IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID J. VOACOLO, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION; FEDERAL HOUSING FINANCE AGENCY; UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.	Civil Action No. 1:16-cv-1324(RC)

MOTION TO DISMISS BY
THE UNITED STATES DEPARTMENT OF THE TREASURY

The defendant, the United States Department of the Treasury ("Treasury"), hereby moves to dismiss the complaint pursuant to Rule 12(b)(1), 12(b)(5), and 12(b)(6) of the Federal Rules of Civil Procedure. The reasons for this motion are set forth in the attached memorandum.

Dated: September 20, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

CHANNING PHILLIPS
United States Attorney

DIANE KELLEHER
Assistant Branch Director

/s/Thomas D. Zimpleman
THOMAS D. ZIMPLEMAN
DEEPTHY KISHORE
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW

Washington, DC 20530
Tel: (202) 514-8095
Fax: (202) 616-8470
E-mail: Thomas.D.Zimpleman@usdoj.gov

Counsel for the United States Department of the Treasury

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THE UNITED STATES DEPARTMENT OF THE TREASURY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

The plaintiff in this case is a shareholder in the Federal National Mortgage Association ("Fannie Mae"). He seeks to challenge the actions taken by the United States Department of the Treasury ("Treasury") and the Federal Housing Finance Agency ("FHFA") to stabilize Fannie Mae, a financial institution that plays an important role in the nation's housing finance system and broader economy, during and after the financial crisis. The claims of his lawsuit are materially identical to those asserted in an earlier series of ten coordinated lawsuits that another court in this district dismissed for lack of jurisdiction. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 228-29 (D.D.C. 2014), *appeals docketed*, Nos. 14-5243, 14-5254, 14-5260, 14-5262 (D.C. Cir. Oct. 8, 2014). Cases brought in other districts by shareholders of Fannie Mae and the Federal Home Loan Mortgage Corporation ("Freddie Mac") asserting similar claims have also been dismissed. *See Robinson v. FHFA, et al.*, No. 7:15-CV-109-KKC, 2016 WL 4726555 (E.D. Ky. Sept. 9, 2016); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015). This complaint fails for multiple reasons, including the same reasons that the complaints filed in *Perry Capital*, *Continental Western*, and *Robinson* failed.

First, plaintiff's demand for money damages in an APA suit is clearly barred by sovereign immunity, as the APA authorizes suit only for claims seeking relief "other than money damages." 5 U.S.C. § 702.

Second, HERA's sweeping jurisdiction-withdrawal provision, 12 U.S.C. § 4617(f), precludes a court from taking "any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." The D.C. Circuit, like every other circuit to consider the issue, has held that a materially identical provision of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") deprives courts of subject matter jurisdiction over challenges to the actions of a conservator or receiver. *See Freeman v. Fed. Deposit Ins. Corp.*, 56 F.3d 1394, 1399 (D.C. Cir. 1995) ("Section 1821(j) does indeed effect a sweeping ouster of [the] court['s] power to grant equitable remedies"); *Nat'l Trust for Historic Pres. v. FDIC*, 995 F.2d 238, 240 (D.C. Cir. 1993), *aff'd and reinstated on reh'g*, 21 F.3d 469 (D.C. Cir. 1994). This provision bars plaintiff from asserting Administrative Procedure Act ("APA") claims challenging FHFA's exercise of its statutory powers as the conservator of Fannie Mae. The plain text of Section 4617(f) also confirms that plaintiff cannot evade the jurisdiction-withdrawal provision by also naming Treasury, the counter-party to the contract, as well as FHFA as a defendant. Equitable or declaratory relief against either party would "restrain or affect" the exercise of the conservator's powers.

Third, HERA's transfer-of-shareholder-rights provision, 12 U.S.C. § 4617(b)(2)(A)(i), bars plaintiff's suit. Under HERA, the conservator succeeds to "all rights, titles, powers, and privileges of [Fannie Mae], and of any stockholder[.]" *Id.* This provision "plainly transfers shareholders' ability to bring derivative suits—a 'right[], title[], power[], [or] privilege[]'—to FHFA." *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012).

Fourth, plaintiff's claims are derivative in nature and thus barred under the doctrine of issue preclusion. Derivative claims have already been resolved against Fannie Mae's shareholders in earlier litigation, and that result requires dismissal of the derivative claims in this case.

Finally, plaintiff has yet to properly serve the United States and, consequently, his complaint is subject to dismissal for lack of personal jurisdiction.

BACKGROUND

I. FANNIE MAE AS A GOVERNMENT SPONSORED ENTERPRISE

Fannie Mae, along with Freddie Mac (collectively, "the GSEs"), are government-sponsored enterprises, chartered by Congress, that provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby freeing up capital. *See Perry Capital*, 70 F. Supp. 3d at 214. These entities have played a key role in housing finance and the broader U.S. economy. *Id.*

"By 2008, the United States economy faced dire straits, in large part due to a massive decline within the national housing market. . . . Given the systemic danger that a Fannie Mae or Freddie Mac collapse posed to the already fragile national economy, among other housing market-related perils, Congress enacted the Housing and Economic Recovery Act [on] July 30, 2008." *Perry Capital*, 70 F. Supp. 3d at 215 (citing Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (2008)). HERA created the Federal Housing Finance Agency, an independent federal agency, to supervise and regulate Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. 12 U.S.C. § 4501 *et seq*.[1]

HERA also granted the Director of FHFA the discretionary authority to place Fannie Mae in conservatorship or receivership "for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2). The statute provides that, upon its appointment as the conservator or receiver, FHFA would "immediately succeed to … all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated

[1] Previously, the GSEs had been regulated by the Office of Federal Housing Enterprise Oversight. *See* Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, §§ 1301-1395, 106 Stat. 3672, 3941-4012) (1992).

entity." *Id*. § 4617(b)(2)(A). The statute accords the conservator the power to "operate" and "conduct all business" of Fannie Mae, *id.* § 4617(b)(2)(B), including the power to take such action as may be "appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity," *id.* § 4617(b)(2)(D)(ii), and to "transfer or sell" any of Fannie Mae's assets or liabilities, *id.* § 4617(b)(2)(G).

HERA also amended the statutory charters of Fannie Mae to grant the Secretary of the Treasury the authority to purchase any "obligations and other securities" issued by Fannie Mae "on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine," provided that Treasury and Fannie Mae reached a "mutual agreement" for such a purchase. *See* 12 U.S.C. § 1719(g)(1)(A). Treasury was required to determine, prior to exercising this purchase authority, that the purchase was necessary to "provide stability to the financial markets," "prevent disruptions" in mortgage financing, and "protect the taxpayer." 12 U.S.C. § 1719(g)(1)(B). This purchase authority would expire on December 31, 2009, 12 U.S.C. § 1719(g)(4); *id.* § 1455(*l*)(4), but the statute expressly stated that Treasury would retain the power to exercise its rights with respect to previously-purchased securities after that sunset date, 12 U.S.C. § 1719(g)(2)(D); *id.* § 1455(*l*)(2)(D).

