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	

RESPONDENT J. TIMOTHY HOWARD'S
MOTION FOR INTERLOCUTORY REVIEW

Respondent J. Timothy Howard respectfully submits this motion for interlocutory review pursuant to 12 C.F.R. § 1780.30. On February 7, 2007, the Presiding Officer denied Respondents' request to set the merits hearing in this proceeding on or before February 16, 2007 or to dismiss the Notice of Charges for failure to comply with the provisions of 12 U.S.C. § 4633.[1] Because the Presiding Officer's reasoning conflicts with the plain language of the statute and the procedural history of the case, the ruling should be reversed and the Notice of Charges should be dismissed.

Interlocutory review is warranted because subsequent modification of the ruling would either provide an inadequate remedy (insofar as the reviewing body ultimately determines that the delay, though violative of statute, cannot be remedied retrospectively) or would cause unusual delay or expense (insofar as the reviewing body dismisses the case after conclusion of the hearing). *See* 12 C.F.R. § 1780.30(b)(3)-(4). Further, the issue involves a controlling

[1] Respondent Franklin D. Raines's Memorandum Concerning the Requirements of 12 U.S.C. § 4633(a)(2) is attached as Exhibit A. Respondent J. Timothy Howard's submission joining the Raines memorandum is attached as Exhibit B, and Respondent Leanne G. Spencer's memorandum is attached as Exhibit C. OFHEO's response is attached as Exhibit D. For the sake of completeness, the transcript of the February 7, 2007 hearing is attached as Exhibit E.

question of law as to which substantial grounds exist for a difference of opinion. *See* 12 C.F.R. § 1780.30(b)(1).[2]

ARGUMENT

The Presiding Officer's ruling violates the plain language of § 4633. This provision provides that the hearing in this proceeding "shall be fixed for a date not earlier than 30 days nor later than 60 days after service of the notice of charges. . ." unless the respondent requests a later date. 12 U.S.C. § 4633(a)(2) (emphasis added). Because the Respondents did not request a later date, this language dictated that the merits hearing begin no later than February 16.

Despite the plain language of § 4633, the Presiding Officer construed the provision to mean that "the scheduling conference, and nothing else, must occur within that 60 day time frame." Ex. E at 10-11 (emphasis added). This interpretation is wrong.

The statute contemplates that the merits hearing – and not just a scheduling conference – must commence within 60 days. The statute as whole, and in particular the relevant subchapter, plainly defines the term "hearing" as the merits hearing, not a mere scheduling conference. Section 4631, for example, provides for a hearing "to determine on the record whether an order to cease and desist from such conduct or violation should issue." 12 U.S.C. § 4631(c). Such a determination can only be made after a hearing on the merits, not at a scheduling hearing. Likewise, § 4636 states that a penalty may be imposed only after the respondent "has been given an opportunity for a hearing on the record pursuant to section 4633. . . ." 12 U.S.C. § 4636(c)(1). This provision too contemplates a hearing on the merits of the charges. There is no basis to give

[2] Upon referral of the matter to the Director for interlocutory review pursuant to 12 C.F.R. § 1780.30(c), Mr. Howard will address the procedure that the Director should follow to assure that the review requested herein is considered by an unbiased decisionmaker other than Director Lockhart and/or his subordinates.

an entirely different meaning to the term "hearing" in § 4633 – especially when that provision explicitly cross-references §§ 4631 and 4636(c).[3]

The Presiding Officer's contrary reading also is inconsistent with OFHEO's Rules of Practice and Procedure. The Rules provide that a scheduling conference must be held "[w]ithin 30 days of service of the notice. . . ." 12 C.F.R. § 1780.33(a) (emphasis added). Thus by definition, the scheduling conference cannot be the hearing that § 4633 dictates must be held "not earlier than 30 days nor later than 60 days after service of the notice of charges." 12 U.S.C. § 4633(a)(2) (emphasis added).[4]

Finally, the case law cited by the Presiding Officer is inapposite. Ex. E at 12-14 (discussing *Brock v. Pierce County*, 476 U.S. 253 (1986) and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993)). Both of these cases involved internal timing requirements governing agency actions vis à vis other government actors. *See Brock*, 476 U.S. at 256 (time limit on final determination following filing of audit report within agency); *Good Real Property*, 510 U.S. at 63 (timing requirements for customs agents to report to customs officers

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[3] Section 4633(a)(2), which imposes timing requirements for "[a]ny such hearing. . .", refers back to § 4633(a)(1). That subsection, in turn, applies to "[a]ny hearing under section 4631 or 4636(c) of this title. . . ." 12 U.S.C. § 4633 (emphasis added).

[4] Contrary to the Presiding Officer's conclusion, enforcing § 4633 as written will not result in an "absurdity." Ex. E at 9. The Presiding Officer assumed that the 60-day period is too short a time for OFHEO to prepare its case, given the number of claims asserted in the Notice of Charges. But OFHEO completed its investigation and finalized its theories months before serving the Notice of Charges. Indeed, OFHEO initiated its Special Examination of Fannie Mae (on which the Notice of Charges is based) in July of 2003, three and a half years before it served the Notice of Charges. In the course of that examination, OFHEO received about 2.8 million pages of hard copy documentation and 4.1 million pages of electronic documentation; as well as more than 700,000 pages of work papers and other documents from various accounting firms. It reviewed memoranda documenting 241 interviews of Fannie Mae employees and third parties conducted by counsel to the Special Review Committee, as well as transcripts of 47 interviews conducted by the SEC. In addition, OFHEO itself conducted 88 interviews of current and former employees, officers and directors of Fannie Mae and employees of KPMG. The agency published two reports summarizing the results of this investigation, each encompassing hundreds of pages.

OFHEO completed this examination in May of 2006 – approximately three years after its inception and more than six months before it issued the Notice of Charges. Thus, enforcing the statutory time limit here would simply require OFHEO to present in a timely fashion the evidence it has been marshalling for more than three and a half years and the theories that it already has reduced to paper in public reports. This certainly would not work an "absurdity."

and for customs officers to report to United States Attorney). Neither case involved requirements relating to the type of adversarial proceeding at issue here, neither concerned timing requirements that expressly confer rights on respondents, and neither involved a request by an individual respondent for prospective rather than remedial relief.

Moreover, *Brock* and *Good Real Property* involved situations in which a subordinate official failed to comply with the time limitation. *See Brock*, 476 U.S. at 256-57; *Good Real Property*, 510 U.S. at 64-65. The Court concluded that errors by such subordinate officials should not strip the agency of its authority to act. Here, by contrast, it is the agency itself that refuses to follow the statutory requirements, even after having received timely notice that Respondents intended to exercise their right to a prompt hearing. In such a circumstance, it would be entirely appropriate for the Presiding Officer to enforce the statutory time limits in a prospective fashion.[5]

[5] The Presiding Officer improperly construed Respondents' discovery requests as a *de facto* waiver of the § 4633 time limitation. Ex. E at 16. There is no statutory support for such a ruling. Nothing in § 4633 or any of the procedural rules suggests that a respondent could implicitly waive the 60-day limit – much less, simply by seeking the discovery to which he is legally entitled. To the extent that OFHEO cannot respond to document requests in a timely fashion notwithstanding its lengthy investigation, it is a problem attributable to OFHEO and OFHEO alone. It most certainly is no basis to imply a waiver by the respondents.

CONCLUSION

For the reasons discussed above, Mr. Howard respectfully requests interlocutory review of the Presiding Officer's ruling and the entry of an order reversing his decision and dismissing the Notice of Charges.

Dated: February 22, 2007

Respectfully submitted,

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(202) 778-1828
Attorneys for J. Timothy Howard

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	

ORDER

Upon review of the Presiding Officer's February 7, 2007 ruling that the merits hearing in this proceeding need not commence within 60 days of service of the Notice of Charges, the ruling is **REVERSED** and the Notice of Charges is **DISMISSED**.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February 2007 I caused to be served by electronic and first-class mail copies of the foregoing on:

David A. Felt, Esq.
Deputy General Counsel
Office of Federal Housing Enterprise Oversight
1700 G Street N.W.
Washington, D.C. 20552

Joseph J. Aronica, Esq.
Duane Morris, LLP
1667 K Street, N.W. Suite 700
Washington, D.C. 20006

Kevin M. Downey, Esq.
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725 Twelfth Street, N.W.
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Washington, D.C. 20006

Caroline E. Reid

EXHIBIT A

UNITED STATES OF AMERICA
OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT

In the Matter of:	
FRANKLIN D. RAINES,	**Notice No. 2006-1**
J. TIMOTHY HOWARD, and	**Judge William B. Moran**
LEANNE G. SPENCER,	
Respondents.	

RESPONDENT FRANKLIN D. RAINES'S MEMORANDUM CONCERNING THE REQUIREMENTS OF 12 U.S.C. § 4633(a)(2)

In response to the Court's invitation at the off-the-record telephonic status conference held on January 31, Respondent Franklin D. Raines respectfully submits this memorandum to set forth the reasons why, pursuant to 12 U.S.C. § 4633(a)(2), the hearing in this matter must commence by February 16, 2007.

The statute requires that the hearing commence within 60 days of the service of the notice of charges unless the respondent requests a later date, which none of the Respondents has done in this case. That the statute imposes such a requirement is not merely Mr. Raines's position. It is what OFHEO itself has recently recognized, in a motion filed in other litigation. In seeking an extension of filing deadlines in an action pending in the U.S. District Court for the District of Columbia, OFHEO urged that it be given additional time because 12 U.S.C. § 4633(a)(2) requires that the hearing in this matter be held within 60 days of December 18, 2006 unless the respondents request a later date. *See* Ex. 1. Directly quoting from the statute, OFHEO specifically stated that the "hearing 'shall be fixed for a date not . . . later than sixty days' after

OFHEO serves the Notice of Charges," and that "[t]he statutorily prescribed time for holding the administrative hearing *only* may be altered 'at the request of the party served.'" *Id.* at 2 (*quoting* 12 U.S.C. § 4633(a)(2)) (emphasis added). As noted, none of the Respondents has requested that the 60-day period be altered. Accordingly, pursuant to the plain language of the statute and pursuant to OFHEO's own recognition that the statute means what it says, the hearing must commence within 60 days of the service of the Notice of Charges, i.e., by February 16, 2007.

BACKGROUND

Following a Special Examination that began three years ago, *see* Declaration of Alex G. Romain, OFHEO filed and served the Notice of Charges on December 18, 2006. The Notice of Charges seeks relief pursuant to 12 U.S.C. §§ 4631 and 4636 and gives notice that a hearing will be held pursuant to 12 U.S.C. § 4633.

On January 17, counsel for Mr. Raines received correspondence from counsel for OFHEO indicating that this Court had been assigned to adjudicate the matter. On January 19, Mr. Raines requested a scheduling conference pursuant to 12 C.F.R. § 1780.33(a) and made clear his position that any hearing must commence by February 16, 2007:

> The hearing in this matter must be fixed for a date not later than sixty days after the service of the notice of charges, unless the party served requests a later date. *See* 12 U.S.C. § 4633(a)(2). We will not, on behalf of Mr. Raines, request a later date. The notice of charges in this matter was served December 18, 2006. Under our reading of the statute, the hearing in this matter must therefore commence by February 16, 2007.

Ex. 2.

On January 24, in a motion filed in a case brought by Respondent Howard in district court, OFHEO itself took note of the mandate of 12 U.S.C. § 4633(a)(2). OFHEO told the court:

> Under the Act, a hearing "shall be fixed for a date not earlier than 30 days nor later than 60 days" after OFHEO serves the Notice of Charges. 12 U.S.C. § 4633(a)(2). *The statutorily prescribed time for holding the administrative hearing only may be altered "at the request of the party served." Id.*

Ex. 1, at 2 (emphasis added).

Despite OFHEO's own acknowledgment that the 60-day period may be altered only at the request of the party served, and despite the fact that none of the Respondents has requested a hearing beyond the 60-day period, earlier this week OFHEO submitted a proposed schedule that contemplates a hearing, at the earliest, *in 2008*. *See* Ex. 3. OFHEO seeks an interval between the notice of charges and the hearing of over a year—*more than six times* the 60-day period prescribed by Congress. OFHEO's submission makes no mention of § 4633(a)(2).

In the off-the-record telephonic status conference held on January 31, the Court questioned whether the requirements of the statute would be satisfied if the scheduling conference were held within 60 days of the Notice of Charges. Counsel for OFHEO took the position that that would satisfy the statute. Counsel for Respondents took the position that it would not. The Court invited the parties to submit memoranda by February 2 setting forth their positions concerning the scheduling of the hearing in this matter.

ARGUMENT

Respondent Franklin D. Raines respectfully submits that the Federal Housing Enterprises Financial Safety and Soundness Act, 12 U.S.C. §§ 4501-4641, entitles him to a hearing, commencing within 60 days of the service of the charges against him, on the merits of the allegations set forth in the Notice of Charges.

As the Supreme Court has recently emphasized, "[w]hen the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2459 (2006) (internal quotation omitted). "'[A]bsent a clearly expressed legislative intention to the contrary,' the words of the statute are conclusive." *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 28 (1989) (*quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *accord, United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" (*quoting Caminetti v. United States*, 242 U.S. 470, 485 (1917))).

The foregoing principle controls the timing of the hearing in this matter.

Three statutory provisions are relevant. The first, 12 U.S.C. § 4631(c)(1), provides:

> Each notice of charges under this section shall contain a statement of the facts constituting the alleged conduct or violation and shall fix a time and place at which a hearing will be held to determine on the record whether an order to cease and desist from such conduct or violation should issue.

