IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL ROP, STEWART KNOEPP, and ALVIN WILSON,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE AGENCY, MELVIN L. WATT, in his official capacity as Director of the Federal Housing Finance Agency, and THE DEPARTMENT OF THE TREASURY,

Defendants.

Civil Action No. 1:17-cv-00497

Hon. Paul L. Maloney

THE DEPARTMENT OF THE TREASURY'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In August 2012, the Department of the Treasury ("Treasury") and the Federal Housing Finance Agency ("FHFA"), acting as conservator for the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, "the GSEs" or "the enterprises"), entered into an agreement to amend Preferred Stock Purchase Agreements between Treasury and FHFA (the "Third Amendment"). Ever since, shareholders in the enterprises – often represented by the same coordinating counsel – have engaged in near constant litigation directly attacking and attempting to vacate the Third Amendment. Having been rebuffed by every court to consider these challenges,[1] the shareholders' strategy has shifted, nearly five years after the Third Amendment was executed, to an indirect attack on that agreement through a challenge to the structure and legal authority of FHFA.

As demonstrated in Treasury's briefing in support of its motion to dismiss, which it incorporates here by reference, this action should be dismissed. Plaintiffs' claims, which are premised on the constitutional separation of powers and the allocation of sovereign authority amongst co-equal branches of government, provide no basis upon which to invalidate the Third Amendment – FHFA entered into that agreement in its capacity as conservator for the GSEs and thus did not exercise any government power, executive or otherwise. More fundamentally, plaintiffs' legal claims do not even implicate Treasury and fail to allege that Treasury engaged in any actionable conduct. Finally, they are derivative suits properly belonging to the GSEs

[1] *See Perry Capital v. Mnuchin*, 864 F.3d 591, 598–99 (D.C. Cir. 2017), *petitions for cert. docketed* (Oct. 16, 2017) (*affirming in pertinent part Perry Capital v. Lew*, 70 F. Supp. 3d 208, 246 (D.D.C. 2014)); *Collins v. FHFA*, 254 F. Supp. 3d 841, 845–46 (S.D. Tex. 2017), *appeal docketed*, No. 17-20364 (5th Cir. May 30, 2017); *Saxton v. FHFA*, 245 F. Supp. 3d 1063, 1080 (N.D. Iowa 2017), *appeal docketed*, No. 17-1727 (8th Cir. April 4, 2017); *Roberts v. FHFA*, 243 F. Supp. 3d 950, 958 (N.D. Ill. 2017), *appeal argued*, No. 17-1880 (7th Cir. Oct. 31, 2017); *Robinson v. FHFA*, 223 F. Supp. 3d 659, 665-671 (E.D. Ky. 2016), *appeal argued*, No. 16-6680 (6th Cir. July 27, 2017); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015).

themselves, and are barred by claim preclusion (which requires suits arising out of the same transaction or occurrence to be brought all at once) and the Housing and Economic Recovery Act's ("HERA") shareholder succession provision (which transfers to FHFA as conservator GSE shareholders' right to assert derivative suits).

For these reasons, this case can be resolved (and dismissed) on the basis of the 77-page, 177-paragraph Amended Complaint. But should the Court determine to decide this case on the basis of plaintiffs' summary judgment papers, which largely just rehash the extensive arguments made in the Amended Complaint, the result is the same: plaintiffs have no claim against Treasury, they are not entitled to judgment as a matter of law, and their case should be dismissed. Nothing in plaintiffs' summary judgment brief suggests that Treasury itself has violated the Constitution with its structure or operations, or demonstrates that Treasury is in any manner responsible for FHFA's alleged violations. Moreover, that brief suggests no basis upon which to invalidate the Third Amendment. Finally, plaintiffs' derivative claims on behalf of the GSEs are barred by HERA's transfer of shareholder rights provision and, further, by claim preclusion. Plaintiffs are correct that there is no genuine issue of material fact in dispute in this case. What the undisputed facts reveal, however, is that Treasury is entitled to judgment as a matter of law.

