UNITED STATES OF AMERICA
OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT

Notice Number 2006-1

In The Matter Of:	)
FRANKLIN D. RAINES	)
J. TIMOTHY HOWARD	)
LEANNE G. SPENCER	)

DECISION OF DIRECTOR JAMES B. LOCKHART III IN RESPONSE TO RESPONDENTS' REQUESTS FOR RECUSAL

In response to Respondents' requests for my recusal, which requests were referred to me by United States Administrative Law Judge Moran, I have fully considered the requests and the following sets out my decision.

BACKGROUND

On July 17, 2003, the Office of Federal Housing Enterprise Oversight (OFHEO) opened a Special Examination (Special Exam) of the government sponsored enterprise known as Fannie Mae pursuant to its authority under the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 12 U.S.C § 4501 et seq. On September 17, 2004, OFHEO issued a preliminary report on the findings of that Special Exam. OFHEO released the final Special Exam Report on Fannie Mae (Special Exam Report) on May 23, 2006.

I, the undersigned, James B. Lockhart III, Director of OFHEO, was appointed Acting Director of OFHEO on April 29, 2006, and nominated by the President to be

Director. Following my U.S. Senate confirmation on June 15, 2006 and appointment by the President on June 23, 2006, I was sworn in as Director of OFHEO on June 26, 2006.

On December 18, 2006, OFHEO filed a Notice of Charges against Mr. Franklin D. Raines, Mr. J. Timothy Howard, and Ms. Leanne G. Spencer in the above captioned matter. The same day OFHEO requested the Office of Personnel Management (OPM) to assign an Administrative Law Judge (ALJ) to preside in this matter. OPM assigned ALJ William B. Moran from the Environmental Protection Agency. ALJ Moran has set the hearing for the Notice of Charges for March 18, 2008.

By letter dated December 18, 2006 (Downey December 18 letter), Mr. Kevin M. Downey of Williams & Connolly LLP wrote to me on behalf of his client, Respondent Raines. In that letter Mr. Downey demanded that I remove myself immediately and completely from any further regulatory action affecting Mr. Raines. He also asked that I enter a temporary order effecting the remedies sought so that Mr. Raines and the other Respondents may challenge that order in U.S. District Court for the District of Columbia, under 12 U.S.C. § 4632. Mr. Downey followed the Downey December 18 letter with another letter dated January 12, 2007 (Downey January 12 letter) in which he submitted an affidavit (Downey Aff.) and accompanying exhibits regarding my alleged bias and why I should recuse myself from the role of deciding official in this enforcement proceeding.

By letter dated January 12, 2007 (Krakoff January 12 letter), Mr. David S. Krakoff of Mayer, Brown, Rowe & Maw LLP, on behalf of Respondent Spencer, demanded that I remove myself from this matter. Next, Mr. Steven M. Salky of Zuckerman Spaeder LLP, on behalf of Respondent Howard by letter of January 18, 2007

(Salky January 18 letter) requested that I recuse myself from any proceeding against Mr. Howard. The Salky January 18 letter also adopts arguments submitted by the Downey December 18 letter and the Downey and Krakoff January 12 letters as well as Mr. Howard's Motion to Require the Director of OFHEO to Pursue His Notice of Charges against Mr. Howard in the United States District Court for the District of Columbia (Howard Motion).

Mr. Krakoff submitted an affidavit dated January 24, 2007 (Krakoff Aff.) with exhibits pursuant to The Administrative Procedure Act, (APA) 5 U.S.C. 556(b), in support of his demand that I recuse myself and also stated in a cover letter of the same date that he intended to petition the U.S. Court of Appeals for the District of Columbia for a writ of mandamus disqualifying me if I did not recuse myself by January 29, 2007. Neither Mr. Salky nor Mr. Howard have submitted an affidavit on behalf of Mr. Howard. OFHEO has not filed in this forum any substantive response to the letters and affidavits seeking my recusal.

On February 7, 2007, OFHEO filed a Motion for Referral to the Director moving to refer the Downey Aff. on behalf of Mr. Raines and the Krakoff Aff. on behalf of Ms. Spencer to me for consideration. ALJ Moran signed an order on February 13, 2007, directing that the letters from Respondents Raines and Spencer seeking my recusal be referred to me.

