UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LELAND C. BRENDSEL, Plaintiff, v. OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, and ARMANDO FALCON, JR., Defendants.	)	No. 1:04cv00487 (RJL)

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

Plaintiff Leland Brendsel has brought an action against the the Office of Federal Housing Enterprise Oversight ("OFHEO") claiming, inter alia, that OFHEO's supervisory letters to the Federal Home Loan Mortgage Corporation ("Freddie Mac") have caused Freddie Mac to refuse to pay him various forms of compensation assertedly owed to him. Plaintiff has simultaneously moved for a preliminary injunction which would alter the status quo and provide him with the ultimate relief sought by his complaint–an order enjoining OFHEO from exercising its supervisory authority as Freddie Mac's regulator and instead requiring that OFHEO instruct Freddie Mac to release immediately all of the compensation to which Plaintiff claims to be entitled.

As we demonstrate below, this Court should deny the motion. First, Plaintiff is unlikely to succeed on the merits of his claim. This Court lacks jurisdiction over Plaintiff's claims because jurisdiction has been removed from the district court by 12 U.S.C. § 4635(b). The Court

also lacks jurisdiction because there has been no final agency action and because the matter is not ripe for review. Additionally, OFHEO's action was neither arbitrary nor capricious. In the context of the special investigation that began at the time that Plaintiff was asked to resign, OFHEO acted quite reasonably in determining that Plaintiff's termination benefits must be reviewed before they could be released. As the regulating agency responsible for ensuring that Plaintiff's compensation was not excessive, OFHEO was reasonable in taking action designed to ensure that a thorough investigation into the propriety of Plaintiff's termination benefits would be possible. Plaintiff's is similarly unlikely to succeed on his due process claim because he is presently receiving that process which is due–an administrative enforcement proceeding that will provide him a hearing and an opportunity for judicial review.

Second, Plaintiff cannot establish any irreparable harm. Plaintiff has not alleged that he is presently suffering any particular harm from the delay in the payment of his compensation claims and termination benefits, and courts have consistently held that the denial of money owed is not irreparable harm for preliminary injunction purposes, absent extraordinary circumstances which are not present here.

Third, Freddie Mac would be harmed if it were forced to release Plaintiff's alleged benefits before OFHEO could determine whether such benefits were appropriate. OFHEO would also be harmed as its authority to ascertain the appropriateness of the compensation would be vitiated. Nor would the public interest benefit from the granting of this motion. To the contrary, OFHEO is currently exploring the issue of whether Plaintiff's termination benefits would constitute excessive compensation or would unjustly enrich him based on possible wrongdoing. Such matters implicate the safety and soundness of Freddie Mac. The public relies on having a

safe and sound Freddie Mac to maintain the nation's secondary mortgage market. Additionally, Freddie Mac's stockholders have a direct interest in ensuring that money is not spent unnecessarily on Plaintiff's termination benefits. For all of these reasons, Plaintiff's motion for preliminary injunction should be denied.

STATUTORY BACKGROUND

OFHEO was created by the Federal Housing Enterprises Financial Safety and Soundness Act of 1992. 12 U.S.C. § 4501, et seq. Recognizing that Freddie Mac and the Federal National Mortgage Association ("Fannie Mae") (collectively "the enterprises") have important public missions affecting the health of the national economy, Congress created OFHEO to provide more effective federal regulation to reduce the risk of failure of these two enterprises. 12 U.S.C. § 4501. OFHEO is headed by a Director, who is appointed by the President and confirmed by the Senate. Id. §§ 4512, 4513. OFHEO's primary responsibilities include, among other things, ensuring the capital adequacy and safe and sound operation of the enterprises. Id. § 4513(a).

As part of fulfilling OFHEO's responsibilities, the Director of OFHEO has the authority and responsibility to review executive compensation packages. Id. §§ 4513(b)(8), 4518. The Director is expressly authorized to take such actions as he or she determines necessary to prohibit the payment of excessive compensation by the enterprises to executive officers. Id. § 4513(b)(8). This general authority to prohibit excessive compensation to executive officers is included as one of the Director's enumerated powers necessary to fulfill his or her duty to ensure that the enterprises are operating safely and soundly. Id. The duty to prohibit excessive compensation is further detailed in another provision of the statute, which reads in relevant part as follows:

The Director shall prohibit the enterprises from providing compensation to any

> executive officer of the enterprise that is not reasonable and comparable with compensation for employment in other similar businesses (including other publicly held financial institutions or major financial services companies) involving similar duties and responsibilities.

Id. § 4518(a). Freddie Mac's compensation policies are governed by section 303(c) and (h) of the Federal Home Loan Mortgage Corporation Act. See 12 U.S.C. §§ 1452(c) & (h).

FACTUAL BACKGROUND

In January 2003, Freddie Mac, one of the world's largest sources of mortgage financing, announced that it would have to delay release of its 2002 financial statement and restate its earnings for 2000 and 2001, due to accounting issues related to the handling of certain transactions and policies. Complaint ¶ 8, 13-14; Plaintiff's Motion for Preliminary Injunction and Memorandum in Support Thereof ("PI Memo") at Exh. 2. The correction of these erroneous statements will affect the company's stated earnings by a cumulative $5 billion.[1] Complaint ¶ 14. New auditors engaged by Freddie Mac, PricewaterhouseCoopers ("PWC"), had questioned the way the company accounted for and described these transactions and strategies. Id. at ¶ 13.

In December 2002, Freddie Mac's Board of Directors ("the Board") retained outside counsel to review the facts and circumstances relating to certain of the principal accounting

[1] Plaintiff notes that the restatements resulted in a net increase in Freddie Mac's reported earnings. PI Memo at 4. That is not the point. The accounting methods used by Freddie Mac were designed to "smooth" the earnings curve to create the appearance of a steady increase in earnings, rather than sudden increases and decreases in earnings. Exhibit A at 31-32, 61-62, 103-04. In 2000, Freddie Mac's earnings were overreported. PI Memo at Exh. 10 ¶ 9. In the other years, earnings were underreported. Id. The purpose of such underreporting was to enable Freddie Mac, at some future time when earnings were low, to claim some of the prior years' earnings in order to continue the smooth upward curve. Thus, the ultimate result, had Freddie Mac's accounting practices gone uncorrected, would have been to enable Freddie Mac to overreport earnings in years in which its earnings had gone down.

issues identified by PWC. Exhibit A at 4.[2] At Freddie Mac's request, Plaintiff Leland Brendsel, Chairman of the Board and Chief Executive Officer of Freddie Mac, resigned on June 6, 2003.[3] Complaint ¶ 16. He submitted a notice under his Employment Agreement resigning from employment "for good reason" effective 30 days from June 6, 2003. Id. Plaintiff's Employment Agreement provided for certain post-employment compensation upon resignation. Id. at ¶ 18; PI Memo at Exh. 3. His termination package included continued payment of his salary for 24 months, payment of a pro-rata bonus for 2003, health care and life insurance benefits for 60 months, and immediate, accelerated vesting of long-term incentives such as restricted stock and stock options. Complaint ¶¶ 19-21. The approximate value of Plaintiff's termination package is $50 million. Id. at ¶ 33; PI Memo at Exh. 4. Plaintiff's termination package was subject to review and approval by OFHEO. See 12 U.S.C. §§ 4513, 4518.

On June 7, 2003, Armando Falcon, the Director of OFHEO, informed the Board that it was widening its existing review of Freddie Mac and directed it to take certain actions. Exhibit B. Director Falcon explained that during OFHEO's review of Freddie Mac's financial statements, he had:

> become increasingly concerned about evidence that has come to light of weakness in controls and personnel expertise in accounting areas and the disclosure of

---

[2] The Report to the Board of Directors of Freddie Mac that was prepared by Baker Botts LLP was not available at the time that OFHEO made the decision that Plaintiff's benefits should be held by Freddie Mac pending further investigation. However, OFHEO had received an oral report from Baker Botts prior to that decision, which was substantively similar to the contents of the report. See Exhibit K.

