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.	)	C.A. No. 15-708-GMS

FHFA, FANNIE MAE, AND FREDDIE MAC'S OPPOSITION TO PLAINTIFFS' MOTION FOR JUDICIAL NOTICE OR, IN THE ALTERNATIVE, TO STRIKE

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INTRODUCTION

Briefing has closed on Defendants' motions to dismiss (D.I. 66, D.I. 68), which explain the numerous reasons why Plaintiffs' claims fail as a matter of law, including that they are flatly barred by federal law. Now, Plaintiffs improperly seek to lead this Court on a pointless detour by asking the Court to review various extraneous and irrelevant documents—primarily e-mails produced in other litigation—that Plaintiffs say prove the factual allegations in their complaint. But in considering the motions to dismiss, this Court already is required to accept as true the very same factual allegations—namely, that the Defendants had improper motives in executing the Third Amendment and that the Third Amendment was unnecessary. Those allegations, even when assumed true, make no difference here. Indeed, *why* Defendants executed the Third Amendment is irrelevant even under Plaintiffs' theory of the case, which posits that the Third Amendment is void—on its face—for purportedly failing to set a proper dividend "rate" under the Delaware and Virginia codes. In this manner, Plaintiffs' motion contradicts positions Plaintiffs took before another tribunal about the very same claims.

The Court should thus deny Plaintiffs' motion for judicial notice, and likewise deny Plaintiffs' alternative request to strike two sentences from the background section of the FHFA Defendants' opening brief.

ARGUMENT

Plaintiffs' motion for judicial notice or to strike fails for multiple reasons.

First, there are no facts in dispute at this stage of the proceedings because, when considering the motions to dismiss, the Court must "accept as true all factual allegations in the complaint." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). Plaintiffs' motion is an improper attempt to "prove[]"—prior to resolution of the pending motions to dismiss—

allegations asserted in the First Amended Complaint. Mot. at 9 (D.I. 75). Indeed, Plaintiffs admit that the "First Amended Complaint makes the very allegations that are proven true by the recently released documents." *Id*. Thus, the proffered materials are irrelevant to the task now before the Court, and to consider them here would conflict with the basic, well-established standard of review on a motion to dismiss. *See Whiting v. AARP*, 637 F.3d 355, 364-65 (D.C. Cir. 2011) (judicial notice improper where materials "merely contain[] facts alleged in the Complaint" (alteration in original) (internal quotation marks and citation omitted)).

Four other courts addressing similar claims challenging the Third Amendment have ruled that such documents are irrelevant at the motion to dismiss stage. For example, in *Continental Western Insurance Company v. FHFA*, another shareholder challenge to the Third Amendment, the plaintiff asked the court to compel production of and consider various extraneous documents (an administrative record) before resolving the pending motions to dismiss. No. 4:14-CV-00042, 2014 WL 12465429, at *1 (S.D. Iowa Aug. 5, 2014). The shareholders argued that the documents were needed to "rebut defendants' assertions," allegedly made in the motions to dismiss, "about the necessity and purpose of the net worth sweep." *Id*. at *2. The court denied the request because it already was obligated to assume "that the net worth sweep was unnecessary and improperly motivated," as alleged in the complaint, and the motions to dismiss "clearly present[ed] purely legal issues." *Id*. at *2-3. At least three other courts are in accord. *See* Order at 4, *Saxton v. FHFA*, No. 1:15-cv-47 (N.D. Iowa Dec. 3, 2015) D.I. 48 (denying motion to appear as amicus and consider extraneous documents "because the court will not consider facts and evidence outside of the pleadings in determining facial challenges to subject matter jurisdiction under Rule 12(b)(1), it will not admit or consider Fairholme's evidence in support of Plaintiffs' opposition to the Motions to Dismiss."); Minute Entry at 1, *Roberts v.*

FHFA, No. 1:16-cv-2107 (N.D. Ill. Nov. 27, 2016) D.I. 64 (denying similar motion "for essentially the same reasons discussed" in *Saxton*); Order at 2, *Fairholme Funds, Inc. v. FHFA*, No. 1:13-cv-1053 (D.D.C. Sept. 30, 2014), D.I. 58 (denying similar motion to supplement administrative record in district court litigation related to *Perry Capital*). So too here: the Court already must assume true the very allegations Plaintiffs contend are "proven" by the proffered documents. Like the other courts addressing substantially similar issues, this Court should deny Plaintiffs' motion.

