IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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FAIRHOLME FUNDS, INC., et al., |
Plaintiffs, |
vs. |
THE UNITED STATES, |
Defendant. |
Case No. 13-465C |

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C O N F I D E N T I A L

DEPOSITION OF ANNE EBERHARDT

Wednesday, July 8, 2015

New York, New York

Deposition of ANNE EBERHARDT, taken by plaintiffs, at the offices of Baker Botts, LLP, 30 Rockefeller Plaza, New York, New York, before Christina Diaz, a Certified Realtime and Registered Merit Reporter and Notary Public within and for the State of New York.

REPORTED BY:

Christina Diaz, CRR, RMR, CSR, CLR

Job No.: 59168

Q. Or 2008?
A. I don't.
Q. Okay. Were you told -- was Grant Thornton told by Treasury to use the stress test, give it some weight?
MS. ACEVEDO: Again, objection. Form as to time.
MR. HARPER: Go ahead if you understand the timeframe that he's covering in the question.
A. I don't believe that Treasury told us in 2011 to do that.
BY MR. THOMPSON:
Q. Did they in 2012?
A. I don't believe they did.
Q. Okay. And what about 2008?
A. I don't believe they existed in 2008.
Q. Okay. All right. We can put that aside. And this may or may not help, but you should assume, Ms. Eberhardt, that my questions today, unless I specifically say otherwise, relate to the two timeframes that the government is insisting that I limit my questions to. Okay? And if I ask you a question and it's a different answer, whether it's 2008 or 2011 or 2012, then

just please say, "Okay. Well, let me break it down." Okay? But otherwise, I'm going to assume that it's for those time periods. Okay?
A. (Nodding affirmatively).
MR. THOMPSON: Thank you. Now, we're going to move on to Eberhardt 8, which has a Bates number of UST 444007.
(Eberhardt Exhibit 8, e-mail dated 7/19/11 bearing Production Nos. UST 444007 through 444008, was marked for identification)
BY MR. THOMPSON:
Q. So this is an e-mail at the bottom from Alan Goldblatt. And he was at Fannie Mae, right?
A. In 2011, yes.
Q. Okay. And the e-mail is dated July 15th, 2011, subject, "Grant Thornton Forecast Discussion." You're one of the recipients of the e-mail.
Do you recall the types of things that were talked about at these forecast discussions?
A. Yes.
Q. Okay. What sort of things were discussed?
A. Generally, we had received a forecast

from the GSEs, from, in this case, Fannie Mae. They had forecasted typically four or five years. We needed to look at cash flows beyond that scenario, that timeframe. We would ask them questions about assumptions we made toward extending those forecasts beyond their timeframe and ask them whether our assumptions were reasonable or not.

Q. Do you recall any instances in which there was disagreement between where Grant Thornton ultimately came out as reflected in the valuations as of September 30, 2011 and where the Fannie and Freddie internal teams thought you should be?

MS. ACEVEDO: Objection to form.

A. Fannie Mae and Freddie Mac were not consulted on our valuation, only the projections. We asked them about the projections only. So they would not have known how we ended up. We asked for their input.

BY MR. THOMPSON:

Q. That's a helpful clarification. Thank you.

So with respect to the projections and the assumptions that went into those projections, do you recall any instance in which the Fannie and

Freddie in-house forecasting teams thought that Grant Thornton's ultimate projections were based on assumptions that were unfounded?

MS. ACEVEDO: Objection to form.

A. It's difficult to put it in those terms. We would have asked them whether our assumptions were reasonable. They said -- they decided if our assumption was unreasonable. We would have asked them what they would have thought was reasonable, and we would have very likely taken their counsel or taken their comments under advisement.

BY MR. THOMPSON:

Q. Okay. And do you recall that coming up?

A. There were times in the meetings when, yes, beyond their forecast period, we asked for their input and we accepted their comments.

