[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FAIRHOLME FUNDS, INC., et al., **Plaintiffs-Appellants,** **v.** **FEDERAL HOUSING FINANCE AGENCY, et al.** **Defendants-Appellees.**	**No. 14-5254**

TREASURY'S OPPOSITION TO FAIRHOLME'S SEALED MOTION FOR JUDICIAL NOTICE AND SUPPLEMENTATION OF THE RECORD

INTRODUCTION AND SUMMARY

In four lawsuits, institutional and individual shareholders of government-sponsored enterprises Fannie Mae and Freddie Mac (the enterprises) sought to challenge actions taken by the Federal Housing Finance Agency (FHFA) as conservator of the enterprises. In claims under the Administrative Procedure Act (APA), plaintiffs sought to set aside a 2012 amendment to 2008 preferred stock purchase agreements between FHFA and the Department of the Treasury. Plaintiffs also sought monetary relief.

The district court granted defendants' motions to dismiss. The court held that the claims for equitable relief are barred by the Housing and Economic Recovery Act of 2008 (HERA), which empowered FHFA to place the enterprises into conservatorship and which provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." 12 U.S.C. § 4617(f). The district court rejected plaintiffs' contention that the applicability of the HERA bar depends on FHFA's motives for entering into the 2012 amendment, Op. 21-22, and also rejected plaintiffs' contention that they could circumvent the HERA bar by suing FHFA's contractual counterparty, Treasury. Op. 15-16. The court explicitly rejected plaintiffs' contention that it needed a "full administrative record" to determine whether the HERA bar applies. Op. 22. The court dismissed plaintiffs' claims for monetary relief on threshold grounds including ripeness, HERA's bar on shareholder suits, and failure to state a claim. Op. 32-51.

Plaintiffs appealed and on June 29, 2015, the institutional plaintiffs filed their opening brief on appeal.[1] A month later, on July 29, one set of the institutional plaintiffs—the Fairholme Funds plaintiffs—filed a "Sealed Motion for Judicial Notice and Supplementation of the Record." That motion asks this Court to consider approximately 500 pages of sealed materials they obtained through discovery in their separate takings action that is pending before the Court of Federal Claims (CFC).

[1] A separate opening brief was filed by individual plaintiffs on June 30, 2015.

The motion should be denied. The principal issue on appeal is whether plaintiffs' claims are barred by HERA. Sealed documents obtained through discovery in other ongoing litigation have no bearing on that issue. Thus, the district court emphasized that the facts plaintiffs sought to establish were immaterial to the legal questions before the court. Op. 21-22.

Moreover, the sealed materials on which plaintiffs seek to rely are not "facts" that could be appropriate for judicial notice; instead, plaintiffs seek to submit deposition excerpts and other documents that, they contend, would create issues of fact. Nor do plaintiffs offer any basis for supplementing the administrative record with selected deposition excerpts and documents. Even when—unlike here—the reasonableness of an agency's decision is subject to APA review, judicial review is based upon "the administrative record already in existence." *Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 743-44 (1985) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).

Introducing hundreds of pages of materials at this juncture would also substantially prejudice defendants. Plaintiffs' opening briefs have already been filed, and defendants would have no opportunity to respond to whatever use plaintiffs may put the discovery materials in their reply brief, compounding the problems created by injecting untested deposition excerpts and other documents into these appeals.

STATEMENT

1. Congress created Fannie Mae and Freddie Mac in order to (among other goals) "promote access to mortgage credit throughout the Nation." 12 U.S.C.

§ 1716(3). To that end, the enterprises purchase mortgage loans from lenders, thus relieving lenders of default risk and freeing up lenders' capital to make additional loans. Op. 3. To finance those operations, the enterprises pool many of the mortgage loans they purchase into mortgage-backed securities and sell the securities to investors. Op. 3-4.

