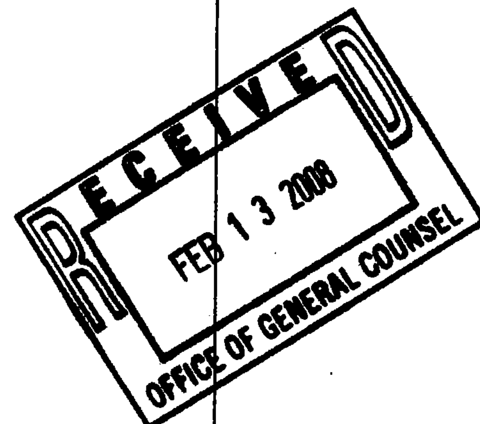
UNITED STATES OF AMERICA
OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT

In the Matters of)
)
Franklin D. Raines)
) Notice No. 2006-1
J. Timothy Howard)
)
Leanne G. Spencer)
)
)
Respondents.)



Order on OFHEO's Motion for a Protective Order and Respondent Spencer's Motion to Compel Production of Documents

On July 16, 2007 OFHEO filed a Motion for a Protective Order to preclude the Respondents from seeking unreasonable, oppressive, and unduly burdensome discovery regarding irrelevant evidence of OFHEO conduct ("Motion"). In issuing this Order[1] the Court considered the Motion, Respondent Spencer's Opposition to the Motion,[2] Respondent Howard's Response to OFHEO's Motion, Respondent Raines's Response to OFHEO's Motion, OFHEO's Reply in Support of its Motion, and Respondent Spencer's Sur-Reply to the Motion.[3]

The terms of the protective order sought by OFHEO would provide "that the Respondents, Franklin D. Raines, J. Timothy Howard, and Leanne G. Spencer, are precluded from seeking further discovery from OFHEO with respect to the conduct of OFHEO's examinations of Fannie Mae." Motion at 1, 17 and draft Order accompanying Motion.

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[1]The delay in issuing this Order stems from a Court-permitted four-month hiatus in these proceedings which came about because the parties wanted an opportunity to explore settlement. As that effort was not fruitful, the case was recently returned to an active litigation status.

[2]Within the same document, Respondent Spencer included her Motion to Compel Production of Documents but this is simply another way to express, in the obverse, that OFHEO's Motion should be denied. Denial of OFHEO's Motion would in effect be an affirmation of Spencer's Motion that the documents should be produced.

[3]In considering Respondent Spencer's Sur-Reply, the Court grants Spencer's Motion for leave to file a Sur-Reply. In the future, any party seeking to file a sur-reply should file only the motion seeking leave to file one. No sur-reply should be submitted until after the Court rules favorably on the motion seeking permission to file it. **As a separate procedural matter, the Court requests that all future filings include a CD copy and that the CD be in a format that allows the Court to cut and paste from that CD so that the Court can easily use passages from submissions in any Order that may ensue from such filings. Floppy discs have proven to be too temperamental for reliable use by the Court. The parties should check to make sure that the submitted CD version is functional and not inadvertently blank.**

OFHEO presents two bases for its Motion: there was an agreement between the parties to use the documents produced *In re Fannie Mae Securities Litigation*, Civ. No. 1:04-cv-01639 (D.D.C.)(the "MDL" [multi-district litigation]); and, the information sought relates to the conduct of OFHEO's examinations, which information has no material relevance to this action and is merely an attempt to "shift responsibility" from the Respondents' conduct in order to place the blame upon OFHEO. Motion at 1. OFHEO states that, through the MDL, Respondents have received "over 20 million pages" of documents but, despite that, they now seek additional electronically stored information ("ESI"). This, they contend, does not involve relevant matters, as it relates to "internal communications and documents concerning how OFHEO conducted its examinations." *Id.* at 2. Given that OFHEO required more than a month to gather the ESI it agreed to provide from the ten originally named custodians, (i.e. ten identified agency employees), the new demand for ESI from "at least 33 additional custodians" will add three months' time to produce the new information. Thus, OFHEO objects both because of the last minute demand for a large amount of information and because that information is irrelevant and inadmissible in any event. *Id.* at 3.

