IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFFS' NOTICE OF FILING OF PLAINTIFFS' PUBLIC, REDACTED RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO STAY ALL PROCEEDINGS

On November 17, 2014, Plaintiffs Fairholme Funds, Inc., et al. filed their opposition to Defendant's recent motion to stay all proceedings.[1] Because Plaintiffs' Stay Opposition referenced, attached, and briefly discussed four documents, produced in discovery by Defendant, Fannie Mae, and Freddie Mac, that had been designated by those entities as Protected Information, the Stay Opposition was filed under seal as required by the August 8, 2014 Protective Order entered in this action (Doc. 73). Defendant, Fannie Mae, and Freddie Mac have to date refused to remove the Protected Information designation from the documents at issue. As contemplated by Paragraph 11 of the Protective Order, Plaintiffs have therefore worked with Defendant, Fannie Mae, and Freddie Mac to prepare the attached public, redacted version of the Stay Opposition.

By filing the attached public, redacted version of the Stay Opposition, Plaintiffs do not intend to waive, and indeed they continue to reserve, their right to argue that the documents at

[1] Plaintiffs' Sealed Response in Opposition to Defendant's Motion To Stay All Proceedings (Doc. 106) (Nov. 17, 2014) ("Stay Opposition").

issue do not meet the Protective Order's definition of Protected Information. *See* Protective Order ¶ 2). Plaintiffs further reserve their right under the Protective Order to challenge the propriety of the designation of these documents as Protected Information (*see id.* ¶¶ 17, 19).

Date: December 18, 2014

Respectfully submitted,

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REDACTED VERSION

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December 18, 2014

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The Government has moved this Court, yet again, to stay proceedings in this case, this time pending appeal of the district court's decision in *Perry Capital LLC v. Lew*, 2014 WL 4829559 (D.D.C. Sept. 30, 2014). As the Court will recall, shortly after Plaintiffs filed their complaint, the Government moved to "stay all proceedings" in this Court "pending the resolution of related actions in the United States District Court for the District of Columbia." Doc. 7 at 1. This Court denied the Government's request. *See* Doc. 12.

After denial of its stay motion, the Government moved to dismiss the complaint. In its motion papers, however, the Government challenged the jurisdictional facts alleged in the complaint, and this Court held that Plaintiffs were entitled to jurisdictional discovery regarding the disputed factual issues. *See* Doc. 32. Since that time, the parties have been engaged in discovery that has entailed extensive negotiations between the parties and active monitoring and participation by the Court. As a result of this effort, it appears that the document phase of discovery is nearing completion.

Now, however, the Government seeks once again to bring this case to a halt, this time pending resolution of the appeals from the district court's decision in *Perry*. But just as there was no legitimate basis to stay this case at its outset pending the resolution of actions challenging the Net Worth Sweep in the D.D.C., there is no "pressing need" to stay this case now pending resolution of the appeals from the D.D.C.'s judgment dismissing challenges to the Net Worth Sweep. The Government has not carried its heavy burden to justify a stay, and its motion should be denied.

QUESTIONS PRESENTED

1. Whether the Government has demonstrated (a) a pressing need for an indefinite stay of all proceedings in this action, and (b) that the balance of interests weighs in favor of such

a stay.

2. Whether the Government has demonstrated, in the alternative, that proceedings in this case should be stayed pending resolution of a motion to dismiss on preclusion grounds.

STATEMENT OF THE CASE

The Government's motion is prompted by the district court's decision in *Perry*. That decision dismissed a number of actions challenging the Net Worth Sweep (collectively, the "D.D.C. Actions"). Two of those actions are particularly relevant for purposes of understanding the Government's motion. The first, *Fairholme Funds, Inc. v. FHFA*, No. 13-1053 (D.D.C.), was brought by Fairholme Funds, Inc., the Fairholme Fund, and several subsidiaries of the W.R. Berkley Corporation. The *Fairholme* action alleges (a) that FHFA and Treasury violated federal law in executing the Net Worth Sweep by exceeding their statutory authority and acting arbitrarily and capriciously, and (b) that FHFA's execution of the Net Worth Sweep also constituted a breach of fiduciary duty, breach of contract, and breach of the implied covenant of good faith and fair dealing under applicable state law.

Each of the plaintiffs in the *Fairholme* action also is a plaintiff in this case. But there is one plaintiff in this case that is *not* a plaintiff in *Fairholme* (or any of the other D.D.C. Actions): Continental Western Insurance Company. Instead of filing suit in the D.D.C., Continental Western filed its own suit in the Southern District of Iowa raising claims that are similar to, although in some respects broader than, those raised by the *Fairholme* plaintiffs. *Continental W. Ins. Co. v. FHFA*, No. 4:14-cv-00042 (S.D. Iowa). Continental Western is an indirect subsidiary of the W.R. Berkley Corporation. Its corporate parent (Berkley Regional Insurance Company) and that entity's corporate parent (Berkley Insurance Company) are plaintiffs in the D.D.C. *Fairholme* action but, again, Continental Western is not. FHFA and Treasury have filed a motion in the

Iowa court to dismiss Continental Western's case on preclusion grounds on the basis of *Perry*, and that motion is still being briefed. In addition, in response to the Government's notice of supplemental authority, ECF No. 48, Continental Western filed a supplemental brief explaining the many errors underlying the D.D.C.'s judgment. *See* Plaintiff's Supplemental Brief, *Continental W.*, No. 4:14-cv-00042 (S.D. Iowa Oct. 20, 2014), ECF No. 49-1.

Second, while Plaintiffs' action in the D.D.C. did not raise a takings claim, the plaintiffs in a separate (but now consolidated) proposed class action proceeding did, invoking the Little Tucker Act, 28 U.S.C. § 1346(a)(2). *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litig.*, No. 13-1288 (D.D.C.). (The consolidated class plaintiffs also brought claims for breach of contract and breach of the implied covenant of good faith and fair dealing, as well as derivative claims of breach of fiduciary duty. *See Perry*, 2014 WL 4829559, at *5.)