The second, 12 U.S.C. § 4636(c)(1), provides in pertinent part:

> The Director shall establish standards and procedures governing the imposition of civil money penalties under subsections (a) and (b) of this section. Such standards and procedures—
>
> . . . .
>
> (B) shall provide for the imposition of a penalty only after the enterprise, executive officer, or director has been given an opportunity for a hearing on the record pursuant to section 4633 of this title; . . . .

The third, 12 U.S.C. § 4633(a), provides in pertinent part:

> (1) Venue and record
>
> Any hearing under section 4631 or 4636(c) of this title shall be held on the record and in the District of Columbia.
>
> (2) Timing
>
> Any such hearing shall be fixed for a date not earlier than 30 days nor later than 60 days after service of the notice of charges under section 4631 of this title or determination to impose a penalty under section 4636 of this title, unless an earlier or a later date is set by the hearing officer at the request of the party served.

In this case, OFHEO has sought relief pursuant to both § 4631 and § 4636. Where OFHEO proceeds under either of those provisions, the timing of a hearing is controlled by § 4633(a)(2). And the meaning of § 4633(a)(2) is plain: A hearing to determine whether to grant the relief sought by OFHEO shall be set for a date between 30 and 60 days after service of the notice of charges, unless the party served requests an earlier or a later date.

In a motion discussing the very Notice of Charges filed in this case, OFHEO itself has recognized that this is what the statute means:

> Under the Act, a hearing "shall be fixed for a date not earlier than 30 days nor later than 60 days" after OFHEO serves the Notice of Charges. 12 U.S.C. § 4633(a)(2). The statutorily prescribed time for holding the administrative hearing only may be altered "at the request of the party served." *Id.*

Ex. 1, at 2.

It is equally clear that neither Mr. Raines nor any of the other Respondents has requested that the hearing commence more than 60 days after December 18.

OFHEO's recent proposal that the hearing be postponed until 2008 is properly construed as a request for a waiver of the requirement that the hearing commence within 60 days of service of the notice of charges. The statute could not be more plain that OFHEO may not compel such a waiver. And Respondents have made clear that they will not provide such waivers.

In the telephonic status conference earlier this week, the Court raised the question whether § 4633(a)(2) can be construed to require only that a scheduling conference be held within 60 days of the service of the Notice of Charges. It is respectfully submitted that that would not be a permissible construction of the statute. By its terms, § 4633(a)(2) addresses when the "hearing" must commence, not the date of any scheduling hearing or conference. Section 4631(c)(1) confirms that the hearing to be held pursuant to that provision is "to determine on the record whether an order" granting the relief sought by OFHEO "should issue," not simply to determine matters relating to scheduling.

Because the statutory language is clear, there is no need to consult anything else. But OFHEO's regulations confirm that a scheduling conference is separate from a hearing and takes place before the hearing:

> Within 30 days of service of the notice or order commencing a proceeding or such other time as the parties may agree, the presiding officer shall direct representatives for all parties to meet with him in person at a specified time and place *prior to the hearing* or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a "scheduling conference." The identification of potential witnesses, the time for and manner of discovery and the exchange of any *prehearing* materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

12 C.F.R. § 1780.33(a) (emphases added). In providing that the scheduling conference shall occur "*prior* to the hearing" (emphasis added), the regulation clearly contemplates that the scheduling conference is an event separate and apart from the hearing. Similarly, in providing that the time for and manner of discovery and the exchange of "*prehearing* materials including witness lists" (emphasis added) may be determined at the scheduling conference, the regulation again clearly contemplates that the status conference is to occur before the hearing and is not part of the hearing.

Thus, it is apparent from both the statute and the regulation that the requirement that the hearing begin within 60 days of the notice of charges is not met merely by holding a scheduling conference within 60 days of the notice of charges. The hearing to determine on the record whether the relief sought in the Notice of Charges will be granted must commence during that period.[1]

[1] In the recent off-the-record telephonic status conference, the Court requested that Respondents submit proposed scheduling orders. Mr. Raines's proposed scheduling order accompanies this Memorandum.

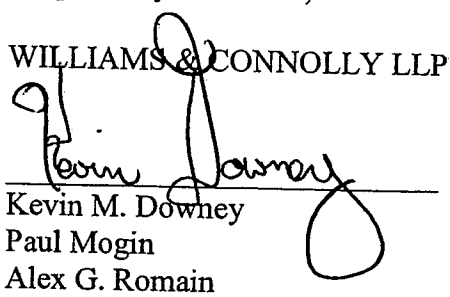
CONCLUSION

For the foregoing reasons, the hearing of this matter should begin by February 16, 2007.

Dated: February 2, 2007

Respectfully submitted,

WILLIAMS & CONNOLLY LLP



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Counsel for Respondent Franklin D. Raines

EXHIBIT B

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

RESPONDENT J. TIMOTHY HOWARD'S SUBMISSION IN ADVANCE OF THE SCHEDULING HEARING TO BE HELD ON FEBRUARY 8, 2007

As undersigned counsel advised this tribunal during an initial off-the-record telephone conference on January 31, 2007, J. Timothy Howard's Motion to Require the Director of OFHEO to Pursue His Motion of Charges Against Mr. Howard in this Court (Miscellaneous Number 07-ms-0020) ("Howard's Motion") is presently pending before the United States District Court for the District of Columbia (the Honorable Richard J. Leon presiding). Howard's Motion, attached hereto as Exhibit 1, seeks an order from the United States District Court compelling the Notice of Charges against Timothy Howard filed by the Director of the Office of Federal Housing Enterprise Oversight ("OFHEO") to be adjudicated in the United States District Court for the District of Columbia and not, as the Notice of Charges seeks, before an administrative tribunal in accordance with the provisions of the Administrative Procedure Act.

Despite the fact that Howard's Motion has been pending since January 12, 2007, OFHEO has not responded to it and instead has requested a lengthy forty-five (45) day extension of time.[1]

Not only is OFHEO dragging its feet in the United States District Court, but the law firm apparently designated by the Director of OFHEO to prosecute the Notice of Charges before this tribunal has refused to commence the hearing "not later than sixty (60) days" after service of the Notice of Charges in accordance with the unequivocal provisions of 12 U.S.C. 4633.[2] Instead, the law firm has submitted a proposed schedule that would have the adjudicatory hearing commence sometime in 2008.

Based on OFHEO's delay in responding to Mr. Howard's Motion and its failure to adhere to the provisions of 12 U.S.C. 4633, the presiding officer should not enter any scheduling order at this time. Rather, the presiding officer should either recommend dismissal of the Notice of Charges for failure of OFHEO to proceed in accordance with 12 U.S.C. 4633 or request Judge Richard Leon to hold a hearing on Mr. Howard's Motion on February 16, 2007.

Dated: 2/2/2007

Respectfully submitted,

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Eric Delinsky
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1800 M Street, N.W.
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(202) 778-1828
Counsel for J. Timothy Howard

[1] Mr. Howard has opposed OFHEO's motion for an extension of time and has requested Judge Leon to hold a hearing on Howard's Motion on February 16, 2007.

[2] We join in the Respondent Franklin D. Raines Memorandum Concerning the Requirements of 12 U.S.C. 4633(a)(2) and will not burden this tribunal by repeating the arguments set forth therein.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February 2007 I caused to be served electronically and by First Class mail, postage prepaid, Respondent J. Timothy Howard's Submission in Advance of the Scheduling Hearing to be Held on February 8, 2007, to the following:

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Deputy General Counsel
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1700 G Street N.W.
Washington, D.C. 20552

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David S. Krakoff. Esq.
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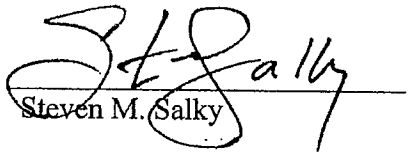
1909 K Street, N.W.
Washington, D.C. 20006



Steven M. Salky

Tab 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J. TIMOTHY HOWARD
8400 Parham Court
McLean, VA 22102,

Plaintiff,

v.

JAMES B. LOCKHART III, in his official capacity as Director of the Office of Federal Housing Enterprise Oversight, an office within the United States Department of Housing And Urban Development
1700 G Street, N.W.
Washington, DC 20552,

Defendant.

CASE NUMBER 1:07MS00020
JUDGE: Richard J. Leon
DECK TYPE: Miscellanous
DATE STAMP: 01/12/2007

J. TIMOTHY HOWARD'S MOTION TO REQUIRE THE DIRECTOR OF OFHEO TO PURSUE HIS NOTICE OF CHARGES AGAINST MR. HOWARD IN THIS COURT

J. Timothy Howard, through counsel, hereby moves pursuant to 12 U.S.C. § 4635(a) for an order requiring the Director of the Office of Federal Housing Enterprise Oversight ("OFHEO") to pursue his Notice of Charges (No. 2006-1) against Mr. Howard in this Court rather than administratively.[1] The grounds for this motion are set forth more fully in the memoranda of law submitted herewith.

Prior to filing this motion, undersigned counsel conferred with in-house counsel at OFHEO via telephone pursuant to Local Rule 7(m) to discuss the issues raised in this motion and the relief sought. The Director opposes the relief sought by this motion.

P.D. Fee 350.00

[1] By separate motion filed this date in *In re Fannie Mae Derivative Litigation*, Civil Action No. 1:04-cv-01783, Mr. Howard has asked this Court to join OFEHO to that action as a necessary party under Fed. R. Civ. P. 19.

A proposed order is attached.

Dated: January 12, 2007

Respectfully submitted,

Steven M. Salky (D.C. Bar No. 360175)
Eric Delinsky (D.C. Bar No. 460958)
Holly A. Pal (D.C. Bar No. 490737)
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Counsel for J. Timothy Howard

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J. TIMOTHY HOWARD
8400 Parham Court
McLean, VA 22102,

Plaintiff,

v.

JAMES B. LOCKHART III, in his official capacity as Director of the Office of Federal Housing Enterprise Oversight, an office within the United States Department of Housing And Urban Development
1700 G Street, N.W.
Washington, DC 20552,

Defendant.

Misc. No. 07-30

MEMORANDUM OF LAW IN SUPPORT OF J. TIMOTHY HOWARD'S MOTION TO REQUIRE THE DIRECTOR OF OFHEO TO PURSUE HIS NOTICE OF CHARGES AGAINST MR. HOWARD IN THIS COURT

On December 18, 2006, the Director of the Office of Federal Housing Enterprise Oversight ("OFHEO") issued a Notice of Charges ("Notice") against Franklin D. Raines, J. Timothy Howard, and Leanne G. Spencer. A copy of the Notice is attached hereto as Exhibit A. That Notice seeks to have the Director's claims adjudicated before an administrative law judge ("ALJ") in accordance with the Administrative Procedures Act. *See* Notice at ¶¶ 506, 507. This Court, however, has statutory authority to order the Director of OFHEO to litigate the Notice in this Court, rather than administratively. As demonstrated below, the Court should exercise that power here because (1) the administrative process is unavailable to the Director under controlling law regarding agency bias, and (2) several legal actions involving the exact same

subject matter already have been consolidated before this Court for the express purpose of coordinating pretrial proceedings before a single judge.[1] In the interests of fairness and judicial economy, the allegations and claims against Mr. Howard in the Notice must be adjudicated before this Court.

A. The Safety and Soundness Act Authorizes the Director to Elect to Pursue the Notice of Charges Either Administratively or Before This Court.

The Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 12 U.S.C. § 4501 et seq. ("Safety and Soundness Act" or "Act"), authorizes the Director of OFHEO to pursue a notice of charges against a former officer of a regulated enterprise before an ALJ, in accordance with the Administrative Procedures Act. *See* 12 U.S.C. § 4633(a)(3).[2] The Act also provides a mechanism for the Director – through, or with the assistance of, the Attorney General – to pursue the same notice of charges in the District Court for the District of Columbia. *See* 12 U.S.C. § 4635(a). Specifically, it authorizes the Director to bring an action in this forum not only for the enforcement of any final "order" but also of any "notice" issued under subchapter III of the Act. *Id.*[3]

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[1] The plaintiffs in *In re Fannie Mae Derivative Litigation*, Civil Action No. 1:04-cv-01783, seek relief that is nearly identical to the relief sought by OFHEO in the Notice of Charges, based on virtually identical allegations of fact. By separate motion filed on this date in the derivative case, we have asked the Court to join OFEHO to that action as a necessary party under Fed. R. Civ. P. 19.

[2] 12 U.S.C. § 4633(a)(3) provides that any hearing under §§ 4631 and 4636(c) "shall be conducted in accordance with chapter 5 of Title 5."

[3] 12 U.S.C. § 4635(a) provides in full:

> The Director may request the Attorney General of the United States to bring an action in the United States District Court for the District of Columbia for the enforcement of any effective notice or order issued under this subchapter [12 U.S.C.A. § 4631 et seq.] or subchapter II [12 U.S.C.A. § 4611 et seq.] of this chapter or may, under the direction and control of the Attorney General, bring such an action. Such court shall have jurisdiction and power to order and require compliance herewith.

