No. 17-1880

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHRISTOPHER M. ROBERTS and THOMAS P. FISCHER,
Plaintiffs-Appellants

v.

FEDERAL HOUSING FINANCE AGENCY; MELVIN L. WATT, in his official capacity as Director of the Federal Housing Finance Agency; UNITED STATES DEPARTMENT OF TREASURY; and STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS (No. 1:16-cv-02107)
HONORABLE EDMOND E. CHANG

BRIEF AND REQUIRED SHORT APPENDIX
OF PLAINTIFFS-APPELLANTS

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1880

Short Caption: Roberts v. FHFA

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Christopher M. Roberts and Thomas P. Fischer

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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Cooper & Kirk, PLLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: s/ Charles J. Cooper Date: 06/06/2017

Attorney's Printed Name: Charles J. Cooper

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Attorney's Signature: s/ Peter A. Patterson Date: 06/06/2017

Attorney's Printed Name: Peter A. Patterson

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Attorney's Signature: s/ Brian W. Barnes Date: 06/06/2017

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Attorney's Signature: s/ Christian D. Ambler Date: 06/06/2017

Attorney's Printed Name: Christian D. Ambler

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INTRODUCTION

This appeal challenges the government's 2012 expropriation and effective nationalization of two of America's largest and most profitable companies—Fannie Mae and Freddie Mac (the "Companies"). In August 2012, Fannie's and Freddie's conservator, the Federal Housing Finance Agency ("FHFA"), acquiesced in Treasury's plan to fundamentally change Treasury's securities from fixed-rate dividend preferred stock that would have entitled Treasury to receive approximately $19 billion in 2013, to stock that entitles Treasury to receive quarterly "dividend" payments equal to each Company's net worth, less a small and diminishing capital buffer. In substance, that change—known as the Net Worth Sweep—nullified the investments of all shareholders other than Treasury, transformed Treasury's preferred stock investment into 100% of the Companies' common stock, and amounted to a purchase of securities long after Treasury's authority to make such purchases had expired in 2009.

The Net Worth Sweep has netted Treasury an astonishing windfall of more than *$100 billion in 2013 alone* and has forced the Companies to operate with almost no capital and in an inherently unsound condition. For decades, federal conservators have exercised powers under statutory schemes indistinguishable from the one at issue here. Yet, no conservator has ever before been permitted to operate its ward for the exclusive benefit of the federal government. The Net Worth Sweep is an unprecedented expropriation of private property that Congress did not authorize. If allowed to stand, it will erode financial institutions' access to private capital in future financial crises.

When Congress established FHFA in 2008, it chose not to authorize the Defendants to eliminate the Companies' federal charters, and it explicitly reiterated "[t]he need to maintain" Fannie and Freddie as "private, shareholder-owned compan[ies]." 12 U.S.C. § 1455(*l*)(1)(C). Congress may someday revisit that decision. But unless and until it does so, the Defendants are obliged to honor the rights of shareholders in these two private, for-profit corporations.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because Plaintiffs assert claims under the Administrative Procedure Act, 5 U.S.C. § 706. Plaintiffs have standing because the Net Worth Sweep "aggrieved" them by usurping the economic bundle rights associated with their securities and eliminating the value of their stock. The district court entered final judgment as to all claims in favor of Defendants on March 20, 2017, Doc. 75, SA24, and Plaintiffs filed a timely notice of appeal on April 27, 2017, Doc. 76. *See* FED. R. APP. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Treasury exceeded its authority under HERA by entering into the Net Worth Sweep in 2012, when HERA expressly permitted Treasury after December 31, 2009, only "to hold [or] exercise any rights received in connection with, or sell, any obligations or securities [it had already] purchased." 12 U.S.C. § 1719(g)(2)(D).

2. Whether 12 U.S.C. § 4617(f), which forbids court actions that would "restrain or affect the exercise of powers or functions of [FHFA] as a conservator," bars Plaintiffs' claim that Treasury's decision to enter into the Net Worth Sweep was arbitrary and capricious under the Administrative Procedure Act ("APA").

3. Whether FHFA exceeded its statutory authority as conservator under HERA by giving Treasury significant control over the Companies and assenting to the Net Worth Sweep, under which the Companies must transfer all of their net assets and future profits to Treasury and have been prohibited from retaining capital.

STATEMENT OF THE CASE

A. Fannie Mae and Freddie Mac.

This Nation's multi-trillion dollar housing finance market, and familiar features of that market such as readily available 30-year fixed rate mortgages, are built on the foundation of two for-profit, privately owned entities—Fannie Mae and Freddie Mac. The Companies do not themselves originate mortgages but instead insure and securitize them, thus providing liquidity to the residential mortgage market that has made home ownership possible for millions of American families. A3 ¶ 2.

Unlike other financial institutions involved in the housing finance system that were affected by the 2008 financial crisis, the Companies never committed any consumer fraud and took a relatively conservative approach to investing in risky mortgages issued during the national run-up in home prices from 2004 to 2007. A3, A19-20 ¶¶ 2, 42-43. As a result, the Companies remained in a comparatively strong financial condition in 2008 that made it possible for them to *save* America's home mortgage system by providing mortgage funding even as distressed banks exited the marketplace. *See* A3-4 ¶ 3.

As mortgage insurers, Fannie and Freddie are designed to generate ample cash to cover their operating expenses. Throughout the financial crisis and the years that followed, the Companies were capable of meeting their obligations to insureds and creditors and of absorbing any losses they might reasonably incur as a result of the financial downturn. A3-4 ¶ 3.

B. Fannie and Freddie Are Forced into Conservatorship and Subjected to the Purchase Agreements.

Despite the Companies' sound financial position in 2008, Treasury implemented a deliberate strategy to seize the Companies and operate them for its exclusive benefit. At Treasury's urging, FHFA forced the Companies into conservatorship on September 6, 2008. A24 ¶ 52. At the time, FHFA stated that under HERA the purpose of the conservatorship was to restore confidence in and stabilize the Companies with the objective of returning them to normal business operations. A24 ¶ 53. As FHFA publicly confirmed, conservatorship is necessarily temporary, and FHFA may act as conservator for the Companies only until they are stabilized. A24 ¶ 54.

Treasury then exercised its temporary authority under HERA to enter agreements with FHFA to purchase equity in the Companies ("Preferred Stock Purchase Agreements" or "PSPAs"). A25-26 ¶ 57. The PSPAs allowed the Companies to draw up to $100 billion each from Treasury as needed to avoid a negative net worth—an amount that was subsequently increased to allow the Companies to draw unlimited sums from Treasury until the end of 2012, and thereafter capped at the amount drawn from 2010 through 2012, plus $200 billion per Company. A35 ¶ 79.

In return for Treasury's funding commitment, FHFA agreed that the Companies would provide several forms of consideration. First, the PSPAs created a new class of securities with very favorable terms to the Government, known as Senior Preferred Stock ("Government Stock"). For each Company, the Government Stock had an initial liquidation preference of $1 billion, an amount that would increase by one dollar for every dollar drawn on Treasury's funding commitment. A27 ¶ 63.[1] The original PSPAs also required the Companies to pay quarterly dividends on the

[1] If the Companies liquidate, Treasury's liquidation preference entitles it to receive the sum specified before more junior preferred and common shareholders receive anything.

outstanding Government Stock liquidation preference. These dividends could be paid in cash, at an annual rate of 10%, or in kind, at an annual rate of 12%, by adding to the liquidation preference the amount of dividends due—an option Treasury and the Companies repeatedly acknowledged. *See* A28-31 ¶¶ 65-71. Opting to pay the dividends in kind would not have reduced the amount available under Treasury's funding commitment.

Second, FHFA agreed that the Companies would issue warrants entitling Treasury to buy 79.9% of their common stock at a nominal price. The common stock warrants gave Treasury "upside" via participation in the Companies' profitability, but this upside would be *shared* with the Companies' other preferred and common shareholders. *See* A27 ¶ 62.

Third, the PSPAs provided for the Companies to pay Treasury a quarterly market-based periodic commitment fee beginning in 2010. A31 ¶ 72. Prior to the Net Worth Sweep, Treasury consistently waived this fee, and it could only be set with the agreement of the Companies at a market rate. A58-59 ¶ 121. Freddie forecasted its "sensitivity" to imposition of the periodic commitment fee beginning in 2013 at $0.4 billion per year. A58-59 ¶ 121.

Prior to conservatorship, the Companies had been consistently profitable in part because of the market's perception that the government impliedly guaranteed their debt, which allowed them to borrow at rates almost as low as the United States government. Under the terms of the original PSPAs, that implied guarantee was replaced by an explicit guarantee for which the government was entitled to receive a market rate of return. *See* A59 ¶ 122.

Fourth, the PSPAs included covenants that gave Treasury substantial control over the Companies. Among other things, these covenants required that the Companies obtain Treasury's consent before: (i) issuing new equity; (ii) paying dividends to any shareholder other than Treasury; (iii) selling or transferring assets outside the ordinary course of business; (iv) incurring debt above a specified level; (v) making certain fundamental changes to their business; or (vi) engaging in certain transactions with affiliates. The PSPAs also prohibit FHFA from terminating the conservatorship without Treasury's consent except to put the Companies into receivership. A7-8, A32-34 ¶¶ 12, 74.

The original PSPAs diluted, but did not eliminate, the economic interests of the Companies' private shareholders. As FHFA's Director assured Congress shortly after the agreements were signed, the Companies' "shareholders are still in place," and "both the preferred and common shareholders have an economic interest in the companies," which "going forward . . . may [have] some value." A24 ¶ 53.

C. Unwarranted Accounting Decisions Artificially Increase the Companies' Draws from Treasury, and the Companies Return to Sustained Profitability.

Under FHFA's supervision, the Companies were forced to dramatically write down the value of their assets and to incur substantial non-cash accounting losses in the form of loan loss reserves and write-offs of deferred tax assets.[2] Tens of billions of dollars of these accounting adjustments were based on FHFA's wildly pessimistic assumptions about potential future losses and were wholly unwarranted. A36-39 ¶¶ 81-84. By June 2012, the Agencies had forced Fannie and Freddie to draw $161 billion from Treasury to make up for the paper losses caused by these accounting decisions, even though there was no indication that the Companies' actual cash expenses could not be met by their cash receipts. The Companies drew $26 billion more to pay dividends to Treasury. Because (i) the Companies were forced to draw funds from Treasury that were not needed to continue operations, (ii) the PSPAs did not permit the Companies to redeem the Government Stock or pay down the liquidation preference, and (iii) the PSPAs tied the Companies' dividend obligations to the size of the outstanding liquidation preference, the dividends owed to Treasury were artificially—and permanently—inflated with each additional draw. *See* A39,

[2] Loan loss reserves reduce reported net worth to reflect anticipated future losses. A37-38 ¶ 83. Deferred tax assets are used to reduce taxable income on future earnings. The book value of a tax asset depends on the likelihood that the corporation will earn sufficient income to use the tax asset. A36-37 ¶ 82.

A77-78 ¶¶ 85, 166.

As a result of these transactions, Treasury's liquidation preference swelled to $189 billion. But based on the Companies' performance in the second quarter of 2012, it was apparent that the Companies' private shares still had value. The Companies were thriving, paying cash dividends on the Government Stock without drawing additional capital from Treasury. *See* A9-A10 ¶ 15. And based on the improving housing market and the high quality of the newer loans backed by the Companies, the Agencies knew the Companies would enjoy stable profitability for the foreseeable future and thus would begin to rebuild significant amounts of capital. A40 ¶¶ 86-87. For example, minutes of a July 2012 Fannie management meeting indicating that the Company was entering a period of "golden years" of earnings were circulated broadly within FHFA, and projections attached to those minutes showed that Fannie expected its cumulative dividend payments to Treasury to exceed its total draws by 2020 and that over $115 billion of Treasury's commitment would remain available after 2022. Similar projections were shared with Treasury less than two weeks before the Net Worth Sweep. A41, A46 ¶¶ 88, 96.

The Agencies also knew that the Companies would soon reverse many of the non-cash accounting losses previously imposed upon them. Indeed, at an August 9, 2012 meeting, just eight days before the Net Worth Sweep was imposed, Fannie's Chief Financial Officer told senior Treasury officials that release of the valuation allowance on Fannie's deferred tax assets would likely occur in mid-2013 and would generate profits in the range of $50 billion—a prediction that proved to be remarkably accurate. *See* A48 ¶ 99. This $50 billion reversal was not included in the projections from the month before. Treasury was keenly interested in the deferred tax assets, which would have catalyzed the Companies' capital rebuilding process; indeed, it had discussions of the deferred tax assets with its financial consultant as early as May 2012, and a key item on Treasury's agenda for the August 9 meeting was how quickly Fannie forecasted releasing its reserves. *See* A44-45, A47 ¶¶ 94, 98.

D. Defendants Impose the Net Worth Sweep, Thereby Expropriating Plaintiffs' Investments in the Companies.

By August 2012, the Agencies fully understood that the Companies were on the precipice of generating huge profits, far in excess of the dividends owed on the Government Stock. *See* A40-49 ¶¶ 86-101. Treasury, moreover, had secretly resolved "to ensure existing common equity holders will not have access to any positive earnings from the [Companies] in the future." A67-68 ¶ 140. Therefore, on August 17, 2012, just days after the Companies announced robust second quarter earnings indicating that they had earned more than enough to pay Treasury's dividends without making a draw from the funding commitment, the Agencies imposed the Net Worth Sweep to ensure, as Treasury put it, that "every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers." A67 ¶ 139. The Net Worth Sweep accomplishes this objective by replacing the prior dividend structure with one that requires Fannie and Freddie to pay Treasury their entire net worth on a quarterly basis, minus a small capital buffer that started at $3 billion and steadily decreases until it reaches $0 in 2018.[3] The Agencies thus nationalized the Companies and expropriated not just their future earnings but also their retained capital, thereby depriving the private shareholders of all of their economic rights.

The government has claimed, both publicly and before the courts, that the Net Worth Sweep was necessary to prevent the Companies from falling into a purported "death spiral" in which the Companies' increasing dividend obligations to Treasury would consume Treasury's remaining funding commitment. *See* A11-12 ¶ 19. But, as explained above, at all times prior to the Net Worth Sweep, the PSPAs permitted the Companies to pay dividends in kind—they were never required to pay cash dividends, let alone to do so by drawing on Treasury's funding commitment.

