

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	No. 13-465C
v.)	(Judge Sweeney)
)	
THE UNITED STATES,)	
)	
Defendant.)	

PLAINTIFFS’ PUBLIC, REDACTED MOTION FOR LEAVE TO FILE MATERIALS DESIGNATED AS “PROTECTED INFORMATION” UNDER SEAL

Plaintiffs Fairholme Funds, Inc., et al. (“Plaintiffs”) respectfully move, pursuant to Paragraph 18 of the Protective Order (“P.O.”) entered in this action (Doc. 73), for entry of an order (1) authorizing them to file under seal in the D.C. Circuit certain materials disclosed through discovery in this case and identified in this motion, (2) granting them general authority to file protected information under seal in the D.C. Circuit, and (3) authorizing them to file protected information disclosed in this case under seal in *Fairholme Funds, Inc. v. Federal Housing Finance Agency*, No. 13-1053 (D.D.C.).

1. The specific materials Plaintiffs seek authorization to file under seal in *Fairholme Funds, Inc. v. The Federal Housing Finance Agency*, No. 14-5254 (D.C. Cir.),¹ appear in this motion’s appendix. The Court has already granted similar relief with respect to two deposition

¹ The D.C. Circuit has consolidated the *Fairholme* appeal with the appeals of other cases challenging the Net Worth Sweep also pending before that court. *See Order, Perry Capital LLC v. Lew*, No. 14-5243 (D.C. Cir. Oct. 27, 2014), ECF No. 1519092. The *Fairholme* plaintiffs (consisting of Plaintiffs in this action, minus Continental Western Insurance Company) have been directed to file consolidated briefs with certain plaintiffs from the other appeals. *See Order, Perry Capital LLC v. Lew*, No. 14-5243 (D.C. Cir. May 6, 2015), ECF No. 1551023.

transcripts and a number of documents, *see* Order (July 7, 2015), Doc. 186 (“July 7 Order”); Order (July 9, 2015), Doc. 194 (“July 9 Order”), and it should take the same approach with respect to the highly-relevant materials at issue here.

The producing parties have designated all of the materials in the appendix for withholding from public disclosure under the Protective Order, but Plaintiffs do not believe that any of those materials satisfy the Protective Order’s definition of “Protected Information.” *See* P.O. ¶ 2; *see* Plaintiffs’ Sealed Motion to Remove the “Protected Information” Designations from the Depositions of Edward DeMarco and Mario Ugoletti at 4–10 (June 12, 2015), Doc. 162 (“Depositions Motion”) (discussing standard for proper designation of materials as “Protected Information”). Plaintiffs therefore intend soon to initiate the process, under Paragraph 17 of the Protective Order, for removing the Protected Information designations for the appendix materials. Given the procedures governing such Paragraph 17 requests, as well as the current schedule for the briefing of several pending motions seeking such “de-designation” relief, it is likely that that process will consume a considerable amount of time.

Wholly apart from such de-designation requests under Paragraph 17 of the Protective Order, Paragraph 18 of the Order provides a mechanism to allow relevant information produced in this action to be brought to the attention of other courts reviewing issues relating to the Net Worth Sweep, as reflected in this Court’s recent orders. This makes perfect sense, since the purpose of the Protective Order is to shield sensitive information from public disclosure, not to conceal relevant facts from another court.

Moreover, requiring Plaintiffs to await the outcome of any dispute over the “Protected Information” status of the materials in the appendix would cause Plaintiffs to suffer severe preju-

dice. As this Court recently observed when it authorized Plaintiffs to file other discovery materials with the D.C. Circuit, “pressing briefing deadlines in [Plaintiffs’] pending appellate case” justify the limited relief Plaintiffs seek here. July 7 Order; July 9 Order. Specifically, Plaintiffs have already filed their opening brief in the D.C. Circuit, with the Defendants’ briefs due on September 14 and Plaintiffs’ reply brief due on October 26. *See Order, Perry Capital LLC v. Lew*, No. 14-5243 (D.C. Cir. July 7, 2015), ECF No. 1561238. Materials produced in discovery in this case and included in the attached appendix undermine, and in some instances completely discredit, important components of the central narrative on which the Government’s defense in the D.C. Circuit action was based, and Plaintiffs should be accorded the opportunity to fully apprise the D.C. Circuit of that reality while briefing is still ongoing.

