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

THOMAS SAXTON, IDA SAXTON, BRADLEY PAYNTER, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, MELVIN L. WATT, in his official capacity as Director of the Federal Housing Finance Agency, and THE DEPARTMENT OF THE TREASURY, Defendants.	Civil Action No. 1:15-cv-00047

REPLY IN SUPPORT OF MOTION TO DISMISS BY DEFENDANTS FEDERAL HOUSING FINANCE AGENCY AS CONSERVATOR FOR FANNIE MAE AND FREDDIE MAC, AND FHFA DIRECTOR MELVIN L. WATT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
INTRODUCTION 1
ARGUMENT 2
I. The Judgment in *Perry Capital* Precludes Plaintiffs' Claims 2
A. Plaintiffs' Claims are Derivative, Not Direct 2
B. Plaintiffs' Other Arguments Against Issue Preclusion Fail 6
II. Section 4617(f) Bars Plaintiffs' Claims For Declaratory and Equitable Relief 8
A. Plaintiffs' Allegation that Treasury "Directed" the Conservator to Execute the Third Amendment Cannot Overcome Section 4617(f) 9
B. Plaintiffs' Allegation that the Third Amendment Was Improperly Motivated Cannot Overcome Section 4617(f) 11
C. Plaintiffs' Allegations that the Conservator Did Not Effectively Carry Out Its Purported Statutory "Obligations" Cannot Overcome Section 4617(f) 14
D. Plaintiffs' Allegations that the Third Amendment Is An Improper Wind Down Cannot Overcome Section 4617(f) 16
III. HERA's Succession Provision Bars Plaintiffs' Claims 19
A. Under HERA, the Conservator Succeeds to Derivative and Direct Claims 19
B. There Is No "Conflict-of-Interest" Exception to HERA 20
1. *First Hartford* and *Delta Savings* Are Inapplicable 21
2. *First Hartford* and *Delta Savings* Were Wrongly Decided 22
IV. Plaintiffs' Contract Claims Fail for Lack of Ripeness and a Right to Dividends 24
CONCLUSION 25
CERTIFICATE OF SERVICE 27

<u>**TABLE OF AUTHORITIES**</u>

Page(s)

Cases

1185 Ave. of Americas Assocs. v. RTC,
22 F.3d 494 (2d Cir. 1994)....17

Arduini v. Hart,
774 F.3d 622 (9th Cir. 2014) 7

Bank of America Nat. Ass'n v. Colonial Bank,
604 F.3d 1239 (11th Cir. 2010) 8

Baptist Mem'l Hosp. v. Sebelius,
603 F.3d 57 (D.C. Cir. 2010)....15

Benihana of Tokyo, Inc. v. Benihana, Inc.,
891 A.2d 150 (Del. Ch. 2005)....3

Bennett v. Spear,
520 U.S. 154 (1997)....10

Bob's Home Services, Inc. v. Warren County,
755 F.2d 625 (8th Cir. 1985) 24

Branch Banking & Trust Co. v. Frank,
No. 2:11-cv-1366, 2013 WL 6669100....9

Brown v. Gardner,
513 U.S. 115 (1994)....22

City of Arlington v. FCC,
133 S. Ct. 1863 (2013) (Opp. 36-39)....8, 9

Cnty. of Sonoma v. FHFA,
710 F.3d 987 (9th Cir. 2013) 8

Cobell v. Norton,
283 F. Supp. 2d 66 (D.D.C. 2003)....17

Continental Western Ins. Co. v. FHFA,
83 F. Supp. 3d 828 (S.D. Iowa 2015) 11, 12, 13

Cottrell v. Duke,
737 F.3d 1238 (8th Cir. 2013) 7

Courtney v. Halleran,
485 F.3d 942 (7th Cir. 2007) 19, 20

Cty. of Cook v. Wells Fargo & Co.,
--- F. Supp. 3d. ---- 2015 WL 4397842, at *7 (N.D. Ill. July 17, 2015) 10

Delta Sav. Bank v. United States,
265 F.3d 1017 (9th Cir. 2001) 20, 21, 22, 23

In re Fannie Mae Sec., Derivative, ERISA Litig.,
629 F. Supp. 2d 1 (D.D.C. 2009), *aff'd sub nom. Kellmer v. Raines*, 674 F.3d 848 (D.C. Cir. 2012) 23

In re Fed. Home Loan Mortg. Corp. Derivative Litig.,
643 F. Supp. 2d 790 (E.D. Va. 2009), *aff'd sub nom. La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. May 5, 2011) 23

FHFA v. City of Chicago,
962 F. Supp. 2d 1044 (N.D. Ill. 2013) 9

First Hartford Corp. Pension Plan & Trust v. United States,
194 F.3d 1279 (Fed.Cir.1999)....................20, 21, 22, 23

FS Parallel Fund L.P. v. Ergen,
No. 19853, 2004 WL 3048751 (Del. Ch. Nov. 3, 2004) 3

Gail C. Sweeney Estate Marital Trust v. U.S. Treasury Dep't,
68 F. Supp. 3d 116, 123 (D.D.C. 2014) 21

Gentile v. Rossette,
906 A.2d 91 (Del. 2006) 4

Grace Holdings, LP v. Sunshine Mineral & Refining Co.,
901 F. Supp. 853 (D. Del. 1995)....................24

Halpert v. Zhang,
No. CV 12-1339, 2015 WL 1530819 (D. Del. Apr. 1, 2015) 4

Hennepin Cty. v. Fed. Nat'l Mortg. Ass'n,
742 F.3d 818 (8th Cir. 2014) 19, 22

Hindes v. FDIC,
137 F.3d 148 (3d Cir. 1998)....................13

Innovative Therapies, Inc. v. Meents,
No. 12–3309, 2013 WL 2919983 (D. Md. June 12, 2013) 4

In re Ionosphere Clubs, Inc.,
17 F.3d 600 (2d Cir. 1994)....................3, 5

In re J.P. Morgan Chase & Co. S'holder Litig.,
906 A.2d 766 (Del. 2006)....................3

Jackson v. Fischer,
No. 11-CV-2753, 2015 WL 5569133 (N.D. Cal. Sept. 21, 2015)....................5

Jama v. Immigration & Customs Enforcement,
543 U.S. 335 (2005)....................22

Kamen v. Kemper Fin. Servs.,
500 U.S. 90 (1991)....................23

King v. Burwell,
135 S. Ct. 2480 (2015)....................16

Knutson v. City of Fargo,
600 F.3d 992 (8th Cir. 2010)....................6

In re Landmark Land Co.,
973 F.2d 283 (4th Cir. 1992)....................13

LeMay v. U.S. Postal Serv.,
450 F.3d 797 (8th Cir. 2006)....................15

Leon Cnty., Fla. v. FHFA,
816 F. Supp. 2d 1205 (N.D. Fla. 2011)....................12

Levin v. Miller,
763 F.3d 667 (7th Cir. 2014)....................20

Massachusetts v. FHFA,
54 F. Supp. 3d 94, 99 (D. Mass. 2014)....................11, 12

In re McKenzie,
716 F.3d 404 (6th Cir. 2013)....................13

Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.,
854 A.2d 121 (Del. Ch. 2004)....................3

Mova Pharm. Corp. v. Shalala,
140 F.3d 1060 (D.C. Cir. 1998)....................11

NAF Holdings, LLC v. Li & Fung (Trading) Ltd.,
118 A.3d 175 (Del. 2015)....................5, 6

Nat'l Trust for Historic Preserv. in U.S. v.FDIC,
995 F.2d 238 (D.C. Cir. 1993)....................16

Nikoonahad v. Greenspun Corp.,
No. C09-02242, 2010 WL 1268124 (N.D. Cal. Mar. 31, 2010)....................4

O'Brien v. Socony Mobil Oil Co.,
152 S.E.2d 278 (Va. 1967)....................25

Pa. Co. for Ins. on Lives & Granting Annuities v. Cox,
23 Del. Ch. 193, 199 A. 671 (1938)....................25

