UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT PIKEVILLE

ARNETIA JOYCE ROBINSON, Plaintiff, 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. 7:15-cv-00109-ART-EBA **REPLY OF DEFENDANTS FEDERAL HOUSING FINANCE AGENCY, AS CONSERVATOR FOR FANNIE MAE AND FREDDIE MAC, AND FHFA DIRECTOR MELVIN L. WATT IN SUPPORT OF THEIR MOTION TO DISMISS**

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INTRODUCTION

Plaintiff's amended complaint and opposition brief are replete with allegations of wrongdoing with respect to the appointment of the Conservator in 2008. Am. Compl. ¶¶ 7-8, 36-49; Opp. 8-9, 23, 46.[1] But because HERA grants the Enterprises the exclusive right to challenge the appointment of the Conservator (and requires them to do so within 30 days of the appointment, 12 U.S.C. § 4617(a)(5)), Plaintiff cannot—and does not even try to—bring claims arising from the imposition of the Conservatorship. In addition, although Plaintiff complains that the Preferred Stock Purchase Agreements ("PSPAs") executed at the outset of the Conservatorships gave Treasury "very favorable terms," Opp. 9, she does not bring any claims arising out of the original PSPAs or the first two amendments thereto. Instead, Plaintiff predicates her claims for relief on a single act that occurred nearly four years later: the agreement between the Conservator and Treasury to amend the PSPAs for a third time.

The Third Amendment, among other things, modified the Enterprises' contractual obligations to pay dividends to Treasury and eliminated, for so long as this modification remains in place, the Enterprises' obligation to pay Treasury an annual periodic commitment fee ("PCF"). Before the Third Amendment, the Enterprises were required to pay Treasury a fixed annual cash dividend equal to 10% of the liquidation preference.[2] By the time of the Third Amendment, the 10% cash dividend had grown to $18.9 billion per year (and would increase if the Enterprises received any additional funds from Treasury). Further, when the Enterprises

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[1] "Am. Compl." refers to the Amended Complaint, filed on Dec. 29, 2015 (ECF No. 17), and "Opp." refers to Plaintiff's Sealed Consolidated Response in Opposition to the Motions to Dismiss, filed on Feb. 12, 2016 (ECF No. 32). Additionally, "FHFA Br." and "Treasury Br." refer to the FHFA (ECF No. 23-2) and Treasury (ECF No. 22-1) memoranda in support of the motions to dismiss.

[2] The 10% annual cash dividend was to be paid quarterly. If the Enterprises failed to pay the 10% cash dividend, the dividend would be accrued at the rate of 12% and added to Treasury's liquidation preference. *See* ECF No. 23-4 at 2-4 (Treasury Stock Certificate § 2).

earned less than the amount needed to pay the 10% dividend, they drew down the Treasury commitment to pay it, thereby reducing the amounts available under the Treasury commitment, adding to Treasury's liquidation preference, and increasing the amount of the required dividend going forward. In addition to the annual dividend obligation, the Enterprises were subject to the PCF, which was intended to compensate taxpayers fully for Treasury's massive and ongoing commitment of public funds to maintain the Enterprises' operations. The Third Amendment replaced the Enterprises' fixed dividend and PCF obligations to Treasury with a variable dividend equal to the net profits of the Enterprises, if any. Absent the Third Amendment, the Enterprises would have remained obligated to Treasury for the annual dividend and PCF. Under the Third Amendment, Treasury accepted the risk that the Enterprises would earn less than 10% of the liquidation preference plus the amount of the PCF. Indeed, if the Enterprises earned no profits in a year, they would owe Treasury *no* dividend.

HERA forecloses Plaintiff's attempt to void the Conservator's operational decisions, including its decision to amend the PSPAs for a third time, and assert supervisory authority over the Conservator. Plaintiff has no right to invoke the jurisdiction of this Court to second-guess the Conservator's operation of the Enterprises, particularly concerning how the Enterprises satisfy their obligations under the PSPAs. HERA unequivocally provides that "no court may take any action to restrain or affect the exercise of powers or functions [of FHFA as Conservator]." 12 U.S.C. § 4617(f). And HERA defines those powers or functions broadly to include "operat[ing]," "carry[ing] on the business [of]," and "contract[ing]" on behalf of the Enterprises. *Id.* § 4617(b)(2)(B). HERA further gives the Conservator the unfettered right to "transfer or sell any [Enterprise] asset . . . without any approval." *Id.* § 4617(b)(2)(G). The Third

Amendment was indisputably an exercise of the powers or functions of the Conservator and therefore not subject to shareholder challenge.