Both Mr. Raines and Ms. Spencer have filed writs of mandamus with the Court of Appeals for the D.C. Circuit to which OFHEO through counsel has responded. As of this writing, the Court of Appeals has not issued a decision.

DISCUSSION

Procedural Prerequisite

Under the APA, the proper procedure to request the presiding employee to disqualify himself is to submit a timely and sufficient affidavit of personal bias or other disqualification. 5 U.S.C. § 556(b). I find that Respondents Raines and Spencer have met this procedural requirement.

Neither Respondent Howard nor his counsel has submitted the required affidavit. Instead, Mr. Howard's counsel requested in the Salky January 18 letter to adopt the arguments of Respondents Raines and Spencer as well as the arguments made in the Howard Motion. Mr. Howard raises several arguments in that motion, in addition to arguments regarding my alleged bias. Because Mr. Howard did not submit an affidavit in the administrative matter as required by the APA at 5 U.S.C. § 556(b), and because I do not find that the adoption of facts and arguments constitutes a sufficient affidavit under the APA, I am not obliged to address any of the arguments he made in a motion before the U.S. District Court. Nevertheless, for the sake of equity and completeness, I have addressed the facts and arguments in the Howard Motion with regard to my alleged bias.

Legal Standards for Recusal of Decision Maker

Respondents allege that statements I made in the course of performing my duties prior to the hearing of this matter show that I have prejudged the outcome. They allege that I am therefore unfit to perform my role as an unbiased decision maker after the hearing. The Respondents further allege that my failure to recuse myself is tantamount to an unconstitutional denial of due process of law.

The ostensible conflict Respondents claim disqualifies me as decision maker is simply the nature of administrative law. Respondents have the burden to prove their claims of unconstitutional bias. Withrow v. Larkin, 421 U.S. 35, 47, 52 (1975). "The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication . . . must overcome a presumption of honesty and integrity in those serving as adjudicators . . . ." Id. at 47. The burden of proof in establishing a disqualifying interest lies with the party making the assertion. Schweiker v. McClure, 456 U.S. 188, 196 (1982). Courts have recognized situations in which there is a significant risk of bias in the decision maker such as where he has a pecuniary interest in the outcome, or where the decision maker has been the target of personal abuse or criticism from a party before him. Withrow, 421 U.S. at 47. See also, Amos Treat & Co. v. SEC, 306 F.2d 260, 267 (D.C. Cir. 1962) (member of an investigative or prosecuting staff may not participate in decision making as well); Trans World Airlines v. Civil Aeronautics Board, 254 F.2d 90, 91 (D.C. Cir. 1958) (one who has appeared on behalf of a party to the litigation cannot later participate in decision making process). However, Respondents do not raise the kind of allegations recognized by these cases. Rather, Respondents claim that I am biased because I have prejudged this case. For evidence Respondents rely primarily on statements I have made to Congress and to the press.

The test for disqualification of a decision maker is to determine whether the decision maker was "not capable of judging a particular controversy fairly on the basis of its own circumstances." Hortonville Joint School District v. Hortonville Educational Association, 426 U.S. 482, 493 (1976)(citations omitted); United States v. Morgan, 313

U.S. 409, 421 (1941); NEC Corp. v. United States, 151 F.3d 1361, 1373 (Fed. Cir. 1998); Bender v. Dudas, 2006 WL 89831, *15 (D.D.C. Jan. 13, 2006) (No. Civ. A. 04-1301). The Supreme Court has stated this test can be met by showing the decision maker's mind is "irrevocably closed." FTC v. Cement Institute, 333 U.S. 683, 701 (1948); see also Bender v. Dudas, 2006 WL 89831 at *15 (citing FTC v. Cement Institute). While agency officials are required to consider objectively all evidence in good faith, they need not be subjectively impartial. Carolina Environmental Study Group v. United States Atomic Energy Comm'n, 510 F.2d 796, 801 (D.C. Cir. 1975).

In Cinderella Career and Finishing Schools Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970) the Court of Appeals for the District of Columbia Circuit described the test as whether a "disinterested observer may conclude that the decision maker has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[1] Id. at 591.

