EXHIBIT A

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:13-cv-465C
THE UNITED STATES,	)	Judge Margaret M. Sweeney
Defendant.	)	

PROPOSED AMICUS BRIEF OF LOUISE RAFTER, JOSEPHINE AND STEPHEN RATTIEN, AND PERSHING SQUARE CAPITAL MANAGEMENT, L.P. OPPOSING DEFENDANT'S MOTION TO STAY

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The Court should not stay this case. The Government's motion for a stay is premised entirely on the notion that a decision by the District Court for the District of Columbia ("D.D.C."), *Perry Capital LLC v. Lew*, -- F. Supp. 3d --, 2014 WL 4829559 (D.D.C. Sept. 30, 2014), precludes the Fairholme Plaintiffs from litigating certain issues in this case before this Court. The Fairholme Plaintiffs address the Government's preclusion argument. Even if that argument had some merit with respect to the Fairholme Plaintiffs, however, a stay of discovery would still be inappropriate. It would unnecessarily complicate and delay the resolution of related cases pending before this Court, including Amici's, to which the Government's preclusion arguments are plainly inapplicable.

Amici—Louise Rafter, Josephine and Stephen Rattien, and Pershing Square Capital Management, L.P., common shareholders of the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, "the Companies")—have their own suit challenging the Net Worth Sweeps currently pending before this Court. *See* Complaint, *Rafter v. United States*, No. 14-740 (Fed. Cl. Aug. 14, 2014), Dkt. No. 1 (hereinafter "Comp."). Unlike many of the Fairholme Plaintiffs, however, Amici were not parties to the D.D.C. decision in *Perry Capital*. Amici, who are holders of common shares of the companies, rather than preferred shares, are differently situated from the Fairholme Plaintiffs. The Government's preclusion argument against the Fairholme Plaintiffs thus does not apply to Amici.

Accordingly, even if *Perry Capital's* alleged preclusive effect did somehow warrant a stay of discovery for parties bound by that decision, it would provide no basis for staying discovery by parties, such as Amici, not so bound. Yet Amici's claims before this Court directly implicate many of the same jurisdictional issues that led this Court to order discovery in this case. Thus, granting the Government's motion for a stay in this case would not obviate the need for discovery to continue into the Government's conduct. It would not conserve any resources of this Court or the parties. To the contrary, it would be *less efficient* than simply allowing the Fairholme Plaintiffs—the parties that have been conducting discovery for the last seven months—to continue with that process, rather than having a different set of plaintiffs effectively start that process from scratch.

ARGUMENT

I. The D.D.C.'s Ruling Has No Preclusive Effect On Amici's Claims In This Court.

Amici are differently situated from the Fairholme Plaintiffs. Amici were not parties to the D.D.C.'s decision in *Perry Capital* and have not had any Net Worth Sweep-related claims ruled upon by the D.D.C. or any other district court. The Government's preclusion argument is inapplicable to Amici. "[C]ollateral estoppel[] protects the finality of judgments by 'preclud[ing] relitigation in a second suit of claims actually litigated and determined in the first suit.'" *Laguna Hermosa Corp. v. United States*, 671 F.3d 1284, 1288 (Fed. Cir. 2012) (quoting *In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994) (alteration in original)). Here, because Amici did

not have any claims "actually litigated and determined" in an earlier action, there is no basis for preclusion.[1]

Furthermore, the Government's preclusion argument focuses on the Fairholme Plaintiffs' claims in the D.D.C. for money damages for breach of contract and breach of the implied covenant of good faith, based on the loss of their liquidation preferences and their right to receive dividends.[2] Those claims were explicitly premised on the Fairholme Plaintiffs' contractual relationship, as preferred shareholders, with the Companies. *See, e.g.*, Complaint at ¶ 126, *Fairholme Funds, Inc. v. FHFA*, No. 13-1053 (D.D.C. July 10, 2013), Dkt. No. 1 (arguing that the Net Worth Sweeps breached the Fairholme Plaintiffs' contractual rights "by effectively eliminating the dividend and liquidation preference rights associated with Plaintiffs' Preferred Stock"). Amici, by contrast, hold common stock

[1] Amici did file suit in the D.D.C. to challenge the Net Worth Sweeps. But Amici did so on August 15, 2014—after the *Perry Capital* parties had fully briefed motions to dismiss by the Government in their cases before that court. Complaint, *Rafter v. Dep't of Treasury*, No. 14-1404 (D.D.C. Aug. 15, 2014), Dkt. No. 1. When the D.D.C. issued its decision dismissing those cases six weeks later, the Defendants had not yet responded to Amici's complaint; the *Perry* decision therefore did not resolve Amici's claims. Amici voluntarily dismissed their complaint without prejudice on October 31, 2014. Notice of Voluntary Dismissal, *Rafter*, No. 14-1404 (D.D.C. Oct. 31, 2014), Dkt. No. 16. A voluntary "[d]ismissal without prejudice … does not operate as an adjudication upon the merits, and thus does not have a res judicata effect." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (internal quotation marks and citation omitted); *see also, e.g.*, 9 *Federal Practice and Procedure* § 2367 (3d ed. 2014) ("[A]s numerous federal courts have made clear, a voluntary dismissal without prejudice under Rule 41(a) leaves the situation as if the action never had been filed.").

