

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., *et al.*,

Plaintiffs,

vs.

THE UNITED STATES,

Defendant.

No. 13-465C
(Judge Sweeney)

PUBLIC VERSION

MOTION OF ARNETIA JOYCE ROBINSON TO REMOVE THE “PROTECTED INFORMATION” DESIGNATIONS FROM DOCUMENTS REFERRED TO IN AMENDED COMPLAINT AND IN MERITS BRIEFING, AND, IN THE ALTERNATIVE, MOTION TO MODIFY THE PROTECTIVE ORDER TO PERMIT REFERENCE TO THESE MATERIALS AT ORAL ARGUMENT

I. INTRODUCTION

Arnetia Joyce Robinson (“Ms. Robinson”) hereby moves the Court to remove the “Protected Information” designation from certain documents and deposition transcripts (hereinafter the “Documents”) produced or generated during discovery in this case, to which Ms. Robinson has previously been granted access by the Court. D.E. 279. This Protected Information has been referred to in the Amended Complaint that Ms. Robinson filed in the case of *Robinson v. Federal Housing Finance Agency*, Case No. 7:15-cv-109 (E.D. Ky. Dec. 29, 2015), (the “Kentucky Litigation”), ECF No. 17 (filed under seal),¹ and in Ms. Robinson’s Consolidated Response in Opposition to motions to dismiss filed in the Kentucky Litigation by the Federal Housing Finance Agency (“FHFA”) and Melvin L. Watt, as Director of FHFA, and

¹ See, e.g., ¶¶ 17-23, 57, 59, 81-88, 93-94, 114, 119, 122-23.

by the Department of Treasury (collectively, the “Kentucky Defendants”).² In addition, FHFA filed Ms. Robinson’s Amended Complaint in connection with a motion that it filed on March 15, 2016 before the Joint Panel on Multidistrict Litigation (“JPML”) seeking transfer of the Kentucky Litigation to the District Court for the District of Columbia, and consolidation of the Kentucky Litigation with a small number of cases pending in other courts. *See In re Federal Housing Finance Agency, et. al., Preferred Stock Purchase Agreements Third Amendment Litigation*, MDL No. 2713, ECF No. 1-13.

Ms. Robinson asks that the Court remove the “Protected Information” designations from the Documents so that they may be referred to in oral argument before the JPML regarding the motion to transfer on May 26, 2016, and, depending upon how and when the JPML rules on the transfer motion, in an oral argument on the merits of the motions to dismiss in the Kentucky Litigation that the District Court has stated would be scheduled during the first two weeks of July of 2016. In the alternative, Ms. Robinson requests that this Court amend the Protective Order to enable the parties to discuss the Documents in open court during the upcoming hearings. A list of the Documents that Ms. Robinson asks this Court to de-designate is attached as Exhibit A.³

On May 4, 2016, Ms. Robinson gave notice to counsel for Treasury and FHFA, as well as counsel for the other producing parties, of her intent to request that the Court de-designate the Documents.⁴ None of them have responded to Ms. Robinson’s request that they state whether their clients oppose this motion. Because oral argument before the JPML is scheduled for May 26, Ms. Robinson requests an expedited briefing schedule to resolve this motion promptly.

² Plaintiff’s Sealed Consolidated Response in Opposition to Defendants’ Motions to Dismiss, filed in the Kentucky Litigation, ECF No. 32 (hereinafter “MTD Response”), pp. 4-5, 11-16, 35-37, 46-49.

³ Copies of each of the Documents that Ms. Robinson requests that the Court de-designate have been filed under seal and are set forth as Exhibits 1-55 in the attached Appendix. Ms. Robinson also attaches as Exhibit B (under-seal) the Amended Complaint filed in the Kentucky Litigation and the JPML.

⁴ See email from Robert B. Craig attached as Exhibit C.

II. BACKGROUND

Discovery in this case has been conducted pursuant to a protective order entered on July 16, 2014 (D.E. 73), an amended protective order entered on July 29, 2015 (D.E. 217), and a second amended protective order entered on November 9, 2015 (D.E. 256) (collectively the “Protective Order”). The Protective Order permits a producing party to “designate as Protected Information any information, document, or material that meets the definition of Protected Information set forth in this Protective Order.” D.E. 256 at 1. Protected Information is defined as “proprietary, confidential, trade secret, or market-sensitive information, as well as information that is otherwise protected from public disclosure under applicable law.” *Id.* ¶ 2. To expedite production, the Protective Order permits a producing party initially to designate all information as protected, *id.*, ¶ 2, but permits the receiving party to challenge that designation. *Id.* ¶ 17.