Pareto v. FDIC,
139 F.3d 696 (9th Cir. 1998)....................3

Perry Capital LLC v. Lew,
70 F. Supp. 3d 208 (D.D.C. 2014).................... *passim*

Price v. Deeba,
No. CIV-14-319-D, 2014 WL 4660810 (W.D. Okla., Sept. 17, 2014)....................13

Protas v. Cavanagh,
No. 6555, 2012 WL 1580969 (Del. Ch. May 4, 2012)....................3, 4

RTC v. CedarMinn Bldg. Ltd. P'ship,
956 F.2d 1446 (8th Cir. 1992)....................17

Satterfield v. Malloy,
700 F.3d 1231 (10th Cir. 2012)....................12, 13

Shintom Co., Ltd. v. Audiovox Corp.,
888 A.2d 225 (Del. 2005)....................25

Sierra Club v. Jackson,
648 F.3d 848 (D.C. Cir. 2011)....................15

Sinclair v. Hawke,
314 F.3d 934 (8th Cir. 2003)....................13

In re Sonus Networks,
499 F.3d 47 (1st Cir. 2007)....................7, 8

Starr Int'l Co. v. United States,
106 Fed. Cl. 50 (2012) (cited at Opp. 27)....................4

Suero v. Fed. Home Loan Mortg. Corp.,
--- F. Supp. 3d ----, 2015 WL 4919999, at *9 (D. Mass. Aug. 18, 2015)....................11

Texas v. United States,
523 U.S. 296 (1998) 24

Tooley v. Donaldson, Lufkin & Jenrette, Inc.,
845 A.2d 1031 (Del. 2004) 2, 4, 5

Town of Babylon v. FHFA,
790 F. Supp. 2d 47 (E.D.N.Y. 2011) 8

United States v. Johnson,
529 U.S. 53 (2000) 19

Vogel v. Foth & Van Dyke Associates,
266 F. 3d 838 (8th Cir. 2000) 24

Zenith v. Hazeltine Research, Inc.,
401 U.S. 321 (1971) 22

Statutes

12 U.S.C. § 1821(d)(2)(A)(i) 20

12 U.S.C. §§ 1821(d)(3)-(6) 22

12 U.S.C. § 1821(j) 8, 13

12 U.S.C. § 1821(p)(3)(A) 20

12 U.S.C. § 4617(i) 18

12 U.S.C. § 4617(i)(2)(A) 18

12 U.S.C. § 4617(a)(2) 15, 17, 18

12 U.S.C. § 4617(a)(7) 9, 10, 11

12 U.S.C. § 4617(b)(2)(A) 21

12 U.S.C. § 4617(b)(2)(A)(i) 2, 6, 19

12 U.S.C. § 4617(b)(2)(B) 14

12 U.S.C. § 4617(b)(2)(D) 15

12 U.S.C. § 4617(b)(2)(E) 15

12 U.S.C. § 4617(b)(2)(G) 18

12 U.S.C. § 4617(b)(2)(H) 15

12 U.S.C. § 4617(b)(2)(J)(ii) 23

12 U.S.C. § 4617(b)(2)(K)(i) 19, 21

12 U.S.C. § 4617(b)(14) 15

12 U.S.C. § 4617(d)(2) 15

12 U.S.C. § 4617(f)..*passim*

8 Del. Code § 151 (c)...25

Va. Code § 13.1-638...25

Other Authorities

18 Moore's Federal Practice § 131.10 6

INTRODUCTION

The Conservator's execution of the Third Amendment was an action that goes to the very core of FHFA's statutory power to manage and operate Fannie Mae and Freddie Mac in conservatorship. This litigation constitutes nothing less than a frontal assault against the Conservator's exercise of the extraordinarily expansive powers expressly granted by Congress to operate, contract, transfer assets, and maintain liquidity for the Enterprises. Indeed, the stock purchase agreements—the Third Amendment to which is challenged here—have provided the massive and continuing commitment of taxpayer funds to support the capital and funding of the Enterprises since 2008, without which the Enterprises long ago would have been forced into mandatory receivership and liquidation. The amendment challenged here modified the Enterprises' continuing financial obligations to Treasury under those critical agreements. In particular, the Third Amendment relieved the Enterprises' of their obligation to pay Treasury fixed dividends and a Periodic Commitment Fee (calculated to fully compensate taxpayers for the unprecedented funding commitment) for so long as the Enterprises pay Treasury a variable dividend equal to profits earned. The Conservator acted squarely within its broad statutory powers and functions when it executed the Third Amendment.

The shareholder plaintiffs in this case—just as the shareholder plaintiffs in the eleven preceding cases—disagree with this Conservator decision. Plaintiffs allege that the Third Amendment harms the Enterprises, reduces shareholders' ability to recover dividends and liquidation proceeds from the Enterprises, fails to preserve and conserve their assets, and was premised on an improper motive to benefit Treasury. But Congress specifically divested the courts of jurisdiction to adjudicate and resolve disagreements relating to the Conservator's operation of the Enterprises, legislating in unequivocal terms that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator." 12 U.S.C. § 4617(f). Congress also specifically transferred "all rights" of the Enterprises and their shareholders to FHFA during the conservatorships. 12 U.S.C. § 4617(b)(2)(A)(i). These provisions make clear that Congress intended to aggregate all control over the Enterprises in the Conservator for the duration of the conservatorships, and to vest in the Conservator complete discretion, unreviewable in the courts, to operate the Enterprises in the manner it deems fit. Plaintiffs' suit is fundamentally at odds with this manifest Congressional intent, and should be dismissed. None of Plaintiffs' arguments in opposition to the motion to dismiss can obscure the plain legal realities that their claims are precluded by the decision in *Perry Capital* and the explicit statutory provisions underlying that dispositive judgment.

ARGUMENT

I. The Judgment in *Perry Capital* Precludes Plaintiffs' Claims

A. Plaintiffs' Claims are Derivative, Not Direct

Plaintiffs attempt to escape issue preclusion by arguing that their claims are direct, not derivative, and that Plaintiffs therefore should not be bound by the final judgment in *Perry Capital*. *See* Opp. 22-28. Plaintiffs are wrong.

Plaintiffs' claims are derivative under the first prong of the *Tooley* test because they are based on alleged harm to the Enterprises, not the shareholders individually. *See Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004). Indeed, Plaintiffs concede that the complaint is based on their "belie[f] that the Net Worth Sweep also injured Fannie and Freddie." Opp. 26. Plaintiffs characterize the alleged harm to the Enterprises in the most extreme terms—*e.g.*, that the Third Amendment "loot[s]" the Enterprises, "expropriate[s] the[ir] entire economic value," and places them in a "financial coma." Opp. 1, 40; *see also* Compl. ¶ 81 (alleging Third Amendment "*plainly harms*, rather than promotes, the soundness and solvency of the [Enterprises]") (emphasis added). Plaintiffs' theory is that, by "looting" the Enterprises, the Third Amendment deprives the Enterprises of monies that could otherwise be used to pay dividends or liquidation proceeds, thus diminishing Plaintiffs' share value. It is black letter law that such claims are derivative, not direct, because they are based on alleged "deplet[ion of] corporate assets that might otherwise [have] be[en] used to benefit the stockholders, such as through a dividend," which "harms the stockholders only derivatively so far as their stock loses value." *Protas v. Cavanagh*, No. 6555, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012).[1]

Plaintiffs cannot successfully recast their claims as direct by including the additional allegation that the Third Amendment harmed their purported contract rights as shareholders. The alleged harm to their purported contract rights is simply a byproduct of the alleged harm to the Enterprises. *See In re Ionosphere Clubs, Inc.*, 17 F.3d 600, 606-607 (2d Cir. 1994) (rejecting same argument and holding claims are derivative where "[t]he injury to the Preferredholders' contractual rights to receive dividend and sinking fund payments was not inflicted 'directly' or 'independently of the corporation'"); *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) (holding claims derivative where alleged injury is based on "use and enjoyment" of stock).[2]

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[1] Plaintiffs also confirm their claims are based upon harm to the Enterprises by asserting that the Third Amendment constitutes "waste" of Enterprise assets and "self-dealing" by Treasury and FHFA (Opp. 56). *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 771 (Del. 2006) ("Claims of waste are classically derivative."); *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 155 (Del. Ch. 2005) (claim based on "engaging in a self-dealing transaction . . . is a derivative claim"), *aff'd*, 906 A.2d 114 (Del. 2006).

