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, *et al*., Defendants.	)	C.A. No. 15-708

TREASURY'S RESPONSE IN PARTIAL OPPOSITION TO
PLAINTIFFS' MOTION FOR LEAVE TO AMEND

Dated: September 26, 2016

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NATURE AND STAGE OF THE PROCEEDINGS

Defendant U.S. Department of the Treasury ("Treasury") hereby submits this response in partial opposition to Plaintiffs' motion for leave to amend the original complaint. *See* D.I. 48 (filed Sep. 7, 2016). In their proposed amended complaint, *see* D.I. 48-1, Plaintiffs abandon a number of their claims, but also seek to add two counts for "unjust enrichment," which, by Plaintiffs' own account, do nothing more than assert a "further basis for recovery" against Treasury, based on the same factual allegations set forth in the original complaint. Plaintiffs do not argue that they have obtained new factual information or that there has been a change in the law that permits them to formulate this new theory of recovery. Rather, Plaintiffs seem to argue that they simply did not think, earlier in the litigation, that it served their litigation strategy to advance their unjust enrichment claims. But Plaintiffs' proposed unjust enrichment claims suffer the same fundamental flaws as the original complaint.

As explained in the motions to dismiss, Plaintiffs fail to establish any basis for federal subject matter jurisdiction, assert no federal cause of action, and identify no waiver of sovereign immunity that would permit their state-law claims against Treasury. What is more, HERA deprives the Court of jurisdiction over Plaintiffs' claims seeking equitable or declaratory relief, as well as Plaintiffs' claims brought based on their status as shareholders in Fannie Mae and Freddie Mac. Nothing in Plaintiffs' proposed amendments could vest the Court with jurisdiction over Plaintiffs' common-law claims for unjust enrichment.

Thus, while Defendants do not oppose Plaintiffs' dismissal of Counts III through IX through the amendment of their original complaint, Defendants oppose Plaintiffs' addition of

Counts III and IV to assert new unjust enrichment claims against Treasury.[1] Permitting Plaintiffs another chance to assert claims seeking the same relief, and based on the same factual predicate, as their original complaint would subvert the interests of judicial economy, unduly delay resolution of this action, and place an unfair burden on Defendants to re-brief motions to dismiss addressing a theory of recovery that Plaintiffs could have advanced a year ago when they filed their complaint.

SUMMARY OF ARGUMENT

Defendants' motions to dismiss demonstrate that Plaintiffs' claims fail as a matter of law for several independent reasons. Plaintiffs do not even attempt to address those grounds for dismissal in their request to add the new counts seeking relief under an unjust enrichment theory. Instead, Plaintiffs simply incorporate by reference the arguments they made in their opposition to Defendants' motions to dismiss and argue that the new unjust enrichment claims would survive for the same reasons. *See* D.I. 48, Pls.' Mot. 6. But Plaintiffs' proposed new claims suffer from the same jurisdictional defects that underlie Plaintiffs' original complaint and are thus clearly futile. As further explained below, Plaintiffs still fail to identify a basis for federal jurisdiction, a federal cause of action, or a waiver of sovereign immunity that would permit their unjust enrichment claims against Treasury. In addition, HERA's shareholder succession provision, 12 U.S.C. § 4617(b)(2)(A)(i), bars Plaintiffs from bringing claims based on their status as shareholders during the conservatorship; and to the extent that Plaintiffs' "unjust enrichment"

[1] In addition, Defendants oppose Plaintiffs' request to provide notice of dismissal of their claims under Federal Rule of Civil Procedure 23.1(c) through the issuance of 8-Ks, for the reasons set forth in Federal Housing Finance Agency, Fannie Mae, and Freddie Mac's Response in Partial Opposition to Plaintiffs' Motion for Leave to Amend, *see* D.I. 51 (filed Sep. 26, 2016).

claims seek equitable and declaratory relief, they are also barred by HERA's jurisdiction withdrawal provision, 12 U.S.C. § 4617(f).

Further, the delay that would follow from granting Plaintiffs' motion would be undue; the new (yet still jurisdictionally deficient) claims could have been asserted more than a year ago, when Plaintiffs first brought suit, but Plaintiffs offer no justification for their failure to do so. Plaintiffs' motion for leave to amend thus should be denied to the extent that Plaintiffs seek now, for the first time, to assert new claims in Counts III and IV of the proposed amended complaint.

