

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

|   |   |                   |
|---|---|-------------------|
| PERRY CAPITAL, LLC, <i>et al.</i> ,             | ) |                   |
|   | ) |                   |
| Plaintiffs-Appellants,                          | ) |                   |
|   | ) |                   |
| v.  | ) | Consolidated Nos. |
|   | ) | 14-5243; 14-5254; |
| JACOB J. LEW, in his official capacity as the   | ) | 14-5260; 14-5262  |
| Secretary of the Department of the Treasury;    | ) |                   |
| MELVIN L. WATT, in his official capacity as     | ) |                   |
| Director of the Federal Housing Finance Agency; | ) |                   |
| UNITED STATES DEPARTMENT OF THE                 | ) |                   |
| TREASURY; FEDERAL HOUSING FINANCE               | ) |                   |
| AGENCY; FEDERAL NATIONAL                        | ) |                   |
| MORTGAGE ASSOCIATION; FEDERAL                   | ) |                   |
| HOME LOAN MORTGAGE ASSOCIATION,                 | ) |                   |
|   | ) |                   |
| Defendants-Appellees.                           | ) |                   |

**DEFENDANTS' BRIEFING FORMAT PROPOSAL**

On December 17, 2015, this Court ordered the parties to submit proposed formats for the briefing of these consolidated cases within 30 days of its order. The Department of the Treasury, the Federal Housing Finance Agency (“FHFA”), the Federal National Mortgage Association (“Fannie Mae”), and the Federal Home Loan Mortgage Corporation (“Freddie Mac”) (together with FHFA “the FHFA Defendants”), hereby respectfully respond to this Court’s order.

The parties have conferred on a proposed briefing format, but have been unable to reach agreement. Defendants propose that they file two briefs of no more

than 14,000 words each. One brief would be filed by the Treasury Department and the other brief would be filed by the FHFA Defendants. Defendants take no position on the plaintiffs' briefing proposal, which we understand will include an over-length brief.

2. In 2008, Fannie Mae and Freddie Mac were placed into the conservatorship of FHFA pursuant to the Housing and Economic Recovery Act of 2008 (HERA).

FHFA, acting as the statutory conservator, then entered into agreements on behalf of Fannie Mae and Freddie Mac with the Treasury Department whereby Treasury committed a massive amount of public funds to Fannie Mae and Freddie Mac—ultimately providing more than \$187 billion. Over the following years, FHFA and Treasury entered into a series of amendments to the purchase agreements to address a number of issues. The Third Amendment, which is the subject of this case, was executed in August 2012.

Various plaintiffs filed suit in federal district court and in the Court of Federal Claims seeking to rescind the Third Amendment and obtain billions of dollars in compensation from the federal government. Plaintiffs in four cases filed suit in district court asserting takings claims, common law claims, and claims under the Administrative Procedure Act (“APA”). The district court coordinated the cases and dismissed all the claims in a thorough 52-page opinion on September 30, 2014. The opinion concluded, among other things, that HERA barred plaintiffs' claims for injunctive and declaratory relief, that plaintiffs' common law claims for monetary

damages were not ripe, and in any event were derivative actions also barred under HERA, and that the court lacked jurisdiction over plaintiffs' takings claims, which it also found to be without substantive merit.

3. Defendants' proposed briefing format is warranted under the circumstances of these consolidated cases. There are a large number of issues presented, in part because Plaintiffs have brought distinct claims against the FHFA Defendants and the Treasury Department. Treasury and the FHFA Defendants are separate entities with different statutory roles and responsibilities with respect to the financial crisis and the asserted claims in this litigation, and Defendants are represented by separate counsel: Treasury is represented by the Department of Justice, while FHFA, Fannie Mae, and Freddie Mac are represented by private counsel.

Plaintiffs initiated four cases in the district court and asserted takings claims, common law claims, and claims under the APA. FHFA is not a defendant with respect to any of plaintiffs' takings claims, and Treasury is not a defendant with respect to plaintiffs' claims for breach of contract or breach of implied duty of good faith. And, although plaintiffs assert APA and breach of fiduciary duty claims against both the FHFA Defendants and the Treasury Department, those claims rest on legally distinct grounds. Plaintiffs' claims of breach of fiduciary duty against FHFA rely upon its alleged violation of the duties as conservator of Fannie Mae and Freddie Mac, while the claims alleging breach of fiduciary duty by Treasury are based upon state law fiduciary duties of a dominant shareholder. *See, e.g.*, Complaint, ¶¶ 116-119, 138-141,

Case No. 13-cv-1053-RCL, Dkt. # 1 (July 10, 2013). Additionally, Fannie Mae and Freddie Mac are defendants only with respect to plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

These consolidated cases pose vast implications for the government's infusion of taxpayer funds into Fannie Mae and Freddie Mac and FHFA's continuing conservatorships of Fannie Mae and Freddie Mac. Because of these potential consequences, the complex financial background, and the number of issues presented, Treasury and the FHFA Defendants respectfully propose to file two separate briefs, neither of which will exceed the 14,000 word limit. Doing so will assist Defendants in presenting the facts and issues relevant to each Defendant to the Court in a coherent fashion, thus aiding the Court's understanding and evaluation of the parties' arguments. Defendants will coordinate during brief writing to minimize duplication of arguments and efforts by the parties and the Court.

## CONCLUSION

Defendants-appellees propose to file separate briefs, each of which will not exceed the 14,000 word limit.

Dated: January 16, 2015

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of January, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

s/ Abby C. Wright  
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