

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

\_\_\_\_\_  
PERRY CAPITAL LLC, et al.,  
Plaintiffs-Appellants,

v.

JACOB J. LEW,  
in his official capacity as Secretary of the Treasury, et al.  
Defendants-Appellees.

\_\_\_\_\_  
On Appeal from the United States District Court  
for the District of Columbia

\_\_\_\_\_  
SUPPLEMENTAL BRIEF FOR THE TREASURY DEPARTMENT

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel declares:

**A. Parties and Amici**

The plaintiffs below and appellants in these consolidated cases are Perry Capital, LLC, for and on behalf of investment funds for which it acts as investment manager (14-5243); Fairholme Funds, Inc, on behalf of its series, the Fairholme Fund (14-5254); Fairholme Fund, a series of Fairholme Funds, Inc. (14-5254); Berkley Insurance Company (14-5254); Acadia Insurance Company (14-5254); Admiral Indemnity Company (14-5254); Admiral Insurance Company (14-5254); Berkley Regional Insurance Company (14-5254); Carolina Casualty Insurance Company (14-5254); Midwest Employers Casualty Insurance Company (14-5254); Nautilus Insurance Company (14-5254); Preferred Employers Insurance Company (14-5254); Arrowood Indemnity Company (14-5260); Arrowood Surplus Lines Insurance Company (14-5260); Financial Structures Limited (14-5260); Melvin Bareiss (14-5262); Joseph Cacciapelle (14-5262); John Cane (14-5262); Francis J. Dennis, derivatively on behalf of the Federal National Mortgage Association (14-5262); Michelle M. Miller (14-5262); Marneu Holdings Co., derivatively on behalf of the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation (14-5262); United Equities Commodities, Co. (14-5262); 111 John Realty Corp., derivatively on behalf of the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation (14-5262).

Listed as Plaintiffs-Appellees on the Court's docket for No. 14-5262 are Mary Meiya Liao; American European Insurance Company; Barry P. Borodkin; and Barry P Borodkin Sep Ira.

Defendants below and appellees here are the United States Department of the Treasury (14-5243, 14-5254, 14-5260, 14-5262); Federal Housing Finance Agency (14-5243, 14-5254, 14-5260, 14-5262); Jacob J. Lew, in his official capacity as the Secretary of the Department of the Treasury (14-5243, 14-5260, 14-5262); Melvin L. Watt, in his official capacity as Director of the Federal Housing Finance Agency (14-5243, 14-5254, 14-5260); Federal National Mortgage Association (14-5260, 14-5262); and Federal Home Loan Mortgage Corporation (14-5254, 14-5260, 14-5262).

There were no amici or intervenors in the district court. Amici in this Court are National Black Chamber of Commerce; Timothy Howard; Independent Community Bankers of America; Association of Mortgage Investors; William M. Isaac; Robert H. Hartheimer; 60 Plus Association, Inc.; Center for Individual Freedom; Investors Unite; Louise Rafter; Josephine Rattien; Stephen Pattien; Pershing Square Capital Management, LP; Better Markets, Inc., and Jonathan R Macey.

## **B. Rulings Under Review**

Appellants seek review of (1) the Memorandum Opinion and Order entered on September 30, 2014, by the Honorable District Court Judge Royce Lamberth granting defendants' motion to dismiss, and (2) the Order Denying Plaintiff-Appellants' Motion for Supplementation of the Administrative Record, Limited Discovery,

Suspension of Briefing on the Defendants' Dispositive Motions, and a Status Conference, also entered on September 30, 2014. The district court's memorandum opinion and order is available on Westlaw. *See Perry Capital LLC v. Lev*, 70 F. Supp. 3d 208 (D.D.C. Sep. 30, 2014); J.A.316.

### C. Related Cases

This case was not previously before this Court or any court other than the district court. Counsel is aware of no related cases within the meaning of D.C. Cir. R. 28(a)(1)(C).

There are multiple cases involving similar issues and parties pending in the Court of Federal Claims: *Washington Federal v. United States*, No. 13-385C; *Fairholme Funds, Inc. v. United States*, No. 13-465C; *Cacciapalle v. United States*, No. 13-466C; *American European Insurance Co. v. United States*, No. 13-496C; *Arrowood Indemnity Co. v. United States*, No. 13-698C; *Dennis v. United States*, No. 13-542C; *Fisher v. United States*, No. 13-608C; *Shipmon v. United States*, No. 13-672C; *Reid v. United States*, No. 14-152C; and *Rafter v. United States*, No. 14-740C. *Cacciapalle*, *American European Insurance*, and *Dennis* have been consolidated, and *Cacciapalle* has been designated as a putative class action.

