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

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

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

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INTRODUCTION

The Housing and Economic Recovery Act ("HERA"), like the analogous Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), expressly withdraws federal subject matter jurisdiction over actions seeking to "restrain or affect" the exercise of a conservator's statutory powers or functions with respect to an entity in conservatorship. 12 U.S.C. § 4617(f). Despite this unambiguous statutory bar, plaintiffs, who are shareholders in the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, "the GSEs"), seek to rewrite the preferred stock purchase agreements ("PSPAs") through which the United States Department of the Treasury ("Treasury") and the Federal Housing Finance Agency ("FHFA") agreed to infuse hundreds of billions of dollars into the GSEs to maintain their positive net worth and sustain their ongoing operations. Plaintiffs complain that the Third Amendment to the PSPAs excessively compensates Treasury for its past and ongoing support of the GSEs, and they seek to rewrite the aspects of the PSPAs they do not like while retaining the terms they find more favorable for themselves.

Unfortunately for plaintiffs, Congress has not permitted shareholders to superintend the course or direction of FHFA's conservatorship of the GSEs. Congress not only withdrew subject matter jurisdiction over these claims under section 4617(f) of HERA, but it also transferred *all* shareholder rights with respect to the GSEs' assets, including the right to bring these claims, to FHFA. Indeed, two federal courts have already dismissed identical lawsuits by other shareholders of the GSEs. *See Cont'l W. Ins. Co. v. Fed. Hous. Fin. Agency*, 83 F. Supp. 3d 828, 832, 840 & n.6 (S.D. Iowa 2015); *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 222-23 (D.D.C. 2014), *appeal pending* No. 14-5243 (D.C. Cir. filed Oct. 8, 2014).

Plaintiffs' claims suffer from the same incurable legal defects that required dismissal of the other suits, and their (highly selective) presentation of deposition excerpts and other discovery from a takings case in the Court of Federal Claims cannot save their amended complaint from dismissal. *See also* FHFA Reply Br. at 18-20, ECF No. 87. Even assuming the existence of jurisdiction, plaintiffs' APA claims against Treasury are insufficient as a matter of law and are in all events precluded by the rulings in *Perry Capital* and *Continental Western*.

ARGUMENT

I. HERA FORECLOSES PLAINTIFFS' ATTEMPT TO RESTRAIN THE ACTIONS OF THE CONSERVATOR

A. HERA Forbids Claims for Equitable Relief for Actions Taken by FHFA as the Conservator of the GSEs

HERA provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator" of the GSEs. 12 U.S.C. § 4617(f). This section "permit[s] the [conservator] to perform its duties as conservator . . . promptly and effectively without judicial interference." *Hindes v. FDIC*, 137 F.3d 148, 160 (3d Cir. 1998) (interpreting materially identical language in 12 U.S.C. § 1821(j)). As such, it bars review of FHFA's actions as conservator under the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 701(a) (APA does not apply where "statutes preclude judicial review"); *see also Heckler v. Chaney*, 470 U.S. 821, 843 (1985) (presumption of reviewability is "defeated if the substantive statute precludes review."). A unanimous body of precedent under both HERA[1] and FIRREA[2]

[1] *See, e.g.*, *Cty. of Sonoma v. FHFA*, 710 F.3d 987, 993 (9th Cir. 2013) (holding that section 4617(f) barred APA claims against FHFA); *Leon Cty. v. FHFA*, 700 F.3d 1273, 1278-79 (11th Cir. 2012) (holding that similar APA claim was barred by Section 4617(f)); *Town of Babylon v. FHFA*, 699 F.3d 221, 227 (2d Cir. 2012) (same); *Suero v. Fed. Home Loan Mortg. Corp.*, 123 F. Supp. 3d 162, 174 (D. Mass. 2015) (lawsuit asserting state law claims affecting conservator was barred by Section 4617(f)); *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 99-100 (D. Mass. 2014) (same), *appeal pending*, No. 14-2348 (1st Cir, filed Apr. 28, 2015).

has applied this statutory language to bar claims, such as this one, that seek to overturn a conservator or receiver's exercise of its statutory powers. *See Perry Capital*, 70 F. Supp. 3d at 222.

Section 4617(f) forecloses this lawsuit, and plaintiffs provide the Court with no reason to depart from the opinions in *Perry Capital* and *Continental Western* dismissing identical claims on that basis. Plaintiffs argue that they can sue to enforce their conception of the conservator's "statutory duties." *See* Pls.' Resp. to Defs.' Mots. to Dismiss, ECF No. 86, at 27–32 (hereinafter, "Opp."). But the determination as to whether a particular action furthers the goal of the conservatorship is committed to the conservator. *See Bank of America*, 604 F.3d at 1244 (plaintiff's "fear of the FDIC's improper performance of its legitimate receivership functions" does not give the court jurisdiction over claims against FDIC); *Gross*, 974 F.2d at 408 ("the availability of injunctive relief does not hinge on our view of the proper exercise of otherwise-legitimate powers."). A court's inquiry under section 4617(f) is correspondingly limited: "A conclusion that the challenged acts were directed to an institution in conservatorship and within the powers given to the conservator ends the inquiry." *Town of Babylon*, 699 F.3d at 228 (internal citation omitted). Thus, plaintiffs cannot evade the jurisdictional barrier simply by alleging that FHFA and Treasury have acted at odds with what is (in plaintiffs' view) the proper purpose of a conservatorship. Nor can plaintiffs evade section 4617(f) by claiming that the conservator's actions were unnecessary or ill-motivated. *See Cty. of Sonoma*, 710 F.3d at

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[2] *See Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707, 715 (8th Cir. 1996); *see also Bank of Am. Nat. Ass'n v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010); *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995); *Volges v. Resolution Tr. Corp*., 32 F.3d 50, 52 (2d Cir. 1994); *Ward v. Resolution Tr. Corp*., 996 F.2d 99, 103 (5th Cir. 1993); *Nat'l Tr. for Historic Pres. v. FDIC*, 995 F.2d 238, 240 (D.C. Cir. 1993), *aff'd and reinstated on reh'g*, 21 F.3d 469 (D.C. Cir. 1994); *Gross v. Bell Sav. Bank*, 974 F.2d 403, 408 (3d Cir. 1992).

