Redacted Version

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., et al., *Plaintiffs,* v. THE UNITED STATES, *Defendant.*	)	No. 13-465C (Judge Sweeney)

PLAINTIFFS' PUBLIC REDACTED RESPONSE TO NON-PARTIES FEDERAL NATIONAL MORTGAGE ASSOCIATION'S AND MR. EGBERT PERRY'S SEALED MOTION TO QUASH PLAINITFFS' DEPOSITION SUBPOENA

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October 19, 2015

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Plaintiffs Fairholme Funds, Inc., et al. ("Plaintiffs") submit this response to the Federal National Mortgage Association's ("Fannie's") and Mr. Egbert Perry's Motion to Quash Plaintiffs' Deposition Subpoena (Oct. 9, 2015), Doc. 250 ("Fannie Mot.").

INTRODUCTION

As one of the longest-serving members of Fannie's Board of Directors, Mr. Perry has a unique perspective on many of the topics on which this Court authorized discovery, including (1) Fannie's future prospects and profitability when the Net Worth Sweep was consummated; (2) why the Government allowed the pre-existing capital structure to remain in place when Fannie was placed into conservatorship; and (3) the significance of the FHFA actions at issue in this case and whether those actions are attributable to the United States. [redacted]

In short, it is apparent that Mr. Perry has information that is highly relevant to issues before this Court, and Plaintiffs cannot obtain it without deposing him.

Under this Court's precedents, it is Fannie's burden to show that the Perry deposition subpoena should be quashed. Fannie cannot meet that burden, both because Plaintiffs have a compelling need to take the deposition and because any inconvenience to Mr. Perry is minimal when considered in the context of a serious legal challenge to the nationalization of the company on whose board Mr. Perry serves. Accordingly, the Court should allow Plaintiffs' deposition of Mr. Perry to go forward.

BACKGROUND

When the Court granted Plaintiffs' motion for discovery, Plaintiffs anticipated that the Government would begin producing relevant Fannie and Freddie materials in short order. After all, as the Companies' conservator, FHFA holds "title to the [Companies'] books, records, and assets." 12 U.S.C. § 4617(b)(2)(A). Applying a materially identical statute in the *Winstar* litigation, the Government took responsibility for producing documents on behalf of the financial institutions it controlled as conservator or receiver, *see* 12 U.S.C. § 1821(d)(2)(A), and Plaintiffs' counsel assumed that the Government would take the same approach here. To Plaintiffs' surprise, however, the Government refused to produce relevant Fannie and Freddie materials in this litigation.

Rather than consuming the Court's time with what would ultimately amount to a fairly inconsequential dispute over who should produce Company materials relevant to this case, Plaintiffs served the Companies with third-party document subpoenas on May 5, 2014 and informed the Court that they had done so at a status conference two days later. *See* Transcript of May 7, 2014 Status Conference 5:21–6:21, attached as Exhibit 1, A004. In the seventeen months since, both Companies have worked with Plaintiffs to respond to various discovery requests, making substantial document productions and agreeing to the depositions of the individuals who served as their Chief Financial Officers ("CFOs") when the Net Worth Sweep was announced in August 2012.

The Companies have produced a substantial amount of the important evidence that has come to light through discovery in this case. Perhaps most significant is the deposition testimony of former Fannie CFO Susan McFarland, [redacted]

[redacted] Transcript of Deposition of Susan McFarland 45:5–8 ("McFarland Tr."), attached as Exhibit 2, A010; *id.* at 59:15–60:1, A014, 158:7–10, A017, 164:6–12, A018. This information is of critical importance to the issues on which this Court authorized discovery, and the [redacted] did not emerge when Plaintiffs deposed Government officials who were involved in the Net Worth Sweep or in the documents the Government has produced in response to Plaintiffs' discovery requests. While Ms. McFarland's deposition revealed extremely important information that the Government might have otherwise been able to conceal, her deposition was also necessarily limited in scope. Ms. McFarland only joined Fannie as an employee in mid-2011, [redacted] and lacked a Board member's perspective on the factual issues before the Court.

Recognizing that a member of Fannie's Board of Directors would be uniquely able to speak to many of the subjects on which this Court authorized discovery—including Fannie's future and the significance of the key Treasury and FHFA actions at issue in this case—Plaintiffs noticed the deposition of Egbert Perry, who joined Fannie's Board of Directors in December 2008 and is currently its Chairman. Despite Plaintiffs' offers to limit the duration of the deposition or take other steps to limit the burden on Mr. Perry, Fannie filed a motion to quash the subpoena.

ARGUMENT

I. The Court's discovery order authorizes Plaintiffs to take discovery from Fannie, which is controlled by the Government and has extensive information relevant to this case.

Citing this Court's observation that certain relevant evidence is "in the possession of defendant only," *see* Discovery Order at 4 (Feb. 26, 2014), Doc. 32 ("Discovery Order"), Fannie half-heartedly argues that the Court's discovery order restricts Plaintiffs to seeking materials from the Government. Fannie Mot. 8. But when the Court issued its discovery order, the Government had not yet refused to produce relevant materials in the possession of the Companies, and it is inconceivable that the Court did not envision that Plaintiffs would seek materials in the possession of the very Companies whose nationalization they challenge. With the Government able to control Fannie as both its conservator and controlling shareholder, there is no reason to treat Fannie as distinct from the Government for purposes of the discovery in this case.

In any event, whether Fannie technically qualifies as a nonparty for purposes of discovery is ultimately of no moment because nothing in the Court's order forbids nonparty subpoenas,[1] particularly with respect to Fannie, which is not only directly affected by the Net Worth Sweep, but is (along with Freddie) the *central subject* of this litigation. While Fannie makes much of cases that say that nonparty status is a factor that weighs in favor of a motion to quash, Fannie Mot. 5–6, that factor loses much if not all of its force when the nonparty concerned is directly involved in the matter at issue. *See, e.g.*, *JZ Buckingham Investments LLC v. United States*, 78

[1] The Court previously rejected an argument made by the Government against allowing Plaintiffs to take third-party discovery, explaining that "if a Plaintiff needs discovery to meet the jurisdictional allegations raised by the United States," it would "let them have it." Transcript of Feb. 25, 2015 Status Conference 22:4–6, attached as Exhibit 3, A020; *see id.* at 20:15 to 31:22, A022–25.

