

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

**PLAINTIFFS’ REPOSE TO THE FHFA DEFENDANTS’ NOTICE OF
SUPPLEMENTAL AUTHORITY**

FHFA brings to the Court’s attention an order entered in what it calls the “Iowa Action,” *Continental Western Insurance Co. v. FHFA*, No. 4:14-cv-00042-RP-RAW (S.D. Iowa). The “Iowa Order,” FHFA claims, “is directly relevant” to this Court’s disposition 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, Doc. 31 (“the Motion for Supplementation”). FHFA Defendants’ Notice of Supplemental Authority at 3, Doc. 53. To the extent the Iowa Order is relevant at all, however, it demonstrates that in deciding FHFA’s motion to dismiss this Court should either grant Plaintiffs the discovery they have requested or ignore Defendants’ factual claims that the Net Worth Sweep was something other than a naked attempt to nationalize Fannie and Freddie and expropriate the value of Plaintiffs’ stock for the benefit of the federal government.

Continental Western, the plaintiff in the Iowa Action, is a subsidiary of Berkley Regional Insurance Company (“Berkley”), one of the plaintiffs in the *Fairholme* action. True, as FHFA notes, Continental Western challenges the Net Worth Sweep on many of the same grounds

advanced by Berkley and the other plaintiffs in this action. But Continental Western's claims are not, as FHFA asserts, identical to Berkley's in this case. To the contrary, Continental Western challenges not only the Net Worth Sweep but also, among other things, the very circular dividend practice that FHFA and Treasury assert as the justification for the Net Worth Sweep. *See, e.g.*, Iowa Complaint ¶¶ 103, 112, 159-64, *Continental Western* (Feb. 5, 2014), ECF No. 1.

FHFA and Treasury have pursued a starkly different strategy in responding to Continental Western's claims than they have to the claims brought in this Court. Here, the agencies combined their motions to dismiss with alternative motions for summary judgment with respect to Plaintiffs' APA claims. In the Iowa Action, by contrast, they have carefully omitted any request for summary judgment, moving exclusively to dismiss the complaint on jurisdictional grounds. As FHFA's counsel insisted in the Iowa Action, this is a "significant difference between the status of" the cases, July 10 Hearing Transcript at 18 ("Tr."), *Continental Western* (attached as Exhibit A), and as a result neither FHFA nor Treasury has produced an administrative record (or a "document compilation," in FHFA's preferred formulation) in the Iowa Action. The Iowa Order thus has no bearing on Plaintiffs' requests for *supplementation* of the administrative record or for discovery regarding its *completeness* because no record has even been *produced* in that case. Indeed, FHFA itself insisted that the materials in the administrative record "produced in D.D.C." were "utterly irrelevant" to the issues before the court in the Iowa Action. Tr. at 19.

Of course, FHFA and Treasury purport to move exclusively to dismiss Plaintiffs' common-law claims in this case. But in their motions to dismiss, they have contradicted the core factual allegations of Plaintiffs' complaint: that the Net Worth Sweep was wholly unnecessary and that its purpose and effect was to nationalize Fannie and Freddie and to expropriate the value

of private investors' shares for the federal government. *See, e.g.*, Complaint ¶¶ 10-11, Doc. 1. FHFA denies these factual allegations, insisting instead that the Net Worth Sweep “ended the circular practice of the Enterprises drawing funds *from* Treasury merely to make dividend payments *to* Treasury” and the concomitant “threat[] to erode the amount of the Treasury commitment available to the Enterprises.” FHFA Motion To Dismiss at 56, Doc. 28 (emphasis in original).

Despite the fact that FHFA and Treasury appear to have consciously omitted in the Iowa Action a number of fact-laden arguments that they raise before this Court, the agencies nevertheless made similar factual allegations regarding the purpose and effect of the Net Worth Sweep, and for that reason Continental Western sought to compel production of the administrative record. As the Iowa Court explained, Continental Western's motion was

prompted by the fact that in their briefs on the motions to dismiss defendants make factual assertions about the necessity and purpose of the net worth sweep inconsistent with the Complaint's allegations on the same subjects. In particular, Continental Western targets statements in defendants' briefs which justify the net worth sweep as necessary to save the Companies from insolvency.

Iowa Order at 4.

At the hearing on Continental Western's motion to compel production of the administrative record, however, FHFA and Treasury expressly and repeatedly *disavowed* their factual allegations contradicting the allegations of Continental Western's Complaint. *See, e.g.*, Tr. at 17-18 (“[F]or purposes of Defendants' motions to dismiss, we accept . . . the correctness of every factual allegation.”) (FHFA); *id.* at 18 (“This is . . . a plain vanilla motion to dismiss . . . taking as true for purposes of our motion every single fact alleged.”) (FHFA); *id.* at 22-23 (“Our position remains [that] we're entitled to dismissal because . . . we've accepted the allegations.”) (FHFA); *id.* at 29 (“THE COURT: . . . [A]s I understand [Continental Western's] argument, the guts of it is that the anti-injunction statute does not apply because the FHFA was acting outside

of its proper function as a conservator when it approved the net worth sweep and, as described by the Plaintiff, ended up essentially nationalizing Fannie Mae and Freddie Mac. . . . [I]f that is their argument, can that still be decided on the face of the pleadings? MR. CAYNE: Yes, Your Honor. I also understand that to be their argument, and in accepting, for purposes of our motion, those factual allegations, we believe that those factual allegations do not change the legal conclusions here.”) (FHFA); *id.* at 34 (“There is no factual dispute. You can take the allegations of the complaint as true”) (Treasury).

And it was on the basis of that disclaimer that the Court in the Iowa Action denied Continental Western’s motion to compel:

As noted, defendants contend that they make only a facial challenge to the Complaint. It is true that in their briefing they describe the net worth sweep in positive terms as a means to save the Companies from the insolvency they were facing under the dividend structure in effect prior to the Third Amendment. . . . Defendants having disclaimed a factual challenge, the Court must take Continental Western’s factual assertions bearing on its jurisdictional theory—that the net worth sweep was unnecessary and improperly motivated—as true.

Iowa Order at 6 (footnote omitted).