On September 30, 2014, the district court issued an omnibus decision dismissing the D.D.C. Actions in their entirety. The district court dismissed the plaintiffs' claims on various grounds. *See id.* at *6-19. The district court dismissed the coordinated class plaintiffs' takings claim on jurisdictional grounds. In particular, the district court reasoned that the coordinated class plaintiffs failed to establish the district court's jurisdiction under the Little Tucker Act because they did not "clearly and adequately waive claims exceeding $10,000 in either their pleadings or subsequent opposition brief." *Id*. at *20. The district court proceeded, in dicta, to discuss the merits of the takings claim to explain why it would have declined a motion to amend the complaint to correct the jurisdictional defect, although the coordinate class plaintiffs never filed such a motion. *Id*. at *20-24.

The plaintiffs in the D.D.C. Actions have appealed the district court's decision, and the

D.C. Circuit has consolidated the appeals.

ARGUMENT

I. THE GOVERNMENT'S REQUEST FOR AN INDEFINITE STAY OF PROCEEDINGS SHOULD BE DENIED.

A. The Government Bears a Heavy Burden To Establish the Need for a Stay.

While it is clear that this Court has the authority to indefinitely stay the proceedings before it pending resolution of an action in another court, it is equally clear that this authority should be exercised only in the most compelling of circumstances. The Government has failed to establish that such circumstances are present here.

"Precedent shows the general disfavor with which stays are viewed," *Kahn v. General Motors Corp.*, 889 F.2d 1078, 1083 (Fed. Cir. 1989), and it establishes that "the burden of making out the justice and wisdom of a departure from the beaten track lay[s] heavily on the" party advocating a stay, *Landis v. North. Am. Co.*, 299 U.S. 248, 256 (1936). *See also Clinton v. Jones*, 520 U.S. 681, 708 (1997) ("The proponent of a stay bears the burden of establishing its need."). Indeed, "the suppliant for a stay must make out a *clear* case of hardship or inequity in being required to go forward, if there is even a *fair* possibility that the stay for which he prays will work damage to some one else." *Landis*, 299 U.S. at 255 (emphases added).

To carry its burden, the stay applicant must first establish an "obvious" and "pressing" need for a stay. *Id.* at 255, 257. If the applicant fails to do so, the stay must be denied, for it is an abuse of discretion to enter "a stay of indefinite duration in the absence of a pressing need." *Id*. at 255. If the applicant succeeds, the applicant must then demonstrate that the "interests favoring a stay" outweigh the "interests frustrated by the action." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997). "Overarching this balancing is the court's paramount obligation to exercise jurisdiction timely in cases properly before it." *Id*. *See also*

Kahn, 889 F.2d at 1080; RCFC 1 (This Court's rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

Because the Government has not met its heavy burden to establish the need for an indefinite stay, its motion must be denied.

B. The Allegedly Preclusive Effect of the Judgment in the D.D.C. Actions Does Not Provide a Pressing Need for a Stay.

The Government's principal submission is its assertion that the judgment in the D.D.C. Actions precludes further litigation of this action. A stay is not in order because the judgment in the D.D.C. Actions does not preclude further litigation of this case.

To establish issue preclusion, the Government must make four essential showings: "(1) identity of the issues in a prior proceeding; (2) the issues were actually litigated; (3) the determination of the issues was necessary to the resulting judgment; and, (4) the party defending against preclusion had a full and fair opportunity to litigate the issues." *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1366 (Fed. Cir. 2000). Because the Government cannot make *any* of these showings, much less all of them, its preclusion argument must fail.

1. *Full and Fair Opportunity to Litigate*.

The Government ignores that one of the plaintiffs in this action, Continental Western, was not a plaintiff in *any* of the D.D.C. Actions. Continental Western instead filed its own action in the Southern District of Iowa, and that action is still pending. This is a critical issue, because "[a] person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit," *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008), and the Supreme Court has "repeatedly emphasize[d] the fundamental nature of the general rule that only parties can be bound by prior judgments," *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011) (quotation marks omitted).

To be sure, the general rule against nonparty preclusion is subject to "discrete exceptions that apply in limited circumstances." *Taylor*, 553 U.S. at 882 (quotation marks omitted). But by ignoring this issue the Government has waived the ability to assert that any of the exceptions apply. At any rate, "[t]he importance of [the rule against nonparty preclusion] and the narrowness of its exceptions go hand in hand," *Smith*, 131 S. Ct. at 2379, and none of them apply here. Only two are potentially relevant: (a) the exception for adequate representation, and (b) the exception for relitigation through a proxy.

The adequate representation exception applies to cases such as "properly conducted class actions and suits brought by trustees, guardians, and other fiduciaries." *Taylor*, 553 U.S. at 894 (citation omitted). At a minimum it requires that a party to the original action "either . . . understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Id*. at 900. Nothing in the record of the D.D.C. Actions indicates that this was the case. While the parties to the *Fairholme* action include Continental Western's corporate parent and that entity's corporate parent, they did not profess to represent Continental Western's interests. And to the extent Continental Western could have fallen within the definition of any class that the consolidated class plaintiffs unsuccessfully sought to represent, the case never even reached the class certification phase. "Neither a proposed class action nor a rejected class action may bind nonparties." *Smith*, 131 S. Ct. at 2380.

The proxy exception applies "when a person who did not participate in a litigation later brings suit as the designated representative [or agent] of a person who was a party to the prior adjudication." *Taylor*, 553 U.S. at 895. Nothing in the record establishes that Continental Western is acting in such a capacity here. "The parent-subsidiary relationship . . . of itself" does not suffice, *see* 18A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE

§ 4460 (2d ed. 1987), nor does a perception of "tactical maneuvering" among the parties, *Taylor*, 553 U.S. at 906.

