IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

THOMAS SAXTON, *et al.*,	)	
	)	
Plaintiffs,	)	Civil Action No. 1:15-cv-00047-LLR
v.	)	
	)	**FAIRHOLME'S REPLY IN SUPPORT**
THE FEDERAL HOUSING FINANCE	)	**OF ITS OPPOSED MOTION FOR**
AGENCY, *et al.*,	)	**LEAVE TO FILE SEALED AMICUS**
	)	**BRIEF AND APPENDIX IN SUPPORT**
Defendants.	)	**OF PLAINTIFFS' OPPOSITION TO**
	)	**MOTIONS TO DISMISS**

It is no surprise that Defendants strenuously oppose Fairholme's motion for leave to file an amicus brief outlining the most significant discovery materials that have come to light in other litigation concerning the Net Worth Sweep. These materials show that Defendants' representations—both in their motions to dismiss and to the public—regarding the purpose and effects of their actions are misleading, and it appears that Defendants would prefer that the Court blind itself to facts known by Defendants and Fairholme but not otherwise available to the Court or Plaintiffs. But for all of Defendants' heated arguments against Fairholme's motion, they are unable to rebut this simple truth: there is no reason for the Court to limit itself and the Plaintiffs to information that Defendants have selectively chosen to place in the public domain when a much more complete and accurate account of the Net Worth Sweep is readily available. The Court should grant Fairholme's motion.

I. The *Fairholme* discovery materials will assist the Court in adjudicating this case.

In their motions to dismiss, Defendants contend that the Net Worth Sweep was necessary because Fannie's and Freddie's existing dividend obligations "threatened to erode the limited funding capacity remaining" under Treasury's funding commitment. Department of the

Treasury's Mem. in Supp. of Its Mot. to Dismiss the Compl. at 9 (Sept. 4, 2015), Doc. 19-1 ("Treasury MTD"). They also argue that Plaintiffs' Complaint fails to allege sufficient facts to support their allegation that FHFA impermissibly agreed to the Net Worth Sweep at Treasury's direction. Treas. MTD 18; Mem. in Supp. of Mot. to Dismiss by Defs. FHFA as Conservator for Fannie Mae and Freddie Mac, and FHFA Director Melvin L. Watt at 29 (Sept. 4, 2015), Doc. 20-1. As explained at length in the proposed amicus brief, the *Fairholme* discovery materials show that defendants' factual claims are misleading and, in important respects, false. Many of the arguments in Defendants' motions to dismiss depend on factual premises that the *Fairholme* discovery materials show to be misleading.[1] The Court should be aware of that reality when ruling on the motions to dismiss and give Plaintiffs an opportunity to amend their complaint to fully reflect key facts that are not in the public domain.

II. The *Fairholme* discovery materials are the proper subject of an amicus brief.

While Defendants style much of their opposition as an attack on Fairholme for its supposed "partisanship" and non-party status, it bears emphasis that the upshot of Defendants' arguments is that *no one* should be permitted to alert the Court to evidence that shows that Defendants' account of the Net Worth Sweep is misleading and, in important respects, false. That is because the *Fairholme* discovery materials are subject to a strict protective order that

[1] Many of the factual premises for Defendants' arguments contradict the allegations in the Complaint and thus belie Defendants' contention that the *Fairholme* discovery materials are legally irrelevant because Defendants have wholeheartedly accepted the Plaintiffs' allegations for purposes of the motions to dismiss. While the Court should ignore factual statements in the motions to dismiss that contradict the Complaint, it should also be aware that Defendants' factual allegations are misleading in light of the evidence discussed in Fairholme's amicus brief. Fairholme's amicus brief explains in greater detail than is possible in this public filing how Defendants' public contentions about the Net Worth Sweep are misleading and, in certain key respects, false, and ultimately why the Court would be mistaken in relying upon them in deciding the Defendants' Motions to Dismiss.

prevents Plaintiffs from accessing them. *See* Amended Protective Order, *Fairholme Funds, Inc. v. United States*, No. 13-465 (Fed. Cl. July 29, 2015), ECF No. 217. Fairholme seeks to present relevant information that Plaintiffs *cannot* present themselves, and that makes this case very different from Defendants' cases in which prospective amici sought to present arguments or evidence that the parties had chosen not to make. *See Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (observing that courts normally grant permission to file amicus briefs "when the amicus has unique information . . . that can help the court beyond the help that the lawyers for the parties are able to provide"); 1998 Advisory Committee Note to FED. R. APP. P. 29 ("An amicus curiae brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court.").

