UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHRISTOPHER ROBERTS, and
THOMAS P. FISCHER,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, MELVIN L. WATT, in his official capacity as Director of the Federal Housing Finance Agency, JACOB J. LEW, in his official capacity as Secretary of the Treasury, and THE DEPARTMENT OF THE TREASURY,

Defendants.

Civil Action No. 1:16-CV-02107

JOINT REPLY OF DEFENDANTS FEDERAL HOUSING FINANCE AGENCY AS CONSERVATOR FOR FANNIE MAE AND FREDDIE MAC, FHFA DIRECTOR MELVIN L. WATT, THE DEPARTMENT OF THE TREASURY, AND TREASURY SECRETARY JACOB J. LEW IN SUPPORT OF MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

Plaintiffs' claims are barred by multiple federal statutory provisions, each of which provides a separate and independent ground for dismissal. Several courts have addressed materially identical claims brought by other shareholders of the Enterprises, and *every* court has held them to be statutorily-barred. Indeed, just last week, yet another court dismissed identical claims challenging the Third Amendment. *See Robinson v. FHFA*, No. 7:15-CV-109, 2016 WL 4726555, at *1 (E.D. Ky. Sept. 9, 2016). This Court should do the same.

Section 4617(f) bars Plaintiffs' claims because they would restrain and affect the Conservator's exercise of its statutorily authorized powers and functions. HERA broadly authorizes the Conservator to operate the Enterprises, carry on their business, enter into contracts on their behalf, transfer assets, provide for funding, and manage every aspect of the Enterprises' operations and activities—all in a manner the Conservator determines is in the best interests of the Enterprises or FHFA. Here, Plaintiffs ask the Court to void the Conservator's execution of the Third Amendment, asserting it was improperly motivated, unnecessary, and a bad deal for the Enterprises. But the Conservator's decision to amend the PSPAs was an exercise of its core statutory power to manage and operate the Enterprises in conservatorship. Section 4617(f) thus bars precisely this kind of second-guessing of the Conservator's operational judgments.

While Section 4617(f) alone provides a sufficient basis to dismiss all of Plaintiffs' claims, those claims also fail for several additional reasons. <u>First</u>, Plaintiffs' out-of-time critique of the original PSPAs is time-barred and meritless. <u>Second</u>, because the Conservator has succeeded to "all rights, titles, powers, and privileges" of the Enterprises *and their shareholders*, Plaintiffs currently have no right to bring this action. <u>Third</u>, Plaintiffs' claims against Treasury fail because HERA does not impose fiduciary duties on Treasury, and Treasury is not a controlling shareholder. Fourth, because Plaintiffs' claims are derivative in nature, issue preclusion requires that they be dismissed: prior court decisions in cases brought by other shareholders on behalf of the Enterprises have held that HERA prohibits these precise claims, and those decisions preclude this action. Fifth, adjudication of Plaintiffs' claims would impermissibly require the Court to review the October 9, 2008 determination by FHFA's Director to suspend the Enterprises' capital classifications during conservatorship in light of Treasury's capital commitment, Section 4623(d) of HERA bars such review.

ARGUMENT

I. SECTION 4617(f) BARS PLAINTIFFS' CLAIMS

Section 4617(f) bars Plaintiffs' claims—which seek declaratory and equitable relief through vacatur of the Third Amendment and return of all dividends paid under it (Am. Compl. ¶¶ 192(a)-(f))—because the Conservator's decision to execute that Amendment fits squarely within its broad powers and functions conferred by Congress. *See* Defs.' Joint Mem. 10-20.

Plaintiffs first attempt to sidestep the dispositive inquiry—whether the Conservator acted within its broad statutory "powers and functions"—by arguing that a "presumption" for judicial review of "administrative action" negates Section 4617(f). *See* Opp. 9, 33. That is wrong. Even if such a presumption would otherwise apply to the Conservator, it could not survive Section 4617(f), which "necessarily covers litigation arising out of contracts executed by FHFA in accordance with its duties as a conservator [and] qualifies as a *reliable indicator of congressional intent to preclude review* of non-monetary APA claims brought against both FHFA and Treasury." *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 221 (D.D.C. 2014), *appeal pending* No. 14-5234 (D.C. Cir.) (emphasis added); *see also Cty. of Sonoma v. FHFA*, 710 F.3d 987, 990 (9th Cir. 2013) ("HERA substantially limits judicial review of FHFA's actions as conservator."); *Robinson*, 2016 WL 4726555 at *6 ("With HERA, Congress enacted a statutory scheme that swept away courts' authority to enjoin FHFA conduct.").[1]

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

Plaintiffs assert a variety of unfounded arguments that the Conservator lacked the statutory power to agree to the Third Amendment. First, they urge the Court to construe the Conservator's powers narrowly and dispute that HERA gives the Conservator "plenary powers." *See* Opp. 11 n.3, 13, 28. This is obviously specious. As this Court has recognized, Congress granted the Conservator "*broad* powers" to "assume complete control" over the Enterprises and "exclusive authority over [their] business operations." *FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1058, 1060 (N.D. Ill. 2013) (emphasis added); *see also Cty. of Sonoma*, 710 F.3d at 989 (recognizing FHFA's "broad powers" as Conservator). These powers are at least as great as those given to conservators and receivers under FIRREA, which courts have described as "extraordinary," *MBIA Ins. Corp. v. FDIC*, 708 F.3d 234, 236 (D.C. Cir. 2013), and "exceptionally broad," *In re Landmark Land Co. of Okla., Inc.*, 973 F.2d 283, 288 (4th Cir. 1992). Moreover, Plaintiffs do not—and cannot—dispute that the Third Amendment was an agreement to amend the PSPAs, which are funding agreements that provide the Enterprises with a capital backstop of billions of dollars. Such a fundamental operational judgment fits squarely within the Conservator's powers under HERA. *See* Defs.' Joint Mem. 13-15. Plaintiffs' arguments to the contrary fail.

[1] Plaintiffs cite *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (Opp. 12), but that decision lends Plaintiffs no support because it does not address HERA, FIRREA, or any other jurisdiction-withdrawal statute, and has nothing to do with conservators or receivers at all. Rather, it addresses whether the FCC could impose time limits on local governments' consideration of wireless facility applications. 133 S. Ct. at 1866-67. And the Supreme Court held that courts should *defer* to federal agencies' interpretation of any statutory ambiguity concerning the scope of their authority. *Id.* at 1871-72. Thus, if applicable at all, *City of Arlington* favors deference to FHFA's assessment of the scope of its own powers.

Second, Plaintiffs argue that the Third Amendment exceeds the Conservator's statutory powers because it was a bad deal for the Enterprises and their shareholders.[2] But Plaintiffs cannot evade Section 4617(f) by alleging that the Conservator failed to strike a more favorable deal for the Enterprises or Plaintiffs. Courts have continuously held that Section 4617(f) and similar jurisdiction-withdrawal statutes bar courts from evaluating the *merits* of conservator or receiver conduct. *See* Defs' Joint Mem. 15-20. Indeed, "[r]equiring the Court to evaluate the merits of FHFA's decision-making each time it considers HERA's jurisdictional bar would render the anti-injunction provision hollow." *Perry Capital*, 70 F. Supp. 3d at 226; *see also Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n. 6 (S.D. Iowa 2015) ("[I]t is not the role of this Court to wade into the merits or motives of FHFA and Treasury's actions."); *Robinson*, 2016 WL 4726555 at *6-7 (finding allegations "regarding FHFA's goals for the [Enterprises] prior to the Third Amendment" to be "likewise unavailing").[3]

For example, in *Ward v. Resolution Trust Corp*., the plaintiff tried to avoid 12 U.S.C. § 1821(j), FIRREA's analogous jurisdiction-withdrawal provision, by alleging that a receiver acted outside of its statutory powers by selling a valuable asset in a manner that involved "an inadequate price, inadequate competition, unequal treatment of [plaintiff] as a potential offeror, [and] failure of the [receiver] to make a determination regarding 'maximizing' the net present

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2 *See, e.g.*, Am. Compl. ¶¶ 17, 120 (alleging Enterprises received no "meaningful consideration" for Third Amendment); *id.* ¶ 132 (alleging Third Amendment "plainly harms" Plaintiffs as shareholders); Opp. 12-13, 19, 26 (arguing Third Amendment puts the Enterprises in a "financial coma," "siphons off every dollar belonging to" the Enterprises, and fails to "maximize[]" the value of the Enterprises' assets).

3 *See also Cty. of Sonoma*, 710 F.3d at 993 ("[I]t is not our place to substitute our judgment for FHFA's."); *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 101 n.7 (D. Mass. 2014) ("Congress has removed from the purview [of] the court the power to second-guess the FHFA's business judgment."); *accord Nat'l Tr. for Historic Preserv. in U.S. v. FDIC*, 995 F.2d 238, 240 (D.C. Cir. 1993) (Section 1821(j) "immunize[s]" conservators and receivers "from outside second-guessing."), *opinion reinstated in relevant part on reh'g*, 21 F.3d 469 (D.C. Cir. 1994); *MBIA Ins. Corp. v. FDIC*, 816 F. Supp. 2d 81, 103 (D.D.C. 2011) (applying Section 1821(j) despite allegation that receiver "came to the wrong conclusion" and an alternative course "would have been preferable"), *aff'd*, 708 F.3d 234 (D.C. Cir. 2013).

value return on the sale." 996 F.2d 99, 104 (5th Cir. 1993). The court "disagree[d] entirely," explaining "the difference between the exercise of a function or power that is clearly outside the statutory authority of the [conservator or receiver] on the one hand, and improperly or even unlawfully exercising a function or power that is clearly authorized by statute on the other." *Id*. at 103; *see also In re Island Reach Partners, Ltd.*, 161 B.R. 310, 313 (Bankr. S.D. Fla. 1993) (applying Section 1821(j) despite allegation that receiver failed to "maximize the return from the sale of failed institutions' assets"). The same principle applies here: Plaintiffs allege the Third Amendment favored Treasury and failed to "maximize the net present value return" to the Enterprises. Allegations that the Conservator "improperly" exercised its powers by doing a bad job with Enterprise assets cannot overcome Section 4617(f).[4]

Third, Plaintiffs' allegation that the Enterprises received no "*meaningful* consideration" and "*virtually* nothing" (Opp. 14, 26 (emphases added)) ignores the "elementary" contract-law principle that courts "will not inquire into the adequacy of consideration as long as the consideration is otherwise valid or sufficient to support a promise." *See* 3 Williston on Contracts § 7:21 (4th ed.). Indeed, Plaintiffs themselves argue that the Third Amendment was a transaction