Plaintiffs will not recount here the relevance of every item in the appendix to the issues in dispute in the D.C. Circuit action, but the deposition transcript of former Fannie Mae CFO Susan McFarland is illustrative. As we explained in our motion to de-designate the transcripts of the depositions of Edward DeMarco and Mario Ugoletti, a key point of dispute in the D.C. Circuit action is what the government knew about the potential for Fannie and Freddie to reverse their deferred tax assets valuation allowances at the time of the Net Worth Sweep. *See Depositions Motion 12*. We further explained that Mr. Ugoletti’s deposition testimony revealed that he had no basis for stating in a declaration submitted to the D.D.C. that “neither the Conservator nor Treasury envisioned at the time of the Third Amendment that Fannie Mae’s valuation allowance on its deferred tax assets would be reversed in early 2013, resulting in a sudden and substantial increase in Fannie Mae’s net worth” *Id.* at 11 (quoting Declaration of Mario Ugoletti ¶ 20, *Perry Capital LLC v. Lew*, No. 13-1025 (D.D.C. Dec. 17, 2013), ECF No. 24-2).

Ms. McFarland's testimony further undermines Mr. Ugoletti's declaration. During her July 15 deposition, Ms. McFarland testified that [REDACTED]

[REDACTED]

In short, Ms. McFarland's testimony further demonstrates that information the government submitted to the D.D.C. is, at best, incomplete and misleading, if not outright false. To "protect the integrity of the judicial process," Plaintiffs should be able to alert the D.C. Circuit to that fact. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

2. Plaintiffs have sought to identify in the appendix all remaining discovery materials that they may seek to file with the D.C. Circuit. But Plaintiffs' review of the discovery materials is ongoing, and Plaintiffs may identify additional such materials that they will seek to file with the D.C. Circuit in the coming weeks. Because filing these materials in the D.C. Circuit is appropriate irrespective of whether they have been properly withheld from the public, Plaintiffs

request that the Court issue an order authorizing them to file under seal in the D.C. Circuit any and all materials produced in discovery in this action. Such an order would conserve the resources of both the Court and the parties without risking public disclosure of any Protected Information.

3. Finally, Plaintiffs seek an order authorizing them to file under seal in *Fairholme Funds, Inc. v. Federal Housing Finance Agency*, No. 13-1053 (D.D.C.), any and all materials that this Court at any time authorizes them to file in the appeal of that action in the D.C. Circuit. Plaintiffs plan to file discovery materials they have been authorized to file under seal with the D.C. Circuit in short order. Plaintiffs may also seek to file the same materials with the district court in connection with a motion for relief from judgment on the basis of newly discovered evidence. *See* FED. R. CIV. P. 60(b)(2), 62.1. Plaintiffs should be authorized to file information under seal in the D.D.C. for the same reasons, and to the same extent, as they are authorized to file that same information under seal on appeal of the D.D.C.'s decision in the D.C. Circuit.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order (1) authorizing them to file under seal in the D.C. Circuit certain materials disclosed through discovery in this case and identified in this motion, (2) granting them general authority to file protected information under seal in the D.C. Circuit, and (3) authorizing them to file protected information disclosed in this case under seal in *Fairholme Funds, Inc. v. Federal Housing Finance Agency*, No. 13-1053 (D.D.C.).

Date: July 20, 2015

Respectfully submitted,

Of counsel:

Vincent J. Colatriano
David H. Thompson
Peter A. Patterson
Brian W. Barnes
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)

s/ Charles J. Cooper
Charles J. Cooper
Counsel of Record
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)
ccooper@cooperkirk.com

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was filed under seal via the Court's Electronic Case Filing system on this 20th day of July, 2015, and served upon counsel listed below by electronic mail:

Elizabeth M. Hosford
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
Post Office Box 480
Ben Franklin Station
Washington, DC 20044
Elizabeth.Hosford@usdoj.gov

Barrie Prinz
Associate General Counsel
Deloitte LLP
555 12th St. N.W.
Suite 400
Washington, D.C. 20004
bprinz@deloitte.com

Richard B. Harper
Counsel for Grant Thornton LLP
Baker Botts, LLP
30 Rockefeller Plz.,
New York, NY 10112
richard.harper@bakerbotts.com

Laura Schwalbe
Counsel for PwC
WilmerHale
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
laura.schwalbe@wilmerhale.com

Michael Ciatti
Counsel for Freddie Mac
King & Spalding LLP
1700 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
mciatti@kslaw.com

