IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

TIMOTHY J. PAGLIARA, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, Defendant.	C.A. No. 16-193-GMS

DECLARATION OF C. BARR FLINN IN SUPPORT OF PLAINTIFF TIMOTHY J. PAGLIARA'S ANSWERING BRIEF IN OPPOSITION TO SUPPLEMENTAL MOTION TO SUBSTITUTE FEDERAL HOUSING FINANCE AGENCY AS PLAINTIFF

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September 23, 2016

I, C. Barr Flinn, hereby declare:

1. I am an attorney with the law firm of Young Conaway Stargatt & Taylor LLP, and counsel of record for Plaintiff Timothy J. Pagliara in the above-captioned matter. I offer this Declaration in support of Plaintiff Timothy J. Pagliara's Answering Brief in Opposition to Supplemental Motion to Substitute Federal Housing Finance Agency as Plaintiff ("Answering Brief").

2. Attached hereto are true and correct copies of the following documents, as referenced in the Answering Brief:

Exhibit	Description
A	Memorandum of Law in Support of Federal Housing Finance Agency's ("FHFA") Motion to Transfer for Coordinated or Consolidated Pretrial Proceedings Under 28 U.S.C. § 1407 (D.I. 1-1), *In re: FHFA, et al. Preferred Stock Purchase Agreements Third Amendment Litigation*, Case No. 2713 (JPML Mar. 15, 2016)
B	FHFA's Reply Brief in Support of Its Motion to Transfer for Coordinated or Consolidated Pretrial Proceedings Under 28 U.S.C. § 1407 (D.I. 23), *In re: FHFA, et al. Preferred Stock Purchase Agreements Third Amendment Litigation*, Case No. 2713 (JPML Apr. 13, 2016)
C	Transcript of Oral Argument on May 26, 2015 (D.I. 38), *In re: FHFA, et al. Preferred Stock Purchase Agreements Third Amendment Litigation*, Case No. 2713 (JPML June 9, 2016)
D	Notice of Appeal (D.I. 43), *Timothy J. Pagliara v. Federal Home Loan Mortgage Corporation* , C.A. No. 16-337-JCC/JFA (E.D. Va. Sept. 21, 2016)
E	Excerpt of Brief of Appellees FHFA, Melvin L. Watt, Fannie Mae, and Freddie Mac, *Perry Capital, LLC, et al. v. Jacob J. Lew*, No. 14-5243 (D.C. Cir. Dec. 21, 2015)
F	Transcript of Oral Argument on April 15, 2016, *Perry Capital, LLC, et al. v. Jacob J. Lew*, No. 14-5243 (D.C. Cir.)

I hereby declare, under penalty of perjury, that the foregoing is true and correct to the best of my personal knowledge.

Dated: September 23, 2016

/s/ C. Barr Flinn
C. Barr Flinn (DE Bar No. 4092)

CERTIFICATE OF SERVICE

I, C. Barr Flinn, hereby certify that on September 23, 2016, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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I further certify that on September 23, 2016, I caused a copy of the foregoing document to be served by e-mail on the above-listed counsel of record and on the following:

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EXHIBIT A

BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In Re:	)	
	)	MDL No. ____
Third Amendment Litigation	)	

MEMORANDUM OF LAW IN SUPPORT OF FEDERAL HOUSING FINANCE AGENCY'S MOTION TO TRANSFER FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS UNDER 28 U.S.C. § 1407

The Federal Housing Finance Agency ("FHFA" or the "Conservator"), as Conservator of Fannie Mae and Freddie Mac (the "Enterprises"), respectfully requests that the Judicial Panel on Multidistrict Litigation (the "Panel") transfer four Enterprise-shareholder actions pending in four district courts (the "Related Cases") to the U.S. District Court for the District of Columbia for coordinated pretrial proceedings. Each case—and more that FHFA expects may soon be filed—involves plaintiffs with the *same* interests asserting the *same* claims arising out of the *same* transaction against the *same* defendants.

As with eleven other actions filed in the District of Columbia and the Southern District of Iowa, which have already been dismissed on motions by FHFA and the U.S. Department of the Treasury ("Treasury"), the cases proposed for transfer concern the Conservator's agreement to amend the Preferred Stock Purchase Agreements ("PSPAs") by which Treasury committed hundreds of billions of dollars to support the Enterprises' solvency. Plaintiffs allege that in agreeing to provide Treasury a variable dividend measured by the Enterprises' quarterly earnings, the Conservator and Treasury acted illegally. The claims and relief sought in each of the four Related Cases are substantially similar; indeed, the Complaints are virtually identical. As a practical matter, plaintiffs are relitigating the same legal issues over and over in hopes of

finding a court that will rule in their favor. Transfer would benefit the parties, the courts, and the efficient administration of justice.

BACKGROUND

A. FHFA, Fannie Mae, Freddie Mac, and the Conservatorships

Congress chartered Fannie Mae and Freddie Mac to establish secondary market facilities for residential mortgages, provide stability in the secondary market for residential mortgages, and promote access to mortgage credit. 12 U.S.C. § 1716 (Fannie Mae); *id.* § 1451 note (Freddie Mac). In July 2008, Congress passed the Housing Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, § 1101, 122 Stat. 2654, 2661 (codified as 12 U.S.C. § 4511 *et seq.*), and created FHFA as the sole regulator for Fannie Mae and Freddie Mac.

The Enterprises suffered massive losses and were at grave risk of insolvency as a result of the collapse of the housing market in 2008. On September 6, 2008, FHFA's Director appointed FHFA as the Enterprises' Conservator, "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs." 12 U.S.C. § 4617(a)(2). Upon appointment, the Conservator "immediately succeed[ed] to . . . all rights, titles, powers, and privileges of the [Enterprises], and of any stockholder, officer, or director of [the Enterprises]." *Id.* § 4617(b)(2)(A). Congress vested the Conservator with broad powers to "operate" the Enterprises, "carry on the business" of the Enterprises, enter into contracts on behalf of the Enterprises, "transfer or sell any [Enterprise] asset . . . without any approval," take actions to put the Enterprises in a "sound and solvent condition," and "preserve and conserve" their assets. *Id.* § 4617(b)(2).

Pursuant to those powers, and on behalf of the Enterprises, the Conservator entered into the PSPAs with Treasury pursuant to which, after subsequent amendments, Treasury committed to infuse nearly half a trillion dollars into the Enterprises when and as necessary to eliminate any net worth deficit. In exchange for that ongoing commitment, the PSPAs granted Treasury a

package of rights, including, *inter alia*, (i) an annual dividend equal to 10% of the amount of each Enterprise's respective draws from the commitment, and (ii) a periodic commitment fee ("PCF") intended to fully compensate the taxpayers for Treasury's commitment of ongoing support.

On August 17, 2012, FHFA and Treasury executed the Third Amendment to the PSPAs (the "Third Amendment"), replacing the fixed 10% dividend with a variable rate dividend equal to the Enterprises' quarterly earnings, if any, and suspending the PCF while the variable dividend was in effect. To date, Treasury has made 24 infusions into the Enterprises totaling more than $187 billion. *See* FHFA, *Treasury and Federal Reserve Purchase Programs for GSE and Mortgage-Related Securities Data as of November 6, 2015*, at 2 (2015), http://goo.gl/D54JHs. Today, $258 billion of the Treasury commitment remains available to support the Enterprises and ensure they continue to fulfill their important statutory missions.

B. The Related Cases

Enterprise shareholders have now filed 15 nearly identical complaints challenging the Third Amendment in the U.S. District Courts for the District of Columbia, the Southern District of Iowa, the Northern District of Iowa, the District of Delaware, the Northern District of Illinois, and the Eastern District of Kentucky.[1] Ten of those actions were decided in *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014), and are currently on appeal to the U.S. Court of

[1] Two actions filed by Enterprise shareholders against the Enterprises' auditors are currently pending in Florida state court. *Master Sgt. Edwards v. Deloitte & Touche, LLP*, No. 2016-004986-CA-01 (Fla. Cir. Ct. Feb. 29, 2016); *Master Sgt. Edwards v. PricewaterhouseCoopers, LLP*, No. 2016-005875-CA-01 (Fla. Cir. Ct. Mar. 9, 2016). The Conservator is monitoring both cases, which raise many of the same questions of fact and law regarding the conservatorships as the 15 cases filed in U.S. district courts.

Appeals for the District of Columbia Circuit.[2] An eleventh action brought by another shareholder was dismissed on issue preclusion grounds in an opinion that was not appealed.[3]

The four currently pending Related Cases are:

- *Saxton v. FHFA*, No. 1:15-cv-00047, was filed on May 28, 2015 in the U.S. District Court for the Northern District of Iowa and is pending before Chief Judge Linda R. Reade. The *Saxton* plaintiffs filed an Amended Complaint under seal on February 9, 2016. (Docket Sheet attached hereto; Amended Complaint filed under seal.)

- *Jacobs v. FHFA*, No. 1:15-cv-00708, was filed on August 17, 2015 in the U.S. District Court for the District of Delaware and is pending before Judge Gregory M. Sleet. (Docket Sheet and Complaint attached hereto.)

- *Robinson v. FHFA*, No. 7:15-cv-00109, was filed on October 23, 2015 in the U.S. District Court for the Eastern District of Kentucky and is pending before Judge Amul R. Thapar. The *Robinson* plaintiff filed an Amended Complaint under seal on December 29, 2015. (Docket Sheet attached hereto; Amended Complaint filed under seal.)

- *Roberts v. FHFA*, No. 1:16-CV-02107, was filed on February 10, 2016 in the U.S. District Court for the Northern District of Illinois and is pending before Judge Edmond E. Chang. (Docket Sheet and Complaint attached hereto.)

The eleven earlier-filed actions and the four Related Cases all assert materially identical claims against FHFA and Treasury that arise out of the same conduct: the Conservator's and

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[2] Those cases are: *Perry Capital LLC*, 70 F. Supp. 3d 208 (filed July 7, 2013 in D.C.); *Fairholme Funds, Inc. v. FHFA*, No. 13-cv-01053 (filed July 10, 2013 in D.C.); *Arrowood Indemnity Co. v. Fed. Nat'l Mortg. Ass'n*, No. 13-cv-01439 (filed September 20, 2013 in D.C.); *Liao v. Lew*, No. 13-cv-01094 (filed July 16, 2013 in D.C.); *Cacciapelle v. Fed. Nat'l Mortg. Ass'n*, No.13-cv-01149 (filed July 29, 2013 in D.C.); *Am.-European Ins. Co. v. Fed. Nat'l Mortg. Ass'n*, No.13-cv-01169 (filed July 30, 2013 in D.C.); *Cane v. FHFA*, No. 13-cv-01184 (filed August 1, 2013 in D.C.); *Dennis v. United States*, No. 13-cv-01208 (filed August 5, 2013 in D.C.); *Marneu Holdings, Co. v. FHFA*, No. 13-cv-01421 (filed September 18, 2013 in D.C.); *Borodkin v. Fed. Nat'l Mortg. Ass'n*, No. 13-cv-01443 (filed September 20, 2013 in D.C.). On November 18, 2013, the *Liao*, *Cacciapelle*, *Am.-European Ins. Co.*, *Cane*, *Dennis*, *Marneu Holdings*, and *Borodkin* actions were consolidated as *In re Senior Preferred Stock Purchase*, No. 13-mc-1288, in the District of Columbia.

[3] *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828 (S.D. Iowa 2015) (filed February 5, 2014).

Treasury's August 17, 2012 entry into the Third Amendment. The four Related Cases together assert 21 materially identical or substantially similar causes of action. Three of the four Related Cases bring claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, alleging that FHFA exceeded its statutory authority as the Enterprises' Conservator, Treasury exceeded its temporary authority to purchase Enterprise securities, and Treasury's actions were arbitrary and capricious. *See Saxton* Am. Compl. ¶¶ 134-62 (Counts I, II & II); *Robinson* Am. Compl. ¶¶ 136-64 (Counts I, II & III); *Roberts* Compl. ¶¶ 125-57 (Counts I, II & III). Indeed, plaintiffs not only bring identical claims, but use materially identical language when asserting them. *Compare Saxton* Am. Compl. ¶¶ 136-39, 143 *with Robinson* Am. Compl. ¶¶ 138-41, 143 *and Roberts* Compl. ¶¶ 127-30, 136. *Saxton* and *Jacobs* rely on the same factual allegations regarding the Third Amendment to bring substantially similar state law claims for breach of contract and breach of the implied duty of good faith and fair dealing, and likewise use largely similar language when stating their claims for relief. *Saxton* Am. Compl. ¶¶ 163-81 (Counts IV & V); *Jacobs* Compl. ¶¶ 107-52 (Counts III, IV, V & IV).

All four Related Cases seek substantially identical declaratory and injunctive relief to void the Third Amendment. The plaintiffs in *Saxton*, *Robinson*, and *Roberts* pray for orders "[d]eclaring that the Net Worth Sweep, and its adoption, are not in accordance with HERA within the meaning of [the APA], and that Treasury acted arbitrarily and capriciously within the meaning of [the APA] by executing the Net Worth Sweep," while the *Jacobs* plaintiffs, who assert state-law claims, pray for an equivalent order "[d]eclaring the Net Worth Sweep is void and unenforceable." *Saxton* Am. Compl. Prayer for Relief (a); *see also Robinson* Am. Compl. Prayer for Relief (a) (same); *Roberts* Compl. Prayer for Relief (a) (same); *Jacobs* Compl. Prayer for Relief (D). Plaintiffs in all four Related Cases also ask for rescission and restitution of the

monies the Enterprises paid to Treasury under the Third Amendment, and three of the four plaintiffs ask the court to enjoin FHFA and Treasury officials from taking any further action under it. *Saxton* Am. Compl. Prayer for Relief (b)-(e); *Jacobs* Compl. Prayer for Relief (C); *Robinson* Am. Compl. Prayer for Relief (b)-(e); *Roberts* Compl. Prayer for Relief (b)-(e).

C. FHFA Anticipates Additional, Materially Identical Actions from Enterprise Shareholders

It is all but certain that the number of pending complaints challenging the Third Amendment will continue to grow. The boards of directors for Fannie Mae and Freddie Mac have received seven demand letters from three Enterprise shareholders presaging litigation. (Attached hereto as exhibits 1 through 7.) Each of these letters asserts that the Enterprises' directors have breached purported duties to the Enterprises and the Enterprises' shareholders by performing under the Third Amendment, and concludes that shareholders are entitled to file suit to seek equitable and legal relief absent action by the boards. Thus, although this motion pertains directly to only the four pending Related Cases, it is likely that there will soon be additional cases that should also be transferred for coordinated or consolidated pretrial proceedings. Indeed, one of the shareholders who sent letters to Fannie Mae and Freddie Mac has now filed suit against Fannie Mae in Delaware Chancery Court and against Freddie Mac in Virginia state court.[4]

ARGUMENT

The Panel may transfer cases for coordinated or consolidated pretrial proceedings if (i) the cases "involv[e] one or more common questions of fact," (ii) transfer would further "the

[4] *Pagliara v. Fed. Nat'l Mortg. Ass'n*, No. 12105-VCMR (Del. Ch. Mar. 14, 2016); *Pagliara v. Fed. Home Loan Mortg. Corp.*, No. CL 2016-03860 (Va. Cir. Ct. Mar. 14, 2016). The Conservator is monitoring those cases, which raise the same factual and legal issues, and purport to investigate the Third Amendment and the conservatorships.

convenience of parties and witnesses," and (iii) transfer will "promote the just and efficient conduct of [the] actions." 28 U.S.C. § 1407(a). All three criteria are easily satisfied here.

A. The Related Cases Involve Common Questions of Fact

Common questions of fact are presumed "when two or more complaints assert comparable allegations against identical defendants based upon similar transactions and events." *In re Air W., Inc. Sec. Litig.*, 384 F. Supp. 609, 611 (J.P.M.L. 1974). Transfer is appropriate where "all actions can be expected to focus on a significant number of common events, defendants, and/or witnesses." *In re Fed. Nat'l Mortg. Ass'n Sec. Derivative & "ERISA" Litig.*, 370 F. Supp. 2d 1359, 1361 (J.P.M.L. 2005).

Here, the operative factual allegations in each of the Related Cases are materially identical. *See Saxton* Am. Compl. ¶¶ 1, 14-25; *Jacobs* Compl. ¶¶ 1, 15-21; *Robinson* Am. Compl. ¶¶ 1, 14-26; *Roberts* Compl. ¶¶ 1, 15-21. Specifically, plaintiffs allege that FHFA and Treasury agreed to the variable dividend provision of the Third Amendment for supposedly improper purposes. *See Saxton* Am. Compl. ¶¶ 14-25; *Jacobs* Compl. ¶¶ 15-21; *Robinson* Am. Compl. ¶¶ 14-26; *Roberts* Compl. ¶¶ 15-21. FHFA has asserted dispositive jurisdictional defenses and will also contest plaintiffs' allegations should litigation progress, but the allegations nevertheless confirm that the Related Cases share common questions of fact, satisfying Section 1407(a)'s threshold requirement.

B. Transfer for Coordination or Consolidation Will Serve the Convenience of the Parties and Witnesses, and Promote the Efficient Conduct of the Actions

Transfer for coordination or consolidation of the Related Cases will be convenient for the parties and witnesses because it will avoid duplicative pretrial activities. All Related Cases involve identically situated shareholder plaintiffs making the same factual allegations, asserting the same claims, and seeking the same relief. The Related Cases thus give rise to materially

identical, dispositive legal questions, and FHFA and Treasury have filed or intend to file motions to dismiss in each case, arguing, *inter alia*, that (i) 12 U.S.C. § 4617(f) bars jurisdiction,[5] and (ii) the Conservator's succession to "all rights, titles, powers, and privileges" of all Enterprise shareholders precludes plaintiffs' claims, *see* 12 U.S.C. § 4617(b)(2)(A)(i).

Transfer is appropriate where numerous cases share common jurisdictional issues. *See In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990) (noting "real economies in transferring" for consideration of common jurisdictional issues and holding "MDL Panel has jurisdiction to transfer a case in which a jurisdictional objection is pending"). Here, "[t]ransfer . . . will permit a single judge to consider [defendants' motions to dismiss] and thus will have the salutary effect of promoting judicial economy and avoiding inconsistent adjudications" regarding the courts' jurisdiction and the scope of the Conservator's succession. *In re Fed. Election Campaign Act Litig.*, 511 F. Supp. 821, 824 (J.P.M.L. 1979); *see also In re Cooper Tire & Rubber Co. Tires Prods. Liability Litig.*, No. 1393, 2001 WL 253115, at *1 (J.P.M.L. Feb. 23, 2001) (transferring cases because "[m]otion practice . . . will overlap substantially in each action"). Transfer to consolidate and coordinate overlapping motion practice is particularly important in the circumstances presented here. To resolve the threshold issues in the Related Cases, the courts must construe HERA and the Enterprises' federal statutory charters, which together constitute a complex, comprehensive statutory scheme. *See In re Dep't of Energy Stripper Well Exemption Litig.*, 472 F. Supp. 1282 (J.P.M.L. 1979) (transferring APA cases where "[a]ll actions . . . share[d] questions of fact *and law arising under a complicated series of statutes and regulations*" (emphasis added)).

[5] In that provision, Congress mandated that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver." 12 U.S.C. § 4617(f).

The Related Cases can be resolved on motions to dismiss without discovery; indeed, materially identical actions have been dismissed on legal grounds. *See Perry Capital*, 70 F. Supp. 3d at 246 (granting FHFA's and Treasury's motions to dismiss); *see also Cont'l W. Ins. Co.*, 83 F. Supp. 3d at 840 & n.6 (dismissing on issue preclusion grounds). However, should the Related Cases survive motions to dismiss, additional common questions—including questions concerning the filing, contents, and adequacy of an administrative record—will surely arise.[6] Transfer is warranted here to coordinate the determination of those issues and "avoid potentially conflicting obligations placed upon" the Conservator with respect to the administrative record and any other potential discovery. *See In re: Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 588 F. Supp. 2d 1376, 1377 (J.P.M.L. 2008) ("[Transfer] will eliminate duplicative discovery and prevent inconsistent pretrial rulings, *particularly those with respect to the identification of the underlying administrative record*." (emphasis added)).

Absent transfer, different courts could issue conflicting rulings on the same, dispositive legal questions and the administrative record, encouraging forum shopping among future plaintiffs. *See Pan Am. World Airways, Inc. v. C.A.B.*, 517 F.2d 734, 741 (2d Cir. 1975) ("'[F]orum shopping' should be discouraged."). Transfer here "provides the opportunity for the uniformity, consistency, and predictability in litigation that underlies the multidistrict litigation system," allowing FHFA and Treasury to assert the same jurisdictional defenses in the same district court and the same circuit court of appeals, if necessary. *See Scott v. Bayer Corp.*, No. Civ. A. 03-2888, 2004 WL 63978, at *1 (E.D. La. Jan. 12, 2004). With actions already pending in four districts in four different circuits, the circumstances suggest that the various

[6] For example, while FHFA as Conservator is under no obligation to maintain or produce an administrative record for the innumerable decisions it makes when operating the Enterprises, FHFA anticipates plaintiffs will nevertheless demand that one be produced.

shareholder plaintiffs and their counsel are distributing the litigation in an effort to evade potentially binding precedent that would foreclose their ability to challenge the Third Amendment.[7] The letters received by the boards of directors of Fannie Mae and Freddie Mac, which threaten still more Third Amendment litigation, underscore the risk of further forum shopping and demonstrate that innumerable shareholder complaints could yet be filed in every district court in the nation. *See In re: Polar Bear Endangered Species Act*, 588 F. Supp. 2d at 1377 ("[O]ther related actions are soon likely to increase the complexity of the litigation. Accordingly, there are sufficient dynamics involved here that warrant our concern for overlapping and duplicative activity."). It is of no moment that there are presently only four Related Cases; more are likely to be filed and the Panel has transferred as few as two or three cases. *See, e.g.*, *In re Fresh & Process Potatoes Antitrust Litig.*, 744 F.Supp.2d 1381, 1382 (J.P.M.L. Oct. 13, 2010) (transferring two actions); *In re: BP p.l.c. Secs. Litig.*, 734 F.Supp.2d 1376, 1379 (J.P.M.L. 2010) (three pending actions); *In re Tramadol Hydrochloride Extended-Release Capsule Patent Litig.*, 672 F. Supp. 2d 1377, 1378 (J.P.M.L. 2010) (three pending actions).

The fact that the Related Cases remain in the early stages of litigation further supports transfer and coordination or consolidation pursuant to Section 1407. The first of the Related Cases was filed less than a year ago, *see Saxton* Compl. (filed May 28, 2015), and the latest, *Roberts*, was filed on February 10, 2016. No discovery has been taken in any of the actions, and neither FHFA nor Treasury has produced an administrative record. FHFA has moved, or will

[7] The actions within the Eighth Circuit are illustrative. The plaintiff in the Southern District of Iowa case, *Continental Western Insurance Co.*, 83 F. Supp. 3d 828, did not appeal the February 3, 2015 decision to the Eighth Circuit. On May 28, 2015, a mere three months later, plaintiffs filed *Saxton* in the immediately adjacent Northern District of Iowa.

soon move, to dismiss each of the complaints, but the courts have not yet ruled. Thus, no prejudice or inconvenience will result from transfer at this time.

C. The Panel Should Transfer All Related Cases to the U.S. District Court for the District of Columbia

The Panel should transfer the Related Cases to the U.S. District Court for the District of Columbia. That district was the venue for ten previous cases concerning the validity of the Third Amendment and therefore is familiar with the factual and legal questions in the Related Cases. *See Perry Capital LLC*, 70 F. Supp. 3d 208. *Perry* granted defendants' motions to dismiss; the decision is on appeal in the D.C. Circuit with argument set for April 15, 2016.[8]

Moreover, FHFA, Treasury, and Fannie Mae all have their headquarters in Washington, D.C., and Freddie Mac is headquartered in nearby McLean, Virginia. Thus, the relevant documents and decision-makers are all located in or near the district. *See In re TJX Companies, Inc. Customer Data Sec. Breach Litig.*, 493 F. Supp. 2d 1382, 1383 (J.P.M.L. 2007). Counsel for FHFA and Treasury are also located in Washington, and transfer would eliminate the need to travel to every location where Related Cases are pending or any other locale where shareholders may file additional copycat complaints. Transfer would not inconvenience potential witnesses because they are deposed "in proximity to where they reside," *In re Cuisinart Food Processor Antitrust Litig.*, 506 F. Supp. 651, 655 (J.P.M.L. 1981) (citing Fed. R. Civ. P. 45(d)(2)), and any potential witnesses most likely reside within a 50-mile range of the U.S. District Court for the District of Columbia's subpoena powers. *See* D.D.C. Local R. Civ. P. 30.1.

[8] Although FHFA is confident in the arguments it has presented on appeal, no one can be certain how the D.C. Circuit will rule. Thus, transfer to the District of Columbia would not predetermine the outcome of the cases.

CONCLUSION

For all the foregoing reasons, FHFA respectfully requests that the Panel coordinate or consolidate the Related Cases listed in the accompanying Schedule of Actions and transfer the cases to the U.S. District Court for the District of Columbia.

DATED: March 15, 2016

Respectfully submitted,

/S/ Howard N. Cayne

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BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION
In re: Third Amendment Litigation, MDL No. ___

SCHEDULE OF ACTIONS

Case Captions	Court	Civil Action No.	Judge
Plaintiffs David Jacobs Gary Hindes **Defendants** Federal National Mortgage Association Federal Home Loan Mortgage Corporation U.S. Department of the Treasury Federal Housing Finance Agency, as Conservator **Movant** Timothy Howard	D. Delaware	1:15-cv-00708	Gregory M. Sleet
Plaintiffs Christopher Roberts Thomas P. Fischer **Defendants** Federal Housing Finance Agency, as Conservator U.S. Department of the Treasury Melvin L. Watt, as Director of FHFA Jacob J. Lew, as Secretary of the Treasury	N.D. Illinois	1:16-cv-02107	Edmond E. Chang
Plaintiffs Thomas Saxton Ida Saxton Bradley Paynter **Defendants** Federal Housing Finance Agency, as Conservator Melvin L. Watt, as Director of FHFA U.S. Department of the Treasury **Amicus** Fairholme Funds, Inc. Investors Unite	N.D. Iowa	1:15-cv-00047	Linda R. Reade

Plaintiff Arnetia Joyce Robinson **Defendants** Federal Housing Finance Agency, as Conservator Melvin L. Watt, as Director of FHFA U.S. Department of the Treasury	E.D. Kentucky	7:15-cv-00109	Amul R. Thapar

EXHIBIT B

BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: FEDERAL HOUSING FINANCE AGENCY, *ET AL.*, PREFERRED STOCK PURCHASE AGREEMENTS THIRD AMENDMENT LITIGATION	MDL Docket No. 2713

FEDERAL HOUSING FINANCE AGENCY'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO TRANSFER FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS UNDER 28 U.S.C. § 1407

Each case proposed for transfer challenges a contract FHFA, acting as Conservator for Fannie Mae or Freddie Mac, entered with the U.S. Treasury—specifically, the Third Amendment to the Preferred Stock Purchase Agreements ("PSPAs") by which Treasury committed the hundreds of billions of dollars necessary to support the Enterprises after the financial crisis of 2008. As FHFA explained in its opening brief, the cases all involve plaintiffs with the *same* interests asserting the *same* claims arising out of the *same* transactions against the *same* defendants.

Plaintiffs do not seriously contest any of this. Their attempts to distinguish the cases from each other fail; the supposed distinctions are, at best, illusory and immaterial. Nor do Plaintiffs' arguments undermine the efficiency benefits that would flow from transfer. Plaintiffs argue that consolidation would be unjust, but that is wrong—allowing plaintiffs unlimited opportunities to relitigate the *same challenges* to the *same contracts* over and over and over again in numerous court around the country poses a greater risk of injustice. Plaintiffs also try to paint FHFA's arguments here as inconsistent with its opposition to MDL transfer in a different set of cases presenting different issues. Plaintiffs err. Transfer was not appropriate in that

litigation, so FHFA opposed it; transfer is proper here, so FHFA seeks it.

