IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

THOMAS SAXTON, IDA SAXTON, BRADLEY PAYNTER, Plaintiffs, vs. 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, and THE DEPARTMENT OF THE TREASURY, Defendants.	Civil Action No. 1:15-cv-00047

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION
TO STAY SUBMISSION OF SCHEDULING ORDER

Thomas Saxton, Ida Saxton, and Bradley Paynter ("Plaintiffs") hereby submit this response to Defendants' Motion to Stay Submission of Proposed Scheduling Order Regarding Filing of Administrative Record (Aug. 26, 2015), Doc. 18 ("Defs.' Mot.").

INTRODUCTION

Both sides in this dispute believe that they are entitled to judgment as a matter of law based on undisputed facts. But rather than briefing all such potentially dispositive legal issues at once, Defendants ask the Court to give preference to their motions to dismiss by delaying production of the administrative records Plaintiffs would use to support a cross-motion for summary judgment. This is plainly not the most efficient course, for it would prevent the parties from presenting all potentially dispositive legal issues for the Court's consideration now. Nor is Defendants' preferred approach contemplated by this Court's rules, which call for setting a

deadline for the filing of an administrative record within 90 days of the commencement of a suit for judicial review of agency action. LR 16(i). There is no basis for Defendants' concerns about delay caused by disputes over the completeness of their submissions; assuming Defendants file administrative records substantially similar to their submissions in other courts, Plaintiffs will raise any concerns they have about the completeness of the records concurrently with their motion for summary judgment, and in no event will Plaintiffs seek discovery into the adequacy of the record before the resolution of the motions to dismiss. Defendants have failed to meet their burden of showing that this Court should deviate from its usual practice of promptly scheduling a deadline for the filing of an administrative record, and thus Defendants' motion should be denied.

ARGUMENT

The basic facts of this case are not subject to dispute. At a time when Fannie and Freddie (the "Companies") had started generating the largest profits in their history, Defendants changed the terms of Treasury's senior preferred stock so that *all* of the Companies' quarterly profits, less a small and decreasing capital reserve, would henceforth be paid exclusively to Treasury. The adoption of this unprecedented "Net Worth Sweep" generated a massive windfall for Treasury—the excess dividend payments already amount to $130 billion—and, as a practical matter, Treasury's claim to all of the Companies' profits in perpetuity extinguished private shareholders' economic interest in the Companies.

Starting from that common understanding of the facts, both sides in this case believe that they are entitled to judgment as a matter of law. Defendants have already filed motions to dismiss arguing that during conservatorship FHFA may do as it pleases with the Companies' assets without regard to the Companies' welfare or the interests of their investors, Department of

the Treasury's Memorandum in Support of its Motion to Dismiss the Complaint at 11–21 (Sept. 4, 2015), Doc. 19-1 ("Treas. MTD Br."); Memorandum in Support of Motion to Dismiss by Defendants Federal Housing Finance Agency and Melvin L. Watt at 20–30 (Sept. 4, 2015), Doc. 20-1 ("FHFA MTD Br."), that judicial review of FHFA's actions is only available if the agency agrees to sue itself, Treas. MTD Br. 21–28; FHFA MTD Br. 30–34, and that a decision by a district court in another circuit rejecting similar claims brought by different shareholders is binding on this Court, Treas. MTD Br. 28–33; FHFA MTD Br. 13–19.

