IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

THOMAS SAXTON, IDA SAXTON, BRADLEY PAYNTER,	)	
Plaintiffs,	)	
v.	)	No. 1:15-cv-00047
FEDERAL HOUSING FINANCE AGENCY, *et al*.,	)	
Defendants.	)	

DEPARTMENT OF THE TREASURY'S MOTION TO DISMISS THE COMPLAINT

The defendant, the Department of the Treasury ("Treasury"), hereby moves to dismiss the complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure. The reasons for this motion are set forth in the attached memorandum of law.

Dated: September 4, 2015

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

KEVIN W. TECHAU
United States Attorney

DIANE KELLEHER
Assistant Branch Director

/s/ Bradley H. Cohen
BRADLEY H. COHEN
JOEL MCELVAIN
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883

Washington, D.C. 20044
Tel: (202) 305-9855
Fax: (202) 616-8202
Email: bradley.cohen@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2015, copies of the Department of the Treasury's Motion to Dismiss the Complaint and its Memorandum in Support of its Motion to Dismiss the Complaint were filed electronically via the Court's ECF system, through which a notice of the filing will be sent to all counsel of record.

/s/ Bradley H. Cohen
BRADLEY H. COHEN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

THOMAS SAXTON, IDA SAXTON, BRADLEY PAYNTER,	)	
Plaintiffs,	)	
v.	)	No. 1:15-cv-00047
FEDERAL HOUSING FINANCE AGENCY, *et al*.,	)	
Defendants.	)	

DEPARTMENT OF THE TREASURY'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

Introduction

The plaintiffs in this action seek to challenge the actions taken by the United States Department of the Treasury ("Treasury") and the Federal Housing Finance Agency ("FHFA") to rescue and stabilize two important financial institutions essential to the Nation's economy, the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, "the GSEs"). Plaintiffs here assert materially identical claims as ones that other district courts have already considered, and rejected, in disposing of ten earlier-filed, coordinated lawsuits in the District of Columbia and an eleventh lawsuit in the Southern District of Iowa challenging the same actions by Treasury and FHFA. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 228-29 (D.D.C. 2014), *appeals docketed*, No. 14-5243, 14-5254, 14-5260, 14-5262 (D.C. Cir. Oct. 8, 2014); *Cont'l W. Ins. Co. v. FHFA*, --- F. Supp. 3d ---, 2015 WL 428342, at *10 & n.6 (S.D. Iowa Feb. 3, 2015). This complaint fails for the same reasons that the complaints filed in *Perry Capital* and *Continental Western* did.

As an initial matter, the complaint – which seeks equitable relief that would go to the (purported) benefit of the GSEs – runs afoul of the anti-injunction provision of the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. § 4617(f). Section 4617(f) precludes courts from ordering equitable relief that would interfere with FHFA's exercise of its powers as conservator of the GSEs. The plaintiffs here, like the plaintiffs in *Perry Capital* and *Continental Western*, attempt to evade this jurisdictional bar by disputing whether FHFA properly exercised its conservatorship powers, but this attempt fails. Well-established law under HERA and a materially identical provision in the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") provides that application of the anti-injunction bar does not

depend on whether the plaintiffs agree with the manner in which FHFA has exercised its conservatorship powers. Nor may the plaintiffs evade the anti-injunction bar by suing FHFA's counter-party, Treasury.

Second, this suit is barred under HERA's prohibition against shareholder suits, 12 U.S.C. § 4617(b)(2)(A). Multiple courts have recognized that this provision transfers all of the GSEs' shareholders' rights, including the right to bring a derivative suit on behalf of those entities, to the conservator for the duration of the conservatorship. The complaint, which seeks relief that would run to the GSEs and only indirectly to shareholders (if at all), is plainly a derivative suit that is subject to this jurisdictional bar. Although the plaintiffs may attempt to invoke a "manifest conflict of interest" exception to HERA's bar against shareholder suits to justify a suit against the conservator, such a purported exception appears nowhere in the text of HERA, and cannot be reconciled with that statutory text. The complaint fails for this independent reason as well. Moreover, to the extent that the complaint seeks relief for a supposed loss of payments that the plaintiffs as shareholders might recover in the event of the GSEs' liquidation, it depends on speculative future events, and is not ripe.

Third, the district court for the District of Columbia has already squarely held in the *Perry Capital* litigation that the same claims as those asserted by the plaintiffs here are barred under HERA. Plaintiffs are bringing a derivative suit on behalf of the enterprises, and the judgment of the *Perry Capital* Court with respect to an earlier-filed shareholder derivative lawsuit has issue preclusive effect here. The law is well settled that a plaintiff in a second derivative action is bound by the determinations rendered in an earlier derivative action raising the same claims on behalf of the same corporate entities (here, the two GSEs). The court's

decision on the issues briefed and presented in the *Perry Capital* litigation, therefore, is binding here.

This Court should enter a judgment consistent with the resolution of the *Perry Capital* and *Continental Western* cases, and dismiss the complaint for lack of subject-matter jurisdiction. Like the other shareholders that have come before them, Plaintiffs cannot use the federal courts to assert claims and seek relief when Congress has barred such efforts.

Background

I. Fannie Mae and Freddie Mac

Fannie Mae and Freddie Mac are government-sponsored enterprises that provide liquidity to the mortgage market by purchasing whole loans from lenders, or by exchanging mortgage backed securities ("MBS") for whole loans, thereby freeing up lenders' capital to make additional loans. *See* Compl. ¶ 28. These entities, which own or guarantee trillions of dollars of residential mortgages and MBS, have played a key role in housing finance and the U.S. economy.

Throughout the first half of 2008, the GSEs suffered multi-billion dollar losses on their mortgage portfolios and guarantees. *See* Compl. ¶ 3. By the end of 2008, Fannie Mae had lost $58.7 billion and Freddie Mac had lost $50.1 billion. *See* FHFA, Office of Inspector General, *Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements* at 5 (Mar. 20, 2013) ("2013 OIG Report")[1] (cited in Compl. ¶¶ 60, 69, 70, 88).[2] These losses exceeded the GSEs' combined earnings for the previous *thirty-seven years*. *Id*.

[1] The 2013 OIG Report is *available at* http://www.fhfaoig.gov/Content/Files/WPR-2013-002_2.pdf.

[2] Documents incorporated within a complaint by reference are considered part of the pleadings, and may be cited in this motion to dismiss, which raises a facial challenge to whether the

In response to the developing financial crisis, in July 2008, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (2008). Compl. ¶ 4. HERA created the Federal Housing Finance Agency, an independent federal agency, to supervise and regulate Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. 12 U.S.C. § 4501 *et seq*. (Previously, the GSEs had been regulated by the Office of Federal Housing Enterprise Oversight. *See* Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, §§ 1301-1395, 106 Stat. 3672, 3941-4012.) HERA also granted the Director of FHFA the authority to place Fannie Mae and Freddie Mac in conservatorship or receivership. *See* 12 U.S.C. § 4617(a). FHFA could use this discretionary authority to "be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2). The statute provides that, upon its appointment as the conservator or receiver, FHFA would "immediately succeed to … rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." *Id*. § 4617(b)(2)(A). The statute accords the conservator the power to "operate" and "conduct all business" of the GSEs, *id.* § 4617(b)(2)(B), including the power to take such action as may be "appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity," *id.* § 4617(b)(2)(D), and to "transfer or sell" any of the GSEs' assets or liabilities, *id.* § 4617(b)(2)(G).

