RECORD NO.

09-3795-cv

In The

United States Court of Appeals

For The Second Circuit

FOX NEWS NETWORK, LLC

Appellant,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON IN SUPPORT OF APPELLANT FOX NEWS NETWORK, LLC

Melanie Sloan
Anne L. Weismann
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
1400 Eye Street, N.W., Suite 450
Washington, D.C. 20005
(202) 408-5565

Counsel for Amicus Curiae

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* Citizens for Responsibility and Ethics in Washington (CREW) submits this corporate disclosure statement.

CREW does not have a parent company, and is not a publicly-held company with a 10% or greater ownership interest. CREW is a non-profit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUES

RULES

OTHER AUTHORITIES

STATEMENT OF *AMICUS CURIAE*

Citizens for Responsibility and Ethics in Washington is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Many of CREW's actions flow from the principles that transparency is a cornerstone of our democracy and that government accountability is achieved through government transparency.

Toward this end, CREW frequently files Freedom of Information Act (FOIA) requests to access and make publicly available government documents that reflect on, or relate to, the integrity of government officials and their actions. CREW currently has two FOIA requests pending with the Board of Governors of the Federal Reserve System (the Board) that duplicate in part or relate closely to the FOIA requests that are the subject of this appeal, and that are the subject of pending litigation. In its requests, CREW seeks documents identifying, *inter alia*, those banking institutions that have received specified loans or other financial assistance from the Board and the repayment terms of the loans.

CREW participates as an *amicus* in this case to preserve the principle that FOIA exemptions are to be narrowly construed in light of the underlying disclosure purpose of the FOIA, particularly where disclosure will advance the interest of the public "to be informed about 'what their government is up to.'" *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)). The documents at issue here are essential to understanding and assessing the government's response to the devastating economic financial crisis our nation faces, and the Board's decision to commit more than $2 trillion as part of its expanded lending programs to private financial institutions. Without this information the public has no way of assessing the prudence of these obligations and whether they are in the best interests of the American taxpayers.

This brief is filed pursuant to Fed. R. App. P. 27 and 29(b).

SUMMARY OF ARGUMENT

Transparency has been the dominant theme behind the government's strategy for financial recovery, rooted in the belief that greater openness will enhance public confidence, which in turn will strengthen our financial institutions. Here, however, the Board continues to embrace an outmoded course of secrecy, acting under the now-disproved theory that telling the American public how the

government has distributed trillions of dollars of federal loans to financial institutions will cause the kind of runs on banks that the nation experienced over 80 years ago. The Board's justifications for withholding basic documents that would shed light on the health of the banking system fail as a matter of law and fact.

First, under Exemption 4 of the FOIA, an agency can withhold only those documents that would cause competitive harm to the submitter, defined as harm that flows from the affirmative use of the requested information by competitors of the submitter. Here, however, the Board has supported its Exemption 4 claims with a different and more generalized harm to the submitter's position in the marketplace, namely the alleged embarrassment and stigma the Board claims would stem from any public revelation that a particular bank is the recipient of a Board loan. The Board's claims of harm do not satisfy the requirements for withholding under Exemption 4.

Second, the speculative harm the Board has alleged is outweighed by the compelling public interest in the requested documents. With the health of our economy in the balance, the public has a clear entitlement to information that would reveal whether the lending decisions of the Board are helping or hurting the economy.

Finally, recent and past historical experience demonstrate that transparency, not secrecy, is the key to strengthening our economy. Publication of a host of detailed financial information about specific financial institutions has enhanced public confidence in our financial institutions by removing the uncertainty and distrust that accompany secrecy. For all these reasons, the district court erred here when it concluded the requested documents are protected from disclosure under FOIA Exemption 4.

ARGUMENT

THE DOCUMENTS FOX SEEKS ARE NOT PROTECTED FROM DISCLOSURE BY EXEMPTION 4 OF THE FOIA.

