No. 13-465C
(Judge Sweeney)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., et al.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFFS' SEALED MOTIONS TO REMOVE THE "PROTECTED INFORMATION" DESIGNATION FROM CERTAIN DISCOVERY MATERIALS

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DEFENDANT'S RESPONSE TO PLAINTIFFS' SEALED MOTIONS TO REMOVE THE "PROTECTED INFORMATION" DESIGNATION FROM CERTAIN DISCOVERY MATERIALS

Defendant, the United States, respectfully submits this response in opposition to motions filed by plaintiffs, Fairholme Funds, Inc., et al. (Fairholme), that request the Court to order the removal of the "Protected Information" designation from the transcripts of the May 2015 depositions of Edward DeMarco and Mario Ugoletti, and from certain other documents produced by the Federal Housing Finance Agency (FHFA), the Department of the Treasury (Treasury), and Grant Thornton, LLP, a Treasury consultant (collectively the Documents).[1]

In its motions, all of which generally seek the same relief for the same reasons, Fairholme argues that the Government and Grant Thornton, LLP, respectively, have improperly designated as protected documents that are not covered by the definition of Protected Information contained

[1] Plaintiffs' Sealed Motion to Remove the "Protected Information" Designations from the Depositions of Edward DeMarco and Mario Ugoletti, June 12, 2015, ECF No. 162; Plaintiffs' Sealed Motion to Remove the "Protected Information" Designation from Certain Grant Thornton Documents, June 18, 2015, ECF No. 165; Plaintiffs' Sealed Motion to Remove the "Protected Information" Designation from Certain Treasury and FHFA Documents, June 24, 2015, ECF No. 166.

The Grant Thornton Documents Fairholme seeks to release were provided to Treasury pursuant to a contract between the Grant Thornton and Treasury, and contain confidential Treasury information, as well as other protected information. *See infra* at 6 n.4. As such, while Grant Thornton intends to file its own response, we respond herein to ECF No. 165 to protect Treasury's confidential information contained in the Grant Thornton Documents.

in the Court's governing protective order. *See, e.g.*, ECF No. 162 at 9. Fairholme further argues that these allegedly improper designations hinder its ability to develop and present its case because Fairholme counsel cannot share this information with scholars, professionals, and its clients. ECF No. 162 at 8; ECF No. 165 at 12; ECF No. 166 at 7-8. Relatedly, Fairholme suggests that the protected information designations are also stifling public debate regarding the Government's bailout of Fannie Mae and Freddie Mac. *See, e.g.*, ECF No. 162 at 8. Fairholme asks the Court to require the de-designation of the Documents in full, or at least to de-designate Fairholme's unilaterally proposed abridged versions of the Documents.[2]

The Court should deny Fairholme's motions. These Documents – which Fairholme has not used in support of a motion or otherwise made a part of the judicial record in this case – contain information meeting the definition of "Protected Information" under the protective order and, thus, are properly designated as protected. The Court should reject Fairholme's overly restrictive, harm-based definition of the term "confidential." Moreover, in light of the potential harms identified in the declarations of FHFA Director Watt and Treasury's Dr. Stegman, even under Fairholme's definition of "confidential," the Documents would still qualify for protection. Def. Mot. for Protective Order, Watt Decl. ¶ 13 (A4), Stegman Decl. ¶ 23-24, May 30, 2014, ECF No. 49.

Furthermore, Fairholme cannot articulate any legitimate, litigation-related rationale for the relief it seeks. Fairholme's counsel and retained experts already have full access to the Documents under the terms of the protective order. The public's right to access court records

[2] Fairholme requested, in the alternative, to be permitted to file the Documents under seal in related litigation pending in the Court of Appeals for the District of Columbia Circuit. Fairholme's request for alternative relief is now moot in light of the Court's July 21, 2015 order.

does not attach to general discovery materials in a civil case, particularly in the face of a protective order designed to protect confidential information and expedite discovery.