OFHEO relates that back in January of 2007 the Respondents made similar discovery requests for information regarding OFHEO's conduct of its examinations of Fannie Mae, and OFHEO objected to those requests, with the parties reaching the accommodation[4] that the MDL documents would be used in this litigation. Indeed, OFHEO asserts that Raines agreed that the MDL documents would suffice and, it notes, neither Spencer nor Howard objected to this.[5] Instead, Spencer waited until June 25, 2007 to make the new demands just before the discovery deadline of July 16, 2007. In short, OFHEO states that it never would have agreed to the irrelevant information sought from the original 10 custodians, but did so with the understanding that providing that information would draw the curtain on the discovery of what it still believed to be a request for the irrelevant. OFHEO takes note that the Court has ruled, in a similarly-based action involving Freddie Mac, that "OFHEO's examinations 'are not at issue in [that] enforcement action,'" and that it invited a motion *in limine* on that issue. *Id.* at 12. So too, OFHEO contends that, in this proceeding, involving former officers and directors at Fannie Mae who are facing similar charges, OFHEO's conduct is not the issue. *Id.* The Court agrees.[6] Accordingly, the Court reaches the same conclusion in this proceeding as in the Freddie Mac matter over which it presided. As OFHEO aptly expresses it, "the Respondents should be judged on the basis of their own conduct and omissions, and not pursuant to OFHEO's examinations of Fannie Mae." *Id.* at 15.

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[4]It is worth noting that the Court never had to add its imprimatur to this arrangement, as the parties apparently worked out that discovery dispute without the Court's intervention.

[5]OFHEO also notes that, per the Court's June 27, 2007 Order Regarding OFHEO's Motion to Strike or Limit Discovery Requests from Respondents, only request Number 20 and "a handful of other documents" remained to be produced to satisfy the Respondents' discovery requests. *Id.* at 6.

[6]As OFHEO notes, its duties are to the public, not to the "officers and directors of [the] institutions [those officers and directors] oversee." Motion at 12- 15. (citations omitted)

Apart from whether Respondent Spencer, or either of the other Respondents, retreated from a previous agreement as to the scope of discovery, OFHEO notes that, per 12 C.F.R. § 1780.26(b), the production of documents that are not materially relevant are to be denied or modified.[7]

The two-page Response by Howard's Counsel contends that, as to Howard, the Motion should be denied because Howard "does not seek a separate production of documents in this case" other than "that which OFHEO has produced, continues to produce, and is obligated to produce in the MDL litigation." Howard Response at 2 and 1. However, Howard, apparently weighing in on the merits of Spencer's Opposition to OFHEO's Motion, and effectively wanting it both ways, then adds that it "disputes OFHEO's contention that Ms. Spencer is not entitled to the discovery she seeks, as well as the characterizations and legal arguments OFHEO advances in support of that contention." *Id.* at 2.

Raines, through his Counsel, offers a similarly brief Response, asserting that Raines "has not sought in this administrative proceeding the 'further discovery' that OFHEO seeks to prohibit . . . and does not seek any ESI [electronically stored information] beyond what OFHEO is obligated to produce in the MDL." Raines Response at 1, 2.

Respondent Spencer's Opposition to OFHEO's Motion asserts that she has never "asked for a single page more [of document requests] than she originally requested on January 8, 2007." Opposition at 2. Acknowledging that OFHEO contends that its production in the MDL litigation also satisfies the discovery requests in this administrative litigation, Spencer responds that its document requests are "broader than the subpoenas issued in the MDL" and, even if such discovery constituted compliance, OFHEO has "emphatically not complied with those subpoenas." Spencer Response at 2. Spencer reminds that "[b]asic principles of fairness and due process . . . requires the agency to produce all relevant documents within its possession." *Id.*

As related by Spencer's Counsel, in the back and forth surrounding Spencer's request for production of documents, it sent OFHEO a letter "identifying the custodians counsel viewed as most likely to possess critical documents."[8] *Id.* at 6. Further, from Spencer's perspective, it is OFHEO, not Respondent Spencer, who waited until the last minute to raise objections.

To OFHEO's claim that the MDL production and the ESI for the ten identified custodians satisfies the document requests in this action, Spencer maintains that claim is false and that any agreement OFHEO may have reached with Raines' Counsel has no impact on Spencer's document requests. *Id.* at 9. Beyond that, Spencer states that the agreement to accept "documents already produced in the MDL" was never intended to limit her discovery to that and that OFHEO always remained obligated to produce "all non-privileged documents . . . ." *Id.* at 10. Spencer

[7]The same provision allows that discovery requests which are excessive in scope, unduly burdensome or oppressive, or otherwise unreasonable, must be denied or modified. This is accomplished through the issuance of a protective order.

