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,	)	C.A. No. 15-708
Plaintiffs,	)	
v.	)	
THE FEDERAL HOUSING FINANCE AGENCY, *et al*.,	)	
Defendants.	)	

FEDERAL HOUSING FINANCE AGENCY, FANNIE MAE, AND FREDDIE MAC'S RESPONSE IN PARTIAL OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND

Dated: September 26, 2016

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The Federal Housing Finance Agency, Fannie Mae, and Freddie Mac respectfully submit this opposition to Plaintiffs' request that notice of their partial dismissal be provided to shareholders. Plaintiffs' decision to abandon certain counts in their original complaint does not trigger notice obligations under Fed. R. Civ. P. 23.1(c), much less does it impose on Fannie Mae and Freddie Mac (the "Enterprises") an obligation to bear the cost and responsibility of providing notice through the filing of a Form 8-K. Quite simply, Plaintiffs cite to no authority (and Defendants are aware of none) for what they request here – requiring a company to issue a Form 8-K announcing a plaintiff's decision not to pursue certain derivative counts in a proposed amended complaint.

ARGUMENT

I. NOTICE UNDER RULE 23.1(c) IS NOT WARRANTED.

At the outset, Rule 23.1 applies, if at all, only to derivative actions seeking "to enforce a right that the corporation or association may properly assert." Fed. R. Civ. P. 23.1(a). It plainly does not apply here, where, under HERA, the conservator succeeded to "all rights, titles, powers, and privileges of the [GSEs], and of any stockholder[.]" 12 U.S.C. § 4617(b)(2)(A)(i).[1]

Even assuming that Plaintiffs have standing to bring derivative claims—despite HERA's clear bar on suits by the Enterprises and shareholders during the conservatorship—notice under Rule 23.1 is unwarranted here. Federal Rule of Civil Procedure 23.1(c) requires that shareholders be notified of any "proposed settlement, voluntary dismissal, or compromise" of a derivative action in the manner ordered by the court. Fed. R. Civ. P. 23.1(c). Plaintiffs' strategic litigation decision to abandon certain counts in their proposed amended complaint is none of

[1] As explained in Defendants' motions to dismiss, this provision "plainly transfers shareholders' ability to bring derivative suits—a 'right[], title[], power[], [or] privilege'—to FHFA." *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012).

these things. At most, their proposed amendments have the effect of a partial dismissal, and such an action does not require notice. *Ball v. Field*, No. 90 C 4383, 1992 WL 57187, at *11 (N.D. Ill. Mar. 19, 1992) (holding that notice under Rule 23.1(c) was not required when the plaintiff amended his complaint to remove various derivative allegations because the policy motives behind the rule were not implicated by the amendment). This is nothing more than a decision by Plaintiffs to refocus their claims; it is not a decision to abandon prosecution of the case. *Id.*

None of the other policies underlying Rule 23.1 are implicated here. There is no settlement, public or private, or any collusion between Plaintiffs and Defendants to enrich themselves at the expense of absent shareholders. *See Cramer v. Gen. Tel. & Elecs. Corp.*, 582 F.2d 259, 269 (3d Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979). Nor is there any risk of prejudice to absent shareholders caused by the running of any applicable statutes of limitations because, as Plaintiffs concede, identical claims have been asserted elsewhere. *See* Motion to Amend, p. 4; *Cramer*, 582 F.2d at 269; *Ball*, 1992 WL 57187, at *10-11. Because none of the conditions triggering notice are implicated here, there is no basis for requiring notice under Rule 23.1(c).

II. THE ENTERPRISES SHOULD NOT BE REQUIRED TO FILE FORMS 8-K ANNOUNCING PLAINTIFFS' DECISION TO ABANDON CERTAIN DERIVATIVE CLAIMS.

