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.)

REPLY IN SUPPORT OF FAIRHOLME'S THIRD MOTION FOR JUDICIAL NOTICE AND SUPPLEMENTATION OF THE RECORD

The Court should take judicial notice and supplement the record with the documents attached to Fairholme's motion. Treasury implies that the documents are privileged, Treasury's Opposition to Plaintiffs' Sealed Third Motion for Judicial Notice at 2 (Feb. 8, 2017) ("Treasury Opp."), but the Court of Federal Claims rejected the Government's privilege claims in an opinion that provides guidance that will likely also force the Government to produce many additional documents relevant to the Net Worth Sweep. *See* Fairholme's Rule 28(j) Letter (Jan. 30, 2017). The fact that the Federal Circuit granted a writ of mandamus as to only 4 of 52 documents at issue that the Government had withheld under the deliberative process

or bank examination privilege simply underscores the reality that Fairholme is likely to obtain significant additional documents as discovery in its takings suit continues.

Fairholme has already fully rebutted Defendants' arguments that nothing it might obtain through discovery could possibly be relevant to the issues before this Court. *See* Fairholme's Unsealed Reply in Support of Its Motion for Judicial Notice at 2–7 (Aug. 31, 2015). In continuing to press that argument in the face of evidence that the Net Worth Sweep was designed to enrich Treasury at private shareholders' expense and to ensure that the Companies could never return to a sound and solvent condition, Defendants highlight the fact that their position places no meaningful limits on a federal conservator's powers. Federal conservators have never been understood to have the authority to operate the financial institutions under their care for the exclusive benefit of the federal government.

Contrary to Treasury's suggestions, its July 20, 2012 "key points" document is not redundant with materials Treasury included in its administrative record. Treasury's brief to this Court relied on documents in the administrative record purporting to show that "Treasury anticipated that the amount of money it would receive under the new dividend formula would be 'materially equivalent' to what it would have received under the 10% dividend formula." Brief for the Treasury Department at 11 (Dec. 21, 2015). FHFA's "document compilation" in the district court included a declaration similarly stating that adoption of the Third Amendment

"did not change the underlying economics of the PSPAs." Declaration of Mario Ugoletti at FHFA 0009 ¶ 19 (Dec. 17, 2013), ECF No. 24-2. The "key points" document, however, reveals that Treasury actually believed that adoption of the Net Worth Sweep did change the underlying economics of the PSPAs, putting it in a "better position" because under the Net Worth Sweep "Treasury's upside" would no longer be "capped." UST00061421 at A2. Of course, the only way that Treasury could have been in a "better position" after the Net Worth Sweep is if the Companies generated income in excess of the 10% dividend.

Treasury disputes the significance of a second document identified in Fairholme's motion by stating that it is already "well documented in the administrative record" that at the time of the Net Worth Sweep "Treasury was aware of the GSEs' deferred tax assets and the potential realization of those assets." Treasury Opp. 4. But this is what Treasury told the district court about the deferred tax asset issue when it opposed Fairholme's motion for discovery:

> As of August 2012, when Treasury, FHFA, and the GSEs entered into the Third Amendment, the companies had not proposed changing their accounting treatment of deferred tax assets. . . . The absence of documents relating to one of Fairholme's merits arguments is not evidence of an incomplete record, *particularly where the plaintiffs' arguments concern an issue that arose only after the agency completed its decision-making process*.

Department of the Treasury's Memorandum in Opposition to Fairholme Funds' Motion to Supplement the Administrative Records and to Take Discovery at 27,

Fairholme Funds, Inc., et al. v. FHFA (D.D.C. Mar. 4, 2014), ECF No. 33 (emphasis added). FHFA similarly included in its "document compilation" for the district court a declaration stating that "neither the Conservator nor Treasury envisioned at the time of the Third Amendment that Fannie Mae's valuation allowance on its deferred tax assets would be reversed in early 2013, resulting in a sudden and substantial increase in Fannie Mae's net worth." Ugoletti Declaration at FHFA 0009–10 ¶ 20. Contrary to those representations, the June 29, 2012 Grant Thornton document shows that in fact this issue arose well before the Net Worth Sweep was imposed. Because Defendants failed to include key materials relating to the Companies' deferred tax assets in their document submissions to the district court, if this Court does not rule that the Net Worth Sweep was unlawful on the arguments before it, it is necessary at an absolute minimum to remand this case so that a complete administrative record may be compiled.

Date: February 14, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of FED. R. APP. P. 27(d)(2) because it contains 794 words according to the count of Microsoft Word.

/s/ Charles J. Cooper
Charles J. Cooper

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of February, 2017, 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: February 14, 2017

/s/ Charles J. Cooper
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