Finally, Fairholme's requests for the redaction and public release of *portions* of the Documents would impose a significant burden on the Government and on the Court, and would either provide the public with a misleading snapshot of the state of the proceedings in this Court or else would force the Government to unwillingly release confidential information to provide missing context. Such an onerous exercise would be extremely burdensome for the Government and would be of minimal, if any, value to Fairholme.

BACKGROUND

After the United States filed its motion to dismiss Fairholme's complaint pursuant to Rules of the United States Court of Federal Claims (RCFC)12(b)(1) and 12(b)(6), Fairholme requested limited, jurisdictional discovery to respond to the Government's motion. The Court granted Fairholme's request. To date, the United States has produced approximately 550,000 pages of documents and defended seven depositions.

Following the Court's order granting discovery, the parties undertook lengthy negotiations to facilitate and expedite discovery, which encompassed a massive and complicated document review and production process. After plaintiffs served their initial discovery requests, the United States sought an order limiting the scope of discovery and relieving it of any obligation to produce documents in response to some of plaintiff's requests. Def. Mot. for Protective Order, May 30, 2014, ECF No. 49. Following briefing on the Government's motion, the Court held a status conference to address the Government's arguments and plaintiffs' response. Transcript of Proceedings Regarding Def. Mot. for Protective Order, June 19, 2014, ECF No. 64 (June 19, 2014 Tr.). The Court noted its belief that many of the Government's concerns about the disclosure of sensitive information could be addressed through a protective

order keeping documents under seal. *Id.* at 5:7-10 ("[I]f there's a protective order in place which provides for the sealing of all such documents [about, *e.g.*, the future of the conservatorships], how is the conservator harmed? There will be no release of documents."). The Court also stated its concerns that sensitive documents in similar litigation before this Court had recently leaked and similar leaks in this action could cause "grave and dire consequences" on the market and the economy. *Id.* at 7:6-19 ("[N]o judge wants a leak. But I think I've been able to come up with some judicial caulk that I would put in the case and it would be this. We'd have a protective order.").

On July 11, 2014, the parties filed a joint status report presenting detailed arguments concerning disagreements over the proposed protective order governing jurisdictional discovery in this matter. Joint Status Report Regarding Proposed Protective Order, July 11, 2014, ECF No. 69 (JSR). On July 16, 2014, the Court held a status conference during which the parties presented their arguments concerning (1) the definition of "Protected Information," and (2) the burden of challenging designations of Protected Information. *See generally* Transcript of Proceedings, July 16, 2014, ECF No. 75 (Tr. Of Status Conf.). The final protective order, issued that same day, facilitates and governs discovery practice. Prot. Order, July 16, 2014, ECF No. 73.[3] The Court concluded that a protective order was necessary "to safeguard the confidentiality of" information likely to be disclosed by the United States which "may be sensitive or otherwise confidential and protectable." Amended Prot. Order at 1. The protective order defines "Protected Information" to include any "proprietary, confidential, trade secret, or market-sensitive information, as well as information that is otherwise protected from public disclosure

[3] On July 29, 2015, the Court entered an amended version of the Protective Order, which contained modifications that were necessitated by the Court's July 10, 2015 order in *Cacciapalle v. United States*, No. 13-466C. Amended Prot. Order, July 29, 2015, ECF No. 217. None of those amendments are material to Fairholme's current motions.

under applicable law." *Id.* ¶ 2. The Court did not adopt either party's definition of Protected Information, but articulated its own definition. *Compare id.* ¶ 2 *with* JSR at 2. The protective order also incorporates a process for a receiving party to challenge the designation of materials as Protected Information, adopting the Government's position that the receiving party bears the burden of showing that the designation was improper. Amended Prot. Order ¶ 17.

ARGUMENT

It is important to emphasize at the outset that (1) Fairholme's motions relate solely to materials produced in limited jurisdictional discovery, *not* judicial records filed with the court in support of a motion; and (2) the Government has withheld no information from Fairholme counsel and other persons with access to materials designated under the protective order. Fairholme has not met its burden to show that public disclosure of the Documents should be allowed where there is no compelling public interest at stake, and where Fairholme cannot identify any prejudice to its ability to litigate this case.