More important, the government's "death spiral" narrative cannot be squared with internal government documents and testimony obtained through discovery in other litigation. As summarized above, this evidence reveals that the Net Worth Sweep was imposed *after* the Companies had returned to stable profitability, and *just days after* Treasury learned that they were on the verge of reporting tens of billions of dollars in profits that would far exceed their existing dividend obligations. Indeed,

[3] The Net Worth Sweep agreement also suspended operation of the periodic commitment fee, but, as explained above, the fee had consistently been waived and was projected to be a relatively modest amount in any event.

the *same day* that Fannie's Chief Financial Officer told senior Treasury officials that Fannie anticipated making accounting adjustments that would cause it to report an additional $50 billion in profits within the next year, an FHFA official wrote that Treasury was making a "renewed push" to impose the Net Worth Sweep. A11-14 ¶¶ 19-24.

The available evidence thus makes clear that the Net Worth Sweep was adopted not out of concern that the Companies would earn too little, but rather out of concern that the Companies would earn *too much* and complicate the Administration's plans to shackle them in perpetual conservatorship and to prevent their private shareholders from recouping their investment principal, let alone any return on that investment. Indeed, an internal Treasury document finalized the day before the sweep was announced specifically identified the Companies' "improving operating performance" and the "potential for near-term earnings to *exceed* the 10% dividend" as support for the Net Worth Sweep. A50 ¶ 104 (emphasis added). And after the Net Worth Sweep was finalized, a senior White House advisor involved in that process wrote to a Treasury official that "we've closed off [the] possibility that [Fannie and Freddie] ever[ ] go (pretend) private again." A51 ¶ 107 (alterations in original). Edward DeMarco, FHFA's then-Acting Director, likewise testified that he had no intention of allowing the Companies to emerge from conservatorship under what he viewed as flawed charters, disavowing his statutory obligations specified in HERA.

A66 ¶ 138.

As the Agencies expected, the Net Worth Sweep has resulted in massive and unprecedented payments to the government. From the fourth quarter of 2012, the first fiscal quarter subject to the Net Worth Sweep, through the first quarter of 2017, the Companies generated over $214 billion in comprehensive income. But rather than using that income to prudently build capital reserves and prepare to exit conservatorship, the Companies have instead been forced to pay substantially all of it as "dividends" to Treasury—approximately $130 billion more than Treasury would have received under the original PSPAs. *See* FHFA, TABLE 2: DIVIDENDS ON ENTERPRISE DRAWS FROM TREASURY, https://goo.gl/vHl8V0. Altogether, Treasury will soon have recouped over $83 billion *more* than it disbursed to the Companies. Yet, Treasury insists that the outstanding liquidation preference remains firmly fixed at $189 billion and that it has the right to all of the Companies' net worth *in perpetuity*.

E. Plaintiffs Challenge FHFA's and Treasury's Unlawful Actions.

Plaintiffs own shares of Fannie and Freddie stock. A18-19 ¶ 40. On February 10, 2016, Plaintiffs filed suit under the APA, alleging that the Net Worth Sweep and various provisions of the original PSPAs violated FHFA's and Treasury's statutory duties under HERA and that Treasury's decision to impose the Net Worth Sweep was arbitrary and capricious. Plaintiffs' counsel subsequently obtained access to materials produced in related litigation in the Court of Federal Claims and amended the complaint to incorporate evidence documenting the purpose and effect of the Net Worth Sweep. Defendants moved to dismiss the amended complaint, and the district court granted Defendants' motions on March 20, 2017, Doc. 74, SA1.

The district court acknowledged that FHFA could be enjoined if it exceeded its statutory conservatorship authority notwithstanding HERA's provision prohibiting courts from "restrain[ing] or affect[ing] the exercise of powers or functions of [FHFA] as a conservator or a receiver." 12 U.S.C. § 4617(f); *see* SA12. The district court, however, concluded that HERA does not require FHFA to preserve and conserve the Companies' assets when it acts as conservator or prevent FHFA as conservator from winding down the Companies. SA20-22. The district court also ruled that Section 4617(f) bars Plaintiffs' claim that Treasury's actions were arbitrary and capricious and concluded that the Net Worth Sweep did not constitute an impermissible "purchase" of securities by Treasury after its authority to make such purchases had expired. SA22-23. Plaintiffs filed a timely notice of appeal on April 27, 2017, Doc. 76.

SUMMARY OF ARGUMENT

1. Treasury violated HERA by imposing the Net Worth Sweep. After December 31, 2009, HERA confined Treasury's authority to allow only holding, exercising rights received in connection with, or selling its previously acquired investment in the Companies. *See* 12 U.S.C. § 1719(g)(2)(D), (g)(4). After 2009, Treasury lacked

authority to amend the compensation structure of its investment to the detriment of every other shareholder. Indeed, that amendment was so transformative—and the exchange for value so plain—that it can only be regarded as the purchase of a brand-new security expressly prohibited by HERA.

2. HERA's limitation on judicial review does not apply to claims that Treasury acted arbitrarily and capriciously when it contracted with FHFA. While HERA forbids judicial action that would "restrain or affect the exercise" of *FHFA's* conservatorship "powers or functions," 12 U.S.C. § 4617(f), requiring that Treasury comply with *its own* legal obligations—including those imposed by the APA—would not restrain FHFA's exercise of its conservatorship powers. Both the strong presumption in favor of judicial review of the actions of administrative agencies and caselaw interpreting the analogous provision of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") confirm that there is no barrier to judicial review of Plaintiffs' arbitrary and capricious claim against Treasury.

3. HERA also does not bar equitable relief against FHFA when it exceeds its conservatorship powers, and the Net Worth Sweep "affirmatively sabotage[s]" FHFA's statutory charge to preserve and conserve the Companies' assets, place them in a safe and sound condition, and return them to normal business operations. *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1118 n.1 (D.C. Cir. 2017) (Brown, J., dissenting). Consistent with the fiduciary obligations of conservators at common law

and with the FDIC statute upon which HERA was modeled, Congress in HERA required FHFA to seek to "preserve and conserve" the Companies' assets and "rehabilitat[e]" them to a "sound and solvent" condition. 12 U.S.C. § 4617(b)(2)(D), (a)(2). The Net Worth Sweep, however, does the opposite: It depletes the Companies' assets and pushes them to the brink of insolvency every quarter. As Treasury explained when it announced the Net Worth Sweep, it does this precisely so that the Companies *cannot* "rebuild capital, [or] return to the market in their prior form." The Net Worth Sweep thus is irreconcilable with—indeed, it is antithetical to—the duties Congress imposed on FHFA as conservator.

STANDARD OF REVIEW

The district court's decision to grant a motion to dismiss is reviewed de novo. The Court must accept the complaint's factual allegations as true and draw all reasonable inferences in Plaintiffs' favor. *Bonte v. U.S. Bank, NA*, 624 F.3d 461, 463 (7th Cir. 2010).

ARGUMENT

I. Section 4617(f) Does Not Bar Plaintiffs' Claims Against Treasury.

A. Treasury Exceeded Its Authority Under HERA by Acting After Its Authority Expired.

HERA granted Treasury authority "to purchase any obligations and other securities issued by the [Companies]," but provided that this power would expire on December 31, 2009. 12 U.S.C. § 1719(g)(1)(A), (g)(4). Thereafter, HERA limited

Treasury's authority to "hold[ing], exercis[ing] any rights received in connection with, or sell[ing]" the Companies' securities. *Id.* § 1719(g)(2)(D). Despite this narrow range of post-2009 authorized activity, the district court held that the exchange of obligations in the Net Worth Sweep was lawful because it did not constitute a "purchase" of securities. The district court misunderstood both HERA and the Net Worth Sweep.

1. The Net Worth Sweep Constituted a Purchase of New Securities.

Treasury's authority to purchase the Companies' securities expired on December 31, 2009, and the Net Worth Sweep was a "purchase" under that term's ordinary meaning. The Oxford English Dictionary defines "purchase" as "[t]o acquire in exchange for payment in money or an equivalent; to buy," OED ONLINE (purchase, v.), the Uniform Commercial Code defines that term as "any other voluntary transaction creating an interest in property," U.C.C. § 1-201(b)(29), and Black's Law Dictionary defines "purchaser" to mean "one who obtains property for money or *other valuable consideration*," BLACK'S LAW DICTIONARY 1430 (10th ed. 2014) (emphasis added).

The Net Worth Sweep clearly meets these definitions of "purchase." Defendants stated below that the Net Worth Sweep "trad[ed] the Enterprises' annual fixed dividend and periodic commitment fee obligations for the payment of a variable dividend based on net worth." Defendants' Joint Memorandum in Support of Motions to Dismiss at 13 (July 13, 2016), Doc. 39-1. Purchases are not confined to cash. *See SEC v. National Sec., Inc.*, 393 U.S. 453, 467 (1969). The Companies sold Treasury a new obligation—to hand over their net worth each quarter—in exchange for canceling the Companies' fixed-dividend obligations. This 2012 transfer of obligations was a "purchase"—albeit an exceedingly one-sided transaction—to which Treasury lacked authority to agree.

The district court nevertheless held the Net Worth Sweep transaction was not a purchase because Treasury did not increase its funding commitment. SA22. But Defendants' stated rationale for the Net Worth Sweep was that it would *increase Treasury funds available to cover future losses* by preventing the Companies from making draws that would then be immediately paid back to Treasury as dividends. In any event, while an increased funding commitment certainly *suffices* to establish a purchase under Section 1719(g), it is not a *necessary* condition of such a purchase. Treasury could have purchased securities with no funding commitment at all. The touchstone of a purchase is an *exchange of value*. Here, Treasury acquired the Companies' future net assets in exchange for cancellation of its right to a fixed dividend and commitment fee. The transfer of a fixed dividend obligation worth $18.9 billion per year in exchange for the Companies' net worth and future earnings (a transaction that has netted Treasury $130 billion to date) most certainly constitutes a new investment in the Companies—Treasury now essentially owns 100% of the Companies' equity value.

An array of securities laws and Treasury's own IRS regulations recognize that "amendments" such as the Net Worth Sweep that alter a security's most basic terms create a new security and that this transformation constitutes a purchase. For example, Section 10(b) of the Securities Exchange Act of 1934 prohibits fraud "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b). When deciding whether plaintiffs have purchased or sold securities under this provision and Rule 10b-5, courts ask whether there is "such significant change in the nature of the investment or in the investment risks as to amount to a new investment." *Gelles v. TDA Indus., Inc.*, 44 F.3d 102, 104 (2d Cir. 1994). Irrespective of whether an investor subjected to what is in substance a *forced* sale may sue for securities fraud without ever relying on a material misrepresentation, *see Isquith by Isquith v. Caremark Int'l, Inc.*, 136 F.3d 531, 536 (7th Cir. 1998), the fundamental change doctrine reflects the more general principle that securities law refuses to elevate form over substance when determining whether a "purchase" has occurred. Instead, courts look to the "economic reality of [a] transaction," *Keys v. Wolfe*, 709 F.2d 413, 417 (5th Cir. 1983), including the investment's altered risk profile, *see 7547 Corp. v. Parker & Parsley Dev. Partners, LP*, 38 F.3d 211, 229 (5th Cir. 1994); *see National Securities*, 393 U.S. at 467 (taking functional approach to interpretation of "purchase" and concluding that purchase had occurred because challenged action "affected individual shareholders' decisions in a way not at all unlike that involved in a typical cash sale or share exchange").

Wholly apart from the fundamental change doctrine, the SEC has taken a similarly pragmatic approach when deciding what qualifies as a "sale" under Section 303 of the Trust Indenture Act. *See Allied-Carson Corp.*, SEC No-Action Letter, Fed. Sec. L. Rep. ¶ 80,434, 1976 WL 10614, at *2 (Mar. 12, 1976) (advising that an amendment that extends a bond's maturity and increases its interest rate qualifies as a "sale" of a new security). The same is true for the SEC's interpretation of Section 2(3) of the Securities Act. *See* General Counsel, SEC Release No. 33-929, 1936 WL 28873 (July 29, 1936) (explaining that a sale of a security would occur if holders of common stock agreed to forgo a cash dividend in exchange for a dividend in the form of common stock). Courts have interpreted the Public Utility Holding Company Act of 1935 in a similar manner. *SEC v. Associated Gas & Elec. Co.*, 24 F. Supp. 899, 903 (S.D.N.Y. 1938).

Treasury's own tax regulations also recognize that a major change to a security is a purchase. Normally, the IRS taxes assets when sold. To prevent tax evasion, IRS regulations provide that "a significant modification of a debt instrument . . . results in an exchange of the original debt instrument for a modified instrument." 26

C.F.R. § 1.1001-3(b). A modification is "significant" if it alters the security's annual yield by "¼ of one percent" or "5 percent of the annual yield of the unmodified instrument," or if it converts debt into equity. *Id*. § 1.1001-3(e)(1), (2)(ii), (5)(i). In addition, the IRS has ruled that an amendment changing the value of preferred stock to "equal the net worth of [a] corporation" "constitutes, in substance, . . . new preferred stock." Rev. Rul. 56-564, 1956-2 C.B. 216, 1956 WL 10781. When Congress included in HERA a provision that forbids Treasury to "purchase" the Companies' securities after 2009, it must be presumed to have legislated against the backdrop of securities and tax laws that consistently look to the substance of a transaction to determine whether a purchase has occurred.

Under the pragmatic approach consistently taken by courts and regulators in related contexts, the Net Worth Sweep clearly qualifies as a purchase of new securities. The Net Worth Sweep generated $130 billion in dividends in 2013 alone, an increase of over $110 billion. And Treasury's annual yield the first year after the Net Worth Sweep went into effect soared from 10% of the liquidation preference, if the Companies chose to pay in cash, to almost 70% of the preference—many multiples of the IRS's threshold.

The Net Worth Sweep also fundamentally transformed Treasury's fixed-dividend preferred stock into what is effectively unlimited-upside common stock. *See*

26 C.F.R. § 1.1001-3(e)(5)(i) (exchange where "modification . . . results in an instrument or property right that is not debt"). Preferred shares "generally give the holder a claim to a fixed dividend that must be satisfied before any dividend is paid on common shares . . . . In contrast to common shares, preferred shares do not provide an unlimited claim on the corporation's residual earnings." 11 *Fletcher Cyclopedia of the Law of Corporations* § 5283, at 464 (2011 rev. vol.). Under the Net Worth Sweep, by contrast, Treasury takes all of the Companies' net worth—their "residual earnings." Indeed, with the Net Worth Sweep having effectively wiped out the Companies' other shareholders, there is no longer any lower-ranked equity over which Treasury's stock could take "priority." *See Folk on the Delaware General Corporation Law* § 151.04 (2015). Because the Net Worth Sweep in substance changed debt-like preferred stock into common stock, it constituted a purchase of new securities.