PROPOSED AMENDED COMPLAINT

In their proposed First Amended Class Action and Derivative Complaint ("Proposed FAC"), D.I. 48-1, Plaintiffs seek to withdraw their existing claims for breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty, by deleting Counts III through X, as well as Paragraphs 56 through 67 of the original complaint.[2] *See* D.I. 48-2. They seek to replace Counts III and IV with new Counts asserting claims against Treasury for unjust enrichment. Proposed FAC ¶¶ 95-108. Both new Counts provide, "Sovereign immunity for this claim for other than money damages has been waived by 5 U.S.C. § 702." *Id.* ¶¶ 100, 107. In addition, Plaintiffs seek to add 12 U.S.C. § 1452(f) as an alleged basis for subject matter jurisdiction. *Id.* ¶ 22. They also seek to amend the Prayer for Relief to add additional claims for restitution, ostensibly to reflect their proposed addition of the two new unjust enrichment claims. *Id.* ¶ 65, Prayer for Relief.

[2] Similarly, Plaintiffs seek to amend their alleged "common questions of law and fact" to add a reference to their proposed unjust enrichment claim and to delete references to their claims for breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty. *See* Proposed FAC ¶ 65.

ARGUMENT

I. Leave to Amend Should Be Denied as Futile Where the Proposed Claims Would Fail for Lack of Jurisdiction.

There is no automatic right to amend a complaint; whether to grant leave to amend rests within the sound discretion of the trial court under Federal Rule of Civil Procedure 15(a). *Massarsky v. Gen. Motors Corp.*, 706 F.2d 111, 125 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983). "[To] allow a meritless claim to proceed to the motion to dismiss and motion for summary judgment stages . . . serves neither justice nor efficiency." *Allied Erecting and Dismantling Co., Inc. v. United States Steel Corp.*, 786 F. Supp. 1223, 1227 (W.D. Pa. 1992).

Denial of leave is appropriate where the complaint, as amended, could not withstand a motion to dismiss. *Massarsky*, 706 F.2d at 125. The Third Circuit routinely affirms district courts' refusal to permit amendment, where, as here, the proposed amendment would not establish jurisdiction or otherwise save a plaintiff's claims from dismissal under Rule 12.[3] Futility "alone is sufficient ground to deny leave to amend." *Kanter v. Barella*, 489 F.3d 170,

[3] *See, e.g., E&R Enter. LLC v. City of Rehoboth Beach, Del.*, 2016 WL 3077612, at *4 (3d Cir. June 1, 2016) (holding that the district court's denial of leave to amend was appropriate "in light of the jurisdictional bar on [the plaintiff's] federal claims" (citation omitted)); *Miklavic v. USAir Inc.*, 21 F.3d 551, 557-58 (3d Cir. 1994) ("[W]e find that granting leave to amend would have been futile on [the] ground . . . [of] lack of subject matter jurisdiction."); *Kanter v. Barella*, 489 F.3d 170, 181 (3d Cir. 2007) (affirming district court's denial of plaintiff's motion under Rule 15(a) where the proposed amendment offered no new facts demonstrating demand futility under Rule 23.1 and thus would be futile); *In re Digital Island Sec. Litig.*, 357 F. 3d 322, 332 (3d Cir. 2004) (affirming district court's denial of plaintiff's motion under Rules 59(e) and 15(a) where the proposed amended complaint failed to state a claim under Rule 12(b)(6) and, therefore, leave to amend would be futile); *Holst v. Oxman*, 290 F. App'x 508, 510 (3d Cir. Aug. 27, 2008) (affirming district court's denial of plaintiff's motion under Rule 15(a) where the proposed amendment "fails to state a claim under RICO and would therefore be futile"); *Massarsky v. Gen. Motors Corp.*, 706 F.2d 111, 125 (3d Cir. 1983) (affirming district court's denial of the plaintiff's motion under Rule 15(a) where the proposed new claim featured the same elements as a claim already rejected by the jury).

181 (3d Cir. 2007) (citations omitted). Further, leave to amend should be denied where, as here, the delay in amending the complaint is undue, "placing an unwarranted burden on the court," and prejudicial, "placing an unfair burden on the opposing party." *Adams v. Gould Inc.*, 739 F.2d 858, 868 (3d Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985).

II. Plaintiffs' Proposed Unjust Enrichment Claims Suffer the Same Jurisdictional Defects as the Original Complaint and Thus Are Clearly Futile.