All three Respondents cite Cinderella, in which the Court decided the decision maker should have recused himself based in part, on a speech he made, as precedent for my own recusal. However, the facts in that case bear no resemblance to the record in this matter and merit some discussion. In Cinderella, the Federal Trade Commission (FTC) brought an action against the Cinderella School for claims of unfair and deceptive advertising. A full record was developed and a hearing examiner held a series of

[1] The standard of review in the Court of Appeals for the District of Columbia Circuit is significantly higher. The Court of Appeals will overturn an adjudicator's decision not to recuse "only where he has demonstrably made up his mind about important and specific factual questions and is impervious to contrary evidence." Power v. Federal Labor Relations Authority, 146 F.3d 995, 1001-1002 (D.C. Cir. 1998) quoting Metropolitan Counsel of NAACP Branches v. FCC, 466 F.3d 1154, 1164-65 (D.C. Cir. 1995). The Court of Appeals reviews such a decision under the deferential abuse of discretion standard. Metropolitan Counsel, 466 F.3d at 1165. See also 32 Charles Alan Wright and Arthur R. Miller Federal Practice and Procedure § 8258 (2007) (citing Power and noting that courts are loath to review decisions of the agency and therefore the standard is substantial).

hearings and wrote a lengthy opinion dismissing the charges. Complaint counsel appealed the decision to the full Commission, which reversed the hearing examiner in large part and entered an order against the Cinderella school. The Cinderella school appealed to the Court of Appeals. Cinderella, 425 F.2d at 584.

The first distinction between Cinderella and the circumstances before me is the timing of the allegations of bias. The Court of Appeals reviewed the record developed and compared the merits of the case to the actual decision of the allegedly biased official. It is certainly easier to identify bias after a decision has been made. In the above captioned matter, the parties have not yet developed a full record, nor is there any preliminary decision by the ALJ as hearing examiner. The allegations of bias at this juncture in the proceeding are merely speculation about what I might do, unlike in Cinderella, where the decision was based on what the decision maker did do.

The second distinction is that the decision makers in Cinderella made it clear that they were defying the procedural requirements of their review of the hearing examiner's decision by stating that they would not even consider certain evidence, and that they were reviewing other evidence de novo rather than evaluating whether the hearing examiner's decision was supported by the record. Id. at 585.

The third distinction is that the FTC chairman in Cinderella made the speech at issue at the exact time the decision was before him. In this matter, the decision will not be before me until 2008. In the interim, the Respondents will no doubt present evidence in their defense for the ALJ and then for me to consider.

The last and most significant distinction is the troublesome history of the chairman in Cinderella. In addition to the decision in Cinderella, the Court of Appeals

for the District of Columbia Circuit previously ruled that the chairman should have recused himself in another matter, Texaco v. FTC, 336 F.2d 754 (D.C. Cir. 1964). Two years later the Court of Appeals for the Sixth Circuit also ruled that the same chairman should have recused himself in yet another matter. American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966). Thus, before the Cinderella decision, the same chairman had disregarded the standards and decisions of two different courts. Cinderella, 425 F.2d at 591 (expressing the hope that this is the last time the Court has to "travel this wearisome road"). Therefore, the Cinderella case is an example of the extreme circumstances necessary to justify disqualifying a decision maker based on bias. Such circumstances do not exist in this matter.

I note that the Respondents also claim that I was able to "hand-pick" the ALJ who will preside over the hearing. Krakoff Aff. ¶ 12; Howard Motion n. 7. This is a misunderstanding of my power. OFHEO requested OPM to assign an ALJ for this enforcement proceeding. As the request letter that is part of the record in this matter shows, OFHEO did not ask for any particular ALJ. I had no influence whatsoever over which ALJ OPM assigned.

Response to Alleged Bias Presented by Respondents

The Respondents have raised several different statements I have made to support their allegations of bias. I have considered all of the arguments raised. A discussion of the allegations follow.

Statements to Congress

All three Respondents cite a June 6, 2006 prepared statement to Congress in which I was called to describe the results of the Special Exam. Downey Aff. ¶ 17.c.; Krakoff Aff. ¶ 14; Howard Motion at 6. The prepared statement was a description of what the Special Exam uncovered at Fannie Mae based on the information I knew at the time. That statement did not reflect a prejudging of the above captioned case, which had not yet been filed.