2. The Net Worth Sweep Was Not an Exercise of a Right that Treasury Received in Connection with Its Purchase of Government Stock.

After December 31, 2009, HERA limited Treasury to "hold[ing]," "sell[ing]," or "exercis[ing] any rights" it had received in connection with its prior purchases of the Companies' securities. 12 U.S.C. § 1719(g)(2)(D). "[L]ike other federal agencies," Treasury " 'literally has no power to act . . . unless and until Congress confers power upon it.' " *American Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir.

2005) (omission in original) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). The district court erred in concluding that the Net Worth Sweep was an "exercise" of Treasury's "right" to amend the PSPAs. SA22; *see* A100 ("This Agreement may be waived or amended solely by a writing executed by *both* of the parties hereto."). Thus, quite apart from whether the Net Worth Sweep constituted a prohibited "purchase" of securities after 2009, it exceeded Treasury's statutory authority and should be enjoined as contrary to law.

Treasury's purported "right to amend" is not a "right" that it can "exercise." A "right" to act means "[a] legal, equitable, or moral entitlement to do something." *Right*, OED ONLINE, *supra*. Similarly, "exercise"—in the context of contracts—means "[t]o implement the terms of; to execute," as in to "exercise the option to buy the commodities." BLACK'S LAW DICTIONARY, *supra*, at 693. A party has a contractual "right" when it "can initiate legal proceedings that will result in coercing" the other party to act. 1 E. Allen Farnsworth, *Farnsworth on Contracts* § 3.4, at 205 n.3 (3d ed. 2004). Definitionally, a contractual "right" is an entitlement to certain performance from the counter-party, and it is "exercised" through unilateral action that does not require negotiation or mutual assent. By contrast, an arrangement that depends on "mutual consent" is not a right at all. *See United States v. Petty Motor Co.*, 327 U.S. 372, 380 n.9 (1946) (an agreement that depends on the parties' subsequent "mutual consent" "does not add to their rights"); *see also International Union,* *United Auto., Aerospace & Agric. Implementation Workers v. NLRB*, 765 F.2d 175, 183 (D.C. Cir. 1985) ("[I]f an employer is not acting on a claim of right under the contract . . . it may not institute changes . . . without the consent of the union."). Because Treasury could not unilaterally require FHFA to agree to the Net Worth Sweep, Treasury's decision to adopt the Net Worth Sweep was not an "exercise" of a "right."

Indeed, Treasury's so-called "right to amend" is vastly different than the actual rights that Treasury received in the Purchase Agreements. The most significant example is the common-stock warrant, which grants Treasury a unilateral right to purchase up to 79.9% of the Companies' common stock at a nominal price. *See* A27 ¶ 62. Exercising this right does not require negotiation or further mutual assent; Treasury can purchase this common stock simply by informing the Companies of the number of shares it wishes to purchase. Treasury could not adopt the Net Worth Sweep through such a process—it needed FHFA's assent on behalf of the Companies—and thus Treasury did not have a *right* to change the terms of its agreement with FHFA to create the Net Worth Sweep.

B. Section 4617(f) Does Not Bar Plaintiffs' Claims that Treasury Exceeded Its Authority Under HERA and Acted Arbitrarily and Capriciously.

HERA bars equitable relief that would "restrain or affect the exercise of powers or functions of the Agency [i.e., FHFA] as conservator." 12 U.S.C. § 4617(f).

The district court properly held that this provision would not bar equitable relief if Treasury violated HERA, SA14, but erred by holding that it bars Plaintiffs' arbitrary and capricious claim against Treasury. The *Perry Capital* majority went further, concluding that Section 4617(f) even forbids claims that Treasury violated HERA by entering into a contract with FHFA. *Perry Capital*, 848 F.3d at 1097. Both courts misunderstood the scope of Section 4617(f) to the extent they held that it shields Treasury from judicial remedies directed at its own illegal actions.

There is a " 'strong presumption' favoring judicial review of administrative action," *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015), and "clear and convincing evidence" is required "to dislodge the presumption," *Kucana v. Holder*, 558 U.S. 233, 251-52 (2010) (quotation marks omitted). Even though HERA specifically contemplates that both FHFA and Treasury would take action with respect to the Companies, Congress chose to circumscribe judicial review *only as to FHFA*; Section 4617(f) contains no express prohibition on claims against Treasury. *See Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 341 (2005). HERA's "silence" with respect to Treasury cannot be construed as "a denial of authority to an aggrieved person to seek appropriate relief in the federal courts." *See Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56 (1993) (alteration omitted).

Far from the clear and convincing evidence required to displace the presumption in favor of the reviewability of Treasury's actions, HERA's text requires that the Secretary of the Treasury make specified findings and consider certain factors before purchasing the Companies' securities. 12 U.S.C. §§ 1455(*l*)(1)(B)-(C), 1719(g)(1)(B)-(C). HERA also strictly limits what Treasury may do with the Companies' securities after 2009. 12 U.S.C. §§ 1455(*l*)(4), 1719(g)(4). Congress plainly did not intend for these limits on Treasury's investment authority to be meaningless during conservatorship. To the contrary, HERA's legislative history shows that the temporal restrictions on Treasury's investment power were critical to the law's passage. *See Recent Developments in U.S. Financial Markets and Regulatory Responses to Them: Hearing Before the S. Comm. on Banking, Housing and Urban Dev.*, 110th Cong. 5, 11-12 (2008) (statements of Treasury Secretary Henry Paulson) (testifying in response to committee questioning that HERA would give "Treasury an 18-month temporary authority to purchase—only if necessary—equity in either of these two [Companies]" and that this was a "short-term" solution that would expire at "the end of 2009").

Without mentioning the presumption in favor of the reviewability of administrative action, the *Perry Capital* court ruled that Section 4617(f) applies because Treasury's decision to impose the Net Worth Sweep is "integrally and inextricably interwoven with FHFA's conduct as conservator." *Perry Capital*, 848 F.3d at 1097. But the question is whether enjoining Treasury from acting arbitrarily and capriciously and violating HERA would "restrain or affect the exercise" of FHFA's conservatorship "powers or functions," 12 U.S.C. § 4617(f), and unilaterally amending the PSPAs is not among FHFA's "powers or functions." To the contrary, the Net Worth Sweep could have only been imposed with Treasury's consent. Insisting that Treasury comply with *its own* legal obligations under HERA and the APA when deciding whether to consent to a change to the PSPAs no more restrains or affects *FHFA's* conservatorship powers than would Treasury refusing to agree to a modification in the first place.

The more sweeping interpretation of Section 4617(f) advocated by Treasury and embraced by the *Perry Capital* majority is especially anomalous given that it is undisputed that FHFA may be enjoined from exceeding its conservatorship powers under HERA. Surely Congress did not intend for Section 4617(f) to bar claims that Treasury exceeded its authority under HERA when similar claims against the conservator itself may go forward, as even the district court in *Perry Capital* understood. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 222 (D.D.C. 2014) (reasoning that Section 4617(f) bar would not apply when FHFA "signs a contract with another government entity that is acting beyond the scope of its HERA powers"). Notably, under Treasury's reading of the statute, no court could restrain it from openly purchasing new securities issued by the Companies in 2017 even though such purchases would blatantly violate HERA's sunset provision.

The Eighth Circuit's decision in *Dittmer Properties, LP v. FDIC*, 708 F.3d 1011, 1017 (8th Cir. 2013), is not to the contrary. That case concerned claims against a *private* third party—not a federal agency other than the receiver—and thus did not implicate the presumption in favor of judicial review of administrative actions. The claim at issue in *Dittmer*, moreover, turned on the validity of debt held by a bank that was subsequently placed in receivership; the plaintiffs were at bottom attempting to enforce the legal obligations the receiver had inherited from its ward and later transferred to a third party. *See id.* at 1019 (claim "relate[d] to the act or omission of a failed banking institution"). In contrast, Plaintiffs' claims against Treasury seek to enforce Treasury's *own* obligations under HERA and the APA.

Rather than the claims at issue in *Dittmer*, Plaintiffs' claims against Treasury are most similar to the APA claims against the Federal Home Loan Bank Board that the Fifth Circuit said could go forward in *281-300 Joint Venture v. Onion*, 938 F.2d 35, 38 (5th Cir. 1991). In that case, the Bank Board determined that a failed financial institution did not have sufficient assets to pay unsecured creditors. Although the Fifth Circuit ruled that the plaintiff could not collaterally attack the Bank Board's determination by suing the federal conservator for its refusal to pay unsecured creditors, it nevertheless said that the Bank Board's determinations "are subject to review under the Administrative Procedure Act." *Id.*; *see also LNV Corp. v. Outsource Serv.*

Mgmt., LLC, 2014 WL 834977, at *4 (D. Minn. Mar. 4, 2014). Accordingly, Section 4617(f) does not protect Treasury's actions from judicial review.

II. FHFA Exceeded Its Conservatorship Powers by Agreeing to the Net Worth Sweep.

A. Section 4617(f) Does Not Prohibit Claims that FHFA Exceeded Its Statutory Authority as Conservator.

Although HERA forbids equitable relief that would "restrain or affect the exercise" of FHFA's conservatorship "power or functions," 12 U.S.C. § 4617(f), every court to examine this language or the analogous provision of FIRREA has concluded that equitable relief is available when a conservator or receiver exceeds its statutory powers or functions. *See, e.g.*, *Courtney v. Halleran*, 485 F.3d 942, 948 (7th Cir. 2007); *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1087 (D.C. Cir. 2017); *id.* at 1119-20 (Brown, J., dissenting).

Importantly, a federal conservator or receiver "cannot evade judicial scrutiny" under Section 4617(f) or its predecessors "by merely labeling its actions with a conservator stamp." *Leon Cty. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012); *see also County of Sonoma v. FHFA*, 710 F.3d 987, 994 (9th Cir. 2013). Thus, in *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997), the Ninth Circuit allowed claims for equitable relief against the FDIC when it "assert[ed] authority beyond that granted to it as a receiver" and held inapplicable 12 U.S.C. § 1821(j), the provision of FIRREA on which Section 4617(f) was modeled. *See Bank of Manhattan, NA v.*

FDIC, 778 F.3d 1133, 1136-37 (9th Cir. 2015) (reaffirming *Sharpe*). Similarly, in *Coit Independence Joint Venture v. Federal Savings & Loan Insurance Corp.*, the Supreme Court held that the analogous provision in FIRREA's predecessor permitted judicial review where a federal receiver purported to adjudicate a claim the statute did not authorize it to resolve. 489 U.S. 561, 572-79 (1989).

Thus, the central question for purposes of Plaintiffs' claims against FHFA is whether HERA authorized FHFA as conservator to siphon all of the Companies' net assets and future profits to Treasury when both Defendant agencies knew that the Companies were on the verge of reporting the largest profits in their history. HERA did not.

B. The Net Worth Sweep Is Antithetical to FHFA's Statutory Mission as Conservator.

1. FHFA's Conservatorship Mission Is To Preserve and Conserve the Companies' Assets While Operating Them in a Sound and Solvent Manner.

HERA provides 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 carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D). Discussing FHFA's status as the Companies' conservator, this Court has said that "a conservator, like a trustee in a reorganization under Chapter 11 of the Bankruptcy

Code, tries to return the bankrupt party to solvency, rather than liquidating it." *DeKalb Cty. v. FHFA*, 741 F.3d 795, 798 (7th Cir. 2013). Numerous other courts have interpreted materially identical conservatorship provisions in FIRREA the same way. *See, e.g.*, *Elmco Props., Inc. v. Second Nat'l Fed. Sav. Ass'n*, 94 F.3d 914, 922 (4th Cir. 1996) ("[A] conservator's function is to restore the bank's solvency and preserve its assets."); *RTC v. United Tr. Fund, Inc.*, 57 F.3d 1025, 1033 (11th Cir. 1995) ("The conservator's mission is to conserve assets."); *RTC v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1453 (8th Cir. 1992) (conservator's "mission[ ]" is "to take action necessary to restore the failed [financial institution] to a solvent position and 'to carry on the business of the institution and preserve and conserve the assets and property of the institution' ") (quoting 12 U.S.C. § 1821(d)(2)(D)).

FHFA has repeatedly expressed the same understanding of its statutory mission. For example, FHFA has stated that "[t]he purpose of conservatorship is to preserve and conserve each company's assets and property and to put the companies in a sound and solvent condition." A22 ¶ 49; *see also* A22-23 ¶¶ 49-50 (collecting similar additional statements). FHFA's regulations explain that "the essential function of a conservator is to preserve and conserve the institution's assets" and that "[a] conservator's goal is to continue the operations of a regulated entity, rehabilitate it and return it to a safe, sound and solvent condition." Conservatorship and Receivership, 76 Fed. Reg. 35,724, 35,727, 35,730 (June 20, 2011). The FDIC—on whose statutory conservatorship powers the relevant provisions of HERA were modeled—likewise understands that "[a] conservatorship is designed to operate the institution for a period of time in order to return the institution to a sound and solvent operation." FDIC, MANAGING THE CRISIS: THE FDIC AND RTC EXPERIENCE 216 (1998), https://goo.gl/qjIjTh.

This understanding of FHFA's statutory mission is reinforced by Congress's use of the word "conservator," for it is well established that when Congress enacts a statute using "a well-established term," courts presume that it "intended the term to be construed in accordance with pre-existing . . . interpretations." *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). "Conservator" is one such "well-established term," familiar to anyone acquainted with financial regulation. As the Congressional Research Service has explained, "[a] conservator is appointed to operate the institution, conserve its resources, and restore it to viability." DAVID H. CARPENTER & M. MAUREEN MURPHY, CONG. RESEARCH SERV., RL34657, FINANCIAL INSTITUTION INSOLVENCY: FEDERAL AUTHORITY OVER FANNIE MAE, FREDDIE MAC, AND DEPOSITORY INSTITUTIONS 5 (2008), https://goo.gl/mgFwQr.