Here, FHFA *purports* to raise a purely facial challenge to the complaint in its motion to dismiss, but it never has disclaimed its insistence that the Net Worth Sweep was necessary to save Fannie and Freddie from the circular dividend practice that FHFA foisted upon them. Indeed, in opposing Plaintiffs’ Motion for Supplementation FHFA insists that “[t]he Court can—and should—consider” its assertions regarding the purpose and effect of the Net Worth Sweep “in resolving the Motion to Dismiss the breach of fiduciary duty claims.” FHFA Opposition to Plaintiffs’ Motion for Supplementation at 15, Doc. 34. But as the Iowa Court correctly concluded, those assertions contradict Plaintiffs’ factual allegations. Thus, the Court should either (a) grant Plaintiffs’ pending motion to allow Plaintiffs to take limited discovery, or (b) ignore FHFA’s attempts to justify the Net Worth Sweep and accept as true, as the Iowa Court

has, Plaintiffs' allegations "that the net worth sweep was unnecessary and improperly motivated" simply to expropriate the value of Plaintiffs' preferred stock in Fannie and Freddie. *See* Iowa Order at 6. Plaintiffs submit that the former option is preferable in light of the circumstances of this case, *see* Plaintiffs' Reply in Support of Their Motion for Supplementation at 23-24, Doc. 36, but what is plainly not permissible is to allow FHFA to attempt to seek dismissal of Plaintiffs' claims on the basis of factual assertions that contradict the central allegations of the complaint.¹

Dated: September 3, 2014

Respectfully submitted,

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¹ As Plaintiffs have previously indicated, Plaintiffs in the *Fairholme* case have been granted the right to take limited discovery in their action challenging the Net Worth Sweep in the Court of Federal Claims. Although that discovery initially was scheduled to close on July 31, 2014, *see* Plaintiff Fairholme Funds, Inc.'s Notice of Filing of Discovery Scheduling Order by United States Court of Federal Claims at 1, Doc. 41, that no longer is the case. Indeed, the Government's document production only began in late July, and remains ongoing.

EXHIBIT A

1:13-cv-01053-RCL

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

- - - - -X

CONTINENTAL WESTERN :
INSURANCE COMPANY, :
 :
Plaintiff, :

vs. : Case No. 4:14-cv-00042

THE FEDERAL HOUSING FINANCE :
AGENCY, in its capacity as :
Conservator of the Federal :
National Mortgage Association :
and the Federal Home Loan :
Mortgage Corporation; :
MELVIN L. WATT, in his :
official capacity as Director :
of the Federal Housing Finance :
Agency, and THE DEPARTMENT OF :
THE TREASURY, :

HEARING TRANSCRIPT

Defendants. :
- - - - -X

Courtroom, Fourth Floor
U.S. Courthouse
123 East Walnut Street
Des Moines, Iowa
Thursday, July 10, 2014
10:10 a.m.

BEFORE: THE HONORABLE ROSS A. WALTERS, Magistrate Judge.

KELLI M. MULCAHY, CSR, RMR, CRR
United States Courthouse
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P R O C E E D I N G S

(In open court.)

THE COURT: Have a seat, everybody, and good morning to you all.

This is Continental Western Insurance Company vs. The Federal Housing Finance Agency; Melvin Watt, its director; and the Department of the Treasury.

I have before me the plaintiff's motion to compel production of an administrative record and for a suspension of the briefing schedule, which has been resisted. Continental Western requested a hearing here today, and I granted that request, which is what we're here to do.

There are a number of people with me, both at counsel table and on the phone. I hope people can hear me on the phone, but I'm not going to go through all those appearances.

But it's my understanding that the main speaking parts today will be Mr. Thompson on behalf of Continental Western. Is that true?

MR. THOMPSON: Yes, Your Honor. Good morning.

THE COURT: Good morning.

And Mr. Cayne for the FHFA, correct?

MR. CAYNE: Yes, Your Honor. Good morning.

THE COURT: Thank you. Good morning to you as well.

And Mr. McElvain--

MR. McELVAIN: Yes, Your Honor, for the Department of

1 Treasury.

2 THE COURT: --for Treasury. Thank you very much.

3 I should point out, just so that people know, we took
4 a roll call of people who signed in both on the phone and here,
5 and since that occurred an additional person, a journalist by
6 the name of Peter Chapman from the Beard Group, is listening in
7 as we speak.

8 And, of course, I have a court reporter present with
9 me. That's for the benefit of those who are not here
10 personally.

11 I have reviewed the motion papers a couple times,
12 actually, so I have that much of a head start, but we are here
13 today, Mr. Thompson, at your invitation, so you can start, and I
14 may have a question or two as we go through.

15 MR. THOMPSON: Very well. Thank you, Your Honor.

16 THE COURT: By the way, all of you, if you are more
17 comfortable, you may remain seated.

18 MR. THOMPSON: Thank you. Thank you, Your Honor.

19 May it please the Court. David Thompson for the
20 plaintiff.

21 Your Honor, as the Court is aware, this is a case
22 about the effective nationalization of Fannie Mae and Freddie
23 Mac. In August of 2012, the Treasury Department and the FHFA
24 entered into an agreement pursuant to which every penny of
25 profit and eventually net worth of Fannie Mae and Freddie Mac

1 would be transferred into the United States Treasury. And this
2 replaced a preexisting regime pursuant to which the Treasury was
3 entitled to receive a dividend either in cash at the rate of 10
4 percent or a payment in kind at 12 percent.

5 And there's no dispute among the parties that in the
6 aftermath of this change, in the aftermath of this net worth
7 sweep, the Government has reaped tens of billions of dollars in
8 profits more than it would have received if it had not entered
9 into the net worth sweep.

10 The plaintiff maintains that this is illegal, that it
11 represented a violation of HERA because it was a failure to
12 preserve and conserve assets, because it did not operate the
13 institutions in a safe and solvent manner, because it was done
14 at the direction of Treasury, and it violated a variety of
15 common law rights as well.

16 The defendants, in their motions to dismiss, tell a
17 different factual story. They claim that Fannie and Freddie
18 owed a close to \$19 billion a year cash dividend and they
19 claimed that if it wasn't paid then Fannie and Freddie would
20 have to draw down on their available line of credit. And FHFA
21 called this on page 17 of their motion, quote, a very real
22 problem, closed quote. And the Department of Treasury has
23 called this--has used similar language on page 3 of its brief.

24 This is a factual assertion. When they say this was a
25 very real problem, that is a statement of fact, and it is

1 contradicted by the complaint in at least two respects.

2 First of all, there was no requirement to pay a penny
3 of cash at any time to the Department of Treasury; therefore,
4 there was no requirement to ever draw down on the line of credit
5 that was available to Fannie and Freddie because the
6 institutions had the ability to do a payment in kind, to simply
7 increase the liquidation preference, the amount of preferred
8 stock, if you will, and pay a 12 percent rate of return.

9 And second of all, the complaint alleges that Fannie
10 and Freddie had turned the corner and were set to generate
11 enormous profits and that this was apparent to everybody.

12 And these allegations, these factual allegations that
13 this was a very real problem that was averted by the net worth
14 sweep, go to the heart of Defendants' jurisdictional statement,
15 but they cite to no case where a defendant comes in, tells a
16 counter-narrative, makes factual statements that are
17 contradicted by the complaint, and then is allowed to have its
18 motion to dismiss granted.