In addition, cases raising similar issues are currently pending in the United States District Court. *Saxton v. FHFA*, No. 15-cv-47 (N.D. Iowa); *Jacobs v. FHFA*, No. 15-cv-708 (D. Del.); *Robinson v. FHFA*, No. 7:15-cv109 (E.D. Ky.); *Roberts v.*

*FHFA*, No. 1:16-cv-2107 (N.D. Ill.); and *Voacolo v. Federal National Mortgage Association, et al.*, No. 1:16-cv-1324 (D.D.C.).

*s/ Abby C. Wright*

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Abby C. Wright

## TABLE OF CONTENTS

	<u>Page(s)</u>
INTRODUCTION .....	1
DISCUSSION .....	2
CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)	
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

<b>Cases:</b>	<b><u>Page(s)</u></b>
<i>Benoit v. U.S. Dep’t of Agric.</i> , 608 F.3d 17 (D.C. Cir. 2010).....	4
<i>Department of the Army v. Blue Fox, Inc.</i> , 525 U.S. 255 (1999).....	4
<i>El Rescate Legal Servs., Inc. v. Executive Office of Immigration</i> , 959 F.2d 742 (9th Cir. 1991).....	6
* <i>El-Shifa Pharm. Indus. Co. v. United States</i> , 607 F.3d 836 (D.C. Cir. 2010) .....	5, 6, 7
<i>Hubbard v. EPA</i> , 982 F.2d 531 (D.C. Cir. 1992) .....	4
<i>In re Supreme Beef Processors, Inc.</i> , 468 F.3d 248 (5th Cir. 2006).....	5
<i>Lujan v. National Wildlife Fed’n</i> , 497 U.S. 871 (1990).....	6
<i>McNeil v. United States</i> , 508 U.S. 106 (1993).....	2
<i>Michigan v. U.S. Army Corps of Eng’rs</i> , 667 F.3d 765 (7th Cir. 2011).....	6
<i>Preferred Risk Mut. Ins. Co. v. United States</i> , 86 F.3d 789 (8th Cir. 1996).....	6
* <i>Sea–Land Serv., Inc. v. Alaska R.R.</i> , 659 F.2d 243 (D.C. Cir.1981) .....	1, 6
<i>Steel Co. v. Citizens for a Better Env’t</i> , 523 U.S. 83 (1998).....	7

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\* Authorities upon which we chiefly rely are marked with asterisks.

*U.S. Info. Agency v. Krc*,  
 989 F.2d 1211 (D.C. Cir. 1993) .....7

*U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*,  
 540 U.S. 736 (2004) .....5

**Statutes:**

5 U.S.C. § 702.....1, 4, 5, 6, 7

\*12 U.S.C. § 4617(f) ..... 1, 4, 7

28 U.S.C. § 1346(b) .....2

28 U.S.C. § 2675 .....2

28 U.S.C. § 2680(a) .....2

28 U.S.C. § 2680(h) .....2

28 U.S.C. § 2680(i).....2



**GLOSSARY**

APA	Administrative Procedure Act
Fannie Mae	Federal National Mortgage Association
FTCA	Federal Tort Claims Act
FHFA	Federal Housing Finance Agency
Freddie Mac	Federal Home Loan Mortgage Corporation
J.A.	Joint Appendix
Third Amendment	Third Amendment to the Preferred Stock Purchase Agreements
TR	Treasury's Administrative Record

## INTRODUCTION

This Court's June 21, 2016 order directs the parties to respond to the question: "Regarding the class plaintiffs' claim against Treasury for breach of fiduciary duty, is there a grant of subject matter jurisdiction and a waiver of sovereign immunity that is not the Federal Tort Claims Act?"

Plaintiffs' supplemental brief confirms that there is no applicable waiver of sovereign immunity. Although plaintiffs have previously disavowed assertion of an Administrative Procedure Act (APA) claim, they now suggest that their common law claim for breach of fiduciary duty might be asserted under the APA because they seek "to undo the effects of the Third Amendment's Net Worth Sweep." Supp. Br. 3. Even assuming that plaintiffs seek the type of relief available under the APA, that statute does not subject the federal government to state common law or statutory claims, regardless of the nature of the relief sought. This Court has long made clear that, notwithstanding 5 U.S.C. § 702, even claims under a federal statute can proceed only when Congress has made that statute applicable to the United States. *See Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 245 (D.C. Cir.1981). Unlike the Federal Tort Claims Act, the APA does not incorporate state law and make it applicable to the United States. And, even assuming that plaintiffs could assert their breach of fiduciary duty claim under the APA, it would be barred by 12 U.S.C. § 4617(f).