A. The Related Cases Raise Common Questions of Fact

As FHFA has explained, the Related Cases all involve common issues of fact.[1] The cases challenge the same transaction, and are all brought by similarly-situated Plaintiffs (Enterprise shareholders) against FHFA and Treasury. FHFA Br. at 3-6, 7. The Related Cases "focus on a significant number of common events" concerning the negotiation of, entry into, and effect of the Third Amendment on the Enterprises and their shareholders. *See In re Fed. Nat'l Mortg. Ass'n Sec. Derivative & "ERISA" Litig.*, 370 F. Supp. 2d 1359, 1361 (J.P.M.L. 2005).

For example, each of the operative complaints raises factual questions regarding the timing of the Third Amendment, and each plaintiff argues that FHFA and Treasury executed the Third Amendment when they knew, or should have known, that the Enterprises were entering a period of sustained profitability. *See, e.g.*, *Saxton* Am. Compl. ¶ 1; *Robinson* Am. Compl. ¶ 1; *Roberts* Compl. ¶ 1; *Jacobs* Compl. ¶ 9. They allege that FHFA agreed to the Third Amendment at Treasury's urging, and that the variable-rate dividend expropriates monies from the Enterprises and deprives Plaintiffs of the economic value of their shares. *See, e.g.*, *Saxton* Am. Compl. ¶¶ 14, 25; *Robinson* Am. Compl. ¶¶ 1, 25, 114, 157; *Roberts* Compl. ¶¶ 17, 25, 128, 134, 144; *Jacobs* Compl. ¶¶ 15, 46, 49, 157. These factual assertions—which FHFA and Treasury accept as true only for the purpose of their motions to dismiss—give rise to the substantially

[1] In two notices, FHFA has identified four additional related cases to be transferred as part of this multidistrict litigation. Not. of Related Actions (Mar. 28, 2016) (ECF No. 9) (noticing *Pagliara v. Fed. Nat'l Mortg. Ass'n*, No. 1:16-cv-00198 (D. Del.) and *Pagliara v. Fed. Home Loan Mortg. Corp.*, No. 1:16-cv-00337 (E.D. Va.)); Not. of Related Actions (Apr. 7, 2016) (ECF No. 22) (noticing *Edwards v. Deloitte & Touche LLP*, No. 1:16-cv-21221 (S.D. Fla.) and *Edwards v. PricewaterhouseCoopers, LLP*, No. 1:16-cv-21224 (S.D. Fla.)); FHFA Br. at 3 n.1, 6 n.4. Those four actions raise common legal questions regarding the Third Amendment and challenge, albeit indirectly, the Conservator's management of the Enterprises. None of the parties in those cases filed responses to FHFA's motion to transfer; therefore, they are not discussed in this Reply Brief. *See* R. P. U.S. J.P.M.L. 3.2(a)(iii) ("Each reply shall . . . address arguments raised in the response(s).").

similar claims each plaintiff presents and the substantially similar relief each seeks. *See* FHFA Br. at 4-6. Because the Related Cases all "assert comparable allegations against identical defendants based upon similar transactions and events," common questions of fact are presumed. *See In re Air W. Inc., Sec. Litig.*, 384 F. Supp. 609, 611 (J.P.M.L. 1974).

Presumptions aside, the parties fundamentally disagree about what happened and why. Robinson, joined by others, argues that FHFA has failed to identify "the specific factual disputes that will be material to the resolution of legal issues in each of the suits." Robinson Opp. at 6; *see* Saxton Opp. at 1 (joining and adopting the Robinson Opp.); Roberts Opp. at 1 (same). But Robinson's own brief identifies two such factual questions: *First*, Robinson concedes that there are "factual disputes . . . about the Defendants' *motive* for negotiating the Third Amendment." Robinson Opp. at 7. *Second*, Robinson incorrectly states that the impact of the Third Amendment on "Fannie and Freddie . . . shareholders[] [is] undisputed." Robinson Opp. at 7. While Plaintiffs argue that the Third Amendment has destroyed the economic value of Plaintiffs' shares, FHFA and Treasury do not concede that the Third Amendment had any material effect on their value, leaving causation as a disputed factual issue. Other factual disputes are surely lurking within the detailed factual allegations underlying each complaint: What was known, assumed, and projected by the parties? On what basis? With what degree of certainty?

Plaintiffs respond, in part, that there are no material factual questions because the resolution of the Related Cases would turn on the administrative records. Robinson Opp. at 5-7. Plaintiffs have it backwards. The Conservator asserts that it is under no obligation to maintain or to produce an administrative record. Plaintiffs are likely to contest the Conservator's position, generating a common question regarding the very facts that may or may not be before the court. Moreover, regardless of the record FHFA and/or Treasury may produce, Plaintiffs are likely to

challenge its adequacy and to seek additional discovery. *Cf. Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 225 (D.D.C. 2014) (noting that plaintiffs alleged that Treasury failed to produce the full administrative record); Order, *Cont'l W. Ins. Corp. v. FHFA*, No. 4:14-cv-00042 (S.D. Iowa Aug. 5 2014) (ECF No. 42) (production of an administrative record would prompt "inevitable disputes about its adequacy" and probable "requests for additional discovery").

Indeed, questions regarding the proper contents of the administrative record have already arisen. Roberts Plaintiffs contend that they "will rely on somewhat different administrative records" than the other Plaintiffs. Roberts Opp. at 2. The three issues that the Roberts Plaintiffs assert as unique—FHFA's decision to pay the dividends in cash, Treasury's purported control over the Enterprises, and the expiration of Treasury's authority to purchase new securities—are all raised in *Jacobs*, *Robinson*, and/or *Saxton*. *See, e.g.*, *Saxton* Am. Compl. ¶¶ 62, 99 (cash versus in-kind dividends); *id.* ¶¶ 23, 112, 139, 149, 160 (Treasury's purported control); *id.* ¶¶ 22, 100, 143 (expiration of Treasury's authority). There is, therefore, no need for any "unique administrative record." *See* Roberts Opp. at 2. Nonetheless, there is a genuine possibility that FHFA and Treasury may face varying rulings on whether they are required to produce an administrative record and, if so, what the administrative record must include. It is precisely these types of questions that weighed in favor of transfer in *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litigation*, 588, F. Supp. 2d 1376 (J.P.M.L. 2008), where the Panel cited disputes over "identification of the underlying administrative record" as a key reason for transfer. *Id.* at 1377. They similarly weigh in favor of transfer here.

B. Transfer Promotes the Efficient and Just Resolution of These Actions

1. Transfer Will Promote Judicial Economy and Avoid Duplicative Litigation

In the Related Cases, similarly situated shareholder plaintiffs assert substantially similar

factual allegations, bring nearly identical claims (asserted frequently in identical language), and request substantially similar relief. *See* FHFA Br. at 4-6. Resolving the many common factual and legal issues in a consolidated proceeding would plainly be in the interests of efficiency and judicial economy.

Plaintiffs' attempts to highlight purported differences between their actions—specifically their legal theories—do not override the fact that HERA (12 U.S.C. § 4617) disposes of Plaintiffs' claims. *See* Jacobs Opp. at 8-11 (arguing that the claims "are so distinct from the claims brought in the other [Related Cases] that consolidation would be neither convenient no efficient"); Roberts Opp. at 1-2 (identifying issues that are purportedly not raised by the other actions); Saxton Opp. at 5 (distinguishing Saxton's abandoned state law claims because they arise under common law while the state law claims in *Jacobs* purportedly arise under state statutes). "[T]he mere fact that divergent legal theories are asserted arising out of the same substantive claims and allegations presents no bar to a Section 1407 transfer." *In re. Air W. Secs. Litig.*, 384 F. Supp. at 611; *see also In re Bank of N.Y. Mellon Corp. Foreign Exch. Transactions Litig.*, 857 F. Supp. 2d 1371, 1372 (J.P.M.L. 2012) ("[T]he presence of different legal theories among the subject actions is not a bar to centralization.").

Plaintiffs all disagree with how the Conservator is operating the Enterprises: "FHFA is operating two of the largest financial companies in the world with no capital. Plaintiff Robinson, *along with the plaintiffs in the other actions*, maintains that this state of affairs is highly prejudicial to Congress's goal of stabilizing the housing and financial markets." Robinson Opp. at 17 (emphasis added). FHFA and Treasury contend that Congress has closed the doors on precisely those types of claims. Thus, despite some variation in Plaintiffs' legal theories, the resolution of all of the Related Cases will, at the pleadings stage, turn on two legal questions:

(1) whether Section 4617(f) deprives the district courts of the power to grant the declaratory and injunctive relief Plaintiffs seek, and (2) whether the Conservator's succession to "all rights, titles, powers, and privileges" of shareholders deprives Plaintiffs of their right to prosecute these actions during conservatorship. *See* 12 U.S.C. § 4617(b)(2)(A)(i), (f). Having a single transferee court decide those two dispositive issues will promote judicial economy and avoid inconsistent adjudications. *See In re Fed. Election Campaign Act Litig.*, 511 F. Supp. 821, 824 (J.P.M.L. 1979); *see also In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990) (noting "real economies in transferring" common jurisdictional issues). Transfer is particularly efficient here given the importance of the PSPAs to the conservatorships and the fact that the courts must construe HERA and the Enterprises' statutory charters. *See In re Dep't of Energy Stripper Well Exemption Litig.*, 472 F. Supp. 1282, 1285 (J.P.M.L. 1979); FHFA Br. at 8.

2. Transfer Is Just

Plaintiffs protest that transfer would be unjust because FHFA is purportedly forum shopping. *See, e.g.*, Roberts Opp. at 2-3; Jacobs Opp. at 14-15. But if anyone is forum shopping, it is Plaintiffs and other Enterprise shareholders, who have given every indication that they will repeatedly litigate the issues presented here in as many forums as it takes for them to garner a single victory. For example, when the *Southern* District of Iowa granted FHFA's and Treasury's motions to dismiss in *Continental Western Insurance Co.*, plaintiff did not appeal that decision. Instead, a new action was filed by Saxton Plaintiffs in the *Northern* District of Iowa. Similarly, Robinson Plaintiff brought her action in the Pikeville Division of the Eastern District of Kentucky, the forum where she resides but otherwise has little connection to the facts here.

Transferring these cases to the District of the District of Columbia will not deprive the Plaintiffs of their opportunity to litigate their claims. Plaintiffs contend that they are "entitled to a full and fair opportunity to present arguments based on those factual allegations before a judge

that has not already deemed them to be irrelevant." Saxton Opp. at 2; *see also* Roberts Opp. at 2-3 (same). This is a red herring. The district court ruling about which Plaintiffs are so troubled is subject to appeal that is yet to be argued, let alone decided.[2] Should the Panel transfer this action to the District of the District of Columbia, each Plaintiff will have a full and fair opportunity to present its arguments before the transferee court that will not have to start from scratch in order to understand the complex factual and legal framework that governs Plaintiffs' claims.

C. Transfer Would Be Convenient for the Parties and Witnesses

1. The District of the District of Columbia Is a Convenient Forum

The factual allegations all address events and occurrences within the Washington, D.C. metropolitan area. FHFA, Treasury, and Fannie Mae are all located in Washington, D.C., and Freddie Mac is headquartered in McLean, Virginia, a Washington, D.C. suburb. Should FHFA, Treasury, or Enterprise personnel be called to testify as witnesses, the overwhelming majority of them reside in the Washington, D.C. metropolitan area. *See In re Cuisinart Food Processor Antitrust Litig.*, 506 F. Supp. 651, 655 (J.P.M.L. 1981); D.D.C. Local R. Civ. P. 30.1 (describing D.D.C.'s 50-mile range subpoena powers). Likewise, any documents that would comprise the administrative record, should one be necessary, are located in or near Washington, D.C. *See In re TJX Companies, Inc. Customer Data Sec. Breach Litig.*, 493 F. Supp. 2d 1382, 1383 (J.P.M.L. 2007). Lead counsel for Defendants are likewise located in Washington, D.C. Thus, the District of the District of Columbia, rather than the Pikeville Division of the Eastern District of Kentucky, *see* Robinson Opp. at 17-18; Saxton Opp. at 2-4, is the most convenient jurisdiction.[3]

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[2] Oral argument in that appeal is scheduled for Friday, April 15, 2016.

[3] *See* Transfer Order, *In re Columbia/HCA Healthcare Corp. Qui Tam Litig. (No. II)*, MDL No. 1307, at 2 (J.P.M.L Dec. 1, 1999) (D.D.C. "is convenient for this litigation in terms of the current location of principal parties, documents, and counsel"); Transfer Order, *In re Pilot Flying J Fuel Rebate Contract Litigation (No. II)*, MDL No. 2515 (J.P.M.L. Apr. 7, 2014) (similar).

2. The Eastern District of Kentucky is Not an Appropriate Transferee Court

The Eastern District of Kentucky has very little connection to this action. The events and occurrences surrounding the Third Amendment did not occur in or near that district. Notwithstanding that, Plaintiffs contend that Pikeville would be the superior venue, purportedly because docket statistics suggest that Judge Thapar might handle the case with greater dispatch. The purported statistical comparison of Judge Lamberth's and Judge Thapar's record in MDL cases underlying Plaintiffs' contention—based as it is on a grand total of two dissimilar matters—is simplistic and unenlightening. *See* Saxton Opp. at 2-4. The varying timelines in *In re Columbia/HCA Healthcare Corp. Qui Tam Litig. (No. II)*, MDL No. 1307, and *In re Pilot Flying J Fuel Rebate Contract Litigation (No. II)*, MDL No. 2515, were not the result of judicial management. Rather, the two cases differed dramatically in scope and complexity.

In re Columbia/HCA, over which Judge Lamberth presided, consolidated 26 cases alleging a healthcare provider and/or its affiliates defrauded the U.S. government by making false claims for payment. Transfer Order, MDL No. 1307, ECF No. 39. Two features of that litigation likely prolonged it: (1) discovery in false claims litigation is voluminous and time-consuming, and (2) the Panel noted that the transferee judge would have to adjudicate numerous remand motions. *Id.* That is precisely what happened. Remand orders occupied Judge Lamberth from early 2003 until the end of the litigation in late 2008. By contrast, the MDL over which Judge Thapar presided, *In re Pilot Flying J*, involved only seven actions brought by plaintiffs who had opted out of a nationwide class settlement. Transfer Order, MDL No. 2515 (J.P.M.L. Apr. 7, 2014). An FBI investigation had already revealed the underlying facts and circumstances, and the class-action litigation developed much of the case. *Id.* The Panel's decision to transfer was largely based on avoiding the need for Pilot executives to sit for

repetitive depositions, *id.*, and Judge Thapar was already familiar with the factual and legal issues because he was presiding over related criminal proceedings. *Id.* Comparison of these two cases shows nothing. Moreover, Plaintiffs ignore a more reliable indication of how Judge Lamberth would manage an MDL proceeding here: in the 10 substantially similar cases decided in *Perry Capital*, his Honor ruled on dispositive motions four months after briefing concluded.

D. The *Transfer Tax* Litigation Is Readily Distinguished from the Related Cases

Plaintiffs extract several snippets from FHFA's brief opposing transfer in a *different* set of cases presenting vastly *different* issues—*In re Real Estate Transfer Tax Litigation*, 895 F. Supp. 2d 1350 (J.P.M.L. 2012) (mem.) (MDL No. 2394)—to argue transfer is not warranted here. Those cases are readily distinguished, and any reasonable comparison to this litigation demonstrates why transfer is appropriate here even though it was not appropriate there.

First, the *Transfer Tax* cases did not involve any factual disputes whatsoever.[4] All parties agreed on what had happened: Fannie Mae or Freddie Mac had sold real properties to which they had taken title through foreclosure proceedings, and various state and local taxing authorities argued that those transactions were subject to excise taxes on the transfer of ownership and/or recordation of the instruments effecting that transfer. The cases turned on a straightforward question of federal statutory interpretation and were essentially over upon the courts' resolution of that issue. *See Transfer Tax*, 895 F. Supp. 2d at 1350 ("This litigation revolves around a fairly straightforward dispute . . . as to whether the Enterprise[s] . . . are

[4] Whereas the complaints here approach 100 pages in length and run to nearly 200 paragraphs that are largely devoted to factual allegations, the *Transfer Tax* complaints were much shorter and focused on points of law. *See, e.g.*, Compl. *Fed. Nat'l Mortg. Ass'n v. Hamer*, No. 3:12-cv-50230 (N.D. Ill. filed June 22, 2012) (containing 15 pages and 52 paragraphs).

required to pay state and county taxes on the transfer of real estate.").[5] Not so here. For the purposes of their motions to dismiss, FHFA and Treasury will accept as true any well-plead, factual allegations in the Related Cases' complaints. However, the parties to the Related Cases have very different interpretations of what FHFA and Treasury did and why they did it. If FHFA's and Treasury's motions to dismiss are denied, disputes regarding the "factual" allegations in Plaintiffs' complaints are likely to become central to the litigation. Thus transfer is warranted here whereas it was not warranted in the *Transfer Tax* cases.

Second, the danger posed by inconsistent rulings is significantly greater here than it was in *Transfer Tax*. *Cf.* Robinson Opp. at 12-13 (quoting FHFA's briefing to the Panel in *Transfer Tax*); Jacobs Opp. at 10-11 (same). That litigation involved *different* taxes imposed by *different* states and localities. While every district court and court of appeals ultimately held FHFA and the Enterprises exempt, had the courts split, the Enterprises could have paid one jurisdiction's tax without paying another's. In other words, divergent merits rulings could have coexisted without creating inconsistent obligations.[6] Here, Plaintiffs all challenge the *same* contracts, seeking injunctive relief that cannot be limited to specific districts or circuits. Absent transfer, shareholders would have virtually unlimited opportunities to litigate the same issues over and over until they obtain their preferred relief; the risk of inconsistent obligations is extreme.

CONCLUSION

Transfer will be just, fair, efficient, and wise. The Panel should grant FHFA's motion.

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[5] FHFA made these points in *Transfer Tax*: "The central fact alleged in each action, that the Enterprises did not pay all transfer taxes Plaintiffs claim were due . . . , is *undisputed*," and "[t]he central *issue* . . . is a purely legal question that can readily and promptly be resolved without the need for any discovery." Enterprise Defs.' Opp., MDL No. 2394, at 7 (ECF No. 108).

[6] FHFA made this point in *Transfer Tax*: "[D]ivergent rulings would not create. . . inconsistent obligations . . . because the transfer taxes are owed on a county-by-county basis. In other words, it is highly unlikely that two or more courts could render the Enterprises simultaneously liable and not liable to the same municipality . . . ." *See* Enterprise Defs.' Opp. at 10.

Dated: April 13, 2016

Respectfully submitted,

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BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION
In re: Federal Housing Finance Agency, et al., Preferred Stock Purchase Agreements Third Amendment Litigation, MDL No. 2713

SCHEDULE OF ACTIONS

Case Captions	Court	Civil Action No.	Judge
Plaintiffs David Jacobs Gary Hindes **Defendants** Federal National Mortgage Association Federal Home Loan Mortgage Corporation U.S. Department of the Treasury Federal Housing Finance Agency, as Conservator **Movant** Timothy Howard	D. Delaware	1:15-cv-00708	Gregory M. Sleet
Plaintiffs Christopher Roberts Thomas P. Fischer **Defendants** Federal Housing Finance Agency, as Conservator U.S. Department of the Treasury Melvin L. Watt, as Director of FHFA Jacob J. Lew, as Secretary of the Treasury	N.D. Illinois	1:16-cv-02107	Edmond E. Chang
Plaintiffs Thomas Saxton Ida Saxton Bradley Paynter **Defendants** Federal Housing Finance Agency, as Conservator Melvin L. Watt, as Director of FHFA U.S. Department of the Treasury **Amicus** Fairholme Funds, Inc. Investors Unite	N.D. Iowa	1:15-cv-00047	Linda R. Reade

Plaintiff Arnetia Joyce Robinson **Defendants** Federal Housing Finance Agency, as Conservator Melvin L. Watt, as Director of FHFA U.S. Department of the Treasury	E.D. Kentucky	7:15-cv-00109	Amul R. Thapar
Plaintiff Timothy J. Pagliara **Defendant** Federal National Mortgage Association	D. Delaware, Wilmington	1:16-cv-00193	Gregory M. Sleet
Plaintiff Timothy J. Pagliara **Defendant** Federal Home Loan Mortgage Corporation	E.D. Virginia, Alexandria Division	1:16-cv-00337	James C. Cacheris
Plaintiffs Master Sgt. Anthony R. Edwards, USAF Gator Capital Management, LLC Perini Capital LLC Dr. Michael Pasternak Allen Harden Jim Humphries Ed Bieryla Doreen Bieryla Jay Huber Jorge Zapata Randy Webb Kevin Jarvis Catherine M. Jennings James Miller Sylvia Miller William Milton Jr. Carl R. Roberts Louise Strang Johnna B. Watson Ray B. O'Steen Melody Sullivan Amit Choksi Joseph K. Dughman Phil Miller Jean Mac Ball	S.D. Florida / Miami	1:16-cv-21221	Robert N. Scola, Jr.

Don R. Cameron II James Ferguson Gordon Inman Shaun Inman Jerry W. Sharber Jay Winer Michael Carmody Matt hill Joseph Waske Maryam Moinfar Jeffrey Langberg Barry West Wayne Olsen Rich Kivela Constance Lameier **Defendant** *Deloitte & Touche, LLP*			
Plaintiffs Master Sgt. Anthony R. Edwards, USAF Master Sgt. Salvatore Capaccio, USAF Gator Capital Management, LLC Perini Capital LLC Allen Harden Ed Bieryla Doreen Bieryla Jorge Zapata Hiren Patel Louise Strang Johnna B. Watson Melody Sullivan Amit Choksi Phil Miller James Ferguson Gordon Inman Shaun Inman Michael Carmody Matt Hill Joseph Waske Maryam Moinfar Wayne Olson Rich Kivela Chris Wossilek Mathew Reed	S.D. Florida / Miami	1:16-cv-21224	Federico A. Moreno

Defendant *PricewaterhouseCoopers, LLP*			

BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: FEDERAL HOUSING FINANCE AGENCY, *ET AL.*, PREFERRED STOCK PURCHASE AGREEMENTS THIRD AMENDMENT LITIGATION	MDL Docket No. 2713

PROOF OF SERVICE

I hereby certify that on April 13, 2016, I electronically filed the foregoing **FEDERAL HOUSING FINANCE AGENCY'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO TRANSFER FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS UNDER 28 U.S.C. § 1407** through this Panel's CM/ECF system. Notice of this filing will be served on all parties of record by operation of the ECF System.

/S/ Douglas M. Humphrey
Douglas M. Humphrey

Clerk of the Court, District of Delaware
Wilmington, DE

Clerk of the Court, Northern District of Illinois
Chicago, IL

Clerk of the Court, Northern District of Iowa
Cedar Rapids, IA

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Pikeville, KY

Clerk of the Court, Southern District of Florida
Miami, FL

Clerk of the Court, Eastern District of Virginia
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Jacobs v. Federal National Mortgage Association **D. Delaware, No. 1:15-cv-00708**	
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Roberts v. Federal Housing Finance Agency **N.D. Illinois, No. 1:16-CV-02107**	

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Robinson v. Federal Housing Finance Agency **E.D. Kentucky, No. 7:15-cv-00109**	

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Pagliara v. Federal Home Loan Mortgage Corporation **E.D. Virginia, No. 1:16-cv-00337**	
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Pagliara v. Federal National Mortgage Association **D. Delaware, No. 1:16-cv-00193**	

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Edwards v. Deloitte & Touche, LLP **S.D. Florida, No. 1:16-cv-21221**	
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Edwards v. PricewaterhouseCoopers, LLP **S.D. Florida, No. 1:16-cv-21224**	
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EXHIBIT C

UNITED STATES JUDICIAL PANEL
ON
MULTIDISTRICT LITIGATION

In re: Federal Housing Finance Agency, et al., Preferred Stock Purchase Agreements Third Amendment Litigation	MDL No. 2713 Chicago, Illinois May 26, 2016 11:55 a.m.

TRANSCRIPT OF ORAL ARGUMENT

Chair:	Honorable Sarah S. Vance United States District Court Eastern District of Louisiana
Members:	Honorable Marjorie O. Rendell (Recused) United States Court of Appeals Third Circuit
	Honorable Charles R. Breyer United States District Court Northern District of California
	Honorable Ellen Segal Huvelle United States District Court District of District of Columbia
	Honorable R. David Proctor United States District Court Northern District of Alabama
Official Court Reporter:	Nancy L. Bistany, CSR, RPR, FCRR 219 South Dearborn, Room 1706 Chicago, Illinois 60604 (312) 435-7626 nancy_bistany@ilnd.uscourts.gov

Oral Argument:

By: Mr. Michael A.F. Johnson
Arnold & Porter LLP
For: Federal Housing Finance Agency and Melvin L. Watt

By: Mr. Thomas D. Zimpleman
Department of Justice, Federal Programs Branch
For: U.S. Department of the Treasury and
Secretary Jacob Lew

By: Mr. Robert B. Craig
Taft Stettinius & Hollister LLP
For: Arnetia Joyce Robinson, et al.

By: Mr. Michael A. Pittenger
Potter Anderson & Corroon LLP
For: David Jacobs, et al.

(Proceedings heard in open court:)

JUDGE VANCE: Next up, No. 2713, In re: Federal Housing Finance Agency, Preferred Stock Purchase Agreements Third Amendment Litigation.

And Mr. Johnson.

MR. JOHNSON: Thank you, Chair Vance, Your Honors.

The Panel should grant our petition to transfer and coordinate challenges brought by similarly situated shareholders of Fannie Mae and Freddie Mac, challenges against the same contracts, contracts which the Federal Housing Finance Agency, acting as conservator, entered into with the United States Treasury to support Fannie Mae and Freddie Mac.

The petition covers four actions. There are already four additional actions covering the same subject matter, and we have every reason to believe --

JUDGE VANCE: What are the common questions in this case from case to case that are factual that would require discovery?

MR. JOHNSON: Common questions of fact pervade the complaints, Your Honor. They run the entire gamut of what happened and why. What happened and why, and let me break that down a little bit.

The "what happened" is, was this a reasonable business deal or was it a give-away? Plaintiffs allege

repeatedly, no consideration, nothing of value exchanged, corporate waste. So on one hand, there's an allegation that this was a gift, a give-away.

We reject that entirely, absolutely dispute that. What happened here was a reasonable exercise of the conservator's business discretion. It was a reasonable deal.

JUDGE VANCE: What discovery is involved in that?

MR. JOHNSON: What discovery is involved in that is looking at the history of the deal, if we get to that point. Of course we have motions to dismiss pending that challenge jurisdiction and would challenge the ability to state a claim if we got past jurisdiction.

JUDGE VANCE: The plaintiffs say that all the discovery they need is what's in the administrative record and what they can get from this Court of Claims case, which they already have. And they don't want discovery outside of those matters, so there's not discovery to be coordinated.

What is your answer to that?

MR. JOHNSON: Well, what we've -- what we've seen is selective snippets from the volume of documents that present various perspectives on facts that would need to be developed in their entirety --

JUDGE VANCE: I'm sorry.

MR. JOHNSON: -- if this case were ever to go to

the merits.

JUDGE HUVELLE: I thought three of these cases were APA cases. Aren't you bound by the record?

MR. JOHNSON: Well, we would have disputes about the adequacy and completeness of the record. That's exactly what the Panel looked at in the polar bear case that we cite.

And here we've already got plaintiffs saying there are issues with the record. We're seeing plaintiffs relying on materials that couldn't possibly be part of an appropriate administrative record because they quote material that was developed after the events at issue took place.

For example, they got some depositions in the takings case in the Court of Federal Claims, and they're touting various excerpts from those depositions as --

JUDGE VANCE: What is the status of those cases? And are you seeking to have the Court of Claims cases part of this?

MR. JOHNSON: No, the Court of Federal Claims cases aren't -- they're not in a district court, and we didn't propose them for MDL treatment. Under the Tucker Act, I don't --

JUDGE VANCE: I don't think you can move them.

MR. JOHNSON: -- I don't even think they could be.

JUDGE VANCE: Okay.

MR. JOHNSON: So the common questions of fact pervade the case. What happened? Why? Not only did they mischaracterize what happened, what were the terms of the deal, but they say FHFA entered into the deal at the insistence and direction of the U.S. Treasury, not based on its own independent business judgment.

And so, of course, there would need to be discovery into what the decision-makers were thinking, what information was before them, how did they analyze it, if we ever get to the merits?

