[Oral Argument Not Yet Scheduled]
Nos. 14-5243 (L), 14-5254 (con.), 14-5260 (con.), 14-5262 (con.)

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

PERRY CAPITAL LLC, for and on behalf of investment funds for which it acts as investment manager,
Plaintiff-Appellant,
v.
JACOB J. LEW, in his official capacity as the Secretary of the Department of the Treasury, MELVIN L. WATT, in his official capacity as Director of the Federal Housing Finance Agency, UNITED STATES DEPARTMENT OF THE TREASURY, and FEDERAL HOUSING FINANCE AGENCY,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
(CASE NO. 13-1025)

BRIEF OF *AMICUS CURIAE* 60 PLUS ASSOCIATION, INC. IN SUPPORT OF REVERSAL

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Corporate Disclosure Statement

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, *Amicus Curiae* 60 Plus Association, Inc. ("60 Plus") states:

60 Plus is a Virginia non-stock corporation qualified as a tax exempt organization under § 501(c)(4) of the Internal Revenue Code. 60 Plus has no parent corporation and no publicly held corporation owns more than 10% of its stock.

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*Authorities upon which Amicus chiefly relies are marked with asterisks.

Statutes and Rules

GLOSSARY

60 Plus	60 Plus Association, Inc.
FHFA	Federal Housing Finance Agency
HERA	The Housing and Economic Recovery Act of 2008, Pub. L. 110-289, 122 Stat. 2654
NGA	National Guardianship Association
The Companies	Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac")
The Net Worth Sweep Amendment	The Third Amendment to the Senior Preferred Stock Purchase Agreements between the United States Department of the Treasury and the Federal Housing Finance Agency, as conservator to the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, dated August 17, 2012, and the declaration of dividends pursuant to the Third Amendment beginning on January 1, 2013
Treasury	United States Department of the Treasury
UGPPA	Uniform Guardianship and Protective Proceedings Act

INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae 60 Plus Association, Inc. ("60 Plus") is a non-partisan seniors advocacy group with a free enterprise, limited government, lower taxes approach to seniors issues. It is dedicated to educating the public about policies that help Americans of retirement age preserve and pass along to their families and to their intended charities the product of their lifelong efforts. Founded in 1992, 60 Plus now has more than 7.2 million supporters nationwide. In its advocacy on issues affecting senior citizens, 60 Plus frequently addresses subjects covered by probate law. Among these subjects are the fiduciary duties that conservators owe to conservatees. Accordingly, *amicus* has a direct interest in the correct application of common law principles that govern conservators.

The district court decision in this case rests on a view of the fiduciary duties of conservators that is contrary to settled common law principles, that misperceives the essential duties of trust and loyalty at the core of the

[1] Pursuant to Fed. R. App. P. 29(c)(5), 60 Plus states that this *amicus curiae* brief is authored by itself and its counsel; no other party or person authored the brief in whole or in part or contributed money intended to fund its preparation or submission. Counsel for all parties have consented to the filing of this brief.

conservator-conservatee relationship, and that ultimately permits the very sort of conduct by a conservator that should be and is forbidden by the common law. Because of the profound misperceptions that inform the district court opinion, 60 Plus has a keen interest in assisting this Court to discern and remedy the errors in the decision below. Given its experience in dealing with these legal issues, 60 Plus is well-suited to address the common law probate antecedents of the terms, principles and concepts that are key to the correct resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress authorized the Federal Housing Finance Agency ("FHFA"), as conservator of Fannie Mae and Freddie Mac (the "Companies"), to take action to put the Companies in a "sound and solvent condition" and to "preserve and conserve" the Companies' assets, it employed a term that has a settled, accepted meaning under common law; and, therefore, intended for the FHFA's scope of authority to fall within the boundaries of well-established principles of conservatorships in the probate context. At the heart of these well-established conservatorship principles are duties required of a conservator, specifically 1) the duty to preserve the conservatee's autonomy; 2) the duty of loyalty to the

conservatee; and 3) the duty to preserve and conserve the conservatee's estate by acting prudently. These duties provide key protections to conservatees, whose fundamental rights to make certain decisions for themselves have been drastically reduced, albeit for their benefit. These duties together create a strict standard by which a conservator's actions are evaluated and deemed either within the scope of the conservator's authority or *ultra vires*.