A. The Board's Speculation About The Stigma Disclosure May Cause Does Not Satisfy The Board's Burden Of Demonstrating Actual Competitive Harm.

Congress enacted the FOIA to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The Act advances the essential right of the American people to know "what their Government is up to," *Dep't of Justice v. Reporters Comm.*, 489 U.S. at 773 (internal quotation omitted), based on the premise that greater transparency leads to greater government accountability. Access to information about government is "a structural necessity in a real

democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

Consistent with this intent, courts universally have interpreted the FOIA's access provisions broadly, and its exceptions to disclosure narrowly.[1] The FOIA carries a "strong presumption in favor of disclosure," *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991), and its "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *see also U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) ("exemptions have been consistently given a narrow compass"); *Associated Press v. U.S. Dep't of Def.*, 554 F.3d 274, 283-84 (2d Cir. 2009) ("FOIA exemptions are to be construed narrowly, 'resolving all doubts in favor of disclosure'") (quotation omitted).

Fox's FOIA requests at issue here were animated by the precise purposes behind the Act. Fox requested records of loans the Board made under new lending programs instituted to address the liquidity problems financial institutions are facing and to improve the stability of the financial system. As a representative of

[1] The FOIA's legislative history also reflects an intent that the exemptions be construed narrowly. *See*, *e.g.*, S. Rep. No. 89-813, at 6 (1965) ("There is, of course, a certain need for confidentiality in some aspects of Government operations and these are protected specifically; but outside these limited areas, all citizens have a right to know.").

the news media, Fox made the requests to satisfy a compelling public need for information that would shed light on the health of the financial system and the extent to which the public's financial interests are being safeguarded adequately by the Board.

In response, the Board refused to produce any of the requested documents, relying in part on FOIA Exemption 4 to justify its withholdings. According to the agency, the "stigma" attached to being identified publicly as a recipient of a Board loan constitutes the kind of harm Congress sought to protect against through the enactment of Exemption 4. The Board's position, which the district court accepted below, rests on a fatally flawed application of the judicially developed test for applying Exemption 4 and a factual premise that is simply wrong. Far from causing competitive harm, disclosure of the requested records will strengthen consumer confidence in the banks, which in turn will strengthen the banking industry itself.

Congress enacted Exemption 4 to protect specified interests of those who submit information to the government and the agencies that collect that information. *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767-70 (D.C. Cir. 1974). Specifically, Exemption 4 exempts from compelled disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (2006).

In construing these terms, courts have found limited guidance in the legislative history, which has been described as "tortured" and "obfuscating." *Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 865 (2d Cir. 1978); *see also N. Y. Pub. Interest Research Group v. EPA*, 249 F. Supp. 2d 327, 332 (S.D.N.Y. 2003) ("The legislative history sheds little light on the precise scope of the definition of 'commercial or financial.'"). The confusing legislative history results, in part, from a discrepancy between an earlier draft version of the statute "that covered all privileged or confidential information" and the final, more limited "commercial or financial" language the FOIA uses to describe the scope of Exemption 4. *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 266 (D.C. Cir. 1982). Even with this confusion, Congress has acknowledged the kind of "detailed financial information" claimed to be within the scope of the exemption also "reflects the functions, operations, and activities of Government . . . can reveal what the regulators are doing and how well they are doing it . . . and therefore [is] of legitimate public interest." H. R. Rep. No. 95-1382, at 8, 9 (1978).

Sorting out these various, and at times competing interests, courts have developed a "substantial competitive harm test" under which commercial information may be withheld "if disclosure of the information is likely to have

either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks*, 498 F.2d at 770; *see also Cont'l Stock Transfer & Trust Co. v. Sec. & Exch. Comm'n*, 566 F.2d 373, 375 (2d Cir. 1977) (adopting *National Parks* test). Under this test, "competitive harm" is that harm flowing from the affirmative use of the requested information by competitors of the submitter, and not just harm to the submitter's position in the marketplace or other embarrassing publicity from disclosure. *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 n.29 (D.C. Cir. 1983); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987); *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys*., No. 08 Civ. 9595 (LAP), 2009 U.S. Dist. LEXIS 74942, *43-44 (S.D.N.Y. Aug. 24, 2009).