Mr. Howard also includes a quote from my testimony before the Senate Committee on Banking, Housing and Urban Affairs on June 15, 2006, to show that I am biased: " '[t]o me, it's not just accounting fraud here. This is mismanagement of the company.' " Howard Motion at 6. In response, first, in connection with both statements I was obliged to appear before Congress. Second, as a witness at a Congressional hearing I was also bound to tell the truth when asked by Senator Martinez about management at Fannie Mae. See OFHEO's Report of the Special Examination of Fannie Mae: Hearing Before the S. Committee on Banking, Housing and Urban Affairs, 109th Cong. 82-84 (2006) (providing the full context for the remark). Third, I qualified the statements as my opinion which shows that I do not consider it to be irrefutable truth, merely what I had reason to believe based on the findings of the Special Exam Report. Last, at that hearing I was seated next to SEC Chairman Christopher Cox and made this remark after Chairman Cox testified about Fannie Mae's accounting fraud. In addition, Senator Martinez used the term "accounting fraud" in his questions to me at that hearing. Taken in this context, my use of the term fraud is neither remarkable nor evidence of bias.

The fact that I expressed an opinion prior to the hearing and presentation of evidence by both sides does not disqualify me as decision maker. FTC v. Cement Institute, 333 U.S. at 700-701; Carolina Environmental Study Group, 510 F.2d at 801. The Supreme Court has expressly stated that the fact that decision makers have entertained views as a result of ex parte investigations that preceded the hearing of a matter does not mean that their minds are irrevocably closed on the subject. FTC v. Cement Institute, at 701. The Court went on to note that if opinions expressed in Congressionally mandated reports disqualified agency officials from acting on prohibited practices, then the purpose of Congress in creating the agency and its laws would be frustrated. Id. at 702.

Public Speech

The Krakoff Affidavit and the Howard Motion also reference my remarks to the American Enterprise Institute, a private, non-partisan, not-for-profit organization, on September 13, 2006. Krakoff Aff. ¶ 16; Howard Motion at 6. I said that we need to send a strong message about mismanagement and, as the SEC says it – fraud committed by the former management.' " It is very clear from the quote that my use of the word "fraud" is a reference to the SEC's label for the behavior. As with the other instances cited by Respondents in their affidavits, I do not believe my statement overcomes the presumption that I will be able to consider all the evidence in the matter before me, or that it shows that my mind is irrevocably closed to evidence that will be presented. As the District of Columbia Circuit has noted, "contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate so long as they do

not frustrate judicial review or raise serious questions of fairness." Louisiana Assoc. of Independent Producers and Royalty Owners v. FERC, 958 F.2d 1101, 1113 (D.C. Cir. 1992).

Statements to the Press

The Respondents point to various statements I have made to the press regarding the Special Exam Report and Notice of Charges as evidence of prejudgment and bias throughout their affidavits. Many of the statements quoted by Respondents represent only my descriptions of the charges, not my opinion. They are not examples of prejudgment, but examples of factual recitations of agency findings which gave OFHEO reason to believe further action was necessary. In Cinderella the court noted that agencies acting in the public interest have a duty to alert the public when they have reason to believe respondents have violated the law and that these types of press releases do not justify disqualifying the decision maker. Cinderella, 425 F.2d at 590. In those statements where I expressed an opinion or position, such statements are not enough to disqualify me as decision maker. Withrow, 421 U.S. at 50 ("We cannot say that the mere fact that a tribunal has . . . taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing."). Indeed,

> officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.

United States v. Morgan, 313 U.S. 409, 421 (1941). Specific examples of the Respondent's arguments with respect to statements that I have made follow.

The Downey and Krakoff Affidavits point to two different May 23, 2006 press releases accompanying the Special Exam Report in which I described its contents. Downey Aff. Ex. 8; Krakoff ¶ 8. The Special Exam Report did make the findings described in those OFHEO press releases. As Director, the law allows me to express the opinion that Fannie Mae management undermined internal controls and manipulated earnings. Cement Inst., 333 U.S. at 702-703 (observing that judges express opinions about what conduct is and is not lawful before sitting in judgment and often decide the same case more than once).

