

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

DAVID JACOBS and GARY HINDES, on)	
behalf of themselves and all others similarly)	
situated, and derivatively on behalf of the)	
Federal National Mortgage Association and)	
Federal Home Loan Mortgage Corporation,)	
)	
Plaintiffs,)	
v.)	
)	
THE FEDERAL HOUSING FINANCE)	
AGENCY, <i>et al.</i> ,)	
Defendants.)	

C.A. No. 15-708

**DEPARTMENT OF THE TREASURY’S RESPONSE IN OPPOSITION TO
PLAINTIFFS’ MOTION FOR JUDICIAL NOTICE OR, IN THE ALTERNATIVE, TO
STRIKE**

The Department of the Treasury (“Treasury”) opposes Plaintiffs’ Motion for Judicial Notice of Documents or, in the Alternative, to Strike Certain Arguments in Defendants’ Briefing in Support of Their Motions to Dismiss. D.I. 75 (“Motion”). Plaintiffs’ Motion is unnecessary, procedurally improper, and it should be rejected for at least three reasons.

First, the Motion is an improper sur-reply, filed without leave of the Court. As its title suggests, the Motion is little more than an attempt to raise new and additional arguments in response to arguments made in the Defendants’ motions to dismiss, which Plaintiffs acknowledge have been fully briefed since July 17, 2017. *See* Mot. at 2. But “Local Rule 7.1.2 provides that parties may submit additional papers after briefing is complete only with the Court’s approval.” *St. Clair Intellectual Prop. Consultants, Inc. v. Samsung Elecs. Co. Ltd.*, 291 F.R.D. 75, 80 (D. Del. 2013). “Since approval was neither sought nor granted,” the filing of the Motion was

“improper,” and the Court need not consider it. *Kondrath v. Arum*, 881 F. Supp. 925, 927 n.2 (D. Del. 1995).¹

Second, even if the Motion was properly filed, it is appropriate neither as a motion for judicial notice nor as a motion to strike. Initially, the documents it seeks to introduce are not subject to judicial notice. Plaintiffs seek to submit documents obtained through discovery in litigation before the Court of Federal Claims that allegedly contradict statements made in the Defendants’ briefs supporting their motions to dismiss.² Facts appropriate for judicial notice are “not subject to reasonable dispute” because they “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Plaintiffs, on the other hand, have submitted documents, for their truth, to support Plaintiffs’ position in an alleged factual dispute. But while a court may take judicial notice that these documents from other court proceedings exist, it may not, on a motion to dismiss, take judicial notice for “the truth of the facts recited therein.” *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp., Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999); *see also Redick v. E Mortg. Mgmt., LLC*, C.A. No. 11-1260-

¹ Even if the Court were to treat the Motion as a request to file a sur-reply, it should deny that request because “[c]ourts in this district disfavor sur-replies,” *EMC Corp. v. Pure Storage, Inc.*, 154 F. Supp. 3d 81, 103 (D. Del. 2016), and Plaintiffs’ filing does not “respond[] to new evidence, facts, or arguments raised for the first time in [either] moving party’s reply brief,” *id.*, as is required for a Court to grant leave to file a sur-reply. Indeed, the Motion does not even mention, much less respond to, any of the reply briefs filed in this case.

² In particular, Plaintiffs contend that statements in the background section of Defendants’ briefs amount to “factual argument” in support of the merits of the Third Amendment to the Preferred Stock Purchase Agreements between Treasury and the Federal Housing Finance Agency (“FHFA”). *See* Mot. at 4. This is not the case. The statements Plaintiffs cite contain accurate information regarding the background of this lawsuit, not argument, and they do not conflict with any allegations in the Amended Complaint. For example, Treasury’s statement that the Third Amendment “effectively ended the practice of the enterprises drawing funds from Treasury in order to pay fixed dividends to Treasury,” D.I. 66 at 9, does not conflict with the Amended Complaint, nor does it “argue[]” that the Third Amendment was “necessary” to end that practice, as Plaintiffs’ Motion inaccurately asserts. Mot. at 5.

GMS-CJB, 2013 WL 5461616, at *2 (D. Del. Sep. 30, 2013) (“But a court may only take judicial notice that the other judicial proceedings exist, it may not make findings of fact based on those other proceedings without converting the motion to dismiss into a motion for summary judgment.”). The Court should reject Plaintiffs’ invitation to take judicial notice of the contents of documents which would allegedly “contradict Defendants’ factual position.” Mot. at 6.

