IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Legislative Material and Rules

Other

INTRODUCTION

If a single theme runs throughout the Government's motion, it is the suggestion that the Court should reverse or substantially narrow its earlier ruling authorizing discovery. Thus, the Government rehashes its arguments that discovery should not go forward because Plaintiffs' claims fail as a matter of law and would impermissibly interfere with FHFA's operation of the Companies. The Court has rejected those same arguments before, and it should do so once again.

The Government seeks to all but foreclose discovery into the Companies' future profitability and the questions of whether, when, and how the conservatorships will end through its assertion of two categorical objections to producing any documents related to those topics created after August 17, 2012. The Government first suggests that public disclosure of such documents "can be anticipated to have a destabilizing effect on the Nation's housing market and economy." Defs.' Mot. for Protective Order 7 (May 30, 2104) (Doc. 49) (hereinafter "U.S. Mot.") (quoting Watt Decl. ¶ 7). Whatever the merit of the Government's claims about the potential effect of any public disclosure—and there are reasons for serious doubt on that score—any such concerns can be fully addressed through a standard protective order prohibiting public dissemination of any truly sensitive information the Government produces. With that solution readily available, it would be manifestly unfair for the Court to nevertheless prejudice Plaintiffs by denying them access to information that the Court has determined, correctly, is needed for Plaintiffs to respond fully to the Government's omnibus motion to dismiss.

The Government also argues that all documents created after August 17, 2012, relating to the future of the conservatorships and of the Companies' profitability are categorically protected by the deliberative process privilege. Having not even reviewed all of the documents it seeks to

withhold, much less produced a privilege log explaining why those documents qualify for the privilege, the Government's assertion of the privilege is premature. In any event, there can be little doubt that a host of documents drafted after the Government's proposed cutoff date are not privileged because they (1) contain factual material, (2) have been shared with Congress or other third parties, (3) announce or relate to final policy decisions, or (4) are relevant to the Government's subjective motivations. The deliberative process privilege does not protect any such documents. Nor does it protect documents created *after* a final policy decision is made, and both FHFA and Treasury documents show that both agencies have had clear policies on the future of Fannie and Freddie for some time.

The Court should also decline the Government's invitation to limit its prior discovery order through a cramped interpretation of that order that is divorced from the reasons the Court authorized discovery in the first place. The Court should deny the Government's motion.

ARGUMENT

I. THE COURT SHOULD REJECT THE GOVERNMENT'S EFFORT TO RELITIGATE THE FEBRUARY 26 DISCOVERY ORDER

The Government begins its presentation with several arguments that the Court quite properly refused to credit when it authorized discovery and when it denied the Government's motion for reconsideration. The third time is not the charm.

The Government first reargues that discovery is unnecessary because FHFA succeeded to Plaintiffs' claims as shareholders when it placed the Companies in conservatorship. U.S. Mot. 6; *see also* U.S. Mot. for Recons. 13-14 (Mar. 17, 2014) (Doc. 33); U.S. Disc. Opp. 9 (Feb. 12, 2014) (Doc. 30). The Court has properly refused to pluck arguments from the Government's omnibus motion to dismiss and resolve them in the piecemeal fashion the Government proposes, and it should do so again now. In any event, the Government's legal argument is facially merit-

less; binding precedent of the Federal Circuit makes clear that shareholders of a financial institution in federal conservatorship or receivership retain the right to bring suit against the conservator or receiver, given that the conservator or receiver has a "manifest conflict of interest" when it pretends to sue itself. Pls.' Reply to Def.'s Opp'n to Pls.' Mot. for Disc. 12 n.4 (Feb. 24, 2014) (Doc. 31) (hereinafter "Plaintiffs' Disc. Reply"); *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1296 (Fed. Cir. 1999).[1]

Also for the third time, the Government argues that the Court should not allow discovery because Plaintiffs' claims are contingent on how the Companies will perform in the future. U.S. Mot. 6-7; *see also* U.S. Mot. for Recons. 11-12; U.S. Disc. Opp. 6-8. But as Plaintiffs previously argued, Pls.' Mot. for a Continuance to Permit Disc. 9-12 (Dec. 20, 2013) (Doc. 22); Plaintiffs' Disc. Reply 3-5, and the Court previously ruled, the Government's contention depends on a disputed factual claim: "[D]iscovery [will] reveal information relevant to resolving the factual dispute between plaintiffs and defendant regarding each party's assessment of future profitability." Disc. Order 3 (Feb. 26, 2014) (Doc. 32).[2]

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[1] In the *Winstar* cases, this Court rejected the FDIC-receiver's attempt to substitute itself for the seized financial institutions' shareholders on the theory that it has succeeded to all shareholder claims. *Plaintiffs in All Winstar-Related Cases at Court v. United States*, 44 Fed. Cl. 3, 7-12 (1999). FHFA has not even attempted that maneuver here.

[2] The Government does manage to introduce a new—albeit meritless—argument when it claims that HERA "limit[s] the shareholders' recovery to what they would have received had the Enterprises gone into immediate liquidation at the time FHFA placed them in conservatorship." U.S. Mot. 6-7 (citing 12 U.S.C. § 4617(e)(2)). Again, the Court should await the conclusion of discovery rather than resolving the Government's omnibus motion to dismiss in the piecemeal fashion the Government proposes. In any event, Section 4617(e) limits FHFA's liability only if it opts to set up a "limited-life regulated entity" under 12 U.S.C. § 4617(i)—something it has not done, and, indeed, cannot do because the Companies are in conservatorship, not receivership. *See* 12 U.S.C. §§ 4617(b)(2)(E) & (i). And even if FHFA does someday appoint itself as receiver and establish a limited-life regulated entity, its liability will be limited as of the date on which the Companies are placed in *receivership*, not conservatorship. *See Castleglen, Inc. v. Commonwealth Sav. Ass'n*, 728 F. Supp. 656, 675 (D. Utah 1989) (where regulated entity was first placed into conservatorship and then receivership, analogous FIRREA provision capped regula-

The Court rightly rejected the Government's arguments in its prior orders, and the same result should obtain here.

II. PLAINTIFFS' DISCOVERY REQUESTS WOULD NOT "AFFECT" FHFA'S EXERCISE OF ITS CONSERVATORSHIP POWERS

The Government next presses another argument this Court has already rejected: that the discovery Plaintiffs seek would impermissibly "affect" FHFA's exercise of its conservatorship powers under 12 U.S.C. § 4617(f). U.S. Mot. 7-10. This argument failed three months ago when the Government asked the Court to reconsider its discovery order, and nothing has changed. *See* Order (Mar. 19, 2014) (Doc. 34) (denying motion for reconsideration); U.S. Mot. for Recons. 13 (making Section 4617(f) argument). As before, the Government's argument is wrong on both the law and the facts.

