UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

DEFENDANTS' JOINT OPPOSITION TO FAIRHOLME FUNDS' MOTION TO APPEAR AND TO FILE AN AMICUS BRIEF

Defendants respectfully oppose Fairholme Funds, Inc.'s motion to appear and file an *amicus* brief advising the Court of the status of discovery in a different case in the United States Court of Federal Claims.[1] Fairholme seeks unprecedented relief for an *amicus*: a stay of the case until documents subject to a motion to compel and protective order in the other case become available to Plaintiffs in this case. But no such delay is necessary. Discovery—especially

[1] *See* Br. in Supp. of Fairholme Funds' Mot. for Leave to Appear as *Amicus Curiae* (filed Oct. 24, 2016) (ECF No. 51) ("Fairholme Br.").

discovery from a different case pending in the Court of Federal Claims—is irrelevant to the Court's consideration of the fully briefed, pending motion to dismiss.

Fairholme does not come before the Court as a disinterested *amicus*. Rather, Fairholme and its related plaintiffs have already lost two challenges to the Third Amendment. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 225-26 (D.D.C. 2014), *appeal docketed* No. 14-5243 (D.C. Cir. docketed October 8, 2014); *Continental W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 & n.6 (S.D. Iowa 2015). Parties other than Fairholme and its related plaintiffs have also had their Third Amendment challenges dismissed. *See, e.g.*, *Robinson v. FHFA*, No. 7:15-cv-109, 2016 WL 4726555 (E.D. Ky. Sep. 9, 2016) (dismissing APA challenge to Third Amendment).

The Northern District of Iowa denied Fairholme's attempt to file an *amicus* brief and appendix in a case presenting materially legal claims identical to those it proposes to present here. *See* Order Denying Motion for Leave to File Sealed Amicus Brief and Appendix in Support of Plaintiffs' Opposition to Defendants' Motions to Dismiss, at 3-4, *Saxton. et al. v. FHFA, et al.*, No. C15-0047 (filed Dec. 3, 2015 N.D. Iowa) (ECF No. 48) (attached as Exhibit A hereto). If Fairholme has further arguments to make, it should present them in the cases in which it is a party (the D.C. Circuit appeal in *Perry* and Fairholme's Court of Federal Claims suit). It is not entitled to do so by hijacking the expeditious conduct of this case.

Before looking to *any* discovery, the Court should rule on Defendants' fully-briefed motion to dismiss, which presents a "[f]acial challenge requir[ing] only that the court look to the complaint and see if the plaintiff has sufficiently *alleged* a basis of subject matter jurisdiction." *See Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009). These motions can be granted, and this case dismissed, as a matter of law pursuant to Fed. R. Civ. P. 12(b)(1).

Moreover, Plaintiffs in this case have disclaimed the need for *any* discovery beyond production of the specific administrative record. The Court should not permit *Fairholme* to clutter the record with collateral discovery Plaintiffs in this case have said they do not need.

BACKGROUND

Plaintiffs challenge the Third Amendment to an agreement between FHFA (as Conservator for Freddie Mac and Fannie Mae) and the United States Department of the Treasury. They claim that FHFA and Treasury exceeded their statutory authority in agreeing to the Third Amendment, and that Treasury acted arbitrarily and capriciously in violation of the Administrative Procedure Act. *See* Am. Compl. ¶¶ 158-191.[2]

From the beginning of this litigation, Plaintiffs have been clear that they would not require any discovery beyond Defendants' production of administrative records relevant to their claims. In opposing centralization of this case in an MDL proceeding, Plaintiffs explained that:

> Because the focus of the Illinois litigation [this case] varies from that of the other related actions, Plaintiffs Roberts and Fischer will rely on somewhat different administrative records. Moreover, Plaintiffs expect to be able to rely exclusively on their unique administrative record. . . . Plaintiffs believe the case can be resolved on a motion for summary judgment based upon the administrative record."[3]

On July 13, 2016, Defendants filed motions to dismiss, explaining that Plaintiffs' claims are barred by the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. §§ 4617(f)

---

[2] *See also* Joint Initial Status Report, at 3 (filed Apr. 6, 2016) (ECF No. 28) ("Joint Status Rep.").