For these reasons, even if the judgment in the D.D.C. Actions mandated dismissal of the remaining plaintiffs' claims on preclusion grounds (as explained below, it does not), it would not affect Continental Western's ability to continue litigating this action. And because this Court will at a minimum be required to address Continental Western's claims (which are, of course, identical to the other parties' claims), the Government's assertions that staying this action will result in the conservation of judicial and party resources are baseless.

2. *Identity and Actual Litigation of Issues*.

There is a second and independent reason that preclusion does not obtain here: the issues before the D.D.C. and this Court are not identical. For issue preclusion to apply, it is imperative that the issue be "*identical* to [the] one decided in the first action," *Laguna Hermosa Corp. v. United States*, 671 F.3d 1284, 1288 (Fed. Cir. 2012) (emphasis added), and if the issue is "not identical," it follows that the issue "was not previously litigated," *Whiteman v. DOT*, 688 F.3d 1336, 1340 (Fed. Cir. 2012). Preclusion does not apply here because the issues the Government seeks to bar Plaintiffs from litigating—dealing with the ripeness and merits of Plaintiffs' taking claim—are not the same as the issues decided against Plaintiffs in the D.D.C. Action, which dealt with the ripeness and merits of Plaintiffs' contract claims (i.e., breach of contract and breach of the implied covenant of good faith and fair dealing).

To the extent there is any doubt about whether the issues before this Court are identical to the issues decided by the district court it must be resolved in Plaintiffs' favor. Indeed, "[t]he public policy underlying the principles of preclusion, whereby potentially meritorious claims may be barred from judicial scrutiny, has led courts to hold that the circumstances for preclusion

'must be certain to every intent.' " *Mayer/Berkshire Corp. v. Berkshire Fashions, Inc.*, 424 F.3d 1229, 1234 (Fed. Cir. 2005) (quoting *Russell v. Place*, 94 U.S. (4 Otto) 606, 610 (1876)). This principle applies with particular force here given this Court's exclusive jurisdiction over the "potentially meritorious claims" sought to be precluded. *Id.* Just as the exclusive nature of this Court's jurisdiction means that *claim* preclusion could not bar Plaintiffs' takings claim, *see Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1071 (Fed. Cir. 1994), it also reinforces the importance of assuring that any *issues* sought to be precluded are indeed identical to the issues decided in the district court.

According to the Government, "[a]t least two issues decided by the district court have preclusive effect on the outcome of this action," Defs.' Mot. to Stay Proceedings at 6, Doc. 103 ("Stay Motion"). The two issues are: (a) the determination that Plaintiffs' contractual liquidation preference claims are not ripe for adjudication, *Perry*, 2014 WL 4829559, at *15-16, and (b) the determination that Plaintiffs' contractual dividend claims failed to state a claim, *id*. at *18-19. The Government's argument is incorrect.

With respect to ripeness, the Government says that it has "raised the same defenses regarding ripeness" that the D.D.C. endorsed, but in fact the ripeness question before this Court is fundamentally different from that in the D.D.C. in two ways. Stay Motion 3; *see id.* at 6-8. First, the Supreme Court and the Federal Circuit have developed a takings-specific body of caselaw that differs in material respects from the ripeness principles that govern contract claims like those at issue in *Perry*. *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985); *Bayou Des Familles Dev. Corp. v. United States*, 130 F.3d 1034, 1037 (Fed. Cir. 1997); 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE JURISDICTION § 3532.1.1 (3d ed. 2014) ("A special category of ripeness

doctrine surrounds claims arising from government takings of property."). And whatever the merits of the D.D.C.'s conclusion that *contract* claims based on shareholders' liquidation preference were not ripe because the damages were too uncertain, the rule in *takings* cases is that "the question of damages is discrete from the question of claim accrual." *Goodrich v. United States*, 434 F.3d 1329, 1336 (Fed. Cir. 2006); *accord Boling v. United States*, 220 F.3d 1365, 1370-71 (Fed. Cir. 2000); *Royal Manor, Ltd. v. United States*, 69 Fed. Cl. 58, 62 & n.3 (2005).

Second, while the D.D.C.'s ripeness analysis focused narrowly on whether the Net Worth Sweep breached a specific provision of the Companies' stock certificates, Plaintiffs claim here that the Net Worth Sweep effected a taking of their stock *in toto*, transferring to Treasury without just compensation *all* of their rights as shareholders. Even if one assumes that a claim specific to Plaintiffs' contract right to a liquidation preference is too contingent for judicial resolution until the Companies are actually liquidated, it does not follow that the same is true for the taking of Plaintiffs' entire bundle of rights as shareholders.

Similarly, the Government is wrong when it argues that this suit is precluded by the D.D.C.'s ruling that the Net Worth Sweep did not violate the dividend provisions of the private shareholders' stock certificates. *See* Stay Motion 8-9. Plaintiffs in this suit do not allege a breach of contract but rather allege only the taking of property, and it does not ineluctably follow from the failure of the contract claims in the D.D.C. that the takings claim before this Court must also fail. *See Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1368 (Fed. Cir. 2009) (observing that different legal standards apply to contract and takings claims). Indeed, the D.D.C. implicitly recognized as much by proceeding to separately consider other parties' takings claims similar to those at issue in this Court after rejecting Plaintiffs' contract claims. *See Perry*, 2014 WL 4829559, at *20-24. Putting aside whether the D.D.C. was correct to conclude that the Net

Worth Sweep did not violate a particular provision of Plaintiffs' contract, this Court must apply a different set of legal principles to determine whether the Net Worth Sweep took Plaintiffs' stock.

3. *Necessity of Issues to Judgment*.