"On September 7, 2008, with the consent of management at Fannie and Freddie, the FHFA placed both into conservatorship." *Judicial Watch, Inc. v. FHFA*, 646 F.3d 924, 926 (D.C. Cir. 2011). Upon its appointment as conservator, FHFA assumed the "power to exercise 'all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity.'" *Id*. (quoting 12 U.S.C. § 4617(b)(2)(A)(i)).

II. TREASURY'S SENIOR PREFERRED STOCK PURCHASE AGREEMENTS WITH FANNIE MAE

Also in September 2008, Treasury used its authority to purchase securities issued by Fannie Mae. *See* Compl. ¶ 16. Treasury entered into Senior Preferred Stock Purchase Agreements (the "PSPAs") with Fannie Mae, through FHFA as conservator. *See* Fannie Mae Amended and Restated Preferred Stock Purchase Agreement ("Fannie Mae PSPA") (cited in, *e.g.*, Compl. ¶ 16).[2] Under the PSPA, Treasury committed to advance funds to Fannie Mae for each quarter in which its liabilities exceeded its assets, in accordance with GAAP, so as to maintain the positive net worth of Fannie Mae. If a draw is needed, FHFA submits a request to Treasury to allow Fannie Mae to draw on the funds committed under its PSPA. Treasury then provides funds sufficient to eliminate any net worth deficit. *See* Fannie Mae PSPA § 2.1, 2.2.

Treasury's statutory authority to provide funding to the GSEs required that the investment "protect the taxpayer." 12 U.S.C. § 1719(g)(1)(C). In exchange for the continuing funding commitment that it provided to Fannie Mae, Treasury received senior preferred stock with a liquidation preference,[3] warrants to purchase 79.9 percent of Fannie Mae's common stock, and entitlement to periodic commitment fees.[4] Fannie Mae PSPA §§ 3.1-3.4. The value

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[2] Copies of the Senior Preferred Stock Purchase Agreements and all amendments are available at http://www.fhfa.gov/Conservatorship/Pages/Senior-Preferred-Stock-Purchase-Agreements.aspx. The Court may consider documents incorporated into the complaint by reference when considering a motion to dismiss under Rule 12(b)(6). *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C .Cir. 1997).

[3] A liquidation preference is "[a] preferred shareholder's right, once the corporation is liquidated, to receive a specified distribution before common shareholders receive anything." Black's Law Dictionary 1298 (9th ed. 2009).

[4] Plaintiff alleges that Treasury is "is the purchaser, pursuant to 79.9% of the common stock of Fannie Mae on a fully-diluted basis pursuant to a September 7, 2008 Purchase Agreement and amendments thereto." Compl. ¶ 13. Plaintiff appears to be referring to the warrant in Treasury's PSPA with Fannie Mae, which has not been exercised. *See* Fannie Mae PSPA §§ 3.1-3.4. If plaintiff is alleging that Treasury *holds* 79.9 of the common stock of Fannie Mae, the Court

of the liquidation preference on Treasury's senior preferred stock was $1 billion from Fannie Mae, and it increased dollar-for-dollar as Fannie Mae drew on its PSPA funding. Fannie Mae PSPA § 3.3. Treasury received no additional shares of stock when Fannie Mae made draws under the PSPAs. *See* Fannie Mae PSPA §§ 3.1, 3.3. Currently, Treasury has a liquidation preference of $117 billion for Fannie Mae. (This reflects approximately $116 billion in draws, plus the initial $1 billion in liquidation preference.) *See Perry Capital*, 70 F. Supp. 3d at 217.

Under the PSPAs, Treasury received quarterly dividends on the total amount of its senior preferred stock. *Id.* at 216. Prior to the Third Amendment, Fannie Mae paid dividends at an annual rate of ten percent of its liquidation preference. Fannie Mae Senior Preferred Stock Certificate § 5.[5] (The quarterly dividend payment thus amounted to 2.5% of the liquidation preference.) The original PSPAs also restricted dividend payments to other shareholders. Fannie Mae PSPA § 5.1. Under these agreements, Fannie Mae cannot pay or declare a dividend to subordinate shareholders without the prior written consent of Treasury for so long as Treasury holds any unredeemed preferred stock. *Id.* Nor may Fannie Mae "set aside any amount for any such purpose" without the prior written consent of Treasury. *Id.*

The PSPAs required Fannie Mae to pay a periodic commitment fee to Treasury beginning on March 31, 2010. Fannie Mae PSPA §§ 3.1, 3.2. The periodic commitment fee "is intended to fully compensate [Treasury] for the support provided by the ongoing Commitment following December 31, 2009." *Id.* § 3.2(b). The amount of the fee was to be "determined with reference

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should not treat this allegation as true. *See Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004) ("Nor must we accept as true the complaint's factual allegations insofar as they contradict exhibits to the complaint or matters subject to judicial notice.").

[5] A copy of the preferred stock certificate is available at http://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2008-9-7_SPSPA_FannieMae_Certificate_N508.pdf.

to the market value of the Commitment as then in effect," as mutually agreed between Treasury and Fannie Mae, in consultation with the Chairman of the Federal Reserve. *Id.* While the fee was initially to be set by December 31, 2009, the PSPAs (as amended) permitted Treasury, in its sole discretion, to waive the fee for up to one year at a time based on conditions in the mortgage market. *See Perry Capital*, 70 F. Supp. 3d at 217. Treasury and FHFA delayed implementation of the periodic commitment fee until December 31, 2010. Treasury then waived the periodic commitment fee in 2011 and 2012. *Perry Capital*, 70 F. Supp. 3d at 217.

In August 2012, Treasury and FHFA, acting as conservator for the GSEs, entered into the Third Amendment to the PSPAs. Compl. ¶ 20. The Third Amendment eliminated the payment of a fixed dividend and suspended the periodic commitment fee that Fannie Mae would otherwise owe to Treasury. Instead, Fannie Mae now pays a quarterly variable based on Fannie Mae's earnings after accounting for prescribed capital reserves.[6] Third Amendment to Amended and Restated Fannie Mae PSPA, § 4 (Aug. 17, 2012). If Fannie Mae's net worth is negative in a quarter, no dividend is due. *Id.*

III. THIS SUIT

Plaintiff, who claims to own shares of stock in Fannie Mae, Compl. ¶¶ 17-18, alleges that the Third Amendment harmed the stock price of Fannie Mae and "deprived" him "of his property." *Id.* ¶ 31. Plaintiff brought suit against Fannie Mae, against FHFA, and against

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[6] Those annual earnings historically averaged below $11.7 billion, the amount that Fannie Mae owed under the fixed dividend. *See* Fannie Mae, Quarterly Report (Form 10-Q) (Aug. 8, 2012) at 4 *available at* http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2012/q22012.pdf ("The aggregate liquidation preference on the senior preferred stock remains at $117.1 billion, which requires an annualized dividend payment of $11.7 billion. The amount of this dividend payment exceeds our reported annual net income for every year since our inception.").

