Redacted Version

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., et al.,	)	
Plaintiffs,	)	
v.	)	No. 13-465C
	)	(Judge Sweeney)
THE UNITED STATES,	)	
Defendant.	)	

PLAINTIFFS' PUBLIC, REDACTED MOTION TO REMOVE THE "PROTECTED INFORMATION" DESIGNATION FROM CERTAIN TREASURY AND FHFA DOCUMENTS

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Plaintiffs Fairholme Funds, Inc., et al. ("Plaintiffs" or "Fairholme") respectfully move, pursuant to Paragraphs 17 and 19 of the Protective Order (July 16, 2014), Doc. 73, for entry of an order requiring the Government to remove the "Protected Information" designation it has affixed to the unredacted information in the attached Exhibits 1–18 (the "unredacted information"). Such information is not "Protected Information" as defined in the Protective Order, and keeping this information secret prejudices Plaintiffs, the public, and other courts that will decide legal challenges to which the information is relevant. Such courts deserve to have access to all relevant information. Alternatively, Plaintiffs respectfully move, pursuant to Paragraphs 17 and 18 of the Protective Order, for entry of an order authorizing Plaintiffs to file the unredacted information under seal in in *Fairholme Funds, Inc. v. FHFA*, No. 14-5254 (D.C. Cir.),[1] as well as in any other action challenging the Net Worth Sweep in which Plaintiffs participate either as parties or amici.

QUESTIONS PRESENTED

1. Does the unredacted information meet the definition of "Protected Information" under Paragraph 2 of the Protective Order?
2. Alternatively, should this Court authorize Plaintiffs to file the unredacted information under seal in any other action challenging the Net Worth Sweep in which Plaintiffs participate either as parties or amici?

[1] The D.C. Circuit has consolidated the *Fairholme* appeal with the appeals of other cases challenging the Net Worth Sweep also pending before that court. *See* Order, *Perry Capital LLC v. Lew*, No. 14-5243 (D.C. Cir. Oct. 27, 2014), ECF No. 1519092. The *Fairholme* plaintiffs (consisting of Plaintiffs in this action, minus Continental Western Insurance Company) have been directed to file a consolidated brief with certain plaintiffs from the other appeals, and that brief is due on June 30, 2015. *See* Order, *Perry Capital LLC v. Lew*, No. 14-5243 (D.C. Cir. May 6, 2015), ECF No. 1551023.

STATEMENT OF THE CASE

The ongoing discovery in this case is being conducted pursuant to a standard protective order ("P.O.") that permits the parties to "designate as Protected Information any information, document, or material that meets the definition of Protected Information set forth in this Protective Order." P.O. at 1. The Protective Order defines Protected Information 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. It also permits a producing party to initially designate all information as protected solely in order to expedite production, but only subject to the receiving party's right to subsequently challenge that designation in accordance with the procedures established under Paragraph 17 of the order. *Id.*

Paragraph 17 makes clear that the receiving party has the right to challenge a producing party's designation of material as Protected Information. *Id.* ¶ 17; *see also id*. ¶ 19 ("This Protective Order shall be without prejudice to the right of any party to bring before the court at any time the question whether any particular document or information is Protected Information or whether its use otherwise should be restricted."). The burden of persuasion rests with the moving party. *Id.* ¶ 17.

In accordance with the procedures established by the Protective Order, Fairholme's counsel notified the Government that it believed Exhibits 1–18 did not contain Protected Information as defined in Paragraph 2 and requested that the Government de-designate these documents. Fairholme's counsel also proposed, as a compromise, that the Government de-designate the unredacted information. *See* Emails from Vincent Colatriano, Counsel for Plaintiffs, to Gregg Schwind, Counsel for the Government (Exhibit 19). In many documents, the unredacted information consists of a single sentence. The Government refused to de-designate either the redacted

or unredacted versions of the documents at issue. *Id.* Fairholme's counsel then informed the Government that Plaintiffs intended to seek a resolution of this issue with this Court. *Id.*[2]

ARGUMENT

I. THE GOVERNMENT HAS IMPROPERLY DESIGNATED THE UNREDACTED INFORMATION AS PROTECTED INFORMATION.

A. The unredacted information does not come within the terms of the Protective Order's definition of "Protected Information."

The Protective Order was carefully crafted, and its definition of "Protected Information" is, accordingly, precisely drawn. Although the order permits a party to "*initially* designate all information" produced as Protected Information, P.O. ¶ 2 (emphasis added), such information must, ultimately, fit within Paragraph 2's definition if it is to remain hidden from the public. The order does not grant any party *carte blanche* to designate as protected any information that it might wish to shield from public scrutiny; the mere assertion that certain information is protected will not do. As the Federal Circuit has emphasized, "[p]arties frequently abuse Rule 26(c) by seeking protective orders for material not covered by the rule," but there must be some "demonstrati[on] that there is good cause for restricting the disclosure of the information at issue." *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1357, 1358 (Fed. Cir. 2011).

There is no plausible argument that the unredacted information is Protected Information. As an initial matter, it is significant that the Government has not suggested that the unredacted information qualifies for protection under the Protective Order. Rather, it has generally argued

[2] With regard to Exhibits 1–5 and 16–18, the Government refused to even consider Plaintiffs' request for de-designation until the end of June, *see* Exhibit 19, A059–61, which amounted to the Government giving itself a one-month extension of time to review the request beyond the five-day period specified in the Protective Order, *see* P.O. ¶ 17. Pursuant to Paragraph 17, Plaintiffs' counsel informed the Government that Fairholme would seek resolution in this Court.

that the Protective Order does not permit the de-designation of redacted documents, which is clearly wrong. *See infra* pages 10–11.

It is not difficult to see why the Government has refrained from specifically arguing that the unredacted information meets the definition of Protected Information. None of the information is a "trade secret" or otherwise "proprietary"; nor does any law protect it from public disclosure. These categories of Protected Information, then, provide no refuge for the Government.

Nor does the unredacted information fall within any legitimate conception of "confidential" information. When this Court heard argument on the parties' competing proposals regarding the definition of Protected Information, it made clear that the mere fact that a document had not been previously released to the public did *not* suffice to render the document "confidential." *See, e.g.*, Transcript of July 16, 2014 Status Conference at 10–11 (Exhibit 20, A068–69). Rather, for information to be considered "confidential" within the meaning of the order, the public release of that information must be likely to cause some type of legally cognizable harm to the producing party or to third parties. *Id.*; *see also In re Violation of Rule 28(D)*, 635 F.3d at 1357–58 ("[T]he party seeking to limit the disclosure of discovery materials must show that specific prejudice or harm will result if no protective order is granted" (citation and quotation marks omitted)); *Lakeland Partners, LLC v. United States*, 88 Fed. Cl. 124, 133 (2009) (party seeking to limit discovery or seeking other protections under Rule 26(c) "must make a particularized factual showing of the harm that would be sustained if the court did not grant a protective order" (citation omitted)).[3]

[3] *Cf. Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1094 (N.D. Cal. 2004) (courts have classified as "confidential" information that is "of either particular significance or [that] which can be readily identified as either attorney work product or within the scope of the

The Government has offered no reason why the unredacted information meets this standard for protection, and there is none. To be sure, the information is found in internal documents that the Government would apparently rather not have made public, but that alone does not make it Protected Information. If the Government is permitted to restrict the use and disclosure of information based on such criteria, this litigation will be conducted almost entirely in secret, and the public will be deprived of access to vital information about their Government. That is not the purpose of this Court's Protective Order. The Government must point to specific harm to a legally cognizable interest in asserting confidentiality, *see In re Violation of Rule 28(D)*, 635 F.3d at 1357–58, and it has not done so.

Nor could it. As a general matter, the unredacted information relates to the Government's understanding of: (1) the GSEs' ability to opt for payments-in-kind in lieu of the 10% dividend obligation prior to the Net Worth Sweep; (2) the GSEs' deferred tax assets around the time of the Net Worth Sweep; (3) Treasury's ability to control FHFA and the GSEs; (4) the financial condition of the GSEs shortly before and after the Net Worth Sweep; (5) the potential value of Treasury's commitment fee; and (6) the political nature of the Net Worth Sweep. *See infra* pages 12–15. None of these bear on current market conditions; rather, they contain historical information about, *inter alia*, decisions that have long-since occurred or forecasts that have long-since become outdated.

For example, the relevant unredacted information in Exhibit 13—an August 14, 2012

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attorney-client privilege." (alteration in original)). *See also Return Mail, Inc. v. United States*, 107 Fed. Cl. 459, 466 (2012) (reviewing cases in which technical knowledge learned by a previous employee is considered confidential information).

email from FHFA's Mario Ugoletti[4]—consists of a single sentence: [redacted] A038. This information has nothing to do with present market conditions; it is simply historical information about the conservatorship around the time of the Net Worth Sweep.[5] Similarly, Exhibit 9, a July 8, 2012 email from Anne Eberhardt of Grant Thornton, states, [redacted] A025. This and all other unredacted information share the characteristic of being relevant to *past* events rather than to *present* economic circumstances, but, as importantly, the information undercuts key claims made by the Government in this and related litigation. *See infra* pages 12–15. That is, perhaps, the true reason why the Government seeks to keep this information from the public, and this Court should reject those efforts.

