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 UNOPPOSED MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN RESPONSE TO ORDER OF JUNE 21, 2016

Pursuant to FRAP 27(a), Plaintiffs-Appellants in No. 14-5254 ("Fairholme") respectfully move for leave to file the attached supplemental brief in response to this Court's order of June 21, 2016. Fairholme's proposed supplemental brief does not exceed 750 words. Although the Court's order did not direct Fairholme to file a supplemental brief, the issues it identifies are relevant to the Court's power to hear Fairholme's fiduciary duty, contract, and implied covenant of good faith and fair dealing claims. Fairholme offers its supplemental brief to advance two arguments based on distinctions between its claims and those asserted by the Class Plaintiffs. FHFA consents to Fairholme's motion on the condition that Fairholme and the Class Plaintiffs consent to FHFA's request for an additional 750 words in its own

supplemental brief, a condition with which Fairholme and the Class Plaintiffs agree. Treasury and the Class Plaintiffs also consent to the filing of Fairholme's brief.

July 6, 2016

Respectfully submitted,

/s/ Charles J. Cooper
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CERTIFICATE OF SERVICE

I hereby certify that, on this 6th 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 6, 2016

/s/ Charles J. Cooper
Charles J. Cooper

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

Plaintiffs-Appellants in No. 14-5254 ("Fairholme") fully agree with the supplemental brief submitted by the Class Plaintiffs in response to this Court's order of June 21, 2016, and they respectfully offer their own supplemental brief to identify two additional reasons why the Court has power to hear Fairholme's fiduciary duty, contract, and implied covenant of good faith and fair dealing claims.

First, unlike the fiduciary duty claims pressed by the Class Plaintiffs, Fairholme's fiduciary duty claim against FHFA seeks only equitable relief. It is well established that 5 U.S.C. § 702 waives sovereign immunity for claims for equitable relief against federal officers and agencies. *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011) (en banc). This waiver "is not limited to APA cases," *Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006); *accord Sea-Land Serv., Inc. v. Alaska*

R.R., 659 F.2d 243, 244 (D.C. Cir. 1981) (R. Ginsburg, J.) (explaining that the "clear purpose" of this provision is to "elimina[te] the sovereign immunity defense in *all* equitable actions for specific relief against a Federal agency or officer acting in an official capacity" (quotation marks omitted)), and the Federal Tort Claims Act does not circumscribe Section 702's waiver of immunity for common-law tort claims for equitable relief against the government, *United States Info. Agency v. Krc*, 989 F.2d 1211, 1216 (D.C. Cir. 1993); *Michigan v. United States Army Corps of Eng'rs*, 667 F.3d 765, 776 (7th Cir. 2011). Accordingly, irrespective of whether FHFA imposed the Net Worth Sweep as conservator or regulator, sovereign immunity does not bar Fairholme's fiduciary duty claim against FHFA.

Second, because Fairholme's APA claims arise under federal law, the federal courts have supplemental jurisdiction to hear Fairholme's closely related fiduciary duty, contract, and implied covenant of good faith and fair dealing claims. *See* 28 U.S.C. § 1367(a). All of Fairholme's claims "derive from a common nucleus of operative fact," *City of Chicago v. International Coll. of Surgeons*, 522 U.S. 156, 164–65 (1997)—namely, Defendants' unlawful expropriation of minority shareholders' investments in Fannie and Freddie through the Net Worth Sweep. Because Defendants did not argue below that the federal courts should decline as a matter of discretion to exercise supplemental jurisdiction over Fairholme's claims, any such argument is forfeited for purposes of this appeal. *Doe by Fein v. District of*

Columbia, 93 F.3d 861, 871 (D.C. Cir. 1996) ("The discretionary aspect to supplemental jurisdiction is waivable."); *accord Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997) (en banc) ("[W]e are not required, *sua sponte*, to decide whether the district court abused its discretion under § 1367(c) when neither party has raised the issue.").

July 6, 2016

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