

July 23, 2012

**VIA ELECTRONIC MAIL**

The Honorable Denise L. Cote  
Daniel Patrick Moynihan U.S. Courthouse  
500 Pearl Street, Room 1610  
New York, NY 10007

Re: *FHFA v. JPMorgan Chase & Co., Inc. et al.*, 11 Civ. 6188; *FHFA v. Ally Financial Inc., et al.*, 11 Civ. 7010; *FHFA v. First Horizon National Corp. et al.*, 11 Civ. 6193; *FHFA v. SG Americas, Inc. et al.*, 11 Civ. 6203; *FHFA v. UBS*, 11 Civ. 5201 (DLC)

Dear Judge Cote:

We represent FHFA in the above-captioned actions (the “Actions”) and write to respond to the July 20, 2012 letter from JPMorgan Chase and its affiliated entity defendants (“JPMC”) regarding its request for an order authorizing predictive coding (the “July 20 Letter”).

As a preliminary matter, JPMC has failed to establish that predictive coding would be appropriate in these Actions. First, JPMC’s proposal is the worst of both worlds, in that the set of documents to which predictive coding is to be applied is already narrowed through the use of search terms designed to collect relevant documents, and predictive coding would further narrow that set of documents without attorney review,<sup>1</sup> thereby eliminating potentially responsive documents. Second, although JPMC attempts to justify its proposed use of predictive coding by claiming that it expects to collect 2.5 million documents, it provides no support for this figure. Indeed, JPMC previously informed FHFA that its estimate was based only on prior experience on similar cases for JPMC, and that to date it had identified 450,000 potentially responsive documents. *See* 7/13/12 Ltr. from P. Shane to M. Sheth (attached as Exhibit 1). Third, JPMC’s reliance on the 66 million pages of documents that it has produced to date is misleading in that nearly all of these documents consist of loan files (for which predictive coding is inapplicable), as opposed to custodial documents. Finally, because training a predictive coding program takes a considerable amount of time,<sup>2</sup> the truncated timeframe for production of documents actually renders these Actions far from “ideal” for the use of predictive coding.

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<sup>1</sup> *See* Jim Eidelman, “Best Practices in Predictive Coding: When are Pre-Culling and Keyword Searching Defensible?,” available at <http://www.depo.com/E-letters/TheDiscoveryUpdate/2012/Feb/Articles/coding.html> (“going through the predictive coding process against ALL documents, rather than just the keyword search hits, is generally the most defensible practice. Predictive coding based on sampling ALL the documents will find documents that the keyword searches miss.”) (emphasis in original).

<sup>2</sup> *See Da Silva Moore v. Publicis Groupe SA*, 2012 U.S. Dist. LEXIS 23350, at \*8, \*12 (S.D.N.Y. Feb. 24, 2012) (noting that there is no guarantee predictive coding will work after seven iterative “reviews” and that the parties might have to “do another round or two or five or 500 or whatever it takes to stabilize the system”).

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Moreover, JPMC's request for judicial assistance is premature. FHFA has repeatedly informed JPMC that it is willing to consider a substantive proposal that sets forth precisely how JPMC intends to implement and utilize predictive coding. *See* 7/11/12 Ltr. from M. Sheth to J. Sedlak (attached as Exhibit 2); 7/18/12 Ltr. from M. Sheth to P. Shane (attached as Exhibit 3). Rather than provide FHFA with the requested information, JPMC has burdened this Court with yet another issue that is not ripe for adjudication.<sup>3</sup> In addition, JPMC has misstated FHFA's position on the use of predictive coding. Contrary to JPMC's statement in the July 20 Letter, FHFA does not maintain that JPMC may use predictive coding only if it "agrees to manually review each and every one of the millions of documents that JPMC anticipates collecting." Rather, FHFA contends that JPMC should include safeguards to ensure that responsive documents are not excluded by the predictive coding tool, and has suggested a manual review of the subset of collected documents that contain an agreed-upon search term, but are coded as non-responsive by the predictive coding tool, as one such potential safeguard.

