

IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
NO. 13-465 C  
(FILED FEBRUARY 26, 2014)

-----x  
FAIRHOLME FUNDS, INC., ET AL

VS. RCFC 12(b); RCFC 12(b)(6);  
RCFC 56(d)

THE UNITED STATES

-----x

PROTECTED INFORMATION ONLY TO BE DISCLOSED

IN ACCORDANCE WITH PROTECTIVE ORDER

ORAL DEPOSITION OF MS. SUSAN MCFARLAND

HOUSTON, TEXAS

JULY 15TH, 2015

10:01 A.M.

Reported By:  
SAMANTHA DOWNING, CSR  
JOB NO. 39652

1 different in time.

2 And it -- Grant Thornton is projecting  
3 that Fannie is going to lose 13 billion dollars in 2012.  
4 Your shop was projecting a loss of 2.1 billion dollars.

5 Do you think Grant Thornton's number was  
6 overly pessimistic?

7 MR. LAUFGRABEN: Objection to the form of  
8 the question; lack of foundation, lack of  
9 personal knowledge, speculation.

10 A. It would be difficult for me. I haven't read  
11 the document. I haven't assessed what assumptions they  
12 were using. So I don't think I can answer that  
13 question.

14 Certainly their number was more negative  
15 in that year than the number we were projecting. There  
16 were other years out from that that they were more  
17 positive. I mean, there were differences in our  
18 projections clearly.

19 Q. (BY Mr. THOMPSON) And if someone had come to  
20 you on the eve of the net worth sweep and said to you,  
21 "I think Fannie Mae is going to lose 13 billion dollars  
22 in 2012," do you think that would have been an  
23 unreasonable statement of future profitability as of  
24 August 2012?

25 MR. LAUFGRABEN: Object to the form of

1 the question; calls for speculation, calls for an expert  
2 opinion.

3 A. In the first quarter -- here's where my numbers  
4 recollection comes in versus names recollection -- I  
5 believe we made 2 to 3 billion in the first quarter of  
6 '12. I think Fannie Mae was 6 billion dollars in the  
7 second quarter of 2012. I am sure we can go look at  
8 publically-available documents to determine whether I  
9 was right or not.

10 So let's say the total profit to date  
11 after June 30th was 8 to 9 billion dollars. So if  
12 someone said, "We're going to lose 13 billion," that  
13 would mean we would have to have a pretty big loss, a  
14 substantial loss during the latter part of the year that  
15 would have had to have been greater than the loss we had  
16 for all of 2011.

17 I -- certainly that was not what we were  
18 expecting. That's not anywhere close to what our  
19 projections were showing. They -- that was not in any  
20 way, shape, or form, what we had reviewed with Treasury  
21 and FHFA at that point in time.

22 So if somebody had come to me, I would  
23 say, "Okay. Tell me what I missed. What is it that you  
24 think is going to happen in the last few months of the  
25 year that's going to completely wipe out the profits

1 that we've already posted, and then, you know, take it a  
2 further 13 billion in the red?"

3 I would have a hard time -- I can't think  
4 of situations that could happen that would cause that  
5 outcome to be so.

6 Q. (BY MR. THOMPSON) Okay. If you were making an  
7 important financial decision for Fannie Mae's future on  
8 the date of the net worth sweep, would you have relied  
9 on projections from September 30, 2011?

10 MR. LAUFGRABEN: Object to the form of  
11 the questions; calls for speculation, lack of  
12 foundation.

13 A. The reason we did updates to the forecast  
14 quarterly were so that we could have, you know, fairly  
15 current perspectives from which to make decisions on.

16 Q. (BY MR. THOMPSON) Why was it important to have  
17 a fairly current perspective?

18 MR. LAUFGRABEN: Objection; form.

19 A. The situation was very fluid. A lot of things  
20 were changing and quickly, and so things could become  
21 very dated very quickly in that particular environment  
22 at that particular time.

23 So it was very important to ensure -- we  
24 were picking up goods and bad that were happening as  
25 quick as we could -- we recognized them and could

1 consume them into our projections.