That conclusion is reinforced by the lengths to which Plaintiffs have gone to accommodate the Government's concerns about the release of sensitive information. This Court need only flip through the attached exhibits to see that Plaintiffs have redacted virtually all information in

[4] Mario Ugoletti served as Special Advisor to the Office of the Director of FHFA at the time of the email.

[5] *See* Gretchen Morgenson, *After the Housing Crisis, a Cash Flood and Silence*, N.Y. TIMES, Feb. 14, 2015, http://goo.gl/exxOYI ("Really? The documents the judge has ordered the government to produce were created three to seven years ago. How could they unsettle the markets now?").

each document, often leaving only a single sentence unredacted.[6] Plaintiffs did this despite their belief that the entirety of each document falls outside the scope of the Protective Order. Plaintiffs have tried, in good faith, to find a way for their clients and the public to gain access to important information about actions taken by their Government while addressing the Government's objections. What remains in each exhibit is the bare minimum of relevant information in the document. Because this information clearly lies outside the bounds of the Protective Order, there is no justification for keeping this information hidden.

B. Keeping the unredacted information secret prejudices Plaintiffs' ability to make their case.

The fact that the unredacted information contains no Protected Information ends the relevant analysis under the Protective Order. But it is worth noting that the Government's refusal to remove the Protected Information designation has had and is continuing to have real-world negative impacts for Fairholme.

Just as keeping the unredacted information from the public makes it impossible to have well-informed democratic deliberation, *see infra* pages 8–10, the Government's illegitimate invocation of the Protective Order prevents Plaintiffs' counsel from consulting with outside experts—as well as with their own clients—about this critical information. As this Court is well-aware, the facts of this case are exceedingly complex, requiring a sophisticated understanding of financial markets, government housing policy, the tax code, congressional action, and other specialized areas of policy. But as long as the unredacted information is subject to the Protective Order, Plaintiffs' counsel are forbidden from sharing that information with scholars, professionals,

[6] In accordance with Appendix E(8)(c)(ii) of the Rules of the Court of Federal Claims, Plaintiffs have included only the unredacted pages for each exhibit in the attached appendix.

and client representatives who could lend their expertise to Plaintiffs' case. P.O. ¶ 4. It is clear enough to Plaintiffs' counsel that the unredacted information undermines the Government's narrative in this and other litigation, *see infra* pages 12–15, but it is entirely possible that those with more expertise in the relevant subject matter would have important insights as to what this information reveals, insights that might not be obvious to Plaintiffs' counsel. Indeed, counsel's *own clients* are sophisticated investors who could shed additional light on the information, but the Government's unjustified designation makes this basic communication impossible. And although the Protective Order permits the sharing of Protected Information with retained experts, P.O. ¶ 4, it would prejudice Plaintiffs if they were forced to expend resources on such experts when the unredacted information is not subject to the Protective Order in the first place. Thus, there can be no argument that keeping this information secret is costless to Plaintiffs; the Government's efforts to subject this information to the Protective Order imposes a real burden on Plaintiffs and prejudices their ability to make their case.

C. Keeping the unredacted information hidden from the public contravenes First Amendment principles.

Keeping the unredacted information from the public not only violates the terms of the Protective Order; it contravenes the First Amendment principles that underlie the public's "right of access . . . to civil trials and to their related proceedings *and records*." *New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012) (emphasis added); *see also Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) ("Though the Supreme Court originally recognized the First Amendment right of access in the context of criminal trials, the federal courts of appeals have widely agreed that it extends to civil proceedings *and associated records and documents*." (emphasis added) (citation omitted)). As the First Circuit

has said, "[F]irst [A]mendment considerations cannot be ignored in reviewing discovery protective orders." *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986). These First Amendment considerations explain the Federal Circuit's willingness to impose sanctions on parties for withholding more information from the public than necessary. *See In re Violation of Rule 28(D)*, 635 F.3d at 1357–58, 1360–61 (citing *Anderson*, 805 F.2d at 7–8). After all, parties "are not the only people who have a legitimate interest in the record compiled in a legal proceeding." *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999).

That is especially true in this case, involving as it does the public's interest in the Government's "unprecedented" actions. FHFA's Mot. to Dismiss and, in the Alternative, for Summ. J. at 10, *Fairholme Funds, Inc. v. FHFA*, No. 1:13-cv-01053-RCL (D.D.C. Jan. 17, 2014), ECF No. 28 ("FHFA MTD") (Exhibit 22, A085). Few issues have so occupied the public mind as the Government's housing policy in the wake of the 2008 financial crisis. The Government's actions at issue in this case have been the subject of congressional hearings,[7] think tank discussions,[8] policy papers,[9] and media coverage.[10] Indeed, one of the first think-tank events in the aftermath

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[7] *See, e.g.*, *Oversight of Federal Housing Finance Agency: Evaluating FHFA as Regulator and Conservator: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 113th Cong. (2013) (statement of Edward J. DeMarco, Acting Director of FHFA); *Mortgage Finance Reform: An Examination of the Obama Administration's Report to Congress: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. (2011); *The Future of Housing Finance: A Progress Update on the GSEs: Hearing Before the Subcomm. on Capital Markets, Ins., and Gov't Sponsored Enters., H. Comm. on Fin. Servs.*, 111th Cong. (2010).

[8] *See, e.g.*, *The election is over: Now what for Fannie and Freddie?*, AMERICAN ENTER. INST. (Nov. 13, 2014) ("*The election is over*"), http://goo.gl/7iDdVT; *The Future of Fannie Mae and Freddie Mac*, BROOKINGS (May 13, 2014), http://goo.gl/IMqUeQ.

[9] *See, e.g.*, Joe Gyourko, *A New Direction for Housing Policy*, NAT'L AFF., Spring 2015, at 27.

[10] *See, e.g.*, Morgenson, *supra* note 5; Jody Shenn, Margaret Cronin Fisk, and Clea Benson, *Fannie Mae, Freddie Mac Plunge After Court Ruling on Profit*, BLOOMBERGBUSINESS, Oct.

of the 2014 midterm election focused on the Government's policy toward the GSEs.[11] All public deliberation, however, has occurred in the absence of critical information that the Government—without any basis in the Protective Order—has kept secret. Given this shroud of secrecy, it is no surprise that members of Congress have raised concerns about the extent of the information the Government has withheld from the public in this case.[12] The impoverishment of the debate over these crucial questions of public policy "cannot be ignored," *Anderson*, 805 F.2d at 7, and this Court should give the public access to the unredacted information.

D. The Protective Order permits the de-designation of partially redacted information under Paragraphs 17 and 19.

The Government has suggested that, if a party wishes to de-designate information that has not been submitted as part of a filing in this Court, either the entire document must be de-designated or it must remain protected. In other words, the Government denies that the Protective Order permits Plaintiffs' proposal: the de-designation of partially redacted information pursuant to Paragraphs 17 and 19. Rather, the Government believes that Paragraph 11 is the exclusive method of de-designating partially redacted information.

There is no basis for the Government's interpretation of the Protective Order. Paragraph 11 is a standard provision of protective orders and merely creates a process to ensure that filings in this Court are made accessible to the public in redacted form. That purpose is consistent with

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1, 2014, http://goo.gl/kGmr8q.

[11] *The election is over*, *supra* note 8.

[12] Letter from Senator Charles E. Grassley, Chairman of the Senate Committee on the Judiciary, to Eric H. Holder, Jr., Attorney General (Apr. 7, 2015), *available at* http://goo.gl/1QfFWc; Letter from Senator Charles E. Grassley, Chairman of the Senate Committee on the Judiciary, to Jack Lew, Secretary of the Treasury (Apr. 7, 2015), *available at* http://goo.gl/oXu7fn.

the public's First Amendment right of access to court filings. *See In re Violation of Rule 28(D)*, 635 F.3d at 1356 ("There is a strong presumption in favor of a common law right of public access to court proceedings.").

