

January 10, 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.), 14-5262
(con.)

Dear Mr. Langer:

FHFA states that Class Plaintiffs “rely heavily” on the decision recently reversed in *El Paso Pipeline GP Co. v. Brinckerhoff*, 2016 WL 7380418 (Del. 2016). That is inaccurate. We did not cite it in our opening brief, and cited it in reply with other cases for propositions that remain good law. Class Reply at 6, 19-20.

El Paso addressed a claim that the General Partner caused a Partnership to overpay for assets transferred to the Partnership from the General Partner’s parent. This claim was based on a contract to which the Partnership and the General Partner were both parties, and was based specifically on a “contractual duty of good faith *owed to the Partnership*, not the individual limited partners.” *Id.* at *8 (emphasis added). Therefore, the Delaware Supreme Court held the claim belonged to the Partnership, not the limited partners.

This casts no doubt on the proposition that when a company breaches a contractual duty owed directly to shareholders, under a contract to which the only parties are the company and the shareholders, the shareholders have a direct claim. Indeed, there is no one else to whom a company can owe contractual duties under a contract that is solely between the company and its shareholders. It would be

nonsensical for companies to own the claims against themselves. No case holds that.

FHFA also says *El Paso* shows that Class Plaintiffs' fiduciary breach claims are solely derivative. But *El Paso* addressed an "overpayment claim," and its holding was based on a desire not to "swallow the rule that claims of corporate overpayment are derivative." *Id.* at *12-13 (internal cites and quotes omitted). This is not a "corporate overpayment" case. Instead, it involves a controlling shareholder agreeing with the Companies to amend its preferred shareholder agreement so as to appropriate 100% of the economic rights of all junior shareholders. That causes direct injury to junior shareholders, who seek a direct recovery of damages. Under established Delaware law, Class Plaintiffs have a direct claim for breach of fiduciary duty.

We also agree with the points in *Fairholme's* December 30, 2016 letter.

Respectfully Submitted,



Hamish P.M. Hume

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