2 MR. LAUFGRABEN: David, I am sorry.

3 If you have a couple of more questions,  
4 let's go, but can we go for a break?

5 MR. THOMPSON: Just another minute or  
6 two, and then we'll move away from this document.

7 Q. (BY MR. THOMPSON) So -- but you said there  
8 were goods and bad.

9 If we look at the period from  
10 September 30, 2011 to the date of the net worth sweep,  
11 the goods outweighed the bad insofar as, you know, these  
12 projections that Fannie put together in McFarland 4  
13 showed a projected loss of 2 billion or so for 2012, and  
14 yet you had -- any had made almost 8 billion halfway  
15 through the year; is that right?

16 MR. LAUFGRABEN: Object to the form of  
17 the question.

18 MR. BARTOLOMUCCI: Objection; form.

19 A. There were a lot of things that moved in a  
20 positive direction between September of 2011 and late  
21 July, early August 2012.

22 You can look at publically-available  
23 information, look at the Home Price Index as it was  
24 published out there and how much those changed during  
25 that period of time.

1 Fannie does produce its own Home Price  
2 Index. But you can look at non-published information,  
3 and you can see improvements in projections coming from  
4 third parties during that period of time. You can look  
5 at average loss statistics on different work-out  
6 situations. You can look at how much G fees changed  
7 during that period of time.

8 If you look at what existed September 11,  
9 and you compared that to what existed in mid, late  
10 summer 2012, there's a number of key factors that moved  
11 in a positive direction during that period.

12 Q. Okay. And those positive developments  
13 outweighed any negative developments in that time period  
14 on balance?

15 MR. LAUFGRABEN: Object to the form of  
16 the question.

17 A. Our forecasts attempted to incorporate all of  
18 those changes good and bad, and the outcomes, you can  
19 see, improved.

20 So the collective -- so if you said if we  
21 added up all the puts and takes in a quantifiable  
22 fashion, then the net benefits outweighed the net  
23 negatives.

24 MR. THOMPSON: Let's take a break.

25 THE REPORTER: It's 11:37.

1 (Recess from 11:37 a.m. to 11:48 a.m.)

2 THE REPORTER: It's 11:48.

3 Q. (BY MR. THOMPSON) I would like to ask the  
4 court reporter to mark as McFarland 6 a document that  
5 bears a Bates number FM3075 through 3091.

6 (McFarland Exhibit No. 6 was marked.)

7 Q. (BY MR. THOMPSON) All right. So these are  
8 minutes of a meeting of the Board of Directors of  
9 Fannie Mae on November 18th, 2011. We can see that in  
10 the third paragraph that Jeff Spohn of the FHFA was  
11 there, and we can see in that same paragraph that you  
12 were there. And if you would be kind enough to turn to  
13 page 3087, it's the carry-over paragraph, and it's four  
14 lines from the bottom of that carry-over paragraph. It  
15 says, "The Board discussed longer-term forecasting and  
16 key sensitivities, as well as the ability to utilize net  
17 operating losses for tax purposes."

18 Is this a reflection of the fact that the  
19 Board was briefed on the ability of the companies to use  
20 their NOLs?

21 MR. LAUFGRABEN: Object to the form of  
22 the question.

23 A. Yeah.

24 It's reference to under what conditions  
25 might some or all of the DTABs be good.

1 Q. (BY MR. THOMPSON) Okay.

2 A. And I don't remember the specifics that we  
3 discussed at that point in time, other than it was a --  
4 it's a material item for the company. So it is  
5 something that we would periodically, you know, review  
6 and discuss in normal course.

7 And then obviously as we got closer to,  
8 you know, the potential to release the allowance, those  
9 discussions picked up.

10 Q. Okay. When you said might be to the good,  
11 that's a way of saying that the valuation allowance  
12 might be reversed?

13 A. Correct.

14 MR. LAUFGRABEN: Object to the form of  
15 the question.

16 Also, for the record, can you please wait  
17 a second for me to interpose my objection before  
18 answering?

19 MR. THOMPSON: Just to be clear -- I am  
20 fine with that, but we're not going to take, you know --  
21 that's fine.

22 Q. (BY MR. THOMPSON) In any event, now, you said,  
23 "periodically."

24 Was the DTVA, when you first got there,  
25 being reviewed on at least a quarterly basis?



1           A.     It would be -- from an accounting perspective,  
2 we reviewed it every quarter, because we have to make a  
3 determination every quarter whether or not the allowance  
4 should stay on or be released.

5           Q.     And who on your team was advising you on that  
6 issue?

7                     MR. LAUFGRABEN:   Object to the form of  
8 the question; vague.

9           A.     Well -- so Vickie Lyons was head of Tax at the  
10 time we really started -- you know, later in my time  
11 there. I can't remember if she was head of Tax at the  
12 start, okay?