What Paragraph 11 does *not* do is provide the *exclusive* means of de-designating partially redacted information. Nothing in Paragraph 11 purports to foreclose de-designating partially redacted information under Paragraphs 17 and 19, and nothing in the rest of the Protective Order does either. Indeed, the Protective Order repeatedly distinguishes between *information* and *documents*, and it makes clear that its purpose is to safeguard information. *See, e.g.*, P.O. ¶ 2 (stating that "Protected Information may be *contained in* . . . any document" (emphasis added)). Clearly, then, the order contemplates that information "contained in . . . any document" can be de-designated. Paragraph 19 expressly provides that a party may "question whether any particular document *or information* is Protected Information" (emphasis added); it does not put parties to the choice of either de-designating an entire document or keeping it secret. The text and purpose of the order contradict the Government's bizarre interpretation.[13]

[13] The Government has expressed concern that the unredacted information would be "misleading and confusing" to the public. Email from Gregg Schwind to Vincent Colatriano re "Fairholme – Request to "De-Designate" Redacted Versions of FHFA documents" (Apr. 2, 2015) (Exhibit 19, A062). As noted above, Plaintiffs originally requested the de-designation of the entirety of the relevant documents, but, when the Government refused, Plaintiffs proposed the unredacted information as a compromise. The Government cannot refuse to de-designate the context of the unredacted information and then complain that such information lacks context. If the Government believes that the unredacted information requires more context, Plaintiffs have no objection to de-designating more information from the relevant documents to ensure that the public has that context, and the Government is welcome to specify what additional information should be de-designated.

E. The Government made assertions in the D.D.C. *Fairholme* litigation that are undermined by the unredacted information. The D.C. Circuit and other courts should have access to the relevant facts in making their decisions.

The Supreme Court has emphasized the importance of "protect[ing] the integrity of the judicial process" and "prevent[ing] improper use of judicial machinery." *New Hampshire v. Maine*, 532 U.S. 742, 749, 750 (2001) (quotation marks omitted). Those values are implicated here. The Government made assertions in the D.D.C.'s *Fairholme* litigation that are contradicted or undermined by the unredacted information. Worse yet, the D.D.C. relied upon at least one of those inaccurate assertions in dismissing a related action. *See Perry Capital LLC v. Lew*, 2014 WL 4829559 (D.D.C. Sept. 30, 2014). The appeal from the D.D.C.'s judgment is now before the D.C. Circuit, and opening briefs in that case are due on June 30, 2015. *See supra* note 1. The plaintiffs in the *Fairholme* appeal should have access to the unredacted information when they file their opening briefs because the D.C. Circuit deserves to have all relevant facts before it when it makes its decision, an opportunity the D.D.C. never had.

The unredacted information undercuts several of the Government's assertions in the *Fairholme* D.D.C. litigation. For instance, the Government argued that the Net Worth Sweep was necessary because the GSEs otherwise would have been unable to meet their 10% dividend obligation. *See* FHFA MTD 3 (Exhibit 22, A084). When the *Fairholme* plaintiffs pointed out that the GSEs could have taken advantage of the stock certificates' payment-in-kind provision rather than continuing to pay the 10% dividend, the Government responded by claiming that there was no optional payment-in-kind provision that the GSEs could have invoked, instead characterizing the relevant provision as a "penalty" for breach. *See* Treasury Defs.' Reply in Supp. of Their Dispositive Mots. and Opp. to Pls.' Summ. J. Mots. at 49–50, *Fairholme Funds, Inc. v. FHFA*, No. 1:13-cv-01053-RCL (D.D.C. May 2, 2014), ECF No. 43 (Exhibit 23, A090). The D.D.C. agreed

with the Government's view in its dismissal order. *Perry Capital*, 2014 WL 4829559, at *3 n.7. Yet, as the unredacted portions of Mario Ugoletti's email in Exhibit 7 show, [redacted] A021; *see also* Exhibit 3, A008–09; Exhibit 16, A048. The D.C. Circuit deserves to be made aware of this important fact.

The other unredacted information is similarly relevant to the D.C. Circuit's deliberations in *Fairholme*:[14]

a) The Deferred Tax Assets (DTA): Mario Ugoletti's December 17, 2013 declaration—which the Government submitted to the D.D.C.—asserts:

> At the time of the negotiation and execution of the Third Amendment, the Conservator and the Enterprises had not yet begun to discuss whether or when the Enterprises would be able to recognize any value to their deferred tax assets. Thus, neither the Conservator nor Treasury envisioned at the time of the Third Amendment that Fannie Mae's valuation allowance on its deferred tax assets would be reversed in early 2013, resulting in a sudden and substantial increase in Fannie Mae's net worth, which was paid to Treasury in mid-2013 by virtue of the net worth dividend.

Ugoletti Decl. ¶ 20 (Exhibit 21, A080–81).

Yet, an August 2008 Fannie Mae Audit Committee presentation entitled [redacted] stated that [redacted] Exhibit 17, A053. Given the Audit Committee's statement, it implausible for the Government to maintain that FHFA and the GSEs "had not yet begun to discuss whether or when the Enterprises would be able to recognize any value to their deferred tax assets" at the time of the Net Worth Sweep, and it strains credulity that neither FHFA nor Treasury "envisioned at the time of the Third Amendment that Fannie Mae's valuation allowance on its deferred tax assets would be reversed in early 2013." Ugoletti Decl. ¶ 20. Other unredacted information likewise undermines the Government's assertions or are relevant to the DTA issue. *See* Exhibit 11, A030.

[14] The categories listed below illustrate one way in which each document is relevant. Of course, each document might be relevant to multiple issues (including issues not listed here), and the categories should not be understood as implying otherwise.

b) Treasury's control over the GSEs: In its February 26, 2014 discovery order, this Court noted the Government's refusal to acknowledge that FHFA is "the United States" for purposes of the Tucker Act. Discovery Order at 3 (Feb. 26, 2014), Doc. 32 ("The question to be answered is a fact-intense inquiry that will include consideration of whether the FHFA acted at the direct behest of the Treasury.").

But the issue of Treasury's control over FHFA and the GSEs is relevant to the D.C. Circuit's *Fairholme* appeal as well. In the D.D.C., the Government asserted, "Treasury does not exercise control over the business and affairs of the GSEs. FHFA, the conservator of the GSEs, is an independent regulator not subject to the direction or control of Treasury." Treasury's Mot. to Dismiss or, in the Alternative, for Summ. J., at 48, *Fairholme Funds, Inc. v. FHFA*, No. 1:13-cv-01053-RCL (D.D.C. Jan. 17, 2014), ECF No. 27 (Exhibit 24, A094).

That assertion is belied by Mario Ugoletti's August 2012 email quoted above, which suggests that [redacted] Exhibit 13, A038. A similar statement appears elsewhere. *See* Exhibit 1, A002.

c) The purported GSE death spiral: Throughout this and the D.D.C. *Fairholme* litigation, the Government has argued that, at the time of the Net Worth Sweep, the GSEs faced an impending death spiral: "The Enterprises were unable to meet their 10% dividend obligations without drawing more from Treasury, causing a downward spiral of repaying preexisting obligations *to* Treasury through additional draws *from* Treasury. Thus, once the capacity became fixed in 2013, the Enterprises' fixed dividend would erode the Treasury commitment." FHFA MTD 3 (Exhibit 22, A084).

[redacted]

[redacted] Exhibit 15, A046. Other documents are similarly relevant to the GSEs' financial condition around the time of the Net Worth Sweep. *See* Exhibit 9, A025; Exhibit 14, A041–44; Exhibit

18, A055.

d) The value of Treasury's commitment to the GSEs: The Government has argued that the value of Treasury's commitment to the GSEs was "incalculably large," such that it could have justified a commitment fee equivalent to what it obtained through the New Worth Sweep. FHFA MTD 67–68 (Exhibit 22, A086–87). Yet, a March 8, 2012 Freddie Mac document estimated the commitment fee [redacted] Exhibit 2, A006. A separate document provides precise estimates of the value of Treasury's commitment (which would have been the basis for calculating the commitment fee) based on four different scenarios as of September 2008. *See* Exhibit 5, A015–16. These documents undercut any argument that Treasury would have been able to charge a commitment fee equivalent to the value of the Net Worth Sweep.

e) The political nature of the Net Worth Sweep: As noted above, the Government has consistently portrayed the Net Worth Sweep as a reasonable, policy-driven response to an impending GSE death spiral. But the unredacted information implies the essentially political nature of the Net Worth Sweep. One email strongly suggests that [redacted] *See* Exhibit 10, A028. Other information is similar. *See* Exhibit 8, A023.

Each of the above categories contains several unredacted statements that contradict or undermine the Government's assertions in the *Fairholme* D.D.C. litigation, and the D.C. Circuit has a right to have such information in making its decision on appeal. *Cf. Ex parte Uppercu*, 239 U.S. 435, 440 (1915) (ordering the release of protected information to a third-party litigant because of "[t]he necessities of litigation and the requirements of justice"). This Court should de-designate the unredacted information so that it is not the only court with access to critical information relating to the Net Worth Sweep.

II. ALTERNATIVELY, THIS COURT SHOULD AUTHORIZE PLAINTIFFS TO FILE THE DOCUMENTS IN THE *FAIRHOLME* D.C. CIRCUIT LITIGATION AND IN ANY OTHER ACTION CHALLENGING THE NET WORTH SWEEP IN WHICH PLAINTIFFS PARTICIPATE EITHER AS PARTIES OR AMICI.