The Government and its aligned third parties have produced more than 70,000 documents in this litigation, all of which were designated as confidential upon production. In July of 2015, this Court granted Plaintiff Fairholme Funds, Inc. leave to file a small number of those documents under seal with the United States Court of Appeals for the D.C. Circuit in *Perry Capital LLC v. Lew*, Nos. 14-5243(L), 14-5254(con.), 14-5260(con.) (D.C. Cir.). D.E. 212. After Fairholme filed the documents under seal in D.C. Circuit, this Court granted Perry Capital’s counsel’s applications for access to the documents. D.E. 255. Perry Capital, Fairholme, and Arrowood (collectively the “Perry Capital Appellants”) thereafter referred to some of the documents filed by Fairholme in their reply brief filed with the D.C. Circuit. When the D.C. Circuit scheduled oral argument in the *Perry Capital* appeal, the Perry Capital Appellants filed a joint motion in this Court seeking to remove the “Protected Information” designation from the documents that had been discussed in the reply brief so that they could refer to the information in those documents during oral argument. *See* D.E. 315 at 1-2. Following full

briefing, this Court granted the Perry Capital Appellants' Motion, finding that none of the documents contained Protected Information because they did not contain trade secrets or proprietary information. The Court also ruled that unsealing the documents would not harm the Nation's financial markets because all of the information in the documents was at least three years old. *Id.*, pp. 3-4.

Like the Perry Capital Appellants, Ms. Robinson owns shares of Fannie Mae and Freddie Mac common stock. The Kentucky Litigation that she initiated challenges the Net Worth Sweep under the Administrative Procedure Act. On December 11, 2015, Ms. Robinson's counsel filed applications for access to Protected Information produced in discovery in this case. D.E. 276. This Court granted Ms. Robinson's counsel access to Protected Information on December 18, 2015. On December 23, 2015, Ms. Robinson filed an Amended Complaint under seal in the Kentucky Litigation. (ECF No. 15) The Amended Complaint contains many allegations that directly refer to or rely upon Protected Information, including, *inter alia*, allegations that the Kentucky Defendants knew the Companies had entered a period of "golden years" of earnings when they imposed the Net Worth Sweep, Am. Compl. ¶¶ 18, 81; allegations that the Kentucky Defendants adopted the Net Worth Sweep to prevent the Companies from rebuilding capital during this anticipated period of sustained profitability, Am. Compl. ¶¶ 16, 92; and allegations that the Kentucky Defendants and the Companies understood that the Companies were always free to pay Treasury's dividends "in kind" with additional preferred stock, thereby avoiding the need to draw on Treasury's funding commitment to pay 10% cash dividends on Treasury's senior preferred stock, Am. Compl. ¶¶ 56, 58. After the Kentucky Defendants filed motions to dismiss Ms. Robinson's Amended Complaint, Ms. Robinson filed the MTD Response under seal (ECF No. 29) that also contained references to much of the same Protected Information, which

rebutts many of the factual assertions made by the Kentucky Defendants in the motions to dismiss. *See, e.g.*, MTD Response, p. 35 (rebutting Treasury's claim that Net Worth Sweep improved Companies' capital position by identifying document produced in this case in which Treasury asked "whether we expect [the Companies] to pay the preferred stock dividends in cash or to just accrue the payments"); *id.*, pp. 45-49 (explaining that documents produced in this case contradict facts assumed by the district court in *Perry Capital* and that Kentucky Defendants' reliance on *Perry Capital* district court decision is therefore misplaced).

On March 15, 2016, the FHFA filed a Motion before the JPML seeking transfer of the Kentucky Litigation and three other actions to the D.C. District Court for coordinated or consolidated pretrial proceedings. A sealed copy of Ms. Robinson's Amended Complaint was attached to FHFA's Motion. MDL No. 2713, ECF No. 1-13. Ms. Robinson and the plaintiffs in the other actions that FHFA seeks to consolidate all oppose the motion to transfer. The JPML has scheduled oral argument on the motion to transfer on May 26, 2016. MDL No. 2713, ECF No. 27.

After the motions to dismiss in the Kentucky Litigation were fully briefed, the Kentucky Defendants jointly moved to stay the Kentucky Litigation until after the JPML ruled on FHFA's pending motion to transfer the Kentucky Litigation and the other cases. On April 21, 2016, Judge Thapar granted the Kentucky Defendants' motion in part, and stayed proceedings in the Kentucky Litigation until the earlier of July 1, 2016 or when the JPML has acted on FHFA's motion. (*See* Kentucky Litigation, Order dated April 21, 2016, ECF No. 45, p. 3) At that point, unless the JPML has granted FHFA's motion, the stay will automatically be lifted and the district court will rule on the motions to dismiss by July 29, 2016. *Id.*, p. 4. The Order also states that Judge Thapar will hear oral argument on the motions to dismiss if requested by the parties, to be

held within 14 days of July 1, 2016. *Id.*, p. 5. During the hearing on the motion to stay, counsel for FHFA stated that FHFA wants to schedule oral argument if Judge Thapar is going to rule on the motion to dismiss.