HERA's use of the word "conservator" thus draws on "the long history of fiduciary conservatorships at common law." *Perry Capital*, 848 F.3d at 1121 (Brown, J., dissenting); *see also CedarMinn*, 956 F.2d at 1453-54. As the *Perry*

Capital dissent explained, "[a]t common law, 'conservators' were appointed to protect the legal interests of those unable to protect themselves," and that mission forbids the conservator "from acting for the benefit of the conservator . . . or a third party." *Perry Capital*, 848 F.3d at 1122 (Brown, J., dissenting); *see also* 12 U.S.C. § 1717(c)(1) (statute creating Fannie Mae discussing "trusts, receiverships, conservatorships, liquidating or other agencies, *or other fiduciary and representative undertakings and activities*" (emphasis added)); *Crites, Inc. v. Prudential Ins. Co. of America*, 322 U.S. 408, 414 (1944) (receiver "was bound to perform his delegated duties with the high degree of care demanded of a trustee or other similar fiduciary"); *Scholes v. Lehmann*, 56 F.3d 750, 755 (7th Cir. 1995) (receiver's "only object is to maximize the value of the corporations for the benefit of their investors and any creditors"); *Federal Sav. & Loan Ins. Corp. v. PSL Realty Co.*, 630 F.2d 515, 521 (7th Cir. 1980) (recognizing that receiver owes "fiduciary duties").

2. FHFA's Pursuit of Its Statutory Mission Is Mandatory.

As Judge Brown correctly explained in her *Perry Capital* dissent, Section 4617(b)(2)(D) "mark[s] the bounds of FHFA's conservator . . . powers," and actions by FHFA that go beyond or conflict with these powers may be enjoined. *Perry Capital*, 848 F.3d at 1118. The district court disagreed, concluding that FHFA's pursuit of a traditional conservator's mission is "discretionary rather than obligatory." SA21. This was error.

a. Like the *Perry Capital* majority, the district court heavily relied on Section 4617(b)(2)(D)'s use of the word "may." SA20-21; *see Perry Capital*, 848 F.3d at 1087-89. But as Judge Brown correctly reasoned, Congress's use of "may" in this provision "is best understood as a simple concession to the practical reality that a conservator may not always succeed in rehabilitating its ward," and it does not leave FHFA as conservator free to "affirmatively sabotage the Companies' recovery." *Id.* at 1118 n.1 (Brown, J., dissenting). In other words, while Congress recognized that FHFA might not *achieve* its conservatorship goals, Section 4617(b)(2)(D) requires that FHFA *pursue* its overarching statutory mission to preserve and conserve the Companies' assets and return them to a sound and solvent condition.

Moreover, the assumption that the word "may" "implies some degree of discretion," can be "defeated by . . . obvious inferences from the structure and purpose of the statute." *United States v. Rodgers*, 461 U.S. 677, 706 (1983). In addition to jettisoning the well-established meaning of the term "conservator," treating Section 4617(b)(2)(D) as optional would lead to the anomalous result that FHFA would be free to decide as conservator whether to place the Companies in a sound condition and rebuild capital even though one of FHFA's "principal duties" as regulator is "to ensure that . . . each regulated entity operates in a safe and sound manner, including maintenance of adequate capital." 12 U.S.C. § 4513(a)(1)(B). Indeed, FHFA is required to place Fannie and Freddie in receivership if they are insolvent for longer than 60 days. 12 U.S.C. § 4617(a)(4)(A). Against the backdrop of these provisions, it makes no sense to interpret HERA to allow FHFA as conservator to dispense with its charge to return Fannie and Freddie to a sound and solvent condition.

The district court's interpretation is also inconsistent with the statutory design, which, like virtually all grants of agency power, constitutes a limited delegation of authority from Congress. That Congress, in describing FHFA's "[p]owers as conservator" in Section 4617(b)(2)(D), spelled out what the conservator "may" do means that FHFA may *not* do anything else. *See New York v. FERC*, 535 U.S. 1, 18 (2002) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) (finding that "Congress has not delegated authority to the agency to act beyond these [enumerated] statutory parameters"); *Halverson v. Slater*, 129 F.3d 180, 184-87 (D.C. Cir. 1997) (language that "Secretary may delegate" authority to specific entity prohibits delegation to another entity). Consistent with this reading of HERA, the Fifth Circuit has explained that under the parallel provision of FIRREA "a conservator *only* has the power to take actions necessary to restore a financially troubled institution to solvency." *McAllister v. RTC*, 201 F.3d 570, 579 (5th Cir. 2000) (emphasis added).

Despite the arguments of FHFA's outside counsel in this case, it is clear that FHFA itself understands pursuit of its statutory mission to be mandatory. Not long after Plaintiffs noticed their appeal, FHFA's Director said in sworn testimony that FHFA's "statutory mandates obligate" it to "[c]onserve and preserve the assets of the Enterprises while they are in conservatorship." Statement of Melvin L. Watt, Director, FHFA, Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (May 11, 2017), https://goo.gl/dUC0oj. A few days later, Director Watt reiterated that his agency has "statutory obligations to operate the [Companies] in a safe and sound manner." Prepared Remarks of Melvin L. Watt, Director, FHFA, at American Mortgage Conference (May 18, 2017), https://goo.gl/tZKnFK. Director Watt's predecessor likewise told Congress that FHFA has a "conservatorship *mandate* to preserve and conserve the [Companies'] assets." Statement of Edward J. DeMarco Before the U.S. Senate Comm. on Banking, Housing and Urban Affairs 3 (Apr. 18, 2013) (emphasis added), https://goo.gl/QI7V44. Indeed, outside of the context of litigation, FHFA has repeatedly and consistently evinced an understanding that Section 4617(b)(2)(D) is mandatory. *See, e.g.*, A22 ¶ 49 ("The statutory role of FHFA as conservator *requires* FHFA to take actions to preserve and conserve the assets of the Enterprises and restore them to safety and soundness." (emphasis added) (quoting FHFA 2009 Annual Report to Congress)); *id.* (referring to the "'preserve and conserve' mandate" (quoting 2012 FHFA Strategic Plan)); 76 Fed. Reg. 35,724, 35,727 (June 20, 2011) ("[T]he Conservator is *charged* with rehabilitating the regulated entity." (emphasis added)); 75 Fed. Reg. 39,462, 39,469 (July 9, 2010) (acknowledging "the Conservator's *mandate* to put the regulated entity in a sound and solvent condition and to preserve and conserve the assets and property of the regulated entity" (emphasis added)); FHFA STRATEGIC PLAN: FISCAL YEARS 2015-2019 at 5, 14 (Nov. 21, 2014), https://goo.gl/MdZ6TB ("FHFA, acting as conservator and regulator, must follow the *mandates* assigned to it by statute . . . . FHFA's authority as both conservator and regulator of the Enterprises is based upon *statutory mandates* enacted by Congress to ensure a liquid, efficient, competitive, and resilient national housing finance market, ensure safe and sound Enterprise operations, as well as to preserve and conserve their assets." (emphasis added)).

Even if the Court agrees with the *Perry Capital* majority that Section 4617(b)(2)(D) places no limits on FHFA's conduct because it uses the word "may," a separate provision of HERA says that "[i]n exercising any right, power, privilege, or authority as conservator . . . in connection with any sale or disposition of assets of a regulated entity . . . , the agency *shall* conduct its operations in a manner which . . . maximizes the net present value return from the sale or disposition of such assets." 12 U.S.C. § 4617(b)(11)(E) (emphasis added). Despite making much of HERA's varying uses of the words "may" and "shall," the *Perry Capital* majority appears to have overlooked this provision. *See Perry Capital*, 848 F.3d at 1088. Before the district court, Defendants strenuously argued that the Net Worth Sweep was justified as a "transfer" of the Companies' "assets" under 12 U.S.C. § 4617(b)(2)(G).

Defendants' Joint Memorandum in Support of Motions to Dismiss at 14-15 (July 13, 2016), Doc. 39-1. With Defendants having thus conceded that the Net Worth Sweep constitutes a "disposition of assets" held by the Companies, judicial review is available to determine whether FHFA complied with its mandatory obligation to "conduct its operations in a manner which . . . maximizes the net present value return" on the Companies' assets. 12 U.S.C. § 4617(b)(11)(E); *see RTC v. Diamond*, 45 F.3d 665, 674 (2d Cir. 1995) ("Congress *required* that RTC conduct its operations in a manner which maximizes the net present value return from the sale or other disposition of thrift assets." (emphasis added) (quotation marks and alterations omitted)); *Arkansas State Bank Comm'r v. RTC*, 911 F.2d 161, 168 (8th Cir. 1990) (FIRREA "commands" that conservator or receiver "maximize the return and minimize the losses on resolving failed thrifts"). For similar reasons, FHFA's giveaway to Treasury cannot be reconciled with HERA's mandate that the conservator "ensure[ ] adequate competition and fair and consistent treatment of offerors" when it disposes of the Companies' assets. 12 U.S.C. § 4617(b)(11)(E)(iii).

b. The district court and the *Perry Capital* majority also relied on FHFA's "[i]ncidental power[ ] . . . as conservator or receiver" to "take *any action authorized by this section*, which the Agency determines is in the best interests of the regulated entity or the Agency." 12 U.S.C. § 4617(b)(2)(J) (emphasis added); SA20; *see Perry Capital*, 848 F.3d at 1089, 1094. But as the italicized language makes clear, this incidental power is limited to actions otherwise authorized by HERA and thus may not be exercised in a manner that is at odds with FHFA's core conservatorship mission to preserve and conserve the Companies' assets.

This interpretation is reinforced by the fact that the incidental power is expressly granted to FHFA "*as conservator or receiver*"—terms that have a well-established common law meaning. Supreme Court precedent "requires *an affirmative act by Congress* . . . to authorize departure from a common law definition," *Perry Capital*, 848 F.3d at 1123 (Brown, J., dissenting) (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *see also, e.g.*, *Universal Health Servs. v. United States*, 136 S. Ct. 1989, 1999 (2016); *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013), and Congress's conferral of authority that is "incidental" to others specifically enumerated does not come close to satisfying that requirement, *cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819) ("[A] great substantive and independent power . . . cannot be implied as incidental to other powers, or used as a means of executing them.").[4] Thus, while the incidental powers provision may allow FHFA

[4] For similar reasons, FHFA's pursuit of its conservatorship mission is not optional because it is empowered to "[o]perate" the Companies, and to "carry on" and "conduct" their business. 12 U.S.C. §§ 4617(b)(2)(B), (b)(2)(J). These statutory powers are given to FHFA "as conservator," and therefore must be exercised in a manner consistent with the core conservatorship mission provided in Section 4617(b)(2)(D). *See FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1057-58 (N.D. Ill. 2013) ("As conservator, FHFA has broad powers to operate Fannie and Freddie and do what it sees fit to '*preserve and conserve [their] assets.*' ") (emphasis added)

to consider its own interests *as conservator* when deciding what actions to take, it does not allow FHFA to abandon its conservatorship mission in pursuit of other, unrelated interests it may have, such as its Director's desire to harness the Companies' substantial earnings and assets to reduce the federal deficit.

In all events, there is nothing in the Complaint to support the conclusion that FHFA ever "determine[d]" that the Net Worth Sweep was "in the best interests of the [Companies] or the Agency." 12 U.S.C. § 4617(b)(2)(J)(ii). To the contrary, the Net Worth Sweep was adopted to promote the interests of Treasury—not those of the Companies or FHFA as conservator. *See* A54-55, A62-63, A68 ¶¶ 116, 129, 141. When FHFA agreed to the Net Worth Sweep, it fully understood that doing so would needlessly and permanently dissipate the Companies' assets, thus forever placing the Companies in an unsound condition and making it impossible for FHFA to achieve its conservatorship mission. A40-49 ¶¶ 86-101. Indeed, FHFA's Director has described the Companies' lack of capital due to the Net Worth Sweep as a "serious risk" because it leaves the Companies with "no ability to weather quarterly losses." A54-55 ¶ 116. More recently, Director Watt testified that "[l]ike any business, the Enterprises need some kind of buffer to shield against short-term operating

(quoting 12 U.S.C. § 4617(c)(2), (b)(2)(D)(ii)); *cf. Leon County*, 700 F.3d at 1278-79; *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 100 (D. Mass. 2014).

losses" and highlighted that the lack of any capital buffer "is especially irresponsible" because it "could erode investor confidence . . . stifle liquidity in the mortgage-backed securities market and could increase the cost of mortgage credit for borrowers." Statement of Melvin L. Watt, https://goo.gl/dUC0oj. This is a stark acknowledgement of the deleterious nature of the Net Worth Sweep. Contrary to the *Perry Capital* majority's assumption, FHFA's "interests" as conservator do not include giving away the Companies' assets or otherwise abandoning its statutory mission.

c. Troublingly, the *Perry Capital* majority's sweeping conclusion that a traditional conservator's "mandates do not exist" in HERA—and that FHFA may effectively do with the Companies whatever it wants—raises grave doubts about Section 4617's constitutionality under the nondelegation doctrine. SA20. Virtually every provision in HERA that discusses the conservator's responsibilities begins with the word "may," and if that word makes everything that follows optional, there is nothing left in the statute instructing FHFA as to how it should exercise its discretion as conservator. A statute that provides "literally no guidance for the exercise of discretion" is unconstitutional, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 474 (2001), and the *Perry Capital* majority's interpretation causes HERA to run afoul of that important principle.

The Supreme Court has repeatedly adopted "narrow constructions to statutory delegations that might otherwise" violate the nondelegation doctrine. *Mistretta v.*

United States, 488 U.S. 361, 373 n.7 (1989). In *Fahey v. Mallonee*, 332 U.S. 245, 250-53 (1947), for example, a statute did not specify the criteria a bank regulator should use when deciding whether to place banks into conservatorship. In rejecting a nondelegation challenge to this statutory scheme, the *Fahey* Court interpreted the statute as implicitly adopting the "many precedents [that] have crystallized into well-known and generally acceptable standards" for the appointment of conservators. *Id.* at 250. While *Fahey* read background principles of conservatorship *into* a statute to *avoid* a nondelegation problem, the district court did the opposite—reading the word "may" to nullify the mission actually specified in the statute and thus leaving the conservator with no guidance from Congress as to how it should exercise its powers. This constitutional flaw in the statute as interpreted by the district court and the *Perry Capital* majority is made even more problematic by Section 4617(f)'s restriction on judicial review. *See United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1994) (observing that the availability of judicial review "is a factor weighing in favor of upholding a statute against a nondelegation challenge"). The Court should avoid these constitutional problems by declining to follow the *Perry Capital* majority's decision to "erase[ ] any outer limit to FHFA's statutory powers." *Perry Capital*, 848 F.3d at 1123 (Brown, J., dissenting).

3. The Net Worth Sweep Guarantees that FHFA Cannot Achieve Its Statutory Mission as Conservator.

Rather than "conserving and preserving" the Companies' assets, the Net Worth Sweep has caused the Companies to turn over the entire net value of those assets to a single shareholder—Treasury—every quarter. And rather than placing the Companies in a "sound and solvent condition," the Net Worth Sweep has needlessly forced the Companies to operate on the brink of insolvency by preventing them from retaining capital. The Net Worth Sweep thus constitutes a wholesale and permanent *abandonment* of FHFA's core conservatorship mission.

