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

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Buried in a footnote of their Opposition to the Motions to Dismiss (Doc. # 86) ("Opp."), Plaintiffs expressly "consent to dismissal of Counts IV [breach of contract] and V [breach of the implied covenant of good faith and fair dealing] of their Complaint." Opp. 8 n.1. Accordingly, the Court should dismiss these two claims without further briefing or argument. Such dismissal is significant, as those two claims were the only claims seeking money damages. *See* Am. Compl. ¶¶ 163-181, 182(g). Thus, all that remains in this case are Plaintiffs' APA claims, which seek exclusively declaratory and injunctive relief. Those claims are squarely barred by Section 4617(f), as well as multiple other provisions of HERA. Accordingly, the motions to dismiss should be granted in their entirety.[1]

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 the Enterprises in conservatorship. 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, an amount that exceeded the Enterprises' historical annual earnings for nearly every year since their founding, and would increase if the Enterprises received any additional funds from Treasury. Further, when the Enterprises 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 commitment, adding to Treasury's liquidation preference, and increasing the amount of the required dividend going forward. In

[1] Though Plaintiffs' Opposition is also peppered with references to alleged "destr[uction]" and "expropriat[ion]" of Plaintiffs' "property rights," (*see* Opp. 1, 7, 12-13, 24, 63), Plaintiffs do not—and cannot—assert any due process or takings claims here.

[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* Treasury Stock Certificate § 2 (b), (c) (Doc. # 77-3).

addition to the annual dividend obligation, the Enterprises were obligated to pay Treasury an annual periodic commitment fee ("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. In the Third Amendment, the Conservator agreed to trade a stream of profits that historically averaged less than $19 billion in exchange for relief from $19 billion per year in fixed dividends *and* payment of the PCF. Treasury thus 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 Plaintiffs' attempt to void the Conservator's operational decisions, including the Conservator's decision to amend the PSPAs for a third time, and to assert supervisory authority over the Conservator. Plaintiffs cannot 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 and 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, is not subject to shareholder challenge.

Moreover, as a matter of law, allegations that the Conservator acted with a bad motive—or did a bad job—cannot overcome Section 4617(f). HERA makes such allegations irrelevant. So long as the Conservator acted within its broad authority to "operate" the Enterprises, "contract" on their behalf, or "transfer or sell" any Enterprise asset, no court may second-guess the Conservator's decisions. Plaintiffs' allegations of the Conservator's supposed "bad motives" or "bad job" thus do not cure the dispositive jurisdictional defects inherent in Plaintiffs' claims. And, besides being legally irrelevant, Plaintiffs' 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 contradicted by the terms of the contract.

Plaintiffs' Amended Complaint should also be dismissed for three 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)), Plaintiffs currently have no right to bring this action. Second, because Plaintiffs' 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 that HERA prohibits these precise claims.[3] Third, adjudication of Plaintiffs' claims would impermissibly require the Court to review the October 9, 2008 determination by FHFA's Director to suspend the Enterprises' capital classifications during conservatorship (the "October 2008 Action") in light of Treasury's capital commitment, and such review is barred by 12 U.S.C. § 4623(d).

[3] We explained in our opening brief why issue preclusion also bars Plaintiffs' claims (*see* FHFA Br. (Doc. # 76-1) 12-18), and we adopt the related arguments Treasury advances in both its opening and reply memoranda. *See* Treasury Br. (Doc. # 77-1) 30-33; Treasury Reply 24-26.

ARGUMENT

I. Section 4617(f) Bars Plaintiffs' Claims

Section 4617(f) bars Plaintiffs' complaint—which seeks declaratory and equitable relief through vacatur of the Third Amendment and return of all dividends paid under it (*See* Am. Compl., Prayer for Relief ¶¶ (a)-(f))—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. 21-23; Treasury Br. 13-17.

Plaintiffs attempt 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; *see also* Opp. 46 n.15. 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), *appeal pending* No. 14-5234 (D.C. Cir. Filed October 8, 2014) (emphasis added).[4]

[4] *See also 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."); *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.").

Plaintiffs' reliance on *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), to somehow authorize judicial review notwithstanding Section 4617(f)'s specific withdrawal of jurisdiction, is misplaced. *See* Opp. 22. 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; rather, 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 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.