The district court purported to apply this test here to conclude the Board's concerns with "rumors" and "runs on banks" resulting from "inferences" the public is likely to draw if the requested documents are released justify their withholding under Exemption 4. *Fox News Network LLP v. Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384, 401 (S.D.N.Y. 2009). In reaching this conclusion, the district court apparently accepted the Board's argument that

rumors of a liquidity strain a particular bank was experiencing could lead to a lack of public confidence in the bank, which the Board alleged in turn could cause "a sudden outflow of deposits (a 'run'), a loss of confidence by market analysts, a drop in the institution's stock price, and a withdrawal of market sources of liquidity. In extreme cases, such developments can lead to closure of the institution." J.A. at 137. This "stigma" could occur, the Board argued, even if the bank were seeking a loan for reasons unrelated to its financial stability. J.A. at 139.

The Board's alleged harm, however, is precisely that which courts have concluded does not constitute "competitive harm" within the meaning of Exemption 4. Grounded in "concerns" and speculations as to the adverse conclusions "market participants would draw . . . based on conjecture and speculation,"[2] the Board's allegations are not made with the "reasonable specificity" the FOIA demands. *Halpern v. FBI*, 181 F.3d 279, 293 (2d Cir. 1999). As Judge Preska noted when assessing the same allegations of harm from the Board in response to a nearly identical FOIA request from Bloomberg, the Board's evidence "say[s] nothing about how borrowers' competitors will affirmatively use the information that the borrowers participated in the Federal

[2] J.A at 93.

Reserve lending programs." *Bloomberg*, 2009 U.S. Dist. LEXIS at *45 (emphasis omitted). Moreover, "the risk of looking weak to competitors and shareholders is an inherent risk of market participation." *Id.* at *46. Thus, accepting the Board's arguments would inflate the protection of Exemption 4 beyond any reasonable limits, to include "all information about borrowers that anyone throughout the entire marketplace might consider to be *negative*." *Id.* (emphasis in original).[3]

Nor are the Board's allegations of harm documented by "specific, credible, and likely reasons why disclosure of the documents would actually cause substantial competitive injury" to the loan recipients. *Lee v. FDIC*, 923 F. Supp. 451, 455 (S.D.N.Y. 1996); *see also Pentagon Fed. Credit Union v. Nat'l Credit Union Admin.*, No. 95-1475-A, 1996 U.S. Dist. LEXIS 22841, *5-6 (E.D. Va. June 7, 1996) (speculative claim of harm, even if based on "a legitimate fear," held to be insufficient to support Exemption 4 withholdings). The kind of "alarmist" fears

[3] The district court here also relied on "the Board's concern . . . that disclosure would reveal propriety trading information of borrowers, their trading strategies and the size and nature of their portfolios of assets." *Fox*, 639 F. Supp. 2d at 401. This "concern," however, is not backed up by any specific facts and is expressed at such a level of generality that it is impossible to ascertain precisely how disclosing the identities of those financial institutions that used the Board's lending programs and the amount of collateral they pledged in return for the loans would (or even could) actually reveal "trading strategies."

the Board has raised – framed in terms of what "could" or "may" occur[4] – simply are "too broad and too speculative to be credited." *Pub. Citizen Health Research Group v. FDA*, 964 F. Supp. 413, 415 (D.D.C. 1997).[5] Devoid of the requisite specifics, the Board's speculations fail to demonstrate precisely how disclosure will cause the alleged competitive and reputational harms. *See Bloomberg*, 2009 U.S. Dist. LEXIS 74942, at *47 ("Conjecture, without evidence of imminent harm, simply fails to meet the Board's burden of showing that Exemption 4 applies.").

