

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE No.

MASTER SGT. ANTHONY R. EDWARDS,
USAF, RETIRED; MASTER SGT. SALVATORE
CAPACCIO, USAF; GATOR CAPITAL
MANAGEMENT, LLC; PERINI CAPITAL LLC;
ALLEN HARDEN; ED BIERYLA; DOREEN
BIERYLA; JORGE ZAPATA; HIREN PATEL;
LOUISE STRANG; JOHNNA B. WATSON;
MELODY SULLIVAN; AMIT CHOKSI; PHIL
MILLER; JAMES FERGUSON; GORDON
INMAN; SHAUN INMAN; MICHAEL
CARMODY; MATT HILL; JOSEPH WASKE;
MARYAM MOINFAR; WAYNE OLSON; RICH
KIVELA; CHRIS WOSSILEK; and MATTHEW
REED,

Plaintiffs,

vs.

PRICEWATERHOUSECOOPERS, LLP,

Defendant.

_____ /

NOTICE OF REMOVAL

PLEASE TAKE NOTICE THAT pursuant to 28 U.S.C. §§ 1331, 1345, 1367(a), 1441(a), and 1446 and 12 U.S.C. §§ 1452(f)(1) and 1452(f)(2), Defendant PricewaterhouseCoopers LLP (“PwC”) hereby notices its removal of this action from the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, Case Number 2016-005875-CA-01, where the action is now pending, to the United States District Court for the Southern District of Florida. PwC states the following grounds for its removal:

BACKGROUND

1. On March 9, 2016, Plaintiffs Master Sgt. Anthony R. Edwards, USAF, Retired, Master Sgt. Salvatore Capaccio, USAF, Gator Capital Management, LLC, Perini Capital LLC, Allen Harden, Ed Bieryla, Doreen Bieryla, Jorge Zapata, Hiren Patel, Louise Strang, Johnna B. Watson, Melody Sullivan, Amit Choksi, Phil Miller, James Ferguson, Gordon Inman, Shaun Inman, Michael Carmody, Matt Hill, Joseph Waske, Maryam Moinfar, Wayne Olson, Rich Kivela, Chris Wossilek and Matthew Reed (collectively, “Plaintiffs”) filed this action against PwC in the Circuit Court for the 11th Judicial Circuit in and for Miami-Dade County, Florida. A true and correct copy of the Plaintiffs’ complaint is included in Exhibit A filed herewith. As of the date of this filing, Plaintiffs have not served PwC with the complaint or summons.

2. The Federal Home Loan Mortgage Corporation (“Freddie Mac”) is a government-sponsored enterprise created by a statutory charter issued by Congress. *See* 12 U.S.C. §§ 1451-1459. Freddie Mac’s bylaws declare that “[t]he corporate governance practices and procedures of the Corporation shall comply with the Corporation’s enabling legislation and other Federal law, rules, and regulations” (Bylaws of the Federal Home Loan Mortgage Corporation (As amended and restated June 3, 2011) § 11.3(a), attached hereto as Exhibit B; Bylaws of the Federal Home Loan Mortgage Corporation (As amended and restated June 6, 2008) §11.3, attached hereto as Exhibit C.)¹

3. Plaintiffs allege that in the wake of the financial crisis, Congress passed the Housing and Economic Recovery Act (“HERA”), which established the Federal Housing

¹ In the absence of applicable federal law, rules, and regulations, Freddie Mac’s corporate governance practices and procedures are governed by state law. (Ex. B, Bylaws of the Federal Home Loan Mortgage Corporation (As amended and restated June 3, 2011 § 11.3(a); Ex. C. Bylaws of the Federal Home Loan Mortgage Corporation (As amended and restated June 6, 2008) § 11.3(a).)

Finance Agency (“FHFA”) to oversee Freddie Mac and granted the United States Department of Treasury (“Treasury”) the authority to purchase securities from Freddie Mac. (Compl. ¶ 20.)

4. Plaintiffs further allege that on September 6, 2008, FHFA placed Freddie Mac into conservatorship and assumed the powers of the board of directors and management of Freddie Mac. (*Id.* ¶ 21.) Plaintiffs allege that FHFA stated that the conservatorship was “a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations.” (*Id.* (emphasis omitted).)

