Nos. 14-5243 (L), 14-5254 (con.), 14-5260 (con.), 14-5262 (con.)

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

IN RE FANNIE MAE/FREDDIE MAC SENIOR PREFERRED STOCK PURCHASE AGREEMENT CLASS ACTION

On Appeal from the United States District Court
For the District of Columbia, No. 13-mc-01288
(Royce C. Lamberth, District Judge)

SUPPLEMENTAL BRIEF FOR CLASS PLAINTIFFS

Hamish P.M. Hume
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Ave., NW, Suite 800
Washington, DC 20015
Tel: (202) 237-2727
Fax: (202) 237-6131

Interim Co-Lead Class Counsel for Appellants American European Insurance Company, Joseph Cacciapalle, John Cane, Francis J. Dennis, Marneu Holdings, Co., Michelle M. Miller, United Equities Commodities, Co., 111 John Realty Corp., Barry P. Borodkin and Mary Meiya Liao

[*Additional Appearances on Inside Cover*]

BERNSTEIN LITOWITZ BERGER& GROSSMAN LLP
David L. Wales
1251 Avenue of the Americas
New York, NY 10020
Tel: (212) 554-1409
Fax: (212) 554-1444
dwales@blbglaw.com

Blair A. Nicholas
David R. Kaplan
Lucas E. Gilmore
12481 High Bluff Drive, Suite 300
San Diego, CA 92130
Tel: (858) 793-0070
Fax: (858) 793-0323
blairn@blbglaw.com
davidk@blbglaw.com

KESSLER TOPAZ MELTZER & CHECK, LLP
Eric L. Zagar
Matthew A. Goldstein
280 King of Prussia Road
Radnor, PA 19087
Tel: (610) 667-7706
Fax: (610) 667-7056

Interim Co-Lead Class Counsel for Appellants American European Insurance Company, Joseph Cacciapalle, John Cane, Francis J. Dennis, Marneu Holdings, Co., Michelle M. Miller, United Equities Commodities, Co., 111 John Realty Corp., Barry P. Borodkin and Mary Meiya Liao

GRANT & EISENHOFER P.A.
Michael J. Barry
David Haendler
123 Justison Street
Wilmington, DE 19801
Tel: (302) 622-7000
Fax: (302) 622-7100
gjarvis@gelaw.com
mbarry@gelaw.com

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Term	Abbreviation
American European Insurance Company, Joseph Cacciapalle, John Cane, Francis J. Dennis, Marneu Holdings, Co., Michelle M. Miller, United Equities Commodities, Co., 111 John Realty Corp., Barry P. Borodkin and Mary Meiya Liao	Class Plaintiffs
Federal National Mortgage Association ("Fannie Mae) and Federal Home Loan Mortgage Corporation ("Freddie Mac")	The Companies
Class Plaintiffs' Consolidated Amended Class Action and Derivative Complaint, filed in the District Court on December 3, 2013	Consolidated Class Complaint or Complaint
Appellees Fannie Mae, Freddie Mac, Treasury, and FHFA	Defendants
United States District Court for the District of Columbia (Lamberth, J.)	District Court
Citations to the Docket in *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations*, Misc. Action No. 13-mc-1288 (RCL)	Dkt. ___
Federal Housing Finance Agency	FHFA
The Housing and Economic Recovery Act of 2008, Pub. L. 110-289, 122 Stat. 2654 (2008)	HERA
The Third Amendment to the Senior Preferred Stock Purchase Agreements between the United	The Net Worth Sweep, or Third Amendment

States Department of the Treasury and the Federal Housing Finance Agency, as conservator to Fannie Mae and Freddie Mac, dated August 17, 2012, and the declaration of dividends pursuant to the Third Amendment beginning January 1, 2013	
Senior Preferred Stock Purchase Agreements	PSPAs, or Government Stock Agreements
United States Department of Treasury	Treasury

PRELIMINARY STATEMENT

This supplemental brief addresses each of the questions on which the Court requested supplemental briefing through its Order of June 21, 2016.

ARGUMENT

I. THERE ARE STATUTES OTHER THAN THE FTCA THAT PROVIDE SUBJECT MATTER JURISDICTION AND A WAIVER OF IMMUNITY FOR THE FIDUCIARY BREACH CLAIMS AGAINST TREASURY.

The Court asked the following question: "Regarding the class plaintiffs' claim against Treasury for breach of fiduciary duty, is there a grant of subject matter jurisdiction and a waiver of sovereign immunity that is not the Federal Tort Claims Act?"

