IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FAIRHOLME FUNDS, INC., et al., *Plaintiffs-Appellants*, v. FEDERAL HOUSING FINANCE AGENCY, et al., Defendants-Appellees.	No. 14-5254

FAIRHOLME'S UNSEALED MOTION FOR JUDICIAL NOTICE AND SUPPLEMENTATION OF THE RECORD

Plaintiffs-Appellants in No. 14-5254 ("Fairholme") respectfully move the Court (1) to take judicial notice of the attached documents and deposition transcripts, all of which were produced in discovery by Defendants or related entities in a parallel action in the Court of Federal Claims ("CFC")—*Fairholme Funds, Inc. v. United States*, No. 13-465 (Fed. Cl.), and (2) to supplement the record on appeal with those materials.[1]

For the reasons set out in Plaintiffs' merits brief, this Court should hold that the Net Worth Sweep is facially inconsistent with FHFA's and Treasury's statutory

[1] Although disclosure of the materials produced in discovery in the CFC action is governed by a strict protective order, that court authorized Fairholme to file the materials under seal here. *See* Order, *Fairholme Funds, Inc. v. United States*, No. 13-465 (Fed. Cl. July 21, 2015), ECF No. 212.

authorities and order entry of judgment for Plaintiffs as a matter of law. But, even if that were not so, the district court's decision must be reversed. As the materials attached to this motion demonstrate, the administrative record submitted by Treasury and the "Document Compilation" and declaration submitted by FHFA in lieu of an administrative record are incomplete, misleading, and, in important respects, outright false. Thus, even if this Court is not prepared to order entry of judgment for Plaintiffs, the Court must at a minimum remand for further proceedings that account for this newly discovered evidence.

BACKGROUND

On August 17, 2012, FHFA and Treasury changed the terms under which Fannie Mae and Freddie Mac (the "Companies") would compensate Treasury for the financial support it provided them in connection with the 2008 financial crisis. Starting January 1, 2013, rather than paying a fixed annual 10% cash or 12% in-kind preferred stock dividend on Treasury's investment, the Companies were required to make quarterly payments to Treasury equal to their *entire net worth*, less a small and decreasing capital reserve that would fall to zero by 2018. This "Net Worth Sweep" effectively nationalizes the Companies and transfers to Treasury the entire economic value of the Companies' privately-held equity.

In this case, Fairholme has alleged that the Net Worth Sweep violates the Administrative Procedure Act ("APA"), as well as FHFA's fiduciary and

contractual obligations to the Companies' private shareholders. Fairholme also filed a taking action against the United States in the CFC. Materials produced in discovery reveal that Treasury's administrative record and FHFA's "Document Compilation"[2] are incomplete, misleading, and, in important respects, false.

ARGUMENT

I. JUDICIAL NOTICE OF THE MATERIALS PRODUCED IN THE CFC IS WARRANTED

A. The Court May Take Judicial Notice of the Existence of the Materials Produced in Discovery in the CFC Action.

This Court has broad discretion to take judicial notice of any fact that is "not subject to reasonable dispute" and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b)(2); *see Power, Inc. v. NLRB*, 40 F.3d 409, 426 n.11 (D.C. Cir. 1994); *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 375 n.29 (D.C. Cir. 1983). The exercise of that discretion is necessary in this case to safeguard the integrity of the judicial process, for the materials attached to this motion reveal that Treasury's

[2] FHFA described its submission in district court as a "Document Compilation" and refused to certify a true administrative record. *See* Notice of Filing Document Compilation, *Fairholme Funds, Inc. v. FHFA*, No. 13-1053 (D.D.C. Dec. 17, 2013), Dkt. 24 at 1. FHFA nevertheless represented that its document compilation included all the materials that "were before it" and "were directly or indirectly considered" when it imposed the Net Worth Sweep. *See* FHFA, Watt, Fannie, and Freddie Combined Reply in Support of Motion to Dismiss, *Fairholme Funds, Inc. v. FHFA*, No. 13-1053 (D.D.C. May 2, 2014), Dkt. 46 at 52.

administrative record and FHFA's document compilation were at best highly misleading. That the CFC discovery materials exist and were produced by the Defendants, their consultant, the Companies, and the Companies' auditors is not subject to reasonable dispute and may be readily established from the materials themselves. Accordingly, the Court should assure that this case is not decided on the basis of a false factual premise and take judicial notice of the existence of the materials in question.