The express language used by Congress in the Housing and Economic Recovery Act ("HERA") applies these established common law duties to FHFA in its role as conservator for the Companies. But the district court validated an action taken by the FHFA that clearly violates a conservator's common law duties. Specifically, the FHFA exceeded the scope of its authority and violated its common law duty by entering into the Third Amendment to the Senior Preferred Stock Purchase Agreements (the "Net Worth Sweep Amendment") with the Department of the Treasury.

By entering into the Net Worth Sweep Amendment, the FHFA violated the following duties it owes to the Companies: 1) the duty to preserve the Companies' autonomy by acting instead to wind down the

Companies; 2) the duty of loyalty by benefiting a third party (Treasury) to the detriment of the Companies; and 3) the duty to prudently preserve and conserve the conservatee's estate by transferring all the Companies' profits to Treasury at a time when it was well aware that the Companies were gaining financial stability.

The Institutional Plaintiffs' opening brief makes clear that, as a matter of bedrock statutory construction principles, the term "conservator" should be given its long-established and well-accepted meaning. Distilled to its essence, the core function of a conservator is to conserve the conservatee's assets. No conservator is permitted to take those assets for its own benefit or to the detriment of the conservatee. In permitting the FHFA to unilaterally award Treasury a windfall at the expense of the Companies to whom the FHFA owed fiduciary duties, the district court relied on incorrect definitions, flawed understandings, and the erroneous application of probate law principles.

Amicus respectfully submits this brief to address the district court's misperception of the duties owed to conservatees by conservators under the common law. In order to preserve the integrity of conservatorship principles as they have been interpreted and applied in probate law for

decades, the district court's ruling validating the Net Worth Sweep Amendment should be reversed.

ARGUMENT

THE DISTRICT COURT DECISION MISPERCEIVED AND INCORRECTLY APPLIED FUNDAMENTAL PRINCIPLES THAT GOVERN THE FIDUCIARY DUTIES OF CONSERVATORS

Under common law, a conservatorship[2] is a relationship created by state law in which a court gives a person or entity (the conservator) the duty and power to make personal and/or property decisions for another (the conservatee). Each state court can, under its respective conservatorship statute, appoint for minors and incapacitated adults a conservator who manages the property and business affairs of the

[2] States vary in their use of the terms "guardian" and "conservator." Many states use the term "guardian" to mean someone that makes decisions about health care and personal affairs and the term "conservator" to mean someone who makes decisions about money and property. Other states, such as California and Connecticut, use the term "conservator" to refer to a person appointed to make decisions as to personal matters (conservator of the person) as well as to financial affairs (conservator of the estate). For purposes of this brief, a "conservator" means the judicially appointed manager of the incapacitated person's assets, as opposed to personal needs, as this is the type of relationship that can be analogized to the conservatorship involving the Companies and FHFA.

conservatee. Although not identical, many provisions of state law governing conservatorship proceedings are substantially similar across most jurisdictions. The Uniform Guardianship and Protective Proceedings Act ("UGPPA")[3] has played a major role in the development of conservatorship law throughout the United States. Since its enactment, five states, the District of Columbia, and the U.S. Virgin Islands have adopted the UGPPA.[4] This brief will consider both provisions of the UGPPA as well as state statutes and will examine the correct application to this case of the settled duties these statutes prescribe.

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[3] The UGPPA was enacted by the Uniform Law Commission in 1982 as a free-standing act (apart from the Uniform Probate Code) that addressed only guardianship of minors and adults. In 1997, the UGPPA was significantly revised to update procedures for appointing guardians and conservators and strengthen due process protections for proposed wards and conservatees. Then, in 1998, Article V of the Uniform Probate Code (which pertained to guardianship and conservatorship proceedings) was amended to align with the UGPPA.