B. Any Harm Alleged By The Board Is Outweighed By The Compelling Public Interest In Disclosure.

Not only has the Board failed to demonstrate that disclosure of the requested records will cause competitive harm within the meaning of Exemption 4, but any harm it has alleged is outweighed by the compelling public interest in disclosure. Consistent with the strong presumption of disclosure the FOIA

---

[4] *See*, *e.g.*, J.A. at 123 ("[p]ublic disclosure that an institution had utilized the CPFF [Commercial Paper Funding Facility] *could* result in a negative perception" (emphasis added)); J.A. at 94 ("if 'haircuts' for TSLF [Term Securities Lending Facility] and TOP [TSLF Options Program] were disclosed, and the haircuts were different from those prevailing in the market, this *could* be destabilizing." (emphasis added)).

[5] As the district court there noted, "[i]t is questionable whether the competitive injury associated with 'alarmism' qualifies under Exemption 4 in any event," because it relates not to harm "flowing from the affirmative use of proprietary information by competitors," but rather that flowing from "adverse public reaction." *Id.* at 415 n.2 (quotation omitted).

embodies, records are properly withheld under Exemption 4 "only when the affirmative interests in disclosure on the one side are outweighed by the factors identified in *National Parks I* (and its progeny) militating against disclosure on the other side. More simply put, 'minor' disadvantages flowing from disclosure 'cannot overcome the disclosure mandate of FOIA.'" *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 865 F.2d 320, 327 (D.C. Cir. 1989) (quoting *Wash. Post*, 690 F.2d at 269); *see also Utah v. U.S. Dep't of the Interior*, 256 F.3d 967, 971 (10th Cir. 2001) (recognizing that "strong public policy argument[s]" can justify "a rough 'balancing of interests'" under Exemption 4)*; GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994) ("[i]n making our determination, we must balance the strong public interest in favor of disclosure against the right of private businesses to protect sensitive information."); *Teich v. FDA*, 751 F. Supp. 243, 253 (D.D.C. 1990) (employing balancing test to order the release of information related to a medical device that was "unquestionably in the public interest" where the benefit of release "far outstrips the negligible competitive harm that defendants allege").

The pronounced public benefits from disclosure here unquestionably outweigh the speculative harms alleged by the Board. The seriousness of the financial crisis we are facing and the critical role the Board has played in that crisis cannot be overstated. The Board reportedly has committed over $2 trillion

in obligations since 2007,[6] and the soundness of the collateral pledged by the recipient financial institutions bears directly on the health of the banking system. Yet the Board is refusing to release any documents that would shed light on this issue by revealing certain fundamental facts behind these transactions – the identities of the borrowers, the amount borrowed, and the collateral they pledged in exchange for the loans.

The FOIA exists to "'promote honest and open government and to assure the existence of an informed citizenry in order to hold the governors accountable to the governed.'" *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005) (quoting *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999)). With the health of our economy in the balance, the public has a clear entitlement to information that would reveal whether the lending decisions of the Board are helping or hurting the economy. As Treasury Secretary Timothy F. Geithner acknowledged in a related context, "[g]iven that the road to recovery requires the confidence of the American people, increased transparency and accountability are key elements to our overall strategy of implementing our

[6] *See*, *e.g.*, Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., The Federal Reserve's Balance Sheet, Speech at the Federal Reserve Bank of Richmond 2009 Credit Markets Symposium (Apr. 3, 2009), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20090403a.htm.

financial stability programs . . .."[7] The American public's compelling interest in the requested documents – an interest perfectly in alignment with the underlying purposes of the FOIA – outweighs the stigma the Board alleges disclosure would cause, and compels the conclusion the requested records are not within the protection of Exemption 4.

