

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MICHAEL ROP, STEWART KNOEPP,
and ALVIN WILSON,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE
AGENCY, MELVIN L. WATT, in his
official capacity as Director of the Federal
Housing Finance Agency, and THE
DEPARTMENT OF THE TREASURY,

Defendants.

Civil Action No. 1:17-cv-00497
Hon. Paul L. Maloney

**NOTICE OF SUPPLEMENTAL AUTHORITY
BY THE DEPARTMENT OF THE TREASURY**

The United States Department of the Treasury (“Treasury”) submits this notice to inform the Court of a recent decision from the Supreme Court of Delaware, *California State Teachers’ Retirement System, et al. v. Alvarez*, No. 295, 2018 WL 547768 (Del. Jan. 25, 2018), that addresses an issue presented in Treasury’s pending motion to dismiss (ECF No. 22). A copy of that decision is attached to this notice.

Treasury has argued that claim preclusion bars Plaintiffs’ claims, which are derivative in nature and arise out of the same transaction that has formed the basis for prior derivative suits by other shareholders in Fannie Mae and Freddie Mac (referred to collectively in Treasury’s briefing as “the GSEs” or “the enterprises”). In opposition, Plaintiffs argued, among other things, that they are not in privity with the prior shareholder plaintiffs, notwithstanding the general rule, adopted by both the Sixth Circuit and other federal circuit courts, that a shareholder bringing a derivative

action is in privity with both the corporation and its shareholders and is thus bound by a judgment in a prior shareholder derivative action. Plaintiffs noted that this logic was “criticized” in a recent Delaware chancery court opinion, *In re Wal-Mart Stores, Inc. Del. Deriv. Litig.*, 167 A.3d 513 (Del. Ch. Ct. 2017), and, drawing an analogy to the class action context, argued that applying claim preclusion based on a judgment in a prior derivative suit would violate due process. *See* Pls.’ Brief in Opp’n to Def. Dep’t of the Treasury’s Mot. to Dismiss at 21, ECF No. 31. Treasury noted in its reply brief that the *Wal-Mart* decision was “contrary to the ‘current state of the law,’” Dep’t of the Treasury’s Reply Br. in Supp. of its Mot. to Dismiss at 9 n. 7, ECF No. 34 (quoting *In re Wal-Mart*, 167 A.2d at 524)), and argued that the due process concerns associated with a class action are not present in the context of a derivative suit.

In *In re Wal-Mart Stores*, the chancery court recommended the adoption of a rule that, as a matter of due process, a judgment in a shareholder derivative suit cannot bind the corporation or other shareholders “until the action has survived a Rule 23.1 motion to dismiss, or the board of directors has given the plaintiff authority to proceed by declining to oppose the suit.” 167 A.3d at 516. In the *California State Teachers’ Retirement System* decision, the Supreme Court of Delaware reviewed the chancery court’s decision and “decline[d]” to adopt this recommendation. 2018 WL 547768, at *2. The court recognized that the “corporation is always the sole owner of the claims” asserted in a derivative action and that, in such an action, “the corporation alone is the real party in interest.” *Id.* at 16. Accordingly, the court reaffirmed the principle that “differing groups of stockholders who seek to control the corporation’s cause of action share the same interest and therefore are in privity.” *Id.* at *17.

In so holding, the Court noted the “fundamental distinction” between a derivative shareholder plaintiff, who “never has an individual cause of action,” and a named class plaintiff,

who “initially asserts an individual claim and only acts in a representative capacity after the court certifies that the requirements for class certification are met.” *Id.* at 16. The Supreme Court of Delaware’s decision thus confirms the general rule that preclusion bars successive derivative claims by shareholder plaintiffs of the same corporation and establishes that, so long as the quality of the original shareholders’ representation was not “grossly deficient” and that those shareholders’ economic interests were not “antagonistic” to other shareholders, binding the later plaintiffs to an earlier judgment – even where that judgment was based on a threshold ground such as failure to plead demand futility – does not violate due process. *Id.* at 21.

The Court should dismiss Plaintiffs’ Amended Complaint for the reasons stated in Treasury’s briefs and further supported by *California State Teachers’ Retirement System*.

Dated: February 2, 2018

Respectfully submitted,

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