[2] *See also FS Parallel Fund L.P. v. Ergen*, No. 19853, 2004 WL 3048751, at *3 (Del. Ch. Nov. 3, 2004) (applying *Tooley* to find purported breach of contract claim derivative) *aff'd*, 879 A.2d 602 (Del. 2005); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 168 (Del. Ch. 2004) (finding shareholder claims seeking contractual damages derivative because otherwise "every equity investor would be able to transform derivative claims alleging harm to the business into direct claims merely by casting them as contractual claims based on the original agreement by which the investor purchased its equity interest").

Plaintiffs nevertheless argue that "some wrongs harm *both* the corporation and its stockholders directly and can be challenged through *either* derivative or direct actions." Opp. 25 (citing *Gatz v. Ponsoldt*, 925 A.2d 1265, 1278 (Del. 2007); *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006)). But the cases upon which Plaintiffs rely provide them no support because each reflects a "narrow exception" that applies only to a specific set of circumstances not present here—namely, where a minority shareholder asserts claims against a company's *controlling third party shareholder* who is alleged to have victimized both the company and the other shareholders by awarding excessive shares (not cash) to itself. *Halpert v. Zhang*, No. CV 12-1339, 2015 WL 1530819, at *3 n.1 (D. Del. Apr. 1, 2015); *see also, e.g.*, *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50, 64 (2012) (cited at Opp. 27) (addressing AIG shareholder claims asserted *against Treasury*, which was alleged to have unfairly caused AIG to issue stock to Treasury). Here, Plaintiffs expressly assert contract claims directly against the Conservator, standing in the shoes of the Enterprises—thus, against the Enterprises themselves (Opp. 23). Plainly stated, Plaintiffs' claims are purely derivative under the first *Tooley* prong.[3]

Plaintiffs' claims also are derivative under the second prong of the *Tooley* test because the remedy Plaintiffs seek—namely, vacating the Third Amendment and returning to the Enterprises all dividends paid thereunder—would flow directly to, and affect the contract rights

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[3] The *Gentile* exception also requires additional elements not present here—namely, (a) the company must issue excessive shares (not cash) to the controlling shareholder without receiving assets of commensurate value in return, and (b) the share issuance must increase the majority shareholders' *voting* power to the detriment of the minority shareholders. *See Gentile*, 906 A.2d at 99-100. Neither of these elements is present here: the Third Amendment did not result in the issuance of any additional shares to Treasury (only cash dividends) or affect any shareholder voting rights (which already were succeeded to by the Conservator). *See Innovative Therapies, Inc. v. Meents*, No. 12–3309, 2013 WL 2919983, at *5 (D. Md. June 12, 2013) (declining to apply the exception where, as here, the "allegations rest solely on a purported loss in the economic value of [plaintiff's] ownership stake rather than any loss of voting power"); *see also Protas*, 2012 WL 1580969, at *6 (declining to apply exception); *Nikoonahad v. Greenspun Corp.*, No. C09-02242, 2010 WL 1268124, at *5 (N.D. Cal. Mar. 31, 2010) (same).

of, the Enterprises, not the shareholders. *See* Compl. ¶ 146(b)-(c). As *Perry Capital* held, such relief "would flow first and foremost to the [Enterprises]" and would "*not* flow directly to the [shareholder] plaintiffs." 70 F. Supp. 3d at 230 n.24 (emphasis in original).

The fact that Plaintiffs (wrongly) request direct money damages for their contract claims does not transform those claims from derivative to direct. Instead, the court "should look to the nature of the wrong and to whom the relief *should* go." *Tooley*, 845 A.2d at 1039 (emphasis added); *see also In re Ionosphere Clubs*, 17 F.3d at 605 (holding claim derivative because "payment of damages directly to the plaintiff-stockholders for the diminution in the value of their stock would be inappropriate"). Here, because the fundamental injury alleged is the "looting" of the Enterprises, the relief (if any) that would flow from such an alleged injury is a return of the purported "loot[]" to the Enterprises, not a direct payment to Plaintiffs.

Finally, Plaintiffs argue the *Tooley* test should not apply at all to their contract claims in light of the recent decision in *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175 (Del. 2015). That is incorrect. In *NAF Holdings*, the Delaware Supreme Court did not overturn or displace *Tooley*. *See, e.g., Jackson v. Fischer*, No. 11-CV-2753, 2015 WL 5569133, at *19 (N.D. Cal. Sept. 21, 2015) (applying *NAF Holdings* and *Tooley* to find claim derivative). Indeed, *NAF Holdings* presents circumstances and analyzes claims that are in no way pertinent to those here or in *Tooley*. *NAF Holdings* addresses the claims of a plaintiff-shareholder who was a direct signatory to a contract with a third party—not the company in which he held shares. The plaintiff-shareholder sued that third party for breach of contract, and the court held that the plaintiff-shareholder's direct claim against his contractual counter-party was not rendered derivative by the fact that the plaintiff sought to measure his damages by reference to a decline in value of his shareholdings. *Id*. at 180–82. Here, Plaintiffs are not asserting any claims based on any contract between Plaintiffs and a third party, so *NAF Holdings* is inapplicable.

B. Plaintiffs' Other Arguments Against Issue Preclusion Fail

Next, Plaintiffs argue that "even if [their] claims [are] derivative, issue preclusion should not apply." Opp. 29. According to Plaintiffs, because *Perry Capital* was not an "avowed derivative action[]," the plaintiffs in that action "cannot be said to have adequately represented the interests of the[] corporate entities." Opp. 30, 31.

Plaintiffs' argument fails for the simple reason that *Perry Capital did* address "avowed" derivative claims. *See Perry Capital*, 70 F. Supp. 3d at 229 ("The class plaintiffs have brought . . . derivative claims for breach of fiduciary duty."). The court in *Perry Capital* held these derivative claims were barred because: (a) they sought some equitable relief, including rescission of the Third Amendment, and such relief is barred by Section 4617(f), (*see id.* at 224-29); and (b) HERA's succession provision, 12 U.S.C. § 4617(b)(2)(A)(i), bars derivative claims notwithstanding allegations that the Conservator faced a conflict of interest. *Perry Capital*, 70 F. Supp. 3d at 230-32. Because Plaintiffs also assert derivative claims here, Plaintiffs are bound by *Perry Capital* and therefore precluded from re-litigating these issues in this litigation.

Plaintiffs argue that the claims they advance in this litigation are not subject to preclusion by pointing out that the overtly derivative claims asserted in *Perry Capital* were only for breach of fiduciary duty, and "Plaintiffs have not asserted any fiduciary duty claims here." Opp. 30 n.5. But Plaintiffs' argument is flatly inconsistent with black letter law: "Issue preclusion prevents relitigation of *issues* actually litigated and necessary for the outcome of the prior suit, *even if the current action involves different claims*. 18 Moore's Federal Practice § 131.10 (emphases added); *see also Knutson v. City of Fargo*, 600 F.3d 992, 996 (8th Cir. 2010) (observing that issue preclusion "preclude[s] relitigation of the issue[s] in a suit on a different cause of action involving a party to the first case" (citation and internal quotation marks omitted)). Here, the *issues* of whether HERA bars all claims seeking equitable relief and all shareholder derivative claims, despite an alleged conflict of interest, were actually litigated in *Perry Capital* and were necessary for that court's dismissal of the derivative claims. Thus, Plaintiffs in this case are barred from relitigating those issues here, even under the guise of different derivative claims.[4]

Plaintiffs also complain in passing that they "cannot be presumed to have been on notice that their rights were at issue in those cases." Opp. 31. But there is no "notice" requirement for issue preclusion to apply to subsequent derivative actions. *See Arduini v. Hart*, 774 F.3d 622, 637-38 (9th Cir. 2014) (explaining "there is no need for [the later shareholder plaintiff] to receive personal notice of the . . . court's decisions" due to adequate shareholder representation in the prior case). Courts routinely apply issue preclusion in subsequent derivative actions without considering notice. *See, e.g., Cottrell v. Duke*, 737 F.3d 1238 (8th Cir. 2013); *In re Sonus Networks, Inc.*, 499 F.3d 47, 64 (1st Cir. 2007).