Moreover, while Plaintiffs are unclear about the source of authority on which they move to strike, a motion to strike generally is governed by Federal Rule of Civil Procedure 12(f), which applies only to “pleading[s].” *See* Fed. R. Civ. P. 12(f). Pleadings are defined as complaints, answers, and replies to answers. *See* Fed. R. Civ. P. 7 (distinguishing these “pleadings” from “motions and other papers”). The device cannot be used to strike motions, exhibits, statements, or other related documents. *Watkins v. New Castle Cty.*, 374 F. Supp. 2d 379, 394 (D. Del. 2005); *United States ex rel. Ryan v. Endo Pharms., Inc.*, No. 05-3450, 2014 WL 4209006, at *2 (E.D. Pa. Aug. 25, 2014). To the extent Plaintiffs’ Motion seeks to strike purported factual assertions in the Defendants’ motions to dismiss, it should be denied.³

Third, the Motion should be denied because the relief it seeks is improper at this stage in the litigation and unnecessary to the resolution of any legal issue presented in the motions to dismiss. Even taking Plaintiffs’ central premise – that documents outside of the pleadings “contradict Defendants’ statements in their briefs,” Mot. at 1 – as true, Plaintiffs are not entitled to introduce any new documents or strike any statements to resolve that contradiction. As the Motion

³ In any case, the Motion is untimely. A motion seeking to strike material in a pleading must be filed either before a party responds to that pleading or, if a response is not allowed, within 21 days after being served with the pleading. Fed. R. Civ. P. 12(f). Even if Treasury’s motion to dismiss and supporting memorandum were pleadings against which a motion to strike could be directed, Plaintiffs have already responded to those filings, *see* D.I. 69, which in any case were filed on April 17, 2017, nearly five months before Plaintiffs’ Motion. D.I. 65, 66

recognizes, *id.* at 9, the method for resolving any factual discrepancies between Plaintiffs' Amended Complaint and the Defendants' motions to dismiss is simply to accept the Plaintiffs' well-pleaded factual allegations as true. No further scrutiny of purported "factual arguments" in a motion to dismiss is necessary or appropriate for the purpose of determining a complaint's legal sufficiency. Treasury seeks dismissal on purely legal grounds and the resolution of its pending motion to dismiss does not turn on the resolution of any disputed facts.⁴ *See* Treasury's Opening Brief in Support of Mot. to Dismiss at 2-4, D.I. 66. The Court should reject Plaintiffs' improper attempt to introduce evidence in support of factual allegations which are irrelevant to Treasury's arguments for dismissal, and the truth of which must in any case be assumed for purposes of resolving the pending motions to dismiss.

For the foregoing reasons, as well as the reasons set forth in Defendants' motions to dismiss, the Court should deny Plaintiffs' motion for judicial notice or, in the alternative, to strike, and the Court should dismiss Plaintiffs' Amended Complaint with prejudice.

Dated: September 22, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

DAVID C. WEISS
Acting United States Attorney

JENNIFER L. HALL

⁴ Plaintiffs acknowledged as much in a stipulation following the first round of motions to dismiss, in which the parties represented that they did not "currently anticipate discovery in this matter" prior to the Court's resolution of the pending motions to dismiss. *See* D.I. 21 at 2. Defendants' motions to dismiss the Amended Complaint rely on the same legal arguments raised in the original motions to dismiss and Plaintiffs themselves represented that the Amended Complaint raises "no new factual issue." D.I. 48 at 5. Similarly, at oral argument on FHFA's petition for consolidation before the Judicial Panel on Multidistrict Litigation, counsel for the Plaintiffs stated that their complaint "requires no discovery because it's a purely legal issue." *See* Transcript of May 26, 2016 Hearing at 19, *In re FHFA, et al., Preferred Stock Purchase Agreements Third Amendment Litigation*, MDL No. 2713 (J.P.M.L. 2016), D.I. 38.

Assistant United States Attorney

DIANE KELLEHER
Assistant Branch Director

/s/ R. Charlie Merritt
R. CHARLIE MERRITT
Trial Attorney (VA Bar No. 89400)
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
(202) 616-8098
robert.c.merritt@usdoj.gov

*Counsel for Defendant U.S. Department of
the Treasury*