

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

DEFENDANT’S OPPOSITION TO PERRY CAPITAL’S NOTICE OF FILING OF APPLICATIONS OF CERTAIN COUNSEL REPRESENTING PERRY CAPITAL, LLC, FOR ACCESS TO PROTECTED INFORMATION, OR, IN THE ALTERNATIVE, MOTION TO AMEND THE PROTECTIVE ORDER

Defendant, the United States, respectfully submits this opposition to Perry Capital LLC’s notice of filing of applications of certain counsel representing Perry Capital LLC, appellant in Perry Capital LLC v. Lew, No. 14-5243(L) (D.C. Cir.), for access to protected information, or, in the alternative, motion to amend the Amended Protective Order (Notice of Filing). Perry Capital’s request is premature, and the Court should deny it.

Perry Capital is one of the appellants in *Perry Capital LLC et al. v. Lew et al.*, Nos. 14-5243, 14-5254, 14-5260, 14-5262 (D.C. Cir.) (the D.C. Circuit appeals). These D.C. Circuit appeals challenge a September 2014 decision of the United States District Court for the District of Columbia in *Perry Capital LLC et al. v. Lew et al.*, Nos. 13-1025, 13-1053, 13-1439, 13-1288 (D.D.C.) (*Perry Capital*). In *Perry Capital*, Judge Lamberth granted FHFA’s and the Treasury Department’s motions to dismiss several complaints, filed by shareholders in Fannie Mae and Freddie Mac, challenging the Third Amendment to the agreements between Treasury and the Federal Housing Finance agency.

Plaintiffs in this action are also appellants in the D.C. Circuit appeals.¹ On July 29, 2015, plaintiffs filed, in the D.C. Circuit, a motion under seal asking that court to take judicial notice of certain discovery documents generated in this action, and to supplement the administrative record with those documents. Briefing on the motion is underway.

Perry Capital's request for immediate access to protected information generated in discovery before this Court is premature in the absence of a decision by the D.C. Circuit granting Fairholme's motion for judicial notice. Perry Capital is not a party to any of the complaints in this Court challenging the Third Amendment. Nonetheless, Perry Capital has asked the Court to provide its counsel immediate access to protected materials in the litigation before this Court, or to modify the Amended Protective Order entered on July 29, 2015 to facilitate such access.

Unless and until the D.C. Circuit grants the motion for judicial notice, Perry Capital should not be granted access to materials to which it otherwise has neither need nor entitlement. Such access would defeat the purpose of the Amended Protective Order to safeguard confidential, proprietary and market-sensitive materials from entities that are not parties the Court of Federal Claims complaints. Indeed, at this point, absent an order by the D.C. Circuit granting Fairholme's motion, Perry Capital has no legitimate need for access to the materials that are the subject of the motion.

Perry Capital attempts to obscure the prematurity of its request by first claiming that denial of access "to filings in their own litigation" will be "unfair and raise due process concerns." Notice of Filing at 3. But Fairholme has simply sought *leave* to file, in the D.C. Circuit, protected documents produced in litigation before this Court. Those documents are not currently part of the record in Perry Capital's appeal. Deferring Perry Capital's request for

¹ One plaintiff named in Fairholme's complaint in this Court, Continental Western Insurance Company, is not a party to Fairholme's D.D.C. complaint.

counsel's access to the documents until the D.C. Circuit decides Fairholme's motion for judicial notice will not harm Perry Capital. Should the D.C. Circuit deny the motion for judicial notice, the documents will never be "filings" in Perry Capital's "own litigation." Indeed, the cases Perry Capital cites discuss whether a court may consider the *merits* of a case without providing access to all materials considered to all parties. Here, the D.C. Circuit has yet to decide whether it will even consider the materials that are the subject of Fairholme's motion. Thus, Perry Capital's fairness and due process concerns are unfounded.

Similarly, Perry Capital's counsel should not be permitted access to protected materials to which it is not otherwise entitled for the sole purpose of weighing in on Fairholme's motion for judicial notice. Perry Capital has provided no basis upon which to conclude that Fairholme, a co-appellant in the D.C. Circuit, is incapable of defending its own motion, and the protected nature of the documents at issue should not be compromised simply to facilitate Perry Capital's support of Fairholme's arguments.

Perry Capital also claims that an amendment to the Amended Protective Order already in place in this case is unnecessary because virtually anyone may be viewed as "persons" for purposes of the application process detailed in Paragraph 7 of the order. But the application process in Paragraph 7 is limited to the categories of persons otherwise entitled to receive Protective Information under the order's Paragraph 4, as the language and structure of the order makes clear. Any other reading would negate the order's carefully crafted provisions specifying categories of persons who may access Protected Information, and would therefore be absurd.

Finally, Perry Capital has not restricted its request for access solely to those documents that are the subject of Fairholme's motion for judicial notice. Instead, Perry Capital seeks unfettered access to *all* protected information produced in the case before this Court. Because

the D.C. Circuit has not decided whether it will consider *any* materials from this case, much less *all* materials designated as protected information, Perry Capital's request should be denied.

For these reasons, the Government respectfully requests that the Court deny Perry Capital's motion, or, in the alternative, stay its consideration of the motion until the D.C. Circuit has ruled on Fairholme's motion for judicial notice.

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

s/Robert E. Kirschman, Jr.
ROBERT E. KIRSCHMAN, JR.
Director

s/Kenneth M. Dintzer
KENNETH M. DINTZER
Deputy Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 616-0385
Facsimile: (202) 307-0973
Email: Kenneth.Dintzer@usdoj.gov

August 12, 2015

Attorneys for Defendant