IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

CHRISTOPHER ROBERTS, et al., Plaintiffs, vs. THE FEDERAL HOUSING FINANCE AGENCY, et al., Defendants.	Civil Action No. 1:16-CV-02107

FAIRHOLME'S REPLY BRIEF IN SUPPORT OF MOTION
FOR LEAVE TO APPEAR AS AMICUS CURIAE

Defendants' opposition to Fairholme's motion leaves little doubt that they are anxious for the Court to dispose of this case before Plaintiffs have an opportunity to review additional relevant documents that the Court of Federal Claims recently ordered produced. While Defendants say that their concern is over "clutter[ing] the record in this case," Defs.' Joint Opp'n to Fairholme Funds' Motion to Appear and to File an Amicus Brief at 7 (Nov. 2, 2016), Doc. 59 ("Opp."), Fairholme submits that there is another explanation for Defendants' position: these additional documents will likely further discredit Defendants' false, made-for-litigation account of the events that led them to impose the Net Worth Sweep. Because Fairholme is well-positioned to update this Court on important developments in the parallel Court of Federal Claims litigation and Defendants' brief underscores the fact that they will not do so, the Court should grant Fairholme's motion.

While Defendants assert that Plaintiffs have disclaimed any need to consult evidence produced in the Court of Federal Claims, the opposite is true. Earlier this year, Plaintiffs told the

Judicial Panel on Multidistrict Litigation ("JPML") that they did not anticipate needing discovery *in this case* in part because they had been able to file an amended complaint that "incorporates discovery information generated in Fairholme's case in the Court of Federal Claims." Resp. of Pls. Roberts & Fischer in Opp'n to the Mot. for Transfer at 2 n.1, *In re: Federal Housing Finance Agency, et al. Preferred Stock Purchase Agreement Third Amendment Litig.*, MDL No. 2713 (J.P.M.L. Apr. 6, 2016), ECF No. 20 ("Roberts MDL Br."). Plaintiffs' JPML brief also adopted by reference the brief of another Net Worth Sweep challenger who argued that it was "unlikely" that discovery in the APA cases would be necessary "now that discovery has already taken place in a related case in the Court of Federal Claims." Resp. of Pl. Robinson in Opp'n to the Mot. for Transfer at 6 n.4, *In re: Federal Housing Finance Agency, et al. Preferred Stock Purchase Agreement Third Amendment Litig.*, MDL No. 2713 (J.P.M.L. Apr. 6, 2016), ECF No. 18 ("Robinson MDL Br."); *see* Roberts MDL Br. 1 (adopting arguments of *Robinson* plaintiff). Similarly, the attorney who spoke on behalf of Plaintiffs during oral argument before the JPML contended that discovery was not likely to be needed because "[w]e've been able to utilize what's being done in the Court of Federal Claims." Transcript of Oral Argument Held May 26, 2016 at 15:1–2, *In re: Federal Housing Finance Agency, et al. Preferred Stock Purchase Agreement Third Amendment Litig.*, MDL No. 2713 (J.P.M.L. June 9, 2016), ECF No. 38. The JPML well understood the significance of these statements when it denied FHFA's transfer motion in part because "several plaintiffs already have been provided with relevant discovery in a similar action pending in the Court of Federal Claims, making further discovery in these actions potentially unnecessary." Order Denying Transfer at 2, *In re: Federal Housing Finance Agency, et al. Preferred Stock Purchase Agreement Third Amendment Litig.*, MDL No. 2713 (J.P.M.L. June 2, 2016), ECF No. 37.