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

Plaintiffs assert 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, Plaintiffs urge the Court to "construe [the Conservator's] powers narrowly." Opp. 21 n.4. 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 Cnty. 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] Recent Congressional action amending certain aspects of the PSPAs, but leaving the Third Amendment intact, validates the variable dividend and confirms that FHFA had statutory authority to execute the Third Amendment. *See* FHFA Br. 29-31; Treasury Br. 21-23.

[Footnote continued on next page]

Although they assert that the Conservator lacked the power to agree to the Third Amendment, Plaintiffs characterize the Third Amendment as a "contractual agreement[]" that "transfer[s]" Enterprise assets. Opp. 41, 64 n.20. Plaintiffs thereby acknowledge the Third Amendment was within the Conservator's enumerated powers, which should end the Section 4617(f) inquiry. *See* 12 U.S.C. § 4617(b)(2)(G); *Dittmer Props., LP v. FDIC*, 708 F.3d 1011, 1017 (8th Cir. 2013) (Section 1821(j) barred claims that would "chill[] . . . the receiver's ability to perform its statutory function" of transferring bank's assets).

Indeed, HERA's asset 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). Plaintiffs nevertheless contend the Conservator exceeded its power because the Third Amendment supposedly amounts to a "giveaway[]" and a failure to "maximize[] the net present value return" to the Enterprises. Opp. 42; *see also* Opp. 32-38 (asserting that the Third Amendment "siphons off" the Enterprises' funds and thus "contravened and exceeded [FHFA's] statutory authority"); Am. Compl. ¶¶ 14, 99 (alleging Enterprises did not receive "meaningful consideration" for the Third Amendment). But these allegations do not create jurisdiction where HERA has unequivocally withdrawn it.

[Footnote continued from previous page]
Plaintiffs' caution to use "extreme care" when considering subsequent legislative action (Opp. 61) 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 Plaintiffs incorrectly contend. Opp. 62; *see N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982) (courts may "presum[e] the legislative intent has been correctly discerned" where "an agency's statutory construction has been fully brought to the attention of . . . Congress" and Congress "has not sought to alter that interpretation although it has amended the statute in other respects" (internal quotation marks and citation omitted)).

First, Plaintiffs cannot evade Section 4617(f) by alleging the Conservator supposedly 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. 24-25. "Requiring the Court to evaluate the merits of FHFA's decision-making each time it considers HERA's jurisdictional bar would render the anti-injunction provision hollow . . . ." *Perry Capital*, 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.").[6]

Another example squarely on point is *Ward v. Resolution Trust Corp*., where the plaintiff tried to avoid FIRREA's jurisdiction-withdrawal provision by alleging that 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)

[6] *See also Cnty. 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).

(applying Section 1821(j) despite allegation that receiver failed to "maximize the return from the sale of failed institutions' assets").

Plaintiffs argue that *Ward* and other cases like it are "best understood to mean only that Section 1821(j) applies . . . when a conservator or receiver violates some law *other* than FIRREA." Opp. 22 n. 5; *see also* Opp. 21 (discussing *Gross v. Bell Savs. Bank PaSA*, 974 F.2d 403 (3d Cir. 1992)). But this argument ignores that *Ward* itself addressed a receiver's alleged failure "to maximize the net present value return" to the receivership estate—not an alleged violation of separate substantive laws. 996 F.2d at 103-04. As the *Island Reach* court correctly observed, "[a]bsent this 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." *Island Reach Partners*, 161 B.R. at 314 n.7. The same principles apply here: Plaintiffs allege the Third Amendment favored Treasury and failed to "maximize the net present value return" to the Enterprises. These allegations, read charitability, amount to no more than an assertion that the Conservator "improperly" exercised its powers because it supposedly did a bad job. Section 4617(f) bars such second guessing.[7]

Second, Plaintiffs' characterization of the Third Amendment as a "giveaway" is contradicted by the contract documents (and Plaintiffs' 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

[7] Plaintiffs also argue that the Conservator's power to transfer assets is limited to "routine" or "specific" transfers of assets, while the Third Amendment is far broader in scope. Opp. 43. But the application of the jurisdictional bar plainly does not depend upon whether the Conservator transferred a single asset or many assets. *See Cnty. of Sonoma*, 710 F.3d at 994 (applying 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").