Q. Okay. And was there a skepticism at Fannie and Freddie about the ability to project cash flows in any sort of accurate way out to 2039?

MS. ACEVEDO: Objection to form.

A. Are you asking me what Fannie Mae or Freddie Mac thought about --

BY MR. THOMPSON:

Q. Well, what they told you. I'm not asking you to be a mind reader, but do you know?

Methodology Discussion."

What types of issues were being discussed about GT's methodology as of August 1, 2011?

A. My memory is that GT methodology was one of our deliverables for Treasury, so they would have a document explaining our approach to the valuation.

Q. Okay. And there was a discussion about that. Do you recall any of the types of things that were discussed, like how far out are the cash flows going to be projected?

A. In any given time, I don't remember specifically without seeing the document what the issues were.

Q. Okay. Would Grant Thornton's methodology have been something that was discussed with FHFA at all?

A. I don't think so.

Q. Well, would it have been discussed with the companies at all?

A. I don't think so.

Q. And I'm not necessarily asking about this particular meeting, but do you recall generally the types of issues that were discussed with Treasury about Grant Thornton's methodology in 2011?

A. One of them would very likely have been the question of do we use the Black Scholes model to value the warrant this year or not. It was probably the same most years or every year maybe, but that would have been part of the methodology.

Q. And there was a discussion about that?

MR. HARPER: Objection as to form.

Go ahead.

A. I think the discussion was with the auditors of Treasury, whether they would agree that our methodology would be acceptable to them.

BY MR. THOMPSON:

Q. So Black Scholes was one thing that would have been discussed with the --

A. Yes.

Q. -- Treasury auditors?

Was that KPMG?

A. Yes.

Q. Okay. And what other types of issues were being discussed in connection with the 2011 valuation report? Would the discount rate have been something that came up?

A. It's likely, yes, how will we come up with the discount rate for the calculation of the senior preferred.

Q. Would another question have been, "Well, do we take the cash flows out to the time that the funding commitment expires?" Is that another methodological question that was discussed?

MS. ACEVEDO: Objection to form.

A. I don't recall that being directly an issue. I think the models were accepted at that point.

BY MR. THOMPSON:

Q. Do you recall any other methodological issues that were being discussed with KPMG in this timetable, or Treasury?

A. I don't recall.

MR. THOMPSON: We're going to go onto Eberhardt 10.

(Eberhardt Exhibit 10, e-mail string beginning with e-mail dated 8/24/11 bearing Production No. UST 406207, was marked for identification)

MR. THOMPSON: And this has a Bates number of UST 406207.

BY MR. THOMPSON:

Q. Now, this is an e-mail chain between you and Jeff Foster. And if we look at the e-mail, the first one in time, so the one on the bottom of the chain --

A. (Nodding affirmatively).

Q. -- it's dated August 24, 2011, 5:28 p.m., to Mr. Foster and Ms. Mlynarczyk. And you write, "Is there any literature you can forward to me that expresses Treasury's most recent position on charging quarterly commitment fees for the PSPA?"

Was there prior literature they had provided you on that topic?

A. I don't remember any literature in the past.

Q. Okay. Do you have any understanding at the time as to how Treasury thought about pricing the periodic commitment fee?

A. No.

Q. Did anyone at Grant Thornton know that?

A. No. We asked them.

Q. Did anyone at the Treasury ever tell Grant Thornton that the periodic commitment fee would be incalculably large?

MS. ACEVEDO: Objection.

