

ORAL ARGUMENT HELD ON APRIL 15, 2016**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PERRY CAPITAL, LLC, *et al.*,

Appellants,

v.

ADAM SZUBIN,¹ *et al.*,

Appellees.

Nos. 14-5243 (lead)

14-5254 (consolidated)

14-5260 (consolidated)

14-5262 (consolidated)

**OPPOSITION OF APPELLEES FEDERAL HOUSING FINANCE AGENCY
AND MELVIN L. WATT TO FAIRHOLME'S THIRD MOTION FOR
JUDICIAL NOTICE AND SUPPLEMENTATION OF THE RECORD**

Plaintiffs-Appellants Fairholme Funds Inc.'s Third Motion for Judicial Notice and Supplementation of the Record (filed February 2, 2017) (the "Motion") should be denied for the same reasons set forth by Defendants-Appellees in opposition to Fairholme's previous two motions for judicial notice. *See* Opp. of FHFA & Melvin L. Watt (filed June 9, 2016); Opp. of Treasury (filed June 9, 2016); Opp. of FHFA, Melvin L. Watt, Fannie Mae & Freddie Mac (filed Aug. 20, 2015); Opp. of Treasury (filed Aug. 20, 2015). As Defendants-Appellees

¹ Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Acting Secretary of the Treasury Adam Szubin is substituted as a party in place of former Secretary Jacob J. Lew.

explained in those filings, these cases are on appeal from the district court's grant of motions to dismiss on threshold legal grounds. In issuing its decision below, the district court properly assumed the truth of all of the allegations in the complaint, declaring FHFA's Document Compilation (submitted only in connection with FHFA's alternative motion for summary judgment) to be "irrelevant" to its decision. *See* JA325-26 ("[T]he complaint is construed liberally in the plaintiffs' favor," and the court "assume[s] the truth of all material factual allegations."); JA336 (deeming the Document Compilation to be "[i]rrelevant" to the court's decision to grant the motions to dismiss). And this Court will apply the same standard of review in assessing Defendants-Appellees' motion to dismiss arguments. There is thus no need for Plaintiffs-Appellants to attempt to substantiate their factual allegations, or supplement the record, by injecting into this appeal discovery materials obtained in a separate case.

CONCLUSION

For the foregoing reasons the Court should deny Fairholme's Third Motion for Judicial Notice and Supplementation of the Record.

Dated: February 6, 2017

Respectfully submitted,

/s/ Howard N. Cayne

Howard N. Cayne

Asim Varma

David B. Bergman

Michael A.F. Johnson

Dirk C. Phillips

Ian S. Hoffman

ARNOLD & PORTER KAYE

SCHOLER LLP

601 Massachusetts Ave., N.W.

Washington, D.C. 20001-3743

(202) 942-5000

(202) 942-5999 (fax)

Howard.Cayne@apks.com

*Counsel for Appellees Federal Housing
Finance Agency and Melvin L. Watt*

CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. The foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 254 words, according to the count of Microsoft Word.

2. The foregoing complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14-point Times New Roman font.

/s/ Howard N. Cayne

Howard N. Cayne

*Counsel for Appellees Federal
Housing Finance Agency and
Melvin L. Watt*

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2017, I electronically filed the foregoing document with the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Howard N. Cayne
Howard N. Cayne

*Counsel for Appellees Federal
Housing Finance Agency and
Melvin L. Watt*