The Downey Affidavit and the Howard Motion use a December 18, 2006 press release as an example of my alleged bias by quoting paragraphs of the press release starting with, " '[t]he Notice of Charges details the harm to Fannie Mae resulting from the conduct of these individuals from 1998 to 2004. The 101 charges reveal how the individuals improperly manipulated earnings to maximize bonuses . . . . The Notice explains how they submitted six years of misleading and inaccurate accounting statements . . . .' " Krakoff Aff. ¶ 17; Downey Aff. ¶ 17.d; Howard Motion at 6. However, it is evident from the wording of the press release that it is meant as a summary of the charges, not necessarily my own opinion. It is in the nature of running a federal regulatory agency that one must sometimes litigate suspected infringement of the laws one is charged to enforce. If the head of the agency did not believe there was good cause to bring the charges, he or she would be acting in bad faith. Whether there is a good faith belief at the onset of enforcement proceedings is a very different question from the one

that will be before me in a year's time. The nature of a notice of charges is that the charges have not yet been proven. Many documents will change hands between OFHEO and the Respondents and evidence will be presented to ALJ Moran before I am asked to review his decision. The fact that I allowed the enforcement action to go forward does not mean that I have prejudged the outcome and will not be able to review the evidence presented without bias.

Similarly, a quote from an article in the New York Times, December 19, 2006, used in the Howard Motion and the Krakoff Affidavit, is that, "we believed as an agency that these three individuals, separately and together, did serious harm . . . ." and that there is a long list of charges that show harm done. Krakoff Aff. ¶ 18; Howard Motion at 7. The statement is not one of fact, but a statement of belief in fact. Without a good faith belief in some wrong doing there would be no reason for OFHEO to have brought charges. This statement, like the others, does not foreclose the possibility of fairly considering contrary evidence.

The Krakoff Affidavit cites a December 7, 2006 article in the Washington Post that appeared shortly after OFHEO announced that it would be filing an enforcement action against the Respondents. I was quoted in the article as saying that the Respondents, " 'grossly mismanaged' Fannie Mae, 'underspent dramatically on systems, internal controls, risk management – all the good building blocks of a good corporation' and went 'beyond mismanagement to manipulate earnings.' " Krakoff Aff. ¶ 13. The quoted words represent an explanation of why OFHEO chose to file charges. As Director of OFHEO, I am responsible for enforcing the law regarding the safety and soundness of the government sponsored enterprises that OFHEO regulates. 12 U.S.C. § 4513. I am

therefore called upon to express opinions about whether certain activities violate that law or not. Expressing such an opinion does not disqualify me from my role as decision maker after a hearing of the matter. The Supreme Court has noted that even a federal judge would not be disqualified in such an instance and that heads of agencies have a lower burden to meet than federal judges. Withrow, 421 U.S. at 48; Carolina Environmental Study Group, 510 F.2d at 801.

Mr. Krakoff also relies on stories in the press that quote me from a conference call with the press on the day OFHEO filed the charges. Krakoff Aff. ¶¶ 19-20. In one instance I am describing the charges that were filed including OFHEO's allegation that the Respondents knowingly neglected accounting systems and internal controls, and in the other I am describing the role of OFHEO as a regulator, that we had no choice but to file these charges and that we have to send a message that the kind of activities alleged in the charges will not be tolerated. See Cement Inst., 333 U.S. at 702-703 (finding that expressions of what behavior is not legal is not a bar to decision making in the adjudicatory process). Neither of these statements proves that I would be unable to judge this case fairly after being presented with a complete record.

The Downey Affidavit posits that statements I made during my appearance on the Jim Lehrer Online News Hour are examples of my prejudgment and bias. I stated that the $52 million dollars in bonuses that Mr. Raines received was fraudulently attained; but as my words make clear, I was quoting the SEC: " 'they were basically fraudulently attained, as the SEC said today.' " Downey Aff. ¶ 17.a. In that same example I stated regarding disgorgement of that salary: " 'If the company fails, we will do it.' " Id. That

factual statement of OFHEO's intent does not overcome the presumption that I will be able to review the ALJ decision with honesty and integrity and with an open mind.