B. The Court Has the Power to Require the Director of OFHEO to Pursue the Notice of Charges in This Forum.

While the Act grants the Director of OFHEO the authority to elect whether to pursue a notice of charges administratively or – with the aid of the Department of Justice – in the United States District Court for the District of Columbia, the Act also supplies this Court with unrestricted authority to require the Director to pursue any such notice of charges judicially rather than administratively. Thus, not only does 12 U.S.C. § 4635(a) initially confer adjudicative jurisdiction on the United States District Court for the District of Columbia when the Director elects to enforce a notice of charges in federal court, but the statute additionally provides that "[s]uch court shall have jurisdiction *and power to order and require compliance herewith.*" 12 U.S.C. § 4635(a) (emphasis added). In light of the cardinal rule of statutory construction to "giv[e] effect, if possible, to every clause and word of a statute," *Clark v. Arizona*, -- U.S. -- , 126 S. Ct. 2709, 2723 n.24 (2006), this language indisputably grants the United States District Court for the District of Columbia authority to compel the Director to proceed judicially.[4]

C. This Particular Court is the Proper Forum Available to the Director to Pursue the Notice of Charges.

This Court should exercise its statutory authority and require the Director to pursue his claims against Mr. Howard in this United States District Court, rather than administratively, for two principal reasons. First, the Director has disqualified himself from self-adjudicating

[4] Subsection (b) of § 4635, which limits the district court's jurisdiction to interfere with ongoing administrative proceedings, does not preclude jurisdiction or the relief sought here. By its own terms, this provision does not take away jurisdiction that is "otherwise provided" in subchapter III of the Act. Thus, read together with subsection (a) discussed above, subsection (b) plainly applies only after the forum determination has been settled, and it precludes interference by courts in ongoing administrative proceedings to the extent that the forum determination was resolved in favor of an administrative forum. Here, we are not asking this Court to interfere in ongoing proceedings (indeed, as of the date of this pleading, an administrative law judge has not even been appointed); rather, we simply are asking the Court to decide the threshold question of whether the Notice of Charges shall proceed to be adjudicated in an administrative forum or in this judicial forum.

administrative proceedings involving Mr. Howard (and the other Respondents), as his public statements show that he impermissibly has prejudged the matter. Second, because consolidated multidistrict litigation involving the same subject matter is pending before this particular Court, and OFHEO is actively involved in those proceedings, judicial economy demands it.

1. Director Lockhart Has Prejudged the Case and Cannot Act as the Ultimate Trier of Fact or Law.

Although the Director has authority to pursue a notice of charges administratively, an administrative forum is not appropriate here. Because "a fair trial in a fair tribunal is a basic requirement of due process," it is well established that "a biased decisionmaker is constitutionally unacceptable." *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). As evidenced by numerous public statements, Director Lockhart has concluded that Mr. Howard is "guilty as charged." Accordingly, Director Lockhart – the ultimate decision-maker in any administrative proceeding[5] – is disqualified from adjudicating an administrative enforcement proceeding against Mr. Howard.

The test for disqualification in this Circuit is "whether a disinterested observer may conclude that [the agency decision-maker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quotation omitted). In *Cinderella*, the D.C. Circuit explained that agency decision-makers are without "license to

[5] OFHEO's Rules of Practice and Procedure authorize the Director to select an ALJ or "any other person" to hear evidence and submit recommended findings of fact and conclusions of law to the Director. *See* 12 C.F.R. §§ 1780.3(h), 1780.5, 1780.53(a). The Director, however, retains exclusive power "to grant any motion to dismiss the proceeding or make a final determination of the merits of the proceeding," and therefore is free to reject the recommendation of the ALJ or other person chosen to preside over the proceeding. *Id.* § 1780.5(b)(7); *see also id.* §§ 1780.53-.55; 12 U.S.C. § 4633(b)(1) ("the Director shall render the decision"). Furthermore, the Director "may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of any act that could be done or ordered by the presiding officer." 12 C.F.R. § 1780.4. As a result, the Director is not only the ultimate trier of fact and law in administrative proceedings, but the Director also maintains absolute control over the administrative process.

prejudge cases or to make speeches which give the appearance that the case has been prejudged," and which also "may have the effect of entrenching [the decision-maker] in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." *Id.* at 590. In this regard, the court distinguished between press releases indicating that an agency "has reason to believe" that violations of law have occurred and public statements that "give that appearance that [the agency] has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves." *Id.* The agency adjudicator in *Cinderella* was found to have engaged in the latter, by suggesting in a single speech that an advertisement by the petitioner was deceptive. *Id.* at 589-90. The court accordingly disqualified the official from participating in the adjudication.

Not just one, or a few, but several public statements by Director Lockhart leave no doubt that he personally has prejudged the claims against Mr. Howard and predetermined their outcome. In press conferences, press releases, interviews and other similar contexts, he has stated, among other things:

- "When things went bad they did some accounting ticks, they basically created, ignored losses in some years. In some years they made so much money they actually figured out how to get losses. ***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." *Interview with James Lockhart: Fannie Mae Investigation*, C-SPAN, May 23, 2006 (emphasis added).

- "The image of Fannie Mae as one of the lowest risk and best-in-class institutions vas a false façade. Our examination found an environment where the ends justified the means. As you will read in the Special Examination Report, ***senior Fannie Mae executives were precisely managing earnings actually to the one-hundredth of a penny to maximize their bonuses while neglecting investments in systems, internal controls and risk management.***" *Press conference: Report on Fannie Mae*, C-SPAN, May 23, 2006 (emphasis added).

- "***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. Senior management manipulated accounting, reaped maximum undeserved bonuses and prevented the rest of the world from knowing about it. They co-opted their internal auditors and other managers. They stonewalled OFHEO.***" *Press conference: Report on Fannie Mae*, C-SPAN, May 23, 2006 (emphasis added).

- "***Senior executives were managing Fannie Mae in an unsafe and unsound condition. They also co-opted their internal auditors. They stonewalled OFHEO.*** During the period covered by this report, Fannie Mae hit earnings-per-share targets with uncanny precision each quarter, by deliberately and systematically using inappropriate accounting and improper earnings management. ***Senior management of Fannie Mae benefited greatly from these manipulations. . . . This inappropriate tone at the top*** spread throughout the organization." Statement of James B. Lockhart III on OFHEO's Report of the Special Examination of Fannie Mae, Before the House Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises (June 6, 2006) (emphasis added).

- "***To me, it's not just accounting fraud here. This is mismanagement of the company.*** And I'm not referring necessarily to the present management, but ***I'm talking about the management during this period. It's more than just accounting fraud. They underinvested in systems. They tried to do a series of activities to weaken the agency as you know. And it's much more than just accounting fraud in my mind.***" Hearing regarding OFHEO's Report of the Special Examination of Fannie Mae Before the Senate Committee on Banking, Housing and Urban Affairs, June 15, 2006 (emphasis added).

- "I think we need to send a very strong message. We sent a strong message with the $400 million fine against Fannie Mae, but ***I think we also need to send a message about the mismanagement – as the SEC says it – fraud committed by the former management.***" Remarks of James B. Lockhart III to the American Enterprise Institute (Sept. 13, 2006) (emphasis added).

- "'The Notice of Charges details the harm to Fannie Mae resulting from the conduct of these individuals from 1998 to 2004,' said Director Lockhart. '***The 101 charges reveal how the individuals improperly manipulated earnings to maximize their bonuses, while knowingly neglecting accounting systems and internal controls, misapplying over twenty accounting principles and misleading the regulator and the public. The Notice explains how they submitted six years of misleading and inaccurate accounting statements and inaccurate capital reports that enabled them to grow Fannie Mae in an unsafe and unsound manner. The misconduct cost the Enterprise and shareholders many billions of dollars and damaged the public trust,***' Lockhart said." *Press Release: OFHEO Files Notice of Charges Against Former Fannie Mae Executives Franklin Raines, Timothy Howard and Leanne Spencer*, December 18, 2006 (emphasis added).

- "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.***" Damien Paletta, *OFHEO files Notice of Charges vs. Ex-Fannie Executives*, Dow Jones Newswires (Dec. 18, 2006) (emphasis added).

- "The OFHEO Director, James B. Lockhart III, said in a conference call yesterday: '***We believed as an agency that these three individuals, separately and together, did serious harm to the company. There is a long list of charges that show they allowed this company to grow out of control.***'" Eric Dash, *Fannie Mae Ex-Officers Sued by U.S.*, New York Times, December 19, 2006 (emphasis added).[6]

Such pervasive and irreparable bias effectively has rendered the administrative process over which Director Lockhart presides unavailable for the enforcement of the Director's claims against Mr. Howard. *See Withrow*, 421 U.S. at 47 ("probability" or "risk" of actual bias or prejudgment is not "constitutionally tolerable"); *Cinderella*, 425 F.2d, 591; *Bakalis v. Golembeski*, 35 F.3d 318, 326 (7th Cir. 1994) ("Certainly, a body that has prejudged the outcome cannot render a decision that comports with due process.").[7] It is not a close call. For this reason alone, the Court should require the Director to enforce the Notice of Charges in this Court.

2. Interests of Judicial Economy Warrant that the Director Be Required to Pursue the Notice of Charges in This Court.

The derivative litigation filed in and currently pending before this Court (Civil Action No. 1:04-cv-01783) involves essentially the exact same factual allegations and nearly identical claims for relief as the Director's Notice. *See* Defendant J. Timothy Howard's Memorandum of Law in Support of His Motion to Join OFHEO as a Necessary Party, at 2-3 and Exhibits B & C thereto, filed this date in Civil Action No. 1:04-cv-01783. No less significantly, the several

[6] The quotations above are just a sampling of the repeated public statements by Director Lockhart demonstrating his bias.

[7] In this regard, it is significant that the Director not only has the authority to hand-pick an ALJ or "any other person" to preside over the proceedings, 12 C.F.R. § 1780.3(h), but should the Director choose – as he must – to disqualify himself from adjudicating or otherwise participating in the proceedings, it remains the Director's prerogative to decide who, within OFHEO, will assume his duties as the ultimate trier of fact and law. *See* 12 U.S.C. § 4513(d) ("The Director may delegate to officers and employees of [OFHEO] any of the functions, powers, and duties of the Director, as the Director considers appropriate.").

additional actions that comprise the multidistrict litigation consolidated before this Court (MDL No. 1668) also involve the same subject matter and essentially the same events as the OFHEO enforcement action. *See* Transfer Order at 2, Docket No. 1668, filed May 17, 2005 (J.P.M.L. 2005) ("[A]ll actions can be expected to focus on a significant number of common events, defendants, and/or witnesses.") The actions were consolidated before this Court by the Judicial Panel on Multidistrict Litigation expressly to "serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation" and "to eliminate duplicative discovery, prevent inconsistent pretrial rulings . . . , and conserve the resources of the parties, their counsel and the judiciary." *See id.* at 1-2. Given the pendency of this consolidated litigation, and its goal of providing efficient and centralized management of Fannie Mae-related proceedings, compelling the Director to bring his claims against Mr. Howard in this Court best serves the goals of judicial economy.

Indeed, there is no forum better suited to adjudicate the Director's Notice than this Court. Having presided for more than two years over several actions involving the same subject matter, this Court is intimately familiar with the facts and legal issues underlying the Notice of Charges. In stark contrast, the ALJ that eventually may be selected to preside over any administrative enforcement proceeding will have to start from scratch on both the facts and the law. Moreover, unlike in most administrative proceedings, the presiding officer will have no particular expertise regarding the subject matter or applicable law. That is because OFHEO is an agency without administrative law judges. Indeed, an ALJ from the Environmental Protection Agency is currently presiding over the only other notice of charges that a Director of OFHEO has previously initiated against former executive officers of an enterprise. *See* Order of Designation, May 25, 2006, HUDALJ 04-056-NA and HUDALJ-04-057-NA, attached hereto as Exhibit B.

Furthermore, OFHEO already is before this Court in connection with the consolidated multidistrict litigation. Not only is this Court presently overseeing OFHEO's third-party document production in the these proceedings – the same documents which will be central to the adjudication of the Notice of Charges – but OFHEO should soon be joined as a party to the shareholder derivative case. *See* Defendant J. Timothy Howard's Motion to Join OFHEO as a Necessary Party, filed this date in Civil Action No. 1:04-cv-01783.

CONCLUSION

For the foregoing reasons, Mr. Howard respectfully requests that the Court enter an Order requiring the Director of OFHEO to pursue the Notice of Charges against Mr. Howard in this Court.

Dated: January 12, 2007

Respectfully submitted,

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EXHIBIT C

UNITED STATES OF AMERICA
OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT

In the Matter of:	)	
	)	**Notice No. 2006-1**
FRANKLIN D. RAINES	)	
	)	**Judge William B. Moran**
J. TIMOTHY HOWARD	)	
	)	
LEANNE G. SPENCER	)	
	)	

LEANNE G. SPENCER'S MEMORANDUM REGARDING THE PROPOSED SCHEDULING ORDER

In response to the Court's request, Respondent Leanne G. Spencer ("Spencer") respectfully submits this memorandum regarding the scheduling order proposed by OFHEO. Spencer joins and adopts the submission of Respondent Franklin D. Raines, which explains that 12 U.S.C. § 4633(a)(2) requires the hearing on the merits of OFHEO's claims to commence within 60 days of the filing of the Notice of Charges.[1]

We write separately to address a point raised during the January 31, 2007 telephone conference. The Court asked whether 12 C.F.R. § 1780.12 gives it the authority to alter the 60-day time limit imposed by § 4633(a)(2). The regulation provides in relevant part as follows:

> Except as otherwise provided by law, the presiding officer may, for good cause shown, extend the time limits prescribed above or prescribed by any notice or order issued in the proceedings.

