[ORAL ARGUMENT HELD ON APRIL 15, 2016]

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

PERRY CAPITAL, LLC, et al., Plaintiffs-Appellants, v. JACOB LEW, et al., Defendants-Appellees.	Nos. 14-5243 (L), 14-5254 (con.), 14-5260 (con.), 14-5262 (con.)

TREASURY'S OPPOSITION TO PLAINTIFFS' MOTION FOR FURTHER JUDICIAL NOTICE AND SUPPLEMENTATION OF THE RECORD

In July 2015, the Fairholme Funds plaintiffs filed a motion asking this Court to take judicial notice of certain documents that they obtained through discovery in a separate takings action before the Court of Federal Claims. Ten months later, Fairholme and other institutional plaintiffs have now filed a second motion asking this Court to take notice of other documents Fairholme obtained through the takings litigation. The Fairholme Funds plaintiffs had access to these additional materials before they filed their first motion. At no point do they explain why they waited until after briefing and oral argument to expand their original request to supplement the record. In any event, plaintiffs' motion for further judicial notice is without merit and

should be denied for the same reasons their initial motion should be rejected. *See* Treasury Opp'n To July 2015 Mot. 10-14 (filed Aug. 20, 2015).

1. Like plaintiffs' original supplemental materials, plaintiffs' additional materials have no bearing on the question whether the district court correctly concluded that it lacked jurisdiction over plaintiffs' claims. *See id.* at 10-11; Dist. Ct. Op. 22. Plaintiffs' additional materials purport to cast doubt on Treasury's stated motivations in entering into the Third Amendment. *See* Pls. Mot. 2-9. But Treasury's motives are irrelevant to the question whether HERA's broad anti-injunction and transfer-of-shareholder rights provisions bar plaintiffs' suit. *See* Treasury Opp'n To July 2015 Mot. 10-11; Dist. Ct. Op. 22.

Plaintiffs' additional supplemental materials are also not "facts" that can be judicially noticed. *See* Treasury Opp'n To July 2015 Mot. 13-14. They are instead a selective sliver of untested discovery materials that lack context and whose meaning is subject to dispute. *See id.*

2. Even assuming Treasury's administrative record were relevant to the threshold jurisdictional issues now before this Court and plaintiffs' discovery materials were judicially noticeable, those materials fall well short of rebutting the "presumption of regularity" that attaches to an agency's compilation of the record. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 420 (1971); Treasury Opp'n To July 2015 Mot. 12-13. The existing record is more than sufficient to support judicial review of Treasury's actions. *See Hill Dermaceuticals, Inc. v. Food & Drug Admin.*, 709 F.3d 44, 47

(D.C. Cir. 2013) (in an Administrative Procedure Act case, a court may consult extra-record materials only in situations involving "gross procedural deficiencies—such as where the administrative record itself is so deficient as to preclude effective review").

Plaintiffs quite wrongly assert that the additional materials "directly contradict[]" Treasury's claim that the Third Amendment was designed to arrest the draws-to-pay-dividends cycle that threatened to deplete Treasury's ongoing capital commitment prematurely. Pls. Mot. 3-4. Treasury's ongoing commitment is vital to the continued viability of Fannie Mae and Freddie Mac (the GSEs), a point plaintiffs have never disputed.[1] Plaintiffs similarly do not contest that the GSEs had, in fact, drawn on Treasury's commitment several times to pay the 10% dividends owed to Treasury under the initial Purchase Agreements, and that the market was concerned about these draws and the corresponding erosion of Treasury's commitment, which became fixed at the end of 2012. *See* Treasury Resp. Br. 9-11, 33. As their sworn statements in the GSEs' August 2012 Securities and Exchange Commission (SEC) filings indicate, the GSEs' executives anticipated that they would not earn enough over the long-term to pay Treasury's 10% dividend and would have to draw down the commitment to pay future dividends. *See id.* at 10, 45. That prediction has proven accurate: the GSEs have failed to earn sufficient income to pay what they would have

[1] The $258 billion remaining commitment is in addition to the $187.5 billion in capital that Treasury has so far provided the GSEs. *See* Treasury Resp. Br. 9-10 (explaining Treasury's past investment and its ongoing commitment).

owed Treasury under the original 10% dividend obligation in five of the last six quarters.[2] In short, protecting Treasury's commitment by ending the draws-to-pay-dividends cycle was a real and important concern for Treasury, the Federal Housing Finance Administration (FHFA), and the market, as the current administrative record reflects. *See id.* at 9-11.

Plaintiffs' additional materials confirm the centrality of that concern. Throughout plaintiffs' additional materials, Treasury and other Administration officials repeatedly emphasize that the Third Amendment was designed to end the draws-to-pay-dividends cycle and conserve the ongoing commitment. *See, e.g.*, Pls. App. to Mot. for Further Judicial Notice (Pls. App.), Ex. 1, at A002 (email from James M. Parrott) (stating that the Third Amendment will "increase the stability of the market by removing concern that [the GSEs will] run out of support before we have a place to which to transition"); A003 (email from James M. Parrott) (absent the Third Amendment, the GSEs will have to "pay a dividend that in any given month . . . requires [the GSEs] to eat into their headroom under the [commitment], scaring the hell out of the market"); *id.*, Ex. 4, at A0014 (Treasury internal memo) (the Third Amendment will "reduc[e] the GSEs' need to continue to borrow unnecessarily from

[2] *See* Fannie Mae 2016 1Q 10-Q at 14; Fannie Mae 2015 10-K at F-93; Fannie Mae 2014 10-K at F-100; Freddie Mac 2016 1Q 10-Q at 7; Freddie Mac 2015 10-K at 329; Freddie Mac 2014 10-K at 239; Treasury Resp. Br. 9-10 (under 10% fixed dividend, Fannie Mae owed Treasury $2.9 billion per quarter and Freddie Mac owed Treasury $1.8 billion).

the Treasury to pay the dividend, gradually chipping away at [the commitment]"); A017 (Third Amendment "eliminates the circularity associated with the GSE's drawing from Treasury in order to pay Treasury the 10 percent dividend."); A023 (Third Amendment "will eliminate the potential for circularity associated with the GSEs requesting additional draws to cover dividend payments. This will make sure the finite amount of [the remaining commitment] is used only to support the financial stability of the GSEs.").