Treasury. *Id.* ¶¶ 28-36. This is one of numerous lawsuits brought by GSE shareholders in federal district courts challenging the Third Amendment. None thus far has survived a motion to dismiss.[7]

LEGAL STANDARD

Treasury moves to dismiss the complaint under Rules 12(b)(1), 12(b)(5), and 12(b)(6). Before proceeding to the merits of a case, a court must establish that it possesses subject matter jurisdiction over the action. *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Cir. 1996). Under Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden to show that the court has jurisdiction over its claims. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998). Where, as here, a motion to dismiss for lack of jurisdiction is limited to a facial attack on the pleadings, it is subject to the same standard as a motion brought under Rule 12(b)(6). *See Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011). Under the Rule 12(b)(6) standard, the Court "assume[s] the truth of all material factual allegations in the complaint and 'construe[s] the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged.'" *Id.* (quoting *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005). The Court, however, "do[es] not assume the truth of legal conclusions, nor . . . accept[s] inferences that are unsupported by the facts set out in the complaint." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015) (citations and internal quotation marks omitted). In

[7] The *Perry Capital* decision is currently on appeal. *See Perry Capital LLC et al. v. Lew et al.*, Nos. 14-5243, 14-5254, 14-5260, 14-5262 (D.C. Cir.). The plaintiff in *Continental Western* did not appeal from the district court's order dismissing the case. Similar lawsuits have been filed by other GSE shareholders in a variety of jurisdictions. *Jacobs et al. v. FHFA et al.*, Case No. 1:15-cv-00708 (D. Del.); *Robinson v. FHFA, et al.*, Case No. 7:15-cv-109 (E.D. Ky.); *Roberts v. FHFA, et al*., Case No. 1:16-cv-2107 (N.D. Ill.). *Robinson* was dismissed on September 9, 2016. *See Robinson*, 2016 WL 4726555 at *8. Treasury and FHFA have filed motions to dismiss in *Jacobs*, *Roberts*, and *Saxton*, and those motions are pending.

ruling on the motion to dismiss, the court must take the well-pleaded facts as true but is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

ARGUMENT

I. THE APA DOES NOT AUTHORIZE MONEY DAMAGES

Plaintiff's primary request is for "monetary relief in the sum of $2,500,000." Compl. Prayer for Relief (B). However, he also claims that his case arises under the APA, id. ¶ 7, and the single count of his complaint is based on the APA. Id. ¶ 29. The APA waives the government's sovereign immunity only for claims seeking "relief other than money damages," 5 U.S.C. § 702. *See Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260-61 (1999) (APA does not permit enforcement of an equitable lien); *Benoit v. U.S. Dep't of Agric.*, 608 F.3d 17, 20 (D.C. Cir. 2010) ("The plaintiffs wisely take no issue with the district court's holding that suits for damages against the United States under the Civil Rights Act, the APA, and the Constitution are barred by sovereign immunity and that suits for damages against the United States under the common law must be brought pursuant to the limited waiver of sovereign immunity in the FTCA, which requires that the claimant have exhausted his administrative remedy before filing suit."); *Hubbard v. EPA*, 982 F.2d 531, 535-37 (D.C. Cir. 1992) (en banc) (APA does not permit award of backpay). Accordingly, plaintiff's APA claim seeking a monetary payment of $2,500,000 – a sum which he claims reflects a share price of $35 for his 50,000 shares of stock, Compl. ¶ 30 – must be dismissed.

II. HERA's Jurisdiction-Withdrawal Provision Bars Plaintiff's Claims

To the extent plaintiff's complaint is interpreted as a request for injunctive or other equitable relief with respect to the Third Amendment, *see* Compl. ¶¶ 19-20, Prayer for Relief (A), Congress has withdrawn subject matter jurisdiction for claims seeking such relief. *See Perry Capital*, 70 F. Supp. 3d at 219-29 (holding that the plaintiffs' claims regarding the Third Amendment are barred by Section 4617(f)); *see also Robinson*, 2016 WL 4726555 at *3-*4 (same); *Cont'l W.*, 83 F. Supp. 3d at 840 n.6 (dismissing on issue preclusion but stating, in the alternative, that the court would dismiss the case as barred by Section 4617(f)). This Court lacks jurisdiction over plaintiff's claims for the same reasons that the courts in *Perry Capital*, *Robinson*, and *Continental Western* determined that they lacked jurisdiction: Because HERA prohibits relief that would restrain the powers that FHFA exercises as conservator of Fannie Mae, such as entering into the Third Amendment.

A. The jurisdiction-withdrawal provision effects "a sweeping ouster" of judicial authority to grant equitable remedies

Plaintiff's case is barred by 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator" of Fannie Mae. Like the materially identical provision of FIRREA, *see* 12 U.S.C. § 1821(j), HERA's anti-injunction provision "effect[s] a sweeping ouster of courts' power to grant equitable remedies" to parties challenging actions taken by FHFA as conservator.[8] *Freeman*, 56 F.3d at 1399 (interpreting FIRREA's equivalent anti-injunction provision); *see also Town of*

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[8] *Compare* 12 U.S.C. § 1821(j) ("Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or receiver.") *with* 12 U.S.C. § 4617(f) ("Except as provided in this section or at the request of the Director, 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.").

Babylon v. FHFA, 699 F.3d 221, 228 (2d Cir. 2012) (Section 4617(f) "excludes judicial review of 'the exercise of powers and functions' given to the FHFA as a conservator"); *Bank of Am. Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010); *Nat'l Trust for Historic Pres. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring) (FIRREA's anti-injunction provision "bar[s] a court from acting in virtually all circumstances").

The jurisdictional inquiry under both Section 4617(f) and 1821(j) is "quite narrow." *Bank of Am.*, 604 F.3d at 1243. "First, we evaluate whether the FDIC's challenged actions constitute the exercise of a receivership power or function. If so, the FDIC is protected from all court action that would 'restrain or affect' the exercise of those powers or functions pursuant to § 1821(j), and we proceed to the secondary inquiry of whether the district court's actions do in fact restrain or affect the FDIC as receiver." *Id*. (internal citations omitted); *see also Town of Babylon*, 699 F.3d at 228 (under Section 4617(f), "[a] conclusion that the challenged acts were directed to an institution in conservatorship and within the powers given to the conservator ends the inquiry."). Provided that the conservator is exercising a statutorily authorized power, injunctive relief is unavailable even where the conservator is alleged to have acted unlawfully. *See Bank of Am.*, 604 F.3d at 1243 (Section 1821(j) "has been interpreted broadly to bar judicial intervention whenever the FDIC is acting in its capacity of receiver or conservator, even if it violates its own procedures or behaves unlawfully in doing so") (citing cases); *Ward v. Resolution Trust Corp.*, 996 F.2d 99, 103 (5th Cir. 1993) (same).