C. The Board's Justification For Withholding The Requested Documents Flows From A Fundamentally Flawed Factual Premise.

At bottom, the Board's claims of harm from disclosure rest on the proposition that financial stability is achieved and maintained through secrecy, not transparency. Without secrecy, the Board argues, the public will have a "negative perception" about the financial viability of those financial institutions receiving funds through the Commercial Paper Funding Facility, which in turn could lead to a "weakening [of] the commercial paper market" and could "render[] the Bank's lending facility ineffective."[8] According to the Board, the stigma of having

---

[7] Letter from Timothy F. Geithner, Sec'y of the Treasury, to Nancy Pelosi, Speaker of the House of Representatives (Apr. 15, 2009), *available at* http://www.financialstability.gov/docs/TransparencyLetters1.pdf (hereinafter Geithner Apr. 15, 2009 Letter). While Secretary Geithner was referring to programs under the Emergency Economic Stabilization Act, his rationale applies with equal force here.

[8] J.A. at 124.

borrowed from the Federal Reserve Banks could lead to "a loss of public confidence in" and a "run" on the borrowing bank, even if its need for sudden funding "may not indicate an underlying capital or liquidity problem."[9]

The Board's rationale for secrecy, however, runs directly counter to historical experience and the dominant theme behind the financial recovery plan: transparency, not secrecy, is the key to strengthening our economy. Transparency forms one of the cornerstones of the government's plan to stabilize the financial system, based on the principle that increased transparency will enhance public confidence.[10] Toward that end, the Treasury Department has implemented a vigorous public communications initiative "designed to more directly communicate how our policies will stabilize the financial system and restore the flow of credit to consumers and businesses." *Id*.

Ironically, the Board brought the administration to a watershed moment of financial transparency when it made public the results of the Supervisory Capital Assessment Program ("SCAP"), the so-called "stress tests." The tests were designed to determine whether the nation's largest banks were sufficiently

---

[9] J.A. at 138-39.

[10] *See*, *e.g.*, Geithner Apr. 15, 2009 Letter ("Upon taking office, President Obama committed to increased transparency, accountability and oversight in our government's approach to stabilizing the financial system.").

capitalized to weather an economic downturn steeper than projected and emerge with the continued ability to lend money. Based on estimates of how much each of the 19 examined banks would lose by such a downturn in select categories of loans, the resources each bank had available to absorb such losses, and the capital buffer each would need, the test results identified a number of banks in need of billions of dollars of additional capital.[11] The published results include detailed estimates of potential losses at specified banks; Morgan Stanley, for example, was estimated to have loss rates from commercial real estate loans that could potentially exceed 40 percent. *Appendix: Institution-Specific Results* at 31. The test results also revealed other vulnerabilities individual banks faced, such as the percentage of credit card default specified banks could experience under a worst-case scenario. *Id.* at 19-21, 23-24, 28-29, 32, 36.

Tellingly, the publication of the stress test results – despite their specificity and identification of specific weaknesses of specified financial institutions – did not lead to the kind of stigma or a run on the banks the Board speculates could occur here. Rather, consistent with the theory behind their publication, the stress

---

[11] *See The Supervisory Capital Assessment Program: Overview of Results*, (May 7, 2009), published by the Board together with an appendix containing the specific results for each of the 19 institutions examined, *Appendix: Institution-Specific Results*. These documents are available at http://www.federalreserve.gov/newsevents/speech/bcreg20090507a1.pdf.

test results provided "greater clarity around the SCAP process and findings" and, as the Board predicted, made "the exercise more effective at reducing uncertainty and restoring confidence in our financial institutions." *The Supervisory Capital Assessment Program: Overview of* Results, at 1. This rationale, of course, echoes a theme sounded more generally by President Barack Obama and Secretary Geithner.

Legislation backs up the administration's general commitment to transparency and accountability in the financial system. For example, the Troubled Asset Relief Program ("TARP"), established by the Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201, *et seq.*, requires the Treasury secretary to make public a description of the amounts and prices of assets the government acquires under the Act within two days of their acquisition "[t]o facilitate market transparency." 12 U.S.C. § 5224(a). The Act also authorizes the secretary to require the public disclosure of off-balance sheet transactions, derivative instruments, contingent liabilities, and other sources of exposure of any financial institution selling troubled assets. *Id.* at § 5224(b).

