

**BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION**

)	
In Re:)	
)	MDL No. _____
Third Amendment Litigation)	
)	

**FEDERAL HOUSING FINANCE AGENCY’S MOTION FOR TRANSFER OF
ACTIONS TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

The Federal Housing Finance Agency (“FHFA” or the “Conservator”) respectfully moves the Judicial Panel on Multidistrict Litigation (the “Panel”) for an order, pursuant to 28 U.S.C. § 1407, transferring four pending actions concerning the Conservator’s and the U.S. Department of the Treasury’s (“Treasury”) entry into the Third Amendment to the Senior Preferred Stock Agreements, as well as any subsequent actions, to the U.S. District Court for the District of Columbia for coordinated or consolidated pretrial proceedings. The Schedule of Actions filed herewith identifies the currently pending actions subject to FHFA’s motion.

In support of its motion, FHFA states:

1. FHFA was created by the Housing Economic Recovery Act of 2008 (“HERA”) as an independent federal agency with supervisory and regulatory authority over the Federal Home Loan Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac,” and, together with Fannie Mae, the “Enterprises”). 12 U.S.C. § 4511 *et seq.* The Enterprises are congressionally chartered with the mission of providing liquidity and stability to the Nation’s secondary residential mortgage market and expanding access to mortgage credit throughout the Nation. *See id.* § 1716 (Fannie Mae); *id.* § 1451 note (Freddie Mac).

2. In September 2008, the FHFA Director, acting pursuant to his powers under HERA, placed the Enterprises in conservatorships and appointed FHFA as Conservator. *Id.* § 4617(a)(2). The Conservator “immediately succeed[ed] to . . . all rights, titles, powers, and privileges of the [Enterprises], and of any stockholder, officer, or director of [the Enterprises].” *Id.* § 4617(b)(2)(A). HERA consolidates control of the Enterprises with the Conservator, *see id.* § 4617(b)(2), and it reinforces and facilitates the Conservator’s plenary operational authority by shielding the Conservator’s actions from judicial review. *Id.* § 4617(f) (“[N]o court may take any action to restrain or affect the exercise of powers or functions of the Agency as conservator.”).

3. The Conservator—acting on behalf of the Enterprises—and Treasury entered into two preferred stock purchase agreements (“PSPAs”) wherein Treasury agreed to commit billions of U.S. taxpayer dollars to ensure that the Enterprises did not enter mandatory receivership. *See* 12 U.S.C. § 4617(a)(4). Under the PSPAs, an Enterprise must draw funds from Treasury if its net worth is negative—defined as liabilities exceeding assets in accordance with U.S. Generally Accepted Accounting Principles—in any calendar quarter. Combined, the Enterprises have made 24 draws totaling approximately \$187 billion on the Treasury commitment.

4. Under the PSPAs, the Enterprises were obligated to pay Treasury a fixed quarterly dividend and a periodic commitment fee (“PCF”), intended to compensate U.S. taxpayers fully for the commitment.

5. FHFA and Treasury amended the PSPAs to, among other things, increase Treasury’s commitment of funds. In the most recent of these amendments, executed on

August 17, 2012 (the “Third Amendment”), FHFA and Treasury replaced the fixed quarterly dividend with a variable dividend equal to the Enterprises’ quarterly earnings, if any. The Third Amendment also suspended the PCF for so long as the variable dividend is in place.

6. Enterprise shareholders have filed 15 complaints challenging the Third Amendment in six different U.S. district courts.¹ Those actions bring materially identical claims against FHFA and Treasury seeking materially identical relief. They allege that FHFA and Treasury acted outside their statutory powers in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, and/or assert Delaware and Virginia state law claims for breach of contract, breach of the implied duty of good faith and fair dealing, and breach of fiduciary duty. Plaintiffs ask the courts to declare that the Third Amendment violates HERA, to vacate the Third Amendment, and to enjoin FHFA and Treasury officials from taking any actions pursuant to the Third Amendment. Plaintiffs also ask the courts to rescind the Third Amendment and to return to the Enterprises all monies paid to Treasury under the Third Amendment.

7. HERA, however, bars shareholders from second-guessing the Conservator’s operational decisions, expressly foreclosing judicial review that would restrain or affect the Conservator’s exercise of its statutory powers, *see* 12 U.S.C. § 4617(f), and transferring to the Conservator the very “rights, titles, powers, and privileges” upon which shareholders rely in the various actions, *see id.* § 4617(b)(2)(A)(i).

8. Bringing all of these cases, which raise common questions of fact, before a single tribunal for pretrial proceedings will serve the convenience of the parties and witnesses as well

¹ Enterprise shareholders have also filed two actions against the Enterprises’ auditors in Florida state court. *Master Sgt. Edwards v. Deloitte & Touche, LLP*, No. 2016-004986-CA-01 (Fla. Cir. Ct. Feb. 29, 2016); *Master Sgt. Edwards v. PricewaterhouseCoopers, LLP*, No. 2016-005875-CA-01 (Fla. Cir. Ct. Mar. 9, 2016). Though it is not a party to either action, the Conservator is monitoring those cases, which raise many of the same questions of fact and law as the 15 actions filed in U.S. district courts.

as promote the just and efficient conduct of the actions. The need to avoid inconsistent pre-trial rulings, to foreclose the possibility of duplicative discovery, and to conserve the efforts and resources of the parties and the judiciary all weigh heavily in favor of transferring these cases to a single court for coordinated or consolidated pretrial proceedings.

