IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., et al.,	)	
	)	
Plaintiffs,	)	Case No. 13-465
	)	Judge Sweeney
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

REDACTED REPLY IN SUPPORT OF NON-PARTIES FEDERAL NATIONAL MORTGAGE ASSOCIATION'S AND MR. EGBERT PERRY'S MOTION TO QUASH PLAINTIFFS' DEPOSITION SUBPOENA

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INTRODUCTION

Plaintiffs' explanation of why they want to depose Mr. Egbert Perry—the Chairman of Fannie Mae's Board of Directors—only underscores that there is no justification for permitting them to do so. Plaintiffs' arguments boil down to the following contention: in order to effectively respond to a motion to dismiss on the issue of this Court's jurisdiction, they need to depose Mr. Perry because of his "unique perspective" on the conservatorship and events surrounding the Third Amendment. *See* Doc. 252 ("Opp.") at 1, 6, 7, 8 (discussing Mr. Perry's purported "unique perspective"). Indeed, plaintiffs barely argue that deposing Mr. Perry will yield non-redundant, non-cumulative, and non-duplicative *factual information*. Nothing in this Court's discovery order, rules, or case law authorizes plaintiffs to conduct a deposition of a third party at this early stage in the litigation simply so they might engage in a fishing expedition in order to understand a deponent's *perspective* on information plaintiffs already possess. Mr. Perry's perspective is wholly irrelevant to the questions raised by the government's motion to dismiss.

This is not merits discovery; it is jurisdictional discovery. The Court should grant the motion to quash.

ARGUMENT

I. Plaintiffs' Effort To Depose The Chairman Of Fannie Mae's Board Of Directors Is Not Authorized By This Court's Discovery Order.

Plaintiffs' attempt to depose Mr. Perry is beyond the scope of authorized discovery in this case, which provides a straightforward ground on which this Court can quash plaintiffs' subpoena. Plaintiffs' arguments to the contrary miss the point. It is beyond dispute that Fannie Mae was "directly affected by the Net Worth Sweep." Opp. at 4. But that Fannie Mae is not a defendant in this case should be equally noncontroversial. Plaintiffs' complaint asserts a takings claim against the United States, not Fannie Mae, *see* Doc. 1, and this Court repeatedly referred to information "solely in the possession of [the] defendant"—*i.e.* the United States—in authorizing discovery. Doc. 32 at 3; *see id.* at 4 ("evidence … in the possession of defendant only"). Plaintiffs cannot leverage this Court's discovery order to obtain discovery from Mr. Perry because of the conservatorship. *Cf. Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 927-28 (D.C. Cir 2011) (rejecting argument that 12 U.S.C. §4617(b)(2)(A), cited by plaintiffs, Opp. at 2, somehow transmogrified Fannie Mae records into FHFA records for FOIA purposes).

II. Allowing Plaintiffs To Depose The Chairman Of Fannie Mae's Board Of Directors Will Fail To Yield Any Relevant Information Not Already Made Available To Plaintiffs.

That plaintiffs' subpoena is beyond the scope of authorized discovery is the most straightforward reason to grant the motion to quash, but it is not the only one.

Plaintiffs' ill-founded effort to depose Mr. Perry is also "unreasonably cumulative," unnecessarily "duplicative," and unduly burdensome. *Zoltek Corp. v. United States*, 104 Fed. Cl. 647, 655-56 (2012). This is particularly true in light of the fact that neither Fannie Mae nor Mr. Perry are parties to this litigation, a "factor which may be considered by the court in assessing whether there is undue burden" and that should carry particular force at this early point in the proceedings. *Id.* at 656; *see JZ Buckingham Invs. LLC v. United States*, 78 Fed. Cl. 15, 26 (2007).[1]

Plaintiffs' opposition to the motion to quash only highlights the absence of any need to depose Mr. Perry. Plaintiffs concede, as they must, that they have received a "substantial document production[]" from Fannie Mae. Opp. at 2. Indeed, they affix several Fannie Mae-produced documents to their opposition that directly speak to the authorized discovery topics. Those documents (and the hundreds of thousands more produced by Fannie Mae, Freddie Mac, Fannie Mae's auditor, Freddie Mac's auditor, FHFA, and Treasury) speak for themselves and

[1] Plaintiffs' attempt to invoke *JZ Buckingham Invs. LLC v. United States*, 78 Fed. Cl. 15 (2007), in support of their subpoena cannot withstand scrutiny. There, after recognizing that the subpoena recipient's third-party status counseled in favor of granting the recipient's motion to quash, the court went on to conclude that the recipient was required to respond to the subpoena because the company "was … a major player in the transactions" at issue and the information sought was solely in the recipient's possession. *Id.* at 26. Plaintiffs have not alleged that Mr. Perry was "a major player" in the adoption of the Third Amendment and, as explained in the motion to quash and again here, the information plaintiffs are entitled to under this Court's order has already been provided by other sources.

provide plaintiffs with more than enough information on the authorized discovery topics for them to use in responding to the government's motion to dismiss. Permitting plaintiffs to depose Mr. Perry will provide plaintiffs with no additional relevant discoverable information beyond that contained in the reams of documents already supplied, but it will certainly impose an undue burden on Mr. Perry.