First, as shown in Section I(A) below, there are at least three statutes in addition to the Federal Tort Claims Act ("FTCA") that provide for subject matter jurisdiction over the claims against Treasury in this case. These statutes do not provide waivers of sovereign immunity, but they do provide subject matter jurisdiction assuming another statute provides the immunity waiver.

Second, as shown in Section I(B) below, the waiver of sovereign immunity found in 5 U.S.C. § 702 applies to Class Plaintiffs' fiduciary breach claims against Treasury to the extent those claims seek declaratory and injunctive relief.

Third, as shown in Section I(C) below, if this Court accepts the Government's argument that the fiduciary breach claims are "essentially

contractual in nature," then neither the FTCA nor 5 U.S.C. § 702 would apply; instead, the only statute providing for a waiver of immunity and for subject matter jurisdiction for those claims would be the Tucker Act, 28 U.S.C. § 1491.

A. In Addition To The FTCA, Subject Matter Jurisdiction Over Class Plaintiffs' Claims Against Treasury Is Also Provided For Under 12 U.S.C. § 1452(f), Under 28 U.S.C. § 1367, And Under 28 U.S.C. § 1332(d).

We explain the basis for subject matter jurisdiction over all the claims in this case in more detail in Section II(B), below.

First, 12 U.S.C. § 1452(f) provides for federal question jurisdiction for "all civil actions" in which Freddie Mac is a party. That statute provides for subject matter jurisdiction over *all* of Class Plaintiffs' claims in this case, including those against Treasury.

Even if § 1452(f) were somehow read narrowly to provide federal question jurisdiction only as to the specific claims against Freddie Mac (which would be a misreading), that federal question jurisdiction would still provide a basis for the Court to exercise supplemental jurisdiction over the claims against Treasury. 28 U.S.C. § 1367.

Furthermore, the Class Action Fairness Act ("CAFA") provides the district courts with original jurisdiction over "any civil action" that is a "class action" in which the amount in controversy exceeds $5,000,000 and there is minimal diversity – *i.e.*, "any member of a class of plaintiffs is a citizen of a State different

from any defendant." 28 U.S.C. § 1332(d)(2). As explained below, Fannie Mae is a citizen of the District of Columbia, and that is a different "State" than the States of which each of the class representatives are citizens. *See* Section II(B)(2), *infra*. Thus, the provisions of CAFA are satisfied, providing yet another basis for subject matter jurisdiction over all claims in this case.

B. 5 U.S.C. § 702 Provides A Waiver Of Sovereign Immunity For The Declaratory And Injunctive Relief Class Plaintiffs Seek Against Treasury To Remedy Its Fiduciary Breaches.

The FTCA waives sovereign immunity and provides for subject matter jurisdiction over tort claims that seek "damages." 28 U.S.C. § 1346(b)(1). In our Complaint, Class Plaintiffs seek not only damages, but also a declaration that Treasury breached its fiduciary duties by agreeing to the Third Amendment, and also seek "such other and further relief as the Court may deem just and proper" – which includes injunctive relief against Treasury to undo the effects of the Third Amendment's Net Worth Sweep. J.A. 278-79. The relevant sovereign immunity waiver allowing Class Plaintiffs' declaratory and injunctive claims against Treasury is found in 5 U.S.C. § 702.[1] That statute provides in relevant part: "A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof. An action in a court of the United States seeking relief other than

[1] While Treasury has argued to the contrary, the HERA anti-injunction provision would not bar any declaratory and injunctive relief sought solely against Treasury. *See* Doc. #1597013 (Reply Brief of Perry Capital) at 24-26.

money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." 5 U.S.C. § 702. Thus, § 702 waives sovereign immunity for claims for declaratory and injunctive relief (*i.e.*, claims "seeking relief other than money damages").

While § 702 is part of the Administrative Procedure Act ("APA"), this Court has held that its "waiver of sovereign immunity applies to any suit whether under the APA or not." *Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006); *see also DeBrew v. Atwood*, 792 F.3d 118, 124-25 (D.C. Cir. 2015) (same); *We the People Found., Inc. v. U.S.*, 485 F.3d 140, 143 (D.C. Cir. 2007) ("Section 702 waives the Government's sovereign immunity from this suit for injunctive relief").

