

**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

**FHFA DEFENDANTS' NOTICE OF SUBSTITUTION
AND SUPPLEMENTAL MEMORANDUM**

The FHFA Defendants hereby advise the Court (1) of a leadership change at FHFA that necessitates substitution of parties under Federal Rule of Civil Procedure 25(d), and (2) that under its new leadership FHFA has reconsidered the issue in this case relating to the constitutionality of HERA's for-cause removal provision, presently takes the position that the provision is constitutional, and urges the Court to uphold the constitutionality of the structure Congress chose for FHFA. The FHFA Defendants thus urge the Court to reject all of Plaintiffs' claims challenging the Third Amendment in all respects.

1. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the FHFA Defendants provide notice that Mark A. Calabria has been sworn in to serve a five-year term as Director of the Federal Housing Finance Agency, effective April 15, 2019. We respectfully request that the caption be updated to substitute the new Director, Mr. Calabria, for the former Acting Director, Joseph M. Otting, as a Defendant in this case.

2. The FHFA Defendants further advise that, under its new leadership, FHFA has reconsidered the issues relating to the constitutionality of the Housing and Economic Recovery Act's ("HERA") provision requiring cause for removal of FHFA's Director.

In this case, Plaintiffs challenge the validity of a transaction known as the Third Amendment on various constitutional grounds. Plaintiffs' Count I alleges that it is unconstitutional for FHFA to be led by a single Director removable by the President only for cause, and that the Third Amendment is consequently invalid. *See* Pls.' First Am. Compl. ¶¶ 134-45, ECF No. 17, PageID.257-60. This case is currently pending on the parties' cross-dispositive motions: Defendants have moved to dismiss (ECF Nos. 22-25, PageID.285 *et seq.*), and Plaintiffs have moved for summary judgment (ECF No. 30, PageID.431 *et seq.*).

In their briefing on the cross-dispositive motions, the FHFA Defendants sought dismissal of Count I on the ground that Plaintiffs lacked standing, that HERA's for-cause removal provision satisfies constitutional requirements, and that even if the provision were unconstitutional, the validity of the Third Amendment would not be affected. In January 2019, after briefing was completed, the term of the prior FHFA Director expired. Under interim leadership, the FHFA Defendants advised this Court that they would no longer defend the for-cause removal provision's constitutionality and withdrew certain arguments on Count I that they had asserted in prior briefing. *See* Supplemental Memorandum filed Jan. 18, 2019, ECF No. 53, PageID.1605-06. The FHFA Defendants continued to argue, however, that Count I should be dismissed because Plaintiffs lack standing and because the constitutionality of HERA's for-cause removal provision is irrelevant to the Third Amendment's validity, and did not withdraw any arguments related to Counts II through V.

Under its new Director, FHFA has reconsidered the constitutionality of the removal provision. The FHFA Defendants now advise the Court that FHFA takes the position going forward that HERA's for-cause removal provision is constitutional. The FHFA Defendants accordingly withdraw the statements relating to this issue in their Supplemental Memorandum of January 18, 2019, and request that the Court treat their prior briefing on the parties' cross-dispositive motions as fully operative and presenting FHFA's position on Count I as well as all of the other counts. The FHFA Defendants respectfully request that, to the extent the Court finds it necessary to reach the constitutional issue in Count I, the Court uphold the constitutionality of HERA's for-cause removal provision, and that the Court enter judgment against Plaintiffs dismissing all claims challenging the Third Amendment.

Dated: July 23, 2019

Respectfully submitted,

/s/ D. Andrew Portinga
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