III. ARGUMENT

A. This Court Should Remove The “Protected Information” Designations For The Documents

1. None of the information in the Documents constitutes “Protected Information” under the Protective Order

In light of this Court’s Order granting the Perry Capital Appellants’ motion to unseal certain documents filed in the D.C. Circuit, it is clear that the information in the Documents that Ms. Robinson seeks to de-designate is not “Protected Information” as defined in the Protective Order. As with the materials at issue in the Perry Capital Appellants’ motion, all of the materials at issue here concern events that occurred more than three years ago and that are only relevant to today’s financial markets because they are relevant to the legal validity of the Net Worth Sweep. Broadly, Ms. Robinson seeks to remove the “Protected Information” designation from:

- Materials indicating that the Net Worth Sweep was imposed so that Treasury would receive a windfall and to prevent the Companies from rebuilding capital after returning to sustained profitability. Exhibit 24, at A312; Exhibit 28, at A343; Exhibit 30, at A428; Exhibit 31, at A430; Exhibit 32, at A433; Exhibit 33, at A437; Exhibit 40, at A504; Exhibit 41, at A506; Exhibit 44, at A531; Exhibit 52, at A591; Exhibit 53, at A597, 602–03; Exhibit 54, at A623.
- Materials revealing that Treasury, FHFA, and the Companies all knew when the Net Worth Sweep was imposed that the Companies had returned to sustained profitability and were in no danger of exhausting Treasury’s funding commitment. Exhibit 1, A01; Exhibit 3, at A32, A46–47; Exhibit 19, at A189; Exhibit 20, at A243; Exhibit 21, at A302; Exhibit 22, at A309; Exhibit 23, at A310; Exhibit 29, at A359; Exhibit 35, at A458; Exhibit 36, at A468; Exhibit 38, at A494; Exhibit 39, at A500; Exhibit 45, at A533; Exhibit 46, at A537; Exhibit 47, at A567; Exhibit 51, at A583; Exhibit 53, at A605–06.
- Materials that show that Treasury and FHFA anticipated that the Companies would soon report tens of billions of dollars in profits thanks to the recognition of deferred tax assets and that they understood that the giveaway of those profits would prevent the Companies from returning to a sound financial condition. Exhibit 4, A51; Exhibit 5, A71; Exhibit 6,

A77; Exhibit 7, A91; Exhibit 8, at A105; Exhibit 9, at A120; Exhibit 25, at A315; Exhibit 37, at A485.

- Materials that show that Treasury and FHFA understood at the time of the Net Worth Sweep that the release of the Companies' excessive loan loss reserves would soon substantially increase their reported earnings. Exhibit 2, A12; Exhibit 27, at A341; Exhibit 34, at A440; Exhibit 50, at A577.
- Materials showing that Treasury, FHFA, and the Companies all recognized that the Companies could avoid paying a 10% dividend on Treasury's senior preferred stock by opting to instead pay Treasury's dividends "in kind" with addition stock. Exhibit 10, at A134; Exhibit 11, at A138; Exhibit 12, at A143; Exhibit 13, at A149; Exhibit 14, at A152; Exhibit 15, at A162; Exhibit 16, at A178; Exhibit 17, at A182; Exhibit 18, at A186; Exhibit 26, at A323; Exhibit 42, at A509; Exhibit 43, at A520; Exhibit 48, at A570; Exhibit 49, at A575; Exhibit 53, at A615–16; Exhibit 55, at A632–33.
- Materials indicating that prior to the Net Worth Sweep the periodic commitment fee that Treasury never charged could not have been used to exhaust Treasury's funding commitment to the Companies. Exhibit 3, at A49; Exhibit 55, at A638–41.

Like the documents that the Perry Capital Appellants asked this Court to de-designate, none of the outdated financial data, applications of generally accepted accounting principles, and other information in the Documents that are the subject of Ms. Robinson's motion constitutes trade secret or proprietary information. *See* D.E. 315, p. 3. The information also is not market-sensitive, as the information from the depositions, presentations, valuations, and other documents is more than three years old. *Id.* (“[T]he court finds that sufficient time has passed to alleviate its initial concerns that disclosure of certain information to the public had the potential to adversely influence United States financial markets.”). And neither the Government nor any producing party can identify any harm that might result from de-designation of the Documents. The most that the Government has suggested is that de-designation may create the potential for criticism of the Government. As this Court has already observed, using the Protective Order “as a shield to insulate public officials from criticism in the way they execute their public duties is not a

legitimate basis to maintain documents under a protective order.” *Id.*, p. 8. Because none of the Documents contains Protected Information, this Court should remove their protected designation.