According to Plaintiffs, the "only addition to the Complaint is the inclusion of unjust enrichment claims against Treasury." D.I. 48, Pls. Mot. 4. As Plaintiffs readily acknowledge, their proposed unjust enrichment claims "rely only on facts already alleged in the complaint," *Id.* at 4; are predicated on the same legal theory that underlies Plaintiffs' other claims—that is, that the Third Amendment violates Delaware and Virginia state law, *Id.* at 7; and only serve to provide a "further basis for recovery" against Treasury and FHFA. *Id.* at 4-5. As explained below, the proposed unjust enrichment claims are futile for the same reasons that the existing claims are futile.

First, in their Proposed FAC, Plaintiffs invoke section 702 of the APA in an attempt to support their assertion that the United States has waived sovereign immunity for the proposed unjust enrichment claims. *See* Proposed FAC ¶ 100 (citing 5 U.S.C. § 702); *id.* ¶ 107 (same). But Plaintiffs' unjust enrichment claims against Treasury are barred by sovereign immunity for reasons even more clearly displayed in Plaintiffs' motion for leave and Proposed FAC. To begin, Plaintiffs acknowledge that their proposed unjust enrichment claims allege no violation of federal law and assert no cause of action, but are premised solely on Plaintiffs' assertion that the Third Amendment violated Virginia and Delaware law. D.I. 48, Pls. Mot. 7. As explained in Treasury's motion to dismiss briefing, the United States has not waived its sovereign immunity for suits premised solely on state law. Treasury Reply 4-8.

Further, as the Supreme Court has made clear, "sovereign immunity bars creditors from attaching or garnishing funds in the Treasury, or enforcing liens against property owned by the United States." *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 264 (1999) (citing *Buchanan v. Alexander*, 4 How. 20 (1846)), *United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452, 471 (1910); *United States ex rel. Hill v. Am. Surety Co.*, 200 U.S. 197, 203 (1906)). This aspect of sovereign immunity was unaffected by the APA's limited waiver of sovereign immunity in section 702, *see Blue Fox*, 525 U.S. at 264, and it bars Plaintiffs from seeking injunctive or other "equitable relief" that would attach to funds paid into the Treasury pursuant to the PSPAs.

Similarly, while Plaintiffs already request restitution in their original complaint, they seek to add additional requests for restitution against Treasury in their proposed FAC. But it is well-settled that any claim seeking restitution, such as Plaintiffs' proposed unjust enrichment claims, "is subject to the defense of sovereign immunity when relief would require disbursement of money from the treasury, even if the government is merely an escrow agent holding funds owned by the plaintiff." *Okoro v. Callaghan*, 324 F.3d 488, 491 (7th Cir. 2003) (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38–39 (1992); *Edelman v. Jordan*, 415 U.S. 651, 663–69 (1974); *Kalodner v. Abraham*, 310 F.3d 767, 769–70 (D.C. Cir. 2002)).

Plaintiffs' invocation of Section 702 of the APA as an applicable waiver of sovereign immunity appears to be based on their misreading of *Bowen v. Massachusetts*, 487 U.S. 879 (1988). *See* Proposed FAC ¶¶ 100, 107. As explained in Treasury's reply brief, *Bowen* does not permit Plaintiffs to bring their claim for money damages within the ambit of the APA merely by labeling it as a claim for injunctive relief. In *Bowen*, the Supreme Court held that section 702 of the APA permitted a suit to enforce a federal statutory entitlement to withheld federal grant-in-aid money. *Id.* at 900-01. However, *Bowen* applies only to a suit that seeks to "enforce the

statutory mandate itself[.]" *See Zellous v. Broadhead Assocs.*, 906 F.2d 94, 97, 99 (3d Cir. 1990) ("Following the direction of the Court in *Bowen*, we conclude that the tenants seek only that to which they were entitled under the Brooke Amendment [42 U.S.C. § 1437a(a)] and thus the relief requested is "other than money damages[.]"). Here, by contrast, Plaintiffs do not predicate their unjust enrichment claim on any federal statutory entitlement to the payment of money; by Plaintiffs' own account, their claims are founded on state law, and they seek purportedly equitable remedies for violations of those state law provisions. But *Blue Fox* squarely holds that the APA's waiver of sovereign immunity does not permit non-statutory equitable relief where the "ultimate claim" is one "for the recovery of money." 525 U.S. at 262. Of particular relevance to this case, the Supreme Court identified the "ultimate claim" secured by an equitable lien as "usually a claim for unjust enrichment," *id*. at 263, which is precisely the type of claim asserted here.

