No. ________

In The
Supreme Court of the United States

FAIRHOLME FUNDS, INC., *et al.*,

Petitioners,

v.

THE FEDERAL HOUSING FINANCE AGENCY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES J. COOPER
Counsel of Record
DAVID H. THOMPSON
HOWARD C. NIELSON, JR.
PETER A. PATTERSON
BRIAN W. BARNES
COOPER & KIRK, PLLC
1523 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com

Counsel for Petitioners

October 16, 2017

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Does 12 U.S.C. § 4617(f) foreclose judicial review of an agreement between the Federal Housing Finance Agency and the Department of the Treasury to transfer the net worth and all future profits of Fannie Mae and Freddie Mac to the federal government and require both Companies to operate with no capital?

PARTIES TO THE PROCEEDING

Petitioners are Fairholme Funds, Inc., The Fairholme Fund, Berkley Insurance Company, Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, and Preferred Employers Insurance Company.

Respondents are the Federal Housing Finance Agency, in its capacity as Conservator of Fannie Mae and Freddie Mac, Melvin L. Watt, in his official capacity as Director of the Federal Housing Finance Agency, and the United States Department of the Treasury.

This suit was consolidated on appeal with cases brought by other plaintiffs against Respondents and Steven T. Mnuchin, in his official capacity as the Secretary of the Department of the Treasury. The following plaintiffs in other cases were appellants in the D.C. Circuit: Perry Capital LLC, Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company, Financial Structures Limited, American European Insurance Company, Joseph Cacciapalle, John Cane, Francis J. Dennis, Marneu Holdings, Co., Michelle M. Miller, United Equities Commodities, Co., 111 John Realty Corp., Barry P. Borodkin and Mary Meiya Liao. Fannie Mae and Freddie Mac were also appellees in the D.C. Circuit and nominal defendants in one of the cases with which Petitioners' case was consolidated on appeal.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Fairholme Fund is a series of Fairholme Funds, Inc. Fairholme Funds, Inc. has no parent corporation.

W.R. Berkley Insurance Corporation is the parent of the following Petitioners: Berkley Insurance Company, Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, and Preferred Employers Insurance Company.

No publicly held corporation owns 10% or more of any of Petitioners' stock.

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OTHER

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Fannie, Freddie Adequately Capitalized: Lockhart, CNBC (July 8, 2008), https://goo.gl/8hd37D 20

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FHFA, REPORT TO CONGRESS 2009 (May 25, 2010), https://goo.gl/5BK9kH..31

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 864 F.3d 591 and reproduced at App.1a. The District Court's opinion granting Respondents' motions to dismiss is reported at 70 F. Supp. 3d 208 and reproduced at App.121a.

JURISDICTION

The Court of Appeals entered its judgment on February 21, 2017. The Court of Appeals ruled on timely petitions for panel rehearing on July 17, 2017, and issued an amended opinion on that day. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions appear in the appendix at 205a-222a.

INTRODUCTION

The core question presented by this case is whether Congress has placed any meaningful limits on the Federal Housing Finance Agency ("FHFA") when it acts as conservator. This question is profoundly important to our Nation's economy, as Fannie and Freddie are a vital part of the multi-trillion-dollar mortgage finance system. And its impact is not limited to housing, as FHFA's conservatorship authorities are taken word-for-word from the statute governing the authorities of the Federal Deposit Insurance Corporation ("FDIC") as conservator of the Nation's banks.

But perhaps even more significant than this case's implications for the housing market and the banking system are its implications for the rule of law. In the Housing and Economic Recovery Act of 2008 ("HERA"), Congress set forth in precise detail the powers of FHFA when it acts as conservator. Chief among these are preserving and conserving Fannie's and Freddie's assets and placing the entities in a sound and solvent condition. In the view of a majority of the panel below, however, HERA's carefully crafted conservator provisions essentially are meaningless surplusage that FHFA is free to ignore.

As a result of the D.C. Circuit's ruling, Fannie and Freddie, and, by extension, the Nation's housing finance system, are subject to the unfettered discretion of FHFA to do as it pleases. Indeed, the court below went so far as to hold that FHFA has the power to shield *other* agencies of the federal government from judicial review by the mere expedient of entering into a contract with them to violate their statutory authorities. If the D.C. Circuit is right, Congress has set up a structure that makes a mockery of our system of checks and balances, with an independent agency headed by an unelected Director not answerable to the President, free to act without regard to Congress's instructions, and without fear of judicial intervention.

Fortunately, the D.C. Circuit is wrong. As Judge Janice Rogers Brown explained in dissent below, HERA plainly "mark[s] the bounds" of FHFA's conservatorship authorities. App.96a. What is more, the text and structure of HERA make clear that FHFA is not free to exceed these bounds. Indeed, it is apparent that not even FHFA agrees with the D.C. Circuit's reasoning that HERA lacks any "mandate" that it is bound to follow, App.28a, as outside the context of litigation the Agency repeatedly has acknowledged that HERA's statutory directives are mandatory.

In upholding the Net Worth Sweep agreement at issue in this case, the decision below established a "dangerous and radical new regime" that gives virtually unlimited power to a federal agency and will make it much more difficult for financial institutions to raise private capital during future financial crises. App.118a (Brown, J., dissenting). "What might serve in a banana republic will not do in a constitutional one." App.120a. In view of this case's importance for the national economy and the rule of law, the Court should grant the writ.

STATEMENT

A. Fannie and Freddie Are Forced into Conservatorship and Subjected to the Purchase Agreements with Treasury.

This Nation's multi-trillion-dollar housing finance market, and familiar features of that market such as readily available, pre-payable 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 purchase, guaranty, and securitize them, thus providing liquidity to the residential mortgage market.

In July 2008, Congress enacted HERA, Pub. L. No. 110-289, 122 Stat. 2654. HERA created FHFA to replace the Companies' prior regulator and authorized FHFA to appoint itself conservator or receiver for the Companies in certain statutorily specified circumstances. *See* 12 U.S.C. § 4617(a). The provisions of HERA outlining FHFA's conservatorship and receivership powers were taken almost verbatim from the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) ("FIRREA"), a statute that the FDIC has used hundreds of times to act as the conservator or receiver for distressed financial institutions. *Compare* 12 U.S.C.

§ 4617(b) *with* 12 U.S.C. § 1821(d). FIRREA's conservatorship and receivership provisions in turn mirror earlier federal statutes that conferred similar powers on the FDIC's predecessors. *See Coit Indep. Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561, 569 (1989).

As a conservator, FHFA is authorized to take "such action as may be – (i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D). This rehabilitative mission contrasts with FHFA's mission when it acts as a receiver, which is to "place the regulated entity in liquidation" and distribute the entity's assets according to a statutorily prescribed order of priorities. *Id.* §§ 4617(b)(2)(E), 4617(c)(1).

On September 6, 2008, FHFA forced the Companies into conservatorship. In publicly announcing this step, FHFA's Director described conservatorship as "a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations" and said that FHFA would act as the Companies' conservator only "until they are stabilized." App.227a. Seeking to further reassure markets that the Companies' conservatorship would follow the familiar model of conservatorships overseen by the FDIC, FHFA also released a document stating that its "goals" as conservator are "to preserve and conserve the Compan[ies'] assets and property and to put [them] in a sound and solvent condition." App.233a.

In addition to establishing FHFA, HERA also gave Treasury temporary authority to purchase the Companies' securities – authority that expired at the end of 2009. *See* 12 U.S.C. §§ 1455(*l*), 1719(g). Concurrent with FHFA's imposition of conservatorship, Treasury exercised this authority by entering into agreements with FHFA to purchase equity in the Companies ("Preferred Stock Purchase Agreements" or "PSPAs"). *See* App.237a. 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.

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 Treasury, 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. App.278a.[1] The PSPAs did not permit the Companies

[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.

to pay down the liquidation preference to the extent that it increased as a result of draws on Treasury's funding commitment. The original PSPAs also required the Companies to pay quarterly dividends on the Government Stock's liquidation preference. These dividends could be paid in cash, at an annual rate of 10%, or in kind, by increasing the liquidation preference by an annual amount of 12%. App.270a. Respondents repeatedly acknowledged the payment in kind option, *see, e.g.*, App.285a, and paying 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 acquire 79.9% of their common stock at a nominal price. App.244a. The warrants were designed to provide future upside to taxpayers once the Companies recovered, but this upside would be shared with the Companies' other preferred and common shareholders.

Third, the PSPAs provided for the Companies to pay Treasury a quarterly market-based periodic commitment fee. App.248a. 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. For its part, Freddie forecasted its "sensitivity" to imposition of the periodic commitment fee beginning in 2013 at $0.4 billion per year, App.287a – a modest sum for a company that during 2013 reported comprehensive income of $51.6 billion, FEDERAL HOME LOAN MORTGAGE CORPORATION, Form 10-K at 1 (Feb. 14, 2014).

The original PSPAs thus 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." App.288a, 289a.

B. 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 wildly pessimistic assumptions about potential future losses that proved to be wholly unwarranted. By June 2012, FHFA 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 the Companies' actual cash receipts were sufficient to cover their cash expenses. The Companies drew $26

[2] Loan loss reserves reduce reported net worth to reflect anticipated future losses. 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.

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 unnecessary draw.

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. And given the high quality of newer loans backed by the Companies, Treasury and FHFA knew the Companies would enjoy stable profitability for the foreseeable future and thus would begin to rebuild significant amounts of capital. Minutes of a July 2012 Fannie management meeting circulated widely within FHFA indicated that the Company was entering a period of "golden years" of earnings, App.292a, 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 $118 billion of Treasury's commitment would remain available after 2022. App.299a. Similar projections were shared with Treasury less than two weeks before the Net Worth Sweep. App.300a-304a.

FHFA and Treasury also knew that the Companies were about to reverse many of the unjustified paper losses previously imposed upon them. At an August 9, 2012 meeting, just eight days before the Net Worth Sweep was announced, 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. App.306a-308a. Treasury was keenly interested in the deferred tax assets, which would have catalyzed the Companies' capital rebuilding process by instantly returning tens of billions of dollars to their balance sheets. Indeed, Treasury had discussed this issue with a financial consultant as early as May 2012, App.309, and a key item on Treasury's agenda for the August 9 meeting was how quickly Fannie forecasted releasing its reserves, App.315a-316a.

C. FHFA and Treasury Impose the Net Worth Sweep, Thereby Expropriating Petitioners' Investments in the Companies.

By August 2012, FHFA and Treasury fully understood that the Companies were on the precipice of generating huge profits, far in excess of the dividends owed on the Government Stock. 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." App.323a. 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 in cash without making a draw from the funding commitment, FHFA and Treasury 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." App.326. 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 at the end of 2017.[3] App.335a. FHFA and Treasury thus nationalized the Companies, thereby ensuring that they would never be rehabilitated and would never be operated in a sound condition.

In the proceedings below, FHFA and Treasury both claimed that the Net Worth Sweep was necessary to prevent the Companies from exhausting Treasury's funding commitment by drawing on Treasury funds to pay dividends on the Government Stock. But, as explained above, at all times prior to the Net Worth

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[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.

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, Respondents' "death spiral" narrative cannot be squared with internal government documents and testimony obtained through discovery in other litigation and added to the record in the proceedings below. 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 the Companies were on the verge of reporting tens of billions of dollars in profits that would far exceed the quarterly cash dividends they had been paying. Indeed, 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. App.342a.

The available evidence thus makes clear that the Net Worth Sweep was adopted not out of concern that the Companies would earn too little and exhaust Treasury's available funds, but rather out of concern that the Companies would earn *too much* and complicate the Administration's plans to shackle them in perpetual conservatorship. Indeed, an internal Treasury document finalized the day before the sweep was announced specifically identified the Companies' "improving operating performance" and the "[p]otential for near-term earnings to *exceed* the 10% dividend" as support for the Net Worth Sweep. App.365a (emphasis added). And after the Net Worth Sweep was finalized, a senior White House advisor involved in that process wrote that Treasury was "ensuring that [the Companies] can't recapitalize" and "clos[ing] off [the] possibility that [Fannie and Freddie] ever[] go (pretend) private again." App.378a, 375a. That same White House official wrote in another email that the Net Worth Sweep would ensure that the Companies "can't repay their debt and escape," a statement fundamentally inconsistent with a conservator's rehabilitative function. App.379a. 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. App.383a.

As FHFA and Treasury expected, the Net Worth Sweep has resulted in massive and unprecedented payments to the federal government. From the fourth quarter of 2012, the first fiscal quarter subject to the Net Worth Sweep, through the second quarter of 2017, the Companies generated over $219 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 if the Companies had elected to declare cash dividends. *See* FHFA, Table 2: DIVIDENDS ON ENTERPRISE DRAWS FROM TREASURY (Sept. 2017), https://goo.gl/vHl8V0. Altogether, Treasury has recouped over $88 billion more than it disbursed to the Companies. Yet FHFA and Treasury insist that the outstanding liquidation preference on the Government Stock remains firmly fixed at $189 billion and that the federal government has the right to all of the Companies' net worth in perpetuity.

D. Petitioners Challenge the Net Worth Sweep and the Divided D.C. Circuit Upholds FHFA's and Treasury's Actions.

Petitioners are Fannie and Freddie shareholders who challenged the Net Worth Sweep under the Administrative Procedure Act ("APA") in the United States District Court for the District of Columbia. The District Court's subject matter jurisdiction was based on 28 U.S.C. §§ 1331 and 1367. As relevant here, Petitioners claimed that in agreeing to the Net Worth Sweep, FHFA exceeded its statutory powers as conservator, Treasury violated HERA by purchasing the Companies' securities after its authority to do so had expired, and Treasury acted arbitrarily and capriciously. The District Court granted Respondents' motions to dismiss, holding that Plaintiffs' APA claims were barred by HERA's prohibition on judicial remedies that would "restrain or affect" the conservator's exercise of its powers and functions. 12 U.S.C. § 4617(f); *see* App.134a-157a.

A divided panel of the D.C. Circuit affirmed. The majority acknowledged that Section 4617(f) applies only "as long as the agency is acting within its statutory conservatorship authority," App.20a, but it held that this exception to HERA's bar on judicial review had "no application" because the Net Worth Sweep "falls within FHFA's statutory conservatorship powers," App.23a. The majority largely rested that conclusion on the uses of the word "may" in 12 U.S.C. § 4617(b), which it interpreted to give FHFA "expansive grants of permissive, discretionary authority" to do whatever it wants with the Companies during conservatorship short of formal liquidation. App.23a-29a. Because HERA says that as conservator FHFA "may" "preserve and conserve" the Companies' assets and restore them to a "sound and solvent condition," 12 U.S.C. § 4617(b)(2)(D), the majority reasoned that FHFA is also free to do the opposite by dissipating the Companies' assets and operating them for the exclusive benefit of the federal government. App.39a.

Troubled by the majority's decision to allow the government "to loot the Companies" by "eras[ing] any outer limit to FHFA's statutory powers," Judge Brown dissented. App.107a, 111a. Pointing to the statute's structure, the fiduciary duties of conservators at common law, and the longstanding practice of the FDIC and other federal conservators under materially identical statutory provisions, Judge Brown reasoned that 12 U.S.C. § 4617(b)(2)(D) "mark[s] the bounds of FHFA's conservator . . . powers." App.96a. Because "consistently divesting the Companies of their near-entire net worth is plainly antithetical to a conservator's charge to 'preserve and conserve' the Companies' assets," Judge Brown concluded that the Net Worth Sweep exceeded FHFA's statutory powers and could therefore be enjoined. App.113a. Judge Brown also expressed concern about the "pernicious" "practical effect of the Court's ruling," which "could dramatically affect investor and public confidence in the fairness and predictability of the government's participation in conservatorship and insolvency proceedings." App.116a-120a.

REASONS FOR GRANTING THE PETITION

I. Review Is Needed Because this Case Presents Issues of Exceptional Importance for the Nation's Economy and Financial Institutions.

A. The D.C. Circuit's Ruling Imperils the Ability of Distressed Financial Institutions To Raise Private Capital.

The decision to nationalize Fannie and Freddie just as they were about to report the largest profits in their history marks a radical departure from the longstanding practice of federal conservators and receivers, and in blessing this decision the D.C. Circuit "disrupted settled expectations about financial markets in a manner likely to negatively affect the nation's overall financial health." App.117a (Brown, J., dissenting).

