

1 UNITED STATES COURT OF FEDERAL CLAIMS
2
3 FAIRHOLME FUNDS, INC., ET)
4 AL.,)
5 Plaintiffs,) Case No. 13-465C
6 vs.)
7 UNITED STATES OF AMERICA,)
8 Defendant.)
9 -----)

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Courtroom 4

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Howard T. Markey National Courts Building

14

717 Madison Place, N.W.

15

Washington, D.C.

16

Wednesday, January 28, 2015

17

10:00 a.m.

18

Status Conference

19

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BEFORE: THE HONORABLE MARGARET M. SWEENEY

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25 Susanne Bergling, RMR-CRR-CLR, Transcriber

1 APPEARANCES:

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3 ON BEHALF OF THE PLAINTIFFS:

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24 ALSO PRESENT:

25 Christine Cubias, Esq. (Via telephone)

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

1/28/2015

1 I N D E X

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3 REMARKS

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4 By Mr. Thompson

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5 By Mr. Schwind

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

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3 (Proceeding called to order, 10:05 a.m.)

4 THE COURT: As a preliminary matter, before we
5 begin, I just wanted to mention that my chambers
6 continues to receive phone calls from individuals
7 claiming to be shareholders or other interested members
8 of the public and apparently offering commentary --
9 favorable commentary with regards to my rulings, less
10 than perhaps courteous descriptions of other judges'
11 rulings at the DDC, also offering or referring me to
12 both blogs, books, other writings of people that are
13 interested or that may be ultimately witnesses in this
14 case.

15 What I'll just let all of you know -- so, that
16 explains why I issued the order that I did on the 26th
17 of January. I realize counsel is not -- and I'm sort of
18 looking now at -- obviously, no one at the Justice
19 Department is calling me. It would be the Plaintiffs.
20 I realize that you can't control members of the public,
21 and sometimes you can't even control clients, but just
22 in case anyone would ask you, my judicial assistant
23 knows not to convey any of the specific information. I
24 don't know what information they want to bring to my
25 attention. That is the job of counsel.

1 Now, I know you all know that, but I'm just
2 explaining why I issued that order, and, frankly, if a
3 party calls and says I'm just the greatest thing since
4 sliced bread, it's rather offputting. I'm certainly not
5 going to in some way penalize the Plaintiff because
6 someone is calling me, trying to butter me up, but just
7 so they know, it doesn't work. So, in any event, you
8 know, Mr. Thompson, again, I know you're not encouraging
9 people to do it.

10 MR. THOMPSON: Yeah.

11 THE COURT: I just wanted to give the background
12 on why the order issued.

13 MR. THOMPSON: And we appreciate that, Your Honor
14 and we want to assure you, anyone over whom we have
15 control will not contact the Court ex parte, and we
16 appreciate the Court informing the general public not to
17 contact the Court.

18 THE COURT: Yes, right, exactly. Since we have
19 other people -- other individuals here in the Court
20 today, I just wanted to say that during this proceeding.
21 So, thank you for indulging me with this little
22 commentary this morning, and I do appreciate it. So,
23 let's move forward with the contents of the status
24 report and the concerns that the parties have.

25 MR. THOMPSON: Well, and good morning, Your

1 Honor, David Thompson for the Plaintiffs. I'm joined
2 today by Mr. Colatriano.

3 MR. COLATRIANO: Good morning, Your Honor.

4 THE COURT: Yes, good morning.

5 MR. THOMPSON: And Mr. Cooper could not be here
6 in Washington, D.C., today, but he's on the phone.

7 THE COURT: On the phone, yes.

8 MR. THOMPSON: And our client, Christine Cubias,
9 General Counsel of Fairholme, is on the line as well.

10 MR. DINTZER: Good morning, Your Honor.

11 THE COURT: Good morning.

12 MR. DINTZER: Kenneth Dintzer for the United
13 States Department of Justice.

14 THE COURT: Good morning.

15 MR. DINTZER: And with me at counsel table today
16 are Greg Schwind and Elizabeth Hosford, also from our
17 office.

18 THE COURT: It's good to see all three of you
19 again. Yes, good morning. Thank you.

20 MR. THOMPSON: Good morning, Your Honor. Your
21 Honor, we come before you today to report and we regret
22 to inform you, there has been a serious breakdown in the
23 discovery process, which I will describe for you in a
24 moment, but I want to emphasize at the threshold that
25 today I'm in no way casting aspersions at Mr. Schwind or

1 Ms. Hosford, both of whom I hold in the highest
2 professional regard, but I want to focus on their
3 clients, Your Honor, on the United States Treasury and,
4 to a lesser degree, the FHFA.

5 Your Honor, the Department of Treasury has
6 utterly failed to fulfill its obligations, its discovery
7 obligations in this matter, and I'd like, with the
8 Court's indulgence, just to take a moment or two and
9 trace the history of how we got to this moment.

