No. 14-5243 (Consolidated with 14-5254, 14-5260, 14-5262)

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

PERRY CAPITAL, LLC, *et al.*,
Plaintiffs-Appellants,

v.

JACOB J. LEW, in his official capacity
as the Secretary of the Department of the Treasury, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

AMICUS BRIEF OF THE FEDERAL DEPOSIT INSURANCE CORPORATION IN RESPONSE TO THE COURT'S JUNE 21, 2016 ORDER AND IN SUPPORT OF FHFA AND AFFIRMANCE

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INTEREST OF THE AMICUS

The Federal Deposit Insurance Corporation (FDIC) has a keen interest in preserving existing caselaw recognizing that the FDIC as receiver or conservator is a federal agency for purposes of sovereign immunity and numerous federal statutes. While the FDIC supports the FHFA's arguments under FHFA's own statutes and agrees with FHFA that the issue of FHFA as conservator's sovereign immunity need not be reached here, FDIC does not support the parties' assertions in the supplemental briefs that the FDIC as conservator or receiver is not the United States or not entitled to sovereign immunity.[1] Pursuant to Federal Rule of Appellate Procedure 29(a), FDIC would like to inform the Court that this Court's law and other well-settled precedent rejects those assertions. *See Auction Co. of Am. v. FDIC*, 132 F.3d 746, 748-49, 750, 752-53 (D.C. Cir. 1997) (distinguishing the language from *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) cited in the supplemental briefs here and holding that the FDIC as receiver is the United States for purposes of sovereign immunity and various federal statutes such as the Tucker Act and 28 U.S.C. § 2401(a)). Under Rule 29(a), FDIC is not required to obtain the consent of the parties to file this brief, nor leave of court. FDIC filed this brief within 7 days of the supplemental brief of the party it supports (FHFA).

[1] FDIC expresses no view on whether FHFA as a conservator is the United States for purposes of sovereign immunity or the FTCA.

ARGUMENT

In response to this Court's questions on sovereign immunity, Plaintiffs and FHFA filed supplemental briefs arguing that FHFA as conservator is not the United States, which they supported with assertions that FDIC as conservator or receiver is not the United States or not entitled to sovereign immunity.[2] But this Court's law and other well-settled precedent holds otherwise as to the FDIC as conservator or receiver.

Specifically, in *Auction Co. of America v. FDIC*, this Court held that FDIC as receiver *is* the United States for purposes of sovereign immunity and various federal statutes. 132 F.3d 746, 748-49, 750, 752-53 (D.C. Cir. 1997) (holding that "[a]s the FDIC as Receiver counts as the United States for the Tucker Act, it does so for the Tucker Act (and general federal) statute of limitations" in 28 U.S.C. § 2401(a)).

In holding that the FDIC as receiver is the United States, this Court rejected as inapposite the very language from *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) cited in the supplemental briefs here. *Id*. at 748. This Court explained that whether FDIC as receiver is the United States depends on the context. *Id*. at 748-49. This is because some statutes define the United States restrictively to only include executive departments, whereas many statutes define the term broadly to also include independent federal agencies or federally-controlled corporations such

[2] *See* FHFA Supp. Br. at 4 n.2, Plaintiffs' Supp. Br. at 15-16.

as the FDIC as receiver. While *O'Melveny* made a passing distinction between the FDIC and the United States, this Court explained that *O'Melveny* itself "twice discounted" that remark. *Auction*, 132 F.3d at 748-49.[3] Whether FDIC as receiver is the United States necessarily depends on the statute at issue in each particular case, and because *O'Melveny* involved federal common law, not a statute, this Court found that *O'Melveny* "cannot be controlling" on the scope of "the United States" in federal statutes. *Id*. at 749.[4]

Therefore, this Court held that *O'Melveny* merely stands for the proposition that it did not involve "one of those extraordinary cases in which the judicial creation of a federal [common law] rule of decision is warranted," and thus *O'Melveny* provided "no guidance" "[o]n the question of the scope of 'United States'" in federal statutes. *Auction*, 132 F.3d at 748-49. Analyzing that distinct question, this Court held that "the FDIC as Receiver counts as the United States for … the … []general federal[] statute of limitations" in § 2401(a), which imposed a qualification on the waiver of sovereign immunity in the Tucker Act and FDIC's sue-and-be-sued clause. *Id*. at 750, 753. In this Court's view, FDIC as receiver is the United States whether it is classified as an agency or a federal instrumentality, because

[3] *O'Melveny* was careful to point out that the issue there did not involve the post-closing acts of the FDIC as receiver, but the pre-closing conduct of "private actors." 512 U.S. at 88.