In 2008, turmoil in the housing market left the enterprises on the brink of collapse. Op. 4, 24. Given the danger that a Fannie Mae or Freddie Mac collapse posed to the already fragile economy, Congress enacted the Housing and Economic Recovery Act on July 30, 2008. Op. 4. HERA established the FHFA as an independent agency to supervise and regulate the enterprises, and granted FHFA authority to act as conservator or receiver of the enterprises, at its discretion. Op. 4-5 (citing 12 U.S.C. §§ 4511, 4617(a)). HERA empowered FHFA, as conservator or receiver, to "immediately succeed to—(i) all rights, titles, powers, and privileges of the [enterprises] and of any stockholder, officer, or director of such [enterprises] with respect to the [enterprises.]" Op. 5 (quoting 12 U.S.C. § 4617(b)(2)(A)(i)). And, as particularly relevant to these appeals, HERA set forth a "limitation on court action" that provides: "Except as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." Op. 5 (quoting 12 U.S.C. § 4617(f)).

Congress also recognized that Treasury (*i.e.*, taxpayer) funds would be needed to capitalize the struggling enterprises. Op. 5. HERA amended the enterprises'

charters to temporarily authorize Treasury to "purchase any obligations and other securities issued by" the enterprises. Op. 5 (quoting 12 U.S.C. § 1455(*l*)(1)(A)). HERA also provided that the "Secretary of the Treasury may, at any time, exercise any rights received in connection with such purchases." Op. 5 (quoting 12 U.S.C. § 1719(g)(2)(A)). Treasury's authority to purchase new securities from the enterprises expired on December 31, 2009. Op. 5 (citing 12 U.S.C. § 1719(g)(4)).

Following the enterprises' unsuccessful effort to raise capital in the private markets, FHFA placed the enterprises into conservatorship on September 6, 2008. Op. 5. One day later, Treasury entered into Senior Preferred Stock Purchase Agreements with each of the enterprises. Op. 5. Under the initial agreements, Treasury committed to provide up to $100 billion in public funding to each enterprise to ensure that their assets were equal to their liabilities—*i.e.*, to cure the enterprises' negative net worth—at the end of any fiscal quarter. Op. 5-6. In May 2009, FHFA and Treasury entered into the first amendment to the preferred stock purchase agreements, whereby Treasury doubled its funding cap to up to $200 billion for each enterprise. Op. 6. In December 2009, FHFA and Treasury amended the agreements for a second time to permit the enterprises to continue to draw unlimited sums from Treasury as required to cure any quarterly negative net worth until the end of 2012, when the Treasury's funding cap would be fixed by an agreed-upon formula. Op. 6.

In exchange for its funding commitment, Treasury received senior preferred stock in each enterprise, which entitled Treasury to four principal rights under the

initial preferred stock purchase agreements. Op. 6. First, Treasury received a senior liquidation preference of $1 billion plus a dollar-for-dollar increase each time the enterprises drew upon Treasury's funding commitment. Op. 6. Second, the agreements entitled Treasury to dividends equal to 10% of Treasury's existing liquidation preference, paid quarterly. Op. 6. Third, Treasury received warrants to acquire up to 79.9% of the enterprises' common stock at nominal price. Op. 6-7. Fourth, beginning on March 31, 2010, Treasury would be entitled to a periodic commitment fee to fully compensate Treasury for the support provided by the ongoing funding commitment. Op. 7. Treasury reserved the right to waive that fee for one year at a time based on adverse conditions in the United States mortgage market, and Treasury waived the commitment fee in 2010 and 2011. Op. 7.

As of August 8, 2012, Treasury had provided $187.5 billion in funding to the enterprises, and thus held a total of $189.5 billion senior liquidation preference between both enterprises. Op. 7-8. Therefore, under the terms of the initial preferred stock purchase agreements, the enterprises' dividend obligations to Treasury were nearly $19 billion per year. Op. 7-8.