10 THE COURT: Please.

11 MR. THOMPSON: As the Court will remember, in
12 February of last year, the Court authorized discovery on
13 certain limited topics. There was a discovery order
14 that the parties put in, a plan, and pursuant to that
15 plan, on April 7th, we submitted discovery -- document
16 requests.

17 In the ensuing months, FHFA produced thousands of
18 documents. In the ensuing months, the United States
19 Treasury, by the time the original discovery cutoff of
20 July 31 had come and gone, they had produced precisely
21 zero -- zero documents -- in four months. And by the
22 end of August, we still had zero documents from
23 Treasury. So, we had to renegotiate a new schedule.

24 And we did that, and in the September joint
25 status report where we, you know, jointly said March

1 27th would be a new, appropriate discovery cutoff line,
2 the Government said the following: "Defendant currently
3 estimates that it should be able to complete the
4 production of nonprivileged, responsive documents within
5 approximately four months, i.e., by the middle of
6 January 2015. Defendant reserves the right to request
7 additional time for document discovery should anything
8 unforeseen arise during the four-month period allocated
9 for this purpose." So, that was the state of play as of
10 September.

11 As you may recall, there was a dispute with the
12 Government about the extent of discovery that was
13 permissible, and we worked in good faith and diligently
14 with our friends at the Department of Justice, and we
15 reached a global agreement on October 14th, that this is
16 what they're going to produce, subject to claims of
17 privilege, and we would not file a motion to compel at
18 that time. And then 14 days later, the Department of
19 Justice filed their stay application.

20 Since that stay request was filed on October
21 28th, we have not received one single document from the
22 FHFA. There is no unforeseen change in circumstance
23 that would preclude them, the FHFA, from continuing to
24 produce documents to us. The FHFA seems to be acting as
25 though the stay was granted by not having given us a

1 single additional document since October 28th.

2 Moreover, you know, we took comfort in the
3 knowledge that, all right, we haven't been receiving
4 rolling productions from FHFA, but we have this
5 commitment, this statement that by mid-January, that
6 documents will be produced, and we did not hear, Your
7 Honor, one single peep out of the Treasury indicating
8 that there was any unforeseen circumstance. And so when
9 the middle of January came, we reached out, and we
10 asked, "Where are we?" And we learned at that moment
11 that they now want -- we learned, in fact, Saturday at
12 5:00 p.m. -- that they want three or four more months.
13 They want until April to produce the additional
14 documents.

15 Your Honor, if they had told us -- if the
16 Treasury had told us we've hit, you know, turbulence,
17 there are unforeseen circumstances, we would have worked
18 with them to try to get to a compromise. If we hadn't
19 been able to agree with them, we would have come to the
20 Court in advance of the middle of January. And it's
21 important to understand, we're not talking about sending
22 an astronaut to Mars, Your Honor. You know, if the
23 Court had been convinced mid-January really is
24 appropriate, they could put additional reviewers. I
25 mean, that's what we're talking about. We're talking

1 about documents, reviewing the documents, you put more
2 reviewers on it, you go through them more quickly. It
3 is just that simple, Your Honor.

4 But we were deprived of that opportunity because
5 the Treasury and the Government made a conscious
6 decision not to tell us, not to tell us that there was
7 some alleged unforeseen circumstance, Your Honor. And I
8 want to talk about whether there were unforeseen
9 circumstances, but whether there were or not, there is
10 no excuse, Your Honor, in our opinion for them to have
11 remained silent and made that conscious decision to be
12 silent during the run-up to the middle of January.

13 Your Honor, as for changed circumstances, there's
14 no changed circumstance that we -- that the Plaintiffs
15 have caused. We haven't added to the discovery burdens
16 of the Government. And just to give you one example
17 that I think is telling to show that the Department of
18 Treasury is not -- their conduct cannot be explained by
19 legitimate considerations, I want to take one example,
20 and it's the Grant Thornton projections, Your Honor.

21 This was in our initial document request from
22 April. This was document request number one. These are
23 projected that are referenced in the administrative
24 record in front of Judge Lamberth but that were not
25 produced in that administrative record. They are

1 projections of Fannie Mae and Freddie Mac's
2 profitability -- we think, we don't have them -- but
3 that's what it appears that they are. They fall,
4 therefore, within the heart of the Court's February
5 order in which we were entitled to projections.

6 In our global agreement with the Department of
7 Justice, they said they'd either give us the documents
8 or they would assert privilege over them. Your Honor,
9 we still do not have these projections which we
10 requested in April, and we still don't have any
11 privilege log including them. We were told on January
12 16th, well, we expect to put a -- you know, to assert
13 privilege over them, but the reality is, we have no way
14 to challenge that assertion of privilege because we
15 don't have a log.