Finally, the Court should reject Plaintiffs' request for a "special circumstances . . . exception to the normal rules of preclusion." Opp. 32. The ever-growing number of follow-on shareholder suits concerning the Third Amendment illustrates the need for application of the issue preclusion doctrine; they are not a reason for an exception to the normal rules.[5]

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[4] For the same reason, Plaintiffs' reliance on the D.D.C.'s *Rafter* order (Opp at 31) is inapt: whether the court's conclusion in *Perry Capital* that the contract claims were derivative can be characterized as a holding vs. *dicta* is irrelevant since the court also considered and dismissed *expressly* derivative claims as barred by HERA.

[5] Additional shareholder suits remain pending in *Robinson v. FHFA*, No. 15-cv-00109 (E.D. Ky. filed Oct. 23, 2015), and *Jacobs v. Federal National Mortgage Association*, No. 15-cv-00708 (D. Del. filed Aug. 17, 2015).

"[D]efendants have already been put to the trouble of litigating the very question[s] at issue, and the policy of repose strongly militates in favor of preclusion." *Sonus*, 499 F.3d at 66.[6]

II. Section 4617(f) Bars Plaintiffs' Claims For Declaratory and Equitable Relief

Section 4617(f) bars Plaintiffs' claims seeking far-reaching declaratory and equitable relief, including to vacate the Third Amendment and return all dividends paid pursuant to it, because the Third Amendment fits squarely within the Conservator's powers and functions.

Plaintiffs attempt to sidestep the dispositive inquiry—namely, whether the Conservator acted within its broad statutory "powers and functions"—by arguing that a "presumption" for judicial review of "administrative action" somehow negates Section 4617(f). Opp. 32-33. That is wrong. Even if such a presumption would otherwise apply to FHFA as Conservator, such a presumption could not survive the plain language of Section 4617(f). As the court held in *Perry Capital*, "HERA's express anti-injunction provision, which . . . necessarily covers litigation arising out of contracts executed by FHFA in accordance with its duties as a conservator, qualifies as a *reliable indicator of congressional intent to preclude review* of non-monetary APA claims brought against both FHFA and Treasury." 70 F. Supp. 3d at 221 (emphasis added).[7] In opposition, Plaintiffs repeatedly cite *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (Opp. 36-39), but that decision provides no support to Plaintiffs because, *inter alia*, it does not address

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[6] Plaintiffs argue their APA claims are not derivative (Opp. 30), but that is incorrect. *See* Treasury Reply at 17-18. Nevertheless, the Court need not resolve these issues, as Plaintiffs' APA claims are separately barred by Section 4617(f). *See Perry Capital*, 70 F. Supp. 3d at 230 n.24 (declining to "determine whether the individual plaintiffs' APA claims should be considered derivative, since all such claims are dismissed pursuant to § 4617(f)").

[7] *See also, e.g.*, *Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 990 (9th Cir. 2013) ("HERA substantially limits judicial review of FHFA's actions as conservator."); *Town of Babylon v. FHFA,* 790 F. Supp. 2d 47, 50 (E.D.N.Y. 2011) ("Congress has specifically limited the power of courts to review the actions of the FHFA when acting as a conservator."), *aff'd* 699 F.3d 221 (2d Cir. 2012); *Bank of America Nat. Ass'n v. Colonial Bank*, 604 F.3d 1239, 1244 (11th Cir. 2010) (Section 1821(j) "clearly and unambiguously reflects congressional intent to bar courts from granting the precise type of injunctive relief sought here").

HERA, FIRREA, or any jurisdiction-withdrawal statute. If anything, *City of Arlington* favors deference to FHFA's assessment of the scope of its powers. *Id.* at 1871-72.

A. Plaintiffs' Allegation that Treasury "Directed" the Conservator to Execute the Third Amendment Cannot Overcome Section 4617(f)

Plaintiffs try to transform Section 4617(a)(7), which shields the Conservator from the direction and supervision of other state and federal agencies, into a statutory nullification of the simultaneously enacted Section 4617(f), which insulates the Conservator's actions from judicial review. That is, Plaintiffs contend that Section 4617(f) does not protect the Conservator from judicial review because Treasury allegedly "supervised" or "directed" the Conservator's agreement to the Third Amendment. Opp. 40-43. Plaintiffs' argument fails.

Section 4617(a)(7) does nothing more or less than to shield the Conservator from encroaching, inconsistent regulation from state or federal agencies. *See Branch Banking & Trust Co. v. Frank*, No. 2:11-cv-1366, 2013 WL 6669100 JCM (CWH), at *11-*12 (D. Nev. Dec. 17, 2013); *FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1058 (N.D. Ill. 2013). It is not intended to be used as a weapon *against* the Conservator to attack the Conservator's decisions or to vest the courts with jurisdiction expressly withheld by Congress. Indeed, Plaintiffs themselves acknowledge that Section 4617(a)(7) is designed to *protect* the Conservator from being "*involuntarily* subjected to legally binding directives of other federal agencies." Opp. 42. Unsurprisingly, Plaintiffs do not cite a single case in which a court has ever relied on this provision (or its FIRREA analog) to limit a conservator or receiver's conduct in any way.[8]

[8] For similar reasons, Plaintiffs do not fit within "zone of interests" of Section 4617(a)(7). Plaintiffs argue that one of HERA's purposes is to protect shareholders, and Section 4617(a)(7) is allegedly part of that broader interest they are seeking to vindicate. Opp. 43 n.14. This argument should be rejected as it misapplies the "zone of interests" test, which is "determined not by reference to the overall purpose of the Act in question [*i.e.*, HERA]. . . but by reference to the *particular provision of law* upon which the plaintiff relies [*i.e.*, Section 4617(a)(7)]." *Bennett v. Spear*, 520 U.S. 154, 176 (1997) (emphasis added); *see also Cty. of Cook v. Wells Fargo &*

[Footnote continued on next page]

Moreover, although Plaintiffs assert that the Conservator did not act "voluntarily" when it agreed to the Third Amendment (Opp. 42), the Complaint is devoid of any allegation that Treasury forced the Conservator to execute the Third Amendment against its will. Plaintiffs' generic allegations that Treasury had "significant influence" over FHFA and that the Third Amendment was a "Treasury initiative" the terms of which favored Treasury (Compl. ¶ 82; Opp. 40-42) do not suggest anything more than Plaintiffs' belief the Conservator may not have negotiated the best deal. "[M]any negotiations arise from one party conjuring up an idea, and then bringing their proposal to the other party." *Perry Capital*, 70 F. Supp. 3d at 227. *Perry Capital* thus held correctly that the same allegations that "Treasury 'invented the net-worth sweep concept with no input from FHFA' do not come close to a reasonable inference that 'FHFA considered itself bound to do whatever Treasury ordered,'" even assuming the truth of Plaintiffs' allegations that the Amendment was "one-sided" and favored Treasury. *Id*. at 226.

