

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

FAIRHOLME FUNDS, INC. *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

No. 13-465C  
(Judge Sweeney)

**REPLY IN SUPPORT 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**

Perry Capital, LLC (“Perry Capital”) respectfully submits this reply in response to Defendant’s Opposition to Perry Capital’s Application for Access to Protected Information (“Opp.”) (D.E. 227).

This Court’s July 21, 2015 Order permitted Plaintiff Fairholme Funds, Inc. (“Fairholme”) to file Protected Information in its appeal before the U.S. Court of Appeals for the D.C. Circuit. D.E. 212. Fairholme has done so—moving the Court of Appeals to take judicial notice of those materials. *See* Under Seal Motion, No. 14-5243, D.E. 1565601 (D.C. Cir. July 29, 2015). Perry Capital is an appellant in that same D.C. Circuit appeal. But Perry Capital cannot meaningfully respond to Fairholme’s motion to take judicial notice because Fairholme’s motion papers and the underlying materials have been filed under seal, and Perry Capital is not currently allowed to access Protected Information under the Amended Protective Order governing the above-captioned matter. Moreover, Perry Capital’s lack of access to documents complicates Perry Capital’s ability to litigate its case going forward: The Court of Appeals has ordered Perry Capital and Fairholme to file joint merits briefs, which they simply cannot do if Perry Capital’s

lawyers cannot view the documents on which Fairholme wishes to rely, or the arguments that Fairholme wishes to make.

This Court is best placed to rectify this bizarre circumstance resulting from the July 21, 2015 Order—a party’s lawyers unable to view documents filed in their own case—and grant Perry Capital’s counsel access to Protected Information, either under the current Amended Protective Order, or under Perry Capital’s proposed Second Amended Protective Order.

Defendant’s chief argument involves timing. Defendant erroneously argues that Perry Capital’s lawyers ought not be granted access now, because the D.C. Circuit has not yet ruled on Fairholme’s motion to take judicial notice, and Perry Capital’s application is thus “premature.” Opp. 2-3. Defendant errs twice. Perry Capital is barred from reviewing the motion filed under seal and the attached documents; and Perry Capital also will likely be unable to review the government’s response to that motion or any further briefing containing sealed materials. (Perry Capital has filed a pleading on that motion flagging these issues for the Court of Appeals.) Further, the briefing on the motion to take judicial notice already has affected Perry Capital’s rights separate and apart from the motion itself, because the Court of Appeals has suspended the merits briefing schedule pending resolution of the motion for judicial notice. *See* Order, No. 14-5243, D.E. 1566590 (D.C. Cir. Aug. 6, 2015).

Contrary to Defendant’s assertions, Perry Capital’s counsel is eligible for access to Protected Information under the current Amended Protective Order. Paragraph 7 permits without limitation “persons” to apply for access to Protected Information—in contrast, other paragraphs employ the more narrow term “party.” Far from “absurd,” Opp. 3, this reading of the Amended Protective Order allows the Court wide discretion to grant or deny applications for access to Protected Information to further the purposes of the Amended Protective Order. This

Court thus can grant Perry Capital's counsel access to Protected Information without changing the Amended Protective Order at all.

In any event, Perry Capital is open to whatever procedural mechanism the Court prefers, so long as its lawyers obtain access to information filed in the Court of Appeals—whether under the terms of the current Amended Protective Order, or under Perry Capital's proposed Second Amended Protective Order. Perry Capital is simply trying to obtain access and preserve its rights in the most efficient, convenient way possible for the Court. Should the Court have reservations about granting Perry Capital's counsel access under the current Amended Protective Order, then it can make a simple amendment to resolve those concerns, to which Defendant has not objected.

And granting Perry Capital's counsel access to Protected Information would not “defeat the purpose of the Amended Protective Order.” Opp. 2. Perry Capital's counsel—like counsel for Defendant, Fairholme, and other plaintiffs before this Court, and numerous non-parties—have agreed to be bound by the Amended Protective Order. Granting them access to Protected Information under the terms of the Amended Protective Order does not increase the risk of disclosure, as they will closely follow the Amended Protective Order, just as counsel for Fairholme and Defendant have followed it.

Finally, although Perry Capital's counsel seeks entry into the Amended Protective Order and access to Protected Information generally, Perry Capital agrees to limit its counsel's access to information that is filed or proposed to be filed in litigation to which Perry Capital is a party.

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Other than the timing of Perry Capital's application for access to Protected Information, Defendant does not oppose the entry of Perry Capital's proposed Second Amended Protective Order.

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This Court should grant Perry Capital's counsel's application for access to Protected Information.

Dated: August 20, 2015

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on this 20th day of August, 2015, I caused the foregoing to be filed with the Clerk of the United States Court of Federal Claims using the CM/ECF system. Service was accomplished on the following persons by the appellate CM/ECF system:

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