

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

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

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November 16, 2015

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## INTRODUCTION

Non-parties Federal National Mortgage Association (“Fannie Mae”) and Mr. Egbert Perry—the Chairman of Fannie Mae’s Board of Directors—move pursuant to Rules of the Court of Federal Claims 26(b)(2) and 45(c)(3)(A) to quash the subpoena served by plaintiffs in this case seeking to depose Mr. Perry. *See* Exhibit A (Perry deposition notice and subpoena). This Court authorized plaintiffs to take limited jurisdictional discovery from FHFA and Treasury in this case on a defined set of topics. Even assuming that this Court contemplated the extensive third party discovery efforts that plaintiffs have engaged in to date, which is far from clear, this Court surely did not anticipate that plaintiffs would seek an unnecessary and unduly burdensome deposition from the Chairman of the Board of a third party. That is, however, precisely what plaintiffs now seek. In light of plaintiffs’ extensive discovery efforts to date, and their deposition of Fannie Mae’s former Chief Financial Officer in particular, there is no reason to permit plaintiffs to depose the current Chairman of Fannie Mae’s Board of Directors.

## BACKGROUND

As this Court is already well aware, plaintiffs in this suit allege that the Third Amendment to the Preferred Stock Purchase Agreement entered into by FHFA—the conservator of Fannie Mae and the Federal Home Loan Mortgage Corporation (“Freddie Mac”)—and the U.S. Department of Treasury constituted a taking under

the Fifth Amendment that entitles them to just compensation. *See* Doc. 1 at 26-27. The government moved to dismiss plaintiffs' complaint pursuant to RCFC 12(b)(1) and 12(b)(6). In response to that motion, plaintiffs filed a motion for continuance to permit discovery pursuant to RCFC 56(d). This Court granted that motion and while plaintiffs and the government dispute the scope of that order, at most, this Court authorized discovery into the following topics: (1) "when" and "how" FHFA's conservatorship of Fannie Mae and Freddie Mac "will end"; (2) "whether the FHFA is 'the United States,'" including "consideration of whether the FHFA acted at the direct behest of the Treasury"; (3) "why the government allowed the preexisting capital structure and stockholders" of Fannie Mae and Freddie Mac "to remain in place" in light of the Third Amendment; and (4) the reasonableness of plaintiffs' expectations regarding the future profitability of Fannie Mae and Freddie Mac during the relevant time period. Doc. 32 at 3-4. In granting plaintiffs' request, the Court made clear that it was doing so because the information it had identified was "solely in the possession of defendant." *Id.* at 3; *see id.* at 4 (discussing plaintiffs' entitlement to "evidence ... in the possession of defendant only").

Despite the narrowness of the Court's discovery order, in tandem with plaintiffs propounding of discovery on Treasury and FHFA and depositions of numerous Treasury and FHFA officials, plaintiffs also served subpoenas on Fannie Mae, Freddie Mac, Fannie Mae's auditor, Freddie Mac's auditor, and other third

parties seeking the production of various documents. With respect to Fannie Mae specifically, plaintiffs served their document production subpoena on May 5, 2014, *see* Exhibit B (Fannie Mae document subpoena), and Fannie Mae served its objections on May 23, 2014, *see* Exhibit C (Fannie Mae document subpoena objections). After numerous meet and confers, Fannie Mae agreed to make a substantial document production to plaintiffs. That production is now complete; Fannie Mae produced thousands of pages of documents to plaintiffs supplementing the tens of thousands of documents that plaintiffs have received from FHFA, Treasury, Freddie Mac, Fannie Mae's auditor, Freddie Mac's auditor, and others.

On May 21, 2015, plaintiffs served two subpoenas seeking depositions of individuals affiliated with Fannie Mae—one from Fannie Mae's former Chief Financial Officer Susan McFarland and one from the Chairman of Fannie Mae's Board of Directors Egbert Perry. *See* Exhibit D (McFarland deposition notice and subpoena) & Exhibit E (original Perry deposition notice and subpoena). Plaintiffs' counsel and counsel for Fannie Mae, Mr. Perry, and Mrs. McFarland met and conferred on plaintiffs' requests. Agreement was reached regarding Mrs. McFarland's deposition, which took place in Houston, TX on July 15, 2015. Plaintiffs agreed not to move forward with their efforts to depose Mr. Perry until after "see[ing] how other depositions go." Exhibit H (May 30, 2015 e-mail from V. Colatriano).

After this Court extended the discovery period through the end of 2015, plaintiffs renewed their efforts to depose Mr. Perry and served a deposition notice and subpoena to that effect on September 16, 2015. *See* Exhibit A. As this Court's rules require, counsel for plaintiffs and counsel for Fannie Mae and Mr. Perry met and conferred on plaintiffs' request. Among other things, counsel for Fannie Mae and Mr. Perry explained to plaintiffs that there was no need to burden Mr. Perry at this early stage in this litigation given that plaintiffs had already deposed Fannie Mae's former Chief Financial Officer—Mrs. McFarland is at least as well-positioned as Mr. Perry to provide plaintiffs with information germane to the topics authorized for discovery and was present at all relevant Board meetings. Mrs. McFarland answered all of Plaintiffs' questions regarding the profitability of Fannie Mae at the time of the execution of the Third Amendment. Plaintiffs nonetheless insisted that they needed to be able to appreciate the distinct perspective of a member of Fannie Mae's Board. No agreement was reached and this motion followed.<sup>1</sup>

### **ARGUMENT**

A party's ability to seek discovery—especially discovery from a third party pertaining to a motion to dismiss for lack of jurisdiction—is not unlimited. This

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<sup>1</sup> Accordingly, counsel for Fannie Mae and Mr. Perry certifies that he has conferred with plaintiffs in good faith in an effort to resolve this dispute without court action.

Court has the discretion to limit discovery on its own initiative or in response to a motion from an interested party. *See Zoltek Corp. v. United States*, 104 Fed. Cl. 647, 655 (2012) (granting, in part, a third party motion to quash). Among other things, “the court must limit the extent of discovery otherwise allowed if it determines that:”

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, and the importance of the proposed discovery in resolving the issues.

*Id.* at 655-56 (quoting RCFC 26(b)(2)).

By the same token, courts “must quash or modify a subpoena if it” “subjects a person to undue burden.” *Id.* at 656 (quoting RCFC 45(c)(3)(A)). In determining whether a subpoena causes undue burden, courts generally balance the following factors: (1) relevance of the information requested; (2) the need of the party for the information; (3) the breadth of the request; (4) the time period covered by the request; (5) the particularity with which the party describes the request; and (6) the burden imposed. *See Jade Trading, LLC v. United States*, 65 Fed. Cl. 188, 190 (2005). Critically, “[t]hat the person served with a subpoena is not a party to the lawsuit is another factor which may be considered by the court in assessing whether

there is undue burden.” *Zoltek*, 104 Fed. Cl. at 656; *see JZ Buckingham Invs. LLC v. United States*, 78 Fed. Cl. 15, 26 (2007).