[4] The five states are: Alabama, Colorado, Hawaii, Massachusetts, and Minnesota. http://www.uniformlaws.org/Act.aspx?title=Adult+Guardianship+and+Protective+Proceedings+Jurisdiction+Act.

A. The Dual Roles Of A Conservator in Probate Law

1. A Conservator Has A Duty to Conserve The Conservatee's Autonomy

A conservatorship is a powerful legal tool that can bring good to incapacitated persons by affording needed protections at the risk of drastically reducing fundamental rights. Consequently, the essential question a court must answer when considering a conservatorship is whether the proposed conservatee so lacks the ability to manage his assets that the state must intervene by appointing a conservator to assist him. Unif. Prob. Code, § 5-401. In other words, the value of the personal autonomy interest is significant in a conservatorship. *Edward W. v. Lamkins*, 99 Cal. App. 4th 516, 520 (2002). On the one hand, when a person's autonomy becomes impaired, public policy justifies others stepping in to make choices on the person's behalf to promote the person's best interests. *In re Conservatorship of Groves*, 109 S.W.3d 317, 330 (Tenn. Ct. App. 2003). On the other hand, public policy also favors allowing incapacitated persons to retain as much autonomy as possible and selecting alternatives that restrict that persons' autonomy as little as possible. *Id.*

Only when no alternative to conservatorship is available should the court create a conservatorship. *See People v. Karriker*, 149 Cal. App. 4th 763, 777 (2007). Moreover, the court may not appoint a conservator unless it makes an express finding that a conservatorship is the least restrictive alternative needed for the protection of the conservatee. Cal. Prob. Code, § 1800.3(b). When a court finds that a conservatee is "capable of managing his own affairs and estate, the conservatorship shall terminate" because the conservator is no longer needed. *In re Maxwell*, 2003 Tenn. App. Lexis 695, 2003 WL 22209378 (Tenn. Ct. App. 2003); Tenn. Code Ann. § 34-3-108(e). When the conservatorship terminates, the conservatee regains the ability to manage his assets and his or her autonomy is restored. *See*, *e.g.*, *In re Cook*, 520 N.Y.S.2d 400 (1987) (discussing the importance of assuring that the conservatee's best interest is protected, since state intervention inevitably imposes limitations upon the conservatee's autonomy).

This movement toward conserving a proposed conservatee's autonomy occurred in the late 1980s and early 1990s, resulting in revisions to the UGPPA and to state conservatorship/guardianship statutes across the nation. For example, courts are directed to tailor the conservatorship to fit the needs of the incapacitated person and to remove only those rights

that the incapacitated person can no longer exercise or manage. Unif. Prob. Code, § 5-409(b); *In re Conservatorship of Groves*, 109 S.W.3d 317, 329 (Tenn. Ct. App. 2003); W. Va. Code § 44A-2-10(c); Fla. Stat. Ann. § 744.344(1) ("The order appointing a guardian must be consistent with the incapacitated person's welfare and safety, must be the least restrictive appropriate alternative, and must reserve to the incapacitated person the right to make decisions in all matters commensurate with the person's ability to do so.")

A conservator must also encourage the protected person to participate in decisions, to act on his own behalf, and to develop or regain capacity to manage financial affairs. Unif. Prob. Code, § 5-418(b); Kan. Stat. Ann. § 59-3078(a)(2); D.C. Code § 21-2047(a)(7) ("A general guardian or limited guardian shall encourage the ward to act on his or her own behalf whenever he or she is able to do so, and to develop or regain capacity to make decisions in those areas in which he or she is in need of decision-making assistance, to the maximum extent possible"). For example, in making decisions with respect to the protected person's estate plan, the conservator must rely, when possible, on the decision the protected person would have made. Unif. Prob. Code, § 5-411(c); A.R.S. § 14-5312(A)(11) ("In making decisions concerning his ward, a guardian shall

take into consideration the ward's values and wishes"). The purpose of requiring conservators to make decisions in accordance with the conservatee's wishes, when those wishes are known, is to enforce the fundamental principle of personal autonomy. *Lamkins*, 99 Cal. App. at 520. Thus, a conservator must afford the conservatee the greatest amount of independence and self-determination in light of the conservatee's "functional level, understanding and appreciation of his or her functional limitations, and personal wishes, preferences and desires with regard to managing the activities of daily living." N.Y. Mental Hyg. Law §81.20(a)(6)(i) (Consol. 1992).