19 And there are two consequences to the defendants'
20 decision to make this factual counter-narrative. First of all,
21 we're entitled to an administrative record, and, second of all,
22 we're entitled to discovery, although we're not here today to
23 ask for discovery for reasons I'll explain in a moment. Not
24 yet, anyway.

25 THE COURT: Don't they say that even if you take your

1 narrative as true there is no jurisdiction under 4617(f)?

2 MR. THOMPSON: Well--

3 THE COURT: That's what they say.

4 MR. THOMPSON: That's what they say. But that's after
5 they've told a very different story. But we certainly dispute
6 that. We say if you take our complaint as true and if you look
7 and you see did taking--entering into the net worth sweep and
8 taking every penny of profit and shipping it to the Government
9 preserve and conserve the assets--this has been over \$100
10 billion that has been taken out of these entities that are in
11 conservatorship and sent to the U.S. Treasury--and if we look
12 and we see at the other HERA command that these institutions be
13 operated by the conservator in a safe and solvent manner, this
14 is the opposite of that.

15 When you have institutions, financial institutions in
16 this country, capital is the bedrock way we keep these
17 institutions safe, and they have stripped these entities of
18 every dollar of capital. They have no capital under the net
19 worth sweep and they will never be able to have capital.

20 So we, under our narrative, Your Honor, we think it's
21 very clear that the jurisdictional bar isn't a problem, that
22 they have exceeded the scope of their authority.

23 We also allege that this was done--

24 THE COURT: Well, why can't that be determined on the
25 face of your complaint? Your basic allegation is that, as I

1 understand it, the FHFA acted ultra vires of its authority as a
2 conservator in entering into this deal with the Treasury, which
3 you contend Treasury sort of put in place, but aren't the facts
4 about what happened known and set out in your complaint and
5 don't we have to take those as true?

6 MR. THOMPSON: Well, that last point, Your Honor, is
7 the key one. Yes, they're supposed to be taken as true, but
8 they have not done that. When they say in their papers that
9 there was a very real problem that the net worth sweep was,
10 quote, designed to or sought to deal with, they're making a
11 factual statement that goes to the heart of what this case is
12 about of, you know, what was the effect, what was the intent
13 behind this net worth sweep.

14 And they are telling-- We're saying it was a naked
15 expropriation and that it was unsafe and didn't conserve assets,
16 and they tell a very different factual story. They made that
17 choice.

18 And this has come up, Your Honor, just so the Court is
19 aware, this came up in the Court of Federal Claims. The
20 plaintiff in this case has also sued for a taking in the Court
21 of Federal Claims, which is the only court where a taking claim
22 can be brought if it's more than \$10,000, and in that court the
23 Department of Justice made the exact same move in its motion to
24 dismiss.

25 It told this different story, they called it a death

1 spiral, that they wouldn't be able to pay the cash dividend, and
2 we went in and we went to the court, just as we did here, and we
3 said we're entitled, not there to an administrative record
4 because it's a takings claim, but to discovery.

5 And the Department of Justice made all the same
6 arguments they're making here; "Well, just ignore our
7 statements," or, "We have purely legal grounds in the
8 alternative." And the Court of Federal Claims has said, no, the
9 plaintiff is entitled to discovery on jurisdiction, and that
10 discovery is ongoing now.

11 And that's the reason, one of the reasons, we haven't
12 asked for discovery in this case is because that discovery is
13 going on. And one of the questions that the Court of Federal
14 Claims has identified is whether FHFA was acting at, quote, the
15 direct behest of Treasury; in other words, was Treasury
16 masterminding that whole thing. And we're in the midst of
17 discovery on that very question and we're hoping not to have to
18 replicate those efforts here, and that's one of the reasons we
19 haven't asked for discovery yet.

20 THE COURT: Well, let me ask you a question about
21 what's happening now. I saw references in the motion papers to
22 the multiple actions in the District of Columbia. I think
23 that's what people have told me. Now, you've got a claim in the
24 Court of Claims--

25 MR. THOMPSON: Yes, Your Honor.

1 THE COURT: --as you just told me. Are there other
2 lawsuits pending in the district court in the District of
3 Columbia?

4 MR. THOMPSON: Yes, Your Honor. So there, just to
5 give you, if I may, a sense of the legal terrain, there are
6 basically three areas or forums in which this fight is being
7 fought. This court, number one. Number two, in the District of
8 Columbia, there are approximately ten different lawsuits that
9 have been filed. They are not identical. At one point one of
10 the defendants calls them, I think the Department of Treasury
11 calls it, identical. They're not. This case is not identical
12 for reasons I'll come back to in a moment.

13 And then there's the Court of Federal Claims, which is
14 the takings, and there are, I believe, seven takings suits, six
15 of which focus on the net worth sweep in 2012 and one of which
16 says the imposition of the conservatorship in 2008 was a taking.

17 So that's the basic legal terrain. In the Court of
18 Federal Claims where we are is the other six cases have been
19 stayed pending the discovery that the plaintiff here and the
20 other plaintiffs in that case are engaged in.

21 THE COURT: Which court ordered the production of the
22 administrative record?

23 MR. THOMPSON: So in the District of Columbia, D.D.C.,
24 the U.S. District Court for the District of Columbia, an
25 administrative record was produced. They didn't fight producing

1 it. I don't believe there was a court order, Your Honor. They
2 gave us an administrative record.

3 We filed a motion saying it was inadequate because the
4 FHFA provided 43 pages of internal documents, that was it, on a
5 decision worth tens of billions of dollars, and we said that's
6 inadequate on its face. There were a number of indicia that it
7 wasn't complete. They say it was complete. And we fully
8 briefed that in front of Judge Lamberth and we're awaiting his
9 opinion on that question.

10 THE COURT: So he's not ruled yet on that?

11 MR. THOMPSON: That's correct, Your Honor, he's not
12 ruled. So that's in the D.D.C. We got an administrative
13 record. We didn't think it was complete.

14 I would add, because this case is different than the
15 actions in the D.D.C., that even if that record were adequate,
16 it wouldn't address here. Here, in this case, the plaintiff is
17 complaining about conduct by Treasury in 2009, '10--excuse
18 me--2010, '11 and '12, where it continued to buy additional
19 preferred stock after the time of the expiration of its
20 authority to do so. That's not a claim that any party in any
21 other case has made.

22 So we're entitled to an administrative record on that
23 issue and we're also, in this case and this case alone, it's the
24 only one where there's been a challenge to the failure to
25 utilize the payment-in-kind provision, we're challenging FHFA's

1 failure to use that payment-in-kind provision. We don't have
2 any administrative record from any court on that question.