In any event, Defendants are simply wrong when they contend—in reliance on mostly decades-old precedent—that an amicus should not have an "interest" in the litigation in which it seeks to appear. *See* Defs.' Resistance to Mot. by Fairholme Funds, Inc., for Leave to File Sealed Amicus Br. and App. at 7–10 (Oct. 29, 2015) Doc. 36 ("Defs.' Br."). This outdated view of the role of an amicus was already under attack as early as 1963, *see* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 703 (1963), and the leading modern case—*Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 131 (3d Cir. 2002)—expressly rejects it. As then-Judge Alito explained, today amici are generally *required* to have an interest in the litigation in which they seek to participate, *id.* (citing, *inter alia*, FED. R. APP. P. 29(b)(1) and (c)(3)), and "it is not easy to envisage an amicus who is 'disinterested' but still has an 'interest' in the case," *id.* Most courts reject the implication of Defendants' argument "that a strong advocate cannot truly be the court's friend" as "contrary to the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views

promotes sound decision making." *Id.* In short, Defendants' argument that Fairholme should not be allowed to file its amicus brief because it has an interest in the outcome of this case is contrary to the prevailing practice in this and other federal courts. *See, e.g., Hoffman v. Cargill, Inc.*, 59 F. Supp. 2d 861, 869–70 (N.D. Iowa 1999) (court allowed arbitration body to submit amicus brief in support of confirmation of its decision); *Sprint Commcn's Co. LP v. Nebraska Pub. Serv. Comm'n*, 2006 WL 148997, at *3 (D. Neb. Jan. 18, 2006) (granting leave to participate as amicus and explaining that "[r]egardless of whether [amicus's] alleged economic interest in this litigation will be adequately protected by [plaintiff], the court may well benefit from [its] participation in briefing."); *Shain v. Veneman*, 278 F. Supp. 2d 1006, 1008 n.2 (S.D. Iowa 2003) (leave to participate as amici was granted "given the obvious interest" of amici in the litigation); *see also* 16AA CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3975 (4th ed.) ("There is nothing wrong, in current practice, with an amicus possessing an interest in the relevant issues.").[2]

Defendants are also wrong when they argue that Fairholme's participation as an amicus is improper to the extent that it seeks to introduce factual, as opposed to legal, arguments. Defs.' Br. 10–12. To the contrary, participation as an amicus is especially appropriate where the prospective amicus has access to relevant information that would not otherwise be available to the Court. *See Community Ass'n for Restoration of Env't v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) ("An amicus brief should normally be allowed when . . . the

[2] In addition to a handful of more recent outlier district court decisions, Defendants cite Judge Posner's in chambers opinion in *Ryan v. CFTC*, 125 F.3d 1062 (7th Cir. 1997); *see* Defs.' Br. 7. But the federal courts have not heeded Judge Posner's call for procrustean review of motions for leave to file amicus briefs, *Ryan*, 125 F.3d at 1063, and "there is little evidence that [Judge Posner's] views are widely shared," WRIGHT & MILLER § 3975; *see* Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. APP. PRAC. & PROCESS 279 (1999) (criticizing *Ryan*).

amicus has unique information . . . that can help the court beyond the help that the lawyers for the parties are able to provide."); *Jin*, 557 F. Supp. 2d at 137 (same). Despite Defendants' suggestions to the contrary, there is no rule against amici introducing evidence and making factual arguments. *See People's Legislature v. Miller*, 2012 WL 3536767, at *5 n.5 (D. Nev. Aug. 15, 2012) ("Generally, courts have exercised great liberality in permitting an amicus curiae to file a brief in a pending case, and, with further permission of the court, to . . . introduce evidence."); *Jamul Action Comm. v. Stevens*, 2014 WL 3853148, at *6 (E.D. Cal. Aug. 5, 2014). Indeed, courts are particularly willing to accept factual submissions from an amicus where, as here, they bear on the court's subject matter jurisdiction. *E.g.*, *Knox v. United States Dep't of the Interior*, 2011 WL 2837219, at *2 (D. Idaho July 9, 2011). In sum, there is nothing improper about Fairholme seeking to present evidence that supports Plaintiffs' claims that Plaintiffs cannot introduce themselves, and no law requires the Court to allow Defendants to litigate this case on the basis of the highly misleading facts that they have purposefully perpetuated in the public domain.

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Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 2, 2015, I electronically filed this foregoing with the Clerk of Court using the ECF system, and to my knowledge a copy of this document will be served on the parties or attorneys of record by the ECF system.

/s/ Charles J. Cooper
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