Not only did JPMC fail to provide the requested information to FHFA, it has similarly failed to provide this Court with any details explaining (i) how it intends to use predictive coding, (ii) the methodology or computer program that will be used to determine responsiveness, or (iii) any safeguards that will ensure that responsive documents are not excluded by the computer model. Without such details, neither FHFA nor this Court can meaningfully assess JPMC's proposal. *See Da Silva Moore v. Publicis Groupe SA*, 2012 U.S. Dist. LEXIS 23350, at \*23 (S.D.N.Y. Feb. 24, 2012) ("[Defendant's] transparency in its proposed ESI search protocol made it easier for the Court to approve the use of predictive coding.")<sup>4</sup> JPMC's proposed order sets forth an amorphous proposal that lacks any details. In the absence of such information, this Court's authorization of JPMC's use of predictive coding would effectively give JPMC carte blanche to implement predictive coding as it sees fit. Worse yet, JPMC's proposed order places the burden on FHFA to challenge JPMC's forthcoming substantive proposal on predictive coding by August 15, 2012, a mere six weeks before the September 30, 2012 document discovery deadline, thereby increasing the likelihood that JPMC will not complete its production of responsive documents by the deadline.<sup>5</sup>

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<sup>3</sup> For example, despite FHFA's requests for clarification regarding whether JPMC intended to use predictive coding to eliminate certain documents identified by the use of the agreed-upon search terms on the documents of the agreed-upon custodians, JPMC revealed for the *first time* in its letter to the Court its intention to use predictive coding to eliminate certain documents identified by search terms from manual attorney review.

<sup>4</sup> Indeed, while JPMC relies heavily upon the *Da Silva Moore* case, the predictive coding proposal endorsed by the court in that case supplied such vital information as the methodology for creating the "seed set," *i.e.*, the initial sample of documents coded for relevance that "teach" the review tool how to code documents; the number of documents in the seed set; who would conduct the seed set review (*i.e.*, senior attorneys); and the number of iterative rounds proposed to determine that the computer is well trained and stable. Further, defendants in that case agreed to provide all documents (other than privileged documents) from the seed set "to plaintiffs for plaintiffs to review [defendant's] relevance coding." *Id.* at \*16-\*19. Here, JPMC has failed to provide any such information.

<sup>5</sup> JPMC's proposal to delay commencing its review of custodial documents until search terms and custodian lists have been agreed upon in their entirety is inappropriate. There is simply no reason why JPMC cannot run the agreed-upon set of search terms on the agreed-upon set of custodians while the parties continue to negotiate additional search terms and custodians.

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In sum, JPMC has failed to provide the details necessary for either FHFA or the Court to endorse the use of predictive coding in the Actions. We look forward to discussing these issues with the Court tomorrow at 3 p.m.

Respectfully submitted,

s/s Manisha M. Sheth

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cc: All counsel of record

# EXHIBIT 1

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July 13, 2012

Via E-mail

Manisha Sheth, Esq.,  
Quinn Emanuel Urquhart & Sullivan, LLP,  
51 Madison Avenue, 22nd Floor,  
New York, New York 10010.

Re: *FHFA v. JPMorgan Chase & Co., et al.*, 11 Civ. 6188

Dear Manisha:

I write on behalf of JPMorgan Chase & Co. and its affiliated entity defendants in the above-named case (collectively “JPMC”) in response to your July 11 letter and in an effort to satisfactorily conclude our discussions over the course of several meet and confer sessions dating back to early June, concerning JPMC’s proposal to use technology assisted review (or “predictive coding”) to respond to Plaintiff FHFA’s First and Second Requests for the Production of Documents.

Your letter asks – again – for the basis of our estimate that JPMC will collect tens of millions of pages of documents. As you are aware, Plaintiff asserts claims concerning more than 100 securitizations issued and/or underwritten by three institutional clusters (*i.e.*, JPMorgan Chase, Bear Stearns & Co. and Washington Mutual) that, prior to 2008, operated independently of each other. Because each of these historically separate and distinct entities had its own personnel, and because your document requests and custodian coverage requests are so broad, JPMC estimates that more than 100 custodians’ files will be collected for review and potential production. JPMC also conservatively estimates that the search terms you and we ultimately agree upon, including many of the expanded terms you have requested, would hit on at least 5% of custodians’ documents, based on prior document reviews for JPMC in analogous circumstances, yielding more than 2.5 million electronic documents from custodian files alone. Already, at the outset of the collection process, JPMC also has identified 450,000 potentially responsive electronic documents on various shared drives, based on search terms relating only to the deals at issue. JPMC also already has produced tens of millions of pages, and anticipates

Manisha Sheth, Esq.