A. Section 4617(f) Does Not Limit This Court's Authority To Order Discovery.

Notably, the Government is unable to cite *any* legal authority for its claim that a discovery order could "restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." 12 U.S.C. § 4617(f). That is particularly significant because FIRREA includes materially identical language protecting FDIC and the Resolution Trust Corporation when they

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tor's liability as of day entity was placed into receivership). The Government's contrary reading of Section 4617(e) would run afoul of HERA itself, not to mention the Takings Clause, by allowing FHFA to retain the Companies' net worth for itself rather than distributing it to stockholders according to the priority scheme established by Congress. *See* 12 U.S.C. § 4617(c)(1). Indeed, in the analogous context of the Financial Institution Reform, Recovery, and Enforcement Act of 1989 (FIRREA), it is well settled that equity holders have a constitutionally protected interest in any surplus resulting from a receivership. *See, e.g.*, *First Hartford*, 194 F.3d at 1288 ("First Hartford, as a shareholder in Dollar, has a property interest in any eventual liquidation surplus."). Thus, far from a "windfall" for shareholders, the net worth of the Companies, after all creditors have been paid by the receiver, is property belonging to the shareholders, as FHFA publicly acknowledged when it placed the Companies in conservatorship. FHFA Fact Sheet, Questions and Answers on Conservatorship 3 (Sept. 7, 2008) (F03) (stating that during conservatorship shareholders "will continue to retain all rights in the stock's financial worth"). "F_" refers to a page in the appendix to this response.

operate as the conservator or receiver of a failed bank. *See* 12 U.S.C. § 1821(j). In 25 years of *Winstar* and other litigation concerning scores of financial institutions as well as 6 years of litigation involving FHFA, Plaintiffs are aware of no court that has ever suggested that either statute's jurisdictional bar limits discovery.

The dearth of authority supporting the Government's position follows, we submit, from the statute's plain text, which limits a court's ability to "restrain or affect the exercise of powers or functions of [FHFA] as a conservator or receiver." 12 U.S.C. § 4617(f). The Government claims that public disclosure of the requested information would "destabilize" and thus "affect" the Nation's housing market, but nowhere does it explain, and we cannot conceive, how such disclosure could impair or otherwise "affect" its ability to exercise its statutory powers or functions however it deems necessary. It is thus not surprising that Courts have uniformly read that language as limiting only the availability of equitable remedies; suits for money damages cannot "restrain or affect" an agency's exercise of its powers. *See Ambase Corp. v. United States*, 61 Fed. Cl. 794, 799 (2004) (FIRREA's jurisdictional bar "is not directed to the pursuit of money damages *ex post* as the result of FDIC actions. Instead, this section is intended to prevent injunctive relief against the FDIC's actions as receiver."); *Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1016 (8th Cir. 2013) (observing that analogous provision of FIRREA "constrain[s] the court's equitable powers"); *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997) (damages claim "not affected" by FIRREA's jurisdictional bar). If suits for money damages may proceed at all, then discovery—a necessary ingredient in almost all such suits—must be allowed as well. The Government's interpretation of Section 4617(f) would thus amount to an implied repeal of the Tucker Act. Tellingly, more than one court has ordered FHFA to submit itself or the Companies to discovery without any suggestion that doing so implicates Section 4617(f). *See In re*

Fed. Nat'l Mortgage Ass'n Secs., Derivative, and "ERISA" Litig., __ F. Supp. 2d __, 2013 WL 6383000, at *4 (D.D.C. Dec. 6, 2013); *FHFA v. JPMorgan Chase & Co.*, No. 11-6188, 2012 WL 6000885, at *1 (S.D.N.Y. Dec. 3, 2012).

Ambase Corp. v. United States illustrates that FIRREA's jurisdictional bar does not preclude discovery. 61 Fed. Cl. 794. In *Ambase*, the plaintiff alleged that FDIC had mismanaged a failed bank and thereby improperly reduced the plaintiff's ability to recover contract damages from the bank's remaining assets. After concluding that the plaintiff's claim could proceed despite FIRREA's jurisdictional bar, *id.* at 799, the Court authorized discovery, *id.* at 802; *see also* Order Granting Ext. of Time To Complete Disc., *Ambase Corp. v. United States*, No. 93-531 (Fed. Cl. Mar. 28, 2006), Doc. 184. In doing so, the Court expressed no concern that FIRREA's jurisdictional bar might preclude discovery but not the plaintiff's claim; adjudicating the claim required the Court to "carefully review" FDIC's actions, which would only be possible with discovery. Because the jurisdictional bar does not prevent the Court from hearing Plaintiffs' claims, it necessarily follows that it does not prevent the Court from authorizing discovery.

B. Public Disclosure of the Requested Discovery Would Not Interfere with FHFA's Operation of the Conservatorships.

But even if the Court were to accept the Government's reading of Section 4617(f), the requested discovery still would not "affect" FHFA's exercise of its conservatorship powers.

As an initial matter, the Government has not explained the basis for its conclusion that public disclosure of *any and all* internal documents relevant to the Companies' future profitability would roil financial markets. Indeed, neither the Government nor its affiants provide any details about how many documents have been reviewed or how those documents were selected. The Court is left to speculate, with the only fact that is apparent being that no one at either agency has reviewed all of the documents that the Government aims to conceal. *See* Stegman Decl.

¶ 5 (May 29, 2014) *in* U.S. Corrected App'x to Mot. for Prot. Order (hereinafter "Doc. 50-1") ("I have reviewed a subset of the documents that could be covered by the . . . requests for production . . . ."); Dickerson Decl. ¶ 20 (May 29, 2014) (Doc. 50-1) ("FHFA has not yet reviewed all of the potentially responsive documents . . . ."). Even accepting the Government's faulty legal premise that it is entitled to withhold from Plaintiffs whatever investors might find troubling about its decision to wipe out shareholders in two of the Nation's largest, most profitable private companies, the mere fact that *some* documents fit into that category is not a basis for refusing to disclose others. It simply cannot be that every responsive document created after August 17, 2012 contains market-moving information.