Plaintiff's challenge reflects a dispute over the manner in which FHFA executed its duties as conservator of Fannie Mae. In plaintiff's view, FHFA agreed to change Fannie Mae's dividend obligations to Treasury at a time when it did not need to do so, because, plaintiff alleges, Fannie Mae was "again making profits," and had an improved financial condition.

Compl. ¶¶ 19-20. But a claim that FHFA exercised its conservatorship powers in an improper manner falls squarely within the scope of HERA's jurisdiction-withdrawal provision. *See, e.g.*, *Bank of Am.*, 604 F.3d at 1244 (FIRREA's jurisdiction-withdrawal provision barred claim that FDIC unlawfully sold assets belonging to plaintiff, because claim was merely an allegation "of the FDIC's improper performance of its legitimate receivership functions"); *Freeman*, 56 F.3d at 1399 (FIRREA's jurisdiction-withdrawal provision barred suit challenging FDIC's allegedly unlawful foreclosure on plaintiffs' home); *Ward*, 996 F.2d at 103 (holding that allegations that the RTC sold a property "for a net present value" alleged to be "substantially less" than the plaintiff's offer and thus violated its receivership obligations was barred by Section 1821(j)).

B. FHFA acted within the scope of its statutory authority when it agreed to the Third Amendment

Despite the plain language of Section 4617(f), plaintiff brings claims challenging the FHFA's exercise of its statutory authority as conservator in entering into the Third Amendment. In executing the Third Amendment, FHFA was exercising the conservatorship powers entrusted exclusively to the agency. HERA grants FHFA "broad powers to operate Fannie and Freddie." *FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1058 (N.D. Ill. 2013). These include the power to "take over the assets of [Fannie Mae]," to "conduct all business of the regulated entit[ies]," to "preserve and conserve the assets and property of the entit[ies]," and to "transfer or sell any asset or liability of the regulated entity." 12 U.S.C. § 4617(b)(2)(B), (G). Further, FHFA has the authority, as a conservator, to "take such action as may be necessary to put the regulated entity in a sound and solvent condition" and to undertake any action "appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the entity." *Id.* § 4617(b)(2)(D).

The Third Amendment restructured Fannie Mae's payment obligations to Treasury, replacing a fixed ten-percent dividend with a variable dividend, and suspending the periodic commitment fee, which under the PSPAs is intended to "fully compensate" the taxpayers for the hundreds of billions of dollars committed to Fannie Mae, for so long as the variable dividend is in effect. To accomplish these goals, FHFA "transfer[red]" one of the GSEs' assets (their future income) to Treasury in exchange for relief from the fixed dividend obligation and the periodic commitment fee. These actions were well within its authority as conservator. *See* 12 U.S.C. § 4617(b)(2)(B), (D), (G); *see also, e.g.*, *Town of Babylon*, 699 F.3d at 227 (the taking of "protective measures against perceived risks is squarely within FHFA's powers as [] conservator"); *Leon Cty. v. FHFA*, 700 F.3d 1273, 1279 (11th Cir. 2012) (same).

As discussed above, Section 4617(f) shields the exercise of conservatorship powers (with respect to both the conservator and its counter-party, in this case Treasury) from judicial review. *See Cty. of Sonoma v. FHFA*, 710 F.3d 987, 993 (9th Cir. 2013) ("it is not our place to substitute our judgment for FHFA's"). Plaintiff's allegations that the Third Amendment was ill-motivated and designed to benefit "taxpayers" do not circumvent Section 4617(f), even assuming the truth of these allegations. Compl. ¶¶ 19-20, 25. Indeed, three courts have already dismissed cases challenging the Third Amendment under an identical legal theory. *See Robinson*, 2016 WL 4726555 at *3-*4; *Cont'l W.*, 83 F. Supp. 3d at 840 n.6 ("it is not the role of this Court to wade into the merits *or motives* of FHFA and Treasury's actions—rather the Court is limited to reviewing those actions on their face and determining if they were permissible under the authority granted by HERA.") (emphasis added); *Perry Capital*, 70 F. Supp. 3d at 226 ("FHFA's underlying *motives* or opinions—*i.e.*, whether the net worth sweep would arrest a downward spiral of dividend payments, increase payments to Treasury, or keep the GSEs in a holding pattern—do not matter for the purposes of § 4617(f).") (emphasis added). In other contexts, as well, courts have recognized that plaintiffs cannot plead around Section 4617(f) or the materially identical Section 1821(j) by challenging the conservator's motives. *See Leon Cty., Fla. v. FHFA*, 816 F. Supp. 2d 1205, 1208 (N.D. Fla. 2011), *aff'd*, 700 F.3d 1273 (11th Cir. 2012); *cf. Hindes v. F.D.I.C.*, 137 F.3d 148, 153, 159-61 (3d Cir. 1998) (finding claims that the FDIC "reneged on an agreement with [the bank] with respect to the computation of its capital base, ignored [the bank's] actual financial condition when seizing [the bank], and engaged in a conspiracy with state officials to close the bank" barred by FIRREA).

C. HERA's jurisdiction-withdrawal provision applies to plaintiff's claims against Treasury

Plaintiff also challenges Treasury's conduct in agreeing to the Third Amendment. Compl. ¶¶ 28-36. However, Section 4617(f) does not permit plaintiff to set aside FHFA's actions by naming Treasury, as well as FHFA, as a defendant. Any relief awarded against either party would "restrain or affect" the conservator, as it would set aside a contract amendment to which the conservator was a party. As the *Perry Capital* court held, "there can be little doubt that enjoining Treasury from partaking in the Third Amendment would restrain FHFA's uncontested authority to determine how to conserve the viability of the GSEs." *Perry Capital*, 70 F. Supp. 3d at 222-23; *see also Robinson*, 2016 WL 4726555, at *3.

Other courts have reached the same common-sense conclusion, holding that the provision "precludes a court order against a third party which would affect the FDIC as receiver, particularly where the relief would have the same practical result as an order directed against the FDIC in that capacity." *Hindes*, 137 F.3d at 160-61; *see also Dittmer Props. v. FDIC*, 708 F.3d 1011, 1017 (8th Cir. 2013) ("Even though the FDIC has apparently already sold the note in question, if plaintiffs such as Dittmer are allowed to attack the validity of a failed institution's assets by suing the remote purchaser, such actions would certainly restrain or affect the FDIC's powers to deal with the property it is charged with disbursing."); *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir. 1992); *St. George Maronite Catholic Church v. Green*, No. CIV.A. SA-94-CA-0334, 1994 WL 763743, at *4-6 (W.D. Tex. July 25, 1994) (holding, despite allegations that "the contract with [a third party] arose as a result of fraud, a breach of good faith and fair dealing, and deceptive trade practices" that "§ 1821(j) bars any relief that would affect the contract between RTC–Receiver and [the third party]").