An analogous approach is taken in California with the "substituted judgment" doctrine. Cal. Prob. Code, §§ 2580-2586. This doctrine, which affords conservators considerable flexibility in estate and personal planning for conservatees, is based on the principle that, were the conservatee "competent," he or she would have taken such action as a reasonably prudent person. *Guardianship of Christiansen*, 248 Cal. App. 2d 398, 424 (1967). These statutes are designed to "protect the conservatorship estate for the benefit not only of the persons who will ultimately receive it from the conservatee or his or her personal representative but also (and

perhaps primarily) of the conservatee himself or herself." *Conservatorship of Hart*, 228 Cal. App. 3d 1244, 1251 (1991).

In short, a probate conservatorship is an arrangement for the sole benefit of the conservatee, and must be limited as much as possible to preserve the conservatee's autonomy. A conservator has a duty to encourage and include the conservatee in the decision-making process to the maximum extent of the conservatee's ability. D.C. Code § 21-2047(a)(7); *Brammer v. Denning* , 270 P.3d 1231, 2012 WL 718947, at *8 (Kan. Ct. App. 2012).

2. A Conservator, As A Fiduciary, Owes The Conservatee The Duty of Loyalty And The Duty To Prudently Conserve The Conservatee's Estate

A conservator occupies a fiduciary position of trust of the highest and most sacred character. *Grahl v. Davis*, 971 S.W.2d 373 (Tenn. 1998). Conservators must accommodate the desires of the conservatee, except to the extent that doing so would violate the fiduciary duty the conservator owes the conservatee. Cal. Prob. Code, § 2113. A leading, independent professional organization defines fiduciary as "[a]n individual, agency, or organization that has agreed to undertake for another a special obligation of trust and confidence, having the duty to act primarily for another's

benefit and subject to the standard of care imposed by law or contract. Standards of Practice (Nat'l Guardianship Ass'n), p. 26.[5] The fiduciary relationship between a conservator and conservatee is governed by the law of trusts; as a fiduciary, a conservator must observe the standard of care applicable to trustees. Unif. Prob. Code, § 5-418(a); Cal. Prob. Code, § 2101; Va. Code § 64.2-2021; S.C. Code § 62-5-417. The fundamental duties of a trustee include the duty of loyalty and the duty to act with prudence. Unif. Trust Code, §§ 802-804; Mo. Rev. Stat. § 475.130. Accordingly, a conservator must act with a good-faith belief that its actions will tend to accomplish the purpose of its trust by benefiting the conservatee and must also act with reasonable prudence. *Conservatorship of Lefkowitz*, 50 Cal. App. 4th 1310 (1996); *see In re Guardianship of Saylor*, 121 P.3d 532 (Mont. 2005).

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[5] The National Guardianship Association (NGA), is an organization dedicated to improving the quality of life for people in need of guardianship and alternative protective services. The NGA provides for the exchange of ideas, education, and communication between groups and individuals interested in providing or furthering guardianship services or alternative protective services to individuals in need of such services. The mission of NGA is to establish and promote a nationally recognized standard of excellence in guardianship.

B. The Net Worth Sweep Amendment Violates Duties The FHFA Owes To The Companies As Their Conservator

In 2008, Congress authorized the director of the FHFA to appoint the FHFA as conservator or as receiver for the Companies if the Companies became undercapitalized. 12 U.S.C. § 4617(a); Memorandum Opinion of the United States District Court for the District of Columbia, Dkt. 51 ("Op.") 4-5. After unsuccessful efforts to capitalize the struggling Companies, the FHFA placed the Companies into conservatorship on September 6, 2008. *Id.* at 5. It is pivotal to the correct resolution of this case to recognize the significance of the FHFA's decision to place the Companies into conservatorship as opposed to receivership. The two statuses are distinct in ways that should be dispositive here: conservatorships are preferred where the entity is expected to return to sound and solvent condition, while receiverships are to "place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity." 12 U.S.C.A. § 4617(b)(3)(E). The difference between a conservator and a receiver, as set forth in HERA, is consistent with common law principles and reinforces that Congress meant "conservator" to conform to the common law purpose and function of a conservatorship.