---

[1] 12 U.S.C. § 4633(a) provides in relevant part as follows:

> (1) Venue and record. Any hearing under section 4631 or 4636(c) of this title shall be held on the record and in the District of Columbia.
>
> (2) Timing. Any such hearing shall be fixed for a date not earlier than 30 days nor later than 60 days after service of the notice of charges under section 4631 of this title or determination to impose a penalty under section 4636 of this title, unless an earlier or a later date is set by the hearing officer at the request of the party served.
>
> (3) Procedure. Any such hearing shall be conducted in accordance with chapter 5 of title 5.

12 C.F.R. § 1780.12.

By its plain terms, this regulation simply does not apply in this situation. First, it does not apply to time limits "otherwise provided by law," such as the 60-day hearing requirement provided for in 12 U.S.C. § 4633(a)(2). Second, it applies only to time limits "prescribed above or prescribed by any notice or order issued in the proceedings," not those prescribed elsewhere, such as the 60-day limit prescribed by statute. Accordingly, 12 C.F.R. § 1780.12 provides this Court no authority to depart from the requirement that it conduct a hearing in this matter within 60 days of the filing of the Notice of Charges.

We also point out that Spencer has filed a petition for a writ of mandamus from the United States Court of Appeals for the District of Columbia Circuit seeking to have the Director of OFHEO disqualified from adjudicating this matter. *See In re Spencer*, No. 07-1024. Spencer has also filed a request for expedited consideration of her petition. On today's date, the Court of Appeals directed OFHEO to respond to the petition by February 9, 2007, and for Spencer to submit a reply by February 14, 2007.[2] While the matter is pending before the Court of Appeals, we submit that this Court should refrain from adopting the schedule proposed by OFHEO. We reserve our right to have the hearing on this matter commence no later than February 16, 2007.

[2] The fact that the Court of Appeals has requested a response is significant. *See* D.C. Cir. R. 21(a) ("No responsive pleading to a petition for an extraordinary writ to the district court or an administrative agency, including a petition seeking relief from unreasonable agency delay, is permitted unless requested by the court. No such petition will be granted in the absence of such a request.").

Respectfully submitted,

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Attorneys for Leanne G. Spencer

Dated: February 2, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2007, I caused to be served by hand delivery a copy of the foregoing Leanne G. Spencer's Memorandum Regarding The Proposed Scheduling Order upon:

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EXHIBIT D

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	)

OFHEO'S MEMORANDUM REGARDING 12 U.S.C. § 4633(a)(2)

The Office of Federal Housing Enterprise Oversight ("OFHEO") respectfully submits this memorandum to set forth reasons why the hearing in this matter will begin on February 7, 2007, with the hearing before the court and why the evidentiary phase of the hearing is not required to commence within 60 days of the filing of the Notice of Charges.

Respondents have argued that 12 U.S.C. § 4633(a)(2) entitles them to the commencement of the evidentiary phase of the hearing by February 16, 2007. However, the definition of "hearing" as used in 12 U.S.C. § 4633(a)(2) is not limited to meaning the end-stage evidentiary phase of the hearing before this Court, but encompasses all of the procedural steps leading to the issuance of an order.[1] This interpretation of "hearing" is consistent with OFHEO's implementing regulations at 12 C.F.R. 1780 as well as with practical considerations concerning

[1] In his memorandum, Respondent Raines mischaracterizes OFHEO's position regarding section 4633(a)(2). *See, e.g.*, Respondent Raines' Memorandum Concerning the Requirements of 12 U.S.C. § 4633(a)(2) at 2 and 6. OFHEO has done nothing more than quote the language of the statute. It is in this Memorandum that OFHEO lays out its interpretation of the provision in question.

discovery issues, various motions filed by Respondents, and the complexity of these kinds of cases.

However, even assuming, *arguendo*, that the definition of "hearing" were limited to the evidentiary phase of the hearing before this Court, nothing prevents the Director or this Court from timing the start of the evidentiary phase of the hearing for a reasonable date so that both sides can complete discovery, file dispositive motions and finalize their evidentiary hearing preparations in hopes of narrowing the issues and streamlining the presentation of evidence.

BACKGROUND

OFHEO filed a Notice of Charges against Respondents Raines, Howard and Spencer on December 18, 2006.[2] On the very same day, Respondent Raines filed an *ex parte* letter with the Director seeking the Director's recusal from this matter. On January 8, 2007, each Respondent filed his/her Answer, along with individual First Sets of Document Requests to OFHEO. On January 12, 2007, Respondent Spencer filed a letter with the Director also seeking his recusal from this matter. On January 31, 2007, Respondent Raines petitioned this Court for subpoenas to seek third-party discovery.

On January 17, 2007, Respondent Raines filed a Petition for a Writ of Mandamus from the United States Court of Appeals for the District of Columbia Circuit seeking to have the Director of OFHEO disqualified from adjudicating this matter, and for removal of the proceeding into federal court. Respondent Spencer filed a similar Petition on January 31, 2007. OFHEO's

[2] Respondent Raines seems to suggest that because OFHEO had an opportunity to conduct its Special Examination of Fannie Mae, it is not now entitled to reasonable discovery or time to prepare its case. *See, e.g.*, Raines' Memorandum Concerning the Requirements of 12 U.S.C. § 4633(a)(2) at 2; *see also* Declaration of Alex G. Romain at ¶¶ 20, 21, and 22. This is clearly incorrect. The Special Examination was directed at determining the extent of problems at Fannie Mae, and was not directed at preparing a case against Respondents for trial.

response to Spencer's and Raines' Petitions are due by February 9, 2007, and Spencer's and Raines' replies are due by February 14, 2007. These matters have yet to be resolved.

On January 12, 2007, Respondent Howard filed a miscellaneous action in District Court in the form of a Motion to Require OFHEO to Pursue Notice of Charges in District Court. OFHEO filed a Motion for Extension of Time to Respond until March 12, 2007. Respondent Howard filed an Opposition and a Motion for an Expedited Hearing. That action has not yet been resolved. However, District Court Judge Richard Leon has set the miscellaneous action for a status conference on March 2, 2007.

This Court convened a telephonic conference on January 31, 2007 and discussed scheduling. A hearing has been set in this matter and will commence on February 7, 2007 at 9:30 am.

ARGUMENT

The evidentiary phase of the hearing in this matter is not required to commence within 60 days of the filing of the Notice of Charges. The main purpose for the time limitations contained in section 4633(a)(2), and cited by Respondents, is to ensure that once Notice of Charges have been filed, the agency continues to move forward with proceedings and does not unreasonably delay the momentum of the case. This purpose is fulfilled by the timely commencement of proceedings with any hearing held within 60 days of filing the Notice of Charges and the adoption of OFHEO's aggressive, proposed schedule.

I. The Definition of "Hearing" Is Not Limited to Meaning the Evidentiary Phase of the Hearing Before this Court, but Encompasses All of the Procedural Steps Leading to the Issuance of an Order.

12 U.S.C. § 4633(a)(3) provides that a hearing "shall be conducted in accordance with chapter 5 of title 5," more commonly known as the Administrative Procedure Act ("APA"). Under the APA, and OFHEO's regulations, the definition of "hearing" as used in 12 U.S.C. § 4633(a)(2) is not limited to mean merely the evidentiary phase of the hearing before this Court, but also encompasses all of the procedural steps leading to the issuance of an order, including scheduling hearings, discovery hearings, and motions/argument hearings. If Congress had intended "hearing" to be limited in the context of section 4633 to "evidentiary hearing," it could have said as much.[3]

5 U.S.C. § 556 of the APA "applies to hearings required by section 553 or 554[4] of this title to be conducted in accordance with this section." Notably, subsection (b) of section 556 refers to who "shall preside at the taking of evidence," suggesting that the reception of evidence is merely one part of, rather than the entirety of, what constitutes a "hearing."[5] Further, subsection (c) of section 556 provides a laundry list of actions that "employees presiding at hearings may" take, including actions that are prerequisite to the commencement of the

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[3] Indeed, the word "hearing" simply means "judicial session." *Black's Law Dictionary* 737 (8th ed. 2004). The breadth of the word's meaning is highlighted by the numerous descriptors necessary to differentiate between the many types of hearings, such as "evidentiary hearing," "oral argument hearing," "scheduling hearing," "pretrial hearing," "preliminary hearing," and "sentencing hearing," to name but a few.

Black's Law Dictionary defines "hearing" in administrative law settings as "[a]ny setting in which an affected person presents arguments to an agency decision-maker." *Black's Law Dictionary* 737 (8th ed. 2004). Similarly, Black's defines an "adjudication hearing" in an administrative law setting as "[a]n agency proceeding in which a person's rights and duties are decided after notice and an opportunity to be heard." *Id.* Such definitions embrace an interpretation of "hearing" that extends beyond the evidentiary phase of the hearing.

[4] The relevant section in this proceeding is section 554, which applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."

[5] See also subsection (d) of section 554 for similar language.

evidentiary phase of the hearing, such as "tak[ing] depositions or hav[ing] depositions taken," *id.* at (4); "hold[ing] conferences for the settlement or simplification of the issues," *id.* at (6); and "dispos[ing] of procedural requests or similar matters," *id.* at (9).

Moreover, and as discussed more fully below, practical considerations dictate a more expansive reading of the term "hearing," and the agency's reasonable interpretation must be afforded due deference.

A. Discovery

The Parties in this case are entitled to reasonable discovery. *See generally*, 12 C.F.R. § 1780.26. At the same time, OFHEO's regulations clearly anticipate that discovery will be completed well before the evidentiary phase of the hearing. Section 1780.26(e) provides:

> "All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing. No exception to this time limit shall be permitted, unless the presiding officer finds on the record that good cause exists for waiving the requirements of this paragraph."

12 C.F.R. § 1780.26(e). Using the February 16, 2007 evidentiary hearing date that Respondents have requested, all discovery in this matter should have been completed as of January 29, 2007.[6]

Meanwhile, Mr. Raines, Mr. Howard and Ms. Spencer have served requests for hundreds of thousands of documents that they argue are central to their defenses; requests which are currently being addressed, and which are the subject of motions to the Court that have yet to be decided. Respondents have also petitioned this Court for discovery subpoenas to third parties,

[6] The definition of "hearing" that Mr. Howard now espouses is at odds with the position he takes in his "J. Timothy Howard's Opposition to OFHEO's Motion to Strike or Limit His Document Requests." On page two of that document, Mr. Howard asserts that OFHEO's motion should be denied in favor of having discovery disputes decided by the District Court in the Fannie Mae shareholders' action. He admits that the date for OFHEO's final production in that action is March 12, 2007. The conflict between Mr. Howard's positions may only be resolved by adopting OFHEO's definition of a hearing.

notably, after January 29, 2007. Meanwhile, OFHEO has propounded two sets of document requests to each Respondent.

The production of documents is a time and labor intensive undertaking, yet the OFHEO regulations make clear that it is an important part of a fair hearing process. As such, more time is required to complete discovery in these proceedings before the commencement of the evidentiary phase of the hearing.

B. Respondents' Procedural Motions

The motions that Mr. Raines, Mr. Howard and Ms. Spencer have filed in this matter, Mr. Howard's motions in the District Court and Mr. Raines' and Ms. Spencer's petitions in the Court of Appeals, regarding this matter, all remain unresolved. It is unreasonable and impractical to suggest that the evidentiary phase of the hearing must commence prior to the resolution of these matters, especially in light of arguments that Respondents have made challenging the Director's role in this matter, as well as seeking removal of this proceeding to federal court. Respondents have also suggested that the Court may be an improper choice to preside over these proceedings as the Court was appointed by the Director.

Resolution of the above matters could affect this proceeding in far-reaching ways that could further delay the commencement of the evidentiary phase of the hearing – for example, if a new administrative law judge had to be designated or if the proceedings were moved to federal court. It is unrealistic and impractical to expect the evidentiary phase of the hearing to commence prior to the resolution of such matters.[7] When making their respective filings in the

[7] Indeed, it is not entirely clear what Respondents seek in this regard. At least one Respondent, Ms. Spencer, urges the Court to "refrain from adopting the schedule proposed by OFHEO" while her writ of mandamus is pending before the Court of Appeals. *See* Leanne G. Spencer's Memorandum Regarding the Proposed Scheduling Order, filed on February 2, 2007. Even while admitting that her reply to OFHEO's response to that petition is not due until

(Continued...)

District Court and the Court of Appeals, Respondents were no doubt aware of the potential procedural implications, and also aware of the time it would take to resolve such matters. To now demand that the evidentiary phase of the hearing begin prior to resolution of these matters is disingenuous at best.

C. Deference Due to Agency Interpretation

Finally, OFHEO's practical and logical interpretation of "hearing" in this case is reasonable and thus would be entitled to deference. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).[8] OFHEO's regulations reflect its interpretation of "hearing" for purposes of 12 U.S.C. § 4633(a)(2) as encompassing far more than an evidentiary hearing. For example, OFHEO's regulation requiring all discovery be completed 20 days prior to the commencement of the evidentiary phase of the hearing, 12 C.F.R. § 1780.26(e), anticipates a longer passage of time than 60 days between the issuance of the notice of charges and an evidentiary hearing.[9] . Similarly, OFHEO's regulation providing for a scheduling conference to

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(Continued...)

