IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

NOTICE OF FILING OF APPLICATIONS OF CERTAIN COUNSEL REPRESENTING PLAINTIFFS IN *SAXTON V. FHFA*, NO. 15-47 (N.D. IOWA) FOR ACCESS TO PROTECTED INFORMATION

Pursuant to Paragraph 4 of the Second Amended Protective Order (Nov. 9, 2015), Doc. 256, Thomas Saxton, Ida Saxton, and Bradley Paynter (the "Saxton Plaintiffs") respectfully submit the attached applications of their counsel for access to Protected Information (attached as Exhibit A). Counsel for the government has informed the Saxton Plaintiffs that the government opposes the requested relief. Plaintiffs Fairholme Funds, Inc., et al. ("Fairholme") consent to the Saxton Plaintiffs' access to Protected Information.

1. The Saxton Plaintiffs own shares of Fannie Mae and Freddie Mac stock, and they are the plaintiffs in a suit challenging the Net Worth Sweep in the Northern District of Iowa. The Saxton Plaintiffs contend that the Net Worth Sweep was unlawful under the Administrative Procedure Act ("APA"), a breach of contract, and a violation of the implied covenant of good faith and fair dealing. *See* Complaint, *Saxton v. FHFA*, No. 15-47 (N.D. Iowa May 28, 2015), ECF No. 1. Defendants FHFA and Treasury moved to dismiss the Saxton Plaintiffs' complaint on September 4, 2015, and Fairholme subsequently filed a motion for leave to submit an amicus brief outlining materials produced in this action that Fairholme states are "directly relevant to issues" in the Saxton Plaintiffs' case and that "show that Defendants' litigation-driven rationales

for the Net Worth Sweep are highly misleading." Fairholme's Br. in Supp. of Mot. for Leave to File Amicus Br. at 1–2, *Saxton v. FHFA*, No. 15-47 (N.D. Iowa Oct. 15, 2015), ECF No. 29-1. Fairholme lodged its proposed amicus brief with the Northern District of Iowa, but counsel for the Saxton Plaintiffs have been unable to review it because they do not have access to protected information under this Court's protective order.

2. FHFA and Treasury opposed Fairholme's motion for leave to file its amicus brief, arguing that on a motion to dismiss the court "must accept as true the allegations of the complaint" without considering supplementary evidence and that as an amicus Fairholme "may not submit evidence and litigate factual issues." Defs.' Resistance to Fairholme's Mot. for Leave to File Amicus Br. at 2–3, *Saxton v. FHFA*, No. 15-47 (N.D. Iowa Oct. 29, 2015), ECF No. 36 (attached as Exhibit B). If credited, those arguments, in conjunction with the fact that the Saxton Plaintiffs do not have access to materials produced in discovery in this case, would mean that the *Saxton* court would be unable to consider evidence that Fairholme has said shows that the Government's public representations about the Net Worth Sweep are "misleading—and in key respects false." Fairholme's Redacted Reply in Support of Motion for Judicial Notice at 1, *Fairholme Funds, Inc., et al. v. FHFA*, No. 14-5254 (D.C. Cir. Sept. 22, 2015), ECF No. 1574387.

3. If the Saxton Plaintiffs had access to the materials produced in discovery in this action, they would seek to amend their complaint. The Saxton Plaintiffs drafted their complaint using only publicly available information about the Net Worth Sweep, most of which was selected by FHFA and Treasury for public disclosure. It is apparent from Fairholme's public filings that the available materials on which the Saxton Plaintiffs relied when they drafted their complaint are, at a minimum, incomplete. The Saxton Plaintiffs therefore need access to

protected information so that they can amend their complaint to account for facts about the Net Worth Sweep that the Government has purposefully concealed from the public to date.