For decades, the FDIC and its predecessors have been empowered to take over distressed financial institutions and operate them as a conservator or receiver without being subject to judicial intervention that would "restrain or affect" the exercise of statutory powers and functions. *See* 12 U.S.C. § 4617(f); 12 U.S.C. § 1821(j); Financial Institutions Supervisory Act of 1966, § 101, Pub. L. No. 89-695, 80 Stat. 1028, 1033. This statutory framework has long listed general powers that a conservator or receiver "may" or is "authorized" to exercise, 12 U.S.C. § 4617(b)(2); 12 U.S.C. § 1821(d)(2); National Housing Act of 1934, § 406(b), Pub. L. No. 73-479, 48 Stat. 1246, and permitted the agency to take its own "best interests" as conservator or receiver into account, 12 U.S.C. § 4617(b)(2)(J); 12 U.S.C. § 1821(d)(2)(J); Bank Protection Act of 1968, § 6, Pub. L. No. 90-389, 82 Stat. 294, 296. Despite hundreds of federal conservatorships and receiverships that have occurred over the decades under this statutory regime, "FHFA's actions in implementing the Net Worth Sweep bear no resemblance to actions taken in conservatorships or receiverships overseen by the FDIC." App.117a (Brown, J., dissenting) (quotation marks omitted). To the contrary, the FDIC's "mission" as conservator has always been understood to "parallel" that of a common-law conservator: "to take action necessary to restore the failed [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.'" *RTC v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1453-54 (8th Cir. 1992) (quoting 12 U.S.C. § 1821(d)(2)(D)); *see also*, *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.").

Prior to the Net Worth Sweep, investors had good reason to expect that the courts would interpret the familiar statutory framework to impose meaningful limits on the powers of a federal conservator or receiver. When this Court considered a statutory provision barring judicial remedies that would "restrain or affect" a receiver in *Coit Independence Joint Venture v. Federal Savings & Loan Insurance Corp.*, 489 U.S. 561, 572-79 (1989), it held that the provision did not bar judicial review in that case because the receiver had acted beyond its statutory powers by purporting to adjudicate a claim the statute did not permit it to resolve. In *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997), the Ninth Circuit allowed claims for equitable relief against a receiver that had "assert[ed] authority beyond that granted to it as a receiver" by breaching a contract without statutory authority. And numerous other courts – including the D.C. Circuit – repeatedly said that equitable relief would be available if a conservator or receiver "acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted powers or functions." *National Tr. for Historic Pres. v. FDIC*, 21 F.3d 469, 471 (D.C. Cir. 1994) (Wald, J., concurring, joined by Silberman, J.). *See also*, *e.g.*, *Leon Cty. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir.

2012) (FHFA "cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp"); *Carney v. RTC*, 19 F.3d 950, 956 (5th Cir. 1994) (limitation on judicial review only applies when conservator or receiver is "exercising an authorized power or function"). The panel's decision interred these repeated assurances of a judicial backstop to prevent conservators from exceeding their powers by concluding that during conservatorship FHFA (and, by extension the FDIC), has the power to do *anything* with its ward short of formal liquidation.

The D.C. Circuit's ruling thus establishes a "dangerous and radical new regime," App.118a (Brown, J., dissenting), and further review is warranted in light of this regime's potentially catastrophic consequences for the ability of financial institutions to raise private capital during financial crises. As FHFA's General Counsel has written, "[o]ne very important criterion through which . . . regulatory agencies assess the soundness of individual [financial] institutions is capital adequacy." 1 ALFRED M. POLLARD & JOSEPH P. DALY, BANKING LAW IN THE UNITED STATES § 5.07 (4th ed. 2013). Indeed, the regulatory framework Congress has established for financial institutions is built around the importance of ensuring that financial institutions maintain sufficient capital. *See, e.g.*, 12 U.S.C. §§ 4512(a)(1), 1831*o*(c), 1844(b). Capital is the first line of defense against an institution's insolvency, and during periods of economic instability regulators are especially concerned with ensuring that financial institutions maintain adequate capital. FHFA's predecessor drew directly from this well-established regulatory playbook as home prices fell in 2007 and 2008, successfully encouraging the Companies to raise an additional $22 billion in capital by issuing new preferred stock – stock that represents roughly two thirds of the privately held preferred stock that the Net Worth Sweep later nullified. *See* TARA RICE & JONATHAN ROSE, WHEN GOOD INVESTMENTS GO BAD: THE CONTRACTION IN COMMUNITY BANK LENDING AFTER THE 2008 GSE TAKEOVER AT 6, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM INTERNATIONAL FINANCE DISCUSSION PAPERS (Mar. 2012). As late as July 2008, FHFA publicly promoted the Companies' stock as safe investments. *See Fannie, Freddie Adequately Capitalized: Lockhart*, CNBC (July 8, 2008), https://goo.gl/8hd37D. Investors were willing to purchase these shares, injecting additional capital into the Companies during an economic downturn and exposing themselves to potential losses, only because they understood that they would eventually benefit if the Companies' fortunes improved.

Judge Brown cogently explained the consequences of the D.C. Circuit's decision to upset long-held investor expectations about the scope of a federal conservator's powers: "[n]ow investors in regulated industries must invest cognizant of the risk that some conservators may abrogate their property rights entirely," "equity in these corporations will decrease as investors discount their expected value to account for the increased uncertainty," and "capital will become more expensive, and potentially *prohibitively* expensive during times of financial distress, for all regulated financial institutions." App.118a. If the D.C. Circuit's decision stands, the cost of capital for troubled financial institutions will rise, financial regulators' work will become more difficult, and the number of costly bank failures will increase – all contrary to public policy encouraging the retention of capital. In view of these troubling consequences for the Nation's economy, further review is warranted.

B. This Court Should Decide Whether Congress Authorized FHFA and Treasury To Nationalize the Two Most Important Components of the Nation's Housing Finance System and To Require Them To Operate with Zero Capital.

For decades, Fannie and Freddie have served as the backbone of the Nation's housing finance system, insuring and securitizing mortgages and thereby making homeownership possible for millions of American families. Although both Companies were originally federal instrumentalities, Congress privatized Fannie and Freddie by amending their federal charters in 1968 and 1989, respectively. *See* Housing and Urban Development Act of 1968, § 802, Pub. L. No. 90-448, 82 Stat. 476; FIRREA, § 731, Pub. L. No. 101-73, 103 Stat. 183. Congress's decision to reorganize Fannie and Freddie as private corporations reflects its judgment that the Companies would most effectively promote a healthy housing finance system by making "the fullest practicable utilization of the resources and capabilities of private enterprise." Housing and Urban Development Act of 1968, § 2; *see also* 42 U.S.C. § 1441.

Congress did not alter this central pillar of federal housing finance policy when it enacted HERA. To the contrary, it explicitly prohibited FHFA from revoking the Companies' charters even during receivership, 12 U.S.C. § 4617(k), and instructed Treasury to consider "[t]he need to maintain" Fannie and Freddie as "private shareholder-owned compan[ies]" when exercising its temporary authority to invest in their securities, 12 U.S.C. §§ 1455(*l*)(1)(C), 1719(g)(1)(C).

By transferring all of the economic rights of the Companies' private shareholders to Treasury, the Net Worth Sweep effectively reverses Congress's decision to reorganize the Companies as private, shareholder-owned corporations. Whereas the Companies' charters contemplate that they will operate as for-profit, private market participants, the D.C. Circuit's decision authorizes FHFA to hold the Companies in a perpetual conservatorship that promotes FHFA's "own best governmental interests" without regard to the interests of the Companies or their investors. App.27a. Whether HERA's conservatorship provisions allowed FHFA and Treasury to abandon one of the most important and enduring features of federal housing finance policy just as Fannie and Freddie began to generate the largest profits in their history is a question that this Court should decide.

In addition to fundamentally altering important features of the housing finance market, the Net Worth

Sweep also imperils the stability of that market by preventing the Companies from maintaining capital. But for the Net Worth Sweep, the Companies would today have roughly $130 billion of capital on their balance sheets to absorb any potential future losses and reassure investors who buy the mortgage-backed securities the Companies insure. Instead, the Net Worth Sweep requires the Companies to operate perpetually on the brink of insolvency, and beginning in 2018 they will not be allowed to maintain any capital at all.

Petitioners are not alone in believing that the Companies' precarious capital position poses systemic risks for the Nation's housing finance system. FHFA Director Watt recently said in testimony to the House Financial Services Committee that the Companies' lack of capital is "especially irresponsible," Statement of Melvin L. Watt, Dir., FHFA, Before the U.S. House of Representatives Comm. on Fin. Servs. (Oct. 3, 2017), https://goo.gl/tCJi97, and he has publicly described the Companies' inability to retain capital under the Net Worth Sweep as the "most serious risk" the Companies face, Prepared Remarks of Melvin L. Watt, Dir., FHFA, at the Bipartisan Policy Ctr. (Feb. 18, 2016), https://goo.gl/57JrpF. Director Watt made much the same point in testimony to the Senate Banking Committee earlier this year: "Like any business, the Enterprises need some kind of buffer to shield against short-term operating losses," and the current situation could ultimately lead to events that would "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, Dir., FHFA, Before the U.S. Senate Comm. on Banking, Housing, and Urban Affairs (May 11, 2017), https://goo.gl/h44qRf. As these statements make clear, the divided D.C. Circuit's decision approving the Net Worth Sweep has major implications for both the structure and the health of the Nation's housing finance market.

II. This Case Is an Ideal Vehicle for Resolving the Question Presented.

Whether FHFA and Treasury may be enjoined from requiring two of the Nation's most important financial institutions to operate with zero capital is a question of administrative law that was exhaustively briefed below and that generated lengthy competing opinions from respected judges on the D.C. Circuit. This Court has repeatedly granted review in cases with important implications for the administrative state that were decided by divided D.C. Circuit panels. *See, e.g.*, *Michigan v. EPA*, No. 14-46; *Utility Air Regulator Grp. v. EPA*, No. 12-1146; *Free Enter. Fund v. PCAOB*, No. 08-861. Likewise here, there is no reason to await further developments in the lower courts; this case presents an ideal vehicle for resolving the question presented.

Respondents may contend that the Court should deny the petition to permit further percolation in the lower courts, several of which are currently considering APA challenges to the Net Worth Sweep.[4] But Respondents have argued in every one of those other suits that the claims are derivative and that the plaintiffs are bound as a matter of issue preclusion by the D.C. Circuit's ruling that shareholder derivative suits may not go forward during conservatorship. *See, e.g.*, Brief for the Treasury Department at 41, *Collins v. Mnuchin*, No. 17-20364 (5th Cir. Sept. 8, 2017); Brief for FHFA at 34, *Collins v. Mnuchin*, No. 17-20364 (5th Cir. Sept. 8, 2017). If Respondents' position were accepted, this would be the *only* case in which the Court could decide whether the Net Worth Sweep should be enjoined under the APA.

Petitioners disagree with the issue preclusion arguments FHFA and Treasury are advancing in the other Net Worth Sweep cases. But those arguments implicate a number of complex issues, including how to determine whether an APA claim is direct or derivative, whether 12 U.S.C. § 4617(b)(2)(A) bars shareholder derivative suits against FHFA and Treasury during conservatorship, and whether shareholders who did not participate in this litigation are nevertheless bound by the D.C. Circuit's ruling. The Court can decide the question presented in this petition without delving into any of those issues, thus making this case the best vehicle for ruling on whether 12 U.S.C.

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[4] *Collins v. Mnuchin*, No. 17-20364 (5th Cir.); *Robinson v. FHFA*, No. 16-6680 (6th Cir.); *Roberts v. FHFA*, No. 17-1880 (7th Cir.); *Saxton v. FHFA*, No. 17-1727 (8th Cir.).

§ 4617(f) prevents courts from enjoining the Net Worth Sweep.

Neither would it be prudent to wait to see how the FDIC exercises its newly recognized power to nationalize financial institutions before weighing in on the merits of the D.C. Circuit's decision. FHFA's treatment of Fannie and Freddie will loom large in the minds of investors the next time financial institutions need to raise capital during an economic downturn, and the national economy will suffer the consequences long before cases concerning future alleged abuses of conservatorship power appear on this Court's docket. Indeed, as the timing of the Net Worth Sweep illustrates, a federal conservator is most likely to attempt to nationalize its ward *after* a financial crisis is over, when the institution is generating profits and additional private capital is no longer urgently needed. When investors decide whether to provide troubled financial institutions with capital during the next financial crisis, they will not know how the FDIC might use its sweeping new conservatorship powers. This Court should act now before any such crisis to provide much-needed guidance to investors and regulators alike.

III. The D.C. Circuit's Decision Conflicts with the Plain Meaning of HERA and FHFA's Own Repeated Statements About Its Conservatorship Mission.

A. FHFA's Conservatorship Mission Is To Preserve and Conserve the Companies' Assets and Return Them to Soundness and Solvency.

HERA only limits judicial remedies that would "restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver," 12 U.S.C. § 4617(f), and the panel majority recognized that this provision does not apply if FHFA exceeds its "statutory conservatorship powers," App.23a; *accord Coit Indep. Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561, 569 (1989). Elsewhere, HERA specifies FHFA's "[p]owers as conservator": "The Agency may, as conservator, take such action as may be – (i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D). This provision defines FHFA's statutory conservatorship mission, and the panel majority erred in treating it as a mere grant of "permissive, discretionary authority" and thereby leaving FHFA without any standards at all for exercising essentially limitless authority. App.25a.

1. FHFA's Pursuit of Its Conservatorship Mission Is Mandatory.

In holding that federal conservators are not required to conserve assets, the panel majority heavily relied on Section 4617(b)(2)(D)'s use of the word "may." App.23a-29a. But 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 long-established understanding of what it means to act as a "conservator," treating Section 4617(b)(2)(D) as optional leads to the anomalous result that FHFA would be free to decide as conservator to place the Companies in an unsound condition and not rebuild capital even though one of FHFA's "[p]rincipal 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 their capital is depleted and they maintain a negative net worth 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 seeking to return the Companies to a sound and solvent condition.

The panel majority'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."). Saying that FHFA "may" do one thing does not give it the power to do the precise opposite. Consistent with this interpretation 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).

Furthermore, as Judge Brown correctly reasoned, Congress's use of "may" in Section 4617(b)(2)(D) "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." App.96a 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* an overarching statutory mission to preserve and conserve the Companies' assets and return them to soundness and solvency.

The panel majority's interpretation of Section 4617(b)(2)(D) is also at odds with FHFA's own repeated statements. Indeed, as demonstrated below, FHFA's senior leadership has continued to recognize that the agency is required to pursue the conservatorship mission set out in Section 4617(b)(2)(D) even after the D.C. Circuit's original opinion in this case issued in February 2017:

- Section 4617(b)(2)(D) is one of FHFA's "*statutory mandates*," and "FHFA, acting as conservator . . . , must follow the mandates assigned to it by statute." FHFA STRATEGIC PLAN: FISCAL YEARS 2018-2022 4 (Sept. 27, 2017) (emphasis added), https://goo.gl/P7w6mP;

- FHFA has "*statutory obligations* to operate the [Companies] in a safe and sound manner." Prepared Remarks of Melvin L. Watt, Dir., FHFA, at American Mortgage Conference (May 18, 2017) (emphasis added), https://goo.gl/ZPGBYA;

- 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, Dir., FHFA, Before the U.S. Senate Comm. on Banking, Housing, and Urban Affairs (May 11, 2017) (emphasis added), https://goo.gl/h44qRf;

- "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." FHFA STRATEGIC PLAN: FISCAL YEARS 2015-2019 5, 14 (Aug. 15, 2014) (emphasis added), https://goo.gl/5BCKem;

- FHFA has a "*conservatorship mandate* to preserve and conserve the [Companies'] assets." Statement of Edward J. DeMarco, Acting Dir., FHFA, Before the U.S. Senate Comm. on Banking, Housing and Urban Affairs at 3 (Apr. 18, 2013) (emphasis added), https://goo.gl/ZrHAUF;
- As conservator, FHFA has a "'preserve and conserve' *mandate*." FHFA, A STRATEGIC PLAN FOR ENTERPRISE CONSERVATORSHIPS: THE NEXT CHAPTER IN A STORY THAT NEEDS AN ENDING 7 (Feb. 21, 2012) (emphasis added), https://goo.gl/XwZxT7;
- "[T]he Conservator's *mandate* [is] to put the regulated entity in a sound and solvent condition and to preserve and conserve the assets and property of the regulated entity." Conservatorship and Receivership, 75 Fed. Reg. 39,462, 39,469 (July 9, 2010) (emphasis added);
- "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." FHFA, REPORT TO CONGRESS 2009 at 99 (May 25, 2010) (emphasis added), https://goo.gl/5BK9kH.

