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**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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

**PLAINTIFFS' PUBLIC REDACTED MOTION TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS WITHHELD FOR PRIVILEGE**

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## INTRODUCTION

After months of discussions regarding Defendant's privilege claims, it has become clear, regrettably, that the parties cannot agree about a variety of significant issues and that guidance from the Court is needed. Presenting those issues to the Court in a manageable form is complicated by the sheer scope and magnitude of Defendant's privilege assertions and withholding of responsive documents; Defendant's current privilege logs, which taken together exceed 1,200 pages, cover more than eleven thousand documents withheld in whole or in part. Complicating matters further, Defendant has revised and supplemented its purportedly "final" privilege logs on numerous occasions, including as recently as November 19. Given the enormous number of withheld documents and the very general—and in many instances clearly inadequate—document descriptions in Defendant's privilege logs, it is virtually impossible for Plaintiffs to identify all documents that may have been improperly withheld.

Plaintiffs have worked with Defendant over the last several months in an effort to develop a mechanism for presenting the parties' privilege disputes to the Court. This motion reflects the approach that Plaintiffs ultimately concluded would be most efficient, which is to: (1) identify a number of overarching legal questions relating to Defendant's privilege assertions that the Court can likely address without reference to particular documents; and (2) identify a relatively small number of documents—listed in Exhibit 1—that illustrate both those overarching legal questions and other privilege issues that can be most efficiently presented in the context of specific documents. It is Plaintiffs' hope that the Court's resolution of this motion will provide meaningful guidance that can be applied to many of Defendant's thousands of other privilege assertions, which

include assertions of the deliberative process, bank examination, and presidential communications privileges.[1]

While it is not feasible, given the above facts, for Plaintiffs to assess all of Defendant's privilege assertions, what is apparent is that many of those assertions suffer from serious deficiencies. Thus, with respect to the deliberative process privilege, Defendant has failed to submit a declaration from an agency head or authorized delegate establishing that someone other than Defendant's litigation counsel has even reviewed the documents at issue, let alone performed the critical analyses that are necessary for the proper assertion of this qualified privilege. Defendant has therefore failed to satisfy its burden to establish its claims of privilege. Defendant has also improperly asserted the deliberative process privilege—a privilege that belongs exclusively to the Executive Branch—over documents produced by or shared with FHFA, despite Defendant's litigating position that FHFA is not the United States. There is also serious reason to doubt that all of the documents Defendant has withheld are deliberative and predecisional, for some of the documents listed in Exhibit 1 appear to discuss the Net Worth Sweep and were created *after* the Third Amendment to the Preferred Stock Purchase Agreements was implemented. Furthermore, even where the documents withheld by Defendant are genuinely deliberative and predecisional in nature, they are not privileged to the extent that they are directly probative of Defendant's motives for adopting the Net Worth Sweep. Finally, even assuming, solely for purposes of argument, that

[1] At least with respect to some of the documents listed in Exhibit 1, Defendant has said that it is withholding "variations of similar documents with the same general substance" and suggested that the Court should simultaneously rule on all similar documents or none at all. Letter from Elizabeth Hosford to Brian Barnes at 9 (Nov. 13, 2015) (attached as Ex. 2). While Plaintiffs do not object in principle to the Court reviewing additional materials where doing so is necessary to give the Court a complete understanding of Defendant's privilege assertions, we do not believe that it is necessary for the Court to review numerous nearly identical drafts of the same document or that doing so would provide the parties meaningful additional guidance on the disputed privilege issues presented in this motion.

Defendant may have grounds to claim the deliberative process privilege over these documents in the first instance, that privilege is not absolute, and in the circumstances of this case, the Court should conclude that Plaintiffs have easily overcome any invocation of this qualified privilege. Plaintiffs' urgent need for these documents and the public's critical interest in fair and accurate factfinding in this important case outweighs any legitimate interest Defendant may have in shielding its deliberations from scrutiny. And any disclosure of the documents at issue will be subject to the Court's protective order, which narrowly restricts access to any confidential information to a small group of specifically identified, judicially admitted individuals.

Defendant's other privilege assertions are similarly flawed. Defendant has improperly asserted the bank examination privilege over a number of FHFA documents even though the Companies are not banks and even though recognizing the privilege, which is intended to promote frank communications between banks and their regulators, would serve no purpose while the Companies are subject to FHFA's complete control during conservatorship. And Plaintiffs have a substantial need for documents Defendant has withheld under the presidential communications privilege that justifies requiring disclosure of those documents.

For these and other reasons explained in this motion, this Court should issue an order making clear that an array of Defendant's privilege assertions are overbroad and improper. Moreover, to the extent that the Court does not order Defendant to produce the documents listed in Exhibit 1 outright, it should review those documents *in camera* to determine whether Defendant's privilege assertions are merited and, even if they are, whether documents withheld

under the qualified deliberative process, bank examination, and presidential communications privileges should nevertheless be released to Plaintiffs.[2]

## ARGUMENT

### I. Defendant's Privilege Assertions in This Litigation Have Been Haphazard, Inconsistent, and Overbroad.

Plaintiffs have long been concerned about Defendant's sweeping assertions of the deliberative process privilege and other privileges to shield over eleven thousand responsive documents from discovery. *See, e.g.*, Letter from Vincent Colatriano to Gregg Schwind (Feb. 5, 2015) (attached as Ex. 3). And a number of events and discoveries in recent months confirm that Defendant's assertions of privilege have been haphazard, inconsistent, and in at least some cases plainly unwarranted. Under the circumstances, Defendant should be required to re-review the documents it has withheld for privilege to ensure that it has consistently and correctly applied governing legal standards when withholding materials for privilege.

First, on July 10, 2015, Defendant informed Plaintiffs that it had "inadvertently provided plaintiffs several documents it considers privileged" and clawed back eight such documents pursuant to paragraph 13 of the Protective Order. Letter from Gregg Schwind to Vincent Colatriano at A034 (July 10, 2015) (attached as Ex. 4). Plaintiffs promptly destroyed all copies of these documents as required by the Protective Order, but informed Defendant that a number of these documents were not included in Defendant's purportedly final privilege logs. *See* E-mail from Brian Barnes to Elizabeth Hosford and Gregg Schwind at A036 (July 17, 2015 4:59 PM EST) (attached as Ex. 5). DOJ responded by withdrawing entirely any claim of privilege over four of

[2] This motion covers only a small subset of the documents that Plaintiffs believe that Defendant may have improperly withheld for privilege. Plaintiffs nevertheless believe that guidance that may be provided by the Court's ruling on this motion will assist the parties in resolving other privilege disputes. Plaintiffs reserve, however, the right to seek to compel the disclosure of additional documents if the parties are unable to resolve other such disputes.

the eight documents, producing three of the documents subject to very minor redactions, and standing by its assertion of privilege over only one of the documents in its entirety. *See* Letter from Elizabeth Hosford to Vincent Colatriano at A038–039 (July 28, 2015) (attached as Ex. 6). Based on Plaintiffs' review of the four documents Defendant once again produced without redaction, Plaintiffs believe that Defendant's initial claim of privilege over these documents was wholly untenable. And the fact that Defendant's counsel withdrew any such claim once challenged suggests that they reached that conclusion as well. Given the baseless nature of Defendant's claims of privilege over at least half of the clawed back documents—documents that were presumably selected with care, since they were among a very small group of documents that Defendant identified for clawback—Plaintiffs are concerned that many of Defendant's other claims of privilege may be unwarranted as well.

