IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAVID JACOBS and GARY HINDES, on behalf of themselves and all others similarly situated, and derivatively on behalf of the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation,	)	
Plaintiffs,	)	
v.	)	C.A. No. 15-708
THE FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, and THE UNITED STATES DEPARTMENT OF THE TREASURY,	)	
Defendants,	)	
and	)	
THE FEDERAL NATIONAL MORTGAGE ASSOCIATION and THE FEDERAL HOME LOAN MORTGAGE CORPORATION,	)	
Nominal Defendants.	)	

DEFENDANTS' OPPOSITION TO MOTION BY TIMOTHY HOWARD FOR LEAVE TO PARTICIPATE AMICUS CURIAE

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Dated: February 19, 2016

INTRODUCTION

Defendants hereby submit this opposition to the motion for leave by Timothy Howard to file an amicus curiae brief in support of Plaintiffs' opposition to the motions to dismiss filed by the United States Department of the Treasury ("Treasury"), the Federal Housing Finance Agency ("FHFA"), and nominal Defendants Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac"). (ECF No. 26).

Mr. Howard is not a disinterested nonparty. To the contrary, he is the former Chief Financial Officer, and former Vice Chairman of the Board of Directors, of Fannie Mae. He resigned in 2004 in the face of allegations of financial improprieties and ongoing investigations into Fannie Mae's accounting practices.[1] Mr. Howard, without having bothered to confer with Defendants, now seeks to insert himself into this case, four months after the Court established a briefing schedule for dispositive motions, (ECF No. 14), and over two months after Defendants filed their motions to dismiss. Mr. Howard's motion should be denied because he improperly seeks to use amicus filings (1) to inject his personal commentary concerning factual issues that were not raised by the parties and are irrelevant to the threshold jurisdictional issues in Defendants' motions to dismiss, and (2) to advance his own interests as a shareholder and former CFO of Fannie Mae, rather than assist the Court with any legal question presented by the pending motions to dismiss.

[1] *See* David S. Hilzenrath, *Fannie Mae's Top Executives Leaving Firm*, THE WASHINGTON POST (Dec. 22, 2004), http://www.washingtonpost.com/wp-dyn/articles/A17241-2004Dec21.html.

ARGUMENT

There is no inherent right of a nonparty to file a brief as an amicus curiae, *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999), and "[n]o statute, rule, or controlling case defines a federal district court's power to grant or deny leave to file an amicus brief." *United States ex rel. Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 927–28 (S.D. Tex. 2007); *United States v. Michigan*, 116 F.R.D. 655, 660 (W.D. Mich. 1987). The decision to accept participation by an amicus is committed to the sound discretion of the Court. *Mausolf v. Babbitt*, 158 F.R.D. 143, 148 (D. Minn. 1994), *rev'd on other grounds*, 85 F.3d 1295 (8th Cir. 1996). However, "a district court lacking joint consent of the parties should go slow in accepting . . . an amicus brief." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). Amicus status may be granted where "(1) the petitioner has a 'special interest' in the particular case; (2) the petitioner's interest is not represented competently or at all in the case; (3) the proffered information is timely and useful; and (4) the petitioner is not partial to a particular outcome in the case." *Liberty Res., Inc. v. Philadelphia Hous. Auth.*, 395 F. Supp. 2d 206, 209 (E.D. Pa. 2005) (citation omitted).

Mr. Howard meets none of these criteria, and his motion should be denied. According to Mr. Howard, his sole interest in this litigation "is ensuring that the Court has a factually accurate understanding of the relevant details concerning the government's placement of [Fannie Mae and Freddie Mac, collectively, "the GSEs"] into conservatorship, and the subsequent management and operation of that conservatorship." (ECF No. 26, at 2); (ECF No. 26–2, at 1). This is far from an accurate statement of his interests. His brief is in fact replete with his personal commentary and characterizations

of factual issues that were not raised by the parties, including, for example, his allegations that "Fannie and Freddie had enough business revenue . . . to cover all of their credit losses and administrative expenses," (ECF No. 26–2, at 2), and that "Fannie and Freddie had not been purchasing or guaranteeing the types of toxic mortgages that caused the housing boom and subsequent bust," (*id.* at 13). It is not the proper role of an amicus curiae to submit briefs addressing purely factual, as opposed to legal, matters. Thus, "an amicus who argues facts"—as Mr. Howard seeks to do here—"should rarely be welcomed." *Strasser*, 432 F.2d at 569. *Cf. United States v. Yaroshenko*, 86 F. Supp. 3d 289, 290 (S.D.N.Y. 2015) ("To the extent that Russia seeks to comment on the existence of allegedly newly discovered evidence, that is not the proper role of an amicus."); *High Sierra Hikers Ass'n v. Powell*, 150 F. Supp. 2d 1023, 1045 (N.D. Cal. 2001), *aff'd*, 390 F.3d 630 (9th Cir. 2004) ("Amici are not parties and cannot introduce evidence."); *State of New York v. Microsoft Corp.*, Civ. No. 98–1233, 2002 WL 31628215, at *1 (D.D.C. Nov. 14, 2002) (consideration of amici materials would be "improper" where the amici did not address "issues of law, but instead offer[ed] factual information" concerning "the substantive issue").