Exhibit 20 to the Downey Affidavit is an article from Mortgage Banking titled "The New OFHEO Chief." I was quoted from an interview as expressing my preliminary opinion that " 'in my view,' " Fannie was mismanaged to be able to maximize bonuses. As noted above, the law does not prohibit me from expressing an opinion. A decision maker can both hold and publicly express strong views and those views do not make him unfit as a decision maker. Morgan 313 U.S. at 421. In addition, the fact that I added the qualifier "in my view" means that I recognized then, as I do now, that my opinion is not an absolute truth. My mind is not irrevocably closed. Mr. Downey does not include the hypothetical question that preceded the second part of the excerpt he used. I was asked "[i]f it proves true, that's criminal, right?" That question preceded my answer, " '[t]he SEC says its [sic] fraud and I cannot disagree with them.' " Downey Aff. Ex. 20 at 2. The interviewer was seeking the expertise of a regulator and I provided it. Because my statement was a response to a hypothetical question, the statement does not speak directly to the prejudgment and bias alleged by Respondents.

The Howard Motion uses three examples from my appearance on C-SPAN, May 23, 2006, the day of the press conference announcing the final Special Exam Report.[2] Each of these three examples represents my description of the content of the report, or evidence uncovered during the examination. However, even if these remarks did

[2] " 'When things went bad they did some accounting t[r]icks . . . . But the whole story here was there was incredible arrogance, unethical activity, by the senior management and in particular this report talks about Franklin Raines and the CFO but also many other people in the organization.' " Howard Motion at 5. " 'As you will read in the Special Examination Report, senior Fannie Mae executives were precisely managing earnings . . . .' " Howard Motion at 5. " 'Actually their actions were much more much worse than foolish, they were flat-out wrong. Or to use the proper regulatory phrase, they were managing Fannie Mae in an unsafe and unsound manner.' " Howard Motion at 6.

represent my opinion, that does not show that my mind is closed to any new evidence. Withrow, 421 U.S. at 47.

A quote from the day the Notice of Charges was issued, December 18, 2006, cited by the Howard Motion and the Krakoff Affidavit, contains my statement that we have no choice but to send a message to management that this kind of activity cannot be allowed.[3] The import of this quote actually contradicts the assertion of bias. Implied in this quote is that whether or not "this kind of activity" did actually take place, OFHEO as a regulator needs to send a message that it cannot be allowed. This quote specifically leaves open the possibility that this kind of activity did not take place.

Other Allegations

The Respondents make other allegations that, upon my full consideration, are not relevant to their request that I recuse myself. Examples follow.

The Downey Affidavit stated that the Notice of Charges in this matter contradict the 2003 OFHEO Report to Congress, Downey Aff. ¶ 4, and that the Special Exam Report mentioned Mr. Raines only eight times compared to others who were mentioned more extensively but not named in the Notice of Charges. Downey Aff. ¶ 5. The Downey Affidavit also claims that the consent decree entered into between OFHEO and Fannie Mae is unfair because Mr. Raines did not get notice that Fannie Mae was agreeing that Mr. Raines would no longer work for Fannie. Downey Aff. ¶¶ 15-16. None of these points is relevant to whether I have prejudged the outcome of the matter or am biased.

[3] " 'This activity was so unsafe and unsound that we have to take this action. We have no choice, really. We have to send a message to the management . . . both present and previous, that this kind of activity cannot be allowed.' " Krakoff Aff. ¶ 20; Howard Motion at 7.

Mr. Downey argues that differences in the Special Exam Report and the report commissioned by Fannie Mae and authored by Warren Rudman (Rudman Report) prove my inability to fairly decide this matter. Downey Aff. ¶¶ 7-11, 14. The differences do not prove that I have prejudged the facts and law in this case. First, the Special Exam was completed before I started as Acting Director of OFHEO in April 2006. I did not draft the Special Exam Report. Rather, the OFHEO staff members who were familiar with the evidence drafted it. The substance of the report was also completed before I began at OFHEO. Only editing remained to be done before its release in May. Second, using the same evidence of differences between the Rudman Report and the OFHEO Report, one could just as easily conclude that the authors of the Rudman Report were biased. Arguably, because Fannie Mae was paying for the Rudman Report, those who worked on it had an actual predisposition to favor Fannie Mae. Nevertheless, the differences between these two reports are not relevant to whether I should be disqualified as decision maker.