993 ("it is not our place to substitute our judgment for FHFA's"); *Leon Cnty., Fla. v. FHFA*, 816 F. Supp. 2d 1205, 1208 (N.D. Fla. 2011), *aff'd*, 700 F.3d 1273 (11th Cir. 2012) ("Congress surely knew, when it enacted [section] 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.").

Negotiating the PSPAs with Treasury, managing the remaining $258 billion in stand-by funding committed by the taxpayers, and compensating the taxpayers for that investment, including the changes to the dividend and periodic commitment fee provisions established by the Third Amendment, all fall squarely within FHFA's statutory powers as conservator.[3] Plaintiffs wrongly assert that the statute forbids FHFA, as conservator, from altering the GSEs' capital retention, limiting its capital reserves, or winding up the Companies' operations, and plaintiffs then compound this error by claiming that they can sue under the APA to enforce these supposed limits. Opp. 36. On the contrary, HERA empowers the conservator with the discretion to carry on the ongoing operations of the GSEs. *See* 12 U.S.C. § 4617(b)(2)(B) ("The Agency *may*, as conservator or receiver . . . operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct all business of the regulated entity") (emphasis added); 12 U.S.C. § 4617(b)(2)(D) ("The Agency *may*, as conservator, take such action as may be . . . appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.") (emphasis added). "The word 'may,' when used in a statute, usually implies some degree of discretion." *United States v. Rodgers*, 461 U.S. 677, 706 (1983);[4] *see also Dickson v. Sec'y of Def.*, 68 F.3d

[3] The scope of this authority is a purely legal question. *See Tri-State Hotels*, 79 F.3d at 715.

[4] Plaintiffs cite *Rodgers*, Opp. 31, but ignore its holding, which is that the "natural meaning" of

1396, 1401-02 (D.C. Cir. 1995) ("When a statute uses a permissive term such as 'may' rather than a mandatory term such as 'shall,' this choice of language suggests that Congress intends to confer some discretion on the agency"). HERA also expressly empowers FHFA to "take any action authorized by [section 4617], which the Agency determines is in the best interests of the regulated entity or the Agency." 12 U.S.C. § 4617(b)(2)(J)(ii). The "exercise" of this statutory authority is precisely what section 4617(f) insulates from judicial review, even where a plaintiff alleges that the conservator has misused it. It is unsurprising, then, that plaintiffs' view of the jurisdiction-withdrawal provisions of HERA and FIRREA has been rejected again and again by the federal courts. *See supra* notes 1-2. The Fifth Circuit, for example, held that a plaintiff's allegation that the Resolution Trust Corporation's agreement to "dispose of an asset for a viciously low price [] frustrates the direct intent of Congress," did not establish jurisdiction in light of section 1821(j). *Ward*, 996 F.2d at 103 ("Ward fails (or refuses) to recognize the difference between the exercise of a function or power that is clearly outside the statutory authority of the RTC on the one hand, and improperly or even unlawfully exercising a function or power that is clearly authorized by statute on the other.").

HERA also provides FHFA the authority as conservator to compensate the taxpayers, in the form of dividends or commitment fees, for their investment in the GSEs. HERA authorizes the conservator to "transfer or sell any asset or liability of the regulated entity in default, and may do so without any approval, assignment, or consent with respect to such transfer or sale." 12 U.S.C. § 4617(b)(2)(G). Plaintiffs argue that this otherwise unambiguous grant of authority must be implicitly conditioned by unstated statutory goals. Opp. 42. But the plain language of the asset transfer provision refutes that assertion; it states that FHFA's authority does not

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the term "may" is "as either conferring or confirming a degree of equitable discretion." *Rodgers*, 461 U.S. at 708.

require "*any* approval, assignment, or consent with respect to such transfer or sale." 12 U.S.C. § 4617(b)(2)(G) (emphasis added). Plaintiffs cite no case (and we are aware of none) permitting a challenge to a conservator's or a receiver's transfer of assets based on the allegation that the transfer (allegedly) conflicted with a litigant's view of the purpose of conservatorship or receivership. Instead, courts have consistently rejected efforts to constrain a conservator or receiver's transfer of assets. *See Courtney v. Halleran*, 485 F.3d 942, 949 (7th Cir. 2007) (rejecting argument that power to transfer assets was restricted by priority distribution requirements in liquidation); *Hanson v. FDIC*, 113 F.3d 866, 871-72 (8th Cir. 1997) (imposition of a constructive trust would restrain or affect, *inter alia*, FDIC's right to transfer assets).

Finally, plaintiffs cannot circumvent section 4617(f) by alleging that the Third Amendment is an unlawful wind-down of the GSEs. Opp. 43. First, as the *Perry Capital* court recognized, this contention is at odds with the reality that the GSEs "maintain an operational mortgage finance business and are, once again, profitable." *Perry Capital*, 70 F. Supp. 3d at 228. Even assuming *arguendo* the truth of plaintiffs' "wind-down" assertion, HERA allows for the appointment of FHFA as "conservator *or* receiver for the purpose of reorganizing, rehabilitating, *or* winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2) (emphasis added). Plaintiffs argue that the term "winding up" is synonymous with liquidation, such that the statute empowers FHFA to "wind up" the affairs of the GSEs only if FHFA acts as receiver. Opp. 38-39. That is mistaken. Although HERA contains separate provisions addressing FHFA's specific powers as conservator or as receiver, *see, e.g.*, 12 U.S.C. §§ 4617(b)(2)(B), 4617(b)(2)(D), those provisions do not negate the separate provision stating that FHFA can be appointed as conservator or receiver for the purpose of "reorganizing, rehabilitating, or winding up" the GSEs. *See* 12 U.S.C. § 4617(a)(2); *see also Resolution Tr.*

Corp. v. CedarMinn Bldg. Ltd. P'ship, 956 F.2d 1446, 1451-52 (8th Cir. 1992) ("Throughout FIRREA, Congress specifically articulated when the Corporation was to exercise a duty, right, or power in its capacity as a 'conservator or receiver.' In each instance, it is clear that Congress intended the duty, right, or power to be enjoyed or exercised by both the conservator and the receiver.").