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[4] Plaintiffs argue that cases like *Ward* are "best understood to mean only that Section 1821(j) applies . . . when a conservator or receiver violates some law *other* than FIRREA." Opp. 12 n.4. But this argument ignores that *Ward* itself addressed a receiver's alleged failure "to maximize the net present value return" to the receivership estate—not an alleged violation of separate substantive laws. 996 F.2d at 103-04. Further, Plaintiffs' reliance on the Ninth Circuit's decision in *Sharpe* is likewise unpersuasive. *See* Opp. 10. The Ninth Circuit and other courts have since limited that decision to its facts—*i.e.*, an alleged breach of a pre-receivership settlement agreement concerning the recording of the reconveyance of a deed of trust. *See, e.g., Meritage Homes of Nev., Inc. v. FDIC*, 753 F.3d 819, 825 (9th Cir. 2014) ("*Sharpe* is not controlling outside of its limited context."); *Deutsche Bank Nat'l Tr. Co. v. FDIC*, 744 F.3d 1124, 1136-37 (9th Cir. 2014) (similar); *McCarthy v. FDIC*, 348 F.3d 1075, 1078-79 (9th Cir. 2003) (similar). And *Sharpe* is inconsistent with numerous other precedents holding an alleged breach of contract is insufficient to overcome Section 1821(j). *See, e.g., RPM Invs., Inc. v. RTC*, 75 F.3d 618, 621 (11th Cir. 1996); *Volges v. RTC*, 32 F.3d 50, 52 (2d Cir. 1994); *In re Landmark Land Co. of Carolina*, No. 96-1404, 1997 WL 159479, at *4 (4th Cir. Apr. 7, 1997); *see also Mile High Banks v. FDIC*, No. 11-cv-01417, 2011 WL 2174004, at *3-4 (D. Colo. June 2, 2011) (finding *Sharpe* unpersuasive).

in which the parties "obtain[ed] property for money or *other valuable consideration*." Opp. 37 (quoting Black's Law Dictionary, at 1430) (emphasis in original).

Before the Third Amendment, the PSPAs required the Enterprises to pay Treasury a fixed annual cash dividend equal to 10% of the liquidation preference.[5] By the time of the Third Amendment, the 10% cash dividend had grown to $18.9 billion per year, an amount that exceeded the Enterprises' historical annual earnings for nearly every year since their founding.[6] In addition, the Enterprises were obligated to pay Treasury an annual periodic commitment fee ("PCF"), which was intended to compensate taxpayers fully for Treasury's massive and ongoing commitment of public funds to maintain the Enterprises' operations. In the Third Amendment, the Conservator agreed to trade (a) a stream of profits that historically averaged less than $19 billion in exchange for relief from (b) $19 billion per year in fixed dividends *and* payment of the PCF. Thus, consideration for the Third Amendment flowed in both directions, with Treasury accepting the risk that the Enterprises would earn less than 10% of the liquidation preference plus the amount of the PCF. Indeed, if the Enterprises earned no profits in a year, they would owe Treasury *no* dividend. Section 4617(f) bars Plaintiffs and the courts from second-guessing whether the consideration for the Third Amendment was favorable enough to the Enterprises or

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[5] The 10% annual cash dividend was to be paid quarterly. If the Enterprises failed to pay the 10% cash dividend, the dividend would be accrued at the rate of 12% and added to Treasury's liquidation preference. *See* Treasury Stock Certificate § 2 (b), (c) (Doc. # 39-3).

[6] *See* Fannie Mae, Quarterly Report (Form 10-Q), at 4 (Aug. 8, 2012) *available at* http://goo.gl/bGLVXz; Freddie Mac, Quarterly Report (Form 10-Q), at 8 (Aug. 7, 2012) *available at* http://goo.gl/2dbgey.

Plaintiffs. Congress vested the Conservator alone with responsibility for making such fundamental decisions.[7]

Fourth, Plaintiffs argue that the Third Amendment was not an authorized "transfer" or sale of assets under 12 U.S.C. § 4617(b)(2)(G). Opp. 26-28. But HERA's asset-transfer provision "does not provide any limitation," and "[i]t is hard to imagine more sweeping language." *See Gosnell v. FDIC*, No. CIV. 90-1266L, 1991 WL 533637, at *6 (W.D.N.Y. Feb. 4, 1991), *aff'd*, 938 F.2d 372 (2d Cir. 1991) (interpreting identical language from FIRREA). Plaintiffs argue that the Third Amendment allows FHFA to "completely ignore" the receivership distribution-priority scheme outlined in HERA. *See* Opp. 25-27 (citing 12 U.S.C. § 4617(b)(3)-(9), (c)). But the Enterprises are not in receivership, so the priority scheme is inapplicable here. *See Cobell v. Norton*, 283 F. Supp. 2d 66, 91 n.12 (D.D.C. 2003) ("The notion of a '*de facto* receivership' is rather akin to the concept of 'semi-pregnancy': an entity is either in *de jure* receivership or it is not."), *vacated in part on other grounds*, 392 F.3d 461 (D.C. Cir. 2004). In all events, allegations that a conservator's conduct violates the statutory order of priority for receiverships are insufficient to overcome Section 4617(f). For example, in *Courtney v. Halleran*, the Seventh Circuit rejected the plaintiff's argument that an asset transfer was purportedly a "thinly disguised way of circumventing the statutory priority scheme and allowing the [investor] to get more than its proper share." 485 F.3d 942, 945 (7th Cir. 2007). The "glaring problem" with this argument, the court held, was that under FIRREA (like HERA), a

[7] Plaintiffs argument that imposing a PCF would have been "inappropriate" in no way diminishes Treasury's legal right to do so under the pre-Third Amendment contract. Opp. 15 & n.8; *see also* Am. Compl. ¶ 122. Plaintiffs contend, apparently based on their own opinion, that the dividends "provided more than adequate return" to Treasury. *Id.* But that assertion contravenes the contract, which specifies that dividends relate to funds *already actually drawn* against the commitment, while the commitment fees relate separately to additional funds *available to be drawn in the future*. *See Centers v. Centennial Mortg., Inc.*, 398 F.3d 930, 933 (7th Cir. 2005) (in considering a motion to dismiss, "to the extent that the terms of an attached contract conflict with the allegations of the complaint, the contract controls").

conservator or receiver is authorized to "transfer assets or liabilities without any further approvals," and thus "the anti-injunction language of § 1821(j)" barred the relief requested. *Id*. at 948.[8]

B. Plaintiffs' Allegation that the Conservator Executed the Third Amendment at Treasury's "Direction" Cannot Overcome Section 4617(f)

Plaintiffs attempt to avoid Section 4617(f) by arguing that Treasury "supervis[ed]" and "direct[ed]" the Conservator's agreement to the Third Amendment in violation of 12 U.S.C. § 4617(a)(7). Opp. 13-15. This argument fails because the "clear purpose" of Section 4617(a)(7) is to "provide a preemption defense for FHFA in its role as conservator." *Robinson*, 2016 WL 4726555 at *6. The Conservator may assert this defense against encroaching, inconsistent regulation from federal agencies or states. *See Branch Banking & Tr. Co. v. Frank*, No. 2:11-cv-1366, 2013 WL 6669100, at *11-12 (D. Nev. Dec. 17, 2013); *City of Chicago*, 962 F. Supp. 2d at 1058. It is not intended to be—nor has it ever been—used as a weapon *against* the Conservator to attack the Conservator's interactions with such agencies. Accordingly, shareholders such as Plaintiffs lack standing to enforce Section 4617(a)(7) because they are not within the "zone of interests" of that section. *See Robinson*, 2016 WL 4726555 at *6 ("To find that Section 4617(a)(7) gives Plaintiff standing would be inconsistent with this Court's limited role in our democratic society.").

Plaintiffs argue they should be able to enforce this provision as shareholders because "one of the principal purposes of conservatorship or receivership is to protect the interests of an entity's creditors and shareholders." Opp. 13 n.5. But, as *Robinson* held, 2016 WL 4726555,

[8] Plaintiffs also argue that the Conservator's power to transfer assets is limited to "routine" or "specific" transfers of assets, while the Third Amendment is far broader in scope. Opp. 27. But the application of the jurisdictional bar plainly does not depend upon whether the Conservator transferred a single asset or many assets. *See Cty. of Sonoma*, 710 F.3d at 994 (applying Section 4617(f) and rejecting distinction between "case-by-case" and "categorical" actions because "nothing precludes a conservator from making business decisions that are both broad in scope and entirely prospective").

at *5, the zone of interests test is "determined not by reference to the *overall* purpose of the Act in question [*i.e.*, HERA] but by reference to the *particular provision of law* upon which the plaintiff relies." *Bennett v. Spear*, 520 U.S. 154, 176 (1997) (emphases added). Here, "there is no indication that Section 4617(a)(7) itself seeks to protect the interests of entity's shareholders. Indeed, it appears that the clear purpose of the requirement is to provide a preemption defense for FHFA in its role as conservator." *Robinson*, 2016 WL 4726555 at *6. Thus, because the Conservator—not the shareholders—"can be expected to police the interests that th[is] statute protects,"[9] *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074-75 (D.C. Cir. 1998), Plaintiffs lack standing.

Additionally, the amended complaint is devoid of any allegation that Treasury forced the Conservator to execute the Third Amendment against its will. The amended complaint merely alleges, "on information and belief," that Treasury invented the Third Amendment, that the Third Amendment was consistent with Treasury objectives, and that Treasury "insiste[d]" on it. Am. Compl. ¶¶ 133, 163, 177. These allegations—even if assumed true—fail to establish that the Conservator was somehow forced to agree to the Third Amendment based on Treasury's direction. Indeed, "the very fact that FHFA itself has not brought suit to enjoin the Treasury from the alleged coercion it was subjected to"—rather, the Conservator has vigorously *defended* the Third Amendment in courts across the country—"suggest[s] that FHFA was an independent, willing participant in its negotiations with the Treasury." *Robinson*, 2016 WL 4726555 at *6.

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[9] Plaintiffs also incorrectly assert that FHFA owes fiduciary duties to the Enterprises' shareholders. Opp. 13 n.5. As the *Robinson* court held in response to similar assertions, "there is no indication that such fiduciary duties exist." *Robinson*, 2016 WL 4726555 at 6 n.4. Plaintiffs cite no authority that a conservator, as opposed to a receiver, owes shareholders any fiduciary duties during conservatorship under HERA. To the contrary, "[i]n HERA, Congress did not intend that acts lying fully within the FHFA's discretion as Conservator of Freddie Mac would violate some residual fiduciary duty owed to the shareholders. The shareholders' rights are now the FHFA's." *Esther Sadowsky Testamentary Tr. v. Syron*, 639 F. Supp. 2d 347, 351 (S.D.N.Y. 2009); *see also* 12 U.S.C. § 4617(b)(2)(J)(ii) (authorizing the Conservator to act in the interests of "the Enterprises *or the Agency*") (emphasis added).

