No. 16-6680

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARNETIA JOYCE ROBINSON,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Kentucky, No. 7:15-cv-109

BRIEF OF DEFENDANTS-APPELLEES THE FEDERAL HOUSING FINANCE AGENCY, AS CONSERVATOR FOR FANNIE MAE AND FREDDIE MAC, AND FHFA DIRECTOR MELVIN L. WATT

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INTRODUCTION

This litigation is one in a series of suits brought in federal courts across the country by shareholders of the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (together with Fannie Mae, the "Enterprises" or "GSEs"). These suits seek to challenge an amendment (the "Third Amendment") to financing agreements, known as the Senior Preferred Stock Purchase Agreements ("PSPAs"), that the U.S. Department of the Treasury and the Federal Housing Finance Agency, acting as Conservator for the GSEs ("FHFA" or the "Conservator"), executed in 2008 in connection with the GSEs' placement in conservatorship. Plaintiff-Appellant Robinson asserts Administrative Procedure Act ("APA") claims seeking to vacate and undo the Third Amendment.

The district court properly dismissed Plaintiff's complaint, consistent with the conclusions of every other court that has considered similar challenges. Indeed, six different courts—including the D.C. Circuit—have now dismissed materially identical claims, with each court ruling that federal law bars the shareholders' APA challenges to the Third Amendment.[1]

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[1] *See Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1086-1096 (D.C. Cir. 2017); *Saxton v. FHFA*, --- F. Supp. 3d ---, 2017 WL 1148279, at *9-11 (N.D. Iowa Mar. 27, 2017); *Roberts v. FHFA*, --- F. Supp. 3d ---, 2017 WL 1049841, at *7-8 (N.D. Ill. Mar. 20, 2017); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015); *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 222

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First, the district court correctly recognized that Congress, through the plain text of the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, § 1101, 122 Stat. 2654, 2661 (codified at 12 U.S.C. § 4511 *et seq*.), clearly spoke to the central issue in this case: for as long as Fannie Mae and Freddie Mac are in conservatorship, "no court may take any action to restrain or affect the exercise of powers or functions" of FHFA as their Conservator. 12 U.S.C. § 4617(f); *see also* Op., RE 63, PageID#1379. Accordingly, "unless Plaintiff has properly alleged that FHFA acted beyond the scope of its conservator power" in agreeing to the Third Amendment, her "complaint seek[ing] only equitable remedies . . . is barred" in its entirety by HERA's express terms. *Id*. (internal citation and quotation marks omitted).

Second, the district court also correctly concluded that execution of the Third Amendment fell squarely *within* FHFA's powers as Conservator, which are "permissive" and "exceptionally broad," "intended to grant [FHFA] discretion" in carrying out the conservatorships. *Id*. at PageID#1386, 1387.

Third, the district court rightly rejected Plaintiff's varied attempts to avoid Section 4617(f)'s "sweeping ouster," refusing to wade into the motives and merits of FHFA's actions as Conservator and declining to grant Plaintiff license to

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(D.D.C. 2014), *aff'd in relevant part*, 848 F.3d 1072 (D.C. Cir. 2017); *see also* Sept. 8, 2016 Memorandum Opinion, RE 63, PageID#1374-1388 ("Op.").

challenge the Third Amendment based on a provision of HERA that she has no standing to enforce. *See id.* at PageID#1379 (quoting *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995)). This Court should affirm these holdings.

This Court should also affirm the dismissal of Plaintiff's complaint for an additional, independent reason that the district court did not reach. Specifically, pursuant to HERA, FHFA as Conservator holds, and alone may exercise, "all rights, titles, powers, and privileges" of the Enterprises, their officers, directors, and stockholders, *id.* § 4617(b)(2)(A)(i), and this clear Congressional directive bars Plaintiff from pursuing the shareholder claims here during conservatorship. Further, as Treasury's brief explains, the doctrine of issue preclusion also applies in this case to prohibit Plaintiff from arguing that a supposed conflict of interest bars application of this shareholder-substitution provision to her claims. In all events, this Court should reject creation of any such conflict of interest exception to HERA's plan language, as every other court has done to date.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

The FHFA Defendants respectfully request oral argument. This appeal raises substantial and important issues, and involves requests for extraordinary relief. Plaintiff seeks, *inter alia*, the transfer of billions of dollars from Treasury to the Enterprises and an order enjoining the U.S. Department of Treasury, and FHFA as Conservator, from taking "any action whatsoever" to carry out the Third

Amendment. *See* Amended Complaint, RE 15 at PageID#178, ¶ 165(d) ("Compl.").

STATEMENT OF JURISDICTION

The district court had jurisdiction over the claims pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over the district court's final order pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether 12 U.S.C. § 4617(f)—which mandates that "no court may take any action to restrain or affect the exercise of [FHFA's] powers or functions" as Conservator of Fannie Mae and Freddie Mac—bars Plaintiff's claims seeking to enjoin the Conservator's decision to amend the funding agreements between the Enterprises and Treasury through the Third Amendment.

2. Whether 12 U.S.C. § 4617(b)(2)(A)(i)—which provides that FHFA as Conservator succeeds to "all rights, titles, powers, and privileges" of the Enterprises and their shareholders—bars Plaintiff's claims, which purport to exercise Plaintiff's claimed rights as a stockholder.

STATEMENT OF THE CASE

A. Fannie Mae, Freddie Mac, and Their Importance to the National Economy

Fannie Mae and Freddie Mac are government-sponsored enterprises, chartered by Congress to provide liquidity to the mortgage market by purchasing

residential loans from banks and other lenders to facilitate the ability of those lenders to make additional loans. *See* Compl., RE 15 at PageID#111, ¶ 2. The Enterprises, which own or guarantee trillions of dollars of residential mortgages and mortgage-backed securities, have played a key role in housing finance and the U.S. economy. *See id.*

Throughout the first half of 2008, the GSEs suffered multi-billion dollar losses on their mortgage portfolios and guarantees, as the housing market collapsed and homeowners defaulted on mortgages at accelerating rates. *See id.* at PageID#125, ¶ 38. "By 2008, the United States economy faced dire straits, in large part due to a massive decline within the national housing market." *Perry Capital*, 70 F. Supp. 3d at 215. Responding to the "systemic danger that a Fannie Mae or Freddie Mac collapse posed to the already fragile national economy," Congress enacted HERA on July 30, 2008. *Id.*; *see also* Compl., RE 15 at PageID#126, ¶ 40. HERA created FHFA, an independent federal agency, to supervise and regulate Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. 12 U.S.C. §§ 4501 *et seq.*; *see also* Compl., RE 15 at PageID#123, ¶ 31. HERA also granted the Director of FHFA the discretionary authority to place Fannie Mae and Freddie Mac in conservatorship "for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2).

B. FHFA Is Appointed Conservator of the Enterprises and Succeeds by Operation of Law to All Rights of the GSEs and Their Shareholders

On September 6, 2008, having concluded that the Enterprises could not operate safely and soundly and fulfill their critical statutory mission, FHFA's Director placed the Enterprises in conservatorship. *See* Compl., RE 15 at PageID#128, ¶ 46. At that time, the GSEs' financial exposure on their combined guaranteed mortgage-backed securities and debt outstanding totaled more than $5.4 trillion, and their net worth and public stock prices had fallen sharply. Fed. Hous. Fin. Agency, *FHFA Fact Sheet: Questions & Answers on Conservatorship*, http://www.fhfa.gov/Media/PublicAffairs/Pages/Fact-Sheet-Questions-and-Answers-on-Conservatorship.aspx (cited in Compl., RE 15 at PageID#128-129, ¶¶ 47, 48).

HERA provides that, upon its appointment as Conservator, FHFA "immediately succeed[ed] to . . . *all rights*, titles, powers, and privileges of the regulated entity, and of *any stockholder*, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." *Id.* § 4617(b)(2)(A)(i) (emphasis added).

In addition to vesting the Conservator with all rights of the Enterprises and their owners, officers, and directors, HERA accords FHFA as Conservator broad

powers to "operate" and "conduct all business" of the GSEs. *Id.* § 4617(b)(2)(B)(i). Specifically, HERA empowers the Conservator to:

- "conduct all business of the [Enterprises]," *id.*;
- "perform all functions of the [Enterprises] in the name of the [Enterprises] which are consistent with the appointment as conservator," *id.* § 4617(b)(2)(B)(iii);
- "preserve and conserve the assets and property of the [Enterprises]," *id.* § 4617(b)(2)(B)(iv);
- "take over the assets of and operate the [Enterprises] with all the powers of the shareholders, the directors, and the officers," *id.* § 4617(b)(2)(B)(i); and
- "transfer or sell any asset or liability of the [Enterprises] without any approval, assignment, or consent with respect to such transfer or sale," *id*. § 4617(b)(2)(G).

Further, HERA authorizes the Conservator to "take any [authorized action], which the Agency determines is in the best interests of the [Enterprises] or the Agency." *Id.* § 4617(b)(2)(J)(ii). Reinforcing and facilitating the exercise of the Conservator's plenary operational authority, Congress shielded the Conservator's actions from judicial review. Under 12 U.S.C. § 4617(f), "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator."

C. Treasury's PSPAs with the Enterprises

1. Treasury Provides Unprecedented Financial Support to the Enterprises

In connection with FHFA's conservatorship appointments, Treasury and FHFA as Conservator entered into the PSPAs. Compl., RE 15 at PageID#113, ¶ 8. Treasury, through those agreements, committed to infuse into the Enterprises billions of taxpayer dollars as necessary, providing the capital support that would allow the Enterprises to remain in operation and avoid mandatory receivership and liquidation. *See generally* PSPAs, RE 22-2, PageID#320, 334 (cited in, *e.g.*, Compl., RE 15 at PageID#131, ¶ 53). HERA specifically amended the statutory charters of the Enterprises to grant Treasury the authority to enter into such transactions for the purchase of securities issued by the Enterprises, so long as Treasury and the Enterprises reached a "mutual agreement" for such purchase. *See* 12 U.S.C. § 1719(g)(1)(A) (Fannie Mae); *id.* § 1455*(l)*(1)(A) (Freddie Mac).