I. Fairholme Cannot Satisfy Its Burden Of Establishing That The Documents Are Improperly Designated Or That Their Disclosure Should Be Otherwise Allowed

Fairholme bears the burden of demonstrating that the Documents are improperly designated as protected or that their disclosure should be otherwise allowed. Pursuant to Paragraph 17 of the protective order, Fairholme must show that the Documents are "improperly designated or that disclosure [should be] allowed." Amended Prot. Order ¶ 17; *see also* Tr. of Status Conf. at 17-18. Although Fairholme's motions acknowledge its burden in passing, Fairholme attempts to reverse the burden through its case citation parentheticals and elsewhere in its briefs. ECF No. 162 at 6 ("[T]he Government has yet to explain why the attorneys who reviewed the Depositions concluded that both must be shielded from public disclosure in their entirety"); *see also* ECF No. 165 at 8, 15-16; ECF No. 166 at 3-5. As we establish below,

Fairholme cannot meet its burden because the Documents contain confidential information that should not be disclosed to the public.

A. The Documents Contain Confidential Information

Confidential information means "[k]nowledge or facts not in the public domain but known to some[.]" Black's Law Dictionary (10th ed. 2014). The information contained in the Documents meets the ordinary definition of "confidential information."[4]

The Documents, which contain the work and testimony of current and former Government officials and Government consultants, were provided to Fairholme for the specific and limited purpose of allowing it to respond to the Government's motion to dismiss. Document and deposition discovery were, pursuant to the jurisdictional discovery orders issued by this Court, limited to the narrow topics and date ranges on which the Court has authorized discovery at this stage of the litigation. The Documents provide, therefore, a limited picture of the highly sensitive topics that are the subject of this litigation, which involve the Government's response to one of the worst financial crises in history. The Documents contain information throughout that is of a highly sensitive and confidential nature. Because the information is necessarily limited in scope, if released publicly it would provide a misleading and potentially harmful view of the issues to markets and to the public at large.

Fairholme's restrictive definition of "confidential" to include only information "likely to cause some type of legally cognizable harm" would, if adopted, eviscerate the meaning of the term "confidential" and render it superfluous. ECF No. 162 at 7; ECF No. 165 at 7-8; ECF No. 166 at 4. The definition of "Protected Information" separately lists information that is

[4] The Documents contain confidential information. In addition, at least some of the documents produced by Grant Thornton contain proprietary information. We understand that Grant Thornton will address these matters in its response to ECF No. 165. The Government's focus on confidential information should in no way be construed as excluding other bases under which any of the Documents may qualify as Protected Information under the Protective Order.

"proprietary" or "market-sensitive." Amended Prot. Order ¶ 2. Indeed, the Court made clear that its inclusion of the term "confidential" held meaning distinct from that of "market-sensitive." July 16, 2014 Tr. at 12:8-13:6.

B. The Authority Upon Which Fairholme Relies Does Not Undermine Our Position That The Documents Are Properly Designated And That Disclosure To The Public Should Not Be Allowed

None of the authorities on which Fairholme relies supports the relief it seeks. Fairholme primarily relies on *In re Violation of Rule 28(d)*, 635 F.3d 1352, 1357-58 (Fed. Cir. 2011). ECF No. 162 at 5, 7; ECF No. 165 at 6-7, 13; ECF No. 166 at 3-5. *Violation of Rule 28(d)*, however, is inapplicable here.

In *Violation of Rule 28(d)*, the Federal Circuit in a patent case sanctioned counsel for the defendant drug manufacturers who had over-designated appellate briefing material as protected under a lower-court protective order. In particular, the court questioned whether "case citations, direct quotations from published opinions of the cases cited, and legal arguments" could qualify as confidential under the lower court's protective order. *In re Violation of Rule 28(d)*, 635 F.3d at 1355-56. The court's concerns in *Violation of Rule 28(d)*, however, were focused on ***judicial records*** – including the legal arguments in appellate briefs – not on documents produced and exchanged with an opposing party during the course of discovery.

