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 UNREDACTED INFORMATION IN DOCUMENTS PRODUCED BY FREDDIE MAC

Of counsel:
Vincent J. Colatriano
David H. Thompson
Peter A. Patterson
Brian W. Barnes
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)

Charles J. Cooper
Counsel of Record
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)
ccooper@cooperkirk.com

June 26, 2015

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Cases **Page**

Legislative Materials

Other

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 Freddie Mac to remove the "Protected Information" designation it has affixed to the unredacted information in the attached Exhibit 1 (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[2]

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 coun-

[2] Plaintiffs initially planned to file a single motion to address de-designation of Fannie Mae, Freddie Mac, Deloitte, and PwC documents, but because of concerns raised by the Government about the permissibility of this approach under the Protective Order, and because of difficulties in obtaining the consent of the non-parties that would have allowed a unified motion to be filed in a timely manner, Plaintiffs have had to file four separate, very similar motions. The Statement of the Case, as well as Parts I.B–D and Part II, are nearly identical across all four motions, with only the entity's name and related information changed.

sel notified Freddie Mac that it believed Exhibit 1 did not contain Protected Information as defined in Paragraph 2 and requested that Freddie Mac de-designate this document. Fairholme's counsel also proposed, as a compromise, that Freddie Mac de-designate the unredacted information, which consists of a single page and two lines of substantive text. *See* Emails from Vincent Colatriano, Counsel for Plaintiffs, to Counsel (Exhibit 2). Freddie Mac refused to de-designate either the redacted or unredacted version of the document at issue. *Id.* Fairholme's counsel then informed Freddie Mac that Plaintiffs intended to seek a resolution of this issue with this Court. *Id.*

ARGUMENT

I. FREDDIE MAC 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 Freddie Mac has not suggested that the unredacted information qualifies for protection under the Protective Order. Rather, it has generally argued only that the Protective Order does not permit the de-designation of redacted documents, which is clearly wrong. *See infra* pages 9–10.

It is not difficult to see why Freddie Mac 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 Freddie Mac.

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 3, A014–15). 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]

Freddie Mac has offered no reason why the unredacted information—which, again, consists of only a single page and two lines of substantive text—meets this standard for protection, and there is none. To be sure, the information is found in an internal document that Freddie Mac would apparently rather not have made public, but that alone does not make it Protected Information. If Freddie Mac 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. Freddie Mac 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. The unredacted information relates to Freddie Mac's understanding of the political nature of the Net Worth Sweep. *See infra* pages 10–11. Clearly, this does not bear on current market conditions. The unredacted information is relevant to a *past* event rather than to *present* economic circumstances,[4] but, as importantly, the information undercuts a key claim

[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 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).

[4] *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?").

made by the Government in this and related litigation. *See infra* pages 10–11. That is, perhaps, the true reason why Freddie Mac 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 Freddie Mac's concerns about the release of sensitive information. This Court need only glance at Exhibit 1 to see that Plaintiffs have redacted virtually all information in the document.[5] Plaintiffs did this despite their belief that the entirety of Exhibit 1 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 Freddie Mac's objections. What remains in Exhibit 1 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 Freddie Mac'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 7–9, Freddie Mac's refusal to de-desig-

[5] 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.

nate the unredacted information 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, 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 10–11, 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 Freddie Mac'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; Freddie Mac'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 4, A020). 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,[6] think tank discussions,[7] policy papers,[8] and media coverage.[9] Indeed, one of the first think-tank events in the aftermath of the 2014 midterm election focused on the Government's policy toward the GSEs.[10] All public deliberation, however, has occurred in the absence of critical information Freddie Mac—without any basis in the Protective Order—has kept secret. 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.

Freddie Mac 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, Freddie Mac denies that the Protective Order permits Plaintiffs' proposal: the de-designation of partially redacted information pursuant to Paragraphs

---

[6] *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).

[7] *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.

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

[9] *See, e.g.*, Morgenson, *supra* note 4; Jody Shenn, Margaret Cronin Fisk, and Clea Benson, *Fannie Mae, Freddie Mac Plunge After Court Ruling on Profit*, BLOOMBERGBUSINESS, Oct. 1, 2014, http://goo.gl/kGmr8q.

[10] *The election is over*, *supra* note 7.

17 and 19. Rather, Freddie Mac apparently believes that Paragraph 11 is the exclusive method of de-designating partially redacted information.

There is no basis for Freddie Mac'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 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 Freddie Mac's interpretation.

E. The Government's assertion in the D.D.C. *Fairholme* litigation that the Net Worth Sweep was a policy-driven action is 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. In the D.D.C.'s *Fairholme* litigation, the Government consistently portrayed the Net Worth Sweep as a reasonable, policy-driven response to an impending GSE death spiral. *See* FHFA MTD 3 (Exhibit 4, A019). [redacted] On the very day that Treasury announced the Third Amendment, [redacted] observed in an email with the subject line "Treasury Announcement," [redacted] Exhibit 1, A002. This statement directly undermines the Government's narrative about the rationale for the Net Worth Sweep in the *Fairholme* litigation, and the D.C. Circuit has a right to have such information in making its decision. *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 UNREDACTED INFORMATION 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 Freddie Mac 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 26, 2015

Respectfully submitted,

s/ Charles J. Cooper
Charles J. Cooper
Counsel of Record
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)
ccooper@cooperkirk.com

Of counsel:
Vincent J. Colatriano
David H. Thompson
Peter A. Patterson
Brian W. Barnes
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 26th day of June, 2015, via the Court's Electronic Case Filing system, and upon counsel listed below by electronic mail:

Michael Ciatti
Counsel for Freddie Mac
King & Spalding LLP
1700 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
mciatti@kslaw.com

s/ Charles J. Cooper
Charles J. Cooper

APPENDIX

APPENDIX TABLE OF CONTENTS

EXHIBIT 1

REDACTED

EXHIBIT 2

From: Ciatti, Michael [mailto:MCiatti@KSLAW.com]
Sent: Wednesday, April 08, 2015 10:00 AM
To: Vince Colatriano; 'zhudson@bancroftpllc.com'
Subject: Re: Fairholme -- De-Designation of Redacted Documents

Vince,

Thanks for your email. I have caught up with Zac and can confirm that our position regarding your request apply to each of our client's respective auditors (Deloitte and PwC). And we're happy to have a call to discuss your request. Zac and I can talk tomorrow at 330. Let us know if that works for you. If it does, will you circulate a conference call number?

Thanks a lot.

Mike

From: Vince Colatriano [mailto:vcolatriano@cooperkirk.com]
Sent: Tuesday, April 07, 2015 06:26 PM Eastern Standard Time
To: Ciatti, Michael; Zac Hudson <zhudson@bancroftpllc.com>
Subject: Fairholme -- De-Designation of Redacted Documents

Mike and Zac –

I am in receipt of your respective emails declining to agree to our request that you "de-designate redacted versions of documents that you had earlier declined to "de-designate in full. I would appreciate it if you could clarify whether your positions on this issue also extends to our similar requests to PwC (in the case of Freddie) and Deloitte (in the case of Fannie).

In addition, 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.

Of course, while we reserve our rights to seek a Court ruling on this issue, we would prefer to continue to explore whether we can reach an amicable resolution. To that end, I was hoping you both might be available on Wednesday or Thursday for a quick call (or if necessary, separate calls) to discuss this issue.

Thanks

Vince

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

From: Ciatti, Michael [mailto:MCiatti@KSLAW.com]
Sent: Tuesday, April 21, 2015 10:48 AM
To: Vince Colatriano
Subject: RE: Fairholme -- Redactions

Vince,

Thanks for the email. As promised, I followed up with Freddie Mac after our call to discuss your client's position on the proposed redactions to the Freddie Mac and PwC documents that are Protected Information. Although we appreciate the discussion, it does not change our view that the redaction process you propose is not envisioned by the Protective Order. As we discussed, if there is a filing that contains Freddie Mac's Protected Information we will, of course, consider whether redaction is appropriate.

Thanks a lot.

Mike

From: Vince Colatriano [mailto:vcolatriano@cooperkirk.com]
Sent: Monday, April 20, 2015 4:07 PM
To: Ciatti, Michael
Subject: Fairholme -- Redactions

Mike –

Good afternoon. Can you let me know where things stand in your reconsideration of our request to "de-designate" redacted versions of Freddie/PwC documents?

Thanks

Vince

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

sender immediately, delete the e-mail from your computer and do not copy or disclose it to anyone else. If you are not an existing client of C&K, do not construe anything in this e-mail to make you a client unless it contains a specific statement to that effect and do not disclose anything to C&K in reply that you expect to be held in confidence. If you properly received this e-mail as a client, co-counsel or retained expert of C&K, you should maintain its contents in confidence in order to preserve any attorney-client or work product privilege that may be available to protect confidentiality.

From: Ciatti, Michael [mailto:MCiatti@KSLAW.com]
Sent: Friday, April 03, 2015 1:55 PM
To: Vince Colatriano
Cc: David Thompson; Brian Barnes
Subject: RE: Fairholme -- Request to "De-Designate" Redacted Versions of Freddie documents

Vince,

Thanks for your email. We are a bit confused by your requests to us and PwC to redact documents designated as Protected Information. The protective order envisions redacting documents designated as Protected Information in order to place them in the public record, but we are not aware of any pleadings or filings in the public record containing the documents identified below. If we are missing such a pleading or filing, please let us know. If, at a later time, there is such a filing or pleading that needs to be considered for redaction, we will consider whether redaction is appropriate.

Happy to discuss at your convenience. Thanks very much.

Mike

From: Vince Colatriano [mailto:vcolatriano@cooperkirk.com]
Sent: Thursday, March 26, 2015 6:09 PM
To: Ciatti, Michael
Cc: David Thompson; Brian Barnes
Subject: Fairholme -- Request to "De-Designate" Redacted Versions of Freddie documents

Mike –

Thanks very much for agreeing to "de-designate" a number of Freddie documents that we believed did not meet the standard for treatment as Protected Information under the Protective Order.

We have since gone back to the documents that Freddie 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, Freddie could agree to de-designate the redacted versions of the documents. We have attached a password-protected file with the redacted 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

FHLMC_00000416

FHLMC_00000422

FHLMC_00000739

FHLMC_00000815

FHLMC_00002370

FHLMC_00002429

FHLMC_00002451

FHLMC_00005225

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

EXHIBIT 3

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.
Cooper & Kirk, PLLC
1523 New Hampshire, NW
Washington, DC 20036
(202) 220-9600
ccooper@cooperkirk.com

ON BEHALF OF THE DEFENDANT:

KENNETH MICHAEL DINTZER, ESQ.
GREGG M. SCHWIND, ESQ.
ELIZABETH M. HOSFORD, ESQ.
U.S. Department of Justice
Post Office Box 480
Ben Franklin Station
Washington, DC 20044
(202) 616-0385
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 4

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).