5. HERA contains detailed provisions regarding the rights and obligations of FHFA as conservator of Freddie Mac. Upon becoming conservator of Freddie Mac, FHFA “immediately succeed[ed] to . . . all rights, titles, powers, and privileges of [Freddie Mac], and of any stockholder, officer, or director of [Freddie Mac] with respect to [Freddie Mac] and the assets of [Freddie Mac].” 12 U.S.C. § 4617(b)(2)(A)(i). FHFA has the power to “reorganiz[e], rehabilitat[e], or wind[] up the affairs of [Freddie Mac].” 12 U.S.C. § 4617(a)(2). FHFA has the authority to “take over the assets of and operate [Freddie Mac] with all the powers of the shareholders, the directors, and the officers of [Freddie Mac] and conduct all business of [Freddie Mac],” “perform all function of [Freddie Mac] in the name of [Freddie Mac] which are consistent with the appointment as conservator or receiver,” and “preserve and conserve the assets and property of [Freddie Mac].” 12 U.S.C. § 4617(b)(2)(B). Moreover, HERA granted FHFA the power to “take any action authorized by this section, which [FHFA] determines is in the best interests of the regulated entity or [FHFA].” 12 U.S.C. § 4617(b)(2)(J)(ii). HERA declared that “no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver.” 12 U.S.C. § 4617(f).

6. Through HERA, Congress amended Freddie Mac's charter to authorize Treasury to "purchase any obligations and other securities issued by [Freddie Mac] . . . on such terms and conditions as the Secretary [of Treasury] may determine and in such amounts as the Secretary [of Treasury] may determine." 12 U.S.C. § 1455(l)(1)(A).

7. Plaintiffs allege that FHFA and Treasury entered into a senior preferred stock purchase agreement ("PSPA"), pursuant to which Freddie Mac sold a new class of stock to Treasury in exchange for a funding commitment from Treasury, issued warrants to Treasury to purchase a certain amount of Freddie Mac common stock, and created covenants barring Freddie Mac from changing its capital structure, paying dividends to shareholders other than Treasury, or seeking to terminate FHFA's conservatorship without Treasury's approval. (Compl. ¶ 22.) Plaintiffs further allege that Treasury Secretary Henry Paulson approved the exercise of Treasury's authority under HERA. (*Id.* ¶ 25.)

8. Plaintiffs further allege that FHFA looked to Freddie Mac's financial statements to determine if Freddie Mac had a negative net worth, and that if Freddie Mac had a negative net worth "FHFA would request that Treasury draw down Freddie Mac's funding commitment and provide funds equal to the net worth deficit." (*Id.* ¶ 26.)

9. Plaintiffs further allege that FHFA and Treasury amended the PSPA to give Treasury the right to "sweep" Freddie Mac's positive net worth to Treasury each quarter (the "Net-Worth Sweep"). (*Id.* ¶ 31.)

10. Plaintiffs further allege that FHFA, Treasury, and Freddie Mac's directors and officers owed fiduciary duties to Freddie Mac and its shareholders and breached those duties because of the terms of the PSPA, among other actions that Plaintiffs find objectionable. (*Id.* ¶¶ 31, 35-42, 111-13, 130-32, 149-51, 168-70, 187-89, 206-08, 225-27, 244-46, 263-65, 282-84,

301-02, 320-22, 339-41, 358-60, 377-79, 396-98, 415-17, 434-36, 453-55, 472-74, 491-93, 510-12, 529-31, 548-50, 567-69.)

11. Plaintiffs further allege that “[t]hrough the Net Worth Sweep, FHFA and Treasury violated” state and applicable “federal law by breaching their fiduciary duties to Freddie Mac and Plaintiffs.” (*Id.* ¶ 41.) Plaintiffs allege that the Net-Worth Sweep was contrary to the best interests of Freddie Mac and its stockholders and “ran directly contrary to FHFA’s purported statutory mission” in 12 U.S.C. § 4617(b)(2)(D). (*Id.* ¶ 38.) Moreover, Plaintiffs assert that “[f]ederal regulators at FHFA and Treasury secretly decided that they would not allow Freddie Mac to ever operate again as a profit-making company for the benefit of its stockholders. . . . [T]he stockholders of Freddie Mac were to be secretly punished by the government.” (*Id.* ¶ 59.)