In any event, there is a missing link in the Government's claim that public disclosure of requested information would "have a destabilizing impact on the Nation's housing market and economy." U.S. Mot. 7 (quoting Watt Decl. ¶ 9 (May 29, 2014) (Doc. 50-1)). While the Government and its declarants are at pains to explain the connection between the welfare of the Companies' bondholders and mortgage rates, they fail to say how documents relating to the Companies' future profitability could affect current bondholders. As FHFA has elsewhere emphasized, the PSPAs "effectively provide a very long-term federal guarantee to holders of Enterprise debt (i.e., bondholders) and [mortgage-backed securities]." FHFA MTD 11, *Fairholme v. FHFA*, No. 13-1053 (D.D.C. Jan. 17, 2014), Doc. 28. Indeed, that is precisely the rationale advanced by the Government (albeit pretextually) for adopting the Net Worth Sweep. U.S. MTD 10 (Dec. 9, 2013) (Doc. 20) (hereinafter "MTD"). And the Office of Legal Counsel has publicly opined that the PSPAs represent a binding legal commitment to the Companies' existing bondholders even in the event of liquidation. *See* Letter from Steven G. Bradbury, Office of Legal Counsel, to Henry M. Paulson Jr., Sec'y of the Treas. (Sept. 26, 2008),

www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/PaulsonLtrPSPA_N508.pdf (F04). With more than $258 billion still available to bond-holders under the PSPAs,[3] it is inconceivable that disclosure of information relating to the Government's decisions about the future of the Companies (and their shareholders) would affect debt markets.

This assessment is confirmed by the fact that government officials have frequently opined on the Companies' future without any apparent concern that doing so would adversely affect mortgage markets. The Government has already released reports containing detailed, forward-looking financial projections for the Companies, including as recently as six weeks ago.[4] The Government's assertions, backed by sworn declarations, that the financial markets could be destabilized by public disclosure of the Government's internal "projections of the future profitability of Fannie Mae and Freddie Mac (or lack thereof) under a range of economic, business and policy scenarios," Watt Decl. ¶ 7, raise this all but inevitable inference: either the Government's public reporting of precisely this same type of information has been misleading, or its alleged concerns about market destabilization are a pretext for some other reason(s) to conceal the requested information. Moreover, FHFA and Treasury officials have publicly disclosed their deci-

[3] *See* Fannie Mae, First Quarter Report (Form 10-Q) at 46 (May 8, 2014) ($117.6 billion remaining under Treasury's commitment) (F07); Freddie Mac, First Quarter Report (Form 10-Q) at 82 (May 8, 2014) (F09) ($140.5 billion remaining under Treasury's commitment). As publicly traded entities, the Companies are required to file financial disclosures for the benefit of the investing public.

[4] *See* FHFA, PROJECTIONS OF THE ENTERPRISES' FINANCIAL PERFORMANCE 4 (Apr. 30, 2014), www.fhfa.gov/AboutUs/Reports/ReportDocuments/GSEFinProj2014FINAL.pdf (F13). ("This report provides updated information on possible ranges of future financial results of Fannie Mae and Freddie Mac . . . under specified scenarios, using consistent economic conditions for both Enterprises."); OFFICE OF MANAGEMENT & BUDGET, FISCAL YEAR 2015 ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT 323 (2014), www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/spec.pdf (F26) ("The cumulative budgetary impact of the PSPA agreements from the first PSPA purchase through FY 2024 is estimated to be a net return to taxpayers of $179.2 billion.").

sion to wind up the Companies and not permit them to rebuild capital and exit the conservatorships.[5] The financial calamity the Government predicts has not come to pass.[6]

C. Any Concern over the Effect of Public Disclosure on Mortgage Markets Could Be Addressed Through an Appropriate Protective Order.

Finally, even if the Court accepts the Government's novel argument that discovery of the requested information could "affect" FHFA's exercise of its conservatorship powers and that the documents in question would have such an effect if publicly disclosed, the Court could fully address that concern by limiting access to these documents to Plaintiffs' counsel. The Court has broad latitude to restrict dissemination of materials produced through discovery, RCFC 26(c)(1)(F)-(H); *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1357 (Fed. Cir. 2011), and such orders are entirely commonplace, *see, e.g.*, *Ross-Hime Designs, Inc. v. United States*, 109 Fed. Cl. 725, 729 (2013); *Armour of America v. United States*, 73 Fed. Cl. 597, 599-600 (2006);

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[5] *E.g.*, FHFA, 2012 REPORT TO CONGRESS 13 (June 13, 2013) (hereinafter "2012 REP. TO CONG."), *available at* www.fhfa.gov/AboutUs/Reports/ReportDocuments/2012_Annual ReportToCongress_508.pdf (F30) ("As we look to the future, there is broad consensus that Fannie Mae and Freddie Mac will not return to their previous corporate forms."); Edward J. DeMarco, Acting Dir., FHFA, Statement Before the S. Comm. on Banking, Hous. & Urban Affairs 3 (Apr. 18, 2013), *available at* www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=9ebba1c6-8488-4fd4-b10a-9e6592756cf1 (F32) ("The Administration has made clear that its preferred course of action is wind down the Enterprises."); Press Release, Remarks of Under Sec'y for Domestic Fin. Mary Miller at the Governor's Housing Conference on Restoring Communities Across Maryland (Oct. 16, 2012), www.treasury.gov/press-center/press-releases/Pages/tg1738.aspx (F33) (stating Administration's goal of "bringing more private capital back to the market, so Fannie Mae and Freddie Mac can be wound down").

[6] To the extent the Government argues that it is entitled to withhold materials it deems market sensitive without regard to whether those materials are protected by Section 4617(f), the deliberative process privilege, or some other specific evidentiary privilege, its argument widely misses the mark. *See Bloomberg L.P. v. Board of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 282 (S.D.N.Y 2009), *aff'd*, 601 F.3d 143 (2d Cir. 2010) (declining to recognize "a sweeping new privilege for any sensitive information, the immediate release of which would significantly harm the Government's monetary functions or commercial interests" and ordering disclosure under FOIA of documents that the Federal Reserve Board claimed were market sensitive).

Speller v. United States, 14 Cl. Ct. 170, 175-76 (1988). Plaintiffs' counsel are well aware of their duty as officers of this Court to comply with its orders, and they have operated under such standard protective orders in numerous cases in the past without incident. Under these circumstances, the better course is to restrict access to the documents in question to a limited number of specified attorneys rather than denying Plaintiffs access to documents that may be critical to their case.

III. THE GOVERNMENT'S ASSERTION OF THE DELIBERATIVE PROCESS PRIVILEGE IS PREMATURE AND UNFOUNDED

The Government also argues that its more recent assessments of the Companies' financial prospects and if and when the conservatorships will end are categorically protected by the deliberative process privilege. U.S. Mot. 10-18. 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); *accord Dairyland Power Co-op v. United States*, 79 Fed. Cl. 709, 720 (2007); *Deseret Mgmt Corp. v. United States*, 76 Fed. Cl. 88, 95 (2007). That principle is especially relevant here, where discovery is focused on facts that the Government has put into issue by raising various defenses. It is hardly fair or appropriate for the Government to assert defenses that turn on disputed facts and then use sweeping assertions of the privilege to deny Plaintiffs a meaningful opportunity to respond.