While the “burden of persuasion in a motion to quash a subpoena is” typically “on the movant,” *Zoltek*, 104 Fed. Cl. at 656, there is good reason to shift the burden to plaintiffs here. Mr. Perry is the Chairman of Fannie Mae’s Board of Directors. As a result, consistent with precedent from other jurisdictions, plaintiffs should be required to establish that Mr. Perry actually possesses genuinely relevant knowledge that is not otherwise available through another witness or other less intrusive discovery. *See Cmty. Fed.l Savs. & Loan Ass’n v. FHLBB*, 96 F.R.D. 619 (D.D.C. 1983); *Consol. Rail Corp. v. Primary Indus. Corp.*, 1993 WL 364471, \*1 (S.D.N.Y. Sept. 10, 1993); *Crown Cent. Petrol. Corp. v. Garcia*, 904 S.W.2d 125, 127-28 (Tex. 1995); *Baine v. Gen. Motors Corp.*, 141 F.R.D. 332, 334-35 (M.D. Ala. 1991); *Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140, 144-46 (D. Mass. 1987); *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985); *Armstrong Cork Co. v. Niagara Mohawk Power Corp.*, 16 F.R.D. 389, 390 (S.D.N.Y. 1954); *M.A. Porazzi Co. v. The Mormaclark*, 16 F.R.D. 383, 383 (S.D.N.Y. 1951); *Liberty Mut. Ins. Co. v. Superior Court*, 13 Cal. Rptr. 2d 363, 366 (Cal. Ct. App. 1992);

*Broadband Commc'ns, Inc. v. Home Box Office, Inc.*, 549 N.Y.S.2d 402, 402 (N.Y. App. Div. 1990).<sup>2</sup>

In all events, the case for quashing plaintiffs' subpoena seeking to depose Mr. Perry is manifest. It is highly unlikely that when this Court authorized limited jurisdictional discovery in this matter that it intended to empower plaintiffs to depose the Chairman of the Board of a third party. Moreover, even if such discovery were contemplated by this Court's order, plaintiffs do not need to depose Mr. Perry. They already have reams of documents that speak to the topics on which this Court authorized discovery and have deposed numerous individuals—including Mario Ugoletti and Edward DeMarco of FHFA, Jeff Foster and Tim Bowler of Treasury, and Fannie Mae's former CFO—who have all testified on those topics. Deposing Mr. Perry adds nothing. Finally, permitting plaintiffs to depose Mr. Perry will impose a wholly unnecessary and undue burden given the substantial unlikelihood that the deposition will yield any non-redundant or otherwise available information and Mr. Perry's myriad non-Fannie-Mae-related professional commitments.

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<sup>2</sup> Based on the fact that plaintiffs should bear the burden of showing that a deposition of the Chairman of Fannie Mae's Board of Directors is necessary, not to mention the early stage of the litigation and limited scope of authorized discovery, this Court's statement that "[i]n general, modification of a subpoena is preferred to quashing it" should carry no weight. *Zoltek*, 104 Fed. Cl. at 656.

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

As an initial matter, this Court's order authorizing limited jurisdictional discovery does not contemplate third party depositions. The Court's discovery order repeatedly refers to information "solely in the possession of [the] defendant." Doc. 32 at 3; *see id.* at 4 ("evidence ... in the possession of defendant only"). While third parties such as Fannie Mae have cooperated with plaintiffs' discovery efforts to date, they have also maintained that such discovery is beyond this Court's limited mandate. *See, e.g.*, Exhibit C (Fannie Mae document subpoena objections). That plaintiffs' request is outside the scope of discovery authorized by this Court provides a straightforward reason for this Court to grant this motion.

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

While plaintiffs' request is inappropriate under a plain reading of this Court's discovery order, at an absolute minimum the limited nature of that order requires that plaintiffs' intrusive and unnecessary discovery request be subjected to the strictest scrutiny. This Court has not hesitated to prohibit plaintiffs from taking discovery that is unlikely to yield information of relevance. *See, e.g., Evergreen Trading, LLC ex rel. Nussdorf v. United States*, 75 Fed. Cl. 730 (2007). The Court has similarly declined to sanction discovery from third parties when the information

sought is readily available from other sources. *See, e.g., Capital Props., Inc. v. United States*, 49 Fed. Cl. 607 (2001). These two lines of authority taken together are fatal to plaintiffs' efforts to depose Mr. Perry on the limited topics authorized by this Court's discovery order.

There is a vanishingly small likelihood that Mr. Perry will be able to provide plaintiffs with information relevant to the authorized jurisdictional discovery topics that plaintiffs have not already received from other sources. As already explained, at most this Court authorized discovery into the following topics: (1) "when, and how, the conservatorship will end"; (2) "whether the FHFA is 'the United States,'" including "consideration of whether the FHFA acted at the direct behest of the Treasury"; (3) "why the government allowed the preexisting capital structure and stockholders" of Fannie Mae and Freddie Mac "to remain in place"; and (4) expectations regarding the future profitability of Fannie Mae and Freddie Mac during the relevant time period. Doc. 32 at 3-4.

Any contention that Mr. Perry has discoverable relevant information on the first three topics above and beyond what plaintiffs have already received is risible. To the extent that anyone knows if, when, and how the conservatorship will end, it is FHFA and Treasury. And plaintiffs have already reviewed FHFA and Treasury-produced documents and deposed FHFA and Treasury witnesses. Deposing Mr. Perry on this issue does nothing other than burden Mr. Perry and waste time and

resources—the Chairman of Fannie Mae’s Board has no special insight into if, when, and how the conservatorship will end and certainly no more knowledge on the matter than FHFA and Treasury.

The same is true of whether FHFA is the United States, whether FHFA acted at Treasury’s behest in adopting the Third Amendment, and why Fannie Mae’s preexisting capital structure and shareholders remained in place in the wake of the Amendment. Those are questions for FHFA and Treasury, not the Chairman of Fannie Mae’s Board.

The only topic that Mr. Perry might arguably have non-redundant discoverable knowledge about is projections of future profitability of Fannie Mae during the authorized discovery period. But FHFA and Fannie Mae have already provided thousands of documents to plaintiffs addressing exactly that issue and that speak for themselves. In addition, plaintiffs deposed Fannie Mae’s former CFO Susan McFarland. Mr. Perry is no better situated than Mrs. McFarland to testify on the lone issue that a non-FHFA or non-Treasury deponent could possibly speak to, further underscoring the complete absence of need for Mr. Perry’s deposition and the undue burden imposed by plaintiffs’ request. Mrs. McFarland’s deposition focused on Fannie Mae’s projections of future profitability at the time the Third Amendment was executed.