12. Plaintiffs further allege that PwC, as the auditor of Freddie Mac, was required to act in accordance with the Generally Accepted Accounting Principles (“GAAP”) and the Generally Accepted Auditing Standards (“GAAS”), as such standards were issued and adopted by the Public Company Accounting Oversight Board (“PCAOB”) for public companies. (*Id.* ¶¶ 44, 49, 100, 119, 138, 157, 176, 195, 214, 233, 252, 271, 290, 309, 328, 347, 366, 385, 404, 423, 442, 461, 480, 499, 518, 537, 556.)

13. Plaintiffs further allege that PwC violated GAAS and GAAP in auditing Freddie Mac’s financial statements for audit years 2008-2013. (*Id.* ¶¶ 28, 44, 46-50, 63-65, 67-68, 73-74, 80, 85, 88, 90, 92.)

14. Plaintiffs further allege that “[a]lthough Freddie Mac’s management was complicit with FHFA, Freddie Mac and the regulators needed PwC’s blessing to execute their plan. Without PwC’s audit opinion, FHFA and Freddie Mac management would not be able to carry out their plan.” (*Id.* ¶ 63; *accord id.* ¶ 95.)

15. Plaintiffs further allege that “PwC assisted FHFA and Freddie Mac to materially misstate Freddie Mac’s financial statements” (*Id.* ¶ 27.) Plaintiffs allege that “PwC’s falsely certified Freddie Mac’s [sic] materially misstated financial statements caused Freddie Mac to have to borrow \$71.3 billion from Treasury in the form of non-repayable 10% Senior Preferred Stock The non-repayable 10% Senior Preferred Stock is senior to Plaintiff’s [sic] class of stock in the capital structure of Freddie Mac, thereby causing harm to Plaintiffs’ Freddie Mac Stock.” (*Id.*)

16. Plaintiffs further allege that “[h]ad PwC performed its public duty by either not issuing its false audit opinions for the audit years 2008-2013 or by issuing audit opinions with the disclosures required by [GAAS], Freddie Mac would have been able to exit the conservatorship as required by law and Plaintiffs would not have suffered their losses.” (*Id.* ¶ 96.)

17. Each plaintiff asserts against PwC claims for Negligent Misrepresentation (Restatement (2d) of Torts § 552) and Aiding and Abetting Breach of Fiduciary Duty.

18. Plaintiffs seek actual, compensatory, and consequential damages and pre- and post-judgment interest.

JURISDICTIONAL BASIS FOR REMOVAL

19. This action is removable to this Court if this Court would have had subject-matter jurisdiction over this action had it been filed in this Court. 28 U.S.C. § 1441(a).

20. This Court has federal subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1345, 1367(a) and 12 U.S.C. §§ 1452(f)(1), 1452(f)(2).

21. 28 U.S.C. § 1331 creates federal jurisdiction for “all civil actions arising under the Constitution, laws, or treaties of the United States.” Section “1331 jurisdiction will support

claims founded upon federal common law as well as those of a statutory origin.” *Ill. v. Milwaukee*, 406 U.S. 91, 100 (1972). 28 U.S.C. § 1331 also allows for federal jurisdiction for state-law claims that “necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005).