16 And that feeds into a broader concern about the
17 privilege logs, Your Honor. We know they are going to
18 assert sweeping privilege over thousands of documents.
19 In their most recent production, they gave us 83 emails
20 from August of 2012, 61 of them they asserted privilege
21 over, Your Honor, but we don't -- we have a log of only
22 two -- well, first of all, we didn't get any privilege
23 log until January 16th from the Treasury, and when we
24 did get it, it had only 231 entries on it, even though
25 we know there are going to be thousands of entries on

1 it. So, we can't assert -- we can't challenge the
2 assertion of privilege over what they haven't given us a
3 log on.

4 Now, we may hear that now, we may hear that they
5 have hit some trouble with automation, that they thought
6 they could, you know, hit a button and that that would
7 generate the privilege log and now it's that they have
8 to type it manually, but, Your Honor, I would make four
9 points about that.

10 Number one, that there's no excuse for not giving
11 us the nonprivileged documents. The fact that they have
12 problems with an automated privilege log isn't an excuse
13 for not giving us promptly the nonprivileged materials.

14 Number two, the FHFA has produced a privilege log
15 in a timely way. They didn't seem to have any
16 technological problems.

17 Number three, we should have been getting this
18 log on a rolling basis.

19 And, number four, there is no excuse for them not
20 telling us that they had hit these problems.

21 Your Honor, all of this stands in stark contrast
22 to the third parties. We have also issued subpoenas to
23 Fannie Mae and Freddie Mac and their auditors,
24 PriceWaterhouse and Deloitte, and we had extensive
25 negotiations with those parties about the scope of

1 discovery. We worked through those difficult issues,
2 and I'm happy to say that those third parties have
3 largely fulfilled their obligations.

4 PriceWaterhouse has provided the documents
5 they've said they were going to give to us. They did it
6 by the middle of January, working very diligently
7 towards that timetable. And this can't be explained on
8 the ground of, well, the third parties don't have as
9 much information. PriceWaterhouse has produced more
10 pages of documents than the Treasury and FHFA combined,
11 and they're a third party, Your Honor. So, this was
12 possible to do, the third parties have done it, and the
13 Treasury has not.

14 There's a real cost to all of this, Your Honor.
15 There's a monetary cost in terms of, you know, the
16 opportunity cost of the capital that's at stake here,
17 but there's also -- you know, some of these events that
18 are at issue took place in 2008, seven years ago. As
19 memories more delay, memories fade, and that impedes the
20 truth-finding process.

21 Your Honor, the bottom line is the Government
22 should have come to us if there were unforeseen
23 circumstances, and they chose not to, and our prayer for
24 relief, Your Honor, is this: We ask this Court to order
25 them to give us all of the responsive documents in two

1 weeks. This can be done, Your Honor. They have the
2 documents from the custodians. They either have run the
3 keyword searches or they could do it in a day, and then
4 all that remains is to do a responsiveness review and a
5 privilege review.

6 With respect to responsiveness, we will take that
7 burden upon ourselves, Your Honor, just so that we can
8 get through this process. And with respect to
9 privilege, we are willing to give them a 60-day
10 claw-back, where we will give them any document that
11 they assert privilege over within 60 days; we will give
12 them any copy; we will give them any notes that contain
13 any reference to that; and it will all be under the
14 protective order so that there won't be any prejudice of
15 them with having produced them. So, that is what we
16 would ask. We believe that is a fair, measured response
17 to what I've outlined for the Court.

18 The one last thing I'd like to point out, Your
19 Honor, is with respect to depositions. They said in the
20 joint status report that they wanted to talk about the
21 fact that we have had preliminary conversations with
22 counsel for Fannie Mae and Freddie Mac about the
23 possibility of deposing individuals with knowledge about
24 the net worth sweep, and, of course, this Court's
25 February order specifically referenced "document and

1 deposition discovery." So, this is not a surprise, you
2 know, that we're taking depositions of people with
3 knowledge.

4 And, Your Honor, we're starting with the third
5 parties, because they're the ones who gave us the
6 documents. If the Treasury had given us all of their
7 documents, we would be deposing their individuals. We
8 don't have all of the documents. It is prejudicial.
9 And so, Your Honor, that's all I have to say about that.

10 Obviously, I am not really sure why the
11 Government has standing to complain about a subpoena
12 that hasn't been issued and that we're still trying to
13 work through, you know, in good faith with Fannie Mae
14 and Freddie Mac. So, that's all I have to say, Your
15 Honor.

16 THE COURT: Thank you very much.

17 MR. THOMPSON: Yes.

18 MR. DINTZER: Your Honor, Mr. Schwind will be
19 addressing these matters.

20 THE COURT: Thank you.

21 MR. SCHWIND: Good morning, Your Honor, and Happy
22 New Year.

23 THE COURT: Thank you. Same to you.

24 MR. SCHWIND: Plaintiffs have very much
25 exaggerated their dire straits, and this seems to be

1 happening -- this seems to be the pattern of these
2 status conferences, that the Plaintiffs complain that
3 the sky is falling when it's not.

