administrative Records is **GRANTED**.

2. Defendants shall promptly supplement their administrative record submissions so as to include all materials that were directly or indirectly considered by Defendants in connection with their decision to enter into the "Net Worth Sweep" implemented by the "Third Amendment" to the Preferred Stock Purchase Agreements, including, without limitation, (a) the June 13, 2011, presentation "Discussion Materials, Presented by Blackstone Advisors to the Department of Treasury"; (b) all financial projections and associated data and analyses; and (c) the Department of Justice materials to which the "decision memorandum" found at page 4332 of the Treasury Defendants' record submission refers. In addition, to the extent Defendants have excluded from their compilation of record materials documents that they claim are protected by applicable privileges, they shall promptly produce to Plaintiff a privilege log identifying those documents and the nature and basis for any such claim of privilege. To the extent any such

privileged materials contain purely factual information, Defendants shall promptly produce redacted versions of such materials to Plaintiff. The productions required under this paragraph shall be made as soon as is reasonably possible, and in no event later than _____, 2014.

SO ORDERED.

Dated: _____

_____
ROYCE C. LAMBERTH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PERRY CAPITAL LLC, Plaintiff, v. JACOB J. LEW, *et al*., Defendants.	Civil Action No. 1:13-cv-1025-RCL

DECLARATION OF MATTHEW D. MCGILL IN SUPPORT OF PERRY CAPITAL LLC'S MOTION FOR SUPPLEMENTATION OF DEFENDANTS' ADMINISTRATIVE RECORDS

I, Matthew D. McGill, hereby declare as follows:

1. I am an attorney licensed to practice law in the District of Columbia and state of New York. I am a partner in the law firm of Gibson, Dunn & Crutcher LLP, counsel for Plaintiff Perry Capital LLC in the above-captioned matter. My business address is 1050 Connecticut Avenue, N.W., Washington D.C. 20036.

2. I respectfully submit this declaration in support of Plaintiff Perry Capital LLC's Motion for Supplementation of Defendants' Administrative Records.

3. Attached hereto as Exhibit A is a true and correct copy of a presentation given by Blackstone, a global investment and advisory firm, and the law firm Skadden, Arps, Slate, Meagher & Flom LLP to the Department of Treasury on June 11, 2011.

4. Attached hereto as Exhibit B is a true and correct copy of Fairholme Funds, Inc.'s Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Supplementation of the Administrative Records, for Limited Discovery, for Suspension of Briefing, and for a Status Conference filed on February 12, 2014 in *Fairholme Funds, Inc. v. FHFA*, No. 13-cv-1053 (D.D.C.).

5. Attached hereto as Exhibit C is a true and correct copy of Fairholme Funds, Inc.'s Reply in Support of Their Motion for Supplementation of the Administrative Records, for Limited Discovery, for Suspension of Briefing, and for a Status Conference filed on March 13, 2014 in *Fairholme Funds, Inc. v. FHFA*, No. 13-cv-1053 (D.D.C.).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of September, 2014.

/s/ Matthew D. McGill

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EXHIBIT A

Confidential

Discussion Materials

June 13, 2011

Blackstone

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The Blackstone and Skadden Teams

We are pleased to have the opportunity to meet with the Department of the Treasury ("Treasury") to discuss our qualifications and potential strategic alternatives regarding FNMA and FMCC.

Blackstone

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II. Blackstone and Skadden Qualifications

Blackstone

Blackstone Overview

Advisory Activities

Restructuring Advisory

- Preeminent advisor to companies and creditors in restructurings and reorganizations
- Advisor on more than 340 restructurings involving over $1 trillion of total liabilities
- Known for working on the most complex situations
- Experience in the vast majority of the largest U.S. and European restructurings that have occurred in the past five years
- Unmatched experience across all industries
- Specialty in out-of-court restructurings of companies controlled by financial sponsors

M&A Advisory

- Trusted strategic and financial advisor to leading public and private companies
- Leading M&A advisory franchise having advised on M&A deals representing over $450 billion
- Significant relationships and access to key decision makers and investors
- Significant cross-border experience and capability
- Focused on providing unbiased, objective advice to companies and boards
- Provides customized M&A and corporate finance solutions
- "Principal" investment mentality

Financing & Structured Products Advisory

- Provide customized M&A and corporate finance transaction solutions including:
  - Joint venture structuring
  - Advising on structured / complex financing transactions
  - Monetization of non-traditional assets
  - Optimization of corporate client tax attributes
  - Hedging and monetization of publicly-traded equity positions

Investment Activities

Corporate Private Equity

- Raised over $44.9 billion of capital through 7 funds
- Invested over $33.9 billion of capital in 142 transactions
- Leading investor in the consumer / retail sector
  - Michaels Stores
  - Performance Food Group
  - Pinnacle Foods
- Portfolio companies employ over 325,000 people worldwide and generate revenues in excess of $81 billion

Real Estate

- Raised $29.5 billion of capital through 11 funds
- Invested/committed $19.4 billion of capital in 296 separate transactions

Multi-Manager Funds

Multi-Manager Funds (BAAM)

- $26.7 billion in 18 non-traditional multi-manager funds
- Attractive risk-adjusted returns with low volatility

Closed-end Mutual Funds

- India Fund ($1.5 billion AUM)
  - Traded on NYSE: "IFN"
- Asia Tiger Fund ($73 million AUM)
  - Traded on NYSE: "GRR"

Corporate Debt Investing

GSO Capital Partners

- Recently acquired credit opportunities fund
- Over $22.6 billion under management in 5 strategies

Mezzanine Partners

- Raised $3.9 billion of capital
- Invested/committed $3.1 billion of capital in 95 transactions

CDO Funds

- 27 CDO investment vehicles totaling $13.8 billion under management

Offices

New York · Atlanta · Boston · Chicago · Dallas · Los Angeles · Houston · Menlo Park · San Francisco

Beijing · Dubai · Dusseldorf · Hong Kong · London · Mumbai · Paris · Shanghai · Sydney · Tokyo

The Group at a Glance

Blackstone's Restructuring and Reorganization Group has become an industry leader in providing advice to debtors and creditors in large, complex restructurings.

The Group

Blackstone is known for advising companies and stakeholders in the largest and most complex restructurings

- Since 1991, the U.S. team has been involved in approximately 300 distressed situations involving nearly $1 trillion of liabilities(1)
- Since its inception in June 2007, the European team has been involved in over 40 transactions involving over $150 billion of liabilities
- We are committed to providing senior-level attention in our engagements (a key differentiating factor in our practice)
- Our transactions span across a broad set of industries, including airlines, automotive, energy / power, financial services, healthcare, media, real estate, steel and telecommunications, as well as other sectors experiencing distress

We have a reputation for leading highly complex, contentious negotiations and driving toward attainable, consensual solutions

(1) For certain financial companies, figure represents net par outstanding of policies restructured.

The Group at a Glance (Cont'd)

Blackstone's restructuring advisory efforts have received substantial praise in recent years.

Thomson's International Financing Review

- Americas Restructuring Deal – 2009
- Restructuring of the Year – 2008
- North American Restructuring House of the Year – 2004 & 2005

TURNAROUND ATLAS AWARDS

Turnaround Atlas Awards

- Turnaround of the Year – 2010 ($5 billion+)
- Turnaround of the Year – 2010 ($1 billion+)
- Corporate Turnaround Deal of the Year – 2010 ($500 million+)
- Beverage, Food & Service Deal of the Year – 2009

TMA Award Winner 2007 Turnaround of the Year

Turnaround Management Association

- Mega Company Turnaround of the Year – 2007

Selected Recent Restructuring Clients

Blackstone's Restructuring Group is known for advising both companies and stakeholders in the largest and most complex restructurings.

Chapter 11 Assignments

- Enron
- Delta
- Mirant
- SemGroup
- Winn-Dixie
- Grace
- Nortek
- Abitibi Bowater

Out-of-Court Assignments

- C-BASS (Credit-Based Asset Servicing and Securitization LLC)
- Ford
- Xerox
- XL Capital
- MoneyGram International
- GM
- Allied Capital
- FGIC
- AIG

Creditor Assignments

- Delphi
- Bally Total Fitness
- Spansion
- Aleris International, Inc.
- Simmons
- LyondellBasell
- Six Flags
- Station Casinos
- Tribune

Blackstone's Restructuring Expertise Spans a Broad Range of Industries Including Financial Services

Automotive
- American Axle & Manufacturing Holdings
- APS Holding Corporation
- Delphi Automotive Systems, LLC
- Dura Automotive Systems Inc.
- Exide Technologies
- Ford Motor Company
- Fruehauf Trailer Corporation
- General Motors
- Goodyear Tire & Rubber
- Harvard Industries, Inc.
- Meridian Automotive Systems
- Safelite Glass Corp
- White Motor Corporation

Consumer Products
- American Pad and Paper
- Ridermann Industries USA
- Bombardier Recreational Products
- Brown Jordan International
- Caterair International Corp.
- Chiquita Brands International, Inc
- Esprit Holdings, Inc
- G Heileman Brewing Co
- Indesco International, Inc
- Interstate Bakeries
- JPS Textile Group, Inc
- The Leslie Fay Companies, Inc.
- Marchon Eyewear, Inc.
- Marvel Entertainment Group
- Monsant Worldwide Inc
- Natural Products Group LLC
- New World Pasta Company
- Paragon Trade Brands
- Plaid Clothing Group Inc
- Premium Standard Farms
- Punch Taverns
- Purina Mills (for Koch)
- Royal Philips Electronics, NV
- Schoeller Arca Systems
- Service America Corporation
- Simmons Bedding Company
- The Singer Company NV
- Stokely USA, Inc
- Sunbeam Corporation
- Thule AB
- Town & Country Corp
- Wheelabrator Allevard
- Xerox Corporation

Energy
- Enron Corp.
- Entergy New Orleans Inc
- Flying J Inc
- Gen Holdings
- Hawkeye Renewables, LLC
- Mirant Corporation
- Prisma Energy International
- Sea Dragon Offshore Limited
- SemGroup L.P.
- Skeie Drilling and Production ASA
- U.S. Energy Biogas Corp.

Financial Services
- ACA Capital Holdings Inc.
- Allied Capital Corporation
- Ambac Assurance Corporation
- American Capital
- American International Group, Inc
- Basis Capital Group
- Bear Stearns Asset Management
- BluePoint Re
- BTA Bank
- C-BASS LLC
- Conti Financial Corp
- CRIIMI MAE, Inc
- Executive Life Insurance Co.
- Financial Guaranty Insurance Co
- Golden Key
- MBIA Inc.
- MoneyGram International
- Northern Rock
- New Valley Corporation
- Parex Banka
- Refco, Inc
- UniCapital Corp.
- XL Capital Ltd. (re: SCA)

Health Care / Medical Products
- aaiPharma, Inc.
- Allegheny Health Systems
- American White Cross, Inc
- Angiotech Pharmaceuticals, Inc.
- Dade Behring Inc
- The Kendall Company

Health Care / Medical Products (Cont'd)
- Medical Resources, Inc
- Taro Pharmaceuticals Industries Ltd.
- Vencor, Inc

Infrastructure
- BAA Airports Ltd
- Eurotunnel plc (for MBIA)
- Jefferson County (Birmingham, AL)

Leisure / Entertainment
- Alliance Entertainment Corp.
- AMF Bowling Worldwide, Inc.
- Bally Total Fitness
- Hoyts Cinemas Corporation
- Kloster Cruise Limited
- Six Flags, Inc.
- SLM International, Inc.

Manufacturing / Basic Industry
- ABB Lummus Global, Inc.
- AbitibiBowater, Inc.
- AEI Resources
- Aleris
- American Banknote
- Anacomp, Inc
- The Babcock & Wilcox Company
- Bombardier Recreational Products
- Combustion Engineering, Inc.
- Crown Pacific Partners
- The Dow Corning Corporation
- Envirodyne Industries, Inc
- Flextronics International Ltd
- Fedders Corp.
- Figgie International, Inc.
- Garden Way, Inc
- Global Power Equipment Group, Inc.
- Goss Holdings, Inc
- Guangdong Enterprises
- Harnischfeger Industries, Inc.
- Horsehead Industries, Inc.
- ICF Industries
- Joy Global
- Klockner Pentaplast GmbH & Co.
- Lone Star Industries, Inc
- LyondellBasell
- Mauser AG

Manufacturing / Basic Industry (Cont'd)
- Minera San Cristóbal, S.A.
- Molten Metal, Inc.
- Mortek Inc.
- Oren L. Benton & Affiliates
- The Pacific Lumber Company
- Panolam Industries International Inc.
- Profine GmbH
- RPM International Inc.
- Russell-Stanley Holdings
- Safety-Kleen Services, Inc.
- Smurfit-Stone Container Corp.
- Solutia Inc.
- Spansion
- Spreckels Industries, Inc
- Sumitomo Corp. (re: Apex Silver Mines)
- Tracor, Inc.
- W.R. Grace & Co.
- Walter Industries
- Westpoint Stevens, Inc.

Media / Communications
- Adelphia (for AT&T Broadband)
- Adelphia (for Comcast)
- Alestra (for AT&T)
- Arch Wireless, Inc
- AT&T Canada (for AT&T)
- Audio Visual Services Corporation
- Bité Communications Corporation
- Cable & Wireless America
- Cellnet Data Systems Inc.
- Communications Corp. of America
- DTN
- Emerson Radio Corporation
- EMI Group plc
- Emmis Communications Corporation
- Excite@Home (for AT&T)
- Flag Telecom Holdings, Ltd.
- Globalstar, LP
- Global Crossing, Ltd
- Granite Broadcasting Corp.
- Iridium (for Motorola)
- Legerity Corporation
- Maryland Cable Corporation
- Minneapolis Star Tribune
- MobileMedia Corporation
- Net Serviços de Comunicação S.A.
- Nortel (for Flextronics)

Media / Communications (Cont'd)
- Orion Cable GmbH
- Philadelphia Inquirer
- Price Communications Corp.
- RCN Corporation
- R.H. Donnelley Corp
- R.P. Companies
- SCI Television
- Star Tribune
- Supercanal Holdings S.A.
- TAK Communications Inc.
- Telemundo Group, Inc
- Teigent, Inc
- Thomas Nelson
- Tribune Company
- Unnamed Hollywood Studio
- Unnamed Hollywood Studio
- Williams Communications Group, Inc
- Winstar Communications, Inc.

Retail / Supermarkets
- Barneys, Inc.
- Best Products Co., Inc
- Big V Supermarkets, Inc
- Buffets Holding Inc.
- The Caldor Corporation
- Camelot Music, Inc.
- Carson Pirie Scott & Co.
- County Seat, Inc
- Edison Brothers Stores, Inc
- Federated Department Stores
- Finlay Enterprises Inc
- Fleming Companies, Inc.
- Grossman's, Inc
- Hechinger Company
- Hills Department Stores, Inc
- Levitz Furniture, Inc.
- Loehmann's Inc.
- Mattress Discounters Corp
- Montgomery Ward Holding Corp. (for General Electric)
- Movie Gallery Inc.
- Mrs. Fields Companies, Inc
- The Penn Traffic Company
- Phar-Mor, Inc
- Phillips Van Heusen
- R.H. Macy & Co., Inc
- Weiner's Stores, Inc

Retail / Supermarkets (Cont'd)
- Wherehouse Entertainment, Inc
- Winn-Dixie Stores, Inc.
- Woodward & Lothrop, Inc

Real Estate / Casinos
- AIG Global Real Estate
- AIG re: AIG Baker
- Citi Property Investors
- Empire City Gaming
- Foxwoods
- General Growth Properties
- Harrah's Jazz Company
- Hilton Hotels Corporation
- Koll Real Estate Group
- Liberté Investors
- The M Resort Spa & Casino LLC
- Magna Entertainment Corp.
- Mameli Shar Gaming, LLC
- Olympia & York Companies
- Realogy Corporation
- Station Casinos Inc
- Stratosphere Corporation
- Transeastern Homes
- Twin River
- U.S. Trails, Inc
- Vista Properties, Inc

Steel
- Altos Hornos de Mexico
- Geneva Steel
- The LTV Corporation
- WCI Steel, Inc

Transportation
- Aeromexico / Mexicana Airlines
- Allied Holdings, Inc
- America West Airlines, Inc
- Delta Air Lines, Inc.
- DX Services Ltd.
- Ermis Maritime Holdings
- Eurotunnel plc (for MBIA)
- Evergreen International Aviation
- Greater Beijing First Expressways
- Leaseway Transportation Corp
- Rocky Mountain Helicopters
- Smarte Carte, Inc
- Trans World Airlines, Inc.

Financial Industry Restructuring Experience

Name	Assignment
ACA Capital	▸ Advised on the restructuring of $69 billion of Swaps and $100 million of MTNs, allowing ACA to safeguard $7.3 billion of public finance policies, avoid a receivership and eliminate billions of dollars of potential structured finance policy claims
AIG	▸ Advisor on restructuring of senior bank debt, mitigation of future losses on portfolio holdings, global divestitures and maintenance of ongoing business operations
Allied Capital	▸ Advised the company in an out-of-court restructuring of $1.65 billion of liabilities
Ambac	▸ Acted as financial advisor to the Company, assisting in the commutation of approximately $18 billion of CDS obligations and creation of segregated account holding over $60 billion of "policy obligations" ▸ Assisting company in addressing its holding company obligations
American Capital	▸ Advisor to public noteholders in an out-of-court restructuring
Basis	▸ Advised on restructuring of Basis Yield Alpha Fund and Basis Pac Rim Opportunity Fund
Bear Stearns Asset Management	▸ Negotiated with creditors in High-Grade Structured Credit Strategies Fund and High-Grade Structured Credit Strategies Enhanced Leverage Fund to reduce "repo" exposure and delever funds
BluePoint Re	▸ Advised financial guarantee reinsurer regarding restructuring of risk portfolio

Financial Industry Restructuring Experience (Cont'd)

Name	Assignment
C-BASS CREDIT-BASED ASSET SERVICING AND SECURITIZATION LLC	▸ Advised on sale of Litton Loan Servicing LP subsidiary, executed within two months of retention ▸ Negotiated four standstill agreements as well as a long-term override agreement with over 45 creditors
FGIC	▸ Advising the Company on strategic alternatives and portfolio restructuring
FGIC XLCA	▸ Advisor on the restructuring of financial guarantees for $3.2 billion of Jefferson County (Birmingham, AL) municipal debt
MBIA	▸ Advised the Company on the restructuring of its business and the creation of a new U.S. public finance financial guarantee insurance subsidiary
MoneyGram. International	▸ Advised on a comprehensive recapitalization, including a $1.5 billion investment led by TH Lee and Goldman Sachs
northern rock	▸ Negotiated with shareholders and developed a restructuring plan used to formulate nationalization plan
XL CAPITAL	▸ Advised in the negotiation of a comprehensive restructuring of XL Capital's guaranty and reinsurance agreements with SCA ▸ Successfully eliminated $65 billion of guaranty, facultative and excess of loss agreements, removing overhang to XL business franchise and stock price

Transactions Featuring Significant Government Involvement

Assignment	Government Constituents	Blackstone's Role
ACA Capital 2008	Maryland Insurance Administration	▸ **Retained as advisor to ACA on the restructuring of $69 billion of swaps and $100 million of notes** ▪ Organized ~30 institutional counterparties and negotiated six forbearance agreements ▪ Assisted ACA in developing a detailed financial and operating plan ▪ Developed and presented a standalone restructuring plan to the counterparties
Ambac Financial Group 2009 – Present	Wisconsin Office of the Commissioner of Insurance (OCI)	▸ **Retained as financial advisor to the Company, assisting in the commutation of approximately $18 billion of CDS obligations** ▪ Analyzed impact of various alternatives on both the Company and Policyholders ▪ Negotiated with OCI and 15 counterparties the commutation of all of the Company's CDO of ABS exposures and certain other exposures and the establishment of a Segregated Account at AAC for over $60 billion of "policy obligations" ▪ Assisting Company in addressing its holding company obligations
Asian Art Museum of San Francisco 2010	City and County of San Francisco	▸ **Retained by MBIA to restructure debt of approximately $120 million issued by the Asian Art Museum of San Francisco and sponsored by the City and County of San Francisco** ▪ Developed restructuring scenarios and evaluated impact on MBIA and other key stakeholders ▪ Negotiated a policy termination agreement and commutation with JP Morgan ▪ Facilitated agreement on a broader restructuring with JP Morgan, the City and County of San Francisco and the Asian Art Museum Foundation
Delphi 2008 – 2009	U.S. Treasury (UST)	▸ **Retained as advisor to the DIP Lenders in Delphi's Chapter 11 proceedings** ▪ Represented the DIP Lenders in negotiations with the U.S Treasury and General Motors in regards to emergence capital, valuation, and transaction structure

Transactions Featuring Significant Government Involvement (Cont'd)

Assignment	Government Constituents	Blackstone's Role
DELTA **Delta Air Lines** **2005 – 2007**	**Pension Benefit Guarantee Corporation (PBGC)**	▸ **Retained as advisor to Delta Air Lines regarding all aspects of Delta's restructuring** • Assisted with building long-term forecast and budget, including analyzing potential cost cuts • Negotiated with all major creditors and negotiated a new collective bargaining agreement with pilots • Negotiated restructuring of pensions with the PBGC • Raised and negotiated major financings (pre and post petition), which in aggregate totaled over $5.3 billion
FGIC **Financial Guarantee Insurance Company** XL CAPITAL **XL Capital Ltd** **2008**	**New York State Insurance Department (NYSID)**	▸ **Retained as advisor to FGIC and to XL, two distinct engagements, to negotiate restructuring plans with NYSID** • Developed strategies to commute agreements and mitigate losses • Led comprehensive negotiations and due diligence process with the NYSID and CDS counterparties to reach solution beneficial to all policyholders
GM **General Motors** **2009**	**U.S. Treasury (Auto Task Force)**	▸ **Retained as advisor to General Motors related to the restructuring of the UAW VEBA as part of GM's Chapter 11 proceedings** • Represented GM in negotiations with the U.S. Treasury and the UAW in regards to structure and funding of the VEBA trust
HARRIS COUNTY-HOUSTON SPORTS AUTHORITY **Houston Sports Authority** **2010 – Present**	**Harris County** **City of Houston**	▸ **Retained as advisor to the Houston Sports Authority to restructure municipal debt issued to fund improvements to Reliant Stadium, home of the Houston Texans** • Developed restructuring proposal to address variable-rate notes in accelerated amortization • Leading negotiations on behalf of the Authority with the Texans, Harris County, J.P Morgan as liquidity bank, UBS as swap provider and MBIA as bond insurer
ILFC **2009 – 2010**	**New York Federal Reserve** **U.S. Treasury**	▸ **Retained as advisor to International Lease Finance Corporation, the largest aircraft lessor in terms of fleet value** • Restructured $10 billion of debt through new financings and maturity extensions • Led aircraft portfolio sales generating approximately $2 billion of proceeds

Transactions Featuring Significant Government Involvement (Cont'd)

Assignment	Government Constituents	Blackstone's Role
Jefferson County 2008 – Present	Jefferson County Commission Alabama Legislature Office of Governor Bob Riley	▸ **Retained as advisor to Financial Guaranty Insurance Corporation (FGIC) and Syncora Guarantee in connection with the restructuring of $3.2 billion of sewer system debt issued by Jefferson County, Alabama** ▪ Developed comprehensive restructuring plan ▪ Worked alongside United States Magistrate Judge John E. Ott and court-appointed Special Masters to develop and negotiate restructuring terms ▪ Met with federal and state officials to propose recommended courses of action and negotiate restructuring terms
New York State Insurance Department 1999 – 2001	New York State Insurance Department (NYSID)	▸ **Retained as advisor on the demutualizations and IPOs of Prudential, Phoenix, John Hancock, Principal and MetLife** ▪ Provided fairness opinions evaluating the aggregate consideration to be received by policyholders in the demutualization ▪ Provided opinions on the IPO procedures followed by certain of these companies
Pension Benefit Guarantee Corporation (PBGC) 2009 – Present	Pension Benefit Guarantee Corporation (PBGC)	▸ **Retained as advisor to the PBGC regarding the $1.5 billion underfunded pension plan in the Smurfit-Stone Container Corporation Chapter 11 proceedings** ▪ Analyzed Company business plan, plan of reorganization and the treatment of the PBGC ▪ Represented the PBGC as a member of the UCC in all aspects of the bankruptcy process with respect to PBGC – insured pension liabilities ▸ **Retained as advisor to the PBGC on Motorola's sale and spin-off transactions with respect to its pension plan obligations** ▪ Evaluated potential triggers of the Early Warning Program created by Motorola's sale and spin-off transactions ▪ Analyzed the impact of the proposed transactions on Motorola's growth prospects, liquidity, cash flow stability, and future pension plan contributions

Transactions Featuring Significant Government Involvement (Cont'd)

Assignment	Government Constituents	Blackstone's Role
State of New Jersey 2009 – Present	State of New Jersey	▸ **Retained as advisor to the New Jersey Department of Banking and Insurance and the New Jersey Attorney General on the proposed conversion of Horizon Blue Cross Blue Shield** ▪ Advised on governance and voting provisions if the conversion were to be consummated ▪ Analyzed these provisions relative to previous Blue Cross Blue Shield conversions
State of New York 2008 – Present	New York Public Asset Fund (NYPAF)	▸ **Retained as advisor to the NYPAF on the successful monetization of its 62% stake in WellChoice to WellPoint for approximately $6.5 billion** ▪ Provided a valuation report and an opinion to the NYPAF stating the contemplated transaction was fair ▪ Assisted in negotiations regarding the terms of the transaction and definitive documentation
State of Pennsylvania 2008 – 2009	Pennsylvania Insurance Department (PID)	▸ **Retained as advisor to the PID on the proposed Consolidation of Highmark and IBC, the two largest non-profit Blue Cross Blue Shield companies in Pennsylvania** ▪ Produced reports on the financial condition of Highmark, IBC and the pro forma company, and on whether the proposed Consolidation violated Pennsylvania's approval standards
Twin River 2008 – 2009	Rhode Island State Authorities	▸ **Retained as advisor to Rhode Island state authorities regarding Twin River's restructuring of approximately $555 million in senior secured debt** ▪ Analyzed the company's business plan and restructuring alternatives ▪ Prepared valuation and debt capacity analyses ▪ Negotiated with all interested parties including state authorities, creditors, the current operator, and equity stakeholders

Skadden Overview

- Global firm of approximately 2,000 lawyers in 23 offices in 13 countries, serving every major financial center
- More than 40 practice areas internationally, including mergers and acquisitions, litigation, corporate finance, real estate, corporate restructuring, banking, tax and arbitration
- Integrated practices provide significant value and cost-efficiencies by bringing together exceptional breadth of experience

FORTUNE 250

Represents many of the largest US and international companies, including approximately one-half of the *Fortune* 250

FINANCIAL TIMES

Financial Times:

Named the top law firm in inaugural "U.S. Innovative Lawyers" report (2010)

CORPORATE BOARD MEMBER

Corporate Board Member:

Recognized as the top corporate law firm in America – for the 10th straight year – in annual survey of "America's Best Corporate Law Firms" (2010)

CHAMBERS USA

CHAMBERS GLOBAL

Chambers:

Recipient of *Chambers Global Award* for "Client Service Law Firm of the Year" – one of *Chambers*' top honors

110 Skadden attorneys have been listed among the world's leading lawyers in *Chambers Global: The World's Leading Lawyers for Business 2011*

Chambers USA: America's Leading Lawyers for Business 2010 cited 208 Skadden attorneys as "leading lawyers" – more than any other firm

Skadden

Skadden – Select Government Representations

- Represented United States Enrichment Corporation (now known as USEC Inc.) in its privatization by the U.S. government through a $2 billion initial public offering

Represented Fannie Mae in:

- Development of a greenhouse gas credit program
- Development of a program to create, capture and monetize GHG credits from an energy-efficient home building and renovation

Represented Sallie Mae in:

- Privatization
- Establishment of $5 billion shelf registration statement and first securitization ever
- Proxy contest with Albert Lord
- Three class actions in the US District Court for the District of Columbia involving alleged violations of federal securities laws

Represented the Government National Mortgage Association (Ginnie Mae) in connection with the largest default ever of a GNMA-approved issuer

Skadden – Select Financial Institution Representations

CIT	Represented CIT Group in the fifth largest bankruptcy in history, the largest and only financial institution to ever successfully file and implement a pre-packaged chapter 11 plan
REFCO	Represented Refco Inc. and 26 subsidiaries in their $38 billion chapter 11 reorganization ▶ Negotiated simultaneously with five bidders to maximize the value of the sale of the company's crown jewel business, resulting in preservation of nearly $1 billion in value ▶ Received a "Dealmaker of the Year" designation in *The American Lawyer*
GMAC ResCap	Represented Residential Capital LLC, a subsidiary of GMAC Financial Services and one of the largest real estate mortgage companies in the world, in one of the largest global out-of-court refinancings in history, including: ▶ Refinancing $14 billion of bond debt through an exchange offer ▶ Procurement of $3.5 billion loan from GMAC ▶ Agreements to provide an additional $2.4 billion in liquidity
SKBHC Holdings	Represented SKBHC Holdings LLC, a private bank holding company ▶ $750 million committed capital raise by multiple funds ▶ $6.5 million acquisition (the first of its kind) of AmericanWest Bank via a bankruptcy court supervised 363 sale process
LTCM The financial technology company	Represented the consortium that successfully bailed out Long-Term Capital Management

Corporate Restructuring – The Group at a Glance

- A pioneer in out-of-court restructuring, Skadden helps clients avoid or minimize time spent in restructuring, lowering costs and adding maximizing value
- Handles high-stakes troubled company and bankruptcy-related litigation, including highly expedited litigation
- Negotiates and closes complex transactions on fast-track, cost-effective basis through integration and depth of global restructuring/other transactional practices
- Provides fully integrated advice across the entire credit cycle, from debt or equity issuances to amendments (including amend to extend transactions), refinancings, debt buy-backs, exchange offers, consent solicitations and debt tender offers
- Draws on Firm's M&A, banking and capital markets experience; advises on insolvency issues in corporate and financing transactions and on all aspects of distressed debt trading and securities issues

Corporate Restructuring – The Group at a Glance (Cont'd)

FINANCIAL TIMES

Financial Times:

Top law firm in inaugural "U.S. Innovative Lawyers" report (2010), and one of the top firms in restructuring for representations of CIT Group and Delphi Corp.