22. Plaintiffs’ claims for aiding and abetting breach of fiduciary duty arise under federal law because federal law is the source of any potential cause of action. This is so for at least two reasons. *First*, Freddie Mac is a government sponsored enterprise created by the Federal Home Loan Mortgage Corporation Act (12 U.S.C. §§ 1451-1459). Freddie Mac’s bylaws adopt federal law for its corporate governance practices and procedures. Those bylaws declare that “[t]he corporate governance practices and procedures of the Corporation shall comply with the Corporation’s enabling legislation and other Federal law, rules, and regulations” (Ex. B, Bylaws of the Federal Home Loan Mortgage Corporation (As amended and restated June 3, 2011) § 11.3(a); Ex. C, Bylaws of the Federal Home Loan Mortgage Corporation (As amended and restated June 6, 2008) § 11.3(a).) In the absence of applicable federal law, rules, and regulations, Freddie Mac’s corporate governance practices and procedures are governed by state law. *Id.* Therefore, any claim that FHFA, Treasury, or any officer or director of Freddie Mac violated a fiduciary duty to Freddie Mac—or that anyone aided and abetted such a violation—must be brought under federal statutory, regulatory, or common law. *Second*, even in the absence of Freddie Mac’s adoption of federal law as the basis for its corporate governance practices and procedures, federal common law would supply the rule of decision for these claims. Plaintiffs assert that FHFA and Treasury have breached

fiduciary duties while they were acting pursuant to federal statute. Congress's enactment of HERA—and FHFA's and Treasury's rights, duties, and actions pursuant to HERA—create a uniquely federal interest that would conflict with state law under Plaintiffs' interpretation. Thus, federal common law supplies the rule of decision in Plaintiffs' aiding-and-abetting-breach-of-fiduciary-duty claims. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 507-08 (1988).

23. In addition, Plaintiffs' claims arise under federal law because these claims “necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” *Grable*, 545 U.S. at 314. Assuming state law were applicable and actually recognizes a claim for aiding and abetting breach of fiduciary duty, Plaintiffs would need to show that FHFA and Treasury breached a fiduciary duty owed to Freddie Mac to state a claim. *Halifax Corp. v. Wachovia Bank*, 604 S.E.2d 403, 411-14 (Va. 2004). The Court cannot determine the existence, scope, or content of FHFA's and Treasury's fiduciary duties without analyzing and interpreting the rights and obligations of FHFA and Treasury under federal law. The federal issues are central to Plaintiffs' claims, and the parties will actually dispute the scope and content of FHFA's and Treasury's alleged duties based on the interpretation of federal law. Resolution of this case, which has special federal importance given the role of FHFA and Treasury in seeking to stabilize the economy in the wake of the housing crisis, in federal court does not upset any approved balance of federal and state judicial responsibilities.

24. Plaintiffs' claims under Restatement (2d) of Torts § 552 arise under federal law because these claims “necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” *Grable*, 545 U.S. at 314. This is so for at least two

reasons. *First*, regardless of which jurisdiction’s law applies to Plaintiffs’ claims under Restatement (2d) of Torts § 552, Plaintiffs must prove that PwC’s alleged violations of GAAS in auditing Freddie Mac caused the losses they complain of. *See, e.g., First Fla. Bank, N.A. v. Max Mitchell & Co.*, 558 So. 2d 9, 12 (Fla. 1990). Plaintiffs’ claims therefore necessarily require an analysis and interpretation of the rights and duties of FHFA and Treasury under HERA and whether HERA required FHFA and/or Treasury to obtain PwC’s audit opinions to carry out the actions that Plaintiffs assert caused their losses. Those issues are central to Plaintiffs’ claims under Restatement (2d) of Torts § 552, and the parties will actually dispute whether PwC caused any alleged damage to Plaintiffs in light of the rights and duties of FHFA and Treasury under federal law. Resolution of this case—which implicates unique federal interests—in federal court does not upset any approved balance of federal and state judicial responsibilities. *Second*, Plaintiffs assert that “[i]n performing its audits of Freddie Mac, PwC was required to follow the Auditing Standards and GAAP. There are ten GAAS standards applicable to PwC’s audit of Freddie Mac, all of which PwC violated” (Compl. ¶ 49.) Pursuant to the Sarbanes-Oxley Act, the PCAOB promulgated the GAAS standards for use in audits of public companies. GAAS are thus federal law. A determination of the standards required of PwC are therefore a question of federal law. An interpretation of GAAS will be central to Plaintiffs’ claims under Restatement (2d) of Torts § 552, and the parties will actually dispute PwC’s obligations under GAAS. Resolution of this case in federal court, given the special federal importance of the case, does not upset any approved balance of federal and state judicial responsibilities.

