## *In re Fannie Mae Litigation*: Contempt Order for Failure to Comply with Stipulated Discovery Order Upheld

On January 6, 2009, the United States Court of Appeals for the District of Columbia issued its decision in *In re Fannie Mae Securities Litigation,*[1] addressing a district court order finding a non-party in contempt and sanctioning that non-party for failure to comply with a stipulated discovery order.

## I. Background and Procedural History

The Office of Federal Housing Enterprise Oversight (OFHEO) was a government agency that regulated the Federal National Mortgage Association ("Fannie Mae").[2] In 2003, OFHEO conducted an investigation into Fannie Mae's accounting and financial practices, and concluded that Fannie Mae "had departed from generally accepted accounting principles in order to manipulate its reported earnings and inflate executive compensation."[3] OFHEO's preliminary investigation report prompted several private civil actions against Fannie Mae, its senior executives, and others, which were consolidated into multidistrict litigation in the United States District Court for the District of Columbia.

In the course of discovery, three individual defendants who were senior executives at Fannie Mae, subpoenaed non-party OFHEO pursuant to Fed. R. Civ. P. 45(c)(2)(B)(ii), seeking records OFHEO had collected in preparing its investigation report. On November 6, 2006, the district court denied OFHEO's motion to quash the subpoenas, and directed it to comply during the following four months.

After receiving two separate one-month extensions, in the summer of 2007, OFHEO reported to the district court that it had produced all documents requested. Subsequently, OFHEO, in a deposition through a designated representative, revealed that it had failed to search all of its off-site disaster recovery backup tapes.

In response, the requesting parties moved to hold OFHEO in contempt. Following the first day of the contempt hearing, OFHEO and the requesting parties "entered into a stipulated order that held the contempt motions in abeyance and required OFHEO to conduct searches of its disaster-recovery backup tapes and provide all responsive documents and privilege logs by January 4, 2008."[4] In language central to the opinion, the stipulated order's fifth paragraph stated:

> "OFHEO will work with the [requesting parties] to provide the necessary information (without individual document review) to develop appropriate search terms. By October 19, 2007, the [requesting parties] will specify the search terms to be used."[5]

Pursuant to the stipulated order, the requesting parties specified over 400 search terms, which resulted in approximately 660,000 documents. OFHEO objected on the grounds that paragraph five "limited the [requesting parties] to 'appropriate search terms,'" but the district court disagreed, and ruled that the order "gave the [requesting parties] sole discretion to specify search terms and imposed no limits on permissible terms."[6]

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1 *See* No. 08-5014, 2009 U.S. App. LEXIS 9 (D.C. Cir. January 6, 2009).

2 *Id*. at *1-*2. OFHEO has since been succeeded by the Federal Housing Finance Agency.

3 *Id*. at *2.

4 *Id*. at *5-*6.

5 *Id*. at *6.

6 *Id*.

OFHEO then "undertook extensive efforts" to comply with the order, hiring 50 contract attorneys, and incurring over $6 million in expenses, which was "more than 9 percent of the agency's entire annual budget."[7]

On November 29, 2007, the day before an interim deadline for producing various categories of documents, OFHEO moved for another extension until December 21, "assuring the district court that it could meet that extended deadline."[8] The district court granted the motion, but on December 19, 2007, OFHEO informed the district court that its prior assurances were "based on insufficient data", and, as a result, it could produce all non-privileged documents by the January 4, 2008 deadline, but it could not produce the required privilege logs until February 29, 2008.[9]

Thereafter, the requesting parties renewed their motions to hold OFHEO in contempt. In finding OFHEO in contempt and sanctioning it, the district court recognized OFHEO's significant efforts to comply, but deemed them to be "legally insufficient" and "too little too late."[10] The district court stated that "OFHEO ha[d] treated its court-ordered deadlines as movable goal posts and ha[d] repeatedly miscalculated the efforts required for compliance and sought thereafter to move them."[11] As a sanction, the district court ordered production of all documents withheld solely on the basis of the qualified deliberative process privilege that were not logged by the January 4, 2008 deadline, but "made clear that the production was only to be made to counsel and would not waive the privilege."[12]

OFHEO appealed the contempt finding and the sanction to the United States Court of Appeals for the District of Columbia, which reviewed both for abuse of discretion.