HERA also amended the statutory charters of the GSEs to grant the Secretary of the Treasury the authority to purchase "any obligations and other securities" issued by the GSEs "on

---

complaint has stated any claim over which this Court has subject-matter jurisdiction. *See Brown v. Medtronic, Inc.*, 628 F.3d 451, 459-60 (8th Cir. 2010).

such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine," provided that Treasury and the GSEs reached a "mutual agreement" for such a purchase. *See* 12 U.S.C. § 1719(g)(1)(A) (Fannie Mae); *id.* § 1455(*l*)(1)(A) (Freddie Mac). Treasury was required to determine, prior to exercising this purchase authority, that the purchase was necessary to "provide stability to the financial markets," "prevent disruptions" in mortgage financing, and "protect the taxpayer." *Id.* § 1719(g)(1)(B) (Fannie Mae); *id.* § 1455(*l*)(1)(B) (Freddie Mac). This purchase authority would expire on December 31, 2009, *id.* § 1719(g)(4); *id.* § 1455(*l*)(4), but the statute expressly recited that Treasury would retain the power to exercise its rights with respect to previously-purchased securities after that sunset date, *id.* § 1719(g)(2)(D); *id.* § 1455(*l*)(2)(D).

In early September 2008, FHFA determined that the GSEs had severe capital deficiencies and were operating in an unsafe and unsound manner. Press Release, Statement of FHFA Director James B. Lockhart at 1, 5 (Sept. 7, 2008) (cited in Compl. ¶ 35).[3] Accordingly, on September 6, 2008, the Director of FHFA placed them into conservatorship. *Id.* at 5. At that time, the GSEs' financial exposure on their combined guaranteed mortgage-backed securities and debt outstanding totaled more than $5.4 trillion, and their net worth and public stock prices had fallen sharply. *Id.* at 1.

II. Treasury's Senior Preferred Stock Purchase Agreements with the GSEs

On September 7, 2008, one day after the GSEs entered conservatorship, Treasury used its authority to rescue the GSEs from impending insolvency and mandatory receivership, providing

[3] Director Lockhart's statement is available at http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-FHFA-Director-James-B--Lockhart-at-News-Conference-Annnouncing-Conservatorship-of-Fannie-Mae-and-Freddie-Mac.aspx.

them with access to a lifeline of billions of dollars in taxpayer funds. *See* Compl. ¶ 8. Treasury entered into Senior Preferred Stock Purchase Agreements (the "PSPAs") with each GSE, through FHFA. Under the PSPAs, Treasury committed to advance funds to each GSE for each calendar quarter in which the GSE's liabilities exceeded its assets, in accordance with GAAP, so as to maintain the solvency (*i.e.*, positive net worth) of that enterprise. If a draw was needed, FHFA submitted a request to Treasury to allow the GSE to draw on the funds committed under its PSPA. Treasury would then provide funds sufficient to eliminate any net worth deficit. *See* Fannie Mae PSPA § 2.1, 2.2, Freddie Mac PSPA §§ 2.1, 2.2 (cited in, *e.g.*, Compl. ¶ 8).[4]

As of August 8, 2012, Fannie Mae had drawn $116.15 billion and Freddie Mac had drawn $71.34 billion from Treasury. *See* Compl. ¶ 58. These draws were necessary to maintain the positive net worth, and thus the viability, of each company. Had Treasury not supplied this capital, both companies would have entered mandatory receivership, and their assets would have been liquidated. *See* 12 U.S.C. § 4617(a)(4)(A) (FHFA must place the GSE in receivership if the obligations of the GSE exceed its assets for 60 calendar days).

In exchange for the capital that it provided to the GSEs, Treasury received senior preferred stock with a liquidation preference,[5] warrants to purchase 79.9 percent of each GSE's common stock, and commitment fees. Compl. ¶¶ 8, 76; Fannie Mae PSPA §§ 3.1-3.4; Freddie Mac PSPA §§ 3.1-3.4. The face value of the liquidation preference on Treasury's senior preferred stock was $1 billion from each GSE, and it increased dollar-for-dollar as either Fannie Mae or Freddie Mac

[4] The PSPAs, with amendments, are attached as Exhibit A to the memorandum in support of the motion to dismiss filed by FHFA and its Director in this action ("FHFA Exh. A").

[5] A liquidation preference is "[a] preferred shareholder's right, once the corporation is liquidated, to receive a specified distribution before common shareholders receive anything." Black's Law Dictionary 1298 (9th ed. 2009).

drew on its PSPA funding capacity. Fannie Mae PSPA § 3.3; Freddie Mac PSPA § 3.3. Treasury received no additional shares of stock when the GSEs made draws under the PSPAs. *See* Fannie Mae PSPA § 3.1, Freddie Mac PSPA §§ 3.1. Currently, Treasury has a combined liquidation preference of $189.5 billion for the two GSEs. (This reflects approximately $187.5 billion in draws, plus the initial $2 billion in liquidation preference.) *See* Compl. ¶ 15.

Treasury also received quarterly dividends on the total amount of its senior preferred stock. Compl. ¶ 9. Prior to the Third Amendment, the GSEs paid dividends at an annual rate of ten percent of their respective liquidation preferences. Fannie Mae Senior Preferred Stock Certificate § 5; Freddie Mac Senior Preferred Stock Certificate § 5 (cited in Compl. ¶ 51) (FHFA Exh. B). (The quarterly dividend payment thus amounted to 2.5% of the liquidation preference.) Treasury would provide funds to the GSEs to cure both enterprises' negative net worth, which was caused in part by the GSE's payment of dividends to Treasury. However, each instance of Treasury providing funds to the GSEs to pay quarterly dividend obligations back to Treasury increased the liquidation preference even further. In turn, this increased future quarterly dividend payments. *See* Press Release, U.S. Dep't of Treasury, Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012) (cited in Compl. ¶ 71).

The original PSPAs also restricted dividend payments to all shareholders who were subordinate to Treasury in the capital structure. Fannie Mae PSPA § 5.1; Freddie Mac PSPA § 5.1. Under these agreements, the GSEs cannot pay or declare a dividend to subordinate shareholders without the prior written consent of Treasury so long as Treasury's preferred stock is unredeemed. *Id.* Nor can the GSEs "set aside any amount for any such purpose" without the prior written consent of Treasury. *Id.*

The PSPAs also required the GSEs to pay a periodic commitment fee to Treasury beginning on March 31, 2010. Compl. ¶ 76; Fannie Mae PSPA §§ 3.1, 3.2; Freddie Mac PSPA §§ 3.1, 3.2. The periodic commitment fee "is intended to fully compensate [Treasury] for the support provided by the ongoing Commitment following December 31, 2009." *Id.* The amount of the fee was to be "determined with reference to the market value of the Commitment as then in effect," as mutually agreed between Treasury and the GSEs, in consultation with the Chairman of the Federal Reserve. *Id.* While the fee was initially to be set by December 31, 2009, the PSPAs (as amended) permitted Treasury, in its sole discretion, to waive the fee for up to one year at a time based on conditions in the mortgage market. Compl. ¶ 50; Second Amendment to Amended and Restated Fannie Mae PSPA, § 8 (Dec. 24, 2009); Second Amendment to Amended and Restated Freddie Mac PSPA, § 8 (Dec. 24, 2009) (cited in Compl. ¶ 55) (FHFA Exh. A).

Treasury's rights under the PSPAs – its receipt of senior preferred stock with accompanying dividend rights, warrants to purchase common stock, and the right to set commitment fees – reflected the extraordinary nature of the commitment it had made to the GSEs. Simply put, the GSEs would have been liquidated, with dramatically negative results for the United States economy, if Treasury had not infused hundreds of billions of dollars that prevented the GSEs from entering into mandatory receivership and liquidation.

By 2012, however, the GSEs' draws under Treasury's commitment of funds had grown so large that the GSEs' dividend obligations to Treasury under the PSPAs were requiring the Enterprises to draw funds from Treasury in order to pay the 10% annual dividend payment back to Treasury. *See* Compl. ¶ 58. Of the $187 billion the Enterprises had drawn from Treasury, approximately $26 billion had been drawn to pay the fixed dividend back to Treasury. Compl.