25. All of Plaintiffs’ claims additionally arise under federal law because the Court must interpret HERA to determine whether Plaintiffs had the legal right to bring the claims they assert against PwC. 12 U.S.C. § 4617(b)(2)(A)(i) states that FHFA, as conservator,

“immediately succeed[s] to . . . all rights, titles, powers, and privileges of . . . any stockholder . . . of [Freddie Mac] with respect to [Freddie Mac] and the assets of [Freddie Mac].” Resolution of this important federal issue will be necessary and central to this case.

26. To the extent Plaintiffs have attempted to plead their complaint to omit federal issues or causes of action, they have engaged in artful pleading, including because federal law completely preempts Plaintiffs’ claims.

27. Plaintiffs’ claims arise under federal law pursuant to 12 U.S.C. § 1452(f) and 28 U.S.C. § 1345. Plaintiffs’ claims for aiding and abetting breach of fiduciary duty are derivative claims that can only be brought by or on behalf of Freddie Mac. *See, e.g., Remora Invs., L.L.C. v. Orr*, 673 S.E.2d 845, 848 (Va. 2009). Plaintiffs must likewise bring their claims under Restatement (2d) of Torts § 552 as derivative claims. Freddie Mac is thus the real party in interest to Plaintiffs’ claims. Federal subject-matter jurisdiction therefore exists pursuant to 12 U.S.C. § 1452(f)(2), which declares that “all civil actions to which [Freddie Mac] is a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such actions, without regard to amount or value.” Furthermore, pursuant to 12 U.S.C. § 1452(f)(1), Freddie Mac is deemed to be an agency included in the jurisdictional grant in 28 U.S.C. § 1345, which confers federal subject-matter jurisdiction on cases commenced by a federal agency. Because Freddie Mac is the real party in interest to Plaintiffs’ claims, there is federal subject-matter jurisdiction under 28 U.S.C. § 1345. For this additional reason, Plaintiffs’ claims arise under federal law.

28. To the extent any subset of Plaintiffs’ claims do not independently create federal subject-matter jurisdiction, the Court has jurisdiction over such claims under 28 U.S.C. § 1367(a)

because all of Plaintiffs' allegations and claims encompass the same case or controversy under Article III of the United States Constitution.

PROCEDURAL COMPLIANCE

29. PwC has timely removed this action. Pursuant to 28 U.S.C. § 1446(b),

[t]he notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

Plaintiffs have not served PwC with the complaint or summons in this case. PwC has removed this action less than thirty days from March 9, 2016, the date Plaintiffs filed their complaint. PwC's Notice of Removal is timely.

30. This action was originally filed in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida. That court is within this Court's district. PwC has therefore complied with 28 U.S.C. § 1441(a).

31. PwC has not been served with any process, pleadings, or orders from the action in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida. Regardless, PwC has attached the complaint and civil cover sheet to this Notice of Removal. There are no other pleadings, orders, or process on file in this action in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida. PwC has complied with 28 U.S.C. § 1446(a).

32. In accordance with 28 U.S.C. § 1446(d), PwC will promptly notify Plaintiffs of this Notice of Removal and file a copy of this Notice of Removal with the Clerk of the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida.

33. PwC reserves the right to amend or supplement this Notice of Removal.

34. By filing this Notice of Removal, PwC does not waive its right to assert any claims, defenses, or other rights permitted by law or the Federal Rules of Civil Procedure.

35. PwC appears in this case for the limited purpose of removal. PwC does not appear for any other purpose.

For the foregoing reasons, PwC requests that this cause proceed in its entirety in this Court.

Dated: April 6, 2016

Respectfully submitted,

/s/ Ramon A. Abadin
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing Notice of Removal with the Clerk of the Court by using the CM/ECF system, and that a true and correct copy of the foregoing has been furnished to:

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Via U.S. Mail and email this 6th day of April, 2016

/s/Ramon A. Abadin
Ramon A. Abadin