Second, in August of this year, Plaintiffs identified more than 2,700 documents that Defendant had withheld as privileged without any mention in its purportedly final privilege logs. *See* E-mail from Vincent Colatriano to Elizabeth Hosford at A043 (Aug. 12, 2015 2:53 PM EST) (attached as Ex. 7).[3] After Plaintiffs' counsel raised this issue, Defendant indicated that approximately 1,800 of these documents were exact duplicates of other documents that either appeared on its privilege logs or had been produced, and that it had subsequently determined that 250 of these documents were not responsive to this Court's discovery order. *See* E-mail from Elizabeth Hosford to Vincent Colatriano at A049 (Aug. 17, 2015 4:29 PM EST) (attached as Ex. 8). Defendant also indicated that approximately 600 of these documents were inadvertently

[3] During discovery in this case, Defendant's practice when withholding a document for privilege has been to assign a Bates number to the document and to include a placeholder sheet in its production identifying the privileged document's Bates number and stating that the document was withheld for privilege. There were more than 2,700 such placeholder sheets included in Defendant's productions that did not correspond to any entries on its privilege logs.

omitted from its privilege logs and would be included on future logs and that it had withdrawn any claim over approximately forty-five of the documents, which it promised to produce. *See id*. Plaintiffs are concerned that Defendant's failure even to notice that more than 2,700 documents that it had flagged as withheld for privilege were missing from its privilege logs—despite the ample time it has had to prepare those logs[4]—indicates a general lack of care in determining which documents to withhold for privilege.

Third, also in August, Plaintiffs sent Defendant a list of 170 documents on its privilege logs that Plaintiffs were considering using as a representative sample in a motion to compel that would present to the Court a number of the parties' broader privilege disputes. In preparing that list, Plaintiffs focused on Treasury documents created between August 7 and August 13, 2012, a date range that corresponds to two August 9, 2012 meetings [redacted].[5] Defendant imposed the Net Worth Sweep eight days later.

[4] Defendant had more than a year to prepare its privilege logs given the multiple extensions this Court granted. *See* Order (Apr. 4, 2014), Doc. 40 (discovery to be completed by July 31, 2014); Order (Sept. 8, 2014), Doc. 92 (extending discovery cutoff deadline to Mar. 27, 2015); Order (Mar. 16, 2015), Doc. 138 (extending discovery cutoff deadline to June 29, 2015); Order (July 9, 2015), Doc. 193 (extending discovery cutoff deadline to Sept. 4, 2015).

[5] Starting in late 2008, FHFA required Fannie and Freddie to write down approximately $100 billion of their deferred tax assets, causing corresponding declines in the Companies' net worth that required infusions of cash from Treasury under the terms of the PSPAs.

Defendant eventually responded to Plaintiffs' list with a letter indicating that its review of the 170 documents Plaintiffs had identified prompted it to reconsider its privilege claims over 41 documents. Letter from Elizabeth Hosford to Vincent Colatriano at A070–073 (Sept. 1, 2015) (attached as Ex. 10). Among the materials that Defendant subsequently produced was a "Q&A" document that Defendant had previously withheld under the deliberative process privilege. Ex. 11 at A076, UST00554581. That document, [redacted] *id.* at A078, UST00554590, i.e., windfall profits for the Government. It is deeply troubling that Defendant originally asserted the deliberative process privilege over a document that is plainly not privileged and contains a critical admission that contradicts Defendant's basic explanation that the Net Worth Sweep was necessary to save the Companies from exhausting Treasury's funding commitment by paying 10% cash dividends under the original terms of Treasury's investment. More generally, the fact that Defendant was unable to maintain its privilege assertions with respect to more than twenty percent of a sample of entries taken from its privilege logs strongly suggests that Defendant took an overbroad approach when determining which documents it would withhold for privilege.

Fourth, in October, Plaintiffs identified a list of 88 additional documents that they proposed to use as a sample to present to the Court for resolution of many of the parties' privilege disputes. Defendant responded by saying that its review of the 88 documents had prompted it to withdraw its privilege claims over 17 documents. Ex. 2 at A018–026. As with Plaintiffs' list of 170 documents from August, re-review of a sample of documents withheld for privilege prompted Defendant to produce either the document in question or a related document in about one out of

every five instances. Exhibit 1, which this motion uses as a sample to frame many of the parties' broader disagreements over privilege issues, identifies a subset of the documents from Plaintiffs' October list that Defendant did not ultimately produce.

Two of the documents Defendant produced only after it became apparent that Plaintiffs were about to file this motion to compel are particularly noteworthy. First, Defendant produced a memo [redacted] Ex. 12 at A081, UST00556835. [redacted] That fact utterly discredits Defendant's "death spiral" explanation for why it imposed the Net Worth Sweep, and it is revealed in a memo that is clearly responsive to document requests that Plaintiffs propounded *in April 2014*. Even though it is clearly not privileged, Defendant did not produce this highly damaging document until last week. Also in anticipation of this motion to compel, Defendant belatedly produced [redacted] Here again, it was only when threatened with a motion to compel 19 months after first receiving Plaintiffs' document

requests that Defendant produced a clearly responsive document that it now concedes is not privileged and that directly undermines the basic narrative it has used to defend the Net Worth Sweep.

Fifth, Plaintiffs have long been concerned that the vague and highly generic document descriptions appearing on Defendant's privilege logs would make it impossible to meaningfully assess Defendant's privilege claims. Ex. 3 at A028–029 (identifying this concern in February 2015); *see Testwuide v. United States*, 2006 WL 5625760, at *4 (Fed. Cl. Aug. 7, 2006) (explaining that "boilerplate assertions" on privilege logs are insufficient). Plaintiffs raised this issue with Defendant with respect to specific documents identified on their August and October document lists, and in both instances Defendant responded by providing much more extensive descriptions of the specific documents in question. *See* Ex. 2 at A019–020; Ex. 10. Defendant has refused, however, to provide similarly complete descriptions for *all* of the documents it is withholding as privileged, and a large number of the documents on Defendant's privilege logs do not come close to providing sufficient information to establish a claim of privilege.

It is of course only natural to expect that, on occasion, the parties' give and take during the course of discovery will prompt Defendant to change its position as to whether particular documents are privileged. The problem here, however, is that the large number of times Defendant has shifted its position in response to challenges by Plaintiffs rises above such normal give and take and instead calls into question Defendant's entire approach to asserting privilege. Many of the documents that have been produced as part of these negotiations are not even arguably privileged—there was never any legitimate basis for withholding these documents as privileged; and they were produced only when we indicated an intent to bring these documents to the Court's attention. *E.g.*, Ex. 14 at A094, UST00506605 [redacted]

[redacted] Ex. 15 at A103, UST00497679 [redacted]; Ex. 16 at A140, UST00397876 [redacted] Under these circumstances—and in light of the many patently improper privilege assertions discussed below—the Court should direct Defendant to re-review all of the documents it has withheld for privilege, applying the proper legal standards as clarified by the Court in response to this motion. *See Cornejo v. Mercy Hosp. and Med. Ctr.*, 2014 WL 4817806, at *1 (N.D. Ill. Sept. 15, 2014) (observing that court had directed producing party "to review more carefully the documents it was withholding" as privileged); *Khoshmukhamedov v. Potomac Elec. Power Co.*, 2012 WL 1357705, at *6 (D. Md. Apr. 17, 2012) (ordering producing party "to re-review their privilege logs and the withheld documents" in light of improper privilege claims).

## II. Defendant Has Not Properly Asserted the Deliberative Process Privilege, and Many of Its Deliberative Process Privilege Claims Are Overbroad or Without Legal Basis.

