Nos. 14-5243 (L), 14-5254 (con.), 14-5260 (con.), 14-5262 (con.)

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

IN RE FANNIE MAE/FREDDIE MAC SENIOR PREFERRED STOCK PURCHASE AGREEMENT CLASS ACTION

On Appeal from the United States District Court
For the District of Columbia, No. 13-mc-01288
(Royce C. Lamberth, District Judge)

BRIEF OF CLASS PLAINTIFFS IN REPLY TO *AMICUS* BRIEF FILED BY FDIC

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Term	Abbreviation
American European Insurance Company, Joseph Cacciapalle, John Cane, Francis J. Dennis, Marneu Holdings, Co., Michelle M. Miller, United Equities Commodities, Co., 111 John Realty Corp., Barry P. Borodkin and Mary Meiya Liao	Class Plaintiffs
Federal National Mortgage Association ("Fannie") and Federal Home Loan Mortgage Corporation ("Freddie")	The Companies
Class Plaintiffs' Consolidated Amended Class Action and Derivative Complaint, filed in the District Court on December 3, 2013	Consolidated Class Complaint or Complaint
United States District Court for the District of Columbia (Lamberth, J.)	District Court
Citations to the Docket in *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations*, Misc. Action No. 13-mc-1288 (RCL)	Dkt. ___
Federal Housing and Finance Agency	FHFA
The Housing and Economic Recovery Act of 2008, Pub. L. 110-289, 122 Stat. 2654 (2008)	HERA
The Third Amendment to the Senior Preferred Stock Purchase Agreements between the United	The Net Worth Sweep, or Third Amendment

States Department of the Treasury and the Federal Housing Finance Agency, as conservator to Fannie Mae and Freddie Mac, dated August 17, 2012, and the declaration of dividends pursuant to the Third Amendment beginning January 1, 2013	
Senior Preferred Stock Purchase Agreements	PSPAs, or Government Stock Agreements
United States Department of Treasury	Treasury

THE COURT SHOULD NOT ALLOW THE FDIC'S BRIEF TO IMMUNIZE THE FHFA FROM CLASS PLAINTIFFS' CLAIMS

This Court directly asked FHFA and Class Plaintiffs whether FHFA and the Companies are subject to suit with respect to Class Plaintiffs' claims "absent a waiver of sovereign immunity and, if not, is there such a waiver?" Class Plaintiffs demonstrated that FHFA was subject to suit without any waiver of sovereign immunity. In response, FHFA made no effort to disagree. Instead, it stated that "FHFA and the Enterprises Have Not Asserted Sovereign Immunity," FHFA Suppl. Br. 3, that "[s]overeign immunity is not applicable to the Enterprises," *id.*, and pointed to court decisions saying that "FHFA as conservator of Fannie Mae is not a government actor," *id.* at 4 n.2 (citation and quotation marks omitted). FHFA supported that assertion with cases holding that "FDIC as conservator" was "not acting as the United States." *Id.* (citation and quotation marks omitted).

This is the same principle the United States has relied on in trying to defeat the Takings Clause claims brought by Class Plaintiffs and Fairholme in the Court of Federal Claims seeking just compensation for the Net Worth Sweep's total expropriation of the economic rights held by private shareholders in Fannie and Freddie.[1] FHFA knows that if it claims sovereign immunity in this case, it will

[1] *See* Defendant's Motion to Dismiss at 13, *Fairholme v. United States*, No. 13-465 (Fed. Cl. Dec. 9, 2013) ("The Court should dismiss the complaint because

directly undercut that defense by the United States in the Takings Clause litigation. Thus, while coyly avoiding an express admission that it has no immunity for the action it took in executing the Third Amendment, FHFA has stuck to the game plan of not affirmatively invoking immunity.