Fairholme's request for judicial notice fits comfortably within this Court's precedents. This Court has long been willing to take judicial notice of facts based on the records in other cases. *See, e.g.*, *Dupree v. Jefferson*, 666 F.2d 606, 608 n.1 (D.C. Cir. 1981); *United States v. Hopkins*, 531 F.2d 576, 581 n.38 (D.C. Cir. 1976); *United States v. Dancy*, 510 F.2d 779, 787 (D.C. Cir. 1975); *Gomez v. Wilson*, 477 F.2d 411, 416 n.28 (D.C. Cir. 1973). It is particularly appropriate for the Court to do so where, as here, another case concerns "the same subject matter or questions of a related nature between the same parties." *See Veg-Mix, Inc. v. USDA*, 832 F.2d 601, 607 (D.C. Cir. 1987) (quoting *Fletcher v. Evening Star Newspaper Co.*, 133 F.2d 395 (D.C. Cir. 1942)). As in *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1265 n.5 (D.C. Cir. 2008), many of the materials at issue were provided by litigants in this action. And similar to *Xydas v.*

United States, 445 F.2d 660, 667 n.22 (D.C. Cir. 1971), important facts about what Defendants knew can be inferred from the existence of these materials.

While the Court may take judicial notice of facts in any APA case, *see Nebraska v. EPA*, 331 F.3d 995, 998 n.3 (D.C. Cir. 2003), it has shown a particular willingness to look beyond the materials considered by the district court where they reveal that the administrative record on review is incomplete. Thus, in *Walter O. Boswell Memorial Hospital v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984), this Court examined materials submitted by the agency in another case when determining that a remand was necessary to complete the administrative record. And in *NRDC v. Train*, 519 F.2d 287, 291–92 (D.C. Cir. 1975), the Court considered a document that the agency had improperly omitted from its administrative record and remanded the case so that the administrative record could be completed.

Finally, judicial notice is especially appropriate in this case because it is necessary to take into account developments that occurred after the district court's decision and that bear on this Court's jurisdiction. Judicial notice is favored "when the appellate court needs to take account of developments in the case subsequent to proceedings in the trial court." KENNETH W. GRAHAM ET AL., 21B FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5110.1 (2d ed. 20105); *see Rothenberg v. Sec. Mgmt. Co.*, 667 F.2d 958, 961 n.8 (11th Cir. 1982). And this Court routinely

uses judicial notice to account for intervening events relevant to its jurisdiction.[3] Materials that have come to light in the CFC since the district court dismissed the complaint on jurisdictional grounds reveal that the Defendants' jurisdictional arguments are premised on a mischaracterization of the relevant facts.

B. The Materials Produced in the CFC Action Establish That Plaintiffs Were Prejudiced By Defendants' Incomplete and Misleading Submissions.

The Net Worth Sweep went into effect on January 1, 2013, and within its first year Treasury had already received more than $100 billion more in cash dividends from the Companies than it would have received under the prior arrangement. A large share of those dividend payments resulted from increases in the Companies' net worth that reflected the reversal of excessively conservative accounting decisions that the Companies made at FHFA's direction in 2008 and 2009. Specifically, in 2013, both Companies' net worth increased by tens of billions of dollars as a result of the recognition of deferred tax assets and releases of loan loss reserves, two balance sheet adjustments that the accounting rules mandated once it became apparent that the Companies' were performing much better than FHFA had assumed they would in 2008 and 2009.

[3] *See, e.g.*, *LeBoeuf, Lamb, Greene & MacRae, LLP v. Abraham*, 347 F.3d 315, 325 (D.C. Cir. 2003); *see also Clark v. K-Mart Corp.*, 979 F.2d 965, 967 (3d Cir. 1992) (en banc) ("[B]ecause mootness is a jurisdictional issue, we may receive facts relevant to that issue . . . ." (citation omitted)).