As the court observed in *Perry Capital*, "many negotiations arise from one party conjuring up an idea, and then bringing their proposal to the other party." 70 F. Supp. 3d at 227. Thus, allegations that Treasury "invented the net-worth sweep concept with no input from FHFA do not come close to a reasonable inference that 'FHFA considered itself bound to do whatever Treasury ordered.'" *Id.* at 226 (internal quotation marks omitted).[10]

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

Despite Plaintiffs' assertion that they are not "alleging that the Conservator . . . took action based on an improper motive," Opp. 24, Plaintiffs argue throughout their opposition that because the Conservator supposedly had improper motives behind the Third Amendment—i.e., to benefit Treasury exclusively, to "nationalize[]" the Enterprises and "harvest" their profits, put them in a "financial coma," and maintain "the Administration's plans to hold them in perpetual conservatorship" (Opp. 3, 7-8, 12-13)—Section 4617(f) does not apply. Plaintiffs are wrong.

The Conservator's alleged motives are irrelevant to the Section 4617(f) analysis. As the court in *Perry Capital* explained: HERA "narrows the Court's jurisdictional analysis to *what* the Third Amendment entails, rather than *why* FHFA executed the Third Amendment." 70 F. Supp. 3d at 225 (emphasis in original). Accordingly, allegations that "ask the Court, directly or indirectly, to evaluate FHFA's rationale for entering into the Third Amendment" are "request[s]

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[10] Plaintiffs try to distinguish *Perry Capital* on the basis that the complaint in that action was "decided without the benefit of evidence produced . . . in the Court of Federal Claims." Opp. 15-16 n.9. But the plaintiffs in *Perry Capital* presented the same types of allegations Plaintiffs present here—that Treasury "invented" and "took credit" for the Third Amendment, and that the terms of the Third Amendment were "one-sided" and favored Treasury—and the court nonetheless held them insufficient to avoid dismissal. *See* 70F. Supp. 3d at 227. Further, the *Robinson* complaint included "evidence produced . . . in the Court of Federal Claims"—the same "evidence" included in Plaintiffs' complaint— but the Court still dismissed the complaint. 2016 WL 4726555 at *5-6. Here, Plaintiffs also assert that they need not "prove 'objective facts'" regarding the "direction and supervision" by Treasury theory to avoid dismissal. Opp. 15-16 n.9. But they still must allege plausible, non-conclusory facts to establish jurisdiction and state a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiffs have failed to do so here.

that contravene[] § 4617(f)." *Id.* Likewise, in *Continental Western*, the court observed that "it is not the role of this Court to wade into the merits *or motives* of FHFA and Treasury's actions—rather the Court is limited to reviewing those actions on their face and determining if they were permissible under the authority granted by HERA." 83 F. Supp. 3d at 840 n.6 (emphasis added). Consistent with *Perry Capital* and *Continental Western*, other courts have applied 12 U.S.C. § 1821(j)—the analogous jurisdictional bar applicable to bank conservators and receivers—in cases where plaintiffs also alleged the receiver acted with improper motives. *See, e.g.*, *Hindes v. FDIC*, 137 F.3d 148, 153 (3d Cir. 1998) (barring challenge to alleged "conspiracy with state officials to close the bank"); *In re Landmark Land Co. of Okla., Inc.*, 973 F.2d at 288-90 (barring challenge to action allegedly taken for conservator's "own benefit" and to other interested parties' detriment); *see also Sinclair v. Hawke*, 314 F.3d 934, 938, 942 (8th Cir. 2003) (holding "comprehensive statutory regime" including Section 1821(j) barred claims alleging OCC acted "for retaliatory and vindictive purposes").[11] These decisions rest on sound policy: if motives *were* relevant, jurisdictional bars such as Section 4617(f) would be meaningless because plaintiffs could easily plead around them simply by alleging an improper motive.

Plaintiffs urge that *Perry Capital* and *Continental Western* are based on a misreading of *Leon County v. FHFA*, 816 F. Supp. 2d 1205 (N.D. Fla. 2011), *aff'd*, 700 F.3d 1273 (11th Cir. 2012). *See* Opp. 11, 31. But *Leon County* fully supports dismissal here. The plaintiff in that case sought to evade Section 4617(f) by alleging the Conservator's conduct (there, a directive to the Enterprises) was an improperly motivated litigation tactic. The court squarely rejected that

[11] An analogous jurisdictional bar to most claims against court-appointed receivers and bankruptcy trustees—the *Barton* doctrine—functions similarly: an exception allows claims where a receiver or trustee acted outside its statutory authority, but not claims based on alleged "improper motives." *Satterfield v. Malloy*, 700 F.3d 1231, 1236 (10th Cir. 2012); *see also In re McKenzie*, 716 F.3d 404, 422 (6th Cir. 2013) (holding allegation of "ulterior purposes" insufficient to overcome jurisdictional bar).

argument: "Congress surely knew, when it enacted § 4617(f), that challenges to agency action sometimes assert an improper motive. *But Congress barred judicial review of the conservator's actions without making an exception for actions said to be taken from an improper motive*." *Leon Cty.*, 816 F. Supp. 2d at 1208 (emphasis added). Unable to rebut this key holding, Plaintiffs point to other language in *Leon County* referring to the "purpose" of FHFA's actions. Opp. 11, 31. But that reference came in the context of analyzing a different issue: how "to determine whether [the directive] was issued pursuant to the FHFA's powers as conservator *or as regulator*." *Leon Cnty.*, 700 F.3d at 1278 (emphasis added). That issue is absent here, as there is no dispute FHFA acted in its capacity as conservator in executing the Third Amendment.

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

Plaintiffs attempt to overcome Section 4617(f) by alleging that, in agreeing to the Third Amendment, the Conservator failed to adequately preserve and conserve Enterprise assets (Opp. 16-22, 29, 32), to maximize value in transferring Enterprise assets (Opp. 26), or to put the Enterprises in sound and solvent condition (Opp. 16-22). But these allegations are, at bottom, attacks on the *merits* of the Conservator's decision to execute the Third Amendment, which—as discussed above—are barred by Section 4617(f). *See supra* Sec. I(A). Just as there is no "bad motive" exception to Section 4617(f), there also is no "bad job" exception, which would expose the Conservator's decision-making to all manner of second-guessing and hindsight analysis.[12] *See id*.

[12] Plaintiffs attempt to convert the Conservator's broad powers and functions—*i.e.*, to preserve and conserve assets—into limitations on its conduct, inviting the Court to evaluate whether the Conservator *effectively* preserved and conserved assets in agreeing to execute the Third Amendment. *See* Opp. 16-22. Section 4617(f) permits no such inquiry, as it would enable any plaintiff to simply plead around Section 4617(f) by alleging the Conservator failed to preserve and conserve assets with respect to any decision, gutting the purpose of Section 4617(f).

Plaintiffs also argue the Conservator is acting in the "exclusive[] . . . province of a receiver" because the Third Amendment is "winding up" the Enterprises' affairs. Opp. 25. As an initial matter, Plaintiffs' argument fails because the Third Amendment is not winding up the Enterprises. The Amendment was executed over four years ago and, as *Perry Capital* correctly recognized, the Enterprises continue to "maintain an operational mortgage finance business." 70 F. Supp. 3d at 228. In all events, contrary to Plaintiffs' contention, the plain language of HERA authorizes FHFA acting as "conservator *or* receiver" to "wind[] up the affairs" of the Enterprises. 12 U.S.C. § 4617(a)(2) (emphasis added). Plaintiffs argue that HERA uses the terms "liquidation" and "winding up" synonymously, and because the Conservator is not permitted to do the former, it must not be permitted to do the latter. Opp. 25. But winding up is different from liquidation; it includes prudential steps short of liquidation, such as transferring Enterprise assets without approvals and shrinking the Enterprises' operations to ensure soundness until an ultimate resolution is determined. 12 U.S.C. § 4617(b)(2)(G). Accordingly, "[t]here surely can be a fluid progression from conservatorship to receivership without violating HERA, and that progression could very well involve a conservator that acknowledges an ultimate goal of liquidation." *Perry Capital*, 70 F. Supp. 3d at 228 n.20; *see also Robinson*, 2016 WL 4726555 at *8 (same).

For similar reasons, Plaintiffs' repeated reliance on *RTC v. CedarMinn Building Ltd. Partnership*, 956 F.2d 1446 (8th Cir. 1992) (Opp. 17 n.10, 18, 24), is inapt. First, *CedarMinn* expressly recognizes that where, as here, Congress authorizes an agency to "exercise a duty, right or power in its capacity as 'a conservator *or* receiver,'" that generally means "the duty, right, or power [is] to be enjoyed or exercised by *both* the conservator and the receiver." *Id.* at 1451-52 (emphases added). This is particularly true if Congress has taken care, in *other* portions of the statue, to delineate the certain "duties, rights, and powers" that can be pursued only in the receivership capacity, or only in the conservatorship capacity, but not in both. *Id.* at 1452; *see also* 12 U.S.C. § 4617(b)(2)(D)-(E). Second, while *CedarMinn* describes the "mission" of a conservator as "maintain[ing] the institution as an ongoing concern," that does not foreclose it from acting in ways that a receiver may also act—i.e., transferring assets and reducing the obligations of the institution—where the statute gives such powers to both types of entities. *See* 956 F.2d at 1454.

Plaintiffs contend that Defendants' straightforward interpretation "cannot be" because it would allow FHFA, if appointed as receiver, to act with a purpose of "rehabilitation," as opposed to liquidation. Opp. 25. But Defendants' interpretation is correct. HERA directs the receiver not only to liquidate Enterprise assets, but also to "rehabilitat[e]" the business of the Enterprise by creating a limited-life regulated entity ("LLRE"). 12 U.S.C. § 4617(i). An LLRE, once established, "succeed[s] to the charter" of the Enterprise and "thereafter operate[s] in accordance with, and subject to, such charter." *Id.* § 4617(i)(2)(A). An LLRE then rehabilitates and reorganizes the Enterprises through a selective transfer of assets and liabilities.

Finally, HERA does not require FHFA to "rehabilitat[e]" the Enterprises and "return them to private control," as Plaintiffs argue. *See* Opp. 18-22, 32, 65. Rather, HERA simply provides that FHFA "may, at the discretion of the Director, be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2). HERA thus contemplates a conservator exercising judgment to address a range of challenges and possible actions by including a bar against judicial review to facilitate decision-making. It does not require the Conservator to return the Enterprises to private control, to the shareholders, or to their prior form.