Plaintiffs also assert that the additional documents they seek to introduce demonstrate that Treasury agreed to the Third Amendment to ensure that the GSEs would not reenter the market as private entities. Pls. Mot. 2-4. In fact, the documents reflect efforts to head off a misperception that the Third Amendment was a bad deal for taxpayers because it eliminated the fixed dividend or that it was inconsistent with the Administration's commitment to comprehensive reform. Moreover, Treasury's position on the GSEs' reentry into the market has long been clear. Since Treasury's initial investment in the GSEs in 2008, Treasury officials have consistently stated that the GSEs should not be allowed to reenter the marketplace as private entities without significant reforms. *See* Press Release, U.S. Dep't of Treasury, Statement by Secretary Henry M. Paulson, Jr. (Sept. 7, 2008) (stating the Administration's view that the GSEs "pose a systemic risk and . . . cannot continue in their current form"); Press Release, U.S. Dep't of Treasury, Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac

(Aug. 17, 2012) (stating the Administration's view that the GSEs should not "return to the market in their prior form"). The Administration's view is consistent with that of Congress, which recently declared that "[i]t is the Sense of Congress that Congress should pass and the President should sign into law legislation determining the future of Fannie Mae and Freddie Mac, and that . . . the Secretary should not sell, transfer, relinquish, liquidate, divest, or otherwise dispose of any outstanding shares of senior preferred stock acquired pursuant to the Senior Preferred Stock Purchase Agreement until such legislation is enacted." Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 702(c) (2015). It is neither surprising nor improper that Treasury was willing to enter the Third Amendment because it addressed the draws-to-pay-dividends problem and did not undermine the Administration's longstanding commitment to legislative reform.

Plaintiffs also reiterate their mistaken assertion that the Third Amendment allowed taxpayers to "reap massive, windfall profits." Pls. Mot. 5. The facts again show otherwise. Between 2008 and 2011, Treasury invested $187.5 billion in the GSEs. J.A. 2411 (TR4351). Through the first quarter of 2016, Treasury has received $245.6 billion in dividends, which equates to an annual rate of return of around 7.5%. Given the size and risk of Treasury's investment into the failing enterprises—an investment private investors were unwilling to make—a 7.5% annual return is far from a windfall. Indeed, a 7.5% annual return is below what plaintiffs have historically earned for their investors. *See* The Fairholme Fund Facts (Mar. 31, 2016),

at 1 (stating the Fairholme Fund has earned a 9.47% annualized return since its inception);[3] James Palmer, *Looking Back at Perry Capital's Credit Fund Pitch*, Absolute Return, 2014 WLNR 37475078 (Aug, 19, 2014) (stating that the "onshore" version of Perry Capital's flagship fund has produced a net annualized return of 12.58% since its inception, while the "offshore" version has produced 11.65% annual returns).

Although irrelevant to the legal questions before this Court, plaintiffs' additional materials are revealing in one respect. During this litigation, plaintiffs have placed great weight on an optimistic set of financial projections that Fannie Mae's financial team purportedly presented to Treasury and FHFA in August 2012. *See, e.g.*, Inst. Pls. Reply Br. 5-6, 33-34; Tr. Oral Arg. 10-11. Plaintiffs contend that the rosy scenario depicted in those projections shows that Treasury and FHFA "knew" that the Third Amendment was unnecessary. Inst. Pls. Reply Br. 5-6; Pls. Mot. 5-6.

Plaintiffs' additional materials reveal, however, that the projections were viewed with skepticism even within Fannie Mae. When presented with the information, Fannie Mae's President and CEO Tim Mayopoulos "wondered whether the Board might question the credibility of [the] financial projections," given that they represented a "large change from the prior forecast." Pls. App., Ex. 12, at A064. In response, Fannie Mae's CFO Susan McFarland conceded that others within the organization "believe[d] that a more conservative approach . . . may be warranted

[3] http://www.fairholmefundsinc.com/Facts/FAIRXfacts.pdf

given the limited number of improved data points." *Id.* Plaintiffs' insistence that FHFA and Treasury erred in choosing a "more conservative approach" thus falls flat, even if that choice were subject to review.[4]

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Further Judicial Notice and Supplementation of the Record should be denied.

Respectfully submitted,

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[4] Plaintiffs also suggest in passing that their additional materials show that the Third Amendment was "an end-run around HERA's statutory priority scheme for liquidation of the GSEs in receivership." Pls. Mot. 4. Plaintiffs do not explain their suggestion. It is, in any event, unavailing, as the Third Amendment was not a *de facto* liquidation. *See* Treasury Resp. Br. 35.

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2016 I electronically filed the foregoing response with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Gerard Sinzdak
GERARD SINZDAK