The PSPAs provide the GSEs with "unprecedented access to guaranteed capital." *Perry Capital*, 848 F.3d at 1090. Under the PSPAs, if in any calendar quarter an Enterprise's net worth is negative—defined as liabilities exceeding assets in accordance with Generally Accepted Accounting Principles ("GAAP")—then the PSPAs required Treasury to invest additional funds in the Enterprise in the amount necessary to cure its negative net worth and bring it back up to zero. *See* PSPAs, RE 22-2, PageID#323-324, 337-338, § 2.2. By late 2008, the Enterprises'

liabilities exceeded their assets as measured by GAAP. Accordingly, Treasury was required to infuse billions of dollars—ultimately a total of $187 billion, pursuant to the PSPAs. *See* Compl., RE 15 at PageID#139, ¶ 73. Had Treasury not cured each and every one of the post-conservatorship net-worth deficiencies reported by the Enterprises, one or both of the Enterprises would have been immediately forced into mandatory receivership and liquidation. *See* 12 U.S.C. § 4617(a)(4).

While the PSPAs initially capped Treasury's commitment at $100 billion per Enterprise, the parties subsequently amended the PSPAs (via the "First Amendment") to double the cap to $200 billion per Enterprise. *See* Compl., RE 15 at PageID#135-136, ¶ 66. The parties thereafter amended the PSPAs again via a "Second Amendment," which increased the amount of funds available under the commitment pursuant to a formula, resulting in a commitment to fund an additional $117.6 billion (over and above the $116.1 billion already infused) for Fannie Mae, and an additional $140.5 billion (over and above the $71.3 billion already infused) for Freddie Mac. *See id.* at PageID#136, ¶ 67. Accordingly, to this day and for the indefinite future, Treasury has committed an additional $258 billion, for a total of $455 billion, to the Enterprises.

2. The PSPAs Permit Treasury to Satisfy Its Statutory Obligation to "Protect the Taxpayer"

In consideration for Treasury's extraordinary and "unprecedented" commitment to invest hundreds of billions of dollars into the Enterprises, *Perry*

Capital, 848 F.3d at 1090, the PSPAs gave Treasury a comprehensive and integrated bundle of rights, entitlements, and financial commitments consistent with the statutory requirement that Treasury's investment "protect the taxpayer." 12 U.S.C. §§ 1455(*l*)(1)(C), 1719(g)(1)(C). Specifically, the original PSPAs granted Treasury the following entitlements:

- Initial Commitment Fee: consisting of (a) an initial senior liquidation preference of $1 billion for each Enterprise and (b) warrants to acquire 79.9% of the Enterprises' common stock for a nominal payment. PSPAs, RE 22-2, PageID#325, 339, § 3.1.

- Senior Liquidation Preference: equal to the total amount of Enterprise draws on Treasury funds, plus the $1 billion initial liquidation preference (*id*. at § 3.3)—currently $189 billion. Thus, if the Enterprises are liquidated through receivership, Treasury must be paid $189 billion from the proceeds of the liquidation before any other shareholders.

- Dividends: requiring the Enterprises to pay Treasury a 10% annual dividend, assessed quarterly, based on the total amount of the liquidation preference. The dividend was mandatory and cumulative, and if the Enterprises failed to pay the dividend in cash, then the dividend would accrue at a rate of 12% and add to Treasury's outstanding liquidation preference. Fannie Mae Senior Preferred Stock Certificate & Freddie Mac Senior Preferred Stock Certificate, RE 23-4, PageID#515, 524-525, § 2(c).

- Periodic Commitment Fee ("PCF"): entitling Treasury to recover, over and above the dividends, an annual fee "intended to fully compensate [Treasury] for the support provided by the ongoing Commitment." PSPAs, RE 22-2, PageID#325, 339, § 3.2(b). The amount of the fee, to be imposed beginning January 2010, was to reflect "the market value of the Commitment as then in effect." *Id.* The PSPAs gave Treasury the right to waive the periodic commitment fee "based on adverse conditions in the United States mortgage market." *Id.* The PCF was deferred from 2010 to 2011 by the Second Amendment, RE 22-4, PageID#371, 377, §

3.2(a), and Treasury waived the fee in 2011 and 2012. *See* Compl., RE 15 at PageID#134-135, ¶ 62.

- PSPA Covenants: imposing a series of covenants that preclude the Enterprises from paying dividends on common stock and preferred stock, redeeming stock, or exiting from conservatorship (other than through receivership) without Treasury consent, and that make clear that shareholders are not third-party beneficiaries to the PSPAs. *See* PSPAs, RE 22-2, PageID#327-328, 330, 341-342, 344, §§ 5.1, 5.3, 5.6, 6.1.

In sum, consistent with Treasury's statutory obligation to "protect the taxpayer," 12 U.S.C. §§ 1455(*l*)(1)(C), 1719(g)(1)(C), the PSPAs are intended to assure that federal taxpayers, who contributed billions to save the Enterprises, are fully compensated for their ongoing commitments to sustain the Enterprises' operations following the federal rescue.

D. The Third Amendment to the PSPAs

On August 17, 2012, FHFA and Treasury executed the Third Amendment to the PSPAs. That amendment (1) eliminated the fixed-rate 10% annual dividend, (2) added a quarterly variable dividend in the amount (if any) of each Enterprise's positive net worth, subject to a declining reserve, and (3) suspended the PCF for as long as the quarterly variable dividend is in effect. *See* Third Amendment, RE 22-5, PageID#381, 389. The Third Amendment thus relieved the Enterprises from obligations to pay fixed dividends of at least $19 billion annually plus commitment fees equal to the market value of Treasury's massive and historic commitment. Instead, the Enterprises would owe only variable dividends equal to profits earned,

which historically averaged well below $19 billion per year and at times were zero.[2]

Among other things, the Third Amendment made it unnecessary to calculate and impose the PCF going forward. *See* Compl., RE 15 at PageID#155, ¶ 102. And under the Third Amendment, Treasury accepted the risk that the Enterprises would earn less than ten percent of the liquidation preference plus the amount of the PCF. Indeed, if a GSE's net worth is negative in a quarter, no dividend is due. Thus, if the Enterprises earn no profits in a year, they would owe Treasury *no* dividend and no PCF. Before the Third Amendment, when the Enterprises earned less than the amount needed to pay the fixed dividend, the Enterprises drew down the Treasury commitment to pay the dividend; this created a circular process that reduced the amount remaining on the Treasury commitment, added to Treasury's liquidation preference, and increased the amount of the required dividend going forward.

SUMMARY OF THE ARGUMENT

The district court properly recognized Plaintiff's complaint for what it is: an attempt to second-guess a business decision made by FHFA as Conservator of the

[2] *See* Fannie Mae, Quarterly Report (Form 10-Q), at 4 (Aug. 8, 2012) ("The amount of this [$11.7 billion] dividend payment exceeds our reported annual net income for every year since our inception."), http://goo.gl/bGLVXz; Freddie Mac, Quarterly Report (Form 10-Q), at 8 (Aug. 7, 2012) ("As of June 30, 2012, our annual cash dividend obligation . . . of $7.2 billion exceeded our annual historical earnings in all but one period."), http://goo.gl/2dbgey.

Enterprises. Plaintiff seeks to dramatically interfere with the Conservator's broad and exclusive "rights, titles, powers, and privileges" to operate the Enterprises. In particular, Plaintiff objects to the agreement between the Conservator and Treasury to amend, for a third time, the financing agreements by which Treasury rescued the Enterprises from insolvency and mandatory receivership. Plaintiff contends that the Third Amendment was too favorable to Treasury, despite the fact that it was the only entity willing to invest the billions in capital needed at a time of historic distress and remains contractually bound to infuse up to an additional quarter-trillion dollars in support of ongoing Enterprise operations should that become necessary.

In connection with her claims, each of which she brings under the APA, Plaintiff seeks a declaration that the Third Amendment is unlawful and in violation of HERA, and an order vacating and rescinding the Third Amendment. Her claims fail as a matter of law, and the district court correctly dismissed them.

First, HERA bars precisely this type of second-guessing of the Conservator's decisions, stripping the courts of jurisdiction over all claims seeking declaratory or equitable relief against the Conservator: "no court may take any action to restrain or affect the exercise of powers or functions of the [FHFA] as a conservator." 12 U.S.C. § 4617(f). The powers and functions of the Conservator are far-reaching and include, *inter alia*, the power to conduct all business of the Enterprises,

reorganize their affairs, transfer or sell any Enterprise assets, and take all such actions in a manner the Conservator determines is in the best interests of the Enterprises or FHFA. *Id*. §§ 4617(a)(2), 4617(b)(2)(B), 4617(b)(2)(G), 4617(b)(2)(J). Because the Conservator acted squarely within these statutory powers in executing the Third Amendment—an agreement to amend the terms of funding for the Enterprises—Plaintiff's claims, which seek exclusively declaratory and equitable relief, are barred. *See* Op., RE 63, PageID#1379, 1382-1388.

Plaintiff attempts to convert HERA's broad grant of permissive authority to the Conservator into mandatory duties. She urges an interpretation that would permit courts to evaluate any Conservator action that allegedly fails to "preserve and conserve assets." 12 U.S.C. § 4617 (b)(2)(D)(ii). She also tries to impose fiduciary and other duties on the Conservator to always act in the best interests of shareholders, when HERA instead authorizes the Conservator to "[act] in the best interests of the [Enterprises] or the Agency." *Id*. § 4617(b)(2)(J)(ii). Plaintiff's positions are contrary to HERA's plain language, and, if accepted, would subvert the obvious purpose of the statute, converting a jurisdiction-shield for the Conservator into a sword for any disgruntled shareholder. *See* Op., RE 63, PageID#1384-1387.