February 14, 2007, she still reserves her right "to have the [evidentiary administrative] hearing on this matter commence no later than February 16, 2007," in the very next breath. *Id.*

[8] The Court should uphold the agency's interpretation where it is a permissible or reasonable interpretation. *Sullivan v. Everhart*, 494 U.S. 83, 93-94 (1990). Agencies may interpret their statutes in a way that is reasonable in light of Congress's intent. *See Chevron, Inc.*, 467 U.S. at 844. Furthermore, courts appropriately give weight to any reasonable interpretation of a statute by the agency charged with its enforcement, particularly where, as here, the agency possesses special expertise. *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995). Therefore, because an agency's interpretation of its organic statute generally may be presumed valid, and OFHEO has special expertise in regulating the safety and soundness of the housing finance giants, the process set forth in its regulations that calls for orderly prehearing and hearing proceedings resulting in an end-stage, oral evidentiary hearing should be upheld as a reasonable interpretation of the Safety and Soundness Act of 1992 and its implementing regulations.

[9] The Director has the exclusive authority to issue regulations to carry out the Statutory mandates of OFHEO, including regulations as to the specific conduct of the administrative proceedings contemplated under 12 U.S.C. 4631 and 12 U.S.C. 4636. *See,* 12 U.S.C. 4513(b)(1). These regulations, as set forth at 12 C.F.R. 1780, govern the timing of this proceeding. It is only through these very precise, very detailed regulations, and in conjunction with the APA that hearings may be conducted.

occur as late as 30 days after service of the Notice of Charges[10] contemplates more than 60 days between the issuance of the Notice of Charges and the evidentiary phase of the hearing. Indeed, the purpose of such scheduling conference is to schedule the course and conduct of the proceeding, as well as to determine "[t]he identification of potential witnesses, the time for and manner of discovery and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference." 12 C.F.R. § 1780.33(a). Clearly, determining "the time for and manner of discovery," as well as the exchange of "witness lists," are actions that should take place far in advance of 30 days before the evidentiary phase of the hearing in order to allow time for the resulting discovery, interviews and depositions to take place.

Given the sheer complexity of this case, any interpretation of "hearing" that would require the evidentiary phase of the hearing to begin by February 16th, is patently *un*reasonable. On the other hand, a definition of "hearing" in the context of 12 U.S.C. § 4633(a)(2) that allows any hearing to constitute the commencement of proceedings for purposes of section 4633(a)(2) solves many logistical problems, and is manifestly reasonable. Discovery has only just begun in these proceedings, and many initial issues remain unresolved. For example, OFHEO is entitled to obtain discovery on the many affirmative defenses filed by Respondents, defenses which the Respondents never raised with OFHEO until a few weeks ago. Forcing the premature commencement of the evidentiary phase of this hearing would be contrary to the interests of

[10] 12 C.F.R. § 1780.33(a) provides:

> "Within 30 days of service of the notice or order commencing a proceeding or such other time as the parties may agree, the presiding officer shall direct representatives for all parties to meet with him in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding."

justice. Moreover, no prejudice to Respondents would result from the schedule proposed by OFHEO.[11]

II. 12 U.S.C. § 4633(a)(2) Is Not a Jurisdictional Requirement.

However, even assuming, *arguendo*, that the definition of "hearing" were limited to an evidentiary hearing before this Court, nothing prevents the Director or the Court from timing the start of the evidentiary phase of the hearing for a reasonable date so that both sides can complete discovery, file dispositive motions and finalize their trial preparations in hopes of narrowing the issues and streamlining the presentation of evidence and thereby limiting the length of the evidentiary phase of the hearing.

The sixty day time period contained in 12 U.S.C. § 4633(a)(2) is not a jurisdictional requirement, and does not prevent this Court from commencing the evidentiary phase of the hearing after 60 days has elapsed from the date of filing of the Notice of Charges. Indeed, in *Brock v. Pierce County*, 476 U.S. 253 (1986), the Supreme Court reviewed a provision in the Comprehensive Employment Training Act ("CETA") which stated that the Secretary "shall" issue a final determination on the misuse of CETA funds by a grant recipient "not later than 120 days after receiving a complaint." 29 U.S.C. § 816(b). Pierce County, a grant recipient, contested the Secretary of Labor's determination made more than two years after the complaint was filed, arguing that the determination was untimely and void. The Court concluded that "the mere use of the word 'shall'...standing alone, is not enough to remove the Secretary's power to act after 120 days. *Brock*, 476 U.S. at 262 (footnote omitted). The Court found the deadline to

[11] Even in the criminal context, a defendant must show prejudice if he is to prevail because of a delay in a hearing. *See Barker v. Wingo*, 407 U.S. 514 (1972). Respondents cannot and have not shown any prejudice that would result from the orderly and aggressive proposed schedule offered by OFHEO.

be a procedural requirement and concluded that the agency did not lose the power to act even when the deadline had passed.[12]

Similarly, in a more recent Supreme Court case, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158-159 (2003), the Court held that, although the Social Security Administration Commissioner's initial assignments of coal industry retirees to coal companies under the Coal Industry Retiree Health Benefit Act of 1992 were made after the mandatory date set forth in 26 U.S.C. § 9706(a), that the untimely action was still valid. In so ruling, the Court wrote "[w]e accordingly read the 120-day provision as meant to spur the Secretary to action, not to limit the scope of his authority." *Id.* (internal quote omitted). The Court further noted that "since *Brock* [we] have [never] construed a provision that the Government "shall" act within a specified time, without more, as a jurisdictional limit precluding action later." *Id.* (citing *United States v. Montalvo-Murillo*, 495 U.S. 711, 714 (1990) (holding that a provision that a detention hearing "shall be held immediately upon the [detainee's] first appearance before the judicial officer" did not bar detention after a tardy hearing) and *Regions Hospital v. Shalala*, 522 U.S. 448, 459, n. 3 (1998) (holding that a mandate that the Secretary of Health and Human Services "shall report" within a certain time did "not mean that [the] official lacked power to act beyond it.")). The *Barnhart* Court concluded, "[w]e have summed up this way: `if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.'" *Id.* (citing *United States v. James*

[12] In *Brock*, the Secretary of Labor based its appeal upon the precedent of circuit court decisions, which held that government agencies do not lose jurisdiction for failure to comply with a statutory time period unless the statute specifies a consequence for failure to comply with the time period. The Supreme Court stated that "our decisions supplied at least the underpinnings of those precedents." *Brock*, 476 U.S. at 259. In the present case, Section 4633(a)(2) does not attach consequences to a failure to fix a hearing date within 60 days.

Daniel Good Real Property, 510 U.S. 43, 63 (1993); *see also Gottlieb v. Pena*, 41 F.3d 730, 733 (D.C. Cir. 1994) (collecting cases).

Under OFHEO's regulations, this Court has the authority to set the date of the hearing, as well as the authority to continue or recess the hearing at any time.[13] Indeed, 12 C.F.R. § 1780.5(b) provides in relevant part:

> "The presiding officer is authorized to –
> (1) Set and change the date, time and place of the hearing upon reasonable notice to the parties;
> (2) Continue or recess the hearing in whole or in part for a reasonable period of time[.]"

Given the extreme factual complexity of this case, coupled with the fact that the ongoing discovery process – already proving voluminous – is still far from complete, commencing the evidentiary phase of the hearing on February 16, 2007 is neither realistic nor in the interests of justice.

CONCLUSION

Respondents have, as noted above, filed numerous procedural and discovery motions not only in this Court but with the District Court and the Court of Appeals that have yet to be resolved. Indeed, many of the arguments Respondents have made in these subsequent filings could result in delay if, for example, a new administrative law judge had to be appointed, or if the proceeding were to be moved into a federal court. It is therefore odd that Respondents, who are the source of such motions and who will have authored numerous delays should their

[13] It is clear that this Court has the power to regulate proceedings before him or her in an orderly fashion, especially with respect to scheduling matters. *See generally*, 5 U.S.C. § 556(c). Indeed, besides the power to "[s]et and change the date, time and place of the hearing," and to "[c]ontinue or recess the hearing in whole or in part for a reasonable period of time," 12 C.F.R. § 1780.5(b), this Court also has the power to extend time limits having to do with the filing and service of papers in the proceedings. 12 C.F.R. § 1780.12. This Court's ability to schedule such matters are important in order to allow this Court to manage this case, as well as any other matters pending before him or her, and to take into account potential timing conflicts, and other unforeseeable circumstances.

motions be decided in their favor, now demand that the evidentiary phase of the hearing commence by February 16, 2007. Accordingly, Respondents have failed to articulate sufficient grounds to circumvent the scheme set forth in the Agency's regulations for the conduct of this proceeding.

For the foregoing reasons, OFHEO requests that this Court enter OFHEO's proposed scheduling order, submitted to this Court on January 31, 2007.

Respectfully submitted,

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Dated: February 6th, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2007, I caused to be served via hand delivery true and correct copies of OFHEO's Memorandum Regarding 12 U.S.C. § 4633(a)(2) on the following persons:

Mr. Kevin M. Downey, Esq.
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Mr. Steven M. Salky, Esq.
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Counsel for Respondent Leanne G. Spencer

Joseph J. Aronica

EXHIBIT E

UNITED STATES OF AMERICA

OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT

- - - - - - - - - - - - - -x

In the Matter of: :

FRANKLIN D. RAINES : Notice Number

J. TIMOTHY HOWARD : 2006-1

LEANNE G. SPENCER :

Respondents :

- - - - - - - - - - - - - x

Washington, D.C.

Wednesday, February 7, 2007

The scheduling conference in the above-entitled matter, convened at 9:32 a.m., before:

HON. WILLIAM B. MORAN

A

APPEARANCES:

On behalf of Respondent Raines:

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APPEARANCES: (Continued)

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P R O C E E D I N G S

ADMINISTRATIVE JUDGE MORAN: Okay. Good morning. For those of you who have not met me before, I am Judge William B. Moran. I am the presiding officer in this case, which is captioned as the Office of Federal Housing Enterprise Oversight in the matter of Franklin D. Raines, J. Timothy Howard, LeAnne G. Spencer. Notice Number 2006-1.

We are here today at the EPA East Building, EAB Courtroom at 1201 Constitution Avenue, Washington, D.C. for the purpose of the scheduling conference concerning the aforementioned administrative notice of charges brought by the Office of Federal Housing Enterprise Oversight, which we're referring to as OFHEO, in the matters I just mentioned.

I would like the parties now to introduce themselves for the record beginning with OFHEO.

MR. FELT: Thank you Your Honor. I'm David Felt. And with me at counsel table from the outside

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Rocco Covino.

MR. COVINO: Good morning, Your Honor.

MR. FELT: And Joseph Aronica.

ADMINISTRATIVE JUDGE MORAN: Mr. Downey, nice to see you again.

MR. DOWNEY: Thank you, Your Honor. Good morning, Your Honor. Kevin Downey for Frank Raines.

ADMINISTRATIVE JUDGE MORAN: Mr. Salky, good to see you again.

MR. SALKY: Good morning, Your Honor. Steven Salky for J. Timothy Howard.

MR. KRAKOFF: Good morning, Your Honor. This is my first time before you. David Krakoff for LeAnne Spencer.

ADMINISTRATIVE JUDGE MORAN: Nice to meet you, sir.

MR. KRAKOFF: Nice to meet you.

ADMINISTRATIVE JUDGE MORAN: Okay. I'm going to make a statement and a ruling. Then we'll deal to some extent with some other issues and some questions I have and then other matters that the

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parties may want to raise.

Can you all hear me okay?

AUDIENCE MEMBER: Your Honor, no, sir, I can not hear you well.

ADMINISTRATIVE JUDGE MORAN: You cannot hear well?

AUDIENCE MEMBER: No, sir.

ADMINISTRATIVE JUDGE MORAN: Okay. If I have feedback, tell me. We'll get this adjusted.

Can you hear me now?

AUDIENCE MEMBER: Much better, sir.

ADMINISTRATIVE JUDGE MORAN: Okay. This scheduling conference is being held pursuant to 12 CFR Section 1780.33. And the purpose is to schedule, quote, the course and conduct of this proceeding.

In my notice of this conference, which was issued on January 31, 2007 and which was orally noticed during a conference call held with the parties on the same date, I indicated that other issues could be addressed in this conference provided those issues were identified to me by

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February 2nd, which was last Friday, I believe.

In accordance with that requirement, the Court did receive a proposed scheduling order from OFHEO and a proposed schedule from counsel from Mr. Raines. I believe there are also submissions from the other two respondents. I don't remember the exact title of them, but I did read all of them.

The Raines proposal, and that is joined, as I recall, by each of the other respondents, calls for all prehearing submissions to be completed by February 12th;

that is, this February 12th. And that the hearing is to begin by February 16th.

Counsel for Raines, et al. has contended that 12 USC 4633, Subsection (a)(2) requires that the hearing in this case must commence by February 16th, 2007.

Now, just this morning, literally before I took the shuttle down here from my office, my paralegal handed me the response or comment from OFHEO on this issue. It's entitled OFHEO's

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memorandum regarding the section I just mentioned. I have skimmed it, but not fully digested it. But I have read it quickly.

I would note that this particular provision actually provides, as opposed to the hearing commencing, it provides that any such hearing shall be fixed for a date not earlier than 30 days, nor later than 60 days after service of the notice of charges under Section 4631 unless an earlier or later date is set by the hearing officer -- that would be me -- at the request of a party served.

Now, I note at the outset for this particular issue that the notice of charges, which was filed on December 18, 2006, contains 101 claims in a 153-page document.

I note that each of the respondents have filed discovery requests. Although, I have to also make mention that the Court has only received the Respondent Spencer's discovery request. As of

this morning, my office has not received a copy from the other respondents regarding their discovery.

Now, I have received, however, OFHEO's

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opposition to the discovery and, I believe, some responses to that. But the -- in terms of the original discovery requests from the respondents, other than Ms. Spencer's attorney, I have not received that.

