

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

WAZEE STREET OPPORTUNITIES  
FUND IV, LP, *et al.*,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE  
AGENCY, *et al.*,

Defendants.

Case No. 2:18-cv-03478-NIQA

**FHFA DEFENDANTS' NOTICE OF CHANGE IN POSITION**

Defendants Federal Housing Finance Agency and Director Mark A. Calabria (“FHFA Defendants”) file this notice to advise the Court of a change in FHFA’s position regarding certain issues relevant to Count I. As reflected by a Stipulation to Substitute Party filed on this same date (ECF 34), a new Director, Mark A. Calabria, was appointed by the President and confirmed by the Senate to serve as Director of the Federal Housing Finance Agency and sworn in effective April 15, 2019. Under its new leadership, FHFA has reconsidered the issue in this case relating to the constitutionality of the Housing and Economic Recovery Act’s (“HERA”) for-cause removal provision, presently takes the position that the provision is constitutional, and urges the Court to uphold the constitutionality of the structure Congress chose for FHFA. The FHFA Defendants thus urge the Court to reject all of Plaintiffs’ claims challenging the Third Amendment in all respects. As further background, the FHFA Defendants advise the Court as follows.

1. In this case, Plaintiffs challenge the validity of a transaction known as the Third Amendment on various constitutional grounds. Plaintiffs' Count I alleges that it is unconstitutional for FHFA to be led by a single Director removable by the President only for cause, and that the Third Amendment is consequently invalid.

2. This case is currently pending on the parties' cross-dispositive motions: Defendants have moved to dismiss (ECF 15, 16), and Plaintiffs have moved for summary judgment (ECF 19).

3. In their memorandum supporting their motion to dismiss, filed November 16, 2018 (ECF 16), the FHFA Defendants sought dismissal of Count I on the ground that Plaintiffs lacked standing, that HERA's for-cause removal provision satisfies constitutional requirements, and that even if the provision were unconstitutional, the validity of the Third Amendment would not be affected.

4. In January 2019, the term of the prior FHFA Director expired, and an Acting Director of FHFA was designated. In February 2019, FHFA's then Acting Director was substituted for FHFA's prior Director as a defendant here (ECF 30).

5. Under that interim leadership, the FHFA Defendants advised this Court in their combined memorandum in opposition to Plaintiffs' motion for summary judgment and reply in support of dismissal, filed February 15, 2019 (ECF 31) that the FHFA Defendants would no longer defend the constitutionality of the statutory provision requiring cause for removal of an FHFA Director. The FHFA Defendants accordingly withdrew certain arguments on Count I that they had asserted in their motion to dismiss. ECF 31 at 1, 6 n.3. The FHFA Defendants continued to argue, however, that Count I should be dismissed because Plaintiffs lack standing and because the constitutionality of

HERA's for-cause removal provision is irrelevant to the Third Amendment's validity, and did not withdraw any arguments related to Counts II through V.

6. Under its new Director, FHFA has reconsidered the constitutionality of the removal provision. The FHFA Defendants now advise the Court that FHFA takes the position going forward that HERA's for-cause removal provision is constitutional. The FHFA Defendants accordingly withdraw the statements relating to this issue in their February 15, 2019 memorandum (ECF 31). The FHFA Defendants further request that the Court treat the arguments in Section II.B of their memorandum in support of their motion to dismiss (ECF 16) in support of the constitutionality of HERA's for-cause removal provision as fully operative and presenting FHFA's position on Count I, for purposes of both the FHFA Defendants' motion to dismiss and Plaintiffs' motion for summary judgment.

WHEREFORE, the FHFA Defendants respectfully request that, to the extent the Court finds it necessary to reach the merits of the constitutional issue in Count I, the Court uphold the constitutionality of HERA's for-cause removal provision, and that the Court enter judgment against Plaintiffs dismissing all claims challenging the Third Amendment.

Dated: July 26, 2019

Respectfully submitted,

/s/ Leslie M. Greenspan

Joe H. Tucker, Jr., Esquire (P.A. 56617)  
Leslie M. Greenspan, Esquire (P.A. 91639)  
TUCKER LAW GROUP, LLC  
Ten Penn Center  
1801 Market Street, Suite 2500  
Philadelphia, PA 19103  
Telephone: (215) 875-0609  
jtucker@tlgattorneys.com  
lgreenspan@tlgattorneys.com

Howard N. Cayne\*  
Asim Varma\*  
Robert J. Katerberg\*  
ARNOLD & PORTER KAYE SCHOLER LLP  
601 Massachusetts Avenue NW  
Washington, D.C. 20001  
Telephone: (202) 942-5000  
Howard.Cayne@arnoldporter.com  
Asim.Varma@arnoldporter.com  
Robert.Katerberg@arnoldporter.com

\* *Admitted Pro Hac Vice*

*Attorneys for Federal Housing Finance  
Agency Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 26, 2019, I filed and served via the Court's ECF system a true and correct copy of the foregoing document upon all counsel of record.

/s/ Leslie M. Greenspan  
Leslie M. Greenspan