Skadden also played a principal role in the top four restructuring deals chosen by the *Financial Times*

IFLR AMERICAS 2010

International Financial Law Review:

"Restructuring Team of the Year," *IFLR* Americas Awards 2010

2009 THE M&A ADVISOR

The M&A Advisor:

"Restructuring Law Firm of the Year," 2009

insolvency & rescue

Credit Today:

"Insolvency Legal Firm of the Year," 2008

"International Insolvency and Rescue Firm of the Year," 2008

Top-ranked in CHAMBERS USA

Chambers USA:

"Bankruptcy Team of the Year," 2007

Corporate Restructuring – The Group at a Glance (Cont'd)

Legal 500:

Top tier for corporate restructurings (2010)

Chambers Global: The World's Leading Lawyers for Bankruptcy:

Top tier for bankruptcy (2010)

Turnarounds & Workouts:

Recognized as lead counsel on 5 of the 10 most successful restructurings (2009)

The National Law Journal:

Two partners named among "The Decade's Most Influential Lawyers" (2010)

Received several "Deal of the Year" awards for our work on the out-of-court restructurings of Centro Properties, Hayes Lemmerz, Intrawest, ION Media Networks, Metro-Goldwyn-Mayer and NTL Incorporated

Financial Institutions – The Group at a Glance

- Advises financial institutions and their investors on regulatory matters, provides advice on the introduction of new products, structures and negotiates mergers and acquisitions, arranges institutional investment and securitization transactions, and represents clients in shareholder and other litigation, as well as government enforcement matters
- Represents financial institutions on compliance and enforcement matters, including examinations, internal investigations, voluntary disclosures and resolution of actions by federal and state regulatory agencies
- Has experience with every major federal and state regulator of financial services
- Advises financial and nonfinancial firms on matters related to money laundering, economic sanctions, privacy, fair lending, consumer compliance, CRA and similar matters
- Counsels clients on all aspects of recent government lending, capital and liquidity programs, such as the Troubled Asset Relief Program (TARP)
- Involved in numerous high-profile and successful transactions and litigation cases arising from recent developments in the financial sector
- Works closely with other practice groups worldwide (M&A, consumer financial services, government enforcement and white collar crime, lending, investment management and government investigations) on regulatory issues arising in connection with transactions, civil and criminal investigations and litigation, enforcement matters, and subprime related cases

Financial Institutions – The Group at a Glance (Cont'd)

Top-ranked in CHAMBERS USA

Chambers USA: America's Leading Lawyers for Business 2010:

Ranked for financial services regulation in the areas of banking, consumer financial services, financial institutions M&A and insurance

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FINANCIAL TIMES

Financial Times:

The only firm to receive the top ranking in the Mergers & Acquisitions category in the "U.S. Innovative Lawyers" report (2010)

THE AMERICAN LAWYER

The American Lawyer:

Topped – for the 26th time –annual "Corporate Scorecard" (April 2011) in which the Firm ranked first for handling the greatest number of the largest M&A transactions

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THE M&A JOURNAL

The M&A Journal:

"Law Firm of the Year," (2009, 2010)

Corporate Control Alert

Corporate Control Alert:

Ranked first as M&A legal advisor (2009)

Structured Finance – The Group at a Glance

- Advises underwriters, issuers, investors and credit enhancers on the securitization of financial assets, such as commercial loans, mortgages, debt securities and derivatives, and on repackagings and resecuritizations of asset-backed securities, REIT debt, mezzanine debt and other securities
- Represents underwriters, issuers, investors and credit enhancers in a broad range of asset-backed securities offerings, including public, private and overseas issuances of asset-backed notes, asset-backed certificates, asset-backed commercial paper and other instruments
- Has been involved in offerings for both U.S. and non-U.S. originators
- Has assisted in structuring of financings designed to give insurance companies access to the capital markets
- Has assisted investment banking firms and U.S. and non-U.S. banks in establishing "conduit" companies to securitize financial assets originated by numerous lenders
- Handles a wide variety of mortgage-related transactions, including transactions involving swaps and other derivative arrangements
- Most diverse practice of its kind on Wall Street, having done more innovative securitization transactions than any other firm
- Works closely with other practice areas including Bank Regulatory, Corporate Restructuring, Banking, Investment Companies, UCC and Secured Transactions, Insurance, Blue Sky and ERISA

Structured Finance – The Group at a Glance (Cont'd)

Top-ranked in CHAMBERS USA

Chambers USA:

Ranked as a leading firm for structured finance and structured product transactions

CHAMBERS GLOBAL

Chambers Global:

Ranked as a leading firm for structured finance and structured product transactions

IFLR AWARDS 2010

IFLR 1000:

Ranked in the top tier for "Capital Markets: Structured Finance and Securitization" (2009)

LEGAL 500

Legal 500:

Ranked for both "Structured Finance: Derivatives and Secured Products" and "Structured Finance: Securitization" (2008)

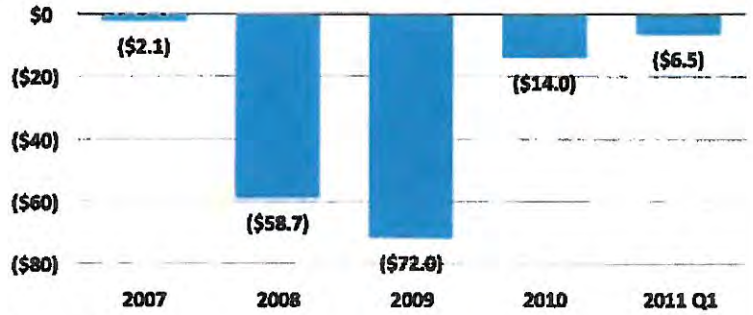
III. Situation Overview

Improving Fundamentals

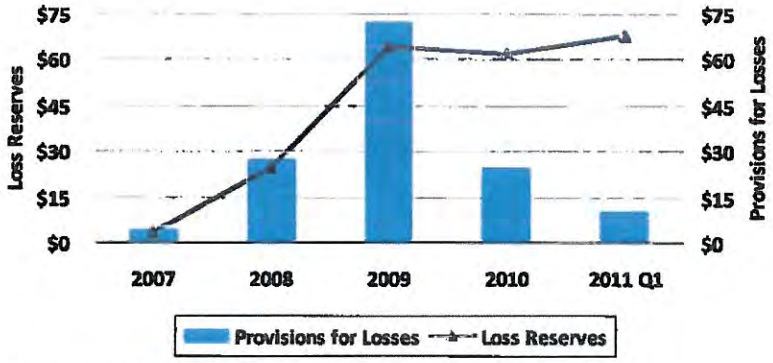
The GSE's are showing improved financial performance and stabilized loss reserves.

FNMA

Net Income (Pre-Dividend)
($ in billions)

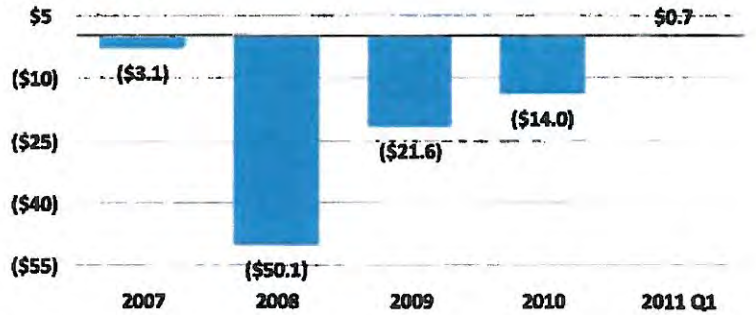


Loss Reserves
($ in billions)

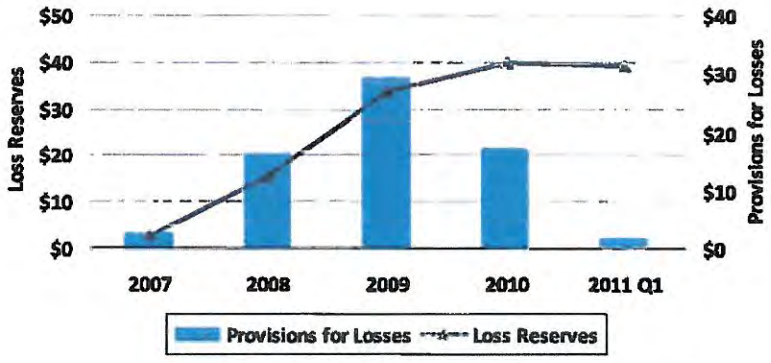


FMCC

Net Income (Pre-Dividend)
($ in billions)



Loss Reserves
($ in billions)



Source: Company 10-K and 10-Qs.

Transitory Capital Structure

Treasury funding for the GSE's continues to slow as inflows to date approximate $164 billion[1].

FNMA
($ in billions)

	Book Value 3/31/2011	Price	Market Value 3/31/2011
Debt [2]			
FNMA Issued LT Debt	$ 761.2	100.0%	$ 761.2
Debt of Securitized Trusts	2,447.6	100.0%	2,447.6
Total Debt	**$ 3,208.8**		**$ 3,208.8**
Equity			
Senior Preferred Stock [2]	$ 91.2	100.0%	$ 91.2
Add'l Sr. Pfd Stock (2011 Deficit)	8.5	100.0%	8.5
Subtotal - Sr. Preferred Stock	**$ 99.7**		**$ 99.7**
Preferred Stock	20.2	9.5% [3]	1.9
Common Equity	(119.9)	$0.39	2.2
Total Stockholder's Equity	**$ -**		**$ 103.8**
Total Capitalization	$ 3,208.8		$ 3,312.6

FMCC
($ in billions)

	Book Value 3/31/2011	Price	Market Value 3/31/2011
Debt [2]			
FMCC Issued Debt	$ 715.6	100.0%	$ 715.6
Debt of Securitized Trusts	1,510.4	100.0%	1,510.4
Total Debt	**$ 2,226.0**		**$ 2,226.0**
Equity			
Senior Preferred Stock [2]	$ 64.7	100.0%	$ 64.7
Add'l Sr. Pfd Stock (2011 Deficit)	-	100.0%	-
Subtotal - Sr. Preferred Stock	**$ 64.7**		**$ 64.7**
Preferred Stock	14.1	11.5% [3]	1.6
Common Equity	(77.6)	$0.39	1.3
Total Stockholder's Equity	**$ 1.2**		**$ 67.6**
Total Capitalization	$ 2,227.2		$ 2,293.6

Source: Company 10-K, 10-Q and Bloomberg.
(1) Gross amount of Treasury funding received to date. Excludes $24 billion of dividends paid to date.
(2) Assume debt and senior preferred trade at 100% of book value.
(3) As of 6/10/11. Pricing is calculated based on the average of each series' preferred stock market price.

Evolution of Government Thinking

Since 2009, the White House has listened to public opinion about different options ...

- **In 2009, the White House outlined six possible courses of action for the future of FNMA and FMCC**

1) **Liquidate the GSE's – winding-down Investment Portfolios and MBS trusts**

2) **Covered Bond Market Replaces GSE's – banks issue bonds secured by pool of mortgages**

3) **Nationalize GSE's – nationalize into public agency as part of FHFA or other federal agency**

4) **Prior GSE status restored – return GSE's to prior status as private institution with public mandate**

5) **Convert GSE's to public utilities – government regulates GSE's profit margin and guarantee fees**

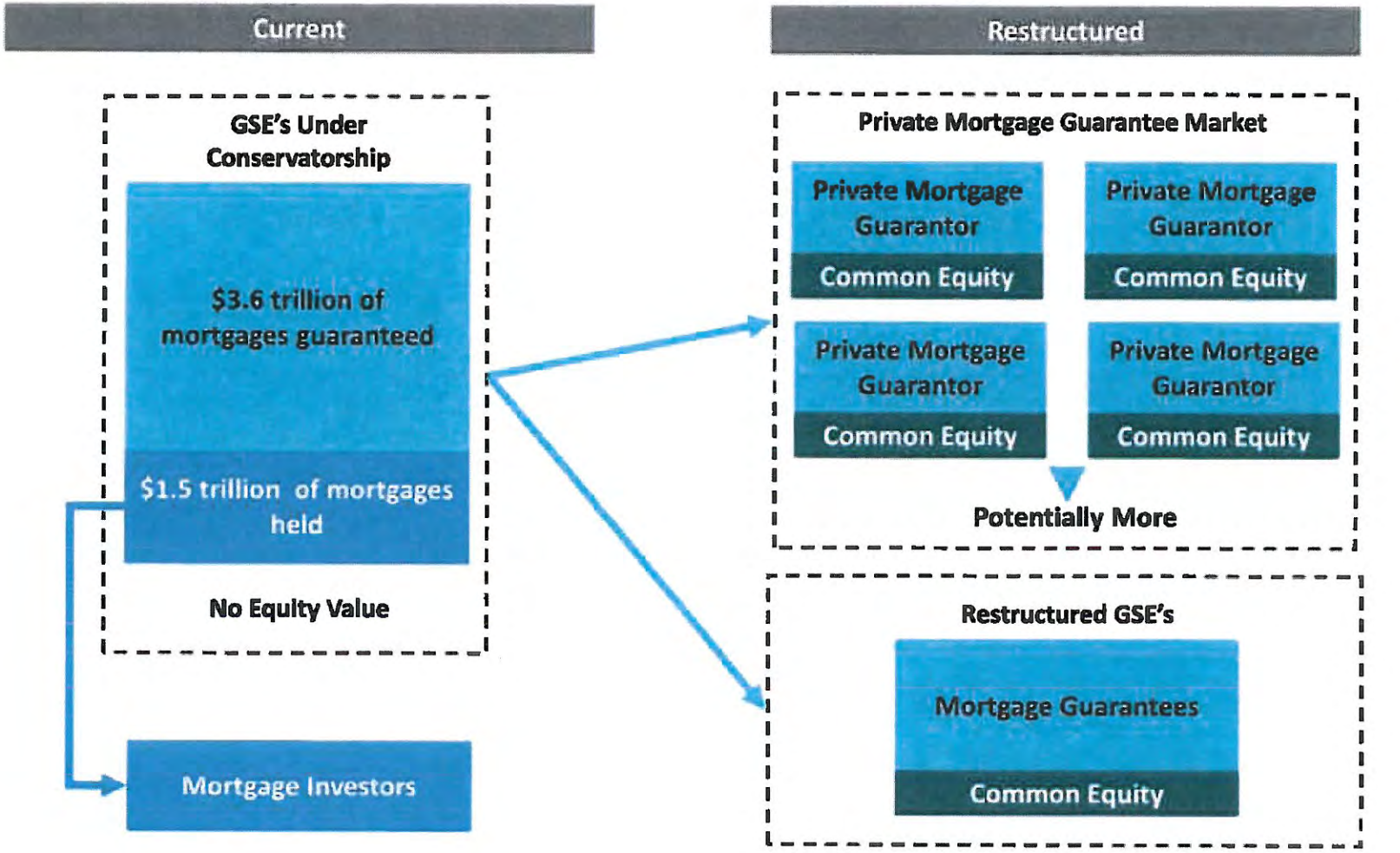
6) **Break up GSE's – break up GSE's into smaller regional institutions to mitigate systematic risk**

Evolution of Government Thinking (Cont'd)

... based on this feedback, the current emphasis is on a wind-down of the GSE's.

- The Treasury's recommendation contains three different approaches to achieve a wind-down:
  1) No government role – only government involvement involves FHA and similar programs
  2) Contingent government role – guarantee private mortgages only when the market is in trouble
  3) Backstop insurance role – government backs certain mortgages already privately insured
- These methods are based on the following White House objectives:
  - Wind down FNMA and FMCC on a responsible timeline and transition to a privatized system
  - Fix the fundamental flaws in the mortgage market through stronger consumer protection, increased transparency of investors, and improved underwriting standards
  - Promote targeted and transparent support to creditworthy but underserved families
- In April, eight bills were proposed to provide immediate reforms to the GSE's and protect taxpayers
  - Proposed reforms include reducing GSE portfolio sizes and increasing guarantee fees
  - Measures will help attract private capital back to the mortgage market
- In May, certain legislation was proposed to replace the GSE's with at least five private companies
  - Restricted to buying loans that meet certain standards, including size caps, and explicit federal guarantees only for MBS securities issued
  - Other proposed legislation advocates for no continued government involvement in GSE's, anticipates dismantling GSE's and proposes preventing future creation of GSE's under HERA

Privatizing the System



Privatizing the System (Cont'd)

Under the current conservatorship, the FHFA can only support the mortgage industry with the status quo, which is universally unsatisfactory. Challenges and goals that lie ahead include:

- Continue to strengthen underwriting standards for mortgages and to develop appropriate risk-based pricing
- Retain executive level talent and professional staff
- Invest in infrastructure and standardization of operational processes
- Determine the precise role of government in the mortgage industry
- Decide on the businesses to keep vs. those that should be divested
- Evaluate strategic alternatives for divestible assets
- Determine if GSE's can be used to populate the private system
- Analyze how can this be effectuated: spin-offs, sales, IPOs, etc.
- Create stable capital structure of GSE's to position them for chosen techniques

IV. Potential Value Creation Opportunity

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Recapitalizing the GSE's for a Private Sector Solution

Private capital will not make a substantial commitment to a solution in the absence of any likelihood of a meaningful return on equity capital.

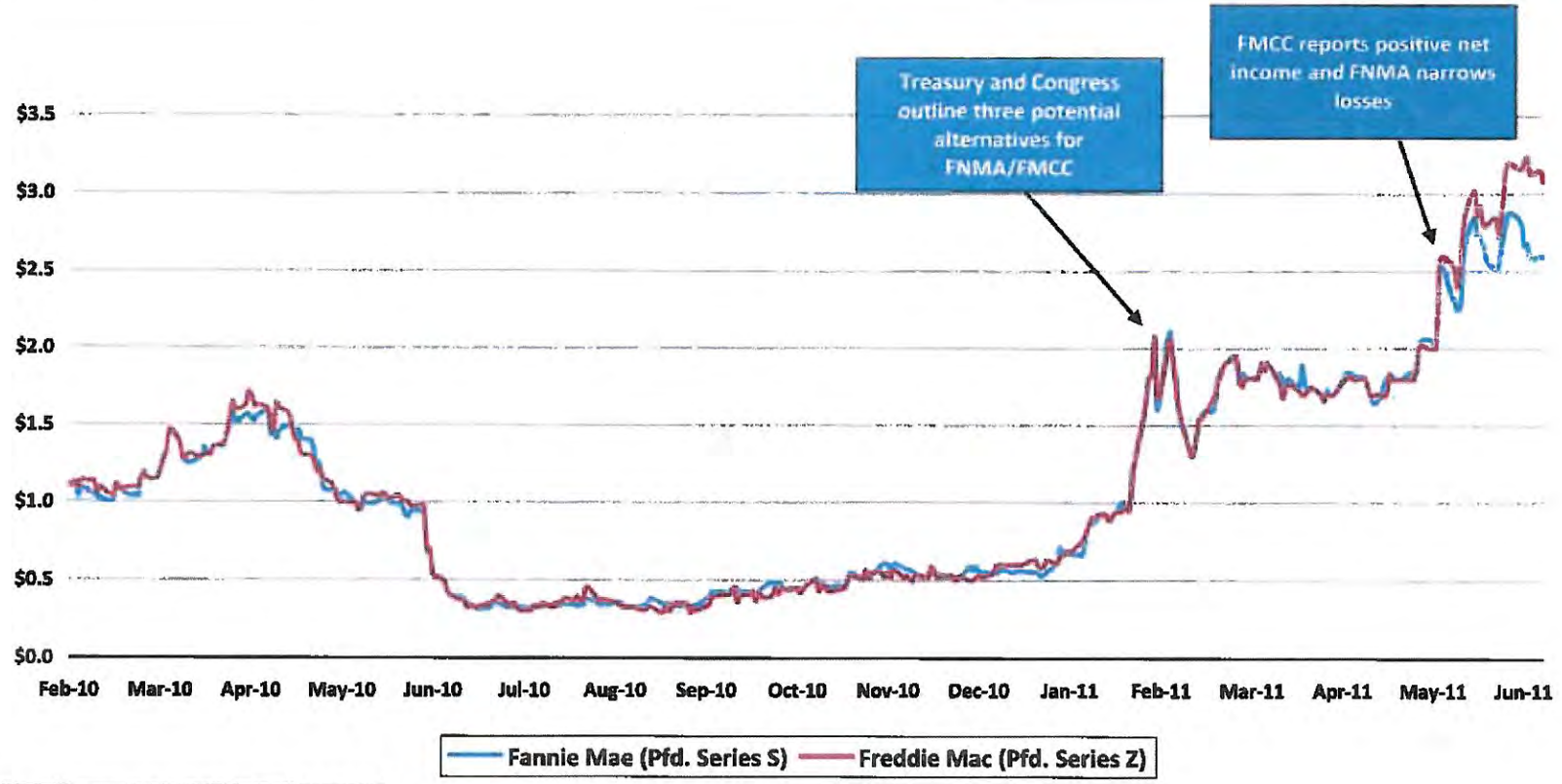
- The first step in demonstrating the possibility of a return on equity capital is to enable the GSE's to generate capital to build more stable balance sheets
- The GSE's could experience a build-up of capital from:
  - Profit improvements from better market conditions and operational cost reductions
    - Increased earnings from higher guarantee fees
    - Profit expansion from the reversal of loan loss reserves
  - Increased capitalization of tax attributes

Public Policy Benefits of Restructuring GSE's

- Increases value of Public Preferreds which benefits holders and serves as a platform for a restructured privatized solution
  - Community bank and insurance holders experience an increase in their capital reserves
    - Benefits economy at large due to increased ability to lend and the multiplier effect
  - Capital accumulation recapitalizes the GSE's allowing them to function as stand-alone private entities
  - Public Preferred offers the government an exit strategy for its Senior Preferred holding
- Restructuring GSE's in this way allows the restructured entity (Newco) increased flexibility to adjust underwriting standards to take reasonable lending risks
  - Benefits housing markets and entire economy with minimal taxpayer cost
- Allows Newco to build capital and restores investor confidence in an uncertain market
  - Excess liquidity reduces Treasury's ownership and recapitalizes Newco

Value Creation Opportunity

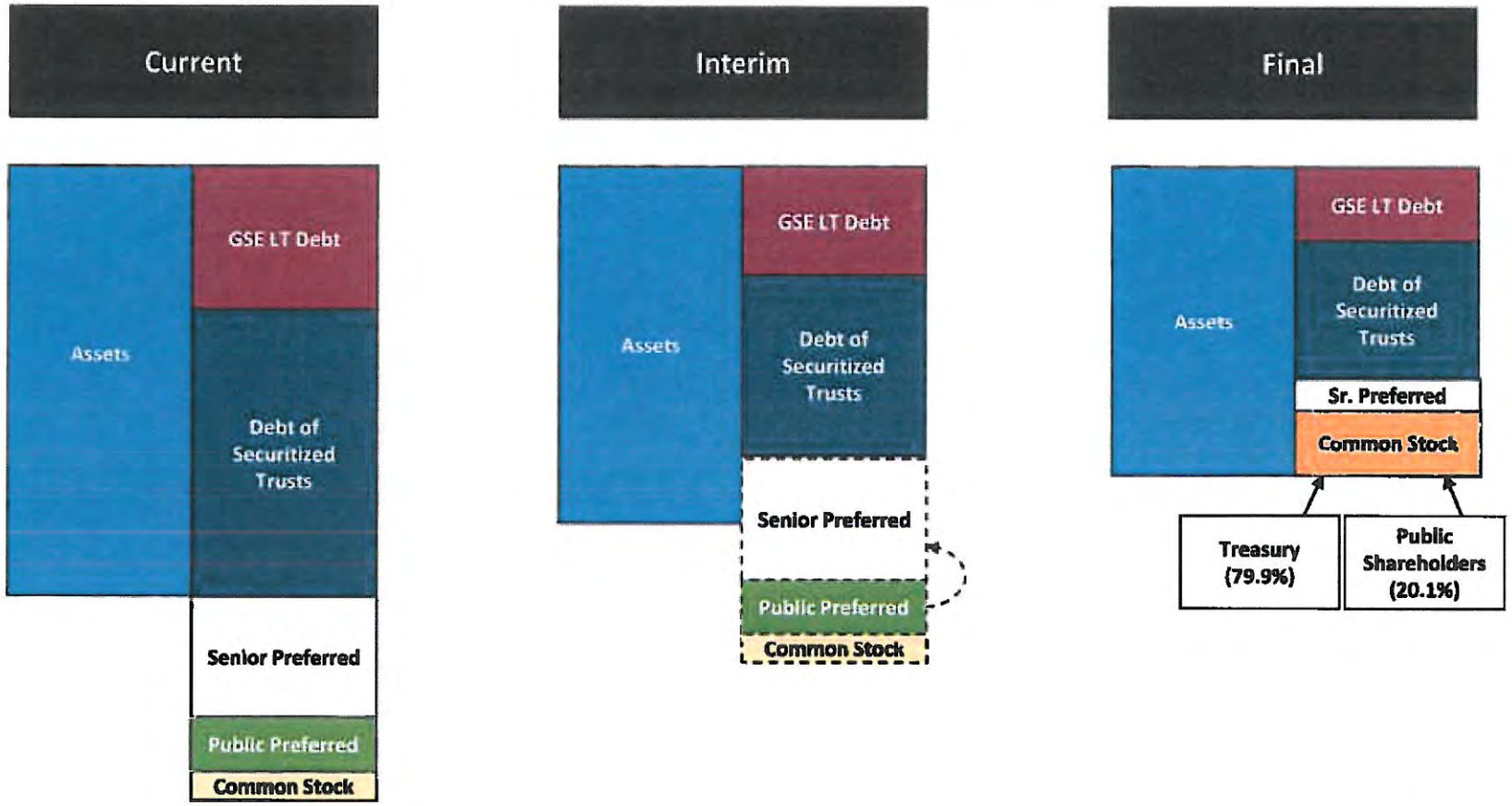
With a current market capitalization of approximately $3.5 billion dollars, the Public Preferred's recent pricing activity reflects the markets favorable outlook of proposed GSE reform and the improving financial performance of the GSE's.