Section 4617(f) forecloses any reliance on a presumption in favor of judicial review. That presumption "is rebuttable: It fails when a statute's language or structure demonstrates that Congress" intended to preclude review. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). Section 4617(f) expressly precludes judicial review of agency actions where such review would "restrain or affect" FHFA's exercise of its conservatorship powers. Section 4617(f)'s prohibition thus "qualifies as a reliable indicator of congressional intent to preclude review of non-monetary APA claims brought against both FHFA and Treasury." *Perry Capital*, 70 F. Supp. 3d at 221.

D. Recent legislation confirms that Treasury and FHFA acted within the scope of their authority under HERA

Recent federal legislation provides strong confirmation that both Treasury and FHFA acted within the scope of their authority under HERA and the original PSPAs when they entered into the Third Amendment. It is well established that "an agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 45 (1983). Where Congress amends a statute fully aware of an agency's construction, but takes no steps to halt the agency action, then "presumably the legislative intent has been correctly discerned." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982).

Here, in the Consolidated Appropriations Act, H.R. 2029 § 702 ("the Act"), Congress legislated with respect to the PSPAs between Treasury and the GSEs, giving particular attention to Treasury's authority to exercise its rights received in connection with the PSPAs. The Act defines the PSPAs between Treasury and the GSEs to include both:

> (A) "the Amended and Restated Senior Preferred Stock Purchase Agreement, dated September 26, 2008, as such Agreement has been amended on May 6, 2009, December 24, 2009, and August 17, 2012, respectively, and as such Agreement may be further amended and restated," H.R. 2029 § 702(a)(2)(A); and
>
> (B) "any provision of any certificate in connection with such Agreement creating or designating the terms, powers, preferences, privileges, limitations, or any other conditions of the Variable Liquidation Preference Senior Preferred Stock of an enterprise issued or sold pursuant to such Agreement," *id.* § 702(a)(2)(B).

While the Act confirms Treasury's ongoing authority to amend the original PSPAs, *see id.* § 702(a)(2)(A), and leaves in effect Treasury's rights under the stock certificates issued in connection with the Third Amendment, *see id.* § 702(a)(2)(B), the Act limits Treasury's authority under the PSPAs to sell or otherwise dispose of its preferred shares.[9] *Id.* § 702(b).

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[9] The Act directs that "until at least January 1, 2018, the Secretary may not sell, transfer, relinquish, liquidate, divest, or otherwise dispose of any outstanding shares of senior preferred stock acquired pursuant" to the PSPAs "unless Congress has passed and the President has signed into law legislation that includes a specific instruction to the Secretary regarding the sale, transfer, relinquishment, liquidation, divestiture, or other disposition of the senior preferred stock so acquired." *Id.* § 702(b).

The statutory text thus makes clear that the amendments to the PSPAs, as well as the right to a variable dividend that Treasury received in connection with the Third Amendment, have "been 'fully brought to the attention of . . . Congress.'" *N. Haven Bd. of Educ.*, 456 U.S. at 535. By expressly predicating parts of the new legislation on the Third Amendment, including the variable dividend that plaintiff challenges here, Congress approved of the Third Amendment as consistent with Treasury's authority and the duties of the conservator under HERA. First, Congress expressly acknowledged Treasury's ongoing authority under HERA to amend the original PSPA. *See* H.R. 2029 § 702(a)(2)(A) (referring to Treasury's authority to "amend[] and restate[]" the PSPAs). Second, Congress indicated its view that the Third Amendment constituted a valid exercise of Treasury's ongoing authority to amend the original PSPAs. *See id.* (defining the PSPAs between Treasury and the GSEs to include the Agreement as amended on "August 17, 2012"). Third, Congress *expressly* incorporated into the Act Treasury's rights under the stock certificates issued in connection with the Third Amendment. *See id.* § 702(a)(2)(B). The new legislation thus demonstrates that "Congress implicitly approved" of Treasury's interpretation of its authority under HERA. *See Appeal of Bolden*, 848 F.2d 201, 208 (D.C. Cir. 1988). Similarly, the fact that Congress circumscribed Treasury's authority in one area but left Treasury's entitlement to the variable dividend intact, H.R. 2029 § 702(b), further confirms that Treasury and the Conservator acted within their statutory powers in executing the Third Amendment. *See United States v. Rutherford*, 442 U.S. 544, 554, n.10 (1979).[10]

[10] In addition, the Act includes a "Sense of Congress" provision declaring that: "[i]t is the Sense of Congress that *Congress should pass and the President should sign into law legislation determining the future of Fannie Mae and Freddie Mac*," and that the Secretary should not sell the Senior Preferred Stock until such legislation is passed. *Id*. § 702(c) (emphasis added).

E. Plaintiff's APA claim fails as a matter of law in any event

Plaintiff's single count cites the APA but fails to specify the substantive basis for his claims against any of the defendants. While agency action may be "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), the plaintiff must still identify an applicable legal limitation on agency discretion that the agency has failed to heed. This follows from the principle that "before any review at all may be had [under the APA], a party must first clear the hurdle of § 701(a)." *Heckler v. Chaney*, 470 U.S. 821, 828-29 (1985). Section 701 withdraws the APA's cause of action if the relevant statute "preclude[s] judicial review [or] agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). Thus, "Section 702 [of the APA] does not create substantive rights. There is no right to sue for a violation of the APA in the absence of a 'relevant statute' whose violation 'forms the legal basis for [the] complaint.'" *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 753 (9th Cir. 1991) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990)); *see also Navab-Safavi v. Broad. Bd. of Governors*, 650 F. Supp. 2d 40, 71 (D.D.C. 2009) ("However, the APA itself does not 'confer a substantive right to be free from arbitrary agency action,'") (quoting *Furlong v. Shalala*, 156 F.3d 384, 394 (2d Cir. 1998)). Rather than conferring substantive rights, "[t]he APA is merely a procedural vehicle for review of agency action," *Furlong*, 156 F.3d at 394, and its provisions "merely provide a vehicle for enforcing rights which are declared elsewhere." *Stockman v. FEC*, 138 F.3d 144, 151 n.14 (5th Cir. 1998) (quotation omitted).

Plaintiff's complaint fails to identify any such substantive limitation on Treasury's management of its Fannie Mae preferred stock investment. HERA authorized Treasury "to purchase any obligations and other securities issued by [Fannie Mae] under any section of this chapter, *on such terms and conditions as the Secretary may determine* and in such amounts as the Secretary may determine." 12 U.S.C. § 1719(g)(1)(A) (emphasis added). HERA further empowered Treasury to "hold, exercise any rights received in connection with, or sell, any obligations or securities purchased" from Fannie Mae, at any time, without limitation. *Id.* § 1719(g)(2)(D). Nothing in HERA suggests that Treasury's management of the taxpayers' investment in Fannie Mae is subject to review by an aggrieved shareholder. *Cf. Perry Capital*, 70 F. Supp. 3d at 224 (holding that the Third Amendment did not violate the restriction on the purchase of new shares contained in Section 1719(g)(1)(A)).