But now comes FHFA's sister agency, the FDIC, with an amicus brief claiming that when the FDIC acts as a receiver or conservator, it *is* the United States, and is entitled to sovereign immunity. To be sure, the very first page of FDIC's brief disclaims any view "on whether FHFA as a conservator is the United States for purposes of sovereign immunity or the FTCA." FDIC Br. 1 n.1. That should make its brief irrelevant. Yet the suggestion appears to be that if the FDIC would be immune for actions taken as the conservator or receiver, then so too should be the FHFA. Thus, with help from its sister agency, FHFA gets to have its cake (never undermining the defense against the Takings claim by claiming immunity), while eating it too (getting the FDIC to throw an immunity blanket out for cover, just in case its other defenses are rejected, as they should be).

The Court should not allow this gamesmanship, and should not allow FHFA to have it both ways. It should hold that even though the FHFA is a governmental

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courts have ruled that a Government regulatory agency – acting as conservator – is not the United States.").

entity, because FHFA purported to execute the Third Amendment in its role as "conservator" for Fannie and Freddie, it is not immune from suit.

As a threshold matter, there can be no question that the FHFA is a creature of the federal government, and that an agreement entered into by FHFA and Treasury is an agreement between two governmental entities. Thus, for purposes of assessing whether that agreement is a breach of Class Plaintiffs' common law or constitutional rights, nothing can change the basic reality that two governmental entities agreed to nullify all of the economic rights held by Fannie and Freddie's private shareholders. Class Plaintiffs' Suppl. Br. at 14.

Nevertheless, the question asked by this Court is whether FHFA and the Companies can invoke *sovereign immunity* to prevent Class Plaintiffs from suing them for breach of contract and breach of fiduciary duty. No one claims that Fannie and Freddie can invoke immunity for any of those claims, not even the FDIC. And FHFA has all but admitted that it also cannot invoke immunity. That is because the law does not allow it to invoke sovereign immunity, and nothing said by the FDIC changes that.

While declining to take a position with respect to FHFA's immunity, FDIC asserts that this Court has "held that FDIC as receiver *is* the United States for purposes of sovereign immunity and various federal statutes." FDIC Br. 2 (citing *Auction Co. of America v. FDIC*, 132 F.3d 746 (D.C. Cir. 1997)). But *Auction Co.*

does not support any argument that FHFA should be entitled to sovereign immunity from Class Plaintiffs' claims. In *Auction Co.*, the contract at issue was executed *after* the receivership was imposed, and was executed between the plaintiff and *the FDIC itself as receiver*; it was not a contract previously entered into between the plaintiff and the entity in receivership, as is the case here. That distinction was key to this Court's holding that the case should be treated as one against the United States for purposes of the statute of limitations provision set forth in 28 U.S.C. § 2401(a). As this Court explained, the plaintiff in *Auction Co.* was "not suing to enforce a contract with a defunct depository but to enforce one made initially and exclusively" with the Resolution Trust Corporation (RTC), FDIC's predecessor as receiver. *Id.* at 751. The receiver in *Auction Co.* "did not inherit" the contract it breached "from defunct depositories," but instead "entered into the contract in furtherance of its statutory mission, and the rights and obligations at issue [were] *its* rights and obligations, not those of the depositories." *Id.* at 750 n.1 (emphasis added). Indeed, the FDIC's contract in *Auction Co.* was not even executed in connection with one "particular depository," but instead was undertaken with respect to numerous, unnamed depositories. *See Auction Co. of America v. FDIC*, 141 F.3d 1198, 1201–02 (D.C. Cir. 1998).

The FHFA itself has emphasized the importance of this distinction. For example, at FHFA's urging, the Federal District Court for the Eastern District of

Virginia recently ruled that *Auction Co.* is "easily distinguished" when a federal conservator breaches a *pre*-conservatorship contract of an entity under its control. *Meridian Invs. v. Federal Home Loan Mortg. Corp.*, 2016 WL 795454, at *3 (E.D. Va. Mar. 1, 2016); *see also* Brief of Appellees at 31, *Meridian Invs., Inc. v. Federal Home Loan Mortg. Corp.*, No. 16-1384 (4th Cir. July 21, 2016) (FHFA arguing that "case law" provides "no support" for an argument that a breach of contract "suit against Freddie Mac and FHFA as Conservator should be deemed a suit against the United States."); *see also id.* ("Neither Freddie Mac nor FHFA, when acting as its Conservator, are the government for present purposes.").[2]