These considered and frequently repeated statements over many years by FHFA and its senior leadership directly contradict the D.C. Circuit's conclusion that HERA includes no "mandate, command, or directive to build up capital" in the Companies. App.25a.

2. FHFA's "Incidental" Powers Do Not Include Abandoning Its Conservatorship Mission and Operating the Companies with Zero Capital.

The panel 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); *see* App.39a-42a. But as the italicized language makes clear, this incidental power is limited to actions otherwise authorized by HERA that FHFA undertakes as a conservator and thus may not be exercised in a manner that is antithetical to the core conservatorship mission of preserving and conserving assets.

Any other interpretation of the general incidental powers provision would nullify the specific rehabilitative mission assigned to the conservator in Section 4617(b)(2)(D). *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) ("It is a commonplace of statutory construction that the specific governs the general."). Moreover, if Section 4617(b)(2)(J) meant that as conservator FHFA may do whatever it wants with the Companies other than formally liquidate them, much of the rest of HERA's careful articulation of FHFA's conservatorship powers would be surplusage. That the power in Section 4617(b)(2)(J) is labeled "[i]ncidental" further supports the conclusion that it is not unlimited. Confronted with a similarly structured statute in *Brannan v. Stark*, this Court rejected an interpretation of an "incidental" powers provision that would have swallowed much of the rest of the statute: "We do not think it likely that Congress, in fashioning this intricate . . . machinery, would thus hang one of the main gears on the tail pipe." 342 U.S. 451, 463 (1952). *Cf. M'Culloch 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.").

This interpretation is reinforced by the fact that the incidental power is expressly granted to FHFA "*as conservator*" – a term that has a well-established common law meaning, ratified by decades of practice by the FDIC under a statute materially identical to the one at issue here, that requires the conservator to seek to preserve and conserve assets and restore its ward to soundness and solvency. "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it," Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947), and "*an affirmative act by Congress*" is required "to authorize departure from a common law definition," App.107a

(Brown, J., dissenting) (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *see also*, *e.g.*, *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1999 (2016); *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013). Congress's conferral of authority that is "incidental" to others specifically enumerated cannot satisfy that requirement. Thus, while the incidental powers provision may allow FHFA 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 a desire to siphon the Companies' substantial earnings and assets to reduce the federal deficit.

This Court has said that when "the FDIC is acting only as a receiver of a failed institution" "it is *not* pursuing the interest of the Federal Government as a bank insurer," *Atherton v. FDIC*, 519 U.S. 213, 225 (1997) (emphasis added), despite FIRREA's authorization of the receiver to pursue "the best interests of . . . the [FDIC]," 12 U.S.C. § 1821(d)(2)(J). The panel majority erred when it deviated from that interpretation of the parallel provision of HERA.

3. FHFA May Not Wind Down the Companies and Distribute Their Assets to a Favored Investor During Conservatorship.

There can be no doubt that the Net Worth Sweep and its requirement that Fannie and Freddie hold zero capital is aimed at winding down the Companies rather than rehabilitating them to a sound and solvent condition. Indeed, Treasury touted this as a benefit, stating when the Net Worth Sweep was announced that it would "help achieve several important objectives," including "that [Fannie and Freddie] will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." App.326a-327a. Treasury thus expressly tied the Net Worth Sweep's zero capital requirement to the wind down of Fannie and Freddie.

The panel majority was wrong to conclude that there is no "rigid boundary between the conservator and receiver roles" and that FHFA is therefore free during conservatorship to begin winding down the Companies and distributing their assets as it sees fit. App.33a. 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 statutory limits and obligations.

Troublingly, by allowing FHFA to wind down the Companies and distribute their assets to a favored stakeholder during conservatorship, the panel majority's interpretation provides a mechanism by which FHFA can evade 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 assets to shareholders or subordinated debtholders before paying general creditors, in direct contravention of 12 U.S.C. § 4617(c)(1). Indeed, this is precisely what the Net Worth Sweep has accomplished, as it has resulted in Fannie and Freddie distributing hundreds of billions of dollars of their capital to Treasury – an equity shareholder. Congress plainly did not intend such a result, and at least before the Net Worth Sweep financial markets had no reason to expect it. Just last Term, this Court 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), and it should do so again here.

Contrary to the panel majority opinion, forbidding FHFA to wind down the Companies during conservatorship would not be tantamount to imposing on the conservator a "mandatory duty to return the Companies to their old financial ways." App.30a. To say that FHFA is required as conservator to seek to "preserve and conserve" the Companies' assets and restore them to a "sound and solvent condition" is not to deny the discretion FHFA enjoys when pursuing those ends. 12 U.S.C. § 4617(b)(2)(D). And if FHFA deems it appropriate to wind down the Companies, it has that authority as well – so long as it lawfully places the Companies into receivership and follows the procedures HERA specifies for distributing the Companies' assets. Whatever authority FHFA has to change the Companies' business model during conservatorship, this authority does not encompass the power to permanently dissipate assets the conservator is charged with preserving and conserving with the end goal of requiring Fannie and Freddie to hold *zero* capital.

B. Section 4617(f) Does Not Empower FHFA To Immunize the Decisions of Other Federal Agencies from Judicial Review.

The D.C. Circuit was also wrong to conclude that Section 4617(f) foreclosed judicial review of Petitioners' claims that Treasury violated *its own* duties under HERA and the APA. *See* App.44a-47a.

This Court has often emphasized that 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). 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 and quotation marks 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 and expressly prohibits purchases of new securities after that time. 12 U.S.C. §§ 1455(*l*)(4), 1719(g)(4). In agreeing to the Net Worth Sweep, Treasury exceeded these limited powers by purchasing what were, in effect, brand new securities in the Companies. Congress plainly did not intend for the statutory limits on Treasury's investment authority to be meaningless during conservatorship. To the contrary, legislative history shows that the temporal restrictions on Treasury's investment power were critical to HERA'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 D.C. Circuit 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." App.46a. 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). It would not. 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* legal obligations 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) embraced by the decision below is especially anomalous given that all agree 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 understood. *See* App.142a-143a (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").

Finally, it bears emphasis that the D.C. Circuit's resolution of this issue is especially problematic when combined with the court's unbounded understanding of the scope of FHFA's conservatorship authority. Having "erase[d] any outer limit to FHFA's statutory powers," App.107a (Brown, J., dissenting), the panel majority went on to say that FHFA may use its conservatorship powers to enter into contracts that suspend the APA and other federal statutes as they apply to other federal agencies. This is an extraordinary conferral of power on an independent agency, and not one that the Framers would have welcomed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES J. COOPER
Counsel of Record
DAVID H. THOMPSON
HOWARD C. NIELSON, JR.
PETER A. PATTERSON
BRIAN W. BARNES
COOPER & KIRK, PLLC
1523 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com

Counsel for Petitioners

October 16, 2017

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 15, 2016 Decided February 21, 2017
Reissued July 17, 2017

No. 14-5243

PERRY CAPITAL LLC, FOR AND ON BEHALF OF INVESTMENT FUNDS FOR WHICH IT ACTS AS INVESTMENT MANAGER, APPELLANT

v.

STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE DEPARTMENT OF THE TREASURY, ET AL., APPELLEES

Consolidated with 14-5254, 14-5260, 14-5262

Appeals from the United States District Court for the District of Columbia
(No. 1:13-cv-01025)
(No. 1:13-cv-01053)
(No. 1:13-cv-01439)
(No. 1:13-cv-01288)

Theodore B. Olson argued the cause for Perry Capital LLC, *et al*. With him on the briefs were *Douglas R. Cox*, *Matthew D. McGill*, *Charles J. Cooper*, *David H. Thompson*, *Peter A. Patterson*, *Brian W. Barnes*, *Drew W. Marrocco*, *Michael H. Barr*, *Richard M. Zuckerman*, *Sandra Hauser*, and *Janet M. Weiss*.

Hamish P.M. Hume argued the cause for American European Insurance Company, et al. With him on the briefs were *Matthew A. Goldstein*, *David R. Kaplan*, and *Geoffrey C. Jarvis*.

Thomas P. Vartanian, *Steven G. Bradbury*, *Robert L. Ledig*, and *Robert J. Rhatigan* were on the brief for *amici curiae* the Independent Community Bankers of America, the Association of Mortgage Investors, Mr. William M. Isaac, and Mr. Robert H. Hartheimer in support of appellants.

Thomas F. Cullen, Jr., *Michael A. Carvin*, *James E. Gauch*, *Lawrence D. Rosenberg*, and *Paul V. Lettow* were on the brief for *amici curiae* Louise Rafter, Josephine and Stephen Rattien, and Pershing Square Capital Management, L.P. in support of appellants and reversal.

Jerrold J. Ganzfried and *Bruce S. Ross* were on the brief for *amici curiae* 60 Plus Association, Inc. in support of reversal.

Eric Grant was on the brief for *amicus curiae* Jonathan R. Macey in support of appellants and reversal.

Thomas R. McCarthy was on the brief for *amici curiae* Timothy Howard and The Coalition for Mortgage Security in support of appellants.

Myron T. Steele was on the brief for *amicus curiae* Center for Individual Freedom in support of appellants.

Michael H. Krimminger was on the brief for *amicus curiae* Investors Unite in support of appellants for reversal.

Howard N. Cayne argued the cause for appellees Federal Housing Finance Agency, *et al*. With him on the brief were *Paul D. Clement*, *D. Zachary Hudson*, *Michael J. Ciatti*, *Graciela Maria Rodriguez*, *David B. Bergman*, *Michael A.F. Johnson*, *Dirk C. Phillips*, and *Ian S. Hoffman*.

Mark B. Stern, Attorney, U.S. Department of Justice, argued the cause for appellee Steven T. Mnuchin. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Beth S. Brinkmann*, Deputy Assistant Attorney General, *Alisa B. Klein*, *Abby C. Wright*, and *Gerard Sinzdak*, Attorneys.

Dennis M. Kelleher was on the brief for *amicus curiae* Better Markets, Inc. in support of appellees and affirmance.

Pierre H. Bergeron was on the brief for *amicus curiae* Black Chamber of Commerce in support of neither party.

Colleen J. Boles, Assistant General Counsel, *Kathryn R. Norcross*, Senior Counsel, and *Jerome A. Madden*, Counsel, were on the brief for *amicus curiae* The Federal Deposit Insurance Corporation in support of FHFA and affirmance.

Before: BROWN and MILLETT, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* MILLETT and *Senior Circuit Judge* GINSBURG.

Dissenting opinion filed by *Circuit Judge* BROWN.

MILLETT, *Circuit Judge*, and GINSBURG, *Senior Circuit Judge*: In 2007-2008, the national economy went into a severe recession due in significant part to a dramatic decline in the housing market. That downturn pushed two central players in the United States' housing mortgage market – the Federal National Mortgage Association ("Fannie Mae" or "Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie Mac" or "Freddie") – to the brink of collapse. Congress concluded that resuscitating Fannie Mae and Freddie Mac was vital for the Nation's economic health, and to that end passed the Housing and Economic Recovery Act of 2008 ("Recovery Act"), Pub. L. No. 110-289, 122 Stat. 2654 (codified, as relevant here, in various sections of 12 U.S.C.). Under the Recovery Act, the Federal Housing Finance Agency ("FHFA") became the conservator of Fannie Mae and Freddie Mac.

In an effort to keep Fannie Mae and Freddie Mac afloat, FHFA promptly concluded on their behalf a stock purchase agreement with the Treasury Department, under which Treasury made billions of dollars in emergency capital available to Fannie Mae and Freddie Mac (collectively, "the Companies") in exchange for preferred shares of their stock. In return, Fannie and Freddie agreed to pay Treasury a quarterly dividend in the amount of 10% of the total amount of funds drawn from Treasury. Fannie's and Freddie's frequent inability to make those dividend payments, however, meant that they often borrowed more cash from Treasury just to pay the dividends, which in turn increased the dividends that Fannie and Freddie were obligated to pay in future quarters. In 2012, FHFA and Treasury adopted the Third Amendment to their stock purchase agreement, which replaced the fixed 10% dividend with a formula by which Fannie and Freddie just paid to Treasury an amount (roughly) equal to their quarterly net worth, however much or little that may be.

A number of Fannie Mae and Freddie Mac stockholders filed suit alleging that FHFA's and Treasury's alteration of the dividend formula through the Third Amendment exceeded their statutory authority under the Recovery Act, and constituted arbitrary and capricious agency action in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). They also claimed that FHFA, Treasury, and the Companies committed various common-law torts and breaches of contract by restructuring the dividend formula.

We hold that the stockholders' statutory claims are barred by the Recovery Act's strict limitation on judicial review. *See* 12 U.S.C. § 4617(f). We also reject most of the stockholders' common-law claims. Insofar as we have subject matter jurisdiction over the stockholders' common-law claims against Treasury, and Congress has waived the agency's immunity from suit, those claims, too, are barred by the Recovery Act's limitation on judicial review. *Id.* As for the claims against FHFA and the Companies, some are barred because FHFA succeeded to all rights, powers, and privileges of the stockholders under the Recovery Act, *id.* § 4617(b)(2)(A); others fail to state a claim upon which relief can be granted. The remaining claims, which are contract-based claims regarding liquidation preferences and dividend rights, are remanded to the district court for further proceedings.

I. Background

A. Statutory Framework

1. The Origins of Fannie Mae and Freddie Mac

Created by federal statute in 1938, Fannie Mae originated as a government-owned entity designed to "provide stability in the secondary market for residential mortgages," to "increas[e] the liquidity of mortgage investments," and to "promote access to mortgage credit throughout the Nation." 12 U.S.C. § 1716; *see id*. § 1717. To accomplish those goals, Fannie Mae (i) purchases mortgage loans from commercial banks, which frees up those lenders to make additional loans, (ii) finances those purchases by packaging the mortgage loans into mortgage-backed securities, and (iii) then sells those securities to investors. In 1968, Congress made Fannie Mae a publicly traded, stockholder-owned corporation. *See* Housing and Urban Development Act, Pub. L. No. 90-448, § 801, 82 Stat. 476, 536 (1968) (codified at 12 U.S.C. § 1716b).

Congress created Freddie Mac in 1970 to "increase the availability of mortgage credit for the financing of urgently needed housing." Federal Home Loan Mortgage Corporation Act, Pub. L. No. 91-351, preamble, 84 Stat. 450 (1970). Much like Fannie Mae, Freddie Mac buys mortgage loans from a broad variety of lenders, bundles them together into mortgage-backed securities, and then sells those mortgage-backed securities to investors. In 1989, Freddie Mac became a publicly traded, stockholder-owned corporation. *See* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 731, 103 Stat. 183, 429-436.

Fannie Mae and Freddie Mac became major players in the United States' housing market. Indeed, in the lead up to 2008, Fannie Mae's and Freddie Mac's mortgage portfolios had a combined value of $5 trillion and accounted for nearly half of the United States mortgage market. But in 2008, the United States economy fell into a severe recession, in large part due to a sharp decline in the national housing market. Fannie Mae and Freddie Mac suffered a precipitous drop in the value of their mortgage portfolios, pushing the Companies to the brink of default.

2. The 2008 Housing and Economic Recovery Act

Concerned that a default by Fannie and Freddie would imperil the already fragile national economy, Congress enacted the Recovery Act, which established FHFA and authorized it to undertake extraordinary economic measures to resuscitate the Companies. To begin with, the Recovery Act denominated Fannie and Freddie "regulated entit[ies]" subject to the direct "supervision" of FHFA, 12 U.S.C. § 4511(b)(1), and the "general regulatory authority" of FHFA's Director, *id.* § 4511(b)(1), (2). The Recovery Act charged FHFA's Director with "oversee[ing] the prudential operations" of Fannie Mae and Freddie Mac and "ensur[ing] that" they "operate[] in a safe and sound manner," "consistent with the public interest." *Id.* § 4513(a)(1)(A), (B)(i), (B)(v).

