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. 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.*	C.A. No. 15-708-GMS

REPLY BRIEF IN SUPPORT OF MOTION BY TIMOTHY HOWARD FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

It is no surprise that Defendants are desperate for the Court to decide this case on the basis of a false narrative about the "rescue" of Fannie and Freddie that Defendants have spent years promoting in both the courts and the public square. As Mr. Howard's amicus brief makes clear, the Net Worth Sweep was the culmination of a long-running scheme by the Department of Treasury and FHFA to destroy the investments of Fannie's and Freddie's shareholders and to

seize those Companies' substantial profits for the exclusive benefit of the federal government. That reality places in stark relief the deeply troubling consequences of Defendants' assertion that, in effect, the Housing and Economic Recovery Act of 2008 ("HERA") allows them to do whatever they want with Fannie and Freddie.

But rather than actually engaging the arguments in Mr. Howard's brief, Defendants urge the Court to ignore them on the basis of their radical reading of HERA, an outdated view of the role of amicus briefs that the Third Circuit has rejected, and various other arguments at odds with the weight of precedent. None of Defendants' arguments is persuasive, and the Court should grant Mr. Howard leave to file his amicus brief.

I. Mr. Howard's Amicus Brief Will Assist the Court in Deciding Issues Raised by the Motions to Dismiss.

The upshot of many of Defendants' arguments in their motions to dismiss is that this suit cannot go forward because various provisions of HERA allow them to do anything they want with the Companies—up to and including operating the Companies in violation of their charters, seizing private shareholders' interest in the Companies' substantial profits for the exclusive benefit of the federal government, and exercising private shareholders' rights even while disclaiming any obligation to consider their interests. The breathtaking scope of Defendants' assertion of power would be problematic even if there were reason to believe that Defendants could be counted upon to treat the Companies and their shareholders with benevolence. But Mr. Howard's amicus brief explains why that is not the case. Rather, Defendants spent years manipulating financial markets and accounting policies attempting to ensure the Companies' ultimate demise before finally settling upon the Net Worth Sweep.

Mr. Howard's amicus brief shows that the Court does not need to imagine hypotheticals to test the limits of the powers Defendants assert for themselves, for *this very case* is the *reductio*

ad absurdum of Defendants' reading of HERA. The Congress that enacted HERA could not have possibly intended to give Defendants unchecked authority to engage in the conduct detailed in Mr. Howard's amicus brief, and understanding how the Companies were placed into conservatorship and accumulated the large liquidation preference on Treasury's senior preferred stock is key to correctly deciding the issues presented in Defendants' motions to dismiss. Defendants themselves assumed as much in their motions to dismiss by providing lengthy explanations of their own (inaccurate) account of the events that led up to the Net Worth Sweep. *See* Opening Brief in Support of Motion to Dismiss of the Department of the Treasury at 3–8 (Nov. 13, 2015), Doc. 20; Opening Brief in Support of Motion to Dismiss of the Department of FHFA, Fannie Mae and Freddie Mac at 5–8 (Nov. 13, 2015), Doc. 18. Mr. Howard's brief discusses issues that are highly relevant to this case from the unique perspective of a former Fannie CFO who is intimately familiar with the Companies' business and accounting practices. The amicus brief would be useful to the Court, and Mr. Howard should be permitted to file it.

II. Defendants' Objections to Mr. Howard's Amicus Brief Are at Odds with Third Circuit Precedent and Numerous Other Authorities.

Unable to successfully dispute the relevance of the issues discussed in Mr. Howard's brief, Defendants fall back on a bevy of procedural objections to the filing of his brief. None is persuasive.

First, while Defendants argue that Mr. Howard is not a proper amicus because his extensive experience as Fannie's CFO means he is not "a disinterested nonparty," Defendants' Opposition to Motion by Timothy Howard for Leave to Participate Amicus Curiae at 1, 4–7 (Feb. 19, 2016), Doc. 30 ("Opp."), they neglect to mention that the leading Third Circuit case on the standard for filing amicus briefs squarely rejected the argument that only "impartial" amicus briefs are permissible. *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128,

131 (3d Cir. 2002).[1] As then-Judge Alito explained, the prevailing view in the federal courts today is that amici are *required* to have an interest in the litigation in which they seek to participate, *id.* (citing, *inter alia*, FED. R. APP. P. 29), and "it is not easy to envisage an amicus who is 'disinterested' but still has an 'interest' in the case," *id.* Furthermore, most courts reject the implication of Defendants' argument "that a strong advocate cannot truly be the court's friend" as "contrary to the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making." *Id.* In short, Defendants' argument that Mr. Howard should not be allowed to file his amicus brief because he cares about the public policy implications of this case is contrary to the prevailing modern practice in the federal courts. *See, e.g., Shain v. Veneman*, 278 F. Supp. 2d 1006, 1008 n.2 (S.D. Iowa 2003) (leave to participate as amici was granted "given the obvious interest" of amici in the litigation); *Waste Mgmt. of Pennsylvania, Inc. v. City of New York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995) ("[B]y the nature of things an *amicus* is not normally impartial.") (quoting United States v. Gotti, 755 F.Supp. 1157, 1158 (E.D.N.Y.1991)); *see also* 16AA CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3975 (4th ed.) ("There is nothing wrong, in current practice, with an amicus possessing an interest in the relevant issues.").