In any case, to withhold materials under the deliberative process privilege, the Government must show on a document-by-document basis that the materials are both pre-decisional and deliberative. *Walsky Constr. Co. v. United States*, 20 Cl. Ct. 317, 320 (1990). But the Government admits that it has not even reviewed all the documents in question, much less produced a

privilege log and provided a concrete explanation as to why each document was properly withheld. The Government has not come close to meeting its burden.

1. As a threshold matter, the deliberative process privilege applies only to communications within the Executive Branch. "The deliberative process privilege is a shield which the executive branch may use to deflect public scrutiny away from its internal decision making process." Disc. Order No. 6 at 6, *Starr Int'l Co. v. United States*, No. 11-779 (Fed. Cl. Nov. 6, 2013), Doc. 182 (hereinafter "*Starr* Order") (F40). It "protects only inter-agency or intra-agency documents. Disclosure to a non-agency third party waives the privilege." *Id.* at 11 (F45). The Government has argued in its motion to dismiss Plaintiffs' taking claim that FHFA "is not the United States when it acts as conservator." MTD 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.

The Government's position thus precludes 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. The government 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.

2. Even if the Government could assert the privilege in these circumstances, the Court should reject the Government's *blanket* assertion of the deliberative process privilege for all documents created after August 17, 2012. Both this Court and numerous others have said that

the privilege may only be asserted with specificity and on a document-by-document basis. *Alpha I, L.P. ex rel. Sands v. United States*, 83 Fed. Cl. 279, 289-90 (2008) ("The court agrees with plaintiffs that defendant's blanket assertion of the deliberative process privilege is premature."); *Sikorsky Aircraft Corp. v. United States*, 106 Fed. Cl. 571, 576 (2012) ("Blanket assertions of the privilege are insufficient.").[7] Those opinions are no doubt correct, for the showing that the Government must make to justify withholding a document under the privilege—that it is both predecisional and deliberative, *see Walsky*, 20 Cl. Ct. at 320—cannot be made using the document's date and subject matter alone.

The Government's blanket assertion of the privilege runs roughshod over a litany of exceptions and limitations that undoubtedly entitle Plaintiffs to documents created after August 17, 2012. As even the Government acknowledges, the privilege does not apply to materials that recite facts without divulging opinion. U.S. Mot. 11; *Sikorsky Aircraft Corp*, 106 Fed. Cl. at 576; *see also EPA v. Mink*, 410 U.S. 73, 88 (1973). Neither may the Government rely on the privilege to withhold documents disclosed "to a non-agency third party," *Starr* Order 11 (F45); *Assembly of State of Cal. v. Department of Commerce*, 797 F. Supp. 1554, 1560 (E.D. Cal. 1992); or documents that establish policies or recall decisions an agency has already made, *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). And even where the privilege applies, its protections are not absolute and will be overcome if the plaintiff's need outweighs the harm from

[7] *See also, e.g., United States ex rel. Williams v. Renal Care Group, Inc.*, 696 F.3d 518, 527 (6th Cir. 2012) (observing that "the privilege may only be invoked with specificity"); *Public Citizen, Inc. v. OMB*, 598 F.3d 865, 875 (D.C. Cir. 2009) (documents covered by the privilege "are hardly contagious, spreading their predecisional and deliberative nature to all other documents in their vicinity"); *In re McKesson Governmental Entities Average Wholesale Price Litig.*, 264 F.R.D. 595, 599 (N.D. Cal. 2009) ("initial blanket assertion of the deliberative process privilege was clearly insufficient"); *EEOC v. Corrections Corp. of America*, No. 6-1956, 2007 WL 4403528, at *1 (D. Colo. 2007); *Resolution Trust Corp. v. Diamond*, 773 F. Supp. 597, 603 (S.D.N.Y. 1991) ("The deliberative process privilege presupposes a review to determine, document by document, whether the assertion of the privilege is justified in each instance.").

disclosure. *Abramson v. United States*, 39 Fed. Cl. 290, 295 (1997); *see Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1580-81 (Fed. Cir. 1985). There is little doubt that these rules entitle Plaintiffs to some agency documents created after August 17, 2012, and the Government has no basis for claiming otherwise with respect to documents it has not reviewed.[8]

A hypothetical example helps illustrate why the protective order sought by the Government is premature and would enable it to withhold responsive nonprivileged materials. Suppose that Secretary Geithner sent an email to several of his subordinates at Treasury on August 18, 2012 explaining that he had signed the Third Amendment the previous day to use the Companies' profits to reduce the federal deficit and ensure that existing shareholders will not have access to any such profits. Such an email would be directly relevant, at a minimum, to the Companies' future profitability and the reasonableness of Plaintiffs' investment-backed expectations at the time of the Net Worth Sweep—two of the subjects on which the Court authorized discovery. And it would not be protected by the deliberative process privilege because it post-dates the Third Amendment, the only policy decision discussed. *See Judicial Watch*, 449 F.3d at 151 (A document is pre-decisional only " 'if it was generated before the adoption of an agency policy.' "). Yet the relief sought by the Government would allow it to withhold that probative email.

The Court should reject the Government's blanket assertion of the deliberative process privilege and make clear that the Government cannot rely on the privilege without providing a

[8] For the same reasons that the Government cannot invoke the privilege for documents it has not reviewed, documents that contain the phrase "For Internal Use Only/ Pre-Decisional/ Sensitive" or some other such phrase are not necessarily privileged. Plaintiffs understand that many Department of Treasury email accounts are set to automatically generate a blanket assertion of the privilege along those lines. A document is covered by the deliberative process privilege only if it is pre-decisional, deliberative, and not subject to any of the privilege's various exceptions; contemporaneous, automatically-generated *ipse dixit* that a document is privileged does not make it so.

privilege log that explains why each document is properly withheld. Without a log, it is impossible for Plaintiffs or the Court to assess the adequacy of the Government's privilege claims.

3. The Government's blanket assertion of the privilege is all the more problematic given how little information it has provided about the number of documents it has reviewed and how those documents were selected. To be sure, declarants for both FHFA and Treasury state that they have reviewed some responsive documents. Stegman Decl. ¶ 5; Dickerson Decl. ¶ 20. But it does not follow from the privileged status of *some* documents from a particular timeframe—however selected—that all other documents from that timeframe must be privileged as well.