E. Section 4617(f) Also Deprives the Court of Jurisdiction Over Plaintiffs' Claims Against the Conservator's Counterparty, Treasury

Plaintiffs cannot evade the jurisdictional limit of § 4617(f) by suing Treasury as well as the Conservator. Numerous courts have held that the jurisdiction-withdrawal provisions of HERA and FIRREA forbid courts from granting equitable relief directed at counterparties, as such relief would simply provide a plaintiff with another method to restrain the Conservator. Plaintiffs argue, implausibly, that these holdings are limited to cases "challenging the conduct or attempting to enforce the legal obligations of the federal conservator or receiver or its ward." Opp. 34. But the cases do not support that supposed distinction. The relevant question in each case was whether the relief requested would, from the Conservator's perspective, "restrain or affect" the exercise of statutory powers. *See Robinson*, 2016 WL 4726555 at *4-5.[13]

Plaintiffs rely on two cases to support their argument that, notwithstanding the express language of Section 4617(f), they may seek to sue the Conservator indirectly through its counterparty, Treasury. Opp. 35. But these cases are inapposite: the conservator or receiver was not a party in either case, as the Conservator is here. In one case, the court held that the jurisdiction-withdrawal provision did not apply where the lawsuit "focused on [the third-party's]

[13] *See also Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1017-18 (8th Cir. 2013) (stating that the relevant inquiry is "whether the challenged action is within the receiver's power or function," and "whether the challenged action would indeed 'restrain or affect' the FDIC's receivership powers," and holding that the statute barred suit against FDIC's counterparty); *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir. 1992) ("Permitting Telematics to attach the certificate of deposit, if that attachment were effective against the FDIC, would have the same effect, from the FDIC's perspective, as directly enjoining the FDIC from attaching the asset. In either event, the district court would restrain or affect the FDIC in the exercise of its powers as receiver."); *Hindes*, 137 F.3d at 160 ("the statute, by its terms, can preclude relief even against a third party, including the FDIC in its corporate capacity, where the result is such that the relief 'restrain[s] or affect[s] the exercise of powers or functions of the [FDIC] as a conservator or a receiver.'") (alterations in original); *St. George Maronite Catholic Church v. Green*, No. CIV.A. SA-94-CA-0334, 1994 WL 763743, at *4-*6 (W.D. Tex. July 25, 1994) (holding, despite allegations that "the contract with [a third party] arose as a result of fraud, a breach of good faith and fair dealing, and deceptive trade practices" that "§ 1821(j) bars any relief that would affect the contract between RTC-Receiver and [the third party], whether that relief is termed recession, declaratory, or anything else.").

actions not the actions of the FDIC," and it did "not believe" that the relief sought "would have a chilling effect on the FDIC's ability to transfer bundles of trust deeds to third parties." *Stommel v. LNV Corp.*, No. 2:13CV821, 2014 WL 1340676, at *5 (D. Utah Apr. 4, 2014). In the other case, the plaintiffs had sought recovery only against the third-party and the court found that the requested relief "would not restrain or affect [the FDIC as receiver] in any way." *LNV Corp. v. Outsource Serv. Mgmt., LLC*, No. CIV 13-1926, 2014 WL 834977 at *4 (D. Minn. Mar. 4, 2014). The stark contrast of those scenarios with Plaintiffs' suit here—where Plaintiffs have sued both Treasury and FHFA, seeking identical injunctive relief from both—is self-evident.

F. Treasury Did Not Exceed Its Authority Under HERA When it Entered Into the Third Amendment

Plaintiffs do not dispute that the "sunset provision" in 12 U.S.C. § 1719(g)(4)[14] applies only to Treasury's authority to "purchase" securities, Treasury Mem. 8; nor do they dispute that Treasury's authority to "exercise any rights received in connection" with earlier purchases, as well as its authority to hold or sell securities, did not expire. *See* 12 U.S.C. § 1719(g)(2)(D). Plaintiffs also appear to concede that HERA's emergency determination requirements apply only to Treasury's authority to "purchase" securities, not to Treasury's separate authority to hold or sell securities, or exercise rights received in connection with earlier purchases. *See id.* § 1719(g)(1), (2). Nonetheless, Plaintiffs contend that the Third Amendment constituted a "purchase" of "obligations and other securities," *id.* § 1719(g)(1)(A), in violation of the sunset provision. Plaintiffs' arguments—already considered and rejected by the courts in *Perry Capital* and *Robinson*—are incorrect.

[14] While this section cites relevant portions of only Fannie Mae's charter, the cited language is identical in Freddie Mac's charter. *Compare* 12 U.S.C. § 1719(g), *with id.* § 1455(*l*).

Plaintiffs argue that any "exchange of value" suffices to make an agreement restructuring payment obligations a "purchase." Opp. 37-38. But an "exchange of value" is also the touchstone of a valid contract amendment. *See, e.g.*, *Robinson v. Ada S. McKinley Cmty. Servs.*, 19 F.3d 359, 364 (7th Cir. 1994) ("A valid modification requires an offer, acceptance, and consideration."); Farnsworth on Contracts § 4.21, p. 524 (3d ed. 2004). And, as the courts recognized in *Perry Capital* and *Robinson*, the Third Amendment created "a new formula of dividend compensation for a $200 billion-plus investment Treasury had *already* made," and did not result in the issuance of any stock or the pledging of additional taxpayer funds by Treasury. *See Perry Capital*, 70 F. Supp. 3d at 224 (emphasis added); *Robinson*, 2016 WL 4726555 at *4. Plaintiffs' construction is thus "belied by the reality of the transaction" (*Robinson*, 2016 WL 4726555, at *4); the Third Amendment effected no purchase of obligations or other securities.

Plaintiffs' argument is particularly anomalous in light of other provisions of HERA that recognize the distinction between a purchase and a modification to an existing agreement. *See* 12 U.S.C. § 1719(g)(3) ("[a]ny funds expended for the purchase of, or modifications to, obligations and securities, or the exercise of any rights received in connection with such purchases under this subsection shall be deemed appropriated at the time of such purchase, modification, or exercise."). And Plaintiffs ignore newly enacted legislation, in which Congress continues to recognize Treasury's ongoing authority to amend the PSPAs. *See infra* Sec. I(G); Treasury Mem. 11-13. As explained above, Congress did not freeze the contract terms or preclude Treasury and FHFA from altering their compensation arrangements as appropriate.[15]

[15] Plaintiffs also cite an Internal Revenue Service tax regulation, 26 C.F.R. § 1.1001-3, which addresses the circumstances in which "modification of the terms of a debt instrument" qualifies as an "exchange" of property, such that any financial gain resulting from the modification must be declared as income. *See* Opp. 38-39. Plaintiffs provide no reason to believe that Congress intended the word "purchase" to be read synonymously with the word "exchange," as used by the IRS in a tax regulation

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Even assuming that it were necessary that Treasury modify the PSPAs through the "exercise" of a reserved contractual "right," that requirement was satisfied here. When it entered into the Third Amendment, Treasury "exercise[d] [the] right[]," 12 U.S.C. § 1719(g)(2)(A)—explicitly conferred by the original PSPAs in 2008—to amend those contracts. *See* Doc. # 22-2 at 13, 27 ("This Agreement may be waived or amended solely by a writing executed by both of the parties hereto."). That Treasury exercised its right to amend jointly with FHFA, *see* Opp. 36, makes it no less the exercise of a right. A contract confers a "right" to be "exercised" even when the right is to be exercised jointly. *See, e.g., Pub. Serv. Co. of N.H. v. Hudson Light & Power Dep't*, 938 F.2d 338, 345, 347 (1st Cir. 1991) (rejecting "attempt by appellants . . . to impede [one party's] exercise of its exclusive contract right to enter into an agreement with [the counterparty] to modify the Sellback Agreement").[16]

As explained in Treasury's opening brief, Treasury Mem. 9, Plaintiffs cannot revive their failed "purchase" argument by relying on the "fundamental change" doctrine, which, in all events, has been rejected by the Seventh Circuit. As Plaintiffs concede, many courts have never recognized the "fundamental change" doctrine even in the disparate securities-fraud context in which it arose, while others, including the Seventh Circuit, have expressly declined to adopt it. *See Isquith by Isquith v. Caremark Int'l, Inc.*, 136 F.3d 531, 535 (7th Cir. 1998); *see also Katz v.*

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addressing *debt* instruments, not *equity* instruments such as Treasury's preferred stock. *See Perry Capital*, 70 F. Supp. 3d at 224 (rejecting identical argument); *Robinson*, 2016 WL 4726555 at *4 (same).

16 Plaintiffs cite *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), for the assertion that a contractual "right" cannot entail mutual agreement. Opp. 36. *Petty Motor* was a takings case that concerned the amount of just compensation the government owed to tenants of a property that the government had appropriated. The Supreme Court determined that the tenants were entitled to an award equal to the value of the remainder of their lease. *Id.* at 380. In a footnote, the Court noted that plaintiffs were not entitled to just compensation based on the expected renewal of their leases, even though the building's landlord had often extended their leases through "mutual consent." *Id.* at 380 n.9. It was the terms of the lease, not the parties' informal expectations, that delineated the tenants' "rights" to compensation. *Id.*

Gerardi, 655 F.3d 1212, 1221 (10th Cir. 2011). And while Plaintiffs attempt to dismiss the Seventh Circuit rulings as mere dicta, Opp. 38 n.21, they make no attempt to explain how the "fundamental change" doctrine could ever apply, in any context, where the supposed "purchaser" (in this case, Treasury) does not claim to have been defrauded.[17]

G. Recent Legislation Confirms That Treasury and FHFA Acted Within the Scope of Their Authority Under HERA

Plaintiffs argue that the Court should simply ignore newly enacted legislation in which Congress expressly incorporated the Third Amendment and instructed Treasury not to sell its senior preferred stock until 2018, absent further legislative action. *See* Consolidated Appropriations Act of 2016 ("the Act"), H.R. 2029 § 702(b), 114th Cong. (2015) (enacted Dec. 18, 2015). The principles on which Plaintiffs rely, *see* Opp. 42-43, are inapposite. Here, the inference of congressional approval "is supported by more than mere congressional inaction." *See Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965). Congress *explicitly* incorporated the Third Amendment—including Treasury's rights to receive a variable dividend—into the scope of the new legislation. *See* Treasury Mem. 11-13. As Plaintiffs appear to concede, (1) Congress defined Treasury's authority under HERA to include the ongoing authority to amend the original PSPAs, *see id.* § 702(a)(2)(A) (referring to Treasury's authority to "amend[] and restate[]" the PSPAs); (2) Congress specifically included the Third Amendment in its definition of Treasury's existing authority under HERA, *see id.* (incorporating agreement as amended on "August 17, 2012"); and (3) Congress expressly acknowledged Treasury's rights under the stock certificates issued in connection with the Third Amendment, which set forth the dividend provisions

[17] Further, *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), does not stand for the proposition that "[h]olders of a fundamentally changed security are considered purchasers of new securities," Opp. 38. That case did not rely on the "purchase" language of section 10(b), but rather on the "broad antifraud purposes" of section 10(b) which were "furthered" by their application to an alleged deceptive scheme in which shareholders exchanged their stock as part of a merger. 393 U.S. at 467.