Source: Bloomberg pricing as of 6/10/11.
Note: $25 Liquidation Preference.

GSE Capital Evolution

Dealing with the Public Preferreds now can optimize the final benefits to the Federal Government.

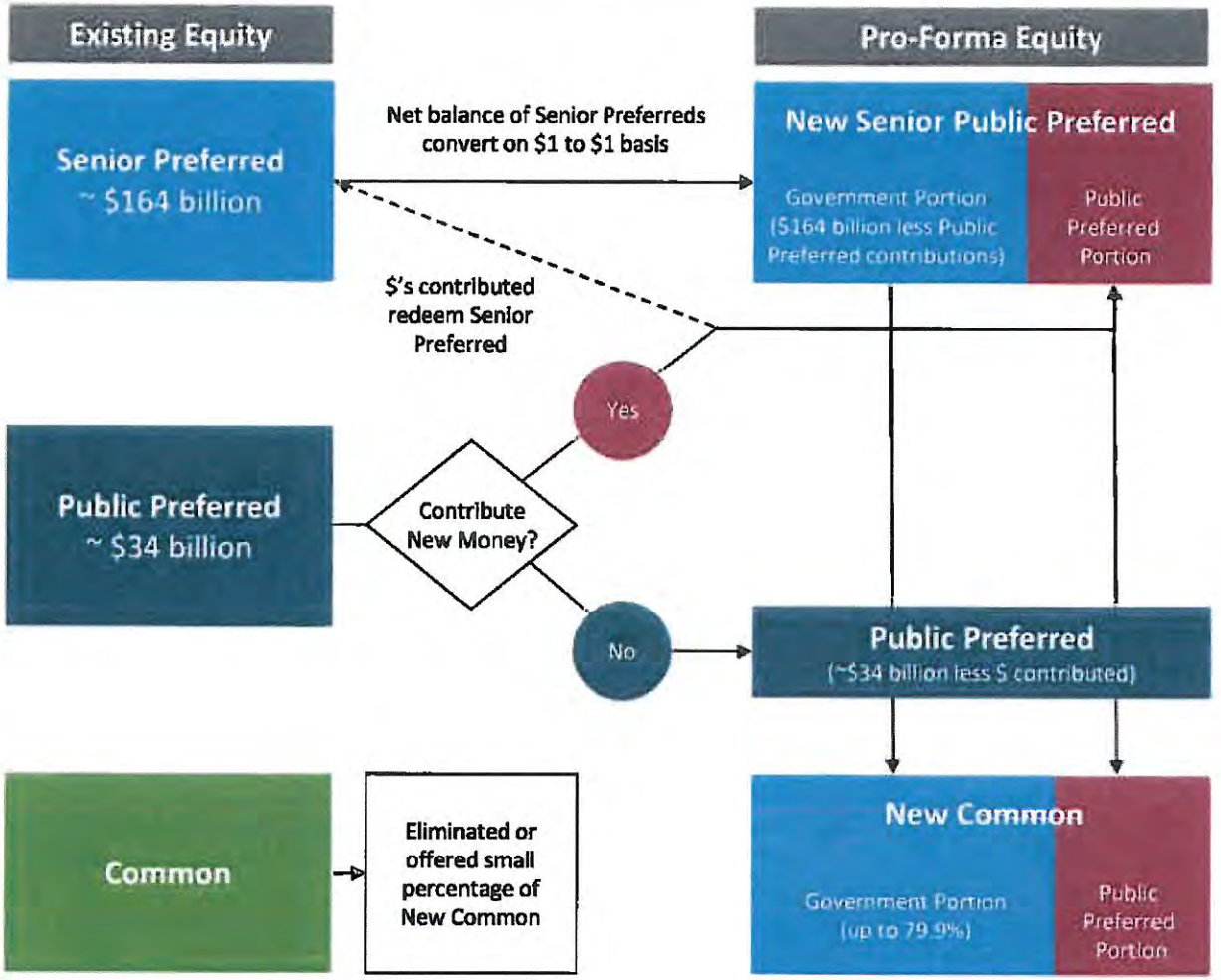


Possible Transactional Solutions

A restructuring of the GSE's could enhance the chances of a full monetization of the government's Senior Preferred holdings over time.

	Transaction 1: Public Preferred Conversion	Transaction 2: Public Preferred Repurchase	Transaction 3: Public Preferred Roll-Up
Description	▸ Public Preferreds convert into new class of Senior Public Preferred stock at a discount ▸ Permits forum for government to monetize its Senior Preferreds over time ▸ Consider including new common stock	▸ Repurchase Public Preferreds at a discount ▸ Consider including new common stock	▸ Senior Preferreds convert into new class of Senior Public Preferred stock ▸ Public Preferreds contribute new money for (i) new Senior Public Preferred stock, (ii) right to convert portion of existing Public Preferred holdings into new Senior Public Preferred Stock and (iii) new common stock
Pro's	▸ Captures significant discount on Public Preferreds prior to a turnaround ▸ Establishes market value for government's Senior Preferreds ▸ Potentially mitigates litigation with Public Preferred holders ▸ Provides foundation for permanent capital structure ▸ Potentially increases value of government's common stock	▸ Captures significant discount on Public Preferreds prior to a turnaround ▸ Potentially increases value of government's common stock ▸ Potentially mitigates litigation with Public Preferred holders ▸ Provides foundation for permanent capital structure	▸ Captures significant discount on Public Preferreds prior to a turnaround ▸ Creates public market out for government's Senior Preferreds ▸ Potentially increases value of government's common stock ▸ Immediately redeems government's Senior Preferred holdings ▸ Potentially mitigates litigation with Public Preferred holders ▸ Provides foundation for permanent capital structure ▸ Prevents full write-off of community bank / insurance holdings
Con's	▸ Community banks / insurance holders may be forced to recognize significant losses ▸ Risks demonstrating low market price for Senior Preferreds if done too soon ▸ Potential holdouts reap windfall	▸ Does not create public market out for government's Senior Preferreds ▸ Community banks / Insurance holders may be forced to recognize significant losses ▸ Potential holdouts reap windfall ▸ May require additional government funds	▸ Community banks / insurance companies may need further government assistance to participate ▸ Potential holdouts reap windfall ▸ Possible public perception of coercion

Illustrative Transaction Three Structure



- Outstanding Senior Preferred, net of new money contributions by Public Preferred, converts to New Senior Public Preferred
- New Senior Public Preferred provides holders attractive yield
- Public Preferred contributes new money for (i) New Senior Public Preferred, (ii) right to convert portion of existing Public Preferred into New Senior Public Preferred and (iii) New Common
- Gov't permanently waives dividend on Public Preferred that remains outstanding to create disincentive to hold-out
- Gov't loan program may be considered to allow participation by community bank and insurance holders
- Senior Preferred receive up to 79.9% of New Common
- Participating Public Preferred receives New Common as additional incentive to contribute new money
- Existing Common eliminated or offered small percent of New Common

V. Proposed Work Plan

V. Proposed Work Plan

Next Steps and Role of Financial and Legal Advisors

- **Phase I – Due Diligence and Analysis**
  - Perform comprehensive due diligence of the GSE's financial condition and business prospects
  - Assist in refining keys goals and range of alternatives (financial and strategic)
  - Analyze various restructuring alternatives to determine optimal recovery/outcome and timing considerations for various constituents
- **Phase II – Develop Restructuring Plan**
  - Deliver preliminary recommendation and advice on choosing optimal strategic path
  - Outline the pros and cons of each restructuring scenario, providing both qualitative and quantitative assessments
  - Assist in developing and refining strategy for discussions with all key constituents, including all government officials, creditors, investors, banks, mortgage insurers and secondary markets makers
- **Phase III – Implement Restructuring Plan and Position GSE's for Privatization**
  - Negotiate with key constituents, as requested
  - Assist in communications with other government agencies and officials
  - Finalize transaction structure, documentation and economics

VI. Team Biographies

Stefan Feuerabendt, Senior Managing Director

Mr. Feuerabendt joined Blackstone's Restructuring Group in 1998 and has advised a wide variety of companies, creditors groups or owners of distressed assets.

The International Financing Review recognized Mr. Feuerabendt's efforts in the restructuring of C-BASS by naming the transaction the *Restructuring of the Year* in 2008 and in the restructuring of Ford Motor Company by naming the transaction the *Americas Restructuring Deal of the Year* in 2009.

Before joining Blackstone, Mr. Feuerabendt was a Vice President at Lehman Brothers in its Financial Services Group. Prior to working at Lehman Brothers, Mr. Feuerabendt worked at Hellmold Associates, Inc. and the Restructuring Group at Prudential-Bache Capital Funding.

Mr. Feuerabendt received a BS from the California Institute of Technology and an MBA from the Anderson School of Management at UCLA.

Mr. Feuerabendt's current and completed advisory assignments include:

- ACA Capital Holdings, Inc.
- Aleris International, Inc.
- Allied Capital Corporation
- Ambac Assurance Corporation
- Ambac Financial Group, Inc.
- American Heavy Lift Shipping Company
- APS Holding Corporation
- Azurix (re. Enron)
- Credit-Based Asset Servicing and Securitization ("C-BASS")
- Darling International
- Eco Electrica (re. Enron)
- Entergy New Orleans
- Ermis Maritime
- Federal Deposit Insurance Corporation
- Financial Guaranty Insurance Company ("FGIC")
- Flag Telecom Holdings Limited
- Fleming Companies, Inc.
- Ford Motor Company
- Glendale Federal Bank, F.S.B.
- Goss Graphics Systems
- Greater Beijing First Expressways
- Guangdong Enterprises
- Lomas Financial Corporation
- LyondellBasell Industries
- Navistar International Transportation Corporation
- Resolution Trust Corporation
- Sithe Independence (re. Enron)
- Stadacona (re. Enron)
- Sunbeam Corporation (Board)
- USG Corporation
- Winstar Communications
- XL Capital Ltd

Erik Lisher, Managing Director

Mr. Lisher is a Managing Director in the Restructuring & Reorganization Group.

Since joining Blackstone in 2003, Mr. Lisher has been involved in advising the Goodyear Tire & Rubber Company, General Motors Corporation, Ford Motor Company, Financial Guaranty Insurance Company ("FGIC"), XL Capital Ltd, Levitz Home Furnishings, Inc., Marchon Eyewear, Inc., Comcast Corporation, Russell-Stanley Holdings, Inc. and Specialty Products Holding Corp. In addition, Mr. Lisher has advised various creditor groups including the Ad Hoc Bondholders Committee of American Capital, Ltd., the Official Creditors Committee of Magna Entertainment Corp., the Ad Hoc Bondholders Committee of aaiPharma, Inc., the Senior Lenders of Communications Corporation of America, Inc., and the Second Lien Committee of Westpoint Stevens, Inc.

Before joining Blackstone, Mr. Lisher was an Associate at J.P. Morgan, where he executed various mergers and acquisitions and financing assignments.

He received an MBA with concentrations in Finance and Strategic Management from the University of Chicago Graduate School of Business and graduated magna cum laude from Wake Forest University with a BA in Political Science.

Edward Slapansky, Vice President

Mr. Slapansky is a Vice President in the Restructuring & Reorganization Group.

Since joining the firm in 2007, Mr. Slapansky has been a member of multiple deal teams advising a variety of clients in complex transactions including debtor-side reorganizations and debt restructurings, creditors' committee representations, out-of-court workouts, and special situation investments. Before joining Blackstone, he worked as a Manager in the Corporate Advisory Services unit of Huron Consulting Group Inc. and an Associate at a boutique investment bank headquartered in Chicago.

Mr. Slapansky has assisted in advising on a variety of restructuring transactions and advisory assignments including Aleris International, Highland Hospitality, Goodyear Tire & Rubber Co., American Capital Strategies, Simmons Bedding Company, Finlay Enterprises, Financial Guaranty Insurance Company, The Pacific Lumber Company, Eagle Food Centers, Inc., Detroit Medical Centers and Ingalls Health System.

Mr. Slapansky received an MBA degree in Finance from the University of Chicago Booth School of Business and a BS degree in Finance at the University of Illinois Urbana-Champaign. He is a Certified Public Accountant (CPA).

Ronak Patel, Analyst

Mr. Patel is an Analyst in the Restructuring & Reorganization Group.

Since joining Blackstone, Mr. Patel has worked on several transactions in various industries.

Mr. Patel received a BS in Finance and Accounting from New York University's Leonard N. Stern School of Business, where he graduated summa cum laude.

U.S. Team Biographies

William J. Sweet, Partner

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Education
J.D., Georgetown University Law Center, 1978

B.A., Bucknell University, 1974

Bar Admissions
District of Columbia

Professional Experience
Attorney, Board of Governors, Federal Reserve System (1978-1981)

Vice-Chairman, Banking Committee, American Bar Association (2005-present)

Former chairman, Mergers and Acquisitions Subcommittee, Banking Committee, American Bar Association (1998-2003)

William J. Sweet, Jr. is head of Skadden, Arps' Financial Institutions Regulatory and Enforcement Group and concentrates in financial institution merger and acquisition, regulatory and enforcement matters. Before joining the firm, Mr. Sweet was a staff attorney with the Federal Reserve Board, where he handled bank holding company regulatory, litigation and enforcement matters.

Mr. Sweet represents U.S., Asian, European and Latin American banking, securities and other financial institutions and their boards of directors on the strategic, policy and regulatory aspects of mergers and acquisitions, negotiated investments, joint ventures, restructuring transactions, bankruptcies and receiverships. In addition, Mr. Sweet advises private equity firms and others seeking to invest in regulated financial institutions.

In addition, Mr. Sweet regularly advises financial institutions on compliance and enforcement issues with respect to a broad range of governance, risk management, money laundering compliance, OFAC sanctions, fair lending, consumer, CRA and other matters, including representation before federal and state regulatory and enforcement agencies.

Mr. Sweet also represents financial institutions before the Financial Services Oversight Council, the Federal Reserve Board, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Treasury Department and other financial regulatory agencies on a wide range of rulings, interpretations and approvals.

Mr. Sweet represented clients on various aspects of federal lending, capital and liquidity support programs, including those established pursuant to the Emergency Economic Stabilization Act of 2008. In addition, Mr. Sweet has advised investors, banks and thrifts on the acquisition of depository institutions and assets from the Federal Deposit Insurance Corporation.

Mr. Sweet also advises clients on the implementation of the Dodd-Frank Act and on strategic transactional and compliance responses to the act.

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Blackstone

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Education
J.D., University of Maryland School of Law, 1993
B.A., Johns Hopkins University, 1990

Certifications
Business Bankruptcy Specialist (American Board of Certification)

Bar Admissions
California
Delaware
District of Columbia
Maryland
New York
Virginia

Skadden

Van Durrer leads Skadden, Arps' corporate restructuring practice in the western United States. In addition, Mr. Durrer advises clients in restructuring matters around the Pacific Rim. Mr. Durrer regularly represents public and private companies, major secured creditors, official and unofficial committees of unsecured creditors, investors and asset-purchasers in troubled company M&A, financing and restructuring transactions, including out-of-court workouts and formal insolvency proceedings.

Mr. Durrer's representative company restructuring and insolvency engagements include: Blue Bird Body Company; FPA Medical Management, Inc.; First Virtual Communications, Inc.; Friedman's, Inc.; Fujita USA Corporation; Indymac Bancorp, Inc. (chapter 7 trustee); JELD-Wen, Inc.; Kmart Corporation; Service Merchandise Company, Inc.; Spansion Inc.; and US Airways Group, Inc. Mr. Durrer also has advised participants in the financial restructurings of AmericanWest Bank; AmeriServe Food Distribution, Inc.; ASAT Holdings Ltd., Co.; Benpres Holding Corporation; Calpine Corporation; Clift Holdings LLC; Cupertino Square, LLC; GTS 900 F, LLC; LBREP/L-Suncal Master I, LLC; New Century Financial Corporation; Pierre Foods, Inc. (M&A Advisor's Food and Beverage Turnaround of the Year 2008); ResMAE Mortgage Corporation; Rock & Republic Enterprises, Inc.; SmarTalk Teleservices, Inc.; SONICBlue Incorporated; Station Casinos, Inc.; THCR/LP Corporation (involving the Trump Atlantic City casinos); and United Pan-Europe Communications, N.V. Selected industries in which Mr. Durrer has been engaged to provide restructuring advice include financial services, gaming, healthcare, hospitality, information technology, logistics, manufacturing, real estate, retail and telecommunications.

Mr. Durrer consistently has been recognized as a "leading lawyer" by *Chambers USA: America's Leading Lawyers for Business* since 2007 and is included in Legal Media Group's *Guide to the World's Leading Insolvency and Restructuring Lawyers* and in *The Best Lawyers in America*. He also has been included in *Turnarounds & Workouts*' list of "Outstanding Young Bankruptcy Lawyers." He has moderated panels and participated as a guest speaker at several engagements for the Association of Insolvency & Restructuring Advisors, Turnaround Management Association, American Bankruptcy Institute, Los Angeles Bankruptcy Forum, Practising Law Institute (PLI) and other similar organizations in the United States and China.

Blackstone

VI. Team Biographies

Mark A. McDermott, Partner

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mark.mcdermott@skadden.com

Education
J.D., Northwestern University School of Law, 1991 (*cum laude*)

B.S., Iowa State University, 1988 (Phi Beta Kappa)

Bar Admissions
New York, Illinois, Iowa and U.S. Court of Appeals for the Fourth and Eighth Circuits

Professional Experience
Law Clerk to the Hon. Arthur A. McGiverin, Chief Justice of the Iowa Supreme Court (1991-1992)

Mark McDermott represents public and private corporations and their principal stakeholders in troubled company M&A, restructuring and financing transactions. He has represented corporations in out-of-court restructurings, prepackaged and prearranged Chapter 11 cases, and traditional Chapter 11 cases. He also has represented bank groups, bondholders, financial institutions, investment funds, equity holders and real estate developers in all types of distressed investments. He advises businesses and investment vehicles in nondistressed transactions, including M&A, spin-off and structured finance transactions. He counsels clients on the bankruptcy aspects of derivatives and similar structured financial products. Finally, he advises officers and directors on matters related to corporate governance and fiduciary duties.

Mr. McDermott has advised clients in numerous industries, including consumer products, energy, entertainment, finance, health care, home building, manufacturing, oil and gas, real estate and real estate finance (including CMBS), retail, technology, telecommunications and transportation. He also has represented troubled companies or their stakeholders facing government investigations and mass tort liability. For instance, he represented Blue Bird Corporation, one of the nation's largest manufacturers of buses, in the fastest prepackaged Chapter 11 reorganization case in history, with the company's stay in bankruptcy lasting approximately 32 hours. He represented Spectrum Brands, Inc., a large consumer products conglomerate, in one of the first Chapter 11 reorganization cases involving litigation over the propriety of reinstatement of senior secured debt. In addition, Mr. McDermott represented Centro Properties Group, one of the largest owners of shopping malls in Australia and the United States, in its out-of-court restructuring. He also represented Kmart Corporation in the largest retail business reorganization case in history, and he served as a member of the team representing Refco Inc. and its subsidiaries in one of the largest broker liquidation proceedings ever.

Mr. McDermott recently was named one of America's "Outstanding Young Restructuring Lawyers" by *Turnarounds & Workouts* magazine. He also was named to the *Euromoney and Legal Media Group's 2009 Expert Guide to the World's Leading Insolvency and Restructuring Lawyers*. The out-of-court restructuring of Centro Properties Group, for which Mr. McDermott served as one of the lead restructuring attorneys, received the "2009 M&A Advisors Cross Border Deal of the Year Award" and the "2009 Turnaround Atlas Award for Out of Court Restructuring of the Year."

Richard F. Kadlick, Partner

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Education
J.D., Georgetown University, 1982

B.A., Hamilton College, 1979 (*summa cum laude*; Phi Beta Kappa)

Bar Admissions
New York
Connecticut

Richard Kadlick, co-head of Skadden's Structured Finance Group, represents underwriters, financial institutions, banks, borrowers and investors in asset-backed and mortgage-backed securities transactions, and owners of and investors in those businesses. He also has represented hedge fund investors in forming investment funds that invest in structured debt obligations, including distressed obligations.

Mr. Kadlick has acted as counsel in a broad variety of public offerings and private placements involving the issuance of all types of structured securities, including asset-backed and mortgage-backed pass-through certificates, notes and bonds; CMOs, CDOs, CBOs and CLOs; and securitized commercial paper notes and participation certificates. His structured finance experience includes transactions in which such instruments have been backed by credit card receivables; underperforming and nonperforming assets; home equity, single-family and commercial mortgage loans; auto and boat loan receivables; federal agency securities; auto and equipment leases; and various other assets.

In the asset- and mortgage-backed area, Mr. Kadlick has worked on many new and innovative structures. For instance, he has worked on the development of the master trust (a widely used vehicle for the issuance of asset-backed securities), balance sheet CLOs, the MACRO (an ETF-like exchange-traded financial product), numerous senior-subordinated structures in the credit card receivables area and many transactions in the structured finance area generally using derivatives.

Mr. Kadlick repeatedly has been selected for inclusion in *Chambers Global* and *The Best Lawyers in America*.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAIRHOLME FUNDS, INC., et al., *Plaintiffs,* v. THE FEDERAL HOUSING FINANCE AGENCY, et al., *Defendants.*	No. 13-cv-1053-RCL

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUPPLEMENTATION OF THE ADMINISTRATIVE RECORDS, FOR LIMITED DISCOVERY, FOR SUSPENSION OF BRIEFING ON DEFENDANTS' DISPOSITIVE MOTIONS, AND FOR A STATUS CONFERENCE

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February 12, 2014

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Pursuant to LCvR 7(a), Plaintiffs Fairholme Funds, Inc. et al. ("Fairholme" or "Plaintiffs") respectfully submit this memorandum of points and authorities in support of Plaintiffs' motion, filed this date, seeking (1) supplementation of the administrative record submissions produced by both sets of Defendants; (2) limited discovery into the completeness of the administrative records produced by Defendants; (3) discovery, pursuant to Federal Rule of Civil Procedure 56(d), necessary to allow Plaintiffs to present facts essential to their opposition to the FHFA Defendants' motion for summary judgment on Plaintiffs' claim for breach of fiduciary duty; and (4) suspension of briefing on Defendants' dispositive motions until such supplementation of the records and limited discovery is completed. Counsel for the plaintiffs in *Arrowood Indemnity Co. v. Federal National Mortgage Association*, No. 13-cv-1439, and *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations*, No. 13-mc-1288, have indicated that their clients join Plaintiffs' motion. Plaintiffs also respectfully request that the Court schedule a status conference, at the Court's earliest convenience, to address the issues raised by this motion.

INTRODUCTION

The Court has pending before it two separate, though related, dispositive motions filed by Defendants in the various related actions challenging certain decisions taken in connection with the conservatorships of the Federal National Mortgage Association ("Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie") (collectively, the "Companies" or the "Enterprises"): (1) the motion to dismiss, or in the alternative, for summary judgment, filed by Defendants Department of the Treasury and the Secretary of the Treasury (collectively, the "Treasury Defendants"); and (2) the motion to dismiss, and in the alternative, for summary judgment, filed by Defendants Federal Housing Finance Agency ("FHFA"), the Director of the FHFA, Fannie, and

Freddie (collectively, the "FHFA Defendants").[1]

Plaintiffs are owners of shares of non-cumulative preferred stock issued by Fannie and Freddie. They brought this action challenging Defendants' actions in entering into agreements that effectively transfer to Treasury the entire positive net worth of Fannie and Freddie and thus effectively confiscate the value of Plaintiffs' shares of preferred stock. This so-called "Net Worth Sweep," pursuant to which the FHFA, as conservator for Fannie and Freddie, has already transferred tens of billions of dollars from the Enterprises to Treasury, is beyond the statutory authority of both the FHFA and Treasury, and is otherwise arbitrary and capricious, and must therefore be set aside as unlawful under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701 *et seq.* *See* Fairholme Complaint for Declaratory and Injunctive Relief and Damages, No. 13-1053 (Doc. 1) ("Complaint"), Counts I-IV. Plaintiffs further allege that by entering into the Net Worth Sweep, the FHFA and its Director breached their fiduciary duty to Plaintiffs and other preferred shareholders of Fannie and Freddie, and also breached Plaintiffs' contract rights and the implied covenant of good faith and fair dealing. *See* Complaint, Counts V-VII.

On January 17, both the Treasury Defendants and the FHFA Defendants filed dispositive motions seeking dismissal of all of the claims raised by Fairholme (as well as the claims challenging the Net Worth Sweep raised by the other plaintiffs in these related actions). Both sets of Defendants request, in the alternative, the entry of summary judgment with respect to certain aspects of the APA claims. As pertinent here, however, Defendants' motions demonstrate that Plaintiffs are entitled to supplementation of the record before the Court and to discovery relating

[1] We cite herein to the brief in support of the Treasury Defendants' motion (Doc. 31) as "Treas. Br." and to the brief in support of the FHFA Defendants' motion (Doc. 32) as "FHFA Br." Unless otherwise noted, references herein to the document numbers of filings in this litigation refer to the document number as reflected in the docket for Case No. 13-cv-1025 (*Perry Capital, LLC v. Lew*).

both to the completeness of the administrative records and to Plaintiffs' claim for breach of fiduciary duty.

First, with respect to their motions to dismiss and/or for summary judgment on Plaintiffs' APA claims, *see* Treas. Br. 36-55; FHFA Br. 63-70, both sets of Defendants have produced a small set of nonpublic documents (as well as a variety of public documents) relating to Defendants' decision to enter into the Net Worth Sweep, although the FHFA Defendants object to this nomenclature. Indeed, the FHFA Defendants contend that they never "created or maintained an administrative record relating to the execution of the [Net Worth Sweep]," and prefer to call their production of materials a "document compilation" rather than an "administrative record."[2] But both of Defendants' *post hoc* compilations, which were assembled solely for purposes of this litigation, suffer from multiple deficiencies. Far from constituting "the whole record" on which the challenged decisions were made, 5 U.S.C. § 706, the materials produced by both Defendants exclude multiple documents that were reviewed and relied upon by Treasury and the FHFA. Moreover, both sets of Defendants rely in part on materials that were created *after* the Net Worth Sweep was implemented, and the FHFA Defendants rely heavily on a December 2013 declaration of Mr. Mario Ugoletti, a "special advisor" to the FHFA Director, which was prepared solely for purposes of this litigation and which includes numerous unsupported assertions of material fact. *See, e.g.*, FHFA0001-0010[3] (Declaration of Mario Ugoletti) ("Ugoletti Dec."). And both

[2] Notice of Filing Document Compilation by [FHFA Defendants] Regarding Third Amendment to Senior Preferred Stock Purchase Agreements (Doc. 24) (filed Dec. 17, 2013) ("FHFA Compilation Notice") at 2.

[3] We cite herein to materials included within the FHFA Defendants' document compilation as "FHFA____" and to materials included within the Treasury Defendants' administrative record compilation as "T____." Relevant excerpts from the Treasury Defendants' administrative record compilation are attached hereto as Exhibit 1 and relevant excerpts from the FHFA Defendants' compilation are attached hereto as Exhibit 2.

FHFA's "document compilation" and Treasury's administrative record are almost completely silent with respect to Defendants' consideration of key facts and issues bearing upon the decision to enter into the Net Worth Sweep.

These facts, as detailed below, compel the conclusions that (1) supplementation of the administrative record is appropriate in order to ensure that the Court "consider[s] neither more nor less than what was before the agency at the time it made its decision," *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C. 2010), and (2) that limited discovery into the completeness of the records submitted by Defendants to the Court is necessary before the Court can fully or meaningfully consider Defendants' dispositive motions on the APA claims. *See Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993); *Amfac Resorts, LLC v. Department of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001).