[3] Plaintiff states that the Board of Freddie Mac has never suggested any wrongdoing by him. PI Memo at 4. It is clear, however, that OFHEO has concerns about Plaintiff's possible wrongdoings, as is demonstrated by the Notice of Charges issued against Plaintiff in December 2003. PI Memo at Exh. 11.

> misconduct on the part of Freddie Mac employees. The removal of members of the management team only goes a part of the way toward correcting serious problems – concerns surrounding management practices and controls remain.

Id. Director Falcon further informed the Board that OFHEO was "deploying a special team to investigate all aspects of the issues surrounding the review of the re-audit that revealed deficiencies in accounting practices and controls and the matter of employee misconduct discovered on June 4, 2003." Id. He directed the Board to fully cooperate with OFHEO's investigation, as well as to provide OFHEO with a remediation plan and an explanation of the Board's rationale for the termination packages of Messrs. Brendsel, Clarke and Glenn, given the circumstances surrounding their departures from Freddie Mac. Id.; see also Exhibits C & D (requesting specific information for the examination). Director Falcon specifically directed the Board and management "to make clear to these individuals that their termination packages are subject to OFHEO approval," and to also inform them that personnel terminated for misconduct could be held liable by OFHEO for indemnification to Freddie Mac for losses that may have resulted from their conduct. Exhibit B; see also Exhibit E.

On June 12, Stephen Blumenthal, Counsel to the Director of OFHEO, wrote to Freddie Mac's Vice President and Deputy General Counsel, Allan Ratner, memorializing an oral conversation in which counsel for OFHEO directed Freddie Mac "not to take any action to fulfill any of the terms of the three executive officers' agreements that relate to termination benefits, including, but not limited to, the vesting, accelerated or otherwise, of any stock or stock options." PI Memo at Exh. 7. OFHEO advised Freddie Mac to maintain the status quo while OFHEO reviewed the three executives' employment agreements and termination packages. Id. Mr. Blumenthal explained that OFHEO's review was being conducted pursuant to the "Director's

broad supervisory oversight of the executive compensation policies and practices of Freddie Mac, which includes safety and soundness and specific prior approval authorities." Id. The same day, Director Falcon wrote to Shaun O'Malley, then-Chairman of the Board of Freddie Mac, noting that OFHEO was reviewing the compensation packages for Plaintiff and others and that the benefits "are not to be provided until we have completed our review and a determination is provided to you." PI Memo at Exh. 6.

On June 17, Mr. Blumenthal wrote to Mr. Ratner in response to questions raised during telephone calls on June 13. PI Memo at Exh. 8. That letter explained that until the special examination was completed Freddie Mac was not to assist Plaintiff in selling his unrestricted stock and was to prevent Plaintiff from exercising his vested stock options. Id. Plaintiff was, however, permitted to transfer shares of stock from the employee account to his personal account. Id. Mr. Ratner responded on June 19. Exhibit F.

On June 19, Alfred Pollard, General Counsel for OFHEO, wrote to inform John Dowd, Plaintiff's counsel at the time, that Plaintiff's termination benefits would continue to be held pending investigation. Exhibit G.

On June 25, Freddie Mac announced the Board counsel's preliminary findings as to the factors contributing to the need for the restatement. Exhibit I. (June 25 press release). The findings were summarized as follows:

> The principal factors thus far identified by Board Counsel are lack of sufficient accounting expertise and internal control and management weaknesses as a consequence of which Freddie Mac personnel made numerous errors in applying Generally Accepted Accounting Principles (GAAP). In addition, Board Counsel has noted that certain capital market transactions and accounting policies had been implemented with a view to their effect on earnings in the context of Freddie Mac's goal of achieving

> steady earnings growth, and that the disclosure processes and disclosure in connection with those transactions and policies did not meet standards that would have been required of Freddie Mac had it been an SEC registrant.

Id. Freddie Mac also announced that the restatement would cause greater volatility in Freddie Mac's financial statements for prior periods and that there would probably also be significant volatility in its statements in future periods.

OFHEO's special examination into the restatement of earnings continued throughout the summer and autumn of 2003, resulting in an administrative Notice of Charges being filed on December 17, 2003 against Freddie Mac, specifically seeking a cease-and-desist order, see 12 U.S.C. § 1341, to affect the type of termination and termination compensation Plaintiff is to receive from Freddie Mac.[4] PI Memo at Exh. 10. The special investigation also culminated in an administrative ten-count Notice of Charges against Plaintiff seeking civil money penalties, an order seeking restitution of the amount of bonuses Plaintiff received in 2001 and 2002, and an order barring Plaintiff from accepting payments to which he would not have been entitled had he been terminated for cause under his employment agreement with Freddie Mac, rather than terminated for good reason.[5] PI Memo Exh. 11.

---

[4] Additionally, there has been a report issued by the Special Examiners, although the examination continues, and Freddie Mac and OFHEO have reached a settlement involving corrective actions and a fine of $125 million. See Exhibit I. The Report of the Special Examiners is available online at http://www.ofheo.gov/media/pdf/specialreport122003.pdf.

[5] There are a number of other ongoing investigations with regard to the events transpiring at Freddie Mac that led to the delay and restatement of earnings. The Securities and Exchange Commission ("SEC") is formally investigating; the United States Attorney for the Eastern District of Virginia has opened a criminal investigation into alleged irregularities at Freddie Mac; three Congressional committees are investigating Freddie Mac; and Freddie Mac's Board's and OFHEO's investigations are ongoing. These various investigations are proceeding independently of one another.

ARGUMENT

I. STANDARDS FOR EVALUATING A PRELIMINARY INJUNCTION

A request for emergency injunctive relief is an extraordinary remedy, and the power to issue such an injunction "should be sparingly exercised." Dorfmann v. Boozer, 414 F.2d 1168, 1173 (D.C. Cir. 1969) (quotation marks omitted). "[I]n considering a plaintiff's request for a preliminary injunction a court must weigh four factors: (1) whether the plaintiff has a substantial likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury were an injunction not granted; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest." Al-Fayed v. CIA, 254 F.3d 300, 303 (D.C. Cir. 2001); see also Serono Labs., Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998).

II. PLAINTIFF CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiff has not shown a likelihood of success on the merits on either his Administrative Procedure Act ("APA") claim or his Fifth Amendment claim. Plaintiff alleges that OFHEO acted in an arbitrary and capricious manner when it told Freddie Mac to hold Plaintiff's termination benefits pending further investigation. Plaintiff also alleges that holding such benefits violates his right to due process under the Fifth Amendment. However, the Court lacks jurisdiction over these claims because jurisdiction has been removed by 12 U.S.C. § 4635(b). Additionally, the Court lacks jurisdiction over Plaintiff's APA claim because OFHEO has not taken any final agency action with respect to Plaintiff's termination benefits and Plaintiff's claims are not ripe. Further, OFHEO's decision to direct Freddie Mac to withhold termination

benefits from Plaintiff was neither arbitrary nor capricious. Rather, it was a logical and rational measure taken by OFHEO's Director pursuant to his responsibility for reviewing Freddie Mac's executive compensation packages. Plaintiff's due process claim fails because he is currently receiving the process which is due in the form of the ongoing administrative proceeding.

