IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 1:16-cv-21221-Scola/Otazo-Reyes

ANTHONY R. EDWARDS, *et al.*,

Plaintiffs,

v.

DELOITTE & TOUCHE, LLP,

Defendant.

STATEMENT OF INTEREST BY THE UNITED STATES

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INTRODUCTION

Plaintiffs in this and a related lawsuit assert claims against the auditors of the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"), two congressionally-chartered, government sponsored enterprises (collectively, the "Enterprises"). While plaintiffs purport to assert claims only against the auditors, their claims for relief are based on allegations that the Federal Housing Finance Agency ("FHFA") and the Department of the Treasury ("Treasury") breached purported state law fiduciary duties to plaintiffs and other shareholders, and that the auditors aided and abetted these alleged breaches. Because the United States has an interest in the proper interpretation and application of the Housing and Economic Recovery Act ("HERA"), 12 U.S.C. § 4501 *et seq.*, and an interest in the proper interpretation and application of the law applicable to Treasury's management of the taxpayers' investment in the Enterprises, pursuant to 28 U.S.C. § 517, the United States offers this Statement of Interest[1] to address to plaintiffs' contentions regarding Treasury's supposed fiduciary duties.

BACKGROUND

I. Treasury's Preferred Stock Purchase Agreements with the Enterprises

Congress created the Enterprises to, among other things, "promote access to mortgage credit throughout the Nation . . . by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing." 12 U.S.C. § 1716(4). These government-sponsored Enterprises provide liquidity to the mortgage

[1] 28 U.S.C. § 517 provides that "any officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State." *See also In re W. Caribbean Airways, S.A.*, 619 F. Supp. 2d 1299, 1328 (S.D. Fla. 2007) (discussing Section 517).

market by purchasing residential loans from banks and other lenders, thereby providing lenders with capital to make additional loans. The Enterprises finance these purchases by borrowing money in the credit markets and by packaging many of the loans they buy into mortgage-backed securities, which they sell to investors. *See Judicial Watch, Inc. v. FHFA*, 646 F.3d 924, 925-26 (D.C. Cir. 2011).

"By 2008, the United States economy faced dire straits, in large part due to a massive decline within the national housing market. . . . Given the systemic danger that a Fannie Mae or Freddie Mac collapse posed to the already fragile national economy, among other housing market-related perils, Congress enacted the Housing and Economic Recovery Act on July 30, 2008." *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 215 (D.D.C. 2014) (citing HERA, Pub. L. No. 110-289, 122 Stat. 2654 (2008)). HERA created the Federal Housing Finance Agency, an independent federal agency, to supervise and regulate Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. 12 U.S.C. § 4501 *et seq*. HERA also granted the Director of FHFA the discretionary authority to place the Enterprises into conservatorship or receivership. 12 U.S.C. § 4617(a)(2).

HERA amended the statutory charters of the Enterprises to grant the Secretary of the Treasury the authority to purchase "any obligations and other securities" issued by the Enterprises "on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine," provided that Treasury and the Enterprises reached a "mutual agreement" for such a purchase. *See* 12 U.S.C. § 1455(*l*)(1)(A); *id.* § 1719(g)(1)(A). Treasury was required to determine, prior to exercising this purchase authority, that the purchase was necessary to "provide stability to the financial markets," "prevent disruptions" in mortgage financing, and "protect the taxpayer." 12 U.S.C. § 1455(*l*)(1)(B); *id.* § 1719(g)(1)(B). In

September 2008, after the Enterprises were placed into conservatorship by FHFA, *see Judicial Watch, Inc.*, 646 F.3d at 926, Treasury used its authority to purchase preferred securities issued by the Enterprises, in the form of a Preferred Stock Purchase Agreement with each Enterprise ("PSPAs").[2] *See* Compl. ¶ 22.

II. Plaintiffs' Allegations Against Treasury

While Treasury is not a defendant in this case, the complaints and motions to remand contain several allegations and arguments concerning Treasury's management of the PSPAs. Specifically, plaintiffs' claims for money damages stem from the Third Amendment to the PSPAs, executed by Treasury and FHFA as conservator of the Enterprises in August 2012. As of August 8, 2012, Fannie Mae had drawn $116.15 billion and Freddie Mac had drawn $71.34 billion under their PSPAs with Treasury. Under the PSPA terms then in effect, these cumulative draws created an annual dividend obligation of approximately $19 billion, a figure which exceeded the typical historical earnings of the Enterprises. *See* Fannie Mae, Quarterly Report (Form 10-Q) (Aug. 8, 2012) at 4 ("The amount of this dividend payment exceeds our reported annual net income for every year since our inception."); Freddie Mac, Quarterly Report (Form 10-Q) (Aug. 7. 2012) at 8 ("our annual cash dividend obligation to Treasury on the senior preferred stock of $7.2 billion exceed[] our annual historical earnings in all but one period."). Further, under the PSPAs, Treasury had the right to establish a periodic commitment fee for the approximately $258 billion in additional undrawn funding that Treasury made available to the Enterprises under the PSPAs. In August 2012, Treasury and FHFA, acting as conservator for the Enterprises, entered into the Third Amendment to the PSPAs, which eliminated the payment of a fixed dividend and suspended the