The Recovery Act further authorized the Director of FHFA to appoint FHFA as either conservator or receiver for Fannie Mae and Freddie Mac "for the purpose of reorganizing, rehabilitating, or winding up the[ir] affairs." 12 U.S.C. § 4617(a)(2). The Recovery Act invests FHFA as conservator with broad authority and discretion over the operation of Fannie Mae and Freddie Mac. For example, upon appointment as conservator, FHFA "shall * * * immediately succeed to * * * all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." *Id.* § 4617(b)(2)(A). In addition, FHFA "may * * * take over the assets of and operate the regulated entity," and "may * * * preserve and conserve the assets and property of the regulated entity." *Id.* § 4617(b)(2)(B)(i), (iv).

The Recovery Act further invests FHFA with expansive "[g]eneral powers," explaining that FHFA "may," among other things, "take such action as may be * * * necessary to put the regulated entity in a sound and solvent condition" and "appropriate to carry on the business of the regulated entity and preserve and conserve [its] assets and property[.]" 12 U.S.C. § 4617(b)(2), (2)(D). FHFA's powers also include the discretion to "transfer or sell any asset or liability of the regulated entity in default * * * without any approval, assignment, or consent," *id.* § 4617(b)(2)(G), and to "disaffirm or repudiate [certain] contract[s] or lease[s]," *id.* § 4617(d)(1). *See also id.* § 4617(b)(2)(H) (power to pay the regulated entity's obligations); *id.* § 4617(b)(2)(I) (investing the conservator with subpoena power).

Consistent with Congress's mandate that FHFA's Director protect the "public interest," 12 U.S.C. § 4513(a)(1)(B)(v), the Recovery Act invested FHFA as conservator with the authority to exercise its statutory authority and any "necessary" "incidental powers" in the manner that "the Agency [FHFA] determines is in the best interests of the regulated entity *or the Agency*." *Id.* § 4617(b)(2)(J) (emphasis added).

The Recovery Act separately granted the Treasury Department "temporary" authority to "purchase any obligations and other securities issued by" Fannie and Freddie. 12 U.S.C. §§ 1455(*l*)(1)(A), 1719. That provision made it possible for Treasury to buy large amounts of Fannie and Freddie stock, and thereby infuse them with massive amounts of capital to ensure their continued liquidity and stability.

Continuing Congress's concern for protecting the public interest, however, the Recovery Act conditioned such purchases on Treasury's specific determination that the terms of the purchase would "protect the taxpayer," 12 U.S.C. § 1719(g)(1)(B)(iii), and to that end specifically authorized "limitations on the payment of dividends," *id*. § 1719(g)(1)(C)(vi). A sunset provision terminated Treasury's authority to purchase such securities after December 31, 2009. *Id.* § 1719(g)(4). After that, Treasury was authorized only "to hold, exercise any rights received in connection with, or sell, any obligations or securities purchased." *Id.* § 1719(g)(2)(D).

Lastly, the Recovery Act sharply limits judicial review of FHFA's conservatorship activities, directing that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator." 12 U.S.C. § 4617(f).

B. Factual Background

On September 6, 2008, FHFA's Director placed both Fannie Mae and Freddie Mac into conservatorship. The next day, Treasury entered into Senior Preferred Stock Purchase Agreements ("Stock Agreements") with Fannie and Freddie, under which Treasury committed to promptly invest billions of dollars in Fannie and Freddie to keep them from defaulting. Fannie and Freddie had been "unable to access [private] capital markets" to shore up their financial condition, "and the only way they could [raise capital] was with

Treasury support." *Oversight Hearing to Examine Recent Treasury and FHFA Actions Regarding the Housing GSEs Before the H. Comm. on Fin. Servs.*, 110th Cong. 12 (2008) (Statement of James B. Lockhart III, Director, FHFA).

In exchange for that extraordinary capital infusion, Treasury received one million senior preferred shares in each company. Those shares entitled Treasury to: (i) a $1 billion senior liquidation preference – a priority right above all other stockholders, whether preferred or otherwise, to receive distributions from assets if the entities were dissolved; (ii) a dollar-for-dollar increase in that liquidation preference each time Fannie and Freddie drew upon Treasury's funding commitment; (iii) quarterly dividends that the Companies could either pay at a rate of 10% of Treasury's liquidation preference or a commitment to increase the liquidation preference by 12%; (iv) warrants allowing Treasury to purchase up to 79.9% of Fannie's and Freddie's common stock; and (v) the possibility of periodic commitment fees over and above any dividends.[1]

The Stock Agreements also included a variety of covenants. Of most relevance here, the Stock Agreements included a flat prohibition on Fannie and Freddie "declar[ing] or pay[ing] any dividend (preferred or otherwise) or mak[ing] any other distribution (by reduction of capital or otherwise), whether in cash, property, securities or a combination thereof" without

[1] Thus far, Treasury has not asked Fannie and Freddie to pay any commitment fees.

Treasury's advance consent (unless the dividend or distribution was for Treasury's Senior Preferred Stock or warrants). J.A. 2451.

The Stock Agreements initially capped Treasury's commitment to invest capital at $100 billion per company. It quickly became clear, however, that Fannie and Freddie were in a deeper financial quagmire than first anticipated. So their survival would require even greater capital infusions by Treasury, as sufficient private investors were still nowhere to be found. Consequently, FHFA and Treasury adopted the First Amendment to the Stock Agreements in May 2009, under which Treasury agreed to double the funding commitment to $200 billion for each company.

Seven months later, in a Second Amendment to the Stock Agreements, FHFA and Treasury again agreed to raise the cap, this time to an adjustable figure determined in part by the amount of Fannie's and Freddie's quarterly cumulative losses between 2010 and 2012. As of June 30, 2012, Fannie and Freddie together had drawn $187.5 billion from Treasury's funding commitment.

Through the first quarter of 2012, Fannie and Freddie repeatedly struggled to generate enough capital to pay the 10% dividend they owed to Treasury under the amended Stock Agreements.[2] FHFA and Treasury stated publicly that they worried about perpetuating the "circular practice of the Treasury

[2] Neither company drew upon Treasury's commitment in the second quarter of 2012 though.

advancing funds to [Fannie and Freddie] simply to pay dividends back to Treasury," and thereby increasing their debt loads in the process.[3]

Accordingly, FHFA and Treasury adopted the Third Amendment to the Stock Agreements on August 17, 2012. The Third Amendment to the Stock Agreements replaced the previous quarterly 10% dividend formula with a requirement that Fannie and Freddie pay as dividends only the amount, if any, by which their net worth for the quarter exceeded a capital buffer of $3 billion, with that buffer decreasing annually down to zero by 2018. In simple terms, the Third Amendment requires Fannie and Freddie to pay quarterly to Treasury a dividend equal to their net worth – however much or little that might be. Through that new dividend formula, Fannie and Freddie would never again incur more debt just to make their quarterly dividend payments, thereby precluding any dividend-driven downward debt spiral. But neither would Fannie or Freddie be able to accrue capital in good quarters.

Under the Third Amendment, Fannie Mae and Freddie Mac together paid Treasury $130 billion in dividends in 2013, and another $40 billion in 2014. The next year, however, Fannie's and Freddie's quarterly net worth was far lower: Fannie paid Treasury $10.3

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[3] Press Release, United States Dep't of the Treasury, *Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac* (August 17, 2012), https://www.treasury.gov/press-center/press-releases/Pages/tg 1684.aspx ("Treasury Press Release").

billion and Freddie paid Treasury $5.5 billion. *See* FANNIE MAE, FORM 10-K FOR THE FISCAL YEAR ENDED DECEMBER 31, 2015 (Feb. 19, 2016); FREDDIE MAC, FORM 10-K FOR THE FISCAL YEAR ENDED DECEMBER 31, 2015 (Feb. 18, 2016). By comparison, without the Third Amendment, Fannie and Freddie together would have had to pay Treasury $19 billion in 2015 or else draw once again on Treasury's commitment of funds and thereby increase Treasury's liquidation preference. In the first quarter of 2016, Fannie paid Treasury $2.9 billion and Freddie paid Treasury no dividend at all. *See* FANNIE MAE, FORM 10-Q FOR THE QUARTERLY PERIOD ENDED MARCH 31, 2016 (May 5, 2016); FREDDIE MAC, FORM 10-Q FOR THE QUARTERLY PERIOD ENDED MARCH 31, 2016 (May 3, 2016).

Under the Third Amendment, and FHFA's conservatorship, Fannie and Freddie have continued their operations for more than four years. During that time, Fannie and Freddie, among other things, collectively purchased at least 11 million mortgages on single-family owner-occupied properties, and Fannie issued over $1.5 trillion in single-family mortgage-backed securities.[4]

[4] *See* FANNIE MAE, FORM 10-K FOR THE FISCAL YEAR ENDED DECEMBER 31, 2015 (Feb. 19, 2016); FREDDIE MAC, ANNUAL HOUSING ACTIVITIES REPORT FOR 2015, at 1 (March 15, 2016); FANNIE MAE, 2015 ANNUAL HOUSING ACTIVITIES REPORT AND ANNUAL MORTGAGE REPORT, tbl. 1A (March 14, 2016); FANNIE MAE, 2014 ANNUAL HOUSING ACTIVITIES REPORT AND ANNUAL MORTGAGE REPORT, tbl. 1A (March 13, 2015); FREDDIE MAC, ANNUAL HOUSING ACTIVITIES REPORT FOR 2014, at 1 (March 11, 2015); FANNIE MAE, 2013 ANNUAL HOUSING ACTIVITIES REPORT AND ANNUAL MORTGAGE REPORT,

C. Procedural History

In 2013, a number of Fannie Mae and Freddie Mac stockholders filed suit challenging the Third Amendment. Different groups of plaintiffs have pressed different claims. First, various hedge funds, mutual funds, and insurance companies (collectively, "institutional stockholders") argued that (i) FHFA's and Treasury's adoption of the Third Amendment exceeded their authority under the Recovery Act, and (ii) FHFA and Treasury each engaged in arbitrary and capricious conduct, in violation of the Administrative Procedure Act ("APA"). The institutional stockholders requested declaratory and injunctive relief, but no damages.[5]

Second, a class of stockholders ("class plaintiffs") and a few of the institutional stockholders alleged that, in adopting the Third Amendment, FHFA and the Companies breached the terms governing dividends, liquidation preferences, and voting rights in the stock certificates for Freddie's Common Stock and for both Fannie's and Freddie's Preferred Stock. They further alleged that those defendants breached the implied

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tbl. 1A (March 13, 2014); Freddie Mac, Annual Housing Activities Report for 2013, at 1 (March 12, 2014).

[5] One of the institutional stockholders – Arrowood – does not identify the claims for which it seeks damages in its prayer for relief. However, looking at the description of each claim, Arrowood alleges that it sustained damages only in its breach of contract and breach of implied covenant claims. For the Recovery Act and APA claims, Arrowood alleges only that it is entitled to relief "under 5 U.S.C. §§ 702, 706(2)(C)," J.A. 208, provisions of the APA that do not authorize money damages.

covenants of good faith and fair dealing in those certificates. The class plaintiffs also alleged that FHFA and Treasury breached state-law fiduciary duties owed by a corporation's management and controlling shareholder, respectively. Some of the institutional stockholders asserted similar claims against FHFA. The class plaintiffs asked the court to declare their lawsuit a "proper derivative action," J.A. 277, and to award damages as well as injunctive and declaratory relief.

The district court granted FHFA's and Treasury's motions to dismiss both complaints for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Perry Capital LLC v. Lew*, 70 F.Supp.3d 208, 246 (D.D.C. 2014). Specifically, the court dismissed the Recovery Act and APA claims as barred by the Recovery Act's express limitation on judicial review, 12 U.S.C. § 4617(f). The court dismissed the APA claims against Treasury on the same statutory ground, reasoning that Treasury's "interdependent, contractual conduct is directly connected to FHFA's activities as a conservator." *Id.* at 222. The district court explained that "enjoining Treasury from partaking in the Third Amendment would restrain FHFA's uncontested authority to determine how to conserve the viability of [Fannie and Freddie]." *Id.* at 222-223.

Turning to the class plaintiffs' claims for breach of fiduciary duty, the court dismissed those as barred by FHFA's statutory succession to all rights and interests held by Fannie's and Freddie's stockholders, 12 U.S.C. § 4617(b)(2)(A). The court then dismissed the breach of contract and breach of the implied covenant of good faith and fair dealing claims based on liquidation preferences as not ripe because Fannie and Freddie had not been liquidated. Finally, the district court dismissed the dividend-rights claims, reasoning that no such rights exist.[6]

II. Jurisdiction

Before delving into the merits, we pause to assure ourselves of our jurisdiction, as is our duty. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction[.]") (citation omitted). A provision of the Recovery Act deprives courts of jurisdiction "to affect, by injunction or otherwise, the issuance or effectiveness of any classification or action of the Director under this subchapter * * * or to review, modify, suspend, terminate, or set aside such classification or action." 12 U.S.C. § 4623(d).

That language does not strip this court of jurisdiction to hear this case. By its terms, Section 4623(d) applies only to "any classification or action of the Director." 12 U.S.C. § 4623(d). Thus, Section 4623(d) prohibits review of the Director's establishment of "risk-based capital requirements * * * to ensure that the enterprises operate in a safe and sound manner,

[6] The class plaintiffs had also alleged that the failure of FHFA and Treasury to provide just compensation for taking private property violated the Takings Clause of the Fifth Amendment. The district court dismissed that challenge for failure to state a legally cognizable claim, Fed. R. Civ. P. 12(b)(6), and the class plaintiffs have not challenged that ruling on appeal.

maintaining sufficient capital and reserves to support the risks that arise in the operations and management of the enterprises." *Id.* § 4611(a)(1). In particular, Section 4614 requires "the Director" to "classify" Fannie and Freddie as "adequately capitalized," "undercapitalized," "significantly undercapitalized," or "critically undercapitalized." *Id.* § 4614(a). Classification as undercapitalized or significantly undercapitalized in turn subjects Fannie and Freddie to a host of supervisory actions by "the Director." *See id.* §§ 4615-4616. It is those capital-classification decisions that Section 4623(d) insulates from judicial review.

The Third Amendment was not a "classification or action of the Director" of FHFA. Rather, it was an action taken by FHFA acting as Fannie's and Freddie's conservator. Judicial review of the actions of the agency as *conservator* is addressed by Section 4617(f), not by Section 4623(d)'s particular focus on the Director's own actions. *Compare* 12 U.S.C. § 4617(f) (referencing "powers or functions of *the Agency*") (emphasis added), *with id.* § 4623(d) (referencing "any classification or action of *the Director*") (emphasis added).

FHFA argues that the Director's decision in 2008 to suspend capital classifications of Fannie Mae and Freddie Mac during the conservatorship could be a "classification or action of the Director." FHFA Suppl. Br. at 6-8 (quoting 12 U.S.C. § 4623(d)). Perhaps. But those are not the actions that the institutional stockholders and the class plaintiffs challenge. Instead, they challenge FHFA's decision as conservator to agree to changes in the Stock Agreement and to how Fannie and Freddie will compensate Treasury for its extensive past and promised future infusions of needed capital. Those actions do not fall within Section 4623(d)'s jurisdictional bar for Director-specific actions.

III. Statutory Challenges to the Third Amendment

Turning to the merits, we address first the institutional stockholders' claims that FHFA's and Treasury's adoption of the Third Amendment violated both the Recovery Act and the APA. Both of those statutory claims founder on the Recovery Act's far-reaching limitation on judicial review. Congress was explicit in Section 4617(f) that "no court" can take "any action" that would "restrain or affect" FHFA's exercise of its "powers or functions * * * as a conservator or a receiver." 12 U.S.C. § 4617(f). We take that law at its word, and affirm dismissal of the institutional stockholders' claims for injunctive and declaratory relief designed to unravel FHFA's adoption of the Third Amendment.