[2] The Ninth Circuit's decision in *Battista v. FDIC*, 195 F.3d 1113 (9th Cir. 1999), likewise does not support the broad theory of sovereign immunity advanced by FDIC here. As an initial matter, the federal courts are divided over whether FDIC may invoke sovereign immunity to avoid pre-judgment interest for breach of contract, and we submit that the better reasoned decisions conclude that it may not. *See FDIC v. Hickey*, 757 F. Supp. 2d 194, 197–98 (E.D.N.Y. 2010) (criticizing *Battista* and explaining that sovereign immunity defense makes no sense "where, as here, FDIC-R[eceiver] stands in the shoes of a failed institution"); *see also FDIC v. Maxxam, Inc.*, 523 F.3d 566, 597 (5th Cir. 2008). But there is no need for the Court to resolve this issue, for FDIC is wrong to the extent it offers *Battista*'s narrow holding on pre-judgment interest as support for the broad proposition that sovereign immunity bars claims that a conservator or receiver breached contracts of the underlying entity. The rule in the Ninth Circuit and everywhere else is that "FIRREA does not permit the FDIC to avoid liability for the breach of pre-receivership contracts," *Bank of Manhattan v. FDIC*, 778 F.3d 1133, 1137 (9th Cir. 2015), and the Court should not use *Battista*'s idiosyncratic treatment of pre-judgment interest as the basis for upsetting the settled expectations of those who contract with financial institutions that are later placed into conservatorship.

FDIC has not cited, and we are not aware of, a single case that has held that sovereign immunity bars a claim against FHFA or FDIC as conservator or receiver for breaching a contract between the plaintiff and the entity in conservatorship or receivership, and that was executed *before* the conservatorship or receivership.

While FDIC focuses on the *Auction Co.* case, it ignores this Court's decision in *Waterview Management Co. v. FDIC*, 105 F.3d 696 (D.C. Cir. 1997). In *Waterview*, this Court reversed a district court decision dismissing a claim alleging that RTC as receiver breached a *pre*-receivership contract, and remanded that claim back to the district for a determination of damages—without ever even mentioning any potential sovereign immunity issues. *Id.* at 702.[3] Indeed, in rejecting FDIC's preemption argument in that case, this Court explained that federal law "does not permit the RTC to increase the value of the asset in its hands by simply 'preempting' out of existence *pre-receivership* contractual obligations." *Id.* at 701 (emphasis added). To the contrary: "Ensuring that the RTC is bound by pre-

[3] FDIC also ignores the position it took in the *Winstar* litigation. *See* Plaintiff-Intervenor FDIC's Motion to Dismiss Carteret Bancorp's Claim for a Surplus at 3, *Ambase Corp. v. United States*, No. 93-531 (Fed. Cl. Dec. 21, 2007) (endorsing the view that "the FDIC is not generally considered to be the government for jurisdictional purposes in *Winstar* litigation" (quotation marks omitted)); *id.* at 12 ("[T]he FDIC is not 'the government' for purposes of this case."); FDIC Reply Memorandum in Support of Motion to Intervene at 28, *Statesman Sav. Holding Corp. v. United States*, No. 90-733 (Fed. Cl. Jan. 24, 1997) ("[T]he FDIC now stands in the shoes of Statesman Bank . . . ."). (Excerpts from both of these FDIC *Winstar* briefs are attached as an appendix to this brief).

receivership contracts promotes stability and security of contract." *Id.* The same is true here, and nothing in HERA indicates a Congressional desire to allow FHFA to assert a sovereign immunity defense that would not have been available to Fannie and Freddie had they breached the same contract before conservatorship. Rather, for purposes of common-law claims like those at issue here, FHFA as conservator has no more immunity from state law than the financial institution under its care. *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 86 (1994); *see* Class Plaintiffs' Suppl. Br. 12–16.