Preclusion extends to an issue only if its "determination [was] *essential* to the prior judgment." *Taylor*, 553 U.S. at 892 (emphasis added); *Comair Rotron, Inc. v. Nippon Densan Corp.*, 49 F.3d 1535, 1538 (Fed. Cir. 1995) ("It suffices to negate preclusion that the finding as to [an issue] was *not* essential" to the prior judgment) (emphasis added)). The Government argues that Plaintiffs' action is precluded because the D.D.C.'s judgment decided that liquidation preference claims are not ripe. But the D.D.C.'s ripeness decision was one of two independent grounds for the D.D.C.'s dismissal of Plaintiffs' contract claims relating to the liquidation preference. The D.D.C. also concluded (incorrectly, in our view), that Plaintiffs' claims were derivative in nature, despite being labeled direct, and thus were barred by 12 U.S.C. § 4617(b)(2)(A)(i). *See Perry*, 2014 WL 4829559, at *16 n.39, 17. (The Government notes that the D.D.C. found Plaintiffs' claims "partially derivative in nature," but it does not argue that this Court is thereby bound to find Plaintiffs' takings claim derivative. Stay Motion 8 n.7.) Because of this alternative finding, the D.D.C.'s ripeness decision was not essential—the court would have reached the same conclusion regardless of its finding on the ripeness issue. And because the D.D.C.'s ripeness decision was not essential, it also is not preclusive: "If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, *the judgment is not conclusive with respect to either issue standing alone*." RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. i (1982) (emphasis added). In light of this principle, the Federal Circuit has "refused to give preclusive effect to alternative findings that were each independently sufficient to support a judgment," and this Court is bound to do the same

here. *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 252 (3d Cir. 2006) (citing *Comair Rotron*, 49 F.3d at 1538-39).

C. The Supposed "Persuasive" Authority of the D.D.C.'s Takings Ruling Does Not Provide a Pressing Need for a Stay.

Because Plaintiffs did not bring a takings claim in the D.D.C., the Government does not contend that the D.D.C.'s takings judgment precludes this Court from considering the merits of that claim. The Government nevertheless contends that the D.D.C. takings judgment justifies a stay to allow "full consideration" of its persuasive value once "appeals from that ruling are resolved." Stay Motion 11. Given the well-established rule that "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both," *Landis*, 299 U.S. at 255, it should be rarer still that a litigant in one cause be compelled to stand aside while a litigant in another pursues relief that may clarify the "persuasive value" of another judgment. Waiting for an appellate ruling in a different case plainly does not provide a *pressing* need for staying this litigation.

Furthermore, the D.D.C. held that the class plaintiffs' pleading of a takings claim in that case was inadequate for jurisdiction under the Little Tucker Act because the class plaintiffs had failed "to clearly and adequately waive claims exceeding $10,000 in either their pleadings or subsequent opposition brief." *Perry*, 2014 WL 4829559, at *20 (emphasis added). Under D.C. Circuit precedent this meant that "the class plaintiffs' takings claims *belong[ed] in the Court of Federal Claims* rather than in" the D.D.C. *Id.* While the D.D.C. went on to opine on what it would have done if the class plaintiffs had moved to amend their complaint to make the necessary jurisdictional allegations, the class plaintiffs did not do so, and the D.D.C. lacked jurisdiction to make any binding pronouncements on the merits. This Court should not allow the D.D.C.'s dicta on the merits of an issue that the D.D.C.'s reasoning itself admitted *belonged in*

this Court to color its determination of that issue.

D. The Balance of Interests Weighs Heavily Against a Stay.

For the reasons discussed above, the Government has not demonstrated a pressing need for an indefinite stay, and its motion should be denied for that reason alone. *See Cherokee Nation*, 124 F.3d at 1416. But should the Court nevertheless proceed to assess the balance of interests served, and frustrated, by a stay, *id.*, it must conclude not only that the Government has failed to discharge its burden of demonstrating that the balance of interests tips decidedly in favor of a stay, but that the balance in fact weighs heavily against a stay.

As the Court is aware, proceedings in this action have been focused for quite some time on the jurisdictional discovery that this Court authorized almost a year ago. That discovery, which was made necessary by the Government's own factual assertions in its motion to dismiss, relates to the Government's contention that this Court lacks jurisdiction over Plaintiffs' takings claims. Unsurprisingly, therefore, the principal harm that the Government alleges it will suffer in the absence of a stay is the alleged "waste of time and energy" involved in complying with that jurisdictional discovery. *See* Stay Motion 13-14.[1] But the Government's arguments on this point are long on rhetoric and short on substance. In particular, the Government does not provide any details that would allow the Court to meaningfully assess whether the balance of interests weighs for or against putting a halt to such discovery.

[1] The Government also mentions the risk of "inconsistent decisions" based on its insistence that the appeal of the district court's decision "may well provide a definitive resolution of certain of the dispositive legal defenses raised in this case." Stay Motion 11, 13. But there is no merit to this argument. As explained above, the Government's issue preclusion argument fails on multiple grounds. In addition, the appeal is pending before the D.C. Circuit, not the Federal Circuit. Thus, the appeal will not "provide a definitive resolution" of the issues before this Court.

"The parties," we are told, "are currently engaged in sensitive, costly, and time-consuming discovery that may be moot when the appeals of the district court decision [in *Perry*] are concluded." Stay Motion 13. But even laying aside the points that the Government is in no position to complain about being "required to respond to onerous discovery" *id.* at 14, when the discovery was made necessary only by the Government's own motion to dismiss,[2] and that the Government's speculation that the discovery "may" ultimately become moot is premised upon its legally erroneous issue preclusion arguments, the Government has come nowhere close to demonstrating that the balance of interests counsels in favor of stopping such discovery mid-stream. Notably, the Government completely ignores the disruption and inefficiencies that would result in this case if such discovery were stayed at this time, when much of the discovery is well advanced. Ignoring these inconvenient facts allows the Government both to inflate the prejudice that it would suffer if a stay were denied and to discount (indeed completely disclaim) the prejudice that Plaintiffs would suffer if a stay were granted.