Indeed, although the court noted that "[t]here is a strong presumption in favor of a common law right of public access to court proceedings[,]" it did not address any right by the public to access discovery materials, much less materials produced under a protective order in the course of limited discovery to determine whether the Court even possesses jurisdiction to entertain the plaintiffs' claims. *Id.* at 1356 (citation omitted). The holding in *Violation of Rule*

28(d) in no way undercuts the Government's designation of the Documents as "Protected Information."

The other cases Fairholme cites are inapplicable because they concern the meaning of "confidential" when considering whether to disqualify experts who may have received confidential or proprietary information from an opposing party during the course of a previous relationship. ECF No. 162 at 7-8 & n.2; ECF No. 165 at 8 n.5; ECF No. 166 at 4-5 & n.3 (citing *Return Mail, Inc. v. United States*, 107 Fed. Cl. 459, 468-69 (2012) (denying defendant's motion to disqualify expert witness in patent litigation when "defendant has not established that relevant confidential, proprietary or privileged disclosures were made to [the proposed expert], or that he was privy to confidential or privileged attorney/client discussions"); *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1098 (N.D. Cal. 2004) (denying defendant's motion to disqualify expert witness in patent litigation when defendant had not shown that any confidential information had been disclosed to the proposed expert)). These cases do not support the relief Fairholme seeks.

Furthermore, to the extent that the definition of confidential information in the expert witness context is in any way applicable to the interpretation of the protective order in this case, the definition this Court employed in *Return Mail* comports much more closely with our proposed definition that with the one offered by Fairholme. The Court cited favorably a case that "[found] there to be a distinction between 'confidential' and 'privileged' information[,]" and quoted another case that defined confidential information as information "shared with [the expert] and not outside of [the company]." *Return Mail, Inc.*, 107 Fed. Cl. at 465-66 (citing *Thompson, I.G., L.L.C. v. Edgetech I.G., Inc.*, No. 11–12839, 2012 WL 3870563, at *6 (E.D. Mich. Sept. 6, 2012) and quoting *Owen v. Gen. Motors Corp.*, No. 06–4067, 2007 WL 1101194,

at *4 (W.D.Mo. Apr. 12, 2007)). This definition mirrors the common definition of confidential information as "[k]nowledge or facts not in the public domain but known to some[.]" Black's Law Dictionary (10th ed. 2014).

Fairholme asks the Court to instead find that for information to qualify as confidential, the release of the information "must be likely to cause some type of legally cognizable harm to the producing party or third parties." ECF No. 162 at 7; ECF No. 165 at 7-8; ECF No. 166 at 4. There is no basis in the protective order or relevant case law for such a restrictive definition, which conflicts with the ordinary meaning of "confidential" cited above. The cases relied upon by Fairholme relate to a party's request to limit discovery altogether, not to the mere designation of protected information produced in discovery. ECF No. 162 at 7-8; ECF No. 165 at 7-8; ECF No. 166 at 4 (citing, *e.g.*, *Lakeland Partners, L.L.C. v. United States*, 88 Fed. Cl. 124, 137-39 (2009) (denying motion for protective order relieving defendant of obligation to produce discovery to plaintiff at all)). None of the cases Fairholme cites concern the propriety of designating a deposition transcript or other discovery materials as protected information under a protective order, thereby limiting their public release but not preventing their use in the litigation.

Finally, even were the Court to adopt Fairholme's restrictive definition of confidential information, Fairholme's assertion that essentially none of the information in this case could qualify because it is all "historical" is demonstrably false. ECF No. 162 at 4; ECF No. 165 at 8-9; ECF No. 166 at 5. In fact, the futures of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) have not yet been decided, and are still a matter of intense debate. Revealing to the public the Government's confidential decision-making processes and isolated snapshots of policy positions would detract from, not aid in, the debate about these issues, and may indeed harm efforts that have large scale

implications for the markets and for the public. In his declaration in support of the Defendant's Motion for Protective Order, FHFA Director Melvin Watt succinctly explained the potential harm that could result from the public disclosure of even "historical" documents:

> The release of documents that reflect prior thinking of Agency personnel concerning matters about which the Agency may follow a different course during my tenure as Director are likely to lead to the public and market participants second-guessing every decision, and will make any changes to Agency policy more difficult at both the deliberation and implementation stages. Thus, the disclosure of such documents and information would substantially impair my ability to direct the operations of the conservatorships in the manner I believe to be in the best interests of the conservatorships and the Agency. Accordingly, disclosure of deliberations of my immediate predecessor and during my tenure could have adverse impact to the Enterprises and market consequences.