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, Plaintiffs' argument that the Enterprises received no "*meaningful* consideration" and "*virtually* nothing" (Opp. at 23, 41 (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, Plaintiffs themselves argue that the Third Amendment was a transaction in which the parties "obtain[ed] property for money or *other valuable consideration*." Opp. 55 (quoting Black's Law Dictionary at 1430).

Third, Plaintiffs also argue that the Third Amendment was unauthorized because it allegedly allows FHFA to "completely ignore" the receivership-distribution priority scheme outlined in HERA, *see* Opp. 42-44 (citing 12 U.S.C. § 4617(b)(3)-(9), (c)), but the Enterprises are not in receivership, so the priority scheme is inapplicable. *See Cobell v. Norton*, 283 F. Supp. 2d 66, 91 n.12 (D.D.C. 2003) ("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.") *vacated in*

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[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-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. The Court can take judicial notice of SEC filings. *See Horizon Asset Mgm't Inc. v. H&R Block, Inc.*, 580 F.3d 755, 761 (8th Cir. 2009).

[9] Plaintiffs' 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. 15; *see also* Opp. at 23 n.6; Am. Compl. ¶ 100. Plaintiffs contend, apparently based on nothing but their own opinion, that the dividends "provided more than adequate return" to Treasury. Am. Compl. ¶ 100. 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 *available 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.").

part on other grounds, 392 F.3d 461 (D.C. Cir. 2004). 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 under FIRREA (like HERA), a conservator or receiver is 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.

Fourth, Plaintiffs' reliance on the Ninth Circuit's decision in *Sharpe* to argue that the Third Amendment is not authorized under HERA, Opp. 19, 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. Plaintiffs' Allegation that the Conservator Executed the Third Amendment at Treasury's "Direction" Cannot Overcome Section 4617(f)

Plaintiffs attempt to avoid Section 4617(f) by arguing that Treasury "supervis[ed]" and "direct[ed]" the Conservator's agreement to the Third Amendment in violation of 12 U.S.C. § 4617(a)(7). Opp. 24-27. 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, Plaintiffs cite no case in which a court has ever relied on this provision (or its FIRREA analog) to constrain a conservator's or receiver's conduct.

Moreover, although Plaintiffs argue that the Third Amendment was not an "arms-length" transaction (Opp. 25), 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, that Treasury invented the Third Amendment, and that the Third Amendment was consistent with Treasury objectives. Am. Compl. ¶¶ 112, 117, 139. Plaintiffs also argue that Treasury was the "driving force" behind the Third Amendment, and that the terms of the Third Amendment favored Treasury. Opp. 25, 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 a "one-sided" arrangement. *Id*. at 226.

Plaintiffs try to distinguish *Perry Capital*'s rejection of the same "direction and supervision" argument on the basis that the complaint in that action was "decided without the benefit of evidence produced . . . in the Court of Federal Claims." Opp. 26 n.8. But they fail 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 Plaintiffs present 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 well-pleaded allegations, nonetheless held them insufficient to avoid dismissal. Supp. Opp. to Mot. to Dismiss at 5, 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, Plaintiffs' "direction and supervision" allegations are facially implausible in light of this (and related) litigation, wherein the Conservator—for years—has vigorously

[10] Plaintiffs also assert that they need not "prove 'objective facts'" regarding the "direction and supervision" theory to avoid dismissal. Opp. 26 n.8. But they must allege plausible, non-conclusory facts to establish jurisdiction and state a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiffs have failed to do so here, just as the plaintiffs failed to do in *Perry Capital* when they presented the same allegations.

defended in courts across the country the very same amendment that Plaintiffs maintain the Conservator was forced to execute against its will. This alone compels rejection of Plaintiffs' "direction and supervision" argument. *See Suero v. Fed. Home Loan Mortg. Corp.*, 123 F.Supp.3d 162, 172 (D. Mass. 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, Plaintiffs' allegations fail because Plaintiffs are not within the "zone of interests" of Section 4617(a)(7). Plaintiffs argue—without support—that shareholders should be able to enforce this provision because "one of the principal purposes of conservatorship or receivership is to protect the interests of an entity's creditors and shareholders." Opp. 26. But Plaintiffs misapply 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 Cnty. 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]