It is beyond cavil that the Net Worth Sweep depletes the Companies' capital, a consequence that FHFA's regulations rightly declare "inconsistent with [its] statutory goals." 76 Fed. Reg. at 35,727. Rather than allow the Companies to retain and build up their capital, the Net Worth Sweep siphons off every dollar belonging to the Companies into Treasury's coffers, precluding them from strengthening along with the improving housing market. Indeed, Treasury made clear in publicly announcing the Net Worth Sweep that its purpose was to prevent the Companies from "retain[ing] profits" or "rebuild[ing] capital." A67 ¶ 139. The Net Worth Sweep is thus antithetical to FHFA's mission to "preserve and conserve the assets and property" of the Companies. 12 U.S.C. § 4617(b)(2)(D)(ii).

This permanent dissipation of capital also violates FHFA's obligation to seek to "put the [Companies] in a sound and solvent condition." *Id.* § 4617(b)(2)(D)(i).

As FHFA has acknowledged, capital reserves are a critical aspect of soundness and solvency. *See* A56 ¶ 118. Capital is the standard by which "soundness" is measured by federal regulators of all financial institutions. Such reserves serve as a buffer against the inevitable vicissitudes of the economic cycle that affect all financial institutions. Institutions with sufficient capital are deemed safe, and those without are deemed unsound.

Further exacerbating this dissipation of the Companies' capital, the Net Worth Sweep has also caused the Companies to needlessly incur tens of billions of dollars in additional debt to finance dividends to Treasury. Because many of the Companies' assets are valued based on assumptions about future financial performance or fluctuating market prices, increases in the Companies' net worth do not necessarily reflect increased cash on hand. Recognizing deferred tax assets, for example, is an accounting decision that does not generate any cash. A cash dividend based solely on net worth may thus require financing through new borrowing. Indeed, the Companies incurred substantial additional debt in 2013 in order to pay cash dividends to Treasury under the Net Worth Sweep. *See* A71 ¶¶ 147-48. Ordering the Companies to weaken their financial position by paying debt-financed dividends when they are in conservatorship is financially reckless and at war with FHFA's conservatorship mission. Private management of an undercapitalized financial institution would never be allowed to borrow tens of billions of dollars to pay a discretionary dividend.

The *Perry Capital* majority discounted these points by characterizing the Net Worth Sweep as "ensuring ongoing access to vital yet hard-to-come-by capital" by ending the circular practice of borrowing money from Treasury to pay dividends. *Perry Capital*, 848 F.3d at 1088. That erroneous defense of the Net Worth Sweep contradicts the allegations in the Complaint in this case. But for the Net Worth Sweep, the Companies would today have approximately $130 billion in capital that they have instead turned over to Treasury. *See* FHFA, TABLE 2: DIVIDENDS ON ENTERPRISE DRAWS FROM TREASURY, https://goo.gl/vHl8V0. The Defendants were fully aware that the Net Worth Sweep would have this effect on the Companies' finances. A40-49 ¶¶ 86-101. Without the $130 billion in capital the Companies have transferred to Treasury due to the Net Worth Sweep, they are *more*, not less, likely to need to draw on Treasury's commitment in the future. This is perverse. Moreover, the original terms of Treasury's stock posed no threat to the funding commitment because the Companies always had the ability to pay Treasury's dividends in kind, and doing so would not have reduced the funding commitment. *See* A28-31 ¶¶ 65-71.

Neither is the Net Worth Sweep consistent with FHFA's conservatorship mission because the Companies "have returned to profitability." SA21. The statute does not require conservators to establish "profitability," but to take necessary action to "preserve and conserve" assets and "put the [Companies] in a sound and solvent condition." 12 U.S.C. § 4617(b)(2)(D). Even if the Companies remain profitable, FHFA's decision to sweep those profits—and any additional net worth—to Treasury nullifies any benefit to the Companies of their renewed profitability, contrary to FHFA's statutory mission.

The district court likewise erred in concluding that, despite the Net Worth Sweep, "Treasury's funding commitment guarantees that Fannie and Freddie will remain solvent." SA21. Treasury's funding commitment does not qualify as "core capital" under HERA, *see* 12 U.S.C. § 4502(7), and the PSPAs reiterate that the remaining amount of Treasury's commitment cannot be counted among the Companies' assets, *see* PSPA, A90 ("total assets" defined to "exclud[e] the Commitment and any unfunded amounts thereof"). Consistent with this understanding, FHFA itself has acknowledged that "[t]he Enterprises are effectively balance-sheet insolvent, a textbook illustration of financial instability." Defs.' Mot. to Dismiss at 19, *Samuels v. FHFA*, No. 1:13-cv-22399 (S.D. Fla. Dec. 6, 2013), ECF No. 38. And even if that were not so, trading all of the Companies' comprehensive income in perpetuity for essentially nothing would still be antithetical to FHFA's mission to "preserve and conserve" their assets.

C. The Net Worth Sweep Impermissibly Seeks To Wind Down the Companies During Conservatorship.

The avowed purpose and indisputable effect of the Net Worth Sweep is to "expedite the wind down of Fannie Mae and Freddie Mac" and to ensure that these two companies "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." A67 ¶ 139 (quoting Treasury Net Worth Sweep Press Release). As Acting FHFA Director DeMarco explained shortly after the Net Worth Sweep went into effect, it "reinforce[s] the notion that the [Companies] will not be building capital as a potential step to regaining their former corporate status." A68 ¶ 142.

FHFA exceeded its conservatorship powers by taking this step toward the Companies' wind down without first placing them into receivership, for "only receivers have the power to liquidate a failed [financial institution]." *McAllister*, 201 F.3d at 578; *see DeKalb County*, 741 F.3d at 798 ("A conservatorship is like a receivership, except that a conservator . . . tries to return [its ward] to solvency, rather than liquidating it."); *Perry Capital*, 848 F.3d at 1119, 1123 (Brown, J., dissenting).[5] FHFA thus impermissibly abandoned its conservatorship duty to "rehabilitate" the Companies. *See* 76 Fed. Reg. at 35,727, 35,730; *see also* A67-68 ¶ 140 (quoting Treasury document acknowledging that "the path laid out under HERA" is for the

[5] *See also, e.g.*, *Del E. Webb McQueen Dev. Corp. v. RTC*, 69 F.3d 355, 361 (9th Cir. 1995) (a conservator "operates an institution with the hope that it might someday be rehabilitated," while a receiver "liquidates an institution and distributes its proceeds to creditors."); *RTC v. United Trust Fund, Inc.*, 57 F.3d 1025, 1033 (11th Cir. 1995) ("The conservator's mission is to conserve assets which often involves continuing an ongoing business" while "[t]he receiver's mission is to shut a business down and sell off its assets."); *CedarMinn*, 956 F.2d at 1454 (emphasizing the "distinction in the roles between conservator and receiver" under FIRREA and explaining that a conservator is required to "conduct an institution as an ongoing business").

Companies to "becom[e] adequately capitalized" and "exit conservatorship as private companies").

The district court and the *Perry Capital* majority rejected this argument, reasoning that there is no "rigid boundary between the conservator and receiver roles." *Perry Capital*, 848 F.3d at 1091; *see* SA22 ("FHFA can operate the companies as a conservator in anticipation of moving onto receivership."). But "[t]here is no such thing as a hybrid conservator-receiver capable of governing the Companies in any manner it chooses up to the very moment of liquidation." *Perry Capital*, 848 F.3d at 1119 (Brown, J., dissenting). Other courts interpreting materially identical provisions of FIRREA have "refuse[d] to adopt such a cavalier attitude about the distinction in roles between the conservator and receiver" and emphasized "the care Congress took to delineate those duties, rights, and powers the Corporation could pursue only in its capacity as receiver, or only in its capacity as conservator, but not both," *CedarMinn*, 956 F.2d at 1452, 1454; *see McAllister*, 201 F.3d at 579. In HERA, Congress authorized FHFA to act "as conservator *or* receiver," 12 U.S.C. § 4617(a) (emphasis added); whichever choice FHFA made had corresponding limits and obligations imposed by Congress.

By allowing FHFA to wind down the Companies and distribute their assets to a favored stakeholder during conservatorship, the district court's contrary reading of HERA provides a mechanism by which FHFA could effect an end run around the statute's carefully delineated procedures for resolving claims against the Companies during liquidation. *See* 12 U.S.C. § 4617(b)(3)-(9), (c). For example, by winding down the Companies during conservatorship, FHFA could transfer the Companies' assets to shareholders or subordinated debtholders before paying general creditors, in direct contravention of 12 U.S.C. § 4617(c)(1). Congress plainly did not intend such a result, and at least before the Net Worth Sweep financial markets had no reason to expect it. Notably, the Supreme Court recently rejected a similar attempt to evade the statutory order of priorities in the bankruptcy context. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017) (explaining that "we would expect to see some affirmative indication of intent" if Congress meant to authorize "a backdoor means" of altering statutory order of priorities).

The procedures FHFA must follow when winding up the Companies during receivership ensure that the receiver "fairly adjudicat[es] claims against failed financial institutions," *Whatley v. RTC*, 32 F.3d 905, 909-10 (5th Cir. 1994), and may well be constitutionally required to afford due process, *see Campbell v. FDIC*, 676 F.3d 615, 619-20 (7th Cir. 2012); *Freeman v. FDIC*, 56 F.3d 1394, 1403 n.2 (D.C. Cir. 1995); *Greater Slidell Auto Auction, Inc. v. American Bank & Tr. Co. of Baton Rouge*, 32 F.3d 939, 942 (5th Cir. 1994); *Elmco Props., Inc. v. Second Nat'l Fed. Sav. Ass'n*, 94 F.3d 914, 922 (4th Cir. 1996). Congress did not authorize FHFA to wind down the Companies during conservatorship and thereby evade the procedures the statute otherwise requires FHFA to follow during liquidation. To the contrary, Congress's failure to specify wind down procedures or an order of priorities for the distribution of assets during conservatorship reflects its understanding that as conservator FHFA's mission is to preserve and conserve the Companies' assets rather than to wind them down. *Cf.* 76 Fed. Reg. at 35,724 ("As one of the primary objectives of conservatorship of a regulated entity would be restoring that regulated entity to a sound and solvent condition, allowing capital distributions to deplete the entity's conservatorship assets would be inconsistent with the agency's statutory goals, as they would result in removing capital at a time when the Conservator is charged with rehabilitating the regulated entity.").

To be sure, Section 4617(a)(2) states that FHFA may "be appointed conservator *or* receiver for the purpose of *reorganizing*, *rehabilitating*, or *winding up* the affairs of a [regulated entity]." But this provision cannot plausibly be read to suggest that all of the powers it articulates belong to both conservators and receivers. After all, "the words of a statute must be read in their context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). HERA, caselaw, commentators, and dictionaries all use "liquidation" and "wind up" synonymously.[6] Liquidation is exclusively the province of a receiver, as both HERA's text and FHFA's regulations

[6] For example, HERA imposes specific requirements on FHFA when it initiates "the *liquidation* or *winding up* of the [Companies'] affairs." 12 U.S.C.

provide. *See* 12 U.S.C. § 4617(b)(2)(E); 12 C.F.R. § 1237.3(b). And given that liquidating the Companies is beyond FHFA's powers as conservator, it follows that "winding [them] up" also exceeds these powers.

Further, if FHFA as conservator has all three powers listed in Section 4617(a)(2)—"reorganizing, rehabilitating, [and] winding up"—it follows that FHFA as receiver must have them all as well. But that cannot be, as even FHFA explains that as receiver it "shall place the [Companies] in liquidation," leaving no room to rehabilitate them. 12 C.F.R. § 1237.3(b) (quoting 12 U.S.C. § 4617(b)(2)(E)). Section 4617(a)(2) is thus best read as a general, introductory provision that summarizes the authorities collectively granted to FHFA as conservator and receiver, while the following provisions of the statute specify which authorities FHFA may exercise in each particular capacity. HERA's structure further supports this interpretation. *See* 12 U.S.C. § 4617(b) ("Powers and duties of the Agency as conservator or receiver"); *id.* § 4617(b)(2)(D) ("Powers as conservator"); *id.*

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§ 4617(b)(3)(B) (emphasis added). Caselaw holds that the purpose of a receivership is "to expeditiously 'wind up the affairs of failed banks.' " *Freeman*, 56 F.3d at 1401 (quoting *Local 2 v. FDIC*, 962 F.2d 63, 64 (D.C. Cir. 1992)). Treatises explain that receivers "liquidate the institution and wind up its affairs." Donald Resseguie, *Banks & Thrifts: Government Enforcement & Receivership* § 11.01 (2013). Dictionaries define "liquidation" and "winding up" virtually synonymously. *Compare* BLACK'S LAW DICTIONARY, *supra*, at 1738 (winding up: "The process of settling accounts and liquidating assets in anticipation of a partnership's or a corporation's dissolution."), *with* OED ONLINE (Dec. 2013) (liquidation, n.: "The action or process of winding up the affairs of a company").

§ 4617(b)(2)(E) (“Additional powers as receiver”).

D. The Complaint Sufficiently Alleges that FHFA Unlawfully Subjected Itself to Treasury’s Direction.

To ensure that FHFA would exercise its best *independent* judgment in protecting the interests of *all* creditors and shareholders of the Companies, Congress mandated that FHFA as conservator “shall not be subject to the direction or supervision of any other agency of the United States.” 12 U.S.C. § 4617(a)(7); *see FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1059-60 (N.D. Ill. 2013) (“Once placed in conservatorship, Congress intended for FHFA to be the sole entity responsible for operating Fannie’s and Freddie’s nationwide business of purchasing and securitizing mortgages.”). By its plain terms, Section 4617(a)(7) forbids FHFA to subject itself to the direction or supervision of Treasury—whether voluntarily or otherwise. The Complaint alleges that FHFA violated this prohibition by: (1) agreeing to terms of the original PSPAs that give Treasury the power to veto important decisions that are the exclusive province of FHFA during conservatorship; and (2) assenting to the Net Worth Sweep at Treasury’s direction. The district court erred in rejecting both of these claims.