Lest there be any doubt, there is no reason to conclude that Mr. Perry has anything to offer plaintiffs on the topic of future profitability in addition to the deposition testimony already provided by Mrs. McFarland. As plaintiffs know based on the documents produced to date and Mrs. McFarland's deposition testimony, [REDACTED]

[REDACTED], which makes sense given her status as the company's Chief Financial Officer. *See, e.g.*, Exhibit G (July 20, 2012 and August 6, 2012 Fannie Mae Board minutes excerpts). Recognizing that fact, [REDACTED]

[REDACTED]. *See, e.g.*, Exhibit F (excerpts from Susan McFarland deposition transcript discussing, *inter alia*, the August 22, 2011 Board of Directors meeting (Tr. 60-61), the October 20, 2011 Board of Directors meeting (Tr. 67-68), the November 18, 2011 Board of Directors meeting (Tr. 80-84), the January 20, 2012 Board of Directors meeting (Tr. 107-08; 132-33)). [REDACTED]

[REDACTED], Tr. 152-57).

In short, in light of plaintiffs' efforts to date, there should be no real dispute that "the discovery sought is unreasonably cumulative or duplicative" and that

plaintiffs have had “ample opportunity ... to obtain the information sought.” *Zoltek*, 104 Fed. Cl. at 655. Plaintiffs have deposed senior FHFA and Treasury officials as well as Mrs. McFarland regarding Fannie Mae’s projections of profitability at the time of the Third Amendment. Any question plaintiffs might put to Mr. Perry has already been answered by, or could have been answered by, someone plaintiffs have already deposed.

**III. Allowing Plaintiffs’ Deposition Will Impose An Undue Burden On Mr. Perry.**

Allowing plaintiffs to depose the Chairman of Fannie Mae’s Board of Directors will also result in undue burden, especially in light of the vanishingly small likelihood that the deposition will yield any information on the topics this Court identified in its discovery order not already revealed by, or that could be revealed by, other sources. “That the person served with a subpoena is not a party to the lawsuit” is a factor that this Court considers when “assessing whether there is undue burden,” *Zoltek*, 104 Fed. Cl. at 656, and that factor should carry special force here.

While Mr. Perry is on Fannie Mae’s Board of Directors, his primary occupation is working as the Chairman and Chief Executive Officer of The Integral Group LLC, a real estate development, advisory, and investment management company based in Atlanta. In that capacity, Mr. Perry oversees the company’s operations and projects in multiple cities across the country. The Integral Group

employees over 300 individuals in five offices located in Atlanta, Dallas, Denver, New York, and San Francisco.

Moreover, Mr. Perry has numerous additional responsibilities. Mr. Perry chairs two boards in addition to serving as chairman of Fannie Mae's board. He chairs the boards of the Penn Institute for Urban Research and Centennial Place Academy, a charter school in Atlanta. Mr. Perry also serves on the Board of Trustees for the University of Pennsylvania and is a member of that board's Executive Committee. There is no justification for distracting Mr. Perry from his many non-Fannie-Mae-related responsibilities with plaintiffs' unnecessary and cumulative deposition.

### **CONCLUSION**

For all these reasons, this Court should grant this motion to quash and prevent plaintiffs' effort to drag the Chairman of Fannie Mae's Board of Directors into this dispute between plaintiffs and the federal government. This is not merits discovery. As this Court has recognized, plaintiffs are entitled to a full and fair opportunity to prove that this Court has jurisdiction over their claims, but that does not translate into permission to needlessly and burdensomely depose the Chairman of the Board of a company that is not—and could not be—a party to this suit.

At an absolute minimum, however, this Court should limit Mr. Perry's involvement in this matter to answering interrogatories. This Court has recognized

that doing so can be appropriate, *see Exxon Research & Engineering Co. v. United States*, 44 Fed. Cl. 597, 602 (1999), and while the best course of action is allowing Mr. Perry to stay out of this matter altogether, interrogatories are the only acceptable alternative.

Respectfully submitted,

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November 16, 2015

# **APPENDIX**

# **EXHIBIT A**







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

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

**NOTICE OF DEPOSITION OF EGBERT PERRY**

PLEASE TAKE NOTICE that pursuant to Rules 26 and 30 of the Rules of the United States Court of Federal Claims, Plaintiffs will depose Egbert Perry by oral examination on October 27, 2015, beginning at 9:30 a.m., before a notary public or other person authorized by law to administer oaths. The deposition will take place at Regus-City View, 3330 Cumberland Blvd., Suite 500, Atlanta, GA 30339. The deposition will be recorded by stenographic means and will continue from day to day until complete.

Date: September 16, 2015

Respectfully submitted,

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# **EXHIBIT B**

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

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

**SUBPOENA SCHEDULE**

As authorized by Rules of the Court of Federal Claims (“RCFC”) 34(c) and 45, Plaintiffs Fairholme Funds, Inc., The Fairholme Fund, Berkley Insurance Co., Acadia Insurance Co., Admiral Indemnity Co., Admiral Insurance Co., Berkley Regional Insurance Co., Carolina Casualty Insurance Co., Continental Western Insurance Co., Midwest Employers Casualty Insurance Co., Nautilus Insurance Co., and Preferred Employers Insurance Co. (“Fairholme Plaintiffs”) subpoena materials from the Federal National Mortgage Association (“Fannie Mae” or “Fannie”). Fannie is requested to produce and/or permit the Fairholme Plaintiffs to inspect and copy each of the requested documents that may be in its possession, custody, or control, or those which are in the possession, custody, or control of its attorneys, agents, or representatives. Under RCFC 45(c)(2)(B), any objections to this subpoena must be served upon the Fairholme Plaintiffs within 14 calendar days. Fannie is requested to provide responsive documents within 30 calendar days. Document production should be delivered to the offices of Cooper & Kirk, PLLC, 1523 New Hampshire Avenue, N.W., Washington, D.C. 20036, or at any other location to which the parties mutually agree.

**DEFINITIONS**

As used herein, the following terms shall have the following meanings:

1. “Communication” means any meeting, conversation (face-to-face, telephonic, or otherwise), discussion, telex message, cable, correspondence, message, electronic mail, voice mail, exchange, provision or relay of a document, or other occurrence whereby thoughts, opinions, data, or other information are transmitted between or among more than one person, or through any photographic, mechanical, electrical or electronic device or devices for receiving, transmitting, or storing data or other information.

2. “Document(s)” should be construed in the broadest sense permissible, and includes all “writings,” “recordings,” and “photographs,” as those terms are defined in Rule 1001 of the Federal Rules of Evidence, as well as all “communications” as defined above.