13                     She worked under Krissa [phonetic] Haley.  
14 Krissa Haley was a Senior Accounting Manager reporting  
15 directly to me. Krissa had significant tax experience  
16 herself, and so she was heavily involved in all of the  
17 discussions around the DTVA. And most of my  
18 conversations around the DTVA involved Greg Fink as  
19 Controller; Krissa Haley; sometimes Kirk Silva, who is  
20 the Accounting Policy Manager; and then Vickie Lyons,  
21 who was head of Tax.

22           Q.     And how is Ms. Haley's last name spelled?

23           A.     H-a-l-e-y, I think.

24           Q.     Okay. So -- and then would they -- someone  
25 then brief the Board on this issue?

1 in compliance with those covenants. We did so on a  
2 quarterly basis.

3 So we had a process whereby we got -- I  
4 got a variety of attestations from various executives  
5 across the company that the component parts of these  
6 statements that were relevant to them and what they and  
7 their team did, that to the best of their knowledge, we  
8 were in compliance with.

9 And legal -- internal legal counsel at  
10 Fannie Mae assisted me in this process so that I then,  
11 on behalf of Fannie Mae, could certify to  
12 Director DeMarco that we indeed were in compliance.

13 So this is just one of the provisions  
14 that we were acquired to make that certification.

15 Q. (BY MR. THOMPSON) So Fannie Mae has -- I think  
16 it was your words -- no capital essentially on its  
17 Balance Sheet in 2011, and, yet, they're making dividend  
18 payments, is that right, to the Government?

19 MR. LAUFGRABEN: Object to the form of  
20 the question.

21 A. Yes.

22 Q. (BY MR. THOMPSON) And was there ever any  
23 discussion at Fannie Mae that, "We don't have any  
24 capital, and, yet, we're being forced to make dividend  
25 payments"?

1                   Did anyone ever discuss that somewhat  
2 anomalous state of affairs?

3                   MR. LAUFGRABEN: Object to the form of  
4 the question; leading.

5                   MR. BARTOLOMUCCI: Objection; form.

6           A. There was conversation about the -- our irony  
7 in the fact that we had to draw money to pay it right  
8 back to Treasury. So we had to borrow money from  
9 Treasury to pay them their dividends for a period of  
10 time while the company was not profitable.

11           Q. (BY MR. THOMPSON) And the agreements provided  
12 for a payment-in-kind option; is that right?

13                   MR. LAUFGRABEN: Object to the form of  
14 the question.

15           Q. (BY MR. THOMPSON) In other words, it was  
16 10 percent if paid in cash or 12 percent if paid in  
17 increased liquidation preference?

18                   MR. LAUFGRABEN: Same objection.

19           A. Yeah. That's incorporated into the Preferred  
20 Stock Purchase Agreement.

21           Q. (BY MR. THOMPSON) Was there ever any  
22 discussion at Fannie of rather than drawing down on the  
23 line of commitment and, by the way, not being able to  
24 repay this 10 percent money, we should do a payment in  
25 kind?

1 MR. LAUFGRABEN: Object to the form of  
2 the question.

3 A. I was not involved in any conversation that  
4 discussed that option.

5 Q. (BY MR. THOMPSON) Okay. Did that thought ever  
6 cross your mind?

7 MR. LAUFGRABEN: Same objection.

8 A. The -- in my mind, what form of payment we  
9 would make and what we were able to do was what Treasury  
10 would allow us to do.

11 Q. (BY MR. THOMPSON) Okay. So if we --

12 A. And let me add to that.

13 In other words, if I thought I could make  
14 a case that they would agree to letting us use the  
15 liquidation preference, then go for it, right? So in my  
16 mind, I had to be realistic about that, that we would be  
17 able to affect their influence.

18 Q. I understand that.

19 Now, let's put that document to the side.

20 Although, you did say there was -- you  
21 mentioned there an irony. What were those discussions?

22 Who did you have those discussions with,  
23 Tim Mayopoulos?

24 MR. LAUFGRABEN: Object to the form of  
25 the question; misstates previous testimony.

1           A.     I mean, what I would call those was kind of  
2 hallway-conversation types of things that -- and it  
3 wasn't just a single conversation. It could be  
4 relatively junior people at the company. You know,  
5 anybody that was sort of familiar with the mechanics of  
6 how it worked.