Despite the Net Worth Sweep's timing—coming just as the Companies began generating the largest profits in their history—Defendants have steadfastly maintained that they had never envisioned or discussed the idea that the Net Worth Sweep would result in a windfall of more than $100 billion for Treasury in 2013 alone. To support that narrative, FHFA submitted a declaration from Mario Ugoletti, who as a Treasury official in 2008 was deeply involved in establishing the terms on which Treasury provided the Companies with financial support, and who, after later moving to FHFA, was a central player in the decisionmaking that led to the Net Worth Sweep. Mr. Ugoletti's declaration claims that FHFA was "concern[ed] that the 10% annual dividend to Treasury would reduce the amount of the Treasury commitment starting in 2013" and that the Net Worth Sweep was not intended or expected "to increase compensation to Treasury." Ugoletti Decl. ¶¶ 16, 19, FHFA 0008–009 (Exhibit 1, A009–10). For its part, Treasury included in its administrative record a presentation dated June 13, 2012 including financial projections showing Fannie and Freddie needing to make draws to pay Treasury's dividends and predicting that imposition of the Net Worth Sweep would result in "materially equivalent" "net cash returned to taxpayers." T3836, T3847–T3850, T3861 (Exhibit 2, A016, A027–30, A041). It is now apparent that those materials, which form the heart of Treasury's administrative record and FHFA's document compilation, are in certain respects highly misleading and in others outright false.

1. Deferred Tax Assets. Mr. Ugoletti's sworn declaration says that "neither the Conservator nor Treasury envisioned at the time of the [Net Worth Sweep] that Fannie Mae's valuation allowance on its deferred tax assets would be reversed in early 2013, resulting in a sudden and substantial increase in Fannie Mae's net worth." Ugoletti Decl. ¶ 20, FHFA 0009–10 (A010–11). But when Fairholme deposed Susan McFarland, who was Fannie's CFO at the time of the Net Worth Sweep, it learned that during a meeting with senior officials at the Department of Treasury on August 9, 2012—just over one week before the Net Worth Sweep was imposed—Ms. McFarland "mentioned the possibility that it could get to a point in the not-so-distant future where the factors might exist whereby the allowance on the deferred tax asset [maintained by Fannie] would be released." McFarland Deposition Transcript 45:5–8 (Exhibit 3, A046); *see also id.* 158:7–10 (A055); 193:8–15 (A059). When "asked . . . in this meeting about how large would it be and did I have any idea of when," Ms. McFarland responded, "probably in the 50-billion-dollar range and probably sometime mid 2013 . . . ." *Id.* 59:14–16 (A050); *id.* 59:25–60:1 (A050); *see also id.* 164:6–12 (A056).[4] Ms. McFarland further testified that FHFA likewise knew, prior to imposition of the Net Worth Sweep, about "the potential that [the deferred tax assets valuation] allowance might be

[4] Notably, the same day that Ms. McFarland met with Treasury officials, Mr. Ugoletti sent an email indicating that "there appears to be a renewed push to move forward" with the Net Worth Sweep. FHFA00103596 (Exhibit 4, A062).

reversed in the not-so-distant future," because she "would have mentioned" that fact "at an Executive Committee meeting" attended by FHFA officials. *See id.* 55:3–17 (A049). In light of Ms. McFarland's testimony, Mr. Ugoletti's sworn statement that neither agency envisioned recognition of the deferred tax assets is not credible.

Likewise, Mr. Ugoletti's testimony during his deposition revealed that he had no basis for making that sworn statement and, thus, that his statement could not have been "based on personal knowledge of the facts." Ugoletti Decl. at 2, FHFA 0002 (A003). When asked whether he had "an opinion on whether FHFA, as conservator, knew [on the eve of the Net Worth Sweep] that the deferred tax assets might be written back up in 2013," Mr. Ugoletti responded, "I don't know who else in FHFA or what they knew about the potential for that . . . . *I* do not recall knowing about that this was going to be an issue until really '13 when it became imminent . . . , and *I don't know what anybody else thought about it.*" Ugoletti Deposition Transcript 331:3–22 (emphases added) ("Ugoletti Tr.") (Exhibit 5, A074). And when asked "[d]o you know what Treasury thought about it," he responded, "*I do not.*" *Id.* 332:2–6 (emphasis added) (A074). Moreover, Jeff Foster, a Treasury official who was intimately involved in developing the Net Worth Sweep idea, testified that during the time leading up to the Net Worth Sweep he "was aware that [release of the Companies' deferred tax assets valuation

allowances] was a possibility at some point in time" and that he had discussed that issue with another Treasury official. Foster Deposition Transcript 256:16–257:1, 258:1–9 (Exhibit 6, A092, 93).[5]