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

Nor may plaintiffs evade the jurisdictional limit of section 4617(f) by suing Treasury as well as the conservator. The Eighth Circuit, like numerous other courts, has held that the anti-injunction provisions of HERA and FIRREA forbid courts from granting equitable relief directed at counter-parties, as such relief would simply provide a plaintiff with another method to restrain the conservator. *See Dittmer Properties, L.P. v. FDIC*, 708 F.3d 1011, 1017-18 (8th Cir. 2013). Plaintiffs argue, implausibly, that *Dittmer* and related precedents apply only to cases "challenging the conduct or attempting to enforce the legal obligations of the federal conservator or receiver or its ward." Opp. 51. But the cases do not support that supposed distinction.

The Eighth Circuit in *Dittmer* did not employ the test invented by plaintiffs. Instead, the court followed the statutory language, and asked, "whether the challenged action is within the receiver's power or function," and "whether the challenged action would indeed 'restrain or affect' the FDIC's receivership powers." *Dittmer*, 708 F.3d at 1017. Answering both questions in the affirmative, the Eighth Circuit barred the suit against the FDIC's counter-party. *Id.* Other courts employ the same approach: the question is whether the relief requested would, from the conservator's perspective, "restrain or affect" the exercise of conservatorship powers. *See Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir. 1992)

("Permitting Telematics to attach the certificate of deposit . . . would have the same effect, from the FDIC's perspective, as directly enjoining the FDIC from attaching the asset. In either event, the district court would restrain or affect the FDIC in the exercise of its powers as receiver."); *Hindes*, 137 F.3d at 160 ("the statute, by its terms, can preclude relief even against a third party, including the FDIC in its corporate capacity, where the result is such that the relief 'restrain[s] or affect[s] the exercise of powers or functions of the [FDIC] as a conservator or a receiver.'") (alterations in original); *St. George Maronite Catholic Church v. Green*, No. CIV.A. SA-94-CA-0334, 1994 WL 763743, at *4-6 (W.D. Tex. July 25, 1994) (holding, despite allegations that "the contract with [a third party] arose as a result of fraud, a breach of good faith and fair dealing, and deceptive trade practices" that "§ 1821(j) bars any relief that would affect the contract between RTC–Receiver and [the third party].").

Plaintiffs cite to two inapposite cases as support for their claim that they may seek to restrain or affect the conservator of the GSEs by suing FHFA indirectly through its counter-party, Treasury, despite the express language of 12 U.S.C. § 4617(f). But the conservator or receiver was not a party in either case cited by plaintiffs, as the conservator is here. In one case, the court held that the anti-injunction provision did not apply where the lawsuit "focus[ed] on [the third-party's] actions not the actions of the FDIC," and it did "not believe" that the relief sought "would have a chilling effect on the FDIC's ability to transfer bundles of trust deeds to third parties." *Stommel v. LNV Corp.*, No. 2:13CV821DAK, 2014 WL 1340676 at *5 (D. Utah Apr. 4, 2014). In the other case, plaintiffs had sought a recovery only against the third-party, and the court held that relief "would not 'restrain or affect' [the FDIC as receiver] in any way." *LNV Corp. v. Outsource Serv. Mgmt., LLC*, No. CIV 13-1926 JNE/LIB, 2014 WL 834977, at *4 (D. Minn. Mar. 4, 2014). The contrast with the present case, in which

plaintiffs sued both Treasury and FHFA, seeking identical injunctive relief, is self-evident.

C. Recent Legislation Confirms That the Third Amendment Constituted a Proper Exercise of Treasury's Authority Under HERA.

Plaintiffs predicate their claims for relief on a single action: the agreement between the conservator and Treasury to amend the PSPAs for a third time. The newly enacted Consolidated Appropriations Act of 2016 ("the Act"), H.R. 2029 § 702(b), 192 Stat. 2242, 114th Cong. (2015) (enacted Dec. 18, 2015), confirms that plaintiffs' claims are foreclosed by HERA. In the new legislation, Congress ratified Treasury's exercise of its authority to enter into the Third Amendment, including a right to receive the variable dividend. First, Congress expressly recognized Treasury's ongoing authority under HERA to amend the original PSPA. *See id.* § 702(a)(2)(A) (referring to Treasury's authority to "amend[] and restate[]" the PSPAs). Second, Congress specifically identified the Third Amendment when defining Treasury's ongoing authority to amend the original PSPAs. *See id.* (referring to Agreement as amended on "August 17, 2012"). And third, Congress expressly acknowledged Treasury's rights under the stock certificates issued in connection with the Third Amendment, which set forth the variable dividend provision that plaintiffs challenge here. *See id.* § 702(a)(2)(B) (defining the PSPA to include the "terms, powers, preferences, privileges, limitations, or any other conditions" of the "Variable Liquidation Preference Senior Preferred Stock" certificates).

Plaintiffs nonetheless contend that no presumption of ratification can apply here because the new legislation does not expressly mention "the *propriety* of the Net Worth Sweep." Opp. 62. But the doctrine of ratification does not require Congress to explicitly express its approval of an agency's action: the whole point of the doctrine is that Congress is *presumed* to ratify the agency's interpretation of a statute if Congress amends the statute fully aware of that interpretation but takes no steps to halt the agency action. *See N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982); *see*

Dep't of the Treasury Mem. in Supp. of Mot. to Dism. at 24–26, ECF No. 77-1 ("Treasury Mem.") (citing authorities). This presumption applies here because Congress made other changes to Treasury's authority under HERA, but it did not indicate any disapproval of Treasury's actions in entering into the Third Amendment. *Id.* To the contrary, Congress *expressly* incorporated the variable dividend provision in the Third Amendment into the scope of the new legislation by referencing it in section 702(a)(2)(B). Thus, plaintiffs' reliance on isolated remarks of legislators, Opp. 62–63, is unavailing; by predicating aspects of the new legislation on the Third Amendment, including the variable dividend, Congress approved of the Third Amendment as consistent with Treasury's authority and the duties of the conservator under HERA.

D. Plaintiffs' APA Claims Against Treasury, Which Are Barred By HERA, Also Fail on the Merits.

For the reasons explained above, HERA deprives the Court of jurisdiction over plaintiffs' claims against Treasury and FHFA. But even if plaintiffs could overcome section 4617(f), their APA claims against Treasury would fail as a matter of law.

1. Treasury Did Not Exceed Its Authority Under HERA Because the Third Amendment Did Not Effect a "Purchase" of "Obligations or Other Securities."