¶¶ 11, 58. As a result of the fixed dividend requirement, the GSEs publicly stated that they did not expect to earn sufficient income to make these dividend payments without taking further draws from the finite supply of Treasury funds under the PSPAs. As Fannie Mae put it in the Form 10-Q that it filed on August 8, 2012, "we do not expect to generate net income or comprehensive income in excess of our annual dividend obligation to Treasury over the long term. … We also expect that, over time, our dividend obligation to Treasury will increasingly drive our future draws under the senior preferred stock purchase agreement." Fannie Mae, *Second Quarter Report, Form 10-Q* at 12 (Aug. 8, 2012).[6] In addition, the amount of Treasury's commitment of funds would become fixed at the end of 2012, meaning these dividend obligations threatened to erode the limited funding capacity remaining.

In August 2012, Treasury and FHFA, acting as conservator for the Enterprises, entered into the Third Amendment to the PSPAs. Compl. ¶ 70. The Third Amendment eliminated the PSPAs' provisions requiring the payment of a fixed dividend. Compl. ¶ 74. Instead, an Enterprise now pays a quarterly variable dividend – referred to in the complaint as a "net worth sweep" – only if the Enterprise has a positive net worth after accounting for prescribed capital reserves. Third Amendment to Amended and Restated Fannie Mae PSPA, § 4 (Aug. 17, 2012); Third Amendment to Amended and Restated Freddie Mac PSPA, § 4 (Aug. 17, 2012) (cited in Compl. ¶ 70) (FHFA Exh. A). If either Enterprise's net worth is negative in a quarter, no dividend is due from that Enterprise. *Id*. This effectively ended the practice of the GSEs

[6] Because Fannie Mae's August 8, 2012 10-Q is "expressly mentioned in the complaint" (*see* Compl. ¶ 60), the Court may consider it here. *Dittmer Properties, L.P. v. FDIC*, 708 F.3d 1011, 1021 (8th Cir. 2013). Additionally, courts frequently take judicial notice of SEC filings. *See Horizon Asset Mgm't Inc. v. H&R Block, Inc.*, 580 F.3d 755, 761 (8th Cir. 2009) (in resolving a motion to dismiss, courts "may take judicial notice of . . . public SEC filings").

drawing funds from Treasury in order to pay fixed dividends to Treasury. The Third Amendment also suspended the periodic commitment fee that each Enterprise would otherwise owe to Treasury. *Id.*

III. This Suit

Plaintiffs, who own common shares of Fannie Mae and Freddie Mac (and one of whom owns preferred shares of Freddie Mac), allege that the Third Amendment expropriated the value of their stock. *See, e.g.*, Compl. ¶¶ 30-32, 71, 125, 135, 140-42. Plaintiffs have brought suit against FHFA and its Director, and also against Treasury. With respect to Treasury, plaintiffs contend that Treasury lacked the legal authority to enter into the Third Amendment and that Treasury's decision-making with respect to the Third Amendment was arbitrary and capricious. Compl. ¶¶ 107-126. As noted above, this is the twelfth lawsuit brought by GSE shareholders challenging the Third Amendment in federal district court.[7]

Argument

I. Standard of Review

Before proceeding to the merits of a case, a court must ensure that it possesses subject matter jurisdiction over the action. *Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 816 (8th Cir. 2009). Under Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden to show that the court has jurisdiction over its claims. *See Steel Co.*

[7] Since plaintiffs filed the complaint in this case, a thirteenth lawsuit was filed in the District of Delaware. *See Jacobs v. FHFA, et al.*, 15-cv-708 (D. Del.). In addition, there are a series of actions concerning the Third Amendment pending in the U.S. Court of Federal Claims. *See Fairholme Funds, Inc., et al. v. United States*, No. 1:13-cv-00465; *Cacciapalle, et al. v. United States*, No. 1:13-cv-466; *American European Ins. Co. v. United States*, No. 1:13-cv-496; *Arrowood Indemnity Co. et al. v. United States*, No. 1:13-cv-698; *Dennis v. United States*, No. 1:13-cv-542; *Fisher, et al. v. United States*, No. 1:13-cv-608; *Reid, et al. v. United States*, No. 1:14-cv-152; *Rafter v. United States*, No. 1:14-cv-740.

v. Citizens for a Better Env't, 523 U.S. 83, 104 (1998). Where, as here, a motion to dismiss for lack of jurisdiction is limited to a facial attack on the pleadings, it is subject to the same standard as a motion brought under Rule 12(b)(6). *See Kellner v. Univ. of N. Iowa*, No. 14-CV-2004-LRR, 2014 WL 855831, at *4 n.2 (N.D. Iowa Mar. 5, 2014). The Court thus "accept[s] as true all factual allegations in the complaint, giving no effect to conclusory allegations of law." *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007). The plaintiff must "assert facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right." *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

II. HERA Precludes the Plaintiffs from Challenging the Third Amendment

Plaintiffs challenge Treasury and FHFA's decision to enter into the Third Amendment to the PSPAs, under a variety of theories. However, Congress has prohibited the plaintiffs from obtaining judicial review over these challenges, as two other courts have concluded in rejecting materially identical challenges to the Third Amendment brought by other shareholders. *See Perry Capital*, 70 F. Supp. 3d at 221-22; *Continental Western*, 2015 WL 428342, at *10 n.6. This Court lacks jurisdiction over plaintiffs' claims for the same reasons that the courts in *Perry Capital* and *Continental Western* determined that they lacked jurisdiction when the same claims were presented to them, *i.e.*, because plaintiffs' complaint violates two separate, and independent, barriers to judicial review over such claims that Congress erected when it enacted HERA. First, HERA prohibits relief that would restrain the powers that FHFA exercises as conservator of the GSEs, such as the decision to enter into the Third Amendment. Second, HERA prohibits suits, such as those brought by plaintiffs here, based on the plaintiffs' status as shareholders in the GSEs

because under HERA, the conservator (FHFA) has succeeded to all of the rights of the shareholders in those institutions.

A. HERA Bars the Relief Requested in the Complaint

At the outset, the complaint must be dismissed because it is barred by the anti-injunction provision of HERA. In their complaint, plaintiffs seek a declaratory judgment that the Third Amendment is unlawful, as well as injunctions preventing FHFA and Treasury "from implementing, applying, or taking any action whatsoever pursuant to" the Third Amendment. Compl., Prayer for Relief ¶ 146 a, d, e. This requested relief conflicts with the statutory bar against injunctive or other equitable relief affecting or restraining FHFA's powers as conservator of the GSEs.

1. HERA Forbids Review So Long as the Conservator Is Acting Within Its Statutory Powers

Section 4617(f) does not permit judicial review of FHFA's actions as conservator or receiver. Specifically, 12 U.S.C. § 4617(f) states that: "Except as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver." The Eighth Circuit, interpreting a nearly identical provision – barring judicial review of actions by the Resolution Trust Corporation (and its successor, the Federal Deposit Insurance Corporation) as conservator or receiver of failed banking institutions[8] – has held that the provision "effect[s] a sweeping ouster of courts' power to grant equitable remedies.'" *Hanson v. FDIC*, 113 F.3d 866, 871 (8th Cir. 1997) (quoting

[8] *Hanson* and some of the other cases cited herein concerned 12 U.S.C. § 1821(j), the jurisdictional bar under FIRREA with respect to claims against the FDIC in its capacity as a conservator or receiver. HERA's jurisdictional bar under 12 U.S.C. § 4617(f) is "substantially identical" to FIRREA's bar. *Perry Capital*, 70 F. Supp. 3d at 220.

Freeman v. FDIC, 56 F.3d 1394, 1399 (D.C. Cir. 1995)) (alteration in original); *see also Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707, 715 (8th Cir. 1996) (holding that because of § 1821(j), "[t]his Court therefore lacks jurisdiction to grant the requested equitable relief."). The D.C. District Court adopted that same interpretation under HERA, holding that § 4617(f) "'effect[s] a sweeping ouster of courts' power to grant equitable remedies.'" *Perry Capital*, 70 F. Supp. 3d at 220 (quoting *Freeman*, 56 F.3d at1399); *see also Town of Babylon v. FHFA*, 699 F.3d 221, 228 (2d Cir. 2012) (section 4617(f) "excludes judicial review of 'the exercise of powers or functions' given to the FHFA as a conservator."); *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 101 (D. Mass. 2014) ("Congress, by enacting HERA's Anti-Injunction Clause, expressly removed such conservatorship decisions from the court's oversight.").