As this Court has repeatedly observed, "the deliberative process privilege should be construed narrowly in order to permit parties seeking discovery to obtain sufficient information." *First Heights Bank, FSB v. United States*, 46 Fed. Cl. 827, 829 (2000); *see also, e.g., Dairyland Power Coop. v. United States*, 79 Fed. Cl. 709, 720 (2007) ("*Dairyland Power II*") ("[T]he deliberative process privilege is to be narrowly construed."). The purpose of this privilege "is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government, not to further the litigation strategy of counsel." *Pacific Gas & Elec. Co. v. United States*, 70 Fed. Cl. 128, 144 (2006) (citation omitted) (internal quotation marks omitted) ("*Pacific Gas I*"). It is well-settled "that the party claiming [this] privilege bears the burden of establishing its entitlement to it." *Dairyland Power II*, 79 Fed. Cl. at 719–20. To withhold materials under the deliberative process privilege, the Government thus must demonstrate on a document-by-document basis that the materials it wishes to withhold are both

predecisional and deliberative, *see, e.g.*, *Walsky Constr. Co. v. United States*, 20 Cl. Ct. 317, 320 (1990).

Defendant has claimed the deliberative process privilege to protect communications among senior government officials that are likely to belie Defendant's claims regarding its motives in implementing the Net Worth Sweep. As explained above, Plaintiffs have reason to believe that Defendant's invocation of this and other privileges in this litigation has often been arbitrary, inconsistent, or improper. For that reason, and for the reasons set forth below, this Court should order Defendant to produce the documents identified in Exhibit 1 that Defendant withheld under the deliberative process privilege as well as other documents Defendant has withheld without proper legal basis. In the alternative, this Court should review the documents listed in Exhibit 1 *in camera* to determine whether Defendant's assertions of privilege are proper and, even if they are, whether the withheld documents should nevertheless be released to Plaintiffs in light of their pressing need for these documents and the public interest in fair and accurate factfinding in this important case.

**A. Defendant Has Not Properly Asserted the Deliberative Process Privilege.**

Defendant's assertion of the deliberative process privilege is flawed at the wholesale level because Defendant has yet to provide Plaintiffs with the required affidavits from the relevant agency heads or their delegates. *See Walsky*, 20 Cl. Ct. at 320 ("[T]he head of the agency that has control over the requested document [or his delegate] must assert the privilege after personal consideration."). The purpose of this requirement is to ensure that "those officials with expertise in the nature of the privilege claim and documents at issue . . . determine whether the public interest in confidentiality outweighs the public interest in disclosure," *Alpha I, LP ex rel. Sands v. United States*, 83 Fed. Cl. 279, 288–89 (2008) (alteration in original) (internal quotation marks omitted)—

something that government trial counsel is not qualified to do. Requiring that "government officials, rather than government counsel, ma[ke] the decision to assert the deliberative process privilege," *Pacific Gas & Elec. Co. v. United States*, 71 Fed. Cl. 205, 208 (2006) ("*Pacific Gas II*"), "ensure[s] that the privilege is invoked as a result of an executive decision about the exigencies of executive management, rather than as a result of trial counsel's decision about a desirable litigation strategy," *Pacific Gas I*, 70 Fed. Cl. at 135. None of Defendant's assertions of the deliberative process privilege are proper without affidavits from the relevant agency heads or their delegates, *see Marriott Int'l Resorts, LP v. United States*, 437 F.3d 1302, 1306–08 (Fed. Cir. 2006), and the Court should therefore order Defendant to produce the documents it has withheld under the deliberative process privilege.

Any belated attempt by Defendant to satisfy the agency affidavit requirement—for example, by attaching affidavits to its response to Plaintiffs' motion—at a minimum "erod[es] the credibility of [its] claim of the privilege" and makes it appropriate for the Court to apply "heightened scrutiny to the government's assertion of the deliberative process privilege." *Pacific Gas II*, 71 Fed. Cl. at 208; *see Confidential Informant 59-05071 v. United States*, 108 Fed. Cl. 121, 135–36 (2012) ("[T]he time to make the showing that certain information is privileged is at the time the privilege is asserted, not months later when the matter is before the Court on a motion to compel."). That is because the agency affidavit requirement is supposed to assure the Court that someone from the agency—ideally, an official "not directly responsible for or involved in . . . this case," *Marriott Int'l Resorts*, 437 F.3d at 1308—has independently determined—at the time the privilege is claimed—that the materials in question should not be produced. Accordingly, "blind assertion of the privilege . . . totally defeats the purpose behind the formal claim requirement," *Martin v. Albany Bus. Journal, Inc.*, 780 F. Supp. 927, 936 (N.D.N.Y. 1992), as does a

"perfunctory and pro forma" affidavit signed by an agency official only after government counsel has decided what to withhold, *Chao v. Westside Drywall, Inc.*, 254 F.R.D. 651, 657 (D. Or. 2009). "The assertion of the deliberative process privilege ordinarily calls for support by an affidavit from an agency official *at the time the privilege is first asserted*," *Alpha I*, 83 Fed. Cl. at 290 (emphasis added), and Defendant's failure to do so here seriously undermines the value of any affidavits it may now submit.

**B. The Deliberative Process Privilege Does Not Protect Evidence of Defendant's Purposes, Intentions, and Motivations.**

Moreover, many of the documents withheld under the deliberative process privilege that are identified in Exhibit 1 would likely reveal important information about Defendant's purpose and/or motivation for imposing the Net Worth Sweep, and such information may not be withheld under the deliberative process privilege. For example, [redacted]

Plaintiffs expect that these and other documents listed in Exhibit 1 would corroborate Ms. McFarland's testimony that [redacted] *See* Ex. 9 at 45:11–13 (A057) (McFarland: [redacted]

[redacted]. If this is true, it would demonstrate that the reason why the Government effectively nationalized Fannie and Freddie was not, as the Government has claimed in its briefing, to prevent a "death spiral" in which the enterprises would "fai[l] to generate enough revenue to fund the 10-percent dividend obligation" and be required to "dra[w] on the Treasury commitment to pay Treasury its fixed dividend, which, in turn, [would] increase[] Treasury's total investment and the next quarterly dividend." Def.'s Mot. to Dismiss at 9–10 (Dec. 9, 2013), Doc. 20 ("Def.'s MTD"). Rather, these documents would demonstrate that the Government's decision was driven by the fact that Fannie and Freddie were poised to generate tens of billions of dollars in profit *over and above* their existing dividend obligations—money that could go toward rebuilding Fannie's and Freddie's capital reserves for potential exit from conservatorship and that could benefit shareholders other than Treasury. Defendant, however, was determined to keep Fannie and Freddie under government control and to ensure that shareholders other than Treasury would be wiped out. *See* [redacted] Thus, we believe that the withheld documents will likely show that the purpose of the Net Worth Sweep was to expropriate for the government every last dollar of the substantial profits and massive deferred tax asset valuation allowance releases that were anticipated in the near future, to prevent Fannie and Freddie from rebuilding capital and exiting conservatorship, and to ensure that Fannie's and Freddie's private shareholders received no value whatsoever for their investment.

As numerous courts have held, the deliberative process privilege does not apply when "the Government's decision-making process and intent is the subject of the litigation." Discovery Order No. 6 at 6 (A163), *Starr Int'l Co. v. United States*, No. 11-779C (Fed. Cl. Nov. 6, 2013), ECF No. 182 (attached as Ex. 21) ("*Starr* Order"); *see also, e.g., id.* ("[T]he deliberative process privilege is unavailable . . . when a plaintiff's cause of action is directed at an agency's subjective motivation."); *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency,* 156 F.3d 1279, 1279 (D.C. Cir. 1998) ("[T]he government's deliberative process privilege does not apply when a cause of action is directed at the government's intent."); *Dunnet Bay Constr. Co. v. Hannig*, 2012 WL 1599893, at *3 (C.D. Ill. May 7, 2012) ("The deliberative process privilege, however, does not apply when the lawsuit puts at issue the intent of the officials making the governmental policy decision. . . . In such circumstances, the deliberative process privilege must yield to the interests of determining the governmental agents' intent."); *Scott v. Board of Educ. of the City of East Orange*, 219 F.R.D. 333, 337 (D.N.J. 2004) ("[W]hen the deliberations of a government agency are at issue, the Privilege is not available to bar disclosure of such deliberations.").[6] Rather, the deliberative process privilege applies only when "the government