3 So those are two issues where, at the very least, we'd
4 be entitled to administrative record on that, and, as I said,
5 we're hoping that in this court they'll produce a genuine and
6 complete administrative record.

7 THE COURT: If you are required to respond to the
8 pending motions to dismiss without the administrative record, or
9 I guess you could use the part that you do have from D.C., how
10 does that hobble you in responding to the motion?

11 MR. THOMPSON: Well, it hobbles us in the sense of,
12 first of all, if we had to respond to that motion that contains
13 all these extraneous factual statements that are not in the
14 complaint and are contradicted by the complaint, we're in a--

15 THE COURT: Well, under the usual standard can the
16 Court-- Well, if your complaint has well-pleaded facts and they
17 simply contradict it, I mean, can the Court consider--doesn't
18 the Court have to take your facts? And I think they argued that
19 your facts don't make a difference.

20 MR. THOMPSON: Well, the Court could--

21 THE COURT: I mean, the Court either will agree with
22 that or not, but if the Court thinks your facts make a
23 difference, your motion's probably going to be--or the motion to
24 dismiss will probably be overruled, wouldn't it?

25 MR. THOMPSON: Well, Your Honor, certainly that will

1 be one path that could be taken. The Court of Federal Claims
2 looked at this exact same issue and decided, well, no, it makes
3 more sense to let them, on these jurisdictional issues, take the
4 discovery and really have a complete understanding that, given
5 that they made this decision, this choice to make factual
6 statements like, "This is a very real problem that we sought to
7 address," that we were entitled to probe that and that they had
8 to live with the consequences of their decision to go beyond the
9 complaint.

10 THE COURT: Thank you.

11 MR. THOMPSON: May I just make a couple of other
12 points?

13 THE COURT: Sure.

14 MR. THOMPSON: Okay. Yes.

15 THE COURT: My interruption does not mean you're done.
16 Go ahead.

17 MR. THOMPSON: Okay. Thank you, Your Honor.

18 So just quickly, on the discovery, I have averred to
19 the fact that we haven't asked for it yet here for two reasons.
20 One, we've got the ongoing discovery in the Court of Federal
21 Claims, and we'd hoped not to have to reinvent the wheel here
22 and the contours of discovery could be affected by what comes
23 out of that process; and, second of all, we don't have the
24 administrative record, and we thought it was premature to start
25 complaining about it before we actually had it. And so we

1 thought it was logical to first receive the administrative
2 record, as we did in the D.D.C., and then analyze its
3 sufficiency.

4 Finally, Your Honor, there's been a suggestion that
5 this case should be transferred back to the District of
6 Columbia. We don't think that makes sense for a variety of
7 reasons. Number one, the cases aren't the same, but, number
8 two, for this Court to make the determination that it was going
9 to transfer, it would have to first conclude that it had subject
10 matter jurisdiction, i.e., that the jurisdictional bar does not
11 apply.

12 And once the Court has figured that question out,
13 really, all the intellectual heavy lifting has been done, at
14 least on the APA claims, because the question under subject
15 matter jurisdiction is did the defendant exceed its authority.
16 If the answer is yes, then we're entitled to an injunction under
17 the APA, so there would not be any efficiency to transferring
18 this case.

19 They also have sort of a host of other types of legal
20 objections. They say, well, even if we did go beyond the
21 complaint, this case isn't ripe, but all of our rights have been
22 stripped from us. Every penny is going to go to the Treasury.
23 That's clear here and now.

24 They say we don't have prudential standing, but that
25 only applies to derivative claims, and this is direct because

1 the plaintiff has been directly injured and will stand to
2 benefit from any ruling.

3 And they say there's no standing because the plaintiff
4 didn't own the securities at the time of the net worth sweep,
5 but that's irrelevant for purposes of the APA, and under
6 Delaware law the claims, the common law claims, inhere in the
7 security and would follow the security.

8 So that's just to say that we don't--we think this
9 Court should follow what the Court of Federal Claims did and,
10 rather than accepting their invitation to decide this on a
11 piecemeal basis, should allow us to get an administrative record
12 as a first step, Your Honor.

13 THE COURT: You know, if the Court were to agree with
14 you, it's not too wildly unpredictable to think that, first of
15 all, we'll be back and forth on what the administrative record
16 is. You might well not be satisfied again with what they
17 produce. And then you go through all that and then you get to
18 the briefing, you're going to be around here for a long time, it
19 seems to me, before this motion ever comes to issue, won't you?

20 MR. THOMPSON: Well, and certainly, Your Honor, we
21 don't welcome that possibility of being around for a long time,
22 but we think it's important that we get the materials to which
23 we're entitled, and we're willing, if that means there's some
24 delay, we think that's more important than rushing through the
25 process.

1 THE COURT: Let me just ask this question: In the
2 Court of Claims, was the same jurisdictional issue presented as
3 it relates to the anti-injunction statute?

4 MR. THOMPSON: No, Your Honor, it was not. It was the
5 same factual-- The trigger to get the discovery was the same
6 factual counter-narrative that has been told here where they
7 said you're going into a death spiral, and we said that's not in
8 the complaint, in fact, the complaint contradicts that, and the
9 court agreed.

10 And with the Court's permission, we would be happy to
11 lodge the Court of Federal Claims decision, and I apologize for
12 not doing this sooner, if it would be helpful. It's only four
13 pages. But we'd be happy to lodge that by the end of the day
14 with the Court.

15 THE COURT: Well, I don't think I need to see it, but
16 just answer this question for me: I take it, then, there wasn't
17 a jurisdictional hurdle there. You do have the merits or you're
18 going to get to the merits in the Court of Claims?

19 MR. THOMPSON: Yes. Well, there are many
20 jurisdictional defenses that they have raised in the Court of
21 Federal Claims, but they did not raise this one. They--

22 THE COURT: All right.

23 MR. THOMPSON: --raised the 4617(f) in the D.D.C. but
24 not in the Court of Federal Claims.

25 THE COURT: All right.

1 MR. THOMPSON: Primarily because we're seeking money
2 damages in the Court of Federal Claims.

3 THE COURT: Okay. Thank you.

4 MR. THOMPSON: Thank you.

5 THE COURT: Well, should we go in order of the
6 pleadings? Unless you two have decided between you who wants to
7 go first.

8 MR. CAYNE: May it please the Court.

9 THE COURT: Mr. Cayne.

10 MR. CAYNE: Howard Cayne for Defendant Federal Housing
11 Finance Agency.

12 THE COURT: And you can stand or sit, as you're most
13 comfortable.

14 MR. CAYNE: Thank you, Your Honor.

15 I listened aptly to my good friend, Mr. Thompson's,
16 passionate statement, most of which went to merits of this case,
17 and to the extent I can, Your Honor, I will attempt to avoid
18 delving into the merits because the issue before this honorable
19 court today is very simple.