In addition, Plaintiffs' theory that the Conservator was forced to execute the Third Amendment against its will is facially implausible in light of this (and related) litigation, where the Conservator has, for years, been vigorously defending in court the very same amendment Plaintiffs maintain the Conservator was forced to execute against its will. These circumstances alone compel rejection of Plaintiffs' "direction and supervision" argument. *See Suero v. Fed. Home Loan Mortg. Corp*., --- F. Supp. 3d ----, 2015 WL 4919999, at *9 (D. Mass. Aug. 18, 2015) (applying Section 4617(f) by looking to the Conservator's "efforts to defend Freddie Mac

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Co., --- F. Supp. 3d. ---- 2015 WL 4397842, at *7 (N.D. Ill. July 17, 2015) (plaintiff outside of zone of interests where it had only an indirect interest in a statute designed to protect others). Here, Section 4617(a)(7)'s purpose is to provide the Conservator with a preemption defense. Thus, the Conservator—not the shareholders—"can be expected to police the interests that the statute protects." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074-75 (D.C. Cir. 1998).

against the legal challenges that have been brought against it"); *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 99 (D. Mass. 2014) (same, by looking to the Conservator's "vigorously defending Freddie Mac and Fannie Mae against the [plaintiff]'s lawsuit," and thus acting to "affirmatively support[] the continued application" of the policies).

B. Plaintiffs' Allegation that the Third Amendment Was Improperly Motivated Cannot Overcome Section 4617(f)

Plaintiffs next argue that because the Conservator supposedly had improper motives behind the Third Amendment—*i.e.*, to "nationalize" the Enterprises, increase payments to Treasury, and/or act at Treasury's behest—Section 4617(f) cannot protect the Conservator's actions from judicial scrutiny. Opp. 42, 59-60. Again, Plaintiffs are wrong.

As an initial matter, Plaintiffs' argument reflects a U-turn: in earlier briefing before this Court, Plaintiffs asserted that they were entitled to prevail "irrespective of FHFA's reasons for agreeing" to the Third Amendment and that "Treasury's rationale . . . makes no difference" to the analysis. *See* Doc. # 21 at 4 (seeking production of administrative records). Now, however, Plaintiffs criticize the court in *Perry Capital* for going "seriously astray" by "blinding itself to FHFA's rationales" and "blind[ing] itself to the purpose of the Net Worth Sweep." Opp. 59-60.

Plaintiffs had it right the first time: the Conservator's motives are irrelevant to the analysis. As the court in *Perry Capital* explained: HERA "narrows the Court's jurisdictional analysis to *what* the Third Amendment entails, rather than *why* FHFA executed the Third Amendment." 70 F. Supp. 3d at 225-26 (emphasis in original). Accordingly, allegations "disputing FHFA's justifications for the Third Amendment . . . ask the Court, directly or indirectly, to evaluate FHFA's rationale for entering into the Third Amendment—a request that contravenes § 4617(f)." *Id.* at 225. Likewise, in *Continental Western*, Judge Pratt held that "it is not the role of this Court to wade into the merits *or motives* of FHFA and Treasury's actions—rather the Court is limited to reviewing those actions on their face and determining if they were permissible under the authority granted by HERA." *Continental Western Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015) (emphasis added). These decisions rest on sound policy: if motives *were* relevant, jurisdictional bars such as Section 4617(f) would be negated, as plaintiffs could always plead around them by simply alleging an improper motive.

Plaintiffs complain that the courts in *Perry Capital* and *Continental Western* misread the earlier decision in *Leon Cnty., Fla. v. FHFA*, 816 F. Supp. 2d 1205, 1208 (N.D. Fla. 2011), *aff'd*, 700 F.3d 1273 (11th Cir. 2012). Opp. 59-60. But *Leon County* is directly on point. The plaintiff in that case sought to evade Section 4617(f) by alleging the Conservator's conduct (the issuance of a directive to the Enterprises) was an improperly motivated litigation tactic. The court squarely rejected that argument, holding: "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*." *Id*. (emphasis added). Here, unable to rebut this key holding, Plaintiffs point to other language that refers to considering the "purpose" of FHFA actions. Opp. 59-60. But that reference came on appeal, in the context of analyzing a different issue: how "to determine whether [the directive] was issued pursuant to the FHFA's powers as conservator or as regulator." *Leon Cnty.*, 700 F.3d at 1278. That issue is entirely absent here; there is no dispute FHFA acted in its conservator (not regulator) capacity in executing the Third Amendment.[9]

[9] Plaintiffs also cite *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 99–100 (D. Mass. 2014) (Opp. 42-43), but that case is unhelpful to Plaintiffs for the same reason, as it discussed the "purpose" of the Conservator's conduct only to assess whether FHFA acted "instead in its capacity as the [Enterprises]' regulator." (citing *Leon County*, 700 F.3d at 1278).

Moreover, consistent with *Perry Capital*, *Continental Western*, and *Leon County*, other courts have applied 12 U.S.C. § 1821(j)—the analogous jurisdictional bar applicable to bank conservators and receivers—in cases where plaintiffs also alleged the receiver acted with suspect motives. *See, e.g.*, *Hindes v. FDIC*, 137 F.3d 148 (3d Cir. 1998) (barring challenge to alleged "conspiracy with state officials to close the bank"); *In re Landmark Land Co.*, 973 F.2d 283, 288-90 (4th Cir. 1992) (barring challenge to action allegedly taken for conservator's "own benefit" and to other interested parties' detriment); *see also Sinclair v. Hawke*, 314 F.3d 934, 938, 942 (8th Cir. 2003) (holding "comprehensive statutory regime" including Section 1821(j) barred claims alleging OCC acted "for retaliatory and vindictive purposes").[10]

Because motive and intent are irrelevant to the Section 4617(f) analysis, the Court need only look at what the Conservator did, not why the Conservator did it. Here, the Conservator agreed to an operational amendment to the longstanding agreement between the Enterprises and Treasury that has, for many years now, allowed the Enterprises to avoid the imposition of a statutorily mandated receivership and liquidation. This action by the Conservator is Congressionally-protected from judicial nullification because—without regard to purpose, motive, intent, or even whether it was a good idea—the execution of the Third Amendment falls squarely within the Conservator's power and authority to enter contracts, transfer assets, provide for funding, and indeed manage every aspect of the Enterprises' operations and activities.

[10] An analogous jurisdictional bar to most claims against court-appointed receivers and bankruptcy trustees—the *Barton* doctrine—functions similarly: An exception allows claims that a receiver or trustee acted outside its statutory authority, but not claims that it acted with "improper motives." *Satterfield v. Malloy*, 700 F.3d 1231, 1236 (10th Cir. 2012); *see also In re McKenzie*, 716 F.3d 404, 422 (6th Cir. 2013) (holding allegation of "ulterior purposes" insufficient to overcome jurisdictional bar); *Price v. Deeba*, No. CIV-14-319-D, 2014 WL 4660810, at *3 (W.D. Okla., Sept. 17, 2014) (holding that allegations of "improper motives" and "retaliatory intent are irrelevant" to jurisdictional bar).

C. Plaintiffs' Allegations that the Conservator Did Not Effectively Carry Out Its Purported Statutory "Obligations" Cannot Overcome Section 4617(f)

Plaintiffs' remaining attempts to avoid Section 4617(f) are premised upon the theory that HERA "requires" the Conservator to comply with various "duties" and "obligations." According to Plaintiffs, by alleging the Conservator has not carried out its "duties" effectively, Plaintiffs can obtain judicial review of the *merits* of the Conservator's decision to execute the Third Amendment. *See* Opp. 43-51. The premise of Plaintiffs' theory is incorrect—the relevant sections of HERA confer broad powers on the Conservator, they do not impose duties or dictate or direct the manner in which those powers are to be exercised.