Should this Court conclude (wrongly, we respectfully submit) that the unredacted information is Protected Information under the terms of the Protective Order, Plaintiffs request that the Court at least permit the filing of such information under seal in the *Fairholme* D.C. Circuit

litigation, as well as in any other action challenging the Net Worth Sweep in which Plaintiffs participate either as parties or amici. This alternative course of action is specifically provided for in the Protective Order. *See* P.O. ¶ 18. The opening briefs in the *Fairholme* appeal are due on June 30, 2015. *See supra* note 1. As demonstrated above, the unredacted information is plainly relevant to the D.C. Circuit's decision and to the decisions by other courts that will decide similar challenges. These courts deserve to have access to this information when making their decisions.

Any concerns about sensitive information can be accommodated in the same way they were accommodated in this case: by filing the information under seal and placing the litigants under the terms of the Protective Order. As the Tenth Circuit said in a similar context, "[A]ny legitimate interest the defendants have in continued secrecy as against the public at large can be accommodated by placing [third-party litigants] under the restrictions on use and disclosure contained in the original protective order." *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990); *cf. Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264–66 (9th Cir. 1964) (permitting the modification of protective orders to allow third-party litigants to take advantage of discovered information).

The unredacted information should be made public, but, failing that, it should at least be made available to other courts under seal.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order (1) requiring the Government to remove the "Protected Information" designation from the unredacted information or, alternatively, (2) authorize the filing of such information under seal in the *Fairholme* D.C. Circuit litigation, as well as in any other action challenging the Net Worth

Sweep in which Plaintiffs participate either as parties or amici.

Date: June 24, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2015, I caused a copy of the foregoing to be served by the Court's electronic filing system on the following counsel:

Gregg Schwind
Commercial Litigation Branch, Civil Division
U.S. Department of Justice
Post Office Box 480
Ben Franklin Station
Washington, DC 20044

s/ Charles J. Cooper
Charles J. Cooper

APPENDIX

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REDACTED

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REDACTED

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EXHIBIT 15

REDACTED

EXHIBIT 16

REDACTED

EXHIBIT 17

REDACTED

EXHIBIT 18

REDACTED

EXHIBIT 19

From: Vince Colatriano
Sent: Thursday, March 26, 2015 5:42 PM
To: Schwind, Gregg (CIV) (Gregg.Schwind@usdoj.gov)
Cc: David Thompson; Brian Barnes
Subject: Fairholme -- Request to "De-Designate" Redacted Versions of Treasury documents

Gregg –

As you'll recall, we had earlier requested that the Government agree to "de-designate" a number of FHFA and Treasury documents that we believed did not meet the standard for treatment as Protected Information under the Protective Order. The Government agreed to de-designate a number of documents, but denied our request with respect to the remaining documents.

We have since gone back to the documents that the Government did not agree to de-designate, and have redacted them substantially. Although we continue to believe that the unredacted documents do not qualify as Protected Information, we were hoping that, as a compromise, the Government could agree to de-designate the redacted versions of the documents. We have attached a password-protected file with the redacted Treasury documents, the Bates numbers of which are identified below. Please treat this email as a notice, pursuant to Paragraph 17 of the Protective Order, of our belief that the redacted documents in the attached file should not be treated as Protected Information. We would appreciate it if you could get back to us as promptly as possible with your response to this request.

I will forward to you by separate email the password for the attached file.

As always, I'm available at your convenience to discuss this issue.

Thanks very much

Vince

UST00003234

UST00004809

UST00005747

UST00056634

UST00059944

UST00060179

Vincent J. Colatriano
Cooper & Kirk, PLLC
1523 New Hampshire Ave. NW
Washington, D.C. 20036
202-220-9656
www.cooperkirk.com

From: Vince Colatriano
Sent: Wednesday, June 03, 2015 11:07 AM
To: 'Schwind, Gregg (CIV)'
Cc: David Thompson; Howard Slugh; Pete Patterson; Hosford, Elizabeth (CIV)
Subject: RE: Highlighted DeMarco transcript

Gregg –

Since the Government doesn't expect to complete its final privilege logs until the end of this month, your email essentially reduces to the Government's decision to grant itself, at the very end of (and for at least one of our requests, after the expiration of) the five business day period specified in the Protective Order, a one-month extension of the deadline to respond to our requests. We understand that you are busy (as are we), and we would have no problem with a reasonable request for an extra day or two to consider our requests, but in light of the relatively small number of documents at issue, we believe that your declaration that you won't even review our requests for a month is not reasonable, and we urge you to reconsider. In the meantime, please consider this email our notice, pursuant to Paragraph 17 of the Protective Order, of our intent to seek a court ruling on this issue.

Thanks

Vince

Vincent J. Colatriano
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Washington, D.C. 20036
202-220-9656
www.cooperkirk.com

From: Schwind, Gregg (CIV) [mailto:Gregg.Schwind@usdoj.gov]
Sent: Tuesday, June 02, 2015 5:20 PM
To: Vince Colatriano
Cc: David Thompson; Howard Slugh; Pete Patterson; Hosford, Elizabeth (CIV)
Subject: RE: Highlighted DeMarco transcript

Vince:

There are several pending requests from plaintiffs for us to review transcripts and documents for possible removal of the "Protected Information" designation. As you know, we are in the midst of completing our final Treasury privilege log and preparing for depositions. In light of these high-priority tasks and our limited resources, we will review the pending requests to de-designate transcripts and documents when we have completed our privilege logs.

Let us know if you have any questions. Thanks.

Gregg

From: Vince Colatriano [mailto:vcolatriano@cooperkirk.com]
Sent: Tuesday, May 26, 2015 10:45 AM
To: Schwind, Gregg (CIV)
Cc: David Thompson; Howard Slugh; Pete Patterson; Hosford, Elizabeth (CIV)
Subject: [Not Virus Scanned] [Not Virus Scanned] FW: Highlighted DeMarco transcript

Gregg --

I'm writing, pursuant to Paragraph 17 of the Protective Order, to request that the Government agree to remove the Protected Information designation from the transcript of the DeMarco deposition. While we believe the transcript should be "de-designated" in its entirety, we are willing, as a compromise, to agree to the de-designation of the highlighted portions appearing in the attached password-protected document. (I will send the password by separate email).

Along similar lines, we have identified a small number of additional documents produced by the Government that we believe should be "de-designated." The list of documents is below. Although we believe that the documents should be de-designated in their entirety, we are willing, as a potential compromise, to agree to the de-designation of redacted versions of the documents. (We understand from our prior correspondence that you do not believe that the Protective Order contemplates such partial de-designations. We nevertheless provide such redacted versions in the hope that you will reconsider your position, which we believe is incorrect). We will be messengering to your attention a password-protected disc with the documents.

FHFA00028644- FHFA00028648
FHFA00047889- FHFA00047891
FHFA00083259- FHFA00083261
FHFA00102167
FHFA00103596
UST00207900- UST00207926
UST00382458
UST00500869

I would appreciate it if you could let me know the Government's position on these requests as promptly as possible.

Thanks very much

Vince

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From: Vince Colatriano
Sent: Monday, April 20, 2015 9:37 PM
To: Schwind, Gregg (CIV)
Cc: David Thompson; Brian Barnes; Hosford, Elizabeth (CIV)
Subject: RE: Fairholme -- Request to "De-Designate" Redacted Versions of FHFA documents

Gregg –

Following up on your April 2 email (below) refusing to agree to "de-designate" redacted versions of FHFA and Treasury documents that the Government had earlier refused to de-designate in full, please consider this email to constitute notice, pursuant to Paragraph 17 of the Protective Order, of our intent to seek a ruling from the Court as to whether the documents at issue (or unredacted versions of the documents) should be de-designated.

Thanks

Vince

Vincent J. Colatriano
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www.cooperkirk.com

From: Schwind, Gregg (CIV) [mailto:Gregg.Schwind@usdoj.gov]
Sent: Thursday, April 02, 2015 2:11 PM
To: Vince Colatriano
Cc: David Thompson; Brian Barnes; Hosford, Elizabeth (CIV)
Subject: RE: Fairholme -- Request to "De-Designate" Redacted Versions of FHFA documents

Vince:

We do not believe that this proposal is contemplated by the protective order, and we are concerned that the redacted documents will be misleading and confusing. Moreover, Fairholme has not offered any justification for its request, or otherwise stated why it needs the documents – in full or in part – to be de-designated. For these reasons, we are not willing to agree to de-designate the redacted FHFA and Treasury documents.

That said, we already agreed to de-designate UST00056634-642 in full. This document is part of the larger document at UST00056597-656 that was identified in my email to you dated January 26, 2015, in response to one of your previous requests.

Let us know if you have any questions.

