

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

THOMAS SAXTON et al.,

Plaintiffs,

vs.

FEDERAL HOUSING FINANCE
AGENCY et al.,

Defendants.

No. 15-CV-47-LRR

ORDER

The matter before the court is third party Fairholme Funds, Inc.’s (“Fairholme”) “Motion for Leave to File Sealed Amicus Brief and Appendix in Support of Plaintiffs’ Opposition to Defendants’ Motions to Dismiss” (“Motion”) (docket no. 29), which Fairholme filed on October 15, 2015. On October 29, 2015, Defendants filed a Resistance (docket no. 36). On November 2, 2015, Fairholme filed a Reply (“Fairholme Reply”) (docket no. 41). On November 5, Plaintiffs filed a Response to the Resistance (“Plaintiffs Reply”) (docket no. 42). No party has requested oral argument, and the court finds that oral argument is unnecessary. The matter is fully submitted and ready for decision.

In the Motion, Fairholme claims that, in litigation in the Court of Federal Claims that is similar to the instant action, it “has obtained a number of documents and other materials that are directly relevant to issues before th[e] [c]ourt and that show that Defendants’ litigation-driven rationales for the Net Worth Sweep are highly misleading.” Brief in Support of the Motion (docket no. 29-1) at 1-2. Fairholme contends that the materials will reveal that the factual premises in Defendants’ pending Motions to Dismiss (docket nos. 19, 20) are misleading and false. *Id.* at 3.

In response, Defendants argue that the materials in Fairholme’s possession are irrelevant to the pending Motions to Dismiss because the Motions to Dismiss concern legal

issues and not factual issues. Resistance at 4-7. Defendants contend that Fairholme's materials would have little effect because the factual allegations in the Plaintiff's complaint are already accepted as true for the purposes of resolving Motions to Dismiss. *Id.* Therefore, "Fairholme's attempt to submit evidence purportedly supporting Plaintiffs' allegations is . . . misplaced at this stage of the litigation." *Id.* at 5. Defendants also argue that admission of the materials would be improper because "an amicus curiae is a nonparty and may not submit evidence and litigate factual issues in a trial court." *Id.* at 3.

Fairholme responds that its materials are highly relevant and that the court should grant the Motion to "give Plaintiffs an opportunity to amend their complaint to fully reflect key facts that are not in the public domain." Fairholme Reply at 2. Fairholme contends that the factual contents of its amicus brief are properly admitted because the information is under a protective order and not otherwise accessible to Plaintiffs. *Id.* at 2-3. Furthermore, Fairholme argues that "there is no rule against amici introducing evidence and making factual arguments." *Id.* at 5. Plaintiffs state that they will "likely seek leave to amend the Complaint" if the court grants the Motion. Plaintiffs Reply at 1. Plaintiffs also assert that Defendants' rationales for the Net Worth Sweep are relevant to resolving the pending Motions to Dismiss. *Id.* at 2.

The court has broad discretion to accept or deny participation by an amicus. *See Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000) ("Whether to permit a nonparty to submit a brief, as amicus curiae, is . . . a matter of judicial grace."); *United States ex rel. Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 927-28 (S.D. Tex. 2007); *Mausolf v. Babbitt*, 158 F.R.D. 143, 148 (D. Minn. 1994), *rev'd on other grounds*, 85 F.3d 1295 (8th Cir. 1996). "No statute, rule, or controlling case defines a federal district court's power to grant or deny leave to file an amicus brief . . ." *Gudur*, 512 F. Supp. 2d at 927 (emphasis omitted). Among the factors the court

considers is whether “the information offered [by the amicus] is ‘timely and useful’” to the pending action. *Waste Mgmt. of Pa., Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995) (quoting *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985)). The court should also consider whether “the brief will assist the judge[] by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs.” *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003).

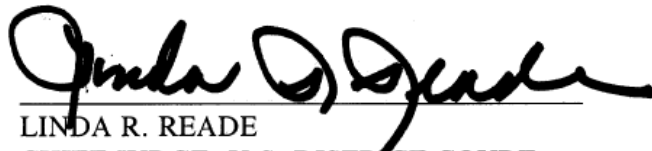
When the Motion was initially filed, Plaintiffs filed a Motion to Stay (docket no. 31). Plaintiffs’ intention was to directly petition the Court of Federal Claims for access to Fairholme’s materials, which are currently under a protective order, and subsequently seek leave to amend the Complaint (docket no. 1). Brief in Support of Motion to Stay (docket no. 31-1) at 2. The court denied the Motion to Stay, finding that Plaintiffs’ reason was insufficient to justify delaying the timely adjudication of Defendants’ Motions to Dismiss. *See* Oct. 21, 2015 Order (docket no. 34) at 2. Now, Plaintiffs state that they “will likely seek leave to amend the Complaint” if they are granted access to the evidence contained in the Motion. Plaintiff Reply at 1.

Defendants’ Motions to Dismiss are facial challenges to the court’s jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See* Brief in Support of Treasury’s Motion to Dismiss (docket no. 19-1) at 10-11; Brief in Support of FHFA’s Motion to Dismiss (docket no. 20-1) at 12. In a facial attack on the complaint, the factual allegations concerning jurisdiction are presumed to be true and the motion will fail unless the plaintiff fails to allege some element necessary to invoke the court’s jurisdiction. *Branson Label, Inc. v. City of Branson, Mo.*, 793 F.3d 910, 914 (8th Cir. 2015). The court must limit its review to the face of the pleadings alone, “and the non-moving party receives the same protections at it would defending against a motion brought under Rule 12(b)(6).” *Id.* (quoting *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990)) (internal quotation marks omitted); *accord Quality Refrigerated Servs., Inc. v. City of Spencer*, 908

F. Supp. 1471, 1481-82 (N.D. Iowa 1995). Both the Fairholme Reply and the Plaintiffs Reply demonstrate that the purpose of the amicus brief is to inject new facts into the pleadings. However, because the court will not consider facts and evidence outside of the pleadings in determining facial challenges to subject matter jurisdiction under Rule 12(b)(1), it will not admit or consider Fairholme's evidence in support of Plaintiffs' opposition to the Motions to Dismiss.¹ Accordingly, the Motion (docket no. 29) is **DENIED.**

IT IS SO ORDERED.

DATED this 3rd day of December, 2015.



LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

¹ Although the court finds that amicus participation is currently improper, it is not foreclosing the possibility of amicus participation at a later stage in the proceedings.