[ORAL ARGUMENT HELD ON APRIL 15, 2016]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PERRY CAPITAL, LLC, et al., Plaintiffs-Appellants, v. JACOB LEW, et al., Defendants-Appellees.	Nos. 14-5243 (L), 14-5254 (con.), 14-5260 (con.), 14-5262 (con.)

TREASURY'S OPPOSITION TO PLAINTIFFS' SEALED THIRD MOTION FOR JUDICIAL NOTICE AND SUPPLEMENTATION OF THE RECORD

In July 2015, the Fairholme Funds plaintiffs filed a motion asking this Court to take judicial notice of certain documents that they obtained through discovery in a separate takings action before the Court of Federal Claims. Ten months later, they filed a second motion. And now, plaintiffs have filed a *third* motion requesting that this Court supplement the record and take judicial notice of two more documents. Just as was the case with their first two motions, the sealed third motion for judicial notice is without merit and should be denied.

1. Plaintiffs seek to submit to this Court two documents they obtained through discovery in their takings action against the United States in the Court of Federal

Claims. That discovery was recently the subject of a petition for writ of mandamus filed by the government. Recognizing that the Court of Federal Claims had misapplied the law governing executive privilege, the Federal Circuit took the "drastic and extraordinary" step of granting mandamus relief to the government as to eight of the documents over which the government had claimed privilege. *See Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 379 (2004). Contrary to plaintiffs' suggestion, Mot. 1, the Federal Circuit did not hold that the government's assertions of privilege were "improper" as to the other documents, but rather that the government had not satisfied the stringent requirements of mandamus.

In any event, like plaintiffs' first two sets of supplemental materials, plaintiffs' third set of additional materials has no bearing on the question whether the district court correctly concluded that it lacked jurisdiction over plaintiffs' claims. Plaintiffs' additional materials purport to cast doubt on Treasury's stated motivations in entering into the Third Amendment. *See* Pls. Mot. 1-4. But, as the district court correctly held and as the government explained in its brief and at oral argument, Treasury's motives are irrelevant to the question of whether HERA's broad anti-injunction and transfer-of-shareholder rights provisions bar plaintiffs' suit. *See* Dist. Ct. Op. 22. All three of plaintiffs' motions to supplement the record should be denied for this reason.

2. Even assuming Treasury's administrative record were relevant to the threshold jurisdictional issues now before this Court, the two documents attached to plaintiffs' motion fall far short of rebutting the "presumption of regularity" that

attaches to an agency's compilation of the record. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 420 (1971).

The two documents do not provide any information that does not already exist in Treasury's administrative record. For example, the first document plaintiffs attempt to submit to this Court is a list of "key points" regarding the Third Amendment, dated July 20, 2012. The document explains, among other things, that under the Third amendment, taxpayers will be the beneficiaries of the future earnings of Fannie Mae and Freddie Mac (the GSEs). *See* Mot. 2. But the record already contains a Treasury presentation dated August 8, 2012, which includes a bullet point explaining that "Taxpayers are in a stronger position as *all* future net income from the GSEs will be paid directly to Treasury." *See* J.A. 1966 (TR3902); *see also* TR4332 ("It captures all future net income and asset appreciation at the GSEs for reimbursement to taxpayers."). Moreover, neither the July 2012 list of key points nor the August 2012 presentation suggests that Treasury believed that the GSEs would be profitable in the near future. Instead the documents explain how the Third Amendment will operate, and both documents expressly state that the Third Amendment will eliminate the cycle in which the GSEs draw funds from Treasury in order to pay Treasury dividends. *See* J.A. 1965 (TR3901). Thus, even assuming it was presented to the Secretary, plaintiffs are quite wrong to assert that the newly disclosed document demonstrates that Treasury failed "to disclose the true basis for its actions." Pls. Mot.

4. The basis for Treasury's actions, assuming it were relevant, is well documented in the existing administrative record.

The second document plaintiffs attempt to submit to this Court also adds nothing to the materials already included in the administrative record. The document was created by a Treasury consultant, Grant Thornton, and discusses the GSEs' deferred tax assets. Plaintiffs claim that the document is relevant because it purportedly shows that "Treasury and its consultant were focused on this issue." Mot. 3. Again, that Treasury was aware of the GSEs' deferred tax assets and the potential realization of those assets is well documented in the administrative record and in the public filings of the GSEs. Indeed, Treasury's brief in this Court noted that Treasury was aware that the GSEs carried deferred tax assets, but explained that both enterprises had determined that it was more likely than not that they would not generate sufficient income to use their deferred tax assets. *See* Tr. Br. 47-49; *see also, e.g.*, J.A.1020 (TR2706); J.A.1277 (TR2963) (discussing the GSEs' conclusion through the end of 2011 that the deferred tax assets would not be realized); Freddie Mac 2012 10-K at 194 (Feb. 28, 2013) (stating that "as of December 31, 2012," Freddie Mac remained unable "to realize the portion of [its] net deferred tax assets that [was] dependent upon the generation of future taxable income"); Fannie Mae 2012 10-K, at 5 (Apr. 3, 2013) ("[I]n evaluating the recovery of our deferred tax assets, as of December 31, 2012, we again determined that the negative evidence outweighed the positive evidence.").

Thus, even assuming Treasury's motivations for entering into the Third Amendment were relevant, the existing administrative record is plainly sufficient to support judicial review of Treasury's actions and plaintiffs' motion should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' Sealed Third Motion for Judicial Notice and Supplementation of the Record should be denied.

Respectfully submitted,

s/ Abby C. Wright
MARK B. STERN
(202) 514-5089
ABBY C. WRIGHT
GERARD SINZDAK
(202) 514-0718
Attorneys, Appellate Staff
Civil Division, Room 7252
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 1,003 words, according to the count of Microsoft Word.

/s/ Abby C. Wright

Abby C. Wright
Counsel for Treasury
Abby.wright@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2017, I electronically filed the foregoing amended response with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Abby C. Wright
ABBY C. WRIGHT