BACKGROUND

The background facts relevant to plaintiffs' action are fully set forth in Treasury's memorandum in support of its motion to dismiss, ECF No. 23 ("Treasury's Mot. to Dismiss"). While that background is useful to understanding the context out of which plaintiffs' claims arise, plaintiffs are correct that their motion for summary judgment can be resolved based on "only a very small number of operative facts." Brief in Support of Pls.' Mot. for Summ. Disposition at 2, ECF No. 33 ("Pls.' Brief"). Consistent with their overall theory of the case, plaintiffs do not appear

to believe that they need demonstrate any wrongdoing on the part of Treasury in order to establish their entitlement to judgment as a matter of law against Treasury. As such, their "small number" of facts relate only to FHFA's structure and governing authority and serve to highlight the fact that plaintiffs have no case against Treasury. In addition to plaintiffs' "operative" facts, facts relevant to Treasury include that it is an Executive Branch agency headed by a Secretary who serves at the pleasure of the President, *see* 31 U.S.C. § 301(b); *see also* Am. Compl. ¶ 14 (characterizing Treasury as an "executive agency"), and that when the Third Amendment was executed, there is no dispute that Treasury was led by its Senate-confirmed Secretary, Timothy F. Geithner. *See* Treasury's Mot. to Dismiss at 10. In addition, as further recounted in its motion to dismiss briefing, Treasury is subject to presidential oversight as an Executive Branch agency, *see* 31 U.S.C. § 301, and its budget is established by annual Congressional appropriations, *see, e.g.*, Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135, Div. E, Title I.

LEGAL STANDARD

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Sagan v. United States*, 342 F.3d 493, 497 (6th Cir. 2003). Where, as here, the moving party bears the ultimate burden of persuasion, that party "not only must show the absence of a material fact issue, they also must satisfy that burden." *Prestige Capital Corp. v. Mich. Gage & Mfg., LLC*, 722 F. Supp. 2d 837, 842 (E.D. Mich. 2010). "[A] moving plaintiff must demonstrate that no genuine issue of material fact exists as to all essential elements of her claims." *Duncan v. Tenn. Valley Auth. Retirement Sys.*, 123 F. Supp. 3d 972, 981 (M.D. Tenn. 2015).

ARGUMENT

Plaintiffs have not demonstrated that they are entitled to judgment as a matter of law on

any of their claims against Treasury. Because they have not alleged that Treasury engaged in any actionable conduct, and indeed concede that point in not responding to Treasury's primary argument in favor of dismissal, *see* Treasury's Reply Brief in Support of its Mot. to Dismiss at 1-2, ECF No. 34, they have not substantiated (or even attempted to substantiate) any element of any of their claims against Treasury. As such, as argued further in Treasury's motion to dismiss briefing, plaintiffs' claims against Treasury should be dismissed. For the same reasons, the Court should deny their motion for summary judgment. *See Holbrook v. Harman Auto., Inc.*, 58 F.3d 222, 225 (6th Cir. 1995) ("Summary judgment will be entered against a party who fails to make a showing sufficient to establish the existence of an essential element to his case.").

Moreover, plaintiffs are not entitled to the judgment they seek because the Amended Complaint does not provide any basis for invalidating the Third Amendment. Plaintiffs' claims do not even implicate the separation of powers or the Appointments Clause because they attack the Third Amendment, which was executed by FHFA in its capacity as conservator for the GSEs and did not involve any exercise of executive power. And plaintiffs' attempt, in their response to FHFA's motion to dismiss, to circumvent the well-established rule that conservators are private, non-governmental actors is without merit.

Plaintiffs argue that the private nature of a conservator's actions is irrelevant because "FHFA acted as regulator when it forced the [GSEs] into conservatorship" and that the GSEs "remain subject to oversight by FHFA as regulator." Pls.' Opp'n to FHFA's Mot. to Dismiss at 6, ECF No. 32. But plaintiffs here challenge only FHFA's agreement to the Third Amendment, and there is no dispute that FHFA took that action as conservator, not regulator. *Cf. United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994) ("It is well settled in the law that the [Resolution Trust Corporation] may function in a corporate or regulatory capacity or in a capacity as receiver. The

separateness of these dual identities has been well recognized in this circuit and others."). Plaintiffs do not challenge FHFA's appointment as conservator, nor could they at this late date. HERA permits the enterprises to bring a lawsuit challenging FHFA's appointment as conservator, which occurred with respect to the GSEs in 2008, "within 30 days of such appointment." 12 U.S.C. § 4617(a)(5). Neither the enterprises nor any of their shareholders brought such a suit within the 30-day window. Accordingly, any challenge to the appointment of FHFA as conservator is barred.