The fact of the matter is that the limited document discovery authorized by the Court is well underway and is in fact nearing completion. Plaintiffs served their document requests in early April, and the parties subsequently reached agreement on both the search terms that would be applied to the Government's search of electronically stored information ("ESI") and the identity of the custodians whose ESI would be searched. It is Plaintiffs' understanding that those ESI

[2] Moreover, the commonplace facts that parties in litigation are required to engage in discovery, or that such discovery may consume substantial time and resources, are not ordinarily considered to constitute the type of harm that would justify a stay of proceedings. *Cf. Beard v. United States*, 101 Fed. Cl. 100, 104 (2011) (stating that "[t]he expenses and effort involved in the defense of litigation do not constitute 'irreparable injury' "). *See also FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980).

searches were conducted some time ago, after which the Government began reviewing and producing responsive documents. Similarly, after initially skirmishing over the scope of the Government's obligation to produce information responsive to a number of Plaintiffs' requests—skirmishing that resulted in the filing of a protective order motion by the Government and the threatened filing of a motion to compel by Plaintiffs—the parties engaged in extensive negotiations that culminated in an agreement in which Plaintiffs agreed to abandon several of their requests, and defer action on others, and the Government agreed to produce documents responsive to other requests. Notably, although the parties reached an agreement in principle on this issue in September, that agreement was finalized and memorialized in October, well *after* Judge Lamberth issued the decision that the Government now relies upon to suspend all proceedings, including discovery.

The Government has represented to the Court that it estimates that it will be able to complete the production of responsive, non-privileged documents by mid-January. *See* Joint Status Report Regarding Proposed Discovery Completion Date (Sept. 5, 2014), Doc. 90. Thus, presumably, the Government has already performed the bulk of the work that is necessary to fulfill the document production obligations it undertook when the Court authorized discovery (and that it subsequently agreed to fulfill when the parties reached an amicable resolution of their dispute over the scope of authorized discovery). These facts, none of which are disputed and all of which are ignored or glossed over by the Government in its motion, substantially undermine any suggestion that the Government would suffer significant prejudice if the discovery authorized by the Court were allowed to run its course.[3]

[3] The Government repeatedly warns, as it has throughout the discovery process, of the supposed dire risks of pressing forward with "potentially market-disruptive discovery," Stay Mo-

On the other hand, hitting the pause button on proceedings in the middle of this discovery would prejudice Plaintiffs and otherwise lead to costly inefficiencies. Plaintiffs' counsel have assembled and trained a team of attorneys to review materials produced in discovery, many of which materials are complex financial and corporate documents, and have retained a financial consultant to assist in that review as well. These lawyers have been admitted to the Protective Order and have been extensively briefed on the issues in this case. If a stay is entered, and additional documents are not produced until many months from now, some members of this document review team may not be available to resume their important work, and all members of the team will need to refamiliarize themselves with the facts and issues of the case. The review process itself will also be less efficient as memories will have faded as to such things as whether a given document is a duplicate or otherwise contains information that has already been produced. A stay will thus undoubtedly lead to greater inefficiencies, and corresponding litigation expense, for Plaintiffs.

A suspension of the ongoing discovery would lead to other types of prejudice as well. Although, as discussed above, the Government has gathered, reviewed, and begun to produce responsive documents, its document productions are incomplete in several important respects.

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tion 9, and its alleged concerns about "the sensitive nature of the information responsive to plaintiffs' discovery requests and their potential effect on the United States financial markets," *id*. at 14 n.9. But it is now even more difficult for us to understand the Government's concerns in light of the documents it has produced thus far, as we have not identified any that would carry any risk of roiling the financial markets if publicly disclosed. We know of no reason why the documents the Government has not yet produced would be of a different character than those it already has produced—and the security of the latter, of course, would not be affected by a stay. In any event, the parties and this Court worked long and hard to craft a tight and comprehensive Protective Order to shield sensitive financial information from public disclosure (as the Government itself concedes, *see* Stay Motion 14 n.9). The Government identifies no information leaks or other lapses that have occurred under the Protective Order, and can offer no reason why this Court's Protective Order cannot continue to be expected to shield any sensitive financial information produced by the Government.

While we do not intend here to catalogue either the documentation that has been produced or that has yet to be produced, we believe it is helpful to briefly outline for the Court several examples of the types of gaps in document discovery that make the timely completion of such discovery particularly critical:

- One of the topics as to which the Court authorized discovery concerns the parties' assessments of the expected profitability of Fannie and Freddie. In connection with this issue, which is critical to several of the jurisdictional arguments made by the Government in its motion to dismiss, Plaintiffs have requested the production of various financial projections prepared by or provided to the Government. The Government has agreed, subject only to a privilege review, to produce these projections, specifically including projections that were provided to the Government by Grant Thornton, which were reviewed by the Government in connection with the decision to enter into the Net Worth Sweep, *see, e.g.*, GSE Preferred Stock Purchase Agreements: Summary Review and Key Considerations, at T3786 (May 23, 2012) (attached as Ex. A) ("[T]he . . . Grant Thornton analysis [was] used to generate the forecast estimates on the subsequent pages."). The Government has thus far not produced them. These projections speak directly to the Government's expectations regarding Fannie's and Freddie's future profitability, and their production will not burden the Government in the slightest.

- Along similar lines, the cornerstone of the Government's defense of its decision to enter into the Third Amendment to the PSPAs and to implement the Net Worth Sweep is its factual claim that at the time of that decision, the Government did not expect Fannie or Freddie to be able to generate sufficient net income to cover their dividend obligation to Treasury under the original PSPAs. *See* Defendant's Motion to Dismiss at 9-10, 39-40, Doc. 20 (Dec. 9, 2013); Plaintiffs' Motion for a Continuance to Permit Discovery at 9-12, Doc. 22 (Dec. 20, 2013). While documents produced by the Government include materials referring to and summarizing some of these projections, they do not include all of the documents (such as the Grant Thornton projections) which are specifically identified as providing the basis for many of the projections. Thus, in addition to the Grant Thornton materials discussed above, Treasury documents refer to financial analyses that were based on "[s]cenarios developed by Treasury Staff," *see, e.g.*, T3887, T3894 (attached in Ex. B), but we do not believe that the Government has produced all responsive documents explaining or describing such Treasury scenarios. And these Treasury "scenarios" played a particularly critical role in the decision to enter into the Third Amendment, since they supported new and much lower projections of the Companies' future profitability than had been previously prepared. For example, analyses that were prepared in July 2012 on the basis of the Treasury "scenarios" projected, inexplicably and suspiciously, much lower net income for Fannie in subsequent years—approximately *a 50% reduction* for most years—than had internal Treasury analyses that had been prepared only a month earlier, in June

2012. *Compare* T3847 (June analysis) (attached as Ex. C) *with* T3889 (July 2012 Treasury analysis) (attached as Ex. B). Again, documents produced thus far by the Government do not purport to explain or justify all of the differences between the scenarios. The production of such critically important documents will cause little if any burden to the Government.