[3] Response of Pls. Christopher Roberts and Thomas B. Fischer in Opp. to the Mot. for Transfer of Actions to the United States District Court for the District of Columbia, at 2 (filed Apr. 6, 2016 in *In re: Federal Housing Fin. Agency, et al., Preferred Stock Purchase Agreement Litig.*, MDL No. 2713). *See also* Joint Status Report, at 6 (Plaintiffs here explain 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.").

and 4617(b)(2)(A), by the statute of limitations, and for other independent reasons.[4] That motion is fully briefed and awaits the Court's decision.

On October 24, 2016, Fairholme filed its motion for leave to appear and to submit an *amicus* brief. *See* ECF Nos. 50 & 51. Fairholme explained that it was pursuing a challenge to the Third Amendment in the Court of Federal Claims, and had secured permission from that court "to take discovery into a variety of topics . . ." Fairholme Br. at 1. Fairholme claims this Court would benefit from its appearance as *amicus* because Fairholme could keep the Court posted on discovery developments in its Court of Federal Claims case. *Id.* at 1-2. Fairholme's proposed *amicus* brief further suggests that the Court defer ruling on the motions to dismiss pending resolution of certain discovery disputes in its Court of Federal Claims case. *See* Exh. A. to Mot. for Leave to Appear as Amicus Curiae by Fairholme Funds, Inc. (filed Oct. 24, 2016) (ECF No. 50, 50-1). On October 27, 2016, the United States petitioned the United States Court of Appeals for the Federal Circuit for mandamus review of the Court of Federal Claims' order compelling the production of the documents that Fairholme proposes this Court await. *See In re United States of America*, Case No. 17-104 (Fed. Cir. filed Oct. 27, 2016) (ECF No. 2).

ARGUMENT

"A federal district court's decision to grant amicus status to an individual . . . is purely discretionary." *U.S. Bd. of Educ. v City of Chicago*, No. 80 C 5124, 1993 WL 408356, at *3 (N.D. Ill. Oct. 12, 1993). Relevant considerations include whether the proffered information is "useful." *Id.* (*quoting Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill 1982)). The Court may "deny a movant amicus curiae status upon determining that the movant's proposed contribution

[4] *See* Mot. to Dismiss (filed July 13, 2016) (ECF No. 39-41).

is unnecessary." *City of Chicago*, 1993 WL 408356, at *3. Under these standards, the Court should deny Fairholme's request to appear and to file an *amicus* brief.

I. ANY CONSIDERATION OF DISCOVERY SHOULD AWAIT THE COURT'S RESOLUTION OF THE MOTION TO DISMISS

There is no need to delay a ruling on Defendants' motion to dismiss pending discovery developments in Fairholme's Court of Federal Claims case. Defendants' motions to dismiss present *facial* challenges to the sufficiency of Plaintiffs' Amended Complaint. The Court resolves such motions without reference to discovery: "[T]he Court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff." *YP Recovery, Inc. v. Yellowparts Europe, SL*, No. 15-cv-3428, 2016 WL 4549109, at 4 (N.D. Ill. Sept. 1, 2016). Then the Court need only "look to the complaint and see if the plaintiff has sufficiently *alleged* a basis of subject matter jurisdiction." *See Apex Digital, Inc.*, 572 F.3d at 443. For purposes of their motions to dismiss, consequently, Defendants have assumed the truth of Plaintiffs' allegations, and other "facts" presented by a party to an unrelated action in a different court have no role to play here.

Each district court that has considered the issue in Third Amendment challenges has ruled that it can resolve the motion to dismiss without regard to discovery or an administrative record. In *Saxton v. FHFA*, No. C.15-0047 (N.D. Iowa), plaintiff urged the court to require production of the administrative record before the court ruled on a HERA-based motions to dismiss. The court disagreed: "[b]oth sides agree that in considering the motion to dismiss, the Court must assume the truth of the allegations set forth in the complaint. Furthermore, assuming the truth of the allegations in the complaint, both sides agree the issues raised in Defendants' motions . . . may be addressed without resort to an administrative record. Accordingly, I find the requirement for filing an administrative record may be stayed pending the Court's resolution of

the motions . . ."[5] *See also Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 225-26 (D.D.C. 2014) (resolving motion to dismiss prior to discovery and without reliance on administrative record); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 & n.6 (S.D. Iowa 2015) (resolving motion to dismiss prior to discovery and prior to production of administrative record).