[11] Plaintiffs also incorrectly assert that "FHFA owes fiduciary duties to Fannie's and Freddie's shareholders." Opp. 26. Plaintiffs cite 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

[Footnote continued on next page]

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

Despite Plaintiffs' claim that they are not "alleging that the Conservator . . . took action based on an improper motive," Opp. 37, Plaintiffs argue throughout their opposition that because the Conservator supposedly had a host of improper motives behind the Third Amendment—*i.e.*, to exclusively benefit Treasury, to "nationalize" the Enterprises, "hold [them] hostage," and put them in a "financial coma" (Opp. 5, 13, 23, 24)—Section 4617(f) must not apply. Again, Plaintiffs are 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. 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 easily plead around them simply by alleging an improper motive.

Plaintiffs urge that these decisions are based on a misreading of *Leon Cnty. v. FHFA*, 816 F. Supp. 2d 1205 (N.D. Fla. 2011), *aff'd*, 700 F.3d 1273 (11th Cir. 2012). *See* Opp. 48. But

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[Footnote continued from previous page]
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.

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 Cnty.*, 816 F. Supp. 2d at 1208 (emphasis added). Unable to rebut this key holding, Plaintiffs point to other language in *Leon County* referring to the "purpose" of FHFA's actions. Opp. 20, 48. 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 Cnty.*, 700 F.3d at 1278 (emphasis added). 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,

[12] Plaintiffs also quote language from *Massachusetts*, 54 F. Supp. 3d at 99-100 (Opp. 48), that is similar to *Leon*'s, but that case too discussed the "purpose" of the Conservator's conduct only to assess whether FHFA acted "instead in its capacity as the [Enterprises'] regulator." (citing *Leon Cnty.*, 700 F.3d at 1278).

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

Plaintiffs attempt 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, 32-37, 45), maximize value in transferring Enterprise assets (Opp. 41-42), or put the Enterprises in sound and solvent condition (Opp. 27-32). But all of these allegations are, at bottom, attacks on the *merits* of the Conservator's decision to execute the Third Amendment, 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]

Plaintiffs also argue the Conservator is acting in the "exclusive[] . . . province of a receiver" because the Third Amendment is "winding up" the Enterprises' affairs. Opp. 38. As an initial matter, Plaintiffs' argument fails because the Third Amendment is not winding up the

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[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).

[14] Plaintiffs also attempt 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. 27-32. 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).

Enterprises. The Amendment was executed over four years ago and, as *Perry Capital* correctly recognized, the Enterprises continue to "maintain an operational mortgage finance business." 70 F. Supp. 3d at 228. In all events, contrary to Plaintiffs' contention, 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). Plaintiffs 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. 38-40. But winding up is different from 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 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.

For similar reasons, Plaintiffs' repeated reliance on *RTC v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446 (8th Cir. 1992) (Opp. 28-30), is inapt. First, *CedarMinn* expressly recognizes that where—as here—Congress has authorized an agency to "exercise a duty, right or power in its capacity as 'a conservator *or* receiver,'" that generally means "the duty, right, or power [is] to be enjoyed or exercised by *both* the conservator and the receiver." *Id.* at 1451-52 (emphases added). This is particularly true if Congress has taken care, in *other* portions of the statue, to delineate the certain "duties, rights, and powers" that can be pursued only in the receivership capacity, or only in the conservatorship capacity, but not in both. *Id.* at 1452; *see also* 12 U.S.C. § 4617(b)(2)(D)-(E). Second, while the *CedarMinn* language Plaintiffs selectively cite does distinguish between the "mission" of a conservator as compared to a receiver, the case

recognizes that even where a conservator is charged with "maintain[ing] the institution as an ongoing concern," that does not foreclose it from acting in ways that a receiver may also act, *i.e.*, transferring assets and reducing the obligations of the institution. *See* 956 F.2d at 1454.