A. I don't recall that conversation.

BY MR. THOMPSON:
Q. Okay. Was there any conversation with Treasury about setting the periodic commitment fee and how it would be set?
MS. ACEVEDO: Objection to form.
A. Our question was really do you continue to waive it or no.
BY MR. THOMPSON:
Q. What did they say?
A. I think, in every case, they said they would waive it.
Q. Okay. And do you know why that was?
A. I don't remember if it came up in conversation specifically.
Q. Well, do you have a general recollection?
A. My memory was that the PSPA or charging a commitment fee would be adding onto the 10 percent dividend, and that that was -- the 10 percent dividend was already big enough. They didn't want to add additional burden to the 10 percent.
MR. THOMPSON: Fine. Let's go to our next exhibit, which will be Eberhardt 11. It has a Bates number of FHFA 23117.

what was done. It sounds like it was an exercise to see what cash flows would be if the liquidity commitment wasn't being drawn every quarter to pay dividends. Right?

BY MR. THOMPSON:

Q. Yes. But that all the earnings were being swept. Is that the way you read this?

MS. ACEVEDO: Objection. Lack of foundation, form.

A. If all of the dividends that were being -- yes. If they were paying dividends based on their earnings and not based on a 10 percent dividend, yes.

BY MR. THOMPSON:

Q. And was this something that was discussed with Treasury, this scenario?

MR. HARPER: Objection to form.

A. I don't remember. I had forgotten that we even did this until now, so I don't recall how the topic came up.

BY MR. THOMPSON:

Q. Okay. Do you recall discussing this with the companies at all?

MR. HARPER: Objection to form.

A. I will say we didn't discuss our

projections with the companies once they informed us how -- once they gave us input as to how we should build them up. We didn't share with them what we did.

BY MR. THOMPSON:

Q. Why not? Couldn't you have benefited from their expertise?

MR. HARPER: Objection as to form.

Go ahead.

A. They were not a party to our valuation report. So we didn't want -- it wouldn't have been appropriate for us to share our models with them once they were completed. We asked for their input. We showed them sections and asked for their input about our underlying assumptions, but we didn't show them our report or talk to them about our valuation process.

BY MR. THOMPSON:

Q. The next statement is about "Control Premium." And it says in the second sentence under that heading, "It is widely accepted that the following are among the prerogatives of control ownership: Setting policy and changing the course of the business, acquiring or liquidating assets."

Is it your understanding when you were

working on this report that Treasury controlled acquiring or liquidating the assets?

MS. ACEVEDO: Objection. Calls for speculation and objection as to form, scope. Calls for a legal conclusion.

A. It's my understanding that they did not, that Treasury did not make these decisions.

BY MR. THOMPSON:

Q. It had no say over selling or liquidating assets?

MS. ACEVEDO: Objection. Calls for speculation and a legal conclusion. Also objection as to form. Vague.

A. I couldn't know from day-to-day what Treasury was doing or what they were able to do at the GSEs. I think the point of this paragraph is to make the case because Treasury was not doing this -- it was our understanding that Treasury was not engaging in these activities. It would not have been appropriate to assign a control premium to the valuation of the senior preferred shares.

BY MR. THOMPSON:

Q. Wasn't it true that, in fact, the companies were not able to raise capital without Treasury's approval?

MS. ACEVEDO: Objection to form and foundation. Calls for speculation and a legal conclusion. Asked and answered.

A. Again, I think that would have been outlined -- those rules are outlined in the PSPA.

BY MR. THOMPSON:

Q. Did you understand at the time you were working on this report that these companies could not go out and do an IPO and raise the money to pay off Treasury?

MR. HARPER: Same objections.

MS. ACEVEDO: Objection. Calls for a legal conclusion.

A. I would have to reread them. I don't remember precisely the terms of --

BY MR. THOMPSON:

Q. I'm asking what your understanding was. I'm not asking what in fact they say. The documents will speak for themselves. But I'm asking -- as you were putting this together, you had clearly an understanding of the PSPAs. And I'm just asking, did you know or have a view as to whether the companies could raise capital or not?

MR. HARPER: Same objections. Lack of foundation and whatever you want to offer.

MS. ACEVEDO: Calls for speculation and a legal conclusion.