Plaintiffs challenge here, *see id.* § 702(a)(2)(B) (defining the PSPA to include the "terms, powers, preferences, privileges, limitations, or any other conditions" of the "Variable Liquidation Preference Senior Preferred Stock" certificates). Plaintiffs thus fail to refute the "overwhelming evidence" in the Act that Congress was fully aware of the Third Amendment and considered it a valid exercise of Treasury's authority under HERA. *See Stapleton v. Advocate Health Care Network*, 817 F.3d 517, 530-31 (7th Cir. 2016) (quoting *Rapanos v. United States,* 547 U.S. 715, 750 (2006)).

Plaintiffs further contend that no presumption of ratification can apply because the Act "does not address the *propriety* of the Net Worth Sweep . . . ." Opp. 43 (emphasis in original). But the doctrine of ratification does not require Congress to explicitly express its approval of an agency's action: the whole point of the doctrine is that Congress is *presumed* to ratify the agency's interpretation of a statute if Congress amends the statute fully aware of that interpretation but takes no steps to halt the agency action. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982). The presumption applies here because Congress made other changes to Treasury's authority under HERA, *see* Act § 702(b); Treasury Mem. 11–12, without indicating any disapproval of the Third Amendment. *See Bell*, 456 U.S. at 535. Indeed, Congress *explicitly* incorporated the Third Amendment into the scope of the new legislation.

Plaintiffs' reliance on isolated remarks of legislators,[18] *see* Opp. 43, is thus unavailing. By amending aspects of Treasury's authority under HERA while leaving Treasury's authority to

[18] Indeed, as Plaintiffs' own cases establish, *see* Opp. 42-43, there is no resort to legislative history where, as here, the statute itself demonstrates Congress's awareness of the administrative interpretation at issue. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) ("Neither as originally enacted *nor as later amended* does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602." (emphasis added)); *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng's*, 531 U.S. 159, 170 (2001) ("Because subsequent history is less illuminating than the contemporaneous evidence, respondents face a difficult task in overcoming the plain text and import of § 404(a).)" (citation and quotation marks omitted)).

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amend the PSPAs, as well its right receive the variable dividend right, "completely untouched" in the new legislation, *Zemel*, 381 U.S. at 12, Congress approved of the Third Amendment as consistent with Treasury's authority and the duties of the conservator under HERA.

H. Plaintiffs' Attempts to Distinguish *Perry Capital* Fail

Plaintiffs fail in their various attempts to distinguish and discredit *Perry Capital*. For example, Plaintiffs argue their complaint presents "different" allegations than those presented in *Perry Capital*, including "allegations supported by evidence produced in subsequent discovery" in related litigation. Opp. 30. This is wrong. The complaints in *Perry Capital* assert the same allegations of wrongdoing with respect to the Third Amendment as asserted here. For example, one purportedly new allegation is that FHFA and Treasury "had received specific information" before the Third Amendment was executed showing the Enterprises would soon report profits. *Id*. (citing Am. Compl. ¶¶ 88-101). But the plaintiffs in *Perry Capital* alleged that FHFA and Treasury knew or should have known that the Enterprises were on the verge of profitability before executing the Third Amendment.[19] And in *Perry Capital*, the court likewise considered allegations that the Third Amendment was intended to "make sure that every dollar of earnings that [the Enterprises] generate will be used to benefit taxpayers," that the Third Amendment was "consistent with the Obama Administration's commitment" to "w[ind] down" the Enterprises, and that "in 2012, the [Enterprises] were once again profitable and . . . able to pay the 10% dividend without drawing additional funds." *Perry Capital*, 70 F. Supp. 3d. at 218. The Court in *Perry Capital* found these allegations insufficient: "FHFA's underlying motives or opinions—i.e., whether the net worth sweep would . . . increase payments to Treasury . . . do not matter for

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[19] *See, e.g.*, *Perry Capital* Compl. ¶¶ 7, 47 (Doc. #1, No. 1:13cv1025, D.D.C.); *Fairholme* Compl. ¶¶ 64-67 (Doc. # 1, No. 1:13cv1053, D.D.C.).

the purposes of § 4617(f)." *Id.* at 226. Moreover, whether the complaint in this action is "supported by evidence" is irrelevant. The court in *Perry Capital* was required to—and did—assume the truth of all of the complaints' allegations, applying the traditional motion to dismiss standard. The allegations in *Perry Capital* needed no further factual gloss; the court assumed them to be true but nevertheless held that the court lacked jurisdiction.[20]

II. PLAINTIFFS' OUT-OF-TIME CRITIQUE OF THE ORIGINAL PSPAS IS TIME-BARRED AND HAS NO MERIT

Plaintiffs also argue that the Conservator acted outside of its statutory powers and functions by agreeing to certain provisions of the *original* PSPAs, executed in September 2008, long before the Third Amendment was executed in August 2012. *See* Opp. 22-23. Plaintiffs' attacks on those provisions are plainly time-barred. *See* Treasury Mem. 3-6. Moreover, those attacks are also barred by Section 4617(f).

A. Plaintiffs' Claims Challenging the PSPAs Accrued in 2008, Not in 2012, and Are Thus Time-Barred.

All of Plaintiffs' challenges to the 2008 PSPAs concern conduct that occurred more than six years before Plaintiffs filed suit on February 10, 2016, and hence may not now be challenged. Treasury Mem. 3-6. Plaintiffs' arguments to the contrary are unavailing.

Plaintiffs first argue that their claims seek judicial review only of a "specific application" of the PSPAs that occurred after 2012, rather than the 2008 decision to enter into the PSPAs. Opp. 63. At the outset, this argument is belied by Plaintiffs' Amended Complaint, which specifically seeks declaratory and injunctive relief pertaining to the 2008 PSPAs. *See, e.g.*, Am. Compl. ¶ 192(f)-(i). This defect aside, none of the 2012 actions on which Plaintiffs base their

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[20] Plaintiffs also argue their allegations contradict a declaration submitted by an FHFA official in *Perry Capital*. Opp. 30 & n.17. But, again, this "difference" is irrelevant because the affidavit was submitted only in connection with FHFA's *alternative* motion for summary judgment. Because the court granted FHFA's motion to dismiss, it did not reach the alternative request for summary judgment, and thus did not even reference—let alone rely upon—the affidavit.

argument constitute the type of first "application" that creates a new, six-year cause of action to challenge to the agency's statutory authority. *See* Opp. 63-64. Rather, as Plaintiffs' own cases show, a new cause of action may accrue where an agency applies a "legislative rule of general applicability" to a particular party in a new enforcement proceeding. *See Commonwealth Edison Co. v. U.S. Nuclear Regulatory Comm'n*, 830 F.2d 610, 615 (7th Cir. 1987); *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) (citations omitted) (judicial review available where "a challenger . . . petitioned the agency to review the application of the regulation to that particular challenger" or "filed a petition with the agency to rescind regulations, then challenge[s] the agency's denial of the petition in federal court"). No such event occurred here. As explained in Treasury's opening brief, the challenged provisions of the PSPAs were entered into in, and have not changed since, 2008. Thus, Plaintiffs could have initiated their claims challenging the PSPAs as early as September 2008, and as late as 2014. Their decision to wait until, in their view, "this feature of the PSPAs became sufficiently harmful," Opp. 64, does not toll the statute of limitations.

Nor does the doctrine of continuing violations save these claims. *See* Opp. 64-65. Plaintiffs contend that their claims challenging certain terms of the PSPAs—including those providing for cash dividends and governing Treasury's liquidation preference—did not accrue until they purportedly resulted in actual harm to Plaintiffs' alleged economic interests after 2012. But as explained above, the challenged provisions of the PSPAs have not changed since they were enacted in 2008. Those provisions committed Treasury to advance funds to either Enterprise for each quarter in which that company's liabilities exceeded its assets. Treasury Mem. 5. The fact that Plaintiffs viewed these terms to have "little importance" before the Third Amendment, Opp. 64, and Plaintiffs' allegation that the Enterprises "had the earning power to repay Treasury" in 2012, Opp. 65, are irrelevant. Neither triggers the accrual of a new claim, and Plaintiffs' inability to cite a single case validating their theories speaks volumes about the infirmity of their argument.

B. The Conservator Had the Authority to Execute the Original PSPAs

In all events, even if Plaintiffs' attempt to challenge the PSPAs as executed in 2008 were timely—and it is not—those challenges still would be barred by Section 4617(f). Because the PSPAs are funding agreements that provide the Enterprises access to billions of dollars in capital, the Conservator clearly had the authority to enter into such agreements on behalf of the Enterprises, particularly where those agreements were executed in September 2008, at the peak of the financial crisis. *See Perry Capital*, 70 F. Supp. 3d at 246 (concluding HERA "enabled FHFA and, consequently, Treasury, to take unprecedented steps to salvage the largest players in the mortgage finance industry before their looming collapse triggered a systemic panic").[21] While Plaintiffs attempt to critique—eight years after the fact—certain terms of those agreements, Plaintiffs cannot reasonably dispute that the Conservator had the authority to enter into those agreements in the first place. *See supra* Sec. I(A), (D).

Further, in HERA, Congress specifically authorized Treasury to purchase securities issued by the Enterprises based on a "mutual agreement" between Treasury and the Enterprises. *See* 12 U.S.C. §§ 1455(*l*)(1), 1719(g)(1). Congress also authorized Treasury to make those

[21] The Conservator executed the PSPAs after the Enterprises had tried and failed to raise capital in the private markets. As FHFA Director Lockhart testified to Congress: "After substantial effort and communication with market participants, each company reported to FHFA and to Treasury that it was unable to access capital markets to bolster its capital position without Treasury financing. FHFA's and Treasury's own discussions with investment bankers and investors corroborated this conclusion." Statement of James B. Lockhart III, Before the H. Comm. on Fin. Services, 110th Cong. (Sept. 25, 2008), *available at* goo.gl/vueu75; *see also* Written Test. of Sec. Geithner Before the H. Comm. on Fin. Services (Mar. 23, 2010), *available at* goo.gl/j4pa7l (similar). In light of the systemic risk posed by the Enterprises, and the devastating consequences of a potential collapse and mandatory receivership (*see* 12 U.S.C. § 4617(a)(4)), the Conservator concluded that a significant infusion of new capital was required. Accordingly, without the PSPAs, there might have been no business for the Conservator to "carry on."

investments "on such terms and conditions as the Secretary may determine." *Id.* And Congress vested in the Conservator "all rights, titles, powers, and privileges" of the Enterprises, *see id.* § 4617(b)(2)(A)(i), which necessarily includes the ability to agree to sell such securities to Treasury. Further, HERA authorizes the Conservator to "take such action as may be (i) necessary to put the regulated entity in a sound and solvent condition; and (ii) 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). Accordingly, the Conservator's decision to execute the original PSPAs was a quintessential exercise of these powers. Section 4617(f) thus bars Plaintiffs' belated attempts to second-guess this fundamental Conservator act.[22]

III. HERA'S SUCCESSION PROVISION BARS PLAINTIFFS' CLAIMS

A separate provision of HERA also bars Plaintiffs' claims. Section 4617(b)(2)(A)(i) provides that the Conservator succeeds to "all rights, titles, powers, and privileges" of the Enterprises and their shareholders. *See* Defs.' Joint Mem. 20-25. Plaintiffs thus have no right to bring this action, which presents claims that relate to, or arise from, their status as shareholders.