4 As far as the first round of status of discovery,
5 at previous status conferences in July and August, we
6 advised the Court that we had collected millions of
7 documents from both FHFA and Treasury in response to the
8 limited discovery allowed in this case. We're trying to
9 do it in a way so that if we do get to the point of
10 merits discovery, we're not going to be repeating a lot
11 of what we're doing now. So, we did collect quite a bit
12 of documents, quite a volume of documents, again,
13 millions of documents.

14 That document collection, for purposes of the
15 limited discovery, has been reduced somewhat because
16 we've -- the parties have been able to agree on search
17 terms, have been able to agree on which custodians would
18 be searched, and, therefore, the Court issued its order
19 in July 2014, and we then had date ranges to go forward
20 on to conduct a search for ESI and hard-copy documents.
21 We've done that.

22 And after that status conference in August, the
23 parties submitted a joint status report estimating that
24 discovery would take until the end of March, and that
25 estimate was based in part on the Government's estimate

1 that we would be done with document review and
2 production by mid-January.

3 The Court will recall, however, that at the time
4 of that joint status report and at the time of the
5 status conference that preceded it, there was a major
6 dispute looming out there, and that was the parties'
7 dispute over responsiveness review; that is,
8 Plaintiffs -- well, Plaintiffs believe that their
9 document requests should govern document review. Our
10 view was that document review should be tied to what the
11 Court specifically allowed in its February 26th order
12 allowing discovery in the first place.

13 And so in -- starting in September, the parties
14 engaged in weeks of negotiation over that, over this
15 dispute, managed to avoid bringing it to the Court. As
16 part of that negotiation, the outcome in October that
17 counsel referred to, Plaintiffs withdrew a number of
18 their document requests; however, the Government agreed
19 to a number of the document requests that we had
20 previously objected to. And so we went forward.

21 We have been reviewing documents -- we had been
22 reviewing documents during that process. We continue to
23 review documents. And let me say at the outset, I am
24 going to have to emphasize this several times, we did
25 not grant ourselves essentially a stay of discovery, as

1 Plaintiffs seem to suggest. We have continued to review
2 documents. We have continued to make productions of
3 both documents and privilege logs through this entire
4 process. Obviously, our review continues today.

5 We have now completed, we estimate, more than
6 half of the document review and production process, and
7 it is a process. It's not as simple as Plaintiffs would
8 like -- and they know this, they are attorneys. We
9 assume they've done large document reviews or been -- or
10 seen -- overseen large document reviews in their time.
11 It's not as simple as sitting down in the old days with
12 a box of documents and putting in, you know, colored
13 slip sheets and then producing -- making a production to
14 Plaintiffs the next day.

15 We have made productions to Plaintiffs so far of
16 over 12,000 documents consisting of over 150,000 pages.
17 We've provided three privilege logs, and we expect to
18 produce several more privilege logs. FHFA -- I'm not
19 sure when FHFA's second privilege log was produced, but
20 it -- we have told Plaintiffs that there will be another
21 privilege log from FHFA and that there will be another
22 document production. So, we've expressly told them
23 this. So, for Plaintiffs to stand up here today and say
24 it looks like FHFA has stopped the train is -- it's
25 wrong, and we've told them that it's wrong, and we will

1 be making a further production and a further privilege
2 log from FHFA.

3 Plaintiffs -- and, again, we've told them that we
4 do require additional time, and I will get to that in a
5 second, but before -- again, it's as if Plaintiffs are
6 creating this perception that they're getting nothing.
7 They did, as counsel said, serve document requests
8 directly on the GSEs, directly on Fannie Mae and Freddie
9 Mac. What's interesting is that discovery from the GSEs
10 was not requested, or I should say, to make it active
11 voice, Plaintiffs did not request discovery from the
12 GSEs in their motion for discovery that led to the
13 Court's February order. In fact, they stated several
14 times in the declaration that supported that motion that
15 the discovery they needed was only in the possession of
16 the Defendant, the United States, the identified
17 government agencies only.

18 The Court, in granting its order in February,
19 found -- essentially sided with Plaintiffs and said
20 several times in its order "The evidence Defendants seek
21 is in the hands of Defendant only." And then out of the
22 blue, we get a -- we see document requests, subpoenas
23 going to the GSEs. We didn't object. We didn't object
24 because we looked at it as it wasn't putting additional
25 burden on us, and it wasn't going to slow the discovery

1 process or otherwise delay the Court's consideration of
2 our motion to dismiss.

3 THE COURT: Well, isn't it also the position of
4 the United States Freddie and Fannie are not part of the
5 United States, that they're separate and independent
6 components, and, therefore, you -- that would help form
7 the basis of your motion to dismiss?

8 MR. SCHWIND: It is, Your Honor.

9 THE COURT: Okay. So, I don't understand -- it
10 sounds like you're somehow trying to say that the -- or
11 imply that the Government has been circumvented when the
12 Plaintiff seeks documents from -- directly from Fannie
13 and Freddie, but how can you complain because you're
14 saying that Freddie and Fannie are not components of the
15 United States Government, therefore, this case should be
16 dismissed? It sounds to me like you're trying to have
17 it both ways, but perhaps I'm missing something.