[2] At least one of the Fairholme Plaintiffs in this action, Continental Western Insurance Company, was not a party to the *Perry Capital* D.D.C. decision.

in the Companies. They have never brought, in any court, any breach of contract or breach of the implied covenant of good faith claims based on their stock certificates.[3] The D.D.C.'s rulings on liquidation preferences and dividends in dismissing the Fairholme Plaintiffs' preferred stock-based breach of contract and implied duty claims could not possibly have any preclusive effect on Amici's claims in this Court.[4]

Finally, although the Government argues that the Court should treat as "persuasive" the D.D.C.'s analysis of the takings claims filed by certain plaintiffs in that court, Motion for Stay at 9, it concedes, as it must, that the D.D.C.'s treatment of this issue has no preclusive effect in this case. Indeed, the Government's argument only highlights why a stay is unwarranted. This Court can determine just how persuasive—or unpersuasive—the D.D.C.'s takings analysis is only after

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[3] Amici's claim in this Court for breach of an implied contract is based on the contractual arrangement the Companies entered into with the Federal Housing Finance Agency ("FHFA") in 2008, under which the Companies' Boards consented to a conservatorship in exchange for FHFA's agreement to preserve and conserve the Companies' assets until the Companies were in a safe and solvent condition.

[4] The Government also suggests that the Court, if it does not grant a stay, "will [] need to consider" the preclusive impact of the D.D.C.'s opinion on two other issues: whether "FHFA acted within its statutory authority under HERA when it entered into the Third Amendment," and whether "FHFA's motivations in entering into the Third Amendment" are relevant to that issue. Motion for Stay at 9 n.8. Tellingly, the Government does not argue that the D.D.C.'s conclusions on those issues actually have a preclusive effect, and does not acknowledge that this Court has already held that the Fairholme Plaintiffs are entitled to discovery into related issues. *See* Order Granting Discovery, *Fairholme Funds, Inc. v. United States*, No. 13-465 (Fed. Cl. Feb. 26, 2014), Dkt. No. 32 (granting discovery into "whether the FHFA is 'the United States'" for purposes of the related actions, which the Court noted would turn "'in part [on] the purposes of FHFA's actions'" (citation omitted)). The D.D.C.'s decision certainly does not require this Court to revisit its own conclusions on these subjects.

jurisdictional discovery that it has already determined is necessary on these issues and merits briefing from the parties.

For all of these reasons, the Government's preclusion arguments are inapplicable to Amici's claims in this Court. Therefore, Amici would be entitled to discovery even assuming that *Perry Capital's* preclusive effect somehow warranted a stay. That being so, granting a stay of all proceedings in this case, including the ongoing jurisdictional discovery, benefits neither the Court nor the parties.

II. Because Amici's Claims Raise The Same Jurisdictional Issues As The Fairholme Plaintiffs' Claims, Discovery Would Be Necessary Even If The Court Stayed This Case.

In light of the foregoing discussion, it is plain that staying discovery in this case serves no purpose because it would not eliminate the supposedly "significant burdens associated with [the] ongoing discovery" currently proceeding here. Motion for Stay at 2. Amici's claims implicate many of the same issues that led the Court to order jurisdictional discovery in *Fairholme*, such as whether FHFA is "the United States" for purposes of this Court's jurisdiction. Thus, there would be a need to continue with discovery even if the Court granted the Government's request for a stay in this case. Granting the Government's motion for a stay would not eliminate the discovery issues that the Government seeks to put on hold.

Moreover, granting a stay in this case would impermissibly grant a *de facto* stay of all proceedings in Amici's case. Amici filed their complaint in this Court on August 14, 2014. Subsequently, they consented to the Government's request to extend its time to respond to the complaint until after jurisdictional discovery

concluded in *Fairholme*. Unopposed Motion for Extension, *Rafter*, No. 14-740 (Fed. Cl. Oct. 10, 2014), Dkt. No. 8. Thus, an indefinite stay of all proceedings in *Fairholme* would also impose an indefinite stay in Amici's case. But such a stay on Amici would be groundless even if one accepts the Government's preclusion argument, because Amici are not precluded by *Perry Capital*. This unjustifiable effect on Amici provides an independent reason to deny the Government's motion. Alternatively, Amici's consent to an extension pending resolution of ongoing discovery in *Fairholme* was obviously based on the premise that such discovery would continue and finish (thus negating the need for simultaneous, duplicative Amici discovery, in keeping with the case-management procedures the Court had established for the related cases challenging the Net Worth Sweeps). If that premise is altered because the *Fairholme* discovery is stayed, there would no longer be a basis for the extension in Amici's case pending such discovery. Again, that would simply revive, albeit in a less efficient way, the discovery problems sought to be avoided by the Government's stay.