In all events, Mr. Howard's participation would not be useful to the Court; his proposed amicus brief presents no argument that is remotely relevant to the threshold jurisdictional issues presented in Defendants' motions to dismiss. *See United States v. Alkaabi*, 223 F. Supp. 2d 583, 593 n.19 (D.N.J. 2002) ("The named parties should always remain in control, . . . [and a]n amicus cannot initiate, create, extend, or enlarge issues." (quotations and citations omitted)). No matter how Mr. Howard might attempt to disparage Defendants' motives or mischaracterize the decision to place the GSEs into

conservatorship (a decision that is not even at issue in this case), the governing federal statute deprives the Court of jurisdiction over Plaintiffs' claims against Defendants, sovereign immunity bars Plaintiffs' claims against Treasury, and Plaintiffs' claims otherwise fail as a matter of law. Mr. Howard makes no attempt to show otherwise, and his brief, based as it is on his purported factual assertions that have no bearing on the pending jurisdictional issues, would not be useful to the Court in deciding Defendants' motions to dismiss. Courts in this circuit routinely deny requests for amicus participation where, as here, the proposed amicus submission fails to meaningfully address legal arguments actually raised by the parties in pending motions.[2]

What is more, Mr. Howard fails to show any valid interest in this litigation that would warrant his participation as an amicus curiae. His submission makes clear that he is "not a disinterested stranger offering to illuminate a legal issue," *Am. Satellite Co. v. United States*, 22 Cl. Ct. 547, 549 (Fed. Cl. 1991), but is instead attempting to use amicus filings for improper personal purposes. He devotes the majority of his proposed brief to pressing his claims that Fannie and Freddie (1) did not need to be "rescued" by the government, (ECF No. 26–2, at 2 & 3–10), and "never experienced a *market* crisis,"

[2] *See, e.g.*, *Am. Coll. of Obstetricians & Gynecologists*, 699 F.2d 644, 645 (3d Cir. 1983) (denying leave to file amicus brief because there was "no indication" that the parties "[could] not adequately present all relevant legal arguments"); *Price v. Corzine*, Civ. No. 6–1520, 2006 WL 2252208, at *3 (D.N.J. Aug. 7, 2006) (denying leave where proposed amicus submission addressed factual allegations that "would not be useful to the Court in deciding Defendant's motion [to dismiss]," and Plaintiffs were "adequately represented by competent counsel"); *New Jersey Prot. & Advocacy, Inc. v. Twp. of Riverside*, Civ. No. 04–5914, 2006 WL 2226332, at *5 (D.N.J. Aug. 2, 2006) (denying leave where proposed amicus brief "would have no effect on the outcome of the present [dispositive] motion"); *Korrow v. Aaron's Inc.*, Civ. No. 10–6317, 2015 WL 7720491, at *12 (D.N.J. Nov. 30, 2015) (denying leave where proposed amicus curiae "failed to show that its appearance would be useful to the Court for the purposes of resolving Defendant's [pending motion]).

(ECF No. 26–2, at 4) (emphasis in original); (2) were "the most disciplined sources of mortgage credit prior to the crisis," (ECF No. 26–2, at 12), and (3) "did not request or require assistance at the time they were taken over," (ECF No. 26–2, at 17). But he nowhere explains how his various theories concerning the GSEs' business operations or Treasury's alleged motives are relevant to deciding the legal issues presented by the pending motions to dismiss. As the Court of Federal Claims has already determined,[3] "Mr. Howard is not a dispassionate, independent expert, but rather, a stockholder and former Fannie Mae executive with a personal motivation to resuscitate his career and be vindicated about his leadership of Fannie Mae." *Fairholme Funds, Inc. v. United States*, Civ. No. 13–465 (Fed. Cl.), Op. and Order 5, ECF No. 101 (Oct. 15, 2014). "When the party seeking to appear as *amicus curiae* is perceived to be an interested party or to be an advocate of one of the parties to the litigation, leave to appear *amicus curiae* should be denied." *Liberty Lincoln Mercury, Inc.*, 149 F.R.D. at 82. Thus, Mr. Howard should not be permitted to use the guise of amicus participation to advance his own personal agenda—for example, to convince the public of his sound leadership of Fannie Mae[4]—

[3] In a suit pending in the U.S. Court of Federal Claims, *see Fairholme Funds, Inc. et al. v. United States*, No. 13–465 (Fed. Cl.), the plaintiffs moved to admit Mr. Howard as an expert to give him access to discovery material that is subject to a protective order. In denying the plaintiffs' motion, the court explained: "[T]he totality of the circumstances—Mr. Howard's history with Fannie Mae, the government, and the mortgage industry; his express desire to be part of the public discussion regarding each; his public discussion of and opining on such matters; and his stock ownership—raise concerns that protected information could be disclosed, inadvertent or otherwise, and that dire consequences would result." *Id.*, Op. and Order 5, ECF No. 101 (Oct. 15, 2014).