Plaintiff complains that he "had no opportunity to voice objections or otherwise be heard prior to the execution of the Third Amendment." Compl. ¶ 33. While the gravamen of plaintiff's claim is again unclear, to the extent he intends to assert a procedural APA challenge to the Third Amendment, he does not identify any source of law requiring Treasury to accept public comment on its management of its investment. The Third Amendment was not a rulemaking subject to the procedural requirements of Section 553 of the APA. Indeed, that provision by its terms excludes any "matter relating to agency management or personnel or to *public property*, loans, grants, benefits, *or contracts*" from notice and comment requirements. 5 U.S.C. § 553(a)(2) (emphasis added). Nor does HERA require that Treasury, FHFA, or Fannie Mae engage in a public hearing with respect to the management of investments pursuant to Section

1719(g). *See Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n v. Mar. Admin*., 215 F.3d 37, 42-43 (D.C. Cir. 2000) ("In the absence of such a statutory command, of course, '[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.'") (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978)).[11]

Further, plaintiff claims (with no empirical support that we can discern) that "[b]ut for the operation of the Third Amendment, Plaintiff's 50,000 Shares would now be valued at approximately $ 35 (thirty-five dollars) per share," and thus that he has been "deprived of his property" in violation of the Fifth Amendment. Compl. ¶¶ 30, 31, 34. While it is not apparent from the complaint which aspect of the Fifth Amendment plaintiffs means to invoke, his expectations regarding Fannie Mae's share price are not a property interest protected by the due process clause of the Fifth Amendment or enforceable through the APA. *See Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 119-20 (D.C. Cir. 2010). "Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). Certainly no such "existing rule[] or

[11] Plaintiff's complaint betrays a misunderstanding of the nature of the PSPAs. *See* Compl. ¶ 25-26 (citing documents allegedly stating that "Treasury conceded that it 'did not make a simple 'loan' to Fannie and Freddie.'"). The taxpayers' capital support for Fannie Mae has always come in the form of preferred stock. *See* Fannie Mae Senior Preferred Stock Certificate. Preferred stock is "[a] class of stock giving its holder a preferential claim to dividends and to corporate assets upon liquidation," Black's Law Dictionary (10th ed. 2014), and while it can be redeemed in accordance with agreed-upon terms and conditions, it is not a simple loan that can be repaid. HERA authorized Treasury to purchase "any obligations and other securities" issued by Fannie Mae, and was not required to structure its investment as a simple loan. 12 U.S.C. § 1719(g)(1)(A).

understanding[]" entitles plaintiff to a certain share price. Indeed, the *Perry Capital* court rejected the argument that GSE shareholders have a protected property interest in the payment of dividends or liquidation preferences pursuant to their stock in the GSEs. *See Perry Capital*, 70 F. Supp. 3d at 241-42.[12]

Thus, even if jurisdiction existed over plaintiff's APA claims, they should nevertheless be dismissed for failure to state a claim.

III. HERA's Transfer of Shareholder Rights Provision Bars Plaintiff's Claims

HERA's transfer-of-shareholder-rights provision, 12 U.S.C. § 4617(b)(2)(A)(i), provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or

[12] Plaintiff also appears to invoke the takings clause of the Fifth Amendment, by referencing a purported "illegal exaction" in his single count. Compl. ¶ 34. This "illegal exaction" claim fails for the simple reason that plaintiff has not pled that he paid anything to the government. *See Piszel v. United States*, No. 2015-5100, 2016 WL 4394602, at *11 (Fed. Cir. Aug. 18, 2016) ("[T]here was no exaction here because there was no payment.") (citing *Westfed Holdings, Inc. v. United States*, 52 Fed.Cl. 135, 153 (2002)). Moreover, if jurisdiction over this claim exists at all, it could exist only in the Court of Federal Claims pursuant to the Tucker Act. *See ECCO Plains, LLC v. U.S.*, 728 F.3d 1190, 1201-02 (10th Cir. 2013). The Court of Federal Claims has exclusive jurisdiction over takings and contract claims against the government that exceed $10,000, as plaintiff's demand for $2,500,000 in damages certainly does. 28 U.S.C. § 1346(a)(2). While the district courts have concurrent jurisdiction under the Little Tucker Act for claims under $10,000, a plaintiff can satisfy the Little Tucker Act's jurisdictional requirements only by "expressly disclaim[ing] monetary damages over $10,000." *Waters v. Rumsfeld*, 320 F.3d 265, 270-71 (D.C. Cir. 2003). The waiver of damages must be "'clearly and adequately expressed,'" *id*. (quoting *Goble v. Marsh*, 684 F.2d 12, 17 (D.C. Cir. 1982) and it should generally "be set forth in the initial pleadings," *Stone v. United States*, 683 F.2d 449, 454 n.8 (D.C. Cir. 1982). Plaintiff makes no such disclaimer in his complaint, and in fact seeks a monetary payment well in excess of $10,000. There are multiple cases asserting similar claims in the Court of Federal Claims: *Washington Federal v. United States*, No. 13-385C; *Fairholme Funds, Inc. v. United States*, No. 13-465C; *Cacciapalle v. United States*, No. 13-466C; *American European Insurance Co. v. United States*, No. 13-496C; *Arrowood Indemnity Co. v. United States*, No. 13-698C; *Dennis v. United States*, No. 13-542C; *Fisher v. United States*, No. 13-608C; *Shipmon v. United States*, No. 13-672C; *Reid v. United States*, No. 14-152C; and *Rafter v. United States*, No. 14-740C.

director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." "This language plainly transfers shareholders' ability to bring derivative suits—a 'right[], title[], power[], [or] privilege[]'—to FHFA." *Kellmer*, 674 F.3d at 850. Further, the conservator's succession to "all rights" of the shareholders would transfer their ability to bring any claim – derivative or direct – with respect to Fannie Mae.

"A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). Thus, legal harms committed against a corporation give rise to claims belonging to the corporation itself. In a derivative suit, any recovery flows to the corporate treasury; in a direct suit, it flows only to the individual plaintiff-shareholders. To the extent that funds rightfully belonging to the corporation are diverted to particular shareholders, the corporation has fewer resources available for its business and fewer assets available to satisfy the claims of its creditors. *See, e.g., St. Clair Shores Gen. Emps. Ret. Sys. v. Eibeler,* 745 F. Supp. 2d 303, 311 (S.D.N.Y. 2010) ("Generally, when a corporation commits waste through overpayment, it is the corporation that is damaged directly and the shareholders suffer only derivative injury.").