Second, the FHFA Defendants rely on disputed material facts to support their motion to dismiss Plaintiffs' fiduciary duty claim for failure to state a claim. *See* FHFA Br. 5, 45-56. For example, the FHFA Defendants seek to defend the Net Worth Sweep on the grounds that it was necessary to address concerns over the potential "erosion" in Treasury's financial commitment to the Enterprises and the implications such erosion would have for the housing finance markets. *See, e.g.*, FHFA Br. 56. Plaintiffs' complaint alleges facts that are contrary to this factual assertion. *See, e.g.*, Complaint ¶¶ 9-10, 13, 64-77, 139-44. Because the FHFA Defendants rely on factual matters outside the pleadings, their motion to dismiss the breach of fiduciary duty claims "must," under Federal Rule of Civil Procedure 12(d), "be treated as one for summary judgment under Rule 56." And under Federal Rule of Civil Procedure 56(d), Plaintiffs must be afforded an opportunity to take discovery in order to develop facts that are essential to their opposition to the FHFA's motion for summary judgment with respect to this claim. *See Anderson v. Liberty Lob-*

by, Inc., 477 U.S. 242, 250 n.5 (1986) (summary judgment must "be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition"). *See also Kim v. United States*, 632 F.3d 713, 719 (D.C. Cir. 2011).

STATEMENT OF FACTS

A. Background Facts Relating to Plaintiffs' Claims

Plaintiffs are owners of non-cumulative preferred stock issued by Fannie and Freddie. Complaint ¶ 18. In 2008, Fannie and Freddie owned and guaranteed trillions of dollars of assets, primarily mortgages and mortgage-backed securities. *Id.* ¶ 1. Although the Companies had been profitable for decades prior to 2008, during the mortgage-related financial crisis of 2008 they faced a steep reduction in the book value of their assets and a loss of investor confidence. *Id.* ¶ 3.

In response to the financial crisis, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"). *Id.* As relevant here, HERA authorizes FHFA, under certain specified conditions, to place Fannie and/or Freddie into conservatorship or receivership. Conservatorship and receivership are distinct statuses with distinct purposes. "A conservator's goal is to continue the operations of a regulated entity, rehabilitate it and return it to a safe, sound and solvent condition," while "[t]he ultimate responsibility of FHFA as receiver is to resolve and liquidate the existing entity." Conservatorship and Receivership, 76 Fed. Reg. 35,724, 35,730 (June 20, 2011); *see also* Complaint ¶ 43. HERA also gave Treasury temporary authority to invest in Fannie's and Freddie's equity securities. When exercising this authority, Treasury is statutorily required to consider "[t]he need to maintain the [Companies'] status as . . . private shareholder-owned compan[ies]," *id*. ¶ 46 (first alteration added) (emphasis omitted) (quoting 12 U.S.C. §§ 1455(*l*)(1)(C), 1719(g)(1)(C)), and this authority expired December 31, 2009, *id.* ¶ 47.

Only weeks after HERA's enactment, on September 6, 2008, FHFA placed both Companies into conservatorship. *Id.* ¶ 40. Consistent with HERA, FHFA acknowledged that conservatorship "is a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations." *Id.* ¶ 40 (quoting Statement of James B. Lockhart, Director, FHFA, at 5-6 (Sept. 7, 2008)). FHFA accordingly committed to acting "as conservator to operate [Fannie and Freddie] until they are stabilized," *id.* ¶ 44 (alteration in original) (quoting Statement of James B. Lockhart, Director, FHFA, at 5-6 (Sept. 7, 2008)), and vowed to terminate the conservatorship "[u]pon the Director's determination that the Conservator's plan to restore the [Companies] to a safe and solvent condition has been completed successfully," *id.* (second alteration in original) (quoting FHFA Fact Sheet, Questions and Answers on Conservatorship). FHFA also emphasized that "the common and all preferred stocks [of the Companies] will continue to remain outstanding," *id.* (alteration in original) (quoting Statement of Lockhart at 8), that "preferred and common shareholders . . . have some economic interest in [the Companies]," and that "going forward there may be some value," FHFA0066 (quoting Testimony of J. Lockhart before House Financial Services Committee (Sept. 25, 2008)); *see also* FHFA0061-62.

On September 7, the day after imposition of the conservatorship, Treasury exercised its temporary authority under HERA to provide the Companies with capital by entering into agreements with FHFA to purchase equity securities of Fannie and Freddie. *Id.* ¶¶ 45-46. These agreements were called Preferred Stock Purchase Agreements ("PSPAs"). Under the PSPAs, Treasury committed to invest up to $100 billion in a newly-created class of "Government Stock" in each Company. *Id.* ¶ 48. The Government Stock ranked senior to all other preferred stock in the Companies, and the Government Stock in each Company had an initial liquidation preference

of $1 billion. *Id*. ¶¶ 5, 50. Under the PSPAs, Fannie and Freddie were permitted to draw from Treasury's commitment on a quarterly basis to maintain a positive net worth. *Id*. ¶ 48. In return, Treasury would receive additional Government Stock in the form of a dollar-for-dollar increase in the Government Stock liquidation preference. *Id*. ¶¶ 5, 50.

The PSPAs entitled Treasury to quarterly dividends on its Government Stock at an annualized rate of 10% if Fannie and Freddie elected to pay the dividends in cash or 12% if the Companies elected to pay them in kind (by adding the amount of the dividend payment to the existing liquidation preference). *See id.* ¶ 51; T0032-0034 (Fannie Government Stock Certificate).

The PSPAs also provided for a quarterly "periodic commitment fee." *See* T0022 (Fannie PSPA). The purpose of the fee was to compensate Treasury for the support provided by its ongoing commitment to purchase Government Stock, and it could be paid in cash or in kind. *Id.* The fee was to be set for five-year periods by agreement of Treasury and the Companies, but Treasury could elect to waive it for up to a year at a time. *Id.* Treasury has exercised this option and has never received a periodic commitment fee under the PSPAs. *See, e.g.*, T3882 (Periodic Commitment Fee Waiver Letter (June 25, 2012)).

In addition to the Government Stock, Treasury also received warrants to purchase 79.9% of the Companies' common stock at a nominal price. Complaint ¶ 5. The warrants gave Treasury an upside return in addition to the dividends on its Government Stock in the event that the Companies recovered and returned to profitability. *Id.*

Treasury and FHFA amended the PSPAs twice before expiration of Treasury's purchase authority. The first amendment increased Treasury's funding commitment to $200 billion per Company. Complaint ¶ 53. The second amendment, entered one week before Treasury's purchase authority expired, replaced the $200 billion commitment amount with a formula that would

allow Treasury's commitment to exceed (but not fall below) $200 billion depending upon any deficiencies experienced in 2010, 2011, and 2012 and any surplus existing as of December 31, 2012. *Id.* ¶ 54.

From 2008 through the second quarter of 2012, Treasury invested a total of $187 billion in Fannie and Freddie under the PSPAs, Complaint ¶ 6, bringing the total liquidation preference of the Government Stock to $189 billion. The Companies' draws from Treasury's commitment were made in large part to fill holes in the Companies' balance sheets caused by large non-cash losses based on exceedingly pessimistic views of the Companies' financial prospects, including write-downs of the value of significant tax assets and the establishment of large loan loss reserves. *Id.* ¶ 56. Approximately $26 billion of the draws were made to pay Treasury cash dividends on its Government Stock. *Id.* As explained above, the Companies were under no obligation to make these draws because they could have paid the dividends in kind.

By the middle of 2012, however, Fannie and Freddie had returned to profitability. "Due to rising house prices and reductions in credit losses, in early August 2012 the Companies reported significant income for the second quarter 2012 . . . and neither required a draw from Treasury under the [PSPAs]." Complaint ¶ 58 (quoting FHFA, Office of Inspector General, Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements at 11 (Mar. 20, 2013) ("FHFA Inspector General Report")). In fact, in the first two quarters of 2012 the Companies posted sizable profits totaling more than $11 billion. *Id.* ¶ 57.

On August 17, 2012, just days after the Companies announced their positive second quarter results, Treasury and FHFA amended the PSPAs for a third time (the "Net Worth Sweep"). *See id.* ¶ 64. The effect of Net Worth Sweep was to ensure that despite their profitability Fannie and Freddie would be wound down and that their existing private shareholders would not receive

any benefit from their investments. Treasury and FHFA (on information and belief, acting at the direction of Treasury, *id.* ¶ 70) accomplished this by replacing the existing dividend structure of the Government Stock with one that entitles Treasury to *all*—100%—of the Companies' profits going forward. *Id.* ¶ 66. Under the Net Worth Sweep, since January 1, 2013 the Companies have been required to make quarterly dividend payments equal to their entire net worth, minus a $3 billion reserve amount that steadily decreases to $0 by January 1, 2018. *Id*. In light of the fact that the Net Worth Sweep entitles Treasury to all the Companies' profits, it suspends payment of periodic commitment fees. *See* T4338 (Third Amendment to Fannie PSPA). As explained above, such fees had never been charged under the PSPAs. The Net Worth Sweep implemented under this "Third Amendment" to the PSPAs also accelerates the rate at which the Companies are required to shrink their mortgage asset holdings down to $250 billion each, from 10% per year under the original PSPAs to 15% per year. Complaint ¶ 66.

Treasury trumpeted that the "quarterly sweep of every dollar of profit that each firm earns going forward" would ensure "that every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers" for their investment in those firms, and that Fannie and Freddie "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." *Id*. ¶ 71 (quoting Press Release, Dep't of the Treasury, Treasury Department Announces Further Steps To Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012) ("Treasury Press Release")). FHFA likewise emphasized that the Net Worth Sweep "ensures all the [Companies'] earnings are used to benefit taxpayers" and reinforces that "the [Companies] will not be building capital as a potential step to regaining their former corporate status." Complaint ¶ 72 (quoting FHFA, REP. TO CONG. at 1 (2012); Edward J. DeMarco, Acting Director, FHFA, Statement Before the U.S. S. Comm. on Banking & Urban

Affairs 3 (Apr. 18, 2013)).

Treasury and FHFA have claimed that the Net Worth Sweep also "end[ed] the circular practice of the Treasury advancing funds to the [Companies] simply to pay dividends back to Treasury." Treasury Press Release. But, as explained above, the Companies were under no obligation to pay Treasury dividends in cash and thus were under no obligation to draw funds from Treasury for that purpose.

Fannie and Freddie have enjoyed record-breaking profitability since the imposition of the Net Worth Sweep. For the year 2012, Fannie and Freddie reported net income of $17.2 billion and $11 billion, respectively. Complaint ¶¶ 60, 62. Through the first three quarters of 2013 (the Companies have not yet reported fourth quarter results), the Companies were even more profitable, with Fannie reporting net income of $77.5 billion and Freddie $40 billion. *See* Fannie, Third Quarter Report (Form 10-Q) at 4 (Nov. 7, 2013); Freddie, Third Quarter Report (Form 10-Q) at 15 (Nov. 7, 2013).[4]

These profits reflect in part the reversal of accounting decisions that led Fannie and Freddie to experience large non-cash losses during the housing crisis. For example, FHFA's Office of Inspector General recognized that release of the Companies' deferred tax assets valuation allowances could lead to "an extraordinary payment to Treasury" under the Net Worth Sweep, Complaint ¶ 73 (quoting FHFA Inspector General Report at 15), and that is precisely what has happened. Fannie released $50.6 billion of the Company's deferred tax assets valuation allowance in the first quarter of 2013, and based on its results that quarter was required by the Net Worth Sweep to pay Treasury a dividend of $59.4 billion. *Id.* ¶¶ 61, 73. Freddie released $23.9

[4] www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2013/q32013.pdf; www.freddiemac.com/investors/er/pdf/10q_3q13.pdf.

billion of its deferred tax assets valuation allowance in the third quarter of 2013, and it was required to pay Treasury a dividend of $30.4 billion. Freddie, Third Quarter Report (Form 10-Q) at 1 (Nov. 7, 2013).

Fannie and Freddie have now repaid to Treasury dividends totaling approximately $185 billion, which amounts to nearly all of the approximately $187 billion in capital provided to the Companies by Treasury. Fannie, Third Quarter Report (Form 10-Q) at 2 (Nov. 7, 2013); Freddie, Third Quarter Report (Form 10-Q) at 97 (Nov. 7, 2013). Yet the liquidation preference of the Government Stock remains at $189 billion, and the Companies' profits continue to be swept to Treasury with no end in sight.

On July 10, 2013, Plaintiffs filed their complaint in this action against the FHFA and its Acting Director and the Treasury. Counts I and II of Plaintiffs' complaint allege that the FHFA Defendants' conduct in implementing the Net Worth Sweep exceeded their statutory authority and was arbitrary and capricious, entitling Plaintiffs to declaratory and injunctive relief under the APA. Complaint ¶¶ 84-93 (Count I); ¶¶ 94-99 (Count II). Counts III and IV allege similar claims under the APA against the Treasury. *Id.* ¶¶ 100-110 (Count III); ¶¶ 111-120 (Count IV). Counts V and VI allege that by instituting the Net Worth Sweep, the FHFA, as conservator of Fannie and Freddie, breached its contracts with owners of Fannie's and Freddie's preferred stock and the covenant of good faith and fair dealing that is implied in those contracts. *Id.* ¶¶ 121-128 (Count V); ¶¶ 129-135 (Count VI). Finally, Plaintiffs allege in Count VII that by instituting the Net Worth Sweep, the FHFA, as conservator of Fannie and Freddie, violated its fiduciary duties to Plaintiffs and other owners of Fannie and Freddie preferred stock. *Id.* ¶¶ 136-145.

B. The Records Filed by Defendants.

Following the filing of the complaint in this action and numerous other complaints challenging the Net Worth Sweep, the parties agreed to a schedule for the production by Defendants of the administrative record and the briefing and argument of dispositive motions. *See* Order Regarding Briefing Schedule in All Cases (Doc. 21) (filed Nov. 18, 2013). Accordingly, on December 17, 2013, the Treasury Defendants filed with the Court an "administrative record on behalf of Treasury" relating to the Third Amendment to the PSPAs. This administrative record was apparently compiled after the commencement of this litigation. The filing by the Treasury Defendants included a certification, by Timothy Bowler, Treasury's Deputy Assistant Secretary, Capital Markets, that the compiled materials "reflect, to the best of [his] knowledge, the nonprivileged information considered by Treasury in entering into" the Third Amendment to the PSPAs. Certification of Administrative Record (Doc. 23-1) ¶ 3 (included in Ex. 1).

The Treasury Defendants have provided no information regarding the process by which this record was compiled or how they have satisfied themselves that they have presented to the Court the complete administrative record. Although the Treasury record contains more than 4300 pages of materials, approximately 3985 of those pages are SEC filings and contracts, with another approximately 167 pages of other documents that were already publicly available. The record contains precious little (approximately 205 pages) in the way of internal, nonpublic information. Moreover, at least one of the documents contained in the Treasury record postdates the Third Amendment and thus could not have been before Treasury at the time it decided to implement the Net Worth Sweep. *See* T4350-57. And, as discussed in greater detail below, the Treasury record is virtually silent as to critical issues that undoubtedly bore on Treasury's decision to enter into the Third Amendment.

Also on December 17, the FHFA Defendants filed what they call their "document compilation." Like the record compiled by the Treasury Defendants, only a tiny fraction of the FHFA document compilation—approximately 43 of 4132 pages—is made up of documents that were not already publicly available. Significantly, the FHFA Defendants took pains to emphasize that they were *not* filing an actual administrative record, which they contended they were not required to prepare, but were instead filing at best a rough approximation of same:

> As the APA does not permit review of actions of the Conservator (5 U.S.C. § 701(a)(2)), [the FHFA Defendants] are not required to – and have not – created or maintained an administrative record relating to the execution of the Third Amendment. Nevertheless, the enclosed documents reflect the considerations and views FHFA as Conservator took into account in connection with execution of the Third Amendment.

FHFA Compilation Notice at 2 (included in Ex. 2). Notably, the FHFA Defendants did not purport to certify or even represent that their "document compilation" included all of the materials that were before the FHFA when it decided to enter into the Third Amendment, or that they had even attempted to gather all such materials. The FHFA Defendants' record is incomplete on its face: it includes no internal memoranda or other contemporaneous decisional documents memorializing the agency's decision to agree to the Net Worth Sweep. And, even more so than the Treasury Defendants, the FHFA Defendants' record includes numerous materials that postdate the Third Amendment. *See, e.g.*, FHFA4051-4095. These *post hoc* materials include the 10-page Declaration of Mario Ugoletti, a "Special Advisor" to the FHFA Director. This declaration, which was prepared solely for purposes of this litigation and dated December 17, 2013, purports to describe the substantive considerations that led the FHFA to enter into the PSPAs and their various amendments, including the Third Amendment implementing the Net Worth Sweep. FHFA0001-10.

C. The Pending Dispositive Motions

On January 17, the Treasury Defendants and the FHFA Defendants separately filed their motions to dismiss, or for summary judgment on, Plaintiffs' claims. Under the Court's scheduling order, Plaintiffs' response to these motions is due on February 19. A hearing on the motions, and on any cross motions filed by Plaintiffs, is scheduled for June 23 of this year.

ARGUMENT

I. NEITHER DEFENDANT HAS PRODUCED AN ADEQUATE ADMINISTRATIVE RECORD AND THUS SUPPLEMENTATION IS NECESSARY

"It is a widely accepted principle of administrative law that the courts base their review of an agency's actions on the materials that were before the agency at the time its decision was made." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997). The APA directs the Court to review "the whole record," 5 U.S.C. § 706, and this Court has "interpreted the 'whole record' to include all documents and materials that the agency directly or indirectly considered . . . [and nothing] more nor less." *Pacific Shores Subdivision v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (alterations in original) (internal quotation marks omitted). *See also Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision.").

As this Court has noted, however, a plaintiff in an APA action who seeks to "supplement" the administrative record produced by the agency must overcome the "standard presumption that the agency properly designated the Administrative Record." *Amfac Resorts*, 143 F. Supp. 2d at 12 (citation and internal quotation marks omitted). "Courts grant motions to supplement the administrative record only in exceptional cases," *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005), and the presumption will defeat a motion to supplement ab-

sent "clear evidence" that the agency considered something it did not place in the record, *Calloway v. Harvey*, 590 F. Supp. 2d 29, 37 (D.D.C. 2008).[5]

Despite this presumption, supplementation of the record is appropriate when it is apparent that the agency failed to include in the record materials that the relevant decisionmakers directly or indirectly consulted in connection with their decision. In *Ad Hoc Metals Coalition v. Whitman*, 227 F. Supp. 2d 134, 139 (D.D.C. 2002), for example, the Court granted the plaintiffs' motion to add to the record a transcript that, according to internal agency documents, decisionmakers had read before deciding what to do. Those internal documents, the Court found, overcame the agency's contention that it had not "relied" upon the transcript when it made its final decision. *Id. See also County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 71 (D.D.C. 2008) (the "whole record include[s] all materials that might have influenced the agency's decision, and not merely those on which the agency relied in its final decision" (alteration in original) (internal quotation marks omitted)); *Public Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1986) (supplementing the record with documents that were "known to [agency] at the time of their decisionmaking, are directly related to the decision made, and are adverse to the agency's position").

Supplementation of the record is also appropriate when an agency withholds a document the agency decisionmaker considered "indirectly" by relying on the work of his subordinates. Thus, in *Styrene Information & Research Center v. Sebelius*, 851 F. Supp. 2d 57, 61-66 (D.D.C. 2012), the Court allowed supplementation of the record with documents that an agency expert

[5] *See also City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010) (courts "do not allow parties to supplement the record unless they can demonstrate unusual circumstances justifying a departure from [the] general rule"); *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F. 2d 1095, 1104 n.18 (D.C. Cir. 1979) (observing that supplementation of the record "is the exception not the rule").

panel drafted but did not submit to the agency's final decision makers. The documents "were an integral part of the Expert Panel's peer review process and influenced [its] recommendation, upon which the [agency] based its listing determination." *Id.* at 64. Under those circumstances, "[t]he mere fact that the [documents] were not ultimately passed on to the final decisionmaker d[id] not lead to the conclusion that they were not before the agency," and plaintiffs satisfied their burden by pointing to "the fact that the administrative record contain[ed] several references" to the omitted documents. *Id. See also Amfac Resorts*, 143 F. Supp. 2d at 12 (if agency's final decision was based "on the work and recommendations of subordinates, those materials should be included as well"); *Miami Nation of Indians v. Babbitt*, 979 F. Supp. 771, 777 (N.D. Ind. 1996) ("[A] document need not literally pass before the eyes of the final agency decision maker to be considered part of the administrative record."); *Tenneco Oil Co. v. Department of Energy*, 475 F. Supp. 299, 318 (D. Del. 1979) ("The internal memoranda, directives and guidelines generated and disseminated at a variety of levels are proper items of discovery.").

To be sure, a passing citation by the agency to other materials is normally not sufficient to satisfy the plaintiff's burden to show that the record should be supplemented with those materials. *Marcum*, 751 F. Supp. 2d at 80; *Cape Hatteras Access Pres. Alliance v. Department of Interior*, 667 F. Supp. 2d 111, 112 (D.D.C. 2009). Similarly insufficient is the mere fact that the materials were somewhere in the agency's files. *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 515 (D.C. Cir. 2010). But where materials in the record rely upon the document at issue, and the document was in the agency's possession when it made its decision, supplementation should ordinarily be ordered. *American Wild Horse Pres. Campaign v. Salazar*, 859 F. Supp. 2d 33, 44 (D.D.C. 2012).

In light of the above standards, limited supplementation of the records is clearly required

here. In particular, the materials contained in the documents produced by Defendants specifically refer to or illustrate Defendants' reliance upon several categories of records that were not produced:

Financial Projections and Associated Records. The cornerstone of Defendants' defense of their decision to enter into the Third Amendment to the PSPAs and to implement the Net Worth Sweep is their factual claim that at the time of that decision, Defendants did not expect Fannie or Freddie to be able to generate sufficient net income to cover their dividend obligation to Treasury under the original PSPAs. *See* Treas. Br. 16-18, 24-25, 49-55; FHFA Br. 15-16, 23-26, 64-70. Defendants rely upon a series of contemporaneous financial projections in connection with this contention. While the documents produced by Defendants include materials referring to and summarizing some of these projections, they do not include documents which are specifically identified as providing the basis for many of the projections. Thus, materials in the records refer to and rely upon projections and analyses prepared by Grant Thornton, but the Grant Thornton materials are not included in the documents produced by Defendants. *See, e.g.*, GSE Preferred Stock Purchase Agreements: Summary Review and Key Considerations, at T3786 (May 23, 2012) ("[T]he . . . Grant Thornton analysis [was] used to generate the forecast estimates on the subsequent pages."). *See also* T3837 (referring to Grant Thornton analyses).

Similarly, the Treasury administrative record includes financial analyses that were based on "[s]cenarios developed by Treasury Staff," *see, e.g.*, T3887, T3894, but the record does not include these Treasury scenarios. And these Treasury "scenarios" played a particularly critical role in the decision to enter into the Third Amendment, since they supported new and much lower projections of the Companies' future profitability than had been previously prepared. For example, analyses that were prepared in July 2012 on the basis of the Treasury "scenarios" project-

ed significantly lower net income for Fannie in subsequent years – approximately a 50% reduction for most years – than analyses that had been prepared only a month earlier, in June 2012. *Compare* T3847 (June analysis) *with* T3889 (July analysis).

Given Defendants' admitted reliance on these financial projections and associated analyses in their decision to implement the Net Worth Sweep, the data, models, and associated analyses on which the various financial projections were based should have been included in the administrative records. Such supplementation should include, at a minimum, the Grant Thornton projections and analyses, the Treasury "scenarios" and associated analyses, and any other records reflecting the data and analyses on which Defendants based their analyses of Fannie's and Freddie's ability to generate earnings sufficient to fund dividend payments.

Freddie Projections Prepared after June 2012. As discussed above, Defendants rely upon financial analyses prepared in July 2012 that projected significantly lower income than analyses prepared in May and June of that year. Unlike the May and June analyses, which evaluated both Fannie's and Freddie's profitability, the July analysis evaluated only Fannie's expected performance. *See* T3883-3894. To the extent that documents were prepared after June 2012 that analyzed Freddie's profitability and that were considered by Defendants in entering into the Third Amendment to the PSPAs, such documents should be included in the records.[6]

Factual Portions of Department of Justice Records. The Treasury record includes a "decision memorandum" signed by Secretary Geithner approving the Third Amendment that demonstrates that Treasury relied upon materials prepared by the Department of Justice ("DOJ"). *See* T4332 ("The Justice Department approved Treasury's request for authority to modify its div-

[6] Counsel for the Treasury Defendants have represented to Plaintiffs' counsel that the Treasury Defendants are unaware of such post-June Freddie analyses. To date, counsel for the FHFA Defendants have not made a similar representation.

idend rights under the PSPAs with the GSEs. The Justice Department agreed that the proposed modification is fiscally prudent and in the best interest of the United States."). No such DOJ materials, however, were included in Treasury's administrative record. Nor have Defendants produced a privilege log asserting that DOJ's analysis was withheld on the basis of any applicable privilege. Defendants must either produce the DOJ documents on which they relied or explain why they are entitled to exclude such documents from the administrative record. Even if Defendants believe that portions of such DOJ documents are protected by applicable privileges, factual information contained within such documents is not privileged. At a minimum, therefore, Defendants should be ordered to produce redacted versions of such documents.[7]

Privilege Logs. Finally, to the extent Defendants have excluded from their administrative records materials that they claim are protected by applicable privileges, they should be required to produce a privilege log so that such claims can be assessed. *Cf. Center for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1276 n.10 (D. Colo. 2010) ("[I]n order to allow meaningful review of any assertions of privilege Respondents shall compile, as necessary, a privilege log."); *Earthworks v. Department of the Interior*, 279 F.R.D. 180, 192-93 (D.D.C. 2012) (reviewing contents of privilege log). While both sets of Defendants have represented to Plaintiffs' counsel that they have not excluded privileged materials from their record compilations, and thus have no obligation to produce a privilege log, such representations mean relatively little in light of Defendants' litigation-driven selection of materials to include in their compilations. This is especially true of the FHFA Defendants, who have acknowledged that they did not even attempt

[7] Plaintiffs do not concede either that the DOJ materials identified in the record are protected by any privilege, or that any arguably applicable privilege has not been waived. We note, in this regard, that the Treasury Defendants' disclosure of their reliance on DOJ materials and the conclusions that DOJ reached waived any claim that the DOJ materials were protected by the attorney-client privilege. *See, e.g., In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989).

to create or maintain a true or complete administrative record. In light of the FHFA Defendants' concession that all they have done is select documents that "reflect the considerations and views FHFA as Conservator took into account" in executing the Third Amendment, FHFA Compilation Notice at 2, their representation that they did not include privileged material in their selection is virtually meaningless. And Treasury, for its part, represented that the documents in the administrative record it produced "reflect . . . the *nonprivileged* information considered by Treasury in entering into the" Net Worth Sweep. Doc. 23-1 at 3 (Certification of Administrative Record ¶ 3) (emphasis added). A reasonable inference to draw from this statement is that Treasury also considered additional information it deems privileged in entering the Net Worth Sweep.

II. PLAINTIFFS ARE ENTITLED TO TAKE LIMITED DISCOVERY INTO THE COMPLETENESS OF THE ADMINISTRATIVE RECORD

Many of the same considerations that support Plaintiffs' request for limited supplementation of the materials produced by the Treasury Defendants and FHFA Defendants also entitle Plaintiffs to conduct limited discovery into the completeness of those records. *See, e.g.*, *NRDC v. Train*, 519 F.2d 287, 292 (D.C. Cir. 1975); *Bar MK Ranches*, 994 F.2d at 740 ("When a showing is made that the record may not be complete, limited discovery is appropriate to resolve that question."). We acknowledge that the party seeking such discovery "must make a significant showing—variously described as a 'strong,' 'substantial,' or 'prima facie' showing—that it will find material in the agency's possession indicative of . . . an incomplete record." *Amfac Resorts*, 143 F. Supp. 2d at 12. *See also Int'l Longshoremen's Ass'n v. National Mediation Bd.*, 2006 WL 197461, at *3 n.1 (D.D.C. Jan. 25, 2006).

