

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

UNITED STATES OF AMERICA)	
)	
and)	
)	
OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT,)	
)	
Petitioners,)	Misc. No. 03-MC-57
)	
v.)	
)	
LELAND BRENDSEL,)	
)	
Respondent.)	
)	

**PETITIONERS' OPPOSITION TO SUPPLEMENTAL MEMORANDUM
OF LELAND BRENDSEL**

INTRODUCTION

Respondent Leland Brendsel has filed with this Court copies of the Stipulation and Consent to the Issuance of a Consent Order (“Stipulation”) and the Consent Order (“Order”) entered into between the Office of Federal Housing Enterprise Oversight (“OFHEO”) and Federal Home Loan Mortgage Corporation (“Freddie Mac” or “the enterprise”) on December 9, 2003, along with other documents not authorized for filing by the Court. Although the Stipulation and Order resolve any potential enforcement action by OFHEO against Freddie Mac regarding matters occurring prior to the date of the Order, the special examination is nevertheless continuing. Because the Stipulation and Order do not alter the ongoing supervisory nature of the special examination, neither of these documents has any bearing on the pending motion to

enforce the administrative subpoena against Respondent.

Respondent argues that the existence of the Consent Order means that OFHEO has no further authority to take any actions related to information obtained in the course of the special examination. Therefore, Respondent reasons, there is no purpose in having him testify pursuant to the special examination. Respondent is wrong on a myriad of levels. The primary purpose of the special examination is not to spawn enforcement actions, but to ensure the safety and soundness of the enterprise by discovering what policies and practices led to the delay and restatement of earnings and determining how to ensure against such detrimental policies and practices in the future. OFHEO's main goal is to gather information about the systems, controls, decision-making processes, corporate governance structures, weaknesses in accounting practices that led to the delay and restatement of earnings. That information is useful to OFHEO in its role as regulator regardless of whether it takes any further enforcement actions. Resolution of the adjudicative enforcement action against the enterprise in no way relieves OFHEO, as the supervisory agency, from continuing its examination responsibilities; the special examination is not concluded.

Moreover, even if the purpose of the special examination had been to seek enforcement actions, the special examination would not be concluded. OFHEO may still prevent Freddie Mac from doing business with third parties if information gathered in the course of the examination shows that the third parties engaged in inappropriate accounting or other activities, as well as engaging in other regulatory actions towards Freddie Mac short of enforcement proceedings. Furthermore, there is nothing on the face of the Consent Order that suggests that the special examination is over or that prohibits the examination from proceeding in the wide variety of

areas that it is continuing to cover. Thus, yet another of Respondent's excuses to avoid being deposed fails, and this Court should enforce the administrative subpoena.

ARGUMENT

Respondent contends that the Consent Order, which constitutes an agreement between Freddie Mac and OFHEO regarding charges that OFHEO could have brought against Freddie Mac, somehow implicates whether he should be subject to an administrative subpoena as part of the special examination. However, as explained below, the Consent Order does not affect the enforceability of OFHEO's subpoena.

The purpose of the special examination, as has been explained by Mr. Roderer, is to determine the safety and soundness of Freddie Mac. Roderer Decl. ¶¶ 3-5, 30; 2d Roderer Decl. ¶¶ 4, 6. Special examiners are seeking to ascertain which accounting practices that have been used over the last several years need to cease and what changes need to be made at Freddie Mac in order to prevent in the future the sort of delay and restatement of earnings that began in January of 2003 and continues even today. See Roderer Decl. ¶ 4; 2d Roderer Decl. ¶ 4. The overriding purpose of the special examination is not to find individuals and entities to prosecute, although the special examination may in some situations produce evidence that leads to such enforcement actions. 2d Roderer Decl. ¶ 4. Thus, to suggest, as Respondent has, that the special examination is over once possible enforcement actions have been resolved is to completely miss the point of the examination.¹ See Supplemental Memorandum of Leland Brendsel in