A. Section 4617(f) Bars the Challenges to FHFA Based on the Recovery Act

1. Section 4617(f)'s Textual Barrier to Plaintiffs' Claims for Relief

The institutional stockholders' complaints ask the district court to declare the Third Amendment invalid, to vacate the Third Amendment, and to enjoin FHFA from implementing it. Those prayers for relief fall squarely within Section 4617(f)'s plain textual compass. The institutional stockholders seek to "restrain [and] affect" FHFA's "exercise of powers" "as a conservator" in amending the terms of Fannie's and Freddie's contractual funding agreement with Treasury to guarantee the Companies' continued access to taxpayer-financed capital without risk of incurring new debt just to pay dividends to Treasury. Such management of Fannie's and Freddie's assets, debt load, and contractual dividend obligations during their ongoing business operation sits at the core of FHFA's conservatorship function.

This court has interpreted a nearly identical statutory limitation on judicial review to prohibit claims for declaratory, injunctive, and other forms of equitable relief as long as the agency is acting within its statutory conservatorship authority. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, governs the Federal Deposit Insurance Corporation ("FDIC") when it serves as a conservator or receiver for troubled financial institutions. Section 1821(j) of that Act prohibits courts from "tak[ing] any action * * * to restrain or affect the exercise of powers or functions of [the FDIC] as a conservator or a receiver." 12 U.S.C. § 1821(j).

In multiple decisions, we have held that Section 1821(j) shields from a court's declaratory and other equitable powers a broad swath of the FDIC's conduct as conservator or receiver when exercising its statutory authority. To start with, in *National Trust* *for Historic Preservation in the United States v. FDIC* (*National Trust I*), 995 F.2d 238 (D.C. Cir. 1993) (per curiam), *aff'd in relevant part*, 21 F.3d 469 (D.C. Cir. 1994), we held that Section 1821(j) "bars the [plaintiff's] suit for injunctive relief" seeking to halt the sale of a building as violating the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* (repealed December 19, 2014). *See* 995 F.2d at 239. We explained that, because "the powers and functions the FDIC is exercising are, by statute, deemed to be those of a receiver," an injunction against the sale "would surely 'restrain or affect' the FDIC's exercise of those powers or functions." *Id.* Given Section 1821(j)'s "strong language," we continued, it would be "[im]possible * * * to interpret the FDIC's 'powers' and 'authorities' to include the limitation that those powers be subject to – and hence enjoinable for non-compliance with – any and all other federal laws." *Id.* at 240. Indeed, "given the breadth of the statutory language," Section 1821(j) "would appear to bar a court from acting" notwithstanding a "parade of possible violations of existing laws." *National Trust for Historic Preservation in the United States v. FDIC* (*National Trust II*), 21 F.3d 469, 472 (D.C. Cir. 1994) (per curiam) (Wald, J., joined by Silberman, J., concurring).

Again in *Freeman v. FDIC*, 56 F.3d 1394 (D.C. Cir. 1995), this court rejected the plaintiffs' attempt to enjoin the FDIC, as receiver of a bank, from foreclosing on their home, *id.* at 1396. We acknowledged that Section 1821(j)'s stringent limitation on judicial review "may appear drastic," but that "it fully accords with the intent of Congress at the time it enacted FIRREA in the midst of the savings and loan insolvency crisis to enable the FDIC" to act "expeditiously" in its role as conservator or receiver. *Id.* at 1398. Given those exigent financial circumstances, "Section 1821(j) does indeed effect a sweeping ouster of courts' power to grant equitable remedies [.]" *Id.* at 1399; *see also MBIA Ins. Corp. v. FDIC*, 708 F.3d 234, 247 (D.C. Cir. 2013) (In Section 1821(j), "Congress placed 'drastic' restrictions on a court's ability to institute equitable remedies [.]") (quoting *Freeman*, 56 F.3d at 1398).

The rationale of those decisions applies with equal force to Section 4617(f)'s indistinguishable operative language. The plain statutory text draws a sharp line in the sand against litigative interference – through judicial injunctions, declaratory judgments, or other equitable relief – with FHFA's statutorily permitted actions as conservator or receiver. And, as with FIRREA, Congress adopted Section 4617(f) to protect FHFA as it addressed a critical aspect of one of the greatest financial crises in the Nation's modern history.

2. FHFA's Actions Fall Within its Statutory Authority

The institutional stockholders cite language in *National Trust I*, which states that FIRREA's – and by analogy the Recovery Act's – prohibition on injunctive and declaratory relief would not apply if the agency "has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions," *National Trust I*, 995 F.2d at 240. They then argue that FHFA's adoption of the Third Amendment was out of bounds because, in their view, the Recovery Act "*requires* FHFA as conservator to act independently to conserve and preserve the Companies' assets, to put the Companies in a sound and solvent condition, and to rehabilitate them." Institutional Pls. Br. at 26 (emphasis added). As the institutional stockholders see it, by committing Fannie's and Freddie's quarterly net worth – if any – to Treasury in exchange for continued access to Treasury's taxpayer-funded financial lifelines, FHFA acted like a *de facto* receiver functionally liquidating Fannie's and Freddie's businesses. And FHFA did so, they add, without following the procedural preconditions that the Recovery Act imposes on a receivership, such as publishing notice and providing an alternative dispute resolution process to resolve liquidation claims, *see* 12 U.S.C. § 4617(b)(3)(B)(i), (b)(7)(A)(i).[7]

That exception to the bar on judicial review has no application here because adoption of the Third Amendment falls within FHFA's statutory conservatorship powers, for four reasons.

(i) The Recovery Act endows FHFA with extraordinarily broad flexibility to carry out its role as conservator. Upon appointment as conservator, FHFA

[7] The institutional stockholders do not argue that FHFA or Treasury transgressed constitutional bounds in any respect.

"immediately succeed[ed] to * * * all rights, titles, powers, and privileges" not only of Fannie Mae and Freddie Mac, but also "of any stockholder, officer, or director of such regulated entit[ies] with respect to the regulated entit[ies] and the assets of the regulated entit[ies.]" 12 U.S.C. § 4617(b)(2)(A)(i). In addition, among FHFA's many "[g]eneral powers" is its authority to "[o]perate the regulated entity," pursuant to which FHFA "*may*, as conservator or receiver * * * take over the assets of and operate * * * and conduct all business of the regulated entity; * * * collect all obligations and money due the regulated entity; * * * perform all functions of the regulated entity * * *; preserve and conserve the assets and property of the regulated entity; and * * * provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver." *Id.* § 4617(b)(2), (2)(B) (emphasis added). The Recovery Act further provides that FHFA "*may*, as conservator, take such action as may be * * * necessary to put the regulated entity in a sound and solvent condition; and * * * 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) (emphasis added). FHFA also "*may* disaffirm or repudiate [certain] contract[s] or lease[s]." *Id.* § 4617(d)(1) (emphasis added); *see also id.* § 4617(b)(2)(G) (providing that FHFA "*may*, as conservator or receiver, transfer or sell any asset or liability of the regulated entity in default" without consent) (emphasis added).

Accordingly, time and again, the Act outlines what FHFA as conservator "may" do and what actions it "may" take. The statute is thus framed in terms of expansive grants of permissive, discretionary authority for FHFA to exercise as the "Agency determines is in the best interests of the regulated entity or the Agency." 12 U.S.C. § 4617(b)(2)(J). "It should go without saying that 'may means may.' " *United States Sugar Corp. v. EPA*, 830 F.3d 579, 608 (D.C. Cir. 2016) (quoting *McCreary v. Offner*, 172 F.3d 76, 83 (D.C. Cir. 1999)). And "may" is, of course, "permissive rather than obligatory." *Baptist Memorial Hosp. v. Sebelius*, 603 F.3d 57, 63 (D.C. Cir. 2010).

Entirely absent from the Recovery Act's text is any mandate, command, or directive to build up capital for the financial benefit of the Companies' stockholders. That is noteworthy because, when Congress wanted to compel FHFA to take specific measures as conservator or receiver, it switched to language of command, employing "shall" rather than "may." *Compare* 12 U.S.C. § 4617(b)(2)(B) (listing actions that FHFA "may" take "as conservator or receiver" to "[o]perate the regulated entity"), *and id.* § 4617(b)(2)(D) (specifying actions that FHFA "may, as conservator" take), *with id.* § 4617(b)(2)(E) (specifying actions that FHFA "shall" take when "acting as receiver"), *and id.* § 4617(b)(14)(A) (specifying that FHFA as conservator or receiver "shall * * * maintain a full accounting"). "[W]hen a statute uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense –

the one act being permissive, the other mandatory." *Sierra Club v. Jackson*, 648 F.3d 848, 856 (D.C. Cir. 2011) (internal quotation marks and citation omitted).

In short, the most natural reading of the Recovery Act is that it permits FHFA, but does not compel it in any judicially enforceable sense, to preserve and conserve Fannie's and Freddie's assets and to return the Companies to private operation. And, more to the point, the Act imposes no precise order in which FHFA must exercise its multi-faceted conservatorship powers.

FHFA's execution of the Third Amendment falls squarely within its statutory authority to "[o]perate the [Companies]," 12 U.S.C. § 4617(b)(2)(B); to "reorganiz[e]" their affairs, *id.* § 4617(a)(2); and to "take such action as may be * * * appropriate to carry on the[ir] business," *id*. § 4617(b)(2)(D)(ii). Renegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital are quintessential conservatorship tasks designed to keep the Companies operational. The institutional stockholders no doubt disagree about the necessity and fiscal wisdom of the Third Amendment. But Congress could not have been clearer about leaving those hard operational calls to FHFA's managerial judgment.

That, indeed, is why Congress provided that, in exercising its statutory authority, FHFA "may" "take any action * * * 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). Notably, while FIRREA explicitly permits FDIC to factor the best interests of depositors into its conservatorship judgments, *id.* § 1821(d)(2)(J)(ii), the Recovery Act refers only to the best interests of FHFA and the Companies – and *not* those of the Companies' shareholders or creditors. Congress, consistent with its concern to protect the public interest, thus made a deliberate choice in the Recovery Act to permit FHFA to act in its own best governmental interests, which may include the taxpaying public's interest.

The dissenting opinion (at 8) views Sections 4617(b)(2)(D) and (E) as "mark[ing] the bounds of FHFA's conservator or receiver powers." Not so. As a plain textual matter, the Recovery Act expressly provides FHFA many "[g]eneral powers" "as conservator or receiver," 12 U.S.C. § 4617(b)(2), that are not delineated in Section 4617(b)(2)(D) or (E). *See id.* § 4617(b)(2)(A) (assuming "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)(B) (power to "[o]perate the regulated entity"); *id.* § 4617(b)(2)(C) (power to "provide for the exercise of any function by any stockholder, director, or officer of any regulated entity"); *id.* § 4617(b)(2)(G) (power to "transfer or sell any asset or liability of the regulated entity in default"); *id.* § 4617(b)(2)(H) (power to "pay [certain] valid obligations of the regulated entity"); *id.* § 4617(b)(2)(I) (power to issue subpoenas and take testimony under oath). *See also id.* § 4617(d)(1) (granting FHFA as the conservator or receiver the power to "repudiate [certain] contract[s] or lease[s]").

The institutional stockholders also argue that, because Section 4617(b)(2)(D) describes FHFA's "[p]owers as conservator" by providing that FHFA "may * * * take such action as may be" "necessary to put the [Companies] in a sound and solvent condition" and "appropriate to * * * preserve and conserve [their] assets," FHFA may act only when those two conditions are satisfied. Institutional Pls. Reply Br. at 13. In their view, FHFA "does not have other powers as conservator." *Id*.

The short answer is that the Recovery Act says nothing like that. It contains no such language of precondition or mandate. Indeed, if that is what Congress meant, it would have said FHFA "may only" act as necessary or appropriate to those tasks. Not only is that language missing from the Recovery Act, but Congress did not even say that FHFA "should" – let alone, "should first" – preserve and conserve assets or "should" first put the Companies in a sound and solvent condition. Nor did it articulate FHFA's power directly in terms of asset preservation or sound and solvent company operations. What the statute says is that FHFA "*may* * * * take such action as *may* be" "necessary to put the [Companies] in a sound and solvent condition" and "*may* be" "appropriate to * * * preserve or conserve [the Companies'] assets." 12 U.S.C. § 4617(b)(2)(D) (emphases added). So at most, the Recovery Act empowers FHFA to "take such action" as may be necessary or appropriate to fulfill several goals. That is how Congress wrote the law, and that is the law we must apply. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-462 (2002) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992)); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014) ("[I]t is this court's obligation to enforce statutes as Congress wrote them.").[8]

(ii) Even if the Recovery Act did impose a primary duty to preserve and conserve assets, nothing in the Recovery Act says that FHFA must do that in a manner that returns them to their prior private, capital-accumulating, and dividend-paying condition for all stockholders. *See* Institutional Pls. Br. at 44. Tellingly, the institutional stockholders and dissenting opinion accept that the original Stock Agreements and the First and Second Amendments fit comfortably within FHFA's statutory authority as conservator. *See* Dissenting Op. at 21 (acknowledging that FHFA "manage[d] the Companies within the conservator

[8] The dissenting opinion suggests that Congress's use of permissive "may" terminology is "a simple concession to the practical reality that a conservator may not always succeed in rehabilitating its ward." Dissenting Op. at 9 n.1. Not so. Even with the hypothesized addition of mandatory terms to the statute, the Act would at most command FHFA to take actions "necessary to put the [Companies] in a sound and solvent condition" and "appropriate to * * * preserve and conserve [their] assets." 12 U.S.C. § 4617(b)(2)(D). FHFA's compliance thus would turn on its actions, not on their outcome.

role" until "the tide turned * * * with the Third Amendment"). But the Stock Agreements and First and Second Amendments themselves both obligated the Companies to pay large dividends to Treasury and prohibited them, without Treasury's approval, from "declar[ing] or pay[ing] any dividend (preferred or otherwise) or mak[ing] any other distribution (by reduction of capital or otherwise), whether in cash, property, securities or a combination thereof." *E.g.*, J.A. 2451; *cf.* 12 U.S.C. § 1719(g)(1)(C)(vi) ("To protect the taxpayers, the Secretary of the Treasury shall take into consideration," *inter alia*, "[r]estrictions on the use of corporation resources, including limitations on the payment of dividends[.]").

That means that FHFA's ability as conservator to give Treasury (and, by extension, the taxpayers) a preferential right to dividends, to the effective exclusion of other stockholders, was already put in place by the unchallenged and thus presumptively proper Stock Agreements and Amendments that predated the Third Amendment. The Third Amendment just locked in an exclusive allocation of dividends to Treasury that was already made possible by – and had been in practice under – the previous agreements, in exchange for continuing the Companies' unprecedented access to guaranteed capital.

The institutional stockholders point to Section 4617(a)(2) as a purported source of FHFA's mandatory duty to return the Companies to their old financial ways. But that Section provides only that FHFA's Director has the power to appoint FHFA as "conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2). It is then the multi-paged remaining portion of Section 4617 that details at substantial length FHFA's many "[g]eneral powers" as conservator or receiver. *Id.* § 4617(b)(2).

Furthermore, that explicit power to "reorganiz[e]" supports FHFA's action because the Third Amendment reorganized the Companies' financial operations in a manner that ensures that quarterly dividend obligations are met without drawing upon Treasury's commitment and thereby increasing Treasury's liquidation preference. FHFA's textual authority to reorganize and rehabilitate the Companies, in other words, forecloses any argument that the Recovery Act made the *status quo ante* a statutorily compelled end game.

In addition, the Recovery Act openly recognizes that sometimes conservatorship will involve managing the regulated entity in the lead up to the appointment of a liquidating receiver. *See* 12 U.S.C. § 4617(a)(4)(D) (providing that appointment of FHFA as a receiver automatically terminates a conservatorship under the Act). The authority accorded FHFA as a conservator to reorganize or rehabilitate the affairs of a regulated entity thus must include taking measures to prepare a company for a variety of financial scenarios, including possible liquidation. Contrary to the dissenting opinion (at 11), that does not make FHFA a "hybrid" conservator-receiver. It makes FHFA a fully armed conservator empowered to address all potential aspects of the Companies' financial condition and operations at all stages when confronting a threatened business collapse of truly unprecedented magnitude and with national economic repercussions.