Plaintiff ascribes all manner of bad motives for the Third Amendment, and alternatively argues the Third Amendment was a bad deal for the Enterprises. But HERA makes such allegations irrelevant: as a matter of law, allegations that the Conservator acted with a bad motive—or did a bad job—cannot overcome Section 4617(f). So long as the Conservator acted within its broad authority under HERA to "operate" the Enterprises, "contract" on their behalf, or "transfer or sell" any Enterprise asset, no court may second-guess the Conservator's decisions. Besides being legally irrelevant, Plaintiff's allegations that the Conservator received no valid consideration under the Third Amendment, either because of a nefarious scheme by Treasury or as a result of incompetence, are simply implausible and contradicted by the terms of the contract.

Plaintiff's amended complaint should also be dismissed for two other, independent reasons. First, because the Conservator has succeeded to all rights, titles, powers, and privileges of the Enterprises ***and their shareholders*** (12 U.S.C. § 4617(b)(2)(A)(i)), Plaintiff currently has no right to bring this action. And second, because Plaintiff's claims are derivative in nature, they should be dismissed as a matter of issue preclusion: prior court decisions in cases brought by other shareholders on behalf of the Enterprises have held HERA prohibits these precise claims.[3]

ARGUMENT

I. Section 4617(f) Bars Plaintiff's Amended Complaint

Section 4617(f) bars Plaintiff's amended complaint—which seeks only declaratory and equitable relief, including vacatur of the Third Amendment and return all dividends paid under it

[3] We explained in our opening memorandum (FHFA Br. 32-35), the reasons why issue preclusion applies here, and we adopt the related arguments Treasury advances in both its opening and reply memoranda. *See* Treasury Br. 36-39; Treasury Reply Sec. IV.

(Am. Compl. ¶ 165)—because the Conservator's decision to execute the Third Amendment fits squarely within its broad powers and functions conferred by Congress. HERA authorizes the Conservator to enter into contracts, transfer assets, provide for funding, and manage every aspect of the Enterprises' operations and activities, all in a manner the Conservator determines is in the best interests of the Enterprises or FHFA. *See* FHFA Br. 11-21; Treasury Br. 12-20.

Plaintiff attempts to sidestep the dispositive inquiry—whether the Conservator acted within its broad statutory "powers and functions"—by arguing that a "presumption" for judicial review of "administrative action" negates Section 4617(f). *See* Opp. 17, 45 n.11. That is wrong. Even if such a presumption would otherwise apply to FHFA as Conservator, it could not survive Section 4617(f), which "necessarily covers litigation arising out of contracts executed by FHFA in accordance with its duties as a conservator [and] qualifies as a *reliable indicator of congressional intent to preclude review* of non-monetary APA claims brought against both FHFA and Treasury." *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 221 (D.D.C. 2014) (emphasis added).[4]

Plaintiff repeatedly cites *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), as somehow authorizing judicial review notwithstanding Section 4617(f). Opp. 20-23. But that decision lends no support because it does not address HERA, FIRREA, or any other jurisdiction-withdrawal statute. Indeed, *City of Arlington* had nothing to do with conservators or receivers; it addressed whether the FCC could impose time limits on local governments' consideration of wireless facility applications. 133 S. Ct. at 1866-67. And the Supreme Court held that courts

[4] *See also Cty. 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."); *Bank of Am. N.A. 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 . . . injunctive relief.").

should *defer* to federal agencies' interpretation of any statutory ambiguity concerning the scope of their authority. *Id*. at 1871-72. Thus, if applicable at all, *City of Arlington* favors deference to FHFA's assessment of the scope of its own powers under HERA.

A. The Third Amendment Falls Within the Conservator's Statutory Powers

Plaintiff asserts a variety of unfounded arguments that the Conservator lacked the statutory power to agree to the Third Amendment, thus rendering Section 4617(f) inapplicable. None has merit.

At the outset, Plaintiff urges the Court to "construe [the Conservator's] powers narrowly." Opp. 23 n.3. This is obviously specious, as Congress granted the Conservator "*broad* powers" to "assume complete control" over the Enterprises and "exclusive authority over [their] business operations." *FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1058, 1060 (N.D. Ill. 2013) (emphasis added); *see also Cty. of Sonoma*, 710 F.3d at 989 (recognizing FHFA's "broad powers" as Conservator). These powers generally match those given to conservators and receivers under FIRREA, which courts have described as "extraordinary," *MBIA Ins. Corp. v. FDIC*, 708 F.3d 234, 236 (D.C. Cir. 2013), and "exceptionally broad," *In re Landmark Land Co. of Okla., Inc.*, 973 F.2d 283, 288 (4th Cir. 1992).[5]

[5] As explained in defendants' opening memoranda, recent Congressional action amending certain aspects of the PSPAs but leaving the Third Amendment intact validates the net worth dividend and confirms that FHFA had statutory authority to execute the Third Amendment. FHFA Br. 21-24; Treasury Br. 23-27. Plaintiff's caution to use "extreme care," Opp. 59, when considering subsequent legislative actions does not change the fact that Congress specifically considered and amended certain of Treasury's rights under the PSPAs, with *full knowledge* of the Third Amendment and judicial interpretations of it. Congress is not required to expressly endorse the "propriety" of the Third Amendment in order to ratify it by subsequent action, as Plaintiff incorrectly contends. Opp. 59; *see also Nichols v. United States*, 260 F.3d 637, 650-51 (6th Cir. 2001) ("Congress *implicitly* approved the regulations enacted by the [agency] by only acting to delay implementation of one provision while allowing the other provisions including the [regulation at issue] to go forward." (emphasis added)); *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982); *United States v. Colahan*, 635 F.2d 564, 568 (6th Cir. 1980).