Plaintiffs' assertion that the Third Amendment constituted an exercise of Treasury's authority to "purchase any obligations or other securities," 12 U.S.C. § 1719(g)(4), is mistaken. *See* Opp. 53–57. Treasury's authority to purchase new securities from the enterprises expired on December 31, 2009. 12 U.S.C. § 1719(g)(4); *id.* § 1455(l)(4). Its authority to "exercise any rights received in connection" with earlier purchases, as well as its authority to hold or sell securities, never expires. *See id.* § 1719(g)(2)(D); *id.* § 1455(l)(2)(D). When entering into the Third Amendment, Treasury neither made a "purchase" nor received "obligations and other securities," under any meaning of those terms: The Third Amendment did not result in the issuance

of any stock to Treasury, or the commitment of any additional taxpayer funds by Treasury. Rather, it merely altered the compensation structure of the securities Treasury *already* owned by creating "a new formula of dividend compensation for a $200 billion-plus investment Treasury had *already* made." *Perry Capital*, 70 F. Supp. 3d at 224 (emphasis added).

The Third Amendment plainly falls within Treasury's authority to hold or sell the securities it owns, or to exercise previously secured rights; indeed, the initial PSPAs explicitly conferred upon Treasury the right to amend the PSPAs received in connection with Treasury's 2008 purchase of securities from the GSEs.[5] S*ee* Ex. A. at 13, 27, ECF No. 77-2. But if there were any doubt about Treasury's ongoing authority to amend the initial PSPAs, recently enacted legislation should eliminate it. *See* Consolidated Appropriations Act of 2016, § 702(a)(2)(A) (enacted Dec. 18, 2015). As Treasury explained in its opening brief, Congress recently recognized Treasury's ongoing right to "amend[] and restate[]" the PSPAs, *id.* § 702(a)(2)(A), and expressly acknowledged Treasury's rights under the stock certificates issued in connection with the Third Amendment. *See id.* § 702(a)(2)(B). Plaintiffs' claim that Treasury has no "power to amend the terms of Treasury's investment in the Companies," Opp. 54, is thus unavailing.

Plaintiffs further argue that, because the Third Amendment involved an "exchange of value," it necessarily resulted in a "purchase" of new securities. Opp. 55. But an "exchange of value" is also the touchstone of any valid contract amendment. *See, e.g.*, *Robinson v. Ada S. McKinley Cmty. Servs.*, 19 F.3d 359, 364 (7th Cir. 1994) ("A valid modification requires an offer,

[5] Plaintiffs' argument is particularly anomalous in light of other provisions of HERA which explicitly recognize the distinction between a purchase and a modification to an existing agreement, and expressly provided funding for such modifications. *See* 12 U.S.C. § 1719(g)(3) ("[a]ny funds expended for the purchase of, or modifications to, obligations and securities, or the exercise of any rights received in connection with such purchases under this subsection shall be deemed appropriated at the time of such purchase, modification, or exercise").

acceptance, and consideration."); E. Allan Farnsworth, Farnsworth on Contracts § 4.21 (3d ed. 2004). What is more, the fact that Treasury exercised its right to amend the initial PSPAs jointly with FHFA makes it no less the exercise of a "right." A contract confers a "right" to be "exercised" even when the right is to be exercised jointly. *See, e.g.*, *Public Serv. Co. of New Hampshire v. Hudson Light & Power Dep't*, 938 F.2d 338, 345, 347 (1st Cir. 1991) (rejecting "attempt by appellants . . . to impede [one party's] exercise of its exclusive contractual right to enter into an agreement with [the counter-party] to modify the Sellback Agreement."). A right, as plaintiffs assert, Opp. 54, is a "legal, equitable, or moral entitlement to do something," and to "exercise" means to "make use of; to put into action" or "[t]o implement the terms of." Black's Law Dictionary 916 (10th ed. 2014). When Treasury and FHFA agreed to the Third Amendment, they "ma[d]e use of" their "legal . . . entitlement" to amend the original PSPAs.[6]

For several reasons, plaintiffs cannot revive their textually deficient "purchase" argument by means of the fundamental change doctrine. First, when courts discuss the "fundamental change" doctrine, they are not elaborating on the meaning of the word "purchase." They are instead discussing the meaning of an exception to the judicially-created "purchaser-seller" limitation to the implied cause of action under section 10(b) of the Securities Exchange Act. *See 7547 Corp. v. Parker & Parsley Dev. Partners, L.P.*, 38 F.3d 211, 226 (5th Cir. 1994) ("Standing under these provisions requires that a plaintiff be an actual 'purchaser' or 'seller' of securities who

[6] Plaintiffs cite *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), for the assertion that a contractual "right" cannot entail mutual agreement. Opp. 54. *Petty Motor* was a takings case that concerned the amount of just compensation the government owed to tenants of a property that the government had appropriated. The Supreme Court determined that the tenants were entitled to damages equal to the value of the remainder of their lease. *Petty Motor*, 327 U.S. at 380. In a footnote, the Court noted that plaintiffs were not entitled to damages based on the expected renewal of their leases, even though the building's landlord had often extended their leases through "mutual consent." *Id.* at 380 n.9. It was the terms of the lease, not the parties' informal expectations, that delineated the tenants' "rights" to compensation. *Id.*

has been injured by deception or fraud 'in connection with' the purchase or sale . . . . The federal courts have created an exception to this rule when [an] investor's interest in a company is fundamentally altered through a merger, acquisition, or liquidation."); *see also Jacobson v. AEG Capital Corp.*, 50 F.3d 1493, 1498 (9th Cir. 1995) (same). Further, many courts have never recognized the "fundamental change" doctrine even in the securities fraud context in which it arose, while other circuits have expressly declined to adopt it. *See Isquith by Isquith v. Caremark Int'l, Inc.*, 136 F.3d 531, 535 (7th Cir. 1998); *see also Katz v. Gerardi*, 655 F.3d 1212, 1221 (10th Cir. 2011).[7] Undaunted, plaintiffs insist that the doctrine's rejection even in the section 10(b) context in which it arose "do[es] not call into question" the doctrine as an interpretive tool for HERA. Opp. 56 n.19. However, "esoteric and dubious judge-made doctrine[s]," *Isquith*, 136 F.3d at 535, from disparate legal contexts, are not used to shed light on the meaning of terms in entirely different statutes, particularly where there is sharp disagreement over the validity of that doctrine. *Cf. Bruesewitz v. Wyeth*, 562 U.S. 223, 243 (2011); *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 349 (2005). Nonetheless, even if this anti-fraud doctrine could somehow be imported to HERA, plaintiffs make no attempt to explain how it could apply where the supposed "purchaser," in this case, Treasury, does not claim to have been defrauded. *See* Treasury Mem. 20 n.11.