Thus, § 702 waives sovereign immunity to permit Class Plaintiffs to seek declaratory and injunctive relief as remedies for their fiduciary breach claims against Treasury. We recognize that § 702 provides that it does not confer authority to grant relief "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." But this Court has held that claims for declaratory and injunctive relief based on a tort are not "expressly or impliedly forbidden by another statute." *U.S. Info. Agency v. Krc*, 989 F.2d 1211, 1216 (D.C. Cir. 1993) (holding that "injunctive relief is available" for claim of "tortious

interference with prospective employment opportunities"). Other courts have similarly held that claims for declaratory and injunctive relief are available under § 702 for tort claims, and are not impliedly prohibited by the FTCA. *See, e.g.*, *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 774-76 (7th Cir. 2011); *Robinson v. Sherrod*, 631 F.3d 839, 841 (7th Cir. 2011).[2]

The Government may argue that in order for Class Plaintiffs to invoke § 702 to obtain declaratory and injunctive relief for their fiduciary breach claims against Treasury, we must also show that the FTCA does not provide an "adequate remedy." Any such argument would be based on 5 U.S.C. § 704, which provides in relevant part that "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704.

This Court has held that the immunity waiver in § 702 is not limited by the "final agency action" requirement of 5 U.S.C. § 704. *Trudeau*, 456 F.3d at 187. Following this same reasoning, a non-APA case brought under § 702 likewise should not be subject to the "adequate remedy" requirement of § 704. Nevertheless, we recognize there are authorities that could be read to suggest that

[2] This contrasts with this Court's ruling that the Tucker Act does impliedly prohibit claims under § 702 that are based on a contract. *Sharp v. Weinberger*, 798 F.2d 1521, 1523-24 (D.C. Cir. 1986) (Tucker Act precludes breach of contract claims for declaratory and injunctive relief under § 702).

such a limitation exists.[3] We therefore address the "adequate remedy" limitation to show that it could be established here in a number of different ways.

First, it may well be the case that damages under the FTCA are not adequate to fully remedy the fiduciary breach claims made by Class Plaintiffs, and some form of injunctive relief is also necessary to provide an adequate remedy. *See. Transohio Sav. Bank. v. Director, Office of Thrift Supervision*, 967 F.2d 598, 608 (D.C. Cir. 1992). That is likely an issue that would have to be determined on remand.

Second, the Government has made a number of arguments as to why, even if the fiduciary breach claims are not essentially contractual in nature, the FTCA nonetheless should not apply to provide any remedy at all. For example, the Government has argued in its appellate brief that Class Plaintiffs failed to comply with the "presentment" requirement set forth in 28 U.S.C. § 2675(a). Doc. #1589858, at 50 n.10. Class Plaintiffs do not think this argument has merit.[4] Moreover, even if it does have merit, this argument at most calls for a dismissal

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[3] *See Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 947 (D.C. Cir. 2004).

[4] Class Plaintiffs respectfully submit that this presentment requirement should not operate to require dismissal of a complaint that has been on file for over two and a half years, thereby fully putting the agency on notice of the FTCA claim, with no indication from the agency that it wishes to consider or grant the claim. That is the equivalent of the agency not having responded to an administrative claim in 6 months, which the statute provides is sufficient to allow the plaintiff to sue. *Cf.* 28 U.S.C. § 2675(a).

without prejudice to re-filing once that administrative claim has been filed and rejected, or once 6 months have passed after the filing of the claim. *See Simkins v. District of Columbia Gov't*, 108 F.3d 366, 371 (D.C. Cir. 1997). In any event, if for some reason this argument required a dismissal with prejudice of Class Plaintiffs' damages claims based on Treasury's fiduciary breach, it would not require dismissal of claims for declaratory and injunctive relief under the § 702 waiver based on the same misconduct.

Similarly, Treasury has also argued on appeal that Class Plaintiffs' fiduciary breach claims might be barred by other defenses, such as those set forth in 28 U.S.C. § 2680(a), (h), and (i). Doc. #1602442, at 50 n.10. These issues have never been briefed, and Class Plaintiffs respectfully request an opportunity to address them before they are made a basis for decision. But if one of these defenses should apply to bar Class Plaintiffs from recovering damages under the FTCA, that would confirm that the FTCA did not provide an "adequate remedy," and the waiver in 5 U.S.C. § 702 would still permit Class Plaintiffs to seek declaratory and injunctive relief to prevent Treasury's ongoing breach of its fiduciary duties.[5]

[5] As shown in Section I(A) above, there are a number of statutes that provide subject matter jurisdiction over the tort claims against Treasury even if the FTCA were not available, and that would therefore provide jurisdiction for the declaratory and injunctive relief for which 5 U.S.C. § 702 waives immunity. In addition to the bases for subject matter jurisdiction set forth in Section I(A), there are potentially two others that would also apply to provide jurisdiction over the declaratory and injunctive relief claims sought under 5 U.S.C. § 702. First, the court would have

C. If This Court Accepts The Government's Argument That The Fiduciary Breach Claims Against Treasury Are Essentially Contractual In Nature, Then The Tucker Act Is The Only Statute That Provides A Waiver Of Immunity And Subject Matter Jurisdiction.