A. This Court Lacks Jurisdiction Over Plaintiff's Claims.

1. Section 4635(b) Deprives the Court of Jurisdiction.

Section 4635(b) of Title 12 establishes a broad limitation on federal court jurisdiction, subject only to specifically enumerated exceptions that are not applicable here. Section 4635(b) provides as follows:

> Except as otherwise provided in this subchapter and sections 4619 and 4623 of this title, no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of any notice or order under section 4631, 4632, or 4636 of this title, or subchapter II of this chapter, or to review, modify, suspend, terminate, or set aside any such notice or order.

The section clearly precludes judicial review of any cease-and-desist order issued by OFHEO under section 4632 or any civil money penalty order issued under section 4636. Indeed, section 4635(b) precludes the district courts from taking any action at all that would "affect" an order issued under those provisions. In short, the statute prevents district courts from interfering with or affecting the merits of any such enforcement action. See Henry v. OTS, 43 F.3d 507, 511-13 (10th Cir. 1994) (interpreting similar language in 12 U.S.C. § 1818(i)); Carlton v. Firstcorp, Inc., 967 F.2d 942, 946 (4th Cir. 1992). Rather, it reserves judicial review of such actions to the United States Court of Appeals for the District of Columbia. See 12 U.S.C. § 4634(a).

Yet, what Plaintiff seeks in this action is precisely what the statute prohibits–interference by the district court in the administrative proceedings that are currently addressing the issues of

cease-and-desist orders and civil money penalties. At issue in these proceedings is the exact question that Plaintiff seeks to put before this Court–his entitlement to certain compensation and termination benefits. The Board's request of Plaintiff to resign his position at Freddie Mac occurred after outside auditors identified certain improper accounting practices that had been used to "smooth" earnings during the previous several years and after an independent investigation commissioned by the Board of Directors made findings of management failures during those years. See Exhibit A. These circumstances triggered a major restatement of earnings for 2000 through 2002 and substantially delayed publication of Freddie Mac's audited public financial statements for 2003. Id. Significantly, the internal review conducted by Baker Botts of the circumstances leading up to the restatements underscored the involvement of Plaintiff in effecting the policies and practices at issue. OFHEO's subsequent examination of the circumstances surrounding these events led directly to the Notices of Charges against Freddie Mac, Plaintiff and another officer.

The Notice of Charges against Plaintiff alleges conduct that resulted in significant losses to Freddie Mac, and seeks a determination of Plaintiff's right to certain termination compensation, an order reducing the compensation he claims and civil money penalties for his conduct at Freddie Mac. PI Memo at Exh. 11. The Notice of Charges against Freddie Mac also deals directly with the issue of Plaintiff's right to termination compensation and seeks an order recasting the manner of Plaintiff's termination and the amount of termination compensation to which he is entitled. PI Memo at Exh. 10. For this Court to opine in any way on the issues now being litigated in the administrative process would clearly "affect" those issues which are already before that tribunal pursuant to Notices of Charges in contravention of section 4635(b), and

inappropriately interfere with the administrative process Congress established to determine actions initiated by the Director under his enforcement powers.[6]

Because OFHEO's statute is relatively new, there is no caselaw interpreting § 4635(b). However, Congress looked to the statutes governing other financial regulators in drafting the statute that formed OFHEO, and a similar provision is found at 12 U.S.C. § 1818(i)(1). Section 1818(i)(1) provides in pertinent part as follows:

> . . . except as otherwise provided in this section or under section 1831o or 1831p-1 of this title no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.

The Supreme Court has construed § 1818(i)(1) to protect the entirety of the enforcement process. In Board of Governors of Federal Reserve System v. MCorp, 502 U.S. 32, 39 (1991), the Court held that the "plain, preclusive language," unequivocally withdraws jurisdiction from the district courts. The Court concluded that Congress had spoken "clearly and directly" on this issue of subject matter jurisdiction. Id. at 44. The MCorp analysis applies with equal force here. Because Plaintiff seeks an injunction ordering the agency to rescind the supervisory letters that involve a critical element of the cease-and-desist and civil money penalty enforcement actions in progress, he seeks action by this Court that would have a deleterious effect on the ability of the agency to issue and enforce any such enforcement order. Such a result would fly in the face of

---

[6] Not only is Plaintiff actively litigating the Notice of Charges against him before the administrative law judge, on February 10, 2004, he filed a motion to dismiss the those charges and to strike the prayer for relief that his termination be converted to one for cause. Respondent Leland Brendsel's Motion to Dismiss Counts One and Two; Respondent Leland Brendsel's Motion to Dismiss Counts 3 through 10; Respondent Leland Brendsel's Motion to Strike Third Prayer for Relief Seeking His Retroactive Termination for Cause, in the Matter of Leland C. Brendsel, HUDALJ 04-056-NA, filed Dec. 17, 2003.

the statute and the intent of Congress. See Carlton, 967 F.2d at 946 (concluding that § 1818(i) is intended to exclude all methods of interfering with a regulatory action except those enumerated in the statute); RTC v. Ryan, 801 F. Supp. 1545, 1550 (S.D. Miss. 1992) (finding that § 1818(i), coupled with appellate review available following a final administrative order, shows that Congress intended to deny district court jurisdiction to review and enjoin ongoing administrative proceedings).

There are certain exceptions to § 4635(b)'s general prohibition on district court jurisdiction over matters affecting cease-and-desist orders, temporary cease-and-desist orders, and civil money penalty actions. These exceptions do not apply here. The first exception, found at 12 U.S.C. § 4619, is inapplicable, as it deals with conservatorships. The second is at section 4635(a), which permits the Director to ask the Attorney General to bring enforcement actions in district court. This clearly does not apply here, where the subject of the enforcement action is seeking to use the district court to interfere with the agency's enforcement proceedings. The third exception is at 12 U.S.C. § 4632, where judicial review is permitted for temporary cease-and-desist orders. That exception does not apply because, as Plaintiff himself observes, the letters at issue here do not constitute a temporary cease-and-desist order. PI Memo at 14-15. Rather, the letters constitute a necessary preliminary measure pursuant to 12 U.S.C. § 4513(b). There is also a judicially-created exception for situations in which there is a clear departure from statutory authority. See First Nat'l Bank of Chicago v. Steinbrink, 812 F. Supp. 849, 854-55 (N.D. Ill. 1993) (discussing the judicial exception to § 1818(i) created in Leedom v. Kyne, 358 U.S. 184 (1958), and finding it inapplicable). That is not the case here, where the statute clearly gives the Director the authority to take what actions are needed to enable him to prevent

excessive compensation to executives of the enterprises. See 12 U.S.C. § 4513(b)(8).

Because an injunction by this Court would affect and interfere with those ongoing administrative proceedings, § 4635(b) deprives the Court of jurisdiction.[7] See First Nat'l Bank of Scotia v. United States, 530 F. Supp. 162, 166-69 (D.D.C. 1982) (party cannot circumvent 1818(i)'s withdraw of jurisdiction through a collateral attack).

2. OFHEO Has Not Taken Any Final Agency Action.

"Federal courts are courts of limited jurisdiction; they are empowered to hear only those cases authorized and defined in the Constitution" and by Congressional grants of jurisdiction. Henry v. OTS, 43 F.3d 507, 511 (10th Cir. 1994). "The party seeking to invoke the jurisdiction of the federal court must prove that the case is within the court's subject matter." Id. at 512. The APA provides a grant of jurisdiction under certain circumstances. "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704.