Now, Ms. Spencer's discovery request, which was filed on January 8, 2007, seeks 110 separate document requests.

As of January 23, a motion to strike or limit Spencer's discovery request was filed by OFHEO. And it represents to the Court that that request seeks millions of pages of materials.

And as I noted, a response has been filed to that motion. And as you all know, the rules do contemplate the availability of filing a reply as well.

As I mentioned, while I have not yet received a copy of the discovery request filed on behalf of Mr. Raines or Mr. Howard, OFHEO has represented to me in its filings that these discovery requests also involve each millions of pages.

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I also want to note for the record that I was designated as the presiding officer in this matter on January 29, 2007. And that, as mentioned, the conference call was held two days after I was appointed to preside in this matter.

Now, having read the respondents' position on the applicability of the Section 12 USC 4633 (a)(2) and the requirement proposed by respondents that the hearing itself must commence no later than 60 days after filing the notice of charges, and also having independently researched the issue and having perused the OFHEO response to this issue, it seems to me that there are several, underscore several, independent bases to reject the respondents' claim that the hearing itself must literally commence by February 16, 2007.

First, I note that the language does not state that the hearing shall commence -- the word commence is not there -- within the 30 to 60-day window; but, rather, that it should be, quote, fixed for a date.

I construe that to mean that the

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scheduling conference should occur within this time frame, and that, among other items, the anticipated hearing date fixed within that time.

And I want to mention now, in case I happen to overlook it later on, I'll depend on one of the parties to bring this to my attention, pursuant to my order that, by February 2, I received

proposed scheduling -- a proposed schedule for the order of the hearing and scheduling order. I received that from OFHEO.

But what's lacking in all of the submissions is an actual date for the hearing; even though that date might change, I think it's important to be consistent with the statute; That my scheduling order, which will be issued shortly after this proceeding, that is, within a few days, that it actually include a proposed hearing date. And that's not in any of the submissions.

So to restate what I said, that my interpretation is that the scheduling conference, and nothing else, must occur within that 60 daytime frame.

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But perhaps more importantly, it is Hornbook law -- and when I use the term "Hornbook" law, that means that there is no need for me to have citations to this statement. And that statement is that the construction of a statute should not result in an absurdity. And that is what we would have here if I were to adopt the respondents' position. It would be nothing short of an absurdity.

And in that respect, I do -- I do view the assertion as being specious and somewhat disingenuous. Because only a low-scale small claims action could reasonably be expected to begin within

the time frames that the respondents have suggested, and certainly not a matter with 101 claims in the notice of charges.

I also note that, effectively, the Supreme Court has addressed this issue. And in my way over here on the shuttle bus, I noted that OFHEO cites the same case which I'm about to mention to you. That is the case of Brock, Secretary of Labor versus Pierce County, which is at 476 US 253, 1986 decision by the

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Court.

And there, a statutory provision under the Comprehensive Employment and Training Act required that the Secretary of Labor, quote, issue a final determination as to the misuse of CETA funds within 120 days of receiving a complaint alleging such misuse.

In a unanimous decision by the Court, it held that there was no indication that Congress intended to remove the Secretary's enforcement powers if the finding determination did not occur within 120 days.

And in that case, as here, the Court noted that the Secretary had promulgated regulations implementing the provision at issue.

Also in that case, as here, the Court noted that the statute nowhere specifies the consequences of a failure to meet the 120 day period.

And, finally, from that decision, the Court also noted the importance that Congress

expressed through that statute of its concern with fraud and illegal practices. And similarly,

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here, without in any way implying any prejudgment of the case, but it is a fact that OFHEO was created to ensure the integrity of the enterprises over which it has oversight.

Brock versus Secretary of Labor is not the only Supreme Court case dealing with this issue. One other example, among many, is the United States versus Good Real Property at 510 US 43, a 1993 decision.

The Court noted that it has held that, if a statute does not specify a consequence for not implying with statutory timing provisions, the federal courts will not in the ordinary course impose their own course of sanction.

In that light, the respondents have not pointed to any provision within the Federal Housing Enterprise -- Housing Enterprise's Financial Safety and Soundness Act of 1992 that specifies the consequences of a failure to meet the putative claim that the hearing itself must begin within 60 days after service of the notice of charges.

Now, absent a dispositive ruling in

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some motion in the future that ends the case, we're

going to be together for quite a period of time. And so I want to notify all of you that it is my view that you are obligated in your motions to at least make note of the existence of case law which runs contrary to a position you are arguing.

So if there is clear precedent that runs against the position that you are arguing, it is my view that you have an obligation at least in a footnote to note the presence of clear contrary statements of law, interpretations of that law, or arguments that you're making.

So you're on notice of my view that that is one of your future obligations as officers of the court.

MR. DOWNEY: Your Honor, may I be heard on this for a moment?

ADMINISTRATIVE JUDGE MORAN: No.

MR. DOWNEY: No. Thank you, Your Honor.

ADMINISTRATIVE JUDGE MORAN: Although, this is sufficient, what I have just stated, to reject the respondents' claim, I also view that

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respondents' discovery request to have the effect of a de facto request that the Court set a later date for the hearing in this matter. That is, this is an alternative independent bases to reject the respondents' claim.

Now, it was at this point that I was going to offer the OFHEO counsel the opportunity to weigh in on this because I mentioned during the conference

call a week ago that they should be prepared to speak to this. And then, as I already alluded to, I received a document which I have reviewed.

But I -- I do not -- I do not see any need for any further -- I've read -- I read and considered the arguments. And that is my ruling in terms of this particular issue.

Do you have something different that you want to mention, counsel?

MR. DOWNEY: No, Your Honor. I just wanted to speak to your comments about the Brock case and implicitly I think it's failure to be included in our pleading. If I might just be heard on that for second.

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We're not arguing, Your Honor, that you lose jurisdiction over this matter for today's purposes. We're arguing the hearing should be set for February 16.

ADMINISTRATIVE JUDGE MORAN: I understood that.

MR. DOWNEY: So we understand the point that OFHEO is making with regard to that.

The other point I would make, Your Honor, is I just want to warrant to the Court that our submission is in no way disingenuous. The burden is on us to prepare for a February 16 hearing are comparable to the burdens on OFHEO. And we're ready to make the submissions on February 12 we identified.

So we're not in any way asking for or arguing for anything other than for hearing to start on February 16. Thank you.

ADMINISTRATIVE JUDGE MORAN: Counsel for OFHEO, want to say anything in response to this? It's not called for, but you can. It's your option.

MR. ARONICA: No, Your Honor. I think we've laid out our position in the papers that we

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filed.

ADMINISTRATIVE JUDGE MORAN: Okay. And so you have a ruling on that issue.

MR. DOWNEY: Thank you, Your Honor.

MR. KRAKOFF: Your Honor, can I just be heard just for a moment to respond to a couple of comments by Your Honor.

ADMINISTRATIVE JUDGE MORAN: Sure. And, again, counsel, tell me your name again. I know I have it here, but you're new to this group.

MR. KRAKOFF: It's Krakoff.

ADMINISTRATIVE JUDGE MORAN: Okay. Go ahead, counsel.

MR. KRAKOFF: David Krakoff.

I just really wanted to respond very briefly to Your Honor's observation that the motions and the position with regard to 4633 (a)(2) was possibly specious and disingenuous.

And with all due respect, we disagree with that characterization. And I say that at this point because we're just getting started to know one

another.

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ADMINISTRATIVE JUDGE MORAN: Yes.

MR. KRAKOFF: And I want to assure the Court that we do not take positions that we in any way consider to be disingenuous. We're ready to go. Simple as that. And I think that we're -- OFHEO -- what's really behind OFHEO's position is they're not ready to go.

And what has happened here, Your Honor, is that OFHEO has initiated an examination three years ago. They hired Deloitte & Touche. They hired Stanley Sporkin and his law firm, Weil, Gotshal & Manges. They hired Duane Morris. The Web site says it's one of the top 100 law firms in the country.

And they should be ready to go. And they've complained about document production. Your Honor, in the last 3 years, they've issued two reports which --

ADMINISTRATIVE JUDGE MORAN: Mr. Krakoff, how long is this going to go on? I've made my ruling. I understand your position. And no umbrage is taken. I was merely alerting the parties that you

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have an obligation in front of me to cite cases that went contrary to positions that have argued.

And I did view this as a close call in terms of the argument being made here given my earlier remarks about the entire context of this case. To suggest that this hearing should begin February 16 is -- it's really disingenuous to suggest that that should happen. I think it's not a fair argument to make.

MR. KRAKOFF: Well --

ADMINISTRATIVE JUDGE MORAN: It doesn't mean that that carries over to anything other than -- any other rulings at all. But that's my view of this. There's going to be a lot of serious things that I'll have to deal with rather than this particular issue. But now it's disposed of.

MR. KRAKOFF: I understand, Your Honor. And I appreciate your candor in sharing your view on that.

And in all candor as well, our concern is that OFHEO has used the last 3 years to mount a public campaign, a bitter campaign, that is

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personal against our clients.

And we have sought mandamus to move this matter to the District Court where we can have a fair hearing. Not -- which is no -- no comment on Your Honor.

ADMINISTRATIVE JUDGE MORAN: I don't take it as that.

MR. KRAKOFF: It's the OFHEO piece of this. So that's really where we're coming from, Your Honor.

ADMINISTRATIVE JUDGE MORAN: Since you're here, why is it, though, that you would not seek mandamus after I issue my recommended decision if that's the case?

MR. KRAKOFF: We sought mandamus at the earliest possible date, as soon as the --

ADMINISTRATIVE JUDGE MORAN: No. But my question is: Why would you not wait, given what you just said, and seek mandamus -- which, by the way, I may be blurring together some of the positions, but I think they're all of the same vein, which is that your position is that, not only should Mr. Lockhart not be able to review this matter, but that anyone

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within OFHEO -- it's not just Mr. Lockhart; is that correct?

MR. KRAKOFF: Yes, Your Honor. Our position is that the agency may maintain a position and an important role in this matter as the prosecutor. And that can occur in District Court.

But that the agency is so thoroughly on record in the public domain from Mr. Falcone, who was investigated by --

ADMINISTRATIVE JUDGE MORAN: Okay. Please. I've read the lengthy documents. I've even scanned -- I have even scanned through some of your filings in front of the District Court.

So I'm aware of all of the representations about your position as to how Mr. Lockhart has

revealed himself, in your respective, to be irrevocably tainted and unable to act as an independent reviewer.

But that still doesn't really answer what I've posited to you, which is that, it seems to me that, if you have any mandamus claim, any legitimate claim -- I'm not saying; I don't know -- that would

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come after the recommended decision is issued by me.

And I might state that -- and this is not said in a defensive posture at all, so please don't interpret it that way. But I've been doing this for 10 years. And my record is out there.

And I'm pretty proud of the record that you will see if anyone takes the time to research the various agencies, eight or nine agencies that I've held hearings in. You will find that I'm pretty much an independent adjudicator, that you'll find no bias one way or the other.

I call balls and strikes. Sometimes people think the umpire is blind, but I'm a fair and impartial judge. And that's what you'll be getting in this case and in any matter that I preside in if you happen to be in front of me in some other agency case.

So I come back to the point that, to the extent you may have some claim, again, without suggesting one way or the other whether there's merit to that claim, the timing for that would most appropriately be after there is an initial

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recommended decision issued by me.

I would also note that, in thinking about this matter a little bit, that, you know, it isn't as if the director can willy-nilly ignore findings of fact, determinations of credibility that I would have to deal with during the course of a hearing.

And I'm going to say this for the last time, assuming there's no dispositive motion that would cause the proceeding to end. Who knows what's coming down the pike. I'm not going to keep repeating myself on that.

But the point is that a --- if, for instance, assuming, hypothetically, that one or more of the respondents were to prevail or to prevail in part, who knows, the point is that the director or any reviewing authority cannot just usurp the determinations made by the Administrative Law Judge and just go contrary to what the evidence and the credibility findings are.

So, again, I come back to -- and that's going to end the discussion on this for now -- my view is that the appropriate time, if

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at all, to raise a question of mandamus would be after I issue a recommended decision in this case.

So thank you, Mr. Krakoff.

MR. KRAKOFF: Thank you, Your Honor. And I do wish to point out that your reputation is for -- as being very fair. And we do not have any quarrel with you as the presiding officer at all.

ADMINISTRATIVE JUDGE MORAN: So then you endorse my idea that you're going to wait for the mandamus until after the initial decision is issued?

MR. KRAKOFF: We will consider a mandamus petition with regard to the 4633 (a)(2) issue. And I think that's what the Court is addressing. But our quarrel is with OFHEO, Mr. Lockhart, because Mr. Lockhart has talked to anyone and everyone about this issue.

ADMINISTRATIVE JUDGE MORAN: Okay. Thank you. Thank you.

Okay. Before I turn to some of the other issues, because there was not an alternative scheduling order presented by the respondents other

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than what I mentioned to you earlier that the hearing begin on February 16, I am adopting the proposed scheduling order which was presented by OFHEO and received by me on February 2nd.

We will -- what we need to do, though, is to add what I mentioned earlier, which is a proposed date for the hearing to actually begin. We need to include that.

Now, in another OFHEO matter that I am currently presiding, for the most part, the parties

have worked together well, as there is an identity of some of the parties here as in the other case.

MR. DOWNEY: Some of the counsel, Your Honor.

ADMINISTRATIVE JUDGE MORAN: What's that?