Plaintiffs' "unjust enrichment" claims also run headlong into an additional Constitutional problem. Plaintiffs' proposed "restitution" and "disgorgement" remedies, even if they could qualify as "relief other than money damages" under section 702, run afoul of the Appropriations Clause of the Constitution. That clause provides that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. For any claim which, like Plaintiffs' claims, seek "money from the Federal Treasury, the Clause provides an explicit rule of decision. Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury *must be authorized by a statute*." *OPM v. Richmond*, 496 U.S. 414, 424 (1990) (emphasis added); *see also Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (explaining that the Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by

an act of Congress."). Plaintiffs cite no act of Congress that entitles them to a disbursement of money from the Treasury; to the contrary, their entire claim is predicated on supposed violations of state law, rather than federal law. As explained above, Section 702 of the APA does not alleviate plaintiffs of the burden of identifying an act of Congress authorizing the monetary remedy they seek. *See City of Houston, Tex. v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1427 (D.C. Cir. 1994) ("Whatever changes *Bowen* may have wrought in the law, it certainly did not repeal the Appropriations Clause of the Constitution."); *United States v. Chambers*, 92 F. Supp. 2d 396, 400 (D.N.J. 2000) ("Indeed, money damages cannot be 'the very thing to which' anyone is 'entitled' unless an Act of Congress creates a payment obligation or authorizes its creation. In other words, principles of equity alone are insufficient.") (quoting *Bowen*, 487 U.S. at 893-95). Nor can the Court's equitable powers bridge this gap. "Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *INS v. Pangilinan*, 486 U.S. 875, 883 (1988); *see also Richmond*, 496 U.S. at 426 ("judicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized.").[4]

[4] Nor can Plaintiffs seek to enforce a state law mandate against the federal government. The Constitution grants the federal government the "[p]ower to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States . . . ." U.S. Const. art. IV, § 3, cl. 2. The Constitution thus authorizes the federal government to establish the rules concerning financial instruments to which it is a party. *See Treasurer of New Jersey*, 684 F.3d at 410. One such term of the senior preferred stock is that the terms of the certificates themselves override any conflicting provision of state law. Fannie Mae PSPA Certificate ¶ 10(e); Freddie Mac PSPA Certificate ¶ 10(e).

Similarly, as described in Treasury's Reply brief, state law cannot apply to the senior preferred stock in light of principles derived from the Supremacy Clause. First, state law does not apply of its own force to the federal government. *See Treasurer of New Jersey*, 684 F.3d at 409-10 (describing the intergovernmental immunity doctrine). Second, under settled principles of preemption, state law is inapplicable if it conflicts with federal law, such as HERA. Implied conflict preemption, the principle that controls here, exists where the state law at issue "stands as

Thus, Plaintiffs' unjust enrichment claims are clearly futile; Plaintiffs can point to nothing that permits them to demand money from the Treasury for a supposed violation of state law.

Second, to the extent that plaintiffs' "unjust enrichment" claims seek equitable and declaratory relief, they are barred by HERA's jurisdiction withdrawal provision, 12 U.S.C. § 4617(f). Treasury MTD 15-17; Treasury Reply 2-4. That provision, which broadly provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator," effects a "sweeping ouster of courts' power to grant equitable remedies . . . regardless of the claimant's likelihood of success on the merits of his underlying claims." *Hanson v. FDIC*, 113 F.3d 866, 871 (8th Cir. 1997) (internal quotation marks and citation omitted). Because the Conservator was acting squarely within its powers and functions in executing the Third Amendment—that is, in agreeing to amend a funding agreement between the Enterprises and Treasury to modify the manner in which the Enterprises satisfied their obligations to Treasury—Section 4617(f) bars Plaintiffs' claims against both the conservator and Treasury. Plaintiffs' claims alleging violations of state corporate laws cannot overcome this jurisdictional hurdle.

Third, HERA's shareholder succession provision, 12 U.S.C. § 4617(b)(2)(A)(i), bars all shareholder claims during conservatorship, whether those claims are characterized as derivative or direct, and whether or not the Conservator faces an alleged conflict of interest in considering

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an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). "[S]tate law is naturally preempted to the extent of any conflict with a federal statute." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

whether to pursue the claims itself. Treasury MTD 18-22; Treasury Reply 8-12. Given that Plaintiffs devoted considerable space in their opposition brief to their (mistaken) argument that their claims are direct, not derivative, it is puzzling that they now purport to have asserted derivative claims in their original complaint, D.I. 48, Pls. Mot. 8 ("Counts IX and X of the Complaint are derivative claims."), requesting permission to dismiss those claims under Federal Rule of Civil Procedure 23.1(c). D.I. 48, Pls. Mot. 8 & *id.* Ex. D. However, regardless of how Plaintiffs presently choose to label their claims, they make no attempt to explain how their allegations that the Third Amendment violated Delaware and Virginia state corporate law can overcome HERA's succession provision. Their proposed unjust enrichment claims may be denied as futile for this reason alone.