Gregg

From: Vince Colatriano [mailto:vcolatriano@cooperkirk.com]
Sent: Thursday, March 26, 2015 5:35 PM
To: Schwind, Gregg (CIV)
Cc: David Thompson; Brian Barnes
Subject: [Not Virus Scanned] [Not Virus Scanned] Fairholme -- Request to "De-Designate" Redacted Versions of FHFA documents

Gregg –

As you'll recall, we had earlier requested that the Government agree to "de-designate" a number of FHFA and Treasury documents that we believed did not meet the standard for treatment as Protected Information under the Protective Order. The Government agreed to de-designate a number of documents, but denied our request with respect to the remaining documents.

We have since gone back to the documents that the Government did not agree to de-designate, and have redacted them substantially. Although we continue to believe that the unredacted documents do not qualify as Protected Information, we were hoping that, as a compromise, the Government could agree to de-designate the redacted versions of the documents. We have attached a password-protected file with the redacted FHFA documents, the Bates numbers of which are identified below. Please treat this email as a notice, pursuant to Paragraph 17 of the Protective Order, of our belief that the redacted documents in the attached file should not be treated as Protected Information. We would appreciate it if you could get back to us as promptly as possible with your response to this request.

I will forward to you by separate emails both the password for the attached file and another file with some redacted Treasury documents.

As always, I'm available at your convenience to discuss this issue.

Thanks very much

Vince

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FHFA00001212

FHFA00010927

FHFA00011168

FHFA00014404

FHFA00016213

FHFA00023073

FHFA00023121

FHFA00023603

FHFA00025049

FHFA00028118

FHFA00028748 and attachment

FHFA00029453

FHFA00029462

FHFA00029638

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EXHIBIT 20

UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., ET AL.,)
Plaintiffs,) Case No.
vs.) 13-465C
THE UNITED STATES OF AMERICA,)
Defendant.)

Courtroom 4
Howard T. Markey National Courts Building
717 Madison Place, N.W.
Washington, D.C.
Wednesday, July 16, 2014
2:00 p.m.
Status Conference

BEFORE: THE HONORABLE MARGARET M. SWEENEY

Elizabeth M. Farrell, CERT, Digital Transcriber

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS:

CHARLES J. COOPER, ESQ.
VINCENT J. COLATRIANO, ESQ.
BRIAN BARNES, ESQ.
DAVID THOMPSON, ESQ.
NICOLE J. MOSS, ESQ.
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ON BEHALF OF THE DEFENDANT:

KENNETH MICHAEL DINTZER, ESQ.
GREGG M. SCHWIND, ESQ.
ELIZABETH M. HOSFORD, ESQ.
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kenneth.dintzner@usdoj.gov

Our proposed definition in our proposed paragraph 2 fully satisfies the relevant principles underlying Rule 26C and fully protects any interest a producing party may have in protecting against the disclosure of information that is legitimately viewed as sensitive. We have defined protected information to include proprietary, trade secret or market-sensitive information, as well as other information that is otherwise protected from disclosure under applicable law. That standard, we would submit, is consistent with the language of the rules and the case law.

And by including the term "market-sensitive information," the proposal will protect any information whose disclosure would have the types of market distorting or economic effects that the Government has warned about in its separate pending motion for protective order regarding materials related to the conservatorships. And, in fact, we took the term "market-sensitive information" from the Government's own proposal. We had originally proposed something like competitively-sensitive information. The Government responded by proposing "market-sensitive" and we've adopted that. We think that makes sense in the context of this case.

THE COURT: But you did not agree with the word "confidential."

MR. COLATRIANO: The word "confidential" was added

very late in the game. It was back on Friday afternoon, by the Government. They had not proposed that before. I don't think we would have a problem with that word as long as it weren't meant to describe anything that's not publicly -- that hasn't publicly been released is, therefore, protected. We don't think that's the standard. In the case law, confidential, in this context, usually means something whose disclosure could cause some harm. So, the mere fact that it hasn't already been publicly released is not sufficient.

THE COURT: Yes.

MR. COLATRIANO: And, so, it's not --

THE COURT: No, I agree with you. I did -- I was having difficulty understanding, though, why Plaintiff opposed "confidential." So, that's --

MR. COLATRIANO: That was added literally at the -- by the Government at the last minute on Friday and they added it as a stand-alone category. And if what they meant was it hasn't been publicly -- if it hasn't already been publicly released, it should never be publicly released or it should have these restrictions, then we don't agree with that. But --

THE COURT: Well, I don't think that's the understood definition of confidential.

MR. COLATRIANO: And with that understanding, if it's something that (inaudible) disclosure would cause these

CERTIFICATE OF TRANSCRIBER

I, Elizabeth M. Farrell, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-titled matter.

DATE: 7/17/14 S/Elizabeth M. Farrell

ELIZABETH M. FARRELL, CERT

EXHIBIT 21

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

PERRY CAPITAL LLC, Plaintiff, v. JACOB J. LEW, *et al.*, Defendants.	Civil Action No. 13-cv-1025 (RLW)
FAIRHOLME FUNDS, INC., *et al.* Plaintiffs, v. FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Civil Action No. 13-cv-1053 (RLW)
ARROWOOD INDEMNITY COMPANY, *et al.*, Plaintiffs, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, *et al.*, Defendants.	Civil Action No. 13-cv-1439 (RLW)

DECLARATION OF MARIO UGOLETTI

I, Mario Ugoletti, hereby declare, based on personal knowledge of the facts, as follows:

1. I am Special Advisor to the Office of the Director of the Federal Housing Finance Agency ("FHFA"), a role I assumed in September 2009. As Special Advisor, my responsibilities include advising FHFA's Acting Director Edward DeMarco concerning the Senior Preferred Stock Purchase Agreements ("PSPAs"), described *infra*. Additionally, I serve as the primary liaison with Treasury concerning the PSPAs and any amendments to the PSPAs.

2. I was employed at Treasury from 1995 to 2009, serving as Director of the Office of Financial Institutions Policy from 2004-2009. In that capacity, I participated in the creation and implementation of the PSPAs.

3. FHFA is an independent federal agency with regulatory authority over the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac") (together, the "Enterprises") and the twelve Federal Home Loan Banks ("Banks"). 12 U.S.C. § 4511.

4. On September 6, 2008, FHFA's Director appointed FHFA as Conservator of the Enterprises, and on September 7, 2008 FHFA as Conservator of the Enterprises entered into two materially identical Senior Preferred Stock Purchase Agreements (together, the "PSPAs") with the United States Treasury ("Treasury")—one for Fannie Mae and one for Freddie Mac. The Amended and Restated Agreements dated September 26, 2008 and subsequent amendments are currently available at http://www.fhfa.gov/Default.aspx?Page=364.

5. The PSPAs were a last resort after it became apparent that no infusions of capital from the private sector were forthcoming to save the Enterprises. *See Oversight Hearing to Examine Recent Treasury and FHFA Actions Regarding the Housing GSEs Before the H. Comm. on Financial Services*, 110th Cong., at 5 (Sep. 25, 2008) (statement of James B. Lockhart III,

Director, Federal Housing Finance Agency), currently *available at* http://archives.financialservices.house.gov/hearing110/lockhart092508.pdf ("After substantial effort and communication with market participants, each company reported to FHFA and to Treasury that it was unable to access capital markets to bolster its capital position without Treasury financing. FHFA's and Treasury's own discussions with investment bankers and investors corroborated this conclusion."). The PSPAs provided the market with assurances that Treasury would provide a backstop to the Enterprises. Absent the commitments of Treasury, the Enterprises would have collapsed. *See id.* at 5-6 ("In the absence of access to new capital, the only alternative left to the firms was to cease new business and shed assets in a weak market. That would have been disastrous for the mortgage markets as mortgage rates would have continued to move higher and, in turn, disastrous for the Enterprises as the prices of their securities would have fallen and credit losses would have increased."); Timothy F. Geithner, Secretary, U.S. Dep't of the Treasury, Written Testimony Before the H. Comm. on Financial Services (Mar. 23, 2010), currently *available at* http://www.treasury.gov/press-center/press-releases/Pages/tg603.aspx ("In 2007, the GSEs reported combined losses of over $5 billion . . . The GSEs ultimately reported combined 2008 losses in excess of $108 billion. . . . Both companies were severely undercapitalized and would not have been able to meet their obligations without the intervention and financial support of the government."). With the PSPAs and the market assurance they provided, the Enterprises were able to remain in operation.

6. The PSPAs provided that the Enterprises would draw funds from Treasury against the Treasury commitment if the Enterprises exhausted all of their stockholder equity and had a negative net worth (defined as liabilities exceeding assets). If Enterprise liabilities exceeded assets, the provision for mandatory receivership in the Housing and Economic Recovery Act of 2008 ("HERA") would be triggered. The PSPAs were designed so that the Enterprises could

draw funds from Treasury in amounts necessary to cure their negative net worth and bring their capital to zero. By the end of 2008, all shareholder equity had been exhausted and the Enterprises drew on the Treasury commitment to avoid mandatory receivership. *See* FHFA Data as of November 14, 2013 on Treasury and Federal Reserve Purchase Programs for GSE & Mortgage-Related Securities at 2, currently *available at* http://www.fhfa.gov/webfiles/25784/TSYSupport%202013-11-13.pdf (Freddie Mac draw of $13.8 billion for third quarter 2008; Fannie Mae draw of $15.2 billion for fourth quarter 2008).