[6] In the parties' discussions regarding this issue, Defendant has cited *First Heights Bank*, 46 Fed. Cl. at 321–22, as support for its position that the deliberative process privilege shields documents relevant to the Government's motivations. While it is true that the *First Heights Bank* court favored a case-by-case assessment of need over "an automatic bar on assertions of deliberative process privilege in any case where the Government's intent is potentially relevant," *id.* at 322, that court's analysis makes clear that the parties' dispute over the Government's intent was a critical factor in its ultimate conclusion that the plaintiffs had made the necessary showing to overcome the qualified privilege, *id.* Thus, to the extent that the Court follows *First Heights Bank* rather than the numerous contrary cases cited in the text, the parties' dispute over Defendant's true reasons for imposing the Net Worth Sweep weighs heavily in favor of finding that Plaintiffs have demonstrated sufficient need to overcome the deliberative process privilege. In any event, rather than following *First Heights Bank*, Plaintiffs submit that this Court should follow Judge Wheeler's carefully reasoned and more recent opinion in *Starr* and rule that Defendant may not use the deliberative process privilege to shield documents that are probative of its purposes, intentions, and motivations for imposing the Net Worth Sweep.

decisionmaking process is 'collateral' to a plaintiff's claim." *In re Subpoena Duces Tecum Served on the Office of Comptroller of Currency*, 156 F.3d at 1279 (emphasis omitted). Here, the Government's decision-making process is not collateral—indeed, Defendant has made its alleged purposes and motivation in adopting the Net Worth Sweep central to its defense. Thus, to the extent that the documents identified in Exhibit 1 are probative of the reasons why the Government imposed the Net Worth Sweep, the deliberative process privilege cannot shield them from discovery.

### C. Defendant's Litigating Position that FHFA Is Not the United States Precludes It from Withholding FHFA Documents Under the Deliberative Process Privilege.

Many of Defendant's assertions of the deliberative process privilege are also improper for an additional reason: Defendant has consistently protested that FHFA is not the United States. It follows that Defendant should be precluded from asserting the deliberative process privilege—a privilege that belongs exclusively to the Government—over documents created by or shared with FHFA. "The deliberative process privilege is a shield which the executive branch may use to deflect public scrutiny away from its internal decision making process." *Starr* Order at 6 (A163). It "protects only inter-agency or intra-agency documents. Disclosure to a non-agency third party waives the privilege." *Id.* at 11 (A168). The Government has argued in its motion to dismiss Plaintiffs' taking claim that FHFA "is not the United States when it acts as conservator." Def.'s MTD at 12. This is what it said to this Court: "Plaintiffs' claims against FHFA and its actions as conservator are effectively claims against Fannie Mae and Freddie Mac—neither of which are alleged to be [a] Government entity. . . .By suing the conservatorships, [P]laintiffs . . . are effectively suing private corporations for the decisions of their management." *Id.* at 14. Defendant's position thus should preclude it from now asserting the deliberative process privilege

as to any communication or document to which Fannie or Freddie, or FHFA as their conservator, was a party or recipient.

At the June 19, 2014 status conference, the Court summed up the conflict inherent in Defendant's assertion of the privilege over FHFA documents, observing:

> On one hand, FHFA is a government entity, you know, for purposes of booting the Plaintiffs out of court and not part of the Government, but for purposes of forwarding discovery, all of a sudden deliberative process is appropriate because they are part of the Government. So, it's a schizophrenic approach and I'm just waiting to hear a reasonable explanation.

Transcript of June 19, 2014 Status Conference at 24 (A175), attached as Ex. 22. Defendant can hardly assert as a defense to Plaintiffs' taking claim that FHFA as conservator is not a government agency and then turn around and assert a privilege available only to government agencies to prevent Plaintiffs from discovering information necessary to prove the contrary. And while Defendant might argue that Plaintiffs' position is also inconsistent as to whether FHFA should be treated as the United States for purposes of this litigation, that argument ignores the fact that it is *Defendant's* burden of persuasion to show that the privilege applies to FHFA documents. *Dairyland Power II*, 79 Fed. Cl. at 719–20. Thus, to sustain its deliberative process assertion, Defendant must demonstrate that FHFA was acting as an agency of the federal government—Plaintiffs' position is irrelevant. And since Defendant affirmatively *disclaims* that FHFA was acting in that capacity, its assertion of deliberative process privilege for FHFA documents necessarily fails. Accordingly, the Court should issue an order making clear that Defendant may not withhold documents reviewed by FHFA or the Companies on the basis of the deliberative process privilege.

### D. The Deliberative Process Privilege Does Not Protect Documents That Discuss the Net Worth Sweep After It Was Imposed.

As this Court has already observed, "to be exempt from disclosure under the deliberative process privilege, the government must show that the information is pre-decisional." Opinion & Order at 3 (July 16, 2014), Doc. 72. Defendant has nevertheless acknowledged withholding documents created or transmitted *after* August 16, 2012—the day Defendant decided to impose the Third Amendment[7]—on the theory that it "may assert the deliberative process privilege with respect to communications that post-date a decision if the communications recount Government employees' views of the proposed decision before the decision was adopted." Ex. 2 at A015. Although Plaintiffs cannot be certain because they have not reviewed the documents in question, several documents listed in Exhibit 1 appear to be examples of documents withheld on that basis. *See* UST00061067; UST00385562; UST00061011. But the better view is that a document is only predecisional for purposes of the deliberative process privilege if it "precedes, in temporal sequence, the 'decision' to which it relates." *Abramson v. United States*, 39 Fed. Cl. 290, 294 (1997); *see Dobyns v. United States*, -- Fed. Cl. --, 2015 WL 6452682, at *7 (June 19, 2015) (document predecisional only if it was "created to assist the agency in the formulation of a specific decision on policy"). Thus, documents that merely express opinions about *past* agency decisions are not predecisional. *See Confidential Informant 59-05071*, 108 Fed. Cl. at 140 (document reflecting "facts about past actions and decisions" was not privileged); *United States v. Hooker Chems. & Plastics Co.*, 123 F.R.D. 3, 43 (W.D.N.Y. 1988) ("[O]nce the decisionmaker has reached

[7] [redacted]

a conclusion and the process is over, the post-decisional views of subordinates about that decision are not within the scope of the [deliberative process] privilege.").

Defendant has taken a contrary position on the strength of *Ford Motor Co. v. United States*, 94 Fed. Cl. 211, 223 (2010), which said that materials "created after a decision which recount pre-decisional deliberations are covered by the [deliberative process] privilege." But this Court's cases are not consistent in adopting that approach; again, other opinions of this Court say that a document is predecisional only if it "precedes, in temporal sequence, the 'decision' to which it relates," *Abramson*, 39 Fed. Cl. at 294, and was "created to assist the agency in the formulation of a specific decision on policy," *Dobyns*, -- Fed. Cl. --, 2015 WL 6452682, at *7. That is clearly the better view, for an exception permitting the Government to withhold materials created after adoption of agency policy that "recount pre-decisional deliberations" would swallow the well-established rule that a document must be *both* deliberative *and* predecisional to be covered by the privilege. *See In re United States*, 321 F. App'x 953, 958 (Fed. Cir. 2009) ("Generally, to be exempt from disclosure under the deliberative-process privilege, the government must show that the information is pre-decisional *and* deliberative." (emphasis added)).