On August 17, 2012, FHFA and Treasury agreed to a third amendment to the preferred stock purchase agreements, which is the subject of plaintiffs' claims. The third amendment replaced the previous dividend formula with a requirement that the enterprises pay, as a dividend, the amount by which their net worth for the quarter exceeds a capital buffer that would gradually decline over time. Op. 8. In other

words, the amount of the enterprises' dividend obligations would depend on whether the enterprises had a positive net worth in excess of the capital buffer during a particular quarter, rather than being fixed at 10% of Treasury's existing (and increasing) liquidation preference. The third amendment also suspended Treasury's entitlement to receive a commitment fee from the enterprises. Op. 7.

2. In four lawsuits filed in district court, institutional and individual shareholders of Fannie Mae and Freddie Mac sought to set aside the third amendment to the preferred stock purchase agreements; they also sought monetary relief. In claims under the APA, they alleged that the third amendment exceeded the agencies' authority and was arbitrary and capricious. They also alleged claims for breach of contract, breach of an implied covenant of good faith and fair dealing, breach of fiduciary duty, and taking without just compensation.

After the district court coordinated the cases for resolution, defendants moved to dismiss the claims. In response, the Fairholme Funds plaintiffs moved for "supplementation of the administrative record" and for "limited discovery into the completeness of the administrative records produced by [Treasury and FHFA.]" (No. 13-cv-1053 (D.D.C.), Dkt. 32, at 1).

The district court granted the motions to dismiss on threshold legal grounds and denied plaintiffs' motion for supplementation of the record and limited discovery as moot. (Dkt. 57, 58). The court ruled that the claims for equitable relief are barred by HERA's anti-injunction provision, which provides that "no court may take any

action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or receiver." 12 U.S.C. § 4617(f). The court explained that this provision "does indeed effect a sweeping ouster of courts' power to grant equitable remedies." Op. 12 (quoting *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995) (interpreting the nearly identical language of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)). The court ruled that the HERA bar precludes review of plaintiffs' claim that the third amendment should be set aside as arbitrary and capricious. Op. 13-15. It rejected plaintiffs' contention that they can circumvent the HERA bar by suing Treasury as FHFA's contractual counterparty, Op. 15-16, and also rejected their contention that the third amendment amounted to a purchase of new securities by Treasury in contravention of HERA, Op. 17-19.

The district court rejected plaintiffs' contention that the applicability of the HERA bar depends on FHFA's motives or justifications for entering into the third amendment to the preferred stock purchase agreements. Op. 21-22. It noted that such an inquiry "would render the anti-injunction provision hollow, disregarding Congress' express intention to divest the Court of jurisdiction to restrain FHFA's 'exercise of [its] powers or functions' under HERA." Op. 22 (alteration in original) (quoting 12 U.S.C. § 4617(f)). The court explained that it "need not look further than the current state of the [enterprises] to find that FHFA has acted within its broad statutory authority as conservator." Op. 24. "Four years ago, on the brink of collapse, the [enterprises] went into conservatorship under the authority of FHFA."

Op. 24. "Today, both [enterprises] continue to operate, and have now regained profitability." Op. 24. The court concluded that "plaintiffs plead no facts demonstrating that FHFA has exceeded its statutory authority as conservator," Op. 26, and it rejected plaintiffs' contention that it was required to "view the full administrative record to determine whether the Third Amendment, in practice, exceeds the bounds of HERA." Op. 22 (emphasis omitted).[2]

ARGUMENT

On June 29, the institutional plaintiffs filed their opening brief on appeal. A month later, on July 29, the Fairholme Funds plaintiffs filed a "Sealed Motion for Judicial Notice and Supplementation of the Record." That motion asks this Court to consider 500 pages of sealed materials that they obtained through discovery in their separate takings action before the Court of Federal Claims. The motion should be denied. The sealed materials that plaintiffs seek to introduce in the midst of appellate briefing have no bearing on legal issues before this Court. Moreover, those sealed materials are not "facts" that could properly be the subject of judicial notice, but select deposition excerpts and other documents that, plaintiffs contend, would create issues of fact. Nor is there any basis to supplement the record. An administrative record consists of materials that were considered by an agency at the time of its

[2] The district court dismissed plaintiffs' monetary claims on various threshold grounds including ripeness, HERA's bar on shareholder suits, 12 U.S.C. § 4617(b)(2)(A)(i), and failure to state a claim. *See* Op. 33-51.

decision, not deposition excerpts or other documents that were not part of the agency's decisionmaking process. And, in any event, the district court accepted as true the allegations in the complaint and granted the motion to dismiss on threshold legal grounds, rendering Fairholme's request to supplement the record moot.