The anti-injunction bar permits review only "where the [agency] is acting clearly outside its statutory powers." *Gross v. Bell Sav. Bank PaSA*, 974 F.2d 403, 407 (3d Cir. 1992); *see also Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 992 (9th Cir. 2013) ("If the [challenged action] falls within FHFA's conservator powers, it is insulated from review and th[e] case must be dismissed."). By contrast, "where the [agency] performs functions assigned it under the statute, injunctive relief will be denied even where the [agency] acts in violation of other statutory schemes." *Gross*, 974 F.2d at 407; *see also Nat'l Trust for Historic Pres. v. FDIC*, 995 F.2d 238, 240 (D.C. Cir. 1993), *aff'd and reinstated on reh'g*, 21 F.3d 469 (D.C. Cir. 1994); *accord Ward v. Resolution Trust Corp.*, 996 F.2d 99, 103 (5th Cir. 1993) (because "disposing of assets of the failed thrift when acting as its conservator or receiver is a quintessential statutory power of the RTC," injunctive relief is unavailable even if the RTC is "improperly or even unlawfully exercising" that power). Moreover, the prohibition against relief that would "restrain or affect" the actions of a

conservator or receiver applies to all "nonmonetary remedies, including injunctive relief, declaratory relief, and rescission." *Freeman*, 56 F.3d at 1398-99.

Section 4617(f) thus forecloses this suit, and plaintiffs' central allegation that, by agreeing to the Third Amendment, FHFA used its authority with respect to the GSEs (two entities in conservatorship) in a manner inconsistent with the alleged purpose of conservatorship, does not provide a basis for this Court to proceed. Where the conservator acts within one or more of its statutory powers, and with respect to an entity in conservatorship, a court has no jurisdiction to award equitable relief. *See Perry Capital*, 70 F. Supp. 3d at 220-21; *see also Town of Babylon*, 699 F.3d at 228. A plaintiff may not evade Section 4617(f) by claiming that the conservator's actions were foolish, unnecessary, or ill-motivated, no matter how strenuously those allegations are made. "'Congress surely knew, when it enacted § 4617(f), that challenges to agency action sometimes assert an improper motive. But Congress barred judicial review of the conservator's actions without making an exception for actions said to be taken from an improper motive.'" *Perry Capital*, 70 F. Supp. 3d at 226 (quoting *Leon Cnty. v. FHFA*, 816 F. Supp. 2d 1205, 1208 (N.D. Fla. 2011), *aff'd*, 700 F.3d 1273 (11th Cir. 2012)). *See also Cnty. of Sonoma*, 710 F.3d at 993 ("it is not our place to substitute our judgment for FHFA's"); *Freeman*, 56 F.3d at 1399 ("The exercise of these powers may not be restrained by any court, regardless of the claimant's likelihood of success on the merits of his underlying claims.").

2. Section 4617(f) Forbids the Plaintiffs' Attempt to Second-Guess FHFA's Exercise of its Conservatorship Authority

Section 4617(f)'s text and the precedents cited above demonstrate that the plaintiffs cannot evade the jurisdictional barrier simply by alleging that FHFA and Treasury have acted at odds with what is (in the plaintiffs' view) the proper purpose of a conservatorship. *See, e.g.*,

Compl. ¶¶ 17, 101-103. So long as FHFA exercised a power within the scope of the authorities granted to it as the conservator, any claim for equitable relief is barred. FHFA did so here.

FHFA, as the conservator of the GSEs, holds statutory powers of "extraordinary breadth." *Perry Capital*, 70 F. Supp. 3d at 225. In particular, FHFA has the statutory authority to raise capital on the GSEs' behalf, and this authority included the power to obtain an unprecedented level of taxpayer support from Treasury through the PSPAs and the amendments thereto. *See* 12 U.S.C. § 4617(b)(2)(D) (empowering FHFA as conservator to "carry on the business" of the GSEs and "put the [GSEs] in a sound and solvent condition."); *Perry Capital*, 70 F. Supp. 3d at 228 (conservator is empowered to "carry on the business of the institution") (quoting *MBIA Ins. Corp. v. FDIC*, 708 F.3d 234, 236 (D.C. Cir. 2013)); *Gail C. Sweeney Estate Marital Trust v. U.S. Treasury Dep't*, 68 F. Supp. 3d 116, 125-26 (D.D.C. 2014) (holding that a court may not review "the type[s] of business decisions Congress entrusted to the Conservator in HERA"). FHFA, as conservator, also had authority to take any actions necessary to "preserve and conserve the assets and property of the [GSEs]." 12 U.S.C. § 4617(b)(2)(D)(ii). In addition, FHFA had the power to transfer dividends to Treasury, given the express authorization to the conservator to "transfer or sell any asset" of the GSEs "without any approval, assignment, or consent." 12 U.S.C. § 4617(b)(2)(G). The PSPAs with Treasury provided both GSEs the capital that they needed to continue operations, and funding from Treasury eliminated net worth deficiencies that would have triggered mandatory receivership. By executing the Third Amendment, the Conservator restructured the GSEs' dividend obligations to Treasury and suspended the GSEs' obligation to pay Treasury periodic commitment fees, all of which had the effect of preventing the GSEs from taking draws from Treasury in order to pay dividends back to

Treasury. Under HERA, the conservator is charged with deciding how to carry on the business of the GSEs and how to preserve its assets and property, free from "outside second-guessing" like that offered by the plaintiffs here. *Nat'l Trust for Historic Pres.*, 995 F.2d at 240.

The plaintiffs offer a misleading theory that FHFA did not exercise its conservatorship powers when it entered into the Third Amendment. They contend, wrongly, that the statute forbids FHFA as the conservator from "winding up" any of the GSEs' operations. That is, the plaintiffs contend that the Third Amendment is contrary to the Conservator's duty to "rehabilitate" the GSEs and instead aimed at winding up the operations of the GSEs. *See, e.g.*, Compl. ¶¶ 93-94, 99-106. As an initial point, plaintiffs err in suggesting that the Third Amendment represents a "winding up" of the GSEs' operations. As the court in *Perry Capital* explained, "[t]oday both GSEs continue to operate" and "have now regained profitability." 70 F. Supp. 3d at 227. "Indeed, the GSEs' current profitability is the fundamental justification" for plaintiffs' suit. *Id.* at 228 n.21.

In any event, the statute permits the appointment of FHFA as "conservator or receiver for the purpose of reorganizing, rehabilitating, *or* winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2) (emphasis added). In a single sentence, Section 4617(a)(2) states that an appointment as "conservator or receiver" may be for the purpose of "reorganizing, rehabilitating, or winding up" the operations of the GSEs, without distinguishing between conservatorship and receivership. Congress knew how to draw a distinction between conservatorship and receivership where it meant to do so. *Compare* 12 U.S.C. § 4617(b)(2)(A) (listing general powers of FHFA "as conservator or receiver") *with* 12 U.S.C. § 4617(b)(3) (granting FHFA the authority "as receiver, [to] determine claims in accordance with the requirements of this

subsection"). There simply is no statutory prohibition, then, against FHFA exercising its powers as conservator to reduce certain aspects of the GSEs' operations. Instead, "HERA permits a conservator wide latitude to flexibly operate the GSEs over time." *Perry Capital*, 70 F. Supp. 3d at 228 n.20 (citing 12 U.S.C. § 4617(b)(2)).[9]

Regardless, the disagreement over FHFA's "winding up" authority is immaterial. The plaintiffs cannot dispute that HERA also gives FHFA the authority as conservator to "transfer or sell any asset or liability of the regulated entity in default, and may do so without any approval, assignment, or consent with respect to such transfer or sale." 12 U.S.C. § 4617(b)(2)(G). The plaintiffs' theory, apparently, is that FHFA may not exercise this otherwise unambiguous grant of authority in a way contrary to plaintiffs' conception of conservatorship which, (according to the complaint), can only be to "rehabilitate [the GSEs] and return [them] to normal operation." Compl. ¶ 37. But plaintiffs may not evade HERA's anti-injunction bar simply by alleging that the conservator took actions that (allegedly) conflicted with a broader statutory purpose. In short, the plaintiffs cannot qualify Congress's express grant of authority to the conservator by "reading language into [the statute] that is not there . . . ." *Courtney v. Halleran*, 485 F.3d 942, 949 (7th Cir. 2007) (rejecting argument that FIRREA's grant of authority to the FDIC as receiver to transfer assets was implicitly conditioned by the statute's priority distribution scheme); *see also Perry Capital*, 70 F. Supp. 3d at 228 n.20 (finding the premise of this purpose-centered argument "to be lacking").