Fed. Cl. 15, 26 (2007) (compelling discovery from a nonparty that "was not a complete stranger to the litigation and was in fact a major player in the transactions at stake"); *Peskoff v. Faber*, 2006 WL 1933483, at *3 (D.D.C. July 11, 2006) (ordering discovery from a nonparty and explaining that "this is not a situation . . . where a non-party is burdened by a subpoena relating to litigation to which it is has no or only a peripheral interest"). This litigation concerns the propriety of the Government's decision to wipe out Fannie's private shareholders—a decision that was informed by extensive information Fannie provided to the Government and that had major consequences for Fannie's capital structure and future prospects. Fannie cannot avoid its discovery obligations by pretending to be only peripherally connected to the issues before the Court.

II. Mr. Perry's position as Chairman of Fannie's Board of Directors is not a basis for shifting the burden of persuasion on Fannie's motion to quash to the non-moving party.

Fannie proposes to shift the burden of persuasion onto Plaintiffs, Fannie Mot. 6–7, but this Court's precedents are clear: "The burden of persuasion in a motion to quash a subpoena is on the movant." *Zoltek Corp. v. United States*, 104 Fed. Cl. 647, 656 (2012); *accord JZ Buckingham Investments LLC*, 78 Fed. Cl. at 19.

The analysis does not change because Mr. Perry is the Chairman of Fannie's Board of Directors. As with any motion to quash, "[t]he party moving to quash the deposition of a senior executive bears the burden of demonstrating that the proposed deponent has no personal or unique knowledge of the relevant facts." *Alex & Ani, Inc. v. MOA Int'l Corp.*, 2011 WL 6413612, at *4 (S.D.N.Y. Dec. 21, 2011). Accordingly, Fannie is simply wrong when it argues that one who seeks to depose a corporate officer or director must make a special showing that the deposition should go forward. To the contrary, "senior corporate and governmental executives

are subject to being deposed in litigation, just as any other employee may be," *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 2006 WL 3476735, at *12 (S.D.N.Y. Nov. 30, 2006), and "[t]he fact that the witness has a busy schedule is simply not a basis for foreclosing otherwise proper discovery," *Consolidated Rail Corp. v. Primary Indus. Corp.*, 1993 WL 364471, at *1 (S.D.N.Y. Sept. 10, 1993).

Fannie cites a string of cases that it says supports shifting the burden to Plaintiffs to justify Mr. Perry's deposition, but in many of its cases the prospective deponent submitted an affidavit swearing that he or she had no knowledge of issues relevant to the litigation—a step Fannie pointedly declined to take here. *See Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985); *Armstrong Cork Co. v. Niagara Mohawk Power Corp.*, 16 F.R.D. 389, 390 (S.D.N.Y. 1954); *Broadband Commc'ns, Inc. v. Home Box Office, Inc.*, 549 N.Y.S.2d 402 (N.Y. App. Div. 1990); *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 126 (Tex. 1995). In many of Fannie's other cases, the courts did not exclude the possibility that a senior corporate official could be deposed but only required that the party taking discovery first seek information from more junior employees. *Consolidated Rail Corp.*, 1993 WL 364471, at *1; *Baine v. General Motors Corp.*, 141 F.R.D. 332, 335 (M.D. Ala. 1991); *M.A. Porazzi Co. v. The Mormaclark*, 16 F.R.D. 383, 383 (S.D.N.Y. 1951); *Liberty Mutual Ins. Co. v. Superior Court*, 13 Cal. Rptr. 2d 363, 366 (Cal. Ct. App. 1992). Those cases are inapposite because, as discussed below, Board members like Mr. Perry have a unique perspective on relevant topics that would not be shared by more junior employees, especially considering that [redacted] The court in *Community Federal Savings and Loan Association v. Federal Home Loan Bank Board*, 96 F.R.D. 619, 620–21 (D.D.C. 1983), declined to allow a deposition because its review was limited to an administrative record. And in *Travelers Rental*

Co. v. Ford Motor Co., 116 F.R.D. 140, 143 (D. Mass. 1987), the court *permitted* the deposition of a senior corporate official to go forward. In short, all of Fannie's cases are distinguishable, and none of them justify reversing the usual rule that the burden of persuasion is on the party that moves to quash a subpoena.

III. Plaintiffs' substantial need to depose Mr. Perry outweighs the limited burden his deposition would impose.

In ruling on a motion to quash, this Court weighs the relevance of the information requested, the need of the requesting party, the breadth of the materials requested, and the burden that would be imposed on the producing party. *Zoltek Corp*., 104 Fed. Cl. at 656. Because Mr. Perry is uniquely positioned to provide highly relevant information and his deposition would impose only a minimal burden, Fannie has failed to show that the subpoena should be quashed.

A. Mr. Perry has information that is highly relevant to issues on which the Court authorized discovery.

Notably missing from Fannie's motion is an affidavit from Mr. Perry disclaiming knowledge of the subjects on which this Court authorized Plaintiffs to take discovery. The submission of such affidavits is routine when senior corporate officials seek to avoid being deposed, *see, e.g.*, *Crown Cent. Petroleum Corp.*, 904 S.W.2d at 126; *Mulvey*, 106 F.R.D. at 366, and Fannie's failure to produce any such evidence is a strong indication that Mr. Perry does indeed have significant knowledge that is relevant to issues before this Court. A review of documents Fannie produced confirms this fact and shows that, as a member of Fannie's Board of Directors since 2008, Mr. Perry has a unique perspective on Fannie's future and profitability, the FHFA and Treasury actions that led to Fannie's nationalization through the Net Worth Sweep, and the reasonableness of Plaintiffs' investment-back expectations.

Fannie's Board of Directors meeting minutes show that Mr. Perry participated in numerous Board discussions of issues relevant to the topics on which this Court authorized discovery. Among other things, Mr. Perry was present for the Board's discussion of [redacted] FM_Fairholme_CFC-00000303 at A029, attached as Exhibit 4, [redacted] FM_Fairholme_CFC-00000311 at A033, attached as Exhibit 5, and [redacted] FM_Fairholme_CFC-00003038 at A039, attached as Exhibit 6. Such discussions directly relate to Fannie's future prospects and profitability, whether FHFA acted on behalf of the United States when it adopted the Net Worth Sweep, and the reasonableness of Plaintiffs' investment-backed expectations—all topics on which this Court authorized discovery. Moreover, as one of the longest-serving members of Fannie's Board of Directors, Mr. Perry has a unique perspective on the coordinated FHFA and Treasury actions relevant to this case—a topic critical to the "fact-intense inquiry" into whether FHFA's decision to agree to the Net Worth Sweep is attributable to the United States. *See* Discovery Order at 3.