7. The PSPAs gave Treasury an expansive bundle of rights and entitlements in exchange for the lifeline that Treasury provided, without which the Enterprises would have gone out of business. For example, Treasury received warrants to acquire 79.9% of the common stock of the Enterprises for a nominal payment. In addition, under the PSPAs, Treasury obtained Senior Preferred Stock that is senior in priority over all other series of preferred stock. The Treasury Senior Preferred Stock in each Enterprise had an initial face value of $1 billion, which increases by any amount that the Enterprises draw from Treasury under the Treasury Commitment. Further, the Treasury Senior Preferred Stock has a liquidation preference so that Treasury has priority over any other preferred or common shareholders in the event of a liquidation — that is, Treasury is entitled to the value of its Senior Preferred Stock (face value plus any amounts drawn from Treasury by the Enterprises, without reduction for dividends or other amounts that the Enterprises might pay to Treasury) before any other shareholders — preferred or common — are paid anything in liquidation.

8. The Treasury Senior Preferred Stock also included payment obligations from the Enterprises to Treasury, commensurate with the enormous risks and financial commitments that Treasury assumed. The Enterprises were obligated to pay a 10% annual dividend together with a

Periodic Commitment Fee ("PCF") that was "intended to fully compensate [Treasury] for the support provided by the ongoing Commitment." Amended and Restated Agreements, § 3.2(b) (Sept. 26, 2008). The PSPAs provided that the amount of the PCF to be imposed beginning January 2010 "shall be determined with reference to the market value of the Commitment as then in effect." *Id.*

9. The PSPA gave Treasury the right, in its sole discretion, to waive the PCF for a year at a time "based on adverse conditions in the United States mortgage market." Treasury exercised this right to waive the PCF for 2010 and 2011, years in which the Enterprises had insufficient funds to pay even the 10% dividend, let alone an additional PCF, stating that "the imposition of the PCF at this time would not fulfill its intended purpose of generating increased compensation to the American taxpayer." Periodic Commitment Fee Waiver Letters from Dept. of Treasury to FHFA (Dec. 29, 2010; Mar. 31, 2011; Jun. 30, 2011; Sept. 30, 2011; Dec. 21, 2011). It was clear by this time that, given the risks of the Enterprises and the enormity of the Treasury commitment, the value of the PCF was incalculably large.

10. Under the Second Amendment to the PSPAs (executed December 24, 2009), Treasury was obligated to commit any amount of funds necessary to maintain the Enterprises' positive net worth through December 31, 2012, subject to an initial cap of $200 billion for each of the Enterprises plus the amount of draws between January 1, 2010 and December 31, 2012. As of January 1, 2013, however, Treasury's financial commitment cap became fixed: the amount

remaining available to Fannie Mae under the cap was $117.6 billion, and the amount remaining available to Freddie Mac under the cap was $140.5 billion.[1]

11. By late 2011, analysts and key stakeholders, including institutional and Asian investors in the Enterprises' debt and mortgage backed securities (MBS), began expressing concerns about the adequacy of Treasury's financial commitment to the Enterprises after January 1, 2013, when the cap on Treasury's funding commitment would become fixed.

12. The principal driver of these concerns about the adequacy of Treasury's capital commitment were questions about the Enterprises' ability to pay the 10% annual dividend to Treasury without having to draw additional funds from Treasury, thereby eating away at the amount remaining available under the capped Treasury commitment. From the outset of the PSPAs, the Enterprises could not at times generate enough income to make these dividend payments.

13. The Enterprises drew funds from Treasury to pay the required 10% dividend back to Treasury. Of the $188 billion the Enterprises drew from Treasury from the outset of the PSPAs (September 2008) to the execution of the Third Amendment (August 2012), $45.7 billion was drawn solely to pay the 10% annual dividend back to Treasury. *See* FHFA, Data as of November 14, 2013 on Treasury and Federal Reserve Purchase Programs for GSE and

---

[1] Under the Second Amendment to the PSPAs, Treasury committed to provide each Enterprise the greater of: (i) $200 billion or (ii) $200 billion plus the Enterprise's cumulative draws for 2010, 2011, and 2012, less the Enterprise's positive net worth, if any, on December 31, 2012. Second Amendment to Amended and Restated Senior Preferred Stock Purchase Agreement, at 3.

For Fannie Mae, alternative (ii) provided the greater amount: $200 billion + $40.9 billion (cumulative draws for 2010-2012) – $7.2 billion (positive net worth on December 31, 2012) – $116.1 billion (total draws from 2008-2012) = $117.6 billion.

For Freddie Mac, alternative (ii) provided the greater amount: $200 billion + $20.6 billion (cumulative draws for 2010-2012) – $8.8 billion (positive net worth on December 31, 2012) – $71.3 (total draws from 2008-2012) = $140.5 billion.

Mortgage-Related Securities at 2, 3. Additionally, each time the Enterprises drew funds to pay the 10% dividend, the total amount of the Treasury draw increased, in turn increasing the amount of the next 10% dividend payment.

14. By mid-2012, the amount of the annual 10% dividend had grown so large—$11.7 billion for Fannie Mae and $7.2 billion for Freddie Mac—that it appeared unlikely that either of the Enterprises would be able to meet that amount consistently without drawing additional funds from Treasury. *See* Freddie Mac, Quarterly Report (Form 10-Q) at 10, 85 (May 3, 2012), currently *available at* http://www.freddiemac.com/investors/sec_filings/index.html ("Over time, our dividend obligation to Treasury will increasingly drive future draws. Although we may experience period-to-period variability in earnings and comprehensive income, it is unlikely that we will generate net income or comprehensive income in excess of our annual dividends payable to Treasury over the long term."); Freddie Mac, Quarterly Report (Form 10-Q) at 10, 92 (Aug. 7, 2012), currently *available at* http://www.freddiemac.com/investors/sec_filings/index.html (same); Fannie Mae, Quarterly Report (Form 10-Q) at 11, 81 (May 9, 2012), currently *available at* http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2012/q12012.pdf ("Although we may experience period-to-period volatility in earnings and comprehensive income, we do not expect to generate net income or comprehensive income in excess of our annual dividend obligation to Treasury over the long term."); Fannie Mae, Quarterly Report (Form 10-Q) at 12-13, 83 (Aug. 8, 2012), currently *available at* http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2012/q22012.pdf (same). Because the cap on the Treasury commitment became fixed on January 1, 2013, each dollar drawn from Treasury merely to repay the Treasury dividend was one less dollar available

to the Enterprises to draw in the event the Enterprise suffered losses due, for example, to a decline in the housing market or broader economic turbulence.

15. Market forecasts—which FHFA monitored—predicted that the Enterprises' ongoing payment of the 10% dividend would completely exhaust Treasury's funding commitment within ten years, leading to potential downgrades in the Enterprises' credit ratings. Moody's rating service opined that the 10% dividend payments would "eliminate Fannie Mae's contingent capital by 2019 and Freddie Mac's by 2022 . . . [even] assum[ing] that the GSEs are able to fully offset credit losses, which we believe is unlikely." Moody's, Sector Comment, "Plan To Raise Fannie Mae and Freddie Mac Guarantee Fees Raises Question of Support," at 2 (Sept. 26, 2011). Moody's stated that this "would be credit negative and prompt a review of [the Enterprises'] Aaa ratings." *Id.* Likewise, Deutsche Bank observed that "diminishing Treasury support raises the risk that the agencies one day might face challenges in covering MBS losses" and that such a risk "becomes greater in a housing market catastrophe, such as the one that started in the US after 2006." Deutsche Bank, *The Path of US Support for Fannie Mae, Freddie Mac*, THE OUTLOOK, Mar. 14, 2012, at 6.

16. FHFA shared the concerns that the 10% annual dividend to Treasury would reduce the amount of the Treasury commitment starting in 2013. Treasury also generated and provided certain forecasts to FHFA that were similar to those prepared by market participants.

17. These concerns about the adequacy of Treasury's financial commitment undermined the purpose of the PSPAs to express financial support to holders of Enterprise debt (*i.e.*, bondholders) and mortgage backed securities. *See* FHFA Mortgage Market Note (Dec. 5, 2008), currently *available at* http://www.fhfa.gov/webfiles/1241/mmnote084.pdf. The strength of that support depends upon the Enterprises having a sufficiently large pool of available funds

from Treasury that will permit the Enterprises to continue to operate under adverse market conditions that may arise in the coming years.