Relatedly, Mr. Ugoletti's deposition testimony demonstrates that another statement in his declaration regarding deferred tax assets is, at a minimum, misleading. That carefully crafted, made-for-litigation declaration reads, "[a]t the time of the negotiation and execution of the Third Amendment, the Conservator and the Enterprises *had not yet begun to discuss* whether or when the Enterprises would be able to recognize any value to their deferred tax assets." Ugoletti Decl. ¶ 20, FHFA 0009 (emphasis added) (A010). Regardless of what the FHFA as Conservator and the Enterprises had begun to discuss, Mr. Ugoletti's deposition testimony makes clear that FHFA *itself* was aware of and monitoring the issue. Indeed, Mr. Ugoletti expressly acknowledged in his deposition that at the time of the Net Worth Sweep, FHFA accountants "were monitoring [the deferred tax asset] situation," Ugoletti Tr. 331:15 (A074), that FHFA would have known that the Companies had already begun to reduce their valuation allowances before the Net Worth Sweep, *id.* 323:10–13 (A072), and that he was generally aware of the fact

[5] *See also, e.g.*, GT005322 (Exhibit 7, A096) (Treasury consultant notes below table displaying results through the first quarter of 2012 indicating that Freddie Mac may release its valuation allowance "probably [in] 2013, 2014").

that the Companies' audit committees were assessing the status of the valuation allowances on a quarterly basis, *id.* 324:20–325:3 (A072).[6] And, as explained above, Ms. McFarland testified that FHFA and Fannie had indeed "begun to discuss" the deferred tax asset issue.

The deferred tax assets issue is critical because reversal of the $74 billion tax valuation allowances alone increased Fannie's and Freddie's net worth by an amount sufficient to pay Treasury's 10% cash dividend for several years wholly apart from the substantial profits generated by their business operations. *See* Fannie Mae News Release, May 9, 2013, http://goo.gl/G1xBTU (announcing benefit of $50.6 billion from reversal of valuation allowance); Freddie Mac News Release, November 7, 2013, http://goo.gl/Hytc3l (announcing benefit of $23.9 billion from reversal of valuation allowance). It is not plausible that Defendants were aware of this issue and nevertheless believed that the Net Worth Sweep was necessary to rescue the Companies from their existing dividend obligations and would not result in increased compensation to Treasury. The Court should take judicial notice of the existence of these materials.

[6] *See also* PWC-FM 00147059 (Exhibit 8, A098) (memo dated June 30, 2012, from Freddie to its auditor and FHFA analyzing whether deferred tax assets should be recognized); DT-055518 (Exhibit 9, A107); DT-055488 (Exhibit 10, A124).

2. Financial Projections. Treasury sought to prop up its proffered rationale for the Net Worth Sweep by including in its administrative record projections purportedly created during the summer of 2012 that showed the Companies unable to generate sufficient long-term profits to pay 10% cash dividends on Treasury's senior preferred stock without making additional draws on Treasury's funding commitment. *See* T3833–T3862 (A013–42). Those projections, included in a presentation dated June 13, 2012, say that they were based in part on "Grant Thornton analyses" that Treasury omitted from its administrative record. T3837 (A017). Examination of those Grant Thornton analyses reveals that Treasury's purported June 2012 projections were taken verbatim from reports that Grant Thornton prepared in November 2011 based on data from September of that year. *Compare* T3847 (A027) *with* GT007276 (Exhibit 11, A150); *compare* T3849 (A029) *with* GT007353 (Exhibit 12, A205); *see* Eberhardt Deposition Transcript 94:21–95:21, 208:22–209:11 (Exhibit 13, A238, 41) (Grant Thornton official acknowledging that "the valuation information contained in this report [was not] intended to be valid 11 months later"). And by the time of the Net Worth Sweep, those stale financial projections had proven to be woefully unreliable. For example, they predicted that Fannie would suffer a comprehensive net loss of $13.1 billion in fiscal year 2012. *See* T3847 (A027) & GT007276 (A150). But in the three quarters leading up to the Net Worth Sweep (the first three quarters of fiscal year

2012), Fannie actually generated comprehensive income of $6.5 billion. *See* T2403 (Exhibit 14, A245); T3350 (Exhibit 15, A248); T3910 (Exhibit 16, A251).