Plaintiffs cannot meaningfully distinguish the present case by pointing out that the documents Plaintiffs proffer here were only recently released. *See* Mot. at 3-4. Whether the extraneous materials are new or old makes no difference because Plaintiffs seek to present these documents for the same reasons the shareholders in the cases cited above unsuccessfully attempted to present their similarly extraneous documents—namely, to prove the veracity of the same factual allegations at the motion to dismiss stage.[1]

[1] The documents are also substantively irrelevant because, as explained in the motions to dismiss, Section 4617(f) bars Plaintiffs' claims whether or not Defendants had improper motives behind the Third Amendment, and regardless of whether the Third Amendment was "necessary." *See* D.I. 68 at 18-19; *Perry Capital v. Mnuchin*, 864 F.3d 591, 612 (D.C. Cir. 2017) ("Nothing in the Recovery Act confines FHFA's conservatorship judgments to those measures that are driven by financial necessity. And for purposes of applying Section 4617(f)'s strict limitation on judicial relief, allegations of motive are neither here nor there, as the dissenting opinion agrees (at 643–44)."); *Saxton v. FHFA*, --- F. Supp. 3d ----, 2017 WL 1148279, at *10 (N.D. Iowa Mar. 27, 2017) ("Whatever Plaintiffs' views of the wisdom of the Third Amendment, FHFA's adherence to its statutory role as conservator does not turn on the wisdom of its decision-making."); *Roberts v. FHFA*, 243 F. Supp. 3d 950, 960 (N.D. Ill. 2017) ("When considering whether FHFA or Treasury has acted ultra vires, the agencies' motives are irrelevant."); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015) ("[I]t is not the role of this Court to wade into the merits or motives of FHFA and Treasury's actions—rather the Court is limited to reviewing those actions on their face and determining if they were permissible under the authority granted by HERA."); *Leon Cty. v. FHFA*, 816 F. Supp. 2d 1205, 1208 (N.D. Fla. 2011) ("Congress barred judicial review of the conservator's actions without making an exception for actions said to be taken from an improper motive."), *aff'd*, 700 F.3d 1273 (11th Cir. 2012).

Second, the proffered documents are factually irrelevant to the specific claims Plaintiffs have advanced, which provides an additional, independent basis to deny Plaintiffs' motion. *See e.g.*, *In re La Rouche Indus., Inc.*, 307 B.R. 774, 780 (D. Del. 2004) (declining to take judicial notice of facts "not relevant to the dispositive question"). The claims advanced by Plaintiffs in this litigation are narrow and technical, asserting that the Third Amendment—on its face—violates Delaware and Virginia statutory law because it fails to set a proper dividend "rate" that is "in preference to" the other Enterprise stockholders. *See* FAC ¶¶ 79-94 (D.I. 62); Plaintiffs' Opp. to Mot. to Dismiss at 22-27 (D.I. 69).[2] Indeed, Plaintiffs told the Judicial Panel on Multidistrict Litigation that Plaintiffs' claims are based on the alleged "prima facie invalidity" of the Third Amendment,[3] and thus "require[] no discovery because it's a purely legal issue based on the language of the net worth sweep."[4] Now, after having taken that position before the JPML and successfully avoided centralization of the Third Amendment litigations, *see In re FHFA, Preferred Stock Purchase Agreements Third Amendment Litig.*, 190 F. Supp. 3d 1356, 1357 (J.P.M.L. 2016), Plaintiffs improperly attempt a U-turn to argue that the Court should look *beyond* the language of the Third Amendment and take judicial notice of documents purporting to show that the Amendment was unnecessary and improperly motivated. But whether

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[2] Although Plaintiffs also assert claims for unjust enrichment against Treasury, *see* FAC ¶¶ 95-108 (Counts III and IV), those claims are "predicated on" the same alleged violations of state statutory law as in Counts I and II, and thus "rise and fall with [] these statutory claims." Mot. for Leave to Amend at 4, 7 (D.I. 48).