18 MR. SCHWIND: Well, Your Honor, we're not trying
19 to have it both ways.

20 THE COURT: Okay.

21 MR. SCHWIND: We did not object to the document
22 discovery from the GSEs. Our position is, yes, they are
23 independent -- independent companies --

24 THE COURT: Right.

25 MR. SCHWIND: -- and when FHFA placed the

1 companies in conservatorship, they stepped into the
2 shoes of those independent companies and lost their
3 character as government agencies, and, of course,
4 that's -- as a government agency, for purposes of this
5 Court's jurisdiction, that --

6 THE COURT: So, I'm just confused. So, what --
7 what -- of what moment is it that they -- that the
8 Plaintiffs sought discovery from these entities? Isn't
9 Plaintiffs' complaint that documents have not been
10 forthcoming from the Treasury that are within the
11 control of the United States Treasury? Isn't that the
12 point?

13 MR. SCHWIND: That's one of Plaintiffs' points,
14 Your Honor, but we just want to remind --

15 THE COURT: But that's an important point.

16 MR. SCHWIND: And we're definitely going to
17 respond to that, because that is our responsibility.

18 THE COURT: Okay, because it seems like
19 everything else is kind of a sidebar issue, but --

20 MR. SCHWIND: It may be a sidebar issue, Your
21 Honor, but what Plaintiffs are embarking on is very
22 different from what they requested in their motion for
23 discovery and what the Court allowed, in our view. In
24 our view, the Court -- the Court's order did not
25 contemplate this kind of discovery from outside

1 entities, such as the GSEs, such as their auditors.

2 Now, we --

3 THE COURT: Well, no, let's be clear, then. I
4 wasn't focused -- I wasn't concerning myself at that
5 point with any -- because these are third parties. I
6 mean, it's up to a third party to come in and complain
7 that they have been served with a document request.
8 It's not up to the United States Government to do that,
9 and, in fact, it would lend credence to -- and support
10 to Plaintiffs' position that, in fact, these third-party
11 entities are controlled by the United States Government,
12 because the Justice Department, who represents
13 government agencies in Federal Court, is coming in to
14 complain on their behalf.

15 MR. SCHWIND: Your Honor, we don't control them,
16 and with respect, we don't think pointing out to the
17 Court that discovery directly from the GSEs and from the
18 auditors exceeds what -- not only what Plaintiffs asked
19 for in limited discovery but what the Court has allowed.
20 We think we are allowed -- we do have standing,
21 essentially, to come in here and say that the discovery
22 that Plaintiffs seek exceeds what the Court has allowed,
23 and we would bring a motion.

24 Now, there are certain motions -- the Court is
25 correct, if -- that we -- the sort of motions that the

1 GSEs themselves would bring, such as why you shouldn't
2 allow a deposition of the CEOs based on, you know,
3 established law and things like that, that would
4 probably come from the GSEs themselves. We're not
5 representing them.

6 However, for purposes of what the Court -- the
7 discovery the Court has allowed, we do think it's
8 significant that Plaintiffs are doing this, and we do
9 think that -- we hope to leave the Court with the
10 impression this morning that the discovery that the
11 Court -- essentially, when the Court opened the door a
12 little bit to allow limited discovery into whether or
13 not this case should go forward at all, that what
14 Plaintiffs are doing is transforming that into something
15 far different.

16 Now, with respect to the Treasury's discovery,
17 we, again, approached them recently with a request that
18 the parties agree to an extension of time given the
19 current outlook, again, given what's happened as far as
20 the parties' agreement to additional subjects back in
21 October and the pace of discovery that we've seen so
22 far.

23 THE COURT: But have you produced anything from
24 the Treasury Department to date? Because it's my
25 impression from Plaintiffs' counsel -- perhaps I

1 misunderstood Mr. Thompson -- but, again, just focusing
2 exclusively on the United States Treasury, that
3 documents have not been produced. Have they been
4 produced?

5 MR. SCHWIND: Yes, Your Honor.

6 THE COURT: Okay. That was --

7 MR. SCHWIND: Absolutely.

8 THE COURT: Because this is --

9 MR. SCHWIND: Again, what we're trying to -- the
10 misperception that they're leaving the Court with, you
11 know, the first production -- it wasn't really a
12 production, but the first group of documents is the
13 administrative record that the Treasury --

14 THE COURT: Well, yeah --

15 MR. SCHWIND: -- put together in the District
16 Court, thousands of pages of documents --

17 THE COURT: But that's not in this Court, of
18 course.

19 MR. SCHWIND: Not in this Court, but as far as
20 Plaintiffs saying we have -- we have to see what's going
21 on --

22 THE COURT: Okay, but wait. Wait, wait, wait.
23 Please confine your remarks in terms of documents being
24 produced in response to Plaintiffs' discovery requests
25 to this case. I mean no disrespect, Mr. Schwind, but I

1 don't care what was produced to Plaintiffs before Judge
2 Lamberth or before any other judge in this country. The
3 only case I'm concerned about is this one and what you
4 have done in this case.

