

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

**DEFENDANT’S OPPOSITION TO SAXTON PLAINTIFFS’
APPLICATIONS FOR ACCESS TO PROTECTED INFORMATION**

Defendant, the United States, respectfully submits this opposition to the notice of filing of applications for access to protected information submitted by Thomas Saxton, Ida Saxton, and Bradley Paynter (the “*Saxton* plaintiffs”). The *Saxton* plaintiffs, who are not parties to any case pending in this Court, are parties in *Saxton v. FHFA*, No. 15-47 (N.D. Iowa), an action in which shareholders of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) challenge the net worth sweep provision of the Third Amendment to the Senior Preferred Stock Purchase Agreements between the Federal Housing Finance Agency (FHFA) and the United States Department of the Treasury.

Generally, the *Saxton* plaintiffs request that the Court should authorize their counsel access to protected information produced in this case so that they can amend their district court complaint (which FHFA and Treasury have moved to dismiss) with information that, they allege, the Government has “concealed from the public.” Notice of Filing of Applications at 3, Nov. 16, 2015, ECF No. 260. The Court should deny the request for access.

The district court has already granted a motion by defendants to delay filing of an administrative record in that case until the court has ruled on the motions to dismiss. The court

noted that defendants argue that plaintiffs' claims are precluded by the Housing and Economic Recovery Act ("HERA") and that "both sides agree the issues raised in Defendants' motions to dismiss may be addressed without resort to an administrative record." Order at 5, dated Oct. 2, 2015, No. 15-47, *Saxton v. FHFA* (N.D. Iowa), ECF No. 23. In fact, the *Saxton* plaintiffs conceded that the district court could address the "threshold legal arguments" presented by the motions to dismiss "irrespective of FHFA's reasons for agreeing" to the Third Amendment and that "*Treasury's rationale . . . makes no difference*" to the analysis. Plaintiffs' Response to Defendants' Motion to Stay at 4, No. 15-47, *Saxton v. FHFA* (N.D. Iowa), ECF No. 21 (emphasis added). In light of this and the district court's prior order regarding how it intends to resolve the *legal* issues presented by defendants' motions to dismiss, the *Saxton* plaintiffs have no persuasive argument that they need protected information to file an amended complaint that would be subject to identical jurisdictional challenges. See *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 220-26 (D.D.C. 2014) (holding that application of HERA's jurisdictional bar is a purely legal inquiry); see also *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015).

Consequently, the *Saxton* plaintiffs' request for access to protected materials is unfounded. The materials to which they seek access purportedly address the defendants' motivations in entering into the Third Amendment. The district court has already determined that the pending motions to dismiss can be decided without resort to an administrative record. The court noted that the motions to dismiss argue that the *Saxton* plaintiffs' claims are statutorily precluded by HERA; the motives behind the Third Amendment are not relevant to that inquiry.

Nor can the *Saxton* plaintiffs justify their request for access upon the proposed amicus curiae brief filed by Fairholme Funds, Inc. (plaintiff in this case). As defendants in the *Saxton*

case argued in their opposition, Fairholme's attempt to insert factual issues via an amicus brief is improper. *See Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). Moreover, the Iowa district court has not ruled on Fairholme's motion for leave to file an amicus brief, much less agreed to consider discovery produced in this action in deciding the pending motions to dismiss. To the contrary, the district court, as noted above, has ordered the parties to brief the motions without resort to an administrative record, much less discovery produced in another court, and has denied the *Saxton* plaintiffs' request to stay the briefing schedule pending resolution of Fairholme's motion. In fact, the *Saxton* plaintiffs have already filed their response to the motions to dismiss.

For these reasons, the Government respectfully requests that the Court deny the *Saxton* plaintiffs' request for access.

Respectfully submitted,

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