First, Plaintiffs argue that HERA imposes "Statutory Duties" and "Obligat[ions]" that "require[]"the Conservator to "preserve and conserve" the Enterprises' assets, to put the Enterprises in a "sound and solvent condition" and to "rehabilitat[e]" them. Opp. 43. This attempt to foist imaginary mandatory obligations upon the FHFA when acting as Conservator permeates Plaintiffs' opposition.[11] Such mandates, however, are nowhere to be found in HERA. Instead, HERA describes the Conservator's powers using *permissive*—not mandatory—language. In particular: "The Agency *may*, as conservator or receiver . . . preserve and conserve the assets and property of the [Enterprises]." 12 U.S.C. § 4617(b)(2)(B). "The Agency *may*, as conservator or receiver . . . operate the [Enterprises] . . . and conduct all business of the [Enterprises]." *Id.* "The Agency *may*, as conservator, take such action as may be . . . appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property

[11] *See, e.g.*, Opp. 3 (asserting purported "duties and obligations as required under HERA," including a "statutory duty of 'rehabilitating' Fannie and Freddie"); 9 (asserting that HERA "obligates FHFA as Conservator to carry on a company's business, preserve and conserve its assets and property, and return it to sound and solvent condition"); 47 (asserting FHFA's purported "basic obligations under HERA"); 48 ("duty" to preserve and conserve assets); 49 ("obligation" and "duty to rehabilitate"); 50 ("statutory duties to 'preserve and conserve'"); 58 ("duty" to preserve and conserve assets); 61 ("statutory duties" as conservator).

of the regulated entity." *Id*. § 4617(b)(2)(D). "The Agency *may* . . . be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." *Id*. § 4617(a)(2) (emphases added in all).

"Certainly, as a general rule of statutory construction, 'may' is permissive, whereas 'shall' is mandatory." *LeMay v. U.S. Postal Serv.*, 450 F.3d 797, 799 (8th Cir. 2006). Accordingly, "the most natural reading" of HERA's statutory language "is the one that is most obvious: 'may' is permissive rather than obligatory." *Baptist Mem'l Hosp. v. Sebelius*, 603 F.3d 57, 63 (D.C. Cir. 2010); *see also Sierra Club v. Jackson*, 648 F.3d 848, 856 (D.C. Cir. 2011) (observing that "when a statute uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory").

HERA uses both "may" and "shall" in different contexts. With respect to duties, HERA provides, for example, that the Conservator "shall" maintain a full accounting. 12 U.S.C. § 4617(b)(14).[12] With respect to powers, however, HERA uses the permissive "may." This choice of language reflects Congress's desire to give the Conservator plenary powers to operate the Enterprises without restraint. As the court in *Perry Capital* recognized, HERA was passed at a time when the Enterprises were on the precipice of collapse, and the Conservator needed broad powers and discretion to stave off disaster. 70 F. Supp. 3d at 225. There is simply no suggestion in the language or context of HERA that its ongoing operation of the Enterprises should be subject to judicial review, and Section 4617(f) demonstrates the opposite.

[12] *See also, e.g.*, 12 U.S.C. § 4617(b)(2)(H) (providing that FHFA as conservator or receiver "shall . . . pay all valid obligations of the regulated entity that are due and payable at the time of the appointment"); 12 U.S.C. § 4617(b)(2)(E) (providing that FHFA as receiver "shall place the regulated entity in liquidation"); 12 U.S.C. § 4617(d)(2) (providing that FHFA as conservator or receiver "shall determine" whether to exercise repudiation rights within a reasonable period").

Second, Plaintiffs' erroneous view that HERA obligates the Conservator to exercise its statutory powers in certain mandatory ways cannot be reconciled with Section 4617(f). Instead of limiting jurisdiction, Plaintiffs' inventive—but flatly wrong—reading of the pertinent statutory provisions would create judicial jurisdiction in virtually every instance where Congress quite clearly effected its intent to withdraw all jurisdiction from the courts. According to Plaintiffs, so long as they allege that the Conservator did not comply with one of its supposed "statutory duties" in executing the Third Amendment, then the Court must assess the merits of the Conservator's decision *in order to determine* whether Section 4617(f) bars their claims. This is plainly incorrect and Plaintiffs' theory would invite litigants and courts to second-guess the reasonableness and effectiveness of the Conservator's conduct *first*, in order to determine whether that conduct is subject to judicial review. This is the exact opposite of what the statute says and Congress intended, and it would improperly "negate [HERA's] stated purposes," *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015), to "immunize" Conservator action "from outside second-guessing." *Nat'l Trust for Historic Preserv. in U.S. v.FDIC*, 995 F.2d 238, 240 (D.C. Cir. 1993). As the court in *Perry Capital* explained: "Requiring the Court to evaluate the merits of FHFA's decisionmaking each time it considers HERA's jurisdictional bar would render the anti-injunction provision hollow, disregarding Congress' express intention to divest the Court of jurisdiction to restrain FHFA's 'exercise of [its] powers or functions' under HERA—*i.e.*, how FHFA employs its powers or functions." 70 F. Supp. 3d at 226.

D. Plaintiffs' Allegations that the Third Amendment Is An Improper Wind Down Cannot Overcome Section 4617(f)

Plaintiffs wrongly contend that the Third Amendment is an improper "wind down" of the Enterprises, and that the power to "wind down" the Enterprises belongs exclusively to the FHFA as receiver, not conservator. Opp. 43-47, 51-55. First, and most simply, the Third Amendment did not effect a wind down the Enterprises. To the contrary, the Enterprises "maintain an operational mortgage finance business and are, once again, profitable." *Perry Capital*, 70 F. Supp. 3d at 228.[13] Nor are the Enterprises in "*de facto* receiver[ship]" or "*de facto* liquidation," as Plaintiffs maintain. Opp. 51-52. "The notion of a '*de facto* receivership' is rather akin to the concept of 'semi-pregnancy': an entity is either in *de jure* receivership or it is not." *See Cobell v. Norton*, 283 F. Supp. 2d 66, 91 n.12 (D.D.C. 2003).

Second, although this Court need not reach the issue, the plain language of HERA authorizes FHFA acting as "conservator *or* receiver" to "wind[] up the affairs" of the Enterprises (12 U.S.C. § 4617(a)(2) (emphasis added)). After acknowledging that the plain text of the statute permits FHFA to be appointed "conservator or receiver for the purpose of . . . winding up the affairs" of the Enterprises, Plaintiffs' advance the implausible argument that the Conservator, notwithstanding this express grant of authority by HERA, is nevertheless "forbidden" under HERA from taking any steps to wind down the Enterprises. Opp. 53. Plaintiffs are wrong and cannot re-write the statute as they see fit. "Congress [does] not use the phrase 'conservator or receiver' loosely." *1185 Ave. of Americas Assocs. v. RTC*, 22 F.3d 494, 497 (2d Cir. 1994). Indeed, by using this phrase, "it is clear that Congress intended the duty, right, or power to be enjoyed or exercised by *both* the conservator and the receiver." *RTC v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1452 (8th Cir. 1992) (emphasis added).

Plaintiffs also argue that HERA uses the terms "liquidation" and "winding up" synonymously, and because the Conservator is not permitted to do the former, it must not be permitted to do the latter. Opp. 52-53. But winding up is different than liquidation; it includes a

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13 As *Perry Capital* noted: "this litigation only exists *because* the [Enterprises] have, under FHFA's authority, progressed from insolvency to profitability." 70 F. Supp. 3d at 228 n.21.

wide variety of prudential steps short of liquidation—including transferring Enterprise assets without approvals or consents and shrinking the Enterprises' operations to ensure their safety and soundness until an ultimate resolution is determined. 12 U.S.C. § 4617(b)(2)(G). Accordingly, "[t]here surely can be a fluid progression from conservatorship to receivership without violating HERA, and that progression could very well involve a conservator that acknowledges an ultimate goal of liquidation." *Perry Capital*, 70 F. Supp. 3d at 228 n.20.

Additionally, Plaintiffs contend that FHFA's interpretation would "generate[] absurd results" because it would allow FHFA as receiver to act with a purpose of "rehabilitation," as opposed to liquidation. Opp. 53. But FHFA's interpretation is consistent with HERA, which directs the receiver not only to liquidate Enterprise assets, but also to "rehabilitat[e]" the business of the Enterprise by creating a limited-life regulated entity ("LLRE"). 12 U.S.C. § 4617(i). An LLRE "succeed[s] to the charter" of the Enterprise for which it is established and "thereafter operate[s] in accordance with, and subject to, such charter." *Id.* § 4617(i)(2)(A). An LLRE then rehabilitates and reorganizes the Enterprises through a selective transfer of assets and liabilities.