In opposition, Plaintiffs contend that HERA's succession provision only applies to shareholder derivative claims, not direct claims, and is limited by an implied conflict-of-interest exception. Opp. 43-47, 54-57. All of this is incorrect: the succession provision applies to "***all*** rights, titles, powers and privileges" of the Enterprises and their shareholders, whether derivative or direct, without exception. 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added). In all events, Plaintiffs' claims are, in fact, derivative.

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[22] Tellingly, Plaintiffs do not ask this Court to void the PSPAs altogether. Rather, Plaintiffs seek only to void those portions of the PSPAs they believe are too onerous or favorable to Treasury. *See* Opp. 22-23; Am. Compl. ¶¶ 192(f) (asking the Court only to declare certain provisions of the original PSPAs invalid). But just as Plaintiffs cannot second-guess the Third Amendment based on allegations that it was too favorable to Treasury, Plaintiffs likewise cannot second-guess the wisdom, necessity, or efficacy of the original PSPAs, particularly where they were executed at the height of the financial crisis in an effort to stave off mandatory receivership and potential economic disaster.

A. There is No Direct-Claims Exception to HERA

Even if Plaintiffs' claims could be considered direct shareholder claims—and they are not—this would not change the outcome. The Conservator succeeds, without limitation or exception, to "all rights" of the Enterprises' shareholders, including Plaintiffs' purportedly direct claims. Plaintiffs' arguments to the contrary are unpersuasive. *See* Opp. 43-47.

1. HERA's Plain Text Does Not Support a Direct-Claims Exception

"As many courts have recognized, the language 'all rights, titles, powers, and privileges . . . of any stockholder' is *extremely broad* and evidences Congress's intent 'to shift as much as possible to the FHFA.'" *Pagliara v. Fed. Home Loan Mortg. Corp.*, No. 1:16cv337, 2016 WL 4441978, at *5 (E.D. Va. Aug. 23, 2016) (emphasis added) (quoting *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & ERISA Litig.*, 629 F. Supp. 2d 1, 3 (D.D.C. 2009) ("*In re Fannie Mae*")). "In other words, the language means what it plainly says; HERA transferred 'all rights previously held by [the Enterprises'] shareholders'" to the Conservator. *Pagliara*, 2016 WL 4441978, at *5 (quoting *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 795 (E.D. Va. 2009)); *see also Montgomery Cnty. Comm'n v. FHFA*, 776 F.3d 1247, 1255 (11th Cir. 2015) (applying "straightforward interpretation" of HERA's exemption from "all taxation" as providing an "exempt[ion] from *all* state taxation").[23]

Plaintiffs argue that the language "with respect to [the Enterprises] and the assets of [the Enterprises]" somehow limits HERA's succession provision only to shareholders' right to pursue derivative claims. *See* Opp. 43-44. But Plaintiffs offer no textual support for this argument, and

[23] HERA provides only one exception to the transfer of shareholder rights: following appointment of a receiver, Enterprise shareholders are permitted to prosecute claims they may have to liquidation proceeds. *See* 12 U.S.C. § 4617(b)(2)(K)(i). The existence of this lone, express exception prohibits courts from creating any additional, implicit exceptions. *See United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.").

none exists. Indeed, in the recent *Pagliara* decision, the court rejected the same argument (asserted in that case by a Freddie Mac shareholder), observing that the phrase " '[w]ith respect to' plainly means 'about or concerning' or 'relating to.' " *Pagliara*, 2016 WL 4441978, at *7 (citing, *inter alia*, Merriam Webster Dictionary). The *Pagliara* court thus observed that "it would strain any reasonable interpretation" of HERA to conclude that the phrase "with respect to the regulated entity and [its] assets" carves out any shareholder rights—in that case, the right to inspect Freddie Mac's books and records—from HERA's succession provision. *Pagliara*, 2016 WL 4441978, at *7. So too here: the alleged shareholder rights Plaintiffs seek to vindicate indisputably concern or relate to the Enterprises and their assets. Indeed, Plaintiffs' Amended Complaint is based largely on the premise that the Third Amendment is allegedly inconsistent with the Conservator's purported duty to preserve and conserve the Enterprises' "assets." *Id.* ¶¶ 4, 49, 55, 130, 132, 149, 160-61, 166.

Plaintiffs rely heavily on *Levin v. Miller*, 763 F.3d 667 (7th Cir. 2014), to argue for a direct-claims exception. Opp. 44-46. But the suggestion in *Levin* that a conservator's succession to "all rights" of a stockholder would not extend to direct claims was not a contested issue in that litigation. Indeed, the parties in that case did not even brief the issue. *See* 763 F.3d at 672.[24] The only in-depth exploration of the issue in *Levin* was Judge Hamilton's persuasively reasoned concurrence. As Judge Hamilton correctly concluded, FIRREA's succession language cannot be read as limited in application to derivative claims:

> It is not obvious to me that the language must be interpreted so narrowly, nor did the cases cited at page 2 of the opinion confront this issue or require that result. ***The FDIC [as conservator or receiver] can already pursue what would be a derivative claim***

[24] Likewise, the other decisions cited by Plaintiffs in this regard, Opp. 44-45, are unpersuasive because the issue whether the FDIC succeeded to direct claims was not squarely presented, and the courts simply assumed with little to no analysis that the FDIC succeeded only to derivative claims.

> ***because the claim really belongs to the failed depository institution itself.*** So what does the language referring to "the rights . . . of any stockholder" add to the meaning and effect of the statute? The doctrine that statutes should not be construed to render language mere surplusage is not absolute, but it weighs in favor of a broader reach that could include direct claims. If "rights . . . of any stockholder" was meant to refer only to derivative claims, it's a broad and roundabout way of expressing that narrower idea.

Id. at 673 (Hamilton, J., concurring) (emphasis added).

In the recent *Pagliara* decision, the court held that, under HERA, the Conservator succeeds to all shareholder rights—even those rights that are "enforceable through a direct lawsuit, not a derivative lawsuit"—such as the right to inspect books and records and the right to vote to elect directors. *See Pagliara*, 2016 WL 4441978, at *6. In so doing, the court refused to extend Judge Easterbrook's majority approach in *Levin* to HERA conservatorships, and instead followed the rationale of Judge Hamilton's concurrence. *See id.* at *7 ("[A]s Judge Hamilton recognized in *Levin v. Miller*, '[i]f 'rights . . . of any stockholder' was meant to refer only to derivative claims, it's a broad and roundabout way of expressing that narrower idea.'") (quoting 763 F.3d at 673). The Court should follow the same approach, and hold Plaintiffs' claims are barred, irrespective of whether Plaintiffs' claims could be characterized as direct or derivative.[25]

2. The Constitutional Avoidance Doctrine Does Not Apply

Plaintiffs argue that interpreting HERA consistent with its plain language to mean that the Conservator succeeds to "all" shareholder claims, whether derivative or direct, would raise

[25] Contrary to Plaintiffs' argument, FHFA did not "concede[]" in any motion filed in *Kellmer v. Raines* that "Section 4617(b)(2) does not bar direct claims." *See* Opp. 45 n.24. That the Conservator, eight years ago, opted not to exercise its substitution rights with respect to one particular claim presented by one particular plaintiff in one particular litigation in no way suggests FHFA did not have the right to seek substitution had it wished to do so. Nor did the *Kellmer* court suggest any limitation on FHFA's exclusive right to bring such claims. To the contrary, the *Kellmer* court noted that FHFA's succession extended to any right, title, power, or privilege, and granted substitution as to all the claims for which FHFA requested it. *Kellmer v. Raines*, 674 F.3d 848, 850-51 (D.C. Cir. 2012).

constitutional concerns. Opp. 46-47. But the doctrine of constitutional avoidance has no application in this case because it "is a tool for choosing between competing plausible interpretations of a provision," *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (citation and internal quotation marks omitted), and "has no application in the absence of statutory ambiguity," *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 494 (2001). Here, there is *no* ambiguity in HERA's succession provision, and thus no need to seek out an alternative interpretation to avoid purported constitutional concerns. *See Pagliara*, 2016 WL 4441978, at *7-8. Indeed, the court in *Pagliara* recently considered—and rejected—the very same constitutional-avoidance argument with respect to HERA's succession provision, holding that the Court "need not resort to the interpretive cannon of constitutional avoidance here because HERA is not ambiguous within the context of this case. . . . Accordingly, the Court will not adopt an unreasonable interpretation of a plain statute to avoid Pagliara's unsubstantiated constitutional concerns." *Pagliara*, 2016 WL 4441978, at *7-8 (internal citations omitted). This Court should follow the same approach here, since "[i]t is a slippery slope for the Court to poke holes in, or limit, the plain language of a statute, especially when, as here, the plaintiffs have not asked the Court to weigh in on the statute's constitutionality." *Perry Capital LLC*, 70 F. Supp. 3d at 232.[26]

B. There Is No "Conflict of Interest" Exception to HERA

Plaintiffs argue that, even if the Conservator is found to have succeeded to the right to pursue the claims at issue in this case, shareholders still have the right to pursue those claims because of an alleged conflict of interest. Opp. 54-57. But there is simply no "conflict of

[26] Moreover, any purported Constitutional concerns are alleviated by the fact that the Conservator holds all shareholder rights for the duration of the conservatorship (12 U.S.C. § 4617(b)(2)(A)(i)) and, in any subsequent receivership, the shareholders regain the right to assert claims against the receivership estate. *See id.* § 4617(b)(2)(K)(i).

interest" exception to HERA's succession provision, and no court has ever applied one. Plaintiffs point to nothing in HERA to suggest that Congress limited in any way the Conservator's succession to "all rights, titles, powers, and privileges" of the shareholders and the Enterprises. Instead, they rely on two inapplicable, out-of-circuit decisions that manufactured a conflict-of-interest exception for FDIC receiverships—not conservatorships. Opp. 54 (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)).