Defendants are also wrong when they argue, without disclosing the contents of the documents the Court of Federal Claims ordered produced, that these additional documents could not possibly be relevant to the proceedings here. When the *Saxton* plaintiffs previously gained access to other Court of Federal Claims discovery materials, the District Court for the Northern District of Iowa allowed them to incorporate those materials into an amended complaint despite Defendants' strenuous objections. *See Saxton v. FHFA*, No. 15-cv-47 (N.D. Iowa Feb. 9, 2016), ECF No. 61. The same could occur here. As Defendants themselves have acknowledged in this case, a court ruling on a motion to dismiss is required to "assume the truth of all of the complaint's allegations." Defs.' Joint Reply in Support of Motion to Dismiss at 22 (Sept. 14, 2016), Doc. 48. Accordingly, the additional information Defendants hope to conceal could affect key factual predicates for this Court's analysis of Defendants' arguments—even arguments presented in a motion to dismiss.

Furthermore, when ruling on Fairholme's motion, the Court should not lose sight of the fact that Defendants' opposition represents just their latest attempt to prevent the federal courts from considering evidence that reveals the true purpose and effect of the Net Worth Sweep. The complaint in this case documents how Defendants made highly misleading and, in some instances, outright false submissions to the district court in the *Perry Capital* case—submissions that discovery in the Court of Federal Claims impeached only after the *Perry Capital* district court had ruled in Defendants' favor. *See* Plaintiffs' Amended Complaint for Declaratory and

Injunctive Relief ¶¶ 19–24, 90, 100 (Apr. 5, 2016), Doc. 22 ("Am. Compl.").[1] In the Court of Federal Claims, the Government resisted or sought to delay discovery at every turn, unsuccessfully argued that plaintiffs in this and other related suits should not be permitted access to materials produced, and asserted privilege over key documents without any justification for doing so. Now that the Court of Federal Claims has ordered the Government to produce additional documents following *in camera* review and characterized Fairholme's need for some of those documents as "overwhelming," Opinion & Order at 49, *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl. Sept. 20, 2016), ECF No. 340, it is hardly surprising that Defendants urge this Court to blind itself to the evidence.

The Government's mandamus petition to the Federal Circuit represents a last, desperate attempt to withhold from the Net Worth Sweep challengers critical documents that should have been produced years ago. When these documents are finally produced, there is every reason to anticipate that they will be important to this litigation and that Plaintiffs will bring them to this Court's attention.

[1] One of the most egregious such examples, described in Plaintiffs' complaint, comes from the sworn testimony of Mario Ugoletti, an FHFA official who was involved in the decision to impose the Net Worth Sweep. In *Perry Capital*, FHFA submitted to the court a sworn declaration from Mr. Ugoletti stating 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." Declaration of Mario Ugoletti ¶ 20, *Perry Capital LLC v. Lew*, No. 13-cv-1053 (D.D.C. Dec. 17, 2013), ECF No. 24-2. But when asked during his Court of Federal Claims deposition, Mr. Ugoletti said "I don't know who else in FHFA or what they knew about the potential for that." Am. Compl. ¶ 100. And when asked whether he knew "what Treasury thought about it," Mr. Ugoletti answered, "I do not." *Id.* Susan McFarland, who was Fannie's CFO at the time, testified during her deposition that eight days before the Net Worth Sweep was announced she told senior Treasury officials that she anticipated that Fannie would release the valuation allowance in 2013, resulting in an immediate increase in Fannie's net worth "probably in the 50-billion-dollar range." *Id.* ¶ 99.

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Respectfully submitted,

Charles J. Cooper*
David H. Thompson*
Peter A. Patterson*
Brian W. Barnes*
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)
ccooper@cooperkirk.com

*Admitted *pro hac vice*

s/ Keith L. Gibson
Keith L. Gibson
LOCKE LORD LLP
ARDC No. 6237159
111 S. Wacker Dr.
Chicago, Illinois 60606
Tel: 312-443-1840
Fax: 312-896-6738
kgibson@lockelord.com

Designated Local Counsel

ATTORNEYS FOR AMICUS CURIAE FAIRHOLME FUNDS, INC.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 7, 2016, I electronically filed the foregoing with the Clerk of Court using the ECF system, and to my knowledge a copy of this document will be served on the parties or attorneys of record by the ECF system.

/s/ Keith L. Gibson
Keith L. Gibson