[8]Although Spencer's Opposition does not identify the date of its letter in response to OFHEO, it would appear to be Exhibit 3, dated June 25, 2007, which is one of the attachments to its Opposition. That letter lists thirteen custodians, some of which are specifically named, and others among the thirteen, who are named either specifically or generally, along with a request for any other individuals occupying a particular position, but not named.

notes that this action is separate from the MDL (in which OFHEO is a third party) and that document discovery in this administrative proceeding, as the only form of permitted discovery, "assumes a heightened importance." *Id.* at 11. Given the significant amount of money OFHEO is seeking along with other remedies, Spencer emphasizes her right "to defend herself vigorously . . . [a right which includes] granting her access to all relevant non-privileged documents within the agency's possession." The Court agrees with this point, along with Respondent's acknowledgment that irrelevant and privileged information are not part of allowable discovery.

Spencer offers a fundamentally different version of this dispute. By its account, OFHEO was not complying with the MDL, having provided only documents that it stored in paper form, but not those that it stored in electronic form. This deficiency, according to Spencer, was temporarily assuaged by OFHEO's agreement to work with Counsel for Respondent Raines by producing "an initial set of ten document custodians . . . ."[9] Spencer adds that this remains deficient because it does not capture the electronically generated documents.

Beyond these objections, Spencer asserts that certain of its requests are beyond the scope of the MDL information in any event. Spencer asserts that its "Requests No. 32 through 109 seek information that supports or refutes specific allegations in OFHEO's Notice of Charges," citing its request number 35, seeking '[a]ll documents that support or refute the allegation in paragraph 25 of the Notice of Charges that Ms. Spencer 'proposed the deferral' of approximately $200 million of estimated amortization expense from 1998 [and] . . . Request No. 109 [|seeking 'All documents that support or refute the allegation in paragraph 401 of the Notice of Charges that Ms. Spencer 'engage[d] in malfeasance, misfeasance, and nonfeasance that caused and would be likely to cause a significant loss to the Enterprise.'" *Id.* at 14-15. Describing these allegations as differing from the charges in the MDL and directed toward the "very heart of this case," Respondent states that OFHEO must produce all documents responsive to this request. *Id.* at 15. Respondent next identifies its Requests Nos. 18 and 19, with the former seeking "[a]ll documents concerning OFHEO's retention of Deloitte & Touche USA LLP in connection with the Special Examination of Fannie Mae, and the latter also seeking (but without further identification in the Response) "documents concerning Fannie Mae's retention [of the same accounting firm]." *Id.*

Spencer also takes issue with its Requests No. 9 and 23. The former seeks all communications between OFHEO and any individual it interviewed in connection with OFHEO's Special Examination of Fannie Mae. The latter, No. 23, seeks all communications between OFHEO and Fannie Mae in connection with OFHEO's annual examinations of Fannie Mae for the years 1998 through 2004. While Spencer notes that OFHEO asserts that it has provided the information sought in those requests through the MDL supplied documents, it adds that OFHEO

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[9]Spencer concedes that OFHEO did produce the information relating to those ten document custodians. Spencer Response at 13. Although Respondent Spencer then spends time relating its recounting of rulings made by the Honorable Richard Leon in the MDL action, it needs to be highlighted that this Court's rulings are independent of, and not controlled by, that separate matter. The parties may agree or not agree that certain or all documents produced in the MDL proceeding will suffice for discovery in this action brought by OFHEO against Respondents Raines, Howard, and Spencer, but rulings made by another court do not bind the discovery rulings in this distinct administrative action. So too, the Court *rejects* the notion that the Respondents have an unrestricted right to any documents that might ever be produced in the MDL in the future, regardless of whether such documents are materially relevant. Material relevance is the cornerstone of discovery in this proceeding.

has provided nothing to support that claim. Last, also regarding Request 23, Spencer takes issue with what it describes as OFHEO's attempt to characterize its request as seeking communications between OFHEO and its witnesses. Spencer asserts that its request is directed to individuals interviewed by OFHEO during its Special Examination of Fannie Mae, not OFHEO's communications with individuals it may call as witnesses in this administrative litigation. *Id.* at 15-16. The Court, upon consideration of OFHEO's response, views the issues in this paragraph and the paragraph above it, as separate matters which subsequently have been resolved. For example, OFHEO states that it has already supplied this information. If this is not the case, Respondent(s) are directed to file a separate motion confined to those particular requests.