The court in *Perry Capital* rightly rejected any application of those decisions to FHFA under HERA. The court explained that those cases were wrongly decided because they improperly relied on the historic rationale for shareholder derivative actions while disregarding the statutory language of FIRREA (and HERA) that bars such actions in these circumstances. 70 F. Supp. 3d at 231. Additionally, *First Hartford* and *Delta Savings* involved receiverships, and their flawed rationale "makes still less sense in the conservatorship context." *Id*. at 231 n.30. Accordingly, there is no basis for creating "an *implicit* end-run around FHFA's conservatorship authority by means of the shareholder derivative suits that the statute explicitly bars." 70 F. Supp. 3d at 231. Other courts are in accord. *See Pagliara*, 2016 WL 4441978, at *9 n.20 (rejecting as "not persua[sive]" the identical conflict of interest argument asserted by shareholder against FHFA as Conservator); *Gail C. Sweeney Estate Marital Trust on behalf of Fed. Nat'l Mortg. Ass'n v. U.S. Treasury Dep't*, 68 F. Supp. 3d 116, 119 (D.D.C. 2014) (observing "no court has held that a conflict-of-interest exception applies to this [HERA] provision" and criticizing *First Hartford* and *Delta Savings* as "unclear [on] how those courts squared their decisions with the anti-injunction provision of FIRREA").[27]

No court has ever applied a conflict-of-interest exception to HERA. This Court should reject Plaintiffs' invitation to be the first.

IV. EVEN IF THERE WERE JURISDICTION, PLAINTIFFS' CLAIMS AGAINST TREASURY ARE MERITLESS

A. HERA Does Not Impose Fiduciary Duties on Treasury.

Plaintiffs claim that Treasury acted arbitrarily and capriciously by failing to consider alleged fiduciary duties,[28] which, according to Plaintiffs, arise under Delaware and Virginia law. As a preliminary matter, the APA provides no cause of action for claims arising under state law. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 854 (D.C. Cir. 2010) (Kavanaugh, J., concurring) ("contrary to plaintiffs' inventive arguments, the APA does not borrow state law or permit state law to be used as a basis for seeking injunctive or declaratory relief against the United States."). Plaintiffs' claim fails for this reason alone. *Robinson*, 2016 WL 4726555 at *4 n.3 ("[T]here is no evidence of Congressional intent to graft state fiduciary duties onto the Treasury's responsibilities under HERA.").

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27 Indeed, it would be odd if "a statute like HERA, through which Congress grants immense discretionary power to the conservator, § 4617(b)(2)(A), and prohibits courts from interfering with the exercise of such power, § 4617(f), would still house an implicit end-run around FHFA's conservatorship authority by means of the shareholder derivative suits that the statute explicitly bars." *Perry Capital*, 70 F. Supp. 3d at 230-31. The very point of a derivative action is to permit shareholders to assert the corporation's interests where managers or directors have a conflict that prevents them from doing so. "[T]he existence of a rule against shareholder derivative suits, § 4617(b)(2)(A)(i), 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. . . . Such an exception would swallow the rule." *Id*.

28 Plaintiffs also refer to these alleged fiduciary duties to support their argument that their claims are direct under federal law. Opp. 48. But as explained below, these fiduciary duties simply do not exist. *Robinson*, 2016 WL 4726555 at *4 n.3.

Attempting to get around this problem, Plaintiffs assert that a regulation authorizing the Enterprises to designate state corporate law for their internal by-laws somehow creates a fiduciary duty on the part of Treasury. Opp. 41 (citing 12 C.F.R. § 1239.3). Unfortunately for Plaintiffs, that regulation cannot obviate the Supremacy Clause; only *Congress* can choose to apply state law to a federal agency. *Hancock v. Train*, 426 U.S. 167, 179 (1976) ("[W]here Congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function must be left free of regulation."); *State of Ariz. v. Bowsher*, 935 F.2d 332, 334 (D.C. Cir. 1991) (same).[29] The government possesses fiduciary duties "only to the extent it expressly accepts those responsibilities by statute," *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011), and Congress has not imposed such fiduciary duties here.[30] *Robinson*, 2016 WL 4726555 at *4 n.3.

In all events, any fiduciary duty claim of the sort that Plaintiffs attempt to assert would be inconsistent with federal law and therefore preempted. If Treasury owed state-law fiduciary duties to Enterprise shareholders, as Plaintiffs contend, Treasury would bear an "unyielding" duty "to act in the best interests of the shareholders." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d. 345, 360 (Del. 1993). But HERA plainly does not permit Treasury to place the interest of

[29] Plaintiffs claim to find limits to the Supremacy Clause in two cases, *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 99 (1940), and *Pac. Coast Dairy v. Dep't of Agric. of Cal.*, 318 U.S. 285, 294 (1943), neither of which has anything to do with intergovernmental immunity. Opp. 41. Rather, both address the interim laws applied to third parties (not the government) when tracts of land are transferred between the federal government and the states. *See Sadrakula*, 309 U.S. at 99 ("The Constitution . . . has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred."); *Pac. Coast Dairy*, 318 U.S. at 294 ("When the federal government acquired the tract, local law not inconsistent with federal policy remained in force until altered by national legislation."). Neither applies here.

[30] As *Robinson* explains, *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001) (*see* Opp. 40), gets Plaintiffs nowhere. *See Robinson*, 2016 WL 4726555 at *6 n.3. The United States' fiduciary duties as a trustee of tribal property, discussed in that case, "can only arise from a statute, treaty, or executive order." *Cobell*, 240 F.3d. at 1098 (quoting *Nat'l Wildlife Fed. v. Andrus*, 642 F.2d 589, 611 (D.C. Cir. 1980). The case in fact holds that where, as here, Congress has not imposed such a fiduciary duty, none exists.

shareholders above all other considerations; quite the contrary, HERA required Treasury to consider the public interest when it made investment decisions with respect to the Enterprises, such as its decision to enter into the PSPAs. *See* 12 U.S.C. § 1719(g)(1)(C) (directing Treasury to consider several factors "to protect the taxpayers" before exercising its purchase authority, including "[t]he need for preferences or priorities regarding payments to the Government"). A state-law obligation for Treasury to maximize the return for Enterprise shareholders, to the exclusion of taxpayer protection or the health of the mortgage markets, "would present a significant and direct conflict with [Treasury's] obligation to act in the public interest," *Starr Int'l Co. v. Fed. Reserve Bank of N.Y.*, 742 F.3d 37, 42 (2d Cir. 2014), and thus is preempted. *Id.* at 41-42 ("Delaware fiduciary duty law cannot be applied to FRBNY's rescue activities consistently with adequate protection of the federal interests at stake in stabilizing the national economy.").

B. Treasury Is Not a Controlling Shareholder Under State Law

Even if state law could supply the basis for a claim against Treasury, a fiduciary relationship would not arise because Treasury is not a "controlling shareholder" within the meaning of state law. Plaintiffs counter that they have *alleged* that Treasury is a controlling shareholder, and therefore the Court must treat this allegation as true. Opp. 40-41. That is wrong. Pleading "labels and conclusions" simply "will not do," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)), and the existence of a controlling shareholder relationship is a question of law. *See Starr Int'l Co. v. Fed. Reserve Bank of N.Y.*, 906 F. Supp. 2d 202, 216-30 (S.D.N.Y. 2012). Plaintiffs make no attempt to answer the arguments of the opening brief that their allegations are simply insufficient as a matter of law to establish that Treasury is a controlling shareholder. Treasury Mem. 15.

V. ISSUE PRECLUSION BARS PLAINTIFFS' DERIVATIVE CLAIMS

In addition to the myriad other bars to Plaintiffs' claims, the doctrine of issue preclusion also bars Plaintiffs' claims. Plaintiffs' claims are derivative, and the same issues raised in this case already were litigated and resolved against the Enterprises' shareholders in *Perry Capital*.

A. Plaintiffs' Claims Are Derivative

Plaintiffs attempt to evade the preclusive effect of the judgment in *Perry Capital* by contending that their claims are direct, not derivative. Opp. 58. They argue that their claims are direct under federal law because, as persons who purportedly fall within the "zone of interests" of HERA, they are "adversely affected or aggrieved" within the meaning of section 702, and thus have a "valid cause of action" under the APA. Opp. 47-48 (citing 5 U.S.C. § 702). The first problem with this argument is that the APA, by its own terms, provides no cause of action—direct or derivative—where, as here,[31] another statute limits judicial review of the agency action in question. *Id.* § 701(a)(1); *see also Heckler v. Chaney*, 470 U.S. 821, 828 (1985) ("[B]efore any [APA] review at all may be had, a party must first clear the hurdle of § 701(a)."); *id.* at 843 (presumption of reviewability is "defeated if the substantive statute precludes review"). Because Plaintiffs cannot simply sue under the APA to circumvent sections 4617(f) and 4617(b), their efforts to cast themselves as aggrieved parties under section 702 of the APA amount to nothing. *See also Robinson*, 2016 WL 4726555 at *5-6 (rejecting shareholder plaintiff's argument that "she falls within [HERA's] zone of interests" and concluding that the plaintiff thus lacked standing to sue under the APA).

[31] As explained above, *see supra* Secs. I, III, sections 4617(b) of HERA expressly bars claims by the Enterprises' shareholders, and section 4617(f) of HERA expressly bars judicial review of claims for equitable relief that, like Plaintiffs' claims, would restrain or affect the exercise of the conservator's powers. Nothing in the APA provides Plaintiffs with a direct claim.

In any event, Plaintiffs' claims are derivative under well-established legal principles. The direct/derivative inquiry does not turn on the statute under which the plaintiff sues or how the plaintiff labels a claim, but on the nature of the harm alleged and the relief sought. *See Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1049 (Del. 2004).[32] Here, Plaintiffs' claims are derivative because they are based on allegations that Treasury's and FHFA's actions have injured the Enterprises, and the injunctive relief that Plaintiffs seek would not require Treasury or FHFA to take any action with respect to Plaintiffs, but would be directed to the Enterprises. *See id.* at 1039; Treasury Mem. 18–21; Am. Compl., Prayer for Relief. Federal law, like state law, recognizes the distinction between injuries to a corporation and injuries to its shareholders. *See Franchise Tax Bd. v. Alcan Aluminum Ltd*., 493 U.S. 331, 336 (1990); *Canderm Pharmacal, Ltd. v. Elder Pharm., Inc.*, 862 F.2d 597, 603 (6th Cir. 1988) (discussing shareholder standing rule under federal law); *Am. Airways Charters Inc. v. Regan*, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984) ("[N]o shareholder—not even a sole shareholder—has standing in the usual case to bring suit in an individual capacity on a claim that belongs to the corporation."). And the distinction between derivative and direct claims extends to the APA. *See Sec. Indus. & Fin. Markets Ass'n v. Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 408 (D.D.C. 2014) (dismissing APA claims based on shareholder standing rule).