4. The Court should not wait for the *Saxton* court to rule on Fairholme's pending motion to file an amicus brief before granting the Saxton Plaintiffs access to the discovery materials produced in this case. Irrespective of whether Fairholme may properly submit evidence in an amicus brief, the Saxton Plaintiffs are plainly entitled to submit evidence in their own case and should be accorded an opportunity to amend their complaint to account for facts familiar to FHFA and Treasury but that they have concealed from the public. But if forced to wait until the *Saxton* court rules on Fairholme's pending motion for leave to file an amicus brief, the Saxton Plaintiffs may lose any opportunity to amend their complaint because the *Saxton* court may not rule on Fairholme's motion until that court resolves the pending motions to dismiss. Thus, requiring the Saxton Plaintiffs to wait until the Northern District of Iowa rules on Fairholme's amicus motion before granting the Saxton Plaintiffs access to protected information could effectively preclude them from *ever* using such information.[1]

5. This puts the Saxton Plaintiffs in a much different profile than Perry Capital was in when it first sought access to protected information. *See* Notice of Filing of Applications of Certain Counsel Representing Perry Capital LLC (Aug. 11, 2015), Doc. 226. By that time, Perry Capital's complaint had already been dismissed by the district court and the case was already in

[1] To be sure, unless the D.C. Circuit closes oral argument in Fairholme's appeal, protected information may become public when that appeal is argued. But that appeal likely will not be argued for several months; the Appellants' reply briefs are not due until January 19, 2016, and oral argument has not been scheduled. *See* Order, *Perry Capital, LLC v. Lew*, No. 14-5254 (D.C. Cir. Nov. 5, 2015), ECF No. 1582075. Briefing on the motions to dismiss *Saxton* is scheduled to conclude on November 23, 2015. Order Modifying Briefing Schedule & Granting Leave to File Overlength Br., *Saxton v. FHFA*, No. 15-47 (N.D. Iowa July 13, 2015), ECF No. 12. Thus, the *Saxton* court may rule on the motions to dismiss before the D.C. Circuit holds oral argument.

the court of appeals; there was no question of an immediate amendment to the complaint. Furthermore, an appellant in a case consolidated with Perry Capital's—Fairholme—was actively seeking to get that information before the appellate court, and the court had suspended merits briefing while it considered whether to let the information into the record. There was thus no immediate risk of the appeal being resolved without Perry Capital having access to the protected information. In *Saxton*, by contrast, the Saxton Plaintiffs could seek an immediate amendment to the complaint if they are granted access to protected information, there are no other plaintiffs involved in the case that have access to protected information, and the court potentially could grant the pending motions to dismiss before turning to Fairholme's amicus motion. Indeed, the *Saxton* court expressly *refused* to stay briefing on the motions to dismiss to give the Saxton Plaintiffs an opportunity to gain access to protected information from this Court. Order, *Saxton v. FHFA*, No. 15-47 (N.D. Iowa Oct. 21, 2015), ECF No. 34.

6. Counsel for the Saxton Plaintiffs are familiar with the terms of this Court's Second Amended Protective Order, agree to be bound by its terms, and will treat any protected information they are allowed to access with the utmost care. They take their responsibility as officers of the Court seriously and will ensure that any protected information disclosed to them will be protected from public disclosure.

Accordingly, the Court should authorize counsel for the Saxton Plaintiffs identified in Exhibit A to access Protected Information produced in this case.

Dated: November 16, 2015

Respectfully submitted,

/s/ Harold N. Schneebeck

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Attorneys for Saxton Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November 2015, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system, causing a true and correct copy to be served on all counsel of record.

/s/ Harold N. Schneebeck
Harold N. Schneebeck

ATTACHMENT A

In the United States Court of Federal Claims

No. 13-456C

FAIRHOLME FUNDS, INC. et al.,	*
	*
Plaintiffs,	*
	*
v.	*
	*
THE UNITED STATES,	*
	*
Defendant.	*

DECLARATION OF HAROLD N. SCHNEEBECK

I hereby certify that I have carefully reviewed and am fully familiar with the provisions of the Protective Order dated November 9, 2015, entered and filed of record in the above-captioned litigation ("Protective Order").

I certify that I am eligible to have access to Confidential Material, pursuant to paragraphs 4 and 7 of the Protective Order. As a condition precedent to my examination of any Protected Information pursuant to the Protective Order, or any information contained in said material, I hereby agree that the Protective Order and any amendments thereto shall be deemed directed to and shall bind me, and that I shall observe and comply with all provisions of the Protective Order.