The district court characterized the PSPAs as merely giving Treasury “a say in decisions that would impact Treasury’s investment” and concluded that these provisions “were contemplated by [HERA] itself,” which authorizes Treasury to purchase the Companies’ securities “ ‘on such terms and conditions as the Secretary [of

Treasury] may determine.' " SA19-20 (quoting 12 U.S.C. §§ 1455(*l*)(1)(A), 1719(g)(1)(A)). But the PSPAs go far beyond the covenants normally included in preferred stock or bond contracts by giving Treasury an absolute *veto* over decisions by FHFA to return the Companies to private control, sell assets outside the ordinary course of business, declare dividends to shareholders other than Treasury, and issue new equity. *See* A32-34 ¶ 74. These are among the most significant business decisions a corporation's management must make, and Treasury's veto power gives it far greater control over the Companies than an ordinary preferred stock investor. HERA does not contemplate that *common* shareholders will control the Companies' management during conservatorship—much less that Treasury will be able to use highly unusual terms in a *preferred* stock agreement to effectively strip FHFA of its independence. *See* 12 U.S.C. § 4617(b)(2)(A) (providing that FHFA, "shall, as conservator . . . immediately succeed to . . . all rights, titles, powers, and privileges of . . . any stockholder").

The district court also erred in concluding that the Complaint does not allege sufficient facts to support Plaintiffs' claim that FHFA impermissibly assented to the Net Worth Sweep at Treasury's direction. *See* SA18. The Complaint alleges that "FHFA agreed to the Net Worth Sweep only at the insistence and under the direction and supervision of Treasury," "subject[ed] itself to Treasury's will," and did not obtain for the Companies "any meaningful consideration." A58, A64, A77 ¶¶ 120, 133,

163. Specific facts support these allegations. Treasury has exerted significant influence over FHFA throughout the conservatorships, A64-65 ¶¶ 134-35, and a White House official closely involved in the development of the Net Worth Sweep explicitly acknowledged that the Net Worth Sweep was imposed through "a Treasury-driven process," A64 ¶ 133.[7] Furthermore, the Net Worth Sweep transfers to Treasury, in perpetuity, every penny that the Companies earn while leaving the principal of the Companies' obligation to Treasury untouched. A74 ¶ 155. It was entered into almost immediately after the Companies announced their return to substantial profitability, A11-12, A49-50 ¶¶ 19, 102-03, was adopted with specific knowledge that it would result in massive profits for Treasury, A41-49 ¶¶ 89-101, and provides the Companies with no relief from their obligation to pay cash dividends that they did not already enjoy, A53 ¶ 113. FHFA would no doubt have understood all this had it exercised its independent judgment, for it was clear that recognition of deferred tax assets, release of loan loss reserves, and monetary recoveries from legal settlements with big banks would soon make enormous contributions to the Companies' net

[7] Various allegations corroborate this concession that Treasury was the driving force behind the Net Worth Sweep: it was entered into against the backdrop of the Administration's previously undisclosed policy decision to exclude the Companies' private shareholders from any access to the Companies' positive earnings, Treasury trumpeted the Net Worth Sweep as making sure that "every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers," and the White House hailed the Net Worth Sweep as achieving the Administration's policy objectives. A50-52 ¶¶ 105-08, 110 (quotation marks omitted).

worth. A41-49 ¶¶ 89-101. And that is to say nothing of the real and substantial profits the Companies had resumed earning from their core business of guaranteeing and securitizing mortgages as the housing market recovered. A40-41 ¶¶ 86-88. Only a conservator that has surrendered its independent judgment could agree to forfeit so much for so little under such circumstances.

III. The Net Worth Sweep Is a Radical Departure from the Past Practices of Federal Conservators and Receivers that Threatens To Reduce Financial Institutions' Access to Capital in Future Crises.

Finally, the history of federal conservatorships and receiverships provides important insight into how 12 U.S.C. § 4617 and the materially identical provisions of FIRREA that govern bank conservatorships and receiverships should be interpreted. Federal conservators and receivers have benefited from limitations on judicial remedies that would "restrain or affect" their actions since 1966, Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, 80 Stat. 1028, 1033, and there have been hundreds of federal conservatorships and receiverships since FIRREA became law in 1989. Yet in all this time, throughout multiple periods of weakness for the Nation's economy including the 2008 financial crisis, to Plaintiffs' knowledge there has *never* been another instance in which a conservator or receiver expropriated its ward's retained capital and future profits for the exclusive benefit of the federal government.

In view of that history, Congress had no reason to believe that HERA would be interpreted to authorize the radical departure from past practice that the Net Worth Sweep represents. Very much to the contrary, it is apparent that Congress specifically chose to model HERA on FIRREA because it wanted to reassure financial markets that any conservatorship or receivership for the Companies would follow the familiar approach used with other financial institutions in past crises. *See Perry Capital*, 848 F.3d at 1128 (Brown, J., dissenting) ("A rational investor contemplating the terms of HERA would not conclude Congress had changed these prevailing norms."); *see also Golden Pac. Bancorp v. FDIC*, 375 F.3d 196, 201 (2d Cir. 2004) ("It is undisputed that, as a receiver, the FDIC owes a fiduciary duty to the [b]ank's creditors and to [the bank's holding company]."); FDIC, THE FIRST FIFTY YEARS: A HISTORY OF THE FDIC 1933-1983 85 (1984), https://goo.gl/HNhTd3 ("When appointed receiver, the FDIC assumes a fiduciary obligation to all creditors of the receivership and stockholders of the bank, with the responsibility to maximize the amounts recovered for them in as timely a manner as possible.").

The long history of federal conservators and receivers acting as fiduciaries also shows that, even during financial crises, regulators do not need the type of power Defendants purport to have exercised in this case. Hundreds of financial institutions have been placed into conservatorship or receivership since 1989, yet only in the case of Fannie and Freddie did a conservator or receiver deem it necessary to nationalize the entities under its control. And this nationalization occurred in 2012—after the financial crisis was over and just as the Companies were about to report the largest comprehensive income in their history—not during the uncertain days of 2008. Tellingly, when the Companies were forced into conservatorship at the height of the financial crisis in September 2008, regulators sought to reassure markets by reiterating the traditional understanding of conservatorship: the Companies' stock would "continue to trade," "shareholders are still in place," and "going forward there may be some value" in the privately-owned stock. A24 ¶ 53 (brackets omitted).

If the Defendants ultimately prevail in this and other litigation, the Net Worth Sweep will become a watershed event for the Nation's regulation of distressed financial institutions. Prior to the Net Worth Sweep, investors provided distress capital on the understanding that a financial institution would be managed with a view to the interests of stakeholders if conservatorship or receivership became necessary. *See Perry Capital*, 848 F.3d at 1127 (Brown, J., dissenting) ("For decades, investors relied on the common law's conservator/receiver distinction, maintained by the FDIC and enforced by courts, to evaluate their investments and guide judicial review."); *see also id.* ("FHFA's actions in implementing the Net Worth Sweep 'bear no resemblance to actions taken in conservatorships or receiverships overseen by the FDIC' " (quoting Amicus Br. for Independent Community Bankers of America and Former FDIC Officials at 6, *Perry Capital v. Lew*, No. 14-5243 (D.C. Cir. July 6, 2015))). The Companies themselves were able to raise $22 billion in new equity capital in 2007 and the first half of 2008 based on this common understanding. *See* TARA RICE & JONATHAN ROSE, BD. OF GOVERNORS OF THE FED. RESERVE SYS. INT'L FIN. DISCUSSION PAPERS, WHEN GOOD INVESTMENTS GO BAD: THE CONTRACTION IN COMMUNITY BANK LENDING AFTER THE 2008 GSE TAKEOVER 5-6 (2012), https://goo.gl/R8nHhR.

Any interpretation of HERA this Court adopts will apply with equal force to the provisions of FIRREA that govern bank conservatorships and receiverships. If federal conservators are held to have the unchecked power to nationalize their wards, no matter how profitable, it will be much more difficult for banks and other financial institutions to raise capital during future periods of economic instability. The cost of capital for troubled financial institutions will rise, financial regulators' work will become more difficult, and the number of bank failures will increase. While the Net Worth Sweep has so far been immensely profitable for the federal government—reducing the federal deficit by $130 billion thanks to excess "dividend" payments—regulators may live to regret the precedent Defendants ask this Court to establish.

CONCLUSION

This Court should reverse the district court's judgment.

Date: June 6, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief complies with the type-volume limitation of Seventh Circuit Rule 32(c) because this brief contains 14,000 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

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 using the 2016 version of Microsoft Word in 14-point Times New Roman font.

/s/ Charles J. Cooper
Charles J. Cooper

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

Pursuant to Circuit Rule 30(d), I certify that the material required by Circuit Rule 30(a) is included in the required short appendix. I further certify that all material required by Circuit Rule 30(b) is included in the separate Appendix of Plaintiffs-Appellants.

/s/ Charles J. Cooper
Charles J. Cooper

REQUIRED SHORT APPENDIX

SHORT APPENDIX TABLE OF CONTENTS

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

Christopher M. Roberts and Thomas P. Fischer,	)	
	)	No. 16 C 02107
Plaintiffs,	)	
v.	)	Judge Edmond E. Chang
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; The Department of the Treasury; and Steven T. Mnuchin[1], in his official capacity as Secretary of the Treasury,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Christopher Roberts and Thomas Fischer are shareholders of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). *See* R. 22, Am. Compl. ¶ 40.[2] Fannie Mae and Freddie Mac—both central figures in the United States' residential mortgage market—have been in conservatorship since the economic downturn of 2008; the Federal Housing Finance Agency (FHFA for short) is their conservator. *See id.* ¶¶ 38, 52.

[1]The current Secretary of the Treasury, Steven T. Mnuchin, is substituted for the former Secretary of the Treasury, Jacob J. Lew. *See* Fed. R. Civ. P. 25(d).

[2]Citations to the record are noted as "R." followed by the docket number and, if necessary, the page or paragraph number.

This case arises from FHFA's involvement, as the companies' conservator, with the Treasury Department. In 2008, FHFA entered into stock purchase agreements with Treasury on Fannie's and Freddie's behalf. Am. Compl. ¶ 56. Under these agreements, Treasury made hundreds of billions of dollars in capital available to the companies in exchange for shares of their preferred stock, which had a variable liquidation preference. *See id.* ¶¶ 56, 58, 61-62. The agreements obligated both Fannie and Freddie to pay Treasury a quarterly dividend equal to a fixed percentage of Treasury's liquidation preference. *Id.* ¶ 65. FHFA and Treasury later modified this dividend formula—in the Third Amendment to the stock purchase agreements—to require Fannie and Freddie to pay the quarterly dividend in an amount roughly equal to their net worth. *See id.* ¶ 113.

The Plaintiffs filed this lawsuit against FHFA and the Treasury Department,[3] principally alleging that, by adopting the new dividend formula in the Third Amendment, FHFA and Treasury had exceeded their statutory authority under the Housing and Economic Recovery Act of 2008 (for convenience's sake, the Recovery Act), Pub. L. No. 110-289, 122 Stat. 2654 (codified, as relevant here, in various sections of Title 12 of the United States Code), and Treasury had acted arbitrarily and capriciously, all in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C)-(D). *See* Am. Compl. ¶¶ 169, 179, 191. The Defendants now move to dismiss the Plaintiffs' amended complaint, arguing (among other things) that a statutory provision in the Recovery Act bars the relief sought in this case. *See*

[3]The complaint also names the heads of FHFA and the Treasury Department in their official capacities, which is no different than suing the agencies themselves.

R. 39, Joint Mot. to Dismiss. For the reasons stated below, the Defendants' motion is granted and the case is dismissed with prejudice.

I. Background[4]

A. Fannie Mae and Freddie Mac

Fannie Mae and Freddie Mac are government-sponsored enterprises born from statutory charters issued by Congress. *See* 12 U.S.C. §§ 1716-1723 (Fannie Mae); *id.* §§ 1451-1459 (Freddie Mac); Am. Compl. ¶ 39. Congress created the companies to, among other things, "provide stability in the secondary market for residential mortgages" and "promote access to mortgage credit throughout the Nation … by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing." 12 U.S.C. § 1716(1), (3). Today, Fannie and Freddie are for-profit, stockholder-owned

[4]The Defendants have asked the Court to consider two categories of documents that were not attached to the Plaintiffs' amended complaint: (1) documents incorporated in the amended complaint by reference and (2) Securities and Exchange Commission filings. *See* R. 39-1, Joint Defs.' Br. at 10 n.1; R. 40, Treasury Defs.' Br. at 10 n.2. As a general matter, a court may not consider documents other than the complaint and documents attached to the complaint when deciding a motion to dismiss. *See* Fed. R. Civ. P. 12(d). There is, however, an exception for documents that have been referred to in a complaint, if they are central to the plaintiff's claims. *See Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 661 (7th Cir. 2002). A district court may also "take judicial notice of matters of public record" without converting a motion to dismiss into a motion for summary judgment. *See Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994) (internal quotation marks omitted). To decide this motion to dismiss, the Court has considered the stock certificates issued pursuant to the stock purchasing agreements as well as the three amendments to the stock purchasing agreements, *see* R. 39-3, Senior Preferred Stock Certificates; R. 39-2, First Amendment; R. 39-4, Second Amendment; R. 39-5, Third Amendment, because their terms are repeatedly referenced in the amended complaint, *see* Am. Compl. ¶¶ 9-12, 18, 22-23, 29, 56, 61-79, 102, 110, 113-114, 116, 120-22, and are central to the Plaintiffs' claims. The Court has not considered any other documents encompassed by the Defendants' request, however, because the Defendants did not provide them to the Court and because it was not necessary to do so to decide the motion to dismiss.

corporations.[5] *See* Am. Compl. ¶¶ 2, 38. They purchase mortgages originated by private lenders and bundle them into mortgage-related securities that can be sold to investors. *Id.*

B. The Housing and Economic Recovery Act of 2008

In the midst of the subprime mortgage crisis, Congress enacted the Recovery Act. *See* Am. Compl. ¶¶ 4, 45. The Recovery Act created FHFA, an independent agency with the power to supervise and regulate Fannie and Freddie. 12 U.S.C. § 4511. FHFA was authorized to place Fannie and Freddie into conservatorship or receivership "for the purpose of reorganizing, rehabilitating, or winding up the[ir] affairs." *See id.* § 4617(a)(2). The Recovery Act also granted Treasury "[t]emporary" authority to "purchase any obligations and other securities issued by" Fannie and Freddie "on such terms and conditions as the Secretary [of Treasury] may determine and in such amounts as the Secretary may determine." *Id.* § 1455(l)(1)(A) (Freddie Mac); *id.* § 1719(g)(1)(A) (Fannie Mae). Treasury's temporary purchasing authority expired on December 31, 2009. 12 U.S.C. § 1455(l)(4) (Freddie Mac); *id.* § 1719(g)(4) (Fannie Mae). But the Act empowers Treasury to, "at any time, exercise any rights received in connection" with purchases completed before December 31, 2009. 12 U.S.C. § 1455(l)(2)(A), (D) (Freddie Mac); *id.* § 1719(g)(2)(A), (D) (Fannie Mae).