Accordingly, “document(s)” includes, but is not limited to, all written, printed, recorded or graphic matter; photographic matter; sound reproductions; electronic mail; or other retrievable data (whether recorded, taped, or coded electrostatically, electromagnetically, optically or otherwise on hard drive, diskette, compact disk, primary or backup tape, audio tape or video tape) from whatever source derived and however and by whomever prepared, produced, reproduced, disseminated, or made. Without limiting the generality of the foregoing, “document(s)” includes the original and any non-identical copy and also every draft and proposed draft of all correspondence, internal memoranda, notes of meetings, telegrams, telexes, facsimiles, electronic mail, reports, transcripts or notes of telephone conversations, diaries, notebooks, minutes, notes, tests, reports, analyses, studies, testimony, speeches, worksheets, maps, charts, diagrams, computer printouts, and any other writings or materials of any nature whatsoever, whether or not divulged to other parties, together with any attachments thereto and enclosures therewith. In addition, the word “document(s)” encompasses all forms and manifestations of electronically or optically coded, stored, and/or retrievable information,

including but not limited to “email,” “voice mail,” digital images and graphics, digital or analog audiotapes and files, and digital or analog videotapes and files.

3. “Fannie” and “Fannie Mae” refers to the Federal National Mortgage Association and its Board of Directors.

4. “Government Stock” refers to the Senior Preferred Stock Treasury received from Fannie pursuant to the PSPA.

5. “Models” refers to any and all models, assumptions, data, and analyses.

6. “Net Worth Sweep” refers to the provision of the Third Amendment to the PSPA that requires Fannie to pay to Treasury each quarter its entire net worth, less a gradually decreasing capital reserve amount.

7. “Person” refers to not only natural persons, but also firms; partnerships; associations; corporations; subsidiaries; divisions; departments; joint ventures; proprietorships; syndicates; trusts; groups; organizations; federal, state, or local government or government agencies, offices, bureaus, departments, entities, including any court (or judge or other officer thereof); other legal, business, or government entities; and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof or any combination thereof. “Person” includes the present and former officers, executives, partners, directors, trustees, employees, attorneys, agents, representatives, and all other persons acting or purporting to act on behalf of the person and also its subsidiaries.

8. “Profitability” refers to any and all information relating to Fannie’s financial performance, prospects, income, and liabilities, including both its profits and losses.

9. “Projections” refers to any and all financial projections, stress tests, forecasts, and any other evaluations of Fannie’s financial condition and/or profitability.

10. “PSPA” refers to the Senior Preferred Stock Purchase Agreement under which Treasury agreed to provide Fannie with funding in exchange for, *inter alia*, Government Stock and warrants to purchase 79.9% of Fannie’s common stock.

11. The word “including” shall have its ordinary meaning and shall mean “including but not limited to” and shall not indicate limitation to the examples or items mentioned.

12. The words or phrases “reflect,” “refer,” or “relate to”—or any tense or combination of those words or phrases—mean reflecting, referring to, relating to, regarding, discussing, concerning, constituting, mentioning, pertaining to, alluding to, or associated with.

13. The singular of each word shall be construed to include its plural and vice versa, and the root word and all derivations (i.e., “ing,” “ed,” etc.) shall be construed to include each other.

14. The words “and,” as well as “or,” shall be construed both conjunctively as well as disjunctively.

15. The word “each” shall be construed to include “every,” and vice versa.

16. The word “any” shall be construed to include “all,” and vice versa.

17. The present tense shall be construed to include the past tense, and vice versa.

18. The “knowledge,” “information,” “possession,” “custody,” and “control” of a person shall be construed to include such person’s agents, representatives, and attorneys.

### **INSTRUCTIONS**

1. Each Request herein constitutes a request for each document referred to or a true, complete, and legible copy thereof.

2. Each Request seeks documents that are in any way in Fannie’s possession, custody, or control from any source, wherever situated, including, but not limited to, the files,

records, and documents to which Fannie has access, including all documents in the possession, custody, or control of contractors, experts, or consultants.

3. A document is deemed to be in Fannie's "control" if Fannie or its attorneys have the right to secure the document or a copy thereof from another person or entity having actual possession of the document.

4. If any of the documents requested herein has been destroyed, Fannie shall furnish a list identifying each such document, its author and addressee, each person to whom copies of the document was furnished or to whom the contents thereof were communicated, a summary of the substance of the document, the date (or approximate date) upon which it was destroyed, and the reason it was destroyed.

5. If Fannie does not answer any Request or part thereof, on the basis of privilege, Fannie shall provide with respect to each such document the following:

- a. The date of the document;
- b. The number of pages comprising the document and a description of any identifying marks or designations (e.g., Bates numbers) if any, on the document;
- c. The nature of the document (letter, memorandum, spreadsheet, presentation, report, etc.);
- d. A description of the subject matter of the document;
- e. A list of all attachments or enclosures to the document;
- f. The name(s) of the author(s) and of any recipient(s) of the document;
- g. The name and address of any person who is not included in response to subpart (f) with respect to such document and who has access to or has seen, read, or heard any portion of the material in the document; and

h. The nature of the privilege asserted.

6. For each Request or part of a Request that Fannie refuses to answer on grounds of burdensomeness, Fannie shall explain in as much detail as possible the basis for its contention.

7. If Fannie objects to any Request, or portion of a Request herein, Fannie must produce all documents covered by the Request, or portion of the request, not subject to the objection. Similarly, if Fannie objects to production of a document, Fannie must produce the parts of the document that are not subject to objection, redacting and clearly indicating the parts of the document that are subject to the objection.

8. Fannie shall produce all documents as they are kept in the usual course of business and label them to correspond to the categories in the request.

9. Except where otherwise specified, the Requests seek documents created on June 30, 2008 or later.

### **REQUESTS FOR PRODUCTION**

**REQUEST NO. 1:** Any and all projections, from June 30, 2008 to the present, including any models relating to those projections. This request includes, but is not limited to, the following:

- a. Projections produced, reviewed, or provided to Fannie in connection with the establishment of the conservatorship;
- b. Projections produced, reviewed, or provided to Fannie in connection with the second amendment to the PSPA;
- c. Projections produced, reviewed, or provided to Fannie in connection with the third amendment to the PSPA;
- d. The projections Fannie routinely prepares and the assumptions, models, data, and analyses relating to those projections, *see* FHFA, Projections of the Enterprises' Financial Performance 14 (Oct. 2011);

- e. Any and all documents relating to the impact that guarantee fee increases would have on Fannie's revenues;
- f. Any and all documents relating to the Periodic Commitment Fee authorized by the PSPA, including without limitation the costs Fannie was expected to incur in paying the Periodic Commitment Fee;

**RESPONSE:**

**REQUEST NO. 2:** Any and all documents relating to Fannie's decision to consent to the conservatorship.

**RESPONSE:**

**REQUEST NO. 3:** Any and all documents relating to the decision to leave Fannie's existing capital structure in place during the conservatorship.

**RESPONSE:**

**REQUEST NO. 4:** Any and all documents relating to the decision to award Treasury warrants to purchase 79.9% of Fannie's common stock.

**RESPONSE:**

**REQUEST NO. 5:** Any and all documents relating to any valuations of Treasury's warrants to purchase Fannie's common stock.