20 And let me state it clearly now if there is any doubt,
21 because Mr. Thompson indicates a lot of doubt, but I don't think
22 there is fair doubt. For purposes of both defendants, and my
23 colleague will speak for the Department of Treasury, but for
24 purposes of Defendants' motions to dismiss, we accept, for that
25 purpose only, the truthful--the correctness of every factual

1 allegation.

2 This is, from this perspective, Your Honor, a plain
3 vanilla motion to dismiss based on every--taking as true for
4 purposes of our motion every single fact alleged. Our position
5 is on our papers, and I will restate it today for the benefit of
6 opposing counsel and the Court. We take those allegations as
7 true for purposes of our motion, and based on those allegations,
8 looking through the prism of the jurisdictional withdrawal
9 statute and the other defenses we raise, this complaint cannot
10 survive, Your Honor. This case is ready to be resolved.

11 The Court asks some questions about what is going on
12 in the D.D.C. Well, interestingly, Your Honor, prior to even
13 filing their complaint in this case Plaintiff filed a motion to
14 supplement the administrative record filed by the defendants.
15 That paper, if I'm remembering correctly, and I'm sure my
16 colleague will correct me if I'm not, was filed prior to the
17 filing of the complaint in this case. To this date, Your Honor,
18 that remains unresolved.

19 But also counsel did not advise the Court there is a
20 significant difference between the status of this case, Your
21 Honor, and the D.D.C. In D.D.C., the FHFA filed a motion to
22 dismiss and in the alternative a motion for summary judgment.
23 My colleague from Justice will address what they filed, but they
24 also filed a motion for summary judgment.

25 It was in that context, Your Honor, that my client

1 agreed to provide a compilation of documents. They did not
2 provide administrative record, Your Honor, because the decisions
3 made by the FHFA were not and are not subject to the APA. They
4 were made in a conservatorship setting, a setting in which no
5 court has jurisdiction to interfere.

6 So Plaintiff, as the Court indicated, can refer to
7 whatever they'd like to refer with respect to what has been
8 produced in D.D.C., but it is, with all respect, Your Honor, to
9 my colleague, it is utterly irrelevant today.

10 We have not filed a motion for summary judgment. As I
11 said once, this is a plain vanilla motion to dismiss. Their
12 remedy, if the judge determines that the facts are--something's
13 not accepted or something's relevant, it will get denied, and
14 then the case will proceed. That is the remedy. But the remedy
15 is not stopping the progress of this case.

16 Your Honor, Plaintiff, again, in the D.D.C., tried the
17 same approach. When Plaintiff asked for supplementation of the
18 administrative record in that case, they attempted to shut down
19 briefing. I don't know that--I don't recall, Your Honor, that
20 an order was ever issued, but the motion wasn't granted and
21 briefing was completed.

22 The motions to dismiss and in the alternative for
23 summary judgment in that case have been briefed, and at this
24 point they did not succeed in their effort to stop briefing.
25 They did not succeed, it's still pending, in their effort to

1 supplement.

2 I, frankly, and the Court can come to his own
3 conclusions, frankly, have never understood why we are here
4 today in light of the fact that this plaintiff is in the CFC,
5 this plaintiff's parent is in the D.D.C., and we're here arguing
6 the same arguments.

7 The complaint in this case, Your Honor, was filed a
8 mere three weeks after our opposition--after our motion to
9 dismiss was filed in D.D.C., and, again, the Court can draw any
10 conclusions that it would like.

11 But getting back to the underlying point, and if I
12 just may detour for one more second because--

13 THE COURT: Let me detour before you detour.

14 MR. CAYNE: Yes.

15 THE COURT: Am I to understand from what you're
16 telling me that the motion to dismiss, alternatively for summary
17 judgment, that you filed in the D.D.C. has been fully briefed?
18 It's in the can, so to speak?

19 MR. CAYNE: That's correct, Your Honor.

20 THE COURT: Has there been an argument on it yet?

21 MR. CAYNE: There has not been an argument, Your
22 Honor.

23 THE COURT: I don't know how the D.D.C. operates. Do
24 they usually set arguments on motions for summary judgment or is
25 it like here, all over the lot?

1 MR. CAYNE: I would submit, Your Honor, it's all over
2 the lot, even with respect to specific judges. Perhaps my
3 colleagues have other insight. My insight is I don't know
4 whether or not there will be an argument.

5 There had been an earlier judge in the case. That
6 judge was elevated to the D.C. Circuit, Your Honor. That judge
7 had set an argument for June 23rd. The new judge, Judge
8 Lamberth, several weeks ago canceled that argument without
9 stating what comes next.

10 So but it is fully briefed, Your Honor. And, again,
11 just to circle to the end before I go through a few points, if I
12 might, that's what needs to happen here.

13 There is no reason Plaintiff cannot today respond to
14 our motion, to brief the motion to dismiss. We can quickly
15 reply, and then it will be all set for Judge Pratt to decide
16 whether or not we are correct that the motion to dismiss should
17 be granted.

18 And delay won't help. Discovery here would be hugely
19 inefficient on many grounds, including that we are more than
20 hopeful that Judge Pratt will agree with the merits of our
21 motion, and particularly whereas, in this case, you have an
22 underlying statute where Congress has expressed very clearly its
23 concern that conservators of institutions in statutory default
24 not waste their time on pointless litigation, particularly when
25 Congress has said a court cannot affect the decisions made.

1 And what Plaintiff has done is Plaintiff has conflated
2 the arguments on the merits arguments on the motion to dismiss,
3 Your Honor, with what's going on in discovery. There is a
4 statement in their brief that says in those words almost, Your
5 Honor, that--I forget if it was "ironically" or there was some
6 predicate--the issues presented on this discovery dispute are
7 virtually the same as the issues, the merit issues, before Judge
8 Pratt.

9 Well, Your Honor, the only issue, with all respect,
10 before this Court today is whether Defendants are challenging,
11 for purpose of their motion to dismiss, facts. We are not. The
12 other issues are properly decided by Judge Pratt when he has the
13 fully briefed motions to dismiss.

14 But on the discovery, Your Honor, Plaintiff cannot do
15 any better by delaying this a month, a year, four years, who
16 knows. We all have been through discovery battles, particularly
17 Your Honor. They can go on forever and it would be totally
18 needless and it would be an enormous burden and expense for the
19 conservator, a burden and expense Congress intended that be
20 avoided here.