¹ Respondent asserts that "OFHEO's examination of the accounting restatement at Freddie Mac (out of which the subpoena arises) has already concluded." Supp. Memo at 1. As Mr. Roderer noted, in a declaration which was written after the Stipulation and Order were signed, the special examination is continuing. 2d Roderer Decl. ¶¶ 3-4. Contrary to

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Opposition to OFHEO's Petition for Summary Enforcement of Administrative Subpoena (hereinafter "Supp. Memo") at 2-7. Even if it were true, which it is not, that there are no further possible enforcement actions for OFHEO to undertake, the special examination would still serve the vital purpose of ascertaining what went wrong in the past and how to fix ongoing problems to prevent them from recurring. This ongoing work into ensuring the continued safety and soundness of the enterprise is OFHEO's basic role as a regulator. See Roderer Decl. ¶ 2; 12 U.S.C. §§ 4501, 4513. That function is not diminished by the existence of enforcement actions or by settlement of potential enforcement actions, be they against Freddie Mac, David Glenn, or other persons or entities.²

As the special examination continues, the possibility exists that other enforcement actions will be filed or supervisory actions taken. For example, if OFHEO should determine that third parties, who are referred to in the Report of the Special Examiners ("Report") as "counter-parties," have failed to abide by proper accounting procedures, OFHEO can order Freddie Mac not to do business or to curtail its dealings with those counter-parties in the future. See 12

¹(...continued)

Respondent's assessment, the special examination is not limited to accounting matters, but extends to broader issues such as the tone at the top, board functions, the role of external auditors, and the role of Freddie Mac's staff at all levels. Id. at ¶ 4; Report of the Special Examiners ("Report") at 163-70 (identifying areas of improvement on a range of matters).

² Respondent claims that Armando Falcon, Jr., the Director of OFHEO, "has made another public statement to the effect that the examination has concluded." Supp. Memo at 2. In fact, however, Director Falcon did not say that the examination had concluded. See Supp. Memo at Exh. A. Nor has there been any previous statement by Director Falcon to the extent that the examination has concluded. Nor does the Report say either that the examination has concluded or that it is a final report on the matter. To the contrary, it specifically notes that the examination is continuing, particularly in the area of counter-parties. See Report at 74.

U.S.C. § 4631.³ The Report specifically recognizes counter-parties as an area where further examination into the past practices of Freddie Mac will be necessary. See Report at 74-82; 2d Roderer Decl. ¶ 4. Further, OFHEO can take action as to any improper activities that are still ongoing. See 12 U.S.C. § 4513. Thus, as part of its special examination, information about past practices would be relevant and useful, even if actions taken during that time period could not be the subject of any future enforcement proceeding. In short, even under Respondent's skewed version of the purpose of the special examination, there would still be reason for the examination to continue, as more enforcement and supervisory actions are possible.

Respondent notes that Mr. Roderer did not inform the Court of the Order in his supplemental declaration. See Supp. Memo at 2. Mr. Roderer did not mention the Order because the settlement is in no way relevant to the administrative subpoena at issue in this case. In addition, Respondent had ample opportunity to present the Consent Order and his arguments pertaining thereto in his Opposition brief, and he did not do so, suggesting that he, also, did not view it as relevant. The Consent Order was signed on December 9, 2003. It was posted on the agency's internet website a day later and widely reported in the newspapers in the days

³ Respondent asserts that the subpoena does not mention third parties or counter-parties and requests that the Court limit the scope of the interview to that subject matter. Supp. Memo at 6 & n.5. While it is true that counter-parties are not specifically mentioned, they are clearly encompassed in the scope of the subpoena. See Ex. 1 to Memorandum of Points and Authorities in Support of Petition for Summary Enforcement of Administrative Subpoena Duces Tecum. Moreover, there is no justification for limiting the scope of the interview. As the safety and soundness regulator, OFHEO is entitled to all of the information that Respondent can provide as to matters relevant to the safety and soundness of Freddie Mac, including all practices, policies, and events leading to the delay and restatement of earnings. OFHEO has need of this information regardless of whether it results in an enforcement action.

immediately following the signing.⁴ See OFHEO's News Center, <http://www.ofheo.gov/News.asp?FormMode=Release&ID=119> (press release describing Order and posting a link to full text of Stipulation and Order). There can be no doubt that Respondent was aware of the settlement prior to filing the Opposition. The Notice of Charges that Respondent discusses extensively in the Opposition was not filed until December 18, 2003, so Respondent clearly had sufficient time to integrate new developments into the Opposition. If Respondent believed that the Order was important to his argument, it was he who erred in not timely informing the Court of its existence, not Petitioners.