Watt Decl. ¶ 13. Counselor to the Secretary of the Treasury for Housing Finance Policy Dr. Michael Stegman echoed these concerns. Stegman Decl. ¶¶ 23-24. Therefore, even if some potential for harm upon public release was required for a document to be considered confidential information, that standard would be met here, and Fairholme has not established its burden of showing otherwise.

II. Fairholme Cannot Establish That Its Inability To Release Confidential Information To The Public Prejudices Its Ability To Prosecute Its Claims In This Court

Fairholme has articulated no legitimate litigation prejudice in this case resulting from the Government's designation of the Documents. Although Fairholme's counsel has full access to the Documents, as do Fairholme's experts, Fairholme argues that it is prejudiced by its inability to share the Documents with its clients and the public, including "scholars and experts."[5] ECF No. 162 at 8-9, 10-12; ECF No. 165 at 12-14; ECF No. 166 at 7-10. But this so-called

[5] In its motions, Fairholme also argued that it was prejudiced by its inability to file discovery materials obtained in this case in related litigation in the United States District Court for the District of Columbia. As noted above, this rationale is now moot in light of the Court's July 21, 2015 order that allowed Fairholme to file discovery materials in this case under seal in the D.C. Circuit and district court.

"prejudice" presumably would exist in every case in which any court issues a protective order, and this Court already weighed such concerns when it issued the protective order in this case. Amended Prot. Order at 1. More importantly, Fairholme has failed to articulate with particularity any reason why the capable counsel and myriad experts that form its litigation team are unable to develop and present its case without resort to its clients or to scholars and experts among the general public.

A. There Is No Public Right Of Access To Protected Pretrial Discovery Materials

Fairholme asks for the public release of materials produced in limited jurisdictional discovery tailored exclusively to allow Fairholme to develop jurisdictional facts in support of its response to the Government's motion to dismiss. There is, however, no public right of access to unfiled discovery materials such as those at issue here.

As this Court has previously held, "[p]retrial discovery is not a public component of a civil trial." *Armour of Am. v. United States*, 73 Fed. Cl. 597, 600 (2006) (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984)). Thus, Fairholme's reliance on the "public's First Amendment right of access . . . to civil trials and to their related proceedings and records" is misplaced. ECF No. 162 at 5 (quotation marks, citation, and emphasis omitted). Moreover, even the public's right to inspect judicial records is "not absolute," and decisions to allow public access to judicial records are "best left to the sound discretion of the trial court, . . . in light of the relevant facts and circumstances of the particular case." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597–99 (1978).

None of the cases on which Fairholme relies supports its argument. Perhaps most surprising is Fairholme's reliance on *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986). In *Anderson*, a newspaper had unsuccessfully challenged a protective order at the district court in a

high-profile tort action claiming that defendant companies had contaminated the water supply of Woburn, Massachusetts. *Id*. at 3-4. The First Circuit departed from the Third Circuit in interpreting the recent Supreme Court decision in *Seattle Times*, and, as Fairholme states, acknowledged that protective orders have the potential to infringe upon First Amendment rights. *Id*. at 6-7. The court held that "[p]rotective discovery orders are subject to first amendment scrutiny, but that scrutiny must be made within the framework of Rule 26(c)'s requirement of good cause." *Id*. at 7. The court found there to be good cause for the district court's protective order, satisfying the First Amendment test, though it rejected the order's selective favoritism of one media outlet over another. *Id*. at 8-9.

