

August 18, 2016

VIA ELECTRONIC FILING

Mr. Mark Langer
Clerk of the Court
United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *Perry Capital LLC v. Lew*, Nos. 14-5243 (L), 14-5254 (con.), 14-5262 (con.)

Dear Mr. Langer:

Pursuant to FRAP 28(j), I write to alert the Court to the Federal Circuit's decision in *Piszel v. United States*, Case 15-5100, Doc. 68-2 (August 18, 2016).

In *Piszel*, the Federal Circuit reiterated its holding that “to effect a taking of a contractual right when performance has been prevented, the government must substantially take away the right to damages in the event of a breach.” Op. 17. This proposition was invoked to reject the takings claim advanced by the Chief Financial Officer of Freddie Mac based on Freddie's refusal to honor a compensation contract. The court held that because the former CFO retained his right to sue Freddie for breach of contract, he had no takings claim. *Id.* at 18–19.

Here, by contrast, FHFA has argued (on appeal only, not in the district court) that Class Plaintiffs have no right to bring their contract claims because FHFA “succeeded” to those claims under 12 U.S.C. § 4617(b)(2)(A)(i). FHFA Br. 47–48 (Dec. 21, 2015). FHFA made no such argument in *Piszel* even though § 4617(b)(2)(A)(i) provides for FHFA to “succeed” to the rights of “officers” in just the same way as it does for “shareholders.” In any event, *Piszel* makes clear that if FHFA's argument is accepted, the Government will have “substantially taken away the right to damages” for its breach of contract, and thereby will be liable for a taking.

The Federal Circuit's decision supports Class Plaintiffs' argument that the constitutional avoidance canon counsels against FHFA's argument. Class Plaintiffs' Br. 4–5 (Feb. 2, 2016). The Seventh Circuit has rejected FHFA's argument for that reason, *see Levin v. Miller*, 763 F.3d 667, 672 (7th Cir. 2014), and this Court has relied on constitutional avoidance under similar circumstances. *See Waterview Mgmt. Co. v. FDIC*, 105 F.3d 696, 699 (D.C. Cir. 1997) (“to hold that the federal government could simply vitiate the terms of existing assets, taking rights of value from private owners with no compensation in return, would raise serious constitutional issues.”). *Piszel* confirms that the Court should apply the doctrine here, too.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Hamish Hume', written in a cursive style.

Hamish Hume
Counsel for Class Plaintiffs