Second, although not addressed by the district court, a separate provision of HERA transfers shareholder rights to the Conservator, stripping Plaintiff of the

right to assert claims during conservatorship. Specifically, HERA provides that, upon appointment, FHFA as Conservator "immediately succeed[ed]" by operation of law to "all rights, titles, powers, and privileges of the [Enterprises] and of any stockholder." 12 U.S.C. § 4617(b)(2)(A)(i). FHFA thus succeeded to, among other things, Plaintiff's rights (i) to pursue APA claims on behalf of the GSEs, or (ii) based on her stock certificates, or (iii) otherwise relating to her status as a shareholder, and Plaintiff cannot assert such claims during the conservatorship. *See id.* This Court should reject Plaintiff's invitation to create a conflict of interest exception to HERA's plain language. Not only is Plaintiff precluded as a matter of law from arguing the merits of such an exception,[3] the proffered exception has no basis in the statutory text, case law, or common sense.

The Court should affirm.

STANDARD OF REVIEW

This Court reviews the district court's grant of a motion to dismiss *de novo*. *Duncan v. U.S. Bank, NA*, 574 F. App'x 599, 601 (6th Cir. 2014).

ARGUMENT

Claims like those Plaintiff asserts here already have been considered and rejected by numerous federal courts. *See supra* n.1. As set forth below, Plaintiff

[3] FHFA adopts and incorporates by reference Treasury's argument that the doctrine of issue preclusion bars Plaintiff's contention that a supposed conflict of interest bars application of Section 4617(b)(2)(A)(i). Treasury Br. § II.C.

provides no basis for a different outcome in this case. To the contrary, Plaintiff presents no new arguments and criticizes the court below for adopting the reasoning of the *Perry Capital* district court opinion dismissing claims identical to Plaintiff's—but the D.C. Circuit has now affirmed all relevant parts of that decision, underscoring that Plaintiff's positions have no merit.

I. SECTION 4617(f) BARS PLAINTIFF'S CLAIMS

Section 4617(f) bars Plaintiff's claims, which are solely declaratory and equitable in nature. Plaintiff seeks to, *inter alia*, vacate the Third Amendment and enjoin FHFA and Treasury from "taking any action whatsoever" to carry it out (Compl., RE 15 at PageID#178-179, ¶ 165(a)-(f)). But the Conservator's decision to execute that Amendment fits squarely within the broad powers and functions that Congress conferred exclusively on the Conservator through HERA.

Plaintiff first attempts to sidestep Section 4617(f)'s dispositive inquiry—whether the Conservator acted within its powers and functions—by suggesting that a "presumption" for judicial review of administrative action negates Section 4617(f). *See* Robinson Br. 4, 15, 17, 40, 50-52. That is wrong. Even if such a presumption would otherwise apply to the Conservator, and none does, it could not survive Section 4617(f)'s express limitation on judicial review of FHFA's actions as Conservator. Section 4617(f) "draws a sharp line in the sand against litigative interference" with FHFA's powers as Conservator. *Perry Capital*, 848 F.3d at

1087. And Section 4617(f) applies without regard for allegations that the Conservator exercised its statutorily-authorized powers in a supposedly unwise, unnecessary, ineffective, or improperly motivated manner. *See, e.g.*, *id.* at 1096 ("Section 4617(f)'s barrier to equitable relief—the only form of relief statutorily authorized for an APA violation[—] . . . would be an empty promise if it evaporated upon the assertion that FHFA's actions ran afoul of [the APA]"). The district court correctly held that Section 4617(f) bars Plaintiff's claims. *See* Op., RE 63, PageID#1388.

A. Section 4617(f) Bars Courts from Ordering Declaratory or Equitable Relief That Would Restrain or Affect FHFA's Exercise of Conservatorship Powers

To enable the Conservator to carry out its functions, Congress expressly insulated the Conservator's actions from judicial second-guessing, mandating that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator." 12 U.S.C. § 4617(f). As the D.C. Circuit recently explained in affirming the dismissal of APA claims virtually identical to those in Plaintiff's complaint, "Section 4617(f)'s . . . plain statutory text" prohibits any "interference—through judicial injunctions, declaratory judgments, or other equitable relief—with FHFA's statutorily permitted actions as conservator." *Perry Capital*, 848 F.3d at 1077. The district court's dismissal of Plaintiff's complaint is fully consistent with the decision of the D.C. Circuit and

other courts that uniformly apply Section 4617(f) to bar all claims seeking relief that would "restrain or affect" the exercise of powers of FHFA as Conservator. Op., RE 63, PageID#1379; *see also id.* PageID#1388 ("so long as FHFA 'is exercising judgment under one of its enumerated powers' . . . this court may not enjoin that act . . ."") (quoting *Ward v. RTC*, 996 F.2d 99, 103 (5th Cir. 1993)); *Cty. of Sonoma v. FHFA*, 710 F.3d 987, 994 (9th Cir. 2013) ("Because . . . FHFA acted within its powers as conservator, neither we nor the district court have jurisdiction over Plaintiffs'-Appellees' [APA and state law] claims"); *Leon Cty. v. FHFA*, 700 F.3d 1273, 1278-79 (11th Cir. 2012) (affirming dismissal of APA claims based on operation of Section 4617(f)).

These decisions under HERA are consistent with the substantial body of case law interpreting the materially identical provision governing Federal Deposit Insurance Corporation ("FDIC") conservatorships and receiverships, 12 U.S.C. § 1821(j), which, like Section 4617(f), "effect[s] a sweeping ouster of courts' power to grant equitable remedies," *Courtney v. Halleran*, 485 F.3d 942, 948 (7th Cir. 2007) (quoting *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995)), and applies "regardless of [the claimant's] likelihood of success on the underlying claims," *281-300 Joint Venture v. Onion*, 938 F.2d 35, 39 (5th Cir. 1991).[4] Indeed,

[4] Section 1821(j) provides that "no court may take any action . . . to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." 12 U.S.C. § 1821(j). "In analyzing the limits of the Court's authority

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given "the breath of the statutory language . . . the statute would appear to bar a court from acting in virtually all circumstances." *Nat'l Trust for Historic Pres. in U.S. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring); *Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1016 (8th Cir. 2013) (Section 1821(j) is "construed broadly to constrain the court's equitable powers.").

The analysis to determine whether Section 4617(f) precludes judicial review is straightforward and "quite narrow." *Bank of Am. Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010) (discussing 12 U.S.C. § 1821(j)). The court "must first determine whether the challenged action is within the [Conservator's] power or function" under HERA. *Dittmer Props.*, 708 F.3d at 1017 (citing *Bank of Am.*, 604 F.3d at 1243). If so, the Conservator "is protected from all court action that would 'restrain or affect' the exercise of those powers or functions." *Bank of Am.*, 604 F.3d at 1243. "A conclusion that the challenged acts were directed at an institution in conservatorship and within the powers given to the conservator [thus] ends the [Section 4617(f)] inquiry." *Town of Babylon v. FHFA*, 699 F.3d 221, 228 (2d Cir. 2012). "[T]he only relevant question" is "whether the conservator or receiver is carrying out a statutory function or power," and "[i]f so, no injunction

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under § 4617(f), the Court may turn to precedent relating to [Section 1821(j)]." *Kuriakose v. Fed. Home Loan Mortg. Corp.*, 674 F. Supp. 2d 483, 493 (S.D.N.Y. 2009).

may issue." *Furgatch v. RTC*, No. 93-20304 SW, 1993 WL 149084, at *2 (N.D. Cal. Apr. 30, 1993).

1. The Third Amendment Is Within FHFA's Statutory Conservatorship Powers

Applying the appropriately narrow Section 4617(f) inquiry here, the district court correctly held that Congress has "swept away courts' authority to enjoin [the Third Amendment]" because execution of that Amendment falls squarely within "the scope of FHFA's [conservator] powers." Op., RE 63, PageID#1384,1385.

HERA "endows FHFA with extraordinarily broad flexibility to carry out its role as conservator." *Perry Capital*, 848 F.3d at 1087. Indeed, HERA grants the Conservator "broad powers to operate Fannie and Freddie," to "assume complete control" over the Enterprises in conservatorship, and to exercise "exclusive authority over [their] business operations." *FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1060 (N.D. Ill. 2013); *see also Roberts*, 2017 WL 1049841, at *2 (describing conservator powers as "expansive"). FHFA's powers under HERA are at least as great as those given to conservators and receivers under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), which courts have also 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).

Specifically, Congress empowered the Conservator to (among other things) "operate" the GSEs, "carry on [their] business," "contract" on their behalf, and "transfer or sell any [GSE] asset or liability . . . without any approval, assignment, or consent." 12 U.S.C. § 4617(b)(2). Moreover, the statute permits FHFA to carry out its role as FHFA sees fit, authorizing the Conservator to exercise all of its powers in the manner the Conservator "*determines* is in the best interests of the [Enterprises] or the Agency." 12 U.S.C. § 4617(b)(2)(J)(ii) (emphasis added).

By executing the PSPAs and the Third Amendment, the Conservator did precisely that; it exercised its power to "operate the [GSEs]" and to "conduct all business of the [GSEs]" in the manner the Conservator "determines is in the [GSEs' or FHFA's] best interests." 12 U.S.C. §§ 4617(b)(2)(B)(i), (J)(ii). The PSPAs are funding agreements that provide the Enterprises with a capital backstop of hundreds of billions of dollars. Just as securing essential funding is a quintessential act for the conservator of a financial institution—which authority Plaintiff does not dispute or challenge—so too is agreeing to amend the PSPAs in a manner the Conservator believes, in its judgment, is in the best interests of the GSEs or FHFA. *See* 12 U.S.C. § 4617(b)(2)(J)(ii).

As the D.C. Circuit held in addressing this exact issue, "FHFA's execution of the Third Amendment [thus] falls squarely within its statutory authority to '[o]perate the [Companies,]' 12 U.S.C. § 4617(b)(2)(B), to 'reorganiz[e]' their

affairs, *id.* § 4617(a)(2), and to 'take such action as may be . . . appropriate to carry on the[ir] business,' *id.* § 4617(b)(2)(D)(ii)." *Perry Capital*, 848 F.3d at 1088. "Renegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital are quintessential conservatorship tasks designed to keep the Companies operational." *Id.* And because the Conservator's "management of Fannie's and Freddie's assets, debt load, and contractual dividend obligations during their ongoing business operation sits at the core of FHFA's conservatorship function," actions "to enjoin FHFA from implementing [the Third Amendment]," "to declare the Third Amendment invalid," or "to vacate the Third Amendment" seek relief "squarely within Section 4617(f)'s plain textual compass" and are barred. *Id.* at 1086.