Most of Defendants' authorities to the contrary are decades-old cases that reflect an outdated view of the role of amicus briefs that was under attack as early as 1963 and that *Neonatology Associates* rightly rejected. *See* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 703 (1963). Notably, while Defendants cite *Liberty Resources Inc. v. Philadelphia Housing Authority*, 395 F. Supp. 2d 206, 209 (E.D. Pa. 2005), for

[1] *See Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 195 F. App'x 93, 99 n.8 (3d Cir. 2006) (citing *Neonatology Associates* for this point); *In re Nazi Era Cases Against German Defs. Litig.*, 153 F. App'x 819, 827 (3d Cir. 2005) (citing *Neonatology Associates* for Circuit law on amicus briefs).

the proposition that an amicus must not be "partial to a particular outcome in the case," Opp. 2, that court's opinion makes clear that "there is no rule that amici must be totally disinterested," 395 F. Supp. 2d at 209. Defendants also cite Judge Posner's in chambers opinion in *Ryan v. CFTC*, 125 F.3d 1062 (7th Cir. 1997); *see* Opp. 7 n.5. But the federal courts have not heeded Judge Posner's call for procrustean review of motions for leave to file amicus briefs, *Ryan*, 125 F.3d at 1063, and "there is little evidence that [Judge Posner's] views are widely shared," WRIGHT & MILLER § 3975; *see* Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. APP. PRAC. & PROCESS 279, 284 (1999) (criticizing *Ryan*). Indeed, in *Neonatology Associates* then-Judge Alito expressly rejected the views espoused by Judge Posner in *Ryan*. *See* 293 F.3d at 130, 131.

Defendants are also wrong when they argue that Mr. Howard's participation as an amicus is improper to the extent that he seeks to introduce factual, as opposed to legal, arguments. Opp. 3. To the contrary, this Court has allowed amici to file briefs presenting relevant factual background information. *United States v. Gordon*, 334 F. Supp. 2d 581, 582–86 (D. Del. 2004). Permitting amici to file briefs is advisable where they "can contribute to the court's understanding" of the issues in a case—factual as well as legal. *Harris v. Pernsley*, 820 F.2d 592, 603 (3d Cir. 1987); *see Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (amicus briefs are proper where they "will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs"); *Community Ass'n for Restoration of Env't v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) ("An amicus brief should normally be allowed when . . . the amicus has unique information . . . that can help the court beyond the help that the lawyers for the parties are able to provide.").

Finally, Defendants miss the mark when they argue that Mr. Howard's motion should be denied because he did not consult them before making it or waited too long. By its express terms, Local Rule 7.1.1's consultation requirement does not apply to non-parties such as Mr. Howard and thus cannot serve as a basis to denying his motion. *See* D. Del. LR 7.1.1 ("Except for . . . motions brought by nonparties, every nondispositive motion shall be accompanied by an averment of counsel . . . that a reasonable effort has been made to reach agreement with the opposing party on the matters set forth in the motion."). And as Defendants themselves acknowledge, far from any rule specifying when a motion for leave to file an amicus brief must be made, "[n]o statute, rule, or controlling case defines a federal district court's power to grant or deny leave to file an amicus brief," Op. 2 (quoting *United States ex rel. Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 927–28 (S.D. Tex. 2007)). In the interest of avoiding unnecessary duplication, Mr. Howard waited to seek leave to file his amicus brief until after he could review Plaintiffs' response to Defendants' motions to dismiss. Mr. Howard's motion for leave to file his amicus brief is procedurally proper, and the Court should reject Defendants' arguments to the contrary.

CONCLUSION

The Court should grant Mr. Howard's motion to file an amicus brief in opposition to Defendants' motions to dismiss.

Respectfully submitted,

ROSS ARONSTAM & MORITZ LLP

/s/ David E. Ross

David E. Ross (#5228)
100 S. West Street, Suite 400
Wilmington, DE 19801
(302) 576-1600
dross@ramllp.com

Counsel for Non-Party Timothy Howard

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CERTIFICATE OF SERVICE

I, David E. Ross, hereby certify that on February 29, 2016, I caused the foregoing ***Reply Brief in Support of Motion by Timothy Howard for Leave to File Brief Amicus Curiae in Opposition to Defendants' Motions to Dismiss*** to be served via electronic mail upon the following counsel of record:

Myron T. Steele
Michael A. Pittenger
Christopher N. Kelly
POTTER ANDERSON & CORROON LLP
1313 North Market Street, 6th Floor
Wilmington, DE 19801
msteele@potteranderson.com
mpittenger@potteranderson.com
ckelly@potteranderson.com

Counsel for Plaintiffs David Jacobs and Gary Hindes, on behalf of themselves and all others similarly situated, and derivatively on behalf of the Federal National Mortgage Associations et al.

Robert J. Stearn, Jr.
Robert C. Maddox
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, DE 19801
stearn@rlf.com
maddox@rlf.com

Counsel for Defendants Federal Housing Finance Agency, Federal National Mortgage Association, and Federal Home Loan Mortgage Corporation

Howard N. Cayne
Asim Varma
David B. Bergman
ARNOLD & PORTER LLP
601 Massachusetts Avenue
Washington, D.C. 20001
n.cayne@aporter.com
asim.varma@aporter.com
david.bergman@aporter.com

Of Counsel for Defendant Federal Housing Finance Agency

Paul D. Clement
D. Zachary Hudson
BANCROFT PLLC
1919 M Street, N.W., Suite 470
Washington, D.C. 20036
(202) 234-0090
pclement@bancroftpllc.com
zhudson@bancroftpllc.com

Of Counsel for Defendant Federal National Mortgage Association

Michael Joseph Ciatti
Graciela Maria Rodriguez
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
mciatti@kslaw.com
gmrodriguez@kslaw.com

Of Counsel to Defendant Federal Home Loan Mortgage Corporation

/s/ David E. Ross
David E. Ross (#5228)