MR. DOWNEY: Some of the counsel.

ADMINISTRATIVE JUDGE MORAN: Yes.

MR. FELT: One of the parties.

ADMINISTRATIVE JUDGE MORAN: Yes. That's what I was referring to. The identity meaning in mathematical terms identity of some of the counsel.

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I want you to confer with each other after the conclusion of this scheduling conference and get back to me so that I can issue a scheduling order perhaps on Friday.

And that would include, if there's some reasonable basis to amend some of the dates that OFHEO has presented. If you can't agree on that, then I'm going to go with what I have in front of me. It seems reasonable. And so that disposes of that.

MR. DOWNEY: Your Honor, can I ask one practical question related to scheduling? I know that Your Honor has a number of matters from being in the Freddie Mac matter. Are there any timeframes within the period that this schedule contemplates that Your Honor would not be available or prefer that we not suggest?

ADMINISTRATIVE JUDGE MORAN: I haven't -- we'll work that out as we go through. I haven't compared the two. I think -- I think in the other matter, which I really don't want to be discussing on the record here, I think that the -- as I recall, the last time, the hearing was scheduled to

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begin in October of this year.

MR. DOWNEY: That's my recollection also, Your Honor.

ADMINISTRATIVE JUDGE MORAN: But with my able staff attorney, we should be able to handle everything.

MR. DOWNEY: Okay. So sometime -- under this schedule, sometime in 2008 is what you would be seeking?

ADMINISTRATIVE JUDGE MORAN: I believe so, yes. The parties are not, for example, in the other matter -- and let's keep these separate, okay. I have no idea as to the anticipated length of the hearing in the other OFHEO matter. So I can't -- that would help you later on.

MR. DOWNEY: That's fine.

ADMINISTRATIVE JUDGE MORAN: But we won't know that until we get further down the road.

MR. DOWNEY: We'll take that into account in our discussions, Your Honor. I was just thinking if there was any other matter in 2008. I want to make clear we're going to adhere to our position on

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the 4633 (a)(2) issue. But I want to work with the Court around the scheduling issues so we can deal with things practically.

Thank you, Your Honor.

ADMINISTRATIVE JUDGE MORAN: Thank you.

Although my ruling has disposed of this, I can't resist but to mention that in the memorandum regarding proposed scheduling submitted by counsel for Ms. Spencer, at the end of that memorandum, counsel says: While the matter is pending before the Court of Appeals, referring to the mandamus proceeding, counsel submits that this Court should refrain from adopting the schedule proposed by OFHEO.

Then they go on to say: But we reserve our right to have a hearing in this matter commence no later than February 16, 2007. And to which I say that idea is rejected.

The other thing is, for people that are more familiar with this area of practice than I am, I notice that, in the Respondent Howard's submission in advance of the scheduled hearing to be

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held -- this is a document entitled Submission in Advance of the Scheduling -- Scheduling Hearing to be held on February 8, 2007.

Mr. Salky, you represented that I

should either recommend dismissal of the notice of charges in accordance with your theory about 12 USC 4633 or request that Judge Richard Leon -- who I happen to know; we went to the same law school -- hold a hearing on Mr. Howard's motion on February 16th.

Are you suggesting that you can request a particular judge to hear a matter?

MR. SALKY: Just to advise the Court, the current status is Judge Leon has set a hearing on Mr. Howard's motion to compel essentially these proceedings to be held in the District Court.

And what I was suggesting to Your Honor was that, at the time we filed that, OFHEO had filed for a 45-day extension to respond to our motion, an extension to which we had opposed.

And that I was suggesting to Your Honor that you might, before doing anything in terms

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of the scheduling, if you were to reject the -- our 4633 argument, that you might encourage Judge Leon to -- regardless, he has ruled and set a hearing on that motion. So we would be -- we will be heard on that.

ADMINISTRATIVE JUDGE MORAN: But not on the question of whether 4633 requires that the hearing begin by February the 16th. That is not in front of Judge Leon.

MR. SALKY: That is not before him.

ADMINISTRATIVE JUDGE MORAN: And it would be my view that, unless OFHEO were to consent to

this, that it would be inappropriate to be requesting a particular judge to hear a particular issue unrelated to what is in front of that judge.

MR. SALKY: No. I was suggesting that encouraging that judge which has been assigned that matter, in other words, Judge Leon is hearing the motion --

ADMINISTRATIVE JUDGE MORAN: I understand.

MR. SALKY: -- of Mr. Howard to compel the proceedings to commence in the United States District

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Court. He's been assigned that case. That this court --

ADMINISTRATIVE JUDGE MORAN: Right. But I'm sure the District Court has their own method for assignment of cases to judges. And this would be a separate matter, not something that would be automatically added on to Judge Leon's plate.

MR. SALKY: If Judge Leon were to decide the motion in favor of Mr. Howard's position, it is my belief and understanding that, as a result of his assignment of all the related civil litigation in the Fannie Mae case, he would be assigned and has been assigned to -- would be assigned to that matter.

ADMINISTRATIVE JUDGE MORAN: That's a little different than what I'm concerned about. But that's -- that's sufficient. Thank you. You have a ruling on this matter. I just wanted to

express my concern.

MR. SALKY: And I wish to advise the Court I no longer need to have the Court's assistance in regards to the scheduling of the hearing. That has been done.

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ADMINISTRATIVE JUDGE MORAN: Okay. I'm going to run through a couple other matters. Let's deal with what should be an easier matter.

Yes, Mr. Salky.

MR. SALKY: Only because I'm standing up. I know one of the other matters is issues with relation to motions to strike discovery request. I know that's on Mr. Aronica's list of items to be taken up.

Mr. Felt and I have conferred and have, I think, determined that we wish the parties to be able to confer further in hopes of resolving actually what is a larger set of document production issues because of the parallel proceedings before Judge Leon in the civil litigation to which OFHEO is making production.

So we will confer further, the parties, as Your Honor indicated. At least the attorneys have a good working relationship. We'll confer further and advise the Court subsequently.

So we will be seeking to postpone what is due on Monday for us, which would be a response with

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a motion to strike OFHEO's first set of document requests.

We think that the document production issues, given the Court's ruling on the date that the hearing should commence, can be resolved by discussion or, more likely, be resolved by discussion and then make it unnecessary to have further pleadings at this time before the Court.

ADMINISTRATIVE JUDGE MORAN: Okay. That's fine. So please put that in writing and request to me to that effect. Okay, Mr. Salky?

MR. SALKY: Yes, sir.

ADMINISTRATIVE JUDGE MORAN: Okay. Now let's deal with something a little bit easier. I have in front of me a confidentiality agreement and stipulated protective order related to the production of documents.

Am I correct there's no dispute there? All that requires is my signature and then the parties' signatures; is that right?

MR. FELT: Yes. That's our protective order that we drafted, Your Honor. That's all that

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that would require.

MR. DOWNEY: Your Honor, actually --

ADMINISTRATIVE JUDGE MORAN: Excuse me. Are you representing someone in this case?

AUDIENCE MEMBER: No, sir, Your Honor.

I wanted to say it's very difficult to hear what counsel are saying. And I just wondered if they might speak closer to the microphone, Your Honor. I'm not sure the sound system is picking up.

MR. DOWNEY: As long as Your Honor can hear me.

We have a number of what I would call mechanical concerns related to the protective order. I think before Your Honor signs the order, before there's further discussion, I could rehearse those here, but it might be better to make it part of the process that Mr. Salky just described.

ADMINISTRATIVE JUDGE MORAN: Is that acceptable to OFHEO?

MR. FELT: Yes.

ADMINISTRATIVE JUDGE MORAN: Okay. So that disposes of that for now at least. You'll be sending

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me some sort of a confidentiality stipulated protective order that you worked out. Yes?

MR. FELT: Yes.

ADMINISTRATIVE JUDGE MORAN: Okay. Now, I'm not going to rule on this, but I just want to take note of the fact that, again, as I'm about to leave to go on the shuttle down here, my paralegal gives me the response from counsel from Mr. Raines regarding the docketing of the ex-parte letter from Mr. Downey. And I haven't had a chance to read your response. Obviously I'm not going to be ruling on that right now, obviously.

It would seem to me that if I were to get to the first juncture, though, and determine that it was appropriate to docket that, I think that the motion also calls for some sort of sanction or -- it would seem to me, but I'll hear from you if you want to speak to me now about this or through some other format, letter, the time to deal with that would be not until after the conclusion of any -- the conclusion of the proceedings or the issuance of a recommended decision and not have that hanging over

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as a concern or an active issue.

Let's just postpone dealing with that other than in the question of including it in the record or not. I don't want to get into questions of sanctions if I get there. Does that work for you people?

MR. FELT: It works for us, Your Honor.

MR. DOWNEY: Your Honor, I don't have a view on that one way or another. I'd be happy to have you decide it now because I think it's inappropriate.

But I just want to bring to your attention that, actually -- I apologize for the late delivery of our submission -- but actually OFHEO has outdone me by one because they submitted this morning just before the hearing started something which I'm sure Your Honor doesn't have. I could pass up my copy.

MR. FELT: We have a copy.

MR. ARONICA: We have a copy.

ADMINISTRATIVE JUDGE MORAN: What does it relate to?

MR. DOWNEY: It relates to what I think is in front of Your Honor, which relates to the --

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ADMINISTRATIVE JUDGE MORAN: The question of the ex-parte letter are you saying?

MR. DOWNEY: To the letter. It is a motion for referral to the director. OFHEO can speak for itself on this. But I understand that they asked that the letter be referred back to the director.

ADMINISTRATIVE JUDGE MORAN: I'm -- I'll look at that back --

MR. DOWNEY: That's fine. Just while I have the benefit of you being here, rather than burdening you with further proceedings, my suggestion on the issue of documenting the letter in light of the fact that OFHEO's position is now that it should be referred back to the director is simply that the motion to docket should be denied.

It was filed in our view with the director in the first instance. They now concede it should be with the director. We'll take up the issue of whether the director has ruled on it in separate proceedings.

ADMINISTRATIVE JUDGE MORAN: Okay. What do you have to say for OFHEO? That takes that into

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account?

MR. FELT: Yes, it does. I think the parties are essentially in agreement that this matter should be moved up to the director as soon as possible for his consideration, Your Honor.

ADMINISTRATIVE JUDGE MORAN: Okay. Would this be the same Director Lockhart?

MR. FELT: Yes, Your Honor.

ADMINISTRATIVE JUDGE MORAN: Okay.

MR. DOWNEY: Your Honor, I apologize. But I just want to be careful about the record. The parties aren't in agreement that it should be moved up for his consideration. Our position is it's already been decided by the director.

But I think what we are in agreement to, what a fair characterization of our agreement is, is it was presented to the director and that is the appropriate level for which it should be decided.

ADMINISTRATIVE JUDGE MORAN: Okay. I just have two other things that I'm going to deal with, and then I'll listen to the parties if they have

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other things they want to bring to my attention. Don't expect I'll make any rulings about things that you raise, though, this morning, because it's not likely.

The two things that I wanted to raise. One is just strictly procedural; and that is

that I need a WordPerfect version of the notice of charges and the answers. And there's no hidden agenda behind that. It just enables me -- and by this, this is an obligation for all filings.

It enables me, since I have to be the craftsman of these articles, we don't really have -- nowadays, we don't have a secretary who types things up. It enables me to use the cut and paste feature. And I like working with WordPerfect.

The other -- the two do not work together well. And so that's why I'm requesting in WordPerfect. And I know I sound a little bit out of date because here I am requesting it be in a floppy disk. And everybody knows except me that

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floppy disks just aren't being used anymore. But my computer at home doesn't know that. But it turns out that I can use a CD at home as well.

So whatever electronic format, please make it in WordPerfect. And make it so it's not read only so that I can be about my copying and pasting your words where I need to.

Okay. Now, the other question I wanted to ask of you folks is, I have in front of me the document subpoenas filed on behalf of Mr. Raines. And just give me a moment, please.

Okay. And this is -- obviously, I'll make my own determination on this. In reviewing the

regulation pertinent to this issue and the subpoenas, it would appear that my role is essentially pro forma in terms of signing document requests for subpoenas unless -- I mean, I'm aware that the regulation does allow me to limit the scope of the subpoena. Do you want to help me with that section, someone? What is the section that deals with that? 1780.28, right?

It says that I should issue the document subpoenas promptly except if I determine

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that the application does not set forth a valid basis for the issuance of the subpoena or that any of its terms are unreasonable, oppressive, excessive in scope or unduly burdensome. Then I can either refuse to issue the subpoena or limit it.

And so my question is -- I just want to get your input on this. And I'll give you one example on what my thinking was. When I looked over the first party, the third party that Mr. Raines wants to get documents from, that's Deloitte & Touche. Am I pronouncing that correctly, the last name?

MR. DOWNEY: That's correct.

ADMINISTRATIVE JUDGE MORAN: Okay. I've heard of them, but I wasn't sure of the pronunciation.

Anyway, it ran through my mind, well, is it possible that Deloitte & Touche could be construed as a de facto party or that the documents

are privileged? And so what I'm leading up to is your views as to whether that is really left in the burden of the party that was subpoenaed to then seek

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to have the subpoena quashed on whatever grounds they may have.

And so, effectively, it comes back to my role is, notwithstanding the language of 1780.28, rather a pro forma role.

Do you want to start with that? Do you have any comments about that from OFHEO first of all? You don't have to. I'm just asking.

MR. ARONICA: I think briefly, Your Honor, I think there may be items that are called for in that subpoena that may be confidential.