9. Existence of Multiple Litigation As detailed in the accompanying memorandum in support of this Motion and the Schedule of Actions, shareholders have filed at least 15 complaints challenging the Third Amendment in six U.S. district courts.

a. Courts have granted the motions to dismiss filed by FHFA and Treasury with respect to eleven of the complaints. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828 (S.D. Iowa 2015). Plaintiffs have appealed the decision of the District Court for the District of Columbia. Briefing on the appeal is completed and argument is scheduled for April 15, 2016 in the U.S. Court of Appeals for the D.C. Circuit. Plaintiff in *Continental Western Insurance Co.* did not appeal the district court's decision to the U.S. Court of Appeals for the Eighth Circuit.

b. Four cases (the "Related Cases") are currently pending in the U.S. district courts for the districts of Delaware, Eastern Kentucky, Northern Iowa, and Northern Illinois.

c. Based on demand letters received by the Enterprises' boards of directors, FHFA anticipates the filing of additional shareholder actions challenging the Third Amendment.

10. Existence of Common Questions of Fact The Related Cases all involve common questions of fact and law, common pretrial procedural issues, and common parties:

a. Each of the Related Cases names FHFA and Treasury as defendants and challenges the Third Amendment, raising substantially similar factual allegations regarding FHFA's and Treasury's execution of and performance under the Third Amendment.

b. Three of the four Related Cases assert claims under the APA, alleging that FHFA and Treasury acted beyond their statutory powers and that Treasury's conduct was arbitrary and capricious.

c. The disposition of all pending claims on the merits would require the examination and consideration of Treasury's administrative record.

d. The Conservator maintains that it was under no obligation to maintain or file an administrative record. FHFA anticipates litigating whether it was required to maintain an administrative record, as well as the adequacy of any record it should be ordered to file.

e. Two of the four Related Cases assert substantially similar claims under Delaware and Virginia state law, alleging breach of contract and breach of the implied duty of good faith and fair dealing.

f. HERA limits the jurisdiction of federal district courts and forecloses judicial review where the relief sought would "restrain or affect" the Conservator's exercise of its statutory powers. 12 U.S.C. § 4617(f). The relief sought in the Related Cases would vacate the Third Amendment and enjoin FHFA and Treasury officials from taking any action pursuant to the Third Amendment. Such relief would restrain or affect the exercise of the Conservator's powers, unwinding the financing agreement that ensures the Enterprises do not enter mandatory receivership. Thus, the Related Cases present common threshold legal issues regarding the courts' jurisdiction.

g. Resolving those dispositive issues based on FHFA's and Treasury's motions to dismiss will require the courts to examine HERA and the Enterprises' federal statutory charters to determine whether the Conservator and Treasury acted within their statutory powers when entering into the Third Amendment.

h. All of the plaintiffs in the Related Cases are Enterprise shareholders, and the Related Cases present the same threshold legal issue of whether the shareholders may maintain those actions in light of the Conservator's succession to "all rights, titles, powers, and privileges" of Enterprise shareholders. 12 U.S.C. § 4617(b)(2)(A)(i).

11. Benefits of Consolidation Consolidation of these actions for pretrial proceedings will serve the convenience of the parties and promote the just and efficient conduct of the actions for at least the following reasons:

a. The claims, issues, and questions of fact and law regarding entry into the Third Amendment and the district courts' jurisdiction are substantially identical in each of the actions.

b. Pretrial motions will be dispositive in all of these actions; it is unlikely that trials will occur.

c. Common issues concerning the Conservator's obligation to maintain and file an administrative record, the completeness of the administrative record, and the supplementation of the administrative record may arise in each of the currently pending actions. Transfer will ensure consistent rulings on the Conservator's need to maintain and file an administrative record. Transfer will also ensure consistent rulings regarding challenges to and/or supplementation of Treasury's and FHFA's record (should FHFA be ordered to file one).

12. Choice of Forum and Judge The U.S. District Court for the District of Columbia is the appropriate forum for all of the Related Cases. It was the venue for ten complaints concerning the validity of the Third Amendment. *See Perry Capital*, 70 F. Supp. 3d. at 246. Additionally, the U.S. District Court for the District of Columbia is the most appropriate transferee court because FHFA, Treasury, and Fannie Mae are located in Washington, D.C. Freddie Mac is headquartered in the Washington, D.C. metropolitan area. Thus, the relevant documents, decision-makers, and administrative record are all located in and around Washington, D.C. Moreover, counsel for FHFA and Treasury are in Washington, D.C., and transfer would eliminate the need for travel to Pikeville, Kentucky, Cedar Rapids, Iowa, and/or any other locale where shareholders may file copycat complaints.

Pursuant to the accompanying Certificate of Service, a copy of this Motion and the attached Schedule of Actions, and the accompanying brief in support of this Motion have been filed with the clerk of each district court identified in the Schedule of Actions and served on counsel for all parties listed in the Schedule of Actions.

DATED: March 15, 2016

Respectfully submitted,

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