The institutional stockholders nonetheless argue that, rather than adopt the Third Amendment's dividend allocation, FHFA could instead have adopted a payment-in-kind dividend option that would have increased Treasury's liquidation preference by 12% in return for avoiding a 10% dividend payment. Perhaps. But the Recovery Act does not compel that choice over the variable dividend to Treasury put in place by the Third Amendment. Either way, Section 4617(f) flatly forbids declaratory and injunctive relief aimed at superintending to that degree FHFA's conservatorship or receivership judgments.[9]

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[9] The institutional stockholders also contend that FHFA's adoption of the Third Amendment violated Section 4617(a)(7), which provides that FHFA "shall not be subject to the direction or supervision of any other agency." 12 U.S.C. § 4617(a)(7). The institutional stockholders pleaded, however, only that "on information and belief, FHFA agreed to the [Third Amendment] * * * at the insistence and under the direction and supervision of Treasury." J.A. 122, ¶ 70. On a motion to dismiss for failure to state a claim, we are not required to credit a bald legal conclusion that is devoid of factual allegations and that simply parrots the terms of the statute. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.") (citations, internal quotation marks, and alterations omitted).

The dissenting opinion claims that the Third Amendment's prevention of capital accumulation went too far because it constitutes a "*de facto* receiver[ship]" or "*de facto* liquidation," and thus could not possibly constitute a permissible "conservator" measure. *See* Dissenting Op. at 10, 17, 25. That position presumes the existence of a rigid boundary between the conservator and receiver roles that even the dissenting opinion seems to admit may not exist. *See* Dissenting Op. at 7 (acknowledging that "the line between a conservator and a receiver may not be completely impermeable"). Wherever that line may be, it is not crossed just because an agreement that ensures continued access to vital capital diverts all dividends to the lender, who had singlehandedly saved the Companies from collapse, even if the dividend payments under that agreement may at times be greater than the dividend payments under previous agreements. The proof that no *de facto* liquidation occurred is in the pudding: non-capital-accumulating entities that continue to operate long-term, purchasing more than 11 million mortgages and issuing more than $1.5 trillion in single-family mortgage-backed securities over four years, are not the same thing as liquidating entities.

The argument also overlooks that the Third Amendment's redirection of dividends to Treasury came in exchange for a promise of continued access to necessary capital free of the preexisting risk of accumulating more debt simply to pay dividends to Treasury. Now, after more than eight years of conservatorship – four of which have been under the

Third Amendment – Fannie and Freddie have gone from a state of near-collapse to fluctuating levels of profitability. FHFA thus has "carr[ied] on the business of" Fannie and Freddie, 12 U.S.C. § 4617(b)(2)(D)(ii), in that they remain fully operational entities with combined operating assets of $5 trillion, *see* Treasury Resp. Br. at 35. While the dissenting opinion worries that the Companies have "no hope of survival past 2018," Dissenting Op. at 27, the Third Amendment allows the Companies after 2018 to draw upon Treasury's remaining funding commitment if needed to remedy any negative net worth.[10]

(iii) The institutional stockholders argue that the Third Amendment violated FHFA's "fiduciary and statutory obligations to * * * rehabilitate [the Companies] to normal business operations," Institutional Pls. Br. at 34, because the Amendment was as a factual matter not needed to prevent further indebtedness, and was instead intended to secure a windfall for Treasury (and indirectly taxpayers) at the expense of the stockholders. They likewise contend that FHFA's motivation for adopting the Third Amendment all along has been to liquidate the Companies. They rest those arguments on factual allegations that FHFA and Treasury knew Fannie and Freddie had just turned an

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[10] The dissenting opinion comments that the dividend payments under the Third Amendment did not go towards paying off what the Companies borrowed from Treasury. *See* Dissenting Op. at 21, 23. Yet the Stock Agreements and the First and Second Amendments, which the dissenting opinion acknowledges were lawful, *id.* at 21, similarly did not provide for the Companies' dividends to pay down Treasury's liquidation preference.

economic corner, and had experienced substantial increases in their net worth. In that regard, the institutional stockholders cite evidence that FHFA and Treasury were aware before they adopted the Third Amendment that Fannie and Freddie might each experience a substantial one-time increase in net worth in 2013 and 2014 due to the realization of certain deferred tax assets. They also point to presentations Fannie Mae made to FHFA and Treasury in July and August before the Third Amendment was executed, predicting that Fannie Mae and Freddie Mac would need only small draws from Treasury's commitment (totaling less than $9 billion) to pay Treasury its dividend through the year 2022. In the institutional stockholders' view, FHFA's alleged knowledge that rosier days were dawning shows that FHFA had no legitimate conservatorship reason to adopt the Third Amendment rather than to pursue measures that would allow the Companies to accumulate capital and return to the dividend-paying *status quo ante*.

To be clear, though, the institutional stockholders argue that the Third Amendment would be just as flawed in their view even if Fannie and Freddie had made *no* profits, were badly hemorrhaging money in 2013 and 2014, and thus were in dire need of the Third Amendment's promise of continued access to capital, free from dividend obligations that would have increased still further Treasury's liquidation preference. *See* Oral Arg. Tr. 22-24 (Q: "[D]oes the argument that they were not acting as a proper conservator depend on the fact that they were in fact profitable? A: "[N]o, it doesn't.").[11]

Treasury argues, by contrast, that FHFA was taking a broader and longer-term view of the Companies' financial condition. In almost every quarter before the Third Amendment was adopted, Fannie and Freddie had been unable to make their dividend payments to Treasury without taking on more debt to Treasury. In SEC filings, Fannie and Freddie themselves predicted that they would be unable to pay the 10% dividend over the long term. *See*, *e.g.*, J.A. 1983 (Fannie Mae statement that it "do[es] not expect to generate net income or comprehensive income in excess of [its] annual dividend obligation to Treasury over the long term[,]" so its "dividend obligation to Treasury will increasingly drive [its] future draws under the senior [Stock Agreement]"); *id.* at 2160 (similar for Freddie Mac). Other market participants shared that view. *See*, *e.g.*, *id.* at 655 (Moody's report).

According to Treasury, the Third Amendment put a structural end to "the circular practice of the Treasury advancing funds to [Fannie and Freddie] simply to

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[11] After the large dividends in 2013 and 2014, Fannie and Freddie made a far smaller dividend payment – a combined $15.8 billion – in 2015. In the first quarter of 2016, Freddie Mac had a comprehensive loss of $200 million and paid no dividend at all. *See* FREDDIE MAC, FORM 10-Q FOR THE QUARTERLY PERIOD ENDED MARCH 31, 2016 (May 3, 2016). That loss was due to market forces such as interest-rate volatility and widening spreads between interest rates and benchmark rates. *Id.* at 1-2.

pay dividends back to Treasury." Treasury Press Release, *supra*. Said another way, the Third Amendment changed the dividend formula to require Fannie and Freddie to pay whatever dividend they could afford – however little, however much – to prevent them from ever again having to fruitlessly borrow from Treasury to pay Treasury. If Fannie and Freddie made profits, Treasury would reap the rewards; if they suffered losses, Treasury would have to forgo payment entirely.

The problem with the institutional stockholders' argument is that the factual question of whether FHFA adopted the Third Amendment to arrest a "debt spiral" or whether it was intended to be a step in furthering the Companies' return to "normal business operations" is not dispositive of FHFA's authority to adopt the Third Amendment. Nothing in the Recovery Act confines FHFA's conservatorship judgments to those measures that are driven by financial necessity. And for purposes of applying Section 4617(f)'s strict limitation on judicial relief, allegations of motive are neither here nor there, as the dissenting opinion agrees (at 20). The stockholders cite nothing – nor can we find anything – in the Recovery Act that hinges FHFA's exercise of its conservatorship discretion on particular motivations. *See Leon County, Fla. v. FHFA*, 816 F.Supp.2d 1205, 1208 (N.D. Fla. 2011) ("Congress barred judicial review of the conservator's actions without making an exception for actions said to be taken from an improper motive.").

Likewise, the duty that the Recovery Act imposes on FHFA to comply with receivership procedural protections textually turns on FHFA actually liquidating the Companies. *See*, *e.g.*, 12 U.S.C. § 4617(b)(3)(B) ("The receiver, in any case involving the liquidation or winding up of the affairs of [Fannie or Freddie], shall * * * promptly publish a notice to the creditors of the regulated entity to present their claims, together with proof, to the receiver[.]"). Undertaking permissible conservatorship measures even with a receivership mind would not be out of statutory bounds.

The institutional stockholders' burden instead is to show that FHFA's actions were frolicking outside of statutory limits as a matter of law. What matters then is the substantive measures that FHFA took, and nothing in the Recovery Act mandated that FHFA take steps to return Fannie Mae and Freddie Mac at the first sign of financial improvement to the old economic model that got them into so much trouble in the first place. Nor did anything in the Recovery Act forbid FHFA from adopting measures that took a more comprehensive, wait-and-see view of the Companies' long-term financial condition, or simply kept the Companies' heads above water while FHFA observed their economic performance over time and through ever-changing market conditions. *See*, *e.g.*, *supra* note 11.[12]

[12] We grant the plaintiffs' various motions to supplement the record with evidence of what FHFA and Treasury officials knew about the Companies' predicted financial performance and when. That evidence does not affect our analysis, and we see no need to

(iv) The institutional stockholders cite state-law and historical sources to suggest that FHFA was not acting as a common-law conservator normally would when it adopted the Third Amendment. *See* Institutional Pls. Br. at 29-33. The problem for the plaintiffs is that arguments about the contours of common-law conservatorship do nothing to show that FHFA exceeded *statutory* bounds, which is what *National Trust I* referenced. Under the Recovery Act, FHFA as conservator may "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)(ii) (emphasis added). That explicit statutory authority to take conservatorship actions in the conservator's own interest, which here includes the public and governmental interests, directly undermines the dissenting opinion's supposition that Congress intended FHFA to be nothing more than a common-law conservator. *See* Dissenting Op. at 16 (asserting that, in the common-law probate context, a conservator is generally "forbid [den] * * * from acting for the benefit of the conservator himself or a third party").

On top of that, Congress in the Recovery Act gave FHFA the ability to obtain from Treasury capital infusions of unprecedented proportions, as long as the deal FHFA struck with Treasury "protect[ed] the taxpayer"

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remand the claims for the district court to consider a fuller administrative record because the Recovery Act simply does not impose upon FHFA the precise duties that the institutional plaintiffs' factual arguments suppose.

and "provide[d] stability to the financial markets." 12 U.S.C. §§ 1455, 1719(g)(1)(B)(i), (iii). That $200 billion-plus lifeline is what saved the Companies – none of the institutional stockholders were willing to infuse that kind of capital during desperate economic times – and bears no resemblance to the type of conservatorship measures that a private common-law conservator would be able to undertake. Indeed, the dissenting opinion acknowledges that FHFA "operating as a conservator may act in its own interests to protect both the Companies and the taxpayers from whom [FHFA] was ultimately forced to borrow[.]" Dissenting Op. at 19. To paraphrase the dissenting opinion (at 27), Congress made clear in the Recovery Act that FHFA is not your grandparents' conservator. For good reason.

The dissenting opinion asserts that our reading of Section 4617(b)(2)(J)(ii) effectively "forecloses *any* opportunity for meaningful judicial review of FHFA's actions," Dissenting Op. at 18, and decries the abandonment of the "rule of law," *see id.* at 2. That is quite surprising to hear. As the balance of our opinion makes clear – much of which the dissenting opinion joins – the Recovery Act only limits judicial *remedies* (banning injunctive, declaratory, and other equitable relief) after a court determines that the actions taken fall within the scope of statutory authority. The Act does not prevent either constitutional claims (none are raised here) or judicial review through cognizable actions for damages like breach of contract.

The dissenting opinion also argues that the court's holding is inconsistent with Congress's provision of judicial review for FHFA's actions in Section 4617(a)(5). Dissenting Op. at 18. But Section 4617(a)(5) permits judicial review *only* at the behest of a regulated entity itself and even then *only* of the Director's decision to appoint FHFA as a conservator or receiver.[13] That narrow focus of the provision is underscored by the requirement that the lawsuit must be promptly filed within thirty days of the appointment decision (a deadline that none of the plaintiffs here met). We thus beg to differ with the dissenting opinion's claim (at 18, 22) that Section 4617(a)(5) provides more intrusive judicial review for actions FHFA takes when acting as a receiver, many of which would presumably occur outside of that thirty-day filing window. *Cf. James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1092-1094

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[13] Section 4617(a)(5) provides in full:

(A) In general

If the Agency is appointed conservator or receiver under this section, the regulated entity may, within 30 days of such appointment, bring an action in the United States district court for the judicial district in which the home office of such regulated entity is located, or in the United States District Court for the District of Columbia, for an order requiring the Agency to remove itself as conservator or receiver.

(B) Review

Upon the filing of an action under subparagraph (A), the court shall, upon the merits, dismiss such action or direct the Agency to remove itself as such conservator or receiver.

12 U.S.C. § 4617(a)(5).

(D.C. Cir. 1996) (distinguishing between provisions in FIRREA for judicial review of the appointment of FDIC as conservator or receiver and those governing judicial review of the FDIC's exercise of its powers as conservator or receiver). Nothing in our reading of Section 4617(b)(2)(J)(ii), which governs what decisions a properly appointed conservator or receiver makes, undermines the sharply cabined opportunity for early-stage judicial review of the appointment decision itself.

* * *

In short, for all of their arguments that FHFA has exceeded the bounds of conservatorship, the institutional stockholders have no textual hook on which to hang their hats. Indeed, they do not dispute that FHFA had the authority as conservator to enter the Companies into the Stock Agreements with Treasury to raise vitally needed capital, to agree to pay dividends to Treasury on the stocks sold as part of that capital-raising bargain, to foreclose dividend payments to private stockholders in that process, *cf.* 12 U.S.C. § 1719(g)(1)(C)(vi), or to amend the terms of the Stock Agreements. The dissenting opinion even admits that FHFA's actions prior to the Third Amendment – which include the debt-inducing dividends paid under the First and Second Amendments as well as the original Stock Agreements – were "within the conservator role." *See* Dissenting Op. at 21.

What the institutional stockholders and dissenting opinion take issue with, then, is the allocated amount of dividends that FHFA negotiated to pay its financial-lifeline stockholder – Treasury – to the exclusion of other stockholders, and that decision's feared impact on business operations in the future. But Section 4617(f) prohibits us from wielding our equitable relief to second-guess either the dividend-allocating terms that FHFA negotiated on behalf of the Companies, or FHFA's business judgment that the Third Amendment better balances the interests of all parties involved, including the taxpaying public, than earlier approaches had. *See County of Sonoma v. FHFA*, 710 F.3d 987, 993 (9th Cir. 2013) ("[I]t is not our place to substitute our judgment for FHFA's[.]"). Because the Third Amendment falls within FHFA's broad conservatorship authority under the Recovery Act, we must enforce Section 4617(f)'s explicit prohibition on the equitable relief that the institutional stockholders seek.

B. Section 4617(f) Bars the Challenges to FHFA's Compliance with the APA

The institutional stockholders also claim that FHFA's adoption of the Third Amendment amounted to arbitrary and capricious agency action in violation of the APA. That argument cannot surmount Section 4617(f)'s barrier to equitable relief – the only form of relief statutorily authorized for an APA violation. *See* 5 U.S.C. § 702 (allowing "action in a court * * * seeking relief other than money damages"); *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011) (en banc). Indeed, Section 4617(f)'s strict limitation on judicial review would be an empty promise if it evaporated upon the assertion that FHFA's actions ran afoul of some other statute.

We accordingly "do not think it possible, in light of the strong language of" Section 4617(f) to read the Recovery Act's grant of "'powers' and 'authorities' to include the limitation that those powers be subject to – and hence enjoinable for non-compliance with – any and all other federal laws." *See National Trust I*, 995 F.2d at 240. Just as we cannot second-guess FHFA's conservatorship decisions under the Recovery Act, we cannot quarterback those actions under the APA either.