## DISCUSSION

1. In the district court, the class plaintiffs urged that their claim for breach of fiduciary duty sounded in tort and that the court therefore had jurisdiction to entertain those claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b). Dkt. No. 33 (No. 13-1288), at 51 (“Because Plaintiffs’ fiduciary duty claims are tort claims, this Court has jurisdiction to hear them under the Federal Tort Claims Act. 28 U.S.C. § 1346(b).”). They did not allege, however, that they filed an administrative claim with Treasury, a prerequisite for filing suit under the FTCA, 28 U.S.C. § 2675, and did not urge a right to recover under the FTCA on appeal.<sup>1</sup>

The government noted in its principal brief that class plaintiffs appeared to assert a breach-of-contract claim only against the Federal Housing Finance Agency (FHFA). Treasury Br. 52 (citing Class Pls. Br. 34-35 (describing contractual relationship between shareholders and the enterprises)). Class plaintiffs confirmed at oral argument that they were not bringing contract claims against Treasury. Oral Arg. Tr. 67 (Apr. 15, 2016) (“[W]ell, we are suing the Treasury for breach of fiduciary duty, but we’re not suing them for breach of contract.”). And class plaintiffs reiterate that

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<sup>1</sup> Plaintiffs’ suggestion (Class Pls. Br. 6 n.4) that they satisfied the FTCA’s pre-lawsuit administrative exhaustion requirement through their prosecution of this lawsuit is self-evidently erroneous. *See McNeil v. United States*, 508 U.S. 106, 113 (1993) (dismissing suit for failure to file an administrative claim before initiating suit). Moreover, as noted in our principal brief (Treasury Br. 50 n.10), plaintiffs’ claims would also be barred by several exceptions to the FTCA’s waiver of immunity. *See* 28 U.S.C. § 2680(a), (h), (i).

position in their supplemental brief (at 9-10), emphasizing that “[f]or the direct fiduciary breach claims brought on behalf of shareholders against Treasury, there is no contract between the shareholders and Treasury to which the fiduciary breach claims could relate.”

2. Prior to this point, the class plaintiffs have not attempted to rely on the Administrative Procedure Act. Their complaint does not state an APA claim, J.A. 212-84, and, consistent with their complaint, the class plaintiffs stressed at oral argument that “the Class advances claims of breach of contract, breach of fiduciary duty, common law claims,” and that “our claims are not APA claims.” Oral Arg. Tr. 43.

In response to this Court’s question regarding an applicable waiver of sovereign immunity, however, plaintiffs assert that they could bring a breach of fiduciary claim against Treasury under the APA.<sup>2</sup> We have previously understood class plaintiffs’ claim for a breach of fiduciary duty as a claim for money damages. *Compare, e.g.*, J.A. 278 ¶ 5 (Class Pls. Compl.) (seeking “compensatory damages and disgorgement” against Treasury for its alleged breach of its fiduciary duties), *with* J.A. 278 ¶ 8 (seeking “appropriate equitable and injunctive relief [against FHFA and Fannie Mae and Freddie Mac] to remedy Defendants’ breaches of contract, and breaches of the

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<sup>2</sup> Plaintiffs’ discussion of supplemental jurisdiction has no bearing on the issue presented here. Supp. Br. 2. Treasury has not disputed that if class plaintiffs could properly assert a claim for breach of fiduciary duty under the APA, which they cannot, their claims would properly be brought in federal court, not state court.

implied covenant of good faith and fair dealing”). In their supplemental brief, however, class plaintiffs note that their complaint seeks “not only damages, but also a declaration that Treasury breached its fiduciary duties by agreeing to the Third Amendment, and also seek[s] ‘such other and further relief as the Court may deem just and proper[.]’” Supp. Br. 3. Plaintiffs assert that this “includes injunctive relief against Treasury to undo the effects of the Third Amendment’s Net Worth Sweep.” *Id.*

Although plaintiffs do not explain what such relief would encompass, labeling the relief as “injunctive” does not bring it within the ambit of the APA, and, as plaintiffs tacitly acknowledge, 5 U.S.C. § 702 does not authorize suits for money damages. *See Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260-61 (1999) (APA does not permit enforcement of an equitable lien); *Benoit v. U.S. Dep’t of Agric.*, 608 F.3d 17, 20 (D.C. Cir. 2010) (“The plaintiffs wisely take no issue with the district court’s holding that suits for damages against the United States under the Civil Rights Act, the APA, and the Constitution are barred by sovereign immunity and that suits for damages against the United States under the common law must be brought pursuant to the limited waiver of sovereign immunity in the FTCA, which requires that the claimant have exhausted his administrative remedy before filing suit.”); *Hubbard v. EPA*, 982 F.2d 531 (D.C. Cir. 1992) (en banc) (APA does not permit award of backpay). And, to the extent that the recast claim would actually seek injunctive relief, it is barred by 12 U.S.C. § 4617(f) for the same reasons that the APA

claims asserted by other plaintiffs are precluded by that provision. *See* Treasury Br. 26-37.