Fannie does not seriously dispute that Mr. Perry possesses relevant information but it argues that his deposition would be redundant with information Plaintiffs were able to glean by deposing Ms. McFarland. But Ms. McFarland joined Fannie as its CFO in mid-2011, McFarland Tr. 15:10–12, Exhibit 2 at A009, and she therefore was not able to address events in 2008 that are relevant to this litigation. Mr. Perry, in contrast, joined Fannie's Board in December 2008, just months after imposition of the conservatorship, and will therefore be able to answer questions about the early days of Fannie's conservatorship and his understanding of the status of

private shareholders' investments and FHFA's goals when the conservatorship began. *See* Discovery Order at 4 (authorizing discovery into "why the government allowed the preexisting capital structure and stockholders to remain in place" when the conservatorships were imposed).

Even with respect to events that occurred after Fannie hired Ms. McFarland, Plaintiffs' deposition of Mr. Perry would be far from redundant. Fannie's Board meeting minutes show that [redacted] Significantly, on numerous occasions, the Fannie Board [redacted]. *E.g.*, FM_Fairholme_CFC-00003177 (Sept. 14, 2012), attached as Exhibit 7 at A043; FM_Fairholme_CFC-00003126 (May 18, 2012), attached as Exhibit 8 at A052; FM_Fairholme_CFC-00003107 (Mar. 23, 2012), attached as Exhibit 9 at A061; FM_Fairholme_CFC-00003075 (Nov. 18, 2011), attached as Exhibit 10 at A067; FM_Fairholme_CFC-00003134 (July 15, 2011), attached as Exhibit 11 at A069. Fannie's Board meeting minutes provide little detail about [redacted], but there can be no doubt that they give Mr. Perry a perspective on FHFA's actions that is relevant to, at a minimum, whether FHFA is the United States and that Ms. McFarland was not able to provide.

Even when a litigant seeks to depose a corporation's senior officers or directors, a court should not "be in a position of second-guessing counsel's judgment except when counsel goes beyond the pale . . . and seeks discovery for which there is no factual basis or which is taken in bad faith or for tactical advantage or solely for the purpose of harassment or oppression." *Travelers Rental Co.*, 116 F.R.D. at 147. Fannie has not even alleged, much less supported, that any such improper purpose motivated Plaintiffs' decision to notice Mr. Perry's deposition. In

light of the evidence outlined above, Plaintiffs' counsel has determined that Plaintiffs should use one of their ten available depositions to depose Mr. Perry. There is ample basis for allowing the deposition to proceed.[2]

B. The limited burden a deposition would impose on Mr. Perry is justified by Plaintiffs' need to depose him.

While Fannie contends that sitting for a deposition would be a serious inconvenience for Mr. Perry, Fannie Mot. 12–13, it neglects to mention that Plaintiffs previously offered to minimize this inconvenience by restricting his deposition to a maximum of four hours. That offer still stands, and Plaintiffs are otherwise willing to take any reasonable steps that would reduce the cost and inconvenience of Mr. Perry's deposition.

In any event, the burden of complying with the subpoena—a few hours of Mr. Perry's time—must be considered in light of the subject matter and stakes of this litigation. Plaintiffs challenge the Government's refusal to pay just compensation for the Net Worth Sweep, an action that effectively nationalized the company on whose Board of Directors Mr. Perry sits. Few (if any) decisions that the Board has made since Mr. Perry joined it have been more consequential than the Net Worth Sweep, which permanently cripples Fannie by guaranteeing that it will never be able to rebuild capital and wipes out its private shareholders. In light of the significance of

[2] Fannie suggests in passing that the Court should restrict Plaintiffs to serving Mr. Perry interrogatories rather than permitting his deposition. Fannie Mot. 13–14. But "[w]ritten interrogatories are rarely, if ever, an adequate substitute for a deposition when the goal is discovery of a witness' recollection of conversations," *Shoen v. Shoen*, 5 F.3d 1289, 1297 (9th Cir. 1993), and the contents of Mr. Perry's conversations with FHFA officials is among the key topics on which Plaintiffs intend to examine Mr. Perry. Given the importance of those conversations and the other subjects on which Plaintiffs seek to depose Mr. Perry, the benefits of live testimony easily outweigh its costs. *See Zito v. Leasecomm Corp.*, 233 F.R.D. 395, 397 (S.D.N.Y. 2006) ("Written questions are rarely an adequate substitute for oral depositions both because it is difficult to pose follow-up questions and because the involvement of counsel in the drafting process prevents the spontaneity of direct interrogation.").

the Net Worth Sweep and Plaintiffs' challenge to it, it is hardly surprising that this case is discussed in Fannie's most recent quarterly SEC filing. Fannie Mae, Second Quarterly Report at 150 (Form 10-Q) (Aug. 6, 2015), http://goo.gl/mhq2Fi. Plaintiffs are not asking Sam Walton to testify in a slip and fall case against Wal-Mart or proposing to depose Lee Iacocca about the particulars of the fuel system of a 1975 Dodge Van. *See Wal-Mart Stores, Inc. v. Street*, 754 S.W.2d 153, 154 (Tex. 1988); *Mulvey*, 106 F.R.D. at 365. Rather, Plaintiffs have a concrete and particularized need to depose Mr. Perry as part of a serious legal challenge to Government action that dramatically and fundamentally altered Fannie's capital structure and future prospects. Under these circumstances, requiring the Chairman of Fannie's Board to sit for a deposition is entirely reasonable.

CONCLUSION

The motion to quash Mr. Perry's deposition subpoena should be denied.