18. To resolve these concerns, FHFA and Treasury agreed on the provisions that were incorporated into the Third Amendment, executed on August 17, 2012. The Third Amendment (1) eliminated the 10% annual dividend, (2) added a quarterly variable dividend in the amount (if any) of each Enterprises' positive net worth (above net worth values that were specified in the Third Amendment), and (3) suspended the PCF for as long as the quarterly variable dividend is in effect. The new dividend structure eliminated the risk that borrowings to make fixed dividend payments would lead to the exhaustion of the Treasury commitment.

19. These changes in structure did not change the underlying economics of the PSPAs. It was my belief at this time, given the size and importance of the Treasury commitment, that through the liquidation preference, fixed dividends, and the market value of the PCF, Treasury would receive as much from the Enterprises under the Second Amendment as it would under the Third Amendment. Thus, the intention of the Third Amendment was not to increase compensation to Treasury — the Amendment would not do that — but to protect the Enterprises from the erosion of the Treasury commitment that was threatened by the fixed dividend. The Third Amendment was therefore consistent with the intent of the original PSPAs to (1) fully compensate Treasury for the value of its financial support, without which the Enterprises would have been forced into receivership, and (2) protect the Enterprises and the national housing market.

20. At the time of the negotiation and execution of the Third Amendment, the Conservator and the Enterprises had not yet begun to discuss whether or when the Enterprises would be able to recognize any value to their deferred tax assets. Thus, neither the Conservator

nor Treasury envisioned at the time of the Third Amendment that Fannie Mae's valuation allowance on its deferred tax assets would be reversed in early 2013, resulting in a sudden and substantial increase in Fannie Mae's net worth, which was paid to Treasury in mid-2013 by virtue of the net worth dividend.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 17 day of DECEMBER 2013 at Washington, D.C.

By: _____
MARIO UGOLETTI

Special Advisor to the Office of the Director,
Federal Housing Finance Agency

EXHIBIT 22

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PERRY CAPITAL LLC, Plaintiff, v. JACOB J. LEW, *et al.*, Defendants.	Civil Action No. 13-cv-1025 (RLW)
FAIRHOLME FUNDS, INC., *et al.*, Plaintiffs, v. FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Civil Action No. 13-cv-1053 (RLW)
ARROWOOD INDEMNITY COMPANY, *et al.*, Plaintiffs, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, *et al.*, Defendants.	Civil Action No. 13-cv-1439 (RLW)
In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations _____ This document relates to: ALL CASES	Misc. Action No. 13-mc-01288 (RLW)

MOTION TO DISMISS ALL CLAIMS BY DEFENDANTS FEDERAL HOUSING FINANCE AGENCY AS CONSERVATOR FOR FANNIE MAE AND FREDDIE MAC, FHFA DIRECTOR MELVIN L. WATT, FANNIE MAE, AND FREDDIE MAC AND, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' ARBITRARY AND CAPRICIOUS CLAIMS BY DEFENDANTS FEDERAL HOUSING FINANCE AGENCY AS CONSERVATOR FOR FANNIE MAE AND FREDDIE MAC, AND FHFA DIRECTOR MELVIN L. WATT

The importance to the national economy of the massive, complex, and ongoing financial commitments from Treasury to the Enterprises cannot be overstated. The governing principle of the contractual framework between FHFA, as Conservator on behalf of the Enterprises, and Treasury was that whenever the Enterprises' net worth fell below zero, Treasury would infuse sufficient capital to eliminate the deficit. The Enterprises were obliged to pay Treasury a 10% dividend on a liquidation preference in amounts tied to the Treasury capital infusions. In addition, the Enterprises committed to pay Treasury Periodic Commitment Fees in any amounts necessary to fully compensate federal taxpayers for the "market value" of the continuing commitment. Subsequent to the execution of the PSPAs, Congress highlighted the critical importance of the Periodic Commitment Fees by enacting special legislation mandating that the Periodic Commitment Fees would be used exclusively for the purpose of reducing the national debt.

At the outset, the PSPAs capped the Treasury commitment at $100 billion per Enterprise. In the First Amended PSPAs, the cap was doubled to $200 billion per Enterprise, and in the Second Amended PSPAs, the method for calculating the cap was changed, resulting in a further increase to approximately $234 billion for Fannie Mae and $212 billion for Freddie Mac. But as events unfolded, there was concern that even this massive commitment of federal tax dollars might not suffice. The Enterprises were unable to meet their 10% dividend obligations without drawing more from Treasury, causing a downward spiral of repaying preexisting obligations *to* Treasury through additional draws *from* Treasury. Thus, once the capacity became fixed in 2013, the Enterprises' fixed dividend would erode the Treasury commitment. The very real possibility that the Enterprises might exhaust the Treasury commitment rattled the confidence of

- "preserve and conserve the assets and property of the [Enterprises]," *id.* § 4617(b)(2)(B)(iv);

- "take over the assets of and operate the [Enterprises] with all the powers of the shareholders, the directors, and the officers," *id.* § 4617(b)(2)(B)(i);

- "transfer or sell any asset or liability of the [Enterprises] . . . without any approval, assignment, or consent with respect to such transfer or sale," *id*. § 4617(b)(2)(G); and

- "take any [authorized action], which the Agency determines is in the best interests of the [Enterprises] or the Agency," *id.* § 4617(b)(2)(J)(ii).

Reinforcing and facilitating the exercise of the Conservator's plenary operational authority, Congress insulated the Conservator's actions from judicial review. Under 12 U.S.C. § 4617(f), "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator."

III. The PSPAs Are Structured to Provide Unprecedented Financial Support in Consideration for Senior Preferred Rights That Protect Taxpayers

A. Treasury Agrees to Provide Unprecedented Support to the Enterprises Through the PSPAs

In connection with the conservatorship appointments, Treasury and FHFA—expressly in its capacity as Conservator of the Enterprises—entered into two Senior Preferred Stock Purchase Agreements (together, the "PSPAs"), one for each Enterprise.[5] Treasury agreed to infuse billions of taxpayer dollars into the Enterprises through the PSPAs to provide the capital needed for the Enterprises to remain in operation and avoid mandatory receivership and liquidation. FHFA0128-0155 (Fannie Mae and Freddie Mac's Senior Preferred Stock Purchase Agreements with Treasury (September 26, 2008) ("PSPAs")). This lifeline of unprecedented federal taxpayer

[5] HERA specifically amended the statutory charters of the Enterprises to grant Treasury the authority to enter into such transactions for the purchase of securities issued by the Enterprises, so long as Treasury and the Enterprises reached a "mutual agreement" for such a purchase. *See* 12 U.S.C. § 1719(g)(1)(A) (Fannie Mae); *id.* § 1455(l)(1)(A) (Freddie Mac).

forecasters were opining that Treasury funds would run out prematurely cast a growing shadow over the safety and stability of investments in Enterprise bonds and MBS.

Fourth, FHFA considered what—if any—impact a net worth dividend would have on the amount of money the Enterprises would pay to Treasury. FHFA0006-0008 (Decl. ¶¶ 12-14, 16). The Enterprises announced publicly, the week before the parties executed the Third Amendment, that it was "unlikely that we will generate net income or comprehensive income in excess of our annual [10%] dividends payable to Treasury over the long term." FHFA0007-0008 (Decl. ¶ 14); *see also* FHFA3598 (Freddie Mac, Form 10-Q Q2 (Aug. 7, 2012)); FHFA3857-3858 (Fannie Mae, Form 10-Q Q2 (Aug. 8, 2012)); FHFA4026 (*Fannie Mae Posts Profit as Home Prices Rise*, Wall St. J. (Aug. 8, 2012)); FHFA2407-2422 (FHFA "Projections of the Enterprises' Financial Performance" (Oct. 27, 2011)). Additionally, FHFA considered Treasury's forecasts and analyses concerning the net difference between the 10% dividend and a quarterly net worth dividend. FHFA0008 (Decl. ¶ 16); AR3833-3862. Treasury had projected that "there should be no material difference in the net cash returned to taxpayers (i.e., the difference between the draws taken and dividends received) as would be expected with the fixed ten percent dividend payment." AR3836. Indeed, Treasury projected that "[t]he net cash returned to taxpayers post the dividend modification is materially equivalent under the proposal as with the 10 percent fixed dividend. The aggregate net cash remains materially the same." AR3861. In sum, forecasts indicated that the Enterprises were not likely to transfer any more money to Treasury under a net worth dividend than a 10% dividend.

