

**UNITED STATES DISTRICT COURT  
FOR THE NORTHER DISTRICT OF ILLINOIS**

CHRISTOPHER ROBERTS, and THOMAS  
P. FISCHER,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE  
AGENCY, in its capacity as Conservator of  
the Federal National Mortgage Association  
and the Federal Home Loan Mortgage  
Corporation, MELVIN L. WATT, in his  
official capacity as Director of the Federal  
Housing Finance Agency, JACOB J. LEW,  
in his official capacity as Secretary of the  
Treasury, and THE DEPARTMENT OF  
THE TREASURY,

Defendants.

Civil Action No. 1:16-CV-02107

**JOINT INITIAL STATUS REPORT**

On February 11, 2016, the Court issued a minute order directing the Parties to file a joint initial status report at least three business days before the initial status hearing scheduled for April 11, 2016. Dkt No. 4. The parties have met and conferred as directed and submit this Joint Initial Status Report to the Court.

**1. The Nature of the Case**

a. **Attorneys of Record:** Plaintiffs Christopher Roberts and Thomas P. Fischer are represented by Christian D. Ambler of Stone & Johnson, Chartered.

Defendants Federal Housing Finance Agency (“FHFA” or the “Conservator”)—in its capacity as Conservator for the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac,” and together with Fannie Mae, the

“Enterprises”)—and Melvin L. Watt (together, the “FHFA Defendants”) are represented by Kristen E. Hudson and Kara A. Allen of Chuhak & Tecson, P.C. and Howard N. Cayne, Asim Varma, and David Bergman of Arnold & Porter LLP, whose motions for leave to appear *pro hac vice* are currently pending before the Court. Dkt Nos. 16-19.

Defendants the U.S. Department of the Treasury (“Treasury”) and Jacob J. Lew are represented by the United States Attorney’s Office for the Northern District of Illinois and Caroline Anderson of the U.S. Department of Justice.

b. **The Basis for Federal Jurisdiction:** Plaintiffs assert that the Court has original jurisdiction over this action because Plaintiffs’ claims arise under federal law. *See* 28 U.S.C. § 1331; Compl. ¶ 23. Plaintiffs also allege the claim rises under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-706 and/or the Housing Economic Recovery Act of 2008 (“HERA”) (codified in part at 12 U.S.C. §§ 1455, 1719, 4617). *See* Compl. ¶ 23.

Defendants assert, *inter alia*, that 12 U.S.C. § 4617(f), the jurisdiction-withdrawal provision of HERA, deprives the Court of jurisdiction to grant the relief Plaintiffs seek.

c. **Nature of the Claims Asserted in the Complaint:** Plaintiffs challenge the terms of the Third Amendment to the Preferred Stock Purchase Agreements (“PSPAs”) between Treasury and the Conservator (referred to by Plaintiffs in their complaint as the “Net Worth Sweep”). Under the PSPAs, Treasury committed to infuse funds into Fannie Mae and Freddie Mac when and as necessary to eliminate any net worth deficit. The Third Amendment—executed on August 17, 2012—replaced the annual fixed-rate dividend provided for by the PSPAs, which was calculated and paid quarterly, based on the amount of each Enterprise’s respective draws from the commitment with a variable-rate dividend equal to the Enterprises net worth, if any (referred to by Plaintiffs in their complaint as the “Net Worth Sweep”), and

suspended the periodic commitment fee (“PCF”) intended to fully compensate Treasury for its ongoing commitment to infuse additional funds into the Enterprises for so long as the variable-rate dividend is in place. The PCF was deferred from 2010 to 2011 by an amendment to the PSPAs. Treasury waived the fee in 2011 and 2012.