This case is no different: Plaintiff challenges precisely the same transaction, pursues precisely the same theory, and seeks precisely the same relief as did the *Perry Capital* plaintiffs. The D.C. Circuit properly held that HERA bars those claims. *See also Roberts*, 2017 WL 1049841, at *8 ("the Plaintiffs have not sufficiently alleged that FHFA acted outside the bounds of its statutory authority [in executing the Third Amendment]."); *Saxton*, 2017 WL 1148279, at *9-10 (adopting the D.C. Circuit's *Perry Capital* Section 4617(f) analysis "in full"); *Cont'l W.*, 83 F. Supp. 3d at 840 n.6 ("FHFA and Treasury did not act outside the power granted to them by HERA"; "HERA bars Continental Western's claims

under the APA"). Accordingly, this Court would have to split with the D.C. Circuit in order to reach a contrary result.

Further, to the extent Plaintiff characterizes the Third Amendment as a "transfer[]" of GSE assets, *see*, *e.g.*, Compl., RE 15 at PageID#149, 177, ¶¶ 90, 163, she concedes any issue of Conservator authority because HERA expressly authorizes the Conservator to "transfer or sell any asset" of the Enterprises "without any approval, assignment, or consent," 12 U.S.C. § 4617(b)(2)(G), and permits FHFA to do so in the manner it "determines is in the best interests of the [Enterprises] or [FHFA]." *Id.* § 4617(b)(2)(J)(ii). HERA's transfer provision is thus one of the many "expansive grants of permissive, discretionary authority" that enables FHFA's "extraordinarily broad flexibility" as Conservator. *Perry Capital*, 848 F.3d at 1087-88.

Like FIRREA's materially identical provision, 12 U.S.C. § 1821(d)(2)(G)(i), HERA's transfer provision "does not provide any limitation"; indeed, "[i]t is hard to imagine more sweeping language." *Gosnell v. FDIC*, No. 90-1266L, 1991 WL 533637, at *6 (W.D.N.Y. Feb. 4, 1991), *aff'd*, 938 F.2d 372 (2d Cir. 1991). Courts thus consistently have held that suits challenging a conservator's or receiver's transfer of assets are barred. For example, in *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320 (6th Cir. 1993), this Court held that Sections 1821(d)(2)(G)(i) and 1821(j) barred the district court from exercising jurisdiction to compel the RTC to

rescind a transaction "transferr[ing] substantially all" assets of the institution under its receivership notwithstanding allegations that the transfer violated the plaintiffs' contract and due process rights. *Id.* at 1323-24.[5]

Moreover, Congress's enactment of the Consolidated Appropriations Act, 2016 (the "Act") on December 18, 2015, confirms that the Conservator had the statutory authority to execute the Third Amendment. *See* Pub. L. No. 114-113, § 702, Tit. VII, Div. O,129 Stat. 2242 (2015). The Act bars Treasury from selling or disposing of its preferred shares in the GSEs before January 1, 2018, but it otherwise leaves in place Treasury's rights under the PSPAs—including the Third Amendment, which is expressly referenced in the "Definitions" section. *Id.* § 702(a). Congress's decision to circumscribe Treasury's authority in one area but to leave intact other provisions of the PSPAs demonstrates that the Conservator and Treasury had the statutory authority to enter the Third Amendment. *See, e.g.*, *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) ("[w]here an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has

[5] *See also Waterview Mgmt. Co. v. FDIC*, 105 F.3d 696, 700-02 (D.C. Cir. 1997) (Section 1821(j) barred declaratory relief and specific performance against a receiver for breach of contract because the action constituting breach fell within the receiver's power to transfer assets under § 1821(d)(2)(G)(i)); *Vogles v. RTC*, 32 F.3d 50, 53 (2d Cir. 1994) (Sections 1821(d)(2)(G)(i) and 1821(j) authorized receiver's transfer of assets, allegedly in breach of a contract, "regardless of [plaintiff's] ultimate chance of success on his contract claim").

been correctly discerned." (internal quotation marks and citation omitted)); *Davis v. Devine*, 736 F.2d 1108, 1113 (6th Cir. 1984) ("when an agency alerts Congress of its statutory interpretations of existing legislation, and the legislature does not alter the tendered interpretation when provided the opportunity to do so, then courts must presume that the agency has correctly discerned the legislative intent").

2. Plaintiff's Claims Plainly Would "Restrain or Affect" the Conservator's Actions with Respect to the Third Amendment

There is no dispute concerning the second step of the two-part analysis for the application of Section 4617(f): Plaintiff's claims plainly would "restrain or affect" the Third Amendment. Indeed, they expressly seek to vacate it. Compl., RE 15 at PageID#178, ¶ 165(c). Thus, because (i) the Third Amendment falls within the scope of the Conservator's powers and authority, and (ii) Plaintiff would restrain or affect the Third Amendment, the district court correctly held that § 4617(f) bars this action.

B. Plaintiff's Attempts to Avoid or Create Exceptions to Section 4617(f) Are Meritless

Plaintiff raises a variety of arguments in an attempt to avoid, or create exceptions to, the jurisdictional bar of Section 4617(f). The district court correctly rejected each of these arguments, as have several other courts when dismissing materially identical claims.

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

Throughout her brief, Plaintiff asserts that Section 4617(f) does not apply because the Conservator supposedly had a host of improper motives for the Third Amendment—*e.g.*, to put the GSEs in a purported "financial coma" and hold them in "perpetual conservatorship" in order to benefit Treasury and "enrich[] the federal government." Robinson Br. 1, 13, 19, 37, 41. Plaintiff is wrong.

As the D.C. Circuit held, "nothing . . . in [HERA] hinges FHFA's exercise of its conservatorship discretion on particular motivations." *Perry Capital*, 848 F.3d at 1093. Allegations about the Conservator's alleged motives are thus irrelevant to the Section 4617(f) analysis: "for purposes of applying Section 4617(f)'s strict limitation on judicial relief, allegations of motive are neither here nor there." *Id.* at 1093.

Indeed, courts evaluating challenges to the Third Amendment have done so by reviewing the Conservator's actions "on their face," without "wad[ing] into the merits *or motives* of FHFA and Treasury's actions." *Cont'l W.*, 83 F. Supp. 3d at 840 n.6 (emphasis added); *see also Perry Capital*, 70 F. Supp. 3d at 225 (explaining that the court's task in applying Section 4617(f) is to ask "*what* the Third Amendment entails, rather than *why* FHFA executed [it]"). Courts have applied FIRREA's jurisdiction-withdrawal provision in the same way, holding that there is no jurisdiction notwithstanding plaintiffs' various allegations of improper

motives. *See, e.g.*, *Hindes v. FDIC*, 137 F.3d 148, 159-61 (3d Cir. 1998) (barring challenge to alleged "conspiracy with state officials to close the bank"); *In re Landmark Land Co. of Okla.*., 973 F.2d at 288-90 (barring challenge to action allegedly taken for conservator's "own benefit" and to other interested parties' detriment).

These decisions rest on sound policy: if motives *were* relevant, jurisdictional bars such as Section 4617(f) would be meaningless; plaintiffs could plead around them simply by alleging an improper purpose. Indeed, "Congress surely knew, when it enacted § 4617(f), that challenges to agency action sometimes assert an improper motive." *Leon Cty. v. FHFA*, 816 F. Supp. 2d 1205, 1208 (N.D. Fla. 2011), *aff'd*, 700 F.3d 1273. But in drafting HERA, "Congress barred judicial review of the Conservator's actions *without making an exception for actions said to be taken from an allegedly improper motive*." *Id.* (emphasis added).

Plaintiff attempts to avoid the appropriately "narrow[] . . . jurisdictional analysis," *Perry Capital*, 70 F. Supp. 3d at 225, based on a misreading of two cases—the Eleventh Circuit's *Leon County* decision and *Massachusetts v. FHFA*, 54 F. Supp. 3d 94 (D. Mass. 2014). *See* Robinson Br. 20. She contends that pursuant to those decisions, "a court 'must consider *all* relevant factors,' including the action's 'subject matter [and] *its purpose.*'" *Id.* (quoting *Leon Cty.*, 700 F.3d at

1278) (emphases added by Plaintiff). But the language on which she relies has no application in this case. It arises from a different context and relates to a different issue than that presented here. That is, the *Leon County* decision addressed how "to determine whether [a directive] was issued pursuant to FHFA's powers as conservator *or [in its capacity] as a regulator*." *Leon Cty.*, 700 F.3d at 1278 (emphasis added); *see also Massachusetts*, 54 F. Supp. 3d at 99-100 ("purpose, rather than labels, determines whether the FHFA in any given instance is acting *as a regulator* or as a conservator") (emphasis added). In this case, there is no dispute that FHFA acted in its capacity as a conservator (not regulator) in executing the Third Amendment. *See, e.g.*, Compl., RE 15 at PageID#130, ¶ 50. Accordingly, "allegations of motive" do not matter. *Perry Capital*, 848 F.3d at 1093.

2. Allegations that the Third Amendment Was an Unfavorable Deal for the Enterprises and the Shareholders Cannot Overcome Section 4617(f)

Plaintiff attempts to overcome Section 4617(f) by asserting that, in agreeing to the Third Amendment, the Conservator failed to adequately preserve and conserve Enterprise assets (Robinson Br. 21, 22, 26-27, 37 n.5, 38-39), maximize value in transferring Enterprise assets (*id*. 35-36), or put the Enterprises in a sound and solvent condition (*id.* 29-31). Plaintiff also generally argues that the Third Amendment was a bad deal for the Enterprises and their shareholders because the

Enterprises supposedly received "virtually nothing" as part of the deal. *Id*. 36; *see also id.* 30, 35-37.