21 But, again, there is no-- The Court asked what's the
22 harm to Plaintiff, Your Honor, if discovery is not granted.
23 There is no harm because even if there are a thousand documents
24 out there supporting their factual allegations, it changes
25 nothing. Our position remains we're entitled to dismissal

1 because, for again, we've accepted the allegations.

2 At bottom, the plaintiff's allegations boil down to
3 assertions that either the conservator had a bad motive, a bad
4 intent, is doing a bad job, somehow improperly conspired with
5 another federal agency to amend the agreement. Again, for
6 purposes of the motion, those, again, on the merits we think are
7 all absurd, but we don't think we need to get to the merits
8 because they don't affect the bottom-line conclusion that the
9 conservator was exercising powers granted it by Congress when it
10 entered into the original agreement, when it entered into the
11 amendment.

12 We cite in our papers at least two or three, Your
13 Honor, Eighth Circuit cases analyzing the precise identical
14 language in the FDIC analog, and they are fully supportive with
15 and, frankly, compel the position we advance that discovery here
16 is pointless because as long as the Court determines--and here
17 now I'm referring to Judge Pratt on the motion to dismiss--as
18 long as it is determined that in exercising, in agreeing to the
19 agreement and later amending the agreement with Treasury, that
20 the conservator was exercising a power delegated by Congress,
21 even if it didn't negotiate a good deal, even if it was a
22 foolish agreement-- Put any label on or qualification on
23 whether Plaintiff or the Court thought it was a good agreement
24 or a bad agreement. None of that's relevant. All the Courts of
25 Appeals, including this circuit, say if it was a power granted,

1 that is the end of the inquiry.

2 So at the end of the day, there are really two simple
3 inquiries before this Court; on discovery, are we really
4 disputing facts for purposes of our motion to dismiss, and, on
5 our motion to dismiss, with respect to jurisdiction, was there
6 power to enter into an agreement to provide for capitalization
7 of these enterprises.

8 Plaintiff makes all these claims that Treasury is
9 essentially stealing money, swiping money away. If we were
10 forced to get to the merits, Your Honor, and just a very quick
11 detour, if we were forced to get to the merits, we would explain
12 that in 2008 when Treasury started infusing what ended up to be
13 just under \$200 billion, both of these--neither of these
14 institutions had any net worth. Both of these institutions
15 would have been subject to mandatory receivership. No plaintiff
16 would have received anything. The only reason these entities
17 are in business is because of the massive, massive infusions by
18 the Department of Treasury pursuant to the agreement.

19 Plaintiff also made-- And it's not relevant to the
20 argument, Your Honor, but I have to respond to it because he
21 said we agree. Plaintiff said all the parties agree that as a
22 result of the third amendment to the agreement executed in
23 September 2008 tens, if not hundreds, of billions of dollars
24 have been swept to Treasury more than would have otherwise been
25 swept.

1 Your Honor, there is no agreement on that. Your
2 Honor, Plaintiff, in their papers, indicates that there was no
3 consideration, for example, given on the third amendment.
4 Again, it goes to the merits, but they made the point, and if I
5 might just have ten seconds to respond to it.

6 They ignore the fact that under the original agreement
7 there is something called a periodic commitment fee, which in
8 other litigation has been quantified as incalculable that it was
9 so large. For the duration of the sweep, the Treasury has given
10 up its right to receive that fee, so the notion in these papers
11 there's no consideration, this is some kind of land grab, asset
12 grab, it is absurd, Your Honor.

13 But back to the point that there are no facts
14 disputed. And, if I might, totally apart from even if Plaintiff
15 was right, Your Honor, which they're not, that we are disputing
16 facts on the jurisdictional issue, we have a wealth of other
17 defenses, and the lead one is there is no standing here.

18 There is a statute-- And Plaintiff says in their
19 reply, I think it's, Your Honor, page 8, 9 and 10, the Court
20 should ignore this other issue because it's merely secondary, we
21 don't really mean it, maybe we only gave a footnote to it. Your
22 Honor, again, that is just absurd. We fully briefed this issue.

23 The plaintiff's position seems to be because
24 jurisdiction went first in our papers that's the only argument
25 we really mean. No, Your Honor. Jurisdiction went first

1 because, at least in my law school in the Midwest, I learned
2 that that's the first thing that you typically challenge is
3 jurisdiction.

4 But right after jurisdiction we point out that another
5 provision of the very same statute says on the instant
6 conservators were appointed for Fannie and Freddie every right,
7 power, attribute of the shares held by Plaintiffs for the full
8 duration of the conservatorship are vested in the conservator.

9 Plaintiffs don't have any rights to stand on today.
10 Plaintiffs have no rights to enforce, Your Honor, and Plaintiffs
11 do not contend that there are some factual issues that the
12 Government disputes that would prevent the Court from
13 adjudicating that defense or that they need discovery on.

14 They simply say, "Oh, that's just a secondary claim,
15 Court. You don't have to bifurcate it. Just consolidate it
16 all." No, Your Honor, it's not secondary. It's at the
17 forefront. They have nothing. We cite a host of cases.

18 All Plaintiff came back with is they cited a couple,
19 one was First Hartford, Your Honor, cases involving
20 receiverships where courts have allowed shareholders to attack
21 an action of a receiver. But there's a huge difference, Your
22 Honor, which is in receiver, when a receiver is appointed
23 following a conservator, all the rights are then, all the
24 shareholder rights are then, transferred to the receiver with
25 one huge exception; a specific statute gives all claimants,

1 including shareholders, rights to prosecute claims relating to
2 their shares or to their contract, whatever. In
3 conservatorship, there is nothing given to claimants such as
4 shareholders to prosecute.

5 We today are in conservatorship. Under the statute
6 the conservatorship is temporary but indefinite. I could not
7 tell the Court is the conservatorship going to end tomorrow, is
8 it going to end next year. I don't know when it's going to end.

9 But the statute's clear, Your Honor, the cases are
10 clear for the full duration of the conservatorship every right
11 Plaintiff claims is held by the conservator. Upon the
12 transformation of a conservatorship into receivership, any due
13 process concerns are addressed because at that point and that
14 point only the statute says all rights of shareholders are
15 extinguished, other than the right to prosecute claims relating
16 to the other shares, first administratively and then through the
17 federal district courts. We are in conservatorship today, Your
18 Honor.

19 And just one-- May I have just one moment, Your
20 Honor?

21 The last thing I would like to address, Your Honor, is
22 I said that the only issue, because Plaintiff spent a lot of
23 time on the merits, as to whether or not the jurisdictional
24 withdrawal applies is did the conservator exercise a power or
25 function granted by Congress.