The First Circuit went on, however, to examine the scope of the public's First Amendment right of access to judicial proceedings. *Id*. at 10-13. The court concluded that "[a]lthough … the public has a right of access to some parts of the judicial process, … this right does not extend to documents submitted to a court in connection with discovery proceedings." *Id*. at 10. Most specifically germane to the question pending before the Court in these motions, the First Circuit held that "there is no right of public access to documents considered in civil discovery motions." *Id*. at 11. The court also "decline[d] to extend to materials used only in discovery the common law presumption that the public may inspect judicial records." *Id*. at 13. The court concluded that "discovery proceedings are fundamentally different from proceedings to which the courts have recognized a public right of access." *Id*. at 12. The court observed that, were public access to the discovery process to be mandated, "the civil discovery process might actually be made more complicated and burdensome than it already is." *Id*.

This logic applies with even greater force here than it did in *Anderson*. The material examined for release to the public in *Anderson* included "documents submitted to a court in

connection with discovery proceedings." *Id*. at 10. Fairholme, on the other hand, seeks to release, in full or in hand-picked part, documents that have not as yet been submitted to the Court for any purpose other than in these motions. The Court has allowed Fairholme to collect these documents and to take these depositions only for the limited purpose of gathering information Fairholme says it needs to respond to the Government's motion to dismiss.

In addition to *Anderson*, Fairholme cites to cases that merely stand for the unremarkable proposition that a party must have good cause to obtain a Rule 26 protective order. ECF No. 162 at 5, 7; ECF No. 165 at 7-8, 13-14; ECF No. 166 at 4, 9 (citing *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999) (remanding to district court judge to determine whether parties may file appendix under seal because lower court judge "fail[ed] to make a determination, as the law requires … of good cause to seal any part of the record" prior to issuing a stipulated protective order); *Lakeland Partners, L.L.C.*, 88 Fed. Cl. at 137-39 (denying motion for protective order where the moving party had not met its burden of showing good cause under Rule 26)). Unlike in the cases cited by Fairholme, the Government has not sought a protective order to avoid responding to document and deposition discovery, but only to protect the Documents, which contain confidential information, from public disclosure. The Court already found good cause for the designation of Protected Information when it issued the protective order. The parties actively negotiated the terms of the protective order, and the subjects on which the parties disagreed were addressed in a status report and at a hearing. Ultimately, the Court issued the protective order in this case, allowing the parties, in these very circumstances, to designate discovery materials as Protected Information.

Fairholme's reliance on *Citizens First* is also misguided because that case dealt with public access to a hearing of the Transit Adjudication Bureau, a forum empowered to determine

whether an alleged violator has broken rules of conduct for use of transit facilities, and to impose penalties for such violations. *Citizens First Nat'l Bank of Princeton*, 178 F.3d at 944. Proceedings in such a forum bear little resemblance to the transcripts of depositions taken for the purpose of allowing Fairholme to respond to the Government's motion to dismiss.

Finally, both *Anderson* and *Citizens First* were decided prior to the 2000 amendments to Federal Rule of Civil Procedure 5(d), which eliminated a provision that, absent a court order or local rule, previously required parties to file discovery materials with the court.[6] This change destroyed the chief justification upon which some courts had previously relied in finding a right of public access to discovery materials. *See, e.g., Bond v. Utreras*, 585 F.3d 1061, 1075-76 (7th Cir. 2009) (observing that whatever force "cases suggest[ing] that Rule 26(c) creates a substantive right of public access to discovery . . . had was destroyed by the 2000 amendment to Rule 5(d), which reversed the longstanding rule generally requiring discovery to be filed with the court"). Fairholme fails to point to a post-amendment decision in any Federal court that finds a public right of access to pretrial discovery materials, and courts that have considered the matter have declared that no such right exists. *See, e.g., Schiller v. City of New York*, No. 04-cv-7922, 2007 WL 136149, at *2 n.2 (S.D.N.Y. Jan. 19, 2007) ("While materials produced in discovery may be disclosed . . . in the absence of a protective order, the public does not have a *right* of access to those materials.") (citation omitted); *Id.* ("The presumption of public access to judicial documents is inapplicable to "[d]ocuments that play no role in the performance of Article III functions, such as those passed between the parties in discovery.") (quoting *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995)).