7                     There's certainly a number of individuals  
8 that kind of took notice of the fact that there was this  
9 sort of, you know, like a hamster on a wheel. You  
10 borrow to pay to borrow to pay.

11                    And the more we borrowed to pay, the more  
12 we had to pay in dividend because the more the amount we  
13 drew on went up, and the more dividend -- you know, so  
14 it had compounded dividend implications.

15           Q.     (BY MR. THOMPSON) And at the time of the  
16 net worth sweep, did you feel that Fannie Mae was in a  
17 death spiral?

18                   MR. LAUFGRABEN: Object to the form of  
19 the question.

20           A.     No, I did not think Fannie Mae was in a  
21 death spiral in mid August of 2012.

22           Q.     (BY MR. THOMPSON) Why not?

23           A.     The company was making money. The projections  
24 that I had been involved in and reviewed and felt  
25 comfortable with seemed to indicate that there was a

1 good chance that the company would continue to make  
2 money. There were a lot of things that were improving  
3 within the company, and I felt the company was on a  
4 positive trajectory.

5 Q. Okay. So our next one is going to be McFarland  
6 8, and it has a Bates number of FHFA25815 through 25816.

7 (McFarland Exhibit No. 8 was marked.)

8 Q. (BY MR. THOMPSON) So this is an e-mail from  
9 Mary Miller to Ed DeMarco on January 4, 2012. And if we  
10 turn to the next page, it says, "Agenda for Discussion  
11 With FHFA."

12 And it says in the very first sentence,  
13 "FHFA and Treasury share common goals to promote a  
14 strong housing market, reduce Government involvement in  
15 the housing market over time, and to provide the public  
16 and financial markets with a clear plan to wind down the  
17 GSEs."

18 Now, when you were at Fannie Mae in 2011  
19 and 2012, did you see any manifestations of this common  
20 goal of trying to wind down the GSEs?

21 MR. LAUFGRABEN: Objection; form,  
22 foundation, vague.

23 A. The reestablished goals -- performance goals  
24 for the company in agreement with FHFA -- and I actually  
25 oversaw that process -- we want to -- FHFA and ourselves

1 MR. LAUFGRABEN: Object to the form of  
2 the question.

3 Q. (BY MR. THOMPSON) The sweep was the 17th, I  
4 will represent to you.

5 A. Yeah.

6 This is August 6th?

7 Q. Yeah.

8 A. So as of this meeting, no, I did not know that  
9 the Third Amendment was going to be put in place.

10 Q. And do you recall what Tim Mayopoulos' reaction  
11 was to the Third Amendment?

12 MR. LAUFGRABEN: Object to the form of  
13 the question; lack of foundation.

14 A. I can tell you the logistics of the  
15 communication of the Third Amendment. That might be  
16 helpful.

17 Q. (BY MR. THOMPSON) Sure.

18 A. I was on vacation in Mexico and was contacted,  
19 I believe it was Tuesday of that week -- I may be off a  
20 day -- that Secretary Geithner would like to meet with  
21 the CEOs and CFOs of the two GSEs the next morning. I  
22 inquired into flight arrangements that could get me back  
23 in time for the meeting, only to discover there were no  
24 commercial arrangements to make that happen.

25 So I let Tim know that I couldn't find a

1 way to get back in time. And apparently there were some  
2 other individuals -- I don't know if it was the CEO or  
3 CFO of Freddie. I was not the only one logistically  
4 challenged to make the meeting at 8:00 the next morning.

5 The decision was then made that  
6 Secretary Geithner would not then meet. Instead, they  
7 set up a meeting with Mary Miller that I know Tim  
8 attended in person, and she communicated the -- that  
9 they were going to put the Third Amendment in place.

10 Tim subsequently had a briefing call with  
11 myself and a few other executives at Fannie Mae after  
12 that to inform us. So I was still in Mexico on vacation  
13 on the phone receiving -- being informed of the  
14 Third Amendment.

15 So I say that only in the context of, you  
16 know, I have to assess it based on what I heard. I  
17 wasn't in the room. I couldn't, you know, get a sense  
18 from body language or any of the other things.

19 I think -- you know, the sense I got was  
20 maybe not that dissimilar from my reaction. When you're  
21 in the unique situation that the GS Es were in, you're  
22 never shocked at anything. But I -- there was a little  
23 bit of surprise and yet not surprise, in the sense that  
24 the chance that they -- we didn't believe that Treasury  
25 would be too fond of a significant amount of capital



1 buildup inside the enterprises.