[4] In addition, Mr. Howard has stated publicly that he desires "to be part of the debate over the future of Fannie Mae and its counterpart, Freddie Mac," and that he has authored a book as part of that initiative. *See* Kathleen Day, *Former Fannie Mae CFO Joins Debate On Its Future*, USA TODAY (Jan. 27, 2014), http://www.usatoday.com/story/money/business/2014/01/27/former-fannie-mae-cfomortgage-wars/4773547/ ("I want to re-insert

rather than assist the Court with any legal question presented by the pending motions. *See Goldberg v. City of Philadelphia*, Civ. No. 91-7595, 1994 WL 369875 (E.D. Pa. July 14, 1994) (denying amicus participation to movant who "appear[ed] to be a friend of the Plaintiff, not a friend of the Court"); *United States v. Gotti*, 755 F.Supp. 1157, 1158–59 (E.D.N.Y.1991) (rejecting amicus curiae application for its failure to provide an "objective, dispassionate, neutral discussion of the issues").

Similarly, as a shareholder in the GSEs, Mr. Howard should not be permitted to use amicus filings to evade the statutory bar on prosecution of shareholder claims during conservatorship and thereby litigate factual issues concerning Treasury's purported motives in entering into the Third Amendment. *See, e.g.*, (Treasury's Opening Br. in Supp. of Mot. to Dismiss, ECF No. 20, at 18–22) (discussing 12 U.S.C. § 4617(b)(2)(A)'s prohibition of suits brought by shareholders of Fannie Mae and Freddie Mac during conservatorship). The interests of Plaintiffs, themselves shareholders in the GSEs, are adequately represented by Plaintiffs' counsel, and Mr. Howard offers no suggestion that his interests diverge from those of Plaintiffs in any way that would require additional briefing. Nor does he offer any reason to suppose that Plaintiffs—who commenced this action by filing a 190-paragraph complaint—are incapable of "ensuring that the Court has a factually accurate understanding of the relevant details," (ECF No. 26, at 2); (ECF No. 26–2, at 1), concerning the conservatorship. Court after court has

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myself into the public discussion . . . .").

held that amicus status should not be granted in a situation like this one, where the movant is merely hoping to pile on as an advocate for one of the parties.[5]

Finally, Mr. Howard's motion should be denied because it is untimely, disruptive, and prejudicial to Defendants. The Court's scheduling order allotted the parties equal time and limited space to present their arguments. There is no sound basis for allowing Mr. Howard to provide seventeen additional pages of extraneous and irrelevant briefing, especially where he waited until briefing was nearly completed on the motions to dismiss to request permission to submit an amicus brief. *See Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (noting that amicus status should be granted cautiously because of "the time and other resources required for the preparation and study of, and response to, amicus briefs").

CONCLUSION

For the reasons discussed above, Defendants oppose the motion of Timothy Howard for leave to file brief amicus curiae in opposition to Defendants' motions to dismiss.

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[5] *See Liberty Lincoln Mercury v. Ford Mkt. Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993) ("When the party seeking to appear as *amicus curiae* is perceived to be an interested party or to be an advocate of one of the parties to the litigation, leave to appear as amicus curiae should be denied.") (collecting authorities); *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (denying amicus status to party that merely wished to weigh in as partisan advocate for petitioner) (citing *United States v. Michigan*, 940 F.2d 143, 164–65 (6th Cir. 1991)); *Leigh v. Engle*, 535 F. Supp. 418, 422 (N.D. Ill. 1982) (stating that the "shift in traditional amicus curiae practice" towards partisan advocacy may be appropriate for appellate practice, but "it is not proper in a trial court"); *Fluor Corp. v. United States*, 35 Fed. Cl. 284, 286 (1996) (denying motion for leave to file an amicus brief where the litigants were "adequately represented by counsel and interested in the issue which is of concern to the movants," and the proposed amici brief was "decidedly partisan"); *cf. Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff'd*, 782 F.2d 1033 (3d Cir.), *cert denied*, 476 U.S. 1141 (1986) (noting that "[w]here a petitioner's attitude toward the litigation is patently partisan, he should not be allowed to appear as amicus curiae.") (citation omitted).

Dated: February 19, 2016

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