Finally, plaintiffs cite an Internal Revenue Service tax regulation, 26 C.F.R. § 1.1001-3, which addresses the circumstances in which "modification of the terms of a debt instrument" qualifies as an "exchange" of property, such that any financial gain resulting from the modification

[7] Further, *SEC v. Nat'l Securities, Inc.*, 393 U.S. 453 (1969), does not stand for the proposition that "holders of a fundamentally changed security are considered purchasers of new securities," Opp. 55, 56. That case did not rely on the "purchase" language of section 10(b), but rather on the "broad antifraud purposes" of section 10(b) which were "furthered" by their application to an alleged deceptive scheme in which shareholders exchanged their stock as part of a merger. 393 U.S. at 467.

must be declared as income. Plaintiffs provide no reason to believe that Congress intended the word "purchase" to be read synonymously with the word "exchange," as used by the IRS in a tax regulation addressing debt instruments. *See Perry Capital*, 70 F. Supp. 3d at 224 (rejecting identical argument).

2. Plaintiffs' APA Claim Alleging that Treasury Breached a Fiduciary Duty is Without Basis.

Plaintiffs next argue that Treasury acted arbitrarily and capriciously by failing to consider fiduciary duties, which, according to plaintiffs, arise under Delaware and Virginia law. As a preliminary matter, the APA provides no cause of action for claims arising under state law. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 854 (D.C. Cir. 2010) (Kavanaugh, J., concurring) ("contrary to [p]laintiffs' inventive arguments, the APA does not borrow state law or permit state law to be used as a basis for seeking injunctive or declaratory relief against the United States"); *cf. Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 793 (8th Cir. 1996) ("[T]he APA['s] . . . own language and the case law interpreting it clearly reject the conception of the APA as substantive, mandating free-wheeling judicial review of any agency action."). Plaintiffs' claim fails for this reason alone.

In an attempt to get around this problem, plaintiffs assert that a regulation authorizing the GSEs to designate state corporate law for their internal by-laws somehow creates a fiduciary duty on the part of Treasury. Opp. 60-61 (citing 12 C.F.R. 1239.3). But a regulation applicable to the GSEs cannot obviate the Supremacy Clause for the entire Executive Branch; only *Congress* can choose to apply state law to a federal agency like Treasury. *Hancock v. Train*, 426 U.S. 167, 179 (1976) ("[W]here 'Congress does not affirmatively declare its instrumentalities or property subject to regulation,' 'the federal function must be left free of regulation.'"); *State of Ariz. v. Bowsher*,

935 F.2d 332, 334 (D.C. Cir. 1991) (same).[8] The government possesses fiduciary duties "only to the extent it expressly accepts those responsibilities by statute," *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011), and Congress has not accepted such fiduciary duties here.[9]

In all events, any fiduciary duty claim of the sort that plaintiffs attempt to assert would be inconsistent with federal law, and therefore would be preempted. Plaintiffs respond that it would not be "at all inconsistent," Opp. 61, for Treasury to act in their benefit as well as fulfill its public purposes under HERA. The conflict is obvious, however. If Treasury were to owe state-law fiduciary duties to the GSEs' shareholders, as plaintiffs contend, Treasury would bear an "unyielding" duty "to act in the best interests of [the] shareholders." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d. 345, 360 (Del. 1993). But HERA plainly does not permit Treasury to place the interest of shareholders above all other considerations, including protection of the taxpayers; quite the contrary, HERA required Treasury to consider the public interest when it made investment decisions with respect to the GSEs, such as its decision to enter into the PSPAs. *See* 12 U.S.C. § 1719(g)(1)(C) (directing Treasury to consider several factors "to protect the taxpayers" before

[8] Plaintiffs claim to find limits to the Supremacy Clause by citing two cases, *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 99 (1940), and *Pac. Coast Dairy v. Dep't of Agric. of Cal.*, 318 U.S. 285, 294 (1943). *See* Opp. 60. But neither case has anything to do with the intergovernmental immunity doctrine; both cases address interim laws applied to third parties (not the government) when tracts of land are transferred between the federal government and the states. *See Sadrakula*, 309 U.S. at 99 ("The Constitution . . . has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred."); *Pac. Coast Dairy*, 318 U.S. at 294 ("When the federal government acquired the tract, local law not inconsistent with federal policy remained in force until altered by national legislation.").

[9] *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001), cited in page 58 of the opposition, is of no help to plaintiffs. The fiduciary duties of the United States as a trustee of tribal land and property, discussed in that case, "can only arise from a statute, treaty, or executive order." *Id.* at 1098-99 (quoting *National Wildlife Federation v. Andrus*, 642 F.2d 589, 611 (D.C. Cir. 1980)). The case in fact holds that where, as here, Congress has not imposed such a fiduciary duty, none exists.

exercising its purchase authority, including "[t]he need for preferences or priorities regarding payments to the Government"). A state-law obligation for Treasury to maximize the return for GSE shareholders, to the exclusion of taxpayer protection or the health of the mortgage markets, "would present a significant and direct conflict" with Treasury's "obligation to act in the public interest," *Starr Int'l Co. v. Fed. Reserve Bank of N.Y.*, 742 F.3d 37, 42 (2d Cir. 2014), and thus is preempted. *Id.* at 41-42 ("Delaware fiduciary duty law cannot be applied to FRBNY's rescue activities consistently with adequate protection of the federal interests at stake in stabilizing the national economy.").