[4] *Ameristar Fin. Servicing Co. LLC v. United States*, 75 Fed. Cl. 807, 812 (2007) is inapposite for the same reason. *Ameristar* merely repeated the language in *O'Melveny* that this Court has rejected as "not controlling."

it is performing federal functions and "[f]ederal agencies or instrumentalities performing federal functions always fall on the 'sovereign' side of that fault line; that is why they possess immunity that requires waiver." *Id*. at 752.

Like this Court, the Ninth Circuit has also concluded that nothing in *O'Melveny* "suggests that the FDIC was like a private enterprise for purposes of sovereign immunity," and held that FDIC as receiver is the United States for purposes of sovereign immunity—there, sovereign immunity from prejudgment interest. *Battista v. FDIC*, 195 F.3d 1113, 1120-21 & n.9 (9th Cir. 1999).

Auction, *Battista*, and other well-settled precedent similarly refutes Plaintiffs' assertion that "[w]hen a federal agency acts as a receiver or a conservator, it is not entitled to invoke sovereign immunity." Plaintiffs' Supp. Br. 15. Even before *Auction* and *Battista*, it was well-settled that FDIC as receiver was the United States for purposes of sovereign immunity under the FTCA. *See FDIC v. Citizens Bank & Trust Co.*, 592 F.2d 364, 369 n. 5 (7th Cir. 1979) (holding that FDIC as receiver "is unquestionably a 'federal agency' within the meaning of" the FTCA); *see also Safeway Portland Employees' Federal Credit Union v. FDIC*, 506 F.2d 1213, 1215 (9th Cir. 1974).[5] The FDIC as receiver is the United States for purposes of the FTCA because, *inter alia*, the statute creating the FDIC provides that all five of the members of the FDIC's Board of Directors are presidential appointees

[5] *See also FDIC v. Hartford Ins. Co. of Ill.*, 877 F.2d 590, 592–93 (7th Cir. 1989) ("What is 'the Federal Deposit Insurance Corporation as receiver' other than part of the United States?").

(12 U.S.C. § 1812 (a)(1)), FDIC is required to report annually to Congress, and FDIC is audited annually by the GAO. *See Mendrala v. Crown Mortgage Co.*, 955 F.2d 1132, 1136-37 (7th Cir. 1992). Therefore, the FDIC as receiver or conservator is protected by sovereign immunity when the tort claims asserted against it fall within the discretionary function exemption to the FTCA. *See Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1131, 1131-43 (10th Cir. 1999) (conservator); *FDIC v. Craft*, 157 F.3d 697 (9th Cir. 1998) (receiver).[6]

While the FDIC supports the FHFA's arguments under FHFA's own statutes and agrees with FHFA that the issue of FHFA as conservator's sovereign immunity need not be reached here, FDIC urges the Court not to rely on the parties' characterization of the FDIC's governmental status. There is no reason for this Court to undertake that tangential issue and place itself in conflict with the binding precedent in *Auction*, especially given that FDIC is not a party to this case and has not had an adequate opportunity to brief the issue.

[6] Plaintiffs' reliance on two cases in which FDIC as receiver—not as conservator—did not invoke sovereign immunity (Br. 15) is inapposite. FDIC did not invoke sovereign immunity in those cases because Congress provided courts with jurisdiction over any claims based on "any act or omission" of the FDIC as *receiver* if the FDIC's receivership administrative claims process is followed. 12 U.S.C. § 1821(d)(13)(D); § 1821(d)(6). But this does not mean that FDIC would not have invoked sovereign immunity if presented with a tort claim that fell within the exclusive ambit of the FTCA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jerome A. Madden
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