JUDGE HUVELLE: Do you concede that they are entitled to discovery, or are you arguing that the administrative record stands?

MR. JOHNSON: Well, we -- our primary challenge is to subject matter jurisdiction, and so as --

JUDGE PROCTOR: So you'd want all that in the District of Columbia at the District Court level?

MR. JOHNSON: Yes, we do.

JUDGE PROCTOR: In the D.C. Circuit?

MR. JOHNSON: Correct.

JUDGE PROCTOR: Oral argument has been held?

MR. JOHNSON: Yes.

JUDGE PROCTOR: Does that have anything to do with your requesting a transfer to the D.C. District Court?

MR. JOHNSON: No, Your Honor. It's -- look, it's a coincidence. And I understand the optic, that it appears to favor our position. There's -- nobody could stand here and say that optic isn't present.

But when the Panel thinks about convenience and efficiency factors, it has to look at what is the focal point of the litigation? What is the center of gravity?

Now, ten plaintiffs brought cases before any of these. They all brought them in the District of Columbia. They brought them in the District of Columbia for a very good reason. The U.S. Treasury is in the District of Columbia. FHFA is in the District of Columbia. Fannie Mae is in the District of Columbia. Freddie Mac is in a close suburb of the District of Columbia. So there's no question but that the focal point of this litigation is the District of Columbia.

Now, our interest --

JUDGE HUVELLE: Isn't there some serious legal issues, like issue preclusion, here? I know that you prevailed in one. But, I mean, you don't even have to wait until the D.C. Circuit rules, but it won't be long if it's been argued.

Isn't that going to decide the issue, to the extent it is a factual issue, which you insist it is?

MR. JOHNSON: I'm not sure I understood Your

Honor's question, and I apologize for that. But I think the gist of it is whether the outcome is preordained here. It's clearly not. We don't know how the District of Columbia is going to rule. Plaintiffs --

JUDGE HUVELLE: Well, they've ruled. Judge Lamberth has ruled. And it's my understanding that a court in Iowa has said we're not going to revisit it. It's been issued. It's collaterally estopped.

MR. JOHNSON: For --

JUDGE HUVELLE: And so to the extent there are factual issues and those have been decided in D.C., I don't understand where the benefit of centralization comes.

MR. JOHNSON: Oh, the benefit of centralization comes from the same factors that were present in the Federal Election Campaign Act, which we cite in our briefs, and the *Tribune Company Fraudulent Conveyance* case which the Panel more recently transferred and consolidated. Even where jurisdictional challenges are pending, dispositive legal challenge is based on subject matter jurisdiction in each of those cases.

As the court said in Federal Election Campaign Act, there is a salutatory effect of avoiding inconsistent adjudication of subject matter jurisdiction issues. In *Tribune Company*, the defendants raise jurisdiction -- can raise jurisdiction in the transferee court.

Having that issue decided by a single judge is the most efficient way --

JUDGE VANCE: But we don't make MDLs to avoid jurisdictional questions.

We create MDLs to avoid disputes over discovery and overlapping discovery decisions, overlapping class questions.

And we're trying to figure out what of that nature is involved here, and I keep harkening back to the plaintiffs telling us they don't want discovery other than what they've already got or could get out of the administrative record and that some of these state corporate law cases are nondiscovery cases that are legal issues.

So I'm trying to figure out what's the -- what are we going to coordinate other than jurisdictional motions?

MR. JOHNSON: So we're going to coordinate what happens after the jurisdictional issues are decided if they're decided against us. Of course, we hope and expect to prevail on the jurisdiction, but that's not what the --

JUDGE VANCE: If we don't send this to D.C., do you still want it centralized?

MR. JOHNSON: Yes --

JUDGE VANCE: And where do you want it?

MR. JOHNSON: -- our interest is in centralization somewhere. That's -- the efficiency and convenience will be

realized if they're centralized anywhere. But once we're at the point where we're talking about centralization, it seems obvious, with great respect to my friends, that the focal point, the center of gravity, the nexus of these cases is in the District of Columbia.

JUDGE HUVELLE: Right, but we're not quite there yet; is that correct? There's some hurdles that have to be overcome until we get to the point that we're at issues that are common factual issues.

MR. JOHNSON: No, Your Honor, we --

JUDGE HUVELLE: There's going to have to be a jurisdictional resolution before you get to the facts.

MR. JOHNSON: Yes, just as there had to be in the Federal Election Campaign Act case and in the *Tribune Company Fraudulent Conveyance* case, each of those -- the *Tribune Company*, as I read the Panel's decision, every action had a challenge to subject matter jurisdiction.

And so the lay-up of that case appears to be on all fours here.

JUDGE VANCE: We have other cases where subject matter jurisdiction was an issue, and we said we're not centralizing it. So I don't think that that's the be all and end all of the centralization case here.

MR. JOHNSON: Well, Your Honor, I think that the efficiency interests are so strong here because the people

who would be subject to juris -- to discovery if the case went into the merits are former government officials, very senior ones, at Treasury and at the White House.

JUDGE VANCE: So? I mean, there are executives all over the United States who are subject to discovery.

MR. JOHNSON: Yes, but there will be delicate issues of governmental privilege involved in the document discovery and in the depositions. And the risk, and should the risk materialize, the troublesome result would be so much greater for --

JUDGE VANCE: How do they get depositions in an APA case?

MR. JOHNSON: In a -- pardon me?

JUDGE VANCE: How do they get depositions in an APA case?

MR. JOHNSON: By contending that the administrative record is insufficient. And then if -- if we get to the point where the agency tenders a declaration to supplement the record, I assume -- I can't predict with certainty -- but I assume they would assist on trying to depose those witnesses. They might not be able to. One judge might say, very strictly, under the APA, no discovery. A different judge might grant more leeway. That's --

JUDGE VANCE: All right. We have your argument. I think we have another government lawyer who is going to

argue. He can clean up for you.

MR. JOHNSON: Thank you, Your Honor.

MR. ZIMPLEMAN: Thank you, Your Honor. Tom Zimpleman. I'm here on behalf of the Department of the Treasury.

We have filed a response in support of FHFA's motion to centralize. I just want to very briefly emphasize one point here.

As counsel for FHFA stated, one factor that this Court has looked at in consolidating APA claims in the past is whether there's the possibility of duplicative litigation over the designation of the administrative record. And what I want to emphasize is, there were related cases that were filed first in D.C., a series of ten cases, and then the *Continental Western* case, which was filed in the Southern District of Iowa.

In the D.C. case, there was a motion challenging the designation of the administrative record. That motion sought supplementation as well as extra record discovery, so it wouldn't be just adding documents to the record. It could potentially be discovery.

In *Continental Western*, the court also --

JUDGE HUVELLE: What was the ruling?

MR. ZIMPLEMAN: Judge Lamberth dismissed the motion as moot based on his dismissal of the complaint as a

matter of law.

JUDGE HUVELLE: I see. So, I mean, you may never get to this issue. There seems to be a lot of hypotheticals that you don't get to it.

He dismissed it on what grounds?

MR. ZIMPLEMAN: He dismissed it for lack of subject matter jurisdiction, at least for the claims with respect to Treasury.

JUDGE HUVELLE: Based on without having to worry about the record?

MR. ZIMPLEMAN: Exactly, Your Honor, without having to worry about the administrative record.

But, again, for the reasons that counsel for FHFA stated, we do believe in the event that these cases get past the jurisdictional questions, there are disputes of fact that underlay these claims that would have to be sorted out. That's likely to play out in the form of, you know, duplicative litigation between these districts over which documents need to be added to the record or, you know, what other discovery might be appropriate.

JUDGE VANCE: All right. Thank you.

MR. ZIMPLEMAN: Thank you.

JUDGE VANCE: Thank you very much.

Next up, Mr. Craig.

MR. CRAIG: Good morning, Your Honors. My name is

Rob Craig. I represent Joyce Robinson, who filed a case in the Eastern District of Kentucky; also appearing on behalf of the other two APA or plaintiffs in the other two APA cases.

Quite simply, Judge Vance, what you identified as the issue is there's not going to be a need for any discovery in this case.

JUDGE BREYER: So you're satisfied -- you're telling us that you're satisfied with the record -- the administrative record as it stands. You're not going to seek any discovery of any kind with respect to going outside that record. That's your representation?

MR. CRAIG: I can honestly tell the Court that that is my intent right now, is that we are able -- we've been cooperating. I'm admitted to get documents from the Court of Federal Claims under their protective order, and I've had access to that. That helped me to draft my amended complaint.

Last week we worked with counsel for the government agencies to lift the protective order as to certain documents that were identified in the amended complaint so that we could unseal the amended complaint. That happened yesterday, and we filed a notice with the court yesterday that my -- that the complaint in my case is unsealed.

That's our intent. We've been able to utilize what's being done in the Court of Federal Claims. Judge Sweeney's case is way in front, so we don't expect it. And we're only talking about three APA cases.

JUDGE VANCE: Is the state of the financial condition of Fannie and Freddie at issue in your case, and is the proof -- is that an issue?

MR. CRAIG: In terms of what the Panel is interested in, the answer to that would be no, because there's no argument about -- it's all a matter of public record. Everybody knows what the --

JUDGE VANCE: That's what I'm questioning.

MR. CRAIG: Yes, Your Honor.

So it will be a factual issue on the merits later on or it might be in terms of what inferences might you derive from the administrative record but --

JUDGE VANCE: But is that an administrative record question as to what the financial condition of Fannie and Freddie were at the time this amendment was adopted?

MR. CRAIG: Absolutely. There's no discovery that's needed in order to make a determination of that. So that's one of the principal reasons why we believe that it really doesn't make any sense. There's no efficiency to be gained in this case.

JUDGE VANCE: Then how do you prove motive? I

mean, do you prove the motive with documents or you have depositions?

MR. CRAIG: Well, some of the unsealed documents show that at a time when Treasury and the FHFA were representing that Fannie and Freddie were in a death spiral, in fact they were receiving information from their accountants that was telling them that they were about to generate tremendous profits which would -- in fact, they had turned the corner and which would enable them to become profitable, which they did, which they have done.

That's all a matter of the administrative record, and now it's starting to become part of the public record as Judge Sweeney is beginning to release those documents to the public.

JUDGE HUVELLE: What is the subject matter jurisdiction argument that -- does it belong in District Court? It belongs in the Court of Claims?

MR. CRAIG: So there's some provisions in HERA that relate to whether or not plaintiffs can bring certain types of suits. Those are purely legal questions. Those are legal questions.

JUDGE HUVELLE: And they're going to have to be -- they've been decided once, and they're going to have to be decided again and again, right?

MR. CRAIG: Well, that's kind of --

JUDGE HUVELLE: I agree that they're legal.

MR. CRAIG: They're legal questions, and that's kind of the way Congress wants it to be.

JUDGE HUVELLE: Yeah.

MR. CRAIG: Congress wants these cases, big important issues, to be addressed to percolate up. So if there is a disagreement, if there is a division, there's a Supreme Court that's there to address and probably would. If there's a circuit split --

JUDGE HUVELLE: You mean four to four?

MR. CRAIG: Pardon?

JUDGE HUVELLE: Four to four?

MR. CRAIG: That, too.

JUDGE VANCE: That doesn't impose -- even if there are different jurisdictional determinations, that doesn't impose inconsistent obligations on the defendants. It just means they've got to go forward in some and not in others, but they won't be doing two conflicting things at the same time.

MR. CRAIG: Exactly. What we're talking about right now is just jurisdiction. So it wouldn't be a big -- sorry. It wouldn't be a big deal if one court were to rule one way and one court were to rule another. It wouldn't place a big burden on the government.

And, again, that's kind of the way it's set up

with the venue statute for administrative challenges.

JUDGE VANCE: All right. Thank you.

MR. CRAIG: Thank you, Your Honors.

JUDGE VANCE: We have one more argument. Mr. Pittenger.

MR. PITTENGER: Good afternoon, Your Honors. I'm Mike Pittenger on behalf of plaintiffs David Jacobs and Gary Hindes in the District of Delaware action.

I would like to take just a moment to explain why the Delaware case, the Jacobs case, is unique and why it's a particularly poor candidate for transfer.

JUDGE PROCTOR: What were the circumstances behind Timothy Howard moving as an amicus to ensure that the court in your district had a full understanding of the relevant details concerning the placement of the companies into conservatorship?

MR. PITTENGER: I don't know of those circumstances. I do know that I was informed that he -- that he wanted to file an amicus brief. I've never spoken to him. And they did ask for recommendations of Delaware counsel, but that was the only --

JUDGE PROCTOR: Would that be expanding discovery outside the administrative record if that was granted?

MR. PITTENGER: We don't have -- we don't have an APA case in Delaware. We don't -- our case in Delaware is

now limited to claims that the net worth sweep is invalid as a statutory matter for dividends under Delaware and Virginia law. That is now the only claim in the case.

Last week we informed the defendants that we were, as soon as the stay is lifted --

JUDGE PROCTOR: You're seeking certification of those questions to various state courts?

MR. PITTENGER: Yes, we're seeking certification. That motion has been fully briefed and seeking certification of that state law question, which requires no discovery, to the Supreme Courts of Delaware and Virginia.

It requires no discovery because it's a purely legal issue based on the language of the net worth sweep dividend language in the certificates of designation.

JUDGE VANCE: All right. Thank you, sir.

MR. PITTENGER: Thank you, Your Honors.

(Proceedings concluded at 12:13 p.m.)

C E R T I F I C A T E

I, Nancy L. Bistany, certify that the foregoing is a complete, true, and accurate transcript, to the best of my ability and understanding, from the record of proceedings on May 26, 2016, in the above-entitled matter.

/s/ Nancy L. Bistany, CSR, RPR, FCRR June 8, 2016

Official Court Reporter Date

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TIMOTHY J. PAGLIARA, Plaintiff, v. FEDERAL HOME LOAN MORTGAGE CORPORATION, Defendant.	)	Case No. 1:16-cv-337 (JCC/JFA)

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Timothy J. Pagliara, by counsel, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the final judgment and order dismissing Plaintiff's Complaint for Inspection of Corporate Records against the Federal Home Loan Mortgage Corporation, which was entered in this action on the 23rd day of August, 2016.

Respectfully submitted,

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Dated: September 21, 2016

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2016, a true and complete copy of the foregoing Notice of Appeal was filed via the court's CM/ECF system and notice of electronic filing was sent to the following counsel of record:

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In addition, a copy of the foregoing was served via electronic mail on the following:

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EXHIBIT E

No. 14-5243 (Consolidated with 14-5254, 14-5260, 14-5262)

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

PERRY CAPITAL, LLC, *et al.*,
Plaintiffs-Appellants,

v.

JACOB J. LEW, in his official capacity as the Secretary of the Department of the Treasury, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLEES FEDERAL HOUSING FINANCE AGENCY, MELVIN L. WATT, FANNIE MAE, AND FREDDIE MAC

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28, Appellees the Federal Housing Finance Agency ("FHFA"); Melvin L. Watt, in his official capacity as the Director of FHFA, as Conservator for the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac," together with Fannie Mae, the "Enterprises"); Fannie Mae; and Freddie Mac, state as follows:

1. Parties and *Amici*

Plaintiffs-Appellants ("Plaintiffs") in these consolidated cases are:

- Perry Capital, LLC, for and on behalf of investment funds for which it acts as investment manager (14-5243);
- Fairholme Funds, Inc., on behalf of its series, the Fairholme Fund (14-5254);
- Fairholme Fund, a series of Fairholme Funds, Inc. (14-5254);
- Berkley Insurance Company (14-5254);
- Acadia Insurance Company (14-5254);
- Admiral Indemnity Company (14-5254);
- Admiral Insurance Company (14-5254);
- Berkley Regional Insurance Company (14-5254);
- Carolina Casualty Insurance Company (14- 5254);
- Midwest Employers Casualty Insurance Company (14-5254);

- Nautilus Insurance Company (14-5254);
- Preferred Employers Insurance Company (14-5254);
- Arrowood Indemnity Company (14-5260);
- Arrowood Surplus Lines Insurance Company (14-5260);
- Financial Structures Limited (14-5260);
- Melvin Bareiss (14-5262);
- Joseph Cacciapelle (14-5262);
- John Cane (14-5262);
- Francis J. Dennis, derivatively on behalf of the Federal National Mortgage Association (14-5262);
- Michelle M. Miller (14-5262);
- Marneu Holdings Co., derivatively on behalf of the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation (14-5262);
- United Equities Commodities, Co. (14-5262);
- 111 John Realty Corp., derivatively on behalf of the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation (14-5262).

Listed as Plaintiffs-Appellees on the Court's docket for No. 14-5262 are Mary Meiya Liao; American European Insurance Company; Barry P. Borodkin; and Barry P. Borodkin Sep Ira. It appears that these parties should be designated as Plaintiffs-Appellants, since they are part of the Consolidated Class Action and Derivative Plaintiffs that filed both the Consolidated Amended Complaint and the Notice of Appeal in the district court under Case No. 1:13-mc-1288.

Defendants-Appellees ("Defendants") in these consolidated cases are:

- Jacob J. Lew, in his official capacity as the Secretary of the Department of the Treasury (14-5243, 14-5260, 14-5262);
- Melvin L. Watt, in his official capacity as the Director of the Federal Housing Finance Agency (14-5243, 14-5254, 14-5260);
- United States Department of the Treasury (14-5243, 14-5254, 14-5260, 14-5262);
- Federal Housing Finance Agency (14-5243, 14-5254, 14-5260, 14-5262);
- Federal National Mortgage Association (14-5260, 14-5262);
- Federal Home Loan Mortgage Corporation (14-5260, 14-5262).

No *amici* appeared in the district court.

The following parties have appeared before this Court as *amici*:

- 60 Plus Association, Inc. (14-5243, 14-5254, 14-5260, 14-5262);
- Center For Individual Freedom (14-5243, 14-5254, 14-5260, 14-5262);
- Timothy Howard (14-5243, 14-5254, 14-5260, 14-5262);
- Independent Community Bankers of America, the Association of Mortgage Investors, William H. Isaac, and Robert H. Hartheimer (14-5243, 14-5254, 14-5260, 14-5262);
- Investors Unite (14-5243, 14-5254, 14-5260, 14-5262);

- Jonathan R. Macey (14-5243);
- National Black Chamber of Commerce (14-5243, 14-5254, 14-5260, 14-5262);
- Louise Rafter, Josephine and Stephen Rattien, and Pershing Square Capital Management, L.P. (14-5243, 14-5254, 14-5260, 14-5262).

As an individual and an independent federal agency, Mr. Watt and FHFA are not required to file corporate disclosure statements under Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1.

Fannie Mae is a government-sponsored enterprise chartered by Congress to "establish secondary market facilities for residential mortgages," to "provide stability in the secondary market for residential mortgages," and to "promote access to mortgage credit throughout the Nation." 12 U.S.C. § 1716(1), (4). Fannie Mae has no parent corporation, and it is a publicly traded company. According to SEC filings, no publicly held corporation owns more than 10% of Fannie Mae's common stock.

Freddie Mac is a government-sponsored enterprise chartered by Congress "to promote access to mortgage credit throughout the Nation." 12 U.S.C. § 1451 note. Freddie Mac has no parent corporation. It is a publicly traded company and, according to public securities filings, no publicly held corporation owns 10% or more of Freddie Mac's common stock.

2. Rulings Under Review

Plaintiffs-Appellants seek review of (1) the Memorandum Opinion and Order entered on September 30, 2014, by the Honorable District Court Judge Royce Lamberth granting Defendants-Appellees' motion to dismiss (available at *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014)); and (2) the Order Denying Plaintiffs-Appellants' Motion for Supplementation of the Administrative Record, Limited Discovery, Suspension of Briefing on the Defendants' Dispositive Motions, and a Status Conference, also entered on September 30, 2014.

3. Related Cases

This case has not previously been before this or any other Court besides the district court.

Appellees know of no "related cases," as that term is defined by this D.C. Circuit Rule 28(a)(1)(C), pending in other federal appellate courts or any other court in the District of Columbia.

There are multiple cases involving similar issues and parties pending in the United States Court of Federal Claims: *Washington Fed. v. United States*, No. 13-385C (Fed. Cl. filed Jun. 10, 2013); *Fairholme Funds, Inc. v. United States*, No. 13-465C (Fed. Cl. filed Jul. 9, 2013); *Cacciapalle v. United States*, No. 13-466C (Fed. Cl. filed Jul. 10, 2013); *American European Ins. Co. v. United States*, No. 13-496C (Fed. Cl. filed Jul. 19, 2013); *Arrowood Indemnity Co. v. United States*,

No. 13-698C (Fed. Cl. filed Sept. 18, 2013); *Dennis v. United States*, No. 13-542C (Fed. Cl. filed Aug. 5, 2013); *Fisher v. United States*, No. 13-608C (Fed. Cl. filed Aug. 26, 2013); *Reid v. United States*, No. 14-152C (Fed. Cl. filed Feb. 26, 2014); and *Rafter v. United States*, No. 14-740C (Fed. Cl. filed Aug. 14, 2014). *Cacciapall*e, *American European Insurance*, and *Dennis* have been consolidated, and *Cacciapalle* has been designated as a putative class action.

Additionally, cases raising similar issues are pending in the United States District Courts for the Northern District of Iowa (*Saxton v. FHFA*, No. 1:15-cv-00047 (N.D. Iowa filed May 28, 2015)), the District of Delaware (*Jacobs v. Fed. Nat'l Mortg. Ass'n*, No. 15-cv-00708 (D. Del. filed Aug. 17, 2015)), and the Eastern District of Kentucky (*Robinson v. FHFA*, No. 7:15-cv-00109 (E.D. Ky. filed Oct. 23, 2015)).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

*Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Other Authorities

recapitalization and release of the Enterprises from conservatorship is inappropriate).

II. HERA's Succession Provision Bars Plaintiffs' Complaints

Plaintiffs' complaints are barred for the separate and independent reason that the Conservator succeeded by operation of law to "***all*** rights, titles, powers, and privileges" of the Enterprises and their shareholders. *Id.* § 4617(b)(2)(A)(i) (emphasis added). Plaintiffs' claims—whether considered derivative (which they are), or direct (as Plaintiffs wrongly contend) —depend on their "rights, titles, powers and privileges" as shareholders, all of which now reside with the Conservator. Accordingly, under HERA, Plaintiffs' claims are not theirs to bring; the Conservator has succeeded to them.

A. Under *Kellmer*, HERA Bars All Shareholder Derivative Claims

Upon its appointment, the Conservator "immediately succeed[ed] to…***all rights, titles, powers, and privileges*** of the [Enterprises], and ***of any stockholder***, officer, or director ***of [the Enterprises]*** with respect to the [Enterprises] and the assets of the [Enterprises]." *Id.* § 4617(b)(2)(A) (emphases added). This Court has held that the succession provision of HERA "***plainly transfers shareholders' ability to bring derivative suits—a 'right[ ], title[ ], power[ ], [or] privilege[ ]'—to FHFA***," *Kellmer*, 674 F.3d at 850 (emphasis added) (alterations in original), and that Congress intended to "***transfer[] everything it could to the [conservator]***" and

to ensure "that nothing was missed." *Id.* at 851 (quoting *Pareto v. FDIC*, 139 F.3d 696, 700 (9th Cir. 1998)) (emphasis added) (first alteration added).[11]

Here, the district court correctly applied the plain statutory text and this Court's ruling in *Kellmer* to hold that HERA bars Plaintiffs' common-law claims. Dkt.51, at 27 (JA__). Plaintiffs nonetheless contend that the district court erred in two ways: First, the Class Plaintiffs (but not the Institutional Plaintiffs) maintain that *one* of their claims against *one* of the Enterprises is both derivative and direct, and thus is not governed by *Kellmer*. Second, Plaintiffs argue for a conflict-of-interest exception to the statute that would enable the shareholders to pursue their claims. Plaintiffs are wrong on both counts.

B. The Class Plaintiffs' Fiduciary Duty Claim Is Derivative, Not Direct, and Thus *Kellmer* Applies

The Class Plaintiffs argue that the district court erred by considering their fiduciary duty claim as "solely derivative." Class Br. 21. The Class Plaintiffs maintain that, "with respect to the Fannie Mae Third Amendment" (but not the Freddie Mac Third Amendment), they asserted a fiduciary-duty claim that is

[11] Other courts are in accord. *See La. Mun. Police Emps. Ret. Sys.*, 434 F. App'x at 191 (affirming substitution of the Conservator in place of shareholder derivative plaintiffs because the "the plain meaning of the statute is that *all* rights previously held by Freddie Mac's stockholders, including the right to sue derivatively, now belong exclusively to the [FHFA]") (citation omitted); *Esther Sadowsky Testamentary Trust v. Syron*, 639 F. Supp. 2d 347, 351 (S.D.N.Y. 2009) (similar).

simultaneously derivative (addressing alleged harm to Fannie Mae) and direct (addressing alleged harm to shareholders). Class Br. 22. This is incorrect.[12]

As an initial matter, Class Plaintiffs waived any argument that their breach of fiduciary duty claim is direct (or both derivative and direct) by failing to make it before the district court. *See United States v. Stover*, 329 F.3d 859, 872 (D.C. Cir. 2003). In fact, Class Plaintiffs' complaint repeatedly alleges that their fiduciary-duty claim is "derivative," Class Compl. ¶¶ 3, 134, 138 (JA __),[13] and they *conceded* below that their fiduciary duty claim was "derivative," not direct. *See* Class Op. at 32-35 (JA __). Because Class Plaintiffs never argued to the district court that their fiduciary duty claim was direct (or both derivative and direct), and in fact argued the opposite, Class Plaintiffs waived the argument.

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[12] No party challenges the district court's rulings that (a) the Institutional Plaintiffs' breach of fiduciary duty claims were derivative (Dkt.51, at n.24 (JA__)); and (b) all Plaintiffs' contract and implied covenant claims were derivative (Dkt.51, at 35 n.39, 40 n.45 (JA__)). Thus, but for Class Plaintiffs' breach of fiduciary duty claim as to Fannie Mae, *all* of Plaintiffs' common law claims have been finally determined to be derivative. Any attempt by Plaintiffs to challenge those rulings for the first time in their reply briefs would be improper. *See Ihebereme v. Capital One, N.A.*, 573 F. App'x 2, 3 (D.C. Cir. 2014) ("declin[ing] to consider appellant's arguments, raised for the first time on appeal in his reply brief").

[13] *See also, e.g.* Class Compl. ¶ 3 (JA__) ("This is also a *derivative action* brought by [the Class] Plaintiffs *on behalf of Fannie Mae*…for breach of fiduciary duty.") (emphasis added); *id.* ¶ 27 ("[T]his action also seeks [relief] derivatively on behalf of Fannie Mae" for alleged breach of fiduciary duty.); *id.* ¶ 129 ("With respect to Count VII hereof, Plaintiffs bring action derivatively on behalf of and for the benefit of Fannie Mae… [for] the breaches of fiduciary duty alleged herein."); *id.* ¶ 134 (describing breach of fiduciary duty as "the derivative claim alleged herein"); *id.* ¶ 138 (describing "*the derivative claim* for breach of fiduciary duty") (emphasis added).

In all events, Class Plaintiffs' breach of fiduciary duty claim is derivative, not direct, under the two-prong test set out in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).[14]

The first *Tooley* prong requires the Court to consider "who suffered the alleged harm (the corporation or the suing stockholders, individually)." *Id.* at 1033. In analyzing this prong, courts consider whether the shareholder's alleged injury is "independent of any alleged injury to the corporation," and whether the shareholder "can prevail *without* showing an injury to the corporation." *Id.* at 1039 (emphasis added). Here, Plaintiffs *specifically allege* injury to the corporation, framing their fiduciary-duty claim as being brought "derivatively on behalf and for the benefit of Fannie Mae *to redress injuries suffered by Fannie Mae*." Class Compl. ¶ 129 (emphasis added) (JA __).[15] Although Class Plaintiffs allege that the Third Amendment resulted in the decrease or loss of value in their stock, this is a prototypical derivative claim—a decline in stock value ***deriving*** from a decline in

[14] Pursuant to their bylaws and 12 C.F.R. § 1710.10(a)-(b), Fannie Mae follows Delaware law (http://goo.gl/JTbjrt), and Freddie Mac follows Virginia law (http://goo.gl/lXAl6k), but only to the extent those laws are not inconsistent with federal law. Here, FHFA assumes that the principles for distinguishing between direct and derivative claims are consistent across federal and state law.