Even if state law could supply the basis for a claim against Treasury, a fiduciary relationship would not arise because Treasury is not a "controlling shareholder" within the meaning of state law. Plaintiffs counter that they have *alleged* that Treasury is a controlling shareholder, and therefore the Court must treat this allegation as true. Opp. 59–60. That is wrong. Pleading "labels and conclusions" simply "will not do," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)), and the existence of a controlling shareholder relationship is a question of law.[10] *See Starr Int'l Co. v. Fed. Reserve Bank of N.Y.*, 906 F. Supp. 2d 202, 216–30 (S.D.N.Y. 2012). Plaintiffs make no attempt to answer the arguments of the opening brief that their allegations are simply insufficient as a matter of law to establish that Treasury is a controlling shareholder.[11] Treasury Mem. 28-30.

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[10] *Gradient OC Master, Ltd v. NBC Universal, Inc.*, 930 A.2d 104 (Del. Ch. 2007), which plaintiffs cite elsewhere, *see* Opp. 72 & 74, undermines their position. There, the court held that plaintiffs failed to show that either defendant constituted "a *de facto* or controlling shareholder" in the absence of evidence that defendants had "close to a majority of shares," regardless of allegations concerning NBCU's "impact on the Board's decisions" as a "result of contractual obligations between NBCU and ION." *Id.* at 130–31.

[11] Their lone argument, a citation to the CBO's budgetary treatment of the GSEs, Opp. 59, is unavailing. CBO includes the GSEs' operations in the federal budget because they are under the conservatorship of a federal agency and the taxpayers' commitment of funds has provided

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

Plaintiffs' suit fails under a second, independent bar in HERA, which prohibits suits by shareholders of the GSEs during conservatorship. "[T]he plain meaning of [section 4617(b)(2)(A) of HERA] is that *all* rights previously held by [the GSEs'] stockholders, including the right to sue derivatively, now belong exclusively to the FHFA." *In re Fed. Home Loan Mortg. Corp. Derivative Litig.* (*In re Freddie Mac*), 643 F. Supp. 2d 790, 795 (E.D. Va. 2009).

Plaintiffs attempt to evade section 4617(b)(2)(A) by arguing that the statute transferred only some shareholder rights to FHFA, while preserving a shareholder's right to bring a direct claim, Opp. 63-67, and that their claims are direct, not derivative, Opp. 67-75. In addition, they argue that, notwithstanding HERA, the APA provides them with a cause of action to bring direct claims. Opp. 68–69. However, as explained below, the claims that plaintiffs seek to assert here are derivative, not direct. But regardless of how they are characterized, plaintiffs' claims are plainly barred under HERA.

A. Plaintiffs' Claims Are Derivative.

Plaintiffs do not contest that their standing to assert a federal cause of action is a matter of federal law. *See* Treasury Mem. 25. Federal law, including the prudential shareholder standing doctrine, frequently requires federal courts to distinguish between direct and derivative claims. *See Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990); *Am. Airways Charters Inc. v. Regan*, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984) ("[N]o shareholder—not even a sole shareholder—has standing in the usual case to bring suit in an individual capacity on a claim that belongs to the corporation."). It is well-established in the Eighth Circuit that "a shareholder or

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them with all of their operating capital in conservatorship. Congressional Budget Office, CBO's Budgetary Treatment of Fannie Mae and Freddie Mac 7 (2010). Whether or not Treasury is a controlling shareholder under state law plays no part in the CBO's analysis. *Id.*

officer of a corporation cannot recover for legal injuries suffered by the corporation." *Jewell v. United States*, 548 F.3d 1168, 1173 (8th Cir. 2008) (citing *Heart of Am. Grain Inspection Serv., Inc. v. Missouri Dep't of Agric.*, 123 F.3d 1098, 1102 (8th Cir. 1997)). Pursuant to this principle, financial injuries suffered by plaintiffs by virtue of their shareholdings do not suffice to provide shareholders with standing. "As we have noted elsewhere, 'actions to enforce corporate rights . . . cannot be maintained by a stockholder in his own name . . . even though the injury to the corporation may incidentally result in [the stockholder's financial loss].'" *Jewell*, 548 F.3d at 1173 (quoting *Potthoff v. Morin*, 245 F.3d 710, 716 (8th Cir. 2001) (alterations in original). The distinction between derivative and direct claims applies fully to claims under the APA. *See Sec. Indus. & Fin. Markets Ass'n v. Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 408 (D.D.C. 2014) (dismissing APA claim based on shareholder standing rule).

Plaintiffs claim that the requirement of a separate and distinct injury is met by their claim that the Third Amendment "destroy[ed] the economic interest in the Companies to which Plaintiffs are entitled as owners of stock." Opp. 72. That claim is plainly insufficient: It rests on their contention that, absent the Third Amendment, the GSEs would have surplus capital which might eventually result in the GSEs exiting conservatorship and, eventually, paying dividends to plaintiffs. *See* Opp. 2 ("the Net Worth Sweep prevents Fannie and Freddie from *ever* being sound and solvent, because it prohibits them from building *any* capital"); Opp. 16 (funds could have been used to "prudently build capital reserves and prepare to exit conservatorship"); Opp. 23 (Third Amendment allegedly "ensured that all of their anticipated profits would flow to Treasury rather than being used to rebuild capital."). The Eighth Circuit rejected a similar claim to standing in *In re AFY*, 734 F.3d 810 (8th Cir. 2013), where a shareholder attempted to appeal from a Bankruptcy Court decision converting a Chapter 11 petition to a Chapter 7 petition. The shareholders had

argued in that case that they had standing to appeal because the bankruptcy estate "would be solvent if this court reverses, in a separate appeal, the bankruptcy court's decision allowing certain claims against [the company's] estate; and . . . '[w]here the debtor is solvent and there is a surplus for shareholders, the shareholders have standing to appeal from orders affecting the surplus.'" *Id.* at 822. The Eighth Circuit held that plaintiffs lacked prudential standing to appeal. "Under the shareholder standing rule, appellants do not have standing because the interest they assert is indirect and derivative of [the company]. Any 'surplus would belong to [the company] and not to [appellants, its] shareholders. [The company], through its officers and directors, will decide whether to retain the capital or distribute it to shareholders.'" *Id.* at 823 (quoting *In re Cent. Ice Cream Co.*, 62 B.R. 357, 359-60 (N.D. Ill. 1986)). Similarly here, the alleged "dissipation of assets," Am. Compl. ¶ 23, ECF. No. 61, does not give rise to a direct claim.

