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January 25, 2017

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:

The plaintiffs in *Edwards v. Deloitte & Touche, LLP*, No. 16-21221 (S.D. Fla. Jan. 18, 2017), did not bring APA or contract claims, and the court in that case had no occasion to decide whether HERA's succession provision permits such claims only if FHFA agrees to sue itself. Because the APA gives a direct claim to anyone who is "adversely affected or aggrieved by agency action," 5 U.S.C. § 702, Fairholme's APA claims are direct as a matter of federal law, *see* Final Reply Brief for Institutional Plaintiffs at 7 (Mar. 8, 2016). Fairholme's contract claims are also direct; it is obviously not up to the Companies to complain that the Net Worth Sweep violated their contractual obligations to shareholders. *See* Final Reply Brief for Class Plaintiffs at 6 (Mar. 8, 2016).

The fiduciary duty claims at issue in *Edwards* are likewise distinguishable from those that Fairholme presses here. The *Edwards* plaintiffs sought damages from the Companies' auditors, not an injunction against an action by the Companies' management that effectively eliminated private shareholders from the capital structure by donating their investments to Treasury. With Fairholme's entire

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investment having been expropriated by the federal government and the Companies operating under conservatorship, Delaware law's distinction between direct and derivative claims does not turn on whether the Net Worth Sweep involved "a dilution of voting power." Order Denying Motion to Remand and Granting Motion to Substitute at 10, *Edwards v. Deloitte & Touche, LLP*, No. 16-21221 (Jan. 18, 2017), ECF No. 50.

Finally, the *Edwards* court's analysis adds nothing to the parties' prior briefing on whether HERA's succession provision bars derivative claims when FHFA has a manifest conflict of interest. *See* Class Plaintiffs' Reply Br. 7–10; Institutional Plaintiffs' Reply Br. 9. The only two Courts of Appeals to consider this issue have allowed such claims to go forward. And contrary to the *Edwards* court's suggestion, the fact that these rulings concerned FIRREA—and that Congress subsequently reenacted materially identical language in HERA—only further strengthens the conclusion that these appellate decisions are correct.

/s/ Charles J. Cooper

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