These allegations are merely attacks on the *merits* of the Conservator's decision to execute the Third Amendment—not allegations that the Conservator lacked the authority to execute that amendment in the first place. Just as there is no "bad motive" exception to Section 4617(f), there also is no "bad job" exception. "Congress has removed from the purview [of] the court the power to second-guess the FHFA's business judgment," *Massachusetts*, 54 F. Supp. 3d at 101 n.7, and "FHFA's adherence to its statutory role as conservator does not turn on the wisdom of its decision-making." *Saxton*, 2017 WL 1148279, at *10; *see also Cty. of Sonoma*, 710 F.3d at 993 ("[I]t is not our place to substitute our judgment for FHFA's."). To create such an exception would expose the Conservator to all manner of hindsight analysis and render "Section 4617(f)'s strict limitation on judicial review . . . an empty promise." *Perry Capital*, 848 F.3d at 1096. As the D.C. Circuit explained:

> What the [plaintiffs] and dissenting opinion take issue with, then, is the allocated amount of dividends that FHFA negotiated to pay its financial-lifeline stockholder—Treasury—to the exclusion of other stockholders, and that decision's feared impact on business operations in the future. But *Section 4617(f) prohibits us from wielding our equitable relief to second-guess either the dividend-allocating terms that FHFA negotiated on behalf of the Companies, or FHFA's business judgment* that the Third Amendment better

> balances the interests of all parties involved, including the taxpaying public, than earlier approaches had.

Id. at 1095 (emphasis added).

Case law interpreting FIRREA's analogous jurisdiction-withdrawal provision (12 U.S.C. § 1821(j)) is fully in accord. For example, in *Ward*, the plaintiff tried to avoid Section 1821(j) by alleging that a receiver acted outside of its statutory powers by selling an asset in a manner that involved "an inadequate price, inadequate competition, unequal treatment of [plaintiff] as a potential offeror, [and] failure of the [receiver] to make a determination regarding 'maximizing' the net present value return on the sale" to the receivership estate. 996 F.2d at 104. 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 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 another course "would have been preferable"), *aff'd*, 708 F.3d 234.

The same principle applies here: Plaintiff alleges the Third Amendment favored Treasury and failed to "maximize[] the net present value return" to the Enterprises. *See* Robinson Br. 35-36 (alteration in original) (quoting 12 U.S.C.

§ 4617(b)(11)(E)(i)). But allegations that the Conservator "improperly" exercised its powers by supposedly mismanaging Enterprise assets cannot overcome Section 4617(f).[6]

Moreover, Plaintiff's argument that the Third Amendment is *ultra vires* because the Enterprises allegedly received "*virtually* nothing" as part of the Third Amendment is unavailing. *See id*. 36 (emphasis added); Compl., RE 15 at PageID#116-117, 154, ¶¶ 14, 101 (alleging the Enterprises received no "*meaningful* consideration" for Third Amendment; emphasis added). Section 4617(f) bars such a merits-based attack on the Conservator's business decisions; but in any event, Plaintiff 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.). Plaintiff herself argues elsewhere that the Third Amendment *was* a transaction in which the parties "obtain[ed] property

[6] *Sharpe v. FDIC* (cited at Robinson Br. 18-19) is both inapt and unpersuasive. While *Sharpe* declined to apply FIRREA's jurisdiction-withdrawal provision because "FIRREA does not authorize the breach of contracts," 126 F.3d 1147, 1155 (9th Cir. 1997), Plaintiff asserts no breach of contract claim arising out of pre-conservatorship actions here, which is the only scenario in which *Sharpe* applies. *See Meritage Homes v. FDIC*, 753 F.3d 819, 825 (9th Cir. 2014) ("*Sharpe* is not controlling outside of its limited context."). Moreover, *Sharpe* conflicts with this and other courts' precedents, holding that alleged breaches of contract cannot overcome Section 1821(j). *See, e.g.*, *Ryan*, 985 F.2d at 1323-24, 1329; *In re Landmark Land Co. of Carolina*, No. 96-1404, 1997 WL 159479, at *4 (4th Cir. Apr. 7, 1997); *RPM Invs., Inc. v. RTC*, 75 F.3d 618, 621 (11th Cir. 1996); *Vogles*, 32 F.3d at 52.

for money or *other valuable consideration*." Robinson Br. 43 (quoting BLACK'S LAW DICTIONARY 1430 (10th ed. 2014)).

Further, the exchange of consideration under the Third Amendment is plain on its face. As the D.C. Circuit explained, before the Third Amendment, the PSPAs required the Enterprises to pay Treasury a fixed annual cash dividend equal to 10% of the liquidation preference. *Perry Capital*, 848 F.3d at 1082. 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. In addition, the Enterprises could be required to pay Treasury an annual PCF, which was intended to compensate taxpayers fully for Treasury's massive and ongoing commitment of public funds to maintain the Enterprises' operations. *See id.* 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. *See Perry Capital*, 848 F.3d at 1083. Section 4617(f) bars Plaintiff and the courts from

second-guessing whether the consideration for the Third Amendment was favorable enough. Congress vested the Conservator alone with responsibility for making such fundamental decisions.

3. Allegations that the Conservator Failed to Comply with an Alleged "Duty" to Preserve and Conserve Assets Cannot Overcome Section 4617(f)

Plaintiff attempts to avoid Section 4617(f) by seeking to convert the Conservator's broad powers and functions—*i.e.*, to preserve and conserve assets—into mandatory duties and obligations that the Conservator is supposedly "require[d]" to undertake, and which Plaintiff can supposedly police through litigation. Robinson Br. 27; *see also id.* 22-24. Plaintiff argues that these supposed duties and obligations limit and define how the Conservator may exercise all other powers HERA grants it. *See id.* 27-28. But HERA, which describes the Conservator's broad powers using *permissive*—not mandatory—language, contradicts Plaintiff's argument. *Compare* 12 U.S.C. § 4617(b)(2)(B) (describing powers FHFA "may" exercise) *with* §§ 4617 (b)(2)(H) and (b)(14) and (describing duties FHFA "shall" undertake).

As the district court observed, "that FHFA '*may*, as conservator, take such action as may be (i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to . . . preserve and conserve the assets and property of the regulated entity'. . . does not create a mandatory duty" requiring the

Conservator to do so. Op., RE 63, PageID#1386, 1387 (quoting 12 U.S.C. § 4617(b)(2)(D)). Accordingly, "FHFA's alleged failure to exercise [its power to preserve and conserve assets]" does not "remove Plaintiff's claims from the ambit of Section 4617(f)'s bar on equitable relief." *Id.*

The D.C. Circuit's decision in *Perry Capital* confirms the correctness of the district court's ruling, holding that HERA's language, providing that FHFA "may" preserve and conserve assets, "does not compel [FHFA] in any judicially enforceable sense to preserve and conserve Fannie's and Freddie's assets and to return the Companies to private operation." *Perry Capital*, 848 F.3d at 1088 ("[W]hen Congress wanted to compel FHFA to take specific measures as conservator or receiver, it switched to language of command, employing 'shall' rather than 'may.'"). Two other federal courts recently reached this same conclusion. *See Roberts*, 2017 WL 1049841, at *8 ("Ultimately, FHFA cannot be said to have violated a duty that did not exist."); *Saxton*, 2017 WL 1148279, at *10 ("HERA speaks to FHFA's powers as conservator," which "plainly allow for the actions contemplated by the Third Amendment"; thus, "Plaintiffs' outcome-oriented interpretation of HERA"—that "FHFA's actions as conservator must achieve certain goals, namely, rehabilitation and a return to normal operations"—"misses the mark"). Adopting a contrary approach would expose the Conservator to a flood of litigation aimed at second-guessing the Conservator's operational

decisions, which is precisely what Congress prohibited through enactment of Section 4617(f).

Moreover, "Section 4617(b)(2)(D) obviously does not set out the exclusive powers of FHFA as conservator," as Plaintiff contends. Op., RE 63, PageID#1387; *see also* Robinson Br. 27-28. "As a plain textual matter, [HERA] provides FHFA many '[g]eneral powers' 'as conservator or receiver,' 12 U.S.C. § 4617(b)(2), that are not delineated in Section 4617(b)(2)(D)." *Perry Capital*, 848 F.3d at 1089. While Plaintiff posits that FHFA as Conservator may take *only* action "necessary to put the [Enterprises] in a sound and solvent condition" and "appropriate to . . . preserve and conserve [their] assets" (Robinson Br. 27), HERA "says nothing like that" at all. *Perry Capital*, 848 F.3d at 1089 ("if that is what Congress meant, it would have said FHFA 'may only' act as necessary or appropriate to those tasks."). The district court was thus also correct in deeming "meritless" Plaintiff's position that "Section 4617(b)(2)(D) represents an exclusive statement of the FHFA's possible authority as conservator." Op., RE 63, PageID#1386.[7]

Plaintiff's assertion that the Conservator "abandoned its conservatorship duty to 'rehabilitate' the [Enterprises]" and return them to "normal business

[7] *Perry Capital's* dissent, which asserts that Section 4617(b)(2)(D) "mark[s] the bounds" of FHFA's conservator powers, is simply wrong. 848 F.3d at 1118 (Brown, J., dissenting). HERA's plain text endows the Conservator with "*many* '[g]eneral powers'" enumerated in other provisions of the statute. *Id.* at 1089 (identifying other Conservator powers in HERA; emphasis added).

operations" by entering into the Third Amendment also depends on made-up obligations. Robinson Br. 30. HERA does not require FHFA to return the Enterprises to operation as "normal, private companies" as Plaintiff claims. *Id.* Rather, HERA 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), and it permits a conservator to exercise unfettered judgment to operate the Enterprises, including through its bar against judicial review of the Conservator's decision-making.

The plain language of HERA simply does not direct the Conservator to return the Enterprises to private control, to the shareholders, or to their prior form. As the D.C. Circuit held, HERA does not require "that FHFA must . . . return[] [the Enterprises] to their prior private, capital-accumulating, and dividend-paying condition for all stockholders." *Perry Capital*, 848 F.3d at 1090. Indeed, "nothing in the Act says that FHFA must preserve and conserve assets in order to guarantee that the companies can pay dividends to non-Treasury shareholders or can return to private control." *Roberts*, 2017 WL 1049841, at *8.