[9] And even if plaintiffs were to suggest that FHFA acted as a receiver, not as a conservator, when it agreed to the Third Amendment, *see, e.g.*, Compl. ¶¶ 4, 37, 94, the relief plaintiffs seek—an injunction setting the Third Amendment aside--would still be barred by 12 U.S.C. § 4617(f). By its terms, § 4617(f) precludes judicial review of actions taken by FHFA acts as "a conservator *or* a receiver." *Id.* (emphasis added).

Despite the express preclusion of judicial review in 12 U.S.C. § 4617(f), the plaintiffs also assert that they may proceed with a claim that Treasury and FHFA acted "arbitrarily and capriciously" under the APA. *E.g.*, Compl. ¶¶ 120-22. But HERA expressly demonstrates Congress's intent to forbid courts from "restraining *how* FHFA employs its powers or functions," and consequently "§ 4617(f) bars all declaratory, injunctive, or other equitable relief stemming from claims of arbitrary and capricious decisionmaking, under APA § 706(2)(A)." *Perry Capital*, 70 F. Supp. 3d at 222. Thus, the plaintiffs cannot avoid the clear consequence of § 4617(f) by arguing that FHFA and Treasury have misused their authority. Their argument "fails (or refuses) to recognize the difference between the exercise of a function or power that is clearly outside the statutory authority of the [conservator] on the one hand, and improperly or even unlawfully exercising a function or power that is clearly authorized by statute on the other." *Ward*, 996 F.2d at 103. *See also Bank of Am. N.A. v. Colonial Bank*, 604 F.3d 1239, 1244 (11th Cir. 2010) (the "fear that the FDIC will make an erroneous determination of ownership is immaterial to our analysis because it is merely a fear of the FDIC's improper performance of its legitimate receivership functions"); *Gross*, 974 F.2d at 408 ("the availability of injunctive relief does not hinge on our view of the proper exercise of otherwise-legitimate powers").

Finally, the plaintiffs also contend that FHFA exceeded its authority as the conservator by purportedly acting at the direction of Treasury. *See* Compl. ¶ 82 (citing 12 U.S.C. § 4617(a)(7)). This allegation fails for the same reason that the identical allegation in the *Perry Capital* litigation failed. The plaintiffs' "subjective, conclusory allegations" to this effect cannot be transformed into the "objective facts" that could support a well-pleaded complaint. *Perry Capital*, 70 F. Supp. 3d at 226. The Third Amendment "was executed by two

sophisticated parties," and the plaintiffs have provided no "hints [of] coercion actionable under § 4617(a)(7)." *Id.* at 226-27. In any event, the plaintiffs' allegation on this score is simply yet another variation of its claim that FHFA exercised its conservatorship powers with an improper motive (by which the plaintiffs mean a motive that operates to their alleged detriment). FHFA's state of mind in exercising its conservatorship powers is simply irrelevant to the Section 4617(f) inquiry:

> Once again, to determine whether it has jurisdiction to adjudicate claims for equitable relief against FHFA as a conservator, the Court must look at *what* has happened, not *why* it happened. . . . FHFA's underlying motives or opinions – *i.e.*, whether the net worth sweep would arrest a downward spiral of dividend payments, increase payments to Treasury, or keep the GSEs in a holding pattern – do not matter for the purposes of § 4617(f).

Perry Capital, 70 F. Supp. 3d at 226. The plaintiffs cannot transform their substantive disagreement with FHFA's actions into a valid basis for this Court's jurisdiction.

3. Section 4617(f) Also Precludes Claims against the Conservator's Counter-Party, Treasury

Nor may the plaintiffs evade the jurisdictional limit of § 4617(f) by switching their target from the conservator to Treasury. Section 4617(f) precludes any court from taking any action "to restrain *or affect* the exercise of powers or functions of the Agency as a conservator or a receiver." 12 U.S.C. § 4617(f) (emphasis added). Injunctive relief that, in the words of the complaint, prevents a counter-party from "from implementing, applying, or taking any action whatsoever" pursuant to an agreement with a conservator would obviously "affect" FHFA's powers as conservator. *See* Compl, Prayer for Relief ¶ 146 e. As the Eighth Circuit has put it, "an action can 'affect' the exercise of powers by an agency without being aimed directly at [the agency]. … [T]he statute, [in that case, 12 U.S.C. § 1821(j),] by its terms, can preclude relief even against a

third party … where the result is such that the relief 'restrains or affects the exercise of powers or functions of the [agency] as conservator or receiver.'" *Dittmer Properties*, 708 F.3d at 1017 (internal quotation and alterations omitted). *See also Perry Capital*, 70 F. Supp. 3d at 222 ("A plaintiff is not entitled to use the technical wording of her complaint – *i.e.*, bringing a claim against a counterparty when the contract in question is intertwined with FHFA's responsibilities as a conservator – as an end-run around HERA."); *Gail C. Sweeney Estate Marital Trust*, 68 F. Supp. 3d at 126 ("a court action can 'affect' a conservator even if the litigation is not directly aimed at the conservator itself") (citation and alterations omitted).

Moreover, there is no substance to the plaintiffs' theory that Treasury has violated the statutory limits on its purchase authority. The plaintiffs contend that, by entering into the Third Amendment on August 17, 2012, Treasury engaged in a "purchase" of securities in the GSEs, and that such a transaction was prohibited because Treasury's purchase authority under HERA had expired at the end of 2009. Compl. ¶ 108 (citing 12 U.S.C. §§ 1455(*l*)(4), 1719(g)(4)). But when it entered into the Third Amendment, Treasury exercised its right to amend the PSPAs, a right it expressly reserved in the agreements. *See* Fannie Mae PSPA § 6.3; Freddie Mac PSPA § 6.3. And Treasury's authority to exercise previously-acquired rights is not subject to HERA's sunset provision. *See* 12 U.S.C. §§ 1455(*l*)(4), 1719(g)(4). As the court in *Perry Capital* has explained, "[w]ithout providing an additional funding commitment or receiving new securities from the GSEs as consideration for its Third Amendment to the already existing PSPAs, Treasury cannot be said to have purchased new securities under § 1719(g)(1)(A) [or § 1455(*l*)(1)(A)]," and

thus it did not violate the sunset provision of its HERA purchase authority.[10] 70 F. Supp. 3d at 224; *see also Continental Western*, 2015 WL 428342, at *10 n.6 (agreeing that FHFA and Treasury did not act outside the statutory powers granted to them under HERA).