This Court lacks jurisdiction to review non-final agency action. See id.; Clifton Power Corp. v. FERC, 294 F.3d 108, 110 (D.C. Cir. 2002). "Courts must not interfere with the executive function, whether exercised by executive officials or administrative agencies, by entertaining a lawsuit that challenges an action that is not final." Sabella v. United States, 863 F. Supp. 1, 3 (D.D.C. 1994). OFHEO's June 2003 letters instructing Freddie Mac to hold Plaintiff's benefits pending a determination of whether the compensation was excessive do not constitute a final agency action. Rather, they constitute an intermediate step in the process of OFHEO's

[7] Plaintiff cannot contend that, notwithstanding § 4635(b), the APA gives the Court jurisdiction to hear his claim. There is no APA jurisdiction where another statute has deprived the Court of jurisdiction. See 5 U.S.C. § 702.

review of Plaintiff's termination benefits, a review required by statute. See 12 U.S.C. §§ 4513(b)(8), 4518.

Finality is to be interpreted in a flexible and pragmatic way. Id. In determining whether an agency action is "final" for APA purposes, the "core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." Franklin v. Mass., 505 U.S. 788, 797 (1992). Here, it is clear that the decisionmaking process is not complete. OFHEO is currently in the midst of determining whether Plaintiff's compensation was excessive and whether Plaintiff should have been terminated for cause.[8] That the process is an ongoing and unfinished one is demonstrated by OFHEO's willingness to work with Plaintiff to resolve specific benefit issues as the process has continued. See Exhibits F & J. There has not yet been a "definitive statement of [the agency's] position." Hindes v. FDIC, 137 F.3d 148, 162 (3rd Cir. 1998). (alteration in original). Here, as in Hindes, the action at issue constitutes the "first step in a multi-step" procedure of determining the appropriateness of Plaintiff's termination benefits. Id. By its nature, the first step in the process is not the final agency action. It does not constitute the "consummation of the administrative process," but, rather, the beginning. Id. Preliminary steps leading up to an

---

[8] Plaintiff argues that OFHEO is not permitted to review his termination benefits because he entered into his contract with Freddie Mac prior to the creation of OFHEO. PI Memo at 16 n.10. However, OFHEO's ability to review excessive compensation is plenary, and provides ample justification for OFHEO to review Plaintiff's termination benefits in these circumstances. See 12 U.S.C. §§ 4513(b)(8), 4518. That is, in addition to the specific mandate of OFHEO to review and approve compensation and termination packages of executive officers, the agency is empowered under its general supervisory authority to ensure the safety and soundness of compensation agreements. See First Nat'l Bank of Eden v. Dept. of Treasury, Office of Comptroller of Currency, 568 F.2d 610 (8th Cir. 1978).

administrative proceeding simply do not constitute final agency action. Id. at 163-64; see also Aerosource, Inc. v. Slater, 142 F.3d 572, 579-81 (3rd Cir. 1998) (orders not final when part of an ongoing investigation); Schmidt v. Ivey, No. 99-1319, 1999 WL 767448 *2 (E.D. La. Sept. 24, 1999) (noting that there is no subject matter jurisdiction when the case involves an intermediate, preliminary, or procedural agency action).

Bennet v. Spear, 520 U.S. 154 (1997), sets out the standard for determining whether an order is "final," and thus reviewable, under 12 U.S.C. § 704:

> As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'

Id. at 177-78 (citation omitted). Neither condition is satisfied here.

OFHEO's decisionmaking process is clearly not yet complete. The issue of Plaintiff's termination compensation will be determined through the sanctioned administrative process which is ongoing and governed by OFHEO's Rules of Practice and Procedure. 12 C.F.R. § 1780, et seq. Plaintiff is a full participant in those proceedings, represented by counsel, entitled to discovery, § 1780.26, an evidentiary hearing, § 1780.50, to subpoena witnesses for the hearing, § 1780.35, to present evidence, § 1780.51, to make written presentations, §§ 1780.34, .52, .54, to a recommended decision and final decision, §§ 1780.53, .55, and to appeal any adverse agency decision to the United States Court of Appeals for the District of Columbia Circuit. 12 U.S.C. § 4634. That process will determine what disposition should be made of the money and stock held in Plaintiff's name by Freddie Mac, and whether some or all of it should be released to Plaintiff.

Moreover, no rights or obligations have been determined here. Bennet, 520 U.S. at 178. Thus far, OFHEO's instruction to Freddie Mac amounts simply to an interlocutory step taken in connection with its supervisory and investigative powers over Freddie Mac and its executive officers. OFHEO's final action with regard to Plaintiff's termination compensation will be determined through the formal enforcement process now underway. When an agency's formal enforcement scheme is thusly laid out and being followed, a finding of final agency action is inappropriate. Reliable Automatic Sprinkler Co. v. Consumer Product Safety Comm'n, 324 F.3d 726, 732 (D.C. Cir. 2003). The established administrative and judicial process must be allowed to run its course. This will allow "the agency to apply its expertise and correct its mistakes, it avoids disrupting the agency's processes, and it relieves the courts from having to engage in 'piecemeal review which is at least inefficient and upon completion of the agency process might prove to have been unnecessary.'" DRG Funding, 76 F.3d at 1214 (quoting FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 242 (1980)).

"When completion of an agency's processes may obviate the need for judicial review, it is a good sign that an intermediate agency decision is not final." DRG Funding Corp. v. Sec'y of Hous. & Urban Dev., 76 F.3d 1212, 1215 (D.C. Cir. 1996). If Plaintiff prevails in the administrative proceedings currently taking place, the benefits will be released to him, and there will be no need for this Court to consider the matter. The existence of such a possibility demonstrates the lack of finality to the decision presently under challenge. If the Court dismisses this case for lack of jurisdiction, the agency will have the opportunity to complete the administrative process and reach final decisions as to matters pertaining to Plaintiff's compensation claims and termination benefits. If the Court exercises judicial review at this stage

in the process, such review will interfere with the agency's ongoing proceedings and prevent OFHEO from fulfilling its role as regulator. Judicial review is inappropriate where, as here, such review would "undermine the authority of the agency acting within the scope of its discretion." Cities of Anaheim & Riverside, Cal. v. FERC, 692 F.2d 773, 779 (D.C. Cir. 1982); see also Papago Tribal Utility Auth. v. FERC, 628 F.2d 235, 242 (D.C. Cir. 1980) ("courts have no jurisdiction to review agency orders where such review would necessarily infringe on the statutory role of the agency").

The existing administrative proceeding also provides Plaintiff with an adequate remedy. See First Nat'l Bank of Chicago v. Steinbrink, 812 F. Supp. 849, 854 (N.D. Ill. 1993). As in Steinbrink, the ongoing administrative proceeding deals with the "very same issues set forth in [Plaintiff's] petition." Id. Plaintiff has the opportunity to raise whatever arguments he deems pertinent to his claim that he is entitled to his compensation claims and termination benefits before the Administrative Law Judge, and he will have the opportunity to appeal that judge's determination if he is not satisfied with the result.[9]

3. Plaintiff's Claim Is Not Ripe.

For reasons similar to those that make the supervisory letters not final agency action, this action is not ripe. Courts look to four factors in determining whether a claim is ripe: whether the issues presented are purely legal; whether the challenged action constitutes final agency action;

---

[9] Although the administrative proceeding commenced in Steinbrink just as the letter at issue was issued., id. at 853, that fact is not determinitive of the outcome of such a challenge. The determinative factor is, rather, that "an adequate remedy exists in this case. Not only is an administrative proceeding pending which addresses the very same issues..., but a viable opportunity for review exists in the ... [United States Court of Appeals for the District of Columbia Circuit] once a final enforcement order is issued." Id. at 854 (emphasis added) (footnotes omitted).

whether the challenged action has or will have a direct and immediate impact on the petitioner; and whether resolution of the issues will foster, rather than impede, effective enforcement and administration by the agency. Tex. v. United States Dep't of Energy, 764 F.2d 278, 283 (5th Cir. 1985) (citing Abbott Labs v. Gardner, 387 U.S. 136, 149-54 (1967)). As noted above, there is no final agency action. Further, the issue presented is extremely factual in nature, since it is intertwined with questions of excessive compensation and possible misconduct by Plaintiff. Resolution of these issues by this Court would impede effective administration by the agency, since these exact issues presently are being resolved by the agency in an administrative proceeding. See Am. Land Title Assoc. v. Clarke, 743 F. Supp. 491, 498 (W.D. Tex. 1989) (finding that judicial review would impede agency enforcement and administration by robbing it of the opportunity to issue a final ruling on the matter).