Further, nowhere in HERA did Congress impose on the Conservator the types of alleged common-law duties imagined by Plaintiff. *See* Robinson Br. 25-26. Rather, Congress gave the Conservator powers greater than—and inconsistent with—the powers allegedly held by common-law conservators. Both Plaintiff and

the *Perry Capital* dissent are thus wrong in their efforts to import here common-law conservatorship principles that may be applicable in the probate, guardianship, or real property context. *See Perry Capital*, 848 F.2d at 1121-22 (Brown, J., dissenting) (asserting that Congress "baked in" to HERA a "long history of fiduciary conservatorships" from "the probate context"); *see also United States v. Sanders*, 314 F.3d 236 (6th Cir. 2002) (guardianship case) (cited at Robinson Br. 25); *Crites, Inc. v. Prudential Ins. Co. of Am.*, 134 F.2d 925, 927 (6th Cir. 1943) (real property receiver appointed to collect rents) (cited at Robinson Br. 26).

Instead, by expressly delegating to the Conservator power to act in any manner the Conservator "determines is in the best interests of [the Enterprises] or the Agency," 12 U.S.C. § 4617(b)(2)(J)(ii), HERA precludes Plaintiff's attempts to graft common-law conservatorship concepts onto the statute. *See Morissette v. United States*, 342 U.S. 246, 263 (1952) (common law meanings presumed only in the "absence of contrary direction"). Thus, this Court, like the D.C. Circuit majority, should reject the unsupported notion that "Congress intended FHFA to be nothing more than a common-law conservator." *Id.* at 1094 (observing that "FHFA is not your grandparents' conservator").[8]

[8] Plaintiff asserts that the Conservator owes fiduciary duties to the Enterprises' shareholders. Robinson Br. 25-26. But "there is no indication that such fiduciary duties exist." Op., RE 63, PageID#1383. Plaintiff cites no authority that a conservator, as opposed to receiver, has fiduciary duties to shareholders under HERA. Rather, "[i]n HERA, Congress did not intend that acts lying fully within the FHFA's discretion as Conservator . . . would violate some residual fiduciary

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4. Allegations that the Third Amendment Is Improperly "Winding Up" the Enterprises Cannot Overcome Section 4617(f)

Plaintiff asserts that the Conservator has exceeded its statutory powers by acting in the "exclusive[] . . . province of a receiver" because the Third Amendment is "winding up" the Enterprises' affairs. Robinson Br. 33. But the Third Amendment is *not* a winding up of the Enterprises. Four years after execution of the Third Amendment, the Enterprises "continue to operate long-term, purchasing more than 11 million mortgages and issuing more than $1.5 trillion in single-family mortgage-backed securities," and "remain fully operational entities with combined operating assets of $5 trillion." *Perry Capital*, 848 F.3d at 1091.

Regardless, contrary to Plaintiff's contention, HERA's plain text authorizes FHFA as "conservator *or* receiver" to "wind[] up the affairs" of the Enterprises. 12 U.S.C. § 4617(a)(2) (emphasis added). Plaintiff argues 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. Robinson Br. 33-34. But winding up is different from liquidation; it includes prudential steps short of liquidation, such as transferring Enterprise assets without

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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 Perry Capital*, 848 F.3d at 1094 (the Conservator's statutory authority to act in its "own interest, which here includes the public and governmental interests," is contrary to any purported fiduciary duty) (citing 12 U.S.C. § 4617(b)(2)(J)(ii)).

approvals and shrinking the Enterprises' operations to ensure soundness until an ultimate resolution is determined. *See* 12 U.S.C. § 4617(b)(2)(G). Accordingly, "[u]ndertaking permissible conservatorship measures even with a receivership mind" would not be outside of the Conservator's "statutory bounds," *Perry Capital*, 848 F.3d at 1093, which the district court correctly recognized. *See* Op., RE 63, PageID#1387-1388.

For similar reasons, Plaintiff's repeated reliance on *RTC v. CedarMinn Building Limited Partnership*, 956 F.2d 1446 (8th Cir. 1992) (Robinson Br. 24-25, 32) is inapt. *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 that "the duty, right, or power [is] to be enjoyed or exercised by *both* the conservator and the receiver." 956 F.2d at 1451-52 (emphases added). This is particularly true if, as here, Congress has taken care, in *other* portions of the statute, to delineate the powers that can be pursued only by a receiver, or only by a conservator, but not by both. *Id.* at 1452; *see also* 12 U.S.C. § 4617(b)(2)(D)-(E). Furthermore, 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.[9]

Plaintiff also argues that Section 4617(a)(2)'s plain command that either the "conservator *or* receiver" may "*wind[] up* the affairs" of an Enterprise cannot mean what it says. *See* Robinson Br. 33 (quoting 12 U.S.C. § 4617(a)(2); emphases added by Plaintiff). She asserts that giving effect to the plain text of Section 4617(a)(2) would permit FHFA, if appointed as receiver, to act with the purpose of rehabilitation, instead of liquidation. *See id.* 34. But this provision of HERA makes perfect sense, and there is no reason to discard it. 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(a)(2). 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). Thus, HERA provides that a receiver will both liquidate and, through an LLRE, rehabilitate and reorganize the Enterprises upon a selective transfer of assets and liabilities.

---

[9] Plaintiff also cites the passing remark in *McAllister v. RTC*, 201 F.3d 570 (5th Cir. 2000), that a "conservator only has the power to take actions necessary to restore a financially troubled institution to solvency." *Id.* at 579; Robinson Br. 24. But that statement addressed "[e]xpenses of liquidation," which "cannot be incurred by a conservator as a matter of law, *as liquidation is not a function of the conservator*." *McAllister*, 201 F.3d at 579 (emphasis added). As explained, there has been no wind-up, much less liquidation of the Enterprises, which are instead "continuing [as] ongoing business[es]" consistent with conservatorship. *Id.*

Finally, Plaintiff argues that the Third Amendment could not have been an authorized "transfer" or sale of assets under 12 U.S.C. § 4617(b)(2)(G) because it allows FHFA "to completely ignore" the receivership distribution-priority scheme outlined in HERA. Robinson Br. 35-37. But the Enterprises are not in receivership, so the priority scheme is inapplicable here. *See Perry Capital*, 848 F.3d at 1093 ("the duty that [HERA] imposes on FHFA to comply with receivership procedural protections textually turns on FHFA actually liquidating the Companies"); *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*, 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 at 945. The "glaring problem" with this argument, the court held, was that under FIRREA (like HERA), a conservator or receiver is authorized

to "transfer assets or liabilities without any further approvals," and thus "the anti-injunction language of § 1821(j)" barred the relief requested.[10] *Id*. at 948.

5. Plaintiff Cannot Avoid Section 4617(f) by Alleging that Treasury "Supervised" or "Directed" the Conservator

Plaintiff also attempts to avoid Section 4617(f) by alleging the Conservator agreed to the Third Amendment only "at Treasury's explicit direction," Robinson Br. 39, supposedly in violation of 12 U.S.C. § 4617(a)(7), which provides that the Conservator "shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of [the Conservator's] rights, powers, and privileges." The district court correctly rejected this argument, holding that Plaintiff is not within the "zone of interests" of Section 4617(a)(7) and thus lacks prudential standing to enforce this provision. *See* Op., RE 63, PageID#1382-1384; *see also Saxton*, 2017 WL 1148279, at *10-11 (holding that shareholders are not in zone of interests of Section 4617(a)(7)).

[10] Plaintiff also argues that the Conservator's power to transfer assets is limited to "routine" or "specific" transfers, as was allegedly the case in *Ryan* and *Courtney*. Robinson Br. 37. But application of HERA's 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.").

a. Plaintiff Lacks Prudential Standing to Enforce Section 4617(a)(7)

To assert an APA claim, the plaintiff must be "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. To meet this requirement, the plaintiff's grievance must "arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). To determine whether a plaintiff is within the zone, courts "consider the purposes of the specific statutory provision that is at issue," and "who in practice can be expected to police the interests that the statute protects." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074-75 (D.C. Cir. 1998).

Here, the district court correctly held that only the Conservator is within Section 4617(a)(7)'s zone of interests because that provision protects *the Conservator* from state and federal encroachment. Accordingly, the Conservator is the party who can police that interest by raising a Section 4617(a)(7) defense:

> [T]here is no indication that Section 4617(a)(7) itself seeks to protect the interests of an 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. . . . FHFA's interest in proceeding independently, if it felt such interest was jeopardized, is precisely the zone of interests congress sought to protect.

Op., RE 63, PageID#1383-1384; *see also Saxton*, 2017 WL 1148279 at *10 (Section 4617(a)(7) "invites no interpretation that shareholders like Plaintiffs fall within its zone of interests"); *City of Chicago*, 962 F. Supp. 2d at 1059 (describing Section 4617(a)(7) as "HERA's preemption provision" that reflects "Congress['s] inten[t] for FHFA to be the sole entity responsible for operating Fannie and Freddie's nationwide business").

On appeal, Plaintiff argues that the district court did not take a "lenient" enough approach or give Plaintiff "the benefit of any doubt" regarding standing. Robinson Br. 39-40. Plaintiff is wrong: the district court applied the correct standard. The court acknowledged that Plaintiff need only show that her "interest in the value of [her] stock *arguably* falls within the zone of interests protected by 12 U.S.C. § 4617(a)(7)." Op., RE 63, PageID#1383 (emphasis added).

While the zone of interests test is not "especially demanding," *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987), it is not a rubber stamp for plaintiff's chosen theory of standing. *See id*. (zone of interests test denies review if plaintiff's interests are only "marginally related" to the purposes implicit in statute). Further, while Section 4617(a)(7) need not embody a specific Congressional intent to benefit Plaintiff, *see NCUA v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 492 (1998), it is necessary to identify the purpose of the statutory provision at issue in

order to determine the relevant interests at stake. *See Dismas Charities, Inc. v. U.S. DOJ*, 401 F.3d 666, 672-75 (6th Cir. 2005); *Mova*, 140 F.3d at 1074-75.

