

**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,

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

**MOTION OF BETTER MARKETS, INC., WITH PARTIAL
CONSENT, FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE
IN SUPPORT OF THE DEFENDANTS-APPELLEES AND AFFIRMANCE**

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 29, Better Markets, Inc. (“Better Markets”) respectfully moves this Court for leave to file the accompanying amicus curiae brief in support of the defendants-appellees in this action. This motion should be granted for the following reasons, as explained in further detail in the argument section below:¹

(1) Better Markets has a strong interest in this case.

¹ A Corporate Disclosure Statement pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit rule 26.1 is included at the end of this motion.

(2) The proposed brief submitted herewith addresses matters that are relevant to the disposition of this appeal, and it offers arguments and perspectives, not included in the defendants-appellees' briefs or not adequately elaborated upon, that will assist the Court in resolving the issues presented.

(3) The accompanying brief is timely and conforms to the word limit imposed by Rule 29 of the Federal Rules of Appellate Procedure.

(4) All of the parties have consented to this motion, with the exception of the class plaintiffs-appellants, whose counsel has not responded to the requests for consent made by counsel for Better Markets.

ARGUMENT

- I. Better Markets has a strong and demonstrable interest in this case, as contemplated by Rule 29(b)(1) of the Federal Rules of Appellate Procedure.

Better Markets is a nonprofit organization that promotes the public interest in the financial markets. It advocates for greater transparency, accountability, and oversight in the financial system through a variety of activities, including public advocacy, regulatory comment, litigation, and independent research. It often appears as amicus curiae in significant cases in the federal courts of appeals involving financial regulation and financial reform. One of Better Markets' core objectives is the establishment of a regulatory and legal framework that is capable of preventing another crisis like the one that the financial sector inflicted on the

nation in 2008. It also seeks to prevent taxpayers from having to pay for the rescue of failed financial institutions.

Better Markets has an interest in this case for three primary reasons. First, a ruling in favor of appellants would burden taxpayers by rescinding billions of dollars in repayments they rightfully received from Fannie Mae and Freddie Mac (“GSEs”), and by restoring a deeply inequitable and risky pre-crisis status quo where the GSEs’ profits flow to its shareholders but the substantial financial risks associated with their operation fall to the taxpayers.

Second, such a ruling will undermine the government’s ability, when confronted with new and unforeseen exigencies in our financial markets, to act decisively through legislation and regulatory action, without fear of opportunistic claimants later challenging their actions. It would discourage the dramatic steps sometimes necessary to avoid financial crises, and it would undermine confidence in the government’s actions, potentially prolonging or exacerbating financial crises once they occur.

Finally, a ruling in favor of appellants will intensify the problem of moral hazard, increasing the likelihood of more financial crises. If Fannie Mae’s and Freddie Mac’s shareholders prevail, the message will be clear: Even financial institutions that engage in reckless behavior stand to receive—along with their shareholders—not only a generous taxpayer-funded bailout, but also the opportunity

to later bite the hand that fed them by challenging the terms of their rescue and seeking once again to unfairly burden the U.S. taxpayers.

II. Better Markets can provide helpful information to the Court that is not duplicative of arguments presented by the parties.

Leave to file an amicus brief is to be freely given when the amicus will aid the Court “by presenting ideas, arguments, theories, insights, facts or data that are not to be found in the parties’ briefs.” *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003); *see also Youming Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (courts typically grant leave to file an amicus brief “when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.”) (citing *Ryan v. Commodity Futures Trading Comm’n*, 125 F. 3d 1062, 1064 (7th Cir. 1997)). Amicus status is generally allowed when “the information offered is timely and useful.” *Ellsworth Assocs. v. U.S.*, 917 F. Supp 841, 846 (D.D.C. 1996). The accompanying amicus brief satisfies these standards.

This case centers on the proper interpretation of the Housing and Economic Recovery Act of 2008 (HERA). Accordingly, Better Markets highlights a series of arguments complementing, but not duplicating, the defendants-appellees’ position that HERA bars shareholder derivative claims and the equitable relief the plaintiffs-appellants seek. Better Markets also devotes a significant portion of its brief to rebutting the plaintiffs-appellants’ claims that the FHFA acted with improper motive

when it entered the shareholder agreement at the center of this controversy (the “Third Amendment”), and further responding to the plaintiffs-appellants’ contention that the FHFA’s actions as conservator were fundamentally unfair to the GSEs or their shareholders.

Finally, Better Markets also points to important historical facts, largely omitted from the parties’ briefing, about the course of events that preceded the conservatorship of the GSEs and the Third Amendment. Without these facts, it is impossible for the conduct of the parties to be considered in the proper context in which the decisions were made. All of Better Markets’ arguments are relevant to this case and will be helpful to the Court.

III. The brief conforms with Rule 29 of the Federal Rules of Appellate Procedure.

The attached brief contains less than 7,000 words and is submitted concurrently with this motion, as required by Rule 29 of the Federal Rules of Appellate Procedure.

IV. All parties except for the class plaintiff appellants have consented to Better Markets filing an amicus brief.

Before filing this motion, Better Markets sought the consent of all parties. Defendants-appellees, including the Treasury Department, the Federal Housing Finance Agency, the Federal National Mortgage Association, and the Federal Home Loan Mortgage Corporation, have consented to the filing of an amicus brief by

Better Markets. The institutional plaintiffs-appellants, including Fairholme Funds, Inc., Perry Capital LLC, and Arrowood Indemnity Company, have also consented to the filing of an amicus brief by Better Markets. Counsel for the class plaintiffs-appellants have not responded to Better Markets' requests seeking their consent to file an amicus brief.

CONCLUSION

For the foregoing reasons, Better Markets requests that the Court grant this motion and accept the accompanying amicus brief for filing.

Respectfully submitted,

Dated: December 28, 2015

/s/ Dennis M. Kelleher
Dennis M. Kelleher
Better Markets, Inc.
1825 K Street, NW, Suite 1080
Washington, D.C. 20006
(202) 618-6464
dkelleher@bettermarkets.com
Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, amicus curiae Better Markets, Inc. (“Better Markets”) states as follows:

1. Better Markets is a nonprofit organization that promotes the public interest in the financial markets. It advocates for greater transparency, accountability, and oversight in the financial system through a variety of activities, including public advocacy, regulatory comment, litigation, and independent research. It often appears as amicus curiae in significant cases in the federal courts of appeals involving financial regulation and financial reform. One of Better Markets’ core objectives is the establishment of a regulatory and legal framework that is capable of preventing another crisis like the one that the financial sector inflicted on the nation in 2008. It also seeks to prevent taxpayers from having to pay for the rescue of failed financial institutions.

2. Better Markets has no parent corporation and there is no publicly held corporation that owns 10% or more of the stock of Better Markets.

Dated: December 28, 2015

/s/ Dennis M. Kelleher
Dennis M. Kelleher
Better Markets, Inc.
1825 K Street, NW, Suite 1080
Washington, D.C. 20006
(202) 618-6464
dkelleher@bettermarkets.com
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December 2015, I caused the foregoing motion to be filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties and amici are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: December 28, 2015

/s/ Dennis M. Kelleher
Dennis M. Kelleher
Better Markets, Inc.
1825 K Street, NW, Suite 1080
Washington, D.C. 20006
(202) 618-6464
dkelleher@bettermarkets.com
Counsel for Amicus Curiae