What is more, Treasury's administrative record fails to reveal that Treasury was in possession of newer projections indicating that the Net Worth Sweep was not necessary to prevent the Companies from running through the available Treasury funding commitment. For example, on August 9, 2012, Ms. McFarland presented senior Treasury officials with Fannie's latest projections, which showed both that the Company's payments to Treasury would exceed its draws by 2020 and that it would have $116.1 billion in remaining funding under Treasury's commitment in 2022. UST00532144 (Exhibit 17, A260); *see* McFarland Tr. 161:18–162:12 (A055–56); FM_Fairholme_CFC-00002532 (Exhibit 18, A270); UST00005747 (Exhibit 19, A275) (August 11, 2012 email to senior Treasury official containing similar Fannie projections).[7]

FHFA was in possession of similar information leading up to the Net Worth Sweep. An internal FHFA email describing a July 9, 2012 Fannie Mae executive management meeting indicates that David Benson, Fannie's Treasurer, stated that that the next eight years were "likely to be 'the golden years of GSE earnings.' "

[7] In addition, a presentation sent to senior Treasury officials in February 2012 indicated that "Fannie and Freddie could have the earnings power to provide taxpayers with enough value to repay Treasury's net cash investments in the two entities." UST00380800 (Exhibit 20, A298).

FHFA00047889 (Exhibit 21, A350). Attached to that email is a draft presentation by Mr. Benson including projections similar to those shared with Treasury on August 9. *See* FHFA0047893, Slide 14 (Exhibit 22, A369); *see also* FHFA00060208 (Exhibit 23, A398) (similar projections included in what appears to be final Benson presentation, dated July 19, 2012).

The Court should take judicial notice of the fact that these materials exist and that Treasury's administrative record and FHFA's document compilation do not accurately represent the true record before the agencies when the Net Worth Sweep was announced.

3. Purpose of the Net Worth Sweep. Materials produced in the CFC action make unmistakably clear that the Net Worth Sweep was *not* meant to rehabilitate Fannie and Freddie, as HERA requires. Indeed, the testimony of both Edward DeMarco—who agreed to the Net Worth Sweep in his capacity as FHFA's Acting Director—and Mr. Ugoletti indicates that FHFA was not even attempting to fulfill its conservatorship obligation to rehabilitate the Companies when it entered the Net Worth Sweep. *See* Institutional Pls.' Br. 29–48. Mr. DeMarco, for example, said that he had no intention of working to free Fannie and Freddie from conservatorship but rather intended to keep "these things together such that the Congress of the United States would ultimately determine what the . . . end of the conservatorship or the future of national housing policy, how these things would be

resolved." Transcript of DeMarco Deposition 146:17–21 ("DeMarco Tr.") (Exhibit 24, A436). And the reason he reneged on his predecessor's (Mr. Lockhart's) repeated public assurances that the central purpose of the conservatorships was to rehabilitate Fannie and Freddie and return them to private control under their existing charters was that Mr. DeMarco viewed those charters as "flawed," and those flaws were not "changeable by FHFA." *See id.* 147:10–148:4 (A436). Similarly, Mr. Ugoletti said that FHFA's objective "was not for Fannie and Freddie Mac to emerge from conservatorship." Ugoletti Tr. 308:7–9 (A069).

Treasury, of course, was also committed to winding down Fannie and Freddie. Indeed, communications between FHFA and Treasury indicate that by January 2012 the agencies "share[d] common goals" that included "provid[ing] the public and financial markets with a clear plan to wind down the GSEs." FHFA00025815–16 (Exhibit 25, A439, 40).[8] Documents produced in the CFC indicate that the Net Worth Sweep was meant to facilitate that wind down.[9] They

[8] *See also* Bowler Deposition Transcript 53:10–16 (Exhibit 26, A444) ("core policy . . . was to wind down the GSEs over time") ("Bowler Tr."); UST00508176 (Exhibit 27, A456).