Here, the district court did not require a specific Congressional purpose to benefit shareholders in Section 4617(a)(7). Rather, the court correctly identified the provision's "clear purpose . . . to provide a preemption defense *for FHFA*" to conclude that Plaintiff lacks standing. Op., RE 63, PageID#1383; *see also Saxton*, 2017 WL 1148279 at *10 (Section 4617(a)(7) "specifically functions to remove obstacles to FHFA's exercise of conservator powers—*i.e.* to preserve FHFA's interests, not those of GSE shareholders.").

Plaintiff argues that she fits within the zone of interests because Section 4617(a)(7) "arguably protects the Companies' shareholders from being deprived of their investments due to other administrative agencies' pursuit of policy objectives that are at odds with FHFA's statutory mission as conservator." Robinson Br. 40-41. This argument—that Enterprise shareholders may lose money if the Conservator's independence is threatened—fails because a financial interest in the enforcement of a statutory provision does not confer prudential standing. *Dismas*, 401 F.3d at 677 (financial interest of halfway house owner in housing prisoners was insufficient to confer prudential standing under statute relating to conditions of incarceration); *see also Gosnell*, 938 F.2d at 374 (disappointed bidder was not "arguably within the zone of interests" protected by FIRREA's asset transfer

provision, and thus could not challenge FDIC's failure to dispose of assets "on the open market for sale to the highest bidder").

Section 4617(a)(7) was plainly designed to give FHFA a defense it may utilize as Conservator (in its discretion) to fend off encroaching, inconsistent directives from states or other federal agencies. It is not a sword for shareholders to use to advance their financial interests at the expense of the Conservator's judgment.

b. Plaintiff Fails to State a Claim for an Alleged Violation of Section 4617(a)(7)

Because Plaintiff lacks standing to enforce Section 4617(a)(7), the Court need not determine whether she has adequately alleged an APA claim based on supposed violation of that provision. In any event, Plaintiff's theory that Treasury directed FHFA to act against its will does not meet the plausibility requirements of *Iqbal* and *Twombly*. *See Perry Capital*, 848 F.3d at 1091, n. 9 (holding "direction and supervision" allegations implausible); *Roberts*, 2017 WL 1049841, at *7 (same).

Plaintiff asserts that, in the Third Amendment, the Conservator "forfeit[ted] its ability to make critical conservatorship decisions to another federal agency." Robinson Br. 41. But as the district court pointed out, "the very fact that FHFA itself has not brought suit to enjoin the Treasury from the alleged coercion it was subjected to suggests that FHFA was an independent, willing participant in its

negotiations with the Treasury." Op., RE 63, PageID#1384. Indeed, the Conservator—for years—has vigorously defended in courts across the country the very same amendment it was purportedly forced to execute against its will. This alone demonstrates that Plaintiff's "direction and supervision" argument has no credibility. *See Suero v. Fed. Home Loan Mortg. Corp.*, 123 F. Supp. 3d 162, 172 (D. Mass. 2015) (applying Section 4617(f) by looking to Conservator's "efforts to defend Freddie Mac against the legal challenges that have been brought against it"); *Massachusetts*, 54 F. Supp. 3d at 99.

Further, the allegations in Plaintiff's complaint are conclusory recitations of legal standards. In *Perry Capital*, the D.C. Circuit rejected the same claim based on the same conclusory allegations that, upon "information and belief," the Third Amendment resulted only from Treasury "insistence." *Perry Capital*, 848 F.3d at 1091 n.9. The Court held "we are not required to credit a bald legal conclusion that is devoid of factual allegations and that simply parrots the terms of the statute." *Id*. (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also Roberts*, 2017 WL 1049841, at *7 (dismissing complaint based on same allegations because Treasury "[f]ormulating a plan and proposing it to FHFA" does not equate to "subjecting FHFA to [Treasury's] 'direction' or 'supervision'"). Thus, even if Plaintiff had prudential standing to assert her Section 4617(a)(7) claim—and she

does not—this Court, following *Perry Capital* and *Roberts*, should dismiss the claim as implausible.

II. HERA'S SUCCESSION PROVISION BARS PLAINTIFF'S CLAIMS

Plaintiff's claims all fail for an additional, independently dispositive reason: HERA bars prosecution of shareholder claims during conservatorship. Congress provided that when FHFA is appointed Conservator, it "immediately succeeds to . . . *all rights*, titles, powers, and privileges of the [GSEs], and *of any stockholder*" of the GSEs. 12 U.S.C. § 4617(b)(2)(A)(i) (emphases added). Here, by asserting APA claims, Plaintiff purports to assert "rights . . . of [a] stockholder." *Id.*; *see also* Compl., RE 15 at PageID#110-111, ¶ 1 (alleging that by the Third Amendment, "the federal government took for itself the entire value of the *rights* held by Plaintiff and Fannie's and Freddie's other private shareholders" and that "Plaintiff brings this action to put a stop to the federal government's . . . ongoing expropriation of private property *rights*") (emphases added). But the Conservator now holds "all" such rights exclusively, leaving Plaintiff with no shareholder rights or interests to assert during the conservatorships.

A. The Conservator Has Succeeded to All Shareholder Rights

Congress could not have been more clear: upon its appointment, the Conservator "immediately succeed[ed] to . . . *all rights, titles, powers, and privileges* of the [GSEs], and *of any stockholder*, officer, or director *of [the GSEs]*

with respect to the [GSEs] and the assets of the [GSEs]." 12 U.S.C. § 4617(b)(2)(A) (emphases added). This broad, unequivocal language evidences Congress's intent to ensure "that nothing was missed" and to "transfer[] everything it could to the [Conservator]." *Kellmer v. Raines*, 674 F.3d 848, 851 (D.C. Cir. 2012) (quoting *Pareto v. FDIC*, 139 F.3d 696, 700 (9th Cir. 1998)). Accordingly, "[t]he shareholders' rights are now the FHFA's." *Sadowsky*, 639 F. Supp. 2d at 351.

Courts uniformly have held that the provision of HERA transferring shareholder rights to the Conservator bars Enterprise stockholders from asserting at least shareholder derivative claims during the conservatorships. For example, in *Kellmer*, the D.C. Circuit affirmed the district court's substitution of the Conservator in place of the plaintiffs—shareholders of Fannie Mae—who had asserted a variety of shareholder derivative claims. The Court held:

> [T]o resolve this issue, we need only heed Professor Frankfurter's timeless advice: "'(1) Read the statute; (2) read the statute; (3) read the statute!'" HERA provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges . . . of any stockholder." 12 U.S.C. § 4617(b)(2)(A). *This language plainly transfers shareholders' ability to bring derivative suits—a "right[ ], title[ ], power[ ], [or] privilege[ ]"—to FHFA.*

Kellmer, 674 F.3d at 850 (emphasis added) (internal citation omitted). "HERA's plain language [thus] bars shareholder derivative suits, without exception." *Perry*

Capital, 70 F. Supp. 3d at 232; *see also Cont'l W.*, 83 F. Supp. 3d at 840 n.6 ("HERA grants all shareholder rights, including the right to bring a derivative suit, to FHFA.").

The transfer of all rights to the Conservator also effectuates other key provisions of HERA, including that the Conservator exclusively "determines [what] is in the best interests" of the GSEs, 12 U.S.C. § 4617(b)(2)(J)(ii), and that no court may "restrain" or "affect" the Conservator's exercise of its statutory power, *id.* § 4617(f). Together, these provisions vest total control over the GSEs exclusively in the Conservator, not the shareholders, and thus bar Plaintiff's claims. Indeed, numerous courts have held that Section 4617(f) *itself* displaces shareholder plaintiffs' attempts to pursue derivative claims. *See Gail C. Sweeney Estate Martial Trust v. U.S. Treasury Dep't*, 68 F. Supp. 3d at 116, 126 (D.D.C. 2014) (concluding shareholder "plaintiff's lawsuit would 'affect' and 'interfere' with the Conservator's exercise of its powers"); *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 799 (E.D. Va. 2009) ("allowing the [shareholder] plaintiffs to remain in this action would violate § 4617(f)"); *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, ERISA Litig.*, 629 F. Supp. 2d 1, 4 n.4 (D.D.C. 2009) ("allowing [shareholder] plaintiffs to continue to pursue derivative claims independent of FHFA would require this Court to take action that would

'restrain or affect' FHFA's discretion, which HERA explicitly prohibits"), *aff'd sub nom. Kellmer*, 674 F.3d 848.

B. The Conservator Has Succeeded to Plaintiff's Claims Whether Those Claims Are Characterized as Derivative or Direct

Plaintiff does not contest that the Conservator generally succeeds to all shareholder derivative claims, and the unanimous authority establishes this basic principle. *See, e.g.*, *Kellmer*, 674 F.3d at 850. Instead, she argued below that HERA's succession clause does not apply to her APA claims because they are supposedly direct. *See* Pl.'s Opp. to Mots. to Dismiss, RE 32, PageID#712-724 ("Pl.'s Opp."). This argument is wrong twice-over: First, as Treasury's brief explains, Plaintiff's claims—premised on classically derivative injury (*e.g.*, depletion of corporate assets) and seeking relief that would plainly flow to the GSEs directly (*e.g.*, return of dividends paid pursuant to the Third Amendment)—are derivative.[11] *See, e.g.*, *Perry Capital*, 70 F. Supp. 3d at 229 n.24; *Saxton*, 2017 WL 1148279, at *6-7. Further, Plaintiff's characterization of her claims as direct is in all events irrelevant because HERA's succession provision applies equally to direct shareholder claims.

Under HERA, the Conservator succeeded to "*all*" shareholder rights. When interpreting HERA, "all means all." *Hennepin Cty. v. Fed. Nat'l Mortg. Ass'n*, 742

[11] The FHFA Defendants adopt and incorporate by reference Treasury's argument that Plaintiff's APA claims are derivative in nature. Treasury Br. §§ II.A-B.