Although she asserts the Conservator lacked the power to agree to the Third Amendment, Plaintiff characterizes the Third Amendment as a "contract" that "transfers" Enterprise assets. Opp. 26, 41-43, 50-51, 61 n.14. Plaintiff thereby concedes the Third Amendment was within the Conservator's enumerated powers, which should end the Section 4617(f) inquiry. *See United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1329 (6th Cir. 1993) (holding Section 1821(j) barred claim challenging receiver's transfer of all assets of the institution).[6] Indeed, HERA's transfer provision "does not provide any limitation"; and "[i]t is hard to imagine more sweeping language." *Gosnell v. FDIC*, No. CIV. 90-1266L, 1991 WL 533637, at *6 (W.D.N.Y. Feb. 4, 1991), *aff'd*, 938 F.2d 372 (2d Cir. 1991). Plaintiff nevertheless contends the Conservator exceeded its power because the Third Amendment supposedly amounts to a "giveaway" for "virtually nothing" and a failure to "maximize[] the net present value return" to the Enterprises. Opp. 42; *see* Am. Compl. ¶¶ 95, 101 (alleging Enterprises did not receive "meaningful consideration" for Third Amendment). But these allegations do not create jurisdiction where HERA has unequivocally withdrawn it.

First, Plaintiff cannot evade Section 4617(f) by alleging the Conservator struck a bad deal. Courts regularly hold that Section 4617(f) and similar jurisdiction-withdrawal statutes bar courts from evaluating the merits of conservator or receiver conduct. *See* FHFA Br. 15-18. 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-

[6] Plaintiff fails in her attempt to distinguish this binding Sixth Circuit precedent. Opp. 43. She argues *United Liberty Life Insurance Company* concerned an asset transfer by a receiver, not a conservator. But HERA's asset transfer provision (like FIRREA's) applies to FHFA "as conservator *or* receiver." 12 U.S.C. § 4617(b)(2)(G) (emphasis added). She also suggest the Sixth Circuit held the receiver had acted within its powers based on a separate asset transfer provision in FIRREA, applicable to bridge institutions. Opp. 43. But the Sixth Circuit cited no such provision, instead relying on FIRREA's analog to HERA's asset transfer provision. *See United Liberty Life Ins. Co.*, 985 F. 2d at 1328-29 (citing 12 U.S.C. § 1821(d)(2)(G)(i)(II)).

injunction provision hollow . . . ." 70 F. Supp. 3d at 226; *see also Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015) ("[I]t is not the role of this Court to wade into the merits or motives of FHFA and Treasury's actions.").[7]

Another example squarely on point is *Ward v. Resolution Trust Corp*., where the plaintiff tried to avoid FIRREA's jurisdiction-withdrawal provision by alleging a receiver acted outside of its statutory powers by selling a valuable asset in a manner that involved "an inadequate price, inadequate competition, unequal treatment of [plaintiff] as a potential offeror, [and] failure of the [receiver] to make a determination regarding 'maximizing' the net present value return on the sale." 996 F.2d 99, 104 (5th Cir. 1993). The court "disagree[d] entirely," explaining "the difference between the exercise of a function or power that is clearly outside the statutory authority of the [conservator or receiver] on the one hand, and improperly or even unlawfully exercising a function or power that is clearly authorized by statute on the other." *Id*. at 103; *see also In re Island Reach Partners, Ltd.*, 161 B.R. 310, 313 (Bankr. S.D. Fla. 1993) (applying Section 1821(j) despite allegation that receiver failed to "maximize the return from the sale of failed institutions' assets").

Plaintiff's attempts to distinguish *Ward* fail. Plaintiff argues *Ward* concerned only a conservator or receiver's "sale of a single" property, while the Third Amendment is broader in scope. Opp. at 21. But the application of the jurisdictional bar does not depend upon whether the Conservator sold a single asset or many. *See Cty. of Sonoma*, 710 F.3d at 994 (applying

[7] *See also Cty. of Sonoma*, 710 F.3d at 993 ("[I]t is not our place to substitute our judgment for FHFA's."); *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 101 n.7 (D. Mass. 2014) ("Congress has removed from the purview [of] the court the power to second-guess the FHFA's business judgment."); *accord Nat'l Tr. for Historic Preserv. in U.S. v. FDIC*, 995 F.2d 238, 240 (D.C. Cir. 1993) (Section 1821(j) "immunize[s]" conservators and receivers "from outside second-guessing."); *MBIA Ins. Corp. v. FDIC*, 816 F. Supp. 2d 81, 103 (D.D.C. 2011) (applying Section 1821(j) despite allegation that receiver "came to the wrong conclusion" and an alternative course "would have been preferable"), *aff'd*, 708 F.3d 234 (D.C. Cir. 2013).