None of these cases relied on an administrative record, let alone permitted any discovery, when dismissing the APA claims. In *Perry Capital*, the district court concluded that the administrative record filed by Treasury was "irrelevant" and denied the plaintiffs' motion to supplement it.[6] 70 F. Supp. 3d at 225-26. In *Continental Western*, the court rejected the plaintiff's motion to compel production of an administrative record, explaining that the defendants' motions to dismiss were based on "purely legal arguments" that could be decided without resort to an administrative record. Ruling on Plaintiff's Motion to Compel Production of the Administrative Record at 6, *Cont'l W. Ins. Co. v. FHFA*, No. 4:14-cv-00042 (S.D. Iowa Aug. 5, 2014). In *Saxton*, similarly, the Court found that it could resolve the motion to dismiss (though it has not yet done so) without regard to the administrative record. Order Regarding Filing Administrative Record, *supra*, at 4-5.

Accordingly, there is no need to delay ruling on Defendants' motion to dismiss pending discovery or the production of an administrative record. Plaintiffs' claims can be dismissed as a matter of law without resort to such materials. *See, e.g.*, *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 266-67 (D.C. Cir. 2001) (holding that the district court was not

[5] Order Regarding Filing Administrative Record, at 4-5 (filed Oct. 2, 2015) in *Saxton v. FHFA*, No. C15-0047 (N.D. Iowa) (ECF No. 23). The motion to dismiss here is fully-briefed, yet Plaintiffs have never suggested that the Court cannot rule on it without consideration of discovery or the administrative record.

[6] FHFA as Conservator did not submit an administrative record in *Perry Capital*, but it did voluntarily submit a compilation of documents reflecting considerations it took into account in connection with execution of the Third Amendment.

required to order an agency to produce an administrative record because the APA claims could be resolved "with nothing more than the statute and its legislative history"). This Court should reject out of hand Fairholme's attempt to use the guise of *amicus* filings to clutter the record in this case with material from another case in another court that the parties here do not want and the Court does not need.

II. DISCOVERY FROM THE FAIRHOLME CASE IS UNNECESSARY WHEN PLAINTIFFS SAY THE CASE CAN BE RESOLVED WITH NO DISCOVERY

Plaintiffs have repeatedly announced that they need *no* discovery to resolve this case beyond Defendants' production of the administrative record. *See supra* note 3 and accompanying text. They have further explained their belief that the administrative record relevant here is "unique" and "different" from that relevant to other cases challenging the Third Amendment. *Id.* Under these circumstances, there is no benefit to Fairholme keeping the Court up-to-date on discovery in the Court of Federal Claims case. If Plaintiffs do not need discovery in *this* case, they certainly do not need discovery from a different case proceeding in a different court. *See, e.g.*, *United States v. Alkaabi*, 223 F. Supp.2d 583, 592 n.19 (D.N.J. 2002) (citation and quotation omitted) (an amicus curiae may not initiate, create, extend, or enlarge the issues raised by the parties).

CONCLUSION

The Court should deny Fairholme's motion to appear and submit an *amicus* brief. The Court should delay *any* consideration of discovery until it has ruled on Defendants' fully-briefed motions to dismiss. Those motions can be resolved solely by reference to the law and the Amended Complaint. There is, moreover, certainly no need to wait for discovery given Plaintiffs' repeated assurance that they need no discovery to resolve this case.

Dated: November 2, 2016

Respectfully submitted,

/s/ Kristen Hudson
Kristen Hudson
CHUHAK & TECSON, P.C.
30 South Wacker Drive, Suite 2600
Chicago, IL 60606
KHudson@chuhak.com

Attorney 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/ Deepthy Kishore
DEEPTHY KISHORE (IL Bar. 6306338)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 616-4448
Facsimile: (202) 616-8470
deepthy.c.kishore@usdoj.gov

Attorneys for Defendants Department of the Treasury and Secretary Jacob J. Lew

/s/ Howard N. Cayne
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

CERTIFICATE OF SERVICE

On November 2, 2016, I, Kristen E. Hudson, the undersigned attorney, hereby certify that Defendants' Joint Opposition to Fairholme Funds' Motion to Appear and to File an Amicus Brief was filed electronically using the Court's CM/ECF system, causing a true and correct copy to be served on all counsel of record.

By: s/ Kristen E. Hudson
Kristen E. Hudson

Kristen E. Hudson (ARDC #6281191)
CHUHAK & TECSON, P.C.
30 S. Wacker Drive, Suite 2600
Chicago, IL 60606
(312) 444-9300
khudson@chuhak.com