SIGNATURE

Harold N. Schneebeck
NAME (PRINTED)

666 Grand Avenue, Suite 2000, Des Moines, IA 50309-2510
BUSINESS ADDRESS

Brown, Winick, Graves, Gross, Baskerville and Schoenebaum, P.L.C.
CURRENT EMPLOYER

Attorney
CURRENT OCCUPATION OR JOB DESCRIPTION

ATTACHMENT A

In the United States Court of Federal Claims

No. 13-456C

FAIRHOLME FUNDS, INC. et al.,	*
	*
Plaintiffs,	*
	*
v.	*
	*
THE UNITED STATES,	*
	*
Defendant.	*

DECLARATION OF ALEXANDER M. JOHNSON

I hereby certify that I have carefully reviewed and am fully familiar with the provisions of the Protective Order dated November 9, 2015, entered and filed of record in the above-captioned litigation ("Protective Order").

I certify that I am eligible to have access to Confidential Material, pursuant to paragraphs 4 and 7 of the Protective Order. As a condition precedent to my examination of any Protected Information pursuant to the Protective Order, or any information contained in said material, I hereby agree that the Protective Order and any amendments thereto shall be deemed directed to and shall bind me, and that I shall observe and comply with all provisions of the Protective Order.

SIGNATURE

Alexander M. Johnson
NAME (PRINTED)

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BUSINESS ADDRESS

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CURRENT EMPLOYER

Attorney
CURRENT OCCUPATION OR JOB DESCRIPTION

ATTACHMENT A

In the United States Court of Federal Claims

No. 13-456C

FAIRHOLME FUNDS, INC. et al.,	*
	*
Plaintiffs,	*
	*
v.	*
	*
THE UNITED STATES,	*
	*
Defendant.	*

DECLARATION OF SEAN P. MOORE

I hereby certify that I have carefully reviewed and am fully familiar with the provisions of the Protective Order dated November 9, 2015, entered and filed of record in the above-captioned litigation ("Protective Order").

I certify that I am eligible to have access to Confidential Material, pursuant to paragraphs 4 and 7 of the Protective Order. As a condition precedent to my examination of any Protected Information pursuant to the Protective Order, or any information contained in said material, I hereby agree that the Protective Order and any amendments thereto shall be deemed directed to and shall bind me, and that I shall observe and comply with all provisions of the Protective Order.

SIGNATURE

Sean P. Moore
NAME (PRINTED)

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EXHIBIT B

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

THOMAS SAXTON, IDA SAXTON, BRADLEY PAYNTER,	)	
Plaintiffs,	)	
v.	)	No. 1:15-cv-00047
FEDERAL HOUSING FINANCE AGENCY, *et al*.,	)	
Defendants.	)	

DEFENDANTS' RESISTANCE TO MOTION BY FAIRHOLME FUNDS, INC., FOR LEAVE TO FILE SEALED AMICUS BRIEF AND APPENDIX

The Federal Housing Finance Agency ("FHFA"), Melvin L. Watt, and the United States Department of the Treasury ("Treasury," and collectively, "Defendants") hereby submit this resistance to the motion for leave by Fairholme Funds, Inc. ("Fairholme") to file a sealed amicus brief and appendix in support of Plaintiffs' opposition to Defendants' motions to dismiss. (Fairholme Mot., ECF No. 29). Fairholme's motion seeks permission to file hundreds of pages of sealed materials that Fairholme obtained through jurisdictional discovery in a separate action that is pending before the Court of Federal Claims ("CFC"), concerning separate takings claims not asserted here. *See Fairholme Funds, Inc. v. United States*, No. 13-465 (Fed. Cl. filed July 9, 2013). According to Fairholme, the CFC materials would be useful to resolving Defendants' pending motions to dismiss because they supposedly "show that Defendants' litigation-driven rationales for the Net Worth Sweep are highly misleading." (Fairholme Mot. ¶ 2, ECF No. 29-1). Fairholme is wrong.