<u>Third</u> and finally, HERA does not require that FHFA "rehabilitate" the Companies and "return them to private control," as Plaintiffs contend. Opp. 34. HERA merely provides that FHFA "may, at the discretion of the Director, 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). Congress never imposed upon the Conservator a duty or obligation to return the Enterprises to "private control," to the shareholders, or to their prior form.[14]

[14] Plaintiffs also argue the Conservator's transfer of assets pursuant to the Third Amendment is improper because it allegedly allows FHFA to "circumvent" the receivership-claims process. Opp. 55-57. But the Conservator's broad powers under HERA are not constrained by HERA's receivership-distribution priority provisions. *See Courtney v. Halleran*, 485 F.3d 942, 949 (7th Cir. 2007). Plaintiff asserts *Courtney* is "very far afield" (Opp. 57) and concerns only a

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III. HERA's Succession Provision Bars Plaintiffs' Claims

Plaintiffs' claims also are barred by a separate provision of HERA, by which the Conservator succeeded to "all rights, titles, powers, and privileges" of the Enterprises and their shareholders. 12 U.S.C. § 4617(b)(2)(A)(i). Plaintiffs' arguments to the contrary fail.

A. Under HERA, the Conservator Succeeds to Derivative and Direct Claims

Because Plaintiffs' claims are derivative (*supra* Sec. I(A)), there is no need to consider whether HERA bars direct claims. In all events, HERA bars all of Plaintiffs' claims—whether derivative or direct—in light of the Conservator's succession to "all" shareholder rights with respect to the Enterprises. 12 U.S.C. § 4617(b)(2)(A)(i). In HERA, "all means all," and the plain statutory language contains no exception for direct claims. *Hennepin Cty. v. Fed. Nat'l Mortg. Ass'n*, 742 F.3d 818, 822 (8th Cir. 2014).[15] Moreover, because the Conservator already can pursue derivative claims that belong to the Enterprises themselves, given its succession to "all rights" of the Enterprises, the phrase "rights . . . of any stockholder" must encompass direct claims arising out of the shareholders' interests if it is to have meaning.

Plaintiffs contend that the language "with respect to [the Enterprises] and the assets of [the Enterprises]" limits HERA's succession provision to derivative claims. This interpretation is not plausible. Even if Plaintiffs' claims are direct, they are inextricably linked to the Enterprises and their assets; their entire case is based on the allegation that the government

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receiver's power to settle legal claims under a different provision (12 U.S.C. § 1821(p)(3)(A)). This is wrong: the Seventh Circuit addressed that provision only in connection with a different issue—whether certain assets were subject to liquidation at all. *See Courtney*, 485 F.3d at 949.

[15] Indeed, the existence of another express exception—namely, one permitting shareholders to prosecute claims they might have to liquidation proceeds pursuant to specific procedures following appointment of a receiver (*id*. § 4617(b)(2)(K)(i))—prohibits the creation of any implicit exceptions. *See United States v. Johnson*, 529 U.S. 53, 58 (2000).

forced the Enterprises "to turn over **all** of their profits"—which, of course, are assets—"to the federal government." Compl. ¶ 1 (emphasis in original).

Plaintiffs also cite *Levin v. Miller*, 763 F.3d 667 (7th Cir. 2014), which addressed the materially-identical succession language in FIRREA (12 U.S.C. § 1821(d)(2)(A)(i)). But the issue of whether the succession provision extends to direct claims was not litigated, as Plaintiffs acknowledge, so any discussion of the direct/derivative distinction was dicta. Opp. 70. Moreover, the concurring judge in *Levin* explained why the plain language of the succession provision *does* apply to direct claims: "It is not obvious to me that the language must be interpreted so narrowly [as to apply only to derivative claims], nor did the cases cited [by the majority] confront this issue or require that result." 763 F.3d at 673 (Hamilton, J., concurring). Judge Hamilton observed that the language "rights . . . of any stockholder" lacks any meaning if the provision is limited to derivative claims; given that the FDIC also succeeds to "all rights" of the institution itself. *Id*. "The doctrine that statutes should not be construed to render language mere surplusage . . . weighs in favor of a broader reach that could include direct claims." *Id*.

B. There Is No "Conflict-of-Interest" Exception to HERA

Plaintiffs attempt to avoid the bar on shareholder claims during conservatorship by arguing that a "conflict of interest" exception should apply to HERA, notwithstanding its complete absence from the statute. *Perry Capital* rightly rejected this argument as seeking "an *implicit* end-run around FHFA's conservatorship authority by means of the shareholder derivative suits that the statute explicitly bars." 70 F. Supp. 3d at 231. Plaintiffs rely upon two decisions that have created an exception in limited circumstances for FDIC receiverships—not conservatorships. Opp. 72-73 (discussing *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295–96 (Fed.Cir.1999), and *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021-23 (9th Cir. 2001)). Those cases are outliers and should not be followed here.

1. *First Hartford* and *Delta Savings* Are Inapplicable

First Hartford and *Delta Savings* are, by their own acknowledgment, exceptional cases. *See First Hartford*, 194 F.3d at 1295 ("our holding is limited to the situation here," and "[w]e neither infer nor express an opinion on the standing of derivative plaintiffs in other circumstances."). Later courts have stated they should be limited to their specific facts. *See Gail C. Sweeney Estate Marital Trust v. U.S. Treasury Dep't*, 68 F. Supp. 3d 116, 123 (D.D.C. 2014) (describing *Delta Savings* as "a significant expansion" of what *First Hartford* "expressly warned was supposed to be a 'very narrow' holding"). Those facts are not present here.

First, *First Hartford* and *Delta Savings* created a conflict of interest exception only in the context of failed banking institutions in *receivership*, not conservatorship. In those receivership cases, the shareholders' contingent right to a distribution from the failed institution's liquidation arguably had ripened—a circumstance not presented here. Indeed, HERA makes clear that, upon appointment of the receiver, shareholders gain the ability to assert claims based on their contingent rights through the administrative and judicial claims process. 12 U.S.C. § 4617(b)(2)(K)(i). Shareholders have no such rights during conservatorship. *See* 12 U.S.C. § 4617(b)(2)(A). Further, as *Perry Capital* recognized, applying a conflict-of-interest exception "makes still less sense in the conservatorship context, where FHFA enjoys even greater power free from judicial intervention" than in receivership. 70 F. Supp. 3d at 231 n.30. Whereas courts have a role with respect to "issues brought by outside shareholders" in receivership (*i.e.*, they are involved in the process of adjudicating shareholder claims), Congress eliminated shareholder involvement in conservatorship operations. *Id.* (citing 12 U.S.C. § 4617(b)(5), (6)).

Second, *First Hartford* and *Delta Savings* are distinguishable because they arose from actions of the federal regulator that preceded and allegedly contributed to the imposition of receivership, and thus concerned rights that allegedly had ripened *before* receivership. *See First*

Hartford, 194 F.3d at 1283-84, 1295; *Delta Savings*, 265 F.3d at 1019-20. Here, Plaintiffs do not seek to vindicate any claims that arose before conservatorship. Rather, Plaintiffs make claims based on actions that allegedly occurred *during* conservatorship, after all of their shareholder rights had already been transferred to the Conservator. Thus, their claims do not implicate the unusual considerations underlying *First Hartford* and *Delta Savings*.