While Defendants' motions to dismiss purport to be "facial" challenges to the sufficiency of the Complaint, Treas. MTD Br. 11; FHFA MTD Br. 12, at times they attempt to justify the Net Worth Sweep on the ground that it was necessary to relieve the Companies from their existing dividend obligations—a factual claim that the Complaint explicitly rejects. *Compare* Compl. ¶ 9 (alleging that "there was never any threat that the Companies would become insolvent by virtue of making cash dividend payments"), *with* Treas. MTD Br. 8–9, 15–16; FHFA MTD Br. 10, 23. But the Court can simply disregard the disputed factual claims in the motions to dismiss. *See* Ruling on Plaintiff's Motion to Compel Production of the Administrative Record at 6, *Continental W. Ins. Co. v. FHFA*, No. 4:14-cv-00042 (S.D. Iowa Aug. 5, 2014), ECF No. 42 (attached as Exhibit A to Defs.' Mot.) (stating that for purposes of motions to dismiss court would "take [plaintiff's] factual assertions bearing on its jurisdictional theory—that the net worth sweep was unnecessary and improperly motivated—as true"). Thus, assuming the Court ignores substantial portions of the motions to dismiss at odds with the Complaint's factual allegations, Defendants are correct that it can adjudicate their motions without consulting an administrative record. *See* Defendants' Brief in Support of Motion to Stay Submission of Proposed Scheduling Order at 4, 7 (Aug. 26, 2015), Doc. 18-1 (Defs.' Mot. Br.).

But Defendants' motions to dismiss only present half of the potentially dispositive threshold legal arguments in this case. Plaintiffs intend to argue that they are entitled to summary judgment because, irrespective of FHFA's reasons for agreeing to the Net Worth Sweep, it exceeded its conservatorship authority by gifting the Companies' profits in perpetuity to its sister agency and thereby guaranteeing that the Companies can never rebuild capital or resume normal operations. Similarly, Treasury's rationale for the Net Worth Sweep makes no difference because it devised and implemented this radical change to its investment in the Companies on August 17, 2012—well after its statutory authority to do so had expired on December 31, 2009. *See* 12 U.S.C. §§ 1455(*l*)(4), 1719(g)(4). The Court need only reference the most fundamental and incontrovertible facts about the Net Worth Sweep to determine the merits of these arguments, which closely relate to many of the issues presented in the motions to dismiss.

Under these circumstances, the most efficient course is clear: Plaintiffs should be permitted to respond to the motions to dismiss by cross-moving for summary judgment. Briefing on the cross-motions would present all of the closely related threshold legal issues for the Court's consideration at one time. If the Court grants either motion, all threshold issues could then be brought to the Eighth Circuit in a single appeal. If it denies both motions, the parties would then proceed to briefing on the merits. To facilitate this approach, Defendants should file what they represent to be complete administrative records, for those records would support the factual predicate for Plaintiffs' summary judgment motion.

Defendants worry that adopting this approach could trigger motions practice on the completeness of the administrative record that would delay resolution of their motions to dismiss. Defs.' Mot. Br. 5–6. But if Defendants file administrative records substantially

similar to those they have already filed elsewhere, *see Perry Capital v. Lew*, No. 1:13-cv-1025 (D.D.C. Dec. 17, 2013), ECF Nos. 26 & 27, that will be enough to enable Plaintiffs to present the dispositive legal arguments they contemplate making in a motion for summary judgment. Plaintiffs will raise any concerns they have about the completeness of the administrative record concurrently with their cross-motion for summary judgment, and in any event Plaintiffs have no intention of seeking discovery in this case until after the Court rules on the parties' cross motions.

Plaintiffs' proposal that Defendants be directed to produce what they represent to be complete administrative records, with any dispute over completeness of those records to be presented to the Court concurrently with Plaintiffs' cross-motion for summary judgment, is very different from the approach the plaintiff urged and the court rejected in *Continental Western*. There, the plaintiff sought to litigate the completeness of the administrative records before responding to Defendants' dispositive motions. Here, in contrast, Plaintiffs do not seek to delay briefing on the motions to dismiss but only to present all potentially dispositive threshold legal issues for the Court's consideration. Unlike the approach rejected in *Continental Western*, Plaintiffs' approach would expedite resolution of this important matter while promoting judicial efficiency by allowing the Court to simultaneously rule on all potentially dispositive legal issues on the basis of a single set of consolidated briefs.