## II. The Court of Appeals' Decision

Writing for a unanimous panel, Judge Tatel first addressed OFHEO's principal argument, which was that the above-quoted paragraph five of the stipulated order constituted a limitation on the requesting parties to specify only "appropriate" terms, "and that by transgressing this limitation, the [requesting parties] relieved OFHEO of its obligation to process the search terms and to produce the corresponding documents and privilege logs by the stipulated order's deadline."[13]

The Court of Appeals disagreed. By interpreting the stipulated order based on the document itself, the Court concluded that "paragraph five's first sentence uses the phrase 'appropriate search terms' to describe an obligation on OFHEO, not the [requesting parties], and its second reserves full discretion to the [requesting parties] to specify search terms."[14] The Court interpreted the phrase "appropriate terms" as serving "only to define the type of information OFHEO must provide—that information necessary for the development of appropriate search terms."[15] The Court emphasized that "[n]othing in paragraph five's text gives OFHEO any

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7 *Id*. at *7.

8 *Id*.

9 *Id*.

10 *Id*. at *8.

11 *Id*.

12 *Id*.

13 *Id*. at *9-*10.

14 *Id*. at *10.

15 *Id*. at *11-12. *See also Id.* at 11 ("The phrase 'to develop appropriate search terms' indisputably modifies 'the

role in actually developing those search terms," and concluded that the order "nowhere limits the search terms the [requesting parties] ultimately specify."[16]

Disagreeing with this interpretation, OFHEO urged that the Court's interpretation would lead to the absurdity of allowing the requesting parties "to specify every word in the dictionary" as a search term.[17] The Court responded that OFHEO's protection against this overreaching was not the term "appropriate," but rather the "general contractual duty of good faith and fair dealing."[18]

In a similar vein, OFHEO insisted that the list of over 400 search terms was "tantamount to a request for the dictionary," since it resulted in approximately 660,000 potentially responsive documents, which constituted approximately 80 percent of the office's emails.[19] The Court noted that this large figure "may simply indicate that most of the emails actually bear some relevance, or at least include language captured by reasonable search terms."[20] Addressing the argument directly, the Court emphasized that this was not an argument that the requesting parties "exercised their contractual rights in bad faith," but rather was an argument that the requesting parties "violated a textual limitation on those rights;" a limitation which did not appear in the stipulated order.[21]

In sum, the Court held that the stipulated order unambiguously reserved to the requesting parties the "unrestricted discretion" to specify the search terms.[22]

The Court then addressed OFHEO's second argument, which was that the district court abused its discretion by "compelling compliance with the subpoenas in the first place."[23] OFHEO claimed that the district court violated Federal Rule of Civil Procedure 45, which requires courts to safeguard non-party subpoena recipients from significant expense, "by compelling compliance without considering cost-shifting, narrowing the scope of the requests, or 'find[ing] that [the requesting parties] demonstrated good cause for forcing OFHEO to retrieve its inaccessible data.'"[24] The Court responded that regardless of the underlying merit of these claims, OFHEO abandoned them when it signed the stipulation order.

In the alternative, OFHEO argued that "even if it was properly subject to the stipulated order, it substantially complied in good faith," which can render a finding of contempt inappropriate.[25]

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necessary information'; it is not an independent obligation on the parties.").

16 *Id*. at *12. *See also Id.* at *14-15 (In addition to relying on the order's plain meaning, the Court contrasted paragraph five with the remainder of the stipulated order that included various provisions that "unmistakably protect[ed] OFHEO.").

17 *Id*. at *16.

18 *Id*.

19 *Id*. at *16-17.

20 *Id*. at *17.

21 *Id*.

22 *Id*. at *17-*18. *See also Id*. (OFHEO appealed to the proposition that contempt is appropriate only for a violation of a clear and unambiguous order in order to argue that paragraph five was ambiguous. The Court disagreed, and reiterated its interpretation of the paragraph as "unambiguously require[ing] OFHEO to process the search terms the [requesting parties] specify.)

23 *Id*. at *18.

24 *Id*. at *18-*19.

25 *Id*. at *20.