Plaintiffs alternatively argue that their claims are direct under state law, asserting that they have not alleged an equal dilution of the economic value of all shares held by shareholders of the Enterprises, but have instead alleged that "the Net Worth Sweep destroyed the value of their investments through the transfer of the [Enterprises'] entire net worth to Treasury." Opp. 51. But this argument ignores the fundamental principle that allegations based on the depletion

[32] *Accord Parsch v. Massey*, 72 Va. Cir. 121, 128 (2006).

of corporate assets assert a "classically derivative" injury. *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 771 (Del. 2006). Here, Plaintiffs' claims concern "an injury to the corporation," *Tooley*, 845 A.2d at 1039—that is, by their own account, "the transfer of the [Enterprises'] entire net worth to Treasury." Opp. 51. Further, the relief that Plaintiffs seek—a change in dividend terms and the return of dividends paid to Treasury pursuant to the Third Amendment—would flow to the Enterprises, not to Plaintiffs directly. *Tooley*, 845 A.2d at 1039.

Tellingly, Plaintiffs cite no authority that validates their theory that their claims are based on an individual injury independent of an injury to the Enterprises.[33] Opp. 51. While they cite *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006), for the proposition that a challenge to an alleged "improper extraction or expropriation" of corporate profits to one class of shareholders qualifies as a direct claim, Opp. 51-52, that case is inapposite. *See* Treasury Mem. 19. In *Gentile*, the corporation had issued excess shares to a majority shareholder, and "the shares representing the 'overpayment' embod[ied] both economic value and voting power." 906 A.2d at 95-96. Here, the Third Amendment did not result in the issuance of any additional shares to Treasury, let alone "excessive" shares. Nor did it affect any Treasury voting rights because Treasury has no voting rights. Further, the non-Treasury shareholders' ownership stakes and voting rights are unaffected by the Third Amendment. *See Innovative Therapies, Inc. v. Meents*, No. 12-3309, 2013 WL 2919983, at *5 (D. Md. June 12, 2013) (declining to apply *Gentile* exception where, as here, the "allegations rest solely on a purported loss in the economic value of [plaintiff's] ownership stake rather than any loss of voting power"); *Nikoonahad v. Greenspun Corp.*,

[33] For example, in citing *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50 (2012), *appeal pending*, Case Nos. 15-5103, 15-5133 (Fed. Cir.), Plaintiff overlooks the key distinction that that case did not concern an entity in conservatorship. Further, because the Third Amendment did not result in the issuance of any new shares to any party, there is no way for Plaintiff to show that the agreement diluted its shares, as the plaintiff in *Starr International* alleged. *Id.* at 64.

No. C09-02242, 2010 WL 1268124, at *5 (N.D. Cal. Mar. 31, 2010) (same). Finally, Treasury is not a majority shareholder of the Enterprises, and the alleged "overpayment" of dividends on Treasury's senior preferred stock is in the form of cash, not additional voting stock.[34] Thus, the Third Amendment does not fit within the *Gentile* exception.[35]

B. Plaintiffs' Other Attempts to Escape the Issue-Preclusive Effect of *Perry Capital* Are Unavailing.

Plaintiffs argue that, even if their claims are derivative, issue preclusion should not bar their suit because "the plaintiffs in *Perry Capital* did not assert or seek to prosecute their APA claims as derivative actions." Opp. 58. But Plaintiffs ignore that *Perry Capital* addressed expressly derivative claims. *See Perry Capital*, 70 F. Supp. 3d at 229 ("The class plaintiffs have brought . . . derivative claims for breach of fiduciary duty."). The court held these derivative claims were barred because: (a) they sought some equitable relief, including rescission of the Third Amendment, and such relief is barred by Section 4617(f), *see id.* at 224-29; and (b) HERA's succession provision, 12 U.S.C. § 4617(b)(2)(A)(i), bars derivative claims notwithstanding allegations that the Conservator faced a conflict of interest. *Perry Capital*, 70

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[34] *Gradient OC Master, Ltd v. NBC Universal, Inc.*, 930 A.2d 104 (Del. Ch. 2007), which Plaintiffs also cite, *see* Opp. 52 n.29, only undermines their position. There, the court held that the plaintiffs failed to show that either defendant NBCU or Citadel constituted "a *de facto* or controlling shareholder" of the ION corporation in the absence of evidence that defendants had "close to a majority of shares," regardless of allegations concerning NBCU's "impact on the Board's decisions" as a "result of contractual obligations between NBCU and ION." *Id.* at 130-31.

[35] Plaintiffs' contractual relationship as stockholders in the Enterprises is irrelevant to whether their APA claims against Treasury are direct or derivative. Regardless, Plaintiffs' claims are derivative under *Tooley*, a legal conclusion that is consistent with the recent holding of *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175 (Del. 2015). In *NAF Holdings*, the Delaware Supreme Court addressed a contractual claim brought by NAF Holdings, LLC, a parent corporation, alleging that Li & Fung had violated a commercial contract entered into with NAF's two wholly-owned subsidiaries for purposes of effectuating a public company acquisition. 118 A.3d at 177. Although the Delaware Supreme Court held that NAF could bring its commercial contractual claim as a direct rather than derivative claim, it specifically distinguished NAF's commercial contractual suit, based on its individual rights under the contract, from the plaintiff-stockholders in *Tooley*, because in *Tooley*, the plaintiffs had no separate contractual right to bring a claim and had no contractual rights under the merger agreement. 118 A.3d at 182, n.10. So too here, plaintiffs have no actionable contractual right to payment for their stock.

F. Supp. 3d at 230-32. It is black-letter law that issue preclusion 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) (emphasis added). The issues of whether HERA bars all claims seeking equitable relief and all shareholder derivative claims, notwithstanding an alleged conflict of interest, were actually litigated in *Perry Capital* and were necessary for that court's dismissal of the derivative claims. Plaintiffs do not argue otherwise. Thus, they are barred from re-litigating those issues here, even under the guise of a different derivative claim.[36]

Plaintiffs next argue, in passing, that they should not be bound by the judgment in *Perry Capital* because they "cannot be presumed to have been on notice that their rights were at issue in that case." Opp. 59. But there is no "notice" requirement for issue preclusion to apply to subsequent derivative actions. *See Arduini v. Hart*, 774 F.3d 622, 637-38 (9th Cir. 2014). Courts routinely apply issue preclusion in subsequent derivative actions without considering notice. *See, e.g.*, *Cottrell v. Duke*, 737 F.3d 1238 (8th Cir. 2013); *In re Sonus Networks, Inc, S'holder Derivative Litig.*, 499 F.3d 47, 64 (1st Cir. 2007).

Plaintiffs also complain that their interests were not adequately represented in *Perry Capital* because those Plaintiffs "did not even purport to assert APA claims on behalf of the Companies." Opp. 59. It is difficult to make sense of this argument in light of Plaintiffs' admission that "*Perry Capital* did involve APA claims similar to those at issue here." Opp. 57-58. In any event, Plaintiffs fail to show that their interests diverge in any material way from those of the plaintiffs litigating identical issues in *Perry Capital*.

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[36] Thus, Plaintiffs' reliance on the D.D.C.'s *Rafter* order, Opp. 58 n.44, is inapt: whether the court's conclusion in *Perry Capital* that the contract claims were derivative can be characterized as a holding vs. *dicta* is of no moment, given that the court considered and dismissed expressly derivative claims as barred by HERA. That holding precludes Plaintiffs' derivative claims here.

Finally, the Court should reject Plaintiffs' request for a "special circumstances" exception to the normal rules of preclusion. Opp. 59. The ever-growing number of follow-on shareholder suits asserting duplicative challenges to the Third Amendment underscores the need to apply the issue preclusion doctrine. Plaintiffs fail to establish any good reason to except their piled-on suit from the normal rules.

VI. SECTION 4623(d) BARS PLAINTIFFS' CLAIMS

Section 4623(d) also bars Plaintiffs' claims because adjudicating them would require the Court to review and affect FHFA's key regulatory action to suspend capital classifications in light of the Treasury commitment. *See* FHFA Mem. 2-6 (discussing 12 U.S.C. § 4623(d)).

Plaintiffs argue that the October 2008 Action was not a "classification[] or action[]" to which Section 4623(d) applies. Opp. 62. This is wrong. Section 4623(d) applies to "*any* classification or action of the Director under this subchapter [II]." 12 U.S.C. § 4623(d) (emphasis added). And Subchapter II empowers the Director to take a host of supervisory actions concerning the capital of the Enterprises. *See, e.g.*, 12 U.S.C. § 4616 (empowering the Director to restrict capital distributions, limit growth, restrict risky activities, "acquire new capital in a form and amount determined by the Director," and "take any other action that the Director determines will better carry out the purposes of" the section); *id.* § 4615 (similar for "undercapitalized" entities). The October 2008 Action falls well within the provisions of this Subchapter, as it reflects a determination by the Director that, in light of the Treasury commitment and FHFA's ability as Conservator to operate the Enterprises directly, "the Enterprises will not be subject to other prompt corrective action requirements," and capital requirements "will not be binding" during conservatorship. Ex. A, FHFA Mem. (Doc. # 41-1).

Plaintiffs also argue that Section 4623(d) does not apply because the October 2008 Action "may not" have been a regulatory action, but rather could have been a Conservator action. Opp. 62 (citing 12 C.F.R. § 1237.3(c)). But the text of the October 2008 Action demonstrates that the action was indeed taken by FHFA's Director in his regulatory capacity. *See* Ex. A, FHFA Mem. (Doc. # 41-1) (referring to FHFA's Director as "the safety and soundness *regulator* for" the Enterprises, and stating that "[t]he *Director*" had made the determination and announcement) (emphases added). That the Conservator is empowered to suspend capital classifications for the duration of the conservatorships (12 C.F.R. § 1237.3) does not mean FHFA as regulator did not suspend the capital classification in 2008, three years *before* the regulation was revised to state the Conservator's capital suspension power. *See* 76 Fed. Reg. 35733 (June 20, 2011). Further, the regulation is expressly derived from provisions of HERA also applicable to FHFA as regulator. *See* 12 C.F.R. § 1237.3(c) (citing 12 U.S.C. § 4614).

Finally, contrary to Plaintiffs' assertions that they are not challenging the October 2008 Action and that their demand to vacate the Third Amendment would not "reinstate capital classifications or otherwise affect their suspension," Opp. 62, Plaintiffs' allegations confirm that they are, in fact, arguing that the Third Amendment was beyond the Conservator's powers and functions *because* it allegedly renders the Enterprises unsafe and unsound by limiting the amount of capital they retain. *See* Am. Compl. ¶¶ 26, 102, 115-19, 131; *see also* Opp. 19-22. In the October 2008 Action, FHFA as regulator declared that the Enterprises *could* operate with zero capital without being deemed unsafe and unsound and without being subjected to further supervisory actions based on the Enterprises' capital levels. Because Plaintiffs' claims necessarily challenge these determinations, Section 4623(d) bars them.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in Defendants' opening briefs, Defendants respectfully requests the Court dismiss with prejudice all of Plaintiffs' claims.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the parties to this action by serving a copy upon each party listed below on September 14, 2016, by the Electronic Filing System.

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