Defendants also miss the mark when they argue that because the *Perry Capital* and *Continental Western* courts did not rely on administrative records, no such record is needed here. Defs.' Mot. Br. 5. Whether the *Perry Capital* court did in fact rely on the evidence Defendants submitted in that case is among the issues that are hotly contested on appeal. *See* Initial Opening Brief for Institutional Plaintiffs 67–77, *Perry Capital LLC v. Lew*, No. 14-5243 (D.C. Cir. June

29, 2015). Although the *Perry Capital* district court said that it did not need to review the administrative record, 70 F. Supp. 3d 208, 225–26 (D.D.C. 2014), elsewhere it appeared to resolve contested factual issues in Defendants' favor, *see, e.g.*, *id.* at 224 (crediting FHFA's assertion that it "executed the [Net Worth Sweep] to ameliorate the existential challenge of paying the dividends [the Companies] *already* owed"). In any event, the evidence Defendants submitted in *Perry Capital* made it possible for the plaintiffs in that case to move for summary judgment, and the D.C. Circuit now has the benefit of a more complete presentation of disputed legal issues as a result. Plaintiffs should be accorded a similar opportunity to move for summary judgment here. And while Defendants are correct that the *Continental Western* court opined on the merits of a challenge to the Net Worth Sweep without consulting an administrative record, that court's holding rested on issue preclusion, and the four-sentence footnote on which Defendants rely is pure dicta. *See* 2015 WL 428342, at *10 n.6 (S.D. Iowa Feb. 3, 2015).

Finally, Defendants make the puzzling argument that this Administrative Procedure Act suit will only become an "action[ ] for judicial review based on an administrative record" under LR 16(i) if the Court denies the motions to dismiss. Defs.' Mot. Br. 4. But the examples of administrative record cases provided in this Court's rules—"a Social Security benefits case or a claim-review case brought under the Employee Retirement Income Security Act of 1974," LR 16(d)(1)—give no indication that an action only seeks "judicial review based on an administrative record" after the Court denies any motions to dismiss. Local Rule 16(i) contemplates the early production of an administrative record in a suit challenging agency action, and following the usual course here will promote the just, speedy, and inexpensive resolution of this suit.

CONCLUSION

Defendants' motion to stay submission of a proposed scheduling order should be denied.

Dated: September 14, 2015

Respectfully submitted,

/s/ Alexander M. Johnson

Alexander M. Johnson, AT0004024
Sean P. Moore, AT0005499

BROWN, WINICK, GRAVES, GROSS,
BASKERVILLE AND SCHOENEBAUM, P.L.C.
666 Grand Avenue, Suite 2000
Des Moines, IA 50309-2510
Telephone: 515-242-2400
Facsimile: 515-283-0231
E-mail: ajohnson@brownwinick.com
moore@brownwinick.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September 2015, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system, causing a true and correct copy to be served on all counsel of record, as follows:

Matthew C. McDermott
Stephen H. Locher
BELIN MCCORMICK, P.C.
666 Walnut Street, Suite 2000
Des Moines, Iowa 50309-3989
E-mail: mmcdermott@belinmccormick.com
E-mail: shlocher@belinmccormick.com
and
Howard N. Cayne
Asi Varma
David B. Bergman
Ian S. Hoffman
ARNOLD & PORTER, LLP
555 12th Street, N.W.
Washington, D.C. 20004
E-mail: Howard.Cayne@aporter.com
E-mail: Asim.Varma@aporter.com
E-mail: David.Bergman@aporter.com
E-mail: Ian.Hoffman@aporter.com

ATTORNEYS FOR DEFENDANTS FEDERAL HOUSING FINANCE AGENCY and DIRECTOR MELVIN L. WATT

Bradley H. Cohen
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
E-mail: bradley.cohen@usdoj.gov

COUNSEL FOR DEFENDANT U.S. DEPARTMENT OF THE TREASURY

/s/ Alexander M. Johnson
Alexander M. Johnson