Before the District Court, Treasury argued that Class Plaintiffs' fiduciary breach claims were based upon Treasury's contractual obligations under the PSPAs, and therefore had to be brought in the Court of Federal Claims under the Tucker Act.[6] The District Court did not address that argument in its decision.

The FTCA waives immunity and provides subject matter jurisdiction for fiduciary breach claims that seek damages, but it does not apply to "Any claim arising out of . . . interference with contract rights." 28 U.S.C. § 2680(h). Accordingly, there are a number of cases holding that when a breach of fiduciary

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supplemental jurisdiction over these claims because they would be related to the claims brought under the FTCA, which itself provides subject matter jurisdiction. 28 U.S.C. § 1367(c). Second, while there should be no need to invoke it, 28 U.S.C. § 1361 provides that "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." While we recognize that mandamus jurisdiction is very rare, we identify it in order to provide a complete response to the Court's question regarding possible bases for subject matter jurisdiction.

[6] *See* Dkt. 19-1 at 44 ("the plaintiffs' assertion that Treasury owes them a fiduciary duty is a claim that is founded on a contractual relation, and thus it is subject to the jurisdictional limits of the Tucker Act."); Dkt. 38 at 38 ("no matter how the plaintiffs choose to characterize their claim, that claim arises (if at all) under the Tucker Act, and this Court lacks jurisdiction over the claim"); *id.* at 39 (plaintiffs' "'breach of fiduciary duty claim is essentially a contract action' within the exclusive jurisdiction of the Court of Federal Claims") (citation omitted).

duty claim "is essentially for breach of a contractual undertaking," then the claim must be brought under the Tucker Act's waiver of immunity for government contract claims. *Woodbury v. U.S.*, 313 F.2d 291, 295-96 (9th Cir. 1963) (where "the action is essentially for breach of a contractual undertaking, and the liability, if any, depends wholly upon the government's alleged promise, the action must be brought under the Tucker Act"); *see also Albrecht v. Comm. on Emple. Ben. of the Fed. Res. Emple. Ben. Sys.*, 357 F.3d 62 (D.C. Cir. 2004); *Trusted Integration, Inc. v. U.S.*, 679 F. Supp. 2d 70, 84 (D.D.C. 2010) (dismissing fiduciary duty claim where "the rights at issue originate[d] with and depend upon the contract."); *Darko v. U.S. Dep't of Agriculture*, 646 F. Supp. 223, 228 (D. Mont. 1986) (dismissing fiduciary duty claim as essentially contractual).[7]

Class Plaintiffs do not believe their fiduciary breach claims against Treasury are "essentially contractual in nature." We rely on the cases holding that the FTCA waives immunity and provides subject matter jurisdiction for claims of fiduciary breach by a governmental entity so long as that claim is not, in essence, a breach of contract claim.[8] For the direct fiduciary breach claims brought on behalf of

[7] *See also Awad v. U.S.*, 301 F.3d 1367, 1372 (Fed. Cir. 2002) ("It is well established that where a tort claim stems from a breach of contract, the cause of action is ultimately one arising in contract, and thus is properly within the exclusive jurisdiction of the Court of Federal Claims to the extent that damages exceed $10,000.").

[8] *See, e.g.*, *Vaupel v. U.S.*, 491 F. App'x 869, 873 (10th Cir. 2012) (describing a claim for "breach of fiduciary duty" as a claim under the FTCA); *Marlys Bear*

shareholders against Treasury, there is no contract between the shareholders and Treasury to which the fiduciary breach claims could relate.[9] We are not aware of a

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Med. v. U.S. ex rel. Sec'y of Dep't of Interior, 241 F.3d 1208, 1218 (9th Cir. 2001) (allowing a fiduciary-duty claim under the FTCA where the relevant state law recognized fiduciary-duty claims as tort claims and where the law "creates liability for the violation of a fiduciary duty regardless of the source of that duty"); *Jachetta v. U.S.*, 653 F.3d 898, 905-06 (9th Cir. 2011) (where "the fiduciary duty allegedly owed . . . arise[s] out of statutory or common law" and it is not possible that it arises from a "contractual undertaking," the "breach of fiduciary duties claim sounds in tort"); *Powers v. U.S. Dep't of Agric.*, 245 F. App'x 924, 927 (11th Cir. 2007); *In re Franklin Savings Corp.*, 385 F.3d 1279, 1286-87 (10th Cir. 2004); *Pearson v. U.S.*, 831 F. Supp. 2d 514 (D. Mass. 2011); *J.C. Driskill, Inc. v. Abdnor*, 901 F.2d 383, 386 (4th Cir. 1990); *Hicks & Ingle Co. of Virginia, Inc. v. Abdnor*, 703 F. Supp. 464 (E.D. Va. 1989).