Date: October 19, 2015

Respectfully submitted,

s/ Charles J. Cooper
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 19th day of October, 2015, via the Court's Electronic Case Filing system.

s/ Charles J. Cooper
Charles J. Cooper

APPENDIX

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EXHIBIT 1

In the Matter of:

Fairholme Funds, Inc., et al. v. USA

May 7, 2014

Condensed Transcript with Word Index

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UNITED STATES COURT OF FEDERAL CLAIMS

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

Courtroom 8
Howard T. Markey National Courts Building
717 Madison Place, N.W.
Washington, D.C.
Wednesday, May 7, 2014
11:00 a.m.
Status Conference

BEFORE: THE HONORABLE MARGARET M. SWEENEY

Elizabeth M. Farrell, CERT, Digital Transcriber

APPEARANCES:
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P R O C E E D I N G S
- - - - -

(Proceedings called to order at 11:03 a.m.)

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

THE COURT: Good morning, Counsel. Please be seated.

ALL: Good morning, Your Honor.

THE COURT: Would counsel who are in the courtroom please identify themselves for the record?

MR. COOPER: Yes, certainly, Your Honor. Good morning, Judge Sweeney, my name is Charles Cooper with Cooper and Kirk. I represent the Plaintiffs in the action before you, Fairholme and the Berkeley Insurance entities. I'd like to introduce as well my colleagues, if I may. With me is my partner, David Thompson.

MR. THOMPSON: Good morning, Your Honor.

MR. COOPER: Also, my partner Vince Colatriano.

MR. COLATRIANO: Good morning, Your Honor.

MR. COOPER: Our colleague and associate, not a lawyer, Scott Proctor. I'd ask your permission to allow him to remain above the Bar, Your Honor.

THE COURT: Of course.

MR. PROCTOR: Good morning, Your Honor.

THE COURT: Welcome.

MR. COOPER: And also with me, but only telephonically, are two other colleagues, Nicole Moss and Brian Barnes.

THE COURT: Good morning to both of them.

And for the United States, I recognize Mr. Dintzer.

MR. DINTZER: Good morning, Your Honor.

THE COURT: Good to see you again. How are you?

MR. DINTZER: And in Washington, D.C.

THE COURT: Yes.

MR. DINTZER: I'm here today representing the United States Department of Justice, and with me at counsel table is Elizabeth Hosford --

THE COURT: Good morning.

MR. DINTZER: -- and Gregg Schwind, both from our office.

MR. SCHWIND: Good morning, Your Honor.

THE COURT: Good morning.

MR. DINTZER: And Mr. Schwind will be addressing the Court today on the matters before the Court.

THE COURT: Very good. Thank you very much.

MR. DINTZER: Thank you, Your Honor.

THE COURT: Whenever counsel are ready to proceed.

MR. COOPER: Thank you very much, Judge Sweeney.

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Again, good morning. Charles Cooper. I first want to say it's a great privilege to appear before you in your courtroom. This is our first meeting, but I and my colleagues have spent much time in the Court of Federal Claims over the years, and we're happy to be here.

Your Honor, we're first very mindful of the burdens on the Court's time and, so, we're grateful for your time this morning and, more broadly, for the Court setting, essentially every two weeks, time aside -- court time aside to continue to monitor on a real-time basis the discovery process between the parties in this case.

Our purpose this morning is really not to bring you an issue or dispute for resolution, but rather to alert you to a couple of things first, things that you will be treating with in due course and quickly. First is an unanticipated complication that has arisen in the case and, secondly, a very serious dispute that has already matured between the parties as a result of the Government's responses to our document requests pursuant to the discovery authorizations contained in the Court's order.

The unanticipated complication is that the Justice Department has taken the position now that it will not gather and will not produce any documents that it says are in the custody and control of the companies, Fannie Mae and Freddie Mac. It says those documents are not in the control and

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custody of the Federal Housing Finance Authority, FHFA. We did not anticipate that wrinkle, largely because of our experience really in the Winstar litigations and in many others where the Government has assumed the responsibility and acknowledged its custody and control over documents that are documents generated and within the entities that are under conservatorship or receivership.

So, this was not something we had anticipated, particularly in light of the Government's position under the statute, which is very similar, if not identical, to the provisions under FIRREA, where the Winstar cases were litigated, that it has assumed all the rights, responsibilities, obligations, blah, blah, blah, of the entities under conservatorship, of the directors, the stockholders and other stakeholders within the companies themselves.

So, that -- in light of that, we have now filed -- served upon the companies themselves third-party document requests, and we shall see what now follows in train, but, again, this is not something we had anticipated and it will likely complicate matters as we go forward.

The dispute, Your Honor, that has now matured into a firm condition arising from really the Government's wholesale refusal to produce any documents relating to most of the disputed factual issues that were the foundation for

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this Court's orders authorizing discovery.

And with your indulgence, I would like to take just a few minutes to kind of preview for the Court what the nature of those disputes are. And, first, if I may, I think it's important to outline for the Court the essential gravamen of our taking claim in this case. Back in September of 2008, when FHFA placed Fannie and Freddie in conservatorship -- and I stress conservatorship not receivership -- with its intended husbanding and gathering of the assets and liquidating the assets, but rather conservatorship, then director James Lockhart of the FHFA publicly assured the public as follows:

"Conservatorship is a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations. FHFA will act as the conservator to operate Fannie and Freddie until they are stabilized."

At the same time as the conservatorship was created, FHFA specifically assured the public that the companies' existing capital structure would remain intact and that the property rights of the existing private stockholders would be protected. This is what they said: "During the conservatorship, the Company's stock will continue to trade ... Stockholders will continue to retain all rights in the stock's financial worth." So that if their purpose is

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succeeded, if the conservatorship did what it was designed and statutorily essentially required to do, which is try to restore them to safety and soundness, then the private stockholders would benefit from those good efforts as well.

Well, four years later -- and I'm getting a little ahead of myself -- in connection with the conservatorship, of course, the Treasury Department agreed to provide funding for those then troubled institutions, Fannie and Freddie. And in return essentially got senior preferred stock that carried an annual dividend of 10 percent. Those are the essential terms. But, in addition, it got warrants for 79.9 percent of Fannie and Freddie's common equity. So, the Government itself received, as a result of that negotiation, a very substantial stake in Fannie and Freddie's future profitability.

Four years later, the conservatorship succeeded. The entities were restored to stable -- they were stabilized. In fact, not only stabilized, but restored to record profitability, profits like Fannie and Freddie had never seen before. But just as Fannie and Freddie were returned to stable profitability and said, we expect to make profits for the foreseeable future in their own stock filings, at the time and thereafter, the Government decided to amend the original deal.