- The Government's failure thus far to produce many of the financial projection documents discussed above is especially curious in light of the fact that many documents produced in third party discovery (by Fannie, Freddie, and their auditors) *Compare* T3889 (July 2012 Treasury analysis) (attached as Ex. B) *with* FM_Fairholme-CFC-00000202-252 (July 2012 Fannie analysis) (attached as Ex. D); UST00005747-UST00005748 (attached as Ex. E); FM_Fairholme_CFC-00002526 (attached as Ex. F). Moreover, *see* FM_Fairholme-CFC-00000208 (attached as Ex. D), FM_Fairholme-CFC-00000220 (attached as Ex. D). *See also* FHLMC-00000734-738 (attached as Ex. G) (Freddie Board minutes from June 2012 Plaintiffs should be allowed to continue their limited discovery in order to further explore .

The above examples illustrate why a stay of the ongoing document discovery will serve only to prejudice Plaintiffs, with little to no offsetting benefit in terms of a significant reduction in any burden to the Government.

A stay of discovery would also pose other costs to Plaintiffs as well, including costs associated with any depositions that Plaintiffs may need to take in connection with the discovery that has been authorized. Most of the relevant events in this case took place between 2008 and 2012. As time continues to elapse, and the events at issue recede further and further into the rear view

mirror, relevant witnesses may become unavailable, and the memory of those witnesses who remain available may become less reliable. "With the passage of time, memories will fade, litigation costs will balloon, and resolve will dwindle. These factors will make it difficult for the [plaintiffs] to retool for litigation when, and if, their claim is allowed to proceed." *Cherokee Nation*, 124 F.3d at 1418. *See also Clinton v. Jones*, 520 U.S. 681, 707-08 (1997) ("[D]elaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party."). The Government ignores all of these indisputable costs in its motion.

The only point the Government does make about depositions in its motion is its suggestion that, absent a stay, it may have to resist efforts by Plaintiffs to depose "high-ranking current and former Government officials." Stay Motion 2. *See also id*. at 13. Of course, the mere fact that the Government may be subjected to deposition discovery does not constitute the hardship or inequity required to justify a stay. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (stating that "being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis*"). *See also United States v. Honeywell Int'l, Inc.*, 2013 WL 6405776, at *3 (D.D.C. Dec. 9, 2013) (denying the government's request for a stay because it would prejudice Honeywell's defense and "[t]he only hardship the government suggests is the time it will take for its witnesses to sit for depositions"). And, on its own, this argument does not justify a stay of document discovery, which, as discussed above, is nearing completion. In any event, because document productions, and document review, have not been completed, Plaintiffs have not yet decided whom they will need to depose. The Government's concerns about such depositions, and its implied threat to resist such depositions (on grounds that are not even hinted at, much less identified or explained), are therefore entirely

speculative and premature, and thus provide no justification for a stay of all proceedings. The Court's rules provide ample means for the Government to raise, at the appropriate time, any legitimate concerns it may have about any depositions that Plaintiffs may ultimately seek to take. The Court should not give the Government what amounts to a veto by allowing its veiled threat to resist certain depositions to justify the suspension of all discovery.

It is true that the discovery authorized by this Court has not always proceeded as smoothly or as quickly as Plaintiffs or the Court may have hoped. It is the rare case, indeed, in which discovery proceeds without any such road bumps. If anything, however, the convoluted history of discovery in this case argues *against* a stay of discovery and related proceedings in this Court. In *Honeywell International*, the federal government "moved to stay discovery pending resolution of partial summary judgment cross motions in two pending related cases," in the hope that those other proceedings would pretermit or at least simplify the case at hand. 2013 WL 6405776, at *1. The court was unmoved by the government's vague assertions about the "substantial overlap in legal and factual issues" and found the government's "speculation" about resolving the case before it on the basis of rulings in other cases insufficient to warrant further delay of discovery "in a case already hobbled by a history of discovery difficulties." *Id*. at *2-3. The district court accordingly denied the government's request for a stay.[4]

For all of these reasons, and especially when considered in light of the failure by the Government to establish a pressing need for the lengthy and indefinite stay of proceedings that it

[4] *See also In re Vitamin Antitrust Litig.*, 2000 WL 33142129, at *2 (D.D.C. Nov. 22, 2000) (certifying for interlocutory appeal the question of which rules govern discovery in the case, but denying a stay of jurisdictional discovery in the interim, stating, "The Court is greatly concerned with the possibility that an appeal of this preliminary ruling on the applicable rules for jurisdictional discovery could significantly delay the ultimate resolution of this action . . . . A stay of jurisdictional discovery would certainly thwart the prompt resolution of this matter and the Court cannot in good faith allow such delay.").

seeks, the balance of interests weighs heavily against such a stay.

II. THIS COURT SHOULD NOT ISSUE A TEMPORARY STAY PENDING DETERMINATION OF THE PRECLUSIVE EFFECT OF THE D.D.C.'S DECISION.

The Government requests, in the alternative, that the Court temporarily stay proceedings to permit briefing and decision on a separate motion to dismiss that the Government would file asserting that the D.D.C.'s judgment precludes further litigation of this action. Stay Motion 14-15. This Court should not grant the Government's request, because the Government's motion is unlikely to succeed. As explained above, the district court's judgment in the D.D.C. Actions does not preclude Plaintiffs' takings claim, and this Court should not stay this action to allow further briefing on the subject.

