

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., *et al.*,

Plaintiffs,

vs.

THE UNITED STATES,

Defendant.

No. 13-465C
(Judge Sweeney)

**REPLY IN SUPPORT OF APPLICATIONS FOR ACCESS TO PROTECTED
INFORMATION OF CERTAIN ATTORNEYS REPRESENTING THE PLAINTIFF
IN ROBINSON V. FHFA, NO. 7:15-CV-109 (E.D. KENTUCKY)**

In opposing the applications of Ms. Robinson’s counsel for access to Protected Information, Defendant makes almost no effort to distinguish Ms. Robinson’s suit from *Saxton v. FHFA*, 15-47 (N.D. Iowa)—another Administrative Procedure Act (“APA”) challenge to the Net Worth Sweep in which, less than one month ago, this Court granted the plaintiffs access to the very same materials at issue here. *See* Order Granting Certain Saxton Counsel Access to Protected Information (Nov. 18, 2015), Doc. 265 (“*Saxton* Order”). Instead, Defendant argues that “the *Saxton* plaintiffs’ request for access was improvidently granted” and urges the Court to reconsider its approach. U.S. Resp. 2. But the same reasons that led the Court to grant the *Saxton* plaintiffs’ motion a few weeks ago point to the same result here: “access to protected information may permit counsel for [Ms. Robinson] to raise arguments and carry their client’s burden of establishing the district court’s jurisdiction” and may also “provide grounds for [Ms. Robinson] to amend the complaint.” *Id.* at 2. Under these circumstances, Ms. Robinson “would be prejudiced if [her] counsel were precluded from reviewing material that could potentially aid in responding to the specific jurisdictional challenges” that FHFA and Treasury have signaled they intend to raise in her case. *Id.* In short, the applications at issue here are on all fours with

those submitted by the *Saxton* plaintiffs, and there is simply no reason to withhold materials that could otherwise be used to “help to inform the district court” in Ms. Robinson’s case of important facts that the Government has kept from the public. *Id.*

The *Saxton* court’s recent order denying Fairholme’s motion for leave to introduce Protected Information as an amicus at the motion to dismiss stage only underscores why Ms. Robinson’s attorneys’ applications should be granted. *See* Order at 4, *Saxton v. FHFA*, No. 15-47 (N.D. Iowa) (Dec. 3, 2015) (“[B]ecause the court will not consider facts and evidence outside the pleadings in determining facial challenges to subject matter jurisdiction under Rule 12(b)(1), it will not admit or consider Fairholme’s evidence in support of Plaintiffs’ opposition to the Motions to Dismiss.”). Because only Ms. Robinson can amend the complaint in her case, the Eastern District of Kentucky may ultimately determine that she alone is able to introduce facts that have been revealed through discovery in this case.

Defendant seeks support for its position in this Court’s initial refusal to grant access to Protected Information to counsel for Perry Capital, one of the appellants in *Perry Capital v. Lew*, No. 14-5243 (D.C. Cir.). *See* U.S. Opp. 2; Order (Oct. 8, 2015), Doc. 249. Significantly, denying Perry Capital’s initial applications did not accomplish what Defendant plainly hopes would be the effect of denying access to Ms. Robinson’s attorneys—preventing another federal court from considering relevant facts about the Net Worth Sweep that the materials produced in this case reveal. Fairholme is a party to the D.C. Circuit litigation and thus was able to put Protected Information before that court irrespective of whether Perry Capital’s attorneys were granted access; in contrast, in the *Saxton* case, the Government strenuously (and successfully) objected to Fairholme introducing Protected Information on the ground that it only sought to participate as an amicus. The Government will no doubt make the same argument in opposition

to Fairholme's efforts to submit an amicus brief revealing Protected Information in Ms. Robinson's case.

Defendant also elides a second key distinction between Perry Capital and Ms. Robinson: unlike Ms. Robinson, who could make immediate use of Protected Information by amending her complaint as of right, Perry Capital initially submitted its applications for access to Protected Information at a time when it was not apparent that there was any way that it could use the information in a filing before the D.C. Circuit. Once it became apparent that Perry Capital's attorneys would be able to make use of Protected Information in the merits briefing if accorded access, this Court granted Perry Capital's applications in short order. *See* Order at 1 (Nov. 9, 2015), Doc. 255 (granting applications and explaining that Court would not "preclud[e] Perry Capital's counsel from using pertinent protected information on behalf of its client"). The Court should do the same here.

Finally, citing "the need to protect sensitive information in this case," Defendant intimates that permitting Ms. Robinson's attorneys to access Protected Information would "encourage similarly situated shareholders (and perhaps others) to file complaints as a means to obtain access to discovery materials." U.S. Opp. 2, 3. But Defendant never suggests that Ms. Robinson filed her suit for any such improper purpose, and any concern that other shareholders might do so is fully addressed by the protective order's restrictions on the use of Protected Information. *See* Second Protective Order ¶ 3 (Nov. 9, 2015), Doc. 256 ("Protected Information shall not be used for any business, commercial, competitive, or personal purpose."). Moreover, the shareholders themselves do not even have access to this information in any of the cases since only attorneys have been admitted to the protective order. Ms. Robinson's attorneys have agreed to be bound by the Protective Order, and they have solemnly pledged to observe and comply

with its provisions. Accordingly, like the attorneys for the *Saxton* plaintiffs, Ms. Robinson's attorneys should be granted access to Protected Information.

Dated: December 14, 2015

Respectfully submitted,

/s/ Jennifer B. Orr

Jennifer B. Orr

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December 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/ Jennifer B. Orr
Jennifer B. Orr