Fifth, FHFA considered the fact that, absent the Third Amendment, the Enterprises still would be liable to pay Treasury the Periodic Commitment Fee, on top of the ongoing 10% dividend payments. The original PSPAs obligated the Enterprises to pay this fee, the amount of

which was to be negotiated by FHFA and Treasury and "determined with reference to the market value of the [Treasury] Commitment as then in effect." FHFA0133; 0147 (PSPAs § 3.2(b)). The PSPAs provided that the Periodic Commitment Fee was "intended to fully compensate [Treasury] for the support provided by the ongoing Commitment." *Id.* Treasury waived the fee from 2010 to 2012 in light of the fact that, during that time period, the Enterprises generally had insufficient funds to pay even the 10% dividend, let alone an additional fee, and thus "imposition of the [Periodic Commitment Fee] . . . would not fulfill its intended purpose of generating increased compensation to the American taxpayer." FHFA1400; 2192; 2392; 2406; 2665 (Letters from Treasury to FHFA (Dec. 29, 2010; Mar. 31, 2011; Jun. 30, 2011; Sept. 30, 2011; Dec. 21, 2011)). However, Treasury always reserved its right to impose the Periodic Commitment Fee going forward, consistently reiterating that Treasury "remains committed to protecting taxpayers and ***ensuring that future positive earnings of the Enterprises are returned to taxpayers*** as compensation for their investment." *Id.* (emphasis added). FHFA believed that, in light of the ongoing risks faced by the Enterprises and the enormity of the Treasury commitment, the value of the Periodic Commitment Fee was incalculably large. FHFA0005 (Decl. ¶ 9).

Accordingly, FHFA acted rationally and reasonably because the Third Amendment—which replaced the 10% dividend with a net worth dividend and suspended the Periodic Commitment Fee—was a reasonable exchange. FHFA0009 (Decl. ¶ 19). That is, through the Initial Commitment Fee (initial liquidation preference and warrants), the senior liquidation preference, the Periodic Commitment Fee, and the fixed 10% dividends, it appeared likely at the time that Treasury would receive as much from the Enterprises under the Second Amendment as it would under the Third Amendment.

EXHIBIT 23

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PERRY CAPITAL LLC, Plaintiff, v. **JACOB J. LEW**, in his official capacity as Secretary of the Treasury, *et al.*, Defendants.	Case No. 1:13-cv-1025-RCL
FAIRHOLME FUNDS, INC., *et al.*, Plaintiffs, v. **FEDERAL HOUSING FINANCE AGENCY**, *et al.*, Defendants.	Case No. 1:13-cv-1053-RCL
ARROWOOD INDEMNITY COMPANY, *et al.*, Plaintiffs, v. **FEDERAL NATIONAL MORTGAGE ASSOCIATION**, *et al.*, Defendants.	Case No. 1:13-cv-01439-RCL
In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations This document relates to: ALL CASES	Misc. Action No. 1:13-mc-1288-RCL

TREASURY DEFENDANTS' REPLY IN SUPPORT OF THEIR DISPOSITIVE MOTIONS AND OPPOSITION TO PLAINTIFFS' SUMMARY JUDGMENT MOTIONS

threatened to lead to the exhaustion of the funding capacity available to the GSEs under the PSPAs. The Third Amendment addressed this danger by ensuring that the GSEs would draw on their funding capacity only to cover their net worth deficits, not to pay billions of dollars in dividends to Treasury.[21] The plaintiffs are unable to dispute that substantial evidence in the record supports this determination, and so argue that Treasury (of FHFA) should instead have adopted an alternative solution to address the circularity problem.

The plaintiffs assert, in particular, that FHFA should have foregone the annual cash dividend to Treasury, thereby incurring the penalty of a twelve-percent-per-year increase in the liquidation preference on Treasury's preferred stock. Perry Br. 66-67; *see also* Fairholme Br. 4-5. The plaintiffs ignore the nature of the penalty provision. *See* Fannie Mae Preferred Stock Certificate § 2(c) (AR 33); Freddie Mac Preferred Stock Certificate § 2(c) (AR 67-68) (addition to liquidation preference is incurred when "the Company shall have for any reason *failed* to pay dividends in cash in a timely manner *as required* by this Certificate") (emphasis added). The penalty rate applies "immediately following such *failure*," *id.* (emphasis added), until the GSE pays in cash all of the accumulated accrued dividends. It is, therefore, no answer for the plaintiffs to assert that FHFA should have incurred these penalties under the PSPAs. The purpose of the Third Amendment, after all, was to bolster market confidence in the long-term solvency of the GSEs, since market observers had already written publicly about their concerns on that score. *See* Action Memorandum for Secretary Geithner at 3 (Aug. 15, 2012) (AR 4332)

[21] Fairholme, in particular, betrays its misunderstanding of the Third Amendment when it asserts that the GSEs "are today just one unprofitable quarter away from insolvency." Fairholme Br. 7. The point of the Third Amendment is that the funding capacity from Treasury will be available to cover all of the GSEs' net losses, and that the funding capacity will no longer need to be used for any other purpose. The Third Amendment thus protects the GSEs from the mandatory receivership that would follow upon the GSEs' experiencing a net worth deficit (*i.e.*, insolvency) after their funding capacity is exhausted.

(noting need to reassure investors who were concerned about long-term viability of the GSEs). At the time of the Third Amendment, neither GSE expected to be able to pay even the *ten-percent* dividend to Treasury, on a consistent basis, solely out of their net income. Fannie Mae Second Quarter 2012 Form 10-Q at 12 (Aug. 8, 2012) (AR 3919); Freddie Mac Second Quarter Form 10-Q at 10 (Aug. 8, 2012) (AR 4096). There would have been no reason for the market to expect, then, that the GSEs would have been able to ever fully pay off the accrued *twelve-percent* dividend, if FHFA had incurred that penalty. In sum, it defies credulity to posit that investors in the GSEs' debt and mortgage-backed securities would have reacted positively if FHFA had used the desperate measure of an open breach of its payment obligation to Treasury.

The plaintiffs also suggest that Treasury could have foregone some of its claim to payment under the PSPAs, by amending the PSPAs either to limit the dividends to which Treasury was entitled, or to permit the GSEs to pay down Treasury's liquidation preference. Perry Br. 80. But "no officer or agent of the Government has the authority to waive contractual rights that have accrued to the [United States] or to modify existing contracts to the detriment of the Government without adequate legal consideration or a compensating benefit flowing to the Government." *Union Nat'l Bank of Chicago v. Weaver*, 604 F.2d 543, 545 (7th Cir. 1979). When it committed in September 2008 to provide unprecedented sums of money to the GSEs – amounting to $189 billion to date – Treasury did so in exchange for certain rights, including the right to receive a dividend, the right to commitment fees, and protection for its liquidation preference so long as its commitment remained in effect. Treasury made this commitment to the GSEs on the premise that these terms would protect the taxpayer's investment in the GSEs. *See* 12 U.S.C. § 1719(g)(1)(B) (HERA authority is designed to "protect the taxpayer"). Treasury in no way acted arbitrarily by declining to exercise a power that it did not have to forego its right to

EXHIBIT 24

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAIRHOLME FUNDS, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:13-cv-1053-RLW
	)	
FEDERAL HOUSING FINANCE AGENCY, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

U.S. DEPARTMENT OF THE TREASURY'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendant, the Department of the Treasury, hereby moves to dismiss pursuant to Fed. R. Civ. P. 12, or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56. The reasons for this motion are set forth in the attached memorandum and the administrative record filed with the Court.

Dated: January 17, 2014

Respectfully submitted,

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§ 5 (AR 70) ("Except as set forth in this Certificate or otherwise required by law, the shares of the Senior Preferred Stock shall not have any voting powers, either general or special.").[17] Nor do Treasury's warrants to purchase common stock confer any voting rights. Moreover, even if Treasury did possess voting rights, it could not exercise them during the period of conservatorship; by statute, FHFA acceded to "all rights, titles, powers, and privileges of . . . any stockholder . . . of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i).

Further, Treasury does not exercise control over the business and affairs of the GSEs. FHFA, the conservator of the GSEs, is an independent regulator not subject to the direction or control of Treasury. By statute, FHFA, "when acting as conservator . . . shall not be subject to the direction or supervision of any other agency of the United States." *Id.* § 4617(a)(7). The complaints, glossing over the independence of FHFA, claim that Treasury exercises actual control over the GSEs because (1) Treasury is their sole source of capital support during the conservatorship, and (2) Treasury must approve new debt and equity offerings by the GSEs.[18] Perry Compl. ¶ 76; Fairholme Compl. ¶ 118; Arrowood Compl. ¶ 116; Class Action Compl. ¶ 177. Nowhere in their complaints do the plaintiffs elucidate how either point satisfies the standard for "actual control." The PSPAs are enforceable contractual agreements. The fact that Treasury has made a binding commitment to provide funds to the GSEs is not a mechanism for controlling those companies.

[17] The only voting power set forth in the Stock Certificate appears in Section 10(g), which states that the GSEs can amend the Certificate with the consent of the holders of Senior Preferred Stock. Fannie Mae Senior Preferred Stock Certificate § 10(g) (AR 38-39); Freddie Mac Senior Preferred Stock Certificate § 10(g) (AR 72-73).

[18] Treasury had the ability to approve new debt offerings by the GSEs under their charter acts, even prior to HERA. *See* 12 U.S.C. §§ 1455(j), 1719(b).