CONCLUSION

For the foregoing reasons, the Government's motion to stay proceedings should be denied.

Dated: December 18, 2014

Respectfully submitted,

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EXHIBIT A

GSE Preferred Stock Purchase Agreements
Summary Review and Key Considerations

Presentation to The Office of Management and Budget
Sensitive and Pre-Decisional

May 23, 2012

Primary GSE Financial Forecast Assumptions

Sensitive / Pre-Decisional

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

TREASURY-3786

EXHIBIT B

Illustrative Financial Forecasts - Fannie Mae Base Case & Stress Scenarios

Market Sensitive and Pre-Decisional

July 2012

10 Year Financial Analysis: Core Financial Assumptions

(analysis based on Grant Thornton's 2011 model; Scenarios developed by Treasury Staff)

Sensitive / Pre-Decisional

Scenario Assumptions

	Base Case	Stress Case	Severe Stress Case
Cumulative Credit Losses on Guarantee Book of Business	75 bps *	150 bps	250 bps
Time Period for Credit Loss Reserve Build In Stress Period (beginning in 2015)	-	2 years	3 years

*Cumulative Expected Losses by Vintage for Base Case

Assumptions for all Scenarios

	Base Case	Stress Case	Severe Stress Case
Retained Portfolio - Annual Run-off	← 15% →		
Net Interest Margin (NIM) - Average over 10-year period **	← 125 bps →		
Initial Size of Guarantee Book of Business (Unpaid Principal Balance (UPB))	← $2.9 Tn →		
Annual Expected Credit Loss Provisions - during non-stress periods	← 12.5 bps →		
Initial Average g-Fee Average (includes 10 bp Payroll Tax Fee)***	← 35 bps →		

** The NIM used each year is based on Grant Thornton's 2011 Financial Model for the Fannie Mae.

*** The 10 bp Payroll Tax Fee is not included in income.

No g-fee Increase Assumptions

	Base Case I	Stress Case I	Severe Stress Case I
Size of Guarantee Book of Business (UPB) - for all periods (no g-Fee Increase)	← $2.9 Tn **** →		

**** A constant guaranteed book of business assumes that new originations are offset by liquidations.

g-Fee Increase Scenarios - Impact on Guarantee Book of Business

	Base Case II	Stress Case II	Severe Stress Case II
Total Average g-Fee Increase (phased-in over 5 years)	← 40 bps →		
Average g-Fees after increase phase-in period	← 75 bps →		
Total decrease in new guaranteed originations during g-Fee phase-in *****	← 50% →		
Size of Guarantee Book of Business (UPB) - at year-end 2022	← $1.8 Tn →		

***** New origination volume is assumed to decline due to increased competition from other sources.

TREASURY-3887

Illustrative Forecast – Fannie Mae: Base Case I (no g-Fee increase)

Sensitive / Pre-Decisional

	(in $billions)	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
1	Guarantee Book of Business (at year-end)	$2,860	$2,860	$2,860	$2,860	$2,860	$2,860	$2,860	$2,860	$2,860	$2,860	$2,860
2	Retained Portfolio Balance (at year-end)	656	558	474	403	342	291	250	250	250	250	250
3	Credit Business - Income	(11.4)	(1.4)	4.3	2.2	2.2	2.2	2.2	2.2	2.2	2.2	2.2
4	Retained Portfolio - Income	8.3	9.7	7.8	3.4	2.8	2.3	1.9	1.9	1.9	1.9	1.9
5	Comprehensive Income	(3.1)	8.3	12.1	5.6	5.0	4.5	4.1	4.1	4.1	4.1	4.1
	10% Dividend											
6	Senior Preferred Stock Dividends (10%)	11.7	13.2	13.7	13.8	14.7	15.6	16.8	18.0	19.4	20.9	22.6
7	Net Worth / (Deficit)	(14.8)	(4.9)	(1.6)	(8.2)	(9.7)	(11.2)	(12.7)	(13.9)	(15.3)	(16.9)	(18.6)
8	PSPA Draw (including draw request)	14.8	4.9	1.6	8.2	9.7	11.2	12.7	13.9	15.3	16.9	18.6
9	Cumulative Draws (at year-end)	131.0	135.9	137.5	145.7	155.4	166.5	179.2	193.1	208.5	225.4	243.9
10	Remaining PSPA Capacity (at year-end)	125.0	120.1	118.5	110.3	100.6	89.5	76.8	62.8	47.5	30.6	12.1
11	*PSPA Capacity as a % of Guarantee Book*	*4.4%*	*4.2%*	*4.1%*	*3.9%*	*3.5%*	*3.1%*	*2.7%*	*2.2%*	*1.7%*	*1.1%*	*0.4%*
	Net Worth Sweep beginning in 2013 (no buffer)											
12	Senior Preferred Stock Dividends (Sweep)	11.7	8.3	12.1	5.6	5.0	4.5	4.1	4.1	4.1	4.1	4.1
13	Net Worth / (Deficit)	(14.8)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
14	PSPA Draw (including draw request)	14.8	-	-	-	-	-	-	-	-	-	-
15	Cumulative Draws (at year-end)	131.0	131.0	131.0	131.0	131.0	131.0	131.0	131.0	131.0	131.0	131.0
16	Remaining PSPA Capacity (at year-end)	125.0	125.0	125.0	125.0	125.0	125.0	125.0	125.0	125.0	125.0	125.0
17	*PSPA Capacity as a % of Guarantee Book*	*4.4%*	*4.4%*	*4.4%*	*4.4%*	*4.4%*	*4.4%*	*4.4%*	*4.4%*	*4.4%*	*4.4%*	*4.4%*

Notes: 1) Figures may not foot due to rounding; 2) 2012 & 2013 estimates based on FHFA published forecast adjusted for YTD results; & 3) Scenarios developed by Treasury Staff.

