IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA and OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, Petitioners, v. VAUGHN CLARKE, Respondent.	)	No. 03-3440 (DKC)

PETITIONERS' REPLY TO RESPONDENT'S LETTER OF JANUARY 16, 2004

INTRODUCTION

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

Respondent argues that the existence of the consent order means that OFHEO has no

authority to file any enforcement actions related to information obtained in the course of the special examination. Therefore, Respondent reasons, there is no purpose in having him testify pursuant to the special examination. Respondent is wrong on a myriad of levels. The primary purpose of the special examination is not to spawn enforcement actions, but to ensure the safety and soundness of the enterprise by ascertaining what policies and practices led to the delay and restatement of earnings and determining how to ensure against such detrimental policies and practices in the future.

Resolution of the adjudicative enforcement action against the enterprise in no way relieves OFHEO, as the supervisory agency, from continuing its examination responsibilities; the special examination is not concluded. OFHEO may also still seek enforcement actions against former senior Freddie Mac officials. Moreover, OFHEO has not closed its inquiry into the conduct and policies of counter-parties. There is nothing on the face of the Consent Order that suggests that the special examination is over or that prohibits the examination from proceeding in the wide variety of areas that it is continuing to cover. Thus, yet another of Respondent's excuses to avoid being deposed fails, and this Court should enforce the administrative subpoena.

Respondent also seeks leave to depose David W. Roderer, OFHEO's Deputy General Counsel. Such leave should be denied because discovery is not appropriate in this context.

ARGUMENT

I. THE CONSENT ORDER DOES NOT ALTER THE FACT THAT THE ADMINISTRATIVE SUBPOENA SHOULD BE ENFORCED.

Respondent contends that the Consent Order, which constitutes an agreement between Freddie Mac and OFHEO regarding charges that OFHEO could have brought against Freddie Mac, somehow implicates whether he should be subject to an administrative subpoena as part of the special examination. The Consent Order does not have anything to do with the pending subpoena enforcement action.

The purpose of the special examination, as has been explained by Mr. Roderer, is to determine the safety and soundness of Freddie Mac. Roderer Decl. ¶¶ 3-5, 25; 2d Roderer Decl. ¶¶ 4, 6. Special examiners are seeking to ascertain which accounting practices that have been used over the last several years need to cease and what changes need to be made in Freddie Mac in order to prevent in the future the sort of delay and restatement of earnings that began in January of 2003 and continues even today. See Roderer Decl. ¶ 4; 2d Roderer Decl. ¶ 4. The overriding purpose of the special examination is not to find individuals and entities to prosecute, although the special examination may in some situations produce evidence that leads to such enforcement actions. 2d Roderer Decl. ¶ 4. Thus, to suggest, as Respondent has, that the special examination is over once possible enforcement actions have been resolved is to completely miss the point of the examination. See January 16, 2004 Letter from Steven M. Salky to Judge Deborah K. Chasanow at 1 (hereinafter "Letter"). Even if it were true, which it is not, that there are no further possible enforcement actions for OFHEO to undertake, the special examination would still serve the vital purpose of ascertaining what went wrong in the past and how to fix

ongoing problems to prevent them from recurring. This ongoing work into ensuring the continued safety and soundness of the enterprise is OFHEO's basic role as a regulator. See Roderer Decl. ¶ 2; 12 U.S.C. §§ 4501, 4513. That function is not diminished by the existence of enforcement actions or by settlement of potential enforcement actions.

As the special examination continues, the possibility exists that other enforcement or supervisory actions will also be filed. For example, OFHEO is free to file Notices of Charges against other former senior officers of the enterprise. See Stipulation at Article IV. Moreover, if OFHEO should determine that third parties, who are referred to in the Report of the Special Examiners ("Report") as "counter-parties," have failed to abide by proper accounting procedures, OFHEO can order Freddie Mac not to do business or curtail its dealings with those counter-parties in the future. See 12 U.S.C. § 4631. This is another form of enforcement action that could result from the ongoing special examination. Cf. Report at 74-82; 2d Roderer Decl. ¶ 4. Further, OFHEO can take action as to any improper activities that are still ongoing. See 12 U.S.C. § 4513. Thus, as part of its special examination, information about past practices would be relevant and useful, even if actions taken during that time period could not be the subject of any future enforcement proceeding. In short, even under Respondent's skewed version of the purpose of the special examination, there would still be reason for the examination to continue, as more enforcement and supervisory actions are possible.

The two documents on which Respondent relies do not support his position. Neither document indicates that the special examination is over, nor does either document tie the fate of the special examination to the (now resolved) enforcement action against Freddie Mac. The Stipulation explicitly states that the Order is not intended to interfere with the ongoing regulatory

oversight of the enterprise with respect to anything subsequent to the Order or with respect to third parties, including separated senior officers. Stipulation at Article IV. It is thus clear from the face of the document that the investigation into matters related to the delay and restatement of earnings continues, particularly as to third parties or counter-parties. OFHEO is entitled to whatever information Respondent may have as to transactions with those counter-parties. OFHEO is also entitled to information relevant to its day-to-day regulation of the enterprise. Whatever Respondent knows about the events, decisions, policies, and practices that led to the delay and restatement of earnings is relevant to OFHEO's ongoing regulation of the safety and soundness of Freddie Mac.