**RESPONSE:**

**REQUEST NO. 6:** Any and all documents relating to Government Stock dividends, including without limitation: the Fannie Board of Directors' decision to declare cash dividends on the Government Stock when doing so necessitated making additional draws on Treasury's funding commitment; any consideration of Fannie's authority under the provisions of the PSPA that permitted Fannie to add Government Stock dividends to Treasury's liquidation preference rather than paying those dividends in cash; and authorizations to declare dividends during the conservatorships pursuant to 12 C.F.R. § 1237.12.

**RESPONSE:**

**REQUEST NO. 7:** Any and all documents relating to whether and under what circumstances Fannie could buy back the Government Stock or otherwise reduce the size of the Government Stock's liquidation preference.

**RESPONSE:**

**REQUEST NO. 8:** Any and all documents relating to any policy or commitment adopted or executed by Fannie or by the Government to ensure that Fannie's private shareholders would not have access to positive earnings from Fannie.

**RESPONSE:**

**REQUEST NO. 9:** Any and all documents reflecting communications relating to the Net Worth Sweep and/or to how and when the conservatorship will end between Fannie, its directors, and/or its officers, and:

- a. Treasury and/or FHFA;
- b. Fannie's auditors;
- c. Rating agencies or other market analysts;
- d. The Federal Home Loan Mortgage Corporation ("Freddie Mac"), its directors, and/or officers.

**RESPONSE:**

**REQUEST NO. 10:** Any and all documents relating to the Government's policies to reduce Fannie's role in the mortgage market and to wind Fannie down, including the impact of those policies on Fannie's profitability.

**RESPONSE:**

**REQUEST NO. 11:** Any and all documents relating to when and how the conservatorship will end and what role Fannie will have in the mortgage market after the conservatorship ends.

**RESPONSE:**

**REQUEST NO. 12:** Any and all documents relating to the steps Fannie or the United States has taken to ensure that potentially relevant evidence is not destroyed during the pendency of this action.

**RESPONSE:**

Date: May 5, 2014

Respectfully submitted,

/s/ Vincent J. Colatriano  
Vincent J. Colatriano  
*Counsel of Record for Plaintiffs*  
COOPER & KIRK, PLLC  
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(202) 220-9600  
(202) 220-9601 (fax)

# **EXHIBIT C**

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

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

**FEDERAL NATIONAL MORTGAGE ASSOCIATION’S RESPONSE  
TO PLAINTIFFS’ SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR  
OBJECTS OR TO PERMIT INSPECTION OF PREMISES**

Pursuant to Rule 45(c)(2)(B) of the Rules of the United States Court of Federal Claims (RCFC), the Federal National Mortgage Association (“Fannie Mae”) objects as follows to the May 5, 2014 subpoena to produce documents, information, or objects or to permit inspection of premises served by Fairholme Funds, Inc., et al. (“Fairholme”). This response should not be construed as an admission that involving Fannie Mae in this litigation at this stage—or any future stage for that matter—is permissible or appropriate.

**GENERAL OBJECTIONS**

Fannie Mae asserts and incorporates by reference the following general and categorical objections to Fairholme’s requests for production as if they were set forth in full response to each request.

1. Fannie Mae objects to the requests to the extent that they seek discovery beyond the three discrete subjects identified by the Court in its February 26, 2014 order permitting limited discovery.

2. Fannie Mae objects to the requests on the ground that they are premature. Many of the documents plaintiffs ask Fannie Mae to produce are in the possession of the Federal

Housing Finance Agency (“FHFA”) and may be produced as a result of the discovery requests already served on the United States.

3. Fannie Mae objects to the requests as duplicative, overly broad, and unduly burdensome as they seek information in the possession of FHFA and the United States Department of Treasury (“Treasury”).

4. Fannie Mae objects to the requests to the extent that they purport to require Fannie Mae to search for documents in the possession of persons or entities outside or other than Fannie Mae. Fannie Mae will not search for such documents.

5. Fannie Mae objects to the requests to the extent that they seek to impose an obligation on Fannie Mae to conduct anything beyond a diligent search of files where responsive documents reasonably would be expected to be found. Fannie Mae will conduct a diligent search for files where responsive documents reasonably would be expected to be found.

6. Fannie Mae objects to the requests to the extent that they seek the production of documents that are protected by the attorney-client privilege, the work-product doctrine, or any other applicable privilege or doctrine. Fannie Mae will not produce privileged or protected documents, materials, or information. Nothing in this response is intended to be a waiver of any of these protections, and Fannie Mae reserves the right to retrieve and to prevent the use of any privileged or protected documents or information inadvertently produced. Moreover, any inadvertent production of privileged or protected documents, materials, or information shall not constitute a waiver of privilege or protection concerning the subject matter of the documents, materials, or information.

7. Fannie Mae objects to the requests to the extent that any inference can be drawn from the requests or responses, that the documents requested or events referenced actually exist

or occurred, or are relevant, non-privileged, or admissible in evidence. The failure to object to each such inference in no way constitutes an admission that such information exists or that such events actually occurred, or that any statement or characterization in the request is accurate or complete.

8. Fannie Mae objects to the requests to the extent they seek information regarding claims not within the jurisdiction of the Court.

9. Fannie Mae objects to the requests to the extent that they seek documents that are available to the public or are already in the possession, custody, or control of plaintiffs, readily available to plaintiffs, or attainable by plaintiffs through public sources, on the ground that the requests are overbroad and unduly burdensome.

10. Fannie Mae objects to the requests to the extent they seek any discovery that restrains or affects the exercise of the powers and functions of FHFA as Conservator for Fannie Mae and is, therefore, barred by 12 U.S.C. § 4617(f).

11. Fannie Mae objects to the requests to the extent that they do not include reasonable restrictions regarding time or scope. Fannie Mae will search for and produce documents from the time periods that are relevant to subjects identified in the Court's February 26, 2014 order, as described in responses to specific requests.

12. Fannie Mae objects to the requests to the extent that the term "relating to" does not identify documents with reasonable specificity.

13. Fannie Mae objects to the requests to the extent they seek production of any emails from custodians beyond those whom plaintiffs identified as "key custodians" in its April 16, 2014 letter to the government regarding email searches.

14. Fannie Mae objects to the requests to the extent they seek proprietary, confidential, or sensitive information.

15. Fannie Mae's responses and objections are based upon present knowledge of, and information provided to, counsel. We reserve the right at any time to revise, supplement, correct, or add to these responses and objections.

**OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS**

1. Fannie Mae objects to the definitions and instructions included with Fairholme's requests as vague and ambiguous.

2. Fannie Mae objects to the definitions and instructions included with Fairholme's requests to the extent they purport to impose requirements beyond those in the RCFC and the Court's February 26, 2014 order.

3. Fannie Mae objects to Fairholme's definitions of the terms "communication," "document(s)," "person," "models," "profitability," "projections," and the phrase "relate to" to the extent that these definitions render the requests overbroad, unduly burdensome, or ambiguous.

4. Fannie Mae objects to paragraph 18 of the definitions to the extent it includes "agents, representatives and attorneys" as overbroad, unduly burdensome, or vague and ambiguous.