Although there could be an overlap in roles between the FHFA as conservator and as receiver, the former focuses on preservation and conservation of the Companies' estate (which is the same goal of a conservator in the common law context) while the latter would focus on winding down the Companies.

1. A Conservator Breaches The Duty To Rehabilitate The Conservatee By Acting To Wind Down The Conservatee's Assets

Reflecting these basic principles of a conservatorship, the FHFA was made conservator of the Companies to rehabilitate the Companies and to restore their autonomy. Despite the stated goal of putting the Companies in a sound and solvent condition and preserving and conserving the Companies' assets, the Net Worth Sweep Amendment did exactly the opposite.

The Net Worth Sweep Amendment changed the structure, and therefore increased the amount, of quarterly dividend payments the Companies were required to pay to Treasury. Op. 8. This increase, which made the payments to Treasury equal to the entire net worth of each Company, worked to sweep nearly all the Companies' profit to Treasury. *Id.* Having denied the Companies' profits and, thus a way for them to

rebuild capital, the FHFA prevented the Companies from returning to the market in their prior form.

When they entered into the Net Worth Sweep Amendment, both the FHFA and Treasury were well aware that their actions would block the Companies' rehabilitation. In fact, in a 2012 press release announcing the Net Worth Sweep Amendment Treasury described it as "steps to expedite [the] wind down of Fannie Mae and Freddie Mac." Press Release, U.S. DEP'T OF THE TREASURY, Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012), http://www.treasury.gov/ press-center/press-releases/Pages/tg1684/aspx. Then-Acting FHFA Director Edward J. DeMarco even indicated that "[t]here seems to be broad consensus that Fannie Mae and Freddie Mac will not return to their previous corporate forms. The Obama Administration has since made clear that its preferred course of action is to wind down the Enterprises." An Update from the Federal Housing Finance Agency on Oversight of Fannie Mae, Freddie Mac and the Federal Home Loan Banks: Hearing Before the U.S. Senate Committee on Banking, Housing and Urban Affairs, 113th Cong. 3 (2013).

The FHFA, knowing that it would operate to wind down the Companies, breached all notions of fiduciary duty when it entered into the Net Worth Sweep Amendment. Such an action intended to liquidate the assets of the Companies would have been appropriate only if the FHFA were named receiver, rather than conservator. Because this action went squarely against the stated purpose of a conservatorship – to put the Companies in a sound and solvent condition and to preserve and conserve the Companies' assets – it violated the FHFA's common law fiduciary duties to preserve the conservatees' assets and restore autonomy to the conservatees.

2. A Conservator Breaches The Duty Of Loyalty By Providing A Windfall To A Third Party To The Detriment Of The Conservatee

The duty of loyalty is perhaps the most fundamental duty of the conservator. Accordingly, a conservator owes the conservatee an undivided duty of loyalty. *Grahl*, *supra*, 971 S.W.2d. at 378. Under this duty, the conservator is obligated not to place any interests, whether of itself or of third parties, above the interests of the conservatee. A conservator must administer the estate solely in the interest of the

conservatee. Mo. Rev. Stat. § 475.130; Cal. Prob. Code, § 16002; *Dep't of Soc. Servs. v. Saunders*, 247 Conn. 686, 707 (1999); *Ravenstein v. Ravenstein*, No. 2012-CA-01085-SCT, 2014 WL 3512968, at *9 (Miss. July 17, 2014). The conservator must avoid any personal, business, or professional interest or relationship that is or reasonably could be perceived as being self-serving or adverse to the best interest of the conservatee. Cal. Rules of Court, rule 7.1059; Mo. Rev. Stat. § 475.130 ("A conservator of the estate is under a duty to act in the interest of the protectee and to avoid conflicts of interest which impair the conservator's ability so to act"). A conservator must manage the conservatee's estate for the benefit of the conservatee and not for the benefit of a third party. *See Dowdy v. Jordan*, 196 S.E.2d 160 (Ga. Ct. App. 1973). Thus, conservators may not transfer the assets of a conservatee to a third party absent a corresponding benefit for the conservatee.