The Recovery Act grants FHFA expansive general powers when acting as conservator or receiver:

[5] Before entering conservatorship, Fannie and Freddie had both issued common stock and several series of preferred stock. Am. Compl. ¶ 40. Fischer owns Fannie and Freddie common stock, while Roberts owns Fannie and Freddie preferred stock. *Id.*

> 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.

12 U.S.C. § 4617(b)(2)(B). In addition, FHFA is empowered to "transfer or sell any asset or liability of the regulated entity in default, and may do so without any approval, assignment, or consent with respect to such transfer or sale." *Id.* § 4617(b)(2)(G). Specific to the conservator role, FHFA "may … take such action as may be … (i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." *Id.* § 4617(b)(2)(D). (As receiver, by contrast, "the Agency shall place the regulated entity in liquidation and proceed to release upon the assets of the regulated entity in such a manner as the Agency deems appropriate." *Id.* § 4617(b)(2)(E).) With respect to either role, FHFA "may" exercise any "incidental powers" necessary to carry out its enumerated powers, as well as "take any action authorized by [Section 4617], which the Agency determines is in the best interests of the regulated entity or the Agency." *Id.* § 4617(b)(2)(J). And, upon becoming either conservator or receiver, FHFA

"immediately succeed[s] 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).

In addition to giving FHFA those broad powers, the Act limits external interference with FHFA's actions as conservator or receiver. For example, the statute specifies that when acting in either role, "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." 12 U.S.C. § 4617(a)(7). And "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." *Id.* § 4617(f).

C. Factual Background

On September 6, 2008—despite statements made by government officials suggesting that the companies were financially healthy, Am. Compl. ¶ 42—FHFA placed Fannie and Freddie into conservatorship. *Id.* ¶¶ 7, 52. The Plaintiffs claim that, at that point in time, neither Fannie nor Freddie were in financial distress or in danger of defaulting on their debts. *Id.* ¶¶ 52, 55.

The next day, Treasury exercised its statutory purchasing authority by entering into stock purchasing agreements with FHFA, which was acting in its role as Fannie's and Freddie's conservator. Am. Compl. ¶¶ 9, 56-57. Under the stock purchasing agreements, Treasury committed to provide each company up to $100 billion to ensure that both maintained a positive net worth. *Id.* ¶ 61. In exchange for the capital infusion, Treasury received one million senior preferred shares in each company, as well as warrants to purchase 79.9% of their common stock. *Id.* ¶ 62. The senior preferred shares entitled Treasury to (1) a one-billion-dollar liquidation preference; (2) a dollar-for-dollar increase of the liquidation preference any time Fannie or Freddie drew upon Treasury's funding commitment; (3) quarterly dividends that Fannie or Freddie could pay at a rate of 10% of the liquidation preference or by increasing the liquidation preference by 12%; and (4) a quarterly periodic commitment fee.[6] *Id.* ¶¶ 63, 65, 72. The stock purchase agreements also contained a variety of covenants constraining the companies' (and FHFA's) actions. *See id.* ¶ 74. FHFA, for example, agreed not to terminate the companies' conservatorships without the prior written consent of Treasury. *Id.*

In May 2009, FHFA and Treasury executed the First Amendment to the stock purchasing agreements, which increased Treasury's total funding commitment from $100 billion per company to $200 billion per company. Am. Compl. ¶ 77. Then, in December 2009, FHFA and Treasury entered into the Second Amendment, which "established a formula to allow Treasury's total commitment to each Company to exceed (but not fall below) $200 billion depending upon any deficiencies experienced in 2010, 2011, and 2012, and any surplus existing as of December 31, 2012." *Id.* ¶ 79.

From the outset of the conservatorships, FHFA made assumptions about Fannie's and Freddie's future financial prospects that required the companies to

[6]Treasury repeatedly exercised its option under the stock purchase agreements to waive the commitment fee. Am. Compl. ¶ 72.

write down the value of significant tax assets and establish large loan reserves. Am. Compl. ¶¶ 81-83. As a result, both Fannie and Freddie reported non-cash losses which decreased their reported net worth by hundreds of billions of dollars. *Id.* ¶ 81. According to the Plaintiffs, these losses forced the companies to draw on Treasury's funding commitment, which thereby increased Treasury's liquidation preference. *See id.* ¶ 85. The companies also drew additional funds to pay cash dividends to Treasury (even though they could have elected to pay the dividends by increasing Treasury's liquidation preference). *See id.* ¶¶ 14, 85. To date, Fannie and Freddie have drawn a total of $187 billion from Treasury; around $26 billion of the total was used to pay the cash dividends. *Id.* ¶ 85.

Despite the establishment of the large loan reserves and the tax-assets write-down, by 2012 Fannie and Freddie had returned to profitability (and FHFA and Treasury were aware of this).[7] Am. Compl. ¶¶ 86-89, 92-98, 101-02. Yet, in August 2012, FHFA and Treasury executed the Third Amendment to the stock purchasing agreements. *Id.* ¶¶ 17, 102. The Plaintiffs allege that FHFA (as conservator) agreed to the Third Amendment at the insistence of Treasury, and that it is part of Treasury's "long-term plan" to keep the companies from emerging from conservatorship. *See id.* ¶¶ 103-07, 109-12, 133-34, 136, 138-40, 142-43.

The Third Amendment replaced the previous dividend formula with the requirement that Fannie and Freddie pay quarterly dividends in the amount of their entire net worth less a capital reserve amount that started at $3 billion and

[7]In the first two quarters of 2012, the companies posted profits totaling more than $11 billion. Am. Compl. ¶ 92.

will decrease to zero by January 1, 2018. Am. Compl. ¶ 113. As of the filing of the amended complaint, the companies had paid $129 billion more under this new dividend formula than they would have had to pay under the original dividend formula.[8] *Id.* ¶¶ 18, 128-29. Treasury has now recouped $245 billion, which is $58 billion more than it invested in Fannie and Freddie. *Id.* ¶¶ 18, 154. Dividend payments do not pay down Treasury's liquidation preference, so the liquidation preference today is $189 billion. *Id.* ¶ 155.

D. Procedural History

The Plaintiffs brought this suit under the Administrative Procedure Act (the APA), claiming that FHFA exceeded its conservatorship authority under the Recovery Act by entering into certain provisions of the stock purchase agreements, as well as by agreeing to the new dividend formula under the Third Amendment. *See* Am. Compl. ¶¶ 158-69 (Count One). They also claim—only with regard to the Third Amendment's new dividend formula—that Treasury exceeded its temporary purchasing authority under the Recovery Act (Count Two) and acted arbitrarily and capriciously (Count Three). *See id.* ¶¶ 170-91. The Plaintiffs request declaratory and injunctive relief, but no monetary damages. *See id.* ¶ 192.

The Defendants have filed a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction. *See* Joint Mot. to Dismiss. They assert a variety of grounds against the amended complaint, including a threshold issue, specifically, that judicial review of the Plaintiffs' claims is barred by 12 U.S.C. § 4617(f), as well

[8]Fannie and Freddie have elected to pay these dividends in cash, even though their net worth includes cash and non-cash assets. Am. Compl. ¶ 147. They have funded payment through the issuance of debt securities. *Id.*

as by 12 U.S.C. § 4623(d). The agencies also argue that the Plaintiffs lack standing in light of a provision in the Recovery Act, 12 U.S.C. § 4617(b)(2)(A)(i); that the Plaintiffs' claims are time-barred; and that the Plaintiffs' claims are barred by the doctrine of issue preclusion. *See* R. 39-1, Joint Defs.' Br.; R. 40, Treasury Defs.' Br.; R. 41, FHFA Defs.' Br.

II. Standard of Review

In invoking 12 U.S.C. § 4617(f), which says that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver," the Defendants contend that subject matter jurisdiction has been withdrawn over the claims in this case. Joint Defs.' Br. at 17-19. But it is not clear that this provision is a *jurisdiction*-stripping statute, rather than a *merits*-based limit on the usual claims that a party might assert against a government agency. The Supreme Court has emphasized the need to draw the line carefully between lack of jurisdiction (which truly goes to the power of a court to hear a case) versus lack of merit (that is, a failure to state a claim for which relief can be granted). Practically speaking, however, it makes no difference here because the key point is that the allegations in the amended complaint must be accepted as true either way. Either the government is making a facial challenge to subject matter jurisdiction, in which case the allegations must be accepted as true (plus the Plaintiffs get the benefit of reasonable inferences), *see Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015), or the government is really arguing that Section 4617(f) prevents the Plaintiffs from stating a claim based on the amended complaint's allegations—which again must be accepted as true, giving the Plaintiffs all reasonable inferences. In considering a similar anti-injunction provision involving the FDIC, 12 U.S.C. § 1821(j), the Seventh Circuit did not describe the obstacle to suit as a jurisdictional one, but rather as an obstacle to providing a remedy in a case over which the district court otherwise had subject matter jurisdiction, *see Courtney v. Halleran*, 485 F.3d 942, 948 (7th Cir. 2007). (In a later case, the Seventh Circuit noted that "some circuits frame Section 1821(j) as a jurisdictional inquiry," but it did not itself decide whether the anti-injunction provision is jurisdictional. *Veluchamy v. FDIC*, 706 F.3d 810, 817 (7th Cir. 2013).) Like § 1821(j), § 4617(f) does not use the word "jurisdiction." And the D.C. Circuit has assumed that § 4617(f) is a merits question, not a subject matter jurisdiction question. *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1085-86 (D.C. Cir. 2017) ("*Perry Capital (D.C. Cir.)*"). This Court also considers § 4617(f) to be a merits question, rather than a jurisdictional one, but to repeat, it makes no practical difference in this case.

III. Analysis

The Defendants contend that 12 U.S.C. § 4617(f) prohibits the court from providing relief for Plaintiffs' claims. *See* Joint Defs.' Br. at 17-27; Treasury Defs.' Br. at 13-20; FHFA Defs.' Br. at 6-9. The Court agrees.[9]

The Plaintiffs have brought all three counts of their amended complaint under the Administrative Procedure Act—which generally authorizes judicial review of agency action—but the APA provisions on which the Plaintiffs rely do not

[9]Because the argument for dismissal under 12 U.S.C. § 4617(f) is independent of the other arguments that the Defendants have offered in support of their motion to dismiss, the Court need not address their remaining arguments.

apply where a substantive "statute[] preclude[s] judicial review." 5 U.S.C. § 701(a)(1); *see Heckler v. Chaney*, 470 U.S. 821, 828 (1985). Here, § 4617(f) says that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." That section no doubt is a limitation on judicial review; the question is, how broad is that limitation?

Although the Seventh Circuit has yet to comment on the scope of § 4617(f), that court has interpreted the nearly identical anti-injunction bar contained in the Financial Institutions Reform Recovery and Enforcement Act. *See* 12 U.S.C. § 1821(j) ("[N]o court may take any action … to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver."); *see also Veluchamy*, 706 F.3d at 817-18; *Courtney*, 485 F.3d at 946-50. When interpreting that similar provision, the Seventh Circuit has said that 12 U.S.C. § 1821(j) "effect[s] a sweeping ouster of courts' power to grant equitable remedies," *Veluchamy*, 706 F.3d at 817 (internal quotation marks omitted), but only where the agency has acted within its statutory conservatorship or receivership authority, *see Courtney*, 485 F.3d at 948-49; *Chem. Futures & Options, Inc. v. Resolution Trust Corp.*, 832 F. Supp. 1188, 1192 (N.D. Ill. 1993). That is to say, if the agency has acted outside its statutory authority (or, to use the legal turn of phrase, "ultra vires"), then the anti-injunction bar in § 1821(j) will not apply. But if the FDIC acts within its statutory authority as a conservator or receiver, then courts cannot enter orders to restrain or affect the FDIC's conservatorship or receivership. This interpretation should apply to the virtually identical statutory text in § 4617(f), which is the Recovery Act's version of the anti-injunction bar. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) ("[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its … judicial interpretations as well." (internal quotation marks omitted)).

Although the Seventh Circuit has not yet interpreted § 4617(f), federal courts in other circuits have. *See, e.g.*, *Cty. of Sonoma v. Fed. Hous. Fin. Agency*, 710 F.3d 987, 992-95 (9th Cir. 2013); *Leon Cty. v. Fed. Hous. Fin. Agency*, 700 F.3d 1273, 1276-79 (11th Cir. 2012); *Town of Babylon v. Fed. Hous. Fin. Agency*, 699 F.3d 221, 227-28 (2d Cir. 2012). Indeed, some cases from other circuits have dealt with nearly identical claims brought by Fannie and Freddie shareholders against FHFA and Treasury. *See Perry Capital (D.C. Cir.)*, 848 F.3d at 1086-97; *Robinson v. Fed. Hous. Fin. Agency*, 2016 WL 4726555, at *3-8 (E.D. Ky. Sept. 9, 2016); *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 219-229 (D.D.C. 2014) ("*Perry Capital (D.D.C.)*"), *aff'd in part, rev'd in part sub nom. Perry Capital (D.C. Cir.)*, 848 F.3d 1072.[10] What the Seventh Circuit has said for the FDIC in applying § 1821(j), courts have said for FHFA and the Treasury Department in applying § 4617(f). *See Perry Capital (D.C. Cir.)*, 848 F.3d at 1086-87; *Cty. of Sonoma*, 710 F.3d at 992; *Leon Cty.*, 700 F.3d at 1278; *Town of Babylon*, 699 F.3d at 227-28; *Robinson*, 2016 WL 4726555, at *3-4; *Perry Capital (D.D.C.)*, 70 F. Supp. 3d at 220, 222.

[10]As out-of-circuit (and, for two of the three, district court) decisions, *Perry Capital (D.C. Cir.)*, *Perry Capital (D.D.C.)*, and *Robinson* are not binding on this Court. But they are well-reasoned and persuasive in interpreting § 4617(f).