Section 4617(f) and rejecting distinction between "case-by-case" and "categorical" actions because "nothing precludes a conservator from making business decisions that are both broad in scope and entirely prospective"). Plaintiff also argues *Ward* addressed only a conservator or receiver's alleged violations of "separate substantive law[s]," such as ERISA. Opp. 22. But *Ward* itself addressed an alleged failure by the receiver to maximize the value of the receivership estate—not an alleged violation of separate substantive laws. 996 F.2d at 103-4.

As the court in *Island Reach Partners* correctly observed, "[a]bsent this statutory protection" against second-guessing, conservators and receivers "would undoubtedly be mired repeatedly in costly, time-consuming litigation challenging its judgment in the exercise of its powers." 161 B.R. at 314 n.7. The same principles apply here: Plaintiff alleges the Third Amendment favored Treasury and failed to "maximize the net present value return" to the Enterprises. These allegations amount, at most, to an assertion that the Conservator "improperly" exercised its powers because it supposedly did a bad job. That kind of second-guessing is barred by Section 4617(f).

Second, Plaintiff's characterization of the Third Amendment as a "giveaway" is contradicted by the contract documents (and Plaintiff's own allegations), which recite an exchange of consideration flowing in both directions—the Enterprises promised uncertain, but potentially smaller, future dividends (equal to the Enterprises' future profits) in exchange for relief from potentially massive future obligations (periodic commitment fees, dividends that exceeded the Enterprises' historical annual profits in all but one year, and increases in Treasury's liquidation preference).[8] Further, Plaintiff's argument that the Enterprises received no

[8] *See* Fannie Mae, Quarterly Report (Form 10-Q), at 4 (Aug. 8, 2012) ("The amount of this [$11.7 billion] dividend payment exceeds our reported annual net income for every year since our inception."), *available at* http://goo.gl/bGLVXz; Freddie Mac, Quarterly Report (Form 10-

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"*meaningful* consideration" and "*virtually* nothing" (Opp. at 24, 42 (emphases added)) ignores the "elementary" contract-law principle that courts "will not inquire into the *adequacy* of consideration as long as the consideration is otherwise *valid or sufficient* to support a promise." *See* 3 Williston on Contracts § 7:21 (4th ed.) (emphasis added).[9] Indeed, Plaintiff herself argues that the Third Amendment was a transaction in which the parties "obtain[ed] property for money or *other valuable consideration*." Opp. 53 (quoting Black's Law Dictionary at 1430).

Plaintiff also argues the Third Amendment was unauthorized because it allegedly allows FHFA to "circumvent" the receivership-distribution priority scheme outlined in HERA. Opp. 41 (citing 12 U.S.C. § 4617(b)(3)-(9), (c)). But the Enterprises are not in receivership, so the priority scheme is inapplicable. In all events, allegations that a conservator's conduct violates the statutory order of priority for receiverships are insufficient to overcome Section 4617(f). For example, in *Courtney v. Halleran*, the Seventh Circuit rejected the plaintiff's argument that an asset transfer was purportedly a "thinly disguised way of circumventing the statutory priority scheme and allowing the [investor] to get more than its proper share." 485 F.3d 942, 945 (7th Cir. 2007). The "glaring problem" with this argument, the court held, was that the receiver is specifically authorized to "transfer assets or liabilities without any further approvals," and thus the relief requested was barred by "the anti-injunction language of § 1821(j)." *Id*. at 948.

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Q), at 8 (Aug. 7, 2012) ("As of June 30, 2012, our annual cash dividend obligation . . . of $7.2 billion exceeded our annual historical earnings in all but one period."), *available at* http://goo.gl/2dbgey. *See also supra* n. 2.

[9] Plaintiff's argument that imposing a PCF would have been "inappropriate" in no way diminishes Treasury's legal right to do so under the pre-Third Amendment contract. Opp. at 24 n.4; Am. Compl. ¶ 102. Plaintiff contends, apparently based on nothing but her own opinion, that the dividends "provided more than adequate return" to Treasury (*id*.), but that assertion contravenes the contract, which specifies that dividends relate to funds *already actually drawn* against the commitment, while commitment fees relate separately to additional funds a*vailable to be drawn in the future*. *See Ctrs. v. Centennial Mortg., Inc.*, 398 F.3d 930, 933 (7th Cir. 2005) (In considering a motion to dismiss, "to the extent that the terms of an attached contract conflict with the allegations of the complaint, the contract controls.").