Moreover, as the Supreme Court has explained, the "ultimate purpose" of the deliberative process privilege "is to prevent injury to the quality of agency decisions," and "it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975); *see Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 884–85 (1st Cir. 1995) ("Because the deliberative process privilege is restricted to the intra-governmental exchange of thoughts that actively contribute to the agency's decisionmaking process, . . . post-decisional documents explaining or justifying a decision already made are not shielded."). Where

an agency decision has already been made, preserving the confidentiality of internal agency communications about the decision—even communications that recount earlier deliberations—does nothing to enhance the quality of agency decision making. In view of the deliberative process privilege's purpose and this Court's repeated admonitions that the privilege should be construed narrowly, *see, e.g.*, *Dairyland Power II*, 79 Fed. Cl. at 720, the Court should rule that Defendant may not use the privilege to withhold documents that discuss deliberations over the Third Amendment that were created after August 16, 2012.

### E. The Deliberative Process Privilege Does Not Protect Financial Projections, Models, or Other Materials that Contain Only Non-Deliberative Factual Information.

Despite the well-established rule that the deliberative process privilege only shields materials that are deliberative, *see* Opinion & Order at 3 (July 16, 2014), Doc. 72, Defendant also appears to have withheld a significant number of documents that contain non-deliberative, factual material. For example, Defendant asserted privilege over numerous financial models and other assessments of the Companies' financial performance. *E.g.*, UST00539251; UST00407342; FHFA00100594; UST00556459; UST00556460; UST00556294; UST00556295; UST00473767; UST00473773; UST00473770; UST00473776; UST00473779; UST00473782; UST00481423; UST00481424; UST00481425. Such assessments do not "make recommendations or express opinions on legal or policy matters" and therefore do not qualify as "deliberative" for purposes of the deliberative process privilege. *Confidential Informant 59-05071*, 108 Fed. Cl. at 135.

Defendant has nevertheless taken the position that financial models and projections are deliberative, selectively disclosing projections that it considers helpful to its case while withholding others. *See* Ex. 2 at A025 ("There are numerous examples of projections for which we have previously waived privilege available in the Administrative Record from the district court

action and in documents we have produced in this action."). But numerous cases hold that technical models, data, and projections of this sort are not deliberative and therefore may not be withheld under the deliberative process privilege. *See, e.g.*, *Lahr v. National Transp. Safety Bd.*, 453 F. Supp. 2d 1153, 1189 (C.D. Cal. 2006) (graphs depicting results of agency computer simulations of plane crash were factual and not deliberative), *rev'd and remanded in part on other grounds*, 569 F.3d. 964 (9th Cir. 2009); *Reilly v. United States EPA*, 429 F. Supp. 2d 335, 352–53 (D. Mass. 2006) (EPA computer model runs were not deliberative); *Carter v. United States Dep't of Commerce*, 186 F. Supp. 2d 1147, 1154–57 (D. Or. 2001) (results of statistical adjustments to census data were not deliberative). The Court should follow those carefully reasoned opinions and rule that Defendant may not withhold financial data, models, or projections under the deliberative process privilege.

Defendant also appears to have withheld documents in full, such as [redacted] which very likely include segregable factual information. *See* Ex. 24 at A180, UST00389661. The same is true of UST00490551, [redacted] *See* Ex. 25 at A182, UST00490550. To be sure, "factual information that itself reveals the deliberative process and cannot be severed from the deliberative context is protected." *In re United States*, 321 F. App'x at 959. But many of the documents listed in Exhibit 1 appear to contain segregable factual or other non-deliberative information. The Court should order Defendant to produce these documents listed in Exhibit 1. At a minimum, it should review those documents *in camera* to assess Defendant's application of the privilege.

### F. Plaintiffs' Need and the Public Interest Outweigh Any Legitimate Interest Defendant May Have in Nondisclosure.

Finally, Plaintiffs respectfully submit that even if Defendant's invocations of the deliberative process privilege were otherwise proper, any harm that Defendant might suffer from disclosure is outweighed not only by Plaintiffs' evidentiary need for the withheld documents but also by the public interest in open and transparent government and in fair and accurate factfinding in this case. Documents listed in Exhibit 1 include materials discussing Defendant's decision to impose the Net Worth Sweep, *e.g.*, UST00384501, UST00536560, the Office of Management and Budget's review of the Net Worth Sweep and its anticipated impact on the federal budget, *e.g.*, UST00539251, UST00407342, and Defendant's assessment of the Companies' financial outlook when the Net Worth Sweep was imposed, *e.g.*, UST00407182, UST00384146. Such documents go to the heart of the disputed factual issues before the Court. To the extent that the Court concludes that the following three categories of withheld documents are subject to the deliberative process privilege despite Plaintiffs' arguments to the contrary, Plaintiffs submit that their need is sufficient to overcome the privilege: (1) materials revealing Defendant's purposes, intentions, and motivations for imposing the Net Worth Sweep; (2) materials that concern the Net Worth Sweep created after it was imposed; and (3) financial data, projections, and models that relate to the Companies' condition and future profitability.

As this Court has already correctly held,

> A claim of deliberative process privilege, even when properly established, "is not absolute." *Marriott Int'l Resorts, L.P. v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006). Rather, the privilege is qualified, and "subject to judicial oversight." *Id*. "After the government makes a sufficient showing of entitlement to the privilege, the court should balance the competing interests of the parties." *Scott Paper Co. v. United States*, 943 F. Supp. 489, 496 (E.D. Pa. 1996) (citing omitted). Plaintiffs may overcome the privilege by making "a showing of evidentiary need . . . that outweighs the harm that disclosure of such information may cause to the defendant." [*Pacific Gas I*], 70 Fed. Cl. [at] 134 . . . .

Opinion & Order at 3 (July 16, 2014), Doc. 72; *see also, e.g.*, *Dairyland Power II*, 79 Fed. Cl. at 719; *Dairyland Power Coop. v. United States*, 77 Fed. Cl. 330, 337–38 (2007) ("*Dairyland Power I*"); *First Heights Bank*, 46 Fed. Cl. at 829. Thus, even where the Government asserts privilege over deliberative, predecisional documents, "[s]trong competing interests must be weighed against the government's interest in nondisclosure. Foremost is the interest of the litigants, and ultimately of society, in accurate judicial fact finding." *Scott Paper Co.*, 943 F. Supp. at 496; *see also, e.g.*, *Dairyland Power I*, 77 Fed. Cl. at 336. Other factors frequently considered in balancing the competing interests of the parties include:

> (1) the relevance of the documents to the litigation; (2) the availability of other evidence that would serve the same purpose as the documents sought; (3) the government's role in the litigation; (4) the seriousness of the litigation and the issues involved in it; and (5) the degree to which disclosure of the documents sought would tend to chill future deliberations within government agencies, that is, would hinder frank and independent discussion about governmental policies and decisions.

*Pacific Gas II*, 71 Fed. Cl. at 210 n.6; *see also, e.g.*, *Dairyland Power I*, 77 Fed. Cl. at 338, 341–42; *Scott Paper Co.*, 943 F. Supp. at 496.

Here, all of these factors plainly weigh in favor of disclosure. The "interest of the litigants, and ultimately of society, in accurate judicial fact finding" is especially strong here, given that the documents in question may well undermine the accuracy and even the veracity of the Government's representations regarding the purpose of the Net Worth Sweep. The documents that Plaintiffs seek are also relevant to the litigation—indeed, they are likely directly probative of central issues on which this Court granted discovery, including whether FHFA should be treated as the United States for purposes of the Tucker Act, Order at 3 (Feb. 26, 2014), Doc. 32, and "the reasonableness of expectations about [Fannie and Freddie's] future profitability," *id.* at 4. Materials, like these documents, that likely bear directly on the factual assertions made by Defendant "must be fully disclosed to enable the court to make . . . finding(s) on the validity of

th[e] defense[s] defendant asserts." Order, *Yankee Atomic Electric Co. v. United States*, No. 98-126C (Fed. Cl. Aug. 25, 2003), ECF No. 719 (as quoted in *Pacific Gas II*, 71 Fed. Cl. at 214). Moreover, given that Defendant's reasons for imposing the Net Worth Sweep and its assessment of the Companies' future prospects are central to issues in this litigation, Plaintiffs respectfully submit that no other available evidence would equally serve the same purpose.