[6] RCFC 5 was amended in 2002 to bring the rule "in closer conformity" with Rule 5 of the Federal Rules of Civil Procedure. RCFC 5, Rules Committee Notes on 2002 Revision.

B. The Purpose Of The Instant Litigation In This Court Is Not To Promote Public Debate

Fairholme bases much of its argument seeking public release of Protected Information on what appears to be a misunderstanding of the purpose of the jurisdictional discovery in which the parties are engaged and, indeed, of the purpose of litigating this case. Fairholme laments the public's being "deprived of access to vital information about their Government" and interference with "well-informed democratic deliberation."[7] ECF No. 166 at 5, 7. These are noble goals, but Fairholme brought this suit seeking tens of billions of dollars of taxpayer funds as compensation for an alleged taking, not to further these other goals. More specifically, the purpose of the jurisdictional discovery, which the Court ordered and in which the parties are currently engaged, is to provide Fairholme with the information it needs to respond to the Government's pending motion to dismiss.

As demonstrated above, there is no public right of access to pretrial discovery materials such as the Documents. Furthermore, while Fairholme's rhetoric about public access and debate sounds democratic, Fairholme did not bring this case to educate the public, and the Court has already weighed the public's interests in issuing the protective order. Not only could harm result from the disclosure of the confidential information contained in the Documents, but, for the reasons explained below, Fairholme's requests to inject the Documents into the public domain are an unnecessary and unwarranted distraction with real costs and consequences in this litigation.

[7] Of note, the Government has already made public in a related case, brought by Fairholme and others in the United States District Court for the District of Columbia, a 4,357-page administrative record of the information considered by Treasury in entering into the Third Amendment to the Preferred Stock Purchase Agreements. *See* Notice of Filing of Administrative Record of the Department of Treasury, *Perry Capital LLC v. Lew*, No. 13-cv-1025 (D.D.C. Dec. 17, 2013), ECF No. 26. Similarly, FHFA filed a 4,180-page document compilation in that same case. *See id.*, ECF No. 27.

III. Fairholme's Requests For Public Release Of Discovery Materials, In Whole Or In Part, Are An Unnecessary Distraction Not Required By The Protective Order

Fairholme's numerous requests for the release of materials produced in the course of the ongoing jurisdictional discovery in this case demand significant additional resources of the Government and of the Court, and are an unnecessary and unwarranted distraction from the purpose of this discovery and of the litigation as a whole.

Fairholme asks the Court to order the Government to remove the Protected Information designation from the portions of the Documents that Fairholme has decided do not, in its view, contain Protected Information. ECF No. 162 at 9-10; ECF No. 165 at 15-17; ECF No. 166 at 3-11. Fairholme argues that, as a "compromise," it redacted the Documents to remove all Protected Information. ECF No. 162 at 9; ECF No. 165 at 15; ECF No. 166 at 2, 11 n.13. The protective order, however, does not contemplate the redaction and release of portions of unfiled documents that have been marked as protected. Furthermore, redaction and public release of portions of the Documents will be time consuming and resource-intensive, and will either provide the interested public with a misleading view of the proceedings in this Court or else will force the Government to waive legitimate and important protections to provide some of the missing context.

Additionally, the Court should rebuff Fairholme's efforts to sidetrack the Government's discovery efforts with repeated requests to publicly release voluminous materials produced in the course of the ongoing jurisdictional discovery. Fairholme's requests serve no proper purpose, and will result in further discovery delays. If the Court were to grant Fairholme's motions more such requests would undoubtedly follow, and discovery efforts will be derailed.

A. De-Designation Of Portions Of The Documents Is Not Contemplated By The Protective Order

The protective order itself does not contemplate the redaction and release of portions of documents that otherwise qualify for protection at this stage of the litigation. The protective order does explicitly provide for the redaction of protected documents for the public record, but this provision only applies "after *filing* a document containing Protected Information." Amended Prot. Order ¶ 11 (emphasis added). Nowhere other than in paragraph 11 does the protective order refer to redaction of Protected Information that has not been filed with the Court.