More generally, Spencer objects to OFHEO's contention that the information she seeks is irrelevant as it relates to OFHEO's examinations of Fannie Mae. Spencer counters that OFHEO has failed to connect that assertion to any specific document request she has made, and that OFHEO's underlying objection is that Spencer is simply trying to "'attack Fannie Mae's regulator [OFHEO] in order to negate their own culpability.'" Spencer contends that OFHEO simply "misapprehends" Spencer's actual purpose. In an argument which is quite familiar to the Court, by virtue of the proceeding involving OFHEO and former officers with Freddie Mac, but delivered this time in new wrappings, Spencer states that it wants "OFHEO's annual safety and soundness examinations from 1998-2004 [in order to] provide the historical backdrop against which the Special Examination was conducted." Spencer maintains this is critical in order to "plac[e] in context the findings of the Special Examination, which form the very basis for the allegations in the Notice of Charges." *Id.* at 17. However, once the package was opened, the content found within is no different than the substance of the contention made in the Freddie Mac case, as Spencer admits that at least this aspect of her defense rests on the theory that "OFHEO's consistent approvals of Fannie Mae's policies and practices were consistent with safety and soundness standards." *Id.* at 17.

As all Counsel are well aware, this argument was totally rejected in the *OFHEO v. Brendsel* matter, in which this Court presided. Ms. Spencer will have the opportunity at trial to assert how OFHEO's safety and soundness examinations impacted her state of mind, and OFHEO will have the opportunity through cross-examination to challenge such claims. Because OFHEO is not on trial, its "routine safety and soundness examinations" are not materially relevant to determining whether Spencer acted with knowledge or recklessness. While of course the Court agrees that "[f]undamental principles of due process require that Ms. Spencer receive a full and fair opportunity to investigate and present evidence in support of her [*defense*]" that is not the same as allowing her the opportunity to investigate and present evidence in support of her *defenses*, where a defense rests upon an invalid, and therefore immaterial, theory. Where an aspect of a defense emanates from such an infirm theory, due process does not come into play. Further, while Spencer maintains that the admissibility of such evidence should be determined by the Court "at the appropriate time *after* discovery has been conducted," this ignores that, per 12 C.F.R. § 1780.26, a party may only obtain document discovery for matters "not privileged that [have] material relevance to the merits of the pending action."[10]

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[10]While the Court read and considered the arguments made in Spencer's sur-reply, it is sufficient to state that they did not alter the outcome of this Order. Simply put, the MDL proceeding has no bearing on the rulings this Court makes in this administrative litigation, other than the parties' mutually convenient arrangement that documents supplied through the MDL need not be duplicated and delivered for a second time to the Respondents. Suggestions or beliefs that this proceeding is otherwise joined at the hip to the MDL proceeding are incorrect.

In its Reply[11] OFHEO reiterates that "the additional discovery the Respondents are seeking is simply not relevant to this action because none of it is related to the Respondents' own conduct," and that its decision to provide the emails from the ten custodians identified by Raines was a concession that was made to put an end to that discovery matter, but it did not alter its view that the information remained irrelevant to the claims or defenses in issue.[12] Reply at 2-3.

Thus, OFHEO takes note that after it objected to Spencer's discovery requests, "Raines identified 10 custodians whose responsive emails the Respondents wanted OFHEO to produce," and collectively the Respondents agreed that the emails from those 10 custodians along with the documents OFHEO was producing at that time in the MDL would suffice. Although Raines' Counsel spoke on this matter, counsel for Howard and Spencer were present and said nothing to contradict, supplement or otherwise distinguish their views of this issue from those voiced by Raines' Counsel. Thus, the Court accepts that, in order to put the matter to rest, OFHEO, while not relinquishing its view that documents did not meet the requirement of material relevancy, acceded to the narrowed request for the emails of the 10 custodians. Howard's and Spencer's Counsel had an obligation to speak up at that time if they did not join in the accommodation.[13]

While OFHEO reads Raines' position as suggesting that OFHEO must produce in this administrative litigation any ESI that OFHEO ever produces in the MDL in the future, the Court agrees with OFHEO that both relevance and this Court's Scheduling Order run contrary to such a position. Any other conclusion would result in the very distinct MDL proceeding controlling this proceeding.

