

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PERRY CAPITAL LLC,

Appellant,

v.

JACOB J. LEW, et al.,

Appellees.

Nos. 14-5243 (L),
14-5254 (con.),
14-5260 (con.),
14-5262 (con.)

**APPELLANT PERRY CAPITAL LLC'S RESPONSE TO MOTION FILED
UNDER SEAL FOR JUDICIAL NOTICE**

On July 29, 2015, Fairholme Fund and Fairholme Funds, Inc. (collectively “Fairholme”) filed a motion under seal requesting that this Court take judicial notice of documents that were produced by the government in a separate litigation involving the Net Worth Sweep in the Court of Federal Claims. Under Seal Motion (July 29, 2015) (D.E. 1565601). Pursuant to Federal Rule of Appellate Procedure 27(a)(3), Perry Capital, LLC (“Perry Capital”) submits this response in support of Fairholme’s motion.

The opening merits brief filed by Perry Capital, Fairholme, and Arrowood Indemnity Co. in this consolidated appeal argues, among other things, that the district court erred when it relied on flawed and incomplete administrative records. Initial Opening Brief for Institutional Plaintiffs, at 67-73 (June 29, 2015) (D.E.

1560037). An administrative record must represent the whole of the record before the agency at the time of the challenged agency action. *Id.* at 68. The records below, however, were clearly incomplete because the government failed to include key, relevant documents—documents that evidently were before the agencies at the time the Net Worth Sweep was executed. *Id.* at 68-71.

Although Perry Capital does not currently have access to the documents appended to Fairholme’s motion for judicial notice, it is highly likely that those documents serve as further proof that the administrative records were incomplete and that the district court, at a minimum, should have ordered supplementation. The documents may also serve to undermine or refute entirely the government’s purported rationales for the Net Worth Sweep, and thus support Perry Capital’s arguments on the merits of this appeal. Perry Capital therefore generally supports Fairholme’s request for this Court to take judicial notice of those documents produced by the government related to the Net Worth Sweep.

Perry Capital currently lacks access to the documents attached to Fairholme’s motion because the documents are subject to a protective order issued by the Court of Federal Claims. *See Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl.) (D.E. 217). Although Circuit Rule 47.1(d)(2) requires that “[e]ach party” to a case be served with copies of material filed under seal, that requirement applies only “if the party is entitled to receive the material under seal.”

Circuit Rule 47.1(d)(2). Because Perry Capital is not yet “entitled” to access the materials under the protective order issued by the Court of Federal Claims, Fairholme has not provided Perry Capital with those materials. Thus, only the parties to this appeal that are also parties to the Court of Federal Claims action—including the government—currently have access to Fairholme’s motion and the attached materials.

It is extremely rare and unusual for a single party to a litigation to be barred from viewing documents filed in its case. *Cf. Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986) (explaining the limited circumstances under which courts may “dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions”), *aff’d*, 484 U.S. 1 (1987); *U.S. ex rel. Boisjoly v. Morton Thiokol, Inc.*, CIV. A. No. 87-0209, 1987 WL 10232, at *4 (D.D.C. Apr. 15, 1987) (lifting seal on documents to allow a litigating party access to documents). Not only is Perry Capital barred from reviewing the motion filed under seal and the attached documents, but Perry Capital also will likely be unable to review the government’s response to that motion or any further briefing containing sealed materials. In addition, it is significant that this Court has suspended the merits briefing schedule pending resolution of the motion for judicial notice, demonstrating that the document issue is affecting Perry Capital’s rights in this appeal.

For this Court's information, Perry Capital has filed a motion before the Court of Federal Claims requesting that Perry Capital's counsel be granted access to the documents filed in this Court, and counsel has agreed to be bound by the protective order. That motion is currently pending.

Dated: August 13, 2015

Respectfully submitted,

/s/ Theodore B. Olson

Theodore B. Olson

Douglas R. Cox

Matthew D. McGill

GIBSON, DUNN & CRUTCHER LLP

1050 Connecticut Avenue, N.W.

Washington, D.C. 20036

Telephone: 202.955.8500

Facsimile: 202.467.0539

Janet M. Weiss

GIBSON, DUNN & CRUTCHER LLP

200 Park Avenue

New York, N.Y. 10166

Telephone: 212.351.3988

Facsimile: 212.351.5234

Counsel for Perry Capital LLC

CERTIFICATE OF SERVICE

I certify that on this 13th day of August, 2015, I caused the foregoing to be filed with the Clerk of the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system. Service was accomplished on the following persons by the appellate CM/ECF system:

Mark B. Stern
Alisa B. Klein
Abby Christine Wright
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Telephone: 202-514-2000
mark.stern@usdoj.gov
alisa.klein@usdoj.gov
abby.wright@usdoj.gov

*Counsel for the U.S. Department of the
Treasury and Secretary Jacob J. Lew*

Charles J. Cooper
Brian W. Barnes
Howard Curtis Nielson, Jr
Peter A. Patterson
David H. Thompson
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Telephone: 202.220.9600
Facsimile: 202.220.9601

Counsel for Fairholme Funds, et al.

Howard N. Cayne
Asim Varma
David B. Bergman
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, D.C. 20004
Telephone: (202) 942-5000
Facsimile: (202) 942-5999
Howard.Cayne@aporter.com
Asim.Varma@aporter.com
David.Bergman@aporter.com

*Counsel for Defendants Federal
Housing Finance Agency and
Director Melvin L. Watt*

Hamish P.M. Hume
BOISE, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, N.W.,
Suite 800
Washington, D.C. 20015
Telephone: 202-237-2727
Facsimile: 202-237-6131
hhume@bsfllp.com

David L. Wales
BERNSTEIN LITOWITZ BERGER &
GROSSMAN LLP
1285 Avenue of the Americas
New York, N.Y. 10019
Telephone: 212-554-1409
Facsimile: 212-554-1444

Blair A. Nicholas
David R. Kaplan
BERNSTEIN LITOWITZ BERGER &
GROSSMAN LLP
12481 High Bluff Drive, Suite 300
San Diego, CA 92130
Telephone: 858-793-0070
Facsimile: 858-793-0323
blairn@blbglaw.com
davidk@blbglaw.com

Jay W. Eisenhofer
GRANT & EISENHOFER, PA
485 Lexington Avenue
New York, N.Y. 10017
Telephone: 646-722-8500
Facsimile: 646-722-8501
jeisenhofer@gelaw.com

Geoffrey C. Jarvis
Michael J. Barr
GRANT & EISENHOFER, PA
123 Justison Street
Willmington, DE 19801
Telephone: 302-622-7000
Facsimile: 302-622-7100
gjarvis@gelaw.com
mbarry@gelaw.com

Lee D. Rudy
Eric L. Zagar
Matthew A. Goldstein
KESSLER TOPAZ MELTZER & CHECK,
LLP
280 King of Prussia Road
Radnor, PA 19087
Telephone: 610-667-7706
Facsimile: 610-667-7056

Interim Co-Lead Class Counsel for Class Plaintiffs