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producing multiples of that in the coming weeks, in order to satisfy your request for priority production of all loan files. With tens of millions of pages produced, multiples of that already in the pipeline, and many more to be collected, reviewed and produced, JPMC's good faith assessment is that only by using an innovative technology-driven tool such as predictive coding, rather than manual document-by-document review, could JPMC's extraordinary efforts to meet the September 30, 2012 document discovery cut-off succeed.

Your letter again poses additional questions about how JPMC expects to use predictive coding in this case. You ask whether agreed-upon search terms would be applied first, followed by predictive coding. As we already advised you, JPMC would be willing to use agreed-upon search terms to define the universe of documents to which predictive coding would be applied. From there, we expect to use predictive coding to conduct our document review.

You also ask whether we "intend to use predictive coding to prioritize documents for review" or whether we intend "to eliminate a portion of documents from" our document review "entirely." We do not have a current expectation that predictive coding will result in the elimination of a portion of documents entirely from review. Rather, the extent and nature of the reduction of review will be determined by the results of the predictive coding, the size and substance of the data, and other factors to be detailed in the report and supporting materials that the proposed stipulation calls for us to provide to you. The proposed stipulation preserves Plaintiff's right to object to the methodology developed by JPMC, including "the treatment of non-responsive documents," until after you receive and review this report and supporting materials.

While the proposed stipulation, the anticipated provision of a detailed report, and the further opportunity to confer and object removes the need for a definitive answer to the above question about presumptively non-responsive document review now, your letter is mistaken when it calls the proposed stipulation a mere "agreement to agree." The proposed stipulation commits JPMC to pursuing predictive coding in order to fulfill your document requests quickly and efficiently, and commits FHFA to accepting the use of predictive coding to that end. The parties also commit to the prompt exercise of their retained respective rights to advance or contest particular applications or aspects of that use, as well as an expedited schedule on which to determine those particulars. These foundational agreements should not be controversial, but that does not make them unimportant, where such a significant undertaking is in the offing, under such tight time constraints.

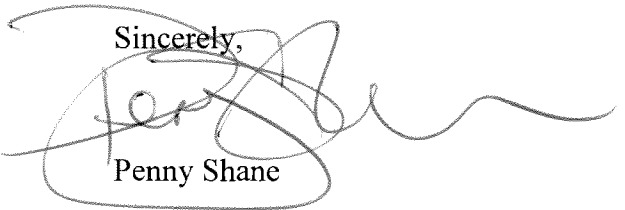
Those time constraints explain as well our proposal that any dispute be brought to the Court by August 15, 2012, a date about which your letter expresses some concern. The August 15 submission date aims to give the parties an opportunity to meet and confer before burdening the Court, but not to wait so long that any agreement or

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order comes too late to be applied in the remaining document review and production effort. We anticipate no delay in production based on the proposed August 15 submission date. As you know, JPMC has already produced 14 million of pages of documents to FHFA, and intends to continue to make rolling productions to FHFA as we identify responsive, non-privileged documents. Because JPMC shares your letter's asserted concern about delay, however, and because the most time-sensitive work on predictive coding must begin immediately in order to remain on schedule to complete document production by September 30, if FHFA remains unable to execute a stipulation on predictive coding by July 17, we will have no choice but to raise the issue with Judge Cote. We look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to read "Penny Shane", written over the printed name. The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Penny Shane

# EXHIBIT 2



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July 11, 2012

**VIA ELECTRONIC MAIL**

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Re: *FHFA v. JPMorgan Chase & Co.*, 11 Civ. 6188 (DLC)

Dear Mr. Sedlak:

We write on behalf of FHFA in response to your July 3, 2012 email from defendants to the above-captioned action (the "JPM Defendants"), and the proposed stipulation regarding "predictive coding" attached thereto.

As an initial matter, FHFA requests that the JPM Defendants supply the basis of their estimate of the volume of documents to be reviewed in this action (*i.e.*, the tens of millions of pages referenced in the proposed stipulation), and also provide an estimate of the volume of *documents* for review, rather than pages. In the absence of an unduly burdensome volume of documents, the use of predictive coding may simply be unnecessary.