[9] As explained in our prior briefing and at oral argument, Class Plaintiffs' Consolidated Class Complaint should be read to be advancing both derivative and direct fiduciary breach claims. *See* Doc. #1602879, at 13, 21-32; Doc # 1602880, at 17-23; Transcript of April 15, 2016, at 49:11-51:10. While Class Plaintiffs acknowledge that the direct claim is not pled as clearly as the derivative claim, the Consolidated Class Complaint alleges repeatedly that Treasury owed a fiduciary duty directly to shareholders, and breached that duty. *See* J.A. 258 (Title), 260 (¶107), 274 (¶176) (2 references), 275 (¶¶177, 180). Moreover, under Delaware law, it is well-established that under these circumstances a controlling shareholder can be both liable simultaneously for both direct and derivative fiduciary breach claims. *See Gatz v. Ponsoldt*, 925 A.2d 1265, 1280-81 (Del. 2007); *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006). Thus, given the liberal rules of notice pleading and the standards applied on a Rule 12 motion, Count VII of the Class Plaintiffs' Consolidated Class Complaint should be construed to advance direct and derivative claims. *See, e.g., Rahman v. Johanns*, 501 F. Supp. 2d 8, 16 (D.D.C. 2007). Alternatively, if the Court concludes that Class Plaintiffs did not adequately allege a direct claim of fiduciary breach on behalf of all shareholders, then the Court should remand with an order to grant Class Plaintiffs leave to amend to add that claim because "justice requires" that Class Plaintiffs be permitted to advance this claim. *See, e.g., DKT Mem'l Fund, Ltd. v. Agency for Int'l Dev.*, 810 F.2d 1236, 1239 (D.C. Cir. 1987) ("During argument before this court, counsel for appellants orally moved to amend appellants' complaint to add the affirmative allegation that, but for the Policy, the appellants would be eligible

case that has held a fiduciary breach claim to be "essentially contractual in nature" when the plaintiff does not have a contract with the agency that is the target of the fiduciary breach claim. For the derivative fiduciary breach claims brought on behalf of Fannie Mae, there is a contract between Fannie Mae and Treasury – the PSPAs. While it is true that the PSPAs gave rise to Treasury owing a fiduciary duty to Fannie Mae and Freddie Mac (and to the shareholders), the fiduciary breach claim is not based upon a breach of the PSPAs. It is based upon a self-dealing transaction in which Treasury and FHFA – two Government agencies – agreed to "amend" the PSPA so as to nullify all of the dividend and liquidation rights of private shareholders, and to ensure that 100% of all of Fannie Mae and Freddie Mac's net worth would be swept into Treasury for the rest of time.[10]

In any event, if the Court concludes that Class Plaintiffs' fiduciary breach claims against Treasury are "essentially contractual in nature," then the Tucker Act

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to receive AID funds. Because we conclude that appellants' failure to affirmatively plead eligibility in their original complaint was more inadvertent than deliberate, and because we believe our action is in the interest of justice, we grant appellants leave to amend their complaint as requested. . . . Accordingly, we reverse the district court order dismissing the original complaint and remand the case for the court's further consideration on this issue of standing in light of the amended complaint.").

[10] The mere fact that the fiduciary breach claims bear some connection to a contractual undertaking by the Government is not enough to render the FTCA inapplicable. *See, e.g.*, *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968-70 (D.C. Cir. 1982).

is the only statute providing a waiver of sovereign immunity and subject matter jurisdiction to hear those claims.

II. THE NON-TREASURY DEFENDANTS ARE NOT ENTITLED TO INVOKE SOVEREIGN IMMUNITY FOR FHFA'S ACTS AS A CONSERVATOR, AND THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION TO HEAR CLASS PLAINTIFFS' COMMON LAW CLAIMS AGAINST THESE DEFENDANTS.

The Court's second question asked as follows:

"2. Regarding all the class plaintiffs' other claims: a. Is each defendant subject to suit absent a waiver of sovereign immunity and, if not, is there such a waiver? The answer to this question should include a discussion of whether the FHFA's challenged actions were taken solely in the agency's capacity as conservator for Fannie Mae and Freddie Mac, or whether they were taken in whole or in part in a regulatory capacity. b. What is the source of subject matter jurisdiction over the claims?"