Further, plaintiffs' argument for standing depends upon an internal inconsistency: They argue in one portion of their brief that their APA claims surmount the jurisdictional barrier of section 4617(f) by alleging that FHFA took actions that were detrimental to the GSEs and contrary to FHFA's statutory obligations as conservator of the GSEs, *see* Opp. 36, while insisting later in the same brief that their APA claims are nevertheless "direct" claims because "Plaintiffs—not Fannie and Freddie—suffered the specific injury complained of here." Opp. 72. Plaintiffs cannot ignore that their amended complaint is replete with allegations of harm *to the GSEs*. *See, e.g.*, Am. Compl. ¶ 110 (alleging the Third Amendment "plainly harms, rather than promotes, the soundness and solvency of the Companies"); *id.* ¶ 136 (alleging the Conservator has "operate[d] the company for its own benefit while stripping it of its assets"); *id.* ¶ 137 (alleging the Third Amendment is "detriment[al]" to the GSEs). Plaintiffs cannot argue for jurisdiction over their

APA claims by citing an alleged injury to the GSEs, and then argue for direct standing for the very same claims by asserting that their claims do *not* depend on an alleged injury to the GSEs.

Even setting aside their muddled logic, plaintiffs' argument is flawed for additional reasons. First, it ignores the fundamental principle that "injury to the 'use and enjoyment'" of stock because of mismanagement of assets "is the language of derivative claims." *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998); *see also Bixler v. Foster*, 596 F.3d 751, 757 (10th Cir. 2010) ("Plaintiffs . . . assert the minority shareholders suffered a diminution in value of their corporate shares without receiving the same monetary compensation the majority shareholders received. Such an injury is not direct and personal for RICO purposes but is, rather, an injury to the corporation."); *Strougo v. Bassini*, 282 F.3d 162, 172 (2d Cir. 2002) ("alleged shareholder injuries deriving from diminution of corporate assets" are "an injury quintessentially remediable by shareholders only through a derivative action"). Further, the relief that they seek—a change in dividend terms and the return of dividends paid to Treasury pursuant to the Third Amendment—would flow to the GSEs, not to plaintiffs directly. *Perry Capital*, 70 F. Supp. 3d at 229 n.24.

Plaintiffs argue that their claims would be direct under Delaware state law, which federal courts often use to distinguish direct from derivative claims, but none of the cases they cite support such a contention. Plaintiffs rely on *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006), for the proposition that their challenge to an alleged "improper extraction or expropriation" of corporate profits to one class of shareholders qualifies as a direct claim. Opp. 72. But *Gentile* is inapposite. There, the corporation had issued excess shares to a majority shareholder, and "the shares representing the 'overpayment' embod[ied] both economic value and voting power." *Gentile*, 906 A.2d at 100. Treasury is not a majority shareholder of the GSEs, and the alleged

"overpayment" of dividends on Treasury's senior preferred stock is in the form of cash, not additional voting stock. Thus, plaintiffs' allegations do not bring this case within the *Gentile* exception.

Further, the Third Amendment did not affect the voting power or dividend rights of any stockholder. Treasury does not hold voting rights, and other shareholders' voting rights and dividend payments were suspended when the conservatorships began, before the PSPAs (let alone the Third Amendment) were entered into. Plaintiffs' inability to show that the Third Amendment changed the status of their voting rights or dividend rights distinguishes their suit from the direct claims described in *Gatz v. Ponsoldt*, 925 A.2d 1265, 1280-81 (Del. 2007) and other cases cited by plaintiffs.[12] Plaintiffs' claims instead depend upon an assertion of alleged wrongdoing that "deplete[d] corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend," and their claims are therefore derivative. *Protas v. Cavanagh*, No CIV.A 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012).[13]

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[12] For example, in citing *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50 (2012), *appeal docketed*, Case Nos. 15-5103, 15-5133 (Fed. Cir. Aug. 14, 2015), plaintiffs overlook the key distinction that that case did not concern an entity in conservatorship. Further, because the Third Amendment did not result in the issuance of any new shares to any party, it did not dilute shares, as the plaintiffs in *Starr International* alleged. *Id.* at 64; *see also Innovative Therapies, Inc. v. Meents*, No. 12–3309, 2013 WL 2919983, at *5 (D. Md. June 12, 2013) (declining to apply *Gentile* exception where, as here, the "allegations rest solely on a purported loss in the economic value of [plaintiff's] ownership stake rather than any loss of voting power"); *Nikoonahad v. Greenspun Corp.*, No. C09-02242, 2010 WL 1268124, at *5 (N.D. Cal. Mar. 31, 2010) (same).

[13] That plaintiffs' claims are derivative under *Tooley* is consistent with the recent holding of *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175 (Del. 2015). Although the Delaware Supreme Court held that NAF could bring its contractual claim directly, it specifically distinguished NAF's claim, based on its individual rights under the contract, from the plaintiff-stockholders in *Tooley*, where the plaintiffs had no separate contractual right to bring a claim and had no contractual rights under the merger agreement. 118 A.3d at 179, n.10. So too here, plaintiffs have no right to payment for their stock, nor do plaintiffs assert breach of contract. Nor is the unpublished trial court decision in *In re: El Paso Pipeline Partners, L.P. Deriv. Litig.*, 2015 WL 7758609 (Del. Ch. Dec. 2, 2015) to the contrary. There, the court made

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

No matter how plaintiffs characterize their claims, their standing to bring *any* action with respect to the assets of the GSEs is one of the "rights, titles, powers, or privileges" of shareholders that was transferred to FHFA upon its appointment as conservator. 12 U.S.C. § 4617(b)(2)(A)(i). Thus, regardless of whether plaintiffs' claims are "direct" or "derivative," they may not proceed with any action premised on an alleged right they lack standing to assert while the conservatorships remain in effect. Their claims thus fail under the plain language of 12 U.S.C. § 4617(b)(2)(A), which bars any shareholder claims over the assets of the GSEs. *See* FHFA Reply. Br. 20-21.