A. Sealed Documents From Other Ongoing Litigation Have No Bearing On the Resolution Of The Legal Issues Presented On Appeal.

The principal issue on appeal is whether the district court correctly held that plaintiffs' attempts to set aside FHFA's third amendment to its preferred securities purchase agreements with Treasury are barred by HERA's anti-injunction provision, which provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." 12 U.S.C. § 4617(f). Interpreting the nearly identical provision of FIRREA, this Court held that this language "does indeed effect a sweeping ouster of courts' power to grant equitable remedies." *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995).

Contrary to Fairholme's premise, sealed documents obtained through discovery in other ongoing litigation have no bearing on the resolution of the legal issues presented on appeal. As the district court explained, the applicability of the HERA bar does not depend on the rationale for actions taken by FHFA as conservator of the enterprises. "The extraordinary breadth of HERA's statutory grant to FHFA as a conservator or receiver for the [enterprises], likely due to the bill's enactment during an unprecedented crisis in the housing market, *Cf. Freeman*, 56 F.3d at 1398, coupled

with the anti-injunction provision, narrows the Court's jurisdictional analysis to *what* the Third Amendment entails, rather than *why* FHFA executed the Third Amendment." Op. 21 (emphases in original). The court noted, for example, that "FHFA's underlying motives or opinions—*i.e.,* whether the net worth sweep would arrest a downward spiral of dividend payments . . . increase payments to Treasury, or keep the GSEs in a holding pattern . . . do not matter for the purposes of § 4617(f)." Op. 22. Similarly, the court declared that "contrary to the [Fairholme] plaintiffs' assertion . . . the Court need not view the full administrative record to determine whether the Third Amendment, *in practice,* exceeds the bounds of HERA." Op. 22.

Also contrary to Fairholme's suggestion, this suit is not the "exception[al]" case in which supplementation of the record is necessary because "injustice might otherwise result." *In re AOV Indus.*, 797 F.2d 1004, 1012 (D.C. Cir. 1986) (citing *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)). Unlike in the cases Fairholme cites, *see* Mot. 18-19, the extra-record materials do not "go to the heart" of the issues contested on appeal. *AOV Indus.*, 797 F.2d at 1012-13 (law firm's time sheets, obtained by the appellant during the appeal, went to the "heart" of the disputed issue on appeal—whether the law firm performed services for a client after a particular date); *Colbert v. Potter*, 471 F.3d 158, 165-66 (D.C. Cir. 2006) (postmarked envelope definitively resolved whether the plaintiff's suit had been timely filed, the central question on appeal). Rather, as noted above, the materials Fairholme asks this Court to introduce

into the appellate record are irrelevant to the threshold legal questions decided by the district court and under review by this Court.[3]

For the same reason, there is no basis for Fairholme's alternative request that this Court "remand this case so that (1) Fairholme can amend its complaint in light of the CFC discovery materials and (2) the district court can consider the materials in resolving Fairholme's unaddressed motion to take discovery into the sufficiency of Treasury's administrative record." Mot. 19-20. The district court concluded that, even accepting plaintiffs' allegations as true, the HERA bar applies. Accordingly, the district court granted the motions to dismiss and denied plaintiffs' motion for supplementation of the record and limited discovery as moot. (Dkt. 57, 58).