While discovery into the completeness of the record submitted by an agency is therefore not the norm, this is far from a normal case. Here, there are numerous and substantial reasons to question the records assembled by Defendants for purposes of their dispositive motions. Plain-

tiffs therefore have more than satisfied any obligation they may have to make a "significant showing," *Amfac Resorts*, 143 F. Supp. 2d at 12, that the records presented to the Court are incomplete.

First, and perhaps most important, the FHFA Defendants essentially concede that they have not even attempted to compile a complete administrative record. Instead, they claim only to have gathered some documents that "reflect the considerations and views" taken into account by the FHFA. FHFA Compilation Notice at 2. In fact, as discussed, they refuse to even call what they have prepared an administrative record, labeling it instead a mere "document compilation." There is certainly no warrant to indulge a presumption that the FHFA Defendants have prepared an adequate and complete administrative record when the FHFA Defendants themselves make no claim that they even tried to do so. To the contrary, the FHFA Defendants' disclaimer of any obligation to compile a complete administrative record further underscores the need for discovery into whether the materials they have submitted for the Court's consideration are complete.[8]

Indeed, even if the FHFA Defendants are correct that they were not required by the APA to create or maintain an administrative record (and they are not correct), the fact remains that the

[8] Notably, in another APA case, the FHFA sought discovery against another party, arguing that the FHFA's failure to maintain an administrative record justified such discovery. The FHFA argued that "[d]iscovery is especially appropriate . . . where FHFA did not compile a formal administrative record in real time because it did not believe it was required to utilize APA procedures." FHFA Consent to Request for Management Conference at 7, *California v. FHFA*, No. 10-3084 (N.D. Cal. Oct. 28, 2011) (Doc. 139) (relevant excerpts attached at Exhibit 3). *See also id.* at 11 ("FHFA did not utilize APA notice-and-comment procedures or compile a formal administrative record in real time because the agency believed that it was not engaged in APA rulemaking, yet the APA Plaintiffs' claim that the agency acted arbitrarily and capriciously in issuing a substantive rule is before the Court. In these unusual circumstances, discovery is necessary to establish whether the analysis and conclusions the APA Plaintiffs claim FHFA failed to consider are 'relevant' or 'important.' ").

FHFA Defendants rely heavily on their "document compilation" in support of their pending dispositive motion. *See, e.g.*, FHFA Br. 17 n.11. The FHFA Defendants cannot have it both ways. Having compiled and produced these materials in support of their dispositive motion, and having asked the Court to rely on this compilation in considering that motion, the FHFA Defendants cannot avoid inquiry into the completeness of their compilation.[9]

Second, neither the Treasury Defendants nor the FHFA Defendants have provided any details regarding the procedures they used to compile the materials they have submitted to the Court or how, if at all, they satisfied themselves as to the completeness of their submissions. Especially when, as here, there are numerous other indications that relevant materials were excluded from the record, the agencies' failure to provide *any* information regarding how they went about compiling the materials they have submitted justifies limited discovery into that very question.

Third, notwithstanding Defendants' failure to explain how they compiled their submissions, it is apparent that they used inconsistent and *ad hoc* standards for deciding what to include therein. A few examples illustrate this point. A forecast prepared by Moody's in April 2012 is included in the Treasury record, T3285, but as discussed above, a similar forecast prepared around the same time by Grant Thornton, and upon which Defendants relied, is not, *see* T3295. Similarly, voluminous SEC filings and contracts that the senior decisionmakers at Treasury and FHFA undoubtedly did not read are included in the record, but financial models on which those officials must have relied are excluded. It is reasonable to infer from such inconsistencies that the Defendants withheld documents that were before the agencies when they made the relevant

[9] For this reason, FHFA's request for judicial notice does not obviate the need for a proper record. FHFA does not claim that the materials it has requested the Court to judicially notice constitute the whole record that was before the FHFA at the time it entered the Net Worth Sweep.

decisions.[10]

Defendants' uneven determinations regarding what was "before the agency" in making the decision to institute the Net Worth Sweep is especially troubling because this case involves informal agency decisionmaking, not subject to notice and comment. In such cases, deciding what was "before the agency" when it made its decision is a difficult task that requires the sound exercise of discretion. *See* *Suffolk County v. Secretary of the Interior*, 562 F.2d 1368, 1384 n.9 (2d Cir. 1977) ("What constitutes part of the administrative record may be very unclear . . . where there is no formal factfinding process.").[11] Allowing the Government to unilaterally and inconsistently apply that amorphous standard "would permit an agency to omit items that undermine its position," *Walter O. Boswell*, 749 F.2d at 792, thus thwarting the APA's command that judicial review be conducted upon "the whole record," 5 U.S.C. § 706.[12]

Fourth, both sets of Defendants rely on materials that post-date the decision to enter into the Third Amendment. *See, e.g.*, T4350-57; FHFA4051-4095. These materials obviously were not before Defendants at the time of the decisions at issue, and even laying aside whether they should be stricken from the record for that reason, their inclusion in the materials submitted to the Court underscores the *post hoc*, litigation-driven nature of Defendants' effort to define the

[10] *See Institute for Wildlife Prot. v. United States Fish & Wildlife Serv.*, No. CV-07-358-PK, 2007 WL 4118136, at *11 (D. Or. July 25, 2007) (observing that "although *review* may generally be limited to the administrative record, *discovery* often is not so limited, in particular where . . . it is not clear . . . on what basis [the agency] will" designate the record).

[11] *See also American Radio Relay League v. FCC*, 524 F.3d 227, 244 (D.C. Cir. 2008) (Tatel, J., concurring) (suggesting that it is particularly appropriate for courts to order additional agency disclosures in APA cases that involve informal decisionmaking).

[12] *See Maritel, Inc. v. Collins*, 422 F. Supp. 2d 188, 196 (D.D.C. 2006) (observing that "an agency may not unilaterally determine what constitutes the administrative record"); *Fund for Animals*, 391 F. Supp. 2d at 197 (agency "may not skew the record in its favor by excluding pertinent but unfavorable information"); *Smith v. FTC*, 403 F. Supp. 1000, 1008 (D. Del. 1975) (allowing agency to artificially truncate record would "make a mockery of judicial review").

record on which the Court should base its review.

No doubt the most significant example of Defendants' reliance on such after-the-fact materials is the FHFA Defendants' preparation and reliance upon the declaration of Mr. Ugoletti. This declaration, which was prepared two months ago solely for use in this litigation, is not limited, or even primarily devoted, to an identification of contemporaneous documents that the FHFA Defendants considered in entering into the Third Amendment. Rather, the declaration is devoted to a substantive, after-the-fact explanation and justification of the FHFA's actions. Indeed, many of the substantive claims made by Mr. Ugoletti are not supported by citation to any contemporaneous record evidence. *See, e.g.*, Ugoletti Dec. ¶ 9 (FHFA0005) (asserting that the value of the "periodic commitment fee" agreed to in the PSPAs was "incalculably large"); *id.* ¶ 12 (FHFA0006) (asserting that the "principal driver of these concerns . . . were questions about the Enterprises' ability to pay the 10% annual dividend to Treasury without having to draw additional funds from Treasury . . . ."); *id.* ¶ 19 (FHFA0009) (asserting that it was his "belief at this time, given the size and importance of the Treasury commitment, that through the liquidation preference, fixed dividends, and the market value of the PCF, Treasury would receive as much from the Enterprises under the Second Amendment as it would under the Third Amendment"); *id.* (asserting that "the intention of the Third Amendment was not to increase compensation to Treasury . . . ."); *id.* ¶ 20 (FHFA0009-10) (asserting that "neither the Conservator nor Treasury envisioned at the time of the Third Amendment that Fannie Mae's valuation allowance on its deferred tax assets would be reversed in early 2013 . . . ."). Given the FHFA Defendants' reliance on the *post hoc*, litigation-driven, and self-serving declaration of Mr. Ugoletti, Plaintiffs must be accorded an opportunity to take limited discovery into the bases and support for Mr. Ugoletti's assertions.

Fifth, discovery is also warranted in light of the fact that, as discussed above, there are specific documents that Defendants appear to have considered but that were not included in Defendants' productions. *See Train*, 519 F.2d at 292 (where agency withheld critical document that should have been included in the administrative record, plaintiffs were "entitled to an opportunity to determine, by limited discovery, whether any other documents which are properly part of the administrative record have been withheld"); *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982) (district court abused its discretion by failing to allow discovery into completeness of record where certain documents were "conspicuously absent" from the record agency submitted and it was "almost inconceivable that such fundamental documents" were not considered); *Maritime Mgmt., Inc. v. United States*, 242 F.3d 1326, 1335 (11th Cir. 2001) (affirming discovery order where district court found the government had "purposefully withheld negative documents").

Sixth, Plaintiffs' request for limited discovery is further supported by the fact that there are several critical subjects on which the record is conspicuously and almost completely silent, including the treatment and valuation of the Enterprises' deferred tax assets and loan loss reserves, and Defendants' consideration of alternatives to the Net Worth Sweep. While, to be sure, the "mere fact that certain information is not in the record does not alone suggest that the record is incomplete," *Amfac Resorts*, 143 F. Supp. 2d at 13, the critical nature of the information missing from the records here suggest that something is almost certainly amiss. *Cf. National Wilderness Inst. v. U.S. Army Corps of Eng'rs*, 2002 WL 34724414, at *4-5 (D.D.C. Oct. 9, 2002) (allowing discovery where numerous gaps in the administrative record led to the reasonable inference that not everything had been disclosed); *Greenpeace, U.S.A. v. Mosbacher*, CIV. No. 88–2158 GHR, 1989 WL 15854, at *1 (D.D.C. Feb. 15, 1989) (permitting plaintiffs to take discovery on whether final decisionmaker received additional scientific evidence orally where there

was very little scientific evidence in the record).

The valuation and treatment of Fannie's and Freddie's deferred tax assets and loss reserves, for example, is highly relevant to the decision to implement the Net Worth Sweep and to the impacts of that decision. The Enterprises had tens of billions of dollars of unrecognized deferred tax assets and loss reserves on their books at the time of the decision, and the treatment of those assets had obvious and significant implications for the future profitability of the Enterprises, and thus for their ability to provide funds for the payment of dividends to Treasury under the PSPAs. Yet the projections and analyses included in Defendants' document productions, and that supposedly buttress Defendants' concern that the Enterprises could not generate sufficient income to fund their dividend obligations to Treasury under the original PSPAs, do not appear to treat with the deferred tax assets and loss reserves at all.[13] The almost complete absence from these records of materials speaking to this highly relevant issue raises significant concerns about the completeness of their administrative records. *See Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 34 (N.D. Tex. 1981) (granting discovery motion where agency submitted so few documents that "it strain[ed] the . . . imagination to assume that [the] record contain[ed] all the information and data considered by the agency" (ellipsis in original) (internal quotation marks omitted)); *Tenneco*, 475 F. Supp. at 318 (similar).

Finally, the relatively small number of internal, nonpublic documents contained in the document productions counsels in favor of discovery. Setting aside the thousands of pages of

[13] Mr. Ugoletti declares that at the time the Third Amendment was negotiated and executed, "the Conservator and the Enterprises had not yet begun *to discuss* whether or when the Enterprises would be able to recognize any value to their deferred tax assets." Ugoletti Dec. ¶ 20 (FHFA0009) (emphasis added). Notably, regardless of whether the Enterprises had "discussed" this issue with FHFA, Mr. Ugoletti is conspicuously silent about whether the Enterprises, FHFA, or Treasury had analyzed or assessed the value of the deferred tax assets. And it is simply incredible that they did not do so.

publicly available SEC filings and contracts that undoubtedly were not the focal point for Defendants' decisionmaking process, there are relatively few documents in Defendants' productions. It is simply implausible that such a limited number of documents were before Defendants when they made the extraordinary decision to nationalize the Companies and expropriate the preferred and common stock of Plaintiffs and other private shareholders.

* * *

These considerations raise serious doubts about the completeness of the materials that both sets of Defendants have submitted to the Court, and more than amply justify the taking of limited discovery into the question of whether either defendant has produced a complete administrative record. Should the Court authorize such discovery, Plaintiffs anticipate that they would be able in short order to propound interrogatories, document requests, and requests for admissions concerning the procedures Defendants followed in assembling their submissions, the steps they took to satisfy themselves that their submissions were complete (assuming they attempted to do so), and the explanation for the various gaps and inconsistencies in their submissions discussed above. Plaintiffs would also anticipate taking depositions, under Federal Rule of Civil Procedure 30(b)(6), of Treasury and the FHFA with respect to the above topics, as well as the deposition of Mr. Ugoletti in order to discover the bases for the statements made in his declaration. Plaintiffs believe that, with Defendants' cooperation in such efforts, the limited discovery they contemplate would take only a few weeks to complete.

III. PLAINTIFFS ARE ENTITLED TO DISCOVERY TO PRESENT FACTS ESSENTIAL TO THEIR OPPOSITION TO DEFENDANTS' CONVERTED MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' BREACH OF FIDUCIARY DUTY CLAIM

Under Federal Rule of Civil Procedure 12(d), if a party filing a motion under Rule 12(b)(6) presents matters outside the pleadings that are not excluded by the Court, "the motion

must be treated as one for summary judgment under Rule 56." In such a case, responding parties "must be given a reasonable opportunity to present all the material that is pertinent to the motion." *Id.* When the Court considers materials outside the pleadings, conversion of a motion to dismiss into a motion for summary judgment is not optional. Rather, the Court is required to treat the motion as one for summary judgment, with all the protections afforded to nonmoving parties under Rule 56. *Kim*, 632 F.3d at 719; *Barnes v. District of Colombia*, 242 F.R.D. 113, 116 (D.D.C. 2007). *See* 5C CHARLES ALAN WRIGHT, ARTHUR R. MILLER ET AL., FEDERAL PRACTICE & PROCEDURE § 1366 (3d ed. 2013) ("As soon as a motion to dismiss under Rule 12(b)(6) is converted into a motion for summary judgment by the district judge, the requirements of Rule 56 become operable and the matter proceeds as would any motion made directly under that rule.").[14]

Among those protections is Federal Rule of Civil Procedure 56(d), which allows the nonmovant to "show[ ] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." If such a showing is made, the Court is authorized to, among other things, defer consideration of the converted summary judgment motion, deny the motion, or allow the movant "time to obtain affidavits or declarations or to take discovery." *Id.* *See Baker v. Henderson*, 150 F. Supp. 2d 13, 16 (D.D.C. 2001) ("When a district court converts a Rule 12(b)(6) motion to one for summary judgment, it must allow all parties a reasonable op-

[14] Indeed, it is reversible error for the Court to consider materials outside the pleadings without notifying the parties and soliciting further submissions on the disputed factual question. *Anderson*, 477 U.S. at 250 n.5 (1986). *See also Convertino v. Department of Justice*, 684 F.3d 93, 99 (D.C. Cir. 2012) ("While the district court enjoys broad discretion in structuring discovery, . . . summary judgment is premature unless all parties have had a full opportunity to conduct discovery." (citation and internal quotation marks omitted)); *United States v. Government Acquisitions, Inc.*, 858 F. Supp. 2d 79, 85 (D.D.C. 2012) ("Rule 56(d) exists to ensure that the nonmoving party isn't 'railroaded' by the moving party . . . ." (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986))).

portunity to present all material made pertinent to such a motion by Rule 56, and a chance to pursue reasonable discovery."). *Cf. Barnes*, 242 F.R.D. at 116 (converted summary judgment motion should be denied as premature "when the discovery process, which has [ ] not even commenced, might yield additional facts that would guide the Court's decision as to the merits of plaintiffs' . . . claims").

In their Rule 12(b)(6) motion to dismiss Plaintiffs' breach of fiduciary duty claim, the FHFA Defendants have relied upon matters outside the pleadings. Plaintiffs have alleged that the Net Worth Sweep did not serve or advance any legitimate interest of Fannie, Freddie, or their private shareholders, and was designed instead to serve only the interests of the Federal Government at the expense of the Enterprises and their shareholders.[15] The FHFA Defendants have responded to Plaintiffs' well-pled factual allegations by disputing them on the merits.[16] They assert primarily that Plaintiffs' breach of fiduciary duty count fails to state a claim because the decision to institute the Net Worth Sweep was "consistent with, and undertaken to promote, the public missions in the [Fannie and Freddie] charters and HERA." FHFA Br. 56. Integral to this claim are the FHFA Defendants' factual assertions that the purpose of the Net Worth Sweep was

[15] In particular, Plaintiffs have alleged, among other things, that (1) FHFA used its control over Fannie and Freddie to agree to and implement the Net Worth Sweep, Complaint ¶ 139; (2) as a federal agency, FHFA was interested in, and benefited from, the Net Worth Sweep, which essentially expropriated for the Government Fannie's and Freddie's entire net worth, *id.* ¶ 140; (3) FHFA had a conflict of interest with respect to the Net Worth Sweep transaction, which amounted to self-dealing, *id.* ¶ 141; (4) Defendants' purpose in implementing the Net Worth Sweep was to ensure "that every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers," *id.* ¶ 71; (5) the Net Worth Sweep constituted waste, gross and palpable overreaching, and an abuse of discretion, *id.* ¶ 143; and (6) the Net Worth Sweep did not further any valid business purpose or legitimate business objective of Fannie or Freddie, did not reflect FHFA's good faith business judgment regarding Fannie's or Freddie's best interests, and was grossly unfair to the Enterprises and their preferred shareholders, *id.* ¶ 144.

[16] We focus herein on the FHFA's arguments with respect to breach of fiduciary claim because the Fairholme complaint alleges such a claim only against FHFA. *See* Complaint ¶¶ 136-145.

to end "the circular practice of the Enterprises drawing funds *from* Treasury merely to make dividend payments *to* Treasury," because it "threatened to erode the amount of the Treasury commitment available to" Fannie and Freddie under the PSPAs. *Id.* (emphasis in original). They further assert that this "potential erosion was the source of growing concern to the housing finance markets because it exposed the Enterprises to greater risk and increased the potential for instability in housing finance." *Id. See also id.* at 23-25.

Not only are the FHFA Defendants' factual contentions regarding the purposes underlying the Net Worth Sweep outside the well-pled allegations of Plaintiffs' complaint, they are also in direct conflict with those allegations. Thus, the Court must either disregard those contentions in connection with its review of the FHFA Defendants' motion to dismiss the fiduciary duty claim, or it must treat the motion as one for summary judgment.[17]

Given that FHFA Defendants' rely upon factual assertions that are outside of and inconsistent with the pleadings, and that Plaintiffs have not had any opportunity to test those assertions through discovery, the standards for relief under Rule 56(d) have been satisfied. And the Court must take a "generous approach" toward Plaintiffs' invocation of Rule 56(d). *Convertino*, 684

[17] It matters not at all that in making these factual contentions regarding the purpose of the Net Worth Sweep, the FHFA Defendants do not directly cite to any supporting documentation or other materials. *See* FHFA Br. 56. The moving party cannot avoid Rule 12(d) and 56(d) simply by making unsupported disputed factual assertions in its motion rather than through supporting affidavits or documentation. *See, e.g.*, *Kostrzewa v. City of Troy*, 247 F.3d 633, 643-44 (6th Cir. 2001) (reversing order granting Rule 12(b)(6) motion because the district court relied upon defendants' factual assertions made in the body of their motion to dismiss but did not convert the motion and afford plaintiffs discovery); *Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000) (A district court must convert a motion to dismiss for failure to state a claim into a motion for summary judgment if the court "relies on factual allegations contained in [the defendant's] legal briefs or memoranda."); *Fonte v. Board of Managers of Cont'l Towers Condo.*, 848 F.2d 24, 25 (2d Cir. 1988) ("Factual allegations contained in legal briefs or memoranda are also treated as matters outside the pleading for purposes of Rule 12(b). Thus, it would [ ] have been error for the court to consider the factual allegations contained in the plaintiffs' memorandum of law without converting the motion to one for summary judgment.").

F.3d at 102 (citing *Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1414 (D.C. Cir. 1995)). A Rule 56(d) motion "requesting time for additional discovery should be granted 'almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence.' " *Convertino*, 684 F.3d at 99 (citing *Berkeley*, 68 F.3d at 1414). *See also Dinkel v. Medstar Health, Inc.*, 286 F.R.D. 28, 31 (D.D.C. 2012).

To obtain relief under Rule 56(d), a party must submit an affidavit or declaration that "states with sufficient particularity . . . why additional discovery is necessary." *Convertino*, 684 F.3d at 99 (brackets and internal quotation marks omitted). The declaration must satisfy three criteria. First, "it must outline the particular facts [the Rule 56(d) movant] intends to discover and describe why those facts are necessary to the litigation." *Id.* Second, "it must explain 'why [he] could not produce [the facts] in opposition to the motion' " for summary judgment. *Id.* (alterations in original) (citing *Carpenter v. Fed. Nat'l Mortg. Ass'n*, 174 F.3d 231, 237 (D.C. Cir. 1999)). Finally, the movant "must show the information is in fact discoverable." *Id.* at 100. *See also Messina v. Krakower*, 439 F.3d 755, 762 (D.C. Cir. 2006). As discussed below and in the supporting declaration of Vincent J. Colatriano ("Colatriano Dec.") (attached hereto as Exhibit 4), all three factors are established here.

First, Plaintiffs have identified the particular factual assertions about which they seek discovery and why those facts are necessary to the litigation. Of course, Plaintiffs are not required at this stage to provide a comprehensive discovery plan. But we have established that discovery is likely to disclose information highly relevant to the disputed question of why the FHFA entered into the Third Amendment, and whether it acted independently, or at the direction of Treasury, in agreeing to the Net Worth Sweep. In particular, discovery is likely to disclose information (beyond the self-serving and *post hoc* information that the FHFA Defendants chose to

include in their "document compilation") relevant to the FHFA Defendants' assertions that the Net Worth Sweep was necessary to address concerns regarding the "potential erosion," FHFA Br. 56, in Treasury's financial commitment under the PSPAs allegedly threatened by Treasury's circular practice of loaning funds to Fannie and Freddie in order to finance the dividends that were then to be paid back to Treasury. Such information is likely to include communications and documents of FHFA, Treasury, and other Government agencies concerning the agencies' analyses of the financial and other considerations implicated by the decision to enter into the Net Worth Sweep, including internal projections of Fannie's and Freddie's expected financial performance and profitability,[18] as well as the FHFA's consideration of alternatives to the Net Worth Sweep that could address the supposed concerns regarding the erosion of Treasury's commitment. *See* Colatriano Dec. ¶¶ 6-10. Also directly relevant to these disputed factual issues is information relating to any other purposes that Defendants may have had in instituting the Net Worth Sweep.

The FHFA Defendants are virtually certain to be in possession of evidence – e-mails and other communications and documents – regarding the above matters, all of which are of course directly relevant to the issue of whether the FHFA violated its fiduciary duties. It is certain –

[18] It is true that Defendants have included some summaries of some financial projections in the materials that they chose to include in the Treasury administrative record and the FHFA "document compilation" that they have filed with the Court. As discussed in greater detail above, however, Defendants have excluded from the submitted materials many of the internal and external analyses on which the summaries they have provided were based. In addition, as is also discussed in greater detail above, the materials provided include virtually nothing about the FHFA's analysis of and projections concerning the Enterprises' enormous deferred tax assets, even though the very fact that FHFA has allowed the Companies to recognize billions of dollars' worth of their deferred tax assets means that they necessarily analyzed the expected profitability of the Companies and determined that the Companies would be highly profitable. Nor has any explanation been provided as to why Treasury's projections for Fannie's future profitability were sharply reduced on the eve of the Net Worth Sweep.

not mere speculation – that Treasury, FHFA, and perhaps other Government agencies have conducted financial analyses about the current and projected financial condition and earnings of Fannie and Freddie. *Id.* It is also a near-certainty that the FHFA and/or other agencies have formulated nonpublic long-term strategic plans for Fannie and Freddie, and it is highly likely as well that there are strategy documents and communications between and among Treasury, FHFA, and other Government agencies and officials that will disclose what role Treasury played in FHFA's decision to enter into the Third Amendment. *Id.* Plaintiffs should be afforded the opportunity, through targeted written discovery, document requests, and depositions of knowledgeable witnesses (including depositions noticed pursuant to Federal Rule of Civil Procedure 30(b)(6)), to develop evidence bearing upon these critical matters.

With respect to the second criterion that should be addressed in a Rule 56(d) request, Plaintiffs have not been able to obtain any of the evidence discussed above, because discovery has not yet begun, and the information discussed above is not publicly available. Therefore, Plaintiffs' failure thus far to discover this information is not "the product of a 'lack of diligence.' " *Convertino*, 684 F.3d at 100 (quoting *Berkeley*, 68 F.3d at 1414). *See* Colatriano Dec. ¶ 11.

Finally, the information we seek "is in fact discoverable." *Id.* In the circumstances of this case, this factor overlaps substantially with the first. "Where, as here, no privilege or other bar to disclosure has been asserted and the information is in the possession, custody, or control of one of the parties, this inquiry effectively merges with the question of whether the sought-after discovery is 'necessary to the litigation.' " *Dinkel*, 286 F.R.D. at 33 (quoting *Convertino*, 684 F.3d at 100). Thus, for the same reasons that Plaintiffs clearly satisfy the first criterion, they clearly satisfy this one as well.

In sum, the FHFA Defendants' reliance upon matters outside the pleadings in support of their Rule 12(b)(6) motion to dismiss Plaintiffs' breach of fiduciary duty claim converts that motion into a motion for summary judgment. Under Rule 56(d), Plaintiffs are in that event entitled to take discovery relating to their breach of fiduciary duty claim.

IV. THE COURT SHOULD NOT AWAIT RESOLUTION OF DEFENDANTS' JURISDICTIONAL ARGUMENTS BEFORE ADDRESSING THE MATTERS RAISED IN THIS MOTION

Defendants may argue that this Court should defer consideration of whether Plaintiffs are entitled to discovery, or to supplementation of Defendants' record submissions, until the Court resolves Defendants' argument that this Court lacks jurisdiction over Plaintiffs' claims. Plaintiffs submit, and will show in their response to Defendants' dispositive motions, that Defendants' jurisdictional arguments are meritless, and that this Court clearly has jurisdiction to address and resolve Plaintiffs' claims for relief. But even leaving aside the substantive merit of Defendants' jurisdictional arguments, the Court should not defer consideration of the issues raised in this motion until it has addressed those arguments.

As an initial matter, there is considerable overlap between Defendants' jurisdictional arguments and its arguments on the merits. Defendants' primary jurisdictional argument is their contention that Plaintiffs' claims are barred by 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator." *See* FHFA Br. 19-32; Treas. Br. 21-29. But both sets of Defendants concede that section 4617(f) does not bar relief when the FHFA is acting in excess of its statutory powers. *See* FHFA Br. 21; Treas. Br. 23. Both the Treasury Defendants and the FHFA Defendants therefore devote the bulk of their jurisdictional argument to their defense of FHFA's actions as within its statutory powers. This defense is, in turn, devoted primarily to a justification of FHFA's and Treasury's decisions to agree to the Net Worth Sweep; integral to this justification are Defend-

ants' claims regarding their supposed desire to conserve Treasury's financial commitment to Fannie and Freddie by eliminating the need for the Enterprises to draw funds from Treasury in order to pay dividends back to Treasury. *See* FHFA Br. 22-26; Treas. Br. 24.

There is obvious and substantial overlap between this "jurisdictional" argument and Defendants' merits arguments defending the Net Worth Sweep. Where, as here, the jurisdictional issues are inextricably intertwined with the merits of the cause of action, jurisdictional motions, even when denominated as motions under Rule 12(b)(1), are more properly treated as motions for summary judgment. *See Loughlin v. United States*, 230 F. Supp. 2d 26, 36-37 (D.D.C. 2002); *American Farm Bureau v. EPA*, 121 F. Supp. 2d 84, 104 (D.D.C. 2000). In these circumstances, discovery and supplementation of the record should be allowed to proceed, so that the overlapping jurisdictional and merits issues can be decided on an appropriate record. *See Unite Here Local 25 v. Madison Ownership, LLC*, 850 F. Supp. 2d 219 (D.D.C. 2012) ("[W]here the jurisdictional question is closely intertwined with the merits of the case, the D.C. Circuit has instructed that it is appropriate for a court to allow discovery to proceed, and to consider the issue of subject matter jurisdiction on a motion for summary judgment thereafter." (citing *Herbert v. National Acad. of Scis.*, 974 F.2d 192, 198 (D.C. Cir. 1992))).