Plaintiffs contend 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. 39. 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 "rehabilitat[e]" the Enterprises and "return them to private control," as Plaintiffs argue. Opp. 18; *see also* Opp. 23. 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. It does not require the Conservator to return the Enterprises to private control, the shareholders, or their prior form.

E. Plaintiffs' Attempts to Avoid *Perry Capital* Fail

Plaintiffs fail in their various attempts to distinguish and discredit *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 218 (D.D.C. 2014). For example, Plaintiffs argue their complaint presents "different" allegations than those presented in *Perry Capital*, including "allegations supported by evidence produced in discovery" in related litigation. Opp. 7, 46-47. This is

wrong. The complaints in *Perry Capital* assert the same allegations of wrongdoing with respect to the Third Amendment as asserted here. For example, one purportedly new allegation is that FHFA and Treasury "had specific information" before the Third Amendment was executed showing the Enterprises would soon report profits. *Id.* (citing Am. Compl. ¶¶ 77-78). But the complaints in *Perry Capital*, as well as the original complaint in this case, alleged that FHFA and Treasury knew or should have known that the Enterprises were on the verge of profitability before executing the Third Amendment.[15] And in *Perry Capital*, the court likewise considered allegations that the Third Amendment was intended to "make sure that every dollar of earnings that [the Enterprises] generate will be used to benefit taxpayers," that the Third Amendment was "consistent with the Obama Administration's commitment" to "w[ind] down" the Enterprises, and that "in 2012, the GSEs were once again profitable and . . . able to pay the 10% dividend without drawing additional funds." *Perry Capital*, 70 F. Supp. 3d. at 218. The Court in *Perry Capital* found these allegations insufficient: "FHFA's underlying motives or opinions—*i.e.*, whether the net worth sweep would . . . increase payments to Treasury. . . do not matter for the purposes of § 4617(f)." *Perry Capital*, 70 F. Supp. 3d at 226.[16]

Moreover, whether the complaint in this action is "supported by evidence" is irrelevant: the court in *Perry Capital* was required to—and did—assume the truth of all of the complaints'

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[15] *See* Compl. ¶ 15, 59, 67-8; *see also Perry Capital* Compl. ¶¶ 7, 47 (Doc. #1, No. 1:13cv1025, D.D.C.); *Fairholme* Compl. ¶¶ 64-67 (Doc. # 1, No. 1:13cv1053, D.D.C.).

[16] Other allegedly new or "different" allegations identified by Plaintiffs are, at best, inapposite. Plaintiffs allege 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. 47. But Plaintiffs' complaint—like the complaints *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, because HERA grants the Enterprises the exclusive right to challenge the appointment of the Conservator, and requires that it be made within 30 days of the appointment. 12 U.S.C. § 4617(a)(5).

well-pleaded factual allegations, applying the traditional motion to dismiss standard. The allegations in *Perry Capital* needed no further factual gloss; the court assumed them to be true but nevertheless held that the court lacked jurisdiction.[17]

II. HERA's Succession Provision Bars Plaintiffs' Claims

A separate provision of HERA also bars Plaintiffs' 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. 32-35. Plaintiffs thus possess no right to bring this action, which presents claims that relate to, or arise from, their status as shareholders.

In opposition, Plaintiffs contend 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. 63-67, 75-79. All of this is incorrect: the succession provision applies to "***all*** rights, titles, powers and privileges" of the Enterprises and their shareholders, whether derivative or direct, without exception. 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added). In all events, Plaintiffs' claims are, in fact, derivative.

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

In HERA, "all means all," *Hennepin Cnty. 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 shareholders to prosecute claims they might have to liquidation proceeds following appointment

[17] Plaintiffs also argue their allegations contradict an affidavit submitted by an FHFA official in *Perry Capital*. Opp. 47. But, again, this "difference" is irrelevant because the affidavit 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.

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). Furthermore, as Plaintiffs concede, the Conservator's succession to "all rights" of the Enterprises already gives the Conservator the right to pursue derivative claims belonging to the Enterprises. *See* Opp. 65. As such, the phrase "all rights . . . of any stockholder" must encompass direct shareholder claims to have any meaning.