The determination whether a federal-law claim is direct or derivative is governed by federal law. *See* 7C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1821 (3d ed. 2015); *cf. Rifkin v. Bear Stearns & Co.*, 248 F.3d 628, 631 (7th Cir. 2001). Where standing turns on the "allocation of governing power within [a] corporation," however, federal law often looks to state corporate law principles, *see Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991), unless the state law in question permits an action prohibited by federal law or is inconsistent with the federal policy underlying the plaintiff's cause of action. *Id.* at 98 (citations omitted).

The principles for distinguishing direct from derivative claims are well-established and consistent across federal and state law. The analysis is governed by two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004); *see also Labovitz v. Washington Times Corp*., 172 F.3d 897, 901 (D.C. Cir. 1999) ("Claims based on injury to the corporation, however, are derivative in nature and any damages suffered are owed to the corporation."). A claim is "direct" when "the duty breached was owed to the stockholder" and the shareholder "can prevail without showing an injury to the corporation." *Tooley*, 845 A.2d at 1039. A claim is "derivative" if the harm to the shareholder is the byproduct of some injury to the corporate body as a whole. *Id.*

"Where all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature." *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008); *see also, e.g.*, *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006). Moreover, "claims that [defendants] caused the company to enter into a series of 'unfair' transactions that have 'involved self-dealing' and 'diverting assets' are fundamentally claims belonging to the corporation and to [shareholders] only derivatively." *See Cowin v. Bresler*, 741 F.2d 410, 416 (D.C. Cir. 1984); *see also Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) ("Pareto's allegations – that the directors breached their duties of care and loyalty by failing to safeguard Barbary Coast's assets and equity, mismanaging its operations, improperly placing it into voluntary receivership, and failing to exercise due diligence during merger attempts – describe a direct injury to the bank, not the individual stockholders.").

Plaintiff's complaint describes a derivative injury: That Fannie Mae has allegedly been "paying 100% of its profits to the United States Treasury," and that "[b]ut for the Third Amendment, Plaintiff would have been entitled to a portion of the benefit of those profits in proportion to his Shares." Compl. ¶¶ 21-22. This is precisely the sort of claim involving an alleged diversion or depletion of assets that courts have held to be derivative. That the Third Amendment allegedly caused plaintiff indirect harm by depressing the value of his stock, Compl. ¶ 30, does not transform his claims into direct claims. *See, e.g.*, *Tooley*, 845 A.2d at 1037; *Sax v. World Wide Press, Inc.*, 809 F.2d 610, 614 (9th Cir. 1987) ("Even if the defendants depleted [the company's] assets with the sole purpose of decreasing the value of [plaintiff's] stock and destroying his return on his investment, the action would nonetheless be derivative."). In *Cowin*, the D.C. Circuit held that an allegation that a corporation and its majority shareholders conspired to "'artificially deflate . . . the market price of [the company's] common stock'" was "an allegation of harm primarily to the corporation shared by each stockholder proportionate to their holdings." 741 F.2d at 416; *see also Labovitz*, 172 F.3d at 904 ("[T]he loss [plaintiffs] suffered in share value is a derivative harm."). The fact that plaintiff demands that $2,500,000 be paid directly to him, Compl. Prayer for Relief (B), does not change this analysis. The court "should look to the nature of the wrong and to whom the relief *should* go." *Tooley*, 845 A.2d at 1039 (emphasis added). Here, because the fundamental injury alleged is the loss of share value because of the alleged depletion of corporate assets, Compl. ¶ 21, 30, the relief (if any) that would flow from such an alleged injury to Fannie Mae, not plaintiff. Such derivative claims have plainly been transferred to the conservator, and plaintiff may not prosecute such a claim in this case.

Moreover, even if plaintiff's claims could plausibly be characterized as direct, they would still be barred by Section 4617(b)(2)(A)(i), which transfers "all" shareholder "rights, titles, powers, and privileges" to FHFA. That transfer includes the "right" to bring any lawsuit with respect to the assets of the GSEs that depends on a shareholder's status as a shareholder. *See Pareto*, 139 F.3d at 700 ("Congress also covered privileges just to be sure that nothing was missed . . . Congress has transferred everything it could to the [conservator]."). Plaintiff's claims against Treasury, FHFA, and Fannie Mae depend upon his shareholder status and assert a claim on the assets of Fannie Mae. Section 4617(b)(2)(A)(i) divested him of the right to bring such claims.

IV. PLAINTIFF IS BARRED BY THE DOCTRINE OF ISSUE PRECLUSION FROM PURSUING DERIVATIVE CLAIMS IN THIS CASE

The doctrine of issue preclusion, or collateral estoppel, "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted). Other shareholders, purporting to bring derivative actions on behalf of the GSEs, have already litigated the legal issues pertinent here, and lost on those issues in the *Perry Capital* case. The plaintiff here brings a derivative action on behalf of Fannie Mae, which is barred by the district court's determinations in *Perry Capital*.

In this circuit, issue preclusion has three elements: "[1], the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case[; 2], the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case [; and] [3], preclusion in the second case must not work a basic unfairness to the party bound by the first determination." *Martin v. Dep't of Justice*, 488 F.3d

446, 454 (D.C. Cir. 2007) (quoting *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992)). All elements are satisfied here.

As an initial matter, the GSEs were the real parties in interest in the derivative actions at issue in *Perry Capital*, just as Fannie Mae is the real party in interest here. A judgment rendered in a shareholder derivative suit precludes subsequent litigation by both the corporation and its shareholders. *See, e.g., Cottrell v. Duke*, 737 F.3d 1238, 1242-43 (8th Cir. 2013); *In re Sonus Networks, Inc, S'holder Derivative Litig.*, 499 F.3d 47, 64 (1st Cir. 2007) ("[I]f the shareholder can sue on the corporation's behalf, it follows that the corporation is bound by the results of the suit in subsequent litigation, even if different shareholders prosecute the suits."); *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) ("Furthermore, in shareholder derivative actions arising under Fed. R. Civ. P. 23.1, parties and their privies include the corporation and all nonparty shareholders."). As plaintiff asserts solely derivative claims, *see supra* Part II.A, he is bound by the district court's determinations in the first derivative action.

The issues here and in *Perry Capital* are the same and were actually litigated. The district court in *Perry Capital* considered expressly derivative claims brought as a part of a putative class action on behalf of GSE shareholders and concluded that: (1) Section 4617(f) barred the equitable relief, including rescission, sought in the derivative claims; (2) that Section 4617(b)(2)(A) barred any derivative claims by shareholders concerning the PSPAs, and that no "conflict of interest" exception to the application of Section 4617(b)(2)(A) exists; and (3) that claims concerning the plaintiffs' liquidation preferences were not ripe for review and that any claim for the value of expected dividends failed to state a claim. 70 F. Supp. 3d at 229-39 & n. 24. Issue preclusion bars plaintiff from re-litigating those same issues in another derivative action. *See Taylor*, 553 U.S. at 892 ("Issue preclusion, in contrast, bars successive litigation . . . even if the issue recurs in the context of a different claim.") (internal citations omitted).