Moreover, considerations of efficiency and judicial economy strongly support allowing the requested discovery and supplementation of the record to proceed now. Defendants have chosen to raise both jurisdictional and merits issues in their dispositive motions, and the parties have agreed to a schedule whereby those issues would be briefed and argued on a consolidated basis. This makes sense in light of the overlap between the jurisdictional and merits issues raised in Defendants' motions. By the time these motions are argued in June of this year, these cases will have been pending for almost a year. Between now and June, there is ample time to com-

plete the limited discovery and record supplementation that Plaintiffs are seeking. In these circumstances, it would be inefficient and potentially wasteful to defer consideration of Plaintiffs' request until such time as the Court decides (as Plaintiffs are confident it will) that Defendants' jurisdictional arguments are meritless.[19]

V. THE COURT SHOULD SUSPEND BRIEFING ON DEFENDANTS' DISPOSITIVE MOTIONS, AND SHOULD SCHEDULE A STATUS CONFERENCE

Finally, the briefing schedule in this case was established, by agreement of the parties, before Defendants had filed their administrative records and dispositive motions, which have necessitated this motion. Accordingly, the Court should suspend the briefing schedule until such time as the Court has had an opportunity to consider and decide this motion, and if this motion is granted, until such time as Defendants have supplemented their deficient administrative record submissions and have provided the limited discovery sought by Plaintiffs in order to adequately and fully respond to Defendants' dispositive motions. Under the current briefing schedule, Plaintiffs' brief is due on February 19. It would be inefficient, for both the parties and the Court, to require Plaintiffs to respond to Defendants' dispositive motions before this Court has resolved the issues raised in this motion and, if the motion is granted, before Plaintiffs have had the benefit of any supplementation and/or discovery allowed by the Court.

As discussed, the supplementation and discovery relating to the administrative records can be completed within a few weeks, and the limited discovery relating to Plaintiffs' breach of

[19] Defendants have also suggested that this motion may be premature or inappropriate because the stipulated briefing schedule makes clear that briefing on any dispositive motion filed by Defendants was without prejudice to any Rule 56(d) request by any plaintiff. Any such suggestion would be meritless. Plaintiffs certainly did not waive their right to file a motion seeking supplementation of the records or discovery under Rule 56(d) before they were required to file their brief on the merits. And it would make little sense to force Plaintiffs essentially to file two merits briefs: one before having the benefit of properly prepared and produced administrative records and the discovery to which Plaintiffs are entitled, and one after.

fiduciary duty claim can likely be completed within a few months at most. In these circumstances, Plaintiffs request that Plaintiffs be allowed to file their response to Defendants' dispositive motions, and any cross-motion, within two weeks of the completion of any supplementation and discovery allowed by the Court.[20]

In any event, Plaintiffs believe it would be productive for the Court to schedule a status conference to address the above scheduling issues, and any other logistical/scheduling issues, implicated by this motion.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order (1) ordering supplementation of the record submissions prepared and filed by both sets of Defendants; (2) allowing Plaintiffs to take limited discovery into the completeness of the records filed by Defendants; (3) allowing Plaintiffs to take discovery, pursuant to Federal Rule of Civil Procedure 56(d), necessary to allow Plaintiffs to present facts essential to their opposition to the FHFA Defendants' pending motion for summary judgment with respect to Plaintiffs' claim for breach of fiduciary duty; and (4) suspending briefing on Defendants' dispositive motions until such supplementation of the records and limited discovery is completed. Plaintiffs also respectfully request that the Court schedule a status conference, at the Court's earliest convenience, to address the issues raised by this motion.

[20] Plaintiffs request that in the event the Court denies this motion, Plaintiffs be allowed to file their response to Defendants' dispositive motions within one week of that denial.

Date: February 12, 2014

Respectfully submitted,

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EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAIRHOLME FUNDS, INC., et al., *Plaintiffs*, v. THE FEDERAL HOUSING FINANCE AGENCY, et al., *Defendants.*	)	No. 13-cv-1053-RCL

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUPPLEMENTATION OF THE ADMINISTRATIVE RECORDS, FOR LIMITED DISCOVERY, FOR SUSPENSION OF BRIEFING ON DEFENDANTS' DISPOSITIVE MOTIONS, AND FOR A STATUS CONFERENCE

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March 13, 2014

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I. FAIRHOLME'S MOTION IS NOT BARRED UNDER THE STIPULATED BRIEFING SCHEDULE

Lacking (as we discuss below) any meritorious objection to Fairholme's demonstration of why both supplementation of Defendants' document submissions and limited discovery are appropriate, Defendants engage in a sustained effort to convince the Court that it should not even consider the merits of Fairholme's Motion. Defendants' first attempt to avoid such scrutiny comes in the form of their complaint that the Motion conflicts with the agreed-upon briefing schedule. Treas. Opp. 10-11; FHFA Opp. 13.[1] Notably, no Defendant can point to *any* provision in the scheduling order that precludes the relief Fairholme seeks. The most they can do is point to a provision that explicitly *preserves* Fairholme's right to seek discovery, and argue that that provision somehow renders Fairholme's decision to seek to invoke that right *at this time* not only premature, but improper.[2] Defendants' argument is meritless.

The order provides only that the briefing schedule was "without prejudice to the parties' rights to oppose any summary judgment motions under Federal Rule of Civil Procedure 56(d), in whole or in part, on the ground that further factual development is needed." Order Regarding Briefing Schedule In All Cases at 2 (Doc. 21) (Nov. 18, 2013). Nothing in this provision waives Fairholme's right, once it received Defendants' facially deficient administrative records and dispositive motions relying on those records and on disputed assertions of fact, from seeking sup-

[1] We refer to Fairholme's Opening brief in support of their motion (Doc. 32, Feb. 12, 2014) as "Motion," to the Treasury Defendants' opposition to the Motion (Doc. 33, March 4, 2014) as "Treas. Opp.," and to the FHFA Defendants' opposition to the Motion (Doc. 34, March 4, 2014) as "FHFA Opp." We also cite to the brief in support of the Treasury Defendants' pending dispositive motion (Doc. 27-1, Jan. 17, 2014) as "Treas. Mot." and to the brief in support of the FHFA Defendants' pending dispositive motion (Doc. 29, Jan. 17, 2014) as "FHFA Mot."

[2] Interestingly, while the Treasury Defendants argue primarily that Fairholme's Motion is premature, elsewhere they complain that it came too late. *See* Treas. Opp. 28.

plementation of the record and limited discovery *before* filing its response to the motions.

The Treasury Defendants suggest that Fairholme's motion reflects its attempt to get two cracks, instead of one, at an opposition to Defendants' dispositive motions. Treas. Opp. 10. Precisely the opposite is true. It is Defendants, not Fairholme, who apparently believe that it somehow makes sense for Fairholme to file a full opposition to the dispositive motions now, before having access to the record supplementation and the discovery to which it is entitled, and for it to file a second opposition later, after it has had the benefit of such supplementation and discovery. The much more efficient course would be for the Court to address whether Fairholme is indeed entitled to the information needed to respond fully to the numerous arguments Defendants chose to include in their omnibus dispositive motions. Significantly, no Defendant suggests that such a procedure would prejudice them in any way. That fact alone should end the inquiry.[3]

II. THE COURT SHOULD NOT AWAIT RESOLUTION OF DEFENDANTS' JURISDICTIONAL ARGUMENTS BEFORE DECIDING FAIRHOLME'S MOTION

Defendants next contend that the Court should at least reach their jurisdictional arguments without wading into the issues raised by Fairholme's Motion. *See* Treas. Opp. 11-16; FHFA Opp. 13-15, 17-23, 25-28. Defendants' arguments fail for several independent reasons.

1. To begin with, even assuming that Defendants' jurisdictional arguments are both purely legal and colorable – which they are not – they present no obstacle to the limited relief Fairholme seeks. Defendants have chosen to file omnibus dispositive motions, including requests in the alternative for summary judgment, that assert a wide variety of defenses against

[3] Although Fairholme's Motion is not foreclosed by, or inconsistent with, the scheduling order, even if it was, the facts here provide ample good cause for the Court to deviate from that order by addressing and resolving Fairholme's Motion at this time rather than requiring Fairholme to make all of the same points in its opposition to Defendants' dispositive motions.

Fairholme's claims. It is undisputed, and indisputable, that a central feature of Defendants' motions is their attempt to provide a justification, on the merits, for the Net Worth Sweep. That justification, in turn, is premised in large part on Defendants' disputed characterization of the Treasury's and FHFA's reasons for implementing a new dividend scheme, *see, e.g.*, Treas. Opp. 3-5; FHFA Opp. 9-12 – a characterization that Fairholme maintains is pretextual.

Where, as here, Defendants have chosen to file omnibus motions that largely depend on Defendants' factual assertions, the Court need not and ought not halt progress in this case to pluck out of the motions discrete legal issues for briefing and resolution in isolation.[4] Defendants have cited to no decision that would require such an inefficient course of action. Rather, the Court should defer ruling on such issues until the completion of the requested supplementation of the record and discovery on the disputed factual assertions, so that each entire omnibus motion may be resolved at one time. At a minimum, if the Court is inclined to decide such legal issues now, it should permit the requested supplementation and discovery to go forward while those issues are briefed and resolved.

2. Even considered on their own terms, however, Defendants' "threshold" jurisdictional arguments lack merit under settled precedent. Moreover, despite Defendants' claims to the contrary, their attacks on this Court's jurisdiction clearly depend in large part on Defendants' own characterization of disputed facts as to which Fairholme seeks discovery.

Defendants' primary jurisdictional argument is that Fairholme's claims are barred as a matter of law by Section 4617(f) of the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or af-

[4] *See* 5C CHARLES ALAN WRIGHT, ARTHUR R. MILLER ET AL., FEDERAL PRACTICE & PROCEDURE § 1366 (3d ed. 2013) (court may convert a motion to dismiss where discovery is desirable and conversion is "likely to facilitate the disposition of the action").

fect the exercise of powers or functions of [FHFA] as a conservator . . . ." *See* FHFA Opp. 17-23, 26-27; Treas. Opp. 12-14. The FHFA Defendants go so far as to say that Section 4617(f) presents a "facial" challenge to this Court's jurisdiction, FHFA Opp. 26-27, and precludes any inquiry into whether Defendants implemented the Net Worth Sweep solely for the plainly unlawful purpose of expropriating hundreds of billions of dollars of Fannie Mae's and Freddie Mac's positive net worth, as well as every penny of the Companies' future net earnings. *Id.* at 17-23.

The breathtaking scope of the immunity that Defendants claim under Section 4617(f) can be squared with neither the law nor the theory underlying Defendants' dispositive motions. As we've discussed, Motion 34-35, Defendants *concede* that section 4617(f) does not bar relief when the FHFA is acting clearly in excess of its statutory powers. *See* FHFA Mot. 21; Treas. Mot. 23. In keeping with this concession, Defendants attempt at great length, both in their dispositive motions and their oppositions to the Motion, to justify the Net Worth Sweep as necessary to conserve Treasury's financial commitment to Fannie and Freddie by eliminating the so-called "death spiral" caused by the Companies' "circular" process of drawing funds from Treasury in order to pay 10% cash dividends to Treasury. *See* FHFA Mot. 22-26; Treas. Mot. 24.

Thus, the FHFA Defendants asserted, *in connection with their Section 4617(f) argument*, the following *factual* justifications for the Net Worth Sweep: (1) by executing the Net Worth Sweep, FHFA "preserved and effectively extended the finite Treasury funds that can be drawn by the Enterprises, which was essential to ensuring the safety and soundness of the Enterprises and well within the core functions of the Conservator," FHFA Mot. 22-23; (2) at the time the Net Worth Sweep was instituted, the existing dividend regime "raised concerns in the marketplace over the adequacy of the remaining Treasury funds," *id.* at 24; (3) the FHFA as conservator entered into the Net Worth Sweep "with the specific purpose of arresting this erosion of Treasury's

commitment, as well as public confidence," *id.* at 25; (4) the Net Worth Sweep "successfully resolved a very real problem – drawing funds from Treasury to pay the 10% dividend to Treasury – that threatened to drain the Treasury commitment and disrupt the housing market that FHFA is charged to protect," *id.* at 26; and (5) by executing the Net Worth Sweep, FHFA "agreed to transfer an Enterprise asset – potential future profits – to Treasury in exchange for relief from an obligation – 10% dividends – in order to minimize the possibility that the Enterprises would exhaust the Treasury commitment and thereby maximize the possibility that the Enterprises would survive and avoid receivership," *id.* at 27. Similarly, the Treasury Defendants contended, *in connection with their Section 4617(f) argument*, that the Net Worth Sweep was within FHFA's statutory powers because it supposedly "ended the need for the [Enterprises] to draw funds from Treasury to pay dividends to Treasury, and materially reduced the risk that the [Enterprises] would be insolvent in the future." Treas. Mot. 24. *See also id.* at 28-29.

Even in their oppositions to the Motion, in which they contend that such factual issues are irrelevant to the jurisdictional inquiry and to Fairholme's entitlement to discovery, Defendants nonetheless double down on their reliance on these factual assertions for purposes of their Section 4617(f) argument. *See, e.g.*, Treas. Opp. 2-5; FHFA Opp. 7-12, 23 n.12. Indeed, the FHFA Defendants argue that the Court can resolve this jurisdictional argument "based on" their characterization of the facts regarding the need for and purpose of the Net Worth Sweep. FHFA Opp. 17. Contrary to the FHFA Defendants' suggestion, *id.*, the "facts" relating to the need for and purpose of the Net Worth Sweep are not "undisputed." Fairholme maintains, for example, that it was obvious when the Net Worth Sweep was announced that the Companies would be able to pay dividends under the prior arrangement for the foreseeable future and that Defendants' implausible claims to the contrary were a pretext for seizing the hundreds of billions of dollars the

Companies would soon generate. *See* Motion 8-11; Fairholme Compl. ¶¶ 56-59.

Nor can the FHFA Defendants excuse their reliance on their version of such disputed "facts" by claiming that they are based on documents of which the Court may take judicial notice. *See* FHFA Opp. 16-17. They ask the Court to take judicial notice not of the fact that certain documents make certain statements regarding the need for and purposes of the Net Worth Sweep, but rather of *the truth* of such statements. When such statements go to the heart of disputed questions of fact, judicial notice is not proper.[5]

In short, Defendants' own arguments under Section 4617(f) plainly put at issue disputed factual questions going to the justification for the Net Worth Sweep – the perceived problems that the Net Worth Sweep was designed to address, other alternatives that could address such supposed needs and problems, and FHFA's and Treasury's asserted purposes in implementing the Net Worth Sweep. These factual questions indisputably go to the substantive merits of Fairholme's challenges to the Net Worth Sweep and are questions on which Fairholme is entitled to discovery. And it is clear on the face of Defendants' own filings in this Court that the jurisdictional issues are inextricably intertwined with the merits of the cause of action. *See* Motion 35 (citing cases). "[W]here the jurisdictional question is closely intertwined with the merits of the case, the D.C. Circuit has instructed that it is appropriate for a court to allow discovery to proceed, and to consider the issue of subject matter jurisdiction on a motion for summary judgment thereafter." *Unite Here Local 25 v. Madison Ownership, LLC*, 850 F. Supp. 2d 219 (D.D.C. 2012) (citing *Herbert v. National Acad. of Scis.*, 974 F.2d 192, 198 (D.C. Cir. 1992)).

[5] *See Leftwich v. Gallaudet Univ.*, 878 F. Supp. 2d 81, 93 n.5 (D.D.C. 2012); *In re XM Satellite Radio Holdings Sec. Litig.*, 479 F. Supp. 2d 165, 174 n.8 (D.D.C. 2007); *In re Apple iPhone Antitrust Litig.*, No. 11-6714, 2013 WL 4425720, at *9 (N.D. Cal. Aug. 15, 2013). *Cf.* FED. R. EVID. 201(b) (court "may judicially notice a fact that is not subject to reasonable dispute.").

The FHFA Defendants also argue at length that whether FHFA had an "ulterior" motive in implementing the Net Worth Sweep, in addition to its alleged desire to avoid the "circularity" problem arising under the previous dividend regime, is irrelevant to the Section 4617(f) inquiry. FHFA Opp. 17-23. But even leaving aside that, as discussed, the FHFA Defendants' jurisdictional arguments themselves put at issue FHFA's purposes in implementing the Net Worth Sweep, the FHFA Defendants misapprehend the nature of Fairholme's claims. Fairholme does not contend simply that FHFA acted with an "ulterior motive" or "improper purpose" in taking action that was otherwise within its statutory powers as conservator (although the facts amply support such a contention), but rather that the Net Worth Sweep was clearly outside FHFA's statutory powers. Whether FHFA was acting as a "conservator" or outside of its statutory mandate is, all agree, at the core of the Section 4617(f) jurisdictional inquiry. Fairholme has alleged that by sweeping Fannie's and Freddie's entire net worth into Treasury without securing any corresponding benefit to the Enterprises, the Net Worth Sweep was directly contrary to FHFA's statutory duties, under 12 U.S.C. § 4617(b)(2), to take actions "necessary to put the regulated entit[ies] in sound and solvent condition" and to "preserve and conserve the[ir] assets and property." *See* Fairholme Compl. ¶ 89. Fairholme has also alleged that because the Net Worth Sweep was explicitly designed to further FHFA's plan to wind down Fannie and Freddie, a power that HERA reserves to a receiver and not a conservator, it exceeded FHFA's powers as conservator. *See id.* ¶ 87. And Fairholme has alleged that FHFA violated HERA by acting as conservator at the direction of Treasury in implementing the Net Worth Sweep. *See id.* ¶ 92. *Cf.* 12 U.S.C. § 4617(a)(7) (FHFA as conservator "shall not be subject to the direction or supervision of any other agency of the United States").

Fairholme's contentions that the Net Worth Sweep clearly exceeds FHFA's statutory

conservatorship powers themselves raise disputed factual questions regarding the circumstances underlying FHFA's actions. At a minimum, those contentions provide a more than colorable basis for this Court's jurisdiction notwithstanding HERA's bar on judicial review and thus further underscore that that Court need not delay the limited supplementation and discovery Fairholme seeks in light of Defendants' challenges to jurisdiction.

3. Defendants argue that this action is also barred by Section 4617(b) of HERA, 12 U.S.C. § 4617(b), which they say "bars suits brought by shareholders for the duration of the conservatorship." Treas. Opp. 14. *See also* FHFA Opp. 25. Section 4617(b) presents no impediment to this Court's jurisdiction, as the law is settled that shareholder suits are allowed where the conservator labors under a manifest conflict of interest.[6] Indeed, the very decision cited by Defendants acknowledges the applicability of such a common-sense conflict of interest exception under HERA. *See Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012) ("[A]bsent a manifest conflict of interest by the conservator not at issue here, the statutory language bars shareholder derivative actions."). Defendants have not cited to any authority holding that under HERA, the appointment of a conservator bars suits by shareholders even when the conservator has a manifest conflict of interest. There can be no serious question that FHFA labors under a direct conflict of interest in this case, which challenges an arrangement in which one arm of the federal government, FHFA, acting together with another closely related arm of the federal government, Treasury, set up a regime under which FHFA as conservator for the Enterprises forever transferred to Treasury the Enterprises' entire net worth, amounting to hundreds of billions of dollars. If the term "manifest conflict of interest" has any meaning at all, it describes the facts here.

[6] *See, e.g.*, *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1283, 1295-96 (Fed. Cir. 1999) (interpreting analogous statute governing FDIC as conservator/receiver); *Delta Savings Bank v. United States*, 265 F.3d 1017, 1021-24 (9th Cir. 2001).

4. Finally, the Treasury Defendants similarly claim that Fairholme lacks prudential standing under the so-called "shareholder standing" rule. Treas. Opp. 15-16. But they cite to no authority which holds or suggests that such a rule has any application in the context of a claim under the Administrative Procedures Act ("APA"). Even leaving that point aside, the shareholder standing rule does not foreclose "a shareholder with a direct, personal interest in a cause of action [from bringing] suit even if the corporation's rights are also implicated." *Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990).[7] Because Fairholme has asserted direct claims for breach of fiduciary duty, breach of contract, and breach of the implied covenant of good faith and fair dealing, this exception to the shareholder standing rule applies here.

III. SUPPLEMENTATION OF DEFENDANTS' DOCUMENT SUBMISSIONS IS NECESSARY

Supplementation of the administrative record is necessary because Defendants' submissions do not contain all documents and materials that Defendants directly or indirectly considered. Contrary to Defendants' assertions, Fairholme has made the showing necessary to overcome "the standard presumption" that Treasury " 'properly designated the Administrative Record,' " *Amfac Resorts, LCC v. Dep't of Labor*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (quoting *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993)) – a presumption that, as discussed below, does not even apply to FHFA in light of its concession that it did not create an administrative record in the first place.

A properly designated administrative record must include "all documents and materials that the agency directly or indirectly considered." *Pacific Shores Subdiv. v. United States Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (internal quotation marks omitted). If an

[7] *See also In re Kaplan*, 143 F.3d 807, 812 (3d Cir. 1998); *Gaff v. FDIC*, 814 F.2d 311, 315 (6th Cir. 1987); *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893, 896 (5th Cir. 1968).

agency's final decision was based "on the work and recommendations of subordinates, those materials should be included as well." *Amfac Resorts*, 143 F. Supp. 2d at 12; *see also Styrene Info. & Research Ctr. v. Sebelius*, 851 F. Supp. 2d 57, 61-65 (D.D.C. 2012). Defendants do not dispute these fundamental propositions of administrative law, but neither do they offer any explanation for their decision to selectively withhold materials that the rest of the record makes clear were at least indirectly considered. The Court should accordingly order Defendants to supplement the record with the materials Fairholme has identified, including the following:

Financial Projections and Associated Records. The cornerstone of Defendants' defense of the Net Worth Sweep is their projections of Fannie's and Freddie's financial performance, projections that underestimated the Companies' net income by more than *$100 billion* over an 18 month period. *See* Treas. MTD 16-18, 24-25, 49-55; FHFA MTD 15-16, 23-26, 64-70. But despite their heavy reliance on those facially flawed, and wildly inaccurate, projections, Defendants insist that they are entitled to withhold the most basic facts about the assumptions underlying the projections and how they should be interpreted. Do Defendants' projections account for the tens of billions of dollars of deferred tax assets, loan loss reserve releases, and settlement proceeds that began to appear on the Companies' balance sheets within months of the Net Worth Sweep? Do they reflect the fact that the Companies had the contractual option to pay the Government dividends "in kind" (additional senior preferred stock) rather than in cash? Did Defendants consult with outside advisors for independent financial analysis? Was there any effort to correct for errors in FHFA's wildly pessimistic October 2010 and 2011 projections, on which Treasury's subsequent projections purport to rely? *See* T3837, T3843.[8] It is not hard to

[8] Cited excerpts to Defendants' administrative record submissions that were not originally attached to Fairholme's Motion are appended hereto as Exhibit 1.

infer the answers to those questions given that events would quickly prove that the projections dramatically undervalued the Companies. But there is no reason for the Court to guess; this Court is entitled to know what the Defendants' knew and considered in imposing the Net Worth Sweep, and Fairholme is entitled to an administrative record that allows it to understand the basis for Defendants' conclusion that the Companies could not afford to pay the required dividends without a radical change to the Preferred Stock Purchase Agreements ("PSPAs") that expropriated the entire value of private shareholders' investments.

The Treasury Defendants first resist their obligation to disclose those fundamental materials by claiming that they "were already incorporated in the material contained within the administrative record." Treas. Opp. 18. Not so. As Fairholme has explained, Treasury's administrative record selectively reveals the *results* of *some* financial projections while withholding others and providing almost no information about how those results were reached. Motion 17-18. At an absolute minimum, Defendants must disclose the Grant Thornton analysis and the "scenarios developed by Treasury staff," which are specifically cited in the administrative record as used to generate the forecasts on which Defendants so heavily rely. *See* T3786, T3887, T3894.

Nor is there any merit in Treasury's claim, unsupported by citation to any case, that "[u]nder the governing case law, the administrative record . . . includes the *most critical* data the agency used in the disputed actions, and nothing more is needed." Treas. Opp. 19 (emphasis added). To the contrary, "a complete administrative record should include *all* materials that might have influenced the agency's decision," *Amfac Resorts*, 143 F. Supp. 2d at 12 (emphasis added) (internal quotation marks omitted), not merely those the agency later deems "most critical." And far from being "disconnected from any practical reality," Treas. Opp. 19, materials such as the analyses, models, and data at issue here are routinely disclosed by administrative

agencies in APA cases.

Defendants try to change the subject by citing cases in which this Court has denied APA plaintiffs' motions to supplement the record with "raw data." Treas. Opp. 19-20; FHFA Opp. 31-32. This is a red herring. Unlike the plaintiffs in the cases Defendants cite, Fairholme is not requesting "raw data" that may or may not exist out of a "bare desire to replicate each calculation" the Defendants made. *District Hosp. Partners v. Sebelius*, No. 11-0116, 2013 WL 5273929, at *6 (D.D.C. Sept. 19, 2013); *see Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 371 (D.D.C. 2007). Rather, Fairholme is seeking what the plaintiffs in those cases already had: "detail sufficient to alert" the Court to "the nature of the judgment" the Defendants made. *Todd v. Campbell*, 446 F. Supp. 149, 152 (D.D.C. 1978).[9]

And lest the Defendants' briefing give the misimpression that supplementation of the record with *data* is somehow specially disfavored, it bears emphasis that "data files and data analysis . . . are necessarily subject to the same standards governing supplementation of the administrative record as reports, draft rules, or any other item of information." *Banner Health v. Sebelius*, 945 F. Supp. 2d 1, 27 (D.D.C. 2013). Where, as here, models or data would reveal the basic assumptions that underlie a challenged administrative decision, this Court has not hesitated to supplement the record. *Id.* at 33 (ordering supplementation with Excel files plaintiffs needed to make sense of apparent "discrepancies" in the administrative record); *National Wilderness Inst. v. United States Army Corps of Eng'rs*, No. 01-0273, 2002 WL 34724414, at *5 (D.D.C. Oct. 9, 2002) (ordering record supplemented with fish population data).

[9] The Treasury Defendants cite two cases that are irrelevant. *Action for Children's Television v. FCC*, 564 F.2d 458, 477 (D.C. Cir. 1977), explains when an agency must disclose its *ex parte* communications, and *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994), describes the scope of the deliberative process privilege. Neither concerns the extent to which an agency must include in the administrative record materials on which it directly or indirectly relied.

To illustrate its need for additional information about the projections and their discrepancies, Fairholme observed that the administrative record is *silent* as to why projections for the Companies' annual income for 2015 and beyond declined by approximately 50 percent between the June 2012 and July 2012 projections. *See* Motion 18 (citing T3847 and T3889). Attempting to explain the shift between June and July, the Treasury Defendants suggest that the June projections made more optimistic assumptions about the Companies' guarantee fee revenues and the rate at which they would reduce their retained investment portfolios. Treas. Opp. 21. But the only citation they can muster in support of this theory is to a slide in the June presentation that says nothing about guarantee fees and that observes that the Companies were contractually required under the original PSPAs to reduce their investment portfolios by a minimum of 10 percent per year.[10] *See* T3841. Nothing in the record, therefore, substantiates the Treasury Defendants' representations about the June projections.