Plaintiff relies heavily on the Ninth Circuit's decision in *Sharpe* to argue that the Third Amendment is not authorized under HERA. Opp. 17, 19, 22. But that case is both inapt and unpersuasive. While *Sharpe* declined to apply the jurisdiction-withdrawal provision of FIRREA because "FIRREA does not authorize the breach of contracts," the Ninth Circuit and other courts have since limited that decision to its facts—*i.e.*, an alleged breach of a pre-receivership settlement agreement concerning the recording of the reconveyance of a deed of trust. *See, e.g.*, *Meritage Homes of Nev., Inc. v. FDIC*, 753 F.3d 819, 825 (9th Cir. 2014) ("*Sharpe* is not controlling outside of its limited context."); *Deutsche Bank Nat'l Tr. Co. v. FDIC*, 744 F.3d 1124, 1136-37 (9th Cir. 2014) (*Sharpe* cannot sustain an "expansive interpretation" and was "limited to its particular facts."); *McCarthy v. FDIC*, 348 F.3d 1075, 1078-79 (9th Cir. 2003) (concluding that "*Sharpe* was an unusual case" and declining to apply it outside "the circumstances [it] present[ed]").

Here, there is no breach of contract claim arising out of pre-Conservatorship actions. In all events, *Sharpe* is inconsistent with numerous other precedents holding an alleged breach of contract is insufficient to overcome Section 1821(j). *See, e.g.*, *In re Landmark Land Co. of Carolina*, No. 96-1404, 1997 WL 159479, at *4 (4th Cir. Apr. 7, 1997); *RPM Invs., Inc. v. RTC*, 75 F.3d 618, 621 (11th Cir. 1996); *Volges v. RTC*, 32 F.3d 50, 52 (2d Cir. 1994); *see also Mile High Banks v. FDIC*, No. 11-cv-01417, 2011 WL 2174004, at *3-4 (D. Colo. June 2, 2011) (finding *Sharpe* unpersuasive and applying Section 1821(j)).

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

Plaintiff attempts to avoid Section 4617(f) by alleging Treasury "supervised" and "directed" the Conservator's agreement to the Third Amendment in violation of 12 U.S.C. § 4617(a)(7). Opp. 25-28. This argument fails: Section 4617(a)(7) provides the Conservator a

defense—a shield—against encroaching, inconsistent regulation from state or federal agencies. *See Branch Banking & Tr. Co. v. Frank*, No. 2:11-cv-1366, 2013 WL 6669100 JCM (CWH), at *11-12 (D. Nev. Dec. 17, 2013); *City of Chicago*, 962 F. Supp. 2d at 1058. It is not intended to be—nor has it ever been—used as a weapon *against* the Conservator to attack the Conservator's interactions with such agencies. Unsurprisingly, Plaintiff cites no case in which a court has ever relied on this provision (or its FIRREA analog) to constrain a conservator or receiver's conduct.

Moreover, although Plaintiff argues the Conservator did not act "voluntarily" when it agreed to the Third Amendment (Opp. 42), the amended complaint is devoid of any allegation that Treasury forced the Conservator to execute the Third Amendment against its will. The amended complaint merely alleges, "on information and belief," that the Conservator agreed to the Third Amendment at the "insistence" of Treasury, and that the Amendment was a "Treasury initiative" that Treasury announced to the Enterprises. Am. Compl. ¶¶ 114, 141, 151. Plaintiff also argues that Treasury had "significant influence" over FHFA and was the "driving force" behind the Third Amendment, and that the terms of the Third Amendment favored Treasury. Opp. 26. These allegations—even if assumed true—fail to establish that the Conservator acted against its will. "[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. The court in *Perry Capital* thus held correctly that the very 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 Third Amendment was "one-sided." *Id*. at 226.

Plaintiff tries to distinguish *Perry Capital*'s rejection of the same "direction and supervision" argument on the ground that the complaint in that action was "decided without the

benefit of evidence" produced in the Court of Federal Claims. Opp. 27 n.6. But Plaintiff fails to point to any such "evidence" that would have changed the outcome in *Perry Capital*. Indeed, the plaintiffs in *Perry Capital* presented the same types of allegations Plaintiff presents here—that Treasury "invented" and "took credit" for the Third Amendment, and that the terms of the Third Amendment were "one-sided" and favored Treasury—and the court, assuming the truth of the allegations, nonetheless held them insufficient to avoid dismissal. *See* Supplemental Opp. to Mot. to Dismiss at 7-10, *Fairholme Funds, Inc. v. FHFA*, No. 1:13-cv-1053 (D.D.C. Mar. 21, 2014), ECF No. 39; Plaintiffs' Cross Mot. for Summary Judgment at 51, *Perry Capital LLC v. Lew*, No. 1:13-cv-1025 (D.D.C. Mar. 21, 2014), ECF No. 37.[10]

In addition, Plaintiff's "direction and supervision" allegations are facially implausible in light of this (and related) litigation, wherein the Conservator—for years—has vigorously defended in courts across the country the very same amendment Plaintiff maintains the Conservator was forced to execute against its will. This alone compels rejection of Plaintiff's "direction and supervision" argument. *See Suero v. Fed. Home Loan Mortg. Corp.*, No. 13-13014, 2015 WL 4919999, at *9 (D. Mass. Aug. 18, 2015) (applying Section 4617(f) by looking to Conservator's "efforts to defend Freddie Mac against the legal challenges that have been brought against it"); *Massachusetts*, 54 F. Supp. 3d at 99 (same).