4. The Government's motion also betrays a fundamental misconception about what it means for a document to be "pre-decisional" for purposes of the deliberative process privilege. The Government claims that any documents relevant to when and how the conservatorships will end are "inherently pre-decisional" because "[v]arious members of Congress have introduced bills proposing legislative solutions for the future disposition of the Enterprises . . ." and none has yet passed. U.S. Mot. 13. But a document is pre-decisional only if it addresses activities "antecedent to the adoption of an *agency* policy," *Walsky*, 20 Cl. Ct. at 320 (emphasis added), and the possibility that disclosure of a document might affect the quality of *congressional* decisionmaking has never been thought to provide a basis for treating the document as pre-decisional, *see Dow Jones & Co. v. DOJ*, 917 F.2d 571, 575 (D.C. Cir. 1990) (distinguishing between documents created "as part of the agency's *own* decision" and those created for Congress); *Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983) (expressing "reservations that a decision by *Congress* to initiate legislation" can render a document pre-decisional). Congress can always overturn an agency's policy decision, but that possibility is irrelevant to whether a particular document predates the formulation of *agency* policy.

And once the focus is properly placed on the question whether *Treasury or FHFA* has adopted a final policy on how and when the conservatorships will end, it is patently clear that they have. They have decided that FHFA will *never* end the conservatorships, but rather that Congress will have to do so. As both FHFA's and Treasury's declarants emphasize: "[I]t is presently anticipated that Congressional action will establish the framework of the structure of the housing finance system going forward. Thus, how and when the conservatorships will be terminated remains undetermined." U.S. Mot. 12 (quoting Dickerson Decl. ¶ 13); *see also* Stegman Decl. ¶ 16. This is not new. Although FHFA told Congress in February 2010 that "[t]here are a variety of options available for post-conservatorship outcomes, . . . [and that] the only one that FHFA may implement today under existing law is to reconstitute the two companies under their current charters,"[9] FHFA later rejected this outcome.

FHFA's actions are consistent with its decision that the conservatorships will never end. By continuously rendering them near insolvent, FHFA continues to destroy Fannie and Freddie's ability to exit conservatorship and operate independently of the Federal Government. *See, e.g.*, Edward J. DeMarco, Acting Dir., FHFA, Statement Before the S. Comm. on Banking, Hous., & Urban Affairs 3 (Apr. 18, 2013) (F32) ("[R]ecent changes to the . . . PSPAs[], replacing the 10 percent dividend with a net worth sweep, reinforce the notion that [Fannie and Freddie] will not be building capital as a potential step to regaining their former corporate status."); FHFA, THE 2014 STRATEGIC PLAN FOR THE CONSERVATORSHIPS OF FANNIE MAE AND FREDDIE MAC 4 (May 13, 2014) (F58) ("FHFA, acting as conservator and regulator, must follow the mandates assigned to it by statute and the missions assigned to the Enterprises by their charters until such time as

[9] Letter of Acting Dir. DeMarco to Chairmen and Ranking Members of S. Comm. on Banking, Hous., & Urban Affairs and of H. Comm. on Fin. Servs. 7 (Feb. 2, 2010), *available at* www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/20100202_Conservatorship Letter_N508.pdf (F55).

Congress revises those mandates and missions."). In the meantime, the agency has said that it will work to ensure that "all the Enterprises' earnings are used to benefit taxpayers." 2012 REP. TO CONG. 1 (F29).

Treasury has also consistently reiterated its policy that Fannie and Freddie will not exit conservatorship and will be wound down. For example, Secretary Lew told Congress earlier this year that the Treasury Department "ha[s] had a *very clear policy* on Fannie and Freddie, which is that we're winding them down." Testimony of Treas. Sec'y Jacob J. Lew before S. Budget Comm. (Mar. 12, 2014) *available at* www.youtube.com/watch?v=6QLPG_8K4bM (3:03-5:02) (emphasis added). That was not a new revelation. As early as 2010, high ranking Treasury officials were referencing in internal documents "the Administration's commitment to ensure existing common equity holders will not have access to any positive earnings from the GSEs in the future." Memo from J. Goldstein, Under Sec'y for Domestic Fin., to T. Geithner, Sec'y of Treas. 2 (Dec. 20, 2010) (F60).

Both agencies' policies on these issues have been clear for some time, and the Government may not hide its policies behind the possibility of congressional intervention.

5. Far from establishing that every responsive document created after August 17, 2012 is "inherently pre-decisional," the Government's communications with Congress are themselves not covered by the privilege. As this Court recently explained, "communications with Congress or communications disclosed to Congress are not protected by the deliberative process privilege because Congress is not a Government agency." *Starr* Order 12 (F46); *see also Elec. Privacy Info. Ctr. v. Transportation Sec. Admin.*, 928 F. Supp. 2d 156, 165 (D.D.C. 2013) (PowerPoint presentation prepared to assist congressional deliberations not protected by the privilege). To withhold a document under the deliberative process privilege, "the government must demonstrate

that the document is either inter-agency or intra-agency in nature," and inter-branch communications are neither. *Dow Jones*, 917 F.2d at 574-75.

To be sure, courts have occasionally said that an agency's communications with Congress may be covered by the privilege in those rare cases in which the communications are "part and parcel of *the agency's* deliberative process." *Rockwell Int'l Co. v. DOJ*, 235 F.3d 598, 604 (D.C. Cir. 2001) (agency memoranda prepared as part of deliberative process and subsequently shared with Congress on understanding that they would remain confidential were privileged); *Ryan v. DOJ*, 617 F.2d 781, 789-90 (D.C. Cir. 1980) (questionnaires sent by agency to senators as part of its own deliberations were privileged). But there is no suggestion here that all of FHFA's or Treasury's communications with Congress fit into that narrow category. To the contrary, the Government's brief emphasizes that "Treasury has worked closely with Congressional staff during the process of drafting bipartisan legislative proposals for housing finance reform." U.S. Mot. 15 (quoting Stegman Decl. ¶ 16). Plainly those efforts were targeted at developing *congressional* rather than *agency* policy. For similar reasons, FHFA's and Treasury's communications with the press, former colleagues, and other third parties are not privileged.

6. Finally, it bears emphasis that the Government may not rely on the deliberative process privilege to the extent that its subjective motivation is at issue in this case. As this Court recently observed, "the deliberative process privilege is unavailable . . . when a plaintiff's cause of action is directed at an agency's subjective motivation." *Starr* Order 6 (F40). In *Starr*, the Government asserted "the affirmative defense that the Government did not believe that the terms of AIG's rescue constitute a taking of property without just compensation or an illegal exaction." *Id.* Because that defense put the Government's subjective motivation at issue, the *Starr* Court ruled that the deliberative process privilege could not be used to shield documents relating to the Govern-

ment's motivation for undertaking the rescue. *See Starr* Order 6 (F40). Numerous other courts confronted with similar facts have taken the same approach.[10] These decisions rest on the commonsense principle that where the Government's subjective motivation is directly in dispute it may not use the deliberative process privilege to conceal its motives.