Plaintiffs' argument that FHFA's agreement to the Third Amendment was not the act of a private party because the Third Amendment "expropriate[s] Plaintiffs' investments for the benefit of the federal government" is similarly unavailing. Pls.' Opp'n to FHFA's Mot. to Dismiss at 7. The Third Amendment involved an action that private fiscal managers typically undertake for the benefit of the financial institutions they oversee—the renegotiation of the institution's financial obligations to its most significant investor. That the GSEs' dividend payments "go to the United States Treasury," *Beszborn*, 21 F.3d at 68, merely reflects Treasury's status as a GSE stockholder—indeed, the only stockholder willing to provide the enterprises with the capital they needed to weather the financial crisis. *See Perry Capital*, 864 F.3d at 601 (noting that the GSEs turned to Treasury only after efforts to raise private capital failed).[2]

Nor are plaintiffs correct when they suggest that FHFA as conservator is a governmental actor because it may take actions that it determines "promote the public interest" and "has no fiduciary duties." Pls.' Opp'n to FHFA's Mot. to Dismiss at 8. That HERA allows the conservator

[2] For similar reasons, plaintiffs' reliance on *Slattery v. United States*, 583 F.3d 800, 826 (Fed. Cir. 2009), is misplaced. In concluding that the Federal Deposit Insurance Corporation ("FDIC") could be considered the United States for purposes of the plaintiffs' particular takings claim, the Federal Circuit emphasized that the FDIC's actions in the case—*i.e.*, its refusal to turn over the monetary surplus it obtained from the liquidation of the seized bank—were "unlike the standard receivership situation in which the receiver is enforcing the rights or defending claims and paying the bills of the seized bank." *Id.* at 827–28. By contrast, FHFA's negotiation of and agreement to the Third Amendment were "quintessential conservatorship tasks." *Perry Capital*, 864 F.3d at 607.

to consider the impact of its actions on the agency (or the public) does not transform FHFA's actions here into those of the government. Indeed, the GSEs' statutory charters authorize the GSEs to act with certain public purposes in mind, *see* 12 U.S.C. §§ 1451, 1716, but that authority has never been deemed sufficient to render them government actors. *See Herron v. Fannie Mae*, 861 F.3d 160, 167–68 (D.C. Cir. 2017); *Mik v. FHLMC*, 743 F.3d 149, 168 (6th Cir. 2014). Similarly, FHFA's actions here are not governmental in nature merely because Congress directed the conservator of an institution whose continuing viability has been made possible by an infusion of taxpayer money to take into account the interests of the GSEs (rather than stockholders) and the public interest represented by the agency.[3] Because the actions FHFA takes as conservator are not governmental actions, plaintiffs' constitutional challenges to the Third Amendment fail. The Court should dismiss their claims and deny their motion for summary judgment.

Regardless, as argued further in Treasury's briefing in support of its motion to dismiss, the claims plaintiffs assert in this action are derivative (*i.e.*, they allege harm to the GSEs and seek relief that would flow to the GSEs in the first instance) and thus barred for two additional reasons. First, plaintiffs' claims could have been asserted in prior derivative suits by GSE shareholders challenging the Third Amendment and are thus barred from being asserted again here by the doctrine of claim preclusion, which protects defendants from "repetitive lawsuits based on the same conduct," *Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 385 (1985). Second, they are barred by HERA's shareholder succession provision, 12 U.S.C. § 4617(b)(2)(A)(i), which "plainly transfers [to FHFA the] shareholders' ability to bring derivative

[3] In any event, as *Perry Capital* concluded, FHFA's actions executing the Third Amendment were "quintessential conservatorship tasks." 864 F.3d at 607. Plaintiffs' reliance on *Perry Capital*'s finding that, as a general matter, FHFA's conservatorship powers exceed those of a traditional, common-law conservator, Pls.' Opp'n to FHFA's Mot. to Dismiss at 8, thus provides no basis for concluding that the specific action they challenge in this case – the conservator's execution of the Third Amendment – was governmental in nature.

suits." *Perry Capital*, 864 F.3d at 623 (quoting *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012)). Accordingly, plaintiffs' claims should be dismissed, and the Court should deny plaintiffs' motion for summary judgment.

CONCLUSION

For the reasons stated in the foregoing brief, and for those stated in Treasury's briefing in support of its motion to dismiss, the Court should deny plaintiffs' motion for summary judgment and enter judgment for the defendants on all claims asserted in the Amended Complaint.

Dated: November 6, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ANDREW BYERLY BIRGE
Acting United States Attorney

DIANE KELLEHER
Assistant Branch Director

/s/ *R. Charlie Merritt*
R. CHARLIE MERRITT
Trial Attorney (VA Bar No. 89400)
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
(202) 616-8098
robert.c.merritt@usdoj.gov

Counsel for the United States Department of the Treasury