ORAL ARGUMENT HELD ON APRIL 15, 2016

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

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

FAIRHOLME'S SUPPLEMENTAL REPLY BRIEF
IN RESPONSE TO ORDER OF JUNE 21, 2016

FHFA has grown so enamored of the argument that 12 U.S.C. § 4623(d) bars this action, an argument that FHFA did not assert before this Court's prompting the day of argument, that FHFA devotes most of its supplemental brief to the issue even though the Court's June 21, 2016 briefing order did not raise it. For the reasons explained in Class Plaintiffs' reply and Class Plaintiffs' and Institutional Plaintiffs' prior briefing on this issue, FHFA's newfound argument is meritless. Plaintiffs in No. 14-5254 ("Fairholme") submit this supplemental reply to emphasize two points.

First, equitable relief invalidating the Net Worth Sweep would not "affect the effectiveness," FHFA Suppl. Br. 7, of FHFA's suspension of capital classifications *at all*. The suspension of capital classifications was fully effective as of October 2008, while the Net Worth Sweep was executed nearly four years later in August

2012. The equitable relief sought by Fairholme would invalidate the Net Worth Sweep and return the parties to the prior terms of the Treasury agreements. The suspension of capital classifications would remain in full effect, just as it was from October 2008 to August 2012.

Second, and relatedly, the suspension of capital classifications is wholly distinct and separate from the Net Worth Sweep. This is demonstrated by the nearly four-year passage of time between the two actions. It is also demonstrated by the context and effects of the two actions.

For example, HERA requires the Director to make certain determinations with respect to mandatory receivership triggers for entities with certain capital classifications. *See* 12 U.S.C. § 4617(a)(4)(B). By suspending capital classifications, FHFA relieved the Director of these obligations during the conservatorship. Perhaps more importantly, HERA restricts and in some cases prohibits capital distributions by entities with certain capital classifications. *See* 12 U.S.C. §§ 4614(e); 4615(a)(3); 4616(a)(2). Suspending capital classifications thus allowed FHFA to freely direct the Companies to pay cash dividends to Treasury during conservatorship—putting aside, of course, whether paying in cash was consistent with FHFA's conservatorship obligations.

The suspension of capital classifications *did not*, however, affirmatively *strip* Fannie and Freddie of their capital and ensure that they *would not* emerge from

conservatorship. That was the effect of the Net Worth Sweep: "But when the Third Amendment was announced the Treasury said we're going to wind this thing down, we're going to kill it, we're going to drive a stake through its heart, and we're going to salt the earth so it can never grow back." Tr. of Arg. at 108 (Ginsburg, J.). That was not the effect of the suspension of capital classifications. Indeed, FHFA's announcement of the suspension assumes that the Companies someday could emerge from conservatorship by stating that FHFA had decided only to "suspend capital classifications . . . during conservatorship," not that it had decided to salt the earth. *See FHFA Announces Suspension of Capital Classifications During Conservatorship*, http://goo.gl/MzpAUH. It is this latter decision that Fairholme challenges, and Fairholme's challenge is not barred by Section 4623(d).

July 20, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of July 2016, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 20, 2016

/s/ Charles J. Cooper
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