Petitioners had no reason to believe that the documents at issue were relevant. Simply put, the Stipulation and Order do not support Respondent's position that his testimony is unnecessary.⁵ Neither document indicates that the special examination is over, nor does either

⁴ See, e.g., "Freddie Mac to Face \$125m in Fine Over Accounts," Financial Times, Dec. 10, 2003, [available at](#) 2003 WL 68496591; "Freddie Mac to Pay 125-Million-Dollar Fine Over Accounting," Agence France Presse, Dec. 10, 2003, [available at](#) 2003 WL 70210831; Patrick Barta & John D. McKinnon, "U.S. Regulator for Freddie Mac Seeks Settlement," Asian Wall Street Journal, Dec. 10, 2003, [available at](#) 2003 WL-WSJA 65019244; David Haffenreffer "Fannie Mac Agrees to Pay Fines In False Accounting Charges," CNNfn: Money & Markets, Dec. 10, 2003, [available at](#) 2003 WL 6958179; "OFHEO Imposes Corrective Actions on Freddie - \$125M Fine," Market News Int'l, Dec. 10, 2003, [available at](#) 2003 WL 69090443; Kathleen Day, "Freddie Agrees To Settle Inquiry For \$125 Million; Civil Fine Ends One U.S. Probe," Wash. Post, Dec. 10, 2003, [available at](#) 2003 WL 67892485; Patrick Barta and John D. McKinnon, "Freddie Mac Gets \$125 Million Fine to Settle Case," Wall Street Journal, Dec. 11, 2003, [available at](#) 2003 WL-WSJ 68130653; Matt Andrejczak, "Freddie Mac Consents to Pay Fine of \$125 Million," The Bradenton Herald, Dec. 11, 2003, [available at](#) 2003 WL 65533536; Jenny Wiggins, "Freddie Mac Fined \$125m," Financial Times, Dec. 11, 2003, [available at](#) 2003 WL 69467246; Thomas A. Fogarty, "Freddie Mac fined \$125M in accounting case; Firm also agrees to structural reforms," USA Today, Dec. 11, 2003, [available at](#) 2003 WL 5325021.

⁵ Respondent claims that the Stipulation and Order give Freddie Mac the right "to estop the Director of OFHEO from taking 'other action' against both Freddie Mac and persons affiliated with it." Supp. Memo at 2, 5 (emphasis added in Supp. Memo). Neither document
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document tie the fate of the special examination to the (now resolved) enforcement action against Freddie Mac. The Stipulation explicitly states that the Order is not intended to interfere with the ongoing regulatory oversight of the enterprise with respect to anything subsequent to the Order or with respect to third parties, including separated senior officers.⁶ Stipulation at Article IV. It is thus clear from the face of the document that the investigation into matters related to the delay and restatement of earnings continues, particularly as to third parties or counter-parties. OFHEO is entitled to whatever information Respondent may have as to transactions with those counter-

⁵(...continued)

contains such a provision. Rather, the settlement provides that Freddie Mac will pay a fine and take corrective actions as laid out in the Order, and OFHEO will not take an enforcement action against Freddie Mac or its current officers or directors. OFHEO is not precluded from exercising its regulatory or supervisory authority over Freddie Mac with regard to events prior to the date of the Order; OFHEO is only precluded from bringing another enforcement action against Freddie Mac based on said prior events. OFHEO is also not precluded from taking action against Freddie Mac with respect to counter-parties. Respondent's assessment that OFHEO's authority is limited to the ability to bring actions against Freddie Mac, officers, and directors ignores OFHEO's ability to act indirectly on third parties by restricting Freddie Mac's ability to do business with them. See Supp. Memo at 4.