Plaintiffs contend that the language "with respect to [the Enterprises] and the assets of [the Enterprises]" limits HERA's succession provision, Opp. 63, but such a limitation would not assist Plaintiffs: their claims are inextricably linked to the Enterprises and the Enterprises' assets, and based on the allegation that the government forced the Enterprises "to turn over **all** of their profits." Am. Compl. ¶ 1. Plaintiffs also cite *Levin v. Miller*, 763 F.3d 667 (7th Cir. 2014), which addressed the succession language in FIRREA. Although Judge Easterbrook's majority opinion suggested that the succession provision may not extend to direct claims, it did so in conclusory fashion, as the issue was not even briefed or addressed by the parties before oral argument. *See* Opp. 64; *see also Levin*, 763 F.3d at 671-72. Moreover, Judge Hamilton's concurring opinion in *Levin* 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.).[18]

[18] The other decisions cited by Plaintiffs in this regard are also unpersuasive. Opp. 64. 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.

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

Plaintiffs' claims are, as a matter of law, derivative, *see* Treasury Reply at18-22, and Plaintiffs do not dispute that HERA generally bars derivative claims. Instead, Plaintiffs argue for a "conflict of interest" exception to HERA's succession provision. Opp. 75-79. However, Plaintiffs can point to nothing in HERA—not a word—to suggest Congress intended to create such an exception limiting the Conservator's succession to "all rights, titles, powers, and privileges" of the shareholders and the Enterprises. Instead, Plaintiffs rely on two inapplicable, out-of-circuit decisions that have manufactured a conflict-of-interest exception for FDIC receiverships—not conservatorships. Opp. 76 (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.[19]

Plaintiffs assert that the absence of a conflict-of-interest exception could raise constitutional issues. *See* Opp. 65-67. But Plaintiffs bring no constitutional claims. Their argument is thus beside the point. *See Perry Capital*, 70 F. Supp. 3d at 232. 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

[19] Plaintiffs argue a "conflict of interest" exception would not "swallow the rule" against shareholder derivative suits because, according to Plaintiffs, the Conservator still would have the exclusive ability to pursue derivative claims concerning pre-conservatorship conduct. Opp. 77. But nothing in HERA's text supports the notion that Congress intended to transfer *some* derivative claims to the Conservator but not others. In the end, Plaintiffs' argument boils down to an assertion that the Conservator may pursue derivative claims when there is no conflict, which is simply a restatement of the alleged (non-existent) "conflict of interest" exception itself.

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); *see also FCC v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 516 (2009) (only "*ambiguous* statutory language" should be "construed to avoid serious constitutional doubts") (emphasis added). Here, there is *no* ambiguity in HERA's succession provision. Moreover, the Conservator holds all shareholder rights for the duration of the conservatorship (12 U.S.C. § 4617(b)(2)(A)(i)) and, in any subsequent receivership, the shareholders regain the right to assert claims against the receivership estate. *See id*. § 4617(b)(2)(K)(i).

III. Plaintiffs' Claims Are Also Barred by Section 4623(d)

Adjudicating Plaintiffs' claims would also require the Court to review and affect FHFA's key regulatory action (separate and apart from the Conservator's execution of the Third Amendment) to suspend capital classifications in light of the Treasury commitment, which now provides the Enterprises with the capital support needed to facilitate their ongoing operations.[20] Plaintiffs' claims are thus barred by 12 U.S.C. § 4623(d), which precludes courts from taking any action that will "affect, by injunction or otherwise . . . the issuance or effectiveness" of FHFA supervisory actions. *See* FHFA Suppl. Br. (Doc. # 83).

Plaintiffs argue that the October 2008 Action was not a "classification[] or action[]" to which Section 4623(d) applies. Opp. 85. Plaintiffs are wrong. Section 4623(d) applies to "*any* classification or action of the Director under this subchapter [II]." 12 U.S.C. § 4623(d) (emphasis added). And Subchapter II empowers the Director to take a host of supervisory actions concerning the capital of the Enterprises. *See, e.g.*, 12 U.S.C. § 4616 (empowering the

[20] *See* FHFA Examination Manual at "Capital" p. 1, *available at* http://goo.gl/BXpdSU ("In Conservatorship the Enterprises are capitalized via the [PSPAs] with the United States Treasury."); *id*. at 16 (noting that "[a]ny capital needs . . . are fulfilled by Treasury under the SPSPAs").