5. Fannie Mae objects to Fairholme's instructions to the extent they contemplate the production of documents not in Fannie Mae's actual possession and control.

6. Fannie Mae objects to Instruction No. 3 to the extent it includes "attorneys."

7. Fannie Mae objects to Fairholme's instruction to "explain in as much detail as possible" the basis for any objection on grounds of burdensomeness. Fannie Mae will provide a reasonable explanation for its objections.

8. Fannie Mae objects to Fairholme's definitions and instructions to the extent that they fail to accurately and completely characterize known terms and events. The failure to object to each use of such terms and events in no way constitutes an admission that any statement or characterization in the request is accurate or complete.

### **SPECIFIC OBJECTIONS AND RESPONSES**

Fannie Mae's objections stated above are hereby incorporated by reference into each response to a request for documents, and may not be repeated as objections to each request to which they are applicable. In addition to the above objections, Fannie Mae asserts the specific objections stated below. By stating further specific objections below, Fannie Mae does not waive any of the objections incorporated herein.

**REQUEST NO. 1:** Any and all projections, from June 30, 2008 to the present, including any models relating to those projections. This request includes, but is not limited to, the following:

- a. Projections produced, reviewed, or provided to Fannie in connection with the establishment of the conservatorship;
- b. Projections produced, reviewed, or provided to Fannie in connection with the second amendment to the PSPA;
- c. Projections produced, reviewed, or provided to Fannie in connection with the third amendment to the PSPA;
- d. The projections Fannie routinely prepares and the assumptions, models, data, and analyses relating to those projections, *see* FHFA, Projections of the Enterprises' Financial Performance 14 (Oct. 2011);

e. Any and all documents relating to the impact that guarantee fee increases would have on Fannie's revenues;

f. Any and all documents relating to the Periodic Commitment Fee authorized by the PSPA, including without limitation the costs Fannie was expected to incur in paying the Periodic Commitment Fee;

**RESPONSE:**

Fannie Mae objects to the request on the grounds that it seeks discovery beyond the scope of the Court's February 26, 2014 order permitting limited discovery on three discrete subjects. This request impermissibly seeks documents from June 30, 2008 to the present, encompassing time periods beyond that contemplated by the limited discovery identified by the Court. Fannie Mae objects to the request as lacking reasonable limitations on time and scope.

Fannie Mae further objects to the request because it is vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence, particularly with regard to the terms such as "models," "projections," "impact," "in connection with," "routinely prepares," and "data and analyses." Terms and phrases such as "models" and "projections" are extremely broad and—although it is impossible to determine the scope of the request as currently formulated—arguably could refer to any number of calculations on any subject. Moreover, Fannie Mae generates numerous calculations on any number of subjects in the normal course of business, using numerous methods of analysis. Identifying and producing all such calculations or methods of analysis that might be deemed a form of "projection" or "model" would be extraordinarily burdensome on Fannie Mae.

Subject to and without waiving the foregoing general and specific objections, Fannie Mae states that it will produce financial updates provided to Fannie Mae's Board of Directors for the period of June through August 2012, to the extent those documents are not in FHFA's or Treasury's possession.

**REQUEST NO. 2:** Any and all documents relating to Fannie’s decision to consent to the conservatorship.

**RESPONSE:**

Fannie Mae objects to the request on the ground that it seeks discovery beyond the scope of the Court’s February 26, 2014 order permitting limited discovery. Fannie Mae’s “decision to consent to the conservatorship” is not one of the topics authorized for discovery. Fannie Mae further objects to the request because it is vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Given the foregoing general and specific objections, Fannie Mae will not produce documents in response to this request.

**REQUEST NO. 3:** Any and all documents relating to the decision to leave Fannie’s existing capital structure in place during the conservatorship.

**RESPONSE:**

Fannie Mae objects to the request on the ground that it seeks discovery beyond the scope of the Court’s February 26, 2014 order permitting limited discovery. Fannie Mae further objects to the request because it is vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Given the foregoing general and specific objections, Fannie Mae will not produce documents in response to this request.

**REQUEST NO. 4:** Any and all documents relating to the decision to award Treasury warrants to purchase 79.9% of Fannie’s common stock.

**RESPONSE:**

Fannie Mae objects to the request on the ground that it seeks discovery beyond the scope of the Court's February 26, 2014 order permitting limited discovery. Fannie Mae further objects to the request because it is vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Given the foregoing general and specific objections, Fannie Mae will not produce documents in response to this request.

**REQUEST NO. 5:** Any and all documents relating to any valuations of Treasury's warrants to purchase Fannie's common stock.

**RESPONSE:**

Fannie Mae objects to the request on the ground that it seeks discovery beyond the scope of the Court's February 26, 2014 order permitting limited discovery. Fannie Mae further objects to the request because it is vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Given the foregoing general and specific objections, Fannie Mae will not produce documents in response to this request.

**REQUEST NO. 6:** Any and all documents relating to Government Stock dividends, including without limitation: the Fannie Board of Directors' decision to declare cash dividends on the Government Stock when doing so necessitated making additional draws on Treasury's funding commitment; any consideration of Fannie's authority under the provisions of the PSPA that permitted Fannie to add Government Stock dividends to Treasury's liquidation preference rather than paying those dividends in cash; and authorizations to declare dividends during the conservatorships pursuant to 12 C.F.R. § 1237.12.

**RESPONSE:**

Fannie Mae objects to the request on the ground that it seeks discovery beyond the scope of the Court's February 26, 2014 order permitting limited discovery. Fannie Mae further objects to the request because it is vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Given the foregoing general and specific objections, Fannie Mae will not produce documents in response to this request.

**REQUEST NO. 7:** Any and all documents relating to whether and under what circumstances Fannie could buy back the Government Stock or otherwise reduce the size of the Government Stock's liquidation preference.

**RESPONSE:**

Fannie Mae objects to the request on the ground that it seeks discovery beyond the scope of the Court's February 26, 2014 order permitting limited discovery. Fannie Mae further objects to the request because it is vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Given the foregoing general and specific objections, Fannie Mae will not produce documents in response to this request.

**REQUEST NO. 8:** Any and all documents relating to any policy or commitment adopted or executed by Fannie or by the Government to ensure that Fannie's private shareholders would not have access to positive earnings from Fannie.

**RESPONSE:**

Fannie Mae objects to the request on the ground that it seeks discovery beyond the scope of the Court's February 26, 2014 order permitting limited discovery. Fannie Mae further objects

to the request because it is vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Given the foregoing general and specific objections, Fannie Mae will not produce documents in response to this request.

**REQUEST NO. 9:** Any and all documents reflecting communications relating to the Net Worth Sweep and/or to how and when the conservatorship will end between Fannie, its directors, and/or its officers, and:

- a. Treasury and/or FHFA;
- b. Fannie's auditors;
- c. Rating agencies or other market analysts;
- d. The Federal Home Loan Mortgage Corporation ("Freddie Mac"), its directors, and/or officers.