A. FHFA And The Companies Are Subject To Suit Without Any Waiver Of Sovereign Immunity, Which They Are Not Entitled To Invoke.

Neither the FHFA nor the Companies have ever invoked sovereign immunity in this case. There is a good reason for that: as a matter of law, they are not entitled to invoke sovereign immunity, but instead are subject to suit without the need for any waiver of immunity.

1. Class Plaintiffs' Claims Are Based On Actions FHFA Took Purportedly Acting As A Conservator, Not As A Regulator.

Class Plaintiffs advance a series of claims alleging that the Third Amendment violated numerous different common law rights held by Fannie Mae and Freddie Mac shareholders. J.A. 268-274. It was the execution of the Third Amendment by Treasury and by FHFA that triggered these claims. FHFA has repeatedly asserted that it executed the Third Amendment in its capacity as "conservator" for Fannie Mae and Freddie Mac.[11] Without agreeing that FHFA's execution of the Third Amendment was necessarily consistent with its *duties* as a conservator, Class Plaintiffs alleged in the Consolidated Class Complaint that FHFA executed the agreement in its *capacity* as a conservator. *See, e.g.*, J.A. 220 (¶ 15) ("FHFA, **as Conservator**, and Treasury acted together to ensure that

[11] *See, e.g.*, Fannie Mae Third Amendment, J.A. 2394 (referring to Fannie Mae "acting through the Federal Housing Finance Agency (the 'Agency') **as its duly appointed conservator**"); *id.* J.A. 2401 (signature block reads "Federal National Mortgage Association, by Federal Housing Finance Agency, **its conservator**"); Freddie Mac Third Amendment, J.A. 2402, 2409 (same); August 17, 2012 Press Release, J.A. 71, 241 (referring to modifications to the PSPAs taken by Treasury and FHFA "**as conservator**" of Fannie Mae and Freddie Mac); FHFA Statement on Changes to Fannie Mae and Freddie Mac Preferred Stock Purchase Agreements, J.A. 4026 ("The steps taken today between the Federal Housing Finance Agency (FHFA), **as conservator** of Fannie Mae and Freddie Mac and the U.S. Department of the Treasury…."); Doc. #1610211, at 4 n.4 ("FHFA **is not claiming** the Third Amendment is a regulatory action. . . . The Third Amendment was executed by FHFA **in its capacity as Conservator**."); Dkt. 24 at 27 ("the actions challenged by plaintiffs were undertaken by FHFA **in its capacity as statutory Conservator** of Fannie Mae and Freddie Mac") (all emphases added herein).

Treasury would be the sole beneficiary, to the exclusion of all other shareholders, of the Companies as operating enterprises") (emphasis added); *id.* J.A. 225 (¶ 25) ("Entry into the Third Amendment by Treasury and FHFA, **in its capacity as Conservator** for Fannie Mae and Freddie Mac, was not an arm's length agreement . . . .") (emphasis added).

In defending against claims brought in the Court of Federal Claims alleging that the Third Amendment was a Taking under the Fifth Amendment, the United States has argued that when FHFA executed the Third Amendment "as conservator," it was "not the United States" for purposes of a Takings Clause claim. Court of Federal Claims Case 1:13-cv-00385-MMS, Document 31, at 11-14. Class Plaintiffs do not agree that FHFA's agreement to the Third Amendment "as conservator" can immunize the Third Amendment from a Takings claim. After all, even when acting as a conservator, FHFA is still a government agency (albeit one that is not immune from suit), and any agreement it executes with another government agency (like Treasury) is still an agreement between two government agencies – and hence an action by the Government.

In any event, it is clear that both FHFA and the United States have repeatedly asserted that FHFA executed the Third Amendment acting as a "conservator." Neither has claimed that FHFA executed the agreement as a regulator.

2. The FHFA And The Companies Have No Sovereign Immunity For Claims Based On The FHFA's Actions As Conservator.

When a federal agency acts as a receiver or a conservator, it is not entitled to invoke sovereign immunity. Indeed, federal receivers and conservators are routinely sued without the issue of sovereign immunity ever being raised. *See, e.g.*, *Waterview Mgmt. Co. v. FDIC*, 105 F.3d 696 (D.C. Cir. 1997) (holding that FDIC/RTC as conservator or receiver could be liable for breach of pre-existing contracts); *Bank of Manhattan, N.A. v. FDIC*, 778 F.3d 1133 (9th Cir. 2015) (same); *see also Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 572 (1989) (holding that district court had jurisdiction to hear creditor claims against insolent savings and loans after FSLIC had substituted itself as receiver). Sovereign immunity appears to have been raised in such cases only as a defense on marginal issues such as prejudgment interest, and even there it has been rejected. *See, e.g.*, *FDIC v. Hickey*, 757 F. Supp. 2d 194, 197-98 (E.D.N.Y. 2010) (rejecting sovereign immunity defense to pre-judgment interest award against FDIC as receiver).

