**ORAL ARGUMENT HELD ON APRIL 15, 2016**

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

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| PERRY CAPITAL, LLC, *et al.*,<br><br>Appellants,<br><br>v.<br><br>JACOB J. LEW, *et al.*,<br><br>Appellees. | Nos. 14-5243 (lead)<br>14-5254 (consolidated)<br>14-5260 (consolidated)<br>14-5262 (consolidated) |

**OPPOSITION OF APPELLEES FEDERAL HOUSING FINANCE AGENCY AND MELVIN L. WATT TO APPELLANTS' MOTION FOR FURTHER JUDICIAL NOTICE AND SUPPLEMENTATION OF THE RECORD**

Plaintiffs-Appellants' Motion for Further Judicial Notice and Supplementation of the Record (filed May 25, 2016) (the "Motion") is improper, both procedurally and substantively, and thus should be denied.

The Motion is a transparent attempt by Plaintiffs-Appellants to improperly expand upon the arguments they presented at oral argument, submitted under the guise of a "further" request for judicial notice. Indeed, the Motion dedicates three pages to responding to the Court's questions posed during oral argument concerning Fannie Mae and Freddie Mac's 10-Qs that were issued just before the Third Amendment was executed, in which the Enterprises stated they did not

anticipate earning enough over the long term to pay a 10% dividend to Treasury.[1] Absent court permission—which Plaintiffs-Appellants did not request—it is wholly improper to submit this sort of unsolicited, post-argument supplemental briefing.

Plaintiffs-Appellants argue the timing of their motion is driven by the fact that the materials they seek to submit—primarily discovery materials obtained in a separate litigation pending in the Court of Federal Claims—only "recently became public." Motion at 1. But this explanation does not withstand scrutiny because Plaintiff Fairholme has had these documents for at least ten months. The documents only "became public" in that the parties to the Court of Federal Claims litigation recently removed their "protected" designation. Because Fairholme is a party to the Court of Federal Claims litigation, it has always had possession of these documents. In fact, in its original motion for judicial notice (filed under seal on July 29, 2015), Fairholme asked this Court to take judicial notice of some of *the very same documents* for which Plaintiffs-Appellants now request "further" judicial notice.[2] Plaintiff Fairholme plainly had the opportunity to submit any

[1] *See* Motion at 5-7 (arguing "[t]he forward-looking statements regarding future earnings in Fannie's August 8, 2012, 10-Q do not undermine [Plaintiffs'] conclusion," and citing Oral Arg. Tr. 16:10-17:12 (Apr. 15, 2016)); Appendix to Motion, Exhibit 10 (D.C. Circuit Oral Argument Transcript) (filed May 25, 2016).

[2] *Compare* Appendix to Motion, Exhibits 1, 12, 14, and 15 *with* Appendix to Sealed Motion For Judicial Notice and Supplementation of the Record, Exhibits 6, 21, 26, and 29 (filed July 29, 2015).

additional documents under seal as part of its original motion for judicial notice, but Fairholme chose not to.

Additionally, Plaintiffs-Appellants' Motion should be denied for the same reasons set forth by Defendants-Appellees in opposition to Fairholme's original motion for judicial notice. *See* Opp. of FHFA, Fannie Mae, and Freddie Mac (filed Aug. 20, 2015); Opp. of Treasury (filed Aug. 20, 2015). That is, these cases are on appeal from the district court's grant of motions to dismiss on threshold legal grounds. In issuing its decision below, the district court properly assumed the truth of all of the allegations in the complaint, declaring FHFA's Document Compilation (submitted only in connection with FHFA's alternative motion for summary judgment) to be "irrelevant" to its decision. And this Court will apply the same standard of review in assessing Defendants-Appellees' motion to dismiss arguments. There is thus no need for Plaintiffs-Appellants to attempt to substantiate their factual allegations, or supplement the record, by injecting into this appeal hundreds of pages of discovery materials obtained in a separate case.

Here, Plaintiffs-Appellants' Motion for "further" judicial notice continues Plaintiffs-Appellants' effort to bolster factual allegations that are undisputed for present purposes. For example, the documents purport to substantiate Plaintiffs-Appellants' allegations that the Third Amendment (a) was intended to wind down and not rehabilitate the Enterprises (*see* Motion at 2-4), (b) foreseeably resulted in

"windfall profits" to Treasury (*id*. at 4-5, 8), and (c) was the result of alleged "direction" by Treasury (*id*. at 7). Each of these allegations are thoroughly presented in Plaintiffs-Appellants' complaints.[3] Indeed, the district court expressly addressed these allegations and held them insufficient as a matter of law—even if assumed true—to save the complaints from dismissal:

> [T]o determine whether it has jurisdiction to adjudicate claims for equitable relief against FHFA as a conservator, the Court must look at *what* happened, not why it happened. . . . FHFA's underlying motives or opinions — *i.e.*, ***whether the net worth sweep would arrest a downward spiral of dividend payments . . . increase payments to Treasury, or keep the GSEs in a holding pattern . . . do not matter for purposes of § 4617(f)***.

JA336-337 (Opinion at 21-22 (emphasis added)). As such, the documents Plaintiffs-Appellants seek to add to the record continue to have no relevance to the issues on appeal.

Plaintiffs-Appellants also continue to emphasize an alleged "payment-in-kind option" (*see* Motion at 6), but as the district court correctly observed below, "there is no need to evaluate the merits of the defendants' decision to execute the Third Amendment instead of selecting other options," in light of Section 4617(f).

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[3] *See* Opp. of FHFA, Fannie Mae, and Freddie Mac at 9 n.4 (filed Aug. 20, 2015) (identifying "wind down" allegations in complaints), 10 nn.5-6 (identifying profitability and deferred tax asset allegations in complaints); *see also* Fairholme Compl. ¶¶ 70, 92, 109 (alleging Conservator agreed to the Third Amendment "under the direction and supervision of Treasury").

JA321 (Opinion at 6, n.7). Likewise, as Judges Millett and Ginsburg correctly posited at oral argument, "surely that decision whether to require dividends in cash or in kind is exactly the type of judgment that's going to be conferred on the Agency's conservator" (Tr. 6:19-22 (J. Millett)), and "that's a discretionary decision that's hardly our role . . . to second guess" (Tr. 8:1-2 (J. Ginsburg)).

Finally, the discovery materials arising out of the Court of Federal Claims litigation are not proper subjects of judicial notice in any event. *See* Opp. of FHFA, Fannie Mae, and Freddie Mac at 13-15 (filed Aug. 20, 2015); Opp. of Treasury at 13-15 (filed Aug. 20, 2015).

## CONCLUSION

For the foregoing reasons, in addition to the reasons set forth in Treasury's opposition, the Court should deny Plaintiffs-Appellants' Motion for Further Judicial Notice and Supplementation of the Record.

Dated: June 9, 2016

Respectfully submitted,

*/s/ Howard N. Cayne*

Howard N. Cayne
Asim Varma
David B. Bergman
Michael A.F. Johnson
Dirk C. Phillips
Ian S. Hoffman
ARNOLD & PORTER LLP
601 Massachusetts Ave., N.W.
Washington, D.C. 20001-3743
(202) 942-5000
(202) 942-5999 (fax)
Howard.Cayne@aporter.com

*Counsel for Appellees Federal Housing Finance Agency and Melvin L. Watt*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 9, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/ Howard N. Cayne*
Howard N. Cayne

*Counsel for Appellees Federal Housing Finance Agency and Melvin L. Watt*