Director to, *inter alia*, restrict capital distributions, limit growth, restrict risky activities, "acquire new capital in a form and amount determined by the Director," and "take any other action that the Director determines will better carry out the purposes of" section concerning "significantly undercapitalized" entities); *id*. § 4615 (similar for "undercapitalized" entities). The October 2008 Action falls well within the provisions of this Subchapter, as it reflects a determination by the Director that, in light of the Treasury commitment and FHFA's ability as Conservator to operate the Enterprises directly, "the Enterprises will not be subject to other prompt corrective action requirements" available under Subchapter II, and capital requirements "will not be binding during the conservatorship." Ex. A to FHFA Supp. Br. (Doc. # 83-1).

Plaintiffs alternatively argue that Section 4623(d) cannot apply because "FHFA's own regulations make clear that the authority to suspend capital classifications [during conservatorship] is one of FHFA's powers as conservator." Opp. 86 (internal quotation marks omitted) (citing 12 C.F.R. § 1237.3(c)). But the text of FHFA's announcement of the October 2008 Action demonstrates that the action was indeed taken by FHFA's Director in his regulatory capacity. *See* Ex. A to FHFA Supp. Br. (Doc. # 83) (referring to FHFA's Director as "the safety and soundness *regulator* for" the Enterprises, and stating that "[t]he *Director*" had made the determination and announcement) (emphases added). And, that the Conservator is empowered to suspend capital classifications for the duration of the conservatorships (12 C.F.R. § 1237.3) does not mean FHFA as regulator did not suspend the capital classification in 2008, three years *before* the regulation was revised to state the Conservator's capital suspension power. *See* 76 FR 35733 (June 20, 2011). Further, the regulation is expressly derived from provisions of HERA also applicable to FHFA as regulator. *See* 12 C.F.R. § 1273.3(c) (citing 12 U.S.C. § 4614).

Finally, contrary to Plaintiffs' assertions that they are not challenging the October 2008 Action and that their demand to vacate the Third Amendment "would not reinstate the capital requirements or affect the suspension of those requirements in any way," Opp. 87, Plaintiffs' allegations confirm that they are, in fact, arguing that Third Amendment was beyond the Conservator's powers and functions because it allegedly renders the Enterprises unsafe and unsound by limiting the amount of capital they retain. *See* Am. Compl. ¶¶ 23, 97, 110-11, 123; *see also* Opp. 35-36. In the October 2008 Action, FHFA as regulator declared that the Enterprises *could* operate with zero capital without being deemed unsafe and unsound and without being subjected to further supervisory actions based on the Enterprises' capital levels. Plaintiffs' claims necessarily challenge these determinations, and Section 4623(d) thus bars them.[21]

CONCLUSION

Because the Court may not restrain or affect the Conservator's decision to enter into the Third Amendment, and because the Conservator has succeeded to all rights, titles, powers and privileges of the Enterprises' shareholders—including Plaintiffs—FHFA's motion to dismiss should be granted, and the Amended Complaint should be dismissed with prejudice.

[21] Plaintiffs' additional argument that the Treasury commitment should not be viewed as capital because the PSPAs exclude the commitment from their description of the Enterprises' "total assets," Opp. 88, ignores that the PSPAs' description of "total assets" applies for the specific purposes of calculating the "deficiency amount" and is not a statement on the purpose of the Treasury commitment. Instead, the PSPAs' exclusion of the commitment from the calculation of the Enterprises' total assets is merely a mechanical device to facilitate the proper calculation of a deficiency amount and, if necessary, a draw of funds under the PSPAs. This is because, under the PSPAs, the Enterprises may draw funds from the commitment only if the Enterprises' total liabilities exceed their total assets on a quarterly basis. *See* PSPAs § 1 (defining "Deficiency Amount") and § 2.2 (available at http://goo.gl/nKKlgU). If the Treasury commitment, which at present stands at $258 billion, were included in the calculation of the Enterprises' total assets under the PSPAs, then the Enterprises' total liabilities could not exceed their total assets, and the Enterprises would be unable to draw funds from the commitment.

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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 August 1, 2016, by the Electronic Filing System.

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