Courts further consider whether the issue is fit for judicial decision and the hardship to the parties of withholding court consideration. Transport Robert (1973) LTEE v. U.S. INS, 940 F. Supp. 338, 340 (D.D.C. 1996). The issue is not yet fit for review because the agency is still in the process of crystalizing its position through the administrative proceeding. As noted below, the harm to Plaintiff is minimal. Further, the only harm at issue is a financial one, which is not generally considered to be a justification for early judicial review of an otherwise unripe matter. See Beverly Enterprises, Inc. v. Herman, 50 F. Supp. 2d 7, 13 (D.D.C. 1999).

B. OFHEO's Instruction that Plaintiff's Benefits Be Held Pending Further Investigation Was Neither Arbitrary Nor Capricious.

APA claims are evaluated on an arbitrary and capricious standard. See 5 U.S.C. § 706(2)(A). The Court must determine "whether the decision was based on a consideration of

the relevant factors and whether there has been a clear error in judgment." Nat'l Conference on Ministry to Armed Forces v. James, 278 F. Supp. 2d 37, 43 (D.D.C. 2003) (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)). The ultimate standard of review is a narrow one; the Court may not substitute its judgment for that of the agency. Id. at 44.

Plaintiff challenges the agency's action in sending the June 2003 letters to Freddie Mac informing it not to release certain compensation benefits to Plaintiff until OFHEO completed its "review and determination" of those benefits. See PI Memo at Exhs. 6-8. See also Exhibits F, G, J. Plaintiff alleges that OFHEO lacks the authority to issue such instructions. This view is mistaken. The Director is authorized by Section 1313(b) of the Safety and Soundness Act, 12 U.S.C. § 4513(b), "to make such determinations, take such actions, and perform such functions" as he "determines necessary" with regard to "prohibiting the payment of excessive compensation by the enterprises to any executive officer of the enterprises under section 1318 [12 U.S.C. § 4518]."

At the time that OFHEO decided to hold Plaintiff's termination benefits pending further investigation, the information before it was that an outside accounting firm had discovered problems with the way that Freddie Mac had been reporting its earnings and further investigation would be necessary. See generally Exhibit A. OFHEO was aware that the possibility existed that Plaintiff, as the CEO and Chairman of Freddie Mac, may have had awareness of and possible involvement in the irregularities that required the restatement of earnings. OFHEO was also aware of its statutory responsibility to review executives' compensation to be certain that it was not excessive and of the need to ensure the safety and soundness of Freddie Mac. 12 U.S.C. §§ 4513(b)(8), 4518. Further, OFHEO was aware that Plaintiff's contract provided significantly

lower termination benefits if Plaintiff was terminated for cause rather than terminated with good reason. See PI Memo Exh. 3.

In light of all of these facts available to OFHEO, the action that it took was neither arbitrary nor capricious. Rather, OFHEO recognized that more information would be needed before it could determine whether Plaintiff would be entitled to the full panoply of his compensation claims and termination benefits. In light of these facts, OFHEO acted prudently to preserve the status quo by holding Plaintiff's benefits pending further investigation. The Director can certainly not be said to have made a clear error in judgment in deciding that swift action was needed to undertake his supervisory responsibilities as regards excessive compensation.

Plaintiff contends that OFHEO acted in an arbitrary and capricious manner because it did not execute a temporary cease-and-desist order. PI Memo at 14-16. However, the statute does not require OFHEO to execute such an order; it simply makes available that option should OFHEO choose to take it. The Director has the authority pursuant to § 4513(b)(8) to take such actions as he deems necessary regarding the prohibition on excessive compensation to executive officers of the enterprise. Included within the range of such actions is the ability to write a letter to Freddie Mac instructing the holding of Plaintiff's termination benefits pending further investigation. The Director may undertake enforcement actions against the enterprises, both formal and informal. As noted in a recent report issued by the General Accounting Office, OFHEO and other financial regulators often rely on informal supervisory actions. "Comparison of Financial Institution Regulators' Enforcement and Prompt Corrective Action Powers," January 31, 2001 (GAO-01-322-R) at 4. Thus, preliminary actions such as the one taken by the Director in instructing Freddie Mac not to release Plaintiff's unpaid compensation claims and termination

benefits are a common and accepted practice and are part and parcel of a regulator's supervisory authority.

C. Plaintiff's Due Process Rights Have Not Been Violated.

Plaintiff alleges that the holding of his claims and benefits pending further investigation violates his Due Process rights under the Fifth Amendment. PI Memo at 10-14. However, due process is an extremely flexible concept which calls for such procedural protections as a particular situation demands. Gilbert v. Homar, 520 U.S. 924, 930 (1997) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). Due process requires an opportunity to be heard at a meaningful time and in a meaningful manner. UDC Chairs Chapter, Am. Assoc. of Univ. Profs. v. Board of Trustees of Univ. of D.C., 56 F.3d 1469, 1472 (D.C. Cir. 1995) (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)). Courts have held on many occasions that a "meaningful time" may well mean after the deprivation has already occurred. See Gilbert, 520 U.S. at 930 (listing cases); Dixon v. Love, 431 U.S. 105, 112-14 (1977) (allowing post-deprivation hearing for driver's license suspension).

The question for a due process claim is "what process is due[?]" Ingraham v. Wright, 430 U.S. 651, 674 (1977). Due process is not a technical concept with a fixed content unrelated to time, place and circumstances; it is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Id. at 675 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163-64 (1951) (Frankfurter, J., concurring)). There are, thus, certain circumstances in which due process does not require notice and hearing in advance of a deprivation of liberty or property. See id. at 682 (school officials can administer corporal punishment without a hearing); Hudson v. Palmer, 468 U.S. 517, 533 (1984)

(unauthorized intentional deprivation of property does not require prior review because meaningful post-deprivation remedies available). Courts look to three factors in determining whether the process provided is constitutionally sufficient:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

3883 Conn. LLC v. D.C., 336 F.3d 1068, 1074 (D.C. Cir. 2003) (quoting Mathews, 424 U.S. at 335).

The private interest at stake is Plaintiff's interest in having his claims and benefits immediately. The risk of an erroneous deprivation is not very high, in light of the information gathered by Baker Botts at the time that the decision was made to hold pending further investigation Plaintiff's benefits. See Exhibit A at vi. The burden on the government if it were required to have a hearing prior to placing a hold on the payment of claims and benefits would be substantial. Cf. FDIC v. Mallen, 486 U.S. 230, 240 (1988). Once the compensation claims and termination benefits are released to Plaintiff, OFHEO and Freddie Mac have no guarantee that they will be able to get them back. Under Plaintiff's theory, their only choice would be to have a hearing immediately upon terminating Plaintiff. However, such an option would provide no time to complete the investigation and engage in the administrative proceedings now ongoing. There is no practical way that a hearing on Plaintiff's termination benefits could have occurred any sooner than it is already occurring.[10] And there would be substantial risk to Freddie Mac if it

[10] Plaintiff complains that the administrative proceeding is not scheduled to have a hearing, if at all, until 2006. PI Memo at 8. However, Plaintiff participated in the creation of this

were forced to turn over the termination benefits before OFHEO could complete its review. Further, OFHEO has a substantial interest in having the ability to act swiftly to hold pending further investigation benefits where there is a safety and soundness concern for one of the enterprises. Cf. id.