Because the Plaintiffs in this case seek only equitable relief, their claims must be dismissed unless FHFA acted beyond the scope of its powers as conservator. And whether FHFA acted beyond the scope of its powers depends, in part, on whether Treasury acted within the scope of its statutory purchase authority. For if Treasury entered into the Third Amendment in contravention of the Recovery Act, "then FHFA is functionally complicit in its counterparty's misconduct," and Treasury's ultra vires conduct is imputed to FHFA. *See Perry Capital (D.D.C.)*, 70 F. Supp. 3d at 222; *see also Robinson*, 2016 WL 4726555, at *3 n.1 ("The Court recognizes that FHFA might also be subject to suit if Treasury exceeded its statutory authority in executing the Third Amendment."). But if neither Treasury nor FHFA acted outside their respective grants of authority, then § 4617(f) bars this lawsuit.

The Plaintiffs argue that § 4617(f) only bars claims for equitable relief against *FHFA*—so it cannot be used in this case to dismiss the claims against Treasury. It is true that, in limiting court action, the specific government agency referred to in § 4617(f) is FHFA. But the breadth of the ban is not so cramped as the Plaintiffs allege. Instead of disabling courts from entering orders directed at FHFA and only FHFA, the statutory text goes further: courts can take no "action" that would "restrain"—or even "*affect*"—"the exercise of powers or functions of" FHFA as a conservator. 12 U.S.C. § 4617(f) (emphasis added). So it is not just *FHFA* that is off limits, but also any court order that would *affect* the *exercise* of FHFA's powers or functions.

Here, the Plaintiffs' prayer for relief seeks, among other things, a declaration that the new dividend formula from the Third Amendment is invalid; an injunction returning dividend payments made according to the new formula to Fannie and Freddie; an injunction preventing Treasury from implementing the new formula; and vacatur of the Third Amendment. *See* Am. Compl. ¶ 192. All of these requests for relief would "restrain or affect" the exercise of FHFA's powers as conservator. Impeding the enforcement of the Third Amendment "affect[s]" FHFA's ability to "conduct all business" for the companies, 12 U.S.C. § 4617(b)(2)(B)(i), enter into contracts on their behalf, *id.* § 4617(b)(2)(B)(v), and "take any action authorized by [§ 4617], which [FHFA has] determine[d] is in the best interests of the [companies] or [FHFA]," *id.* § 4617(b)(2)(J)(ii). And because FHFA is a party to the Third Amendment, granting the requested relief against *Treasury* also "would have just as direct and immediate an effect as if the injunction operated directly on FHFA." *Perry Capital (D.C. Cir.)*, 848 F.3d at 1096. It takes two to tango, and undoing one side of the Third Amendment against Treasury necessarily affects FHFA, which is, after all, the other party to the Third Amendment. So § 4617(f) can operate to bar claims against Treasury, so long as FHFA and Treasury acted within their legal authority.

One final point before turning to whether the Plaintiffs have sufficiently alleged that either FHFA or Treasury acted outside the scope of its authority. When considering whether FHFA or Treasury has acted ultra vires, the agencies' motives are irrelevant.[11] *See Perry Capital (D.C. Cir.)*, 848 F.3d at 1093 ("[F]or purposes of applying Section 4617(f)'s strict limitation on judicial relief, allegations of motive are neither here or there…."); *Cty. of Sonoma*, 710 F.3d at 993 ("[I]t is not our place to substitute our judgment for FHFA's…."); *Cont'l W. Ins. Co. v. Fed. Hous. Fin. Agency*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015) ("[I]t is not the role of this Court to wade into the merits or motives of FHFA and Treasury's actions—rather the Court is limited to reviewing those actions on their face and determining if they were permissible under the authority granted by the [Recovery Act]."); *Perry Capital (D.D.C.)*, 70 F. Supp. 3d at 226 ("FHFA's underlying motives or opinions … do not matter for the purposes of § 4617(f)."); *see also Robinson*, 2016 WL 4726555, at *6-7; *cf. Gross v. Bell Sav. Bank PA SA*, 974 F.2d 403, 408 (3d Cir. 1992) (holding with respect to 12 U.S.C. § 1821(j) that "the availability of injunctive relief does not hinge on [the court's] view of the proper exercise of otherwise-legitimate power"). Section 4617(f) prohibits courts from restraining the "exercise of [FHFA's] powers or functions"—it makes no exception for instances when FHFA supposedly had an improper motive but acted within its authority. Nothing in the Recovery Act limits FHFA to exercising its powers only when it has proper "motives," as the Plaintiffs seem to think. Nor must FHFA act with a motive that exclusively favors the interests of Fannie or Freddie. Instead, the Recovery Act permits FHFA to "take

[11]The Plaintiffs cite *Leon County v. Federal Housing Finance Agency*, 700 F.3d 1273 (11th Cir. 2012), as supporting the proposition that FHFA's "purpose" might be relevant to whether it acted within the scope of its statutory authority. R. 46, Pls.' Resp. Br. at 22. But *Leon County* says that a court should consider purpose (among other things) when determining whether FHFA took a particular action as a conservator or as a regulator, *see* 700 F.3d at 1278, *not* when determining whether FHFA's actions as a conservator were within the scope of its statutory powers as a conservator.

any action authorized by [§ 4617], which the Agency determines is in the best interests of the regulated entity *or the Agency*," *see* 12 U.S.C. § 4617(b)(2)(J)(ii) (emphasis added).

With the parameters of § 4617(f) in place, the Court now addresses whether FHFA or Treasury acted outside their statutory authority.

A. FHFA

The Plaintiffs allege that FHFA exceeded its statutory authority in a variety of ways when it entered into the Third Amendment, *see* Am. Compl. ¶¶ 158-68, but their allegations can be distilled into two sets of arguments. First, they claim that FHFA entered into the Third Amendment "at the insistence and under the direction and supervision of Treasury" and have "cede[d] substantial control over the operation of Fannie and Freddie in conservatorship to Treasury," in violation of 12 U.S.C. § 4617(a)(7). *Id.* ¶¶ 163, 167; *see also* R. 46, Pls.' Resp. Br. at 24-26. Second, they assert that entering into the Third Amendment was "inimical" to FHFA's core mandates as conservator, in particular its statutory obligations to "put the [companies] in a sound and solvent condition," 12 U.S.C. § 4617(b)(2)(D)(i), and to "preserve and conserve [their] assets and property," *id.* § 4617(b)(2)(D)(ii). Am. Compl. ¶¶ 160-62, 165-66, 168; Pls.' Resp. Br. at 27-35. Neither of these arguments has merit.

1. Section 4617(a)(7): Other-Agency Direction

The Plaintiffs first argue that FHFA's interactions with Treasury run afoul of 12 U.S.C. § 4617(a)(7). Section 4617(a)(7) says that FHFA, "[w]hen acting as conservator or receiver … 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." The Plaintiffs believe that FHFA violated this provision in two ways: (1) FHFA "subject[ed] itself to Treasury's will" when it entered into the Third Amendment, and (2) FHFA ceded "extraordinary control" over the companies' operation when it entered into the stock purchase agreements (a fact that was exacerbated by the Third Amendment). Pls.' Resp. Br. at 24-25. But other than making the conclusory allegation that Treasury had a long-term plan to "seize" Fannie and Freddie for the "exclusive benefit" of the federal government, *see* Am. Compl. ¶ 133, the Plaintiffs have alleged no *facts* from which it can be reasonably inferred that something like that actually happened. At most, on the facts alleged, Treasury came up with the idea for the new dividend formula in the Third Amendment and proposed it to FHFA. Formulating a plan and proposing it to FHFA does not mean that Treasury was subjecting FHFA to its "direction" or "supervision." As the district court pointed out in *Perry Capital (D.D.C.)*, "[u]ndoubtedly, many negotiations arise from one party conjuring up an idea, and then bringing their proposal to the other party." 70 F. Supp. 3d at 227. FHFA simply did not, on the facts alleged, violate § 4617(a)(7) by entering into the Third Amendment.

Nor did it violate § 4617(a)(7) by entering into the stock purchase agreements. The Plaintiffs point out that the agreements contain covenants prohibiting FHFA from taking certain actions with respect to the companies without the prior written consent of Treasury. *See* Am. Compl. ¶ 74. This might be problematic—except that Treasury's actions were contemplated by the Recovery Act itself. At the same time that Congress enacted § 4617(a)(7), it authorized Treasury to purchase securities from Fannie and Freddie "on such terms and conditions as the Secretary [of Treasury] may determine." 12 U.S.C. §§ 1455(l)(1)(A), 1719(g)(1)(A). In doing so, it made clear that Fannie and Freddie could not be forced to issue securities "without mutual agreement" between the companies and Treasury. *Id.* ("Nothing in this subsection requires the corporation to issue obligations or securities to the Secretary without mutual agreement between the Secretary and the corporation."). Sections 1455(l)(1)(A) and 1719(g)(1)(A) must be read in harmony with Section 4617(a)(7). *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." (internal quotation marks and citations omitted)). Together, the provisions protect FHFA (in its role as conservator for the companies) from being subject to Treasury's supervision and direction *against FHFA's will*, but they do not prevent FHFA from voluntarily entering into to a purchase agreement that gives Treasury a say in decisions that would impact Treasury's investment.

2. Conservator Duties

Contrary to the Plaintiffs' arguments, Pls.' Resp. Br. at 16, FHFA did not violate any "core statutory mandates" as conservator—largely because these mandates do not exist, at least not as the Plaintiffs have alleged. The Plaintiffs say that, by using the term "conservatorship," Congress injected longstanding, preexisting conservatorship principles into the Recovery Act. *See id.* at 27. It is true that courts presume that where a well-established term has been used in a statute, Congress intended that term to have its customary meaning. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). But this presumption does not apply where Congress has employed the term in a fashion that contravenes that established meaning. *See id.* And here Congress did not set up a typical conservatorship. This is best evidenced by the fact that FHFA is empowered, in its role as conservator, to act in *its own best interests*. *See* 12 U.S.C. § 4617(b)(2)(J)(ii). As a result, the ordinary understanding of a conservator is irrelevant to whether FHFA acted outside the bounds of its statutory authority, and the Court must look to the statute's text to determine the scope of the agency's powers and responsibilities as conservator.

Section 4617(b)(2)(D) says 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 carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C.

§ 4617(b)(2)(D) (emphasis added). The Plaintiffs maintain that these are "obligations" that FHFA contravened by entering into the Third Amendment. *See* Pls.' Resp. Br. at 30. But § 4617(b)(2)(D) uses the permissive term "may," not the compulsory term "shall," which makes the actions listed discretionary rather than obligatory. The structure of the statute supports this interpretation. Section 4617(b)(2)(D) is entitled "Powers as conservator," and it is nestled under the heading "General powers." 12 U.S.C. § 4617(b)(2). Both of these headings fall under the subsection setting forth "Powers and duties of the Agency as conservator or receiver." *Id.* § 4617(b). The differences between the three provision headings suggests that (1) "powers" are different than "duties," and (2) § 4617(b)(2)(D) grants power in lieu of creating a duty. Ultimately, FHFA cannot be said to have violated a duty that did not exist.

Even if § 4617(b)(2)(D) required FHFA to take action to put Fannie and Freddie in a "sound and solvent condition" and to "preserve and conserve" their assets and property—to the exclusion of other interests—the agency still did not act ultra vires. The Plaintiffs admit that, under FHFA's conservatorship, the companies have returned to profitability. Am. Compl. ¶ 18. And Treasury's funding commitment guarantees that Fannie and Freddie will remain solvent. *See id.* ¶ 61 (noting that the purpose of Treasury's commitment was to ensure that the companies maintain a positive net worth). What's more, 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. *See Perry Capital (D.C. Cir.)*, 848 F.3d at 1090. Indeed, FHFA can operate the companies as a conservator in anticipation of moving onto receivership. *See* 12 U.S.C. § 4617(a)(4)(D). All told, the Plaintiffs have not sufficiently alleged that FHFA acted outside the bounds of its statutory authority.[12]

B. Treasury Department

Lastly, the Plaintiffs allege that Treasury exceeded its statutory purchase authority when it entered into the Third Amendment because (1) its purchase authority had expired; and (2) it disregarded its fiduciary duties to the companies' minority shareholders. *See* Pls.' Resp. Br. at 46-53. Neither of these arguments have merit. There is zero hint in the Recovery Act, or anywhere else, that Congress intended for state-law-type fiduciary duties to apply to Treasury in the exercise of its Recovery Act purchase authority. *See Robinson*, 2016 WL 4726555, at *4 n.3. And the Third Amendment was an exercise of rights received in connection with securities it had purchased before its purchase authority expired, *see* 12 U.S.C. § 1455(1)(2)(A), (D); *id.* § 1719(g)(2)(A), (D), not a *new* purchase. The previous agreements gave Treasury (and FHFA) the right to amend the agreements at a later date. *See, e.g.*, R. 39-2, First Amendment at 13. And the Third Amendment substituted one dividend obligation for another; it did not increase Treasury's funding commitment or entitle Treasury to new securities. *See Robinson*, 2016 WL

[12]For the same reasons that FHFA did not violate any core mandates as conservator when it entered into the Third Amendment, FHFA did not act ultra vires with respect to those aspects of the stock purchase agreements that the Plaintiffs say were exacerbated by the Third Amendment.

4726555, at *4; *Perry Capital (D.D.C.)*, 70 F. Supp. 3d at 224. No new purchase occurred.

In sum, under the facts alleged, neither FHFA nor Treasury acted outside the scope of its authority under the Recovery Act.[13] Section 4617(f) bars this court from granting relief for the Plaintiffs' claims, and the Defendants' motion to dismiss is granted.

IV. Conclusion

For the reasons discussed, the Plaintiffs' amended complaint is dismissed. The dismissal is with prejudice because the Plaintiffs' have already amended the complaint and they offer no additional possible amendments to get around the bar of Section 4617(f). A separate judgment shall be entered, and the status hearing of April 4, 2017 is vacated.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: March 20, 2017

[13]The Defendants also argue that subsequent legislation by Congress has impliedly endorsed the Third Amendment. *See* Treasury Defs.' Br. at 18-20; FHFA Defs.' Br. 6-9. In light of the Court's holding, there is no need to investigate this post-enactment legislative history, nor offer a conclusion on the value (if any) of appropriations bills as evidence of congressional approval of agency action.

**IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS**

Christopher M. Roberts and
Thomas P. Fischer,

Plaintiff(s),

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; The Department of the Treasury; and Steven T. Mnuchin1, in his official capacity as Secretary of the Treasury,

Defendant(s).

Case No. 16 C 02107
Judge Edmond E. Chang

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

☒ other: Case dismissed with prejudice.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.

☒ decided by Judge Edmond E. Chang on a motion to dismiss.

Date: 3/20/2017

Thomas G. Bruton, Clerk of Court

\s\Sandra Brooks , Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Charles J. Cooper
Charles J. Cooper