Specifically, because Amici's case implicates many of the same issues that led this Court to grant jurisdictional discovery in *Fairholme*, discovery would remain necessary for the very reasons the Court set forth in that order granting discovery. This Court determined that Fairholme was "entitled to conduct fact discovery" into three sets of separate issues: (1) whether "evidence exists with regard to [the Companies' future] profitability"; (2) whether FHFA is "'the United States' for purposes of the Tucker Act"; and (3) whether the plaintiffs had "a reasonable

investment-backed expectation … that Fannie and Freddie would be profitable again in the future." Order Granting Discovery, Dkt. No. 32 at 3–4. Amici's claims implicate all three of those issues.

First, like the Fairholme Plaintiffs, Amici allege that the Companies are expected to enjoy strong profitability for years to come, and that the Government knew as much when it entered into the Net Worth Sweep Agreements. *See, e.g.*, Comp. ¶ 9 ("By the end of the second quarter of 2012, both Companies were profitable, with the prospect of exceptionally large profits in the future."); *id.* ¶ 66 ("Before Treasury and FHFA entered into the Net Worth Sweep Agreements in August 2012, it was or should have been evident to them that the residential housing market was recovering and that the Companies had returned to strong profitability."). Amici have also alleged, similarly to the Fairholme Plaintiffs, that despite the Companies' continued profitability, the Government "seek[s] to 'expedite the wind down of'" the Companies. *Id.* ¶ 3. As this Court recognized, the information underlying these issues, which could affect the ripeness of claims challenging the Net Worth Sweeps, "is solely in possession of" the Government, such that discovery is warranted. Order Granting Discovery, Dkt. No. 32 at 3.

Second, Amici allege that FHFA is the United States for purposes of this litigation, as evidenced by the fact that FHFA acted at the direction, behest, or control of the Department of the Treasury in entering into the Net Worth Sweep Agreements and causing the Net Worth Sweeps. *See, e.g.*, Comp. ¶ 61 ("Treasury had and exercised actual control over FHFA's conduct as conservator through

pressure and influence, as well as through the terms of the Stock Purchase Agreements."); *id.* ¶ 78 ("Treasury directed and continues to direct FHFA to implement the Net Worth Sweeps …."); *id.* ¶ 23 ("Defendant United States of America includes … FHFA …."). The Government has challenged this assertion in all of the related cases pending before this Court, and the issue goes to the heart of the Court's jurisdiction: "[i]f, as plaintiffs allege, the FHFA was an agent and arm of the Treasury, then this court possesses jurisdiction over plaintiffs' complaint." Order Granting Discovery, Dkt. No. 32 at 3.

Third, Amici allege that they had a reasonable investment-backed expectation that the Companies would remain profitable in the future and that Amici would be able to participate in those profits. *See, e.g.*, Comp. ¶¶ 94–95 (alleging that Amici "had reasonable, investment-backed expectations" that their right to participate in the Companies' future profits "would be preserved"); *id.* ¶ 109 (noting that when FHFA offered to place the Companies into conservatorship, it "made no finding of insolvency, undercapitalization, or any other ground to impose conservatorship"). The Government, however, disputed the Fairholme Plaintiffs' allegations on this issue in arguing that they had failed to state a claim for a regulatory taking. In granting discovery into this issue, the Court emphasized that the relevant documents—including documents showing whether the Government "expect[ed] that Fannie and Freddie would be profitable again in the future"—are "in the possession of [the Government] only." Order Granting Discovery, Dkt. No. 32 at 4.

Accordingly, even if the Court stayed the proceedings in this case, jurisdictional discovery would remain necessary in Amici's case. Thus, granting a stay will not "conserve resources." Motion for Stay at 13. The Government would likely need to produce the same documents, defend depositions of the same officials, and litigate the same discovery issues; the only real difference would be the plaintiffs seeking the discovery. Indeed, staying this case will result in additional burdens and substantial inefficiencies for the Court and for the parties. It would mean effectively starting the discovery process anew and retreading ground that has already been covered between the Government and the Fairholme Plaintiffs during the more than seven months that discovery has been proceeding. Thus, the more efficient course is simply to allow the Fairholme Plaintiffs to continue their task.

CONCLUSION

For the foregoing reasons, the Court should deny the Government's motion.

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