Even if the Court nonetheless concludes that shareholder notice is required by Rule 23.1, and decides that it is not Plaintiffs' burden to provide that notice (*see* Section III, *infra*), then the Court should not require the Enterprises to provide notice through the issuance of Forms 8-K.[2]

[2] Plaintiffs were clearly aware that the Enterprises object to any form of notice that would require the Enterprises to issue 8-Ks. *See* ECF No. 49, Amended Rule 7.1.1 Certification, at 1-2 (noting that "Defendants oppose . . . Plaintiffs' request to provide notice to stockholders pursuant to Federal Rule of Civil Procedure 23.1(c) regarding dismissed Counts IX and X by United States Securities and Exchange Commission Form 8-K filings"). Yet Plaintiffs supply no argument or authority in support of their extraordinary position that a company should be required to issue a Form 8-K announcing a plaintiff's desire not to pursue certain derivative counts in a proposed

Public companies are required to file current reports with the SEC on Form 8-K within four business days of certain triggering events. Instruction B.1, Instructions to Form 8-K (attached as Ex. A). The form itself enumerates specific events that trigger the need for a filing; none of those events have occurred here. In particular, a shareholder's decision not to pursue some derivative claims is not on the list. Although the form allows for permissive disclosure of any event the registrant deems of importance to investors, the event must still be material and significant. Item 8.01, Form 8-K; *SEC v. Goldstone*, 952 F. Supp. 2d 1060, 1085, n.13 (D.N.M. 2013) ("A Form 8-K is [an] SEC form that a registered corporation must file if a material event affecting its financial condition occurs between the due dates for regular SEC filings.") (quotation omitted)).

Plaintiffs' strategic decision not to pursue certain shareholder derivative claims in a proposed amended complaint does not fall within *any* of the categories of triggering events for a Form 8-K filing, nor is it material or significant. Indeed, we are aware of no instances in which a company has issued a Form 8-K announcing a plaintiff's decision not to pursue certain derivative counts in a proposed amended complaint, much less a court requiring a company to do so.[3] This Court should not be the first.

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amended complaint. For this reason alone, Plaintiffs' request should be rejected. *See* D. Del. LR 7.1.3(c)(2) ("The party filing the opening brief shall not reserve material for the reply brief which should have been included in a full and fair opening brief.").

[3] This case does not involve a settlement in which defendants agreed to make any changes, let alone changes that the defendants deemed sufficiently material to issue Forms 8-K. *Cf. In re MRV Commc'ns, Inc. Derivative Litig.*, No. 08–03800 GAF, 2013 WL 2897874, at *1 (C.D. Cal. June 6, 2013) (settlement involving material changes to the company's stock option granting and documentation procedures, reporting policies and internal controls, director education requirements, and whistleblower policy); *Feuer v. Thompson*, No. 10–cv–00279 YGR, 2012 WL 6652597, at *2–3 (N.D. Cal. Dec. 13, 2012) (settlement involving material changes to the defendant's corporate governance, including its risk management policy); *In re Rambus Inc. Derivative Litig.*, No. C 06-3513 JF (HRL), 2009 WL 166689 (N.D. Cal. Jan. 20, 2009) (settlement involving amendments to compensation and stock ownership guidelines, the hiring of additional financial oversight personnel, and additional training requirements). Moreover, this case does not involve a voluntary dismissal of the entire case. *Cf. Bushansky v. Armacost*, No. 12-CV-01597-JST, 2014 WL 2905143, at *1 (N.D. Cal. June 25, 2014).

III. IF NOTICE IS REQUIRED, THEN PLAINTIFF SHOULD BEAR THE COST.

If the Court determines that Plaintiffs' amendment is sufficient to trigger Rule 23.1's notice requirement, then Plaintiffs should bear the associated cost resulting from their change in strategy, not the Enterprises. Plaintiffs' decision to abandon some of their derivative claims is theirs and theirs alone, and we are aware of no case in which a plaintiff is allowed to shift the cost to defendants of providing notice to shareholders of a plaintiff's strategic decision to abandon some, but not all shareholder derivative claims. Indeed, courts have made clear that when a plaintiff voluntarily dismisses an entire shareholder derivative action, the plaintiff is the party responsible for notifying nonparty shareholders. *See Cannon ex rel. Bridgepoint Educ., Inc. v. Clark*, No. 13CV2645 JM NLS, 2015 WL 4624069, at *4 (S.D. Cal. Aug. 3, 2015) ("[A] plaintiff's lack of standing to proceed as the representative plaintiff does not excuse him from his duty to provide notice . . .").

CONCLUSION

For all of these reasons, the Court should deny Plaintiffs' request to provide shareholders with notice of its decision to abandon some but not all of its derivative claims. If the Court determines that notice is required, then it should deny Plaintiffs' request to require the Enterprises to file Forms 8-K and bear the costs associated with providing shareholder notice and should instead require Plaintiffs to provide the notice and bear that cost.

[*Signature page follows*]

Dated: September 26, 2016

Respectfully submitted,

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