For these reasons, FDIC's implicit suggestion that FHFA could somehow assert sovereign immunity here is meritless. But even if FHFA could assert sovereign immunity, that would not mean that Class Plaintiffs' contract claims would go away. Instead, those claims would simply need to be refiled as breach of contract claims against the United States under the Tucker Act. *See Auction Co.*, 132 F.3d at 749–50. We doubt this is the result Congress intended, i.e., that all of Fannie's and Freddie's contractual obligations would become contractual obligations of the United States upon appointment of FHFA as conservator. But that is the inescapable conclusion of the approach FDIC appears to be suggesting.

The same is true with respect to Class Plaintiffs' fiduciary breach claims against FHFA. If the Court were to conclude that FHFA has sovereign immunity for those claims (even though FHFA has never asserted such immunity), then Class

Plaintiffs should be entitled to pursue such claims either under the Tucker Act or under the FTCA, and should be given leave to re-plead those claims accordingly.

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Even after the Court's prompting, no party in this litigation has taken the position that sovereign immunity bars Class Plaintiffs' common-law claims against FHFA and the Companies. Whatever the scope of sovereign immunity when FDIC acts as receiver, that defense cannot leave Class Plaintiffs without any remedy for the common-law breaches caused by the Net Worth Sweep. Any such holding would raise "significant constitutional questions under the takings clause." *Waterview Mgmt. Co.*, 105 F.3d at 701; *see also Auction Co. of America v. FDIC*, 141 F.3d at 1200.

CONCLUSION

The Court should reject the arguments made by FHFA and Treasury.

Dated: July 23, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to FED. R. APP. P. 25(c), Cir. R. 25 and this Court's Order dated June 21, 2016, the foregoing was hand-delivered to the Court and electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

DATED: July 23, 2016

/s/ *Hamish P.M. Hume*
Hamish P.M. Hume

APPENDIX

Appendix

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[1] These two briefs are referenced in footnote No. 3 of our foregoing brief. Full copies can be provided at the Court's request.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STATESMAN SAVINGS HOLDING CORP., ET AL., Plaintiffs, v. THE UNITED STATES, Defendant.	Civil Action No. 90-773C Chief Judge Loren A. Smith

REPLY MEMORANDUM IN SUPPORT OF FEDERAL DEPOSIT INSURANCE CORPORATION'S MOTION TO INTERVENE AND SUBSTITUTE ITSELF AS PARTY PLAINTIFF TO ASSERT CLAIMS FOR DAMAGES TO THE STATESMAN BANK OF SAVINGS, FSB

The Federal Deposit Insurance Corporation ("FDIC") respectfully submits this Reply[1] to the Opposition to the FDIC's Motion to Intervene and Substitute Itself as Party Plaintiff ("Shareholder Plaintiffs' Opposition") filed by Plaintiffs, The Statesman Group, Inc., Statesman Savings Holding Corp., and American Life and Casualty Insurance Company (collectively "Shareholder Plaintiffs").[2]

[1] In compliance with Rule of the United States Court of Federal Claims ("RUSCFC") 83.1(b)(3), the FDIC has attached, as Exhibit A, a copy of the FDIC's Reply Brief, *see* fn. 3, *infra*. Excerpts from FDIC's Reply Brief and Initial Brief, *see* fn. 4, *infra*, are relied upon in this reply memorandum. Fifty-two pages from these two previously filed FDIC briefs are cited. A Motion and Memorandum for Leave to File A Brief Exceeding Page Limits was filed with the Court on Jan. 22, 1997.

[2] *Statesman Savings Holding Corp., et al. v. United States*, No. 90-773C ("*Statesman*") was initially included in FDIC's Motion To Intervene And Substitute Itself As Party Plaintiff To Assert Claims For Damages To The Failed Financial Institutions ("FDIC's Motion") filed October 21, 1996, pursuant to this Court's Omnibus Case Management Order entered September 18, 1996. *Statesman*, however, was set on a separate track for briefing and decision.