D. Zachary Hudson
Counsel for Fannie Mae
Bancroft PLLC
500 New Jersey Avenue, N.W.
7th Floor
Washington, D.C. 20001
zhudson@bancroftpllc.com

s/ Charles J. Cooper
Charles J. Cooper

Redacted Version

APPENDIX

Volume 1

APPENDIX VOLUME 1 TABLE OF CONTENTS

Exhibit 1:	FHFA00013354 (August 17, 2012 Emails between Mario Ugoletti, Edward DeMarco, and Amy Lakroune).....	A001
Exhibit 2:	GT005306 (June 27, 2012 Handwritten Notes).....	A005
Exhibit 3:	FHFA00025815 (January 4, 2012 Agenda for Discussion with FHFA)	A009
Exhibit 4:	FHFA00031708 (August 8, 2012 Email from Mario Ugoletti to Edward DeMarco).....	A012
Exhibit 5:	FHFA00060194 (July 19, 2012 Fannie Mae Strategic Planning Session Presentation)	A014
Exhibit 6:	PWC-FM 00147059 (June 30, 2012 Memo from Gregory Metz et al. to PricewaterhouseCoopers re 2Q 2012 Valuation Allowance Assessment)	A064
Exhibit 7:	PWC-FM 00010788 (November 13, 2009 Memo from Timothy Kviz re Value of Senior Preferred Stock Issued to Treasury and Value of the Commitment Set Forth in the Purchase Agreement)	A071
Exhibit 8:	UST00002404 (August 7, 2012 Freddie Mac Second Quarter 2012 Financial Results Supplement)	A075
Exhibit 9:	UST00380783 (February 14, 2012 Millstein & Co. Housing Finance Reform Presentation)	A109
Exhibit 10:	UST00393810 (August 15, 2012 Briefing Memorandum for Secretary Geithner)	A178
Exhibit 11:	UST00517664 (August 17, 2012 Emails from Jim Parrott and Mary Goodman)	A184
Exhibit 12:	UST00406876 (July 19, 2012 Emails from Alan Goldblatt and Adam Chepenik).....	A187
Exhibit 13:	UST00480703 (February 6, 2012 Housing Finance Reform Proposal).....	A189
Exhibit 14:	UST00503991 (August 17, 2012 Emails from Timothy Bowler, Jim Parrott, and Chris Russell).....	A205

EXHIBIT 1
REDACTED

EXHIBIT 2
REDACTED

EXHIBIT 3
REDACTED

EXHIBIT 4
REDACTED

EXHIBIT 5
REDACTED

EXHIBIT 6
REDACTED

EXHIBIT 7
REDACTED

EXHIBIT 8
REDACTED

EXHIBIT 9
REDACTED

EXHIBIT 10
REDACTED

EXHIBIT 11
REDACTED

EXHIBIT 12
REDACTED

EXHIBIT 13
REDACTED

EXHIBIT 14
REDACTED

Redacted Version

APPENDIX

Volume 2

APPENDIX VOLUME 2 TABLE OF CONTENTS

Exhibit 15:	UST00503874 (August 10, 2012 Emails from Autumn Lynch and Timothy Bowler).....	A209
Exhibit 16:	UST00504519 (July 24, 2012 Email from Timothy Bowler and attached Bank of America Analysis).....	A212
Exhibit 17:	UST00504469 (August 9, 2012 Emails from Timothy Bowler, Matthew Anderson, and Daniel Indiviglio)	A221
Exhibit 18:	UST00508175 (January 6, 2012 Briefing Memorandum for Secretary Geithner)	A226
Exhibit 19:	UST00517850 (August 8, 2012 Emails from Jim Parrott, Matthew Anderson, and Zachary Goldfarb)	A237
Exhibit 20:	UST00522259 (May 31, 2012 Briefing Memorandum for Secretary Geithner)	A239
Exhibit 21:	Transcript of the Deposition of Timothy Bowler, July 1, 2015	A246
Exhibit 22:	Transcript of the Deposition of Anne Eberhardt, July 8, 2015	A373
Exhibit 23:	Transcript of the Deposition of Ross Kari, July 10, 2015	A479
Exhibit 24:	Transcript of the Deposition of Susan McFarland, July 15, 2015	A572
Exhibit 25:	Transcript pf the Deposition of Jeff Foster, July 14, 2015	A684

EXHIBIT 17
REDACTED

EXHIBIT 38
REDACTED

EXHIBIT 39
REDACTED

**EXHIBIT 3:
REDACTED**

**EXHIBIT 3;
REDACTED**

EXHIBIT 42
REDACTED

EXHIBIT 43
REDACTED

EXHIBIT 44
REDACTED

EXHIBIT 45
REDACTED

EXHIBIT 46
REDACTED

EXHIBIT 47
REDACTED