It is important to keep in mind that the decision at issue here is not the final decision. OFHEO has not made a determination that Plaintiff is not entitled to the benefits–it has simply determined that investigation and an administrative proceeding is needed. That administrative proceeding is the process to which Plaintiff is entitled in determining his entitlement to his termination benefits. In such cases, courts have found that as long as there is an appropriate administrative procedure contemplated, that is sufficient to satisfy due process. See, e.g., Gilbert, 520 U.S. at 930 ("This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause."); Hudson, 468 U.S. at 533 (post-deprivation hearing may be sufficient if predeprivation hearing is not practicable). In Mallen, the Court observed that "[a]n important governmental interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may[,] in limited cases demanding prompt action[,] justify postponing the opportunity to be heard until after the initial deprivation." 486 U.S. at 240. The governmental interest in Mallen was the need to suspend a bank officer to protect the interests of depositors and maintain public confidence in banking institutions. Id. at 240-41; cf. Barry v. Barchi, 443 U.S. 55, 64 (1979) (allowing suspension of a horse trainer to

---

schedule. See Exhibit L. Any concerns that he might have that it is not proceeding quickly enough should be raised before the administrative law judge, rather than in this Court.

preserve the integrity of horse racing). Similarly, here, the suspension of Plaintiff's termination benefits was to protect the interests of Freddie Mac and its stockholders and to maintain public confidence in the safety and soundness in Freddie Mac, as well as to preserve the integrity of OFHEO's regulatory powers. See Part IV.

Plaintiff relies on Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337 (1969), to argue that even a temporary deprivation is unconstitutional, PI Memo at 11, however, Sniadach is inapposite. At issue in Sniadach was the garnishment of wages based on claims by creditors.[11] Id. at 337-38. The court noted that many of these claims were fraudulent, and often the amount of money remaining in the garnishees' salaries was below subsistence level. Id. at 341-42. Such factors are utterly absent here, where Plaintiff has made no claim that he is unable to support himself notwithstanding the hold on his benefits, and where the hold was undertaken by a federal regulatory agency, not by an unscrupulous creditor with a questionable claim.

More on point is Gilbert, in which an employee was suspended without pay following the filing of felony charges against him. 520 U.S. at 926. In that case, the Court noted that because at issue was a temporary suspension without pay, rather than a permanent one, a prompt post-deprivation hearing would satisfy due process. Id. at 932. The Court further pointed to the

---

[11] Plaintiff also relies on Fuentes v. Shevin, 407 U.S. 67 (1972), which deals with a similarly inapposite replevin issue. PI Memo at 11-12. Plaintiff also points to United States v. James Daniel Good Real Property, 510 U.S. 43 (1993), PI Memo at 12, but a primary concern in that case was that because the item at issue was real property which could not be removed, there was no time pressure preventing a predeprivation hearing. Such is not the case with money, which is extremely mobile. See id. at 53 (discussing the fact that the mobility of a yacht played an important role in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)). As noted above, there was significant time pressure in ensuring that Plaintiff's benefits were frozen before they could be distributed to him and thus be made much less available to Freddie Mac if OFHEO determined that they were wrongfully awarded.

State's interest in being able to act quickly in suspending an employee when a felony charge is filed. Id. Similarly, here, the withholding of Plaintiff's termination benefits is a temporary one, pending determination of whether payment is appropriate, and OFHEO needed to act quickly to suspend those benefits. There is already an administrative procedure underway to resolve the issue, which is sufficient to satisfy due process.[12] In Haralson v. Federal Home Loan Bank Board, 837 F.2d 1123, 1126-27 (D.C. Cir. 1988), the court recognized the need for swift action to minimize economic loss for troubled and failing financial institutions, and therefore allowed a post-deprivation hearing. The Haralson court relied on Bob Jones University v. Simon, 416 U.S. 725 (1974), in reaching this conclusion because, in Bob Jones, the Court held that there was no due process violation where Bob Jones' tax exempt status was revoked and a hearing held subsequently.

When the government needs to act quickly, courts have permitted a post-termination hearing to suffice. See, e.g., Wash. Teacher's Union Local #6 v. Board of Educ. of D.C., 109 F.3d 774, 776 (D.C. Cir. 1997) (allowing Board not to have pre-termination hearings where fast reduction-in-force was necessary). "The Supreme Court has consistently held that government officials do not violate procedural due process when they deprive an individual of property, so long as a meaningful post-deprivation remedy was available." Zephyr Aviation, L.L.C. v. Dailey, 247 F.3d 565, 574 (5th Cir. 2001). This is particularly true where the loss at issue is a purely

---

[12] Plaintiff also cites to Manges v. Camp, 474 F.2d 97 (5th Cir. 1973), as an example of a preliminary injunction being granted against the Comptroller of the Currency's order. PI Memo at 12-13. However, the court in Manges applied the rare exception that permits judicial intervention where an agency has a non-final action because the action at issue was clearly outside the statutory authority of the agency. Id. at 99-100. As noted above, the Director was clearly within his authority to regulate executive compensation when he ordered Plaintiff's termination benefits frozen, so that exception does not apply.

financial one that is completely compensable by a post-deprivation hearing finding in the deprived person's favor, as is the case here. See UDC Chairs Chapter, Am. Assoc. of Univ. Profs. v. Board of Trustees of Univ. of D.C., 56 F.3d 1469, 1473 (D.C. Cir. 1995). At stake for Plaintiff are financial benefits, and if Plaintiff is wholly successful in the administrative proceedings (and any possible appeals), he will be given any claims and benefits that he is found to be owed.

III. PLAINTIFF CANNOT ESTABLISH IRREPARABLE INJURY.

The quintessential basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. See Wisc. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting Sampson v. Murray, 415 U.S. 61, 88 (1974)). In other words, irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." Bell & Howell: Mamiya Co. v. Masel Supply Co., 719 F.2d 42, 45 (2d Cir. 1983) (quoting 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 2948, at 431 (1973)). The absolute necessity of irreparable injury derives from the fact that "[p]reliminary injunctions are issued to forestall imminent and irreversible injury to the plaintiff's rights." Comic Strip, Inc. v. Fox Television Stations, Inc., 710 F. Supp. 976, 981 (S.D.N.Y. 1989).

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958).

For an alleged injury to be irreparable, "it must be both certain and great" and "actual

and not theoretical." Wisc. Gas, 758 F.2d at 674. The plaintiff "must show that the injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." Id. (alteration in original and internal quotation marks omitted) (quoting Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 307 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976)).

1. Plaintiff Seeks a Mandatory Preliminary Injunction, Making His Burden of Proof of Irreparable Injury Greater.

Further, the purpose of a preliminary injunction generally is to preserve the status quo pending litigation on the merits. See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977). When seeking mandatory injunctive relief, i.e., an injunction that "would alter, rather than preserve, the status quo by commanding some positive act--the moving party must meet a higher standard than in the ordinary case by showing clearly that he or she is entitled to relief or that extreme or very serious damage will result from the denial of the injunction." Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi, Ltd., 15 F. Supp. 2d 1, 4 (D.D.C. 1997) (quotation marks omitted), aff'd, 159 F.3d 636 (D.C. Cir 1998) (quoting Phillip v. Fairfield Univ., 118 F.3d 131, 133 (2d Cir. 1997)). A district court should not issue a mandatory preliminary injunction unless the facts and the law clearly favor the moving party. Nat'l Conference on Ministry to Armed Forces v. James, 278 F. Supp. 2d 37, 43 (D.D.C. 2003). As shown above, that is not the case here.