A. Again, I think this paragraph was an argument for not assigning control premium. I don't know what -- I don't remember exactly what they could or could not do, what the GSEs could or could not do. It seems that there were some restrictions on what they could do according to the PSPA as far as getting capital, floating debt. I don't remember the specifics.

BY MR. THOMPSON:

Q. If we turn to the next page, 17. We've talked a little bit about these FHFA lawsuits, and I apologize if you've answered this question. But in this document, there's zero value attributed to the lawsuits against financial institutions.

Do you recall whether in the placeholder report that you were working on through September 30, 2012 whether there was value attributed to these lawsuits in that report?

MS. ACEVEDO: Objection to form.

A. I don't remember in 2012.

BY MR. THOMPSON:

Q. The next section says, "Federal Income Taxes. We have assumed that the companies will not pay federal income taxes."

Was that because of the tax loss carry forwards at least in the early years?

MS. ACEVEDO: Objection. Form and foundation, calls for speculation and a legal conclusion.

MR. HARPER: I'll join. Lack of foundation in particular.

Go ahead.

A. Before I can answer your question, I want to read the entire paragraph.

BY MR. THOMPSON:

Q. That's fine. Please take your time.

A. (Witness reviewing document).

Okay.

Q. Okay. So my question is: Obviously, this states Grant Thornton assumed the company will not pay federal income taxes. Was that in part based on the assumption that the companies would utilize and exhaust their NOLs?

MR. HARPER: Same objections.

MS. ACEVEDO: Objection to form and foundation.

BY MR. THOMPSON:

Q. As stated in the second sentence of this

Q. And it stays exactly the same for the next 19 years.

A. Okay.

Q. Was this just a pure extrapolation?

MR. HARPER: Objection as to form.

If you understand the question.

BY MR. THOMPSON:

Q. I guess what I'm trying to ask is: Did Grant Thornton make an independent analysis and say, "You know what, we think, for 20 years in a row, they're going to make exactly the same net interest margin," or did they simply extrapolate the 2020 numbers out into the future?

MR. HARPER: Objection. Lack of foundation.

MS. ACEVEDO: Objection. Calls for speculation. Can you refer me again to where you're reading from?

MR. THOMPSON: 7741.

MS. ACEVEDO: Yes.

MR. THOMPSON: In the top right-hand column, the first row.

MS. ACEVEDO: Yes.

BY MR. THOMPSON:

Q. There's GAAP Net Interest Margin, 8.635

billion. And then that's the exact same number for every year through 2039.

A. My memory is the underlying figures, so these were probably a little more nuanced than that. But without seeing them, I can't remember exactly how we -- the team came up with these figures.

Q. I'm sorry. I'm not understanding what you're saying. You're saying there is a model that had different results than this?

A. This model -- no. The model -- I believe there were underlying figures supporting GAAP net interest margin. But in 2011, I don't remember for sure. And I don't recall the reasons for holding GAAP net interest margin constant as you say from 2020 forward. There may be language within the report that describes that reason. I just don't remember.

Q. If you look at the next page for a moment, 7742, it shows administrative expenses growing year by year, and that's true through 2039. Why were administrative expenses growing while the entities were being wound down?

MS. ACEVEDO: Objection.

MR. HARPER: Objection.

MS. ACEVEDO: Form, foundation, mischaracterizes the document.

A. I believe there might have been a section within the report that describes administrative expenses being subject to an inflationary growth. We might have assumed that there was a certain level of administrative expenses that were necessary no matter what happened and that those would grow by some rate. And that's probably described somewhere in the report, but I don't recall exactly where.

BY MR. THOMPSON:

Q. What is OTTI, O-T-T-I, which is in the third row?

A. It's an accounting term for "other than temporary impairment."

Q. I'm sorry, but could you translate that into lay terms?

A. You need an accountant.

Q. Well, what's your understanding?

A. More of an accountant than I am. If certain securities are being held and they become impaired and it's determined that they're more or less permanently impaired, the company is required under, I think, certain accounting standards to