5 MR. SCHWIND: In this case, Your Honor --

6 THE COURT: Okay.

7 MR. SCHWIND: -- we have produced over 120,000
8 pages of Treasury documents --

9 THE COURT: Treasury.

10 MR. SCHWIND: -- to these Plaintiffs in this
11 case.

12 THE COURT: Okay.

13 MR. SCHWIND: It was directly to Mr. Colatriano
14 on DVDs --

15 THE COURT: Okay.

16 MR. SCHWIND: -- and messengered over to Cooper &
17 Kirk. We have also produced a privilege log. In
18 addition to that, we've produced -- I don't know how
19 many pages exactly -- an additional 30,000 pages of FHFA
20 documents -- and two privilege logs, again, in this
21 case.

22 THE COURT: Okay.

23 MR. SCHWIND: There is no agency -- and certainly
24 we're not stopping the train or not following our
25 obligations to produce the documents as the Court's

1 ordered and as we've agreed to do and, again, in
2 negotiations with the Plaintiffs.

3 THE COURT: I just wanted the tension explained
4 between Plaintiffs saying no documents had been produced
5 by Treasury and your talking about the 150,000 pages of
6 documents from FHFA. So, that's why I -- I just wanted
7 to make sure that there wasn't something that I was
8 missing here. So, I'll have Mr. Thompson respond to
9 this after you complete your remarks.

10 MR. SCHWIND: Yes, Your Honor. To be clear,
11 150,000 pages from both agencies; 122,000 of those pages
12 are from Treasury.

13 THE COURT: Thank you.

14 MR. SCHWIND: So, the bulk of what we've produced
15 has been from Treasury.

16 THE COURT: Well, but if there's a big
17 difference -- even if it was 50,000, there is a big
18 difference between zero and --

19 MR. SCHWIND: Yes.

20 THE COURT: -- and a sum greater than zero, so
21 thank you.

22 MR. SCHWIND: Mathematically, yes, Your Honor.
23 Fair enough.

24 THE COURT: Yes.

25 MR. SCHWIND: But we did approach Plaintiffs

1 recently with a request that they -- that we could come
2 to the Court together and ask for more time. Again, the
3 discovery period ends at the end of March. That was
4 based on an estimate -- our estimate before the
5 negotiations back in September/October -- but our
6 estimate that we could complete discovery by
7 mid-January. Obviously, the fact that we're here this
8 morning, you know, we agree that that's not the case,
9 and that's why we intend to raise this in a motion for
10 extension.

11 In the Court's order, after the parties' joint
12 status report back in August, the Court stated that "If
13 the need for additional time should arise, the parties
14 should file the appropriate motions." Again, we intend
15 to do that, and we don't think our request is
16 unreasonable, and we think it's justified from the
17 circumstances. There have been a number of unexpected
18 circumstances.

19 THE COURT: And could you describe those? And
20 also, I'd like you to detail, if you would, please --
21 and, again, I don't want to get into attorney-client
22 privilege or anything of that manner, but if you could
23 just tell me what it is that the Treasury Department is
24 doing to respond to all the Plaintiffs' discovery
25 requests. Can you tell me what kind of resources have

1 been appropriated to deal with responding to discovery?

2 Is it one attorney? Is it one paralegal? It --
3 do you have any idea what's happening and do you feel
4 comfortable --

5 MR. SCHWIND: I'm certain, Your Honor, it's --
6 you know, we have -- well, first of all, the unexpected
7 incidents that have come up --

8 THE COURT: And what are those?

9 MR. SCHWIND: Well, again, going back to the
10 agreement with Plaintiffs to agree to a number of
11 document requests to which we had previously objected.
12 We also have had some problems with simply the
13 technology involved in reviewing these documents. They
14 are on what's called a review platform, we're talking
15 about the ESI, and also the hard-copy documents were
16 loaded to that platform as well, and that review process
17 is more cumbersome -- I'll just say it -- more
18 cumbersome than promised from the contractor, from the
19 vendor.

20 So --

21 THE COURT: In all fairness, it often is, so I
22 do -- I sympathize with that.

23 MR. SCHWIND: Well, we have eight attorneys doing
24 document review. We have -- and, you know, one of those
25 attorneys is overseeing the preparation of privilege

1 logs.

2 THE COURT: And let me ask you, with the eight
3 attorneys performing the document review, are they doing
4 this full-time or are the eight attorneys working a half
5 hour each day on the project? Can you give me a little
6 more information?

7 MR. SCHWIND: These attorneys right now -- excuse
8 me, Your Honor. These attorneys right now are working
9 nearly full-time on this.