Treasury and FHFA entered the third amendment,

which contained the so-called net worth sweep, the sweep amendment, which said, essentially, the 10 percent dividend isn't good enough anymore. From now on, Treasury will receive 100 percent dividend, all profits, the entire net worth of both entities going forward in perpetuity, and that the entities will not be allowed to restore capital, build capital, will not be allowed to essentially return to the market in their pre-conservatorship condition, the original premises and, in fact, the statutory premises of conservatorship itself.

Your Honor, you, in the light of all that and in the light of the Government's motion to dismiss and the factual disputes that it created between the parties relating to three defenses that were asserted in that motion to dismiss, granted Plaintiffs the authority to take limited discovery into those three areas. They were relating to the Government's claim that our takings case is not ripe; secondly, to their argument that this Court has no jurisdiction over the Tucker Act because they said, hey, FHFA, as conservator, is not the United States; and, finally, related to the merits of our takings claim and the prong of the Penn Central test that we have to show a reasonable investment-backed expectation.

So, in light of the Government's factual assertion in connection with two of those, that is its ripeness defense

and its argument that we lacked any reasonable investment-backed expectation, the Court authorized discovery into the Government's assessments of Fannie and Freddie's future profitability and into the related subject of why the Government had allowed preexisting capital structure to remain in place and whether that was at least impartial recognition of future profitability of the entities.

In its responses to our document requests, the Government takes the position that it will not produce any documents, one, that relate to the operations of Fannie and Freddie, including their future profitability. Two, no documents that relate to the Government's assessment of Fannie and Freddie's future of profitability at the time of the net worth sweep, at the time when the deal was changed and they imposed the net worth sweep, the critical moment when -- when, presumably, our investment-backed expectations would be tested and when we believe our takings claim became ripe.

Three, no documents that relate to the Government's assessment of the value of its warrants to purchase 79.9 percent of the common equity of these entities, in its own stake, negotiated stake in the future profitability of those entities, no documents that relate to that.

Finally, four, no documents that relate to Fannie and Freddie's original obligation to pay the 10 percent

dividend on the Government's senior preferred stock.

The second area, Your Honor, that the Court authorized discovery that was ripe in this related discovery, concerned questions of when and how Fannie and Freddie will be allowed to exit conservatorship, if at all. Remember, our position is that decision's been made. They are not going to be allowed -- we will never -- the Government's compass is set and the private shareholders will never be allowed to participate in any profits no matter how record-breaking they become, no matter how solvent the entities are.

But the Government has taken the position that it will not produce any documents, one, that relate to the Government's own standards or other considerations for determining when, whether and how the corporate -- the conservatorships of Fannie and Freddie may be terminated; essentially, the essential issue on which this Court allowed discovery. But there's more.

Secondly, they'll produce no documents that relate to the Government's decision to ensure that the existing private shareholders will not have access to any future profitability of Fannie and Freddie, again, a decision that they've all -- they made clear, or at least has become clear from internal documents produced in a different case, a parallel case, and that's the Government's own -- Treasury's anyway -- own commitment.

And, third, they'll produce no documents that relate to the Government's decision to wind down Fannie and Freddie and to ensure that they will not be allowed to continue in -- or to return to their pre-conservatorship market status. No documents that relate to those issues. Essentially, a wholesale refusal on this important subject matter of the Court's discovery order.

The final area, Your Honor, is this Court authorized discovery, and to the Government's argument that the FHFA is not the United States and, therefore, our claims aren't ripe, and even if they were, we have no taking claim against an entity other than the United States, so the merits are meritless.

The Court recognized, in your order, that this question, whether or not FHFA is the United States even when it is purported to act as the conservator is an intensely fact-based inquiry that examines the purposes of FHFA and its actions. And that that includes considerations that -- as to whether or not the FHFA was, in effect, acting as an agent of Treasury. And that, of course, is our allegation. That's our clear factual allegation, that they were acting at the direction of the Treasury and in collusion with Treasury.

The Government has interpreted that authority for discovery very narrowly, Judge Sweeney, essentially taking the position that it will produce only documents related to

whether FHFA acted at the direct behest of Treasury in agreeing to the net worth sweep. Now, of course, that language comes out of this Court's order in -- amidst a lot of other language. And we don't expect to find any documents in the Government's warehouse that -- in which the Government will -- the Treasury will have said to FHFA, you will do as you're told. But we -- but, Your Honor, we expect to find a lot of documents that will support and demonstrate that the Treasury was in the driver's seat every step of the way here. Already much has surfaced, as we've outlined in our papers to this Court, that strongly suggests that, if not prove it outright. But we are certain that the discovery -- we are highly confident, I should say, that the discovery will show that Treasury was in that driver's seat.

But the Government has said no documents will they produce relating to FHFA's determination that it is obligated to maximize the return of the Treasury. They've stated that explicitly, that is, FHFA has stated that's their obligation. They have denied any obligation to the shareholders. Their obligation is to maximize return. Well, that's -- that, by itself, Your Honor, suggests the answer to the inquiry, but in terms of FHFA's status, vis-a-vis, Treasury.

But in any event, we've got no documents that relate to that. We've also got no documents relating to communications on this subject, relating to the net worth

sweep that may have taken place between Treasury and FHFA, its leadership, or Treasury and/or FHFA and the companies. Anything related to net worth sweep, they say those communications they won't produce.

Your Honor, they have a variety of reasons for that. You will see them. But -- and it's not my purpose here to short circuit the process the Court has put in place, but rather, as I think the Court anticipated from the generous scheduling of regularized conferences, mainly to keep this Court aware on a real-time basis as things arise. But according to this Court's procedural expectations, the Government will be coming forward with a protective order, and that will be briefed up in due course, on these and the many related skirmishes that I haven't thought rose to the level to mention to you here this morning.

So, that's my purpose. Again, thank you very much for, again, holding your courtroom open for these purposes. I am fairly confident and always have been that we will be tolling upon the Court's good offices over the course of this discovery frequently. Thank you.