B. Plaintiffs Cannot Bring Claims Based on Their Status as Shareholders in the GSEs

The plaintiffs' suit also fails under a second, independent bar in HERA, which prohibits suits by shareholders of the GSEs during the conservatorships. FHFA, as the conservator of the GSEs, has succeeded to all of the rights of the GSEs' shareholders for the duration of the conservatorship, including the right to bring any suit predicated on a plaintiff's status as a shareholder of one or both of those entities. *See* 12 U.S.C. § 4617(b)(2)(A)(i) (FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to … all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity"). HERA "plainly transfers shareholders' ability to bring derivative suits – a 'right, title, power, or privilege' – to FHFA." *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012) (internal alterations omitted). This statutory provision thus "bars shareholder derivative actions," *id.*, because Congress took care to "transfer[] everything it could to the conservator," *id.* at 851; *see Perry Capital*, 70 F. Supp. 3d at 229-30; *Continental Western*, 2015 WL 428342, at *10 n.6. The plaintiffs explicitly premise their standing to bring this action on their ownership of common

[10] The court in *Perry Capital* concluded that it could review the plaintiffs' claim that Treasury exceeded its purchase authority, because, if Treasury acted unlawfully under HERA, "such unlawful actions may be imputed to FHFA." 70 F. Supp. 3d at 222. Treasury disagrees with this aspect of the court's analysis. Under 12 U.S.C. § 4617(f), the only relevant question should be whether FHFA acted within the limits of its own authority as the conservator. *See, e.g.*, *Town of Babylon*, 699 F.3d at 228. This point is immaterial, however, since (as discussed in the text) Treasury has not violated any restrictions that HERA placed on its purchase authority.

and preferred stock in the GSEs, Compl. ¶¶ 31-32, and allege that the Third Amendment "prevent[s] Plaintiffs and other private shareholders from receiving any dividends or value from their stock[.]" *See* Compl. ¶ 125. Section 4617(b)(2)(A) prohibits this claim.

The plaintiffs do not offer any theory in their complaint to avoid dismissal under Section 4617(b)(2)(A). In similar lawsuits, however, other GSE shareholders have (unsuccessfully) offered two arguments against dismissal. First, shareholders have argued that a challenge to the Third Amendment presents a direct shareholder claim that would not be subject to Section 4617(b)(2)(A). This argument fails, because the plaintiffs' claims assert an injury to the corporations, and seek relief that would run to the corporations' (purported) benefit. Those claims are therefore derivative, and in any event, the plain language of Section 4617(b)(2)(A) applies to direct claims and derivative claims equally. Second, shareholders have unsuccessfully asked other courts to create an exception to the plain meaning of the statute for actions where the conservator purportedly faces a conflict of interest. Such an exception would swallow the statutory rule, and should be rejected. This Court should instead follow the plain language of Section 4617(b)(2)(A), and dismiss this suit.

1. Plaintiffs' Right to Bring This Suit Has Been Transferred to the Conservator for the Duration of the Conservatorship

a. Plaintiffs' Claims Are Derivative

Section 4617(b)(2)(A) forbids the claims brought here, as the plaintiffs are seeking to assert derivative claims to challenge the Third Amendment. To distinguish between a derivative and direct claim, "a court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed

to the stockholder and that he or she can prevail without showing an injury to the corporation." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004); *see Perry Capital*, 70 F. Supp. 3d at 229 n.24 (applying *Tooley* analysis).[11]

The plaintiffs' claims are derivative because they cannot prevail "without showing an injury to the corporation." *Tooley*, 845 A.2d at 1039. Indeed, they expressly plead that FHFA's and Treasury's actions "force[] the Companies to operate on the edge of insolvency." Compl. ¶ 17. At heart, the complaint alleges that Treasury's and FHFA's actions, including their entry into the Third Amendment to the PSPAs, have resulted in a waste of corporate assets. Thus, the plaintiffs contend (wrongly), FHFA and Treasury have violated a duty owed to the GSEs themselves, a duty to take action to restore those entities to a "sound and solvent condition." *E.g.*, Compl. ¶ 102. Because the harm that the plaintiffs allege is "dependent on a prior injury to the corporation," their claims are derivative. *Agostino v. Hicks*, 845 A.2d 1110, 1122 (Del. Ch. 2004); *see also In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 771 (Del. 2006) ("claims of waste are classically derivative"). The plaintiffs' claim that the value of their shares has been depressed due to FHFA's alleged mismanagement of the GSEs is, therefore, a derivative claim. *See Perry Capital*, 70 F. Supp. 3d at 235 n.39.

Moreover, the relief that the plaintiffs seek plainly is relief that would inure to the (alleged) benefit of the GSEs themselves, and only indirectly (if at all) to the plaintiffs. They

[11] Fannie Mae is a federally-chartered corporation that regularly executes agreements under Delaware law, and thus it may presumed that federal common law would look to the Delaware Supreme Court's decision in *Tooley* for the applicable law for distinguishing between derivative and direct claims. Freddie Mac, which is also a federally-chartered corporation, regularly executes agreements under Virginia law. The Virginia Supreme Court has not adopted the *Tooley* test, but agrees with "[t]he overwhelming majority rule [] that an action for injuries to a corporation cannot be maintained by a shareholder on an individual basis and must be brought derivatively." *Simmons v. Miller*, 544 S.E.2d 666, 674 (Va. 2001).

ask the Court to "vacat[e]" the Third Amendment to the PSPAs, and to order Treasury to "return to FHFA as conservator of Fannie and Freddie" the GSEs' prior dividend payments made pursuant to the Third Amendment. Compl., Prayer for Relief, ¶ 146 b, c. The requested "recovery or relief will not flow 'directly to the stockholders.'" *Perry Capital*, 70 F. Supp. 3d at 229 n.24 (quoting *Tooley*, 845 A.2d at 1036). Instead, the relief that the plaintiffs seek "would flow first and foremost to the GSEs." *Id.* (alteration omitted). The plaintiffs' claims are derivative for this reason as well. *See id.*; *see also Big Lots Stores, Inc. v. Bain Capital Fund VII, LLC*, 922 A.2d 1169, 1179 (Del. Ch. 2006) (claim is direct, rather than derivative, only where "no relief flows to the corporation").

b. HERA Bars Both Direct and Derivative Shareholder Claims

In any event, HERA would bar the plaintiffs' claims, even if those claims were direct.[12] HERA does not refer to derivative claims or direct claims, but instead transfers "all rights, titles, powers, and privileges" of the GSEs' shareholders "with respect to the regulated entity and the assets of the regulated entity" to the conservator for the duration of the conservatorship. 12 U.S.C. § 4617(b)(2)(A)(i). "'[T]he plain meaning of [Section 4617(b)(2)(A)] is that *all* rights previously held by [the GSEs'] stockholders, including the right to sue derivatively, now belong exclusively to [FHFA].'" *Perry Capital*, 70 F. Supp. 3d at 231 n.28 (quoting *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 795 (E.D. Va. 2009), *aff'd sub nom.*

[12] Plaintiffs allege that Treasury has harmed them by preventing them from receiving any dividends that they would have received had Treasury not implemented the Third Amendment. *See* Compl. ¶ 125. However, "shareholders do not have a present or absolute right to dividends which are subject to the discretion of the board." *Perry Capital*, 70 F. Supp. 3d at 237. The payment of dividends to shareholders of the GSEs such as the plaintiffs is entirely discretionary, and these payments have been suspended since the GSEs entered conservatorship in September 2008. *Id.* To the extent that plaintiffs allege a loss in the current economic value of their stock, Compl. ¶ 125, that claim is squarely derivative. *See id.* at 235 n.39.

La. Mun. Police Emp. Ret. Sys. v. FHFA, 434 F. App'x 188 (4th Cir. 2011)). The plaintiffs apparently mean to contend, however, that the statute transferred only *some* shareholder rights to FHFA, and that shareholders would retain the right to bring direct claims concerning the GSEs' assets. *See, e.g.*, Compl. ¶¶ 128-29. But a plaintiff's ability to bring any action "with respect to the assets" of the GSEs, whether the action is called direct or derivative, is, under the express terms of the statute, one of the "rights, titles, powers, or privileges" of shareholders that was transferred to FHFA upon its appointment as conservator. 12 U.S.C. § 4617(b)(2)(A)(i).