[15] *See also* Class Compl. ¶ 92 (alleging Third Amendment "clearly harms, rather than promotes, the soundness and solvency of the Companies") (JA __); *id.* ¶ 182 (alleging "Fannie Mae suffered damages" as a result of the alleged breach of fiduciary duty"); *id.* ¶ 181 (alleging the Third Amendment "constituted waste" of the Enterprises' assets). "[C]laims of waste are classically derivative . . . ." *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 771 (Del. 2006).

value of the company. *See Tooley*, 845 A.2d at 1037; *Protas v. Cavanagh*, No. CIV.A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012).

Class Plaintiffs' fiduciary duty claim also fails the second prong of the *Tooley* test, by which a claim is direct only if the relief sought "flows directly to the stockholders, not to the corporation." *Tooley*, 845 A.2d at 1036; *see also Big Lots Stores, Inc. v. Bain Capital Fund VII, LLC*, 922 A.2d 1169, 1179 (Del. Ch. 2006) (claim is direct only where "no relief flows to the corporation"). Class Plaintiffs demand relief in the form of "compensatory damages and disgorgement *in favor of Fannie Mae*"—not the shareholders—as a result of the alleged breach of fiduciary duty. Class Compl. at Prayer for Relief ¶ 5 (JA __). Because such relief flows first and foremost to Fannie Mae, the claim is derivative.

Class Plaintiffs assert in conclusory fashion that they "have a right to bring the fiduciary duty claim as a direct claim." Class Br. 22. But the cases they cite—in particular, *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006)—reflect a "narrow exception" under Delaware law in which a corporate transaction may give rise to both direct and derivative claims. *Halpert v. Zhang*, No. CV 12-1339, 2015 WL 1530819, at *3 n.1 (D. Del. Apr. 1, 2015). And that exception applies only where (a) the company issues excessive shares (not cash) to a third party controlling shareholder without receiving assets of commensurate value in return, and (b) the share issuance increases that shareholder's voting power to the detriment of the

minority shareholders. *See Gentile*, 906 A.2d at 99-100. Neither of these elements is present here: the Third Amendment did not result in the issuance of any additional shares to Treasury or affect the voting rights of non-Treasury shareholders.[16]

C. Under HERA, the Conservator Also Succeeded to Stockholder Rights to Direct Claims

Even if Class Plaintiffs' fiduciary duty claim were direct, HERA would bar it in light of the Conservator's succession to "all" shareholder rights. 12 U.S.C. § 4617(b)(2)(A)(i). The statutory text contains no exception for direct claims, and the existence of another express exception—namely, one permitting shareholders to prosecute claims they might have to liquidation proceeds following appointment of a receiver (*id*. § 4617(b)(2)(K)(i))—prohibits the creation of any implicit exceptions. *See United States v. Johnson*, 529 U.S. 53, 58 (2000).

Levin v. Miller, 763 F.3d 667 (7th Cir. 2014), which addressed the analogous succession language in § 1821(d)(2)(A)(i), is not to the contrary. The question whether § 1821(d)(2)(A)(i) extends to direct claims was not litigated in that case, but the concurring judge nonetheless explained that the plain text of § 1821(d)(2)(A)(i) applies to direct claims, noting that the language "rights . . . of

[16] *See Innovative Therapies, Inc. v. Meents*, No. CIV.A. 12-3309, 2013 WL 2919983, at *5 (D. Md. June 12, 2013) (declining to apply *Gentile* exception); *Protas*, 2012 WL 1580969 at *6; *Nikoonahad v. Greenspun Corp.*, No. C09-02242, 2010 WL 1268124, at *5 (N.D. Cal. Mar. 31, 2010).

any stockholder" lacks meaning if § 1821(d)(2)(A)(i) is limited to derivative claims, given the FDIC's succession to "all rights" of the institution itself. *Id.* at 673 (Hamilton, J., concurring). Because the Conservator already can pursue derivative claims belonging to the Enterprises, the statutory phrase "rights … of any stockholder" only has meaning if it encompasses direct claims arising from shareholders' interests in the Enterprises. Accordingly, "[t]he doctrine that statutes should not be construed to render language mere surplusage…weighs in favor of a broader reach that could include direct claims." *Id.* (Hamilton, J., concurring).

Thus, although the Court need not reach this issue because all of Plaintiffs' common-law claims are derivative, the Conservator has also succeeded to stockholders' direct claims.

D. There Is No "Conflict-of-Interest" Exception to HERA's Bar on Shareholder Claims

Class Plaintiffs attempt to avoid the bar on shareholder claims during conservatorship by arguing that a "conflict-of-interest" exception should be judicially created for HERA, notwithstanding its complete absence from the statute. The district court correctly rejected this argument as seeking "an *implicit* end-run around FHFA's conservatorship authority by means of the shareholder derivative suits that the statute explicitly bars." Dkt.51, at 28-29 (JA__).

Plaintiffs rely upon two decisions that created an exception in very limited circumstances for FDIC receiverships—not conservatorships. Class Br. at 25-26

(discussing *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295–96 (Fed. Cir. 1999) and *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021-23 (9th Cir. 2001)). But those cases are outliers that are inapplicable here, and their limited holdings should not be expanded. Moreover, analyzing *First Hartford* and *Delta Savings* on their own terms makes clear that those cases were—as the district court recognized—wrongly decided.

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

First Hartford and *Delta Savings* are, by their own acknowledgment, exceptional cases limited to their facts. *See First Hartford*, 194 F.3d at 1295 ("[O]ur holding is limited to the situation here," and "[w]e neither infer nor express an opinion on the standing of derivative plaintiffs in other circumstances."); *see also Gail C. Sweeney Estate Marital Tr. v. U.S. Treasury Dep't*, 68 F. Supp. 3d 116, 123 n.9 (D.D.C. 2014) (describing *Delta Savings* as "a significant expansion of what . . . *First Hartford* expressly warned was supposed to be a 'very narrow' holding").[17] Those facts are not present here; Plaintiffs' complaints simply do not allege the kind of conflict-of-interest found in either case.

First, contrary to Class Plaintiffs' repeated assertions, *First Hartford* and

[17] Class Plaintiffs cite *Gaubert v. Fed. Home Loan Bank Bd.*, 863 F.2d 59 (D.C. Cir. 1988) (Class Br. 26)—a pre-FIRREA, pre-HERA, and pre-*Kellmer* decision—but that case does not support Plaintiffs' argument. In *Gaubert*, the derivative shareholders sought to contest the appointment of a receiver pursuant to 12 U.S.C. § 1464(d)(6)(A)—a provision that specifically authorized the company to bring such actions within a specified timeframe. 863 F.2d at 67-68.

Delta Savings created a conflict-of-interest exception only in the context of failed banking institutions in *receivership*, not conservatorship. In those receivership cases, the shareholders' contingent right to a distribution from the failed institution's liquidation arguably had ripened—a circumstance not presented here. *See infra* Sec. III.B. Indeed, HERA makes clear that, upon appointment of the receiver, shareholders gain the ability to assert claims based on their contingent rights through the administrative and judicial claims process. 12 U.S.C. § 4617(b)(2)(K)(i). Shareholders have no such rights during conservatorship. *See id.* § 4617(b)(2)(A).

Further, as the district court recognized, applying a conflict-of-interest exception "makes still less sense in the conservatorship context, where FHFA enjoys even greater power free from judicial intervention" than in receivership. Dkt.51, at 30 n.30 (JA__). As the district court explained, whereas courts have a role with respect to "issues brought by outside shareholders" in receivership (*i.e.*, they are involved in the process of adjudicating shareholder claims), Congress eliminated shareholder involvement in conservatorship operations. *Id.* (citing 12 U.S.C. § 4617(b)(5), (6)).

Second, *First Hartford* and *Delta Savings* are distinguishable because they involved actions of the federal regulator that allegedly contributed to the imposition of receivership. *See First Hartford*, 194 F.3d at 1283-84, 1295

(concluding FDIC receiver should not control breach-of-contract claim where FDIC's regulatory rulemaking both triggered appointment of the receiver and breached a contract); *Delta Savings*, 265 F.3d at 1019-20 (concluding FDIC receiver should not control claims based on alleged pre-receivership discrimination by OTS when OTS put the bank into receivership after it became the target of discrimination investigations).

Here, Plaintiffs do not seek to vindicate any claims that arose before conservatorship. Rather, Plaintiffs make claims based on actions that allegedly occurred *during* conservatorship, after all shareholder rights were transferred to the Conservator. Thus, their claims do not implicate the unusual considerations underlying *First Hartford* and *Delta Savings*.

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

The district court correctly held that it would be wrong to create a conflict-of-interest exception to HERA, which broadly transfers ***all*** shareholder rights, titles, powers, and privileges. "Because statutory language represents the clearest indication of Congressional intent . . . we must presume that Congress meant precisely what it said." *NPR v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001).

Moreover, creating a judicial exception to HERA would be especially inappropriate because Congress already "considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529

U.S. 53, 58 (2000). FIRREA, like HERA, allows shareholders to prosecute certain claims during receivership by following specific procedures, which is an exception to the statutory rule that conservators and receivers succeed to shareholder rights. *See* 12 U.S.C. §§ 1821(d)(3)-(6), 4617(b)(3)-(6). The existence of this lone, express exception precludes judicial exceptions, including one for "conflict-of-interest."

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

The district court rightly rejected the proffered exception, explaining:

> [T]he existence of a rule against shareholder derivative suits, § 4617(b)(2)(A)(i) [recognized in *Kellmer*], indicates that courts cannot use the *rationale* for why derivative suits are available

> to shareholders as a legal tool—including the conflict of interest rationale—to carve out an *exception* to that prohibition. Derivative suits largely exist so that shareholders can protect a corporation from those who run it—and HERA takes the right to such suits away from shareholders. How, then, can a court base the exception to a rule barring shareholder derivative suits on the purpose of the 'derivative suit mechanism' that rule seeks to bar? Such an exception would swallow the rule.

Dkt.51, at 29-30 (JA__).

Class Plaintiffs' hodgepodge of additional arguments in support of a conflict-of-interest exception are unpersuasive.

For example, Class Plaintiffs argue that the "structure" of HERA—permitting the shareholders to retain "rights to future distributions" and "the right to participate in a statutory claims process regarding the Companies' residual assets"—supports creation of a conflict-of-interest exception during conservatorship. Class Br. 30. They base this argument on *Branch v. FDIC*, 825 F. Supp. 384 (D. Mass. 1993), which—on its face—is squarely inconsistent with this Court's decision in *Kellmer*, 674 F.3d at 851 (rejecting plaintiffs' reliance on *Branch*[18] and holding that—notwithstanding the shareholders' contingent right in

[18] *See* Kellmer Br. at 35 n.24 (No. 09-5253) (filed May 26, 2011).

HERA to a residue of Enterprise assets—the Conservator alone holds the ability to pursue derivative claims on behalf of the Enterprises).[19]

Class Plaintiffs also argue for a conflict-of-interest exception because the provision of HERA by which shareholder rights are "terminated" in receivership, but not in conservatorship, supposedly suggests that conservatorship-shareholders have greater rights. Class Br. 31-32. Class Plaintiffs are wrong. During conservatorship, the Conservator "succeed[s] to all rights" of the shareholders. 12 U.S.C. § 4617(b)(2)(A)(i). Upon appointment of the receiver, HERA "terminate[s] all rights and claims" the shareholders may have against the Enterprises' assets, but allows shareholders to assert certain claims through the administrative and judicial claims process that occurs in receivership. *See id.* § 4617(b)(2)(K)(i); *id.* § 4617(b)(6). Successful shareholder claims are paid according to the priority scheme established by the statute. 12 U.S.C. § 4617(c). Thus, HERA specifies when and how shareholders may pursue any claims, and it does not allow them to do so during conservatorship.

III. Plaintiffs' Contract-Based Claims Fail as a Matter of Law

Plaintiffs' claims for breach of contract and the implied covenant of good

[19] Other courts have rejected the *Branch* approach as well. *See, e.g.*, *Pareto*, 139 F.3d at 701; *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 797 (E.D. Va. 2009), *aff'd sub nom. La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. 2011); *First Hartford Corp. Pension Plan & Trust v. United States*, 42 Fed. Cl. 599, 614 (1998), *aff'd in pertinent part*, 194 F.3d 1279 (Fed. Cir. 1999).

Dated: December 21, 2015

Respectfully submitted,

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EXHIBIT F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PERRY CAPITAL LLC, FOR AND ON BEHALF OF INVESTMENT FUNDS FOR WHICH IT ACTS AS INVESTMENT MANAGER, Appellant,	:	
v.	:	No. 14-5243, et al.
JACOB J. LEW, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE DEPARTMENT OF THE TREASURY, ET AL., Appellees.	:	

Friday, April 15, 2016
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES BROWN AND MILLETT, AND SENIOR CIRCUIT JUDGE GINSBURG

APPEARANCES:

ON BEHALF OF THE APPELLANT:
THEODORE B. OLSON, ESQ.
HAMISH P.M. HUME, ESQ.

ON BEHALF OF THE APPELLEES:
HOWARD N. CAYNE, ESQ.
MARK B. STERN, ESQ.

C O N T E N T S

P R O C E E D I N G S

THE CLERK: Case number 14-5243, et al., Perry Capital LLC, for and on Behalf of Investment Funds for which it Acts as Investment Manager, Appellant v. Jacob J. Lew, in his Official Capacity as the Secretary of the Department of the Treasury, et al.. Mr. Olson, the Institute for Institutional Plaintiffs Perry Capital, LLC, et al.; Mr. Hume for Class Plaintiffs; Mr. Cayne for FHFA; and Mr. Stern for Jacob J. Lew.

JUDGE BROWN: Good morning, Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON, ESQ.

ON BEHALF OF THE INSTITUTIONAL PLAINTIFFS PERRY CAPITAL LLC, ET AL.

MR. OLSON: Good morning, Your Honor, may it please the Court. The net worth sweep which is at the center of this case was a massive, we submit lawless government expropriation of Fanny Mae and Freddie Mac, two publicly held companies pretending to act as a conservator, which is required by law, to conserve and preserve the assets, and rehabilitate these companies to a sound and solvent condition. The net worth sweep, and the name really says it all, net worth sweep systematically drained these entities of all value, leaving in its wake two unsolved, unsound, and insolvent zombies, a golden goose for the Treasury, and utterly worthless for the individuals and

institutions who in good faith invested in them. If private individuals, we submit, had done this to public companies what the United States Government has done here, the SEC, the Justice Department would be investigating and perhaps prosecuting.

In September of 2008 the FHFA named itself the Conservator of Fannie and Freddie, under the statute pursuant to which it acted it was required to preserve the assets, conserve the situation of those companies, and put each in a sound and solvent condition, and rehabilitate them, that is in the statute pursuant to which the FHFA purported to act. And in its regulations, which have been cited in the brief, the Agency describes the primary objective, the essential function, and the statutory charge of a Conservator is to keep the enterprise going, and bring it back to life to the extent that it needs resuscitation. A Conservator is under the statute, under the regulations, under the same statute the FDIA that governs the FDIC, and decades of tradition and common law a conservator is a trustee for the assets of its ward. It has responsibility to retain the rights of the institution that it's protecting, and when this conservatorship was created the FHFA put out a press release with questions and answers describing what its role would be, this is at pages 2441 through 2443 of the Joint Appendix, it answers these same

questions about conserving and preserving, and sound and solvent, and under a conservatorship it says the company is not liquidated, there are no plans to liquidate the company, and a stockholder's rights, the company, the stockholders will retain their financial worth in the institution. Then a few years later on August 17, 2012 the net worth sweep was announced, and it did exactly the opposite of what a conservator is responsible by law, tradition, and regulation to do, it basically decided to wipe out all the value of Fannie and Freddie and make them wards of the State.

JUDGE GINSBURG: What was the stock selling for at that point?

MR. OLSON: The price of the stock?

JUDGE GINSBURG: Yes.

MR. OLSON: I don't know the answer to that. I don't know, I'm not even sure whether it's in the briefs, and I'm not sure I would argue that it wouldn't be relevant. The institutions unquestionably had been in difficult straits, but the record is now clear, and it is, has been clear for quite some time that the entities have turned the corner and were moving towards a profitable position. What --

JUDGE MILLETT: Well, is that accurate? You're talking about 2013, my understanding is that they've either, their profits have gone down markedly and that at least

Freddie Mac has been losing money again, is that accurate or inaccurate?

MR. OLSON: What I understand the case to be is that the institutions are because of the deferred tax assets that have been put in place that the entities have both produced and returned to the Treasury over $50 billion of the amounts that the Treasury has put into it --

JUDGE MILLETT: No, there was a big amount of money in 2013 that 2014, 2015 after those tax credits were taken out of the picture they've been back in this position where the amount of profits that they're making may or may not fluctuate above or below the amount of dividend that they would owe to Treasury each year, and in fact, Freddie Mac lost money in the third quarter of 2015.

MR. OLSON: The dividends could have been paid in kind, which is something that the, our opponents overlook, that would increase the liquidation preference, but it would have preserved the capital of the institution.

JUDGE MILLETT: Well, surely that decision whether to require dividends in cash or in kind is exactly the type of judgment that's going to be conferred on the Agency's conservator that we could superintend, would you agree with that?

MR. OLSON: Well, but what we're talking about here is the --

JUDGE MILLETT: But would you agree that we certainly couldn't say, we couldn't say the conservator erred and enjoined them, or a declaratory judgment, they should have done a liquidation rather than preference rather than cash.

MR. OLSON: We submit that what they were is making a mistake because they were assuming because of the 10 percent cash dividend that that would impair the capital of the institutions, and would drive them further towards insolvency.

JUDGE MILLETT: I guess I'm going to try one more --

JUDGE GINSBURG: Well, they were inferring that from --

MR. OLSON: Whereas that was not, that was not necessary.

JUDGE GINSBURG: They were inferring that from the pattern of continued losses, and I think twice maybe more times in which the GSEs borrowed the money simply to pay it back as a dividend, right?

MR. OLSON: Well, the payment of the 10 percent dividend did not have to be done, not a cash dividend.

JUDGE GINSBURG: I understand that, but --

MR. OLSON: Could have been done --

JUDGE GINSBURG: -- Judge Millett just covered

that with you, that's true, but that's a discretionary decision that's hardly our role --

MR. OLSON: But if it --

JUDGE GINSBURG: -- to second guess.

MR. OLSON: If that discretionary decision was being used to act in a way that a conservator does not act, then there is the right of this Court under the APA, and other circumstances to take judicial review of the fact that the statute required the conservator to do one set of things, and the net worth sweep does precisely the opposite.

JUDGE MILLETT: All right.

JUDGE GINSBURG: Take you back. You made reference to the potential realization of the tax benefits, now, it's not entirely clear to me, it looks like the tax benefit here is essentially a loss carried forward, is that right?

MR. OLSON: Yes --

JUDGE GINSBURG: Okay. Okay.

MR. OLSON: -- that's one way to put it.

JUDGE GINSBURG: Okay. So, if the Agency, if the GSEs are going to continue to realize losses they will not happen to be in a position to get the benefit of the carry forward --

MR. OLSON: Well, that's only a benefit up to a point, what the Government did was prevent the agencies, the

entities from utilizing that --

JUDGE GINSBURG: I understand that. So, I want to put ourselves in the position of the FHFA prior to, just prior to the Third Amendment, and at that point as I understand it the GSEs have been pretty consistently losing money, the prospect of realizing anything on the tax credits because there will be profitable quarters in the projected future, is looking like 2013, 2014, somewhere in that range, there's a handwritten note on a document suggesting, a Treasury document suggesting that, right?

MR. OLSON: Well, the record is fairly substantial, especially in conjunction with the recently unsealed documents that were made available --

JUDGE GINSBURG: Right, right.

MR. OLSON: -- to us just recently that the former ex-CFO McFarland of Fannie specifically said there was likelihood of $50 billion --

JUDGE GINSBURG: Yes.

MR. OLSON: -- profits at the --

JUDGE GINSBURG: Okay.

MR. OLSON: -- end of the year. The testimony is that the corner had been turned because the housing market had been turned, and at that point --

JUDGE GINSBURG: That was the GSEs estimate, not Treasury's. Treasury had a very pessimistic view of this

throughout the whole period.

MR. OLSON: That is -- the record pretty much was the Grant Thornton, which was an expert for --

JUDGE GINSBURG: Right.

MR. OLSON: -- the Treasury Department --

JUDGE GINSBURG: They had that, they had that before them.

MR. OLSON: -- said the corner has been turned. What we submit --

JUDGE GINSBURG: Well, Grant Thornton, wait a minute, Grant Thornton gave them a very pessimistic outlook for the long term.

MR. OLSON: But during that, right immediately around the time, these documents make it clear that at the time, shortly before the decision was made, which was made in 2012, in August, McFarland said that she gives the report to the Treasury Department, says the corner has been turned, there's a profitable prospect ahead, and at that --

JUDGE GINSBURG: She actually -- let me quote her on that, because she didn't say I said it, she said I would have said that, right? She's trying to recall what happened at this meeting some couple of years earlier. She said well, I would have mentioned that.

MR. OLSON: Well, I think the record is more clear than that, Judge Ginsburg, and I think what the record

supports the proposition that the Treasury at that point seeing what other people were being able to see, including investors, that these institutions have turned the corner, and if they had been not eliminated from the possibility of ever being solvent by a net worth sweep that that was, that the institutions had turned profitable --

JUDGE MILLETT: Well, I think what you're talking about seeing is there's a short-term and a long-term problem, and there were competing views it looks like within --

JUDGE GINSBURG: Right.

JUDGE MILLETT: -- the Government about what these prospects were, and reality has confirmed that, and a lot of what folks were talking about was the short term profits that would be made when they carried forward and were able to take advantage of that tax benefit, which is done, it expired at this point, and they now, the concern as a conservator was if you have this cycle of drawing money to pay dividends right, you know, from the right pocket and putting it back into the left pocket it was going to increase --

MR. OLSON: Well, this is not what a --

JUDGE MILLETT: -- continue the problem.

MR. OLSON: -- this is not what a conservator is required by law to do, and the Treasury --

JUDGE MILLETT: It's not that it's required by law, it's a conservator permitted by law to say the scheme that is in place under the PSPAs and the First and Second Amendment isn't going to work in the long-term, it's only going to increase the amount of money that they owe, they're going to keep, like I said, taking money, borrowing money just to pay us back money, and instead, we need to come up with a new solution, and that new solution says you will give us all those profits whatever they are, if they're zero we get nothing for the money that we're loaning you and the risk that we're exposed to. And if they're --

MR. OLSON: I want to make --

JUDGE MILLETT: -- less than our $19 billion dividend we will have to suffer that loss, but if it's more we will get the benefit of it, what's not, how is that not within the discretion of a conservator?

MR. OLSON: I want to answer that, I want to make sure that I reserve the time that I was hoping to reserve for rebuttal.

JUDGE MILLETT: You'll be fine.

MR. OLSON: The answer is that to the extent that the decision was made at that time, and we submit the decision was made at that time by the Treasury Department, we can use this to deal with our budget concerns, and that they at that point stopped being a conservator. The

Treasury Department's release -- and by the way, the FHA decision is supposed to be made without the supervision or direction of the Treasury Department. The announcements that were made at the time make it clear that the Treasury Department was directing whether the FHFA was doing at that time, they specifically said this is going to expedite the wind down of Freddie and Fannie, and we are going to now make sure that the institutions can be liquidated. So, what they were doing was changing --

JUDGE MILLETT: See, I think as I read the record it's more complicated and nuanced than that, and that is that an awful lot of folks both on Capitol Hill and within the Executive Branch think that we cannot go back to the pre-2008 situation here, but we, FHFA are not, we're not the ones to make that call, or is Treasury by itself, and so what we will do, we do not want to liquidate these two entities, that would be extraordinarily damaging to the economy --

MR. OLSON: So, we want to --

JUDGE MILLETT: -- we're going to hold them, we're going to hold them, and we're going to keep things in a stable condition until the policy makers make a decision.

MR. OLSON: This is not --

JUDGE MILLETT: What's wrong with that?

MR. OLSON: That's not sound and solvent. The

statute requires keeping institutions sound and solvent.

JUDGE MILLETT: It's sounding solvent, you told me they're making all this money, that sounds like the definition of sound and solvent.

MR. OLSON: Not if the conservator which is supposed to be acting as a trustee, a fiduciary to the entities decides I will take all of the profits and give it to the Treasury Department.

JUDGE MILLETT: Well, a fiduciary to whom, because this statute is different, it doesn't say a fiduciary to stockholders, it's a fiduciary serving the best interests of the entity or the agency.

MR. OLSON: No, I submit that that reference, which is under incidental powers in the statute itself, doesn't provide a conservator to act in its own best interests, or in the interests of --

JUDGE MILLETT: Well, what does it mean? What does it mean if it doesn't say they can't take something in the interests of the agency?

MR. OLSON: Well, it can, and are incidental --

JUDGE MILLETT: I think the FDIC has the same language.

MR. OLSON: Well, that would swallow up all the responsibilities that conservators have had for centuries --

JUDGE GINSBURG: Well, it does, this is a statute

that reads out the fiduciary duty by that provision.

MR. OLSON: I submit that it does not, Judge Ginsburg, and I think that would be an error. If the Court came to the conclusion that that reference, an incident powers, which is also in the FDIA, would allow the conservator who is supposed to bring according to the statute conserve and preserve and sound and solvent, and rehabilitate the agency --

JUDGE GINSBURG: Suppose the --

MR. OLSON: -- it would swallow up all those words.

JUDGE GINSBURG: Suppose the FDIA is facing a troubled bank of enormous proportions, one of the largest banks in the country, and it says we could, we're acting as conservator here, we could perform the ordinary duties of a conservator, but it would so impair the reserves of the FDIC that it would be a danger to all of the insured depositors around the country, and so, we're going to act to a degree in our own interests, rather than solely in the interest of the troubled institution?

MR. OLSON: At that point I think if you read the statute as a whole, and if you look at the way the FDIA and the FDIC have operated all these many years there's a choice then to decide to move to a position of a receivership, and then wind down the entity, which is what Treasury said it

was going to do.

JUDGE GINSBURG: Well, that's right, and they're still, in their capacity as conservator they haven't yet pulled the trigger as a liquidator, right?

MR. OLSON: Well, they're pulling the trigger --

JUDGE GINSBURG: As a receiver.

MR. OLSON: -- but they're not admitting it, and they're still supposed to be acting as a conservator, and then they decide no, we're going to take --

JUDGE GINSBURG: Just go back, I have your point, just go back a moment to what Judge Millett was saying about the somewhat conflicting views of the long-term outlook, I think there was consensus that there would be a lot of fluctuation, volatility over any period of time for the GSEs, but the, what's the date of the Third Amendment, the 17th?

MR. OLSON: August 17 --

JUDGE GINSBURG: Seventeenth.

MR. OLSON: -- 2012.

JUDGE GINSBURG: Okay. So, on the eighth, I think it's the eighth of August, the two GSEs, the ninth, issued, one's on the eighth, one's on the ninth, they're 10-Qs, right? And the 10-Qs say we do not expect to generate net income or comprehensive income in excess of our annual dividend obligation to the Treasury over the long term. We

also expect that over time our dividend obligation to Treasury will increasingly drive our future draws under the senior preferred stock purchase agreement. So, the week before, whatever it is, 10 days before the trigger is pulled both of the GSEs go out with their 10-Qs and say we have no future.

MR. OLSON: And at the same time, and this is reinforced by the documents that were recently unsealed, that there were projections because of the deferred tax assets, and the availability they were soon to be released would make a completely different picture. It's not a coincidence, we submit --

JUDGE MILLETT: A completely different picture for how long?

MR. OLSON: For the foreseeable future. This was --

JUDGE MILLETT: Not the foreseeable future, for 2012/2013.

MR. OLSON: Well, the proof is in the pudding.

JUDGE GINSBURG: Are you talking about the McFarland statement?

MR. OLSON: These entities have returned $50 billion to the Treasury more than the Treasury put into these institutions. And the other thing is that what was done at the net worth sweep --

JUDGE GINSBURG: No, that's doesn't follow, it doesn't necessarily mean more, it's just $50 billion --

MR. OLSON: In excess.

JUDGE GINSBURG: -- toward the commitment, towards paying down the commitment.