THE COURT: Well, that's fine. And I look forward to hearing from Mr. Dintzer in just a moment, but just so you know, it was -- I don't know what -- I believe it was the Plaintiffs' suggestion that I conduct the -- or at least give the parties the option of having a status conference

concerning discovery with the Court every two weeks, and that's my role as a judge to help smooth the waters where I can.

Just so you know, it's my policy in every single case -- I say this at every initial scheduling conference with the parties right after the JPSR is filed, to immediately contact my office when there's an impasse in discovery because I'd rather diffuse the situation than have -- forgive the metaphor -- the pot boil and then have warring factions in front of me. There's no need for that. Whenever I can help the parties navigate the -- or set down the rules of the road so we know where we're going, that's always the best way to proceed. Otherwise, people just get spun up and we're -- I wouldn't say that these counsel involved in this case would get spun up, but it does happen in other cases.

And, so, rather than have people exchanging rather unpleasant emails and letters, this is just, I think, the best way to proceed, or at least it's my practice. So, we'll move forward.

MR. COOPER: Thank you, Your Honor, understood. And we very much welcome the Court's active management. That's very refreshing. If only that were the case everywhere that we all practice, but thank you very much.

THE COURT: I do have one question, unless I should save this for the Justice Department, but I guess it was in

docket number 39, reply in support of Defendant's proposed plan for discovery, the Justice Department notes that the District Court has -- I guess there's a -- docket 33 and 34 in the Fairholme case that's -- I believe it's in front of Judge Lamberth --

MR. COOPER: That's right.

THE COURT: Someone that I esteem and admire greatly and who spoke at my --

MR. COOPER: Investiture?

THE COURT: -- introduction to the -- my investiture, thank you. There was -- I guess you all were awaiting a ruling from him on the motion to supplement the administrative record. Now, I also from -- my wonderful law clerk has told me there have been many things that have been filed on that docket and, so, it could very well be that Judge Lamberth has not had an opportunity yet to rule. But I will just ask you as of checking early this morning, there did not appear to be a ruling. Are we either mistaken or have we missed something in the past hour or two?

MR. COOPER: Well, Your Honor, if you've missed something in the past hour or two, so have I. And I'm seeing no correction from my colleagues. So, we haven't had movement from Judge Lamberth on those pending requests.

Just to fill out the Court's background here, Judge Lamberth really inherited this case from Judge Wilkins, who

EXHIBIT 2

REDACTED

EXHIBIT 3

In the Matter of:

Fairholme Funds, Inc., et al. v. USA

February 25, 2015

Condensed Transcript with Word Index

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justice to somehow increase the comfort level of a plaintiff that we are being diligent, that we are being fair, we are being honest.

So, I would ask you if by the end of March if you would carve out part of your day to meet with Mr. Thompson and/or Mr. Cooper or whomever, and just spend a couple of hours with them just to have an initial -- you may not cover the entire universe of documents. I know that couldn't be accomplished, but maybe if you could just take -- you and some of your colleagues could take some time, would you be willing to do that?

MR. SCHWIND: Yes, Your Honor, to the extent -- again, it's a category-type challenge. And maybe we can talk to Plaintiffs' counsel about this, but the minute it descends into a document-by-document challenge, that's where we're somewhat more resistant.

THE COURT: Okay, can we agree to that?

MR. THOMPSON: Yes, Your Honor. And I would point out, I think the bank examination privilege that Mr. Schwind points to is a perfect example of why we thought it was ripe to bring a motion to compel now. We may not know whether there are going to be five documents or a hundred documents that the bank examination privilege is going to be asserted to, but we know they're going to assert it, we know we're going to contest it, and rather than having that resolved at

the end of discovery and maybe having to reopen depositions if we prevail and we get additional documents.

We thought it would be sensible to tee that categorical question up now, perhaps leaving aside specific documents, where we could get the Court's guidance. It's a live controversy. They're going to assert it. And then we could move forward and it would really narrow down the document-by-document type of discussion. So, that's -- that was our contemplation and what we'd like to do.

THE COURT: Well, so, what we will do, then, what you all will do by the end of March is you will take a macro, not micro, a macro approach to the various categories of documents where privileges may be asserted. Is that fair?

MR. SCHWIND: Yes, Your Honor.

THE COURT: Okay.

MR. THOMPSON: Thank you, Your Honor.

THE COURT: That satisfies?

MR. THOMPSON: Yes, thank you.

THE COURT: Do you have your calendars here today?

MR. SCHWIND: I do not.

THE COURT: All right. Are you available to have a telephone conference with Mr. Thompson either today or tomorrow to discuss dates and times --

MR. SCHWIND: Yes.

THE COURT: -- for the end of the month?

MR. SCHWIND: And we've had no problem scheduling phone calls.

MR. THOMPSON: Yeah.

MR. SCHWIND: I mean, there's -- that's not at issue.

THE COURT: Okay. Well, then, what I would ask is if you would confer today and then just contact my Chambers. You may call Ms. Ahmed and let her know what the date in that you will be meeting in March, and I will put that in an order so it will be reflected.

MR. THOMPSON: Thank you, Your Honor.

THE COURT: All right? Is that -- is that all right? Again, and I'm not -- really, this is just simply cooperation. I'm just noting the Government's cooperation. You know, Mr. Schwind, I think you hung the moon. I think you're a great guy. You're a fine lawyer. You're the perfect public servant, so -- but I just --

MR. SCHWIND: Well, I can say, Your Honor, is it not sufficient for the Government to state here on the record, we will meet and confer in good faith with Plaintiffs well before --

THE COURT: Absolutely. You know what, that's fine.

MR. SCHWIND: -- the end of March.

THE COURT: I'm just -- I just -- I thought if you

wanted a deadline, I would just put it in the order, but that's fine. If that's sufficient for you, that's fine with me.

MR. THOMPSON: That's fine, Your Honor.

THE COURT: That's good. That works. That's good. All right.

MR. SCHWIND: Thank you.

THE COURT: Fine.

MR. THOMPSON: Thank you, Your Honor.

THE COURT: Is there anything else for the Plaintiff?

MR. THOMPSON: Nothing further, Your Honor.

THE COURT: Is there anything else for the Government this morning?

MR. SCHWIND: Yes, Your Honor, one final issue. And that has to do with our concerns regarding Plaintiffs continuing and expanding third-party discovery in this case. And we touched on this briefly at the last status conference, and I'd like to devote a few more minutes to it this morning.