The government's role in this litigation likewise supports disclosure. Here, the Government is not a disinterested third party. Rather "the Government is a party to this litigation and is the party that seeks to benefit from the invocation of the deliberative process privilege." *Dairyland Power I*, 77 Fed. Cl. at 342. Given the Government's immense stake in the outcome of this litigation, "its invocation of the deliberative process privilege must be carefully scrutinized to ensure that the privilege retains its proper narrow scope." *Id.*

Nor can there be any reasonable dispute regarding the seriousness of this litigation and the issues involved in it. Plaintiffs challenge the Government's seizure of *all* of the existing net worth and future profits of two of the largest and most profitable publicly owned corporations on earth. This decision has already allowed the government to expropriate over $100 billion. As significant private shareholders of those corporations, Plaintiffs seek "substantial" damages as just compensation. *Id.* In addition, the "decisions in this case may have broad implications for other litigation as well as executive and legislative branch policy repercussions." *Id.* For this lawsuit calls into question the propriety and integrity of the government's policies and actions, as well as the veracity of its explanation and defense of those policies and actions in this (and other) Courts and in the public square. And where—as here—"the documents sought may shed light on alleged government malfeasance, the privilege is routinely denied," for in such circumstances, weighty interests "in due process and fairness" plainly outweigh the Government's "interest in shielding

its deliberations from public view." *Texaco Puerto Rico, Inc.*, 60 F.3d at 885 (internal quotation marks omitted).

In considering Defendant's interest in nondisclosure, this Court must focus on "the public interest in confidentiality (as distinct from the government's interest in th[e] litigation)." *Pacific Gas I*, 70 Fed. Cl. at 142 (alteration in original). And that interest is not weighty here.

As an initial matter, Defendant has not been shy about disclosing details about its deliberations when it believes that doing so will further its narrative concerning the Net Worth Sweep. Thus, despite Defendant's position that financial projections are privileged, Defendant's administrative record in the D.D.C. action publicly disclosed several sets of internal Treasury financial projections that purport to show that the Net Worth Sweep was necessary because the Companies could not afford to continue paying 10% cash dividends under their original arrangements with Treasury. *See, e.g.*, Ex. 26 at A184; Ex. 27 at A215. While Plaintiffs believe that those projections are highly misleading and do not accurately reflect Defendant's actual reasons for imposing the Net Worth Sweep, the key point for present purposes is that Defendant selectively disclosed materials that it claims are privileged for the purpose of strengthening its position in this and related litigation. Defendant's decision to release such materials despite its claim of privilege highlights the fact that *Defendant itself* believes that prevailing in this litigation is more important than preventing any negative long-term effect that disclosure of its deliberations would have on the frankness of internal agency deliberations. With Defendant having shown little concern for safeguarding materials it considers deliberative when release of such materials suits its purposes, the public's interest in the confidentiality of agency deliberations (as distinct from Defendant's interest in winning this case) deserves little weight.

Furthermore, even if the Court sets aside Defendant's intentional disclosures and gives the benefit of every reasonable doubt to Defendant's decision to assert the privilege in the first instance, the documents at issue implicate only governmental deliberations about commercial and economic policy matters—not diplomatic or national security deliberations, the confidentiality of which is especially important. *Cf. First Heights Bank*, 46 Fed. Cl. at 829. Moreover, "any documents that this Court orders disclosed will be subject to the existing protective order in this litigation." *Dairyland Power I*, 77 Fed. Cl. at 339. Not only does the protective order sharply limit the individuals who are permitted access to protected information, *see* Second Amended Protective Order ¶ 4 (Nov. 9, 2015), Doc. 256, it also limits the use of this information to litigation purposes, *see id*. ¶ 3. And it expressly provides that "Protected Information shall not be used for any business, commercial, competitive, or personal purpose." *Id*. Where, as here, disclosure will be subject to a protective order, "limited disclosure of deliberative process documents should be less likely to result in significant harm to policy debates within an agency." *Dairyland Power I*, 77 Fed. Cl. at 339; *see also, e.g*., *Dairyland Power II*, 79 Fed. Cl. at 720 ("The strict terms of the protective order in effect in this case is a factor in Dairyland's favor in these determinations."); *Pacific Gas II*, 71 Fed. Cl. at 214 n. 9 ("In weighing the parties' interests, the court keeps in mind that 'any need the government might have for confidentiality . . . is diminished by the fact that the court has issued a Protective Order in this case . . . .'") (quoting *Pacific Gas I*, 70 Fed. Cl. at 142 n.12) (first omission in original).

Finally, Defendant's interest in non-disclosure is especially weak with respect to one category of materials that Plaintiffs seek: responsive materials that post-date the Net Worth Sweep. Even if the Court agrees with Defendant that materials that post-date the Net Worth Sweep can nevertheless somehow be "pre-decisional," the disclosure of such materials could not conceivably

harm the quality of agency decision making. The only internal agency communications that can affect an agency's decision are those that occur before the agency makes up its mind. Agency officials simply do not need this Court to shield their after-the-fact communications from disclosure in order to be assured that their discussions about *pending* agency decisions will generally remain confidential.

At the end of the day, "the deliberative process privilege is a discretionary one," and "[i]n deciding how to exercise its discretion, an inquiring court should consider, among other things, the interests of the litigants, society's interest in the accuracy and integrity of factfinding, and the public's interest in honest, effective government." *Texaco Puerto Rico*, 60 F.3d at 885 (internal quotation marks omitted). As demonstrated above, all of these considerations support disclosure here.

## III. The Bank Examination Privilege Is Not Available in This Case, and in Any Event Defendant's Assertions of the Privilege Are Overbroad and Improper.

The bank examination privilege is a judge-made, qualified evidentiary privilege that shields examination reports and other communications between banks and their regulators. Although this Court has never recognized the bank examination privilege, other courts have concluded that it is needed to provide "protection for the banking industry by promoting and protecting the integrity of candid relations between banks and government regulatory agencies." *In re Bank One Sec. Litig.*, 209 F.R.D. 418, 426 (N.D. Ill. 2002). The privilege's rationale thus rests on the premise that bank regulation is an "iterative process," the success of which depends on "extensive and informal" communications that would suffer if subjected to routine disclosure in litigation. *In re Subpoena Served Upon Comptroller of the Currency*, 967 F.2d 630, 633–34 (D.C. Cir. 1992) (hereinafter "*Fleet Bank*"). As one court recently recognized, however, there is good reason to doubt that bank examination truly involves the frank and informal exchange of

views that proponents of the privilege assume. *Wultz v. Bank of China, Ltd.*, 61 F. Supp. 3d 272, 291–93 (S.D.N.Y. 2013). Nor is it likely that the availability of such a privilege will succeed in promoting open and honest communications by bank officers to their regulators if the *threat of federal criminal prosecution* has failed to do so. *See* 18 U.S.C. §§ 1001, 1005, 1007.

But this Court ultimately need not concern itself with the wisdom of recognizing a privilege that shields communications between privately run banks and their examiners, for it is inapplicable here in any event. And even if it was, like all judicially created privileges, the bank examination privilege must be construed narrowly, *see University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990); *Pearson v. Miller*, 211 F.3d 57, 67 (3d Cir. 2000), and Defendant's assertions of the privilege go well beyond its accepted bounds.

Defendant has withheld over 2,000 FHFA documents on the basis of the bank examination privilege, many of which were created after FHFA began operating the Companies as their conservator. But Fannie and Freddie are not banks, and any concern that they might not be entirely forthcoming with FHFA certainly disappeared once the Companies were placed in conservatorship and thereby subjected to FHFA's complete control. And even if the Court concludes that FHFA may, under some circumstances, invoke the bank examination privilege, Defendant has withheld numerous documents that do not appear to fit within the privilege's limits or that otherwise should have been disclosed. Thus, at an absolute minimum, the Court should review the bank examination documents identified in Exhibit 1 *in camera* to independently assess whether they have been properly withheld.