1 There are several that were issued, exercised here,
2 Your Honor. The conservator exercised the power to carry on the
3 business of the enterprises in conservatorship. The conservator
4 exercised the expressly granted power to transfer any enterprise
5 asset without the consent or authorization of any party or
6 court. Your Honor, the conservator exercised its power to take
7 actions it deemed in the best interest of both the
8 conservatorship and the agency. The interest of the agency and
9 the conservator itself are interests referenced in the statute,
10 Your Honor, explicitly.

11 And here what happened, Your Honor, is, as I
12 mentioned, in 2008, and I'm sure this Court remembers, the
13 United States was facing an economic meltdown, and these
14 enterprises were placed in conservatorship, and as conservator
15 it was determined that for these enterprises to continue to
16 operate financing and capital was needed, and an agreement was
17 entered into with Treasury, an agreement that Congress had
18 authorized expressly, and that agreement provided for the \$200
19 billion that has kept these enterprises in business since that
20 date.

21 And whether or not Plaintiff thinks the conservator
22 executed a good deal, a bad deal, even a stupid deal, Your
23 Honor, it doesn't matter. It was a power granted to the
24 conservator by Congress that it should. And we will submit to
25 Judge Pratt, if Plaintiffs are required to file their opposition

1 and we get to reply, that is the end of the inquiry on
2 jurisdiction, the end of the inquiry of standing as they have no
3 rights to prosecute anyway.

4 And, Your Honor, with that I will respond to any
5 questions or turn the floor over to my colleague.

6 THE COURT: I have a couple questions for you or at
7 least a statement and ask you to respond to it. I certainly
8 understand that Continental Western claims that these were bad
9 decisions that were made, but as I understand their argument,
10 the guts of it is that the anti-injunction statute does not
11 apply because the FHFA was acting outside of its proper function
12 as a conservator when it approved the net worth sweep and, as
13 described by the Plaintiff, ended up essentially nationalizing
14 Fannie Mae and Freddie Mac.

15 I think that's the focus of their argument. Now, if
16 that is their argument, can that still be decided on the face of
17 the pleadings?

18 MR. CAYNE: Yes, Your Honor. I also understand that
19 to be their argument, and in accepting, for purposes of our
20 motion, those factual allegations, we believe that those factual
21 allegations do not change the legal conclusions here.

22 Because if they're arguing that the conservator did
23 not have the right or was exercising a power it did not possess
24 in agreeing to amend this four-year-old agreement, that is a
25 classic, Your Honor, question of law, and we, for what it's

1 worth, have no doubt that the right answer to that question is
2 the conservator, in agreeing to the agreement that allowed these
3 enterprises to remain in business, the conservator, in agreeing
4 to a third amendment to that agreement, was doing the same
5 thing, and all of those decisions, smart or stupid, were
6 authorized.

7 And Plaintiff's contention, again, accepting that
8 fact, it's a legal question; does that allegation somehow, if
9 accepted, take the conservator out of its statutory authority to
10 operate the conservatorships as it deems best. And, Your Honor,
11 I respectfully suggest the answer to that is no.

12 And even accepting those allegations, which we do,
13 which we have to do, we understand the rules, it doesn't change
14 the applicability of the withdrawal, Your Honor.

15 THE COURT: One other thing. On your alternative
16 transfer motion, which Mr. Thompson argues that the Court must
17 determine the jurisdictional issue before transfer, and, you
18 know, I hadn't thought of that before I saw that in the
19 briefing, and, I honestly don't know, is that accurate? I mean,
20 does the same-- Let me make sure I understand.

21 It's combined or there's a motion for summary judgment
22 and a motion to dismiss pending, but the motion to dismiss out
23 in the D.D.C. is also based on the anti-injunction statute; is
24 that true?

25 MR. CAYNE: It includes that, Your Honor. It also

1 includes the other argument I stated with respect to all the
2 rights being transferred to the conservator.

3 THE COURT: But can--

4 MR. CAYNE: Both of those defenses.

5 THE COURT: --a district court transfer a case in
6 which a motion is pending, a jurisdictional motion is pending,
7 to another court where the same jurisdictional issue is pending
8 without first in the transferor court--without first having the
9 transferor court decide the jurisdictional issue?

10 MR. CAYNE: Your Honor, that is what they call in law
11 school a nice question. I'll turn to my colleague from the
12 Department to respond to that. But I would simply say that,
13 frankly, there is no reason that the Court should not proceed,
14 and now I'm talking about Judge Pratt, that Judge Pratt should
15 not now direct that our motion be responded to and decided
16 because it's all briefed. It's briefed as well here as it is in
17 the District of Columbia.

18 Plaintiff can decide where they want to bring a suit.
19 They decided to bring a suit here, Your Honor, and we're ready
20 to submit to the jurisdiction of this court and have this case
21 decided. We have dispositive motions pending. There is no
22 reason whatsoever either to mandate discovery or to delay the
23 resolution of those motions to dismiss, Your Honor.

24 And-- I'm sorry.

25 THE COURT: I know that's what you want. The argument

1 triggered my interest, and I am not sure it's critical to the
2 current motion, but that's why I asked it.

3 And you just made a statement, I think, we are happy
4 to submit to the jurisdiction of this court. I think you mean
5 you're happy to submit to the jurisdiction of this court for the
6 Court to determine the jurisdiction of the court.

7 MR. CAYNE: Your Honor, my colleague just punched me
8 in the leg for saying that, and I'm glad you picked it up. That
9 is absolutely right, Your Honor.

10 And the last thing, what's going on in the Court of
11 Federal Claims has no relevance here. My client, to whom this
12 statute attaches, is not a defendant in that action. There are
13 many issues going on in that case on which I am not expert, but
14 it's a different case in a different court.

15 If you want to look at similarities, the similarity is
16 to D.D.C., the only real difference being in your court, Your
17 Honor, we have not moved on summary judgment, and that's why,
18 rather than this case presenting a more compelling reason for a
19 record, this case presents zero reason for the production of a
20 record by either defendant, Your Honor.

21 THE COURT: Thank you.

22 I'll turn things over, then, to Mr. McElvain.

23 MR. CAYNE: Thank you, Your Honor.

24 MR. McELVAIN: Thank you, Your Honor, and may it
25 please the Court.

1 I don't have--

2 THE COURT: McElvain; is that right?

3 MR. McELVAIN: Mr. McElvain, yes.

4 THE COURT: I'm sorry. I--

5 MR. McELVAIN: That's quite fine. Everybody gets it
6 wrong.

7 THE COURT: I can't read my law clerk's writing, but
8 that's no sin because-- Well, she can read mine, but I can't
9 read hers sometimes. I apologize for mispronouncing your name.

10 MR. McELVAIN: That's perfectly fine.

11 I don't wish to spend a great deal of time belaboring
12 the points that have already been made, and ably so, by my
13 co-counsel, but I do wish to underscore a few points that I
14 believe are dispositive of the pending motion to compel.

