

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC. *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

No. 13-465C
(Judge Sweeney)

**MOTION OF FILING OF APPLICATIONS OF CERTAIN COUNSEL,
REPRESENTING CLASS PLAINTIFFS IN *IN RE FANNIE MAE/FREDDIE MAC
SENIOR PREFERRED STOCK PURCHASE AGREEMENT CLASS ACTION, NO. 14-5262
(D.C. CIR.)*, FOR ACCESS TO PROTECTED INFORMATION**

The United States Court of Appeals for the D.C. Circuit has ordered that certain information protected under this Court’s Second Amended Protective Order (“Protected Information”) (ECF No. 256) may be referenced in the merits briefing in *Perry Capital LLC v. Lew, et al.*, Nos. 14-5243(L), 14-5254(con.), 14-5260(con.) and 14-5262(con.) (D.C. Cir.) (“*Perry Capital Action*”). Accordingly, plaintiff-appellants in a putative class action consolidated with the *Perry Capital Action* appeal¹ request that this Court enter an order pursuant to paragraph 4 of the Second Amended Protective Order, which allows their counsel be admitted to the Second Amended Protective Order for the purpose of having access to the Protected Information that has been lodged with the D.C. Circuit appeal in the *Perry Capital Action*. Counsel for Class Plaintiffs contacted counsel for the government to determine whether the United States would oppose this motion. Government counsel responded that it would not

¹ The plaintiff-appellants in the class action are American European Insurance Company, Joseph Cacciapalle, John Cane, Francis J. Dennis, Marneu Holdings, Co., Michelle M. Miller, United Equities Commodities, Co., 111 John Realty Corp., Barry Borodkin and Mary Meiya Liao (collectively, “Class Plaintiffs”).

oppose granting Class Plaintiffs' counsel access to the Protected Information that has been referenced in briefs filed in the D.C. Circuit appeal.

Class Plaintiffs are engaged in litigation involving the net worth sweep before the U.S. Court of Appeals for the D.C. Circuit. *See In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action*, No. 14-5262 (D.C. Cir.). Certain of the Class Plaintiffs (Joseph Cacciapalle, American European Insurance Company and Francis J. Dennis) are also parties to litigation before this Court challenging the net worth sweep. *See Cacciapalle et al. v. United States*, No. 1:13-cv-466 (MMS). Thus, some but not all of the Class Plaintiffs and their counsel have access to the Protected Information.

As this Court is aware, on July 29, 2015, Fairholme Funds, Inc., with this Court's permission (ECF No. 212), filed Protected Information under seal in the D.C. Circuit as part of a motion requesting that the Court of Appeals take judicial notice of that Protected Information. On August 11, 2015, Perry Capital, LLC ("Perry Capital") submitted an application for access to the Protected Information (ECF No. 226), which the Court denied as "premature because the United States Court of Appeals for the District of Columbia Circuit has not ruled on Fairholme and Fairholme Fund, Inc.'s motion for judicial notice." (ECF No. 249).

On November 3, 2015, the Court of Appeals issued an order permitting the parties to refer to the Protected Information in their briefs, and directing the merits panel to determine whether to take judicial notice of the materials. *See In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action*, No. 14-5262 (D.C. Cir.) (ECF No. 1581672). In light of the D.C. Circuit's ruling, on November 6, 2015, Perry Capital renewed its application for access to the Protected Information (ECF No. 254). The Court granted that request on November 9, 2015, holding that:

Perry Capital would suffer extreme prejudice if counsel were denied access to the protected information lodged with the D.C. Circuit. If denied access, counsel for Perry Capital would be precluded from reviewing portions of Fairholme's and government's respective legal memoranda, thus preventing Perry Capital from responding either in support or opposition to those parties' legal arguments, and precluding Perry Capital's counsel from using pertinent protected information on behalf of its client. In sum, without admission to the protective order and access to the protected information, Perry Capital would be denied the ability to fully prosecute its pending appeal in the D.C. Circuit.

(ECF No. 255). On the same date, the Court entered the Second Amended Protective Order, which permits "any person" to have access to Protected Information "by order of the Court." (ECF No. 256, ¶ 4).