Other transparency legislation includes Title XV of the American Recovery and Reinvestment Act of 2009, entitled "Accountability and Transparency," which requires recipients of recovery funds to submit quarterly reports detailing the funds received and how they were spent and requires each agency to post these

reports on-line within 30 days of their receipt. Pub. L. No. 111-5, 123 Stat. 115, 288 (2009). That same Act also establishes the Recovery Accountability and Transparency Board and requires the Board to post reports on-line detailing potential management and funding problems. *Id.* at 291.

Notably, with this wealth of detailed financial data now publicly available, financial institutions have not suffered adverse economic effects from the "stigma" of receiving federal financial assistance. Stocks in those banks receiving TARP funds experienced no significant fluctuations in their prices before and after the banks' participation in the program was announced. For example, the price of Bank of America stock on Friday, October 10, 2008, was $20.31 per share. Bank of America Corporation (BAC) Historical Prices, Yahoo Finance, http://finance.yahoo.com/q/?s=BAC (last visited Nov. 10, 2009) (hereinafter BAC Historical Prices). On October 13 and 14, the Treasury Department announced Bank of America's participation in the Capital Purchase Program (CPP), an offshoot of the TARP.[12] The bank's stock did not fall below the October 10 closing price until October 27. BAC Historical Prices. Moreover, after the

[12] *See* Treasury Announces TARP Capital Purchase Program Description, FinancialStability.gov, Oct. 14, 2008, http.financialstability.gov/latest/hp1207.html.

Treasury purchased $15 billion of Bank of America stock on October 28, the stock price rose above $20.31. *Id.*[13]

Other historical experience also undermines the Board's theory that the health of the financial industry depends on secrecy. In response to the financial crisis of the late 1920's and early 1930's, Congress enacted the Reconstruction Finance Corporation Act on January 22, 1932. Through this law Congress sought

---

[13] The stock of other TARP recipients experienced a similar pattern. Stock in Bank of New York Mellon closed at $25.79 per share on October 10, The Bank of New York Mellon Corporation (BK) Historical Prices, Yahoo Finance, http://finance.yahoo.com/q/hp?s=BK (last visited Nov. 10, 2009) (hereinafter BK Historical Prices), a price it did not trade below until October 24. *Id.* After the government purchased $3 billion of preferred stock from the bank on October 28, the bank's stock rose above $25.79, where it stayed until November 19, 2008. *Id.* Similarly, the closing stock price for Goldman Sachs on October 10, 2008, was $87.63 per share. Goldman Sachs Group Inc. (GS) Historical Prices, Yahoo Finance, http://finance.yaoo.com/9/hp?s=GS (last visited Nov. 10, 2009) (hereinafter GS Historical Prices). Its participation in the CPP was announced on October 13 and 14, yet its stock price did not trade below the October 10 closing price until October 28. *Id.* After the government purchased $10 billion of preferred Goldman Sachs stock on October 28, the company's stock closed that day trading at $92.62. *Id.* Eight of the nine financial firms participating in the CPP saw a direct increase in their stock prices between October 10 and October 14, when their participation in the CPP was made public. *See* BOA Historical Prices; BK Historical Prices; GS Historical Prices; Citigroup, Inc. (C) Historical Prices, Yahoo Finance, http://finance.yahoo.com/q/hp?s=C (last visited Nov. 10, 2009); JP Morgan Chase & Co. (JPM) Historical Prices, Yahoo Finances, http://finance.yahoo.com/q/hp?s=JPM (last visited Nov. 10, 2009); Morgan Stanley (MS) Historical Prices, Yahoo Finance, http://finance.yahoo.com/q/hp?s=MS (last visited Nov. 10, 2009); State Street Corp. (STT) Historical Prices, Yahoo Finance, http://finance.yahoo.com/q/hp?s=STT (last visited Nov. 10, 2009); Wells Fargo & Company (WFC) Historical Prices, Yahoo Finance, http://finance.yahoo.com/q/hp?s=WFC (last visited Nov. 10, 2009).