[2] Copies of the Senior Preferred Stock Purchase Agreements and all amendments are available at http://www.fhfa.gov/Conservatorship/Pages/Senior-Preferred-Stock-Purchase-Agreements.aspx.

periodic commitment fee that each Enterprise would otherwise owe to Treasury. *See* Compl. ¶¶ 31-43. Instead, the Enterprises now owe a quarterly variable dividend based on net worth after accounting for prescribed capital reserves. If either Enterprise's net worth is negative in a quarter, no dividend is due.

Citing the dividend payments that the Enterprises made in 2013 pursuant to the variable dividend formula, plaintiffs allege that the Third Amendment was "an unfair, self-dealing transaction," Compl. ¶ 40, through which "FHFA and Treasury violated Delaware law and applicable federal law by breaching their fiduciary duties to Fannie Mae and Plaintiffs." Compl. ¶ 41. They seek unspecified money damages from Deloitte, the auditor of Fannie Mae, as a result of these alleged breaches.

DISCUSSION

I. Plaintiffs' Aiding and Abetting Theory Depends Upon the False Premise that Treasury Owes Fiduciary Duties Under State Law

Plaintiffs seek to recover money damages from Deloitte by alleging that the auditor aided and abetted a breach of fiduciary duty by the directors and officers of the Enterprises, by FHFA, or by Treasury. *See* Mot. to Remand at 9, ECF No. 23. Contrary to their complaint, which alleged that FHFA and Treasury violated "applicable federal law" by executing the Third Amendment, Compl. ¶ 41, plaintiffs ignore that earlier contention and now assert that Treasury is a "controlling shareholder" that possesses fiduciary duties under state law, and that federal jurisdiction is inappropriate because the case turns entirely on questions of state law. *See* Mot. to Remand at 12. Because the law is clear that Treasury does not owe state-law fiduciary duties, plaintiffs' "aiding and abetting" claims in this suit necessarily turn on substantial and disputed issues of *federal* law.

Plaintiffs' contention that Treasury owes fiduciary duties to the Enterprises and their shareholders pursuant to state corporate law is incorrect and ignores important aspects of the

United States' federal structure. Pursuant to the Supremacy Clause, states have no power to regulate the property or operations of the federal government, absent an affirmative declaration from Congress enabling such regulation. "[W]here Congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function must be left free of regulation." *Hancock v. Train*, 426 U.S. 167, 179 (1976) (quotations omitted). "Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is a clear congressional mandate . . . that makes this authorization of state regulation clear and unambiguous." *Id*. (quotations omitted); *see also Treasurer of New Jersey v. U.S. Dep't of Treasury*, 684 F.3d 382, 410 (3d Cir. 2012) ("states may not directly regulate the federal government's operations or property") (citing *Arizona v. Bowsher*, 935 F.2d 332, 334 (D.C. Cir. 1991)). Plaintiffs' claims regarding Treasury's conduct thus cannot be resolved as a matter of state law, because state law does not, of its own force, govern the operations of a federal agency such as Treasury.[3]

Not only have plaintiffs failed to identify a source of federal law which would apply state law fiduciary duties to Treasury, but their claims would actively frustrate the objectives of federal law. In executing the PSPAs with the Enterprises and providing taxpayer money to ensure their continued operations, Treasury is acting pursuant to a Congressional mandate in HERA to "provide stability to the financial markets, prevent disruptions in the availability of mortgage finance; and protect the taxpayer." 12 U.S.C. § 1719(g)(1)(B); *id*. § 1455(*l*)(1)(B). When a

[3] Plaintiffs appear to concede that nothing in federal law authorizes state law regulation of Treasury's authority under HERA. *See* Mot. to Remand at 12 ("HERA does not address Treasury's duties as Fannie's majority shareholder.").