Class Plaintiffs and Perry Capital are similarly situated. Like Perry Capital, Class Plaintiffs would suffer the prejudice identified in this Court's November 9, 2015 order if denied access to the Protected Information. Of the four law firms representing Class Plaintiffs, only two – Boies, Schiller & Flexner LLP and Kessler Topaz Meltzer & Check, LLP – have access to protected material because they have an action before this Court.² Class Plaintiffs in the D.C. Circuit appeal, however, include multiple plaintiffs whose cases were consolidated by an order of the D.C. District Court. *See In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations*, No. 13-mc-1288 (RCL) (Nov. 18, 2014) (consolidating the putative class and derivative actions and appointing co-lead class counsel). Class Plaintiffs in the D.C. Circuit appeal cannot effectively litigate their appeal consistent with the District Court's November 18, 2014 order when only some of the court-appointed class counsel are permitted to review the complete appellate record, respond to arguments in the briefing that refer to Protected Information, or participate in oral argument. Permitting some but not all of counsel access to

² *See Cacciapalle v. U.S.*, No. 1:13-cv-466 (MMS) (ECF No. 36) (order consolidating cases and appointing Boies, Schiller & Flexner LLP and Kessler Topaz Meltzer & Check, LLP as interim co-lead class counsel for the *Cacciapalle* consolidated action).

Protected Information would leave the Class Plaintiffs and the remaining class counsel at an extreme disadvantage. Thus, Class Plaintiffs request that this Court enter an order permitting all counsel representing Class Plaintiffs before the D.C. Circuit to have access to the Protected Information.

Applications of counsel for Class Plaintiffs who request access to Protected Information are attached hereto as Exhibit A, pursuant to paragraphs 4 and 7 of the Second Amended Protective Order.

Dated: November 19, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this 19th day of November, 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 CM/ECF system:

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/s/ Eric L. Zagar

Eric L. Zagar

Exhibit A

ATTACHMENT A

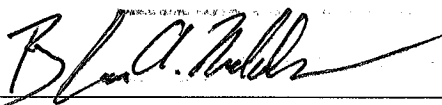
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 Defendant. *

DECLARATION OF BLAIR A. NICHOLAS

I hereby certify that I have carefully reviewed and am fully familiar with the provisions of the Protective Order dated November 9, 2015, entered and filed of record in the above-captioned litigation (“Protective Order”).

I certify that I am eligible to have access to Confidential Material, pursuant to paragraphs 4 and 7 of the Protective Order. As a condition precedent to my examination of any Protected Information pursuant to the Protective Order, or any information contained in said material, I hereby agree that the Protective Order and any amendments thereto shall be deemed directed to any shall bind me, and that I shall observe and comply with all provisions of the Protective Order.



 SIGNATURE

Blair A. Nicholas

 NAME (PRINTED)

12481 High Bluff Dr., Ste. 300, San Diego, CA 92130

 BUSINESS ADDRESS

Bernstein Litowitz Berger & Grossmann LLP

 CURRENT EMPLOYER

Lawyer

 CURRENT OCCUPATION OR JOB DESCRIPTION

ATTACHMENT A

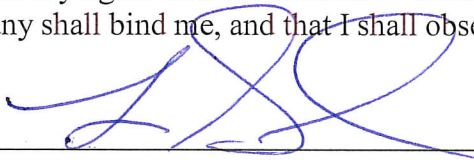
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DECLARATION OF LUCAS E. GILMORE

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SIGNATURE

Lucas E. Gilmore
 NAME (PRINTED)

12481 High Bluff Dr., Ste. 300, San Diego, CA 92130
 BUSINESS ADDRESS

Bernstein Litowitz Berger & Grossmann LLP
 CURRENT EMPLOYER

Lawyer
 CURRENT OCCUPATION OR JOB DESCRIPTION

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DECLARATION OF DAVID R. KAPLAN

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 SIGNATURE

David R. Kaplan

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 BUSINESS ADDRESS

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 CURRENT EMPLOYER

Lawyer

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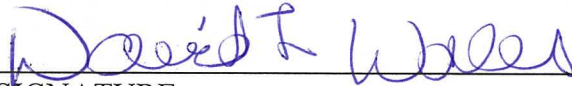
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DECLARATION OF DAVID WALES

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 SIGNATURE

David Wales

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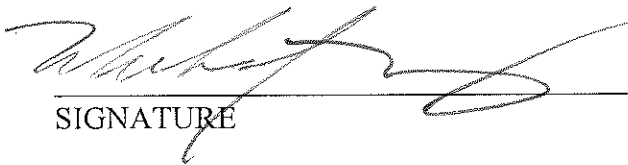
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DECLARATION OF MICHAEL J. BARRY

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Grant & Eisenhofer PA
CURRENT EMPLOYER

Director, Lawyer
CURRENT OCCUPATION OR JOB DESCRIPTION

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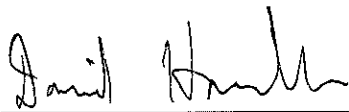
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DECLARATION OF DAVID HAENDLER

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SIGNATURE

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