⁶ The Order requires Freddie Mac to study, report upon, and reform the past practices, controls, and conditions at Freddie Mac in a number of areas of accounting and corporate governance. Order at ¶¶ 3-4, 6-7, 15-16, 20-21, 24. OFHEO can bring enforcement actions if it determines that Freddie Mac has not fulfilled the conditions of the Order in any of these areas. 12 U.S.C. 4631(a)(3) (providing for cease-and-desist orders for violations of the Director's "order" or any "written agreement entered into by the enterprise with the Director"). Plainly, OFHEO needs to obtain all of the information possible regarding the management and operation of Freddie Mac during Mr. Brendsel's tenure in order to evaluate Freddie Mac's reports and proposed reforms. If OFHEO lacks a sufficient understanding of Freddie Mac's past, it cannot adequately evaluate Freddie Mac's review of its own past practices and its recommendations for reform. It is therefore vital for OFHEO to continue examining the various failures in accounting, controls, and corporate governance, to ensure that they are remedied properly. No one was in a better position to understand these problems at Freddie Mac than Respondent, which is one of the reasons his testimony remains crucial to the ongoing special examination.

parties. OFHEO is also entitled to information relevant to its day-to-day regulation of the enterprise. OFHEO has continually and consistently sought to interview Respondent in its primary role as Freddie Mac's safety and soundness regulator. OFHEO needs to understand current and prior practices of Freddie Mac that may pose a threat to the enterprise, and Respondent is a primary and critical source of information in obtaining that understanding.

Respondent contends that the cooperation provision in the Order does not deal with cooperation for the purposes of the special examination. Supp. Memo at 7-8. Respondent interprets this to mean that the special examination is not ongoing. However, Freddie Mac is always required to cooperate with OFHEO's examinations of it. There is no need to include such a provision in the Consent Order. Further, at the time the Order was written, Freddie Mac had been cooperating with the special examination for six months, and Freddie Mac has continued to cooperate, so there would be no purpose served in including such a provision in the Order. Moreover, the special examination is continuing. 2d Roderer Decl. ¶ 4. The special examiners continue to interview witnesses and to seek additional witnesses. They also continue to receive and review documents. Respondent has not worked for Freddie Mac in more than six months and has no personal knowledge as to whether the examination is continuing. Mr. Roderer, by contrast, is counsel to the special examination. In that position, he has personal knowledge, and he has clearly stated that the examination continues. Id. This Court should accept that sworn testimony.

The special examination is continuing to explore the cause of the restatement and delay of earnings reports and possible changes to be made in the future. Respondent has information critical to allowing the special examiners to reach a complete understanding. That Freddie Mac

and OFHEO have settled charges that could have been brought against Freddie Mac is simply not relevant to OFHEO's need to understand what occurred, nor is it relevant to Respondent's ability to provide such critical information. The subpoena should therefore be enforced against Respondent.⁷

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court enforce the administrative subpoena.

Respectfully submitted,

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⁷ Respondent asks that this Court issue an order preventing the use of testimony given as a result of this subpoena in future proceedings. Supp. Memo at 6 n.5. Respondent offers no authority in support of the position that such an order would be appropriate. Nor does Respondent offer any response to the cases cited in Petitioners' Reply brief noting that such an order is not appropriate because such arguments should be resolved in the future proceedings, if Respondent's testimony is, in fact, utilized in any future proceeding. See Petitioner's Reply at 6 (citing RTC v. Walde, 18 F.3d 943, 950 (D.C. Cir. 1994); Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1518 (D.C. Cir. 1993); Office of Thrift Supervision, Dep't of Treasury v. Dobbs, 931 F.2d 956, 958 (D.C. Cir. 1991)).

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2004, a copy of Petitioners' Reply In Support of Petition for Summary Enforcement of Administrative Subpoena Duces Tecum, was sent by first class mail, postage prepaid, to:

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