Given the relationship between the FHFA and the Treasury — both entities are components of the federal government — well-developed common law arising in the context of family fiduciaries provides compelling parallels. For example, in *In re Conservatorship of Moore*, 409 N.W.2d 14 (Minn. Ct. App. 1987), a father was appointed conservator for his three sons after their mother died. The father married shortly after the

death of the conservatees' mother and raised the conservatees along with the wife's children. While serving as conservator, the father regularly deposited the conservatees' social security and insurance checks into a joint checking account from which the father paid for his entire family's needs. When the court considered whether the father breached his fiduciary duty by using the conservatees' funds to provide for other members of their family, it emphasized that the conservator is a fiduciary with a duty to guard the conservatees' entrusted assets. *Id.* at 16-17. The court found that the father had breached his fiduciary duty by spending the conservatees' assets on other family members, thereby failing to safeguard the conservatees' estate from depletion.

Similarly, in *Grahl v. Davis*, 971 S.W.2d 373 (Tenn. 1998), the Supreme Court of Tennessee considered the duties of a daughter who was appointed conservator for her mother when the mother was found to be incompetent. *Id*. at 374. While serving as conservator, the daughter allowed the conservatee's husband to withdraw funds from four certificates of deposit in which the conservatee had an interest and reinvest the funds into certificates of deposit held either solely in the name of the husband or jointly in the name of the husband and the conservatee. *Id*. In

holding that the conservator breached her fiduciary duty to the conservator, the court explained that "a conservator cannot be allowed by law to have any inducement to neglect the interests of the conservatee." *Id*. at 378. By allowing the conservatee's property to be transferred to both the conservatee's husband and the conservatee, the conservator had failed to protect the interests of the conservatee. *Id*. at 379.

In much the same way the father in *Moore* and daughter in *Grahl* owed a duty of loyalty to their respective conservatees, the FHFA, once it became conservator in 2008, owed the Companies a duty of loyalty to act in the Companies' best interests and to safeguard the Companies' estates from depletion. In violation of its duty of loyalty, the FHFA entered into the Net Worth Sweep Amendment in 2012, which provided a huge windfall to Treasury and imposed a huge detriment on the Companies. The Net Worth Sweep Amendment entitled Treasury to the Companies' positive cash flow as well as their entire net assets, and characterized payments to Treasury as dividends. Op. 8-9. Under this arrangement, Treasury stood to benefit tremendously if the Companies reversed their non-cash losses and, because characterized as dividends, the payments

would neither reduce Treasury's liquidation preference or redeem the Treasury stock. *Id.*

The Companies were extremely profitable in 2013 and, in accordance with the Net Worth Sweep Amendment, the Treasury received a windfall of $130 billion in dividends that year. Op. 9. The Companies continued their profitability thereafter, in excess of the cash dividends they would have owed prior to the Net Worth Sweep Amendment, thereby increasing the Companies' net worth. Initial Opening Brief for Institutional Plaintiffs ("IOB") 41. In spite of these strides toward autonomy, the Companies were left with no profits; instead, Treasury reaped all the benefits. For these reasons, the FHFA breached the duty of loyalty it owed to the Companies.

3. A Conservator Breaches The Duty To Prudently Conserve The Estate By Acting To Wind Down The Conservatee's Assets When The Conservatee Has Achieved Financial Stability

Another fundamental duty of a conservator is to exercise reasonable care, skill, and caution when acting on behalf of the conservatee. Unif. Trust Code, § 804; *In re Conservatorship of J.R.*, 252 P.3d 163, 168 (Mont. 2011). Conservators must act in the conservatee's "best interest" and with prudence to "preserve the estate." *See, e.g.*, Va. Code § 64.2-2021. The

conservator, in managing and controlling the estate, shall use ordinary care and diligence, which is determined by all the circumstances of the particular estate. S.D. Codified Laws § 29A-5-405; Cal. Prob. Code, § 2401(a). One of the circumstances that a court will consider is the expertise, or presumed expertise, of the conservator. *See Estate of Beach*, 15 Cal.3d 623, 635 (1975).