[3] Opposition of Plaintiffs David Jacobs and Gary Hindes to FHFA's Motion for Transfer of Actions at 7, 16, *In re FHFA, Preferred Stock Purchase Agreements Third Amendment Litig.*, MDL No. 2713 (J.P.M.L. Apr. 6, 2016), D.I. 21.

[4] Transcript of Oral Argument at 19, *In re FHFA, Preferred Stock Purchase Agreements Third Amendment Litig.*, MDL No. 2713 (J.P.M.L. May 26, 2016), D.I. 38; *see also* Plaintiffs' Notice of Supplemental Information at 2, *In re FHFA, Preferred Stock Purchase Agreements Third Amendment Litig.*, MDL No. 2713 (J.P.M.L. May 19, 2016), D.I. 35 ("Counts I and II are both questions of law that can be answered based on facts that are not capable of dispute.").

Defendants executed the Third Amendment for nefarious or noble reasons makes no difference to the merits of Plaintiffs' claims: under Plaintiffs' theory, the Third Amendment is either "prima facie invalid[]" under the Delaware or Virginia code or it is not.

Third, the Court may not take judicial notice of the proffered materials for "the truth of the facts recited therein." *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999); *see also Trevino v. Merscorp, Inc.*, 583 F. Supp. 2d 521, 527 (D. Del. 2008) ("In general, documents may not be judicially noticed for the truth of the matters stated in them." (citation omitted)). This is particularly true when a party seeks judicial notice of the content of discovery materials from other litigations. *See, e.g.*, *Davis v. City of Clarksville*, 492 F. App'x 572, 578 (6th Cir. 2012) (denying motion for judicial notice of materials from other litigations because plaintiff "seeks to rely on the substantive facts within those exhibits"); *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 386 n. 1 (9th Cir. 2010) (denying request for judicial notice because "the content of a deposition is not a clearly established 'fact' of which this panel can take notice"). Here, Plaintiffs ask the Court to find that the proffered documents actually "demonstrate" and "show that the real reason" for executing the Third Amendment was to give Treasury "an even greater windfall" from the Enterprises. Mot. at 3-4. Because these facts are "subject to reasonable dispute," judicial notice is improper. Fed. R. Evid. 201(b) (declaring that matters appropriate for judicial notice must establish facts that are "not subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

Finally, the invalidity of Plaintiffs' motion is punctuated by Plaintiffs' claim that Defendants' motions to dismiss conflict with the complaint by asserting a "factual argument" about the "necessity" of the Third Amendment. Mot. at 4, 7. Plaintiffs are wrong: the motions

to dismiss do no such thing. In an effort to manufacture a conflict, Plaintiffs point only to the following two sentences from the background section of FHFA's motion to dismiss:

> The Third Amendment thus exchanged future payments in an uncertain amount (a variable dividend equal to profits earned) for relief from future obligations (fixed dividends and periodic commitment fee). The Enterprises' annual earnings historically averaged less than $19 billion, the amount owed under the pre-Third Amendment fixed dividend.

D.I. 68 at 9 (omitting citations to Enterprise SEC filings). These sentences merely describe the terms of the Third Amendment (a copy of which FHFA submitted for the Court's review (*see* D.I. 68-1)), and identify the Enterprises' annual historical profits as reported in their SEC filings. *See* D.I. 68 at 9. They do not conflict with the complaint, nor do they assert any argument. In all events, as explained above, the Court is required to assume the allegations in the First Amended Complaint are true when resolving motions to dismiss. As such, the Court should deny Plaintiffs' attempt to prove their factual allegations at this stage by looking to extraneous documents produced in other litigation.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Defendants' motions to dismiss, the Court should deny Plaintiffs' motion for judicial notice or, in the alternative, to strike, and the Court should dismiss Plaintiffs' complaint with prejudice.

[*Signature page follows*]

Dated: September 22, 2017
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