government agency acts pursuant to such a mandate to stabilize and protect the broader economy, courts have consistently rejected efforts to impose fiduciary duties on the federal government under state corporate law. *See Starr Int'l Co. v. Fed. Reserve Bank of N.Y.*, 742 F.3d 37, 41-42 (2d Cir. 2014) ("Delaware fiduciary duty law cannot be applied to FRBNY's rescue activities consistently with adequate protection of the federal interests at stake in stabilizing the national economy."); *see also Robinson v. FHFA*, No. 7:15-CV-109-KKC, 2016 WL 4726555, at *4 n.3 (E.D. Ky. Sept. 9, 2016) (finding "no evidence of Congressional intent to graft state fiduciary duties onto the Treasury's responsibilities under HERA."). Indeed, the Supreme Court has recognized that the government possesses fiduciary duties "only to the extent it expressly accepts those responsibilities by statute," *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011), and plaintiffs point to nothing in HERA or any other source of federal law demonstrating that Congress has accepted such fiduciary duties here.[4]

Plaintiffs' sole citation in support of their claim that Treasury possesses fiduciary duties under state corporate law is a citation to a law review article. *See* Mot. to Remand at 12 (citing Steven Davidoff Solomon & David T. Zaring, *After the Deal: Fannie, Freddie and the Financial Crisis Aftermath*, 95 B.U. L. Rev. 371, 390-91 (2015) ("Solomon & Zaring"). But in fact, that law

[4] It would be particularly illogical to hold that Congress not only imposed such fiduciary duties on Treasury, but also provided shareholders with standing to file suits, either against Treasury or against third parties. To the contrary, HERA transferred "all rights, titles, powers, and privileges of [the Enterprises], and of any stockholder . . of [the Enterprises] with respect to the regulated entity and the assets of the regulated entity" to FHFA. 12 U.S.C. § 4617(b)(2)(A) (emphasis added). "As many courts have recognized, this language . . .'is extremely broad and evidences Congress's intent to transfer as much as possible to FHFA.'" *Pagliara v. Fed. Home Loan Mortg. Corp.*, No. 16-cv-337, 2016 WL 4441978, at * (E.D. Va. Aug. 23, 2016) (internal citations omitted). Congress thus "transferred everything it could to the [conservator] and that includes a stockholder's right, power, or privilege . . . to sue directors or others when action is not forthcoming." *Kellmer v. Raines*, 674 F.3d 848, 851 (D.C. Cir. 2012). In addition to the issues identified herein, plaintiffs also ignore this threshold issue of federal law issue raised by their complaint.

review article discussed the possibility of utilizing state corporate law to inform an evaluation of the Third Amendment under the Administrative Procedure Act ("APA"). *See* Solomon & Zaring, 95 B.U. L. Rev. at 390-91. Plaintiffs do not assert an APA claim (which would arise under federal law, and could not be asserted against a private entity like Deloitte); rather, they argue that they can assert a claim against Treasury directly under state law as a precondition for establishing liability by Deloitte. In any event, the premise of this argument – that state law can be incorporated into the APA and used as a basis for declaratory or injunctive relief, or that the APA can otherwise be used to assert state law claims – has been rejected by the Eleventh Circuit and numerous other federal courts. *See Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997) ("An agency's actions could only fail to be 'in accordance with law' when that agency's actions are *subject to that law*.") (quoting 5 U.S.C. § 706); *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792 (8th Cir. 1996) ("[T]he plaintiff must identify a substantive statute or regulation that the agency action had transgressed *and* establish that the statute or regulation applies to the United States."); *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 753 (9th Cir. 1991) ("There is no right to sue for a violation of the APA in the absence of a 'relevant statute' whose violation 'forms the legal basis for [the] complaint.'") (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 881 (1990)); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 854 (D.C. Cir. 2010) (Kavanaugh, J., concurring) ("the APA does not borrow state law or permit state law to be used as a basis for seeking injunctive or declaratory relief against the United States.").

CONCLUSION

A lawsuit challenging the conduct of a federal agency necessarily raises questions of federal law. Plaintiffs ignore this principle by asserting that they can accomplish indirectly (by suing Deloitte and alleging that Deloitte aided and abetted a violation of state law by Treasury) what they could not accomplish directly (suing Treasury for a violation of state law). Accordingly, we encourage the Court to reject plaintiffs' contention that Deloitte' liability for allegedly aiding and abetting a breach of fiduciary duty by Treasury can be resolved as a matter of state law.

Dated: October 4, 2016

Respectfully submitted,

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Certificate of Service

I hereby certify that on October 4, 2016, I electronically filed the foregoing with the Clerk of the Court using the ECF system. To my knowledge, a copy of this document will be served on the parties or attorneys of record through the ECF system.

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