

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.

Civil Action No. 15-708-GMS

**CLASS ACTION**

**JURY TRIAL DEMANDED**

**ORDER**

WHEREAS, on January 15, 2016, Plaintiffs David Jacobs and Gary Hinds, on behalf of themselves and all other similarly situated, and derivatively on behalf of the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac”), filed an Application for Certification to the Delaware and Virginia Supreme Courts of Novel and Undecided Issues of State Law pursuant to Del. Const. Art. IV, § 11(8) and Va. Const. Art VI, §1, respectively. (D.I. 24). On February 16, 2016, Defendants the Federal Housing Finance Agency (“FHFA”) and the United States Treasury, filed a brief in opposition to

Plaintiffs' Application for Certification. (D.I. 27). Plaintiffs filed a reply to Defendants' brief in opposition on February 26, 2016. (D.I. 34).

WHEREAS, having considered the party's positions as set forth in their papers, as well as the applicable law;

IT IS HEREBY ORDERED that:

1. Plaintiffs' Application for Certification to the Delaware and Virginia Supreme Courts of Novel and Undecided Issues of State Law is DENIED.<sup>1</sup>

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<sup>1</sup> Plaintiffs seek to certify one question to the Delaware Supreme Court:

[d]oes Delaware law permit preferred stock of a corporation to have a cumulative dividend right equal to the entire net worth of the corporation, payable quarterly in perpetuity, as provided in Section 2 of Fannie Mae's Amended and Restated Certificate of Designation of Terms of Variable Liquation Preference Senior Preferred Stock, Series 2008-2, dated September 27, 2012 . . . ?

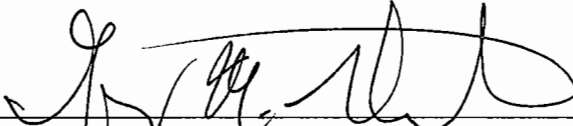
(D.I. 24 at 2). Under Delaware Supreme Court Rule 41, United States district courts can certify a question of Delaware law to the Delaware Supreme Court, provided that the district court has not issued a final judgment, "there is an important and urgent reason for an immediate determination of such question or questions . . . and the certifying court or entity has not decided the question or questions in the matter." Del. Supr. Ct. R. 41(a)(ii). The court has previously articulated that it has discretion to certify questions of Delaware law to the Delaware Supreme Court. *Deutscher Tennis Bund v. ATP Tour, Inc.*, 2013 WL 4478033, at \*1 (D. Del. Aug. 20, 2013). Where the questions presented may not be case-dispositive, however, "[t]he burden placed on the state judiciary counsels restraint." *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 796 F. Supp. 117, 120 (D. Del. 1992).

Plaintiffs' Application for Certification does not present an important and urgent reason for certification of its question to the Delaware Supreme Court. This case presents a unique fact-pattern—Congress enacted the Housing and Economic Recovery Act of 2008, empowering FHFA to appoint itself as conservator of Fannie Mae and Freddie Mac, two government-sponsored enterprises, and as conservator, FHFA sold preferred stock to the U.S. Treasury with a perpetual quarterly dividend right equal to the net worth of the enterprises. (D.I. 24 at 5–9). It is unclear to the court how an answer to Plaintiffs' general question of whether or not Delaware law permits this type of dividend right for preferred stock does much to aid in answering the more specific question at issue in this case: whether the FHFA, acting as conservator of Freddie Mac and Fannie Mae in the wake of the 2008 financial crisis, can amend the senior preferred stock agreements to pay the treasury a quarterly dividend in the amount of the positive net worth of the two GSEs. Thus, there is not an important or urgent reason for certification of Plaintiffs' question.

Plaintiffs fail to adequately explain how an answer to their question is potentially dispositive in this case. Defendants assert in their Opposition to Plaintiffs' Application for Certification that "Plaintiffs' claims are precluded as a threshold matter by a number of separate and independent bases." (D.I. 27 at 2). Additionally, another federal district court granted a motion to dismiss, precluding the plaintiffs' claims in that case as a threshold matter, based on the same issues that Defendants present in their Motion to Dismiss (D.I. 18). *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014) (holding that the statutory provisions of the Housing and Economic Recovery Act compelled dismissal of plaintiffs' claims). While the court has not yet ruled on Defendants' Motion to Dismiss, it would be a waste of judicial resources to certify Plaintiffs' question to the Delaware Supreme Court when it is at least possible that Defendants' motion will be granted. If it is possible that the case could be resolved on other grounds, Plaintiffs' question is clearly not case-dispositive. Accordingly, the court denies Plaintiffs' Application for Certification to the Delaware Supreme Court.

Plaintiffs also seek to certify a question to the Virginia Supreme Court:

Dated: September 12, 2016



UNITED STATES DISTRICT JUDGE

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[d]oes Virginia law permit preferred stock of a corporation to have a cumulative dividend right equal to the entire net worth of the corporation, payable quarterly in perpetuity, as provided in Section 2 of Freddie Mac's Amended and Restated Certificate of Creation, Designation, Powers, Preferences, Rights, Privileges, Qualifications, Limitations, Restrictions, Terms and Conditions of Variable Liquidation Preference Senior Preferred Stock (Par Value \$1.00 Per Share), dated September 27, 2012 . . . ?

(D.I. 24 at 2). Similar to the Delaware Supreme Court, the Virginia Supreme Court will accept certification of a question of Virginia law from a federal district court "if a question of Virginia law is determinative in any proceeding pending before the certifying court and it appears there is no controlling precedent on point" by either the Virginia Supreme Court itself or the Court of Appeals of Virginia. Va. Supr. Ct. R. 5:40(a). For the reasons discussed above, it is not clear at this stage that a question of Virginia law will be determinative in this case because of Defendants' Motion to Dismiss that the court has not yet addressed. Thus, the court denies Plaintiffs' Application for Certification to the Virginia Supreme Court.