Finally, Plaintiff's allegations fail because she is not within the "zone of interests" of Section 4617(a)(7). Plaintiff argues—without support—that shareholders should be able to enforce this provision because "one of the principal purposes of conservatorship or receivership

[10] Plaintiff asserts she need not "prove 'objective facts'" regarding her "direction and supervision" theory in order to avoid dismissal. Opp. 27 n.6. But she must allege plausible, non-conclusory facts to establish jurisdiction and state a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). She has failed to do so, just as the plaintiffs failed to do in *Perry Capital* when they presented the same allegations.

is to protect the interests of an entity's creditors and shareholders." Opp. 27. But Plaintiff 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." *Bennett v. Spear*, 520 U.S. 154, 176 (1997) (emphases added); *see also Cty. of Cook v. Wells Fargo & Co.*, 115 F. Supp. 3d 909, 918 (N.D. Ill. 2015). Here, the purpose of Section 4617(a)(7)—not HERA overall—is to provide the Conservator with a preemption defense. Thus, the Conservator—not the shareholders—"can be expected to police the interests that th[is] statute protects." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074-75 (D.C. Cir. 1998).[11]

C. Plaintiff's Allegations that the Third Amendment Was Improperly Motivated Cannot Overcome Section 4617(f)

Plaintiff argues throughout her opposition that because the Conservator supposedly had a host of improper motives behind the Third Amendment—*i.e.*, to benefit Treasury, use the Enterprises "as ATM machines," "nationalize" the Enterprises, and put them in a "financial coma" (Opp. 5, 12, 18, 21, 24-5)—Section 4617(f) must not apply. Again, Plaintiff is wrong.

The Conservator's alleged motives are irrelevant to the Section 4617(f) 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.

[11] Plaintiff also incorrectly asserts that "FHFA owes fiduciary duties to Fannie's and Freddie's shareholders." Opp. 27. Plaintiff cites no authority that a conservator, as opposed to a receiver, owes shareholders any fiduciary duties during conservatorship under HERA. Indeed, the authority rejects such a duty: "In HERA, Congress did not intend that acts lying fully within the FHFA's discretion as Conservator of Freddie Mac would violate some residual fiduciary duty owed to the shareholders. The shareholders' rights are now the FHFA's." *Esther Sadowsky Testamentary Tr. v. Syron*, 639 F. Supp. 2d 347, 351 (S.D.N.Y. 2009). Only in receivership do shareholders gain a potential interest in filing a claim against the receivership estate. *See* 12 U.S.C. §§ 4617(b)(2)(K)(i), 4617(c)(1)(D). Moreover, HERA expressly authorizes the Conservator to act in the interests of "the Enterprises *or the Agency*," *Id.* § 4617(b)(2)(J)(ii) (emphasis added); the Conservator need not prioritize the interests of shareholders first.

3d at 225 (emphasis in original). Accordingly, allegations that "ask the Court, directly or indirectly, to evaluate FHFA's rationale for entering into the Third Amendment" are "request[s] that contravene[] § 4617(f)." *Id.* Likewise, in *Continental Western*, the court 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." 83 F. Supp. 3d at 840 n.6 (emphasis added). These decisions rest on sound policy: if motives *were* relevant, jurisdictional bars such as Section 4617(f) would be meaningless because plaintiffs could always plead around them by alleging an improper motive.

Plaintiff urges that these decisions are based on a misreading of *Leon Cty. v. FHFA*, 816 F. Supp. 2d 1205 (N.D. Fla. 2011), *aff'd*, 700 F.3d 1273 (11th Cir. 2012). Opp. 47. But *Leon County* fully supports dismissal here. The plaintiff in that case sought to evade Section 4617(f) by alleging the Conservator's conduct (a directive to the Enterprises) was an improperly motivated litigation tactic. The court squarely rejected that argument: "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.*" *Leon Cty.*, 816 F. Supp. 2d at 1208 (emphasis added). Unable to rebut this key holding, Plaintiff points to other language in *Leon County* referring to the "purpose" of FHFA's actions. Opp. 47. But that reference came 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 Cty.*, 700 F.3d at 1278.