Second, as we previously discussed, FHFA is willing to consider a substantive proposal that sets forth precisely how the JPM Defendants intend to implement and utilize predictive coding. The proposed stipulation, however, fails to provide such details, and amounts to nothing more than an "agreement to agree." For example, the proposed stipulation is unclear as to the purpose for which the JPM Defendants intend to use predictive coding. To the extent that the JPM Defendants intend to use predictive coding to prioritize documents for review, FHFA has no objection. However, if the JPM Defendants' intention is to eliminate a portion of documents from their document review entirely, FHFA requires a significant amount of additional

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information before it can meaningfully assess any proposal, including the following:

1. How is the “model” referred to in numbered paragraph 2 of the proposed stipulation developed?
2. Do the JPM Defendants intend to remove a portion of documents from the review? If yes, what is the criteria for eliminating those documents? If a criterion is the relevancy score assigned to the documents, what is the threshold score below which a document will not be reviewed?
3. What is the proposed quality control procedure to ensure that responsive documents have not been improperly eliminated from the review?
4. Are the JPM Defendants proposing to apply predictive coding to a population of documents that has already been narrowed through the use of search terms?
5. What is the volume of documents to which predictive coding will be applied and the volume eliminated from review?

Third, FHFA is concerned about the schedule contemplated by the proposed stipulation, pursuant to which (i) the JPM Defendants would not provide a substantive proposal until approximately August 2, and (ii) the parties would make submissions to the Court regarding predictive coding on August 15, a mere six weeks before document production must be substantially completed. This timing is simply not practical given the September 30, 2012 deadline for substantial completion of document production.

Finally, we note that nothing in these discussions regarding the potential use of predictive coding should delay the review and production of responsive documents.

Very truly yours,



Manisha M. Sheth

# EXHIBIT 3

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July 18, 2012

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Sullivan & Cromwell LLP  
125 Broad Street  
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Re: *FHFA v. JPMorgan Chase & Co.*, 11 Civ. 6188 (DLC)

Dear Penny:

We write in response to your letter of July 13, 2012 regarding your request on behalf of defendants to the above-captioned action (the "JPM Defendants") that FHFA enter into a stipulation regarding predictive coding.

Your letter fails to address our key concern regarding predictive coding – whether the JPM Defendants intend to use predictive coding to designate documents as non-responsive without having those documents reviewed by an attorney. Your letter states that the JPM Defendants "do not have a current expectation that predictive coding will result in the elimination of a portion of documents entirely from review," which suggests that attorneys will review every withheld document. However, in the next sentence, you speak of "the extent and nature of the reduction of review," suggesting that attorneys may not review every document withheld from production.

FHFA's position is straightforward. In reviewing the documents identified by the agreed-upon search terms, the JPM Defendants should not deem a document non-responsive unless that document has been reviewed by an attorney. If the JPM Defendants wish to use predictive coding to prioritize the review and production of documents, FHFA has no objection,

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provided that any documents that are identified as potentially non-responsive through the predictive coding tool are reviewed by an attorney. What FHFA objects to is the use of predictive coding in a manner that results in the withholding of relevant documents without attorney review, particularly when the universe of documents has been already narrowed through the use of search terms designed to collect relevant documents.

Given your concerns regarding the volume of the expected production, we reiterate our request that we are willing to consider a specific predictive coding proposal that addresses our concern. Given that you have failed to provide the specifics of your proposal or the method by which you will ensure that the predictive coding tool does not exclude relevant and responsive documents, we believe that it is premature for you to burden the Court with predictive coding issues that are not ripe for the Court's resolution.

Finally, your arguments relying on the size of the JPM Defendants' productions are misplaced. First, you note that the JPM Defendants has already produced 14 million pages of documents, but as you know, nearly all of those documents are loan files. There is no need to use predictive coding on loan files. Second, you estimate that the search terms will produce over 2.5 million documents from custodian files for review "based on prior document reviews for JPMC in analogous circumstances," but with respect to the actual volume of data collected in this action to date, you note that the JPM Defendants have identified only 450,000 potentially responsive electronic documents. If the JPM Defendants seek to withhold materials without attorney review based on the number of documents identified by search terms, it should provide support for its request by providing the actual number of documents returned by the search terms in this action.

In the interests of moving forward in an timely manner, we reiterate our request that you promptly inform us (1) whether the JPM Defendants intend to use predictive coding to withhold documents identified by search terms without attorney review; (2) if so, the specifics of JPM Defendants' proposed predictive coding process, including any quality control measures and safeguards to ensure that relevant and responsive documents are not excluded through the use of predictive coding; and (3) the number of documents identified when the search terms are run on the agreed upon list of document custodians in this case. Thank you for your prompt attention to these issues.

Very truly yours,



Manisha M. Sheth