Given the limited universe of discoverable information and the hundreds of thousands of pages of documents plaintiffs already have obtained through discovery, Mr. Perry can have nothing to add to the documents produced or that would be non-duplicative with the information already provided by the individuals plaintiffs have already deposed—Mario Ugoletti and Edward DeMarco of FHFA, Jeff Foster and Tim Bowler of Treasury, and Fannie Mae's former CFO Susan McFarland. Any contention that Mr. Perry has discoverable relevant information on the authorized topics above and beyond that gleaned from these documents and depositions is unfounded. Importantly, Mr. Perry is no better positioned than Mrs. McFarland to speak to Fannie Mae's projections of future profitability, the only topic that a non-FHFA, non-Treasury deponent could possibly speak to in greater detail than an FHFA or Treasury deponent. Plaintiffs do not dispute that their deposition of Mrs. McFarland "focused on Fannie Mae's projections of future profitability at the time the Third Amendment was executed." Doc. 250 at 10. Nor do plaintiffs dispute that they "repeatedly asked Mrs. McFarland questions about what transpired at various

meetings of Fannie Mae's Board of Directors" generally, and "how the Board reacted to the Third Amendment" specifically. *Id.* at 11.

Plaintiffs' efforts to avoid the inescapable conclusion that there is no need to unduly burden Mr. Perry with an intrusive deposition at this early stage in the proceedings are unavailing. As noted at the outset, plaintiffs' primary argument—that Mr. Perry has a "unique perspective" on information plaintiffs already have—should be a nonstarter under this Court's rules and precedent. *See* Opp. at 1, 6, 7, 8 (discussing Mr. Perry's purported "unique perspective"). "Unique perspective" is not "unique knowledge," and the law requires the latter. *See Zoltek*, 104 Fed. Cl. at 655-56; RCFC 26(b)(2). Whatever the exact scope of discovery authorized by this Court, it surely did not contemplate that plaintiffs would go around serving subpoenas on third parties for no reason other than to hear those parties' "unique perspectives" on facts already discovered. Unsurprisingly, plaintiffs fail to cite a single case in support of their unsupportable "unique perspective" argument.

Plaintiffs' remaining arguments fare no better. Beyond citing to Mr. Perry's purported "unique perspective," the tactic that dominates plaintiffs' opposition is to cite to Board minutes that Fannie Mae produced and contend that those documents support their argument that they need to depose Mr. Perry. That approach suffers from two related and equally fatal problems. First and foremost, many of the Fannie Mae Board meeting minutes speak for themselves and make plain that no further

elucidation from Mr. Perry or anyone else is required. More problematically, the minutes on which plaintiffs rely confirm that Mrs. McFarland was present when the topics germane to discovery that a non-FHFA or non-Treasury deponent could possibly speak about in more detail than an FHFA or Treasury deponent were discussed. Mrs. McFarland was present for the "discussion of '[redacted]" pointed to by plaintiffs. Opp. at 8 (quoting plaintiffs' Exhibit 4 at A029). And Mrs. McFarland was not only present for the Board's discussion of "'[redacted]," Opp. at 8 (quoting plaintiffs' Exhibit 5 at A033)—Mrs. McFarland led the discussion of [redacted]. *See* Plaintiffs' Exhibit 5 at A033.

Plaintiffs suggest that the fact that Mrs. McFarland did not join Fannie Mae until July 2011 means that, in the absence of a deposition of Mr. Perry, they are somehow being denied non-redundant discoverable information. *See* Opp. at 3, 8. Not so. Again, the only topic that a non-FHFA, non-Treasury deponent could possibly speak to is "Fannie's future prospects and profitability *when the Net Worth Sweep was consummated*" in August of 2012. Opp. at 1 (emphasis added). However, at the time of the Third Amendment, Mrs. McFarland had been Fannie Mae's CFO for over a year and regularly attended Fannie Mae's Board meetings.

Plaintiffs' own appendix materials amply demonstrate that the information that the Board possessed about Fannie Mae's "[redacted]" came directly from Mrs. McFarland. *See* Plaintiffs' Exhibit 8 at A058 ("[redacted]").