Plaintiffs state that they challenge three other alleged aspects of the PSPAs and FHFA’s management of Fannie Mae and Freddie Mac, which they characterize as follows:

- FHFA’s alleged decision to pay Treasury cash, rather than “in-kind”, dividends. *See* Compl. ¶¶ 11, 14, 58, 132.
- Provisions of the PSPAs allegedly granting Treasury “substantial control” over FHFA’s operation of the conservatorships. *Id.* ¶¶ 12, 21, 63, 105, 123, 144.
- Treasury’s alleged standby commitment to acquire new equity in the Companies despite the expiration of its authority to acquire the Companies’ stock. *Id.* ¶¶ 19, 22, 52-53, 69, 145.

Plaintiffs state that they bring three claims for relief against Defendants: (i) FHFA allegedly exceeded its statutory authority as Conservator under HERA when it entered into the Third Amendment (Compl. ¶¶ 125-36); (ii) Treasury allegedly exceeded its statutory authority when it entered into the Third Amendment (*id.* ¶¶ 137-46); and (iii) Treasury’s conduct allegedly was arbitrary and capricious in violation of the APA (*id.* ¶¶ 147-57).

Defendants do not assert any counterclaims against Plaintiffs.

**d. Major Factual and Legal Issues:**

Plaintiffs believe that Defendants’ conduct exceeds the authority granted them by Congress and that Treasury acted in an arbitrary and capricious manner. Plaintiffs believe that the case should be decided on motions for summary judgment following the production of the administrative record. Plaintiffs do not anticipate that discovery will be necessary, assuming Defendants produce a proper administrative record.

Defendants believe that Plaintiffs' claims are barred by law and that the Complaint should be dismissed under Rule 12. Defendants thus intend to file motions to dismiss the complaint. For purposes of their Rule 12 motions, Defendants do not believe there are any disputed issues of material fact.

Plaintiffs identify the following as the major legal issues in the case:

- Whether FHFA has exceeded its statutory authority as conservator;
- Whether Treasury has exceeded its limited, temporary statutory authority invest in Fannie Mae and Freddie Mac;
- Whether Treasury has acted in an arbitrary and capricious manner.

Defendants identify the following as the major legal issues in the case:

- Whether Plaintiffs' claims are barred by 12 U.S.C. § 4617, including but not limited to 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as conservator or receiver";
- Whether the Conservator's succession by law to "all rights, titles, powers and privileges . . . of any stockholder," 12 U.S.C. § 4617(b)(2)(A)(i), deprives Plaintiffs of the right to maintain this action;
- Whether FHFA acted within its statutory authority as Conservator as provided by HERA;
- Whether Treasury acted within its statutory authority in executing the Third Amendment;
- Whether the APA applies to the challenged conduct;
- Whether the APA applies to the FHFA Defendants;
- Whether Treasury acted arbitrarily and capriciously in executing the Third Amendment; and
- In connection with whether Treasury's conduct was arbitrary and capricious, whether Treasury is a controlling shareholder in Fannie Mae and Freddie Mac and whether Treasury owes fiduciary duties to minority shareholders, including Plaintiffs.

e. **Relief Sought by Plaintiffs:** Plaintiffs seek declaratory and injunctive relief that would, *inter alia*, vacate the Third Amendment, re-characterize the dividends paid to date as paying down Treasury's liquidation preference, and enjoin FHFA and Treasury personnel from performing under Third Amendment. *See id.* Compl. ¶ 158 a.-j. (Prayer for Relief). Plaintiffs also seek declaratory and injunctive relief that would enjoin FHFA and Treasury personnel from performing the additional aspects of the conservatorship and PSPAs challenged as unlawful in the complaint.