2. *First Hartford* and *Delta Savings* Were Wrongly Decided

In addition to being inapplicable, *First Hartford*, *First Hartford* and *Delta Savings* were wrongly decided, and this Court should thus follow *Perry Capital* in rejecting them. HERA broadly transfers "*all*" shareholder rights, titles, powers, and privileges and contains no "conflict of interest" exception. "Unambiguous statutory language is generally enforced as written and may be departed from only on the most extraordinary showing of contrary intentions in the legislative history." *Hennepin Cty.*, 742 F.3d at 821-22 (internal quotation marks and citation omitted). Moreover, creating a judicial exception to HERA would be especially inappropriate because Congress already "considered whether there was need for any exception and 'limited the statute to the ones set forth.'" *Id.* (quoting *Johnson*, 529 U.S. at 58); *see also supra* n.15; 12 U.S.C. §§ 1821(d)(3)-(6) (FIRREA analog to receivership claims procedure). The existence of this lone, express exception precludes any others, including one for "conflict of interest."[16]

Further, the rationale behind the conflict of interest exception is inapposite to the circumstances here. In *First Hartford*, the court relied heavily on the traditional derivative

[16] Plaintiffs argue that Congress endorsed *First Hartford* and *Delta Savings* by using the same language in HERA that it used in FIRREA. Opp. 73-74. But two cases do not constitute a settled judicial construction of a statute. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 351 (2005). And "where the law is plain"—as here—"subsequent reenactment does not constitute an adoption" of the prior construction. *Brown v. Gardner*, 513 U.S. 115, 121 (1994); *see also Zenith v. Hazeltine Research, Inc.*, 401 U.S. 321, 336-37 & n.7 (1971) (finding "no direct evidence that Congress ever considered the issue . . . or voiced any views upon it").

litigation concept, rooted in common law, that shareholders may bring suit on behalf of the corporation "when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation." *First Hartford*, 194 F.3d at 1295 (discussing *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 95 (1991)). But HERA's succession provision *eliminates* the distinction between shareholder interests on the one hand, and officer and director interests on the other; the conservator succeeds to *all* such interests and is alone empowered to determine what is in the "best interests" of the Enterprises. *See* 12 U.S.C. § 4617(b)(2)(J)(ii).

The *Perry Capital* court rightly rejected the proffered exception, explaining:

> [T]he existence of a rule against shareholder derivative suits, § 4617(b)(2)(A)(i) [recognized in *Kellmer*], 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. Derivative suits largely exist so that shareholders can protect a corporation from those who run it—and HERA takes the right to such suits away from shareholders. How, then, can a court base the exception to a rule barring shareholder derivative suits on the purpose of the 'derivative suit mechanism' that rule seeks to bar? Such an exception would swallow the rule.

70 F. Supp. 3d at 231 (emphasis in original). This Court should adopt the same reasoning here.[17]

[17] Plaintiffs insist that a conflict of interest exception "would [not] swallow the rule" because the exception may not apply in "actions relating to corporate mismanagement leading to the imposition of the conservator or receiver in the first place." Opp. 74. But that was precisely the sort of conflict alleged in *Delta Savings* and for which the court (incorrectly) applied the exception. *See First Hartford*, 194 F.3d at 1283-84, 1295; *Delta Sav.*, 265 F.3d at 1019-20. Moreover, other shareholders *have* sought to apply a conflict of interest exception to the Conservator's decision whether to pursue claims based on pre-conservatorship corporate mismanagement, demonstrating that such an exception would, in fact, threaten to "swallow the rule." *See, e.g.*, *In re Fannie Mae Sec., Derivative, ERISA Litig.*, 629 F. Supp. 2d 1, 4 n.5 (D.D.C. 2009), *aff'd sub nom. Kellmer v. Raines*, 674 F.3d 848 (D.C. Cir. 2012); *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 797-98 (E.D. Va. 2009), *aff'd sub nom. La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. May 5, 2011).

IV. Plaintiffs' Contract Claims Fail for Lack of Ripeness and a Right to Dividends

Plaintiffs' contract claims (Counts IV and V) also fail for lack of ripeness. In opposition, Plaintiffs argue that because the Complaint alleges that "the Net Worth Sweep sets the Companies on an inexorable path to wind down," their claims are ripe. Opp. 77. Aside from the fact that the Third Amendment does not "wind down" the Enterprises (*see supra* Sec. II(D)), a "path to wind down" is not a triggering event under the terms of Plaintiffs' stock certificates, and Plaintiffs cannot avoid dismissal on ripeness grounds merely by conclusory pleading that an uncertain future event—conclusion of the Conservatorship and liquidation of the Enterprises—must be inevitable. *See Texas v. United States*, 523 U.S. 296, 300 (1998).

Plaintiff's citations to *Bob's Home Services, Inc. v. Warren County*, 755 F.2d 625 (8th Cir. 1985) and *Vogel v. Foth & Van Dyke Associates*, 266 F. 3d 838 (8th Cir. 2000) offer no help to Plaintiffs' claims. In *Vogel*, the court determined the claims were ripe where contingent future events "could not *further ripen* [the] claims," 266 F.3d at 840 (emphasis added), and *Bob's Home Services* addressed ripeness in the context of "impending government enforcement of a statue or regulation." *Grace Holdings, LP v. Sunshine Mineral & Refining Co.*, 901 F. Supp. 853, 861 (D. Del. 1995). Here, Plaintiffs are entitled to recover liquidation proceeds only upon the Enterprises' dissolution and liquidation; because the Enterprises remain in conservatorship and continue to operate, there is no "impending" liquidation. As noted in *Perry Capital*, "[t]he question for the Court cannot be whether the Third Amendment diminished an *opportunity* for liquidation preferences at some point in the future" because "the purpose of the ripeness doctrine is to ensure the Court hears only an 'actual case or controversy.'" 70 F. Supp. 3d at 234-35.

Plaintiffs' contract claims also fail because Plaintiffs have no contractual right to dividends. Effectively conceding that they lack such a right, Plaintiffs assert that even though they have not alleged "an 'absolute right' to any particular dividend," the Third Amendment has breached their stock certificates because "there is no chance that Plaintiffs … will receive a dividend payment." Opp. 79. But the Third Amendment did not nullify Plaintiffs' contractual rights to dividends; the terms of Plaintiffs' stock certificates remain unchanged. Because Plaintiffs' stock certificates provide for dividends to be awarded only in the "sole discretion" of the Enterprises' boards, Plaintiffs have "no right to dividends" and no claim for breach. *See, e.g.*, *Pa. Co. for Ins. on Lives & Granting Annuities v. Cox*, 23 Del. Ch. 193, 198, 199 A. 671, 673 (1938) ("shareholders have no right to dividends until they are declared"); *O'Brien v. Socony Mobil Oil Co.*, 152 S.E.2d 278, 285-86 (Va. 1967) ("no right to demand payment" of undeclared dividends"); *see also Perry Capital*, 70 F. Supp. 3d at 237 & n.41.[18]

Finally, while Plaintiffs cite 8 Del. Code § 151 (c) and Va. Code § 13.1-638 to suggest that the Third Amendment does not reflect a "preference[]" over other classes (Opp. 79), Treasury's stock certificates are consistent with these provisions, both of which accord companies "great flexibility" and "considerable latitude in creating classes of stock." *Shintom Co., Ltd. v. Audiovox Corp.*, 888 A.2d 225, 227-228 (Del. 2005); *see also* Va. Code § 13.1-638 (permitting issuance of preferred stock that provides dividends "calculated in any manner").

CONCLUSION

For the foregoing reasons, as well as the reasons stated in FHFA's Motion to Dismiss and Treasury's Motion to Dismiss, FHFA respectfully requests the Court dismiss with prejudice all claims asserted against it.

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[18] Plaintiffs cannot save their claim by asserting that "*[i]f Treasury's stock is considered common stock*, the Companies' dividend distributions to Treasury breach the contracts of all other shareholders." Opp. 80 (emphasis added). This argument was correctly rejected in *Perry Capital*. Treasury's Stock Certificates clearly state that the stock ranks senior to all other outstanding classes, and these "senior-most dividend and liquidation rights … distinguish [Treasury's] stock from common stock." *Perry Capital*, 70 F. Supp. 3d at 238 n.44.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the parties to this action by serving a copy upon each party listed below on November 23, 2015, by the Electronic Filing System.

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