MR. OLSON: The commitment, this -- the amount that has been returned exceeds by $50 billion.

JUDGE GINSBURG: As of now, is that what you're saying?

MR. OLSON: That's --

JUDGE GINSBURG: As of now?

MR. OLSON: -- $58 billion, I think.

JUDGE GINSBURG: Okay. So, that's post record, but fair enough. Okay.

MR. OLSON: Yes. I think that it is in --

JUDGE GINSBURG: All right. But the only optimistic scenario here is what McFarland relays, correct?

MR. OLSON: No, I believe that if you look at the Ugoletti deposition, the Jeff Foster who was a Treasury official --

JUDGE GINSBURG: Ugoletti takes us to a very interesting point. Are you still maintaining that the record was inadequate before the District Court?

MR. OLSON: Absolutely, the record was inadequate, it was not only inadequate, it was misleading, it was

incomplete.

JUDGE GINSBURG: So, you want to basically invoke *Overton Park*?

MR. OLSON: Yes.

JUDGE GINSBURG: Okay.

MR. OLSON: *Overton Park* requires a full and complete administrative record, we did not --

JUDGE GINSBURG: Is that your opening salvo?

MR. OLSON: Pardon me?

JUDGE GINSBURG: Is that your first argument and first preference here?

MR. OLSON: No, our first, our preference is that this Court recognize that what was done in August of 2012 was directly contrary to the responsibilities of the Agency acting at the direction of the Treasury which was against the statute.

JUDGE GINSBURG: I don't see how that's consistent with saying the record's inadequate.

MR. OLSON: Well, we have learned enough to know that, where the record was nonetheless inaccurate we, we're learning more things --

JUDGE GINSBURG: I think what's happened is that with what we've learned is that there was another view somewhere out there.

MR. OLSON: And the view, as the picture started

to become rosier, and as the deferred tax assets became available to be released to change the financial condition the Treasury Department --

JUDGE GINSBURG: Well, that was after --

MR. OLSON: -- said instead of --

JUDGE GINSBURG: That was after the Third Amendment.

MR. OLSON: -- rehabilitating the companies we will take --

JUDGE GINSBURG: Okay.

MR. OLSON: -- all of their net worth in perpetuity and make it impossible for them to be rehabilitated.

JUDGE GINSBURG: So, you would like, though, to depose Ugoletti, right?

MR. OLSON: Pardon?

JUDGE GINSBURG: You would like to depose Ugoletti?

MR. OLSON: Well, of course we would, and --

JUDGE GINSBURG: And you'd like the notes of meetings, and you'd like the e-mail traffic?

MR. OLSON: We would like the administrative record to be complete, but in addition to that we believe that there is enough in this record to show that what the FHFA did at that time was not justified pursuant to the

reasons that they gave, the downward spiral had stopped.

JUDGE GINSBURG: Okay, but if the record's incomplete, completing the record may reverse that inference that you just suggest we drop.

MR. OLSON: Well, at minimum we're in -- I agree that at minimum we're entitled to a complete administrative record, not just somebody's summary of administrative record, and that's *Overton Park*, and other decisions of this Court. But there is enough to know --

JUDGE MILLETT: Well, the reason they didn't do the ordinary record here is they said that it's just, APA review is injunctive and declaratory, and that's in the teeth of 4617(f), we can't have that, so what's the point of bringing the record forward? I think that's their explanation.

MR. OLSON: Well, that is what they're saying, but the *County of Sonoma* case specifically says that when the conservator acts beyond and contrary to its responsibilities as a conservator then 4617 does not preclude review.

JUDGE MILLETT: Right. And so what exactly is the test we're supposed to apply for acting beyond their authority as conservator? It can't be violated the --

MR. OLSON: Right.

JUDGE MILLETT: -- statute of the APA or it would be a pointless provision. You have to show --

MR. OLSON: Well, it also would be --
JUDGE MILLETT: -- success to get an injunction.
MR. OLSON: -- a provision that would eliminate any judicial review, the courts have --
JUDGE MILLETT: So, what is your definition? What is the standard?
MR. OLSON: Our definition is when they're not acting as a conservator, if you're buying and selling assets, operating the business in a way designed to rehabilitate, then you're acting as a conservator, but you're not acting as a --
JUDGE MILLETT: So, what action did they do here that -- let me give you a hypothetical. If there had been no deferred tax asset issue, and so as it turned out Fannie Mae and Freddie Mac never made at any time between 2008 and the present, or 2012 when the Third Amendment came in, in the present never made a profit --
MR. OLSON: Well, when you --
JUDGE MILLETT: -- if they adopted the Third Amendment and there were no profits, so all they did was protect Fannie Mae and Freddie Mac from more and more debt, would that be consistent with being a conservator?
MR. OLSON: No, it would not be consistent with being a conservator because --
JUDGE MILLETT: Why would it not?

MR. OLSON: -- it wasn't an act towards rehabilitating the entities, they --

JUDGE MILLETT: It was stopping the hemorrhaging, if they were just going to keep, imagine they just keep losing money, or if they get profits that are less than the $19 billion they owe --

MR. OLSON: They made it impossible, they made it impossible, Your Honor, for these entities to operate. If you can imagine in the private sector taking a corporation that for, or a bank for which you have responsibility to rehabilitate, to keep it sound and solvent, then issue a decree saying I'm going to take all of your profits and give them to my uncle, or to give them to my friend, and so you can't operate in that normal way, we're going to, we're going to --

JUDGE MILLETT: Yes, but we have a different statute here that let's --

JUDGE BROWN: But --

JUDGE MILLETT: I'm sorry.

JUDGE BROWN: I'm sorry. I was just going to say Judge Millett is asking a hypothetical.

MR. OLSON: Yes, I know.

JUDGE BROWN: And the hypothetical is let's assume that when Treasury gave up its right to dividends the entities were not profitable. So, in fact, they would have

been getting nothing because there were no net profits.

MR. OLSON: They would still have had the right, Judge Brown, of providing that dividend in kind, which would have increased the liquidation preference, but it would have preserved the capital of the entities.

JUDGE BROWN: Yes. No, but we're assuming that they did the Third Amendment, it just wasn't successful, that is to say they gave up their right to the dividend and simply said we're going to take whatever is generated as net profit to these entities, but nothing was generated. And the question is, in other words, does the argument that they were not acting as a proper conservator depend on the fact that they were in fact profitable?

MR. OLSON: It depends -- no, it doesn't. It depends upon whether the actions taken were calculated, and had the purpose of keeping the institutions in a sound and solvent condition, and were intended to rehabilitate the entities. What was intended --

JUDGE MILLETT: And so if they knew they were going to keep --

MR. OLSON: -- and the Treasury --

JUDGE MILLETT: I'm sorry, if they knew they were going to keep, or they expected they were going to keep either losing money or having profits that were going to fall short of the dividends owed, if that was their

understanding how could it not be consistent with managing, or trying to get it into some sound and solvent situation to say you don't have to pay the dividends --

MR. OLSON: You cannot --

JUDGE MILLETT: -- just give us what you can --

MR. OLSON: You can never get --

JUDGE MILLETT: -- give us what you can --

MR. OLSON: -- into a sound and solvent situation if every nickel of profit you make is given to someone else. You cannot possibly, yet --

JUDGE GINSBURG: No, that's clearly true. Go ahead.

MR. OLSON: Pardon?

JUDGE GINSBURG: I think that's clearly true.

MR. OLSON: And the Treasury specifically said --

JUDGE GINSBURG: But they could avoid further spiraling down, right?

MR. OLSON: Well, the record I think suggests that the downward spiral, the death spiral, whatever they've called it, is not justified by the record. We haven't explored all of that, but basically, the Treasury said itself at the time of August of 2012 we're going to make sure that the tax payers get everything, and the stockholders get nothing. That was their intention. Their intention was --

JUDGE GINSBURG: And they said in compensation for --

MR. OLSON: -- to wind it down --

JUDGE GINSBURG: -- in compensation for the risk we've taken.

MR. OLSON: But that was not being acting as a conservator. If they could have decided, if they had to move to a position of liquidating, you know, to a receivership, which is also permitted by these statutes, by this same statute that we're talking about, you could move to a receivership which is essentially what they did, but they would then have to pay attention to the rights of stockholders and creditors.

JUDGE GINSBURG: This press release you're talking about, that's from the Treasury, right?

MR. OLSON: Yes.

JUDGE GINSBURG: They're a creditor. What's the difference what the creditor says about what the conservator is doing?

MR. OLSON: The Treasury is saying what it is doing as participating with the FHFA as implementing the net worth sweep.

JUDGE GINSBURG: Did the conservator ever say this?

MR. OLSON: Pardon me?

JUDGE GINSBURG: Did the conservator say this, or just the Treasury?

MR. OLSON: It's other documents that the conservator is saying it's the same thing, and the Treasury is saying we and the FHFA are doing these things.

JUDGE GINSBURG: That's the --

MR. OLSON: This is one government --

JUDGE GINSBURG: So, Treasury is saying that? The conservator is the FHFA, doesn't it say that?

MR. OLSON: And the conservator has done X, which is inconsistent with being or any reasonable interpretation --

JUDGE GINSBURG: Okay.

MR. OLSON: -- of what conservators do, and --

JUDGE GINSBURG: Okay, but --

MR. OLSON: -- it is doing it in -- the --

JUDGE GINSBURG: But you attribute it to both of them, this intention, stated intention to wind down.

MR. OLSON: This is a motion to dismiss that Judge Lamberth granted. The allegations of the complaint must be taken as true. We believe that to the extent that we have a record it demonstrates that the FHFA and the Treasury Department were doing this together, they saying it that they're doing it together, those allegations must be taken as true, the Judge decided, the District Court decided with

all due respect that he decided various different things with respect to purpose and other evidentiary things that were not in the record, decided those in favor of the Government, rendered its judgment and dismissed the complaint, which without providing an administrative record.

JUDGE GINSBURG: Let me ask you a question --

JUDGE BROWN: Well, let me --

JUDGE GINSBURG: -- am I -- I'm sorry, go ahead.

JUDGE BROWN: Sorry. I wanted to ask you about something that the District Court does here, which is to say that these roles, conservator and receiver, are not hermetically sealed in that they can sort of flow one into the other, obviously, you don't agree with that, but my question is what is it in the statute that you think precludes that kind of morphing from one to the other?

MR. OLSON: Well, I think that you can become, you can decide that the role no longer is appropriate as a conservator, and then you must be a receiver.

JUDGE BROWN: Okay.

MR. OLSON: But the receiver, if you're acting as a receiver you can't just say we're doing it and then not respond to the responsibilities in the statute. The statute specifically says in Section J acting, all powers specifically granted to conservators or receivers, respectively. The powers of a receiver are antithetical to

the powers of a conservator. When you're acting as a receiver you have a responsibility to stockholders, to creditors to behave in a certain way, to provide certain notices, to recognize certain obligations, and to deal with it in a certain way. So, you can change --

JUDGE MILLETT: Well, when you say that, I guess I want to be precise, what exactly is it that your clients would get if a court were to declare the FHFA as having been a subroset (phonetic sp.) receiver since the Third Amendment, what would they get that they don't have?

MR. OLSON: The net worth sweep is an invalid, arbitrary, capricious, lawless administrative action under the APA --

JUDGE MILLETT: Is it lawless as -- would it be lawless if done as a receiver but not a conservator?

MR. OLSON: They would have to, well, they would have to behave in a different way, they can't --

JUDGE MILLETT: Well, I know, and that's what I'm asking you, I'm asking you is the relief you want here an injunction undoing the Third Amendment and sending all these hundreds of billions of dollars back to Fannie Mae and Freddie Mac --

MR. OLSON: Well, see --

JUDGE MILLETT: -- or, I really want to finish this, or is it a declaration that as of the Third Amendment

they were actually a receiver and you needed notice?

MR. OLSON: No. That action under those circumstances when it was acting in its role as a conservator was against the law, it was against --

JUDGE MILLETT: Was it against the law, or was it that they should have shifted, they should have -- they could have done it, could they have done it as a receiver if they said we're taking this into receivership, here we go, and given you your notice could they have done it, or would it have been unlawful as receivers?

MR. OLSON: They would have had to go through certain steps articulated in the statute, they did not do that, Judge Millett, what they have to do, you can't just say okay, I wanted to do it under some other statute and so that's okay.

JUDGE MILLETT: Well, no it's the same statute, let's be clear about that. What I'm hypothesizing here is that the mistake is not, as you would say, doing this as a conservator because you can't do with a mistake is they said we're doing it as a receivership, but what they failed to do was the notice and statutory requirements, so as a remedy of them that it's unlawful for a receiver to do this as well, or is it just that there's some notice and procedural requirements that should have been undertaken?

MR. OLSON: Not just notice and procedural

requirements, recognition of the assets, recognition of the rights, recognition of property rights of creditors and stockholders, and that sort of thing. So, you can't just say well, they should have done it as a receiver, but what the --

JUDGE MILLETT: So, they couldn't have done it as a receiver, either?

MR. OLSON: -- net worth sweep is not the act of a receiver, it might have been something because they wanted to wind down the entities, that they could have transited into the other level of responsibility and complied with the laws and requirements there, they did not do that. What we're seeking --

JUDGE MILLETT: What about creating a limited life entity?

MR. OLSON: Well, that's a different type --

JUDGE MILLETT: No, but he does a receiver and you kind of keep the company going for a couple of years, and, again, I know that doesn't fit the model of what happened here, but they surely would have the authority to have done that.

MR. OLSON: It does not fit the model, it is not what those statutory provisions were intended to do, and we addressed that in the reply brief.

JUDGE MILLETT: So, just what is the remedy that

you want here for this?

MR. OLSON: The remedy is that what the, the remedy that the APA provides, the action of the net worth sweep in August of 2012 was illegal, not justified by the statute, arbitrary, capricious, and inconsistent with what they were telling the world that they were actually doing, and therefore it has to be set aside. Now, the details of how --

JUDGE MILLETT: And how -- not details, what happens if one sets aside the Third Amendment, what happens?

MR. OLSON: The implementation of that decision is obviously something that the District Court would have to work out, and that's why I said details, I mean, they're important details.

JUDGE MILLETT: Well, your clients must have something to, I mean, they have to have standing, so they must think there's some remedy they would get out of this, what's the remedy --

MR. OLSON: Yes, we -- the remedy is --

JUDGE MILLETT: -- that they're going to get?

MR. OLSON: -- that once the net worth sweep is set aside the financial circumstances of these people that invested in this company believing the statements that the Government was giving them about we won't liquidate, as a conservator we don't intend to liquidate. Those

representations that people in the marketplace relied upon, they're entitled to the fulfillment of those rights that they had at that time, when the Government acted arbitrarily, illegally beyond its powers that has to be taken away, and we have to go back to that point. And to the extent that there are aspects of the implementation of that to be worked out that's why we have District Courts to do that sort of thing. But what this Court's responsibility, I submit, is to recognize that what happened at that time in August of 2012 was beyond the power of the FHFA under the statutes pursuant to which it was operating, it was supposed to be operating, and it said it was operating. It was illegal, it was unlawful.

JUDGE MILLETT: And what you say makes it -- just I want to be crystal clear, what they violated, you say, is the requirement that they manage it, and progress it toward a sound and solvent condition?

MR. OLSON: And preserve and conserve the assets and rehabilitate the entity. This is not something I'm making up --

JUDGE MILLETT: Is rehabilitate the --

MR. OLSON: -- it's in the statute.

JUDGE MILLETT: Is, where's rehabilitate?

MR. OLSON: Rehabilitate the agency to a sound and solvent condition. This is not something that I've come up

with, this is in the statute, it's in the regulations that the Agency itself has put out, it's in the statement of what the Agency said it was going to do when it --

JUDGE MILLETT: I'm sorry, I'm -- yes.

MR. OLSON: -- took this step back in 2008, and did everything that was --

JUDGE MILLETT: I'm sorry, but I'm --

MR. OLSON: -- directly --

JUDGE MILLETT: Sorry, I just want to make sure, because I do want to make sure I've got it right. Where it says that they have a -- I take it you mean by rehabilitate is to make it profitable again for private investors?

MR. OLSON: Well, A(2)(B), A(b)(2), rather, (d), powers of a conservator, the agency shall take such actions that may be necessary to put the regulated entity in a sound and solvent condition, that's (i), little, and then small (i)(2), appropriate to carry out the business of the regulated entity, and preserve and conserve the assets and the property --

JUDGE MILLETT: Right.

MR. OLSON: -- of the regulated entity. That --

JUDGE MILLETT: And if they thought, again, this is hypothetical, I'm not fighting with your record materials, if they thought there were not going to be any profits were have to stop the hemorrhaging, we have to stop

the hemorrhaging, there's never going to be enough profits we think in the foreseeable future to pay the dividends, and so they do the Third Amendment on that basis, would that not count --

MR. OLSON: The Third Amendment was, this is another part of the record and the brief and the arguments, there was essentially a stock purchased, they went from being a creditor to a holder of all of the common stock by having the ability to take all of the assets. That ability to do that was restricted under HERA, H-E-R-A, the statute to end at the end of 2009. What they did in 2012 was inconsistent with that limitation on their authority.

JUDGE MILLETT: That's your purchase argument, I want to stay focused --

MR. OLSON: But to answer your --

JUDGE MILLETT: -- I want to -- that's your argument about the sunset provision, right? That's what you're talking about is your, your argument about Treasury violating the sunset provision, that's --

MR. OLSON: Yes.

JUDGE MILLETT: Right. I still want to get back on (2)(d) here, A(2)(d), and that is if they thought that there weren't going to be any profits, or maybe there'd be a blip for one year for tax credits, but that going forward it was going to be hemorrhaging with that could you take these

measures --

MR. OLSON: No --

JUDGE MILLETT: -- and would that constitute, as sound and solvent as this thing can be by stopping the hemorrhaging and carrying on the business and conserving the assets by stopping the hemorrhaging.

MR. OLSON: No, they weren't stopping the hemorrhage --

JUDGE MILLETT: If they were in my hypothetical, my hypothetical, not --

MR. OLSON: But your hypothetical makes up facts that are directly contrary to the record. The hemorrhaging --

JUDGE MILLETT: That's what hypotheticals do.

MR. OLSON: The hemorrhaging was --

JUDGE MILLETT: That's what hypotheticals do. Come on. I want to know when you talk about what it means to keep something in a sound and solvent condition, and conserving the assets, if they don't think there's going to be a pattern of profits, and there's going to be more hemorrhaging than profits could they take a step like this? I know you say that isn't this case and that's the problem here, and the record, you have your record arguments about that, but could it ever be consistent with a conservator's duties under the statute to stop the hemorrhaging by saying

just give us whatever you can pay each year, we won't demand more than whatever you can pay?

MR. OLSON: No. My answer to that is that they would at that point decided to wind down the entity, which is what they said they did in August of 2012. They've made the step to wind down the entity, at that point they should have said we were wrong acting as a conservator, which by the way the facts suggests it was working, but we, yes, under your hypothetical they could say we were wrong, we now want to wind down the entity, which is what they said they were doing with the net worth sweep, and we're going to have to move to the provisions in the same statute that provide for a receivership and liquidation of the company. That's what they said in 2008 they weren't going to do as a conservator.

JUDGE MILLETT: Okay. Just to be clear, so if your -- just to make sure I understand this, your position is if they made this determination that we can't, they're just never going to get to a point of consistent profits then they can't conserve it anymore, that once they've made that judgment they have to go to receivership --

MR. OLSON: They have --

JUDGE MILLETT: -- is that what I hear you saying?

MR. OLSON: Yes, that's the other authority that the FHFA has under this provision of the laws of the United

States. They can act as a conservator, or they can act as a receiver. Being a receiver is not a conservator; being a conservator is not a receiver. If they had decided under that hypothetical that that was something that needed to be done they had to move into another pattern, operate under the procedures of the statute to give them powers of receiver, and give rights to other people that are affected by that decision. They didn't do that, they didn't do that.

JUDGE GINSBURG: So, throughout this period and when the Third Amendment was entered into as I recall the combined portfolios of the two GSEs was roughly $5 trillion, is that right? Yes. So, suppose that a supplemented record would reveal that the Treasury and the FHFA were of the view that there's no way to liquidate a $5 trillion portfolio, all of the possible purchasers of pieces of this portfolio could not muster $5 trillion, so we're going to have to wind it down till we get to a stage where it's practical to liquidate, and that will happen assuming they don't make profits that no one expects them to make, that will happen with this sweep, at least that way it'll happen within a few years and then we'll be able to liquidate.

MR. OLSON: What I think you're asking me then what should they have done under our theory?

JUDGE GINSBURG: And indeed, what they did do wouldn't have a benign explanation.

MR. OLSON: Well, the --

JUDGE GINSBURG: A lawful explanation.

MR. OLSON: I submit that the record supports the proposition, the record that we have so far supports the proposition that they saw the pot at the end of the, pot of gold at the end of the rainbow, they decided we're going to take that away from the stockholders and we're going to give it to the Treasury Department because we have a budget deficit, and this is going to be a big help, the record --

JUDGE GINSBURG: Well, the only person who saw a pot at the, of gold at the end of the rainbow was possibly Ms. McFarland.

MR. OLSON: Well, it wasn't just Ms. --

JUDGE GINSBURG: The 10-Qs don't say it.

MR. OLSON: And it is supported by what happened subsequently to that.

JUDGE GINSBURG: That can't reflect what their --

MR. OLSON: Well, well --

JUDGE GINSBURG: -- motivation was.

MR. OLSON: -- if we're speculating about the future we, and the record does support that, and the $58 billion that I mentioned is subsequent to that, but it was, part of the record does support that there was a point which the amount coming into the Treasury exceeded the amount that the Treasury had put into the GSEs.

JUDGE GINSBURG: Sometime after the Third Amendment.

MR. OLSON: Yes, but based upon what you could see, based upon the 10Ks that were at the end of the year, and so forth, the information was available, people saw that the housing market had turned around by then, by 2012, things had changed enormously, and we believe --

JUDGE GINSBURG: Well, not so much that there was unanimity, we still had the, the 10-Qs, we had the Grant Thornton report, all of that, which was September of 2011, at least the date will work, but the report was done March, or June of 2012.

MR. OLSON: Well, what you -- what the --

JUDGE GINSBURG: But so, before the District Court when you were seeking to supplement the administrative record, as I recall one of your arguments was, and maybe your principle argument was we need to know why, what their explanation is for why they did, so the District Judge said their motivation is not relevant --

MR. OLSON: Yes.

JUDGE GINSBURG: -- to the question of whether they conformed to the law or did not.

MR. OLSON: Yes.

JUDGE GINSBURG: You said it is relevant.

MR. OLSON: Yes.

JUDGE GINSBURG: And so, if we fully explore that, if you get an opportunity fully to explore that I'm saying isn't it possible that one of the things one could turn up is an entirely lawful explanation? Because --

MR. OLSON: I don't believe it's going to happen.

JUDGE GINSBURG: -- liquidation at that scale was not practical, and that only by winding it down to a practical scale could they ever appoint themselves receiver.

MR. OLSON: I don't believe that that's what we'll find out, Your Honor. But you said is it possible, I suppose it's possible, but that's what happens when we're both speculating about what's in a record that had been denied to us.

JUDGE GINSBURG: Exactly right. Exactly right. So, the question of motivation could cut either way here, it might not be irrelevant.

MR. OLSON: It certainly is relevant with respect to whether an entity is operating in a fiduciary capacity as a conservator, because a conservator has, and the --

JUDGE GINSBURG: Yes --

MR. OLSON: -- agency --

JUDGE GINSBURG: -- motivation is relevant to that you're saying?

MR. OLSON: Yes.

JUDGE GINSBURG: Yes. Yes. Okay.

MR. OLSON: Yes.
JUDGE GINSBURG: The District Judge disagreed with that.
MR. OLSON: Yes.
JUDGE GINSBURG: You have constructed one, and I've constructed another scenario in which it is relevant.
MR. OLSON: Yes.
JUDGE GINSBURG: Okay.
MR. OLSON: Yes. I agree with that.
JUDGE GINSBURG: I don't know why we should go any further than that.
MR. OLSON: Well, perhaps. I think that you have enough, and I'll, I think I've taxed your patience, Judge Brown, so I will sit down.
JUDGE GINSBURG: That's not what I meant, but I, but --
MR. OLSON: I think you have enough to decide that the net worth sweep was not what it was said to be, and it was not consistent with acting as a conservator. I think you have enough. But at minimum we're entitled to have a record that we can try this, and we're entitled to have a District Court decision that accepts as true the allegations of the complaint so that we can go forward.
JUDGE BROWN: Thank you.
ORAL ARGUMENT OF HAMISH P.M. HUME, ESQ.

ON BEHALF OF THE CLASS PLAINTIFFS

MR. HUME: Good morning, Your Honors, may it please the Court. This is Hamish Hume from Boies, Schiller & Flexner representing the Class of private preferred and common shareholders of Fannie and Freddie. Your Honors, the Class advances claims of breach of contract, breach of fiduciary duty, common law claims.

We've just heard a lot about a very important APA claim, but our claims are not APA claims. I would urge the Court to free itself from the confines of the APA in considering our common law claims, because we are not limited to the concept of an administrative record, or the concept of whether the Agency acted reasonably within the confines of the statute. The question --

JUDGE MILLETT: How can fiduciary duty claims, common law fiduciary duty claims survive a statute that first assigns all titles, power, and privileges, and rights of stockholders to FHFA, and provides that any actions the Agency, can be taken by the Agency if they determine it to be the in the best interests of the regulated entity or the Agency, how can a common law fiduciary claim survive that?

MR. HUME: Well, let me answer that first with a derivative claim, and then the direct claim, if I might. With respect to a derivative fiduciary duty claim there are two courts of appeal, the Federal Circuit and the Ninth

Circuit that both held that the identical statute in FIRREA allowed a derivative claim because of the manifest conflict of interest, when there's a manifest conflict of interest between the conservator and whoever it's being asked to sue. That was well established from 1999 onwards, and it was no small decision, it led to a whole slew of cases in the *Winstar* litigation worth billions of dollars in which private shareholders were permitted to pursue both derivative and direct claims, because the *First Hartford* (phonetic sp.) decision didn't just allow the derivative claim when there was a manifest conflict, but also allowed shareholders to pursue a direct claim at page 1288 to 1289 of that Federal Circuit decision. And it was a huge deal, it led to these *Winstar* cases that went on and on and on, seeking billions of dollars, and collecting billions of dollars from the Government, Congress knew that when it enacted HERA, and it enacted the identical statute in HERA knowing that. And on page 27 of our opening brief we cite two decisions of this Court, *City of Donaire* (phonetic sp.) *v. FAA*, and *Gordon v. Capitol Police*, both of which say unequivocally that when Congress adopts a statute that's identical in wording to a prior statute, and that's been interpreted by the courts, that generally indicates that Congress adopted the judicial interpretation. Our friends, the Defendants, the Appellees, never respond to those cases,

they say nothing about them. In fact, the FHFA embraces that concept in its brief, and says in trying to argue with the APA case says that Congress has blessed the Third Amendment because it enacted the Consolidated Appropriations Act of 2016, which sort of talked about the Third Amendment, talked about where the money would be spent, and didn't say anything bad about the Third Amendment, so they embraced the proposition that Congress knows what's going on, and when Congress adopts an identical statute it embraces what the courts have said about it, and the courts have said where there's a manifest conflict of interest then you can bring --

JUDGE MILLETT: Two courts have said. Two courts have said.

MR. HUME: Two courts have said that --

JUDGE MILLETT: Two courts have said.

MR. HUME: -- and no court has rejected it other than Judge Lamberth below. So --

JUDGE MILLETT: I'm just trying to figure out how, what the conflict of interest is when they're entitled to act in the Agency's best interests, as much --

MR. HUME: Well, first of all --

JUDGE MILLETT: -- as the entities and the whole point of shareholder derivatives is deemed to be a conflict of interest, I just don't understand how it works.

MR. HUME: Judge Millett, I'm glad you asked that question, because one error in Judge Lamberth's reasoning that I don't think we, I clearly identified in our briefs it is absolutely not correct to say that the exception swallows the rule here, it is absolutely not correct to say that derivative suits only exist when there's a conflict of interest. This Court's decision in *Kellmer* is a perfect illustration, it was a derivative case in which there was no conflict of interest, it's just that the company chose in its decision, in its business judgment that it wasn't worth suing Franklin Raines and the other officers, the shareholders disagreed. It wasn't a conflict of interest, let alone a manifest inescapable conflict of interest, just a difference of judgment, that's why the derivative claim generally exists.