That issue is absent here; there is no dispute FHFA acted in its capacity as conservator (not regulator) in executing the Third Amendment.[12]

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, 153 (3d Cir. 1998) (barring challenge to alleged "conspiracy with state officials to close the bank"); *In re Landmark Land Co. of Okla., Inc.*, 973 F.2d at 288-90 (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").[13]

D. Plaintiff's Allegations that the Third Amendment Failed to Adequately Preserve and Conserve Assets, and Improperly "Winds Down" the Enterprises, Cannot Overcome Section 4617(f)

Plaintiff attempts to overcome Section 4617(f) by alleging that, in agreeing to the Third Amendment, the Conservator failed to adequately preserve and conserve Enterprise assets (Opp. 23-24, 33-38), maximize value in transferring Enterprise assets (Opp. 42-44), or put the Enterprises in sound and solvent condition (Opp. 28-33). But all of these allegations are, at bottom, attacks on the *merits* of the Conservator's decision to execute the Third Amendment,

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[12] Plaintiff also cites *Massachusetts*, 54 F. Supp. 3d at 99-100 (Opp. 47), but that case also discussed the "purpose" of the Conservator's conduct only to assess whether FHFA acted "instead in its capacity as the [Enterprises'] regulator." (citing *Leon Cty.*, 700 F.3d at 1278).

[13] An analogous jurisdictional bar to most claims against court-appointed receivers and bankruptcy trustees—the *Barton* doctrine—functions similarly: an exception allows claims where a receiver or trustee acted outside its statutory authority, but not claims based on alleged "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).

which—as discussed above—are barred by Section 4617(f). *See supra* Sec. I(A). Just as there is no "bad motive" exception to Section 4617(f), there also is no "bad job" exception.[14]

Plaintiff also argues the Conservator is "winding up" the Enterprises by acting as a "*de facto* receiver," placing them in "*de facto* liquidation." Opp. 38-39, 49. But "[t]he 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." *Cobell v. Norton*, 283 F. Supp. 2d 66, 91 n.12 (D.D.C. 2003), *vacated in part on other grounds*, 392 F.3d 461 (D.C. Cir. 2004). The Enterprises remain in operation; they are not in receivership or liquidation. *See Perry Capital*, 70 F. Supp. 3d at 227.

In any event, 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). Plaintiff argues 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. 39-40. But winding up is different than liquidation; it includes prudential steps short of liquidation, such as transferring Enterprise assets without approvals and shrinking the Enterprises' operations to ensure 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

[14] Plaintiff also attempts to convert the Conservator's broad powers and functions—*i.e.*, to preserve and conserve assets—into mandatory "duties" and "obligations" with which the Conservator must comply. *See, e.g.*, Opp. 28-33. Such mandates, however, are nowhere to be found in HERA, which describes the Conservator's powers using *permissive*—not mandatory—language. *Compare* 12 U.S.C. § 4617(b)(2)(B) (describing powers FHFA "may" exercise) *with id.* § 4617(b)(14) and (b)(2)(H) (describing duties FHFA "shall" undertake). "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). Regardless, Section 4617(f) does not permit shareholders or courts to police the Conservator's compliance with any such "obligations," as that would require the Court to evaluate the effectiveness or merits of Conservator conduct, gutting the purpose of Section 4617(f).

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.

Plaintiff contends 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. 40. 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, once established, "succeed[s] to the charter" of the Enterprise 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.

Finally, HERA does not require FHFA to "rehabilitate" the Enterprises and "return them to private control," as Plaintiff contends. Opp. 18, 21. Rather, 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). HERA thus contemplates a conservator exercising judgment to address a range of challenges and possible actions by including a bar against judicial review to facilitate decision making where billions of taxpayer dollars are at stake. It does not require the Conservator to return the Enterprises to private control, the shareholders, or their prior form.

E. Plaintiff's Attempts to Avoid *Perry Capital* Fail

Plaintiff fails in her various attempts to distinguish and discredit *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 218 (D.D.C. 2014). For example, Plaintiff argues this case presents new allegations that the Enterprises "were not in financial distress" when placed in conservatorship in 2008, and that they drew billions of dollars in Treasury funds during Conservatorship merely as a result of "accounting manipulations." Opp. 46. But these

allegations are inapposite. Plaintiff's complaint—like those in *Perry Capital*—challenges only the Third Amendment; it does not—and cannot—challenge the appointment of the Conservator in 2008, or any of the Enterprises' draws on the Treasury commitment. Thus, to the extent these allegations constitute a distinction with *Perry Capital*, it is one that makes no difference.[15]

II. HERA's Succession Provision Bars Plaintiff's Claims

A separate provision of HERA also bars Plaintiff's claims. Section 4617(b)(2)(A)(i) provides that the Conservator succeeds to "all rights, titles, powers, and privileges" of the Enterprises and their shareholders. *See* FHFA Br. 24-27. Plaintiff thus possesses no right to bring this action, which presents claims that relate to, or arise from, her status as a shareholder.