C. Section 4617(f) Bars the Challenges to Treasury's Compliance with the Recovery Act and the APA

Lastly, the institutional stockholders argue that declaratory and injunctive relief should be available against Treasury because its own actions in signing on to the Third Amendment both violated the Recovery Act and were arbitrary and capricious in violation of the APA. Those claims fall within Section 4617(f)'s sweep as well.

To be sure, Section 4617(f) most explicitly bars judicial relief against FHFA, and not Treasury. But Section 4617(f) also forecloses judicial relief that would "affect" the exercise of FHFA's "powers or functions" as conservator or receiver. 12 U.S.C. § 4617(f). An action "can 'affect' the exercise of powers by an agency without being aimed directly at [that agency]." *Hindes v.*

FDIC, 137 F.3d 148, 160 (3d Cir. 1998); *see also Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir. 1992) (Enjoining a third party "would have the same effect, from the FDIC's perspective, as directly enjoining the FDIC[.]").

In this case, the effect of any injunction or declaratory judgment aimed at Treasury's adoption of the Third Amendment would have just as direct and immediate an effect as if the injunction operated directly on FHFA. After all, it takes (at least) two to contract, and the Companies, under FHFA's conservatorship, are just as much parties to the Third Amendment as Treasury. One side of the agreement cannot exist without the other.

Accordingly, Section 4617(f)'s prohibition on relief that "affect[s]" FHFA applies here because the requested injunction's operation would have exactly the same force and effect as enjoining FHFA directly. *See Dittmer Properties, L.P. v. FDIC*, 708 F.3d 1011, 1017 (8th Cir. 2013) ("Dittmer's request for injunctive relief is barred by § 1821(j), even though the FDIC is no longer the holder of the note, because the relief requested – a declaration that the note is void as to Dittmer – affects the FDIC's ability to function as receiver in th[is] case.").[14]

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[14] *See also Kuriakose v. Federal Home Loan Mortgage Corp.*, 674 F.Supp.2d 483, 494 (S.D.N.Y. 2009) ("By moving to declare unenforceable the non-participation clause in Freddie Mac severance agreements, in essence Plaintiffs are seeking an order which restrains the FHFA from enforcing this contractual provision in the future. * * * [The Recovery Act] clearly provides that this

The institutional stockholders argue that this case is different because they claim Treasury "violated a provision of federal law unrelated to the conduct of a receivership." Institutional Pls. Reply Br. at 25. But Section 4617(f)'s plain language focuses on the "[e]ffect" of "any action" on FHFA's exercise of its powers; the cause of that effect is textually irrelevant. What matters here is that the institutional stockholders' claims against Treasury are integrally and inextricably interwoven with FHFA's conduct as conservator. Specifically, the complaint alleges that Treasury violated a provision of the Recovery Act – the very same law that governs FHFA's conservatorship activities – and that the Recovery Act prevented Treasury from entering into the Third Amendment with the Companies, operating at the direction of FHFA as conservator. Such a holding would just be another way of declaring that the Recovery Act barred FHFA from entering the Companies into the Third Amendment with Treasury. Treasury's action thus cannot be enjoined without simultaneously unraveling FHFA's own exercise of its powers and functions.

In so holding, we have no occasion to decide whether or how Section 4617(f) might apply to "an order against a third party [that] would be of little consequence to [FHFA's] overall functioning as receiver" or conservator, *Hindes*, 137 F.3d at 161, or to third-party activities that are by their nature less interwoven with FHFA's judgments as conservator or receiver.

Court does not have the jurisdiction to interfere with such authority.").

It is enough that, in this case, the direct and unavoidable effect of invalidating Treasury's contract with the Companies would be to void the contract with Treasury that FHFA concluded on the Companies' behalf. That would be a "dramatic and fundamental" incursion on FHFA's exercise of its conservatorship authority. *Id.*[15]

IV. The Class Plaintiffs' Claims

The class plaintiffs appeal the dismissal of their claims against Treasury, the FHFA, and the Companies (as nominal defendants) for breach of fiduciary duty,[16] and against the FHFA and the Companies for

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[15] None of the cases that plaintiffs cite has anything to do with third-party claims that would directly restrain or affect the actions of a conservator. *See*, *e.g.*, *Ecco Plains, LLC v. United States*, 728 F.3d 1190, 1202 n.17 (10th Cir. 2013) (stating that Section 1821(j) does not apply to a claim for money damages); *National Trust II*, 995 F.2d at 241 (characterizing Section 1821(j) as "[t]he prohibition against restraining the FDIC" in a case that only sought to restrain the FDIC itself).

[16] The class plaintiffs named the Companies as nominal defendants to their derivative claims on behalf of the Companies for breach of fiduciary duty because "the corporation in a shareholder derivative suit should be aligned as a defendant when the corporation is under the control of officers who are the target of the derivative suit." *Knop v. Mackall*, 645 F.3d 381, 382 (D.C. Cir. 2011).

breach of contract and for breach of the implied covenant of good faith and fair dealing.[17] Two groups of institutional shareholders – namely, the Arrowood plaintiffs and the Fairholme plaintiffs – likewise asserted common-law claims (in addition to their APA claims) in district court. Because they neither made their arguments for breach of contract and breach of the implied covenant of good faith and fair dealing in their opening brief nor incorporated those arguments by reference to the class plaintiffs' brief, they did not properly preserve their appeal against the dismissal of those claims. In view, however, of the unusual circumstances presented by the separate briefing for the consolidated cases that we required in this case, we shall exercise our discretion under Federal Rule of Appellate Procedure 2 to permit appeal of the order dismissing those claims as if their arguments had been properly preserved. Therefore, subsequent references to the class plaintiffs are also applicable to the Arrowood and Fairholme plaintiffs insofar as they concern claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

The Fairholme plaintiffs also forfeited their claim for breach of fiduciary duty against the FHFA by failing to raise in their opening brief the district court's alternative holding that the "claim is derivative . . . and, therefore, barred under § 4617(b)(2)(A)(i)," *Perry*

[17] The FHFA and the Companies submitted a joint brief. When describing their arguments on appeal, therefore, we will refer to them collectively as the FHFA.

Capital LLC, 70 F. Supp. 3d at 229 n.24. *See Jankovic v. Int'l Crisis Grp.,* 494 F.3d 1080, 1086 (D.C. Cir. 2007). We see no reason to relieve them of the consequences of this forfeiture.

A. The Claims Against Treasury

The class plaintiffs alleged that by executing the Third Amendment Treasury violated fiduciary duties to the Companies and their shareholders that are imposed by state corporate law because it is a controlling shareholder in the Companies. We have subject matter jurisdiction over the class plaintiffs' claims for breach of fiduciary duty against Treasury because "all civil actions to which [Freddie Mac] is a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such actions." 12 U.S.C. § 1452(f); *see also Lackey v. Wells Fargo Bank, N.A.*, 747 F.3d 1033, 1035 n.2 (8th Cir. 2014) ("Because Freddie Mac is a party to this case, the district court had original jurisdiction pursuant to 12 U.S.C. § 1452(f)").[18]

[18] We previously have interpreted a so-called "Deemer Clause" to provide jurisdiction under 28 U.S.C. § 1331, *Auction Co. of Am. v. FDIC*, 132 F.3d 746, 751 (D.C. Cir. 1997), *clarified on denial of reh'g*, 141 F.3d 1198 (1998), but have also held a Deemer Clause instead grants jurisdiction "directly" under Article III, § 2 of the Constitution, *A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1460 (D.C. Cir. 1995). Although we need not decide which is the correct approach, we must assure ourselves the Congress has "not expand[ed] the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983). For

Whether sovereign immunity shields Treasury from suit is a trickier question because the class plaintiffs forfeited any argument under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), by failing to respond to Treasury's contention that the FTCA is inapplicable. *Cf. NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008) ("[A]rguments in favor of subject matter jurisdiction can be waived by inattention or deliberate choice"). The class plaintiffs argue the APA provides an alternate waiver of sovereign immunity for their

federally chartered organizations such as Freddie Mac, the Congress may grant federal jurisdiction "so long as the legislature does more than merely confer a new jurisdiction," but also "ensure[s] the proper administration of some federal law (although the disputed issues in any specific case may be confined to matters of state law)." *A.I. Trade*, 62 F.3d at 1461-62 (internal quotation marks and brackets omitted).

Whether the Deemer Clause is constitutional depends upon the substantive law anchoring that grant of federal jurisdiction today, not just the legislation extant when the clause was enacted, viz., the Emergency Home Finance Act of 1970, Pub. L. No. 91-351, § 303(e)(2), 84 Stat. 450, 453. Federal law today governs the composition and election of Freddie Mac's board of directors, 12 U.S.C. § 1452(a)(2), limits its capital distributions, § 1452(b), sets forth in detail both the powers of and limitations upon Freddie Mac with respect to its purchase and disposition of mortgages, §§ 1452(c), 1454(a), exempts the company from certain taxes, § 1452(e), and provides for conservatorship or receivership by the FHFA, § 4617. *Cf. A.I. Trade*, 62 F.3d at 1463. An issue of federal law may well arise in a suit involving Freddie Mac and "the potential application of that law provides a sufficient predicate for the exercise of the federal judicial power." *Id.* at 1462. The Congress may, "by bringing all such disputes within the unifying jurisdiction of the federal courts," avoid or ameliorate the potential for "diverse interpretations of those substantive provisions" that may prove "vexing to the very commerce" the provisions were undoubtedly "enacted to promote." *Id.* at 1463.

claims for breach of fiduciary duty against Treasury. Under 5 U.S.C. § 702,

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States. . . .

We agree with the class plaintiffs with respect to their pleas for declaratory relief against Treasury for several reasons.

First, the class plaintiffs sought "relief other than money damages," to which the waiver of § 702 is limited, by requesting a declaration that Treasury breached its fiduciary duties. *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) (holding declaratory relief is not "money damages").[19] Therefore, § 702 waives immunity for the class plaintiffs' claims for breach of fiduciary duty insofar as they seek declaratory relief.

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[19] Contrary to the class plaintiffs' assertions, however, their request for "[s]uch other and further relief as the Court may deem just and proper" does not qualify as non-monetary relief. J.A. 279 ¶ 12. Such boilerplate requests – which refer to the proviso of Federal Rule of Civil Procedure 54(c) that a "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings" – "come[] into play only after the court determines it has jurisdiction." *See Hedgepeth ex rel. Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1152 n.2 (D.C. Cir. 2004) (Roberts, J.). The class plaintiffs do not argue that their request for "disgorgement," J.A. 278 ¶ 5, is

Second, § 702 waives Treasury's immunity for the claims for breach of fiduciary duty because they are not founded upon a contract. The waiver in § 702 does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *See also Albrecht v. Comm. on Emp. Benefits*, 357 F.3d 62, 67-68 (D.C. Cir. 2004). We have interpreted the Tucker Act, 28 U.S.C. § 1491(a)(1), which waives sovereign immunity for some claims "founded . . . upon" a contract and brought in the U.S. Court of Federal Claims, to "impliedly forbid[ ]" contract claims against the Government from being brought in district court under the waiver in the APA. *Albrecht*, 357 F.3d at 67-68. Treasury on appeal does not dispute the class plaintiffs' characterization of their claims as not contractual, though the agency argued in district court that the claims were in essence a contract action because it "assumed [any fiduciary duties] in entering into the [Stock Agreements]" with Fannie Mae and Freddie Mac. Treasury Defs. Mem. in Support of Mot. To Dismiss or for Summ. J., Doc. No. 19-1, at 44 *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigs.*, 1:13-mc-01288 (Jan. 17, 2014). That Treasury has not briefed the issue on appeal does not, however, relieve us of our obligation to assure ourselves we have jurisdiction, *see Steel Co.*, 523 U.S. at 94; this obligation extends to sovereign immunity because it is "jurisdictional in nature," *FDIC*

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not "money damages." Nor do they invoke the request for rescission of the Third Amendment that appears outside of the prayer for relief in their complaint.

v. Meyer, 510 U.S. 471, 475 (1994), and may not be waived by an agency's conduct of a lawsuit, *Dep't of the Army v. FLRA*, 56 F.3d 273, 275 (D.C. Cir. 1995).

In order to determine whether an action is in "its essence" contractual, we examine "the source of the rights upon which the plaintiff bases its claims" and "the type of relief sought (or appropriate)." *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982); *see also Albrecht*, 357 F.3d at 68-69. The class plaintiffs claim that, because it is the controlling shareholder, Treasury owes the Companies and their shareholders "fiduciary duties of due care, good faith, loyalty, and candor." J.A. 275 ¶ 177; *see also* Derivative Compl., Doc. No. 39, at 27 ¶ 74 *In re Fannie Mae/Freddie Mac*, 1:13-mc-01288 (July 30, 2014). These claims against Treasury are not "a disguised contract action," *Megapulse, Inc.*, 672 F.2d at 968, because they do not seek to enforce any duty imposed upon Treasury by the Stock Agreements – the only relevant contracts to which Treasury is a party. Although any fiduciary duty allegedly owed by Treasury as a controlling shareholder in the Companies arose from its purchase of shares pursuant to the Stock Agreements, we do not think that "*any* case requiring *some* reference to . . . a contract is necessarily *on the contract* and therefore directly within the Tucker Act." *Id.* at 967-68. The class plaintiffs do not contend Treasury breached the terms of the Stock Agreements nor otherwise invoke them except to establish that Treasury is a controlling shareholder.

The relief the class plaintiffs seek does not further illuminate whether their claims are essentially contractual. In *Megapulse*, we held the action was not founded upon a contract in part because the plaintiffs sought no specific performance of the contract and no damages, 672 F.2d at 969, presumably because specific performance is an explicitly contractual remedy and because "damages are a prototypical contract remedy," *A & S Council Oil Co. v. Lader*, 56 F.3d 234, 240 (D.C. Cir. 1995). Here, the class plaintiffs seek a declaration that Treasury breached its fiduciary duties and an award of "compensatory damages" in favor of the Companies. These forms of relief are not specific to actions that sound in contract, *cf. Spectrum Leasing Corp. v. United States*, 764 F.2d 891, 894-95 (D.C. Cir. 1985) (concluding a claim was essentially contractual in part because the relief sought amounted to "the classic contractual remedy of specific performance"), and any relief would not be determined by reference to the terms of the contract, *cf. Albrecht*, 357 F.3d at 69 (concluding a claim was essentially contractual in part because a contract would "determine whether the relief sought . . . is available").[20] The plaintiffs also seek rescission

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[20] The class plaintiffs also request "disgorgement" in favor of the Companies, but they do not explain further what measure of relief they seek and on appeal they appear to characterize the plea as one for damages. We do not take the class plaintiffs to seek more than restitution of the dividends paid to Treasury pursuant to the Third Amendment and in excess of the 10% dividend, because they have not alleged that Treasury has otherwise profited from its execution of the Third Amendment. Restitution of the benefits conferred by a plaintiff is not specific to claims for breach of contract, 1 Dan B. Dobbs, Law of Remedies § 4.1(1), pp. 552-53

with respect to their claim regarding Fannie Mae. This plea does not render the claim essentially contractual even though rescission is typically a remedy for breach of contract because there is no question that any breach of contract claim would concern the Purchase Agreement and the class plaintiffs seek rescission of only the Third Amendment. In sum, the Tucker Act does not "impliedly forbid[]" us from awarding relief against Treasury based on the waiver of immunity in § 702 because the class plaintiffs' claims are not founded upon a contract.

Third, Treasury's argument that § 702 does not waive its immunity from suit for state law claims is foreclosed by our precedent. We have "repeatedly" and "expressly" held in the broadest terms that "the APA's waiver of sovereign immunity applies to any suit whether under the APA or not." *Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006) (internal quotation marks omitted). Furthermore, we concluded in *United States Information Agency v. Krc*, 989 F.2d 1211 (D.C. Cir. 1993), that § 702 waived sovereign immunity for a (presumably) state tort claim against the Government because the FTCA did not "impliedly forbid" the non-monetary relief the plaintiff sought. *Id.* at 1216 (citing § 702).

Fourth, the class plaintiffs forthrightly point out that we have held "the waiver of sovereign immunity under § 702 is limited by the 'adequate remedy' bar of

(2d ed. 1993), so the plea for disgorgement does not alter our analysis.