So, there are lots of instances in which derivative claims couldn't be brought by shareholders and would be the decision of the conservator. But when you're asking the conservator to sue itself you have gone through the looking glass into a world of absurdity if you say that shareholders cannot bring that claim, and that's what the *First Hartford* --

JUDGE MILLETT: But it's okay to make a decision in the interest of itself.

MR. HUME: I'm sorry, Judge Millett?

JUDGE MILLETT: When the Agency is the conservator, and the Agency can make a decision in the interests of the Agency then it's okay. It seems to me the statute is saying that's not a conflict of interest.

MR. HUME: The statute --

JUDGE MILLETT: If they take actions as long as they're in the best interests of the entity, or the Agency. And so, then to sue on the grounds that well, they won't sue because they made a decision in the best interests of themselves, the Agency doesn't seem to grapple with how these two sections intersect.

MR. HUME: I don't think it's possible to read the statute as conferring on the FHFA the authority to decide whether or not to sue itself for violating fiduciary duties. It says, the succession provision says that the FHFA as conservator succeeds to the rights, powers, and privileges of the company with respect to the regulated entities and its assets. I would submit that the textual -- I think, Judge Millett, maybe what you're asking is where in the statute can I attach this notion of a manifest conflict of interest exception, and I would suggest the word conservator may be the place to put it because if they're not acting as a, if the question is whether they violated their fiduciary duties then the real question is whether they can sit as judge and jury over that claim. I would concede that the

statute doesn't talk about an exception, and the courts have read it in, in fact, *First Hartford* doesn't really even talk about it as an exception, it simply says there's no way Congress could have intended that if there's a manifest conflict of interest, then the derivative claim is possible.

And I think that the backdrop to that is a constitutional avoidance doctrine, because you can't read the statute to do something that would be an obvious due process violation, there's a whole string of Supreme Court cases going back to the 1920s --

JUDGE MILLETT: Due process isn't taking of property? Due process taking --

MR. HUME: Yes, and, but also the inability to advance your own claim, and I think if, I would refer the Court to the Plaintiff's --

JUDGE MILLETT: Well, I don't see what -- the inability to advance your own claim if it's not your own claim is not --

MR. HUME: Fair enough.

JUDGE MILLETT: -- a due process problem unless the argument is that they took your claim, which is --

MR. HUME: Yes.

JUDGE MILLETT: -- back to taking of property, right? So, that's the only constitutional --

MR. HUME: I think for the derivative claim that

constitutional avoidance issue may depend in part on whether there's also a direct claim that could be brought. All I'm saying is I think the courts have suggested there may be a due process issue, as well, in the *First Hartford* case. If I could --

JUDGE MILLETT: And then on the --

MR. HUME: If I could just --

JUDGE GINSBURG: Are you a party to the takings case in the claims court?

MR. HUME: Yes, I am.

JUDGE MILLETT: Well, your direct claim, I just didn't see you raising that below in the District Court.

MR. HUME: Yes, I understand --

JUDGE MILLETT: Can you tell me where you did?

MR. HUME: I think, all I would say is this, Judge Millett, in count seven of our complaint we did refer to a fiduciary duty to shareholders four different times.

JUDGE MILLETT: I'm sorry. Yes. Yes. Fiduciary duty to shareholders.

MR. HUME: Yes. I would concede that the clarity with which we pled a direct claim, and the clarity with which we briefed it left something to be desired, but did allege --

JUDGE MILLETT: No, but you can tell me where you raised it not so clearly.

MR. HUME: Your Honor, I think it's paragraphs 377, it's in, if you look at count seven of our complaint you will see a reference four different times, I can give you the exact cites if you would like.

JUDGE GINSBURG: Four references to what?

MR. HUME: To, in paragraph 176, 177, and 180, twice in 176 --

JUDGE MILLETT: I'm sorry, which page of the J.A. are you on? I'm sorry.

MR. HUME: This is, I don't have the J.A. cite, but it's in our third amended complaint. But before I delay you too long I'm simply saying that we say fiduciary owed to the shareholders four different times in those three paragraphs. We briefed a derivative claim. We would submit two things, Your Honors, on our direct fiduciary breach claim, first, under the lenient notice pleadings, maybe three things, first under notice pleading I think we said enough; second, that's especially true in light of the fact that the Delaware courts in the *Gatz* case and the *Gentile* case, which are both cited repeatedly in our briefs and other briefs, have recognized that in some situations a fiduciary breach claim can be both direct and derivative, modifying to some degree the *Tully* decision, and that's exactly --

JUDGE MILLETT: Did you brief this to the District

Court? So, you -- it's not in your complaint, did you brief it to the District Court?

MR. HUME: We did not.

JUDGE GINSBURG: Did you brief this as a separate matter as you have here, the claim that the net worth sweep violates, pardon me, that there was a breach of the implied covenant of good faith?

MR. HUME: Yes.

JUDGE GINSBURG: You did brief that?

MR. HUME: Yes, and I'd like to turn to the --

JUDGE GINSBURG: If successful that would be fully adequate to, for the relief that you would claim as a fiduciary.

MR. HUME: I think that's probably correct, Judge Ginsburg, there are --

JUDGE GINSBURG: So, the argument would be that okay, they have dual loyalties here, unlike an ordinary fiduciary, unlike a Delaware fiduciary, but like the FDIC, and they have to administer that inherent conflict in good faith.

MR. HUME: Absolutely. And in fact, if I could, if I may just finish the questions on the direct claim, Judge Millett, this Court does have the authority, its discretion rarely exercised to allow us to amend, to add a direct claim, and the citation for that is *DKT Memorial Fund*

v. Agency for International Development, 810 F.2d 1236 at 1239. If the Court thinks it's necessary after full consideration that we amend, we ask to amend, but it may not be because our think our breach of contract claim, or breach of implied covenant claim clearly must survive and the decision will be reversed.

In considering our contract claims, Your Honors, we would urge the Court to look at the substance, the basic economic substance of what happened, and not accept the highly formalistic argument of the Defendant/Appellees, and respectfully of the District Court below.

Here's the basic economic substance of what happened, under the original PSPA, the Treasury Department had senior preferred stock entitling it to get a couple of 10 percent every year on the full amount of its investment, plus an extra $2 billion. It also had a right to buy 80 percent of the common stock of these two companies for a nominal price, and everyone keeps saying a nominal price, I looked it up and if my math is correct the nominal price is about $10,000 to $15,000 for 80 percent of Fannie and Freddie. That stock's worth --

JUDGE GINSBURG: Do you know what the market value was at the time?

MR. HUME: I know that the preferred stock, the junior preferred stock, I know that the preferred stock

before the Third Amendment was trading at about just over $2 billion, between $2 and $3 billion market cap. I don't know --

JUDGE GINSBURG: About 15 cents a share.

MR. HUME: I don't know the per share price, and I don't know if from September of '08, but I'm confident it was more than $15,000. And I'm very confident that in a liquidation it would have been worth more than that.

But in any event, the original structure was that, which is revealing first of all in showing the Treasury was a stockholder, all the stuff you're hearing about there are no stockholders, stockholders have nothing, stockholders are gone, they're wiped off the face of the planet, it's not true at all. The Treasury is a stockholder, they put in their agreement a choice of law clause, a venue clause, where they're going to litigate, they're a stockholder, they have rights as a stockholder, they can litigate as a stockholder, they're entitled to dividends as a stockholder. First preferred senior, 10 percent, then 80 percent of the common, that is clearly saying that if, if the companies make enough money to pay dividends in excess of 10 percent, and if they decide to do so they first have to pay the junior preferred, whose total cumulative dividend if paid, there are different coupon rates, but it's a total face amount of $35 billion, their coupon would maybe be some are

at five percent, some are at eight percent, at seven percent it would maybe be $2.7 billion. Okay? Then if Treasury wanted more it can take the $10,000 or $15,000 by 80 percent of the common and get 80 percent of it in the rest of the dividends. So, here's what happened, the companies did become profitable, Susan McFarland did think that $50 billion tax, preferred tax would be reversed, and sorry, but I read the August 9th, 2012 projections differently than the Court, I would urge the Court to look at them, they were conservative compared to what happened, but they were still optimistic. Those two documents submitted with the seven --

JUDGE GINSBURG: Wait a minute. When you say August 9 documents --

MR. HUME: There's an August 9, 2012 projection, and an August 11, 2012 projection.

JUDGE GINSBURG: Are these the 10-Qs, or are these something else?

MR. HUME: No, they're internal Fannie projections, and they show a projection of when the dividends will exceed the draws, in 2019 for one enterprise and 2020 for the other. Now, it turned out --

JUDGE GINSBURG: Namely when?

MR. HUME: I'm sorry?

JUDGE GINSBURG: You said it shows when they would exceed, when was that? What are they projecting?

MR. HUME: The projection was made in, right before the Third Amendment.

JUDGE GINSBURG: Yes. And projected?

MR. HUME: Projected that they're going to have gotten more money back than they put in in dividends alone.

JUDGE GINSBURG: By?

MR. HUME: By 2019 or 2020. So, they're not projecting a death spiral, they're projecting a recovering Fannie and Freddie that are going to be hugely profitable. Now, they underestimated how profitable, but they knew they were going to be profitable.

JUDGE GINSBURG: Just to one's point, these documents are, are these the recently unsealed documents?

MR. HUME: That's correct. And I have them, unfortunately, by the exhibit numbers they were given in the Court of Federal Claims where they were Exhibits G and H, but basically, that means they were the fifth and sixth of the seven documents in order. They had different exhibit numbers from the --

JUDGE GINSBURG: Do you have dates on them?

MR. HUME: What's that?

JUDGE GINSBURG: Do you have the dates on them?

MR. HUME: Yes, the first one is August 9th, 2012, and the second is August 11th, 2012.

JUDGE GINSBURG: So, the August 9, 2012 document

is Fannie Mae's projection, right?
MR. HUME: That's right.
JUDGE GINSBURG: And the 11th is what?
MR. HUME: It's an e-mail from David Benson of Fannie to somebody at Treasury really sending the same projections.
JUDGE GINSBURG: Okay. So, they're -- and Freddie is not --
MR. HUME: But they --
JUDGE GINSBURG: -- in this picture?
MR. HUME: Freddie is in it. I don't know why it's coming from Fannie only, but the projections are for Freddie, as well, they're just a page with both projections.
JUDGE GINSBURG: Okay.
MR. HUME: In fact, Freddie has better projections, they're destined to have returned more money than any money drawn down by 2019. Now, here's what actually happened, then, so --
JUDGE MILLETT: Virginia law for Freddie Mac, though, is different than Delaware law, right?
MR. HUME: I'm sorry, Judge Millett, I --
JUDGE MILLETT: Isn't Virginia law different than Delaware law for Freddie Mac?
MR. HUME: I don't think it's different in any material respect here, and I haven't heard the Defendants

argue that it is.

JUDGE MILLETT: I thought that's why this was coming at us from Fannie Mae, because that's where you had precedent and you didn't have it from, for Freddie Mac in Virginia, am I wrong?

MR. HUME: I don't -- I'm sorry, I don't --

JUDGE MILLETT: Okay.

MR. HUME: -- understand the question. The projections were coming from Fannie, it's true that Freddie is subject to Virginia law and Fannie is subject to Delaware law.

JUDGE MILLETT: And are they the same for purposes of contract claims, implied covenants claims, and fiduciary duty claims, direct and indirect?

MR. HUME: Yes, I think -- yes, I think they are the same for contract and implied covenant. I am not aware of a difference with those respects. On fiduciary duty Virginia may be a little tougher on the direct fiduciary duty claim than Delaware.

JUDGE MILLETT: And then -- I'm sorry, were you done answering Judge --

MR. HUME: Well, if I --

JUDGE MILLETT: I want to let you finish answering him and then I have another question.

MR. HUME: If I might, I would like to just finish

sort of the presentation of the core substance of what happened because I've explained the original structure --

JUDGE MILLETT: Well, then I want to get back, if that's what you're doing, on the contract. You don't challenge the PSPAs?

MR. HUME: That's correct.

JUDGE MILLETT: And do the PSPAs provide that the entities could not make any distributions of capital otherwise until Treasury stock was paid off?

MR. HUME: No, I don't think they say that you can't make a distribution until the stock is paid off. It says it can't make a redemption, it can't make a redemption of the Treasury stock until the stock is paid off.

JUDGE MILLETT: What I have is the enterprise isn't -- tell me if I'm wrong, from J.A. 2451, they may not declare or pay any dividend, preferred or otherwise, or make any other distribution by reduction of capital or otherwise, whether in cash, property, securities, or a combination thereof, other than to Treasury, until Treasury is paid off, am I misunderstanding that?

MR. HUME: I think Treasury has the right to consent to it. I think that's -- Treasury has to consent to any dividend that is paid.

JUDGE MILLETT: And they haven't done that.

MR. HUME: They haven't done that.

JUDGE MILLETT: So, but how does this affect your contract claim to dividends?

MR. HUME: It makes it contingent.

JUDGE MILLETT: Huh?

MR. HUME: It simply makes it contingent because, listen, here's what -- all dividend rights are contingent, in fact, even if you read the senior preferred stock agreement the Treasury's dividend rights were contingent on the board declaring them, all dividends in the private stock market.

JUDGE MILLETT: And Congress has now declared, passed a law that they can't pay these dividends either, correct?

MR. HUME: No, I'm not aware of --

JUDGE MILLETT: They can't even pay --

MR. HUME: No, no.

JUDGE MILLETT: The 2016 Act prevents them from paying back Treasury --

MR. HUME: No.

JUDGE MILLETT: Treasury can't even sell its stock or have it satisfied, correct?

MR. HUME: No, the 2016 statute does not say that they cannot pay dividends to private shareholders.

JUDGE MILLETT: No, no. No. You have this provision that says you've got to pay Treasury, you've got

to buy Treasury off first, and then the 2016 Act says Treasury, you can't sell anything, and so I'm trying to figure out how those together leave you with much of any contract claim. It seems it's less than contingent at this point. But if I'm misunderstanding please tell me.

MR. HUME: Well, I'm not sure I'm understanding the relevance of the Appropriations Act. What we're saying is that the basic substance of what happened here is that in the three years after the Third Amendment dividends were paid from the enterprises to Treasury of $130 billion, okay? If dividends had been paid pursuant to the original agreement, 10 percent would have gone as senior preferred stock to the Treasury, and -- sorry, and the 130 is in excess of the 10 percent, so the 130 dividends that would have been paid at most, again, we don't know the exact amount of the preferred dividend, but it would have been somewhere between six and nine, let's call it seven and a half, the remainder, 122 or so, would have been divided 80/20 between the common, so Treasury still would have gotten $100 billion of the 130, they just didn't want to give the private shareholders anything, so they leapfrogged, there are mandatory dividend rights in the contracts.

And by the way, Judge Millett, if there's something in that Appropriations Act that's inconsistent then it would be a breach. But the mandatory dividends

rights say you cannot pay anyone junior to us, the junior preferred say don't pay anyone junior to us until you pay us, and that's exactly what the Third Amendment did, it gave $130 billion to the Treasury beyond its senior preferred dividend, some of that had to come to the junior preferred. Then the common have a provision in their contract that says you have to pay us ratably with any stock that's equal to us, well, their stock is by definition equal to the common stock the Treasury would have gotten, so they should have gotten paid. That's the substance of what happened, and their answer to it is, and it's rather galling, there's no breach of contract because the written terms of the share certificates of the private shareholders have not been altered. Well, thanks a lot, we still have a piece of paper with the same words on it, but the words are being completely disregarded. The words say you're not going to pay a dividend more than the 10 percent senior preferred to the Treasury without paying us first, and people invested on that. Then they went and said through another, just basically asserted through an amendment, they could have done it through a bylaw, it doesn't matter, it's a breach either way no matter how they do it they said we're going to pay dividends to Treasury beyond its 10 percent, hundreds of billions of dollars beyond its 10 percent, without paying you first, even though your contract says that you have to

get paid first, that's a breach. And it's also a breach for the common not to pay them ratably.

In addition, if you look at the substance of all that, there's no way to contest the fact that they materially, adversely harm the interests of these private shareholders without giving them a vote, and their contracts entitle them to a two-thirds vote for any such change.

Again, especially when there's an implied covenant claim, the Delaware and Virginia courts would look at substance and not get caught up in formalisms. And I think what you're going to hear from the Defendants is a lot of formalism. It should be substance, not form that governs this case, and there are cases that say that, I would refer the Court to the *Winston v. Mandor* Delaware case on page six of our reply brief, and another case, *Price v. State Farm*, 2013 Delaware Superior Lexus 102 explicitly says that when there's an applied covenant claim Delaware courts look at substance over form.

JUDGE MILLETT: How does applied covenant work, though, when you've got, when they can take interest, actions in the interest of the agency, as well as the entity? Are there cases that tell us how us how that would work?

MR. HUME: Well, that's what I was trying to say at the beginning, that whether the actions were taken in a

good faith effort to help the enterprises, and help the agency, or help the tax payer, they still have an implied covenant to respect the terms of their contracts that they assumed with the private shareholders. And so, this whole issue of motive that the Court was asking Mr. Olson about --

JUDGE MILLETT: Yes, but this case isn't, and albeit another context where the Supreme Court has explained that when the United States has a fiduciary duty, that fiduciary duty is infused with its right to acts as sovereign, and acting in its sovereign interests is consistent with its fiduciary duties, the fiduciary duty for governmental entities is just not the same as it might be for a private fiduciary.

MR. HUME: Yes, we encountered --

JUDGE MILLETT: And so --

MR. HUME: -- that in the *Starr* case in the Second Circuit, but there's a big difference here, the FHFA has vigorously asserted, or the Department of Justice has asserted on its behalf that it is not the Government. In the Court of Federal Claims takings case, which Judge --

JUDGE MILLETT: Well, but I bet you disagree with it.

MR. HUME: Well, we're saying --

JUDGE MILLETT: Yes. Yes.

MR. HUME: -- we're saying, yes, we are saying

that they are the Government, and this was --

JUDGE MILLETT: Okay.

MR. HUME: -- two Government agencies colluding, but they can't have it both ways, okay, they can't say we're not the Government, you can't sure us for takings --

JUDGE MILLETT: Nor can you.

MR. HUME: -- but over here in District Court --

JUDGE MILLETT: Right, but you can't have it both ways, either, so if we're going to assume --

MR. HUME: I'm pretty sure if I get it one way I'll win.

JUDGE MILLETT: Well, that's what I'm asking you is if you, on an applied --

MR. HUME: I only need one way to win.

JUDGE MILLETT: So --

MR. HUME: They need to have it both ways for me not to win.

JUDGE MILLETT: -- if they are the United States for these purposes a federal agency for these purposes, and can take actions in the interest of the agency, and the interest of the United States is sovereign then how could there be a breach of the implied covenant of good faith on this contract --

MR. HUME: Well, I think, you know what I think at most --

JUDGE MILLETT: -- when it's all conditional rights on Treasury's decisions anyhow?

MR. HUME: At most what that would lead to, Judge, and they haven't really argued this, but at most what that would leave you, Judge Millett, is that we'd have to bring this implied covenant and breach of contract case in the Court of Federal Claims, that's the most it would mean, because there's plenty of cases in the Court of Federal Claims with implied covenant claims. The United States Government can breach a contract and be sued for money, and it can breach the implied covenant, that happens in the Court of Federal Claims. So, I think the line of questioning you have simply says, is about which court I need to go to.

JUDGE MILLETT: And so, since you think the United States, and then does that mean you agree the contract claims should be here?

MR. HUME: No, because they haven't claimed immunity, and we --

JUDGE MILLETT: Well, that would be jurisdictional.

MR. HUME: The Court did have jurisdiction over, because they didn't claim any immunity, and they're not the Government.

JUDGE MILLETT: If they are the United States then

you're alleging a breach of contract with the United States then they, as you seem to be arguing in the Court of Federal Claims, then the contract claims need to be there, too.

MR. HUME: We explained in the very first two pages of our complaint in this case, in the original complaint that to some degree, to the extent we're suing FHFA we're doing it as an alternative claim. The system set up by Congress requires the -- normally an alternative claim would be in the same case, the system created by Congress requires us to do it this way, that if you agree you're the Government it's a taking, if you're going to try to say you're not the Government then we have to be in District Court. And by the way, if you are the Government we may have more claims in the Court of Federal Claims.

And I would keep in mind, also, that our breach of contract claims, I don't want to be read, I don't want the record to reflect that I've conceded too readily that the Defendants on the FHFA side here are governmental because Fannie and Freddie still exist, the FHFA is their conservator, it runs them, but Fannie and Freddie are private entities, they are still getting sued in District Courts around the country, and I think the balance of the case law is that they don't get to assert immunity. So, those two entities are still liable for breach of contract, and I don't actually envision any scenario in which we have

to sue them in the Court of Federal Claims, so I think our claims against them really do belong in District Court not just as an alternative claim, but because Fannie and Freddie are not the Government. The FHFA is a Government agency, but the entities it's running are not.

JUDGE GINSBURG: The Government isn't a Delaware corporation, amazing.

MR. HUME: We're not -- not yet. Given its exceptional money-making abilities it might decide to issue stock, I don't know. But the -- we're not suing the Treasury for -- well, we are suing the Treasury for breach of fiduciary duty, but we're not suing them for breach of contract.

JUDGE BROWN: All right.

MR. HUME: Thank you very much, Your Honor.

JUDGE BROWN: Thank you, Mr. Hume.

JUDGE GINSBURG: Can we take a break?

JUDGE BROWN: Excuse me. We're going to, the Court is going to take a brief recess before the Government starts. Thank you.

JUDGE GINSBURG: We may or may not be back.

(Whereupon, a brief recess was taken.)

MR. CAYNE: May I proceed?

JUDGE BROWN: Yes.

ORAL ARGUMENT OF HOWARD N. CAYNE, ESQ.

ON BEHALF OF THE FHFA

MR. CAYNE: May it please the Court, Howard Cayne for Federal Housing Finance Agency, Fannie Mae, and Freddie Mac. Your Honors, Judge Lamberth's decision should be affirmed actually now based on a notice we were provided by the Court earlier today for three independent reasons, first, a statutory jurisdictional bar precludes review of Plaintiff's claim, in addition to the bar laid out in our statute, Your Honors, the statute reference in the Court notice to Counsel also fully precludes each and every claim in this matter seeking relief, Your Honors.

JUDGE GINSBURG: So, you overlooked a dispositive jurisdictional bar to this case?

MR. CAYNE: I'm sorry, Your Honor?

JUDGE GINSBURG: You overlooked a dispositive judicial --

MR. CAYNE: Your Honor --

JUDGE GINSBURG: I mean, a jurisdictional bar?

MR. CAYNE: Your Honor, as is many litigations this case morphed over time.

JUDGE GINSBURG: More morphing.

MR. CAYNE: And I would, I said to my colleagues I applauded the member of the Panel, or the Clerk who saw this, but it just supplements what we have said, because let me just get to --

JUDGE GINSBURG: So, you're saying the equitable, pardon me, the Third Amendment, that's what we're talking about, right, the Third Amendment was a discretionary supervisory action?

MR. CAYNE: No, Your Honor, let me --

JUDGE GINSBURG: Okay, go ahead.

MR. CAYNE: -- tell, say to the Court, and this is what wasn't so clear in the complaints, but as the case has developed and we heard this morning, Plaintiffs essentially allege that the FHFA is violating all sorts of rules, laws, regulations, safe and sound banking practices by allowing these institutions to operate with as little as zero capital, that is the point that this statute gets to, Your Honor, because as you Court will know from the statute, it says that the, if the Agency as regulator, and again, Your Honor, when we filed out papers we were focusing on the conservatorship allegations in the complaints, but when the Agency is regulator, reclassifies or changes capital classification, that might be challenge, but beyond that anything relating to a changed capital classification according to the statute is not subject, it may not be affected in any way by an order of any court. So, what we have here at the outset in 2008 at the time the institutions were put into conservatorship, a new capital paradigm was established, and that capital paradigm said as long, by the

Director of the Agency as regulator, and that capital paradigm said as long as these institutions are not forced into mandatory receivership they may operate. And the new paradigm was rather than requiring them to maintain eight percent, five percent, six percent capital, whatever the standard was as a normal banking institution, it was determined that as long as the Treasury commitment was out there ready to come in to cure any insolvency, which as the Court knows if the institutions were insolvent for more than 60 days the Agency would have been forced to place them into mandatory receivership, so the new paradigm was we'll have the 100, 200, eventually Treasury committed to 467 billion, nearly a half a trillion dollars to support these enterprises, and the regulator made the regulatory decision that we will, the Agency will allow that to satisfy capital standards. So, again, this, it was not challenged at the time, and so what the statute says is that this action by the Agency as regulator to establish a new capital paradigm for the duration of the conservatorships may not be affected by injunction or otherwise in any manner, it's similar to the banking cite in here, and the banking cite is 12 U.S.C. 1818(i), no court may effect by injunction or otherwise a cease and desist order that has been issued. What was happening there, and there's case law on this, this provision essentially parrots what are called on the banking

landscape capital directives. Capital directives were first enacted by Congress in 1983 pursuant to the International Lending Supervision Act of 1983. And what a capital directives -- and it was issued, Your Honors, in response to a Fifth Circuit decision, the Fifth Circuit back in 1983 in a case called *Comptroller Currency v. First National Bank of Bel Aire* ruled that the Comptroller's cease and desist order requiring the bank to increase its capital was not supported by substantial evidence. And to overrule that decision the Congress enacted what are called capital directives, and capital directives provide that the agencies, the comptroller, the FDIC, the Fed, the NCUA, I believe, can require institutions to maintain whatever capital level they deem appropriate under the circumstances, and this was the key point, those determinations are subject to no judicial review. In 1990 that point that they were subject to no judicial review was challenged in the Fifth Circuit in a case called *FDIC v. Bank of Coushatta*, reported at 930 F.2d 1122, and on a three-judge Fifth Circuit panel including the esteemed Judge John Minor Wisdom, the Court ruled that the statute comported with due process. There's a lengthy analysis, and the statute, the capital directive statute at issue there that provided no judicial review to banks, when the agencies changed, increased, decreased their capital guidelines was not subject to judicial review. Your Honors,

that is precisely what is implicated by the statute that the Court has referenced.

JUDGE MILLETT: And so your view here is that they're challenging this what you call capital paradigm of, that was created here of, in the Third Amendment getting rid of obligations that the GSEs had under the prior amendments, and the PSPAs and replacing them with this just pay us whatever you can each month, that's a new capital paradigm decision by the Director?

MR. CAYNE: No, what I'm referring to, Your Honor, is the, it's throughout their briefs, it came up in my esteemed colleague Mr. Olson's presentation many times that we, the Agency is driving these institutions out of business. It's allegedly not allowing them to grow capital, it's keeping them at zero, how can that be? Well, the reason that can be is the paradigm, the new capital program that never has been challenged that was established in 2008 sets precisely that, an action was taken by the Director at that time, in September, 2008, that said going forward the normal capital classifications, whatever the percentage was, I don't recall, three, four, five, six, seven, eight percent no longer applied. Instead, we're going to have this new paradigm, and the new paradigm is, and we all have to understand, much of the presentation by my colleagues, it's like we're dealing with this fabulously successful financial

institution, and the shareholders are being stripped of their rights. Well, what we're dealing with are institutions which we all recall that in 2008 were on the verge of insolvency, and they were threatened with receivership, which would have had massively adverse consequences on the national mortgage markets, so Congress passed special legislation, and this legislation, getting, and I apologize for just skipping a bit, but this legislation is with respect to the matters that we hear about, conflicts. This legislation was actually included in the charter acts, the charter act of Fannie Mae, the charter act of Freddie Mac, so this is both federal law, and this is in the governing corporate instruments of these institutions, this ability, authority of Treasury to infuse massive amounts of tax payer dollars, and so what we have in this --

JUDGE MILLETT: Well, so their argument is as I understand it is that the paradigm that you had was in 2008 and going forward to, up to and through the Third Amendment the Director's decision was no way do we want this going into mandatory receivership, no way do we want that happening, we must prevent that from happening, we do not want receivership because of the enormous consequences that would have for the economy, the Treasury, hook up the hose and we're going to have the money running in and do whatever

we have to avoid, we can to, whatever we have to do to avoid receivership, is that --

MR. CAYNE: Yes.