In apparent recognition of this fact, plaintiffs ask this Court to depart from the statute's text to create a judicial exception that would permit derivative suits alleging a "manifest conflict of interest" on the part of the conservator. Opp. 75-79; *see also Delta Sav. Bank v. United States*, 265 F.3d 1017 (9th Cir. 2001); *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999). Both of those cases concerned derivative suits over *pre-receivership* claims against federal agencies, and neither case supports the proposition that shareholders can sue the conservator itself, or the counter-party to an action taken by the conservator. Such a holding would be particularly illogical in the conservatorship context. *See Perry Capital*, 70 F. Supp. 3d

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clear that a claim for damages to a corporation must be brought as a derivative action: "Treating a dual-natured claim as *derivative* for purposes of *claim initiation* achieves the important goals of screening out weak claims and providing an efficient and centralized mechanism for conducting the litigation." 2015 WL 7758609 at *2 (emphasis added). *El Paso* treated the claim as direct only for purposes of "claim continuation," where a subsequent merger would deprive plaintiffs of standing to pursue an already-initiated action. The court also indicated that if the plaintiff sought the return of funds to the corporation—as plaintiffs seek here—the claim would be derivative under second prong of *Tooley*. *Id*. at *31-32.

at 230-31. Plaintiffs' proposed "manifest conflict of interest" exception would thus go well beyond the bounds even of the two cases that have adopted it. *See* Treasury Mem. 28.

Further, plaintiffs overlook authority establishing that, even if the Court assumed the existence of a conflict of interest exception, such an exception would be inapplicable here. In *Gail C. Sweeney Estate Marital Trust v. United States Treasury Dep't*, 68 F. Supp. 3d 116, 123 (D.D.C. 2014), the court held that even if a conflict of interest exception could be read into HERA, it would not apply between Treasury and FHFA. First, "FHFA and Treasury . . . are not virtually the same agency. Unlike the agencies in *Delta Savings Bank*, they do not share employees and directors, and they were not created by the same statute to serve complementary functions." *Id.* Second, "in *Delta Savings Bank*, the would-be defendant, the OTC, appointed the FDIC as the bank's conservator, and that was a factor leading the court to conclude that the entities were intertwined. But Fannie Mae is not a bank, and would-be defendant Treasury did not appoint the FHFA as Conservator." *Id.* Finally, the court found it "particularly significant" that "Treasury and the FHFA are counterparties to a contract that was authorized by Congress in the HERA statute." *Id.* If Congress intended FHFA's dealings with Treasury to be subject to challenge by shareholders, it would have expressly granted shareholders that right. Instead, it transferred "all rights, titles, powers, and privileges" of the GSEs' shareholders to FHFA. 12 U.S.C. § 4617(b)(2)(A)(i).[14]

III. The Judgment in the *Perry Capital* Actions Precludes Plaintiffs' Claims

Finally, plaintiffs' claims are barred by the doctrine of issue preclusion, or collateral

[14] Plaintiffs dismiss *Sweeney Trust* because the case "did not involve a challenge to the Net Worth Sweep." Opp. 25 n.7. But the court in *Sweeney Trust* considered the PSPA agreements between FHFA and Treasury before concluding that the circumstances giving rise to a conflict-of-interest exception in *First Hartford* and *Delta Savings* do not exist between Treasury and FHFA. *Sweeney Trust*, 68 F. Supp. 3d at 123-25.

estoppel: the court in *Perry Capital* already considered and dismissed shareholder derivative claims against both FHFA and Treasury holding that section 4617(f) barred the equitable relief, including rescission, that the derivative action sought against the conservator's exercise of its authority, that section 4617(b)(2)(A) barred any derivative claims by shareholders concerning the PSPAs, and that no "conflict of interest" exception to the application of section 4617(b)(2)(A) exists. *Perry Capital*, 70 F. Supp. 3d at 229-33. Issue preclusion bars plaintiffs from re-litigating those issues in another derivative action. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) ("Issue preclusion, in contrast, bars successive litigation . . . even if the issue recurs in the context of a different claim.") (internal citations omitted); *Cottrell v. Duke*, 737 F.3d 1238, 1242-43 (8th Cir. 2013) (issue preclusion principles apply in shareholder derivative actions).

Plaintiffs argue that even if their claims are derivative, that the plaintiffs in *Perry Capital* and *Continental Western* were not seeking to bring their APA claims derivatively and cannot be said to have intended to adequately represent or bind the corporations. Opp. 80. But plaintiffs overlook the fact that the *Perry Capital* opinion did address an "avowed derivative action," *id.* at 81. *See Perry Capital*, 70 F. Supp. 3d at 229-33. The Court's holdings with respect to that derivative action "bar[] relitigation of those issues even in the context of a suit based on an entirely different claim." *In re Sonus Networks, Inc., S'holder Derivative Litig.*, 499 F.3d 47, 56 (1st Cir. 2007). For the reasons explained in Section II.A, plaintiffs' claims are derivative, and should be subject to the issue-preclusive effect of the *Perry Capital* opinion with respect to the availability of equitable relief, the transfer of shareholder rights to the conservator, and the inapplicability of any conflict-of-interest exception.[15] These issues were litigated in *Perry Capital*, and their resolution

[15] Plaintiffs cite Judge Lamberth's order in *Rafter v. Dep't of Treasury*, Opp. 80 n.27, in which the court held that that *Rafter*, a later-filed case, was not consolidated with the prior actions filed in *Perry Capital*. *See* Memorandum & Order at 5, *Rafter v. Dep't of Treasury*, No.

was an essential element of that opinion. Because the GSEs were the real parties in interest in these derivative claims, and *Perry Capital* is considered a valid and final judgment regardless of the pending appeal, the Eighth Circuit's standards for issue preclusion are fully satisfied.

CONCLUSION

For the foregoing reasons, the Court should dismiss the amended complaint for lack of subject matter jurisdiction and, alternatively, for failure to state a claim.

Dated: August 1, 2016

Respectfully submitted,

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1:14-cv-01404-RCL (D.D.C. Jan. 21, 2015), ECF No. 20. But the *Rafter* order simply stated that the *Perry Capital* Court's analysis of the derivative nature of Fairholme plaintiffs' fiduciary claims was dicta; the *Perry Capital* opinion also dismissed avowedly derivative claims, and it is that aspect of the opinion that has issue preclusive effect here.

Certificate of Service

I hereby certify that on August 1, 2016, I electronically filed the foregoing with the Clerk of the Court using the ECF system. To my knowledge, a copy of this document will be served on the parties or attorneys of record through the ECF system.

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