10 THE COURT: And has -- you say right now.

11 MR. SCHWIND: Right.

12 THE COURT: Prior to right now --

13 MR. SCHWIND: It has not always -- I will
14 confess, it has not always been that way, just given the
15 availability of resources and other cases that
16 Plaintiffs have been able to -- that our attorneys have
17 been able to do that.

18 THE COURT: And are they DOJ attorneys? Are they
19 Treasury attorneys?

20 MR. SCHWIND: Well, we have --

21 THE COURT: A mixture?

22 MR. SCHWIND: Well, the eight I referred to are
23 just DOJ.

24 THE COURT: Okay.

25 MR. SCHWIND: But, of course, there are in-house

1 counsel at Treasury that do play a role as well. But,
2 again, without getting too much into the -- you know,
3 the inner workings of --

4 THE COURT: Well, I'm just trying to understand
5 just how committed -- I know Justice is committed to
6 fulfilling its responsibilities. I just wanted to make
7 sure that if Treasury had assigned one paralegal to work
8 a half hour every day on this, I -- you know, I -- you
9 know, I wanted to know where I could perhaps inspire
10 either an agency or the Department of Justice to move
11 into a higher gear to respond to Plaintiffs.

12 MR. SCHWIND: Well, Your Honor, Treasury itself,
13 in-house counsel has also committed resources to the
14 review effort, and they are doing I'd call it a
15 second-level review of documents before they go out the
16 door. So, you know, without getting too much into the
17 inner workings of our process, I mean, between DOJ and
18 Treasury, there are, I'd say, 10 or 11 attorneys that
19 are part of the review process right now.

20 We don't think that's unreasonable. We are --
21 again, at least on our side, we are trying more and more
22 to commit more and more time of these attorneys to the
23 review process, and that's part of our proposal for the
24 three months, is that we'll be able to do that because
25 these attorneys will be able to devote more of their

1 time to the review.

2 One final -- well, it's not final, but one -- the
3 next item is we've gotten recently a second set of
4 document requests from Plaintiffs. They're asking for
5 what is known in numerous court opinions as "discovery
6 into discovery." The Court will recall, at a previous
7 status conference, that we talked about -- Plaintiffs
8 talked about what is known as hit reports, essentially
9 reports that the review platform can generate showing
10 how the documents were searched, how many documents came
11 up for each search term, things like that.

12 Plaintiffs admitted they want these things just
13 to monitor our document review and object to our review
14 process if they think it's necessary, and we consider
15 that to be an improper use of discovery under the case
16 law and under the Court's rules, and we expect this to
17 give rise to yet another contested motion. So, this
18 is -- this is essentially where we are right now.

19 We intend to bring a motion to the Court for
20 additional time. If Plaintiffs won't agree, if, you
21 know, Plaintiffs take this absolutist position that we
22 have heard this morning, that, no, we want essentially
23 all of the Government's documents in two weeks, we think
24 that's preposterous, but if they continue to stick to
25 that position, we'll file the motion ourselves, but if

1 Plaintiffs want to at least say, okay, how much more
2 time do they think they need on the end of our
3 discovery, then we can maybe file that motion in some
4 way jointly.

5 But, Your Honor, with respect to the -- I do want
6 to reiterate that with respect to the motion to stay, we
7 have continued reviewing documents and adding resources
8 and making productions to Plaintiffs during this entire
9 period of time, including most recently -- you know, in
10 January, we have had either one or two document
11 productions and we have had the production of the first
12 Treasury privilege log.

13 We do expect there to be privilege logs --
14 additional privilege logs from both FHFA and Treasury
15 that Plaintiffs will get in the next several months, but
16 our estimate really is based on the fact that, for
17 example, we're not going to get in -- dragged into
18 depositions during this period of time. Plaintiffs
19 agree -- and I think that it's reasonable -- that
20 depositions shouldn't start until the document
21 productions are complete. So, we're hoping that
22 essentially we'll have the deck cleared to complete
23 document review and the production of privilege logs
24 during the three-month period that we're asking for.

25 THE COURT: Very good. I -- just kind of --

1 hopefully you all can negotiate this out, but I will
2 just tell you that I think two weeks realistically is
3 not enough time. Perhaps it should be, but the reality
4 is it has to be done right. So, I certainly will give
5 you more time. I'll also let you know, although the
6 decision or the order hasn't issued yet, the stay will
7 not be granted. So, you -- there wouldn't have been a
8 legitimate basis for you to -- and I'm not saying you
9 did -- to delay discovery. You've moved forward with
10 it, but the stay request will be denied.

11 But if a motion -- if you can't agree to a motion
12 and a motion is filed for an enlargement, I won't go
13 beyond four months, because the -- I think we have to
14 move -- we have to move things along. But, I mean,
15 obviously I want the Justice Department to be
16 comfortable that the documents they're turning over are
17 appropriate, that -- and I certainly appreciate the
18 claw-back provision. I mean, that's appropriate.