### A. FHFA's Communications with the Companies Are Ineligible for the Bank Examination Privilege Because the Companies Are Not Banks.

The bank examination privilege protects communications between *banks* and *banking* regulatory agencies, and Fannie and Freddie are not banks. They hold no bank charter of any kind,

they do not retain customer deposits, and they do not otherwise conduct banking activities. Indeed, the Companies function much like insurance companies that guarantee mortgages against the risk of default. These facts alone are enough to defeat Defendant's assertions of the bank examination privilege over FHFA documents in this case, for there is no "regulated entity" examination privilege that extends to non-banks. Communications involving insurance companies, broker-dealers, mutual funds, and other regulated non-bank participants in the financial markets are not covered by the bank examination privilege, and there is no reason to treat Fannie and Freddie differently than other such non-bank entities. *See*, *e.g.*, *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 239 F.R.D. 508, 514 n.5 (N.D. Ill. 2006) (rejecting assertions of bank examination privilege because "it is undisputed that the regulated entities at issue here are not banks"); *In re Putnam Inv. Mgmt., LLC*, 2004 WL 885245, at *3–*4, SEC Release No. 614 (SEC Apr. 7, 2004) (declining to recognize an "SEC Examination Privilege"); *see also Merchants Bank v. Vescio*, 205 B.R. 37, 42 (D. Vt. 1997) ("The bank examination privilege belongs solely to the FDIC, the Federal Reserve, and other *banking* regulatory entities." (emphasis added)).

To be sure, one court has extended the bank examination privilege to FHFA, reasoning that Fannie and Freddie are, in certain respects, similar to banks. *See FHFA v. JPMorgan Chase & Co.*, 978 F. Supp. 2d 267, 272–77 (S.D.N.Y. 2013). But the fact that FHFA is charged with promoting public confidence in the Companies by examining the soundness of their investments and capital levels does not make the Companies banks any more than similar aspects of insurance regulation mean that insurance companies are banks. If accepted, the *JPMorgan Chase* court's reasoning would thus expand the bank examination privilege far beyond its accepted bounds and shield from the judicial truth-finding process a wide range of materials related to financial regulation that have never been understood to be privileged. Furthermore, unlike bank regulators, FHFA is required by

law to report to Congress on its examinations of the Companies, and its reports are publicly available. *See* 12 U.S.C. § 4521(a); FHFA, Reports and Plans, http://goo.gl/3p4XtQ (links to FHFA's Annual Report to Congress); *see also* FHFA, FHFA Answers to the PWG Working Group on Supervision Questionnaire A232 (Apr. 29, 2010) (attached as Ex. 28) ("Unique among federal financial regulators, FHFA is required by statute to report publicly the results of its annual examinations to Congress."). With the Companies not functioning as banks and the results of FHFA's examinations already in the public domain, there is no basis for extending the bank examination privilege to communications between FHFA and the Companies.[8]

### B. FHFA's Communications with the Companies During Conservatorship Are Not Protected by the Bank Examination Privilege.

Even if the Court determines that FHFA examiners' communications with the Companies are shielded by the privilege during ordinary times, it should not further extend the privilege to communications that occurred after September 6, 2008, when the Companies were placed into conservatorship. As explained above, the purpose of the privilege is to ensure that banks are "open and forthcoming in response to the inquiries of bank examiners," *Fleet Bank*, 967 F.2d at 634, and any concern that the Companies might not be entirely forthcoming with FHFA evaporated when FHFA took them over. As conservator, FHFA has exercised complete control over the Companies. *See* 12 U.S.C. § 4617(b)(2)(A)–(D). It has determined their strategic direction, selects their

[8] In holding that FHFA could invoke the bank examination privilege, the *JPMorgan Chase* court also pointed to 12 U.S.C. § 4525, which extends the Freedom of Information Act ("FOIA") exemption for bank examination materials to the Companies' submissions to FHFA. 978 F. Supp. 2d at 275–76. But it is well settled that "[t]he Freedom of Information Act creates no privileges," *Chamber of Commerce of United States v. Legal Aid Soc'y of Alameda Cnty.*, 423 U.S. 1309, 1310 (1975), and Congress has in the past considered and rejected bills that would have entitled OFHEO, FHFA's predecessor, to invoke the bank examination privilege, *see* Financial Services Antifraud Network Act of 2001, H.R. 1408, 107th Cong. (2001). Treatment of the Companies' documents under FOIA thus provides no support for permitting FHFA to withhold relevant examination materials during discovery.

managers and directors, and participates in their day-to-day operations. A review of the Companies' SEC filings confirms this reality and further reveals that the Companies' FHFA-installed managers consider themselves to be fiduciaries of FHFA, not the Companies or their investors. *See* Fannie Mae 2014 Annual Report at 1 (Form 10-K) (Feb. 20, 2015), http://goo.gl/FZofs6 ("Our directors do not have any fiduciary duties to any person or entity except to the conservator and, accordingly, are not obligated to consider the interests of the company, [or] the holders of our equity or debt securities . . . unless specifically directed to do so by the conservator."); Freddie Mac 2014 Annual Report at 20 (Form 10-K) (Feb. 19, 2015), http://goo.gl/Bdr9jo ("The Conservator continues to determine, and direct the efforts of the Board of Directors and management to address, the strategic direction for the company . . . [M]anagement frequently receives directions from FHFA on various matters involving day-to-day operations.").

Because evidentiary privileges invariably suppress probative evidence, they must be extended "only as far as needed to effectuate their utilitarian purposes." *Evergreen Trading, LLC ex rel. Nussdorf v. United States*, 80 Fed. Cl. 122, 127 (2007); *see Ullmann v. United States*, 350 U.S. 422, 438–39 (1956) ("Once the reason for the privilege ceases, the privilege ceases."). With the Companies subject to FHFA's complete control and operating under management chosen by and avowedly beholden as fiduciaries only to FHFA, the concern that underlies the bank examination privilege—that privately run banks might not be forthcoming with their regulators—plainly does not apply here. Indeed, during conservatorship, communications between FHFA and the Companies are more akin to *internal* Company communications, and it would stretch the bank examination privilege well beyond any legitimate purpose to hold that such communications are privileged. For that reason, the Court should rule that the Companies' communications with FHFA examiners during conservatorship are not subject to the bank examination privilege.

### C. Even If the Bank Examination Privilege Applies, the Court Should Review a Subset of Bank Examination Materials To Determine Whether Defendant Properly Withheld Them.

Courts that recognize the bank examination privilege hold that the privilege "shields from discovery only agency opinions or recommendations; it does not protect purely factual material." *Fleet Bank*, 967 F.2d at 634; *see also, e.g., Schreiber v. Society for Sav. Bancorp, Inc.*, 11 F.3d 217, 220 (D.C. Cir. 1993) (bank examination privilege does not apply to documents "primarily factual in nature"). Where it is possible to redact deliberations and opinions and disclose a document's relevant factual content, the bank regulator must do so. *Schreiber*, 11 F.3d at 220. As with Defendant's assertions of the deliberative process privilege, it is apparent that Defendant did not consistently and faithfully observe the fact-opinion distinction when deciding what to withhold under the bank examination privilege. Notably, Defendant withheld a number of projections, models, and other financial analyses that undoubtedly include factual information about the Companies' financial performance. [redacted] Plainly, Fannie's capital results are factual in nature and therefore cannot be withheld under the bank examination privilege. [redacted] suggest that the following documents also include factual information that should have been produced: FHFA00100594, FHFA00093706, FHFA00031962, FHFA00031964, FHFA00096631, FHFA00096634, FHFA00096636, FHFA00096638. The Court should review these documents *in camera* and order Defendant to disclose them to the extent that they contain factual information.