JUDGE MILLETT: And that was their decision, the Director's decision as conservator, that's what was going on here?

MR. CAYNE: That was the, the agreement, Your Honor, was executed between the enterprises, so it was, the enterprises and Treasury, so it was authorized by the Federal Housing Finance Agency in its capacity as conservator. And getting back to Judge Ginsburg's question, that's why our briefs rely on the withdrawal of jurisdiction that would apply or bar a court from effecting the operations of a conservator.

With respect to the Court's inquiry to Counsel this morning, the reason I'm referring to the FHFA as regulator is it was the FHFA as regulator that made the regulatory decision that going forward the capital tests that previously had applied to these enterprises were off the boards for the indefinite future, for the duration of the conservatorship. Instead, as I said, the Agency as regulator in that capacity authorized this new capital paradigm, which is Treasury, the conservator on behalf of the enterprises will enter into an agreement with the Department of Treasury pursuant to which the Department will

commit literally hundreds of billions of tax dollars to the infusion and to the support of these enterprises, and that will satisfy any capital requirement we as regulators believe is necessary. And my points simply with respect to the Court's inquiry is the whole range of relief being sought by Plaintiffs here were granted, but directly contradict, undermine, effectively set aside that regulatory decision by the Agency. What, just one specific, what my esteemed colleague Mr. Olson is asking for is that the Court issue some type of relief to force these enterprises to increase their capital to some arbitrary level. Well, again, that may happen or not, but it's not consistent with the action taken by the Director which focuses on keeping these entities in business, and the Court had, there was much back and forth in the context of fiduciary powers, fiduciary interest relating to the statutory provision that the Agency as conservator now can take action in the best interests of the enterprises, or in the best interests of the Agency.

If I may submit, what that means is these are very unique creatures, they are, as the Court has noted, massive financial institutions, but these are not comparable to standalone banks, or standalone savings and loans, because Congress had a more fundamental purpose, Congress' purpose in enacting and authorizing these financial institutions

wasn't just to have two more banks, it was to provide support to facilitate the operation of the national mortgage markets, that was a policy decision by Congress. Congress considered it absolutely essential that those markets operate, and they operate efficiently, and that was the purpose for these enterprises.

So, under circumstances such as 2008, now, whenever, the conservator may well determine well, I have a particular choice to make, I can run things to try to make this a profitable, more profitable, or I can run things to maximize the ability of the enterprise to facilitate the operation of those markets. Congress made the policy judgment to allow the conservator without interference by shareholders, with all respect, without interference by the judiciary to make that decision. And what we have here, getting back to what's being challenged, again, we have to look everything in the context, what is -- we have here are the shareholders are effectively asking this Court to override the conservator's judgment, and this is judgment Congress decided this is the agency, this is the expert, we want to rely on the agency, and the agency is conservator. The net effect of what is being asked of this Court is to second guess the decisions made by the conservator on how it will handle, marshal, administer this nearly half a trillion dollars of tax payer funds. And again, the record is clear,

and I'll refer to the statute in a moment, Congress put that money in clearly not to benefit shareholders of an institution that months later became insolvent, they put it in because the bottom had fallen out of the world, and the United States' national economy, and Congress believed, this is their, in their judgment that if the national mortgage market fails, becomes non-operational, that will just make a horrible situation so much worse, and that is why --

JUDGE MILLETT: Well, I think what they would say is what's happening here, or they have said is this situation what the FHFA is doing doesn't look like what conservators usually do, it doesn't look like they're getting it back in a solvent condition if it can never have a penny profit. And on the other hand, you're not, the liquidation hasn't started, you're sort of in this limbo on life support here, and trying to figure out how that fits into the statutory scheme as to what, because Congress did choose to call them conservators and distinguish conservators from receivers, so how do you deal with that?

MR. CAYNE: But, Your Honor, this, everything that's happening goes to really I'll call it the heartland, the heartland of the conservator's statutory powers. And there was a lot of discussion that conservators and receivers are polar opposites, they have a whole different set of powers and duties, that's just not the case. Except

for the fact that a receiver is authorized by statute to liquidate, the statutory powers of both are identical, you just have to look at the statute to see that, they both have the power to operate, just every term is the same except, then there's a follow up provision, additional powers of receiver, and it says the receiver can liquidate. But what we're having here --

JUDGE MILLETT: Well, the receiver has some other obligations, too, right? About notice.

MR. CAYNE: Well, in a liquidation, of course, Congress made an exception to the succession statute, because the succession statute applies both to the conservator and to the receiver, so in other words, in a conservatorship or in a receivership all the powers of the shareholders, the officers, the directors, anything over the assets, the powers, anything related to the institution for both a conservator and a receiver is by operation of law assigned to the conservator or the receiver upon the institution of any of those situations, the institution of a receivership, an institution of a conservatorship. As we point out in our briefs, when all of that is assigned to, transferred to, when the conservator succeeds to it there is no exception to that, the conservator succeeds to everything. But in contrast in receivership there is a single exception, and the single exception is in

receivership notwithstanding the fact that everything has also been transferred to the receiver, claimants against the institution, including shareholders, may file administrative claims pursuant to a comprehensive claim process established by the statute with ultimate review in the Federal Courts, and that really deals with many of the arguments about conflicts and looking for exceptions, Congress knew how to draw an exception on these statutes when it wanted. In receivership it did give an exception, and the exception was a claimant can file a claim in receivership. In conservatorship, which may lead or often leads to receivership, claims cannot be filed.

But, Your Honor, I apologize for digressing because the Court's question was about what is a conservator authorized to do, and there's a lot of papers filed, well, this doesn't look like any conservatorship any of the filers had ever seen, well, it's different because there have never institutions with, as the courts indicate, $5 trillion of assets that were becoming insolvent. And typically in the bank context an institution that is failing may sometimes be put in conservatorship to give the regulator a chance to determine can this business be saved. Sometimes it can, usually it can't, and when it can't then it goes to receivership. But there is nothing in the bank statutes or in our statute that says the regulator has to determine

within blank days, blank weeks, blank years how long the conservatorship will last. But when you go back to the underlying reason that motivated Congress to authorize these enterprises to empower them that we want to facilitate the operation of the national mortgage markets, then it's very understandable, then it's very consistent. These entities are being operated in conservatorship for the purpose of facilitating those markets. As the Court now knows, we have affirmative legislation from Congress that says at least through 2018 we want this status to stay, we don't want anything changed, we want these entities to remain in conservatorship until we, Congress, decide what the next step is. And that, Your Honor, refers, relates back to a question you asked earlier about statements made by Congress about what happens next, and then Congress also said even after 2018 please understand that it is the sense of Congress that this status should continue until we, Congress, get around to doing something about it.

And just another aspect of that, when you think about what Congress did there, Congress by statute essentially, directly mandated that the Department of Treasury continue to hold the shares it holds today at least under 2018. So, Congress is telling Treasury continue to hold the shares, these shares which are governed by the Third Amendment now until that date. To me, and I know they

put in a couple of statements from legislative history, you can't understand that provision without recognizing that Congress was in fact signing off on the current structure of the shares because we know from the regulators they thought the --

JUDGE MILLETT: Well, put that aside, what does the 2016 Act direction, how would that affect any remedy that's asked for in this case? Or not at all?

MR. CAYNE: I would suggest it, in and of itself, and I haven't spent extensive time evaluating this, but it certainly could be argued that, that we're not relying on it, but it certainly could be argued that the 2016 Act would bar this Court from making any change to the attributes of the shares held by Treasury because Congress has in a legislative act said Treasury, you must hold these shares as presently constituted, and if this Court --

JUDGE MILLETT: And when you say is presently --

MR. CAYNE: -- were to go back to the Second Amendment that's not what Congress told Treasury to hold.

JUDGE MILLETT: Well as presently constituted, does that mean those shares as presently constitute include a dividend equal to 100 percent of any profits, is that the theory, or is it that --

MR. CAYNE: No, that's --

JUDGE MILLETT: -- they've got their shares,

but --

MR. CAYNE: No, no, that --

JUDGE MILLETT: -- processes could still --

MR. CAYNE: -- a term of the shares because, again, we have to go back to the underlying agreements. The whole purpose is to --

JUDGE MILLETT: But how could that --

MR. CAYNE: -- keep the --

JUDGE MILLETT: -- be a term of the shares because they didn't buy any shares in 2016 --

MR. CAYNE: I'm sorry?

JUDGE MILLETT: -- or they didn't buy any, or their argument is they didn't acquire any new shares, so --

MR. CAYNE: No, no, no, and that's correct, there were no new shares --

JUDGE MILLETT: Right.

MR. CAYNE: -- but certain of the terms governing the shares changed, that's what the Third Amendment did, it changed some terms. And those terms, and the shares, the shares that Congress said that Treasury must hold were governed by the terms of the PSPAs, as amended by the First, Second, and Third Amendments, so that's what Congress had in front of it, that's what Congress told Treasury to hold.

And also, Your Honor, though, we hear lots of discussion that this was a takeaway, this is awful, this is

a seizure of assets, well, first, as I mentioned, on the legislation that's part of the charter act it required Treasury to make a three-step emergency determination before it agreed to infuse these funds, and that three-step determination required Treasury to consider market stability to prevent disruptions in the availability of mortgage finance, and to protect tax payers. That was it. It wasn't about protecting shareholders, and -- yes, Your Honor?

JUDGE BROWN: But that was Treasury, right? Which was --

MR. CAYNE: No, I'm just saying that --

JUDGE BROWN: -- lending its money, and Treasury was not the conservator as I understand it.

MR. CAYNE: That's correct, Your Honor.

JUDGE BROWN: Okay.

MR. CAYNE: But this is the provision that is in the charter act of the two enterprises, and it says Treasury may lend, infuse its money on such terms as Treasury directs, and it says that the enterprise, now the conservator, may agree to that. So --

JUDGE BROWN: Right. And what they first agreed to as I understand the Second Amendment, right, was that they would have dividends, and that they had a warrant to buy up to 80 percent of the common stock --

MR. CAYNE: And Your Honor --

JUDGE BROWN: -- is that correct? And so, presumably Treasury was acting under that mandate when it made the Second Amendment, right?

MR. CAYNE: That's correct. But Your Honor, if I may respectfully correct something the Court just said, and I'm not surprised the Court said it because it's consistent with the presentation of Plaintiffs, when you read, for example, the class action briefs you would think the original transaction was the exchange of one stream, the dividend that was $19 million, and that was, that is not the case. There was a second stream, it was called the periodic commitment fee --

JUDGE BROWN: Right.

MR. CAYNE: -- and that had been waived for three years, but the periodic commitment fee, which was a term included in the initial agreement, was sufficiently significant that subsequent to the enactment, subsequent to the execution of these agreements the United States Congress passed special legislation called the Pay It Back Act that provided any and every dollar ever paid pursuant to the periodic commitment fee must be directed to the pay down of the national debt. And I'm not standing here arguing to the Court would this have not been more than all the profits, it would have been less than all the profits, but it's something that Plaintiff should have presented. If you look

at the class action brief you'll see captions, Treasury was given the right, captions of their full sections, Treasury was granted the right for all, to all future profits for zero, no consideration. Well, that's just not true, there was the $19 million, and there was this periodic commitment fee, and if the Court were to look you'll see from 2010 through the time that the Third Amendment was signed there are a series of letters from the Department of the Treasury to the Federal Housing Finance Agency, each of which states, and again, this is inconsistent with any kind of profit grab going on, each of which states that due to the adverse economic circumstances of the national mortgage markets we, the Department of Treasury, waive for this quarter our right to a fee pursuant to the periodic commitment fee. And just to look at the terms of that fee it says, and this is right in the agreement, the periodic commitment fee was intended to compensate the tax payers for the market value of the remaining commitment by the Department of Treasury, and we hear a lot in the briefs and in the discussions this morning to the effect that well, everything's been paid back and more, and so this is all behind us, no, no, no, $189 billion into the two enterprises is what through today has been infused, but as of today, and into perpetuity until these conservatorships have wound down the United States Treasury remains obligated to infuse up to $258 billion to assure

that these institutions based on something that happens tomorrow, next week, next year, don't face receivership again. So, this periodic commitment fee that Class Plaintiffs ignore, not once do they mention it, it is supposed, if it was assessed --

JUDGE MILLETT: How much would that have been if it hadn't been waived, or going forward if you didn't have that abandoned in the Third Amendment how much would that have been?

MR. CAYNE: Your Honor, as I said, I have --

JUDGE MILLETT: How much were the ones that you waived?

MR. CAYNE: I'm sorry?

JUDGE MILLETT: How much were the commitment fees that were waived?

MR. CAYNE: No, all I -- the commitment fee has never been determined. All I'm saying is had the Third Amendment not been executed, Treasury was giving up not only the right to the $19 billion, it was giving up the right to the periodic commitment fee, which was under the terms of the agreement intended to reflect the value of this --

JUDGE MILLETT: No, I understand that, but does anyone have any sense of how much that would have been worth?

MR. CAYNE: The only sense I have, Your Honor, is

the fact that Congress passed the legislation indicates well, they thought it was worth, it was significant enough to pass special legislation to do. But to be clear, even if there wasn't a periodic commitment fee, there's nothing to examine in this transaction because the great bulk of the discussion between the Court and Counsel this morning had to do with well, what does this term mean, and was this a good deal or a bad deal? Well, I'll stipulate for this purpose let's just stipulate that it was a bad deal, and in retrospect something else should have been agreed to. But this is not an APA case under any arbitrary and capricious, or other standard, the only issue for this Court to resolve is whether the conservator exercised the power granted by Congress, and that in this case is a simple determination because the conservator exercised the power, the power to operate the institutions, the power to enter into contract, when it executed the original agreement in 2008, and that has never been challenged. And what are we dealing with her? We're dealing with an amendment --

JUDGE BROWN: Well, what if that's not actually the question here, what if the question is not whether the conservator exercised the power, but whether the power that they exercised was the power authorized by the statute, or whether they acted ultra vires --

MR. CAYNE: Right.

JUDGE BROWN: -- right?

MR. CAYNE: Yes, Your Honor, and the power that I'm suggesting that was exercised here was the power to operate the institutions, the determination was made that without these agreements the institutions couldn't operate at all because they do into mandatory receivership, and down the road as laid out in great detail in our colleagues' briefs from the Department of Justice, a determination was made that if we leave things as they are there may be a lot of periods --

JUDGE BROWN: Right.

MR. CAYNE: -- or some periods where the $19 billion dividend exceeds the amount of profits for that year, which will have the effect of reducing the Treasury commitment, and perhaps shorting the life, giving less backup support, and that was a, you know, a paradigm of a business judgment. The business judgment was made by the conservator that this new arrangement will better allow the preservation of the commitment. And for purposes of the Court's analysis I would, the Court should say well, that was clearly a wrong judgment, maybe the Second Amendment was better, maybe a Fourth Amendment with a different paradigm would be better, but that is the heartland of what Congress said, we are a power that we are investing in the conservator that we don't want to authorize third parties,

or shareholders, or courts to challenges, we want --

JUDGE BROWN: All right.

MR. CAYNE: -- this to operate as a business.

JUDGE BROWN: Mr. Cayne --

JUDGE GINSBURG: Mr. Cayne --

JUDGE BROWN: -- I think -- did you have a question?

JUDGE GINSBURG: Yes.

JUDGE BROWN: Okay.

JUDGE GINSBURG: When you started your argument I thought that you were saying that the only question before the Court, or the only one we need answer arises under 4623, okay? And I asked you whether this was a situation in which there had been a discretionary supervisory action, and I think you said no, this was a reclassification of the capital structure.

MR. CAYNE: I've spoken way too long and I forget most of what I've said already, Your Honor, but what I, the way I would answer your question now --

JUDGE GINSBURG: I've been trying to keep it in mind.

MR. CAYNE: Yes, what I would say now what it was is there used to be a capital system that said the enterprises had to have capital based on certain percentages and calculations --

JUDGE GINSBURG: Yes.
MR. CAYNE: -- and that system was eviscerated, eliminated as it applied to the enterprises in its totality, and instead there was a new system, and the new system was --
JUDGE GINSBURG: Yes, I think you used the word paradigm, right?
MR. CAYNE: Yes, it's a new paradigm. Yes.
JUDGE GINSBURG: Okay.
MR. CAYNE: Yes, Your Honor, I did. The new paradigm is a Treasury support.
JUDGE GINSBURG: But you raised that in connection or in response to the Court having asked you to address Section 4623.
MR. CAYNE: Yes, Your Honor.
JUDGE GINSBURG: Section 4623 contemplated, addresses two types of decisions, it says a regulated entry that is not classified as critically under-capitalized and is the subject of a classification change, that's one action; or of a discretionary supervisory action taken under this subchapter by the Director, that's the second one, all right? Now, I asked you if this was a discretionary supervisory action, and I thought you said it was a, because of this paradigm point it was a change in the classification with respect to its capital.

MR. CAYNE: Change in the system that applied to --

JUDGE GINSBURG: Okay, change in the system.

MR. CAYNE: -- the measuring -- yes.

JUDGE GINSBURG: But what the words are is the subject of a classification, okay? So, there seems to be in the statute a whole typology of classifications, adequate recapitalized, and then under-capitalized, and within that significantly under-capitalized, critically under-capitalized, okay?

MR. CAYNE: That's correct, Your Honor.

JUDGE GINSBURG: Was there a change?

MR. CAYNE: Yes, Your Honor, that entire system by virtue of the Director's action was set aside, there is an issuance by the Director that says this system doesn't apply.

JUDGE GINSBURG: Setting it aside is not making a change within the grid, it's moving off that grid, right?

MR. CAYNE: Well, I would say that it's before that change institution you have to comply with this, now you have to comply with --

JUDGE GINSBURG: Okay.

MR. CAYNE: -- that.

JUDGE GINSBURG: So, if it's not a change in this menu that's given here then it's a discretionary supervisory

action, those are the only two possibilities under 4623, if you think 4623 is a jurisdictional body.

MR. CAYNE: And Your Honor, I'm just at a slight disadvantage because I didn't know this was going to come up, I don't have that statute in front of me --

JUDGE GINSBURG: Well, you addressed it --

MR. CAYNE: But, right --

JUDGE GINSBURG: -- with some confidence when you started.

MR. CAYNE: But, right. Well, I read it before I walked in, Your Honor --

JUDGE GINSBURG: Would you like to read it again?

MR. CAYNE: -- on an iPhone. But may I?

JUDGE GINSBURG: Please.

MR. CAYNE: Thank you. Thank you, sir.

JUDGE GINSBURG: You're welcome.

MR. CAYNE: And --

JUDGE GINSBURG: If you ignore my marginal notes.

MR. CAYNE: I can't see anything. And what I'm looking at is --

JUDGE MILLETT: I think the question is whether this is an action of the Director under this subchapter within --

MR. CAYNE: Right.

JUDGE MILLETT: -- the meaning of 4623.

JUDGE GINSBURG: Supervised revision.

MR. CAYNE: Yes, and I'm just looking right now for the withdrawal language in the statute, Your Honor.

JUDGE MILLETT: It's in (d).

MR. CAYNE: D? Okay. So, it says the withdrawal, and this is where I was comparing to the withdrawal under the capital directives, and under the cease and desist proceedings for banking agencies where it says except as provided in this section no court shall have jurisdiction to effect by injunction or otherwise the issuance or effectiveness of any classification or action of the Director under this subchapter. And what I'm suggesting, Your Honor, is that the issuance of a directive saying capital classifications no longer apply during conservatorship was an action under 12 U.S.C. Section 4623 that the Court or any court has no jurisdiction to effect by injunction or otherwise.

JUDGE GINSBURG: But just to be clear, not because it was a change of classification, but because it was a supervisory action putting the whole classification scheme to one side.

MR. CAYNE: I wouldn't disagree with that statement --

JUDGE GINSBURG: Okay.

MR. CAYNE: -- Your Honor, yes.

JUDGE GINSBURG: Okay. Thank you. May I have the statute back? Thank you.

MR. CAYNE: Thank you very much. I should have been better prepared. I apologize.

JUDGE GINSBURG: Well, you didn't have much notice.

JUDGE BROWN: All right.

MR. CAYNE: But --

JUDGE MILLETT: I think if Counsel wants to submit supplemental briefs on that, that would be fine.

MR. CAYNE: Your Honor, we'd be obviously pleased to submit supplemental briefs, but we obviously think the answer is clear, but we'd be happy to document it in briefing if that would be useful.

JUDGE GINSBURG: It may become less clear on rebuttal.

JUDGE BROWN: All right.

MR. CAYNE: Unless there are any other questions --

JUDGE BROWN: Mr. Cayne --

MR. CAYNE: -- I will sit.

JUDGE BROWN: -- we think we understand your argument. Thank you.

MR. CAYNE: Thank you, Your Honor.

JUDGE BROWN: Mr. Stern.

ORAL ARGUMENT OF MARK B. STERN, ESQ.

ON BEHALF OF JACOB J. LEW

MR. STERN: May it please the Court. The Court's been very generous with its time this morning, and I am primarily here at this point to answer the questions that have been raised in the Court's mind by the briefs and the preceding colloquies. Obviously, sort of there's been lots of discussion in and out sort of what sort of the merits of some of these claims in the, to state the obvious the question that's presented by Judge Lamberth's opinion is whether the two critical provisions of HERA, the explicit bar on judicial review, and the transfer of rights provision bar these claims, and the Plaintiffs have advanced a number of theories for why this Court should imply an exception. And I think it's very important that this be sort of seen sort of, an interpreted in light of sort of the particulars of what was before Congress, because yes, this does come from FIRREA, yes the FIRREA case law is relevant, but this is also a very particular kind of instance which was going to be applied, like, and Congress understood what was going to be happening here, this is very different from the broad application of the judicial sort of removal of a general preclusion of review, sort of, in cases that are going to come up, sort of, you know, in a whole variety of unforeseen contexts. And what Congress knew in particular, whatever

the, sort of, ultimate scope of these provisions is the one thing that we know is that this was all enacted as part of Congress addressing institutions that are indisputably failing, and this was factorable here today. It all is the result of this legislation.

JUDGE GINSBURG: Well, Plaintiffs have suggested that there was some internal disagreement as to whether they were failing, and it wasn't undisputed.

MR. STERN: I'm sorry, Your Honor, I was referring to the original 2008 --

JUDGE GINSBURG: I'm sorry. Okay.

MR. STERN: -- which sort of just in terms of trying to understand what, how we should be interpreting these provisions. Because what Congress, one thing that Congress understood was that there was going to be sort of an enormous amount of tax payer money that was going to go into this at an enormous risk, I mean, looking back at a lot of the things that happened in 2008 it's easy to forget what it all looked like to regulators and Congress at the time, and the extent to which the Government was being criticized for putting gigantic amounts of money at risk with no guarantees of return. And one thing Congress understood was that there was going to be this massive infusion, and it was going to last for a long time. This Treasury commitment is crucial, and this also I think is undisputed, this Treasury

commitment that remains ongoing, and this is an ongoing risk to the tax payer, and that's out there. So, the question is when Congress says we're transferring all the rights of the shareholders in this institution to the conservator, and when it says there should be no action to restrain sort of the conduct of this conservator, did Congress mean for there to be room for claims that this was sort of a bad feel, this isn't really the way, you know, that a conservator acts, this sounds more like somebody who's thinking about putting sort of like the possibility of liquidation, so maybe that's sort of kind of a little bit more than we expected from a conservator. And that is not something that could possibly have been intended, nor can it possibly be the case that knowing the stakes that were involved in this that Congress would contemplate actions for rescission of agreements that were going to govern this. And one thing that we know is that Congress knew it was going to be keeping a weather eye on what was going on. And in 2015 Congress addressing all the circumstances that are presented here says, and addresses the purchase agreements as amended, and it notes like the Third Amendment as well as all the other amendments, and it says, tells Treasury you've got to hold on to your preferred stock, you can't sell it, and it's the sense of Congress that Congress should enact and the President should sign legislation to determine the fate of

Fannie Mae and Freddie Mac.

JUDGE GINSBURG: Okay, well --

JUDGE MILLETT: Well, how would you answer --

JUDGE GINSBURG: -- what -- if the Plaintiffs had all of the relief they're requesting would it entail the Treasury selling shares?

MR. STERN: No, we're not saying that -- I'm sort of pointing to that, Your Honor, just as a reflection of what it was that, like, where Congress fits into this. Congress is overseeing this, and --

JUDGE GINSBURG: Okay. But the Congress acts by enacting a statute, and Mr. Cayne and you both seem to want to avoid discussing the terms of the statute in any detail, and viewing this at 30,000 feet looking at the purpose in 2008 and so on, but we have to grapple with the terms of the statute, part of which was drafted from the FDIA, or through FIRREA, parts of which were tacked on for this occasion, and we're stuck with that.

MR. STERN: I couldn't agree more, Your Honor.

JUDGE GINSBURG: Okay. So, let's --

MR. STERN: If we look --

JUDGE GINSBURG: -- delve into it.

MR. STERN: Right. I mean, let's understand that the statute itself doesn't contain words that permit this to go forward, we have to imply exceptions, and in implying

that we're, like, it's based on a reliance of courts that implied exceptions under FIRREA. Now, whether or not Congress intended to incorporate those exceptions, sort of, that were judicially implied into this language, there's no indication that Congress did that, but as we've argued at length in our brief, if Congress did do that there is no ultra vires action --

JUDGE MILLETT: Well, why wouldn't it be ultra vires to say the one thing we know a conservator can't do is adopt a plan by which the companies, the regulated entities can never actually become solvent, they just will never have a penny in the bank account, it always goes over to your Treasury, how can that be, I think that's their argument, that can't be what a conservator does, and so that can't fall within 4617(f).

MR. STERN: I mean, I think that there are a couple of answers to that. I'll forget the second answer after I give my first one.

JUDGE GINSBURG: Well, then tell us the second one first.

MR. STERN: I think at this point I may have forgotten both of them, Your Honor. The, I mean, first the, when there's a reference to what a conservator can do, that, and I hate to sort of say we have to look to the nature of this statute, and this statute what we have is, the purpose

of this is to keep Fannie Mae and Freddie Mac performing the functions that they as government sponsored enterprises were supposed to be doing. And as Judge Lamberth said, look, they're not in liquidation, it's now been sort of, like, you know, three and a half, almost four years since the Third Amendment was entered into, and there's not been a liquidation, the enterprises are solvent, the capital, there, like, is the, and they can proceed this way because of the enormous, like, underlying commitment of tax payer money, and that's sort of one level of answer.

Another level of answer is that the situation, like, there are no good answers for exactly how to proceed, sort of, in this, and it's been Treasury's position, you know, for a long time that ultimately legislation, you know, is needed to deal with this, and indeed that was the sense of the Congress resolution, also. But it's not like there was sort of like, well, here's the terrific way of approaching it because one way of doing it was, like, Treasury going okay, let's, like, we want dividends, you know, let's do that, you know, that turned out to be for a long time fairly, sort of, not, sort of, good, the, you know, for all the reasons, you know, that, you know, we're discussed in the brief, and, you know, and there was, you know, that very severe spiral.

So, one answer is to go, and the parties could

have decided this, sort of, like, right at the beginning could go look, here's what, you know, we've put a lot of money on the line, we're going to waive our periodic commitment fee, we're also entitled to dividends, but we don't want to put you under, we don't want you making draw on the commitment, so what we'll do is it's unclear when and if and to what extent you're ever going to be making profits, but we will take that risk, and, you know, and maybe there will be quarters where we do like with Treasury and the tax payer, like *Noel*, you know, and then there will be others where we don't get anything at all. And that, they could have decided to do that right at the outset. And in fact, the way that it's played out is that yes, as it happened there was, like, a big spike, sort of, in 2013, sort of, in profitability, which was all but largely from the one time recognition of the tax deferred assets, goes down notably the next year, the year after that in 2015 would have been paying under the old dividend arrangement than they were paying under the Third Amendment, and you don't know what's going to happen. And this Treasury commitment, like, I mean, part of what the enterprises are paying for, even though we've waived the periodic commitment fee, is the enormous amount of money that has been sunk in, but the fact that there remains on the line sort of this $250 billion approximately of tax payer money that the

enterprises can draw on, and that is absolutely crucial to their existence. And this is what these review provisions, you know, which is what is at issue here, are designed to protect is no, we don't get to fight about exactly what the conservator thought was the best way of dealing with this very difficult situation, and to say well, you know, a really good conservator would have done something else, I think that what they did was entirely appropriate and sensible, but whether you agree or disagree with that, that goes right to the kinds of things that were meant to be protected, and don't fall into what anybody would sort of typically characterize sort of as ultra vires in the sense that there's an explicit statutory prohibition, and you stepped over that line. There's nothing like there here even alleged.