No matter how Fairholme may attempt to disparage Defendants' motives or characterize

the documents it seeks to submit, the materials are in fact irrelevant to the threshold legal issues presented in Defendants' motions to dismiss. In resolving those motions, the Court already must accept as true the allegations of the complaint—including those attacking Defendants' motives for entering into the Third Amendment. As Defendants explain in the pending motions to dismiss, the governing federal statute bars Plaintiffs' claims, even assuming the complaint's factual allegations. Indeed, Plaintiffs have conceded—and Magistrate Judge Scoles has agreed—that extraneous evidence purportedly concerning Defendants' rationales for the Third Amendment would not be relevant to the adjudication of Defendants' motions to dismiss. Thus, Fairholme's motion should be denied for the same reasons this Court already rejected Plaintiffs' request for the production of administrative records. In short, the proposed amicus submission is irrelevant to the pure legal issues presented in Defendants' motions to dismiss. For this reason alone, Fairholme's motion should be denied.

Moreover, Fairholme improperly seeks to use amicus filings solely to advance its own interests as a litigant, rather than assist the court with any legal question presented by the pending motions. Directly and through a co-plaintiff's corporate affiliate, Fairholme already has lost lawsuits in the federal district courts for the Southern District of Iowa and the District of Columbia that also challenged the Third Amendment. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014), *appeal docketed*, No. 14-5243 (D.C. Cir.); *Continental Western Ins. Co. v. FHFA*, 83 F. Supp. 3d 828 (S.D. Iowa 2015). While Fairholme can advance (and has advanced) its claims and theories in its own lawsuits, it should not be permitted to use amicus filings as a vehicle to relitigate those failed claims and theories in this forum.

More fundamentally, Fairholme's motion incorrectly assumes that an amicus curiae may introduce evidence and submit briefs addressing factual, as opposed to legal, matters. This is

incorrect; an amicus curiae is a nonparty and may not submit evidence and litigate factual issues in a trial court. Similarly, as a nonparty, Fairholme has no right to control this litigation; it is controlling its own litigations, two of which it already lost in other district courts. Fairholme should not be permitted to submit its own discovery materials from other ongoing litigation in this case, especially where Plaintiffs themselves have "pledged" that "in no event" will they "seek discovery into the adequacy of the record for the resolution of the motions to dismiss." (Order re: Filing of Admin. Record 3, ECF No. 23) (quoting Pls. Resp. to Defs. Mot. to Stay 2, ECF No. 21)). *See also* (Pls. Resp. to Defs. Mot. to Stay 5, ECF No. 21) (Plaintiffs stating that they "have no intention of seeking discovery in this case until after the Court rules on the parties' cross motions").

ARGUMENT

There is no inherent right of a nonparty to file a brief as an amicus curiae, *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999), and "[n]o statute, rule, or controlling case defines a federal district court's power to grant or deny leave to file an amicus brief." *United States ex rel. Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 927–28 (S.D. Tex. 2007); *United States v. Michigan*, 116 F.R.D. 655, 660 (W.D. Mich. 1987). Because the role of an amicus submission is to assist the Court, the decision to accept participation by an amicus is committed to the sound discretion of the Court. *See Mausolf v. Babbitt*, 158 F.R.D. 143, 148 (D. Minn. 1994), *rev'd on other grounds*, 85 F.3d 1295 (8th Cir. 1996).

"[A] district court lacking joint consent of the parties should go slow in accepting . . . an amicus brief." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). Perhaps the "most important" consideration is whether "participation by the amicus will be useful to [the court], as contrasted with simply strengthening the assertions of one party." *Am. Satellite Co. v. United*

States, 22 Cl. Ct. 547, 549 (1991). While it is not necessary that an amicus curiae be totally disinterested, "courts have frowned on participation which simply allows the amicus to litigate its own views." *Id.* (citation omitted). Thus, where the movant's "attitude toward the litigation is patently partisan, [it] should not be allowed to appear as amicus curiae." *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff'd*, 782 F.2d 1033 (3d Cir.), *cert denied*, 476 U.S. 1141 (1986); *see also United States v. Gotti*, 755 F.Supp. 1157, 1159 (E.D.N.Y. 1991) (rejecting amicus curiae application for its failure to provide an "objective, dispassionate, neutral discussion of the issues").