Here, the Government's subjective motivation is at issue in one critical respect. The Court has already credited Plaintiffs' argument that the question whether FHFA's actions may be attributed to the United States for purposes of the Tucker Act depends on a "highly context-specific inquiry that considers in part the purposes of FHFA's actions." Disc. Order 3. Thus, for example, the Government cannot withhold documents under the deliberative process privilege that bear on why FHFA agreed to the Net Worth Sweep. It did so either to protect the Companies from a "death spiral," MTD 9, or to benefit the Treasury. FHFA's subjective motivation for adopting the Net Worth Sweep is thus directly relevant to resolution of the Government's argument that it is not liable for FHFA's actions under the Tucker Act. Having put its own subjective motivations for adopting the Net Worth Sweep at issue, the Government cannot rely on the deliberative process privilege to prevent discovery on those topics.

IV. THE GOVERNMENT'S CRAMPED READING OF THE SCOPE OF THE COURT'S DISCOVERY ORDER WOULD DEPRIVE PLAINTIFFS OF DOCUMENTS TO WHICH THEY ARE ENTITLED

The final part of the Government's motion seeks entry of an order "that discharges the government of any obligation to respond to the remaining document requests to the extent that these requests exceed the scope of the February 26 Order." U.S. Mot. 22. According to the

[10] *See, e.g., In re Subpoena Duces Tecum Served on Office of Comp. of Currency*, 156 F.3d 1279, 1280 (D.C. Cir. 1998); *Dunnet Bay Constr. Co. v. Hannig*, No. 10-3051, 2012 WL 1599893, at *3 (C.D. Ill. May 7, 2012); *Moreland Props. v. City of Thornton*, No. 7-716, 2007 WL 2523385, at *2 (D. Colo. Aug. 31, 2007); *Scott v. Board of Educ. of East Orange*, 219 F.R.D. 333, 337 (D.N.J. 2004).

Government, well more than half of Plaintiffs' document requests exceed the scope of the Court's discovery order. U.S. Mot. 19-21. Plaintiffs' requests fall well within the scope of the Court's February 26 discovery order, and the Court should reject the Government's effort to neuter its discovery obligations through a clear misreading of the scope of that order.

1. The Government argues that "the Court authorized discovery into the solvency of the Enterprises and reasonable expectations of their future profitability at the time they were placed into conservatorships *in September 2008*," U.S. Mot. 19 (emphasis added), but the temporal scope of the Court's order is not so limited. To the contrary, the Court also approved discovery into the Government's factual assertion that "plaintiffs lacked a reasonable investment-backed expectation" at the time of the Net Worth Sweep because "Fannie and Freddie were insolvent." Disc. Order 3. Indeed, that is the only interpretation of the Court's order that makes sense, for as the Government acknowledges, "the time frame of the core issue in this case" is the "time period around execution of the Third Amendment" in August 2012. U.S. Mot. 21. The Government argued in its motion to dismiss not only that the Companies were in danger of becoming insolvent when the conservatorships began in 2008, but also when the Net Worth Sweep was imposed in August 2012. *See* MTD 10 ("There was concern that, under the weight of the fixed dividend, the Enterprises would run through the remaining Treasury investment capacity, leading to insolvency . . . . The Third Amendment eliminated the prospect of future insolvency caused by the required fixed-dividend payments."). Whether the Net Worth Sweep effected a taking depends in part on whether Plaintiffs had a reasonable investment-backed expectation at the time of the Net Worth Sweep, and the Court should reject the Government's effort to avoid discovery on that pivotal factual dispute. *See* Plaintiffs' Disc. Reply 16-20 (Feb. 24, 2014) (Doc. 31).

The Government also seeks to avoid responding to many of Plaintiffs' requests through a willful misreading of those requests. Plaintiffs made clear in their requests for production, for example, that, although organized by subject matter, "many of the requests call for information that pertains to more than one topic as to which the Court has authorized discovery." Doc. 50-1, A37 n.1. Yet the Government repeatedly objects to requests obviously relevant to one authorized topic on the ground that they are irrelevant to another. Thus, the Government objects to Plaintiffs' Request 1 to the extent it seeks financial projections and other assessments of the Companies' prospects created after September 30, 2008 on the ground that "documents created after the conservatorship decision are irrelevant to profitability expectations at the time of the conservatorship." U.S. Mot. 19. But more recent projections are relevant to both the reasonableness of Plaintiffs' investment-backed expectations at the time of the Net Worth Sweep and the Companies' future profitability—two additional topics on which the Court's order authorizes discovery. Disc. Order 3. The Government does not even attempt to show otherwise.

The Government also objects to Plaintiffs' Requests 2 and 3 for documents relating to Treasury's decision to take warrants to buy 79.9% of each Company's common stock and how it has valued those warrants. U.S. Mot. 19. That Treasury originally negotiated for a common equity interest in the Companies strongly implies that the Government had a "partial expectation that Fannie and Freddie would be profitable again in the future," Disc. Order 4, and Plaintiffs are thus clearly entitled to information relating to Treasury's decision to insist on warrants. Similarly, the Government's more recent valuations of its warrants would reveal its assessment of the Companies' future prospects and the reasonableness of Plaintiffs' investment-backed expectations; high valuations of the right to buy the Companies' common stock at a nominal price would imply that the Government expects the Companies to be profitable in the future.

Plaintiffs' Request 5, which seeks documents relating to the Companies' declaration and payment of cash dividends on Treasury's stock, is likewise relevant to the reasonableness of Plaintiffs' investment-backed expectations, the Companies' future profitability, and whether FHFA's actions as conservator should be deemed the actions of the United States for Tucker Act purposes. Under the original terms of the PSPAs, the Companies could opt to pay the dividends on Treasury's preferred stock "in kind" by adding to Treasury's liquidation preference at a 12 percent rate (without reducing the availability of future draws) rather than paying those dividends in cash at a 10 percent rate. PSPA Stock Certificate § 2(c) (F62).[11] Despite that alternative, the Companies (presumably at the direction of FHFA) consistently chose to declare and pay cash dividends on Treasury's stock, even when cash dividends had to be financed through additional draws on Treasury's funding commitment. The decision to pay the dividends in cash could and likely did reflect the FHFA's and Treasury's view about the Companies' future financial prospects; for example; officials may have decided to pay cash dividends because they anticipated that the Companies would soon return record profits and could therefore afford to make the cash payments. Moreover, documents showing the role that FHFA and/or Treasury played in such dividend decisions clearly bear on whether FHFA was acting for the benefit of the Treasury or of the Companies. The Companies' dividend actions prior to the Net Worth Sweep are thus probative of several different topics as to which the Court authorized discovery.