In opposition, Plaintiff contends that HERA's succession provision only applies to shareholder derivative claims, not direct claims, and is limited by an implied conflict-of-interest exception. Opp. 60-64. All of this is incorrect: the succession provision applies to "***all*** rights" of the Enterprises' shareholders, whether derivative or direct, without exception. 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added). In all events, Plaintiff's claims are, in fact, derivative.

A. Whether Plaintiff's Claims Are Derivative or Direct, HERA Has Transferred Them to the Conservator

In HERA, "all means all," *Hennepin Cty. v. Fed. Nat'l Mortg. Ass'n*, 742 F.3d 818, 822 (8th Cir. 2014), and the statutory text provides that the Conservator succeeds to "*all*" rights, titles, powers, and privileges of the Enterprises and their shareholders. HERA contains no exception for direct claims. Indeed, the existence of another express exception—one permitting

[15] Plaintiff also seeks to distinguish *Perry Capital* on the basis that her allegations supposedly contradict an affidavit submitted by an FHFA official in that case. Opp. 46. But, again, this "difference" is irrelevant because the affidavit in *Perry Capital* was submitted only in connection with FHFA's *alternative* motion for summary judgment. Because the court granted FHFA's motion to dismiss, it did not reach the alternative request for summary judgment, and thus did not even reference—let alone rely upon—the affidavit.

shareholders to prosecute claims they might have to liquidation proceeds following appointment of a receiver (12 U.S.C. § 4617(b)(2)(K)(i))—prohibits the creation of any implicit exceptions. *See United States v. Johnson*, 529 U.S. 53, 58 (2000). Moreover, because the succession to "all rights" of the Enterprises gives the Conservator the right to pursue derivative claims belonging to the Enterprises, the phrase "all rights . . . of any stockholder" must encompass direct shareholder claims in order to have any meaning.

Plaintiff contends that the language "with respect to [the Enterprises] and the assets of [the Enterprises]" limits HERA's succession provision, Opp. 60-61, but such a limitation would not assist Plaintiff: her claims are inextricably linked to the Enterprises and their assets, and based on the allegation that the government forced the Enterprises "to turn over **all** of their profits." Compl. ¶ 1. Plaintiff also cites *Levin v. Miller*, 763 F.3d 667 (7th Cir. 2014), which addressed the succession language in FIRREA. Although resolved in conclusory fashion by the *Levin* court, the issue whether the succession provision extends to direct claims was not an issue contested by the parties there. *See* Opp. 64. Moreover, the concurring opinion recognizes that the plain language of the succession provision *does* apply to direct claims. *Levin v. Miller*, 763 F.3d at 673-74 ("[R]ights . . . of any stockholder" lacks meaning if the provision is limited to derivative claims, as the FDIC also succeeds to "all rights" of the institution itself.).[16]

B. Plaintiff's Claims Are Derivative, and There is No "Conflict of Interest" Exception to HERA's Clear Statutory Language

Plaintiff's claims are, as a matter of law, derivative, *see* Treasury Reply Sec. II(A), and Plaintiff does not dispute that HERA generally bars derivative claims. She argues for a "conflict of interest" exception to HERA's succession provision, Opp. 73-77, but can point to nothing in

[16] The other decisions cited by Plaintiff in this regard are unpersuasive. Opp. 61. As in *Levin*, the issue whether the FDIC succeeded to direct claims was not squarely presented, and the courts simply assumed with little to no analysis that the FDIC succeeded only to derivative claims.

HERA—not a word—to suggest Congress intended to create a conflict-of-interest exception limiting the Conservator's succession to "all rights, titles, powers, and privileges" of the shareholders and the Enterprises. Instead, Plaintiff relies on two inapplicable, out-of-circuit decisions that have manufactured a conflict-of-interest exception for FDIC receiverships—not conservatorships. Opp. 74 (discussing *First Hartford Corp. Pension Plan & Tr. 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)). *Perry Capital* rightly declined to apply these cases to FHFA conservatorships, explaining there was no basis for creating "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. *See also* Opp. at 31.

Plaintiff asserts that the absence of a conflict-of-interest exception could raise constitutional issues. Opp. 73 & n.22. But Plaintiff brings no constitutional claims, so her argument that the Court should depart from HERA's plain text to ensure "judicial review of . . . constitutional claims" is beside the point. *See* Opp. 73. In all events, constitutional avoidance has no application here. It "is a tool for choosing between competing plausible interpretations of a provision," *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (citation and internal quotation marks omitted), and "has no application in the absence of statutory ambiguity," *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 494 (2001). Here, there is no ambiguity in HERA's succession provision.

CONCLUSION

The Court may not restrain or affect the Conservator's power to enter the Third Amendment, and in any event, the Conservator has succeeded to all of Plaintiff's rights, titles, and privileges, including the rights asserted in her amended complaint. Thus, FHFA's motion to dismiss should be granted, and the Amended Complaint should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2016, I electronically filed the foregoing through the Court's ECF system, which will send a notice of electronic filing to all parties to this action.

/s/ Howard N. Cayne