In order to be assured that conservators act in accordance with the duty to prudently preserve and conserve a conservatee's estate, numerous states require procedural safeguards (*e.g.*, mandatory disclosures and probate court approval), to ensure that a conservator is properly administering the conservatee's estate. Certain actions are disallowed entirely, or are permitted only with a court order. For example, the giving of gifts may require prior court approval. Kan. Stat., § 59-3078 (providing that the conservator shall not have the power "except with approval of the court" to "make a gift on behalf of the conservatee); Judicial Council of California, Handbook for Conservators 141 (2002) ("You may not give gifts of estate money or assets to yourself or anyone else without a judge's prior approval. You need court approval, even if the conservatee asks you to give the gift, and even if he or she has given similar gifts in the past").

Selling assets may also require court approval. See Scott K. Summers, Guardianship & Conservatorship: A Handbook for Lawyers 149 (1996) (stating that selling assets "often require[s] prior authorization of the court" and "[s]ervices of a court-appointed appraiser may be necessary").

In re Estate of Berger, 166 Ill. App. 3d 1045, examined the standard of care required of a conservator in yet another family context. In *Berger*, a conservator transferred monies and gifts from the conservatee's estate to the conservatee's daughters to cover their "living expenses." These "living expenses" included support payments to one daughter above the amount previously approved by the court, and payments for graduate schools costs to another daughter who was no longer financially dependent on the conservatee. The court held that these payments were wrongful because there was no proof of necessity or duty to support these "living expenses." In so holding, the court stated that a conservator "must act with the degree of diligence which an ordinarily prudent person would use in conducting his own affairs." *Id.* at 1056.

As in *Berger*, the Net Worth Sweep Amendment was not necessary, and the FHFA therefore violated its duty to act prudently to conserve the conservatee's estate. Indeed, not only did the FHFA lack proof of

necessity, it had abundant proof that the Net Worth Sweep Amendment was unnecessary. Even before entering into the Net Worth Sweep Amendment in August 2012, the FHFA predicted that, by 2013, Freddie Mac would generate enough income so that it would no longer need to make draws from Treasury and that Fannie Mae's annual draws would decline substantially. IOB 14. By late 2011, Treasury recognized that the Companies might have "positive net income after dividends." *Id.* at 14. The Companies' financial conditions continued to improve in 2012 and by the second quarter of that year, Fannie Mae and Freddie Mac reported net income of $5.1 billion and $3.0 billion. *Id.* at 15.

Yet, in spite of the Companies' continued positive forecasts, the FHFA entered into the Net Worth Sweep Amendment. That action was especially egregious because it occurred less than two weeks after the Companies released their 2012 second quarter earnings reports, which evidenced tremendous progress. IOB 16. Under established principles of fiduciary duty, the FHFA could not agree to a new payment arrangement with Treasury that included the potential for a huge windfall to Treasury, while it was well-aware that the Companies were fully capable of making payments under the prior arrangement. The Net Worth Sweep

Amendment does not allow the Companies to retain profits, rebuild capital, or return to the market in their prior form. Had the FHFA used ordinary care and diligence to process readily available information, its fiduciary duty to preserve and conserve the Companies' assets should have precluded the Net Worth Sweep Agreement.

CONCLUSION

The judgment of the district court should be reversed.

Dated: July 6, 2015

Respectfully submitted,

/s/ Jerrold J. Ganzfried

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B). It contains 4,734 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14-point font size.

Dated: July 6, 2015

By: /s/ Jerrold J. Ganzfried
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeal for the D.C. Circuit by using the appellate CM/ECF system on July 6, 2015. 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.

Dated: July 6, 2015

By: /s/ Jerrold J. Ganzfried
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