

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.)

**CLASS PLAINTIFFS' MOTION FOR LEAVE TO FILE
RESPONSE TO FDIC'S UNTIMELY AMICUS BRIEF**

Pursuant to FED. R. APP. P. 27(a), Class Plaintiffs move for leave to file a supplemental response to the amicus brief submitted by the FDIC on July 20, 2016. The Court issued an order on June 21 directing Class Plaintiffs and Defendants to file briefs on the sovereign immunity question that is the subject of FDIC's amicus brief. The Court subsequently set out a briefing schedule under which Class Plaintiffs' supplemental reply brief was due on July 20. Without having previously alerted the Court or any of the Plaintiffs of its plans, the FDIC waited to file its amicus brief until approximately one hour after Class Plaintiffs had filed their supplemental reply brief. The timing of FDIC's surprise filing, which presents arguments that FHFA did not advance in this case and has affirmatively disavowed in other litigation, effectively denied Class Plaintiffs an opportunity to respond.

FDIC cites Federal Rule of Appellate Procedure 29(a) as the source of its authority to file its brief. *See* FDIC Amicus Br. at 1 (July 21, 2016). While that Rule generally allows the United States or a federal agency to file an amicus brief without first seeking the parties' consent or the Court's leave, its purpose plainly is to allow the government to provide its views when it is interested in a question before the Court but not a party. Here, of course, a federal agency represented by the Department of Justice already is a party, and the Department of Justice could have conveyed FDIC's views in its supplemental brief. If they had, then Class Plaintiffs would have been able to respond in their June 20 reply.

Moreover, the FDIC's brief appears to be untimely, or at a minimum is sufficiently irregular that it warrants a response by Class Plaintiffs. In apparent reliance on Federal Rule of Appellate Procedure 29(e), the FDIC tells the Court that it submitted its amicus brief "within 7 days of the supplemental brief of the party it supports (FHFA)." FDIC Amicus Brief at 1. But Rule 29(e) says that an amicus brief must be filed "no later than 7 days after the *principal* brief of the party being supported," FED. R. APP. P. 29(e) (emphasis added). FHFA filed its principal brief in this case on December 21, 2015. *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 458 F.3d 359, 361 (4th Cir. 2006) (explaining that "the term 'principal brief' would appear to refer to the lead brief filed by a party in anticipation of argument . . . and not to something such as a reply brief or petition

for rehearing”); *Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, J., in chambers) (“It would be unsound to treat the phrase ‘principal brief’ in Rule 29(e) to refer to a document other than the opening brief on the merits.”).

The deadlines set out in the Federal Rules of Appellate Procedure were calibrated to ensure that “The opposing party will have sufficient time to review arguments made by the amicus and address them in the party’s responsive pleading.” 1998 Advisory Committee Note to FRAP 29(e). While the Court “may grant leave for later filing” of an amicus brief, it may do so only while “specifying the time within which an opposing party may answer.” FRAP 29(e). While the Court would be justified in striking FDIC’s untimely filing, FDIC’s failure to comply with the deadline set out in Rule 29(e)—or even to “notify the Court as soon as practicable” of its plans as contemplated by the Court’s Handbook of Practice and Internal Procedures, D.C. Circuit Handbook at 38—at a minimum warrants giving Class Plaintiffs’ permission to file a short response.

CONCLUSION

For the foregoing reasons, Class Plaintiffs respectfully ask that our motion to file the short response to the FDIC be granted.

Dated: July 23, 2016

Respectfully submitted,

/s/ Hamish P.M. Hume

Hamish P.M. Hume

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to FED. R. APP. P. 25(c), Cir. R. 25 and this Court's Order dated June 21, 2016, the foregoing was hand-delivered to the Court and electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

DATED: July 23, 2016

/s/ Hamish P.M. Hume

Hamish P.M. Hume