**RESPONSE:**

Fannie Mae objects to the request on the ground that it seeks discovery beyond the scope of the Court's February 26, 2014 order permitting limited discovery. Fannie Mae further objects to the request because it is vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing general and specific objections, Fannie Mae will produce documents, if any, reflecting execution of the Third Amendment to the Senior Preferred Stock Purchase Agreement to the extent those documents are not in FHFA's or Treasury's possession.

**REQUEST NO. 10:** Any and all documents relating to the Government's policies to reduce Fannie's role in the mortgage market and to wind Fannie down, including the impact of those policies on Fannie's profitability.

**RESPONSE:**

Fannie Mae objects to the request on the ground that it seeks discovery beyond the scope of the Court's February 26, 2014 order permitting limited discovery. Fannie Mae further objects to the request because it is vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Fannie Mae objects to the use of the term "impact" as vague and ambiguous.

Given the foregoing general and specific objections, Fannie Mae will not produce documents in response to this request.

**REQUEST NO. 11:** Any and all documents relating to when and how the conservatorship will end and what role Fannie will have in the mortgage market after the conservatorship ends.

**RESPONSE:**

Fannie Mae objects to the request on the ground that it seeks discovery beyond the scope of the Court's February 26, 2014 order permitting limited discovery. Fannie Mae further objects to this request on the grounds that Fannie Mae is unaware of "when and how the conservatorship will end" and what Fannie Mae's post-conservatorship "role . . . in the mortgage market" will be; any documents responsive to this request are in the possession of FHFA or Treasury.

Fannie Mae further objects to the request to the extent it seeks the production of privileged material.

Fannie Mae further objects to the request because it is vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Given the foregoing general and specific objections, Fannie Mae will not produce documents in response to this request.

**REQUEST NO. 12:** Any and all documents relating to the steps Fannie or the United States has taken to ensure that potentially relevant evidence is not destroyed during the pendency of this action.

**RESPONSE:**

Fannie Mae objects to the request on the ground that it seeks discovery beyond the scope of the Court's February 26, 2014 order permitting limited discovery.

Fannie Mae further objects to this request on the basis that it seeks information irrelevant to the issues being litigated in this case, and is beyond the scope of the obligations imposed under the RCFC.

Fannie Mae further objects to this request because it calls for privileged information, such as that protected by the attorney client privilege and the work product doctrine, and because it is unduly burdensome and not likely to lead to the discovery of admissible evidence.

Given the foregoing general and specific objections, Fannie Mae will not produce documents in response to this request.

/s/ Paul D. Clement  
Paul D. Clement  
D. Zachary Hudson  
Bancroft PLLC  
1919 M St. NW  
Suite 470  
Washington, DC 20036  
(202) 234-0090  
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May 23, 2014

# **EXHIBIT D**

FORM 6B  
SUBPOENA TO TESTIFY AT A DEPOSITION OR TO PRODUCE DOCUMENTS

**United States Court of Federal Claims**

Fairholme Funds, Inc., et al.,  
\_\_\_\_\_  
\_\_\_\_\_

vs.

No. 13-465C

THE UNITED STATES

**SUBPOENA TO TESTIFY AT A DEPOSITION  
AND TO PRODUCE DOCUMENTS**

To: Susan McFarland  
162 W. Shore Drive  
Montgomery, TX 77356

**Testimony:** **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in the above-captioned case. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: <u>DoubleTree by Hilton</u> <u>8181 Airport Blvd.</u> <u>Houston, TX 77061</u>	Date and Time: <u>June 8, 2015</u> <u>9:30 AM</u>
---	--

The deposition will be recorded by this method: Stenographic means

**Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

The provisions of RCFC 45(d), relating to your protection as a person subject to a subpoena, and RCFC 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: \_\_\_\_\_

CLERK OF COURT

OR

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

\_\_\_\_\_  
*Attorney's signature*

NOTE - If the person served is neither a party nor a party's officer and the place of travel is more than 100 miles (by the shortest usual means of travel) from the place where the subpoena is served, or if the place of the hearing or trial is more than 100 miles from the place where the person served resides, is employed, or transacts business in person, the person served may file a motion to quash the subpoena pursuant to RCFC 45(d)(3) unless there is attached to the subpoena an order of the court requiring his/her appearance notwithstanding the distance of travel. In any event, response to the subpoena will entitle the person to the fees and mileage allowed by law. (28 U.S.C. §1821)

The name, address, telephone number, and e-mail of the attorney representing *(name of party)* Fairholme Funds, Inc., et al. \_\_\_\_\_, who issues or requests this subpoena, are: Vincent J. Colatriano  
1523 New Hampshire Avenue, N.W. Washington, D.C. 20036  
202-220-9656, vcolatriano@cooperkirk.com

**PROOF OF SERVICE**

This subpoena for *(name of individual and title, if any)* \_\_\_\_\_ was received by me on *(date)* \_\_\_\_\_.

I personally served the subpoena on the individual at *(place)* \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I left the subpoena at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_, a person of suitable age and discretion who resides there, on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the subpoena on *(name of individual)* \_\_\_\_\_ who is designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I returned the subpoena unexecuted because \_\_\_\_\_; or

Other *(specify)*:

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of \$ \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding service, etc:

RCFC 45.

**(d) Protecting a Person Subject to a Subpoena; Enforcement.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

**(A) Appearance Not Required.** A person commanded to produce documents, electronically stored information, or

tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

**(B) Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the

earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for an order compelling production or inspection.
  - (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.
- (3) **Quashing or Modifying a Subpoena.**
- (A) **When Required.** On timely motion, the court must quash or modify a subpoena that:
    - (i) fails to allow a reasonable time to comply;
    - (ii) requires a person who is neither a party nor a party's officer to comply beyond the limitations specified in RCFC 45(c);
    - (iii) requires disclosure of privileged or other protected matter, if no exception of waiver applies; or
    - (iv) subjects a person to undue burden.
  - (B) **When Permitted.** To protect a person subject to or affected by a subpoena, the court may, on motion, quash or modify the subpoena if it requires:
    - (i) disclosing a trade secret or other confidential research, development, or commercial information; or
    - (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.
  - (C) **Specifying Conditions as an Alternative.** In the circumstances described in RCFC 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:
    - (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
    - (ii) ensures that the subpoenaed person will be reasonably compensated.
- (e) **Duties in Responding to a Subpoena.**
- (1) **Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:
    - (A) **Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.
    - (B) **Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.
    - (C) **Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.
    - (D) **Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show

that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of RCFC 26(b)(2)(C). The court may specify conditions for the discovery.