The D.C. Circuit in *Kellmer* did not limit its holding to derivative claims. Nor did the court hold that HERA's transfer of all rights to the conservator silently carved out an exception for direct claims. Rather, that court held that, because "a shareholder's ability to sue derivatively … is fairly described as a 'right[]' or 'power[]' of owning stock," it transferred to FHFA upon its appointment as conservator. *Kellmer*, 674 F.3d at 851; *see also Perry Capital*, 70 F. Supp. 3d at 230 (reciting the holding of *Kellmer*). The court recognized that Congress intended HERA's transfer of rights to the conservator to be all-encompassing, for the duration of the conservatorship.[13] "'Congress also covered privileges just to be sure that nothing was

[13] As part of their third count, Plaintiffs assert that Treasury is the "dominant shareholder [in the GSEs] and owe[s] fiduciary duties to minority shareholders," *see* Compl. ¶ 123, and suggest that setting aside the Third Amendment would improve plaintiffs' potential recovery in the event of the GSEs' liquidation. But any claim by plaintiffs of a right with respect to the liquidation preference would not be ripe. "[B]y definition, the GSEs owe a liquidation preference payment to a preferred [or common] shareholder only during liquidation. It follows that there can be no loss of a liquidation preference prior to the time that such a preference can, contractually, be paid. Here, the GSEs remain in conservatorship, not receivership, and there is no evidence of *de facto* liquidation." *Perry Capital*, 70 F. Supp. 3d at 234. To the extent that plaintiffs' third claim is based on an asserted right to the liquidation preference, then, it "[is] not fit for a judicial decision until liquidation occurs." *Id.* at 235. Nor would the plaintiffs suffer any hardship from a deferral of review, given that the plaintiffs' asserted "right to a liquidation preference can be adjudicated during the statutorily prescribed receivership claims process." *Id.* (citing 12

missed. Congress has transferred everything it could to the conservator, and that includes a stockholder's right, power, or privilege to demand corporate action or to sue directors or others when action is not forthcoming.'" *Kellmer*, 674 F.3d at 851 (quoting *Pareto v. FDIC*, 139 F.3d 696, 700 (9th Cir. 1998)) (internal alterations omitted). Congress's transfer of "everything it could to the conservator" included the right to bring any shareholder suit with respect to the GSEs' assets, no matter how that suit is labeled.

2. HERA's Explicit Transfer of All Shareholder Rights to the Conservator Contains No Exception That Would Permit Plaintiffs' Claims

Since, the plaintiffs' claim fails under the plain language of 12 U.S.C. § 4617(b)(2)(A), they apparently intend to ask this Court to depart from the statute's text to create an exception that would permit shareholder suits that allege a "conflict of interest" on the part of the conservator. *E.g.*, Compl. ¶ 87. This Court is not free to create such a judicial exception where Congress did not see fit to do so. "HERA's plain language provides, in a broad stroke, that the FHFA succeeds [to] 'all rights, titles, powers, and privileges' of the stockholders of Fannie Mae . . . . This directive implies no exception, and plaintiffs[] fail to identify any accompanying statutory text to persuade this Court that, when read as a whole, HERA carved out or otherwise permits the exception they propound." *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative & "ERISA" Litig.*, 629 F. Supp. 2d 1, 3 (D.D.C. 2009), *aff'd sub nom. Kellmer v. Raines*, 674 F.3d 848 (D.C. Cir. 2012). "HERA, by its unambiguous text, removes the power to bring derivative suits from shareholders and gives it to FHFA." *Perry Capital*, 70 F. Supp. 3d at 231.

U.S.C. § 4617(b)(2)(K)(i), (b)(3)-(10)).

In other litigation, GSE shareholders have urged this Court to depart from this unambiguous text to adopt a version of the "manifest conflict of interest" exception described in two cases arising under FIRREA. *See Delta Sav. Bank v. United States*, 265 F.3d 1017 (9th Cir. 2001); *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999). It would be an odd reading, however, to provide "that a statute like HERA, through which Congress grants immense discretionary power to the conservator, § 4617(b)(2)(A), and prohibits courts from interfering with the exercise of such power, § 4617(f), would still house an *implicit* end-run around FHFA's conservatorship authority by means of the shareholder derivative suits that the statute explicitly bars." *Perry Capital*, 70 F. Supp. 3d at 230-31. "'To resolve this [oddity, however,] we need only heed Professor Frankfurter's timeless advice: '(1) Read the statute; (2) read the statute; (3) read the statute!'" *Id.* at 231 (quoting *Kellmer*, 674 F.3d at 850). The plaintiffs' proposed exception cannot be squared with the statutory text. After all, the very point of a derivative action is to permit shareholders to assert the interests of the corporation where managers or directors have a conflict of interest that prevent them from doing so. "[T]he existence of a rule against shareholder derivative suits, § 4617(b)(2)(A)(i), indicates that courts cannot use the *rationale* for why derivative suits are available to shareholders as a legal tool – including the conflict of interest rationale – to carve out an *exception* to that prohibition. … Such an exception would swallow the rule." *Id.* In short, "HERA provides no qualification for its bar on shareholder derivative suits." *Id.*

But even if a "conflict of interest" exception applied for shareholder suits under HERA, the plaintiffs' complaint would not fall within that exception. Such an exception could not save the plaintiffs' claims against Treasury, since those claims do not assert a breach of duty by the

conservators, but instead are based on Treasury's alleged breach of its alleged duties. *See Perry Capital*, 70 F. Supp. 3d at 232. Moreover, "[t]he relationship between FHFA and Treasury fails the Ninth Circuit's interrelatedness test" given the lack of an operational or managerial overlap between the agencies, and given that Treasury did not select FHFA to serve as the conservator. *Id.* The mere fact that Treasury entered into the PSPAs with FHFA cannot establish a conflict of interest, given that Treasury was "the only feasible entity" that could have served as a backstop for the GSEs in September 2008. Indeed, "Congress expressly foresaw the need for a Treasury-FHFA relationship, specifically authorizing Treasury to invest in the GSEs" to serve as the "investor of last resort" in the event that the financial crisis deepened. *Id.* at 232-33. This Congressionally-blessed relationship cannot establish the supposed conflict of interest that could justify a departure from HERA's express prohibition on shareholder suits. *See id.*; *see also Kellmer*, 674 F.3d at 850.

III. In Bringing a Shareholder Derivative Action, the Plaintiffs Are Precluded from Relitigating the Adverse Judgments in the *Perry Capital* Litigation

The doctrine of issue preclusion, or collateral estoppel, "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted). Precluding a party from disputing issues that it has already litigated "protects [its] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153–54

(1979).[14] Issue preclusion bars the claims asserted in this complaint. Other shareholders, purporting to bring derivative actions on behalf of the GSEs, have already brought the claims asserted here, and have lost on those claims in the *Perry Capital* and *Continental Western* litigation. The plaintiffs here bring a derivative action on behalf of the same GSEs, and are barred by the district court's determinations in *Perry Capital*.

In this Circuit, issue preclusion has five basic elements: (1) the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original suit; (2) the issue sought to be precluded must be the same as the issue involved in the prior action; (3) the issue sought to be precluded must have been actually litigated in the prior action; (4) the issue sought to be precluded must have been determined by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment. *Robinette v. Jones*, 476 F.3d 585, 589 (8th Cir. 2007). All five elements are satisfied here.

As an initial matter, the GSEs were the real parties in interest in the derivative actions at issue in *Perry Capital*, just as the GSEs are the real parties in interest in this derivative action. Therefore, the requirement of identity of parties has been satisfied.[15] As the Eighth Circuit has recognized, a judgment rendered in a shareholder derivative suit precludes subsequent litigation by the corporation and its shareholders. *See, e.g., Cottrell v. Duke*, 737 F.3d 1238, 1242-43 (8th Cir. 2013) (addressing Delaware issue preclusion principles and concluding that Delaware state derivative action suit could have potential preclusive effect on future proceedings in federal court).