While recognizing the "extensive efforts" made by OFHEO to comply with the order, the Court of Appeals concluded that OFHEO had not proffered any basis for concluding that the district court abused its discretion.[26] After noting particular examples of OFHEO's non-compliance, the Court relied upon the authority of district judges by stating that they "must have authority to manage their dockets, especially during massive litigation such as this, and we owe deference to their decisions whether and how to enforce the deadlines they impose."[27] Relying on the "district court's intimate familiarity with the details of the discovery dispute, the scale of the production requested, and the progress of the multidistrict litigation as a whole," the Court of Appeals found itself "ill-positioned to second-guess" a district court's assessment of whether strict enforcement of its deadline was necessary.[28] In the Court's opinion, finding an abuse of discretion in such a case "would risk undermining the authority of district courts to enforce the deadlines they impose."[29]

The Court concluded its opinion by addressing OFHEO's final argument, which was that the district court abused its discretion by ordering OFHEO to produce documents withheld on the basis of the deliberative process privilege that were not logged by the January 4 deadline. The Court indicated that the "compulsory disclosure would not waive the privilege with respect to further disclosure," and the sanction "directed that the documents be provided only to individual defendants' counsel[,] and created a mechanism for OFHEO to recover documents found to be privileged."[30]

Initially, the Court determined that the sanction was one issued pursuant to the district court's contempt power,[31] which meant that it "must be calibrated to coerce compliance or compensate a complainant for losses sustained."[32] The Court went on to reason that by failing to comply with the court imposed deadlines, OFHEO "delayed the resolution of disputes over its ultimate compliance with its obligation to produce all unprivileged documents."[33] In order to mitigate this delay, the district court required OFHEO to produce certain of the privileged documents, "solely for the purpose of resolving whether they were in fact privileged."[34] "[B]y facilitating faster resolution of outstanding privilege disputes, the sanction not only coerced OFHEO's compliance with its obligation to provide all documents not in fact privileged, but also compensated the individual defendants by ameliorating OFHEO's delay in disclosing the privilege logs."[35]

The Court of Appeals noted that the district court considered various possible sanctions, but in deciding between a wholesale waiver of the privilege and/or fines and no sanction at all, the district court ultimately opted for a "middle ground calculated to facilitate prompt resolution of the dispute without impairing OFHEO's ability

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26 *Id*. at *20-*21. *See also Id*. ("Were we deciding this matter in the first instance, we might not have held OFHEO in contempt. But our review is for abuse of discretion. . . .).

27 *Id*. at *21.

28 *Id*. at *22.

29 *Id*.

30 *Id*. at *22-23.

31 *Id*. at *23-24 (Despite mentioning that the requesting parties had filed motions for discovery sanctions, the Court determined that the structure of the order and the juxtaposition of the contempt finding with the sanction made clear that the sanction functioned as a contempt sanction.).

32 *Id*. at *23.

33 *Id*. at *24-*25.

34 *Id*. at *25.

35 *Id*.

to protect privileged communications from general disclosure."[36] Since "it did not require wholesale waiver of the privilege, the sanction was non-punitive,"[37] "fit comfortably within the district court's civil contempt power,"[38] and thus, was not an abuse of discretion.[39]

## III. Conclusion

The Federal Rules of Civil Procedure afford non-parties the opportunity to seek judicial protection from abusive discovery demands. Where the recipient of an electronic discovery request waives its right to test the reasonableness of a discovery demand by entering into a stipulated order requiring production of information, the rules of the game change. Unless the issuing court relieves the burdens imposed in such a stipulated order, full compliance is the order of the day. It is therefore important that counsel and parties consider carefully in advance the terms of any such agreement, making clear beforehand what is and is not being undertaken and what is and is not subject to further objection based on reasonableness.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Kevin Burke at 212.701.3843 or kburke@cahill.com; Charles Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Daniel Goldman at 212.701.3733 or dgoldman@cahill.com.

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36 *Id*. at *25-26. *See also Id*. at *26 (The Court specifically mentioned that while OFHEO viewed the sanction as an abuse of discretion, it also refused to identify a single permissible sanction.).

37 *Id*. at *25. *See also Id*. at *26-27 ("[A]lthough OFHEO claims that the . . . sanction 'effectively' waives the deliberative process privilege, Appellant's . . . counsel conceded at oral argument that the court-ordered nonwaiver disclosure will allow OFHEO to assert privilege with respect to those documents in the future. . . . Any documents disclosed to the [requesting parties] attorneys that turn out to be privileged will remain privileged and presumably will be returned to OFHEO.").

38 *Id*. at *25.

39 *Id*. at *27.