(2) **Claiming Privilege or Protection.**

- (A) **Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:
  - (i) expressly make the claim; and
  - (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.
- (B) **Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

\* \* \* \* \*

- (g) **Contempt.** The court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

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

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

**NOTICE OF DEPOSITION OF SUSAN McFARLAND**

PLEASE TAKE NOTICE that pursuant to Rules 26 and 30 of the Rules of the United States Court of Federal Claims, Plaintiffs will depose Susan McFarland by oral examination on June 8, 2015, beginning at 9:30 a.m., before a notary public or other person authorized by law to administer oaths. The deposition will take place at DoubleTree by Hilton, 8181 Airport Blvd., Houston, TX 77061. The deposition will be recorded by stenographic means and will continue from day to day until complete.

Date: May 21, 2015

Respectfully submitted,

s/ Charles J. Cooper  
Charles J. Cooper  
*Counsel of Record for Plaintiffs*  
COOPER & KIRK, PLLC  
1523 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
(202) 220-9600  
(202) 220-9601 (fax)  
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*Of counsel:*

Vincent J. Colatristano

David H. Thompson

Peter A. Patterson

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# **EXHIBIT E**

FORM 6B  
SUBPOENA TO TESTIFY AT A DEPOSITION OR TO PRODUCE DOCUMENTS

**United States Court of Federal Claims**

Fairholme Funds, Inc., et al.,  
\_\_\_\_\_  
\_\_\_\_\_

vs.

No. 13-465C

THE UNITED STATES

**SUBPOENA TO TESTIFY AT A DEPOSITION  
AND TO PRODUCE DOCUMENTS**

To: Egbert Perry  
60 Piedmont Ave. NE  
Atlanta, GA 30303

**Testimony:** YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in the above-captioned case. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: <u>Regus - City View</u> <u>3330 Cumberland Blvd., Suite 500</u> <u>Atlanta, GA 30339</u>	Date and Time: <u>June 16, 2015</u> <u>9:30 AM</u>
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The deposition will be recorded by this method: Stenographic means

**Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

The provisions of RCFC 45(d), relating to your protection as a person subject to a subpoena, and RCFC 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: \_\_\_\_\_

CLERK OF COURT

OR

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

\_\_\_\_\_  
*Attorney's signature*

NOTE - If the person served is neither a party nor a party's officer and the place of travel is more than 100 miles (by the shortest usual means of travel) from the place where the subpoena is served, or if the place of the hearing or trial is more than 100 miles from the place where the person served resides, is employed, or transacts business in person, the person served may file a motion to quash the subpoena pursuant to RCFC 45(d)(3) unless there is attached to the subpoena an order of the court requiring his/her appearance notwithstanding the distance of travel. In any event, response to the subpoena will entitle the person to the fees and mileage allowed by law. (28 U.S.C. §1821)

The name, address, telephone number, and e-mail of the attorney representing (name of party) Fairholme Funds, Inc., et al. \_\_\_\_\_, who issues or requests this subpoena, are: Vincent J. Colatriano  
1523 New Hampshire Avenue, N.W. Washington, D.C. 20036  
202-220-9656, vcolatriano@cooperkirk.com

**PROOF OF SERVICE**

This subpoena for (name of individual and title, if any) \_\_\_\_\_ was received by me on (date) \_\_\_\_\_.

I personally served the subpoena on the individual at (place) \_\_\_\_\_ on (date) \_\_\_\_\_; or

I left the subpoena at the individual's residence or usual place of abode with (name) \_\_\_\_\_, a person of suitable age and discretion who resides there, on (date) \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the subpoena on (name of individual) \_\_\_\_\_ who is designated by law to accept service of process on behalf of (name of organization) \_\_\_\_\_ on (date) \_\_\_\_\_; or

I returned the subpoena unexecuted because \_\_\_\_\_; or

Other (specify):

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of \$ \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding service, etc:

RCFC 45.

**(d) Protecting a Person Subject to a Subpoena; Enforcement.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

**(A) Appearance Not Required.** A person commanded to produce documents, electronically stored information, or

tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

**(B) Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the

earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

**(A) When Required.** On timely motion, the court must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person who is neither a party nor a party's officer to comply beyond the limitations specified in RCFC 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception of waiver applies; or
- (iv) subjects a person to undue burden.

**(B) When Permitted.** To protect a person subject to or affected by a subpoena, the court may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or
- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

**(C) Specifying Conditions as an Alternative.** In the circumstances described in RCFC 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

**(1) Producing Documents or Electronically Stored Information.**

These procedures apply to producing documents or electronically stored information:

**(A) Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

**(B) Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

**(C) Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

**(D) Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show

that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of RCFC 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

**(A) Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

**(B) Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

\* \* \* \* \*

**(g) Contempt.** The court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

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

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

**NOTICE OF DEPOSITION OF EGBERT PERRY**

PLEASE TAKE NOTICE that pursuant to Rules 26 and 30 of the Rules of the United States Court of Federal Claims, Plaintiffs will depose Egbert Perry by oral examination on June 16, 2015, beginning at 9:30 a.m., before a notary public or other person authorized by law to administer oaths. The deposition will take place at Regus-City View, 3330 Cumberland Blvd., Suite 500, Atlanta, GA 30339. The deposition will be recorded by stenographic means and will continue from day to day until complete.

Date: May 21, 2015

Respectfully submitted,

s/ Charles J. Cooper  
Charles J. Cooper  
*Counsel of Record for Plaintiffs*  
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# **EXHIBIT F**

**REDACTED**

# **EXHIBIT G**

**REDACTED**

# **EXHIBIT H**

**Zac Hudson**

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**From:** Vince Colatriano <vcolatriano@cooperkirk.com>  
**Sent:** Saturday, May 30, 2015 2:58 PM  
**To:** Zac Hudson  
**Cc:** David Thompson  
**Subject:** Fairholme -- McFarland and Perry depositions

Zac –

Good afternoon. In light of our discussion yesterday regarding the fact that June 24 no longer works on your end for the McFarland deposition but that the week of June 29 does work, we would like to reschedule that deposition for July 1.

In addition, I wanted to memorialize the arrangement we discussed yesterday to, as you put it, “hit the pause button” on the parties’ potential dispute regarding the Perry deposition. Specifically, (1) we agree that we will not depose Mr. Perry on the noticed date (June 16) and will wait to see how other depositions go before making a final decision on whether we need to depose him; (2) you agree that Fannie will not file a motion to quash the subpoena unless and until we inform you that we have made a final decision to take Mr. Perry’s deposition; and (3) we agree that if we do decide to take Mr. Perry’s deposition, we will give Fannie sufficient time (at least two weeks) to move to quash the subpoena.

I would appreciate it if, when you have a chance, you could shoot me an email letting me know whether this arrangement is acceptable to Fannie. And please let me know if you have any questions.

Thanks very much, and enjoy the rest of your weekend.

Vince

Vincent J. Colatriano  
Cooper & Kirk, PLLC  
1523 New Hampshire Ave., NW  
Washington, D.C. 20036  
www.cooperkirk.com

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maintain its contents in confidence in order to preserve any attorney-client or work product privilege that may be available to protect confidentiality.