Perhaps the clearest example of the Government's misreading of the Discovery Order is its treatment of Requests 11-19, which Plaintiffs had organized under the heading of requests seeking information relating to the Government's factual claim that FHFA's actions are not at-

[11] *Available at* www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2008-9-7_SPSPA_FannieMae_Certificate_N508.pdf and www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2008-9-7_SPSPA_FreddieMac_Certificate_508.pdf.

tributable to the United States. The Government's rationale for resisting these requests can be found in a single sentence of its motion: "On their face, these requests go well beyond the relationship between FHFA and Treasury, and well beyond the time frame of the core issues in this case, the August 2012 Third Amendment to the stock agreements." U.S. Mot. 21. The Government never attempts to explain *why* these requests are not relevant to the question whether FHFA should be considered the United States for purposes of this action, let alone attempt to articulate a clear (or any) standard that would govern its decisions about which documents do relate to this issue and which do not. But whatever the Government's rationale may be for objecting to these requests, its objection is meritless.[12]

[12] The Government's views as to the scope of authorized discovery on this issue have been evolving, and (perhaps not surprisingly) narrowing, over time. For example, in its written responses to Plaintiffs' document requests, the Government took the position that it would produce at least some documents in response to Plaintiffs' Requests 11 and 16, Doc. 50-1, A58, A62. However, it now lists those requests as among those that "go well beyond the relationship between FHFA and Treasury," U.S. Mot. 21, and that are therefore outside the scope of authorized discovery.

The Government's motion also confuses Requests 4 and 14, inaccurately stating that Request 14 seeks "[a]ny and all documents relating to the decision to leave the [Enterprises'] existing capital structure in place during the conservatorships." U.S. Mot. 20. In fact, Request 14 seeks "[a]ny and all documents relating to FHFA's and/or Treasury's decision to enter into the Net Worth Sweep." Doc. 50-1, A41. Plaintiffs' understanding is that the Government stands by its prior objection to that request and intends to produce only responsive documents "related to whether FHFA acted at the direct behest of Treasury in executing the Third Amendment." Doc. 50-1, A60. But as the Government acknowledges, the Net Worth Sweep is "the core issue in this case." U.S. Mot. 21. There can be little doubt that documents relating to the Net Worth Sweep decision are directly relevant to issues on which the Court has authorized discovery, including whether FHFA acted on behalf of the Government or the Companies, or whether it was seeking to do Treasury's bidding or instead acting independently, when it "agreed" to the Net Worth Sweep. Moreover, if, as appears to be the case, FHFA or Treasury purported to rely on projections and analyses of the Companies' income in deciding to implement the Net Worth Sweep, documents discussing such projections or analyses are directly relevant to the reasonable investment-backed expectation issue. Plaintiffs are thus entitled to all non-privileged documents relating to the decision to enter into the Net Worth Sweep, not just those that, in the Government's judgment, reveal whether FHFA acted at Treasury's "direct behest."

This Court made clear in its February 26 order that the question whether FHFA should be considered the United States for purposes of the Tucker Act poses a "fact-intense inquiry." Disc. Order 3. Contrary to the Government's assertions, all of Plaintiffs' requests on this topic are designed to elicit information that is highly relevant to this fact-bound inquiry. Thus, Plaintiffs' Requests 11 through 18 are all tightly connected to the "highly context-specific inquiry" into whether FHFA's actions are attributable to the United States. Disc. Order 3. For example, communications relating to the Net Worth Sweep between FHFA and Treasury, and between FHFA or Treasury and the Companies, the Department of Justice, the Federal Housing Finance Oversight Board (of which FHFA's Director and the Secretary of the Treasury are members), or select other parties (including the Companies' auditors and rating agencies) (Requests 11, 15, 17, and 18) are likely to bear on whether FHFA truly made an independent decision when it agreed to that change, or whether it was acting on behalf of or for the benefit of Treasury rather than the Companies—the specific issue on which the Court ordered discovery.[13]

The Government's objections to Plaintiffs' other requests also fail. Communications between Treasury and FHFA relating to prior important conservatorship decisions (Request 11) are relevant because whether FHFA had acted at Treasury's direction or for its benefit in the past is

[13] Plaintiffs' request for documents relating to Treasury's communications with the Department of Justice (Request 15) is also relevant to the Companies' future profitability. A document disclosed in other litigation implies that the Department of Justice prepared a memo for Treasury assessing how the Net Worth Sweep would affect government proceeds from the PSPAs and whether the Government was receiving adequate consideration for agreeing to the Third Amendment. *See* Memorandum re Third Amendment from Michael Stegman, Counselor, Dep't of Treas., to T. Geithner, Sec'y of Treas. 3 (Aug. 15, 2012) (F72) ("The Justice Department approved Treasury's request for authority to modify its dividend rights under the PSPAs with the GSEs. The Justice Department agreed that the proposed modification is fiscally prudent and in the best interest of the United States."); *In re Dep't of Airforce-Sewage Util. Contracts*, B-189395, 1978 WL 9944, at *2 (Comp. Gen. Apr. 27, 1978) (Governmental officials may not "modify existing contracts[] or . . . waive contract rights vested in the government" absent "a compensatory benefit to the United States."). That and any similar such documents fit comfortably within the authorized scope of discovery into the Companies' future profitability.

obviously probative of whether it did so when it agreed to the Net Worth Sweep. Put simply, evidence that FHFA was essentially doing Treasury's bidding or seeking to protect Treasury's interests when it took these prior actions is undeniably probative of whether FHFA was doing the same thing when it agreed in August 2012 to transfer to Treasury, in perpetuity, the entire positive net worth of the Companies.[14]

Similarly, Plaintiffs' request for documents relating to the considerations taken into account when the Net Worth Sweep was adopted (Request 16) seeks information that is clearly probative of "the purposes of FHFA's actions" and whether FHFA acted on Treasury's, rather than the Companies', behalf. Disc. Order 3. And information relating to FHFA's understanding of its own fiduciary duties as the Companies' conservator (Request 13), would bear on whether it acted at Treasury's direction or on its behalf, rather than on behalf of the Companies, when it agreed to the Net Worth Sweep. If FHFA understands itself to be acting in the best interests of the taxpayers, that would no doubt make FHFA more pliant when Treasury—the taxpayers' representative—directs it to do something. Similarly, if the Companies could have sought Treasury's consent to allow them to use their record profits to buy back Treasury's preferred stock but were directed not to do so by FHFA (Request 12), that would suggest that FHFA is managing the Companies at Treasury's direction rather than exercising its independent judgment.[15]

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[14] For this reason, the Government's suggestion that discovery on this issue must be limited to the January-September 2012 time frame is not correct. As a practical matter, however, and as discussed further below, the parties have discussed, and have come close to agreement on, discovery protocols that will provide time limits similar (but not identical) to those suggested by the Government for many of the search requests that are designed to yield information relevant to this issue.