Cumulative Net Dividends (Dividends less Draws) 2013 - 2022:	10% Dividend Scenario:	$55.9	Net Worth Sweep Scenario:	$55.9

TREASURY-3889

Illustrative Forecast – Fannie Mae – Severe Stress Case II (with g-Fee Increase)

Sensitive / Pre-Decisional

	(in $billions)	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
1	Guarantee Book of Business (at year-end)	$2,860	$2,817	$2,738	$2,628	$2,491	$2,333	$2,198	$2,083	$1,985	$1,903	$1,832
2	Retained Portfolio Balance (at year-end)	656	558	474	403	342	291	250	250	250	250	250
3	Credit Business - Income	(11.4)	(1.1)	4.9	(16.2)	(16.0)	(15.8)	4.3	4.6	4.8	5.0	5.2
4	Retained Portfolio - Income	8.3	9.7	7.8	3.4	2.8	2.3	1.9	1.9	1.9	1.9	1.9
5	Comprehensive Income	(3.1)	8.5	12.7	(12.8)	(13.1)	(13.5)	6.2	6.5	6.7	6.9	7.1
	10% Dividend											
6	Senior Preferred Stock Dividends	11.7	13.2	13.7	13.8	16.4	19.4	22.7	13.9	-	-	-
7	Net Worth / (Deficit)	(14.8)	(4.7)	(1.0)	(26.6)	(29.6)	(32.9)	(16.4)	(17.8)	(19.0)	(18.8)	(18.6)
8	PSPA Draw (including draw request)	14.8	4.7	1.0	26.6	29.6	32.9	16.4	13.9	-	-	-
9	Cumulative Draws (at year-end)	131.0	135.6	136.6	163.2	192.8	225.6	242.1	256.0	256.0	256.0	256.0
10	Remaining PSPA Capacity (at year-end)	125.0	120.3	119.4	92.8	63.2	30.4	13.9	-	-	-	-
11	*PSPA Capacity as a % of Guarantee Book*	*4.4%*	*4.3%*	*4.4%*	*3.5%*	*2.5%*	*1.3%*	*0.6%*	*0.0%*	*0.0%*	*0.0%*	*0.0%*
	Net Worth Sweep beginning in 2013 (no buffer)											
12	Senior Preferred Stock Dividends	11.7	8.5	12.7	-	-	-	6.2	6.5	6.7	6.9	7.1
13	Net Worth / (Deficit)	(14.8)	0.0	0.0	(12.8)	(13.1)	(13.5)	0.0	0.0	0.0	0.0	0.0
14	PSPA Draw (including draw request)	14.8	-	-	12.8	13.1	13.5	-	-	-	-	-
15	Cumulative Draws (at year-end)	131.0	131.0	131.0	143.8	156.9	170.4	170.4	170.4	170.4	170.4	170.4
16	Remaining PSPA Capacity (at year-end)	125.0	125.0	125.0	112.2	99.1	85.6	85.6	85.6	85.6	85.6	85.6
17	*PSPA Capacity as a % of Guarantee Book*	*4.4%*	*4.4%*	*4.6%*	*4.3%*	*4.0%*	*3.7%*	*3.9%*	*4.1%*	*4.3%*	*4.5%*	*4.7%*

Notes: 1) Figures may not foot due to rounding; 2) 2012 & 2013 estimates based on FHFA published forecast adjusted for YTD results; & 3) Scenarios developed by Treasury Staff.

Cumulative Net Dividends (Dividends less Draws) 2013 - 2022: 10% Dividend Scenario: ($12.0) Net Worth Sweep Scenario: $15.2

TREASURY-3894

EXHIBIT C

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

Sensitive and Pre-Decisional

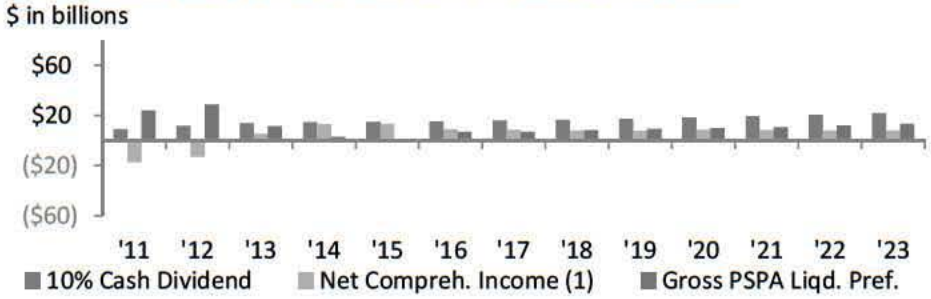
June 13, 2012

Fannie Mae Base Case PSPA Forecast

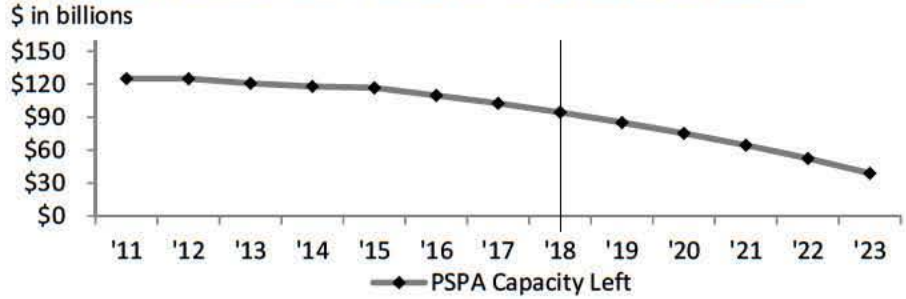
Sensitive / Pre-Decisional

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

Per annum projected PSPA draws and dividends



Projected PSPA funding capacity as a result of draws



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

EXHIBIT D

Excluded from Public, Redacted Version

EXHIBIT E

Excluded from Public, Redacted Version

EXHIBIT F

Excluded from Public, Redacted Version

EXHIBIT G

Excluded from Public, Redacted Version