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## 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.), 14-5260 (con.), 14-5262 (con.)

Dear Mr. Langer:

FHFA does not suggest that *El Paso Pipeline GP Co. v. Brinckerhoff*, 2016 WL 7380418 (Del. Dec. 20, 2016), in any way affects Plaintiffs' APA claims. Nor does the case undermine any Plaintiffs' common law claims.

Claims that the Net Worth Sweep breached the Companies' contractual obligations to shareholders cannot belong to the Companies, and *El Paso Pipeline* provides no support for FHFA's argument to the contrary. The limited partnership context in which that case arose was critical to the Delaware Supreme Court's reasoning, which turned on the fact that the plaintiff alleged a breach of duties that the *General Partner* "owed to the Partnership, not the individual limited partners." *Id.* at \*8. In contrast, the contract claims in this case concern breaches of the *Companies'* contractual duties owed directly to their shareholders. *El Paso Pipeline* reaffirmed the well-settled principle that where a plaintiff "asserts a claim based upon the plaintiff's own right, such as a claim for breach of a commercial contract," the plaintiff's claim is direct. *Id.* at \*9.

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Nor does *El Paso Pipeline* establish that Plaintiffs' fiduciary duty claims are derivative. Unlike the transaction at issue in that case, the purpose and effect of the Net Worth Sweep was to expropriate the entire economic value of minority shareholders' interest in the Companies. Under these circumstances, and with the Companies operating under conservatorship, the distinction between direct and derivative claims does not depend on the "voting power [of] the minority stockholders." *Id.* at \*12.

In all events, whether Plaintiffs' claims are direct or derivative is ultimately of no moment because HERA permits shareholders to bring derivative claims where, as here, FHFA has a manifest conflict of interest. *See* Class Plaintiffs' Br. 23–32; *see also* 12 U.S.C. § 4617(a)(5) (authorizing Companies to seek judicial review of FHFA's decision to impose conservatorship despite separate HERA provision specifying that as conservator FHFA "immediately succeed[s]" to the Companies' rights, titles, powers, and privileges). That has long been the accepted interpretation of FIRREA, and Congress's decision to include materially identical language in HERA shows it intended to adopt the prior judicial interpretations.

/s/ Charles J. Cooper

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14-5254, Fairholme Funds, Inc., et al.*