In likely recognition of the fact that Mr. Perry is no better positioned than Mrs. McFarland—whom they have already deposed—to provide information on the authorized discovery topics, plaintiffs engage in two gambits, both of which fail to convince. First, plaintiffs [redacted]. Opp. at 9. Plaintiffs have a problem here as well—[redacted]. *See* Plaintiffs' Exhibit 7 at A043; Exhibit 8 at A052; Exhibit 9 at A061; Exhibit 10 at A067; Exhibit 11 at A070 [redacted]. [redacted] *See* Plaintiffs' Exhibit 8 at A052; Exhibit 9 at

A061; Exhibit 10 at A067. [redacted]

[redacted] *See* Exhibit 10 at A067.[2]

Second, plaintiffs attempt to manufacture a need to depose Mr. Perry by expanding the topics of authorized discovery. Plaintiffs assert on multiple occasions that this Court authorized discovery into "why the Government allowed the pre-existing capital structure to remain in place when Fannie *was placed into conservatorship*" and "*the significance of the FHFA actions at issue in this case* and whether those actions are attributable to the United States." Opp. at 1 (emphasis added). Based on that gloss on this Court's order, plaintiffs proceed to contend that deposing Mr. Perry will allow them to better understand "the early days of Fannie's conservatorship" and "FHFA's goals when the conservatorship began." Opp. at 8-9. But FHFA did not even reconstitute Fannie Mae's Board of Directors until nearly three months after Fannie Mae was placed into conservatorship, and Mr. Perry was not appointed to the Board until nearly a month after that.[3] Moreover, this Court's discovery order provides no basis for pursuing discovery regarding "the significance of the FHFA actions," "the early days" of the conservatorship, or "FHFA's goals

[2] [redacted] *See, e.g.*, Plaintiffs' Exhibit 6 at A037.

[3] Fannie Mae's December 24, 2008, 8-K.

when the conservatorship began." The discovery authorized pertains to the Third Amendment, not the conservatorship *qua* conservatorship. Plaintiffs' felt need to attempt to expand the topics of authorized discovery simply demonstrates that they have no actual need to depose Mr. Perry on the authorized topics.

In light of plaintiffs' own submission, which party bears the burden in this dispute is of no moment. Plaintiffs' own arguments make plain that they do not need to depose Mr. Perry and they should not be permitted to do so. In the event that the Court decides that who bears the burden here matters, however, it should place the burden on plaintiffs. Plaintiffs do not dispute that many of the authorities cited in the motion to quash provide square support for shifting the burden to plaintiffs here given that their subpoena was served on the Chairman of Fannie Mae's Board. *See* Doc. 250 at 6-7 (discussing cases applying the apex doctrine). Plaintiffs do contend, however, that many of those cases are inapposite because "the prospective deponent" in those cases "submitted an affidavit swearing that he or she had no knowledge of issues relevant to the litigation" and Mr. Perry has not submitted such an affidavit. Opp. at 6. Reflecting how little actual concern they have for Mr. Perry's time, plaintiffs note that Mr. Perry has not submitted an affidavit at other points in their opposition as well. *See id.* at 7. In all events, no affidavit is necessary to establish the obvious: deposing Mr. Perry will add nothing to the information contained in the hundreds of thousands of documents plaintiffs have received and Mr. Perry is no

better positioned to provide information on the limited topics of authorized discovery than the individuals plaintiffs have already deposed.

III. At An Absolute Minimum, This Court Should Limit The Deposition Of Mr. Perry.

Fannie Mae and Mr. Perry firmly believe that plaintiffs' effort to depose Mr. Perry is completely unnecessary, duplicative, cumulative, and unduly burdensome. In the event this Court disagrees and does not quash the subpoena outright, for the reasons explained herein and in the motion to quash, this Court should limit plaintiffs' dealings with Mr. Perry to interrogatories. *See Exxon Research & Eng'g Co. v. United States*, 44 Fed. Cl. 597, 602 (1999).

Should this Court conclude that a live deposition is appropriate, it should enter an order materially limiting both the time and scope of that deposition. At most, plaintiffs have set forth a need for a short deposition—no more than one to two hours—to explore Mr. Perry's "perspective" on "whether FHFA is the United States." Opp. at 9. It is quite apparent, however, that any testimony by Mr. Perry on that legal question is completely irrelevant, further highlighting that there is no need to permit plaintiffs to depose him. But should this Court authorize such a deposition, it should be limited in time and scope.

CONCLUSION

For the reasons stated herein and in the motion to quash, Mr. Perry and Fannie Mae respectfully request that this Court quash plaintiffs' subpoena.

Respectfully submitted,

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