Fairholme looks for support of its proposal in paragraphs 17 and 19 of the protective order, which provide, respectively, procedures for seeking relief from the protective order and for preserving rights to challenge confidential designations. ECF No. 165 at 16-17; ECF No. 166 at 10-11. Fairholme parses words like "contained in" and "document or information" to arrive at the absurd conclusion that each sentence, phrase, or perhaps even each word of each and every protected document must be evaluated individually for qualification under Fairholme's strict construction of the definition of Protected Information. ECF No. 165 at 17; ECF No. 166 at 11. Clearly, any document could be redacted in such a way that no confidential or otherwise Protected Information would remain. It is illogical to suggest that the protective order, therefore, requires such a micro-level approach to the designation or Protected Information. Requiring the Government or any other party to determine whether each sentence, phrase, or word individually merits protection would be a colossal misuse of resources and would lead to unjust results.

Fairholme's proposed process of redaction and partial release of information contained in documents otherwise entitled to protection would force the Government to assess whether, to provide context for information that may not qualify under a strict construction of the definition of Protected Information, we must release confidential information clearly entitled to protection

under any definition. This leaves the Government with the unenviable choice of allowing Fairholme to publicly promote a false or misleading narrative or to waive important legitimate protections under the protective order.

Although Fairholme cites good faith compromise as their motivation for proposing redactions to all but a single sentence for certain of the Documents, it appears, unsurprisingly, that the selection of the particular passages at issue depends more on the material Fairholme would like to have released into the public domain than on an academic analysis of the material least likely to qualify as protected. *See* ECF No. 162 at 9-10; ECF No. 165 at 15-16; ECF No. 166 at 6-7, 11 n. 13. Countering such efforts would at a minimum involve resource-intensive efforts to identify other specific passages that rebut or provide context to the ones selected by Fairholme, or alternatively would require wholesale release of documents which contain at least some information that is clearly entitled to protection under any definition of the terms in the protective order.

Even if the Court were to agree with Fairholme that certain individual parts of the Documents do not meet a strictly construed definition of Protected Information under the protective order, the Court should question the purpose of allowing Fairholme to, on a line-by-line or even word-by-word basis, challenge each designation of information as protected. Such an exercise diverts valuable resources of the parties and of this Court to a task that has no significant impact on the litigation of the claims at issue in this and other related actions.

B. Fairholme's Extensive Requests For Release Of Discovery Materials Impose Significant Delay And Costs On The Government And On This Court

Finally, the Court should decline Fairholme's repeated attempts to sidetrack the Government's discovery efforts with requests to de-designate materials produced in the course of a preliminary phase of discovery designed to assist in determining whether the Court even

possesses jurisdiction to entertain Fairholme's claims, and if so whether those claims should be dismissed on other grounds. Fairholme's requests serve no proper purpose, and will result in further discovery delays.

The Government has devoted significant resources to completing its discovery obligations, which have included production of approximately 550,000 pages of documents, preparation of a detailed privilege log in consultation with counsel from multiple agencies, and preparing for and defending depositions on a schedule dictated by Fairholme, among many other tasks. This multi-part effort requires the full-time attention of a team of Government attorneys in consultation with agency counsel. The Court has recognized that Fairholme's strategic decision to take depositions before document discovery was complete would inevitably delay other discovery efforts. March 31, 2015 Tr. at 25:24-26:1. Yet Fairholme continues to request public release of a variety of discovery materials, in whole or in its own hand-selected, misleading portions, despite express provisions in the protective order allowing wholesale designations to facilitate expeditious discovery processing. Prot. Order ¶ 2. Fairholme's challenges of the protected designations of vast swaths of the material the Government has produced threaten to render moot the negotiated and considered provision this Court included in the protective order and to grind remaining discovery efforts to a halt. Because Fairholme has failed to meet its burden to demonstrate that the Documents are not confidential or to demonstrate any litigation related prejudice, Fairholme's requests are premature and improper, and should be denied.

CONCLUSION

For these reasons, the Government respectfully requests that the Court deny Fairholme's motions.

Respectfully submitted,

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