15 In our motions to dismiss, both defendants have raised
16 purely legal arguments on multiple grounds as to why the
17 complaint should be dismissed. Each of those grounds can be
18 decided purely on the four corners of the complaint and should
19 be decided on the four corners of the complaint. And, in fact,
20 the plaintiff has only disputed whether legal or factual grounds
21 are presented as to only one of the grounds that have been
22 presented.

23 First, as to Section 4617(f), that is the
24 anti-injunction bar which prohibits the Court from taking any
25 action to restrain or affect the conservator's exercise of its

1 powers. We have presented a purely legal argument. You can
2 take the allegations of the complaint as perfectly true, and
3 nonetheless the conclusion is still compelled that what the
4 plaintiff seeks here is an order that would restrain or affect
5 the conservator's exercise of its powers to enter into the third
6 amendment to the PSPAs.

7 There is no factual dispute. You can take the
8 allegations of the complaint as true, and we still contend we
9 should prevail under 4617(f). But, again, that's only one of
10 the multiple grounds that the parties have submitted.

11 Under 4617(b), as Mr. Cayne has already recounted,
12 FHFA has succeeded to all rights of any shareholders in the
13 enterprises, including the shareholder plaintiff here today.
14 One of those rights would be the right to bring an action like
15 this one. That, again, presents a purely legal question that we
16 would like to present to Judge Pratt, and we should prevail once
17 we have briefing completed on that.

18 In addition, there are questions of ripeness, of
19 shareholder standing, of the failure of the plaintiff to allege
20 that it even owned shares at the time of the actions that are
21 challenged here. Each of those, again, are purely legal
22 questions. There are no facts that need to be resolved for any
23 of those grounds to be presented to Judge Pratt.

24 Now, the plaintiff, as I understand it, disputes our
25 view of the law in each of those points. It says that, well, we

1 contend that the 4617(f) bar wouldn't extend to circumstances
2 where FHFA acted improperly or failed to keep the GSEs in what
3 they viewed as sound and solvent condition.

4 The legal argument we want to present to Judge Pratt
5 is that that simply does not matter. Now, they have a different
6 view of the law and they're entitled to argue that different
7 view of the law to Judge Pratt, but that, again, will be a
8 purely legal question that both sides will present to the Court.
9 There are no facts that need to be resolved for that issue to be
10 teed up for a decision by the district court.

11 And the same goes with each of those additional
12 points; there are simply no factual disputes that need to be
13 resolved for this issue to be taken up to the district court.

14 I'd like to refer also to the alternative motion to
15 transfer or stay. And there's simply no allegation whatsoever,
16 nor could there be, that any discovery is needed to decide
17 whether a case should be transferred or certainly to be stayed.
18 A stay would be perfectly within the district court's discretion
19 without any resolution of any factual issues.

20 The one point that the plaintiff has raised is, well,
21 you have to litigate fully the question of jurisdiction before
22 you can even get to the question of whether the case should be
23 transferred, but that's not right, and this turns on case law
24 that hasn't been briefed to this Court because it only came up
25 on the reply brief on the motion to compel. So this is an issue

1 that we would like to spell out further in briefing before Judge
2 Pratt on the main motion to dismiss or in the alternative to
3 transfer.

4 But there is more recent Supreme Court authority that
5 says that there is no necessary sequencing that requires a court
6 to decide jurisdictional issues before deciding transfer issues.
7 The case I'm referring to is Sinochem International Company vs.
8 Malaysia International Shipping Corp. The cite for that is 549
9 U.S. 422, 2007.

10 The issue in that case was--the holding in that case
11 was that the Supreme Court held that a motion to dismiss for
12 forum non conveniens could be considered before questions of
13 jurisdiction could be considered. Forum non conveniens is
14 somewhat different from the transfer motion here but I think not
15 different in any relevant way.

16 So what we would like to present in briefing to Judge
17 Pratt, if briefing is permitted to go forward, is that under
18 that case law it would be up to Judge Pratt's discretion whether
19 to consider the transfer or stay motion first or the
20 jurisdictional motion first.

21 We think probably the easiest-- Well, I won't use the
22 word "easiest," but perhaps the cleanest result would be simply
23 to dismiss for lack of jurisdiction because we think our legal
24 arguments are so clear, but, again, it would be a matter for
25 Judge Pratt's discretion which of those two alternatives he

1 would wish to address first.

2 THE COURT: Thank you.

3 Mr. Thompson, I'll let you have the final word.

4 MR. THOMPSON: Okay. I'll be succinct, Your Honor.

5 Just a couple of quick things.

6 First, on the D.D.C., the motion that we filed to
7 suspend the briefing--excuse me, Your Honor--was never ruled
8 upon, so we went ahead and filed our briefs there, and we fully
9 expect to put in supplemental briefs after we've got a proper
10 administrative record and discovery has taken place there.

11 Second of all, there was a number of references to the
12 fact that the defendants have now assumed all the rights of
13 shareholders, including the right to sue themselves. It's sort
14 of like the Coke Zero ad, you know; maybe we should sue
15 ourselves. And not surprisingly, the courts have unanimously
16 said that the fox is not going to be allowed to guard the
17 henhouse and that there is a conflict of interest exception to
18 that statute. And they don't cite to any contrary authority.

19 And then finally, Your Honor, the one thing that was
20 not disputed in any of their remarks is that they have, in fact,
21 in their motions to dismiss, they have made a number of factual
22 statements that are contained in our briefing here. I cited a
23 few of them, and those are hotly contested, and they can't deny
24 the fact that we dispute whether there was a very real problem,
25 the centerpiece of their defense of jurisdiction on the

1 jurisdictional bar.

2 Thank you, Your Honor.

3 THE COURT: Thank you.

4 Thank you all. And this argument has been quite
5 helpful to me. I realize that you need a ruling on the current
6 motion straight away. I'll get on it, and it won't be long
7 before you have a ruling from me, and then you can go forth
8 whither that leads in this court.

9 But thank you all for coming today, and I do
10 appreciate the arguments you've made. Thank you.

11 (Proceedings concluded at 11:04 a.m.)

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C E R T I F I C A T E

I, Kelli M. Mulcahy, a Certified Shorthand Reporter of the State of Iowa and Federal Official Realtime Court Reporter in and for the United States District Court for the Southern District of Iowa, do hereby certify, pursuant to Title 28, United States Code, Section 753, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated at Des Moines, Iowa, this 14th day of July, 2014.

/s/ Kelli M. Mulcahy
Kelli M. Mulcahy, CSR No. 941, RMR, CRR
Federal Official Court Reporter