And as I indicated in our letter to the Court, we may want to take a look at that and file a motion in that regard unless, in a meeting -- meet and confer with counsel, some of the items might be deleted so that we don't need to bring that to the Court.

ADMINISTRATIVE JUDGE MORAN: Okay. That's exactly what I was concerned about, whether this could be, effectively, a backdoor method of getting documents for which, trying to achieve frontally, it would be denied because of some

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assertion of some privilege.

MR. ARONICA: Yes, Your Honor. So we would like to meet with them and discuss those. And then if we cannot reach an agreement, then we might present something to the Court, a motion to quash or something.

But, generally, the third party who receives the subpoena certainly has the right to move to quash it.

ADMINISTRATIVE JUDGE MORAN: Sure. So then you -- then you essentially, if I can sum up what you're saying, then you essentially agree that, absent my finding something in those limitations that I have already mentioned twice now, that my role is virtually a pro forma issuance of the subpoenas.

MR. ARONICA: That's correct, Your Honor.

ADMINISTRATIVE JUDGE MORAN: Okay.

MR. ARONICA: But we would like to have the opportunity to confer with counsel because we believe there are things in there that are objectionable and we may want to bring that to the Court at this stage.

ADMINISTRATIVE JUDGE MORAN: Before --

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because the requirement is that I issue these promptly. Are you saying before I issues the subpoenas or after?

MR. ARONICA: Before the Court issues the subpoenas. We would like to confer with them to see whether some of the items can be withdrawn and we have no objection to the issuance, which doesn't

necessarily mean that Deloitte & Touche, the third-party recipient, wouldn't move to quash it for whatever basis they see it.

ADMINISTRATIVE JUDGE MORAN: Okay. And I'll hear from you in a second, Mr. Downey. Are you acting as lead counsel on these issues for the other respondents? Yes?

MR. DOWNEY: I'll try to do my best. I haven't conferred with them on this issue but I'll do my best.

ADMINISTRATIVE JUDGE MORAN: Okay. Well, then I have the question, do you even have the standing, do you have standing to object other than, for instance, if I -- what I suggested a moment ago, if you can make the argument that, in effect, this is

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not a third party.

MR. ARONICA: For example, I believe one of the requests, and I don't have it in front of me, one of the requests from Deloitte & Touche is regarding their engagement with OFHEO when they were working on behalf of OFHEO. We believe that's objectionable.

We want to confer with counsel to see if they would eliminate that. And if they do not, then we -- we would advise the Court that we would want to file something to move to quash that and strike that portion of their third-party subpoena.

ADMINISTRATIVE JUDGE MORAN: And your standing to be able to move that would be based on

what?

MR. ARONICA: Privilege. Since the items would be used in this hearing. I believe we would have standing at this point to object to what's included in their subpoena request.

ADMINISTRATIVE JUDGE MORAN: Okay. Mr. Downey. Thank you.

MR. DOWNEY: Your Honor, just to answer the

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question you posed directly. I think your role is largely pro forma, and we don't need to advocate in advance.

Let me use a different example of a third party because I think the Deloitte example complicates it for a reason that I'll explain in a minute.

Goldman Sachs is another party from whom we're seeking documents. OFHEO doesn't have any privilege relationship or claim of a privilege relationship with Goldman Sachs.

I think the Court's role in that is to review the subpoena and issue it.

There are some complications with regard to the Deloitte & Touche because of this relationship. But I think the appropriate step for the Court to take is to issue -- have the subpoena issued.

We represent to the Court that we'll work with OFHEO to try to address whatever concerns they

have. And if there's a nonproduction upon which we think there should be a production, we'll have the

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burden of coming to the Court and addressing it then.

I don't think we should try to work that issue before the subpoena is issued. They're not self-enforcing in any event.

ADMINISTRATIVE JUDGE MORAN: Well, what I gather from counsel for OFHEO is he is requesting a little bit of time to just at least discuss this with you and the other respondents before I issue the subpoenas.

Are you willing to have some reasonable period of time for this discussion to take place before I issue the subpoenas?

MR. DOWNEY: Your Honor, I'm willing to do it that way. But I would suggest the better way to do would be to just let the subpoena issue. Because there's plainly a lot of material that Deloitte needs to get working on gathering as the subsequent auditors.

ADMINISTRATIVE JUDGE MORAN: Okay. I'll consider that.

MR. DOWNEY: But I represent, whether it happens one way or the other, we'll work with them.

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ADMINISTRATIVE JUDGE MORAN: Okay.

Mr. Salky, do you want to get up and speak? And,

also, Mr. Krakoff, if you have something, please. Everyone gets a turn.

MR. SALKY: Your Honor, I do think that there will be a lot of third-party subpoenas issued. So I do want to just comment and endorse the following procedure, which is that either party can submit requests for third-party subpoenas. I think it's a ministerial act.

The party then, OFHEO, for instance, can, if it believes the third party would be producing information which is privileged, has an opportunity in that motion that Deloitte might file or it could file. So it has standing to that extent after the subpoena is issued, but not before the issuance of the subpoena.

It's not to say the parties can't informally confer. But the rules seem to us to be clear, as Your Honor indicated, that, if we believe and in good faith, there is a good faith requirement in the rule that we must adhere to, that

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we need the documents to defend our case, or OFHEO needs third-party documents to proceed in its case, that the Court would then, this Court, would issue the subpoena subject, of course, to objections subsequently.

ADMINISTRATIVE JUDGE MORAN: Okay. Mr. Krakoff.

MR. KRAKOFF: Your Honor, I have nothing to

add to what Mr. Downey and Mr. Salky represented. They did a great job.

ADMINISTRATIVE JUDGE MORAN: Okay. Well, here's what I'm going to do. I'm going to direct that the parties consult with one another. And let me know by next Monday, Monday coming up next, which would be the 12th, okay. And then I will act with regard to the issuance of the subpoenas.

But I'm not -- I'm still going to pay attention to 1780.28 (a)(3) and use my best judgment about that with regard to this particular request for third-party document subpoenas.

All right. So you will consult with one another.

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MR. ARONICA: Thank you, Your Honor.

ADMINISTRATIVE JUDGE MORAN: I don't have anything else to bring up. Did we come up with a date for the hearing yet? Did we say that?

MR. FELT: No, Your Honor. We had left that blank.

ADMINISTRATIVE JUDGE MORAN: You were going to get back to me.

MR. FELT: We were going to get back to you on that. We were not certain of Your Honor's schedule and didn't want to presume in that regard.

I just wanted to ask your indulgence to return to the issue of the referral to the director on the recusal issue.

And I needed to correct the record at least

-- or respond to Mr. Downey's assertion that the director had already made a decision on that issue.

In fact, he has not made a decision. There's nothing in the record.

ADMINISTRATIVE JUDGE MORAN: You have to be clearer to me. Which item are you referring to in

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terms of the director's decision?

MR. FELT: The director has not made a decision as to whether or not to recuse himself from this matter.

ADMINISTRATIVE JUDGE MORAN: Oh.

MR. FELT: And we think it is important, and we agree with the respondents, to the extent that we believe it's important that the director have an opportunity, have an opportunity soon, to address that issue.

And that's why we would urge Your Honor to sign the order that we've proposed this morning, or this morning by motion, to refer that matter to the director so that he can deal with it.

The issue is currently pending in the Court of Appeals. As you know, they put it on an expedited schedule, briefing schedule. And we would appreciate that matter being formally referred to the director, which I believe is the reason why he wanted it docketed and made a part of

the record in the case. He just wanted some

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formality brought to the process.

ADMINISTRATIVE JUDGE MORAN: Right. But you haven't -- I don't physically have that document yet.

MR. FELT: I can cure that right now.

ADMINISTRATIVE JUDGE MORAN: Of course, counsel for the respondents all have this, correct, counsel?

MR. FELT: They do, Your Honor.

MR. DOWNEY: We do, Your Honor. We received it this morning.

This is just a reminder, because I know there's a lot. This is the issue on which our position is that there's a motion pending to docket it. Now there is a motion to refer it. The correct procedure is not to docket it and refer it, but just to deny the initial motion.

ADMINISTRATIVE JUDGE MORAN: Okay.

MR. KRAKOFF: Your Honor, can I just make one comment with regard to Mr. Felt's representation?

ADMINISTRATIVE JUDGE MORAN: This individual keeps standing up in the hearing room.

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MR. KRAKOFF: Sorry.

AUDIENCE MEMBER: I want to clarify. You asked if I'm representing anybody. I'm a

reporter for The Washington Post.

ADMINISTRATIVE JUDGE MORAN: Yes. That's fine. We want you to be able to hear.

AUDIENCE MEMBER: Thank you, sir.

MR. KRAKOFF: And the only thing I wanted to note for the record is that Mr. Pollard, the general counsel of OFHEO, has represented in a press conference, at least as noted in the media, that the director refuses to recuse himself from this matter. So just for the record.

ADMINISTRATIVE JUDGE MORAN: Okay.

MR. KRAKOFF: Thank you.

MR. FELT: I don't think we're arguing this motion or the substance of this for Your Honor, but that we obviously do not agree that the director has refused to recuse himself. And I think, if one were to examine the timing of the statement, you would realize or anyone would realize that it was not made in response to this motion or any of their papers.

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ADMINISTRATIVE JUDGE MORAN: Okay. People are queuing up here. Just wait, Mr. Salky.

It would help me, by the way, if you can make arrangements with the court reporter that I get a copy of the transcript of this proceeding this afternoon. Is that possible? Can you work that out?

MR. FELT: Yes, we will, Your Honor.

ADMINISTRATIVE JUDGE MORAN: Okay. Next is

Mr. Salky.

MR. SALKY: Simply to note for the record that Mr. Howard, that he not be orphaned in this matter.

The pleading which OFHEO filed this morning with the Court to refer Mr. Downey and Mr. Spencer -- Ms. Spencer's request for recusal, to refer those back to the director, did not include Mr. Howard's request for recusal.

My understanding upon conferring with counsel for OFHEO is that they do seek the same referral back to the director. And we don't oppose that.

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ADMINISTRATIVE JUDGE MORAN: Do you agree, counsel for OFHEO?

MR. FELT: Yes. Yes, we do, Your Honor.

ADMINISTRATIVE JUDGE MORAN: They are not orphaned.

MR. FELT: They are definitely not orphaned, Your Honor.

ADMINISTRATIVE JUDGE MORAN: Okay.

MR. FELT: We want to keep them in this.

ADMINISTRATIVE JUDGE MORAN: Okay. That concludes the items that I need to bring up.

You'll be getting appropriate orders from me promptly dealing with some of the issues that we've raised here that have been raised here this morning.

Is there anything else that anyone

wants to bring to my attention before we call the scheduling conference to a close? I'm going to begin with OFHEO, Mr. Salky.

MR. ARONICA: Nothing further, Your Honor.

ADMINISTRATIVE JUDGE MORAN: Okay. Now, Mr. Salky, go ahead.

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MR. SALKY: And I think we've established this with OFHEO. But I would like the Court also to ensure that notices in this case are, not only sent to my attention, but to Mr. Eric Delinsky's attention who is a member of our firm who has entered an appearance in this matter.

I've asked OFHEO to make sure they include him on all notices. I have a trial schedule that may take me out of town. I want to be sure that we are -- things tend to happen, you know, the morning of and the Friday afternoon. I just want to make sure we all get proper service. Thank you.

ADMINISTRATIVE JUDGE MORAN: Mr. Felt, is that all right?

MR. FELT: That's not a problem. I would just like to ask that Mr. Aronica, likewise, be served with any notices in the case for the same reason.

ADMINISTRATIVE JUDGE MORAN: Okay. Mr. Salky, everyone understands what Mr. Felt said?

Okay. Go ahead, Mr. Downey.

MR. DOWNEY: Your Honor, just one request

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in connection with your entry of the scheduling order that might would be, I think, useful to us as a party. It might be useful to OFHEO as well.

I wonder if -- it would be a long time between this conference and whatever hearing date is set by Your Honor.

I wonder if the scheduling order might embody the idea that we would come for a conference at some point, you know, part of the way or midway through just to get Your Honor's views on the progress of discovery and raise any issues that are outstanding.

I think it's beneficial for us, for example, to hear your reflections on the subpoenas rather than to issue a bunch of paper. It may keep the matter on track better.

ADMINISTRATIVE JUDGE MORAN: Okay. And my reaction to that is I have no problem doing that. But we need not formally include it within the scheduling conference.

All you have to do is get on the phone, and we'll talk, and we'll get together in

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person as appropriate without formally including it. I have no aversion to it, but there's no need to do it.

MR. DOWNEY: Fair enough, all right.

MR. KRAKOFF: Nothing further, sir.

ADMINISTRATIVE JUDGE MORAN: Okay. So the important thing is that you'll have this transcript. OFHEO, you'll take care of that for me.

MR. ARONICA: Yes, Your Honor.

ADMINISTRATIVE JUDGE MORAN: All right. It was nice meeting all of you. Stay warm. We'll be meeting again in the near future I'm sure. This meeting will come to a close. Thank you.

(Whereupon, at 10:32 a.m., the hearing adjourned.)

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CERTIFICATE OF NOTARY PUBLIC

I, Vicky J. Stallsworth, the officer before whom the foregoing hearing was taken, do hereby certify that the proceedings was taken in shorthand and thereafter reduced to typewriting by me or under my direction; that said transcript is a true record of the proceedings; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

_____

Notary Public in and for
the District of Columbia

My Commission expires:

August 14, 2007