Mr. Downey further asserts that I have used the alleged malfeasance of the Respondents as a means to further my legislative agenda. Downey Aff. ¶ 18. I note that most of the legislative provisions regarding the government sponsored enterprises pending in Congress do not concern matters of alleged mismanagement of Fannie Mae. Further, whether or not true, pushing or not pushing a legislative agenda is not relevant to whether I am able to consider evidence in an enforcement proceeding with an open mind. This claim I also find irrelevant to the issue of my recusal.

Mr. Downey and Mr. Krakoff also make reference to the partial conclusion of the Department of Housing and Urban Development Inspector General Report (IG Report)

that OFHEO as an agency was biased against Fannie Mae and Mr. Raines. Downey Aff. ¶ 19; Krakoff Aff. ¶¶ 3, 23-27. I was not employed at OFHEO in 2004 when the IG Report was issued, so that report is irrelevant to the matter of my recusal. Mr. Krakoff also cites the analysis of the Washington Post, the New York Times, and a professor at the University of Texas Law School about why OFHEO brought these charges. Krakoff Aff. ¶ 22. The opinions of these third party commentators are not pertinent to my alleged bias.

CONCLUSION

I have carefully considered all the evidence and arguments raised by all three Respondents as well as the relevant law on the subject and I am satisfied that I should not be disqualified as the decision maker in this matter. None of the statements used by Respondents, as discussed above, has overcome the presumption of my integrity and honesty by showing that I have prejudged the factual or legal issues of this case or that my mind is irrevocably closed. Schweiker, 456 U.S. at 195; Withrow, 421 U.S. at 47; Morgan, 313 U.S. at 421. For instance, none of the evidence the Respondents offer has any bearing on whether I have formed a conclusion about the legal issues of whether the Respondents failed to ensure proper documentation for debt buybacks (Notice of Charges- Fourth Claim) or whether Respondents caused inaccurate minimum capital reports to be submitted to OFHEO in 1999 (Notice of Charges- Thirty-Seventh Claim) or whether Respondents failed to correct Fannie Mae's accounting policies, practices and systems with respect to dollar roll accounting (Notice of Charges- Eighty-Eighth Claim) or any of the dozens of other charges of the 101 alleged in the Notice of Charges. See

Lead Industries Ass'n v. EPA, 647 F.2d 1130, 1178 (D.C. Cir.) cert denied, 449 U.S. 1042 (1980) (holding in part that decision maker could not be disqualified because there was no evidence that he had prejudged any of the legal questions in a rulemaking). Respondents have offered no evidence that I have prejudged either the facts or the law involved in this case. They therefore have not met the burden set out in Cinderella to show both. Cinderella, 425 F.2d at 591.

Furthermore, the Respondents cannot have evidence of actual bias because I have not yet made a decision. ALJ Moran has not made a recommended decision or forwarded the record, and will not do so until after the hearing of the matter on March 18, 2008. Thus, the claims of bias are speculative at this juncture. Indeed, when I do receive the recommended decision of ALJ Moran, I am not at liberty to dismiss it or ignore evidence or the factual determinations of the ALJ who was present at the live testimony of witnesses. Id. at 587-588.

Moreover, having reflected on my statements regarding Respondents' management of Fannie Mae I believe that I have acted and spoken with the single intent of ensuring the safety and soundness of that government sponsored enterprise and without any animus towards Respondents or prejudgment of the legal and factual questions which ALJ Moran will eventually forward to me. I am capable of judging this matter with honesty and integrity based on the specific evidence and law in the record that will be developed.

For the foregoing reasons, after giving full consideration to the arguments of the Respondents, I conclude that neither the facts nor the law support Respondents' arguments that I have prejudged the above captioned matter or that I am predisposed to

rule against them. A disinterested observer would not conclude that I had prejudged the facts and the law of this case or that my mind is irrevocably closed. Therefore, I decline to recuse myself. This decision shall be made a part of the record in this matter.

James B. Lockhart III
Director,
Office of Federal Housing Enterprise Oversight

Dated: April 5, 2007