Further, "an amicus who argues facts"—as Fairholme seeks to do here—"should rarely be welcomed." *Strasser*, 432 F.2d at 569. "At the trial level, where issues of fact as well as law predominate, the aid of amicus curiae may be less appropriate than at the appellate level where such participation has become standard procedure." *Yip*, 606 F. Supp. at 1568; *see also Leigh v. Engle*, 535 F. Supp. 418, 422 (N.D. Ill. 1982) (while the "shift in traditional amicus curiae practice" towards partisan advocacy may be appropriate for appellate practice, "it is not proper in a trial court").

Fairholme's motion should be denied.

A. The Sealed Materials Fairholme Seeks to Introduce Would Not Be Useful to Resolving the Legal Issues Presented in the Pending Motions to Dismiss.

Fairholme proposes to participate as an amicus curiae for the purpose of supporting factual allegations in Plaintiffs' complaint. But the Court is already required to assume the truth of those allegations for purposes of resolving the pending motions to dismiss. Those motions raise purely legal issues, including whether the Court has jurisdiction to adjudicate Plaintiffs' claims. Fairholme can provide no assistance to the Court in resolving the pending motions, and its request to participate as an amicus should be denied for this reason alone.

The only explanation that Fairholme offers as to the relevance of the CFC discovery materials it seeks to introduce is that they allegedly "show that Defendants' litigation-driven rationales for the Net Worth Sweep are highly misleading." (Fairholme Mot. ¶ 2, ECF No. 29-1); (*id.* at ¶5) (asserting that "many of the arguments in Defendants' motions to dismiss depend on factual premises that the *Fairholme* discovery materials demonstrate to be misleading and, in important respects, false"). Again, Defendants flatly reject this contention, but that disagreement is immaterial here; Plaintiffs have already conceded that Defendants' rationales for the Third Amendment are legally *irrelevant* for purposes of resolving Defendants' motions to dismiss. *See* (ECF No. 21, at 4) (stating that the Court can resolve the "threshold legal arguments" in this case "*irrespective of* FHFA's reasons for agreeing" to the Third Amendment and that "Treasury's rationale . . . *makes no difference*" to the analysis).

Further, Plaintiffs *already* allege that FHFA and Treasury acted with motivations the Plaintiffs characterize as improper and nefarious. Defendants accept those allegations for the limited purpose of the motions to dismiss. Fairholme's attempt to submit evidence purportedly supporting Plaintiffs' allegations is therefore misplaced at this stage of the litigation. *See Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club*, No. 94 Civ. 0436, 1995 WL 358777, at *1 (S.D.N.Y. June 14, 1995) (denying leave to appear as amicus curiae, even where movant had its own particular interests in the outcome of the litigation, because the proposed amicus submission "would not be germane and may even serve to conflate and confuse the issues").

That is why, on October 2, 2015, Magistrate Judge Scoles issued an order rejecting Plaintiffs' demand that Defendants produce administrative records. Judge Scoles explained that the Court "must assume the truth of the allegations set forth in the complaint," and "assuming the truth of the allegations in the complaint, both sides agree the issues raised in Defendants'

motions to dismiss may be addressed without resort to any administrative record." (Order 4–5, ECF No. 23).[1] The same principle applies here: just as there is no need for an administrative record to resolve the motions to dismiss, so too is there no need to consider whatever materials Fairholme seeks to submit.