I'd like to start by reminding the Court of the obvious, that we are still at the motion-to-dismiss stage in this litigation. We are not in merits discovery where third-party discovery might be more common and is more common. We filed our motion to dismiss over a year ago. As the Court knows, we raised multiple bases that we believe as a matter

of law require the Court to dismiss Plaintiffs' complaint, even assuming the facts in Plaintiffs' complaint as true.

Plaintiffs then responded with their motion for discovery, also in December 2013, saying they needed some discovery from the Government in order to meet -- I think there were three particular issues that they picked out, that were raised by the motion to dismiss.

THE COURT: Are you suggesting there's something unprincipled or improper about seeking discovery from a third party that would prove the jurisdiction of this Court or that would support it?

MR. SCHWIND: In this case, it is improper, Your Honor, given that Plaintiffs in their motion for discovery stated only that they needed -- that the need -- and this is articulated in a declaration from counsel for Plaintiffs, the need they said --

THE COURT: Well, but why would -- I mean, in this Court, the only defendant is the United States Government, so is silence with respect to other individuals a commentary that -- or an affirmation that no other discovery would be taken from any other individuals? Or is it -- I'm just --

MR. SCHWIND: The short answer, Your Honor, is absolutely yes. I mean, we are, again, at the motion-to-dismiss stage where discovery is highly unusual. Now, we're not relitigating that motion for discovery. We are saying

that the Court granted limited discovery, given Plaintiffs' stated need for discovery to meet certain aspects of our motion to dismiss.

THE COURT: But if a Plaintiff needs discovery to meet the jurisdictional allegations raised by the United States, let them have it.

MR. SCHWIND: Well, they didn't make that argument, Your Honor. They have not asked the Court for discovery from third parties. They asked the Court for discovery from Government agencies. That's our point. What Plaintiffs are doing, essentially they've arrogated to themselves and then expanded this right to discovery in this case. And we do think under the circumstances it's improper. We --

THE COURT: But wouldn't that be for the third-parties to have their counsel come in and complain?

MR. SCHWIND: Certainly --

THE COURT: Rather than the United States?

MR. SCHWIND: No, Your Honor. Certainly, the third parties have their reasons to object, and --

THE COURT: Is that because it might show the United States controls those third parties?

MR. SCHWIND: No, Your Honor. The United States does not control these third parties. We're talking about one of the --

THE COURT: Who are the third parties?

MR. SCHWIND: -- we're talking about one of the big three bond credit rating agencies, Moody's.

THE COURT: Okay. Okay.

MR. SCHWIND: The United States does not control Moody's. We're talking about --

THE COURT: So, I don't know who the third parties are.

MR. SCHWIND: -- two major accounting forms, Deloitte -- Deloitte and PricewaterhouseCoopers, and that's the kind of -- that's how far we've gone astray from Plaintiffs' request for discovery from the Government agencies, to see, the Court will recall, the main question is whether or not FHFA was controlled by Treasury, whether FHFA acted at the behest of Treasury when it executed -- when it entered into the third amendment.

THE COURT: Well, why aren't those -- why aren't the lawyers for the third parties coming in?

MR. SCHWIND: Your Honor, we don't know what the -- again, those are independent companies. We're not telling them what to do. All we are saying --

THE COURT: But -- but if they have -- but if a third party has a complaint or -- what is the connection -- I guess what I -- what I'm -- and I apologize, Mr. Schwind, really. I'm not trying to give you a hard time. It's just I'm trying to wrap my head around the Government complaining

about a third party responding to discovery. If a third party is served with a discovery request by the Plaintiff, it's up to that third party to come in and complain to me, not the United States Government.

MR. SCHWIND: With respect, Your Honor, we believe that is not a correct statement of the law.

THE COURT: Okay.

MR. SCHWIND: We think that where this discovery does place some type of burden on a party, such as us. And --

THE COURT: What's your -- what is your authority?

MR. SCHWIND: The authority, Your Honor, is that the burden -- well, for standing, there are plenty of cases out there, for example, that talk about if that third party production impinges on the Government assertions of privilege. Some of these documents we may, the United States, need to reach out and assert privilege on, but because Plaintiffs have done the end-around, it would deny us that opportunity. It doesn't recover all the third-party discovery they request, but it definitely covers some of it.

But the fundamental point is that when this third-party discovery creates a burden on us, and we're talking -- we heard the last discovery -- at the last status conference that one of the accounting firms or both have produced almost as much or more documents than we have in this litigation,

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but now we have that burden of reviewing all these documents.

We know, for example, recently that Plaintiffs have approached counsel for Fannie Mae and Freddie Mac seeking to depose their current chief executive officers and their former chief financial officers. That is obviously a burden on us to prepare for these depositions. And, so, we see that just growing and growing and growing, this third-party discovery that does, again, create a burden on us. And we think under the circumstances we certainly have standing to object and say no, particularly where we are at the motion-to-dismiss stage.

Plaintiffs asked for limited discovery just from Government agencies, essentially that was part of the deal. The Court allowed that, and now we feel like somewhat we're being subjected to a bait-and-switch, where now Plaintiffs are saying, well, we're going to now seek all this other material. So, we do intend to bring this -- raise this in a motion for the Court's attention. We would appreciate Your Honor today, again because this has happened and all this -- these conversations are going on without Government counsel. You know, the Plaintiffs are reaching out to these major firms without us and perhaps negotiating discovery. We don't know what they're negotiating.

What we would ask from the Court this morning is that the Court simply direct Plaintiffs to stop third-party

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discovery until the Court has a chance to rule on our motion. We think Plaintiffs should have to come --

THE COURT: I want to have -- I want a motion in front of me with authority. I want you to explain the burden, explain the obligation. I'm not going to enter -- hamstring the Plaintiff until I see things laid out.

MR. SCHWIND: Well, we can definitely do that, Your Honor, but, again, when --

THE COURT: I mean, this --

MR. SCHWIND: -- these subpoenas -- these subpoenas the Plaintiffs are serving on major companies, you know, have a certain time frame as to which those companies have to respond.

THE COURT: And if --

MR. SCHWIND: And what we are concerned --

THE COURT: -- and not only that, but if third -- if a privileged document is produced, there are remedies, there are remedies for that, which you know. So, but -- proceed.