As this Court has explained, "a claim against the FDIC-as-receiver . . . is a claim against the depository institution for which the FDIC is receiver." *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1144 (D.C. Cir. 2011). Thus, since the underlying institution in conservatorship or receivership is not immune, neither is

the federal agency that is acting as conservator or receiver. *See FDIC v Maxxam, Inc.*, 523 F.3d 566, 695 (5th Cir. 2008) ("if FDIC were acting in its capacity as receiver, it would not likely be immune from an assessment of prejudgment interest") (footnote omitted).

Based on the principles set forth above, FHFA and the Companies are not entitled to claim sovereign immunity. Indeed, several courts have held that the imposition of the FHFA conservatorship did not cause Fannie Mae or Freddie Mac to become a federal agency.[12] Thus, there is no waiver of sovereign immunity required for the claims brought against FHFA, Fannie Mae, or Freddie Mac.

B. The District Court Had Subject Matter Jurisdiction Over Class Plaintiffs' Common Law Claims Against FHFA, Fannie Mae, And Freddie Mac.

1. The Statutory Charter For Freddie Mac Provides Subject Matter Jurisdiction Over All The Claims In This Case.

The statutory charter for Freddie Mac provides that "**all civil actions to which the Corporation** [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**

[12] *See, e.g.*, *Mik v. Fed. Home Loan Mortg. Corp.*, 743 F.3d 149, 168 (6th Cir. 2014) ("Freddie Mac is not a government actor"); *Fed. Home Loan Mortg. Corp. v. Shamoon*, 922 F. Supp. 2d 641, 645 (E.D. Mich. 2013) (FHFA conservatorship "does not and cannot transform that private corporation [Freddie Mac] into a government actor"), *appeal dismissed* (Sept. 5, 2013); *Hookano v. Wash. Mut. Bank, Inc.*, 2010 WL 4623956, at *2 (E.D. Cal. Nov. 4, 2010) ("Fannie Mae is a private, for profit entity" whose stock is "publicly traded on the New York Stock Exchange"); *Bridgeman v. U.S.*, 2011 WL 221639, at *11 (E.D. Cal. Jan. 21, 2011) ("by statute, Fannie Mae is not a federal agency").

have original jurisdiction of all such actions, without regard to amount or value." 12 U.S.C. § 1452(f) (emphasis added).

This statute is alone sufficient to provide the District Court with subject matter jurisdiction over all of the claims in this case. The statute applies to "all civil actions" in which Freddie Mac is a party, not just to the specific claims brought against Freddie Mac. Since Freddie Mac is a party to the civil action brought by Class Plaintiffs, the action "shall be deemed to arise under the laws of the United States," and therefore the District Court had original jurisdiction over the action pursuant to both 28 U.S.C. § 1331 and 12 U.S.C. § 1452(f).

Courts have properly read the plain text of § 1452(f) to provide federal question subject matter jurisdiction in cases involving multiple parties beyond Freddie Mac, including FHFA. *See Allen v. ABN AMRO Mortg. Grp., Inc*., 618 F. App'x 823, 826 (6th Cir. 2015); *Delaware Cnty., Pa. v. Fed. Hous. Fin. Agency*, 747 F.3d 215, 220 (3d Cir. 2014); *Curtis v. Cenlar FSB*, 2013 WL 5495554, at *1 (S.D.N.Y. Oct. 3, 2013); *Fed. Home Loan Mortg. Corp. v. Matassino*, 911 F. Supp. 2d 1276, 1278 (N.D. Ga. 2012). Thus, § 1452(f) provides federal question subject matter jurisdiction for **all of the claims** in this case. At a minimum, even if § 1452(f) somehow did not apply to all claims in this action (which, on its face, it does), its provision for federal question jurisdiction would provide a basis for

supplemental jurisdiction for any claims that it might be read not to cover directly. *See* 28 U.S.C. § 1367(a).

2. The Provisions Of CAFA Also Provide Subject Matter Jurisdiction Over All The Claims In This Case.

CAFA provides that "The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which (A) any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2). In this case, the class representative plaintiffs are citizens of Kansas, New Jersey, Vermont, Missouri, and New York. J.A. 226-228 (¶¶ 30-37).