2. Ms. Robinson has a legitimate and present need to be able to refer to the Documents in open court before the JPML and the Kentucky district court

Ms. Robinson’s request for de-designation is ripe for resolution, just as the Perry Capital Appellants’ request was ripe. D.E. 315, p. 3. This Court granted the Perry Capital Appellants’ motion to remove the “Protected Information” designation from documents that had been referred to in briefing to the D.C. Circuit panel in advance of oral argument before the panel held on April 15, 2016. Similarly, de-designation of the Documents is appropriate here because of the upcoming oral argument on May 26 before the JPML, and the possibility that a hearing on the merits on the motions to dismiss in the Kentucky Litigation will be scheduled on short notice in early July, depending upon when and how the JPML rules. Given the direct relationship between Ms. Robinson’s allegations and arguments that rely upon “Protected Information” and some of the key issues that the JPML must consider in ruling on the FHFA’s application, there is a substantial likelihood that the Protected Information will be raised in the upcoming hearing. And given that the JPML only allots 20 minutes of argument to consider each motion to transfer,⁵ it would be extremely cumbersome to ask that the Panel to close the hearing in some fashion simply to discuss materials cited in the Amended Complaint.

In addition, closing the hearing would contravene core First Amendment principles. “Under the first amendment, the press and the public have a presumed right of access to court proceedings and documents.” *Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of Oregon*, 920 F.2d 1462, 1465 (9th Cir. 1990); *New York Civil Liberties Union v. New York City Transit. Auth.*, 684 F.3d 286, 298 (2d Cir. 2012) (the public has a “right of access . . . to civil trials and to

⁵ See JPML Rule 11-1(f).

their related proceedings and records”). “Without access to the proceedings, the public cannot analyze and critique the reasoning of the court.” *Brown & Williamson Tobacco Corp v. FTC.*, 710 F.2d 1165, 1178-79 (6th Cir. 1983); *Chicago Tribune v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001) (public access to the judicial process is “instrumental in securing the integrity of the process”). And in light of the Government’s failure to articulate any legitimate basis for continued secrecy, there is no reason to hamstring Ms. Robinson’s presentation of her case, to complicate the JPML argument, or to deny the public access in the upcoming proceedings.

Ms. Robinson also will suffer prejudice at oral argument on the motions to dismiss in the Kentucky Litigation if the Documents remain sealed. The Kentucky Defendants heavily relied upon the D.C. District Court’s decision in *Perry Capital LLC v. Lew*, 70 F.Supp.3d 208 (D.D.C. 2014) in their motions to dismiss.⁶ The Documents that Ms. Robinson referred to in opposing the motions demonstrate that the record before Judge Lamberth when he issued his ruling was significantly and materially different from the allegations in Ms. Robinson’s Amended Complaint. The Documents also contradict Defendants’ position because they show that Treasury knew that the Net Worth Sweep was completely unnecessary to prevent exhaustion of Treasury’s commitment, both because other options were available, and, more importantly, because there was no risk of exhaustion in the first place. It would be very unfair to Ms. Robinson if she is unable to refer to the Protected Information in the Documents to provide the district court with a complete understanding of the circumstances surrounding the imposition of the Net Worth Sweep.

⁶ See Memo. in Support of FHFA’s Mtn. to Dismiss in Kentucky Litigation, Doc. 23-2, pp. 10, 14-20, 27-28, 30-35, and Memo in Support of Treasury’s Mtn. to Dismiss in Kentucky Litigation, Doc. 22-2, pp. 16, 18-19, 33-34, 36-39.

B. In The Alternative, The Court Should Modify The Protective Order

If the Court denies Ms. Robinson's motion to remove the "Protected Information" designation from the Documents, it should modify the Protective Order to permit counsel to reference the information contained in the Documents in the hearings before the JPML and the hearing on the pending motions to dismiss in the Kentucky Litigation. This would permit free discussion of the issues and information that the Panel or Judge Thapar deems relevant, while not placing the Documents in the public domain, thereby significantly alleviating any (unsupported) claims of harm from public disclosure.

IV. CONCLUSION

For all of these reasons, this Court should grant Ms. Robinson's motion and enter an order removing the "Protected Information" designations for all of the Documents. In the alternative, this Court should modify the Protective Order to permit counsel to reference those documents at oral argument before the JPML and the Kentucky district court.

Dated: May 11, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 11th day of May, 2016, the foregoing Motion, and supporting documents were filed with the Clerk of the United States Court of Federal Claims using the CM/ECF system, causing a true and correct copy to be served on all counsel of record. In addition, copies were emailed to the following counsel:

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