F.3d 818, 822 (8th Cir. 2014); *see also Cox v. Mayer*, 332 F.3d 422, 426 (6th Cir. 2003) ("in interpreting a statute a court should always turn first to one, cardinal canon before all others, which is that courts must presume that a legislative says in a statute what it means and means in a statute what it says").

As the court in *Pagliara v. Federal Home Loan Mortgage Corp.*, 203 F. Supp. 3d 678 (E.D. Va. 2016), held in deciding the scope of the Conservator's succession rights under HERA, the Conservator succeeds to all shareholder rights, including those that are "enforceable through a direct lawsuit, not a derivative lawsuit." *Id.* at 687 (holding the Conservator had succeeded to the right to inspect books and records and the right to vote to elect directors). *Pagliara* distinguished a case principally relied on below by Plaintiff, *Levin v. Miller*, 763 F.3d 667 (7th Cir. 2014), and sided with the dissent in that case, holding that HERA's succession provision extends to direct shareholder claims. *See Pagliara*, 203 F. Supp. 3d at 688 ("[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). This Court should follow the same approach and hold that Plaintiff's APA claims are barred, irrespective of whether they are direct or derivative.

In this regard, the FHFA Defendants respectfully disagree with the D.C. Circuit's conclusion in *Perry Capital* that HERA's succession language does not

apply to direct claims. *See Perry Capital*, 848 F.3d at 1104-05. The D.C. Circuit stated that shareholders' rights "with respect to the regulated entity and [its] assets" are "only those an investor asserts derivatively on the Company's behalf." *Id*. But this reading "strain[s] any reasonable interpretation" of HERA, *Pagliara*, 203 F. Supp. 3d at 688, because claims such as those Plaintiff asserts here are unquestionably related to the Enterprises and their assets regardless of whether the claims are characterized as direct or derivative. Furthermore, the D.C. Circuit reached its conclusion based on its reasoning that a separate provision of HERA, 12 U.S.C. § 4617(b)(2)(K)(i), "terminates [shareholders'] rights and claims in receivership" against the assets or charter of the Enterprises and thus "indicates that shareholders' direct claims against and rights in the Companies survive during conservatorship." *Perry Capital*, 848 F.3d at1105. But the succession clause does not *terminate* any rights upon conservatorship; instead, it transfer them to the Conservator during the conservatorship. Only if and when the Enterprises enter receivership would any shareholder rights be terminated, and in that context, Section 4617(b)(2)(K)(i) excludes certain rights from termination and permits shareholders to assert those rights through the administrative process. Accordingly, there is no reason to limit the succession clause's broad language—encompassing "all rights" of a shareholder—to only derivative claims.

C. There Is No "Conflict of Interest" Exception to HERA's Succession Provision

Before the district court, Plaintiff also argued that her claims can survive HERA's succession provision based upon a so-called "conflict of interest" exception. *See* Pl.'s Opp., RE 32, PageID#725-729. As Treasury explains, issue preclusion bars Plaintiff from advancing that argument. Treasury Br. § II.C.

In all events, there is no "conflict of interest" exception in HERA. Every court that has addressed this issue under HERA—including the D.C. Circuit—has soundly rejected the creation of any such exception, which would be "contrary" to "the plain statutory text." *Perry Capital*, 848 F.3d at 1106 ("[T]he Succession Clause does not permit shareholders to bring derivative suits on behalf of the Companies even where the FHFA will not bring a derivative suit due to a conflict of interest[.]"); *see also Saxton*, 2017 WL 1148279, at *12 ("The court finds no ambiguity in the provision's meaning and, therefore, refuses to judicially alter the provision to allow for an unstated conflict-of-interest exception."); *Edwards v. Deloitte & Touche, LLP*, No. 16-21221-CIV, 2017 WL 1291994, at *7 (S.D. Fla. Jan. 18, 2017) ("Looking at the plain wording of HERA's succession clause, there is no exception to the bar on derivative suits.");[12] *Pagliara*, 203 F. Supp. 3d 678 at

[12] The *Deloitte* plaintiffs filed a Rule 59(e) motion to alter the judgment, but the motion does not challenge the court's ruling on the "conflict of interest" issue. *See* Pls.' Rule 59(e) Mot., Dkt. 57, *FHFA v. Deloitte & Touche LLP*, No. 1:16-cv-21221 (S.D. Fla. Feb. 15, 2017).

691 n.20 ("The Court is not persuaded by [plaintiff's] argument that he may have standing to pursue a derivative claim because FHFA and/or Treasury may have a conflict of interest.").

The two decisions that have found a conflict-of-interest exception to FIRREA's succession provision are outliers that other courts have rejected. *First Hartford Corp. Pension Plan & Tr. v. United States*,194 F.3d 1279, 1295-96 (Fed. Cir. 1999); *Delta Savs. Bank v. United States*, 265 F.3d 1017, 1021-24 (9th Cir. 2001). *Perry Capital* eviscerated these decisions as being poorly reasoned, "mak[ing] little sense," and contradicting FIRREA's plain language. 848 F.3d at 1105-06; *Perry Capital*, 70 F. Supp. 3d at 231 ("[conflict of interest] exception would swallow the rule [against derivative actions]"). Moreover, the limited holdings of *First Hartford* and *Delta*, both receivership cases, "make[] still less sense in the conservatorship context." *Id.* at 231 n.30 ("HERA, through which Congress grant[ed] immense discretionary power to the conservator," cannot "house an implicit end-run around [that] authority by means of the shareholder derivate suits that the statute explicitly bars"). Even the courts in these cases emphasized the "very narrow range of circumstances" in which the purported conflict-of-interest exception applies. *First Hartford*, 194 F.3d at 1295; *Delta Savs.*, 265 F.3d at 1023.

* * *

In addition to the foregoing, the FHFA Defendants adopt and incorporate by reference Treasury's arguments that the doctrine of issue preclusion bars Plaintiff's contention that a supposed conflict of interest bars application of Section 4617(b)(2)(A)(i), and that Plaintiff's APA claims are derivative in nature. *See* Treasury Br. §§ II.A-C.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Dated: April 12, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 12,995 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure and 6th Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface in 14-point Times New Roman font.

/s/ Howard N. Cayne
Howard N. Cayne

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6th Cir. Rule 30(g)(1), the FHFA Defendants hereby designate the following portions of the district court record for this Court's consideration:

Record Entry No.	Description	PageID Range
15	Amended Complaint	110-179
22	Treasury's Motion to Dismiss	269-270
22-1	Memorandum in Support of Treasury's Motion to Dismiss	271-318
22-2	Ex. A. to Treasury's Motion to Dismiss --Fannie Mae and Freddie Mac Amended and Restated Preferred Stock Purchase Agreements (PSPAs)	319-347
22-4	Ex. C to Treasury's Motion to Dismiss -- Second Amendment to the PSPAs	367-379
22-5	Ex. D to Treasury's Motion to Dismiss -- Third Amendment to the PSPAs	380-396
23	FHFA Defendants' Motion to Dismiss	398
23-2	Memorandum in Support of FHFA Defendants' Motion to Dismiss	401-445
23-4	Ex. B to FHFA Defendants' Motion to Dismiss -- Fannie Mae Senior Preferred Stock Certificate & Freddie Mac Senior Preferred Stock Certificate	513-531

32	Plaintiff's Opposition to Defendants' Motions to Dismiss	641-733
37	FHFA Defendants' Reply In Support of Motion to Dismiss	740-768
38	Treasury's Reply in Support of Motion to Dismiss	769-795
63	Memorandum Opinion & Order	1374-1388
64	Judgment	1389
65	Notice of Appeal	1390

RELEVANT STATUTES, REGULATIONS, AND RULES

12 U.S.C. § 4617

§ 4617. Authority over critically undercapitalized regulated entities

(a) Appointment of the Agency as conservator or receiver

(1) In general

> Notwithstanding any other provision of Federal or State law, the Director may appoint the Agency as conservator or receiver for a regulated entity in the manner provided under paragraph (2) or (4). All references to the conservator or receiver under this section are references to the Agency acting as conservator or receiver.

(2) Discretionary appointment

> The Agency 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.
>
> . . .

(4) Mandatory receivership

> (A) In general
>
> > The Director shall appoint the Agency as receiver for a regulated entity if the Director determines, in writing, that--
> >
> > > (i) the assets of the regulated entity are, and during the preceding 60 calendar days have been, less than the obligations of the regulated entity to its creditors and others; or

(ii) the regulated entity is not, and during the preceding 60 calendar days has not been, generally paying the debts of the regulated entity (other than debts that are the subject of a bona fide dispute) as such debts become due.

. . .

(7) Agency not subject to any other Federal agency

When acting as conservator or receiver, the Agency shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the Agency.

(b) Powers and duties of Agency as conservator or receiver

. . .

(2) General Powers

(A) Successor to regulated entity

The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to--

(i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity; and

(ii) title to the books, records, and assets of any other legal custodian of such regulated entity.

(B) Operate the regulated entity

The Agency may, as conservator or receiver--

> (i) take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct all business of the regulated entity;
>
> (ii) collect all obligations and money due the regulated entity;
>
> (iii) perform all functions of the regulated entity in the name of the regulated entity which are consistent with the appointment as conservator or receiver;
>
> (iv) preserve and conserve the assets and property of the regulated entity; and
>
> (v) provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver.

. . .

(D) Powers as conservator

> The Agency may, as conservator, 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.

. . .

(G) Transfer or sale of assets and liabilities

> The Agency may, as conservator or receiver, transfer or sell any asset or liability of the

> regulated entity in default, and may do so without any approval, assignment, or consent with respect to such transfer or sale.
>
> . . .
>
> (J) Incidental Powers
>
> The Agency may, as conservator or receiver--
>
> (i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this section, and such incidental powers as shall be necessary to carry out such powers; and
>
> (ii) take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity or the Agency.
>
> . . .

(f) Limitation on court action

> Except as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2017, I filed the foregoing Brief of Defendants-Appellees the Federal Housing Finance Agency, as Conservator for Fannie Mae and Freddie Mac, and FHFA Director Melvin L. Watt with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered users:

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