In this case, there are no issues concerning an administrative or policy matter that is the responsibility of one branch of government. To the contrary, at issue is a breach of contract between the United States and Statesman Bank, a claim traditionally within this Court's jurisprudence and of the type that is normally resolved by adjudication. The fact that the FDIC now stands in the shoes of Statesman Bank does not alter the nature of the controversy. Regardless of who owns the claim and who represents the claimant, the claim involves the contractual rights and obligations between the United States and a private party. Accordingly, the FDIC's claims present a real case or controversy, and the Court may render judgment for or against the Defendant on Statesman Bank's contract claims at the conclusion of litigation

Finally, the Shareholder Plaintiffs rely on a False Claims Act case in which a *qui tam* plaintiff was suing an agency of the Government in the name of the Government to recover money on behalf of the Government. *Juliano v. Fed. Asset Disposition Ass'n*, 736 F.Supp. 348 (D.D.C. 1990), *aff'd mem.*, 959 F.2d 1101 (D.C. Cir. 1992). In *Juliano*, the Government not only owned the claim asserted by the plaintiff and had a right to control the prosecution of the claim through the Department of Justice, the basis for the claim for monetary relief was injury *to the Government by the Government*. Any judgment for the damage the Government caused itself would have been paid by the Government, in part, to the *qui tam* plaintiff with the balance would have gone back to the Government. The court correctly, reached the unremarkable conclusion that the False Claims Act did not permit a *qui tam* plaintiff cannot get rich -- and in the process cost the government significant monies -- by pointing out to the government that the government

III. CONCLUSION

For the reasons and on the authorities set forth above, in the FDIC's Initial Brief, and FDIC's Reply Brief, the Federal Deposit Insurance Corporation requests that the Court grant the FDIC's motion to intervene and substitute the FDIC, the real party in interest, as party-plaintiff in the this action.

Respectfully submitted,

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

AMBASE CORPORATION and CARTERET BANCORP, INC. Plaintiffs, FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff-Intervenor, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 93-531C Senior Chief Judge Loren A. Smith

PLAINTIFF-INTERVENOR FDIC'S MOTION TO DISMISS CARTERET BANCORP'S CLAIM FOR A SURPLUS

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mal claims for "mismanagement" by the FDIC of the Carteret receivership, and for review of the projected receivership deficit, are premised on this mistaken belief that Shareholder Plaintiffs are entitled to a direct award of damages. Therefore, those claims should also be dismissed for lack of subject matter jurisdiction.

ARGUMENT

I. STANDARD OF REVIEW

When the issue of subject matter jurisdiction has been raised, "[p]laintiffs must establish jurisdictional facts to survive a motion to dismiss." American Red Ball Internat'l, Inc. v. United States, -- Fed. Cl. – , 2007 WL 4238993 (Nov. 28, 2007); citing RCFC 12(b)(1), Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed.Cir.1988). "The court assumes that all well-pled allegations in the Complaint are true and draws all reasonable inferences in plaintiffs' favor. Rule 12(b)(6) states, '[a] motion to dismiss for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not, under the law, entitle him to a remedy.' " Id., quoting Perez v. United States, 156 F.3d 1366, 1370 (Fed.Cir.1998), citing RCFC 12(b)(6).

II. CARTERET BANCORP MAY NOT CROSS-CLAIM AGAINST FDIC

In asserting a claim for a direct award of damages Shareholder Plaintiffs assert that the FDIC has "mismanaged the [Carteret] receivership, resulting in an unfair reduction of the amount of their potential damages award." AmBase II, 61 Fed. Cl. at 796. This is, as the Court recognizes, "a claim against the FDIC," which "is not generally considered to be the government for jurisdictional purposes in *Winstar* litigation"; ergo, "this claim between two non-governmental parties would seem to fall outside the jurisdictional limitations of the Tucker Act." Id. at 796 (internal citations omitted).

CONCLUSION

Carteret Bancorp's direct claim for recovery of "the amount of [a] surplus" in which Carteret Bancorp allegedly "possesses a direct interest" (FAC, Count V) should be dismissed. The Shareholder Plaintiffs' claim for "mismanagement" by the FDIC of the Carteret receivership, and their claim for review of the projected receivership deficit, must also be dismissed.

Respectfully submitted,

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