JUDGE GINSBURG: Well, the statute does have a limitation, I mean, the broad discretion of the FHFA here is to act as necessary and appropriate to conserve as conservator or as receiver, and the Plaintiffs came in saying that's not what happened, and you all produced an incomplete administrative record.

MR. STERN: Well, obviously we take issue with that idea that the administrative record was incomplete. But certainly what you can't --

JUDGE GINSBURG: Well, there are now things that

have been produced that were not submitted, right?

MR. STERN: I mean, Your Honor, you know, we rest in, like, in posing the motion to supplement I think we laid out our position on why it would not be appropriate, and, I mean, you know, and there are things like, you know, the statement of the CFO who says well, maybe I would have, you know, like I would have made a comment. Now, that statement is from like August, 2012, I believe that's the same CFO who signed the securities disclosure form that Your Honor was referring to that, like contained --

JUDGE GINSBURG: The 10-Q?

MR. STERN: Yes, the 10-Q. That, sort of, like, contained all the language, you know, that Your Honor read out loud. And regardless of what she says that, you know, she might have, like, said to somebody then, she was signing a form that went to the regulators, and that, the idea that, like, this wasn't the, sort of the record, you know, or the kind of thing that was supposed to be looked at, you know, as opposed to, like, statements that people make, you know, in discovery that are untested, that are their recollections about things that were said, I mean, like, that's really not the way that an administrative record could be put, should be put together. And that would sort of open up all kinds of administrative records, the claims that they should be supplemented.

JUDGE GINSBURG: Well, *Overton Park* does that, doesn't it?

MR. STERN: No, I don't think so, Your Honor. I mean, it's true that *Overton Park* says that if you really can't figure out what's going on in the case that the Agency explanation isn't adequate that you can remand to the Agency or request additional declarations from the Agency. And we could certainly put in additional declarations, but we think that what the Agency has said, like, is clear, and this is sort of a funny kind of APA case, because, remember, this is coming up in the context of a, sort of amendment to a purchase agreement. So, this is sort of like the issuance, like, of rule-making. So, you know, I think that, you know, it could be that exactly what one expects from an administrative record might vary.

JUDGE GINSBURG: You see, it goes beyond even what you said, though, Mr. Stern, it says the court may require the administrative officials who participate in the decision to give testimony explaining their actions.

MR. STERN: Yes, Your Honor, and there also, as Your Honor is aware, lots of decisions talking about not having, like, administrative officials call --

JUDGE GINSBURG: Well, the District Court doesn't --

MR. STERN: -- for a probing of the --

JUDGE GINSBURG: -- do that lightly, of course.
MR. STERN: No.
JUDGE GINSBURG: It's a last resort.
MR. STERN: And there's certainly no basis for doing it here, because if you, if, look, look, if everybody knew, which of course they didn't and couldn't, but if everybody knew in August of 2012 exactly what the pattern was going to be there would be, you know, for the next three years, you looked at it, you go well, okay, like, that's not, like, unlawful, you know, there's no basis for saying that there should be administrative review even if you assumed that everybody knew exactly what was going to happen.
JUDGE MILLETT: Well, they would say imagine if, assume the worst record, administrative record possible, and that is that it turns out everybody lined up saying woo-hoo, they're now solvent, and we think they're going to stay solvent for the next three or four years, let's take, let's have a new agreement here, and we're going to take all of that money and leave them not a penny to get back on their feet with, could a conservator do that? I've just taken the worst administrative record possible, would that prove their case that you weren't acting as a conservator?
MR. STERN: I mean, I think that a conservator could do that given the position, like, the extent to which,

like, the ongoing Treasury commitment, you know, is crucial, they could decide that, I mean, but you need to know, I mean, maybe there's some fact working in that hypothetical that is extremely problematic, but also, I mean, it should be clear, even, like, nothing that has been adduced, like, sort of would support that kind of claim, I mean, like, what Mr. Olson says, you know, when you asked is, like, would it make a, would it have made a difference, like, if everything had gone, like, south, like, in a big way, you know, for the next few years, and the answer was no. It was, you know, the -- it's a standalone, I mean, there's, you know, they've got two variance, one of them is well, you know, they should have known in 2012 that things were going to be better at least for awhile, but the more fundamental one is no, this is just a deal you can't do, doesn't matter how good, like, it's going to be, how much it's going to advance, sort of, like, sort of the interests of everybody involved in a very difficult and perhaps I always hate to say unique, but perhaps unique situation.

JUDGE GINSBURG: The administration took a position I think a year earlier, I think in 2011, that the GSE should be wound down, right? There's a white, you know, you know, a press release or something like that, but then comes the Third Amendment, and it's now concrete, we're going to wind down these GSEs, but we're not going to pull

the receivership trigger, which would, of course, have required, we're expecting the liquidation preferences of the Plaintiffs.

MR. STERN: Well, it's not a liquidation, and the statute, I mean, first of all, the statute specifically contemplates, like, the wind down as being a power that can be asserted, like, in the conservatorship, you know. But it's, like, what --

JUDGE GINSBURG: Does it? Where is that?

MR. STERN: It's in, it's 4617(a)(2), which allows the conservator as well as the receiver to take actions for the purposes of reorganizing, rehabilitating, or winding up the affairs of the GSEs.

JUDGE GINSBURG: Yes, well, as I read that, it's, the word respectively is implicit in there.

MR. STERN: I disagree, Your Honor, because there are a lot of powers that are set out specifically for the conservator and the receiver in the statute, this one doesn't make that. But I think more fundamentally there is, like what the, I believe that the Third Amendment talks about an acceleration of, like, the, of like of the enterprises reducing or retaining mortgage portfolios, and in that sense that's a kind of winding up. The, like, what you have in terms just of their ongoing functionality is not, like, in any sort of particular, sort of, like way,

it's winding up, what Treasury does think, you know, is that given the difficulties that are involved in sort of like a recapitalization of any conservatorship, and, you know, we've said this many times that legislation is appropriate. But --

JUDGE GINSBURG: But when the Third Amendment was announced the Treasury said we're going to wind this thing down, we're going to kill it, we're going to drive a stake through its heart, and we're going to salt the earth so it can never grow back.

MR. STERN: I don't remember that language.

JUDGE GINSBURG: Yes. You may be confusing it with Tortego (phonetic sp.). But that was the gist of it, we're not going to allow it to be recapitalized in any way, and we're going to look to a future in which the GSEs don't play a role.

MR. STERN: Well, I think what Treasury has said repeatedly is that it thinks that congressional action is appropriate, and we've discussed, like, the difficulties of recapital --

JUDGE GINSBURG: But defending the congressional action it has to live within the statute it's got.

MR. STERN: Yes, and it is. I mean, because the alternatives are not good ones, I mean, it's not, like, what they had wasn't a good alternative, I mean, that wasn't

doing well. What's happened now it's like they're all sort of things to deal with a very difficult situation, and --

JUDGE GINSBURG: Well, I think they had two alternatives to act as a conservator, which they didn't want to do, or to act as a receiver, and move towards liquidation.

MR. STERN: No, Your Honor, I don't think that this is a move towards liquidation, there has not been a liquidation, and again --

JUDGE GINSBURG: Well, they could move slowly considering the size of the portfolio --

MR. STERN: Well, but --

JUDGE GINSBURG: -- they would have to move slowly.

MR. STERN: -- and they could legitimately do that, like, if that's what they wanted to do, they could do that.

JUDGE MILLETT: So, if you're moving --

MR. STERN: There's nothing wrong with a conservator doing that.

JUDGE MILLETT: If you're in the moving stage, you're not yet liquidating, is that something conservators do, or can only a receiver do the moving to liquidation?

MR. STERN: You can move towards a, I mean, a conservator can properly go, you know, we're going to, like,

sort of that this isn't working, we're going, like, we need to set the stage for liquidation. I don't say that that is what's happening here at all, I have no reason to believe that that's the case. I'm just saying that a conservator could do that, and the statute specifically refers to rehabilitating, reorganizing, winding, and winding up, those are all things that you, like, even if it didn't say that --

JUDGE MILLETT: How would we know when winding up stop and liquidation begins?

MR. STERN: Because you see a liquidation. I mean, like, you know, right now this, like, these things, these enterprises are functioning, they're performing their statutory purpose, that's what that legislation was all about. And, like, the stockholders, like, you know, are not the people who Congress wanted to sort of, like, be able to come in --

JUDGE GINSBURG: All right. Okay.

MR. STERN: -- and sue, and that's all that this, like, case is about is do they get to come in and say I'm not happy with the way that you guys are dealing with this.

JUDGE GINSBURG: Let's say that it said that directly, the stockholders may not sue, okay? Shareholders may not sue. That surely means in their capacity as shareholders, right? Creditors can sue, right? Tradesmen can sue?

MR. STERN: Yes.

JUDGE GINSBURG: Okay. So, they've come in in part asserting what they say are direct claims, not derivative claims, right? Not in their capacity as a, not -- in other words, the succession clause succeeds their rights as shareholders, but their, which would be their derivative rights.

MR. STERN: Well, I mean, again, I mean, the language is, like, very broad, all rights, titles, powers, privileges of the regulated entity, of any stockholder, director with respect to the entity, and the assets of the regulated entity, I mean, that's really broad. But as we discuss in our brief, like, these are, I mean, these are quintessential derivative claims, what they're saying is that the conservator, like, isn't, like, minding the store --

JUDGE GINSBURG: Well, if it's a --

MR. STERN: -- like, in looking after the enterprises.

JUDGE GINSBURG: If it's a quintessential derivative claim then the relief accrues to the corporation and not to them, right?

MR. STERN: Yes.

JUDGE GINSBURG: And they want their liquidation preferences, that's not an asset of a corporation.

MR. STERN: Well, I mean, that's what they say, but what they want, I mean, yes, I mean, everybody wants money for themselves sooner or later, I mean, like, you know, that's always the feature.

JUDGE GINSBURG: But the question is whether they want it directly or through the corporation.

MR. STERN: Right, and they want it, but they --

JUDGE GINSBURG: They say they want it directly.

MR. STERN: What they want is they're saying that the value of their shares, I mean, like, I mean, they don't, you know, they don't want this in liquidation, they don't want liquidation preferences, they want the value of their shares to go up, you know, they sort of, like, you know, at this point we're talking largely about speculators, and the idea of speculation is quite, you know, legitimate, you buy low, you try to sell high, they're going my shares would be, like, higher, you know. Fair enough. But Congress has also said you don't get to bring these lawsuits.

JUDGE GINSBURG: Well, they had a preexisting right to bring the lawsuit, the succession clause takes away something.

MR. STERN: Yes, it takes away.

JUDGE GINSBURG: But does it take away a direct claim? It doesn't take away a, just because a shareholder is a shareholder doesn't mean that his loss of rights as a

shareholder means his loss of rights in any other capacity. If he were also a tradesman he'd still retain his trade account.

MR. STERN: Yes. That's right. I mean, we're not -- but what we've got here is sort of something that's going sort of fundamentally to how the enterprises should be compensated, or how they should be compensating Treasury. I mean, and the claims are, like, are derivative of what they say is the harm to the enterprises, and again --

JUDGE GINSBURG: Well, that's a question of Delaware and Virginia law, correct?

MR. STERN: Well, I think it's, I mean, we've argued and I think correctly in our brief that this is a matter of federal law, but federal law, like, sort of, I don't think that there's a --

JUDGE MILLETT: Well, the complaint doesn't even ask, on their shareholder claims does not ask for damages to them, it asks for compensatory damages and disgorgement in favor of Fannie Mae. So, that sure sounds like they're not getting a recovery, correct?

MR. STERN: I think it's a derivative claim, Your Honor.

JUDGE MILLETT: All right.

JUDGE GINSBURG: Insofar as they want their liquidation preference they don't get, Fannie Mae doesn't

get anything.

MR. STERN: Yes, but the, look, again, that's like, like anything else that is sort of, you know, like a derivative of, like, sort of, like, harm, and it's also, like, so far away from being, like, a ripe claim, and what they, they don't want, I mean, the purpose of the relief that's being sought here, like, isn't to put, like, a directive to put this into liquidation so that they can realize their liquidation preferences, nobody wants that, I mean, that, that really, that really isn't what this lawsuit is about.

JUDGE GINSBURG: Well, what they do want is some sort of preservation of those liquidation preferences for when and if there's a liquidation, right? Which will have, as you said, an immediate effect on the price of their shares.

MR. STERN: Well, I mean, their liquidation preferences, like, haven't been, you know, taken away, I mean, what, you know, you know, what they've got, they've got, I mean --

JUDGE GINSBURG: What have they got?

MR. STERN: You know, look, here's what, what they have is a lot more than anybody would have had if not for these deals. I mean, like, you know, I mean, I realize, like, you know, I'm sort of beating a drum here, but, you

know, this is, I mean, in some respects, you know, like the shareholders are, like, the beneficiaries, and almost the incidental beneficiaries of a huge tax payer risk, you know, and what Congress was trying to do was to make sure that the, that the conservator and Treasury could take the steps that needed to be taken when everybody knew it was going to be a difficult time with an ongoing huge Treasury risk at issue. And we think that these things are really clear. And I thank you so much for your time.

JUDGE BROWN: Thank you. I know that no one had any time left because we used up all of your time, but we'll give you back three minutes for rebuttal.

ORAL ARGUMENT OF THEODORE B. OLSON, ESQ.

ON BEHALF OF THE INSTITUTIONAL PLAINTIFFS

PERRY CAPITAL LLC, ET AL.

MR. OLSON: Thank you, Your Honor. In the first place, this is who did it, what did they do, and why did they do it. We know that it was Treasury --

JUDGE GINSBURG: All in three minutes.

MR. OLSON: -- and FHFA working together, the record is replete with that, the statute precludes Treasury from supervising or directing what the FHFA does as with respect to its position as a conservator. Now, that is one violation of the statute, and there's a reason for that, because the FHFA is supposed to act as a fiduciary in its

capacity as a conservator, the Treasury would have separate interests, and it has the interest, and that's all over the record, too, of the tax payer. And so, that's what happened here, we saw the Treasury directing something that happened that they decided that was in the best interest of the tax payer, and there's plenty of the record that we have, probably more in the record that we don't have, that this was done to strip the stockholders of any residual value.

Now, when FHFA announced this in the first place on September 7, 2008 they answered this questionnaire, I referred to it before, 2443 in the Joint Appendix, the stockholders will continue to retain all rights in the stock's financial worth. Now, we find out that they didn't really intend that, or the Government didn't really intend that, but that what they also said on the same page, can the conservator determine to liquidate the company, answer, the conservator cannot make a determination to liquidate the company. Now, that is the FHFA determining or articulating what powers it has as a conservator under the statute that it administers.

Now, what we have is a shell game going on here, first of all, the Government decides that there's going to be a conservator and it has specific responsibilities and duties as a fiduciary acting as a conservator, it also then says well, we can act as a receiver at the same time, those

responsibilities, and those statutory duties are separate, and if you have, if you're acting as a conservator that is different than acting as a receiver.

What we know now, and I will summarize, that what the Government did acting together is decide that this was in its best interests of the tax payer, something that Congress might have decided to do, and by the way, the Appropriations Act, the record is quite clear, and we quote the supervising sponsor of that massive appropriations bill, it didn't validate or ratify what's going on here, and the sponsor specifically said so, but what has happened here is that the Government decided that it would bring these entities to a close, and it said that repeatedly, to liquidate them, and to make sure that they have no further value to the stockholders. They said, the FHFA said in the *Samuels* case that we quote in our briefs that they are net worth insolvent now.

The, the, since the, since this all took place there hasn't been a single dollar gone into these entities from the Treasury. The record is difficult for us to deal with because the Treasury Department talks about well, there may be some things in the record, but you really wouldn't be concerned about those things, the FHFA didn't even try to produce an administrative record, they did a --

JUDGE MILLETT: But you did say your --

MR. OLSON: -- they gave us a summary --
JUDGE MILLETT: You said your position would be the same whatever the record showed --
MR. OLSON: Well, it would -- we --
JUDGE MILLETT: -- on motivation, correct?
MR. OLSON: Well, we are entitled to an administrative record, and to the extent that we are entitled to that it should be remanded to the District Judge to insist on a record because --
JUDGE MILLETT: It's your position that --
MR. OLSON: -- we're entitled to know what happened and why it happened. But we're also saying --
MR. OLSON: But your position wouldn't change, right?
MR. OLSON: We're also saying, Judge Millett, because on the record that what we do have is we have the FHFA taking a position that it will be a conservator, we know they have said in their, it is said in the statute, it said in their regulation, it said in other things what they must do, which is to return the entity to a sound and solvent condition. We know that they haven't done that, we know that they have done the reverse of that. They've made it impossible. You can't have a conservator take all of the assets out of an entity. And the commitment, the Treasury commitment isn't an asset, they've said that themselves, not

under any standards is that an asset. It's a --

JUDGE BROWN: Mr. Cayne says that he will stipulate that maybe the Third Amendment was a bad deal, and so he says that's just a bad business judgment, so what's your response to that?

MR. OLSON: The response is that it might be a bad business judgment, and perhaps it was, but it was not the act of a conservator. And the power that the Government had is to make judgments with respect to the benefit of the conservator.

With respect to Section F, which we've talked about here, we referred to the *Leon* case, which specifically talks about the fact that the FHFA, which is an Eleventh Circuit decision in 2012, cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp, and this is on page 1278 of the Federal Reports. Moreover, if the FHFA were to act beyond the statutory or constitutional bounds in a manner that adversely impacted the rights of others, Section 4617(f) would not bar judicial oversight or review of the actions, because the position that they're taking now is that we can do anything we want, and we're immune from judicial scrutiny, that cannot be, and that is not what the statute says. Nor the other provisions --

JUDGE GINSBURG: I think we have that point. Did you have a succinct and devastating, and I emphasize

succinct, comment on 4623?

MR. OLSON: Yes.

JUDGE GINSBURG: The jurisdictional --

MR. OLSON: We believe it applies to those sections that are referred to there of 4614, 15, 16, 17, and the actions of, we have briefed it before.

JUDGE GINSBURG: You'll submit on that?

MR. OLSON: Well, we will be happy to submit, but we do not apply, we do not believe it remotely applies to this situation, and it is incomprehensible that this Agency never thought to raise what they now say at the suggestion of the Court that oh, this lawsuit should never have taken place whatsoever.

JUDGE GINSBURG: Yes, well Homer nodded.

MR. OLSON: They came to it late. At any rate, we think that the record needs to be developed, we have an absolute right under *Overton Park* to look into what the Government was doing, why it was doing it, the circumstances of its doing it, but that this is clear, that there, if you're going to act as a conservator, and the powers of the Government can't be in the best interests of the agency which would obliterate all the other provisions in the statute, the Agency when acting as a conservator may act in the interests of the agency fulfilling those responsibilities, but it doesn't rub out all the other

statutory provisions. And you look at their regulations in 76 C.F.R. which we've cited, the primary purpose is to preserve the entity, and return it to a sound and solvent condition.

JUDGE GINSBURG: Enough said.

JUDGE BROWN: Thank you.

ORAL ARGUMENT OF HAMISH P.M. HUME, ESQ.

ON BEHALF OF THE CLASS PLAINTIFFS

MR. HUME: Thank you, Your Honors. I'll be very brief. Mr. Cayne for the FHFA said that the shareholders have more rights in receivership than conservatorship, that is not only logically impossible, but irreconcilable with the statute. 4617B(2)(k)(i) says that it is the act of putting the entities into receivership, only receivership, that shall terminate the rights and claims of the shareholders arising out of their status as shareholders. That's the action, subject to their payment claims under C(1)(d), and other provision recognized there that it constrains, it's a limitation when it goes into receivership for shareholders. Before that they obviously have more rights, and it was acknowledged, Mr. Olson, J.A. 2443, I urge the Court to look at it. Mr. Lockhart, the Director of FHFA, or the, in their formal written answers say shareholders continue to retain all rights in the stock's financial worth. They retain rights in conservatorship to

the economic rights of their shares, they can still trade them, no one said anything that they can't trade, they can receive dividends if you're the Treasury anyway, a shareholder has rights in conservatorship.

JUDGE MILLETT: Do those rights change under the PSPAs or their First and Second Amendment?

MR. HUME: No.

JUDGE MILLETT: They didn't change at all?

MR. HUME: No, not that I'm aware of.

JUDGE MILLETT: Their order of payment?

MR. HUME: I don't think they changed, they were nullified in the Third Amendment. And Your Honor, to your question about the original deal on the prohibition on dividend without Treasury's consent, 5.1 it clearly says without Treasury's consent, it's not an absolute prohibition that would allow Treasury to consent, the reason we're not challenging that --

JUDGE MILLETT: All right. So, that's the right you had coming into the Third Amendment is no dividend without Treasury's consent, and you don't challenge that?

MR. HUME: The reason --

JUDGE MILLETT: That's what I was just asking about it changing.

MR. HUME: Yes. The reason we're not challenging the provision in the original PSPA that says no dividends

without Treasury's consent is that is not the thing that has caused us not to receive dividends.

JUDGE MILLETT: No, I understand, but what -- so, the stockholder interests by the time of the Third Amendment were that we have a right to a dividend after Treasury is paid with Treasury's consent?

MR. HUME: No, it doesn't say after Treasury has been paid, it just says with Treasury's consent. It's not different than any shareholder's right to a dividend, it's contingent on the people who control the company declaring a dividend, that's all it says. They have to declare it, and that's not what happened. The reason we're not challenging that is that's not the reason we didn't get a dividend.

Since I'm running out of time, they say we don't say anything about the periodic commitment fee, the reason we don't is they waived that it had no value, it was at best going to be based on a market value, so at best it creates a fact issue of what that would be. And I want to be careful --

JUDGE MILLETT: Wait, how can you say it had no value?

MR. HUME: Well, they never, they waived it every year --

JUDGE MILLETT: Well, they waived it, but that doesn't mean it doesn't have value --

MR. HUME: Fair enough.

JUDGE MILLETT: -- going forward.

MR. HUME: Then it may have had some potential value, and I want to be careful here because there's protected information that's with the Court that would address the issue. I would simply request that the Court look at Exhibit 34 to the Institutional Plaintiff's motion for judicial notice. It's a fact issue of what the value would have been, and it's our position it would have paled in comparison to the net worth sweep and the hundred billion dollars, and tens of billions of dollars they've swept over.

This debate, Your Honors, just if I could on the direct claims, when they say we have no rights, and then they said we have no direct claims, they've never said that before. Neither they nor the FDIC, no court, as Judge Easterbrook said, no court has ever held the FIRREA succession provision, or the HERA succession provision does that, and numerous courts have allowed it. And they --

JUDGE MILLETT: Well, they haven't said it because you didn't raise it, and your complaint doesn't seek any relief on it.

MR. HUME: No, no, no. No, no, no. Sorry, Judge Millett. We absolutely raised direct claims. Our breach of contract claims were unambiguously always --

JUDGE MILLETT: Okay. Breach of contract, okay.

MR. HUME: -- uniformly direct.

JUDGE MILLETT: I was distinguishing, because I was, you had shareholder claims that were derivative and direct, and then you, as I took your briefing you also had contract claims. So, what you're calling direct claims are the same as your contract claims?

MR. HUME: Our contract claims are direct claims.

JUDGE MILLETT: Yes.

MR. HUME: They have always been direct claims.

JUDGE MILLETT: Do you have any direct claims distinct from those?

MR. HUME: We litigated them as direct claims, they were analyzed as direct claims, and --

JUDGE GINSBURG: Because the contract in question is the certificate of the shares.

MR. HUME: Yes, it's --

JUDGE MILLETT: Right.

MR. HUME: -- a contract between me the shareholder and you the company. I'm the shareholder, I get to enforce the contract. It is a direct claim, look at page six of our reply brief, those kinds of claims are always analyzed under state law as direct claims. They didn't even argue this in the District Court, or in any other case, in *Kellmer*, in the *Barnes* case, see footnote --

JUDGE MILLETT: I just want to be, I just want to

make sure I'm crystal clear in understanding this --

MR. HUME: Yes.

JUDGE MILLETT: Is your direct claim, is that just another way of talking about your contract claims, or do you use a direct claim label to mean something in addition to your contract claims?

MR. HUME: No.

JUDGE MILLETT: I'm sorry?

MR. HUME: Let me try to be very clear. Our breach of contract claims are direct claims. I don't mean to suggest there's some other amorphous direct claim. Our breach of contract claims are all direct, breach of contract, breach of implied covenant. The only issue was whether we said enough for a direct fiduciary breach claim. And on that, I'll rest on what I said before, which is we think we said enough, if not, we ask the right to amend. But on breach of contract there's no ambiguity at all, those claims were brought --

JUDGE MILLETT: Right.

MR. HUME: -- only as direct claims --

JUDGE MILLETT: Right.

MR. HUME: -- and we asked for damages in paragraph seven of our prayer for relief, below what Your Honor just read, Judge Millett --

JUDGE MILLETT: Right.

MR. HUME: -- we asked for payment --

JUDGE MILLETT: For the contract claims, right.

MR. HUME: -- directly to the shareholders, directly, nothing new is through the companies. And that -- just to -- in the *Barnes* case, the *Leven* case, the *Kellmer* case, the FHFA or the FDIC, whichever it was didn't even try to intervene on behalf of the direct claims. They admitted through their conduct that direct claims belong to the shareholders. They never even took the position in any of those cases, please see the cases in footnote six on page four of our reply, and also what happened in *Kellmer*. And it does, to what we discussed earlier, it does raise a serious issue of constitutional doubt to even suggest the shareholders, whom they admit have economic rights and interests, don't have the ability to come to court to protect them, that raises serious constitutional issues as recognized by Judge Easterbrook in the *Leven* case, and the Plaintiffs in all *Winstar* case, and by Judge Edwards in the *Waterview* case, and in the, which is cited in the *Pershing Square* Amicus brief, which I --

JUDGE MILLETT: Did you raise --

MR. HUME: -- strongly commend the Court to look at, because it --

JUDGE MILLETT: Did you raise his constitutional doubt argument in your opening brief?

MR. HUME: Did we?

JUDGE MILLETT: In your opening brief? I didn't see it there.

MR. HUME: I don't know whether we did, but the *Pershing Square* Amicus brief raises it, and it's most applicable to the direct claims.

Finally, Your Honors, this whole debate about receivership, conservatorship, what on earth should we as a country do with these two entities? It's fascinating, but it's irrelevant to the simple fact that the private shareholders had contractual rights that were breached, and our friends at the FHFA said well, you didn't do anything to save, you didn't invest to help rescue this entity, I want the Court to know that of the $35 billion of preferred, $22 billion of it was invested in 2007 and '08 when it was clear that these entities were distressed, and that can be found in the record at FHFA 631 and 2062, the document in the District Court 24-10 at 302 and 560. $22 billion in those last two years. Who's going to want to -- and they invested on the strength of those certificates that said they got paid before any common, and that's what they've done is they've taken their common and just converted it up into their senior preferred in the Third Amendment. Who's going to want to invest in financially distressed entities that might go into conservatorship if you recognize the risk of

conservatorship, you know they have broad powers, but can they rescue, make one deal, four years later when the company is doing better just change the deal so they get all the money, no one will invest, it'll be terrible for tax payers and investors. Thank you.

JUDGE BROWN: All right. Thank you, Mr. Hume. The case will be submitted. Do we want supplemental briefing on 4623?

JUDGE GINSBURG: I think we should.

JUDGE MILLETT: If they want to submit, yes.

JUDGE BROWN: All right. We would like supplemental briefing on 4623, five pages.

JUDGE MILLETT: Five is plenty.

JUDGE GINSBURG: Five pages, seven day; 10 pages, seven days.

JUDGE BROWN: Okay. Ten pages, seven days. Thank you.

(Whereupon, at 12:27 p.m., the proceedings were concluded.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Paula Underwood April 20, 2016

DEPOSITION SERVICES, INC.