Also unavailing is the Treasury Defendants' claim that the sudden change in the *post-2014* outlook is somehow explained by the June projection's reliance on numbers from an October 2011 FHFA projection that only ran to the end of 2014. *See* T1900, T3837. And despite the Treasury Defendants' nonsensical argument to the contrary, the decision about whether to use fiscal or calendar years cannot explain an approximate 50 percent decline in income for every year starting in 2015. The Treasury Defendants' halfhearted attempts to reconcile the June and July projections only further underscore the fact that they have not satisfied their obligation to submit "the whole record" for judicial review. 5 U.S.C. § 706.

[10] One might have thought that all of Treasury's projections would assume that, absent the Third Amendment to the PSPAs, the Companies would reduce their investment portfolios at the contractually required rate of 10 percent per year. But in fact Treasury's July 2012 projections assume a 15 percent reduction. *See* T3887. Despite Treasury's suggestion to the contrary, the June 2012 presentation now in the record does not say what rate of reduction was assumed.

Freddie Projections after June 2012. In its motion, Fairholme observed that the record includes two series of financial projections from July and August 2012 for Fannie Mae for which no corresponding Freddie Mac projections were disclosed. Motion 18. In response, the Treasury Defendants reiterate their representation that *they* did not create any Freddie Mac projections after June 2012, Treas. Opp. 22, but the FHFA Defendants are conspicuously silent. It hardly seems likely that Freddie's conservator made no quantitative attempt to assess the Company's prospects during the critical eight weeks before it decided that the outlook was so grim that *de facto* nationalization and receivership of the Company was the only available alternative. To the extent that any such Freddie projections exist, FHFA must disclose them. We note that this issue is particularly important because the last set of projections for Freddie currently in the record show that Freddie would still have between $102.6 and $137.1 billion of remaining Treasury funding available in 2023. T3849-50.

Factual Portions of Department of Justice Records. Fairholme argued that Treasury's record should have included the factual portions of a Department of Justice ("DOJ") memo and other DOJ communications that Secretary Geithner admittedly relied upon when he approved the Net Worth Sweep. Motion 18-19. In their opposition, the Treasury Defendants make no attempt to explain why the factual contents of these communications are covered by the deliberative process privilege, and for good reason: that privilege cannot be used as a basis for withholding purely factual information. *Loving v. Department of Def.*, 550 F.3d 32, 38 (D.C. Cir. 2008).[11]

The Treasury Defendants instead rest their argument for withholding these documents in

[11] *See also Mead Data Cent., Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 255 n.28 (D.C. Cir. 1977) (factual portions of documents otherwise covered by deliberative process privilege must be disclosed); *National Courier Ass'n v. Board of Governors*, 516 F.2d 1229, 1242 (D.C. Cir. 1975) ("Purely factual material is, after all, not deliberative, and the agency has no good reason to withhold it.").

their entirety on the attorney-client privilege, contending that the record does not reveal enough about Treasury's communications with DOJ to effect a subject matter waiver of the privilege. Treas. Opp. 23. As an initial matter, Treasury's claim that the record's "recitation of the conclusions reached by the Department of Justice *apart from* the specific legal advice sought does not constitute a waiver" raises grave doubts that these communications are fully covered by the attorney-client privilege. *Id.* If, as the Treasury Defendants intimate, DOJ was not giving legal advice when it told Treasury that the Net Worth Sweep was "fiscally prudent and in the best interest of the United States," T4332, then DOJ's analysis of that issue is not covered by the privilege and must be disclosed. *See Tax Analysts v. IRS*, 117 F.3d 607, 619-20 (D.C. Cir. 1997).

More fundamentally, the Treasury Defendants are wrong when they assert that the memo Secretary Geithner signed to approve the Net Worth Sweep does not "convey[ ] the particular issues on which legal advice was sought or the specific legal advice provided." Treas. Opp. 23. To the contrary, it is apparent that Treasury consulted DOJ "[b]ecause [the Third Amendment] relates to vested contract rights of the government," T4332, thus implicating the rule that governmental officials may not "modify existing contracts . . . or . . . waive contract rights vested in the government" absent "a compensatory benefit to the United States," Dep't of Airforce-Sewage Util. Contracts, B-189395, 1978 WL 9944, at *2 (Comp. Gen. Apr. 27, 1978); *see Union Nat'l Bank v. Weaver*, 604 F.2d 543, 545 (7th Cir. 1979). After examining the impact that the Net Worth Sweep would have on government receipts, "[t]he Justice Department approved Treasury's request for authority to modify its dividend rights" because it "agreed that the proposed modification is fiscally prudent and in the best interest of the United States." T4332. In short, Treasury has already disclosed *both* the subject of its request for legal advice *and* the content of the advice it received. It is difficult to imagine a clearer example of waiver.

Under Federal Rule of Evidence 502(a), when a litigant intentionally discloses privileged material, other documents concerning the same subject matter must also be disclosed if "in fairness" they "ought . . . to be considered together." That is manifestly the case here. By revealing that "[t]he Justice Department agreed that the proposed modification is fiscally prudent and in the best interest of the United States," T4332, Treasury seeks to bolster its contention that the Net Worth Sweep "accomplished the goals of maintaining the solvency of the [Enterprises] while also protecting the interests of taxpayers," Treas. Mot. 54. Fairholme will be prejudiced if Treasury is allowed to rely on DOJ's conclusion while withholding the facts and analysis on which that conclusion was based.[12] At a minimum, the Court should examine *in camera* the DOJ memo and related documents to determine the bona fides of the Treasury Defendants' claim of attorney-client privilege.

Privilege Log. The FHFA Defendants did not respond to Fairholme's argument that it is entitled to a privilege log, and have thus forfeited any argument that they need not provide one. For their part, the Treasury Defendants object to Fairholme's request for a privilege log on the ground that "[p]rivileged materials 'are not a part of the administrative record.' " Treas. Opp. 24 (quoting *Blue Ocean*, 503 F. Supp. 2d at 372). But the cases they cite say only that materials covered by the *deliberative process privilege* are not part of the record—a rule that arguably follows from the fact that an agency's predecisional deliberations are not normally relevant in APA cases. *See National Ass'n of Drug Stores v. Department of Health & Human Servs.*, 631 F.

[12] *See United States Airline Pilots Ass'n v. Pension Benefit Guar. Corp.*, 274 F.R.D. 28, 32 (D.D.C. 2011) ("[S]ubject-matter waiver is appropriate as a matter of fairness where 'the privilege holder seeks to use the disclosed material for advantage in the litigation but to invoke the privilege to deny its adversary access to additional materials that could provide an important context for proper understanding of the privileged materials.' " (quoting 8 CHARLES A. WRIGHT ET AL., FED. PRACTICE & PROCEDURE § 2016.2 (3d ed., 2010 update))).

Supp. 2d 23, 27-28 (D.D.C. 2009); *Blue Ocean*, 503 F. Supp. 2d at 371. Not surprisingly given the rationale employed in those decisions, this Court has never extended that rule to other privileges.[13] At an absolute minimum, Fairholme is entitled to privilege logs identifying materials Defendants withheld on grounds other than the deliberative process privilege.

In any event, it is well within this Court's discretion to order Defendants to also log materials withheld on the basis of the deliberative process privilege, and Fairholme submits that it would be appropriate to do so under the unusual circumstances presented here. Neither set of Defendants disclosed a single document that was partially redacted on deliberative process grounds. Given the conspicuous, and suspicious, paucity of nonpublic materials Defendants included in their records, the only reasonable inference is that they made little or no effort to release redacted versions of materials partially covered by any claim of privilege.

IV. FAIRHOLME IS ENTITLED TO TAKE LIMITED DISCOVERY INTO THE COMPLETENESS OF DEFENDANTS' ADMINISTRATIVE RECORD SUBMISSIONS

The standard for allowing an APA plaintiff to take discovery into the completeness of the administrative record is well-settled: when the plaintiff is able to make "a significant showing—variously described as a 'strong,' 'substantial,' or 'prima facie' showing—that it will find material in the agency's possession indicative of . . . an incomplete record." *Amfac Resorts*, 143 F. Supp. 2d at 12 (citation omitted).[14] Defendants rely on decisions in which this Court has said

[13] Tellingly, the Treasury Defendants' current position goes well beyond the position taken by the DOJ in prior litigation. *See* Memo from Ronald J. Tenpas, Assistant Attorney General, Guidance to Federal Agencies on Compiling the Administrative Record (Dec. 23, 2008) (attached as Exhibit 2) ("The Department of Justice has defended in litigation the legal position that *deliberative documents* are not generally required in an administrative record, and thus has also defended the position that in such circumstances no privilege log reflecting such documents would need to be prepared." (emphasis added)).

[14] *See also Air Transp. Ass'n v. National Mediation Bd.*, No. 10-0804, 2010 WL

that discovery into an agency's *decisionmaking process* "is normally unavailable in an APA case, 'except when there has been a strong showing of bad faith or improper behavior or when the record is so bare that it prevents effective judicial review.' " *Friends of the Earth v. Department of the Interior*, 236 F.R.D. 39, 42 (D.D.C. 2006) (quoting *Commercial Drapery Contractors v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998)); *see* Treas. Opp. 24-25; FHFA Opp. 33. Yet Fairholme has been careful not to seek discovery into Defendants' decisionmaking process. Rather, Fairholme seeks discovery into the completeness of the record—limited discovery to which a more permissive legal standard applies.

A. FHFA's Representation that Its Document Compilation Is Complete Contradicts Its Own Prior Statements and Is Implausible on Its Face.

The FHFA Defendants represent for the first time that "no documents considered by FHFA in connection with the decision to execute the Third Amendment were excluded" from the documents in its "compilation." FHFA Opp. 29. That representation is difficult to square with their prior concession that they "have not . . . created or maintained an administrative record relating to the execution of the Third Amendment." Notice of Filing Document Compilation by [FHFA Defendants] Regarding Third Amendment to Senior Preferred Stock Purchase Agreements (Doc. 24) (filed Dec. 17, 2013) at 2. *See also* FHFA Opp. 28. The FHFA Defendants make no attempt to reconcile their claim that they have already submitted a complete administrative record with their original statement that they did not create or maintain such an administra-

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8917910, at *2 (D.D.C. June 4, 2010); *Int'l Longshoremen's Ass'n v. National Mediation Bd.*, No. 04-824, 2006 WL 197461, at *3 n.1 (D.D.C. Jan. 25, 2006) ; *see also, e.g.*, *National Res. Def. Council v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975); *National Wilderness Inst. v. United States Army Corps of Eng'rs*, No. 01-0273, 2002 WL 34724414, at *4-5 (D.D.C. Oct. 9, 2002) ; *Greenpeace, U.S.A. v. Mosbacher*, No. 88-2158, 1989 WL 15854, at *1 (D.D.C. Feb. 15, 1989). *Cf. Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 140 n.5 (D.D.C. 2002) ("Contrary to defendants' contention, a showing of bad faith or improper behavior is not required for a court to supplement the record.").

tive record. The FHFA Defendants' self-contradictory position underscores Fairholme's need for discovery and is more than enough to defeat "the presumption of administrative regularity" on which it relies. *Pacific Shores*, 448 F. Supp. 2d at 6; *see Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 57 (D.D.C. 2003) ("The 'presumption of administrative regularity' is just that—a presumption—and may be overcome.").[15]

Moreover, the FHFA Defendants' representation that their document compilation constitutes a complete administrative record is implausible on its face. It simply cannot be that FHFA agreed to a *de facto* nationalization of the two most significant companies it regulates and was purportedly "conserving" without a document or email memorializing its decision. Nor is it to be believed that the agency chose to take such a momentous step after referencing a total of *43 pages* of nonpublic materials, none of which record FHFA's independent assessment of the Companies' financial prospects or how the Net Worth Sweep was expected to affect government revenue. Also implausible is FHFA's apparent contention that it made no effort to verify statements in the Companies' SEC filings suggesting that they were unlikely to earn enough to pay the government dividends under the prior arrangement.[16] And while Defendants are no doubt correct that their failure to consider factors that had a major impact on the Companies' financial health, such as the likely (if not certain) reversal of prior writedowns of deferred tax assets and the release of loan loss reserves, could provide a basis for holding their decision arbitrary and

[15] We note that the FHFA Defendants do not disavow their argument, made in prior litigation and discussed in Fairholme's motion, *see* Motion 21, that "[d]iscovery is especially appropriate . . . where FHFA did not compile a formal administrative record in real time because it did not believe it was required to utilize APA procedures." FHFA Consent to Request for Management Conference, *California v. FHFA*, No. 10-3084, at 7 (N.D. Cal. Oct. 28, 2011) (Doc. 139). Indeed, the FHFA Defendants do not respond to this point at all.

[16] *See* FHFA Office of Inspector General, FHFA's Certifications for the Preferred Stock Purchase Agreements 10 (Aug. 23, 2012), http://fhfaoig.gov/Content/Files/EVL-2012-006_3.pdf (observing that "FHFA's review of the Enterprises' SEC filings is a fairly extensive process").

capricious, FHFA Opp. 34-35; Treas. Opp. 27, it is incredible that either agency simply "forgot" about this predictable source of hundreds of billions of dollars in net worth when it decided to impose the Net Worth Sweep. The conspicuous absence of these and other "fundamental" materials puts this case on all fours with *Dopico v. Goldschmidt*, in which the Second Circuit held that the district court abused its discretion by declining to order discovery into the completeness of the record. 687 F.2d 644, 654 (2d Cir. 1982).

Notably, the FHFA Defendants do not respond to Fairholme's argument that the declaration by Mario Ugoletti contains numerous factual statements that are unsupported by any other document in the record. Under the circumstances, Fairholme should be accorded an opportunity to take discovery, including a deposition, into the bases for Mr. Ugoletti's declaration. *See* Motion 24. More fundamentally, the FHFA Defendants' reliance on Mr. Ugoletti's declaration and other materials that FHFA could not have considered in August 2012 provides yet another reason to doubt their late representation that the Court has before it "all documents and materials that the agency directly or indirectly considered and nothing more nor less." *WildEarth Guardians v. Salazar*, 670 F. Supp. 2d 1, 4 (D.D.C. 2009) (internal quotation marks and alterations omitted).

Rather than attempting to account for the numerous gaps and irregularities discussed above, the FHFA Defendants criticize Fairholme for not describing the improperly withheld documents with sufficient specificity. FHFA Opp. 30-31, 33-34. This argument borders on the perverse. FHFA's all but total withholding of nonpublic materials makes it impossible for Fairholme to identify specific documents, other than the conspicuously missing documents reflecting FHFA's final approval of the Net Worth Sweep. *See Amfac Resorts*, 143 F. Supp. 2d at 12 (recognizing that when an agency negligently or intentionally withholds materials from the administrative record "the only way a non-agency party can demonstrate to a court the need for extra-

record judicial review is to first obtain discovery from the agency"). And the FHFA Defendants are simply wrong when they argue that an APA plaintiff must identify a specific document that is missing before obtaining discovery into the completeness of the record; all that is required is a "significant showing" that there is "reason to believe that discovery will uncover evidence relevant to the Court's decision to look beyond the record" submitted by Defendants. *Id.*; *see Greenpeace*, 1989 WL 15854, at *1; *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 34 (N.D. Tex. 1981); *Tenneco v. Department of Energy*, 475 F. Supp. 299, 318 (D. Del. 1979).

B. Treasury's Arguments Suggest that It Applied the Wrong Legal Standard when Compiling Its Administrative Record.

The Treasury Defendants' opposition betrays a fundamental misunderstanding of the scope of their duty to disclose the "whole record" for judicial review. 5 U.S.C. § 706. At one point, the Treasury Defendants suggest that they withheld the analyses, models, and data on which their financial projections were based because they do not consider those materials to be among the "most critical" documents that Treasury considered. Treas. Opp. 19. Elsewhere, they suggest that they need not disclose those documents because they are "internal proprietary Treasury material" the results of which are "reflected in the administrative record in Treasury's financial presentations." Treas. Opp. 26. But as previously discussed, a complete administrative record includes *all* of the documents an agency considered, not just those the agency deems to be "most critical." There is no "internal proprietary material" exception to that rule. It is apparent that the Treasury Defendants compiled their administrative record using the wrong legal standard, and that they have information that they plainly should have disclosed but withheld. Chief among the materials that should have been disclosed are the missing analyses, models, and data discussed at length above. Treasury's withholding of such plainly pertinent materials suggests the troubling prospect that Treasury improperly "skew[ed] the record in its favor by excluding

pertinent but unfavorable information." *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005). Treasury's refusal to disclose materials that would allow Fairholme to probe the basic assumptions underlying the financial projections on which it allegedly based the Net Worth Sweep appears to reflect an ad hoc, results-driven approach to compiling the record that makes discovery particularly appropriate. Indeed, Treasury included in its record many hundreds of pages of public SEC filings to which final decisionmakers no doubt gave less attention than to the analyses, models, and data it withheld from the record.

Finally, Treasury's administrative record included an April 2012 Moody's analysis of the Companies' financial prospects but excluded a Grant Thornton analysis prepared at around the same time and on which Treasury's subsequent projections heavily rely. The Treasury Defendants' only answer is to say that the difference between the documents is "obvious" and to characterize the Grant Thornton analysis as "internal proprietary Treasury material." Treas. Opp. 26. The "obvious" difference in these documents escapes us. Indeed, the only thing that is "obvious" is that the Defendants indirectly, at least, relied on the Grant Thornton materials when they decided to impose the Net Worth Sweep. *See* T3786 ("[T]he . . . Grant Thornton analysis [was] used to generate the forecast estimates on the subsequent pages."). With Treasury having improperly withheld so many documents that are readily identifiable, there are very likely additional documents that it should have disclosed. Under these circumstances, limited discovery into the completeness of the Treasury record is appropriate.

V. FAIRHOLME IS ENTITLED TO DISCOVERY IN ORDER TO RESPOND TO DEFENDANTS' CONVERTED MOTION FOR SUMMARY JUDGMENT ON THE BREACH OF FIDUCIARY DUTY CLAIM

Fairholme has demonstrated that in moving to dismiss its breach of fiduciary duty claim for failure to state a claim, the FHFA Defendants responded to Fairholme's well-pled factual allegations by disputing them on the merits and by mounting a substantive defense of their deci-

sion to implement the Net Worth Sweep. Motion 29-30. The FHFA Defendants thus converted their motion into one for summary judgment, *id.* 28-29, entitling Fairholme to discovery in order to respond to the FHFA Defendants' motion, *id.* 30-33.

The FHFA Defendants argue that their motion to dismiss the fiduciary duty claim should not be so converted because it relies on matters either cited or incorporated by reference in the Complaint or as to which the Court may take judicial notice. FHFA Opp. 15-17. But as we have already discussed, the FHFA Defendants' request for judicial notice of the truth of "facts" relating to the need for and purposes underlying the Net Worth Sweep – "facts" that are actually hotly contested by Fairholme – is inappropriate and must be rejected.

The FHFA Defendants further argue that, in any event, the Court should not reach this issue because Fairholme's fiduciary duty claim is barred by HERA's bar on actions seeking to restrain the actions of a conservator and by HERA's bar on actions by shareholders. *See* FHFA Opp. 25. For reasons already discussed, however, these supposedly threshold legal defenses lack merit, are (at least in the case of the former) inextricably intertwined with disputed questions of fact, and present no impediment to the limited relief Fairholme seeks through this Motion.

The FHFA Defendants therefore fall back on one final argument: the Court may simply ignore the matters that are outside the pleadings rather than convert their motion into one for summary judgment. FHFA Opp. 24-25.[17] That is, of course, an option for the Court. But given that this would leave Defendants with, at most, only their meritless "threshold" jurisdictional ar-

[17] The FHFA Defendants suggest that only one paragraph of their motion would need to be excluded from the Court's consideration. FHFA Opp. 25. They ignore, however, that that paragraph is supported by cross-references to other pages of the FHFA Defendants' brief, *see* FHFA Mot. 56 (cross-referencing FHFA Mot. 23-25), which themselves refer to numerous extra-pleading materials. More fundamentally, the FHFA Defendants ignore that, regardless of their length, the passages at issue go the heart of their substantive defense of the Net Worth Sweep.

guments as a defense to the breach of fiduciary duty claim (arguments that themselves depend at least in part on disputed questions of fact), it is difficult to imagine a scenario in which Fairholme would not ultimately be entitled to the discovery it is now seeking. In any event, for the reasons previously discussed, because Defendants have chosen to file, and to maintain, omnibus dispositive motions, the most efficient course is for the Court to allow the limited discovery that is necessary to address the disputed factual issues raised by those motions, especially since Fairholme would still be entitled to discovery into the completeness of Defendants' record submissions. Tellingly, that is the course the Court of Federal Claims ("CFC") recently took in allowing Fairholme to proceed with discovery against Defendants under very similar circumstances.

VI. THERE IS SUBSTANTIAL OVERLAP BETWEEN THE DISCOVERY ALLOWED IN FAIRHOLME'S COURT OF FEDERAL CLAIMS ACTION AND THE LIMITED DISCOVERY SOUGHT HERE

Defendants acknowledge the CFC's recent order ("CFC Order") allowing discovery in Fairholme's pending action in that court, but they argue that that order and such discovery are irrelevant to the issues raised in Fairholme's Motion in this Court. *See* FHFA Opp. 35-36; Treas. Opp. 16 n. 6. To be sure, Fairholme has raised different substantive challenges (e.g., takings and illegal exaction claims) to the Net Worth Sweep in the CFC action than they do in this Court. It is also true that the Government has raised a different set of jurisdictional and merits arguments in the CFC action. But the disputed factual issues that were raised by the Government's dispositive motion in the CFC action are closely similar to disputed issues implicated by Defendants' dispositive motions in this case. In short, contrary to Defendants' assertions, there is substantial overlap between the discovery allowed by the CFC and the discovery Plaintiffs seek here.

For example, one of the issues as to which the CFC authorized discovery is "whether the FHFA acted at the direct behest of the Treasury." *Id.* There can be no question that FHFA's purposes in entering into the Net Worth Sweep, and whether FHFA acted at the behest and for

the benefit of Treasury, are also directly implicated by Defendants' dispositive motions with respect to, at a minimum, Fairholme's breach of fiduciary duty and APA claims.[18]

Likewise, the CFC concluded that "discovery would reveal information relevant to resolving the factual dispute between plaintiffs and defendant regarding each party's assessment of future profitability," *id.* at 3, and it ordered discovery into "the disputed factual issues about Fannie and Freddie's solvency and the reasonableness of expectations about their future profitability" and "why the government allowed the preexisting capital structure and stockholders to remain in place." *Id.* at 4. In this case Defendants' dispositive motions also seek to justify imposition of the Net Worth Sweep largely on the basis of their contemporaneous expectations regarding Fannie and Freddie's future performance and profitability, and thus on the basis of one of the subjects as to which the CFC explicitly authorized discovery.

CONCLUSION

For the foregoing reasons, Fairholme respectfully requests that the Motion be granted.

Date: March 13, 2014

Respectfully submitted,

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[18] *See, e.g.*, Motion 31 (requested "discovery is likely to disclose information highly relevant to the disputed question of why the FHFA entered into the Third Amendment, and whether it acted independently, or at the direction of Treasury, in agreeing to the Net Worth Sweep").

EXHIBIT 1

No. 13-cv-1053-RCL

Federal Housing Finance Agency

Projections of the Enterprises' Financial Performance

October 2011

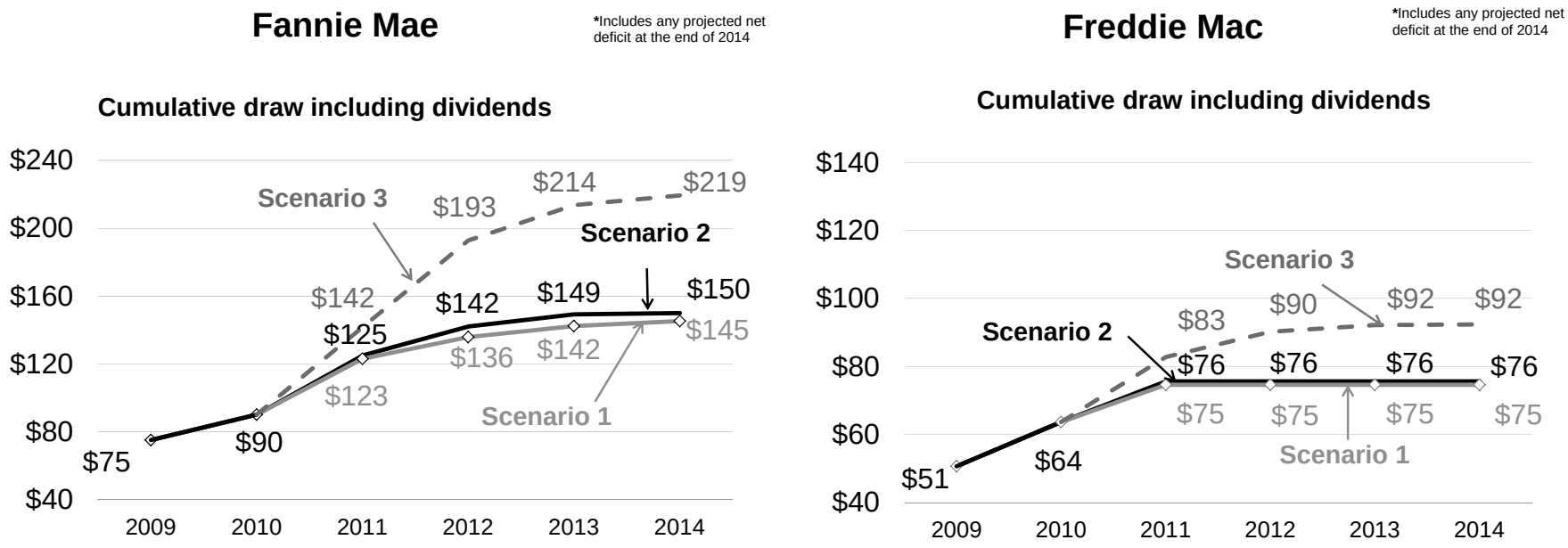
Summary

- This report provides updated information on possible future Treasury draws by Fannie Mae and Freddie Mac (the "Enterprises") under specified scenarios, using consistent assumptions for both Enterprises. FHFA published initial projections of the Enterprises' financial performance in October 2010. The report on the initial projections can be found in FHFA's Projections of the Enterprises' Financial Performance, October 2010. The projections have been updated to reflect the current outlook for house prices, interest rates, and recent trends in borrower behavior. The projection period has been extended an additional year.
- To date, the Enterprises have drawn $169 billion from Treasury under the terms of the Senior Preferred Stock Purchase Agreements (PSPAs), as amended, between the Treasury and each of the Enterprises. FHFA worked with the Enterprises to develop forward-looking financial projections across three possible house price paths. **Under the three scenarios used in the projections, cumulative Treasury draws (including dividends) at the end of 2014 range from $220 billion to $311 billion. In the initial projections released in October 2010, cumulative Treasury draws (including dividends) at the end of 2013 ranged from $221 billion to $363 billion.**
- The difference in the range of ending cumulative Treasury draws between the October 2010 projections and the October 2011 projections can be attributed primarily to the fact that actual results for the first year of the projection period in the October 2010 projections were substantially better than projected. (See page 8 for further details.)
- The projections reported here are not expected outcomes. They are modeled projections in response to "what if" exercises based on assumptions about Enterprise operations, loan performance, macroeconomic and financial market conditions, and house prices. The projections do not define the full range of possible outcomes. Actual outcomes may be very different. This effort should be interpreted as a sensitivity analysis of future draws to possible house price paths.
- FHFA provided the Enterprises with key assumptions for each scenario. The Enterprises used their respective internal models to project their financial results based on the assumptions provided by FHFA. While this effort achieves a degree of comparability between the Enterprises, it does not allow for actions that the Enterprises might undertake in response to the economic conditions specified in the scenarios. Those Enterprise-specific business changes could lead to different results across the scenarios than are presented in these projections.

Results

The assumptions used in each of the three scenarios are described on page 11. The projected combined cumulative Treasury draws for both Enterprises through December 31, 2014 reach $220 billion under Scenario 1, $226 billion under Scenario 2, and $311 billion under Scenario 3. Fannie Mae's cumulative draws are higher than Freddie Mac's in part because Fannie Mae's mortgage book of business is approximately fifty percent larger than Freddie Mac's. In addition, Fannie Mae's serious delinquency rates are higher than Freddie Mac's.