[9] For example, a "housing finance / GSE reform proposal" Jeff Foster sent to officials at the Federal Reserve Bank of New York in February of 2012, which makes clear that the Net Worth Sweep was integral to Treasury's plan to replace Fannie and Freddie with an alternative housing finance system. UST00480703 (Exhibit 28, A460). One of the features of that proposal was to "[r]estructure

also indicate that White House officials shared Treasury's goals. *See* UST00503991 (Exhibit 29, A476); UST00517664 (Exhibit 30, A480).[10]

In sum, the documents and testimony highlighted here demonstrate that the Net Worth Sweep was based on Treasury and FHFA's commitment that Fannie and Freddie *would not* be rehabilitated, not their determination that they *could not* be rehabilitated. Indeed, Mr. Foster's testimony brings this into sharp focus:

> [I]n order to be able to wind down the GSEs in a safe and responsible manner, we needed to be able to reduce—well, Congress or FHFA would have needed to reduce the size and the footprint of the GSEs or Fannie Mae and Freddie Mac's retained portfolio and guarantee books. That reduction in footprint would reduce their ability to generate net income. Reduce[d] net income generation capacity would reduce [the] ability to meet any fixed income dividend payments under a variety of—almost under any scenario and, as a result, to be able to support the wind-down, a more flexible dividend structure supported that.

Foster Tr. 240:10–241:5 (A089); *see also id.* 230:1–7 (A087); *id.* 239:5–14 (A089); Bowler Tr. 88:22–89:3 (A447); *id.* 255:8–256:8 (A453).

The Court should take judicial notice of the existence of documents demonstrating that the Net Worth Sweep was integral to Treasury's and FHFA's

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PSPAs to allow for variable dividend payment based on positive net worth," UST00480714 (A471)—*i.e.*, to impose a net worth sweep.

[10] Treasury officials communicated with the White House about the Net Worth Sweep during the time leading up to its adoption. *See, e.g.*, Foster Tr. 112:15–113:9 (A079); Bowler Tr. 152:16–153:13 (A450); UST00503874 (Exhibit 31, A483).

plans to wind down Fannie and Freddie, which Defendants improperly concealed by submitting manifestly incomplete and misleading materials in the district court.

4. Agencies' Understanding of the Purchase Agreements. Documents produced in discovery also confirm that the central defense of the Net Worth Sweep—a purported concern that the Companies' cash dividend payments would exhaust the government funding commitment—was based on a false premise. The Companies were not obligated to make cash dividend payments, but rather could make a non-cash payment in kind dividend payment at their election. *See*, *e.g.*, FHFA00083260 (Exhibit 32, A487); UST00500869 (Exhibit 33, A490). Indeed, Mr. Foster could not identify any "problems of the circularity [in dividend payments that] would have remained had the [payment-in-kind] option been adopted," and he could not "think of" "any other company that has drawn on a line of credit to pay dividends." Foster Tr. 161:17–162:4 (A083–84); *see also id.* 154:9 (A082) (acknowledging that in-kind dividend payment "would not impact the net worth"). The Court should take judicial notice of the existence of materials indicating that the government understood that the PSPAs provided for Fannie and Freddie to pay their dividend obligations in kind.[11]

[11] In a similar vein, the CFC discovery materials contradict Defendants' litigation-driven construction of a provision of the Companies' agreements with Treasury providing for payment of a periodic commitment fee ("PCF"). In his declaration, Mr. Ugoletti asserted that, "It was clear by [some time before the Net

II. SUPPLEMENTATION OF THE RECORD WITH THE CFC DISCOVERY MATERIALS IS WARRANTED

Apart from, or in addition to taking judicial notice of the existence of the CFC discovery materials, the Court should add them to the record on appeal. Although the record on appeal is ordinarily limited to the record that was created before the district court, *In re AOV Indus., Inc.*, 797 F.2d 1004, 1012 (D.C. Cir. 1986), this Court nevertheless has broad discretion to supplement the record itself when "injustice might otherwise result," *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *see also Colbert v. Potter*, 471 F.3d 158, 165–66 (D.C. Cir. 2006) (acknowledging this Court's "inherent equitable power to allow supplementation of the appellate record if it is in the interests of justice."). The exercise of that

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Worth Sweep] that, given the risks of the Enterprises and the enormity of the Treasury commitment, the value of the PCF was incalculably large," Ugoletti Decl. ¶ 9, FHFA 0005 (A006)—the inference being that this was clear to people *other than Mr. Ugoletti himself*. But Mr. Ugoletti testified that he could not recall discussing his theory of an "incalculably large" commitment fee with anyone at FHFA or Treasury and did not know if anyone at either agency "shared that particular view." Ugoletti Tr. 170:7–13 (A066); 171:10–20 (A066). And Freddie's own internal projections showed that it calculated the fee as a modest fraction of a percentage point of the commitment amount. FHFA00102167, Slide 27 (Exhibit 34, A519) ("Our sensitivity to a commitment fee based on remaining commitment available beginning in 2013 of $149 billion shows that a 25 bps fee results in a $0.4 billion annual impact on Stockholders' Equity."); *cf.* McFarland Tr. 65:16–66:19 (A051–52). The Court should take judicial notice of the existence of materials produced in the CFC action that contradict the discussion of the PCF in Mr. Ugoletti's declaration.