The statutory charter for Defendant Fannie Mae provides that Fannie Mae "shall be deemed, for purposes of jurisdiction and venue in civil actions, to be a District of Columbia corporation." 12 U.S.C. § 1717(a)(2)(B). This statute has been widely interpreted to mean that Fannie Mae is a citizen of D.C. for purposes of determining diversity jurisdiction.[13] Thus, at least one plaintiff is a citizen of a

[13] *See Jeong v. Fed. Nat. Mortg. Ass'n*, 2014 WL 5808594, at *2 (W.D. Tex. Nov. 7, 2014); *Carter v. Mae*, 2014 WL 7339208, at *1 (C.D. Cal. Dec. 23, 2014); *Simms v. Nationstar Mortg., LLC*, 2014 WL 1515881, at *1 (E.D. Mo. Apr. 18, 2014); *Funderburk v. Fannie Mae*, 2014 WL 1292650, at *1 (N.D. Ga. Mar. 28, 2014); *Pinela-Navarro v. BAC Home Loans Servicing LP*, 2011 WL 3666586, at *1 (W.D. Tex. July 29, 2011); *Hayward v. Chase Home Fin., LLC*, 2011 WL 2881298, at *3 (N.D. Tex. July 18, 2011); *but see Lightfoot v. Cendant Mortg. Corp.*, 769 F.3d 681, 689-90 (9th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3720

State that is different from the State of citizenship of defendant Fannie Mae (indeed, *all* of the class representatives are citizens of States different from Fannie Mae's State of citizenship). This satisfies the minimal diversity needed to establish federal subject matter jurisdiction under CAFA.[14]

3. The Fannie Mae Charter Provides An Additional Basis For Subject Matter Jurisdiction, Though That Issue Is Being Reviewed By The Supreme Court.

The Fannie Mae statutory charter provides Fannie Mae with the power to "sued and be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1723a. This Court has held (as have several others) that this provision confers on federal courts "automatic" subject matter jurisdiction over all actions in which Fannie Mae is a party. *Pirelli Armstrong Tire Corp. Retiree Med. Ben. Trust ex rel. Fed. Nat'l Mortg. Ass'n v. Raines*, 534 F.3d 779, 786 (D.C. Cir. 2008). This holding is still binding, and provides another basis for subject matter jurisdiction over all claims in this case.

(U.S. June 28, 2016) (No. 14-1055); *Henok v. JPMorgan Chase Bank, N.A.*, 106 F. Supp. 3d 1, 7 n.6 (D.D.C. 2015).

[14] It is well-settled that a federal court only considers the citizenship of the named parties when determining whether there is diversity of citizenship in a class action. *Snyder v. Harris*, 394 U.S. 332, 340 (1969); *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 216 F.3d 291, 296 (2d Cir. 2000); *Nat'l Bank of Washington v. Mallery*, 669 F. Supp. 22, 25 (D.D.C. 1987); *see also* 7A Wright & Miller, Fed. Prac. & Proc. § 1755 (3d ed. 2016) ("the citizenship of the representative parties [is] determinative.") (collecting cases).

However, on June 28, 2016, the Supreme Court granted certiorari to review the question whether § 1723a provides federal courts with subject matter jurisdiction over all claims in which Fannie Mae is a party. *See Lightfoot v. Cendant Mortg. Corp.*, 769 F.3d 681, 689-90 (9th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3720 (U.S. June 28, 2016) (No. 14-1055). Given the number of other bases for subject matter jurisdiction in this case, it is not necessary for the Court to await the decision of the Supreme Court on the § 1723a issue, and we urge the Court not to do so.

CONCLUSION

Sovereign immunity does not bar Class Plaintiffs' claims, and this Court has subject matter jurisdiction to consider them.

Dated: July 6, 2016

Respectfully submitted,

/s/ *Hamish P.M. Hume*

Hamish P.M. Hume
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Ave., NW, Suite 800
Washington, DC 20015
Tel: (202) 237-2727
Fax: (202) 237-6131

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and this Court's Order dated June 21, 2016, I hereby certify that this brief complies with the page limitation because the text of the brief is not in excess of 7,500, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Times New Roman font using Microsoft Word.

Dated: July 6, 2016

/s/ *Hamish P.M. Hume*
Hamish P.M. Hume

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c), Cir. R. 25 and this Court's Order dated June 21, 2016, that on July 6, 2016, the foregoing was hand-delivered to the Court and electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: July 6, 2016

/s/ *Hamish P.M. Hume*
Hamish P.M. Hume