Conclusion:

OFHEO has capsulized that "[t]he heart of [its] Motion for a Protective Order is its objections to the production of any documents that relate solely to the conduct of OFHEO's examinations." OFHEO Reply at 8, n. 2. The Court agrees that documents that fit this description are not materially relevant to this proceeding.

OFHEO has advised that the emails for the 10 custodians were produced to the Respondents on May 31, 2007. Consequently Respondents have had over eight months to pour over these documents. This information represents a fair gauge of whether the information sought by the Respondents has produced information which provides a valid, that is a non-infirm, defense or whether it is indicative of a fishing expedition, designed more for tactics than for producing

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[11]OFHEO's Reply also responds to Respondent Spencer's Motion to Compel Production of Documents which, as mentioned, was folded into its opposition to the OFHEO Motion.

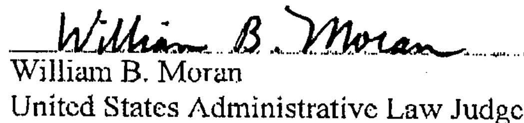
[12]As to Respondents Raines and Howard, OFHEO asserts that they "are themselves trying to recast the original discovery agreement they had made with OFHEO. They claim that they have a right to *any* documents that might ever be produced in the MDL in the future, regardless of the relevance of any such documents to this action. They also propose that this Court must cede to the MDL court the authority to make any discovery rulings here." Reply at 3.

[13]The February 18, 2007 to the AUSA representing OFHEO, while penned by Counsel for Raines, makes it clear that it was on behalf of all three Respondents, as it begins by informing that "*We* write to follow up on our requests for electronically stored information . . . ." Emphasis added.

materially relevant information. Therefore, subject to the Court revisiting this Order upon a renewed motion showing that the emails from the 10 custodians has provided information for a cognizable defense, OFHEO's Motion is GRANTED and Respondent Spencer's Motion is DENIED.

Accordingly, upon consideration of all the filings in connection with OFHEO's Motion for a Protective Order and Respondent Spencer's Motion to Compel Production of Documents, OFHEO's Motion is GRANTED and Respondent Spencer's Motion is DENIED, subject to the Court revisiting this ruling, as described above, if Respondents are able to show that the emails they have received, concerning the 10 custodians, provides information in defense of the charges that is *not* based on an infirm theory. An infirm theory is any one that has as its genesis the notion that OFHEO's actions may be raised as a defense. This is because only the Respondents' conduct is on trial in this proceeding, not the conduct of OFHEO.[14] As the Respondents have been in possession of this information for more than three-quarters of a year, any such submission must be submitted for the Court's consideration within two weeks of this Order. Therefore, consistent with the terms of this Order, it is hereby ORDERED that the Respondents are precluded from seeking further discovery from OFHEO with respect to the conduct of OFHEO's examinations of Fannie Mae.

So Ordered.



William B. Moran
United States Administrative Law Judge

Dated: February 13, 2008
Washington, D.C.

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[14] Any direction Respondents' Counsel may need on this issue may be gleaned from this Court's rulings in the *OFHEO v. Brendsel* matter, about which rulings defense counsel are already keenly aware, as they acted as counsel in the *Brendsel* matter. As in that matter, and as alluded to already, at the hearing Respondents in this matter will have the opportunity to testify how, if at all, various evaluations by OFHEO concerning Fannie Mae influenced their state of mind and informed them as to the propriety of their conduct while serving that enterprise, but Respondents hardly need email messages created by OFHEO personnel to inform them about their particular state of mind as derived from OFHEO statements about Fannie Mae's operations through Special Examinations, copies of which examinations Respondents already have received.

In the Matter of Franklin D. Raines, J. Timothy Howard, Leanne G. Spencer
Notice No. 2006-1

CERTIFICATE OF SERVICE

I certify that the forgoing **Order on OFHEO's Motion for a Protective Order and Respondent Spencer's Motion to Compel Production of Documents**, dated February 13, 2008, was sent this day in the following manner to the addresses listed below.

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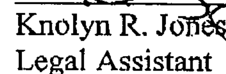

Washington, DC
February 13, 2008

Knolyn R. Jones
Legal Assistant