power is particularly appropriate when the material sought to be introduced "go[es] to the heart of the contested issue." *In re AOV Indus., Inc.*, 797 F.2d at 1013.

As the foregoing discussion of the materials attached to this motion demonstrates, Treasury's administrative record and FHFA's document compilation and declaration were misleading and, in certain important respects, false, and they obscured the true rationale for the Net Worth Sweep and what the Defendants considered and understood when they imposed it. It is difficult to imagine materials that go more directly the heart of the matter in dispute in this case, and "it would be inconsistent with this court's own equitable obligations . . . to pretend that [the materials] do not exist." *Id*. *Accord United States ex rel. Davis v. District of Columbia*, 679 F.3d 832, 837 & n.3 (D.C. Cir. 2012). It is therefore appropriate for this Court to exercise its discretion and add the materials to the record.[12]

Finally, even if the Court chooses not to consider the attached CFC discovery materials when deciding the merits of this appeal, it should at an absolute minimum remand this case so that (1) Fairholme can amend its complaint

[12] While this Court's precedents make clear that it has authority to supplement the record on appeal, it has at times required litigants to introduce newly-discovered evidence by filing a motion in the district court under Federal Rule of Civil Procedure 60(b). *See United States ex rel. Oliver v. Philip Morris USA Inc.*, 763 F.3d 36, 44 (D.C. Cir. 2014). Fairholme believes that use of that procedure in this case would only further delay resolution of this action, but it will move to introduce the evidence in the district court if this Court disagrees.

in light of the CFC discovery materials and (2) the district court can consider the materials in resolving Fairholme's unaddressed motion to take discovery into the sufficiency of Treasury's administrative record and FHFA's document compilation.[13] Accordingly, if the Court concludes that Fairholme cannot otherwise prevail on this appeal, it should remand the case for further proceedings.

CONCLUSION

For the foregoing reasons, the Court should take judicial notice of the existence of the materials attached to this motion and add them to the record.

Date: July 29, 2015

Respectfully submitted,

Charles J. Cooper
David H. Thompson
Vincent J. Colatriano
Peter A. Patterson
Brian W. Barnes
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Telephone: 202.220.9600
Facsimile: 202.220.9601
Counsel for Appellants Fairholme Funds, Inc., et al.

[13] *See Hoai v. Vo*, 935 F.2d 308, 315 (D.C. Cir. 1991) (noting that remand to amend complaint would have been appropriate if complaint's inadequacies were "attributable to a new development or change in law"); *Cardenas v. Smith*, 733 F.2d 909, 914 (D.C. Cir. 1984) (observing that the "appellate court can remand with directions to allow the appellant to amend pleadings"); *City of Columbia, Mo. v. Paul N. Howard Co.*, 707 F.2d 338, 341 (8th Cir. 1983) (noting that "[a]n amendment can be proper after remand to the district court even if the claim was presented for the first time on appeal").

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the Clerk's office this 29th day of July, 2015, and was served upon counsel for Defendants listed below via First Class U.S. Mail:

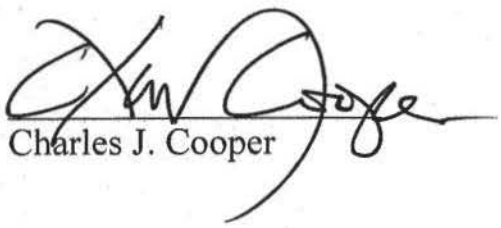
Gerard Joseph Sinzdak
U.S. Department of Justice, Civil Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Howard Neil Cayne
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, D.C. 20004

Courtesy copies were also sent via First Class U.S. Mail to the following counsel:

D. Zachary Hudson
BANCROFT PLLC
500 New Jersey Avenue, N.W.
Seventh Floor
Washington, D.C. 20001

Michael Joseph Ciatti
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006



Charles J. Cooper