

[ARGUED APRIL 15, 2016; DECIDED FEBRUARY 21, 2017]

Consolidated Nos. 14-5243, 14-5254, 14-5260, 14-5262

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

—————
PERRY CAPITAL LLC, et al.,

Plaintiffs-Appellants,

v.

JACOB J. LEW,

in his official capacity as Secretary of the Treasury, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

THE TREASURY DEPARTMENT'S RESPONSE TO THE
CLASS PLAINTIFFS' PETITION FOR PANEL REHEARING

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GLOSSARY

FHFA Federal Housing Finance Agency

The Treasury Department hereby respectfully responds to this Court's order of April 18, 2017, directing it to respond to the panel rehearing petitions filed by plaintiffs in this case to the extent Treasury has "an interest in the issues presented in the petitions." Order of April 18, 2017, *Perry Capital v. Lew*, No. 14-5243.

This response concerns the petition for panel rehearing filed by the class plaintiffs on March 31, 2017. *See* Reh'g Pet., *Perry Capital v. Lew*, No. 14-5243 (Mar. 31, 2017) (Petition). In that petition, class plaintiffs take issue with language contained in the portion of the Court's decision remanding their claims for breach of the implied covenant of good faith and fair dealing to the district court. Petition 1. Class plaintiffs express concern regarding this Court's suggestion that the district court "may need to redefine or subdivide the class depending upon what the various plaintiffs could reasonably have expected when they purchased their shares." Opinion of February 21, 2017, *Perry Capital v. Lew*, No. 14-5243 (Opinion), at 69. They request that the Court amend the opinion by either removing this language or "replac[ing] it with language articulating the correct legal standard." Petition 3.

Class plaintiffs' contract-based claims are directed solely at the Federal Housing Finance Agency (FHFA), and the Treasury Department defers to the arguments made by FHFA in opposing class plaintiffs' request to remove or modify the quoted language.

Treasury submits this response to emphasize that—regardless of the appropriate date for determining the expectations of shareholders of the enterprises for purposes of the contract claims at issue here—with respect to the takings claims asserted by some of the *Perry Capital* plaintiffs in other litigation, the analysis turns on the plaintiff's reasonable expectations at the time the plaintiff acquires the property.

A plaintiff may recover on a regulatory takings claim only to the extent of the plaintiff's "reasonable, investment-backed expectations." See *Good v. United States*, 189 F.3d 1355, 1360 (Fed. Cir. 1999). As the Federal Circuit has explained, "[t]he purpose of consideration of plaintiffs' investment-backed expectations . . . is to limit recoveries to property owners who can demonstrate that they 'bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.'" *Norman v. United States*, 429 F.3d 1081, 1092-93 (Fed. Cir. 2005) (quoting *Cienega Gardens v. United States*, 331 F.3d 1319, 1345-46 (Fed. Cir. 2003)). Put differently, it is common sense that "[o]ne who buys with knowledge of a restraint assumes the risk of economic loss. In such a case, the owner presumably paid a discounted price for the property. Compensating him for a 'taking' would confer a windfall." *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994) (citations omitted).

Respectfully submitted,

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JUNE 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's April 18, 2017 order, because it contains 504 words according to the count of Microsoft Word.

s/ Abby C. Wright

Abby C. Wright
Counsel for the Treasury Department

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2017, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

s/Abby C. Wright
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