2 Q. Why not.

3 They had mortgaged 79.9 percent of the  
4 economy.

5 MR. LAUFGRABEN: Objection to the form of  
6 the question; calls for speculation.

7 A. There was a desire to reach a more wholistic  
8 solution for housing finance reform.

9 So as time passed and the companies  
10 continued to operate and things happened through the  
11 operation of those companies, you had -- all of the  
12 parties involved, whether that's Treasury or FHFA or  
13 Fannie, had to deal with the outcomes of those in the  
14 absence of a more wholistic solution.

15 Some of those outcomes could start taking  
16 things down a certain path that might affect or make the  
17 ultimate solution, if there ever is one, more difficult  
18 to deal with.

19 And I don't know. I am just saying that  
20 if you start allowing capital to accumulate up in the  
21 enterprises, then that creates an additional variable or  
22 factor that has to be taken into account if and when  
23 perhaps a more wholistic solution is put in place.

24 You know, again, I am giving you sort of  
25 my perspective on why, you know, there might be a reason

1 to prefer that not to happen -- you know, capital  
2 accumulation to happen at that point in time.

3 Q. And what did Mr. Mayopoulos say during this  
4 conference call when you were in Mexico?

5 A. Well, he was very factual providing the  
6 information that was provided to him by Treasury.

7 Q. Yeah.

8 A. Kind of discussing, okay, what does this mean?  
9 What do we need to do?

10 You know, there were communication  
11 issues, there's logistical issues, different things that  
12 had to be -- you know, we had to be prepared to deal  
13 with it. And so what do we as a company need to do and  
14 by when and who is on point for different things. So  
15 there was a little bit of a call to action.

16 And, you know, we needed to communicate  
17 to the Board. We also ultimately needed to communicate  
18 to the employees. But you -- you know, the timing of  
19 when and how you did that was very important because we  
20 couldn't get out in front of, you know, the  
21 communications that Treasury needed to make. So we  
22 needed to make sure that we were clear on that -- you  
23 know, that type of thing --

24 Q. Okay.

25 A. -- and working through that.

1 it's talking about potential value creation  
2 opportunities.

3 And my question, Ms. McFarland, is, have  
4 you ever seen this document before?

5 A. No.

6 Q. Okay. We can put it to the side, then.

7 Okay. The next document is going to be  
8 McFarland 27. It's got a Bates number of FHLMC96  
9 through 171.

10 (McFarland Exhibit No. 27 was marked.)

11 Q. (BY MR. THOMPSON) So this is a Freddie Mac  
12 document. I understand it's not your document. It does  
13 say, "May 22, 2012, Corporate Forecast Three-Year  
14 Outlook."

15 I would like to direct your attention to  
16 page 27 of this document. And the final bullet point  
17 says, "Our sensitivity to a commitment fee based on  
18 remaining commitment available beginning in 2013 of 149  
19 billion dollars shows that a 25 basis point fee results  
20 in a 400,000,000 annual impact on stockholders' equity."

21 Does that strike you as a reasonable  
22 estimate of an appropriate fee for the commitment from  
23 the Government?

24 MR. LAUFGRABEN: Object to the form of  
25 the question; calls for speculation, lack of foundation,

1 lack of personal knowledge.

2 MR. BARTOLOMUCCI: Same objections.

3 A. I -- the only comment I would have is that's  
4 not dissimilar to pricing you might see, say, for a  
5 letter of credit, which was the comparison I made  
6 earlier.

7 Q. (BY MR. THOMPSON) Okay. Very good. Let's  
8 see.

9 Now, if we -- for loan loss reserves, did  
10 the company have a -- did it have a model to project,  
11 you know, future losses and, therefore, to make its loan  
12 loss provisions?

13 MR. LAUFGRABEN: Object to the form of  
14 the question.

15 A. Yes, we had a model.

16 Q. (BY MR. THOMPSON) Who maintained that model?

17 A. Leslie Deich and her team.

18 Q. Okay. Were those models shared with FHFA; do  
19 you recall?

20 A. Yes, and they were -- their regulatory arm did  
21 regular exams, examinations of that group and the models  
22 that they used.

23 Q. Okay. Now, we've talked a lot about deferred  
24 tax assets today.

25 And if I wanted to find all the