to provide liquidity to and restore public confidence in the banking system by establishing a government entity that would make loans to banks and other financial institutions. *See generally* James Butkiewicz, *Reconstitution Finance Corporation*, Econ. History Assoc., http://eh.net/encyclopedia/article/butkiewicz.finance.corp.reconstruction (last visited Nov. 10, 2009). The Reconstruction Finance Corporation operated in total secrecy until July 21, 1932, when Congress passed additional legislation requiring the Corporation to make public those companies that had received loans since its inception. *Id.* The mandated transparency did not destroy either the Corporation or its loan recipients. The required disclosures did lead, however, to the resignation of the Reconstruction Finance Corporation's president, when the newly released data showed that under his direction, the Corporation had favored a cadre of banks with Republican political connections. *See* 1 Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Crisis of the Old Order, 1919-1933*, at 236-38 (First Mariner Books 2003) (1957).

In short, we operate under a new paradigm where transparency, not secrecy, is the dominant force behind restoring financial stability. The reforms of the financial regulatory system now underway are, in the words of President Obama,

> rooted in a simple principle: We ought to set clear rules of the road that promote transparency and accountability. That's how we'll make certain that markets foster responsibility,

> not recklessness. That's how we'll make certain that markets reward those who compete honestly and vigorously within the system, instead of those who are trying to game the system.

Barack Obama, President of the United States of America, Remarks on Financial Rescue and Reform at Federal Hall (Sept. 14, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Financial-Rescue-and-Reform-at-Federal-Hall/. The Board's position here, rooted in an old paradigm of secrecy at all costs, simply does not reflect the reality of the current situation and the path toward restoring our country to financial stability.[14]

CONCLUSION

For the foregoing reasons and those set forth in Plaintiff-Appellant's Brief, the Court should reverse the ruling of the district court and order the Board to disclose all requested documents.

---

[14] The Board is, of course, part of the executive branch and answers to the president, as do all other financial regulatory agencies. Yet inexplicably it continues to pursue a course of secrecy directly at odds with the direction of the administration in all other financial arenas, despite the complete absence of evidence justifying its lack of transparency.

DATED: November 13, 2009

Respectfully submitted,

_____

Melanie Sloan
Anne L. Weismann
Citizens for Responsibility and Ethics
in Washington
1400 Eye Street, N.W., Suite 450
Washington, D.C. 20005
(202) 408-5565

Counsel for *Amicus Curiae*
Citizens for Responsibility and Ethics
in Washington

CERTIFICATE OF VIRUS SCANNING

Pursuant to Interim Local Rule 25(a)(3)(D)(6), this will certify that the accompanying PDF document has been scanned for viruses and that no viruses have been detected.

Respectfully submitted this 13th day of November, 2009.

The Lex Group[VA]
Post Office Box 1111
Richmond, Virginia 23218

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 13th day of November, 2009, two bound copies and one electronic copy on CD of the foregoing Brief of Amicus Curiae were served via UPS Transportation to the following:

Steven G. Mintz
MINTZ & GOLD, LLP
470 Park Avenue, South, 10th Floor
New York, New York 10016

Counsel for Appellant

Katherine M. Wheatley
BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM
20th and C Streets, N.W.
Washington, D.C. 20551

Counsel for Appellee

I further certify that on this 13th day of November, 2009, the required number of copies of the Brief of Amicus Curiae were filed via UPS Next Day Air with the Office of the Clerk, United States Court of Appeals for the Second Circuit.

The necessary filing and service were performed in accordance with the instructions given me by counsel in this case.

The Lex Group[VA]
Post Office Box 1111
Richmond, Virginia 23218

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains *4,808* words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type of style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word (2000) in Times New Roman 14-point typeface.

Dated: November 13, 2009

_____
Melanie Sloan