Moreover, Magistrate Judge Scoles' decision and reasoning are fully consistent with those of other courts. In cases in which Fairholme (as a litigant rather than as an amicus) sought to challenge the Third Amendment, two federal district courts—for the Southern District of Iowa and the District of Columbia—have already rejected attempts by Fairholme and its co-plaintiff's corporate affiliate (represented by the same counsel representing Fairholme here) to introduce extraneous materials concerning the negotiation and execution of the Third Amendment at the motion-to-dismiss stage. *See Perry Capital*, 70 F. Supp. 3d at 226 (holding that because "FHFA's underlying motives or opinions . . . do not matter for purposes of Section 4617(f)," no administrative record or other extraneous documents were necessary "to determine whether the Third Amendment, in practice, exceeds the bounds of HERA"); *id*. at 225 (finding administrative record to be "[i]rrelevant" because "FHFA's Justifications for Executing the Third Amendment . . . Are Irrelevant"); *Cont'l W. Ins. Co.*, 83 F. Supp. 3d at 831, 840 n.6 (dismissing claims and observing that "it is not the role of this Court to wade into the merits or motives of FHFA and Treasury's actions"); *Cont'l W. Ins. Co.*, Civ. No. 4:14-00042, Order 6, ECF No. 18-2 (Aug. 5, 2014) (assuming the truth of the plaintiff's allegation that the Third Amendment was "unnecessary and improperly motivated," and denying plaintiff's demand for production of administrative records).

[1] If Plaintiffs disagreed with the Magistrate Judge's decision, they could have sought review by this Court pursuant to 28 U.S.C. 636(b)(1).

Having failed to convince those district courts to allow Fairholme to conduct discovery or to compel the filing of the administrative record in cases raising materially identical claims, Fairholme should not be allowed to use amicus filings as a vehicle to seek contrary results in this Court. Because Fairholme's proposed submission would not be useful to the Court in resolving the legal issues presented in Defendants' motions to dismiss, Fairholme's motion should be denied.

B. Fairholme Is Not a Proper Amicus Curiae.

Additionally, Fairholme cannot serve as an amicus curiae here because (1) Fairholme seeks to use its amicus filings solely to advance its own interests as a litigant, rather than assist the court with any legal question presented by the pending motions to dismiss; and (2) Fairholme seeks to introduce evidence and submit briefs addressing factual, as opposed to legal, matters.

1. Fairholme's True Interests Are as a Litigant, Not as a Friend of the Court.

"The term 'amicus curiae' means friend of the court, not friend of a party." *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997) (citing *United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir. 1991)). "Participation as amicus curiae, as opposed to becoming an intervenor, is appropriate when the party cares only about the legal principles of the case, and has no personal, legally protectable interest in the outcome of the litigation." *Russell v. Bd. of Plumbing Examiners of Cnty. of Westchester*, 74 F. Supp. 2d 349, 351 (S.D.N.Y. 1999), *aff'd*, 1 F. App'x 38 (2d Cir. 2001) (citation omitted).

Fairholme makes its own interests clear in its motion: Like Plaintiffs here, Fairholme "owns a substantial number of shares of both preferred and common stock issued by Fannie Mae and Freddie Mac," (Fairholme Mot. ¶ 1, ECF No. 29-1), and by Fairholme's own account, its sole interest in this litigation is that if the Third Amendment "survives judicial review, the shares

owned by Fairholme and all other private investors"—such as Plaintiffs—"will have no economic value." *Id.* Thus, and for the reasons outlined in Defendants' motions to dismiss,[2] Fairholme's "real interests are as a litigant, not as a friend of the court." *Am. Satellite Co.*, 22 Cl. Ct. at 549.

Fairholme's partisanship is underscored by the fact that Fairholme has directly and through a co-plaintiff's wholly owned subsidiary already lost materially identical lawsuits filed in the district courts for the District of Columbia and the Southern District of Iowa. *See Perry Capital*, 70 F. Supp. 3d 208; *Cont'l W. Ins. Co.*, 83 F. Supp. 3d 828. Fairholme, along with other plaintiffs whose claims were dismissed by the U.S. District Court for the District of Columbia, filed an appeal. *Perry Capital LLC v. Lew*, No. 14-5243 (D.C. Cir.) (appeal pending). On July 29, 2015, Fairholme filed with the D.C. Circuit a "Sealed Motion for Judicial Notice and Supplementation of the Record." That motion, like the motion for leave that Fairholme filed in this case, requests that the D.C. Circuit consider hundreds of pages of sealed materials that Fairholme obtained through jurisdictional discovery in the CFC, where Fairholme's takings claim is pending. Both Fairholme's appeal and its motion to supplement remain pending in the D.C. Circuit.