## 2. Pending Motions and Case Plan

a. **Status of Service of Process:** Each of the Defendants has received service of process. *See* Dkt. Nos. 5-10 (affidavits of service filed by Plaintiffs regarding Summons and Complaint served on Defendants).

b. **Pending Motions:** There are currently at least six motions pending before the Court, with another motion to be filed shortly before or after the filing of this statement:

- The FHFA Defendants have moved for leave for Howard Cayne, Asim Varma, David Bergman, and Michael A.F. Johnson to appear *pro hac vice*. Filed on March 28, 2016, Dkt. Nos. 16-19.
- Plaintiffs have filed or plan to file within the next one or two days an amended complaint as of right. Because the amended complaint refers or will refer to information subject to a protective order, Plaintiffs have moved or plan to move to file the amended complaint under seal.
- Defendants moved to stay this action pending the decision of the Judicial Panel on Multidistrict Litigation (the "Panel") on FHFA's March 15, 2016 motion to transfer this case and other Related Cases for consolidated or coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407 to the District Court of the District of Columbia. Filed on April 5, 2016, Dkt. No. 23.
- The Parties filed an Agreed Motion For Extension of Time and Leave to Exceed Page Limits. Filed on April 5, 2016, Dkt. No. 26.

c. **Proposed Discovery Plan:**

Plaintiffs assert that no discovery is necessary at this time because they believe the case should be resolved on cross-motions for summary judgment following Defendants' production of the administrative record.

Defendants assert that no discovery nor the production of an administrative record is necessary or appropriate in this action because (i) the action should be stayed pending resolution of the motion to the MDL Panel to transfer this case and other Related cases, and (ii) in all events, the action should be resolved on motions to dismiss since Plaintiffs' Complaint should be dismissed under Rule 12.

d. **Jury Trial:** Plaintiffs have not requested a jury trial.

e. **Service of Pleadings and Other Papers by Electronic Means:** The Parties agree to service of pleadings and other papers by electronic means under Federal Rule of Civil Procedure 5(b)(2)(E).

**3. Consent to Proceed Before a Magistrate Judge**

a. The Parties are not unanimous regarding their consent to proceed before a Magistrate Judge for all purposes, including entry of final judgment.

**4. Status of Settlement Discussion**

No settlement discussions have occurred. The Parties do not believe that settlement is likely in this case, and, therefore, do not request a settlement conference.

Dated: April 6, 2016

Respectfully submitted,

/s/ Christian D. Ambler

Christian D. Ambler  
STONE & JOHNSON, CHTD.  
111 West Washington St.  
Suite 1800  
Chicago, Illinois 60602  
Telephone: (312) 332-5656  
Facsimile: (312) 332-5858  
[cambler@stonejohnsonlaw.com](mailto:cambler@stonejohnsonlaw.com)  
*Attorney for Plaintiffs Christopher  
Roberts and Thomas Fischer*

/s/ Kristen Hudson

Kristen Hudson  
CHUHAK & TECSON, P.C.  
30 South Wacker Drive | Suite 2600  
Chicago, Illinois 60606  
Telephone: (312) 444.9300  
Facsimile: (312) 444.9027  
KHudson@chuhak.com  
*Attorney for Defendants Federal Housing  
Finance Agency and Director Melvin L.  
Watt*

Howard N. Cayne (D.C. Bar # 331306)  
Asim Varma (D.C. Bar # 426364)  
David B. Bergman (D.C. Bar # 435392)  
ARNOLD & PORTER LLP  
601 Massachusetts Avenue NW  
Washington, D.C. 20001  
Telephone: (202) 942-5000  
Facsimile: (202) 942-5999  
Howard.Cayne@aporter.com  
Asim.Varma@aporter.com  
David.Bergman@aporter.com  
*Attorneys for Defendants Federal Housing  
Finance Agency and Director Melvin L.  
Watt*

BENJAMIN C. MIZER  
Principal Deputy Assistant Attorney  
General

DIANE KELLEHER  
Assistant Branch Director

*s/ Caroline J. Anderson*

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CAROLINE ANDERSON  
DEEPTHY KISHORE  
THOMAS ZIMPLEMAN  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, N.W.  
Washington, D.C. 20530  
Telephone: (202) 305-8645  
Facsimile: (202) 616-8470  
Caroline.J.Anderson@usdoj.gov  
*Attorneys for Defendants Department of the  
Treasury and Secretary Jacob J. Lew*