Plaintiff here seeks a mandatory preliminary injunction that would result in the release of funds from Freddie Mac to Plaintiff, and he alleges that he will suffer irreparable injury unless he obtains immediate access to and possession of these funds. PI Memo at 16-17. However,

Plaintiff's alleged need for these funds falls significantly short of establishing irreparable injury for mandatory preliminary injunction purposes. At most, it constitutes an injury that is compensable if Plaintiff succeeds on the merits in the instant litigation.

Immediacy is an important component of irreparable harm. See Wisc. Gas, 758 F.2d at 674. There is no allegation that the money is being dissipated, nor is there any explanation as to why Plaintiff needs the money immediately.[13] Plaintiff should particularly be required to demonstrate the immediacy of his need in light of the fact that this is a suit seeking to alter, rather than preserve the status quo. See Columbia Hosp., 15 F. Supp. 2d at 4. It is worth noting that Plaintiff's benefits were held pending investigation in June 2003, and Plaintiff did not see fit to file the instant action until March 2004. Such delay strongly supports Defendants' contention that Plaintiff has sustained no irreparable injury here.

2. Deprivation of Money Is Not Irreparable Injury.

Courts have consistently held that deprivation of money is not sufficient to constitute irreparable injury except under extreme circumstances. See, e.g., Wisc. Gas, 758 F.2d at 674 ("It is also well settled that economic loss does not, in and of itself, constitute irreparable harm."); Va. Petroleum Jobbers, 259 F.2d at 925; accord Boivin v. U.S. Airways, 297 F. Supp. 2d 110, 118-19 (D.D.C. 2003). If Plaintiff is successful in this litigation (or in the administrative proceeding and any subsequent appeals), he will receive his termination benefits, which makes

[13] If Plaintiff had actually needed any of the money for his living expenses, he could have made a request for partial release of the funds to Freddie Mac and/or OFHEO. Cf. Exhibit F (allowing Plaintiff to transfer stock into a different account at his request). Nor have Plaintiff's health insurance and life insurance been suspended during OFHEO's ongoing investigation of whether Plaintiff's termination benefits constitute excessive compensation or a safety and soundness threat to Freddie Mac. See Exhibit H.

the injury at issue entirely reparable through the normal litigation process and not the sort of extraordinary situation that requires a preliminary injunction. See Keys v. Wash. Metro. Area Transit Auth., 297 F. Supp. 2d 1, 3-4 (D.D.C. 2003). Economic harm only constitutes irreparable harm in the extremely rare circumstance that withholding the money will destroy a business or leave an individual unable to pay his bills, neither of which is alleged to be the case here. See, e.g., Lee v. Christian Coalition of Am., Inc., 160 F. Supp. 2d 14, 31-32 (D.D.C. 2001). "[F]or an injury to be deemed irreparable, it must be the kind of injury for which an award of money cannot compensate, and for which adequate redress cannot be reached by a trial on the merits." Cayuga Indian Nation of N.Y. v. Village of Union Springs, 293 F. Supp. 2d 183, 195 (N.D.N.Y. 2003) (citations and internal quotation marks omitted). As the Third Circuit observed, "we have never upheld an injunction where the claimed injury constituted a loss of money, a loss capable of recoupment in a proper action at law." In re Arthur Treacher's Franchisee Litigation, 689 F.2d 1137, 1145 (3d Cir. 1982).

3. Plaintiff Has Not Alleged the Type of Constitutional Harm that Constitutes Irreparable Injury Per Se.

Plaintiff contends that the holding of his money constitutes an ongoing due process violation, which would necessarily constitute irreparable harm. PI Memo at 10-14. However, the caselaw does not support Plaintiff's contention that a temporary deprivation of property, particularly money, constitutes irreparable harm. See, e.g., id. (denying preliminary injunction because Indian Nation could not show that denial of access to their property constituted irreparable harm and monetary relief was available as a remedy). In Cayuga Indian Nation, the court specifically rejected the Indian Nation's claim that "it need only set forth an allegation of a

constitutional deprivation in order to establish irreparable harm per se." Id. at 195.

The cases upon which Plaintiff relies for the proposition that he needs no proof of irreparable injury where he has alleged a violation of his constitutional right to due process, PI Memo at 17, do not support his argument. Davis v. D.C., 158 F.3d 1342 (D.C. Cir. 1998) is not a preliminary injunction case, nor does it deal with a due process claim. Rather, it is about a prisoner's suit under section 1983 regarding an alleged violation of his right to privacy. In Manges v. Camp, 474 F.2d 97 (5th Cir. 1973), the appellate court granted a permanent injunction, but did not hear any issues dealing with a preliminary injunction. Further, the district court had denied the motion for preliminary injunction. Id. at 98. These cases that do not deal with preliminary injunctions cannot control the instant case.

Student Press Law Center v. Alexander, 778 F. Supp. 1227 (D.D.C. 1991), deals with claims under the First Amendment and the Fifth Amendment's equal protection clause. The basis of the Court's decision to grant the preliminary injunction was solely on the First Amendment aspect of the case. Id. at 1233-34. Nothing in Plaintiff's case is remotely analogous. The caselaw in this area distinguishes the First Amendment from deprivation of property under the due process clause, treating ongoing violations of the First Amendment as necessarily constituting irreparable harm while not granting the same status to Fifth Amendment property claims. See Wisc. Central Ltd. v. Pub. Serv. Comm'n of Wisc., 95 F.3d 1359, 1372 (7th Cir. 1996). Cf. Phillips v. Comm'r of Internal Revenue, 283 U.S. 589, 595 (1931) (treating claims for property under due process clause as less significant for irreparable harms purposes than life or liberty claims). In Phillips, the Court noted "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the

opportunity given for the ultimate judicial determination of the liability is adequate." Id. at 596-97. Thus, as long as Plaintiff is given an opportunity to present his side of the story and obtain judicial review, which the administrative proceedings and appeal to the D.C. circuit permits, he has no basis to assert irreparable harm based on the temporary withholding of his termination benefits.

IV. THE REMAINING FACTORS DO NOT JUSTIFY THE ENTRY OF A PRELIMINARY INJUNCTION.

The remaining factors are whether an injunction would substantially injure other interested parties and whether the grant of an injunction would further the public interest. Al-Fayed v. CIA, 254 F.3d 300, 303 (D.C. Cir. 2001). Neither of these factors favor Plaintiff.

If Plaintiff's motion is granted, Freddie Mac will have to release all of the compensation claims and termination benefits to which Plaintiff claims entitlement, including those to which Plaintiff may be determined not to be entitled. The possible economic loss to Freddie Mac if it ends up paying undeserved benefits weighs strongly against granting Plaintiff's motion. Plaintiff is claiming that he is entitled to tens of millions of dollars in termination benefits. Complaint ¶¶ 33-34, 38. The potential effect on Freddie Mac could be quite serious, if it pays out such a large sum and it is ultimately determined that the money should not have been paid. OFHEO's concern in preventing excessive compensation from being paid to Plaintiff is for the safety and soundness of Freddie Mac.