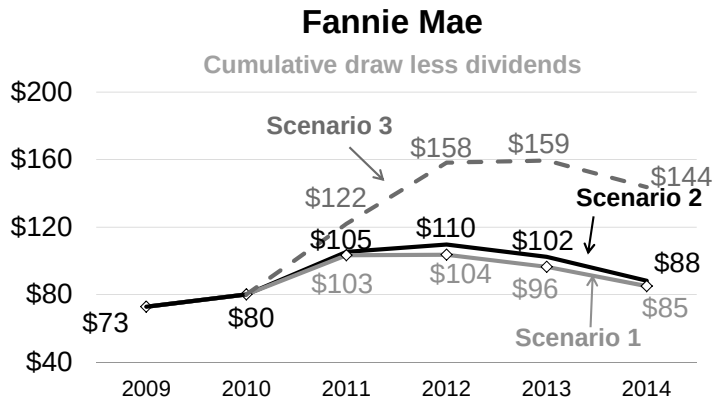
Figure 1: Cumulative Treasury Draws* *($ in billions)*

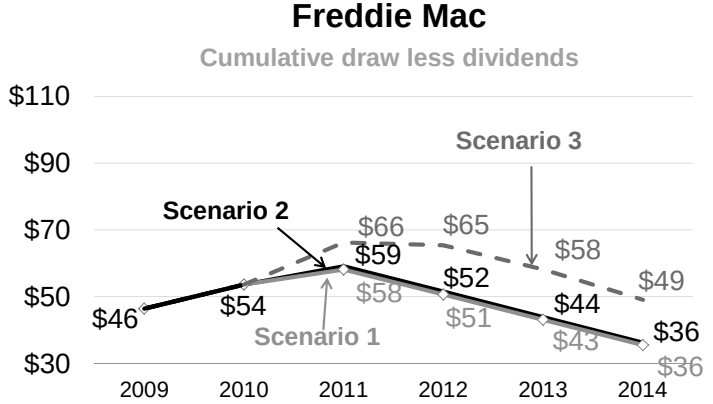


Results (continued)

The Enterprises are required to pay a 10 percent dividend on the amount of funds drawn by the Enterprises under the Senior Preferred Stock Purchase Agreements (PSPAs) with Treasury. The PSPAs do not allow for dividends to reduce prior draws. However, for illustrative purposes, if dividend payments were subtracted from the projected cumulative draws, the net amounts would reach $121 billion under Scenario 1, $124 billion under Scenario 2, and $193 billion under Scenario 3. Most dividends to date have been paid from funds acquired with additional draws. The projections show a portion of future dividends being paid out of comprehensive income.

Figure 2: Cumulative Treasury Draws less dividends paid *($ in billions)*





Cumulative Treasury Draw through 2014

	Scenario 1	Scenario 2	Scenario 3
Related to operating losses and other*	$105	$110	$161
Related to senior preferred dividends	40	40	58
Cumulative Treasury Draw	$145	$150	$219
Senior preferred dividends (not financed through Treasury Draws)	$20	$22	$18
Total senior preferred dividends	$60	$62	$76

Cumulative Treasury Draw through 2014

	Scenario 1	Scenario 2	Scenario 3
Related to operating losses and other*	$58	$59	$66
Related to senior preferred dividends	17	17	26
Cumulative Treasury Draw	$75	$76	$92
Senior preferred dividends (not financed through Treasury Draws)	$22	$22	$17
Total senior preferred dividends	$39	$39	$43

*Operating losses and other refers to net losses reported on the income statement, changes in unrealized losses reported on the balance sheet, and the impact of other accounting changes for consolidation and security impairments.
In accordance with Senior Preferred Stock Purchase Agreements (PSPAs), the Enterprises are not permitted to paydown the Treasury draw amounts, even if the Enterprises generate positive net income or total comprehensive income.
Numbers may not foot due to rounding.

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GSE Preferred Stock Purchase Agreements (PSPA) Overview and Key Considerations

Sensitive and Pre-Decisional

June 13, 2012

Primary GSE Financial Forecast Assumptions

Sensitive / Pre-Decisional

- As conservator, FHFA evaluated the GSEs financial future by performing sensitivity analyses, commonly referred to as the "stress tests."
  - The sensitivity analyses included a base and downside case and were projected out to year 2014.
  - The sensitivity analyses were based on assumptions about GSE operations, loan performance, macroeconomic and financial market conditions, and house prices.
- Treasury also evaluated the financial prospects of the GSEs.
  - Grant Thornton was engaged as an independent, third-party consultant to perform a valuation of the entities for the Treasury Financial Report and OMB budget estimation figures.
  - Grant Thornton developed their own forecasts based, in part, on the forecasts prepared by each GSE based on a consistent set of assumptions provided by FHFA.
  - The Grant Thornton models were projected out until each GSE depleted its PSPA capacity.
- Both the FHFA and Grant Thornton analyses were used to generate the forecast estimates on the subsequent pages.

TREASURY-3837

PSPAs: Key Terms

Sensitive / Pre-Decisional

As of December 31, 2011	
Core Terms	
Amended & Restated PSPAs	Signed on September 26, 2008.
Amendments Dated	1st Amendment – May 6, 2009; 2nd Amendment – December 24, 2009.
Liquidation Preference	Increases with draws under the funding commitment.(1)
Dividend Rate	Cash 10%; if elected to be paid in kind ("PIK") 12%.
Seniority of Senior Preferred Stock	Senior Preferred Stock is senior to the existing preferred stock issued prior to conservatorship and common equity but is junior to all debt claims and obligations.
Covenants	
Retained Investment Portfolio	Reduce by 10% per year until the GSEs' retained portfolios each reach $250 billion.
Dividend Payments to Other Parties	None permitted until senior preferred stock is repaid in full.
Asset Sales	No sale, transfer, or disposition of any assets other than dispositions for fair value in the ordinary course of business.
Leverage Limitation	Not permitted to increase debt to more than 120% of the total amount of mortgages and mortgage-backed securities owned by each enterprise.
Other Terms	
Warrants	Right to purchase up to 79.9 percent of the common equity at one-thousandth of one cent ($0.00001) per share, fully diluted. Warrants expire Sept. 7, 2028.

(1) As amended on December 24, 2009, each PSPA commits Treasury to provide additional support to each Enterprise through the end of 2012 in exchange for a greater liquidation preference. Treasury's financial commitment now equals the greater of $200 billion or $200 billion plus cumulative net worth deficits experienced during 2010, 2011, and 2012, less any surplus remaining as of December 31, 2012. Beginning in 2013, the capacity available becomes fixed and the remaining capacity declines as there are further draws.

TREASURY-3841

Remaining Preferred Stock Purchase Agreement Capacity

Sensitive / Pre-Decisional

- Initial Purchase Agreement had a specified funding commitment cap of $100 billion for each GSE.
- The May 2009 amendment increased the specified cap for each institution to a fixed $200 billion.
- The Dec. 2009 amendment modified the fixed cap and allowed the cap to increase dollar for dollar for any draws between Jan. 1, 2010 and Dec. 31, 2012.
  - At the end of 2009, Fannie Mae had drawn $75.2 billion and Freddie Mac had drawn $50.7 billion, excluding the initial $1.0 billion liquidation preference for which the GSEs did not receive cash proceeds.
- At the end of 2012, these caps become fixed and there will be ~$125 billion of capacity remaining for Fannie Mae and ~$149 billion for Freddie Mac.
  - This remaining capacity will decline to the extent there are further draws from 2013 onward.

Fannie Mae:

PSPA cap as of 12/24/09 amendment	$200 billion
+ Est. PSPA draws[1] Jan. '10 – Dec. '12	+ $65.9 billion
Total est. PSPA cap on Dec. 31, 2012	$265.9 billion
- PSPA draws through Dec. 31, 2009	- $75.2 billion
- Est. PSPA draws[1] Jan. '10 – Dec. '12	- $65.9 billion
= Remaining capacity Dec. 31, 2012 *(less any positive net worth on Dec. 31, 2012)*	$124.8 billion

Freddie Mac:

PSPA cap as of 12/24/09 amendment	$200 billion
+ Est. PSPA draws[2] Jan. '10 – Dec. '12	+ $25.1 billion
Total est. PSPA cap on Dec. 31, 2012	$225.1 billion
- PSPA draws through Dec. 31, 2009	- $50.7 billion
- Est. PSPA draws[1] Jan. '10 – Dec. '12	- $25.1 billion
= Remaining capacity Dec. 31, 2012 *(less any positive net worth on Dec. 31, 2012)*	$149.3 billion

[1] Actual draws between January 1, 2010 and March 31, 2012, forecasted draws thereafter. Forecasted draws through December 31, 2012 as estimated by the base case forecast in the Federal Housing Finance Agency's annual "Projections of the Enterprises' Financial Performance" report, released October 2011.

TREASURY-3843

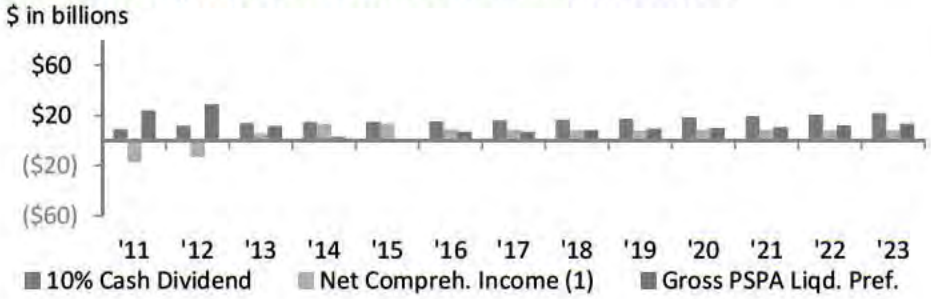
Fannie Mae Base Case PSPA Forecast

Sensitive / Pre-Decisional

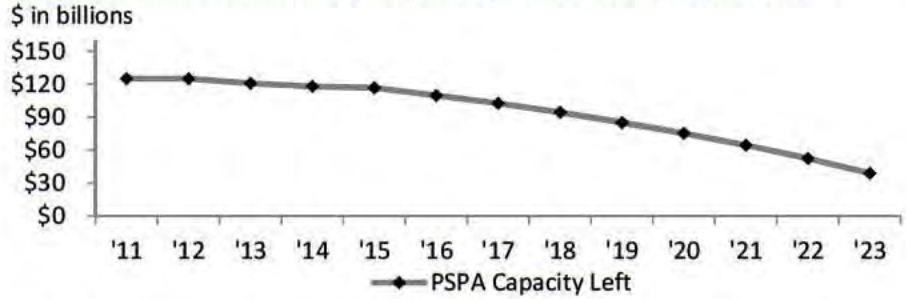
Projections: $ in billions	FY2012	FY2013	FY2014	FY2015	FY2016	FY2017	FY2018	FY2019	FY2020	FY2021	FY2022	FY2023
Net Comprehensive Income (Loss)[1]	($13.1)	$5.4	$13.1	$13.5	$9.1	$8.5	$8.0	$7.9	$8.5	$8.4	$8.1	$8.0
Total Gross PSPA Draw	$28.7	$11.4	$2.9	$1.2	$7.0	$7.1	$8.2	$9.4	$9.8	$10.7	$12.1	$13.5
Total Dividend Paid	($11.8)	($14.0)	($14.8)	($15.0)	($15.2)	($15.9)	($16.6)	($17.5)	($18.4)	($19.4)	($20.6)	($21.8)
Total PSPA Draw Net of PSPA Dividends	$16.9	($2.6)	($11.9)	($13.8)	($8.2)	($8.8)	($8.4)	($8.1)	($8.6)	($8.7)	($8.5)	($8.3)
Projected End of Period Net Worth[2]	*($6.2)*	*($3.4)*	*($2.2)*	*($2.5)*	*($1.6)*	*($1.9)*	*($2.3)*	*($2.4)*	*($2.5)*	*($2.9)*	*($3.3)*	*($3.6)*
Percent of Dividends Funded by PSPA Draws	100%	81%	20%	8%	46%	45%	49%	54%	53%	55%	59%	62%
Dollar Amt. of Dividends Funded by Earnings	$0.0	$2.6	$11.9	$13.8	$8.2	$8.8	$8.4	$8.1	$8.6	$8.7	$8.5	$8.3
Cumulative Cash Dividends Funded by Earnings	**$0.0**	**$2.6**	**$14.5**	**$28.3**	**$36.5**	**$45.3**	**$53.7**	**$61.7**	**$70.4**	**$79.1**	**$87.6**	**$95.9**
Cumulative Net Return To Taxpayers By FY2023[3]	-	-	-	-	-	-	-	-	-	-	-	**$92.4**
Beginning PSPA Liquidation Preference	$112.6	$141.3	$152.7	$155.6	$156.8	$163.8	$170.9	$179.1	$188.5	$198.3	$209.0	$221.1
Total Gross Liquidation Preference	$28.7	$11.4	$2.9	$1.2	$7.0	$7.1	$8.2	$9.4	$9.8	$10.7	$12.1	$13.5
Cumulative Gross Liquidation Preference	$141.3	$152.7	$155.6	$156.8	$163.8	$170.9	$179.1	$188.5	$198.3	$209.0	$221.1	$234.6
Remaining PSPA Funding Capacity	*$125.0*	*$120.8* [4]	*$117.9*	*$116.7*	*$109.7*	*$102.6*	*$94.4*	*$85.0*	*$75.2*	*$64.5*	*$52.4*	*$38.9*
Cumulative Net PSPA Investment[5]	**$112.3**	**$109.7**	**$97.7**	**$84.0**	**$75.8**	**$67.0**	**$58.6**	**$50.5**	**$41.9**	**$33.2**	**$24.7**	**$16.4**

TREASURY-3847

Per annum projected PSPA draws and dividends



Projected PSPA funding capacity as a result of draws



(1) Net comprehensive income is defined as the sum of economic net interest margin, fees and other income less a provision for credit losses, administrative expenses and other non-interest expenses.
(2) Negative every year because of a one quarter timing delay in payment of PSPA draw requests. Calculated as the sum of net comprehensive income and total gross PSPA draws less total dividends paid.
(3) The cumulative net return to taxpayers by FY2023 represents the sum of the cumulative cash dividends funded by earnings as of FY2023 and the projected end of period net worth in FY2023.
(4) Remaining PSPA funding capacity reduced by draws that occur after January 1, 2013. Potential PSPA draws in 4Q 2012 appear as FY2013 but do not reduce PSPA capacity.
(5) The cumulative net PSPA investment decreases by the dollar amount of dividends funded by earnings paid to the U.S. Department of the Treasury.

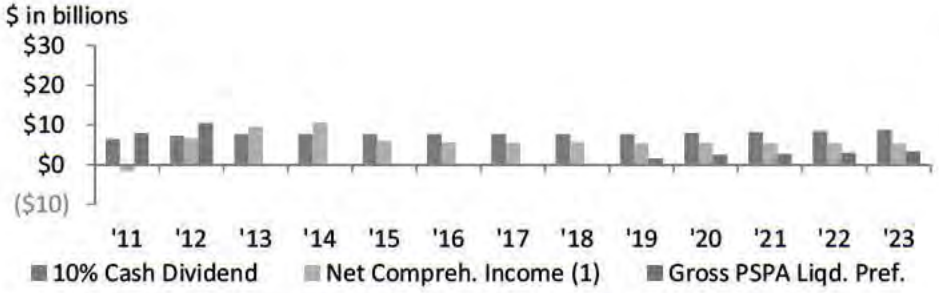
Freddie Mac Base Case PSPA Forecast

Sensitive / Pre-Decisional

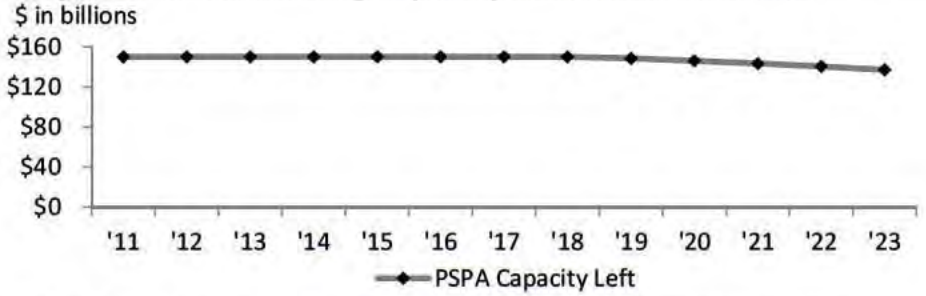
Projections: $ in billions	FY2012	FY2013	FY2014	FY2015	FY2016	FY2017	FY2018	FY2019	FY2020	FY2021	FY2022	FY2023
Net Comprehensive Income (Loss)[1]	$6.7	$9.5	$10.6	$6.0	$5.5	$5.5	$5.6	$5.3	$5.5	$5.4	$5.4	$5.4
Total Gross PSPA Draw	$10.5	$0.0	$0.0	$0.0	$0.0	$0.0	$0.0	$1.5	$2.5	$2.6	$3.0	$3.3
Total Dividend Paid	($7.3)	($7.7)	($7.7)	($7.7)	($7.7)	($7.7)	($7.7)	($7.7)	($7.9)	($8.2)	($8.4)	($8.7)
Total PSPA Draw Net of PSPA Dividends	$3.2	($7.7)	($7.7)	($7.7)	($7.7)	($7.7)	($7.7)	($6.2)	($5.4)	($5.6)	($5.4)	($5.4)
Projected End of Period Net Worth[2]	*$3.5*	*$5.3*	*$8.2*	*$6.6*	*$4.4*	*$2.3*	*$0.2*	*($0.7)*	*($0.6)*	*($0.7)*	*($0.8)*	*($0.8)*
Percent of Dividends Funded by PSPA Draws	100%	0%	0%	0%	0%	0%	0%	19%	32%	32%	36%	38%
Dollar Amt. of Dividends Funded by Earnings	$0.0	$7.7	$7.7	$7.7	$7.7	$7.7	$7.7	$6.2	$5.4	$5.6	$5.4	$5.4
Cumulative Cash Dividends Funded by Earnings	**$0.0**	**$7.7**	**$15.3**	**$23.0**	**$30.7**	**$38.3**	**$46.0**	**$52.2**	**$57.6**	**$63.2**	**$68.6**	**$74.0**
Cumulative Net Return To Taxpayers By FY2023[3]	-	-	-	-	-	-	-	-	-	-	-	**$73.2**
Beginning PSPA Liquidation Preference	$72.2	$82.7	$82.7	$82.7	$82.7	$82.7	$82.7	$82.7	$84.2	$86.7	$89.3	$92.3
Total Gross Liquidation Preference	$10.5	$0.0	$0.0	$0.0	$0.0	$0.0	$0.0	$1.5	$2.5	$2.6	$3.0	$3.3
Cumulative Gross Liquidation Preference	$82.7	$82.7	$82.7	$82.7	$82.7	$82.7	$82.7	$84.2	$86.7	$89.3	$92.3	$95.6
Remaining PSPA Funding Capacity	*$150.0*	*$150.0* [4]	*$150.0*	*$150.0*	*$150.0*	*$150.0*	*$150.0*	*$148.5*	*$146.0*	*$143.4*	*$140.4*	*$137.1*
Cumulative Net PSPA Investment[5]	**$60.5**	**$52.8**	**$45.2**	**$37.5**	**$29.8**	**$22.2**	**$14.5**	**$8.3**	**$2.9**	($2.7)	($8.1)	($13.5)

TREASURY-3849

Per annum projected PSPA draws and dividends



Projected PSPA funding capacity as a result of draws



(1) Net comprehensive income is defined as the sum of economic net interest margin, fees and other income less a provision for credit losses, administrative expenses and other non-interest expenses.
(2) Negative in some years because of a one quarter timing delay in payment of PSPA draw requests. Calculated as the sum of net comprehensive income and total gross PSPA draws less total dividends paid.
(3) The cumulative net return to taxpayers by FY2023 represents the sum of the cumulative cash dividends funded by earnings as of FY2023 and the projected end of period net worth in FY2023.
(4) Remaining PSPA funding capacity reduced by draws that occur after January 1, 2013. Potential PSPA draws in 4Q 2012 appear as FY2013 but do not reduce PSPA capacity.
(5) The cumulative net PSPA investment decreases by the dollar amount of dividends funded by earnings paid to the U.S. Department of the Treasury.

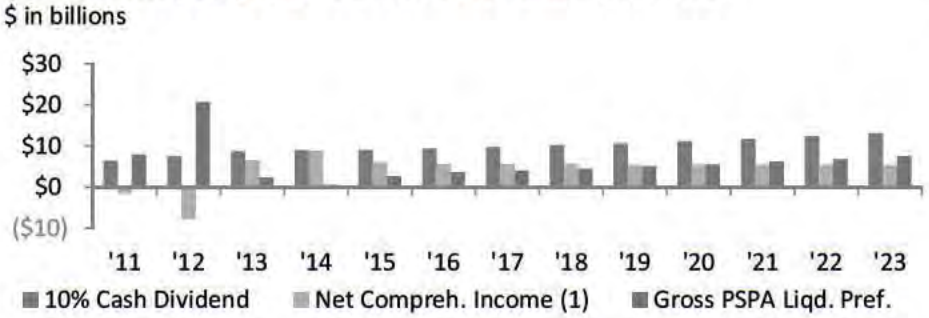
Freddie Mac Downside Case PSPA Forecast

Sensitive / Pre-Decisional

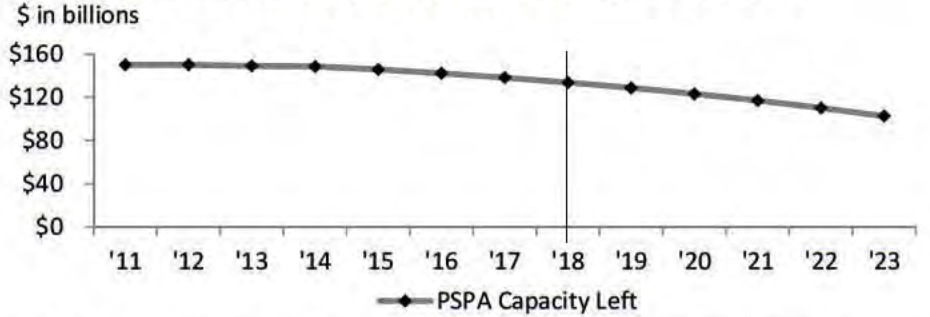
Projections: $ in billions	FY2012	FY2013	FY2014	FY2015	FY2016	FY2017	FY2018	FY2019	FY2020	FY2021	FY2022	FY2023
Net Comprehensive Income (Loss)[1]	($7.8)	$6.6	$8.9	$6.1	$5.6	$5.6	$5.7	$5.4	$5.5	$5.4	$5.4	$5.4
Total Gross PSPA Draw	$20.7	$2.3	$0.5	$2.7	$3.6	$4.0	$4.4	$5.1	$5.5	$6.2	$6.8	$7.5
Total Dividend Paid	($7.6)	($8.8)	($9.0)	($9.1)	($9.4)	($9.7)	($10.2)	($10.6)	($11.2)	($11.7)	($12.4)	($13.1)
Total PSPA Draw Net of PSPA Dividends	$13.1	($6.5)	($8.4)	($6.4)	($5.8)	($5.7)	($5.8)	($5.5)	($5.7)	($5.5)	($5.6)	($5.6)
Projected End of Period Net Worth[2]	*($1.1)*	*($0.9)*	*($0.5)*	*($0.8)*	*($0.9)*	*($1.1)*	*($1.2)*	*($1.3)*	*($1.5)*	*($1.6)*	*($1.8)*	*($2.0)*
Percent of Dividends Funded by PSPA Draws	100%	26%	6%	30%	38%	41%	43%	48%	49%	53%	55%	57%
Dollar Amt. of Dividends Funded by Earnings	$0.0	$6.5	$8.4	$6.4	$5.8	$5.7	$5.8	$5.5	$5.7	$5.5	$5.6	$5.6
Cumulative Cash Dividends Funded by Earnings	**$0.0**	**$6.5**	**$14.9**	**$21.3**	**$27.0**	**$32.8**	**$38.6**	**$44.1**	**$49.7**	**$55.3**	**$60.8**	**$66.4**
Cumulative Net Return To Taxpayers By FY2023[3]	-	-	-	-	-	-	-	-	-	-	-	**$64.4**
Beginning PSPA Liquidation Preference	$72.2	$92.9	$95.2	$95.7	$98.4	$102.0	$106.0	$110.4	$115.5	$121.0	$127.2	$134.0
Total Gross Liquidation Preference	$20.7	$2.3	$0.5	$2.7	$3.6	$4.0	$4.4	$5.1	$5.5	$6.2	$6.8	$7.5
Cumulative Gross Liquidation Preference	$92.9	$95.2	$95.7	$98.4	$102.0	$106.0	$110.4	$115.5	$121.0	$127.2	$134.0	$141.5
Remaining PSPA Funding Capacity	*$150.0*	*$149.0* [4]	*$148.4*	*$145.7*	*$142.1*	*$138.1*	*$133.7*	*$128.6*	*$123.1*	*$116.9*	*$110.1*	*$102.6*
Cumulative Net PSPA Investment[5]	**$70.4**	**$64.0**	**$55.6**	**$49.2**	**$43.4**	**$37.7**	**$31.9**	**$26.4**	**$20.7**	**$15.2**	**$9.6**	**$4.0**

TREASURY-3850

Per annum projected PSPA draws and dividends



Projected PSPA funding capacity as a result of draws



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(5) The cumulative net PSPA investment decreases by the dollar amount of dividends funded by earnings paid to the U.S. Department of the Treasury.

EXHIBIT 2

No. 13-cv-1053-RCL

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

December 23, 2008

MEMORANDUM

To: Selected Agency Counsel

From: Ronald J. Tenpas RJT
Assistant Attorney General

Re: "Guidance to Federal Agencies on Compiling the Administrative Record" (January 1999)

In January 1999, the Environment and Natural Resources Division authored a document entitled "Guidance to Federal Agencies on Compiling the Administrative Record." That document identified issues that agencies may confront in assembling an administrative record. As explicitly stated in the document, it was intended only as internal Department of Justice guidance, and did not create any rights, substantive or procedural, nor did it limit the "otherwise lawful prerogatives of the Department of Justice or any other federal agency." As was stated in a recent brief by the Department of Justice, the 1999 memorandum "does not represent a formal policy of the Department of Justice, nor even an official directive of the Environment and Natural Resources Division (ENRD). The memorandum focuses on the compilation of an administrative record in the absence of a contemporaneous docket."

It has come to our attention, however, that outside parties have sought to use this 1999 document in litigation against federal agencies, and have argued that it supports a particular composition of the administrative record, or a particular process for its assembly. This memorandum serves to clarify that the January 1999 document does not dictate any requirement for, or otherwise provide binding guidance to, federal agencies on the assembly of the administrative record. The composition of an administrative record is left to the sound discretion of the relevant federal agency, within the bounds of controlling law. This is an agency responsibility in the first instance and the Supreme Court has made clear that an agency has discretion in how to create the record to make and explain its decisions. *See, e.g., Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544 (1978) (in rejecting the need for adjudicatory hearing in the context of rulemaking, the Court refers to the "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure" and noting that "the agency should normally be allowed to 'exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence. . . .'").

The Department of Justice has defended in litigation the legal position that deliberative documents are not generally required in an administrative record, and thus has also defended the position that in such circumstances no privilege log reflecting such documents would need to be prepared. The 1999 document should not be read as casting doubt on this legal position. Obviously,

specific statutory provisions and/or case law in the jurisdiction will play a significant role in determining the appropriate approach in a particular case. Agencies would likely benefit from having their own internal guidance regarding the contents and compilation of the record. An agency's guidance should, of course, be informed by applicable case law and the agency's experience and internal procedures.

Should you have any question about the development of agency procedures for compiling an administrative record, or the preparation of a particular administrative record, the Division would be pleased to consult with you. This memorandum is being sent to agencies with whom the Division frequently works, although it is available for use or reference by any federal agency.