---

[14] In addition, issue preclusion still applies even where the previous decision was decided wrongly, or in error. *Continental Western*, 2015 WL 428432, at *3 (citing *Ginters v. Frazier*, 614 F.3d 822, 826 (8th Cir. 2010)).

[15] The "circuits are consistent in holding that 'an action to redress injuries to a corporation . . . cannot be maintained by a stockholder in his own name.'" *Canderm Pharmacal, Ltd. v. Elder Pharm., Inc.*, 862 F.2d 597, 602-03 (6th Cir. 1988) (citing cases).

This is consistent with the rulings of other courts as well. *See United States v. LTV Corp*., 746 F.2d 51, 54 n.5 (D.C. Cir. 1984) (final judgment rendered in a shareholder derivative suit binds shareholders and non-party class members who have been given adequate notice); *Arduini v. Hart*, 774 F.3d 622, 633-34 (9th Cir. 2014) (shareholders bringing derivative suits are in privity for purposes of issue preclusion under Nevada law); *Henik ex rel. LaBranche & Co. v. LeBranche*, 433 F. Supp. 2d 372, 380 (S.D.N.Y. 2006) (judgment in prior derivative shareholder suit has preclusive effect upon subsequent action brought by shareholders who were not plaintiffs to the original action). The reason for this rule is obvious: "if the shareholder can sue on the corporation's behalf, it follows that the corporation is bound by the results of the suit in subsequent litigation, even if different shareholders prosecute the suits, subject to the important proviso that the shareholder must fairly and adequately represent the corporation." *In re Sonus Networks, Inc., S'holder Derivative Litig*., 499 F.3d 47, 64 (1st Cir. 2007) (Gibson, J., sitting by designation).[16] As the plaintiffs here assert solely derivative claims, *see* pp. 22-24, *supra*; they are bound by the district court's determinations in the first derivative action.

Moreover, with respect to the second and third requirements, the complaint in this action is materially identical to the complaints at issue in the *Perry Capital* and *Continental Western* litigation, and the same issues were fully aired in those two cases. *See Continental Western*, 2015 WL 428432, at *2, 10.[17] In particular, the parties fully briefed, and submitted for judicial

[16] The plaintiffs cannot plausibly claim to have lacked notice of the well-publicized *Perry Capital* litigation. Nor could they credibly assert that the plaintiffs in those cases, who were represented by experienced counsel, failed to adequately present their claims.

[17] *Compare* Compl. ¶¶ 99-145 (alleging five counts that are identical to five of the seven counts in both the *Fairholme* and *Continental Western* actions); *with* Compl. ¶¶ 84-93, 100-135, ECF No. 1, *Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency*, No. 13-cv-01053, (D.D.C. Jul. 10, 2013) (one of the complaints filed in the D.D.C. Actions); Compl., ¶¶ 88-90, 115-136, ECF No.

determination, the questions whether 12 U.S.C. § 4617(f) barred claims for equitable relief against the conservator or its counter-party; whether 12 U.S.C. § 4617(b)(2)(A) barred shareholders' attempts to assert rights that have been transferred to the conservator for the duration of the conservatorship; and whether the shareholders had asserted claims for liquidation preferences or for dividends on their shares that were ripe, or that could state a claim.

The *Perry Capital* district court concluded that neither FHFA nor Treasury had exceeded its statutory authority, and that Section 4617(f) barred any claims for equitable relief concerning the conservator's exercise of its authority. 70 F. Supp. 3d at 219-28. The court also determined that Section 4617(b)(2)(A) barred any derivative claims by shareholders concerning the FHFA-Treasury PSPAs and that no "conflict of interest" exception could prevent the application of the Section 4617(b)(2)(A). *Id.* at 229-33 & n. 24. The Court further held that the shareholders' claims for liquidation preferences were not ripe, and that any claims for the value of expected dividends failed to state a claim. *Id.* at 233-39.

To the extent that plaintiffs here purport to include new arguments in their complaint in support of their claims that Treasury and FHFA exceeded their statutory authority under HERA, *see, e.g.*, Compl. ¶¶ 82, 85, the "mere assertion of a different ground" to reach the same outcome "does not bar application of issue preclusion." *Continental Western*, 2015 WL 428432, at *9 (quoting *Simmons v. Small Bus. Admin.*, 475 F.3d 1372, 1374 (Fed. Cir. 2007)). "Here, the ultimate issue—whether FHFA and Treasury exceeded the statutory authority granted to them by HERA--has already been decided by *Perry Capital*." *Id.*, at *10. It does not matter if the plaintiffs intend to set forth "additional arguments related to the same ultimate issue" as they all

---

1, *Cont'l W. Ins. Co. v. FHFA*, No. 14-cv-00042 (S.D. Iowa Feb. 5, 2014).

"could have been argued in the first case." *Id.* (citing Restatement (Second) of Judgments § 27 cmt. c (1982)). Therefore, each of the holdings in *Perry Capital* described above preclude relitigation of the same issues here.

The dismissal of the ten actions in the District of Columbia was also a "valid and final judgment" for purposes of issue preclusion. It is of no moment that the suits were dismissed for lack of subject matter jurisdiction, rather than on the merits. "Although dismissal for lack of subject matter jurisdiction does not adjudicate the merits of the claim asserted, it does adjudicate the court's jurisdiction," and therefore, precludes a second cause of action plagued by the same jurisdictional defect. *Sandy Lake Band of Miss. Chippewa v. United States*, 714 F.3d 1098, 1103 (8th Cir. 2013).[18] The judgment is also "final" notwithstanding the fact that an appeal of that judgment is pending in the D.C. Circuit. *See Continental Western*, 2015 WL 428432, at *10 ("Although *Perry Capital* has been appealed, it is still 'valid and final' for purposes of issue preclusion analysis" because "[i]t is well established in the federal courts that the pendency of an appeal does not diminish the *res judicata* effect of a judgment rendered by a federal court.'") (quoting *In re Ewing*, 852 F.2d 1057, 1060 (8th Cir. 1988)); *see also Webb v. Voirol*, 773 F.2d 208, 211 (8th Cir. 1985); *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 467 (5th Cir. 2013).

Finally, the district court in the D.D.C. actions decided issues that were necessary to its judgment. *See, e.g.*, *Perry Capital*, 70 F. Supp. 3d at 221-39 (describing bases for dismissal of each of the counts raised by the shareholders in that action, and by the plaintiffs here). Thus,

[18] "Dismissals for want of subject-matter jurisdiction … are preclusive with respect to the jurisdictional ruling … as otherwise the plaintiff would be free to refile the identical case in the same court," *Hill v. Potter*, 352 F.3d 1142, 1146-47 (7th Cir. 2003) (Posner, J.) (citations omitted), or, as here, in another court in which the same jurisdictional limit applies. *See also Ginters*, 614 F.3d at 825 ("We have determined the doctrine of preclusion may apply to the question of subject matter jurisdiction.") (citing cases).

the "essential to the prior judgment" element is also met. *See Continental Western*, 2015 WL 428432, at *10. In sum, because each element for issue preclusion has been satisfied, plaintiffs, as shareholders suing on behalf of the GSEs, are bound by the resolution of these issues in the prior shareholder-derivative suit, and their complaint must be dismissed.

Conclusion

For the foregoing reasons, the Court should dismiss the complaint for lack of subject matter jurisdiction. Alternatively, the Court should dismiss this case for failure to state a claim upon which relief can be granted.

Dated: September 4, 2015

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

KEVIN W. TECHAU
United States Attorney

DIANE KELLEHER
Assistant Branch Director

/s/ Bradley H. Cohen
BRADLEY H. COHEN
JOEL MCELVAIN
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
(202) 305-9855
bradley.cohen@usdoj.gov

Counsel for Department of the Treasury