[15] Whether the Government has made reasonable efforts to preserve documents responsive to Plaintiffs' requests (Request 19) is also a relevant inquiry. *See* RCFC 26(b)(1) ("Parties may obtain discovery regarding . . . the existence, description, nature, custody, condition, and location" of relevant documents.).

Thus, a fair reading of both the Court's prior discovery order and Plaintiffs' document requests compels the conclusion that the Government's naked and largely unsupported assertions that Plaintiffs' document requests "on their face" exceed the scope of authorized discovery demonstrate, on their face, only that the Government intends to use a cramped understanding of relevance to artificially restrict which documents it produces.[16]

2. Although discovery here is currently limited to the specific topics identified in the Court's February 26 order, the broad relevance standard that normally governs discovery applies to Plaintiffs' requests. The decisions of both the Federal Circuit and this Court make clear that relevance with respect to discovery should be "broadly construed." *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993); *accord Banks v. United States*, 90 Fed. Cl. 707, 710 (2009); *Ford Motor Co. v. United States*, 84 Fed. Cl. 168, 170 (2008); *see also Wolpin v. Philip Morris Inc.*, 189 F.R.D. 418, 422 (C.D. Cal. 1999) (noting "the broad standard of relevance in the discovery context"); *see also* May 7, 2014 Status Conf. Tr. 18:19 (F74) (explaining that Court will "allow discovery to proceed in [a] very broad" manner). Indeed, a document is relevant in the discovery context if it "bears on, or . . . reasonably could lead to other

[16] While the Government's blanket objections to the majority of Plaintiffs' document requests are quite revealing about its attitude regarding its obligations under the Discovery Order, perhaps equally revealing is the Government's selection of those few requests as to which it, albeit grudgingly, concedes it must produce responsive information. Thus, the Government acknowledges that it is obligated to produce at least some non-privileged documents relating to the decision to leave the Companies' existing capital structure in place during the conservatorships (Request 4), although it seeks to restrict the time frame for which it is to search for such documents. U.S. Mot. 19-20. (On page 20 of its motion, the Government misidentifies this request as Request 14). Of course, the Government could hardly deny that such documents are within the scope of authorized discovery, as the Discovery Order itself made clear that discovery was appropriate with respect to "why the government allowed the preexisting capital structure and stockholders to remain in place." Disc. Order 4. When one compares the many discovery requests to which the Government objects to the few to which it does not object, it becomes apparent that, with few exceptions, the only discovery requests the Government believes are within the scope of the Court's order are those that parrot that order.

matter that could bear on" one of the topics the Court's order identifies. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

3. In addition to misreading or completely ignoring the Court's Discovery Order and the general principles underlying discovery, the Government's arguments as to the scope of discovery also ignore the substantial progress that the parties have made in their attempts to reduce the discovery burden on the Government. While the Government complains about the breadth of Plaintiffs' document requests and its concern that many of those requests seek materials created over a six-year period, it does not mention that the parties have engaged in extensive discussions (initiated by Plaintiffs) regarding the search terms and time frames governing any searches for electronically stored information (ESI) responsive to those requests. As discussed at the recent status conference, although no final agreement has yet been reached—the Government has yet to respond to Plaintiffs' last ESI proposal, made on May 29—Plaintiffs have agreed to many of the search terms proposed by the Government, and the parties have also narrowed their differences with respect to such matters as the identity of custodians whose ESI would be searched and the time frames of any ESI searches. Thus, although the Government's motion focuses on the abstract question whether Plaintiffs' April 7 requests for production exceed the scope of the Court's discovery order, the parties' only concrete dispute after eight weeks of negotiations (assuming no further backtracking by the Government) boils down to little more than a handful of search terms and custodians, and whether the Government's search efforts for most of the ESI search terms should cover an additional few months.[17]

Notably, although Government counsel took pains to suggest at the most recent status

[17] The parties' proposed date ranges are further apart with respect to two search terms that Plaintiffs anticipate will return a small number of documents. And as discussed at length above, the parties also disagree about whether documents created after August 17, 2012 should be reviewed for evidence of future profitability and when the conservatorships will end.

conference that it has gathered upwards of ten million documents, that number has no bearing on the Government's actual discovery burdens. Regardless of the source or basis for the figure represented by counsel at the hearing, the fact of the matter is that, according to information provided to Plaintiffs by the Government, application of Plaintiffs' *original* ESI proposal slashes that figure *by more than 90 percent*. Considering that even this greatly reduced figure likely contains a very large number of duplicate documents, and that Plaintiffs' most recent ESI proposal to the Government further narrowed proposed search terms and date ranges and reduced the number of proposed custodians whose ESI would need to be searched, it is almost certainly the case that the actual universe of information that needs to be reviewed and produced is considerably smaller. The Government's actual discovery burden, in short, is quite manageable, especially considering the importance of the issues raised in this litigation and the magnitude of the Government actions being challenged.

4. Finally, the Court's consideration of the scope of discovery authorized by the Court should be mindful of the obvious and considerable mismatch between the comparatively minimal prejudice to the Government of *over*production of information and the very real prejudice to Plaintiffs stemming from any *under*production of relevant information. Simply put, the prejudice to the Government from producing non-privileged documents that it considers outside the scope of authorized discovery pales in comparison to the prejudice Plaintiffs would suffer if the Government withholds, on the basis of its cramped reading of its discovery obligations, information Plaintiffs need to respond to the motion to dismiss. Plaintiffs do not begrudge the Government a thoroughgoing privilege review; documents covered by an applicable privilege obviously need not be produced. But the Government has little interest in withholding *non-privileged* documents on the ground that they are unresponsive, especially given that many of

those documents could no doubt be obtained by any member of the public under FOIA. *See* 5 U.S.C. § 552(a)(3); *Burke v. Department of Health & Human Servs.*, 87 F.3d 508, 517 (D.C. Cir. 1996) (observing that relevance and need "are not pertinent in the FOIA context"). Given the Government's failure to articulate any standard governing its reading of its discovery obligations under the Court's order and its unsupported assertions that most of Plaintiffs' requests fall outside the scope of discovery, there is reason for concern that the Government intends to use its narrow understanding of this Court's order and the factual disputes relevant to the motion to dismiss to withhold a host of responsive materials. The Court should reaffirm its commitment to "allow Plaintiffs every opportunity to establish that this Court has jurisdiction over its claims," May 7, 2014 Status Conf. Tr. 18:19-24 (F75), by directing the Government, in accordance with RCFC 26(c)(2), to produce documents responsive to Plaintiffs' document requests and to use the usual, permissive discovery relevance standard when deciding what to disclose in response to those requests.

CONCLUSION

For the foregoing reasons, the Government's motion for a protective order should be denied.

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Respectfully submitted,

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