The dismissal of the derivative actions in the District of Columbia was also a "valid and final judgment" for purposes of issue preclusion. It is irrelevant that the suits were dismissed for lack of subject matter jurisdiction. "[U]nder principles of issue preclusion, even a case dismissed without prejudice has preclusive effect on the jurisdictional issue litigated." *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1248 (D.C. Cir. 1999); *see also Shaw v. Merritt–Chapman & Scott Corp.*, 554 F.2d 786, 789 (6th Cir.1977) ("[W]hile a dismissal for lack of jurisdiction does not constitute an adjudication upon the merits, it does constitute a binding determination on the jurisdictional question, which is not subject to collateral attack."). The pending appeal in the *Perry Capital* judgment is also irrelevant for these purposes. *See Cont'l Western*, 83 F. Supp. 3d at 840 ("Although *Perry Capital* has been appealed, it is still 'valid and final' for purposes of an issue preclusion analysis" because "[i]t is well established in the federal courts that the pendency of an appeal does not diminish the *res judicata* effect of a judgment rendered by a federal court.'") (quoting *In re Ewing*, 852 F.2d 1057, 1060 (8th Cir. 1988)); *see also Webb v. Voirol*, 773 F.2d 208, 211 (8th Cir. 1985); *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 467 (5th Cir. 2013). The bar on equitable relief, the transfer of shareholder rights to the conservator, the inapplicability of a conflict of interest provision, and the lack of ripeness for claims related to the plaintiffs' liquidation preferences were also all essential to the district court's judgment in *Perry Capital*. *See, e.g.*, *Perry Capital*, 70 F. Supp. 3d at 221-39.

Finally, there is no unfairness in applying issue preclusion in these circumstances. "There is no general public policy exception to the operation of *res judicata*." *Apotex, Inc. v. FDA*, 393 F.3d 210, 219 (D.C. Cir. 2004). Rather, the D.C. Circuit has declined to apply issue preclusion in only narrowly defined circumstances. First, “if there has been an intervening ‘change in controlling legal principles.’” *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 306 (D.C. Cir. 2015) (quoting *Apotex*, 393 F.3d at 219). Second, “if the party to be bound lacked an incentive to litigate in the first trial, especially in comparison to the stakes of the second trial.” *Id.* (quotation omitted). Third, “if the ‘prior proceedings were seriously defective.’” *Id.* (quoting *Martin*, 488 F.3d at 455). None of those circumstances is present here. There has been no change in controlling legal principles since the *Perry Capital* decision was issued; indeed, the issues have yet to be decided on appeal. Nor did the derivative plaintiffs in *Perry Capital* lack incentive to litigate their claims; they were a “purported class [of] plaintiffs” comprising “private individual and institutional investors who own either preferred or common stock in the Federal National Mortgage Association [] or the Federal Home Loan Mortgage Corporation [].” *Perry Capital*, 70 F. Supp. 3d at 214. The putative class plaintiffs were thus similarly situated to plaintiff, and similarly motivated to pursue their derivative claims. *See Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 610 (D.C. Cir. 2007) (“We can discern no difference between the incentives that the [plaintiff] may have had in its [earlier] litigation and its incentives here. The stakes in its attempt before that court were no less than they are now.”). Finally, there is no argument that the proceedings in *Perry Capital* were procedurally flawed. “[I]f the parties have the same incentive to litigate in both the earlier and the subsequent litigation, if there is no change in the controlling law and if there is no concern about procedural defects in the first litigation, the application of issue preclusion is unlikely to result in a ‘compelling’ showing of unfairness to the party against which it is asserted.” *Canonsburg Gen. Hosp.*, 807 F.3d at 306. Thus, issue preclusion serves to bar plaintiff from re-litigating the issues decided with respect to the derivative claims in *Perry Capital*.

V. PLAINTIFF HAS NOT YET PROPERLY SERVED THE UNITED STATES

The Federal Rules provide that where a federal agency or corporation is sued, a plaintiff must "serve the United States and also send a copy of the summons and complaint by registered or certified mail to the agency, corporation, officer, or employee." Fed. R. Civ. P. 4(i)(2). Service upon the United States also requires the plaintiff to both (1) deliver a copy of the summons and complaint to the United States Attorney for the district in which the action is brought, or send copies of each by registered or certified mail, addressed to the civil process clerk at the office of the United States Attorney; and (2) send a copy of the summons and complaint to the Attorney General of the United States by registered or certified mail. *See* Fed. R. Civ. P. 4(i)(1)(A). The summonses issued in this case do not include summonses to the Attorney General or the United States Attorney. *See* Summons, ECF No. 3 (summonses issued to Federal Housing Finance Authority, Federal National Mortgage Association, and United States Department of the Treasury). Plaintiff has not filed a return of service affidavit in this case, and thus there is no record of the United States being served in accordance with Rule 4. Moreover, because the complaint in this case was filed on June 26, 2016, the complaint is subject to dismissal without prejudice under Rule 4(m).

Plaintiff was represented by counsel at the time the complaint was filed, and while plaintiff may be proceeding pro se at this time, and thus would be "allowed more latitude than litigants represented by counsel to correct defects in service of process and pleadings," *Moore v. Agency for Int'l Dev.*, 994 F.2d 874, 876 (D.C. Cir. 1993), this "does not constitute a license for a plaintiff filing *pro se* to ignore the Federal Rules of Civil Procedure." *Id.* (quoting *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987)). Until the United States has been properly served, the Court lacks personal jurisdiction over it. "[F]ederal courts lack the power to assert personal jurisdiction over a defendant 'unless the procedural requirements of effective service of process are satisfied.'" *Mann v. Castiel*, 681 F.3d 368, 372 (D.C. Cir. 2012) (citation omitted). Indeed, proper service is "'a ritual that marks the court's assertion of jurisdiction over the lawsuit,'" and "under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant." *Id*. (emphasis added; citations omitted). Thus, the Court also lacks jurisdiction pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure until such time as proper service upon the United States is completed.

CONCLUSION

For the foregoing reasons, and for those stated in FHFA's motion, the Court should dismiss the complaint.

Dated: September 20, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

DIANE KELLEHER
Assistant Branch Director

/s/ *Thomas D. Zimpleman*
THOMAS D. ZIMPLEMAN
DEEPTHY C. KISHORE
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
(202) 514-8095
thomas.d.zimpleman@usdoj.gov

Counsel for the United States Department of the Treasury

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID J. VOACOLO, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION; FEDERAL HOUSING FINANCE AGENCY; UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.	Civil Action No. 1:16-cv-1324(RC)

[PROPOSED] ORDER

Upon consideration of the Motion to Dismiss by the United States Department of the Treasury, and for good cause shown, it is hereby:

ORDERED that the Motion to Dismiss is GRANTED and the Complaint is DISMISSED WITH PREJUDICE.

SO ORDERED.

Dated: ___________.

____
Hon. Rudolph Contreras
United States District Judge