There exists a strong public interest in ensuring that Freddie Mac operates in a safe and sound manner. Unlike other privately-owned financial institutions, Freddie Mac has an important public purpose. Because of its unique and important role in the mortgage market, Freddie Mac

receives certain special benefits of Government sponsorship, including a Federal charter; the statutory authority of the Treasury to purchase up to $2.5 billion of its debt instruments; and state income tax exemptions, among other things. "Rules of Practice and Procedure," 64 Fed. Reg. 72501, 72502 (Dec. 28, 1999). Under this special status the enterprises play a significant role in the financial markets. At year-end 2002, Fannie Mae and Freddie Mac, collectively, held more than 21 percent of the single-family mortgage debt outstanding and their share of the overall market for mortgage-backed securities (MBS) reached nearly forty percent. Some of the benefits the public derives from the enterprises' involvement in the housing market include: standardization of lending practices, increased competition among mortgage originators, reductions in the up-front costs of financing a home purchase or refinancing a mortgage, a broader range of financing options from which to choose, and increasing the average homeowners' ability to tap into the wealth they have accumulated in their homes. See Office of Federal Housing Enterprise Oversight, Report to Congress: 2003, Ch. 1 at 18 – 20 (June 15, 2003). All of these elements have "contributed to greater housing activity and homeownership in the U.S." Id. Because the enterprises, by the nature of their business, are highly leveraged, vigilant oversight of the various risks posed by their operations is critical.

Further, the entry of a preliminary injunction would undermine OFHEO's role as regulator by preventing it from completing one of its critical duties–the review of Plaintiff's benefits to determine whether the compensation is excessive or poses a safety and soundness risk to Freddie Mac. In accordance with its Congressional mandate to ensure that the enterprises are operated in a safe and sound manner, OFHEO is currently investigating any part that Plaintiff may have played in Freddie Mac's failure to issue timely and fully accurate financial statements

and its departure from corporate governance practices that meet the highest standards. It appears very likely that Mr. Brendsel's compensation was overly dependent upon Freddie Mac's business performance as measured by its short term earnings. That focus contributed in large measure to the earnings management violations.

OFHEO is presently engaged in an administrative process to address these precise questions. The administrative proceeding will determine whether Plaintiff will receive his full set of compensation claims and termination benefits or whether he should be terminated for cause, which would substantially reduce the benefits to which he is entitled. See PI Memo at Exhs. 10 & 11. An injunction by this Court ordering release of Plaintiff's termination benefits would interfere with that proceeding, as is noted above. The harm to OFHEO's authority vis a vis the enterprises could be quite detrimental.[14]

The public interest also weighs on the side of OFHEO in this matter. One purpose of OFHEO's review of Plaintiff's termination package is to ascertain whether there is any safety and soundness risk for Freddie Mac. The public has an interest in maintaining a safe and strong Freddie Mac, as Freddie Mac plays a critical role in the secondary mortgage market. Complaint ¶¶ 8, 13-14; PI Memo at Exh. 2. In addition, the stockholders of Freddie Mac would be injured by the precipitous release of benefits to Plaintiff if it turned out that such compensation was excessive. Nor is there any public interest in seeing the money released. No one other than Plaintiff stands to benefit from such an action.

---

[14] Additionally, the relief that Plaintiff seeks is the ultimate relief in the litigation–the release of his termination benefits. A motion for preliminary injunction is not the appropriate means of obtaining the ultimate relief. See Heckler v. Redbud Hosp. Dist., 473 U.S. 1308, 1313-14 (1985).

CONCLUSION

A preliminary injunction is an extraordinary and drastic remedy, which should not be granted unless the movant clearly carries the burden of persuasion. Boivin v. U.S. Airways, Inc., 297 F. Supp. 2d 110, 116 (D.D.C. 2003). That standard has not been met here. Defendants therefore respectfully request that this Court deny Plaintiff's Motion for Preliminary Injunction.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

ROSCOE C. HOWARD, JR.
United States Attorney

/s/

ARTHUR R. GOLDBERG, D.C. Bar 180661
MARCIA N. TIERSKY, Ill. Bar 6270736
Attorneys, Department of Justice
20 Mass. Ave., N.W., Room 7206
Washington, D.C. 20530
Tel: (202) 514-1359
Fax: (202) 616-8470
E-mail: marcia.tiersky@usdoj.gov
Attorneys for Defendants

OF COUNSEL:
DAVID FELT
OFHEO
1700 G Street, N.W.
Washington, D.C. 20552
Tel: (202) 414-3750

UNITED STATES OF DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LELAND C. BRENDSEL, 8900 Gallant Green Drive McLean VA 22102 Plaintiff, v. OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, an Office within the United States Department of Housing and Urban Development, and Armando Falcon, Jr., in his official capacity as Director Defendants.	Civil Action No. 1:04cv00487 (RJL) DECLARATION OF Tasha L. Cooper

DECLARATION OF TASHA L. COOPER

I, Tasha L. Cooper, hereby state as follows:

1. I am employed by the Office of Federal Housing Enterprise Oversight (OFHEO). I submit this declaration in support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction.

2. Attached to this declaration as Exhibit A is a true and correct copy of the July 22, 2003 report that was prepared by the law firm of Baker Botts LLP, special counsel to the outside directors of Freddie Mac's Board of Directors. This report is available on Freddie Mac's website (www.FreddieMac.com).

3. Attached to this declaration as Exhibit B is a true and correct copy of a June 7, 2003 letter from Armando Falcon, Jr., Director of OFHEO, to the Members of the Board of Directors of the Federal Home Loan Mortgage Corporation (Freddie Mac). This letter is available on OFHEO's website (www.OFHEO.gov).

4. Attached to this declaration as Exhibit C is a true and correct copy of the June 17, 2003 letter from Stephen A. Blumenthal of OFHEO to Allan Ratner, Vice President and Deputy General Counsel of Freddie Mac.

5. Attached to this declaration as Exhibit D is a true and correct copy [with minimal redactions] of the June 18, 2003 letter from Stephen A. Blumenthal of OFHEO to Allan Ratner, Vice President and Deputy General Counsel of Freddie Mac.

6. Attached to this declaration as Exhibit E is a true and correct copy of the Termination Provisions relating to Leland Brendsel dated June 11, 2003. This document is available on Freddie Mac's website (www.FreddieMac.com).

7. Attached to this declaration as Exhibit F is a true and correct copy [with minimal redactions] of a June 19, 2003 letter from Allan Ratner, Vice President and Deputy General Counsel of Freddie Mac, to Stephen Blumenthal of OFHEO.

8. Attached to this declaration as Exhibit G is a true and correct copy of a June 19, 2003 letter from Alfred M. Pollard, General Counsel of OFHEO, to John M. Dowd of Akin Gump Strauss Hauer & Feld, LLP.

9. Attached to this declaration as Exhibit H is a true and correct copy of Freddie Mac's June 25, 2003 press release entitled "Freddie Mac Reports on Restatement Progress." This press release is available on Freddie Mac's website (www.FreddieMac.com).

10. Attached to this declaration as Exhibit I is a true and correct copy of the Stipulation and Consent to the Issuance of a Consent Order and Consent Order (No. 2003-02) entered into on December 9, 2003 by Freddie Mac and OFHEO. This document is available on OFHEO's website (www.OFHEO.gov).

11. Attached to this declaration as Exhibit J is a true and correct copy [with minimal redactions] of a July 16, 2003 letter from Stephen Blumenthal of OFHEO to Allan Ratner, Vice President and Deputy General Counsel of Freddie Mac.

12. Attached to this declaration as Exhibit K is a true and correct copy of OFHEO's July 17, 2003 press release entitled "Statement of the Honorable Armando Falcon, Jr. Before the Committee on Banking, Housing and Urban Affairs, United States Senate, July 17, 2003." This press release is available on OFHEO's website (www.OFHEO.gov).

13. Attached to this declaration as Exhibit L is a true and correct copy of the Scheduling Order issued In the Matter of Leland C. Brendsel on February 26, 2004.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 5, 2004.

Tasha L. Cooper

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April 2004, I caused a copy of the foregoing to be served by facsimile and first class mail on the person identified below:

Kevin M. Downey, Esq.
Williams & Connolly LLP
725 Twelfth St., N.W.
Washington, DC 20005

Alfred M. Pollard
General Counsel
Office of Federal Housing Enterprise Oversight