In sum, while Plaintiffs' proposed amendments do not attempt to address the grounds for dismissal set forth in Defendants' motions to dismiss, they only highlight the reality that Plaintiffs fail to establish a basis for federal subject matter jurisdiction, fail to assert any federal cause of action, and fail to identify any waiver of sovereign immunity that would apply to their claims. Plaintiffs' proposed Counts III and IV are clearly futile because there is simply no basis for jurisdiction over their proposed unjust enrichment claims. *See Miklavic v. USAir Inc.*, 21 F.3d 551, 557-58 (3d Cir. 1994) ("[W]e find that granting leave to amend would have been futile on [the] ground . . . [of] lack of subject matter jurisdiction.").

III. Even if There Were Jurisdiction Over the Unjust Enrichment Claims, Leave Should Be Denied Because Plaintiffs' Delay in Asserting Those Claims Is Undue.

Plaintiffs admit that their proposed amendments arise solely from a change in their litigation strategy, *see* D.I. 48, Pls. Mot. 7 ("The proposed amendments are in direct response to Defendants' objections to allegedly having to defend similar issues in multiple jurisdictions."), rather than any new factual information that would permit them to formulate a new theory of

recovery. *See, e.g.*, *Id.* at 5. ("Simply put, there's no new factual issue raised by the proposed amendments."). And Plaintiffs acknowledge that their proposed new claims merely "provide a further basis for recovery from Treasury" based on relief that Plaintiffs have already requested in their original complaint. *Id.* at 4-5.

But if Plaintiffs had a basis on which to seek recovery under an unjust enrichment theory, they should have asserted those claims in their initial complaint or when Defendants briefed the issue of subject matter jurisdiction in the motions to dismiss the initial complaint. Instead, Plaintiffs waited until months after briefing on the motions to dismiss had been completed to seek to advance new (yet still legally insufficient) claims, based on the same factual allegations and requesting restitution and other relief already requested in their original complaint. Plaintiffs are not entitled to assert new theories of recovery that could have been asserted before briefing was completed on Defendants' motions to dismiss. *See Gasoline Sales, Inc. v. Aero Oil Co.*, 39 F.3d 70, 74 (3d Cir. 1994) (affirming district court's order refusing leave to amend, and noting that "a plaintiff has to carefully consider the allegations to be placed in a complaint before it is filed") (internal quotation marks omitted). Permitting Plaintiffs to assert new theories will require Defendants to incur the burden of preparing yet another set of motions to dismiss to address the new claims. The resulting delay and the prejudice to Defendants that would follow from granting Plaintiffs' motion would be undue, given that Plaintiffs offer no justification for their failure to assert the new (yet still jurisdictionally deficient) claims more than a year ago, when they first brought suit.

Previously, when it served their interests, Plaintiffs themselves expressed their commitment to judicial efficiency and the expeditious resolution of this matter. In opposing FHFA's motion to transfer this case, Plaintiffs cited their "desire to move forward

expeditiously," and complained that "all briefing [was] completed" in this case. ECF No. 21, MDL No. 2713, Opp. 6 n.8, (April 6, 2016).[5] And yet here, Plaintiffs gloss over the same concerns. As noted above, Plaintiffs could have asserted their unjust enrichment claims up front in the original complaint based on the allegations asserted there. Instead they waited until now, after the motion to dismiss briefing has been completed, to assert these new counts, making no effort to explain why the newly asserted theory for recovery was unavailable to Plaintiffs when they drafted their initial complaint. Under these circumstances, permitting Plaintiffs another chance to advance further (but still deficient) theories for relief against Treasury would subvert the interests of efficiency and judicial economy.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' proposed addition of Counts III and IV in their Motion for Leave to Amend. Further, Defendants respectfully request that the Court grant the motions to dismiss filed by FHFA and Treasury, and dismiss with prejudice all claims asserted against FHFA and Treasury in the original complaint.

Dated: September 26, 2016

Respectfully submitted,

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[5] *See also* ECF No. 21, MDL No. 2713, Opp. 9 (April 6, 2016) ("Resolution of these critical state law issues in the respective high courts of Delaware and Virginia will likely delay proceedings in the Other Designated Actions in the event the Panel grants FHFA's motion. To delay the Other Designated Actions on account of resolving the Delaware Action's state law questions would be inefficient and unfair to those other plaintiffs.").

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