Fairholme is "thus not a disinterested stranger offering to illuminate a legal issue." *Am. Satellite Co.*, 22 Cl. Ct. at 549. Quite the opposite, Fairholme is "a litigant itself," "intimately

[2] *See, e.g.*, (Treasury's Mot. to Dismiss 21–28, ECF No. 20-1) (claims based on status as shareholders of Fannie Mae and Freddie Mac are derivative in nature and are barred by statute). Indeed, Fairholme's interests as a shareholder of Fannie Mae and Freddie Mac are in identity with Plaintiffs' claims in this litigation, because any shareholder's action based on injury to stock value must be brought derivatively on behalf of Fannie Mae and Freddie Mac, and any relief for such an action would flow to Fannie Mae and Freddie Mac. *See Perry Capital LLC*, 70 F. Supp. 3d at 229 n.24 (relief sought by the plaintiffs "will not flow 'directly to the stockholders,'" but instead "would flow first and foremost to [Fannie Mae and Freddie Mac]").

involved" in the "circumstances [of] the pending lawsuit." *Id.* "It is troubling in this connection that [Fairholme] offers to add to the factual background." *Id.* Fairholme should not be permitted to use the guise of an amicus submission to re-litigate its claims, submit new evidence, or, for that matter, evade the statutory bar on prosecution of shareholder claims during conservatorship, *see* (Treasury's Mot. to Dismiss 30–33, ECF No. 20-1) (discussing effect of 12 U.S.C. 4617(b)(2)(A) on suits brought by shareholders of Fannie Mae and Freddie Mac during conservatorship); *see also United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 151 (D.D.C. 2002) (denying motions to intervene and for leave to file amicus curiae brief where purported amici were plaintiffs from a related action whose brief only sought to advance their own interests rather than assist the court); *Yip*, 606 F. Supp. at 1568; *Gotti*, 755 F. Supp. at 1158.

Court after court has made clear that "[c]onferring amicus status on such partisan interests is inappropriate." *S.E.C. v. Bear Stearns & Co. Inc.*, Civ. No. 03-2938, 2003 WL 22000340, at *5–6 (S.D.N.Y. Aug. 25, 2003) (citations omitted); *see Ryan*, 125 F.3d at 1063 (denying amicus status to party that merely wished to weigh in as partisan advocate for petitioner) (citing *United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir. 1991)); *Liberty Lincoln Mercury v. Ford Mkt. Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993) ("When the party seeking to appear as *amicus curiae* is perceived to be an interested party or to be an advocate of one of the parties to the litigation, leave to appear as amicus curiae should be denied.") (collecting authorities); *Yip*, 606 F. Supp. at 1568 ("Where a petitioner's attitude toward the litigation is patently partisan, he should not be allowed to appear as amicus curiae.") (citation omitted); *Fluor Corp. v. United States*, 35 Fed. Cl. 284, 286 (1996) (denying motion for leave to file an amicus brief where the litigants were "adequately represented by counsel and interested in the issue which is of concern to the movants," and the proposed amici brief was "decidedly partisan").

In short, Fairholme has its own lawsuits to litigate its own claims, and Plaintiffs here are adequately represented by their own counsel. The Court need not grant amicus status so that Fairholme can use this litigation to make a decidedly partisan submission and press its views as a plaintiff in the other lawsuits which, in all events, involve identical shareholder interests and claims.

2. Amici Curiae May Not Submit Evidence or Comment on Factual Matters.

Even if Fairholme were a proper amicus curiae, its motion should be denied because its purpose is to provide factual enhancement for Plaintiffs' claims. A nonparty may not use amicus filings to inject new evidence or litigate factual issues. *See United States v. Yaroshenko*, 86 F. Supp. 3d 289, 290 (S.D.N.Y. 2015) ("To the extent that Russia seeks to comment on the existence of allegedly newly discovered evidence, that is not the proper role of an amicus."); *High Sierra Hikers Ass'n v. Powell*, 150 F. Supp. 2d 1023, 1045 (N.D. Cal. 2001), *aff'd*, 390 F. 3d 630 (9th Cir. 2004) ("Amici are not parties and cannot introduce evidence."); *State of New York v. Microsoft Corp.*, 2002 WL 31628215, at *1 (D.D.C. Nov. 14, 2002) (consideration of amici materials would be "improper" where the amici did not address "issues of law, but instead offer[ed] factual information" concerning "the substantive issue of remedy").

