

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

MICHAEL ROP, *et al.*,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE
AGENCY, *et al.*,

Defendants.

Case No. 1:17-cv-00497

Oral Argument Requested

**MOTION TO DISMISS OF DEFENDANTS FEDERAL HOUSING FINANCE AGENCY
AS CONSERVATOR FOR FANNIE MAE AND FREDDIE MAC AND FHFA
DIRECTOR MELVIN L. WATT
(ORAL ARGUMENT REQUESTED)**

Defendants the Federal Housing Finance Agency (“FHFA”), as Conservator for Fannie Mae and Freddie Mac, and FHFA Director Melvin L. Watt (together, the “FHFA Defendants”), move for an order dismissing Plaintiffs’ First Amended Complaint for Declaratory and Injunctive Relief pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, based upon the following grounds:

1. The FHFA Defendants move to dismiss Counts I and II, which allege that the Third Amendment to preferred stock purchase agreements between FHFA, as Conservator for Fannie Mae and Freddie Mac, and the U.S. Treasury Department (“Third Amendment”) is invalid because FHFA’s status as an independent agency headed by a single Director and other structural features violate Article II of the Constitution and the separation of powers, for lack of subject matter jurisdiction. Plaintiffs lack Article III standing to bring those claims because

their alleged injuries are not traceable to the alleged constitutional violations and would not be redressed by an order finding FHFA's structure unconstitutional. The FHFA Defendants further move to dismiss Counts I and II and the ground that they fail to state a claim upon which relief may be granted because they are contradicted by well-established precedent upholding the constitutionality of independent agencies.

2. The FHFA Defendants move to dismiss Count III, which alleges that the Third Amendment is invalid because it was approved by an FHFA Acting Director in violation of the Appointments Clause of the Constitution, for failure to state a claim upon which relief may be granted because (a) settled precedent permits subordinate agency officials to act as the head of an agency without Senate confirmation, (b) Plaintiffs' challenge to the reasonableness of the President's nomination efforts and duration of the Acting Director's service presents non-justiciable political questions, (c) the *de facto* officer doctrine bars Plaintiffs' claim, and (d) the duration of the Acting Director's service was reasonable.

3. The FHFA Defendants move to dismiss Counts IV and V, which allege that the Third Amendment is invalid because FHFA as Conservator exercised powers in violation of the nondelegation and private nondelegation doctrines, for failure to state a claim upon which relief may be granted because the Conservator did not exercise any improperly delegated governmental power when it entered into the Third Amendment, and the Housing and Economic Recovery Act of 2008 provides intelligible principles.

4. The points and authorities supporting FHFA's motion to dismiss are more fully set forth in the brief being filed contemporaneously with this motion.

5. The FHFA Defendants further adopt and incorporate by reference the arguments set in support of the Treasury Department's motion to dismiss that Plaintiffs' claims are barred

by claim preclusion and because FHFA has succeeded to claims by shareholders of Fannie Mae and Freddie Mac. See ECF No. 23 at 14-24, PageID.307-317.

6. Pursuant to Local Civil Rule 7.1(d), counsel for the FHFA Defendants contacted Plaintiffs' counsel on September 8, 2017, inquiring whether Plaintiffs would concur in this Motion. Plaintiffs' counsel responded that they do not concur.

WHEREFORE, the FHFA Defendants respectfully request that the Court grant their motion and dismiss Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief with prejudice.

Dated: September 8, 2017

Respectfully submitted,

/s/ D. Andrew Portinga

D. Andrew Portinga (P55804)

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