In any event, the materials that Fairholme seeks to introduce would not form part of the administrative record even if the HERA bar did not apply. An administrative record consists of materials that were considered by the decision-maker, and Fairholme falls far short of rebutting the "presumption of regularity" that attaches to an agency's compilation of the record. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 420 (1971). Moreover, even when an administrative

[3] Although the district court did not reach the question, *see* Op. 26 n.24, plaintiffs' APA claims are also precluded by HERA's bar on shareholder suits, 12 U.S.C. § 4617(b)(2)(A)(i). *See Kellmer v. Raines*, 674 F.3d 848, 850-51 (D.C. Cir. 2012). The materials Fairholme seeks to introduce are irrelevant to the purely legal question whether their APA claims are barred by § 4617(b)(2)(A)(i). Thus, Fairholme's extra-record materials also have no bearing on an alternate, threshold ground for affirmance.

record is inadequate to permit effective judicial review, the appropriate course is to obtain supplemental affidavits from the agency, not to engage in a de novo evaluation. *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973).

B. The Sealed Materials that Fairholme Seeks To Introduce Are Not Subject To Judicial Notice.

Even if the sealed materials that Fairholme seeks to introduce were relevant to the dispositive legal issues, those materials would not be subject to judicial notice. Under Rule 201(b) of the Federal Rules of Evidence, a court may take judicial notice of "a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See also Almerfedi v. Obama*, 654 F.3d 1, 10 n.3 (D.C. Cir. 2011).

Fairholme's sealed materials do not establish "facts" that could be appropriate for judicial notice; instead, Fairholme seeks to submit deposition excerpts and other documents obtained through discovery that, they contend, would create issues of fact with respect to FHFA's reasons for entering into third amendments and the reasonableness of the agencies' determinations. Even in the CFC, these discovery materials have not been the subject of findings of fact. Moreover, any ruling by the CFC would be subject to appellate review.[4]

[4] Although nothing here turns on the issue, we respectfully note that the CFC erred in allowing discovery on Fairholme's takings claim before acting on the government's dispositive motions. *Cf.* Op. 43-51 (identifying threshold defects in plaintiffs' takings claim).

The cases on which Fairholme relies provide no support for its attempt to introduce discovery materials from other litigation into these appeals. For example, in *Yellow Taxi Co. Of Minneapolis v. NLRB*, 721 F.2d 366, 375 (D.C. Cir. 1983), this Court took notice of a map showing geographical boundaries. In *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1265 n.5 (D.C. Cir. 2008), this Court took judicial notice of the number of potential members in a Tribe. And in *Nebraska v. EPA*, 331 F.3d 995, 998 n.3 (D.C. Cir. 2003), this Court took judicial notice of data contained in an EPA database. This Court has also taken judicial notice of official court records. *See Dupree v. Jefferson*, 666 F.2d 606, 608 n.1 (D.C. Cir. 1981) (record indicating that another lawsuit had been filed); *United States v. Hopkins,* 531 F.2d 576, 581 n.38 (D.C. Cir. 1976) (hearings); *United States v. Dancy*, 510 F.2d 779, 787 (D.C. Cir. 1975) (same); *Gomez v. Wilson*, 477 F.2d 411, 416 n.28 (D.C. Cir. 1973) (affidavits filed in other lawsuits where appellees conceded that the experiences recounted therein were consistent with police practice); *Xydas v. United States*, 445 F.2d 660, 667 (D.C. Cir. 1971) (using transcripts in another case to show that counsel was aware of information conveyed at the hearing); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 606-07 (D.C. Cir. 1987) (debts listed in a bankruptcy proceeding).

Those cases provide no support for Fairholme's attempt to introduce deposition excerpts and other materials to which Treasury and FHFA have had no opportunity to respond. Indeed, the introduction of hundreds of pages of materials in the midst of appellate briefing would substantially prejudice defendants, which

would have no opportunity to address whatever use plaintiffs might put the discovery materials in their reply brief.

CONCLUSION

For the foregoing reasons, Fairholme's "Sealed Motion for Judicial Notice and Supplementation of the Record" should be denied.

Respectfully submitted,

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AUGUST 2015

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2015, I electronically filed the foregoing response with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Gerard Sinzdak
GERARD SINZDAK