Here, Fairholme improperly seeks permission to submit "a number of documents and other materials" that it obtained in discovery in its CFC case, along with an "amicus brief" in which it "describe[s]" these materials "in detail." (Fairholme Mot. ¶ 2, ECF No. 29-1). Fairholme's proposed submission thus violates the principle that an amicus "cannot introduce evidence." *High Sierra*, 150 F. Supp. 2d at 1045.

Fairholme's attempt to use the discovery from the Court of Federal Claims to provide factual enhancement for Plaintiffs' claims is particularly inappropriate here, because Plaintiffs

themselves have "pledged" that "in no event" will they "seek discovery into the adequacy of the record for the resolution of the motions to dismiss." (Order re: Filing of Admin. R., ECF No. 23, at 3 (quoting Pls. Resp. to Defs. Mot. to Stay 2, ECF No. 21)). *See also* (Pls. Resp. to Defs. Mot. to Stay 5, ECF No. 21) (Plaintiffs stating that they "have no intention of seeking discovery in this case until after the Court rules on the parties' cross motions"). *Cf. New Jersey v. New York*, 523 U.S. 767, 781 n.3 (1998) (stating that courts must pass over arguments of amici that the named party to the case has in effect renounced).

Amici should not be permitted to wrest control of a pending case from the actual litigants in this manner. "Otherwise, outside parties could hijack litigation quite easily." *Self-Ins. Inst. of Am., Inc. v. Snyder*, 761 F.3d 631, 641 (6th Cir. 2014). *Cf. Cont'l Ins. Companies v. Ne. Pharm. & Chem. Co.*, 842 F.2d 977, 984 (8th Cir. 1988) ("Ordinarily, we consider only issues argued in the briefs filed by the parties and not those argued in the briefs filed by interested nonparties.") (citing *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 861–62 (9th Cir. 1982)); *United States v. Alkaabi*, 223 F. Supp. 2d 583, 593 n.19 (D.N.J. 2002) (explaining that an amicus curiae may not initiate, create, extend, or enlarge the issues raised by the parties).

In all events, Fairholme's assertion that the proffered sealed materials "will further this Court's truth-finding function," (Fairholme Mot. ¶5, ECF No. 29-1), could not justify its participation as an amicus. There is no "truth-finding" that occurs at the motion-to-dismiss stage because the Court assumes the truth of the complaint's well-pleaded, plausible factual allegations. And as explained above, the parties have already agreed that any inconsistencies between Defendants' stated rationales for the Third Amendment and Plaintiffs' allegations should be resolved simply by assuming the truth of the plausible allegations in the complaint—not by resorting to materials outside the complaint—to resolve the motions to dismiss. *See*

(Order Re: Filing of Admin. Record 4–5, ECF No. 23); (Pls. Resp. to Defs. Mot. to Stay 3, ECF No. 21) (Plaintiffs acknowledging that "Defendants are correct that [the Court] can adjudicate their motions without consulting an administrative record" by assuming the truth of all allegations).

Thus, even if the Court were to permit Fairholme to participate as an amicus curiae, Fairholme should only be permitted to submit legal argument concerning issues raised by the parties, not introduce evidence or provide commentary on factual matters. The cases on which Fairholme relies only confirm that Fairholme's proposed submission is inappropriate. For example, in *Shain v. Veneman*, 278 F. Supp. 2d 1006 (S.D. Iowa 2003), the court noted the "legal nature of the issue" when it granted amici status to movants who had an "obvious interest" in the outcome of the case. *Id.* at 1008 n.2. Tellingly, Fairholme does not furnish a single case in which an amicus curiae has been permitted to inject evidence and litigate factual issues, let alone submit discovery materials from other ongoing litigation.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Fairholme's motion seeking leave to file a brief as amicus curiae in support of Plaintiff's opposition to Defendants' motions to dismiss.

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Respectfully submitted,

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