In addition, the bank examination privilege, like the deliberative process privilege, is qualified; a court may order disclosure of materials covered by the privilege where doing so would

further "the public's interest in effective government." *Fleet Bank*, 967 F.2d at 634. In deciding whether materials subject to the privilege should be disclosed, courts consider many of the same factors relevant to overcoming the qualified deliberative process privilege:

> (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

*Id.* (quoting *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 583 (E.D.N.Y. 1979)).

A number of the documents listed in Exhibit 1 appear to speak directly to the issues at the heart of this litigation and therefore should be disclosed under that standard. For example, the documents listed at FHFA00096631, FHFA00096634, FHFA00096636, and FHFA00096638 are [redacted] *See* Ex. 30 at A237, FHFA00096630. Similarly, FHFA00100594 reflects FHFA's September 2011 projections of the Companies' "remaining . . . Treasury funding commitment under FHFA stress scenarios"—a key issue because according to Defendant's "death spiral" narrative, it imposed the Net Worth Sweep out of concern that the Companies would otherwise exhaust Treasury's funding commitment. *See* Ex. 1. And FHFA00092209 is [redacted] *See* Ex. 31 at A239–255, FHFA00092209 to FHFA00092200_0016. FHFA's assessment of the Companies' deferred tax assets at the beginning of the conservatorships is critical to this case because the decision to write down those assets caused the bulk of the Companies' paper losses during the early years of conservatorship—losses that were subsequently offset by massive profits when the Companies released the deferred tax asset reserves shortly after the Net Worth Sweep

went into effect. All of these materials are highly relevant to this dispute, and there is no adequate evidentiary substitute for FHFA's assessments of these issues.

The other factors relevant to whether Plaintiffs can overcome the qualified bank examination privilege likewise support an order compelling Defendant to produce these documents. Billions of dollars are at stake in this case, and as the Defendant, the Government's motives for imposing the Net Worth Sweep have been called into serious question. *See Wultz*, 61 F. Supp. 3d at 286–93 (overriding qualified bank examination privilege where hundreds of millions of dollars were at issue and there was no other way to obtain required information); *In re Subpoena Duces Tecum Served Upon Office of Comptroller of Currency*, 151 F.R.D. 1 (D.D.C. 1992) (qualified privilege was defeated where government's statements were allegedly "false and misleading"). And any concern that disclosure of these materials might discourage banks from being forthcoming with their examiners in the future is greatly reduced by the fact that the materials at issue here were produced while the Companies were operating under conservatorship—an unusual scenario that greatly weakens the justification for the bank examination privilege and distinguishes this case from most cases in which bank examination materials are relevant. Helping to further mitigate the risk that disclosure will have a chilling effect on future exchanges between banks and their regulators is the fact that under the terms of this Court's Protective Order these materials will not become public even if they are made available for purposes of this litigation. *See Lundy v. Interfirst Corp.*, 105 F.R.D. 499, 502 (D.D.C. 1985) (ordering Comptroller of the Currency to turn over records submitted by bank in part because records were subject to protective order that would prevent public disclosure).

To ensure that bank examiners do not have free reign to determine the scope of the privilege, "courts commonly . . . examine . . . documents *in camera* before determining whether

they fall within the claimed privilege." *Schreiber*, 11 F.3d at 221. To the extent that the Court concludes that FHFA may invoke the bank examination privilege in this case even though the Companies are not banks and are subject to the total control of FHFA, the Court should review the bank examination documents identified in Exhibit 1 *in camera*.[9]

## IV. Defendant Should Be Ordered To Produce Materials Withheld Under the Presidential Communications Privilege.

Four of the documents listed in Exhibit 1 were withheld under the presidential communications privilege, and the Court should review those documents *in camera* to determine the bona fides of Defendant's privilege assertions.

The presidential communications privilege shields White House documents from routine disclosure in litigation in view of "the need for confidentiality to ensure that presidential decision-making is of the highest caliber, informed by honest advice and full knowledge." *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997). In view of that purpose, the privilege protects communications sent or "solicited and received" by "the President or his immediate White House advisers" when those advisers are preparing to give advice to the President. *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004).

The presidential communications privilege can be overcome by a showing that a document "likely contains important evidence" that "is not available with due diligence elsewhere." *In re Sealed Case*, 121 F.3d at 754; *Dairyland Power II*, 79 Fed. Cl. at 661. It is apparent from other materials that Defendant has produced that [redacted]

[9] Defendant also asserts the deliberative process privilege over several of the documents listed in Exhibit 1 that are withheld under the bank examination privilege. To the extent that the Court concludes that these FHFA documents are subject to the deliberative process privilege at all, it should reject Defendant's deliberative process privilege claims because, as discussed above, *supra* Part II.F, the documents in question are not deliberative and because Plaintiffs have made the showing necessary to overcome that qualified privilege as well.

[redacted]. *See, e.g.*, Ex. 32 at A257, UST00503991 (Aug. 17, 2012) [redacted]; Ex. 33 at A261, UST00517664; Ex. 34 at A264, UST00503874; Ex. 35, Transcript of Deposition of Jeff Foster at 112:15–113:9 (A268) (July 14, 2015); Ex. 36, Transcript of Deposition of Timothy Bowler at 152:16–153:13 (A271) (July 1, 2015). Because the documents listed in Exhibit 1 withheld under the presidential communications privilege "may contain statements by senior Government officials on issues specifically pertinent to this case that are not publicly available," *Dairyland Power II*, 79 Fed. Cl. at 668, the Court should review those documents *in camera* and order their disclosure to Plaintiffs, pursuant to the Court's protective order, to the extent that they contain otherwise unavailable information relevant to this case. The Court should also direct Defendant to submit an appropriate affidavit from an authorized official formally invoking the privilege. *See id.* at 669.

**CONCLUSION**

For the foregoing reasons, this Court should:

(1) to the extent that the documents in question are not covered by any other privilege, direct Defendant to produce deliberative process privilege documents listed in Exhibit 1 because Defendant has not properly asserted that privilege;

(2) order that documents that are relevant to Defendant's purposes, intentions, and motivations for imposing the Net Worth Sweep are not covered by the deliberative process privilege or that Plaintiffs' need for such documents is sufficient to overcome the qualified privilege;

(3) order that documents shared with or produced by FHFA may not be withheld under the deliberative process privilege;

(4) order that documents that discuss the Net Worth Sweep and were created after its imposition are not predecisional and therefore may not be withheld under the deliberative process privilege, or that Plaintiffs' need for those documents overcomes the qualified privilege;

(5) order that financial data, models, and projections are not deliberative and therefore may not be withheld under the deliberative process privilege, or that Plaintiffs' need for those documents overcomes the qualified privilege;

(6) to the extent that the Court does not otherwise order all deliberative process privilege documents listed in Exhibit 1 produced, review those documents *in camera* and determine whether they are deliberative and predecisional and whether Plaintiffs' need for them overcomes the qualified privilege;

(7) order that FHFA's communications with the Companies are not protected by the bank examination privilege, especially where those communications occurred while the Companies were under FHFA's control during conservatorship;

(8) to the extent that it rules that FHFA may assert the bank examination privilege over documents listed in Exhibit 1, review those documents *in camera* to determine whether Defendant has properly asserted the privilege and whether Plaintiffs' need for the documents in question overcomes the privilege;

(9) review *in camera* the documents listed in Exhibit 1 as withheld under the presidential communications privilege and determine whether Defendant has properly asserted the privilege; and

(10) order Defendant to re-assess all of its privilege claims in light of the Court's decision and to produce all documents that are not genuinely privileged.

Date: November 23, 2015

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 23rd day of November, 2015, via the Court's Electronic Case Filing system.

s/ Charles J. Cooper
Charles J. Cooper