MR. SCHWIND: Well, our -- Your Honor, again, our fundamental point is that this Court -- Plaintiffs did not request, and this Court certainly did not authorize Plaintiffs to seek discovery from wherever they wanted. Again, at this stage of this, we are not at the point at which Plaintiffs appear to be transforming this case into

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merits discovery, trying to prove up allegations in their complaint, as opposed to simply figure out whether or not this Court has jurisdiction, whether FHFA acted at the behest of Treasury.

It seems strange to us. And I don't want to go to any more extreme adjectives, but at least strange to us that for this Court to figure out whether or not it has jurisdiction over Plaintiffs' complaint, the Plaintiffs get to go out to Deloitte, Pricewaterhouse, Moody's, and other firms for documents. We think that's entirely incongruous, inappropriate, and rather strange. And that's why, again, given that there are time frames on this discovery and it will take the Court --

THE COURT: I don't know if it is or not. I don't know what's been requested. I don't know what's been produced.

MR. SCHWIND: Well --

THE COURT: It may help them.

MR. SCHWIND: -- we don't know either, Your Honor. But, again --

THE COURT: Well, then, if you don't know what it is, then you're just making it up as you go along.

MR. SCHWIND: We're definitely not, Your Honor. And --

THE COURT: Well, of course you are. You're saying

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you don't know what they've asked for, you don't know what's been produced. Oh, by the way, but it simply goes to merits, and it can't possibly help them with respect to their jurisdictional defenses or their jurisdictional allegations.

MR. SCHWIND: This is why, Your Honor, we are asking in our motion that Plaintiffs demonstrate that before going out there and embarking on third-party discovery. For example, Plaintiffs said in their motion for discovery they only needed discovery from the Government. It made sense, whether or not, for example, whether FHFA acted at the behest of Treasury. It has to do with the relationship between FHFA and Treasury, not the relationship between Fannie Mae's auditor and Fannie Mae, for example.

So, we don't think -- well, Plaintiffs have never come forth and established why this is necessary. The Court has never agreed with Plaintiffs that this type of discovery is necessary. It does create a burden on us. And, again, given the time frames, we think it would be wise for the Court simply to say -- and we're going to file our motion probably within -- within two weeks.

THE COURT: Well, that's fine. I just -- I just don't -- as I sit here today, I mean, I don't have every pleading that's ever been filed in front of me memorized. I don't remember a declaration from counsel stating that in no uncertain terms that the Plaintiffs would not seek -- I'm not

saying you're making it up. I just -- I just didn't remember them saying affirmatively they would not seek discovery from third parties.

MR. SCHWIND: Your Honor --

THE COURT: And I'm not saying they didn't say it. I'm just saying I just don't recall. And --

MR. SCHWIND: Okay. In the motion for discovery dated December 20th, 2013, there was a declaration -- the motion itself, that has the declaration attached to it justifying the need for the documents that they said they needed. Every category of document they said they needed was filed with some statement that the discovery should include documents in the possession of Treasury, FHFA, and/or other relevant government agencies. At no time did they say in their motion or in their reply they would go outside of that.

THE COURT: Well, is there something --

MR. SCHWIND: And I would say, Your Honor --

THE COURT: -- in that declaration that says that they will not, that they would refrain from seeking discovery from a third party?

MR. SCHWIND: No, Your Honor. And, again --

THE COURT: Okay, well, that's -- okay, fine.

MR. SCHWIND: -- you can't --

THE COURT: Thank you. There's -- thank you.

MR. SCHWIND: Well, Your Honor, we understand what

the Court's saying, but again, we have been -- this is --

THE COURT: Well, yeah, it's a big distinction. You said -- you made an affirmative statement to me that the Plaintiffs said they would not seek third-party discovery.

MR. SCHWIND: No, Your Honor. What I said was that Plaintiffs never said they would seek third-party discovery, and the Court never -- that is what I said, Your Honor, Plaintiffs have never said, prior to serving the first few subpoenas on Fannie Mae and Freddie Mac, that they were seeking third-party discovery, not in their motion for discovery, not in their reply.

Again, the Court never had that before it. And I'm sorry if I've -- if I've suggested otherwise, but that is what's in their motion, Your Honor. This is -- this came as a surprise to us. We've allowed it to continue. We allowed it to continue for some -- again, document productions from Fannie Mae and Freddie Mac, even from the auditors, but we don't see an end to it. This has never been authorized by the Court. It is disruptive. It is burdensome. And we do intend to bring it to the Court's attention.

THE COURT: That's fine.

MR. THOMPSON: The Court -- Your Honor, if I may just very briefly --

THE COURT: Certainly.

MR. THOMPSON: -- make a couple of points. This is

really a search for a controversy. They are very able lawyers from Wilmer Hale and King & Spaulding representing these third parties. We have had productive and cooperative negotiations with all of them. We have resolved all of the issues. They are well aware of the limits on discovery that were in this Court's February order, and that's why we've been able to negotiate through successfully.

We raised in May of last year the need to go to third parties, which was in part born of the fact that the Government wasn't going to give us the Fannie Mae and Freddie Mac documents, unlike in the Winstar cases, where when entities were in conservatorship, you know, the Government gave us all those documents. And, so, we thought we would get the Fannie Mae and Freddie Mac documents from the Government. When they said no, we said, okay, well, then, we'll issue a subpoena.

And we told the Government that in May; we told the Court that in May. This is -- this is nothing new, Your Honor, and so we are confident we will continue to be able to work productively with these very fine lawyers representing the third parties. We don't think there's going to be a controversy, Your Honor.

THE COURT: Thank you. Is there anything else for the Plaintiff this morning?

MR. THOMPSON: No, Your Honor.

THE COURT: Thank you.

Is there anything else for the United States this morning?

MR. SCHWIND: No, Your Honor. Thank you.

THE COURT: Thank you very much. We're adjourned.

MR. SCHWIND: Thank you, Your Honor.

(Whereupon, the hearing was adjourned at 11:37 a.m.)

EXHIBIT 4

REDACTED

EXHIBIT 5

REDACTED

EXHIBIT 6

REDACTED

EXHIBIT 7

REDACTED

EXHIBIT 8

REDACTED

EXHIBIT 9

REDACTED

EXHIBIT 10

REDACTED

EXHIBIT 11

REDACTED