In any event, even assuming that class plaintiffs would be seeking the type of relief available under 5 U.S.C. § 702, the APA does not subject the United States to suits asserting state law claims, whether based on common law or statute. As Judge Kavanaugh's concurring opinion in *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc), explained with regard to a purported common law defamation claim, "contrary to plaintiffs' inventive arguments, the APA does not borrow state law or permit state law to be used as a basis for seeking injunctive or declaratory relief against the United States." *Id.* at 854 (citing *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 255 (5th Cir. 2006) (Bankruptcy Code's waiver of immunity did not permit a plaintiff to assert a common law tort claim against the United States that would be barred by the exceptions to the FTCA)). Indeed, even when a claim is premised on a federal statute, a waiver of immunity "does not result in liability if the substantive law in question is not intended to reach the federal entity." *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 744 (2004) (plaintiff could not assert claim under Sherman Act despite Postal Service's sue-and-be-sued clause). Even prior to *Flamingo*, this Court had held that, notwithstanding 5 U.S.C. § 702, the Sherman Act "does not expose United States

instrumentalities to liability, whether legal or equitable in character, for conduct alleged to violate antitrust constraints.” *Sea–Land Serv.*, 659 F.2d at 245.<sup>3</sup>

To the extent that plaintiffs here may be arguing that the APA creates a cognizable federal cause of action for breach of fiduciary duty, “that, too, is wrong.” *El-Shifa*, 607 F.3d. at 853-54 (Kavanaugh, J., concurring). The APA contains no cause of action for breach of fiduciary duty and “plaintiffs cannot use the APA—which, as relevant here, prohibits executive action that is ‘not in accordance with law’—to vindicate a purported federal common-law right that does not exist.” *Id.* The concurring judges in *El-Shifa* concluded that the invocation of the APA to assert a common law tort claim was “so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy,” and therefore would not have reached the jurisdictional grounds

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<sup>3</sup> See also *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792-93 (8th Cir. 1996) (Lanham Act does not apply to the federal government notwithstanding 5 U.S.C. § 702 because a “plaintiff must identify a substantive statute or regulation that the agency action had transgressed and establish that the statute or regulation applies to the United States”); *El Rescate Legal Servs., Inc. v. Executive Office of Immigration*, 959 F.2d 742, 753 (9th Cir. 1991) (“There is no right to sue for a violation of the APA in the absence of a ‘relevant statute’ whose violation ‘forms the legal basis for [the] complaint.’”) (citing *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883 (1990) and 5 U.S.C. § 702). In *Michigan v. U.S. Army Corps of Eng’rs*, 667 F.3d 765, 776 (7th Cir. 2011), cited by plaintiffs, the Seventh Circuit, in reversing the denial of a preliminary injunction, concluded that the waiver of sovereign immunity in the APA applied to a suit based on a purported violation of federal common law of public nuisance. The court did not engage in the kind of analysis required by cases such as *Sea-Land*, and, in any event, its holding that the federal common law of public nuisance applied to the actions in question provides no support for plaintiffs here.

on which the majority decided the case. *Id.* at 855 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). (The majority did not believe that the claims met the stringent standards for jurisdictional dismissal although it recognized that the claims might have been subject to dismissal on the merits. *Id.* at 849-50.)<sup>4</sup>

In sum, plaintiffs cannot assert their breach of fiduciary duty claims under the APA, and such claims would, in any event, be barred by 12 U.S.C. § 4617(f). For these reasons—and for the reasons explained in our principal brief—the district court correctly dismissed class plaintiffs’ suit, and this Court should affirm the district court’s judgment.

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<sup>4</sup> In *U.S. Information Agency v. Krc*, 989 F.2d 1211, 1216 (D.C. Cir. 1993), relied on by plaintiffs, the Court held that the FTCA did not “impliedly forbid[],” 5 U.S.C. § 702, a claim for injunctive relief to preclude an agency from interfering with plaintiff’s future employment. We do not rely on that argument here, and *Krc* does not concern the analysis undertaken in cases such as *Flamingo* and *Sea-Land*. See *El-Shifa*, 607 F.3d at 853 (Kavanaugh, J., concurring) (rejecting reliance on *Krc*).



Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH  
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation in this Court's June 21, 2016, order because it contains 1,873 words according to the count of Microsoft Word.

*s/ Abby C. Wright*  
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Abby C. Wright  
Counsel for the Treasury Department

**CERTIFICATE OF SERVICE**

I hereby certify that on July 13, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. I also hand-delivered paper copies of the foregoing to the Clerk of Court by 4pm, as ordered.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

*s/ Abby C. Wright*  
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