The special examination is continuing to explore the cause of the restatement and delay of earnings reports and possible changes to be made in the future. Respondent has information critical to allowing the special examiners to reach a complete understanding. That Freddie Mac and OFHEO have settled charges that could have been brought against Freddie Mac is simply not relevant to OFHEO's need to understand what occurred, nor is it relevant to Respondent's ability to provide such critical information. The subpoena should therefore be enforced against Respondent.

II. RESPONDENT'S REQUEST FOR LEAVE TO SUBPOENA DAVID RODERER SHOULD BE DENIED.

Attached to Respondent's letter of January 16, 2004, is a subpoena for the testimony of David W. Roderer. Mr. Roderer is employed by OFHEO as counsel to the special examination, and he has provided two declarations on behalf of the government in this enforcement proceeding. Respondent's request for leave to file the subpoena for Mr. Roderer's testimony and

for documents should be denied because this case does not present an exception to the general rule that there is no discovery available in administrative subpoena enforcement proceedings.[1]

Discovery in the context of an administrative subpoena enforcement is not permitted except in certain rare circumstances. Respondent cites to no authority for the proposition that discovery would be appropriate in this situation. And, in fact, "except in extraordinary circumstances[,] discovery is improper in a summary subpoena enforcement proceeding." United States v. Am. Target Advertising, Inc., 257 F.3d 348, 356 (4th Cir. 2001), accord United States v. Exxon Corp., 628 F.2d 70, 77 n.7 (D.C. Cir. 1980). "Because subpoena enforcement proceedings are generally summary in nature and must be expedited, discovery is not usually permitted." SEC v. Lavin, 111 F.3d 921, 926 (D.C. Cir. 1997). In order to obtain discovery, the target of the subpoena must distinguish himself from the class of the ordinary respondent by citing special circumstances that raise doubts about the agency's good faith. Am. Target Advertising, 257 F.3d at 355 (quoting SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1388 (D.C. Cir. 1980) (en banc)).

The only "special circumstance" cited by Respondent is the fact that the government failed to mention OFHEO's settlement with Freddie Mac in its reply brief. See Letter at 2 n.1. This argument lacks merit. The government did not mention the settlement in its reply brief because the settlement is in no way relevant to the administrative subpoena at issue in this case. In addition, Respondent had an opportunity to present the Consent Order and his arguments pertaining thereto in his Opposition brief, and he did not do so, suggesting that he, also, did not

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[1] It is of note that the documents sought in the subpoena are almost universally privileged pursuant to attorney-client privilege, deliberative process privilege, and possibly other privileges. See Exh. 3 to Letter.

view it as relevant. The Consent Order was signed on December 9, 2003. It was posted on the agency's internet website a day later and widely reported in the newspapers in the days immediately following the signing.[2] See OFHEO's News Center, http://www.ofheo.gov/News.asp?FormMode=Release&ID=119 (press release describing Consent Order and posting a link to full text of Stipulation and Order). There can be no doubt that Respondent was aware of the settlement prior to filing the Opposition. The Notice of Charges that Respondent discusses extensively in the Opposition was not filed until December 18, 2003, so Respondent clearly had sufficient time to integrate new developments into the Opposition. Failure to apprise the Court of irrelevant developments cannot be considered to be evidence of a lack of good faith on the part of the government.

The caselaw in this area does not support Respondent. Courts have cabined discovery in the administrative subpoena context to a narrow set of situations in which a serious concern about the good faith of the government has been raised. See, e.g., SEC v. Wheeling-Pittsburgh

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

Steel Corp., 648 F.2d 118, 128-29 (3d Cir. 1981); United States v. Fensterwald, 553 F.2d 231 (D.C. Cir. 1977). Where respondents have only been able to provide the court with "diffuse speculations concerning possible misuse of administrative authority," discovery has been denied. SEC v. McGoff, 647 F.2d 185, 194 (D.C. Cir. 1981). Even where the respondent has made a considerably more extensive effort to establish bad faith on the part of the government than Respondent has here, this Court has denied discovery based upon an affidavit on behalf of the government demonstrating the lack of improper purpose. In re MacCaferri Gabions, Inc. v. United States, 938 F. Supp. 311, 318-19 (D. Md. 1995). Here, Respondent provides no evidence of bad faith but relies on vague accusations. The government has provided two declarations which are responsive to Respondent's claims in that they explain the purpose of the special examination. Contrary to Respondent's belief, the special examination is not focused on him; it is about ensuring the safety and soundness of Freddie Mac on a continuing basis. See Roderer Decl. ¶ 4; 2d Roderer Decl. ¶ 4.

Respondent suggests that this Court should ignore the declarations provided by Mr. Roderer because they are "self-serving representations." Letter at 2. There is no basis for the Court to reject Mr. Roderer's declarations. The case cited by Respondent is inapposite. In United States v. Gertner, 65 F.3d 963 (1st Cir. 1995), the declaration relied on by the government was apparently generic, bareboned, and conclusory. Id. at 968-70. Mr. Roderer's declarations, by contrast, are extensive and explanatory. Mr. Roderer does not simply assert the bottom line but describes the purpose of the special examination in detail, as well as why Respondent's testimony is relevant to the special examination. See Roderer Decl. ¶ 3-5, 23-26; 2d Roderer Decl. ¶ 3-6, 8. Further, in Gertner, the respondent made some effort to provide actual evidence

of bad faith, 65 F.3d at 970, whereas Respondent here has done no such thing. The request to subpoena Mr. Roderer should, therefore, be denied.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court enforce the administrative subpoena against Respondent and deny the request to subpoena Mr. Roderer.

Respectfully submitted,

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