19 If you're handing something over that you
20 shouldn't -- particularly with this volume. It's one
21 thing if you have just one banker's box worth of
22 documents, a claw-back may not be necessary. If you
23 have one in place, 30 days might very well cover it.
24 But when you're talking about hundreds of thousands, if
25 not, you know, millions of pages of documents, a 60-day

1 claw-back may very well not be realistic. But anyway,
2 that's the glimpse behind the curtain for today.

3 MR. SCHWIND: Thank you, Your Honor.

4 THE COURT: But I do want to hear from
5 Mr. Thompson.

6 MR. SCHWIND: If I can just add one thing, Your
7 Honor?

8 THE COURT: Sure.

9 MR. SCHWIND: On the motion for stay, we are
10 concerned that the deposition and the contested motions
11 practice over privilege logs and whatnot are going to be
12 fairly time-consuming, not only for us but also for the
13 Court. We understand that document discovery is
14 essentially winding down. If the Court would consider
15 simply, you know, allowing the document discovery to
16 reach its end and then stay further depositions and
17 contested motions practice, that would obviously be, you
18 know, favorable to us as well. We would ask the Court
19 to consider that.

20 THE COURT: I understand your position. If I
21 were in your shoes, I'd make the same motion, but it
22 will not be granted. So, I'm just letting you know
23 that. Thank you.

24 MR. SCHWIND: Thank you, Your Honor.

25 MR. THOMPSON: Your Honor, I just wanted to

1 clarify a couple of points. With respect to the
2 Treasury's productions, I was saying that for the first
3 five months of discovery, you know, from April until,
4 you know, September, we received zero documents. I
5 agree with Mr. Schwind that they have given us documents
6 since that time, but obviously --

7 THE COURT: You seemed to say both, and I missed
8 the time frame that you were --

9 MR. THOMPSON: Yeah.

10 THE COURT: -- and so that's why I was -- I
11 wanted to hear back from you on that inconsistency.

12 MR. THOMPSON: Right, yes. Apologies for any
13 confusion on that.

14 THE COURT: No, no, no, that was my error. Thank
15 you.

16 MR. THOMPSON: And then I also just wanted to
17 say, you know, on the Grant Thornton document that we
18 requested on April 7th, we still don't have that, and we
19 don't have an assertion of privilege either.

20 So, I think everything -- if the Court doesn't
21 have further questions, the one point of clarification I
22 want to make is, when I was speaking about depositions
23 of Fannie Mae and Freddie Mac, I was saying, well, we're
24 starting with them because we have the documents. We
25 reserve all rights, Your Honor, you know, to proceed

1 with discovery within the rules, you know, on whatever
2 timetable we want to. I just wanted to be clear on
3 that.

4 THE COURT: Well, no, absolutely, although I will
5 say this, and Plaintiffs have to litigate as they
6 believe is the best strategy, and I completely
7 understand and respect that, but the Government has a
8 finite number of resources, just like the Plaintiffs,
9 and if they're trying to produce documents, they can't
10 be in two places at one time, as much as I'm sure they'd
11 like to be. Since they haven't perfected cloning, they
12 are going to have to put their resources in one
13 particular area.

14 Since you have filed for -- understandably for
15 the document production first, it may very well delay
16 other depositions that you may want to take. So, their
17 point with regard to producing documents is well taken,
18 but, again, I -- it would be -- as soon as Treasury can
19 identify and provide the documents to the -- all the
20 attorneys who are performing this document review, the
21 better. So -- and I'm sure they will.

22 I mean, it's not in the Justice Department's
23 interest to delay. I know that that happens in criminal
24 cases because they're hoping that memories will fade,
25 and that certainly does impact this case as well, but I

1 know these attorneys, and that's not their strategy. I
2 think their strategy is just to get the job done, and
3 it's trying to drink from a fire hose to go through
4 millions of pages of documents, which I'm sure you've
5 found in your practice as well.

6 MR. THOMPSON: Yes, Your Honor.

7 THE COURT: All righty. Is there anything else?

8 MR. THOMPSON: Nothing further at this time from
9 the Plaintiffs, Your Honor.

10 THE COURT: Is there anything else for Justice?

11 MR. SCHWIND: No, Your Honor.

12 THE COURT: Very good.

13 Well, I wish you all the best in trying to
14 resolve the discovery issue. I will rule on the motion
15 as soon as it's received, and I think as many instances
16 as you can agree on things, the better off you are, but
17 I'm happy to rule on whatever you present to me. So,
18 thank you very much and good morning.

19 (Whereupon, at 10:46 a.m., the proceedings were
20 adjourned.)

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1 CERTIFICATE OF TRANSCRIBER

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4 I, Susanne Bergling, court-approved transcriber,
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12 DATED: 1/28/2015

s/Susanne Bergling

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SUSANNE BERGLING, RMR-CRR-CLR

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