§ 704," *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 947 (D.C. Cir. 2004) (quoting 5 U.S.C. § 704); *see also Transohio Sav. Bank v. Dir., OTS*, 967 F.2d 598, 607 (D.C. Cir. 1992), and go on to argue we should look to more recent authority that contradicts those holdings, *see Trudeau*, 456 F.3d at 187-89. Again, that Treasury has no response to this point does not relieve us of our duty to ascertain whether Treasury's immunity has been waived. We agree with the class plaintiffs that the holdings in *National Wrestling* and *Transohio Savings* are no longer good law.

Section 704 provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. In *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (en banc), after first concluding that immunity from suit was waived by § 702 with nary a mention of the adequate remedy bar of § 704, *id.* at 722-31, we held that whether there is an "other adequate remedy" for the purpose of § 704 determines whether a litigant states "a valid cause of action" under the APA. *Id.* at 731. We did not expressly speak to whether the adequate remedy bar limits immunity, but it strains credulity to think the choice to address the adequate remedy bar not as a condition of immunity, but instead as a requirement for a cause of action, was not deliberate in that case.

A further reason for this reading of *Cohen* is that we there cited approvingly, *id.* at 723, our prior holding in *Trudeau*, 456 F.3d 178, that the requirement of final agency action in § 704 is not a condition of the waiver of immunity in § 702, but instead limits the cause of action created by the APA, *id.* at 187-89. The holding of *Trudeau* and its endorsement in *Cohen* clearly override *National Wrestling* and *Transohio Savings*: We see no textual or logical basis for construing § 704 – which limits judicial review to "final agency action for which there is no other adequate remedy" – to condition a waiver of sovereign immunity on the absence of an adequate remedy but not on the presence of final agency action. In *Trudeau* we concluded the finality requirement does not bear upon the waiver of immunity in § 702 because the waiver "is not limited to APA cases – and hence . . . it applies regardless of whether the elements of an APA cause of action [under § 704] are satisfied." *Id.* at 187. This reasoning applies equally to the adequate remedy bar. *See Viet. Veterans of Am. v. Shinseki*, 599 F.3d 654, 661 (D.C. Cir. 2010) (relying in part upon our holding that the finality requirement no longer limits a court's subject matter jurisdiction to reach the same conclusion for the adequate remedy bar and referring to them collectively as the "the APA's reviewability provisions").

Furthermore, in a departure from prior cases, we have several times recognized that the finality requirement and adequate remedy bar of § 704 determine whether there is a cause of action under the APA, not whether there is federal subject matter jurisdiction. *Cent. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 805-06 (D.C. Cir. 2006); *Trudeau*, 456 F.3d at 183-85; *Shinseki*, 599 F.3d at 661; *Cohen*, 650 F.3d at 731 & n.10. Reading § 704 to limit only the cause of action that may be brought under the APA and not the grant of immunity in § 702 is in line with our new understanding of § 704 as narrowly focused upon the requirements for the APA cause of action. We therefore hold that § 702 waives Treasury's immunity regardless whether there is another adequate remedy under § 704 because the absence of such a remedy is instead an element of the cause of action created by the APA.

In sum, pursuant to 12 U.S.C. § 1452(f) and 28 U.S.C. § 1291, we have subject matter jurisdiction over the class plaintiffs' claims against Treasury for breach of fiduciary duty, and the Congress waived the agency's immunity from suit for these claims, insofar as they are for declaratory relief, in the APA, 5 U.S.C. § 702. We nonetheless affirm the district court's dismissal of the claims for a declaratory judgment. As discussed in greater detail above, *supra* at 37-40, 12 U.S.C. § 4617(f) bars us from awarding equitable relief against Treasury with respect to the Third Amendment because doing so would impermissibly "restrain or affect the exercise of powers or functions of the [FHFA] as a conservator."

B. The Claims Against the FHFA and the Companies

The class plaintiffs sued the FHFA (and the Companies, as nominal defendants) for breach of fiduciary duties imposed on a corporation's management under state law. They also alleged claims against the FHFA and the Companies for breach of contract and breach of the implied covenant of good faith and fair dealing. We have subject matter jurisdiction over the class plaintiffs' claims under 12 U.S.C. § 1452(f). As mentioned above, our obligation to assure ourselves we have jurisdiction, *see Steel Co.*, 523 U.S. at 94, extends to sovereign immunity because it is jurisdictional, *Meyer*, 510 U.S. at 475. "A waiver . . . must be unequivocally expressed in statutory text," *Lane v. Pena*, 518 U.S. 187, 192 (1996), so the Government may not waive immunity merely by its conduct in a lawsuit, *Dep't of the Army*, 56 F.3d at 275. We therefore disregard FHFA's point that the agency, "in its capacity as Conservator, has not asserted sovereign immunity with respect to [its] execution of the Third Amendment." FHFA July 2016 Supp. Br. at 4.

Assuming the FHFA has sovereign immunity when it acts on behalf of the Companies as conservator, *cf. Auction Co. of Am. v. FDIC*, 141 F.3d 1198, 1201-02 (D.C. Cir. 1998) (holding a suit against the FDIC was a suit against the United States for purposes of jurisdiction and sovereign immunity where the FDIC "did not act as receiver for any particular depository"), the Congress has waived the agency's immunity by consenting to suit. The Congress has granted Freddie Mac "power

. . . to sue and be sued . . . in any State, Federal, or other court," 12 U.S.C. § 1452(c)(7), and has granted Fannie Mae the same "power . . . to sue and to be sued . . . in any court of competent jurisdiction, State or Federal," *id.* § 1723a(a). The FHFA "by operation of law[ ] immediately succeed[ed] to . . . all . . . powers" of the Companies upon its appointment as conservator – including the Companies' power to sue and be sued – under the so-called Succession Clause of the Recovery Act. *Id.* § 4617(b)(2)(A)(i). Such a statutory grant of power to "sue and be sued" constitutes an "unequivocally expressed" waiver of sovereign immunity. *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 33-34 (1992); *see also Meyer*, 510 U.S. at 475.[21]

By providing for the FHFA to succeed to the Companies' power to sue and be sued, the Congress has given its express consent that the FHFA is subject to suit in the same way the Companies would otherwise be when the agency acts on their behalf as conservator. This understanding is borne out by the FHFA's other functions under the Succession Clause, which further provides that the FHFA succeeds to "all rights, titles, powers, and privileges of the regulated entity." § 4617(b)(2)(A)(i). The Supreme Court interpreted the nearly identical provision in FIRREA to "place[ ] the FDIC in the shoes of the [entity in receivership], to

[21] We need not reach the question whether the FHFA's conservatorship of Fannie Mae and Freddie Mac endows the Companies with sovereign immunity because their "sue and be sued" clauses would waive any immunity.

work out its claims under state law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994) (interpreting 12 U.S.C. § 1821(d)(2)(A)(i)). The Recovery Act further empowers the FHFA, as conservator, to "take over the assets of and operate the [Companies] with all the powers of [their] shareholders, . . . directors, and . . . officers" and to "perform all functions of the [Companies] in the name of the [Companies]." 12 U.S.C. § 4617(b)(2)(B)(i), (iii).

What if the class plaintiffs' claims for breach of fiduciary duty are cognizable under the FTCA, 28 U.S.C. § 1346(b)? The FTCA does not withdraw the Congress's waiver of immunity in this case, for the FTCA provides:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under [the FTCA], and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. § 2679(a). The Congress has not, however, authorized the FHFA to be sued "in its own name" by enacting a "sue and be sued" clause specifically for the agency. Instead, the Congress has granted the FHFA the power to be sued just as the Companies would be absent a conservatorship insofar as the agency steps into the shoes of the Companies and acts on their behalf to defend alleged breaches of their obligations. Because the Companies, pre-conservatorship, were not affected by the FTCA proviso cited above, neither is the FHFA when it is sued for an action taken

on their behalf – in this case, the Third Amendment.[22] Nor would the Tucker Act, 28 U.S.C. § 1491(a)(1), require the class plaintiffs to file their claims for breach of contract in the Court of Federal Claims. "If a separate waiver of sovereign immunity and grant of jurisdiction exist, district courts may hear cases over which, under the Tucker Act alone, the Court of Federal Claims would have exclusive jurisdiction." *Auction Co. of Am. v. FDIC*, 132 F.3d 746, 752 n.4 (D.C. Cir. 1997) (suit for breach of contract), *clarified on denial of reh'g*, 141 F.3d 1198 (1998).

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[22] It follows that the FTCA does not apply to Fannie Mae or Freddie Mac either, even though the FHFA, as conservator, exercises complete control over the Companies. The statute provides that the remedies set forth in the FTCA "shall be exclusive" despite any "sue and be sued" clause of a "federal agency," 28 U.S.C. § 2679(a), which includes "corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States," *id.* § 2671. Generally, we determine whether a defendant is such a corporation that is subject to the FTCA by examining whether the Federal Government has the power " 'to control the detailed physical performance of the [corporation].' " *Macharia v. United States*, 334 F.3d 61, 68 (D.C. Cir. 2003) (quoting *United States v. Orleans*, 425 U.S. 807, 814 (1976)). As we have just concluded, however, the Recovery Act evinces the Congress's intention to "place[ ]" the FHFA "in the shoes" of the Companies, *O'Melveny & Myers*, 512 U.S. at 86-87, which become wards of the Government. The Companies therefore remain subject to suit as private corporations for violations of state law just as they were before the FHFA was appointed conservator.

1. The Succession Clause

The FHFA and the class plaintiffs dispute whether the common-law claims against the agency are barred by the so-called Succession Clause, which provides that the FHFA, as conservator, "succeed[s] to" the stockholders' rights "with respect to" the Companies and their assets, 12 U.S.C. § 4617(b)(2)(A)(i). In *Kellmer v. Raines*, 674 F.3d 848 (D.C. Cir. 2012), we held the Succession Clause "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits" on behalf of the Companies, but left open whether it transfers claims as to which the FHFA would face a manifest conflict of interest. *Id.* at 850.

The class plaintiffs argue the Succession Clause should not be read to bar their derivative claims for breach of fiduciary duty because the FHFA would face a conflict of interest in pursuing, on behalf of the Companies, claims against itself. They also argue the Succession Clause does not apply to their direct claims for breach of contract and for breach of fiduciary duty. The FHFA responds that the Succession Clause transfers to it the right to bring derivative suits without exception, that all the claims of the class plaintiffs are derivative, and that the Succession Clause also transfers any direct claims to the agency.

The district court held the statute bars all the class plaintiffs' claims and dismissed them "pursuant to [Federal Rule of Civil Procedure] 12(b)(1) for lack of standing," *Perry Capital LLC*, 70 F.Supp.3d at 233, 235 n.39, 239 n.45, but whether the Succession Clause bars the claims has no bearing upon standing under Article III of the Constitution of the United States. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The district court's error, however, is of no moment; we simply examine the issue under Rule 12(b)(6). *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) ("Although the district court erroneously dismissed the action pursuant to Rule 12(b)(1), we could nonetheless affirm the dismissal if dismissal were otherwise proper based on failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)").

We conclude the Succession Clause transfers to the FHFA without exception the right to bring derivative suits but not direct suits. The class plaintiffs' claims for breach of fiduciary duty are derivative and therefore barred, but their contract-based claims are direct and may therefore proceed.

a. The Succession Clause bars derivative suits, but not direct suits

The Recovery Act transfers some of the shareholders' rights to the FHFA during conservatorship and receivership and provides that others are retained by the shareholders during conservatorship but terminated during receivership. Specifically, the Succession Clause provides that "as conservator or receiver" the FHFA "shall . . . by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder . . . with respect to the regulated entity and [its] assets."

§ 4617(b)(2)(A)(i). The Recovery Act further limits shareholders' rights during receivership by providing that the FHFA's appointment as receiver and consequent succession to the shareholders' rights "terminate[s] all rights and claims that the stockholders . . . of the regulated entity may have against the assets or charter of the regulated entity or the [FHFA] . . . except for their right to payment, resolution, or other satisfaction of their claims" in the administrative claims process. § 4617(b)(2)(K)(i).

The Recovery Act thereby transfers to the FHFA all claims a shareholder may bring derivatively on behalf of a Company whilst claims a shareholder may lodge directly against the Company are retained by the shareholder in conservatorship but terminated during receivership. The Act distinguishes between the transfer of rights "with respect to the regulated entity and [its] assets" in the Succession Clause and the termination of rights "against the assets or charter of the regulated entity" in § 4617(b)(2)(K)(i). Rights "with respect to" a Company and its assets are only those an investor asserts derivatively on the Company's behalf. *Cf. Levin v. Miller*, 763 F.3d 667, 672 (7th Cir. 2014) (so interpreting the analogous provision of FIRREA, 12 U.S.C. § 1821(d)(2)(A)(i)). Rights and claims "against the assets or charter of the regulated entity" are an investor's direct claims against and rights to the assets of the Company once it is placed in receivership in order to be liquidated, *see* 12 U.S.C. § 4617(b)(2)(E); that the Recovery Act terminates such rights and claims in receivership indicates that shareholders' direct claims against and rights in the Companies survive during conservatorship.[23]

This reading is borne out by the statutory context. If the Succession Clause transferred all of the stockholders' rights to the FHFA in conservatorship and receivership, as the FHFA contends, then they would have no rights left to assert during the administrative claims process should a Company be liquidated. That result is plainly precluded by § 4617(b)(2)(K)(i), which excepts from termination upon the FHFA's appointment as receiver a shareholder's "right to payment, resolution, or other satisfaction of [his or her] claims." Furthermore, we see the logic in permitting the shareholders to retain their rights to bring suit against a Company during conservatorship and terminating those rights when the Agency institutes an administrative claims process as required when it becomes a receiver. *See* 12 U.S.C. § 4617(b)(3)-(5). We note that the Federal Circuit recently held, albeit without considering the Succession Clause, that Fannie Mae's former Chief Financial Officer had no takings claim based

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[23] The FHFA argues that "[b]ecause the Conservator already can pursue derivative claims belonging to the Enterprises, the statutory phrase 'rights . . . of any stockholder' only has meaning if it encompasses direct claims." FHFA Br. at 48. This argument is foreclosed by *Kellmer*, where we determined the Succession Clause "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits," 674 F.3d at 850, and it overlooks that, when the Companies are in conservatorship, the Succession Clause functions not only to grant the FHFA powers, but also to take powers from the shareholders.

on the company's failure – pursuant to FHFA's regulations – to pay severance benefits as mandated by his employment contract because the CFO "was left with the right to enforce his contract against Freddie Mac in a breach of contract action . . . under state contract law." *Piszel v. United States*, 833 F.3d 1366, 1377 (Fed. Cir. 2016).

The class plaintiffs argue that because, as shareholders, they retain rights in the Companies during a conservatorship, the Succession Clause should be read to permit them to sue derivatively to protect those rights when the FHFA has a conflict of interest. They point to the decisions of two other circuits interpreting 12 U.S.C. § 1821(d)(2)(A), a nearly identical provision in FIRREA, to permit such an exception. *See First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999); *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1022-23 (9th Cir. 2001). Contrary to the class plaintiffs' assertions, two circuit court decisions do not so clearly "settle[] the meaning of [the] existing statutory provision" in FIRREA that we must conclude the Congress intended *sub silentio* to incorporate those rulings into the Recovery Act. *Merrill Lynch v. Dabit*, 547 U.S. 71, 85 (2006).

Nor are we convinced by the reasoning of those two cases that the Succession Clause implicitly excepts derivative suits where the FHFA would have a conflict of interest. The courts in those cases thought it would be irrational to transfer to an agency the right to sue itself derivatively because "the very object of the derivative suit mechanism is to permit shareholders to file suit on behalf of a corporation when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so." *First Hartford*, 194 F.3d at 1295; *see also Delta Sav.*, 265 F.3d at 1022-23 (extending the exception to suits against certain agencies with which the conservator or receiver has an "interdependent" relationship and "managerial and operational overlap"). As the district court in this case noted, however, it makes little sense to base an exception to the rule against derivative suits in the Succession Clause "on the purpose of the 'derivative suit mechanism,'" rather than the plain statutory text to the contrary. *See Perry Capital LLC*, 70 F.Supp.3d at 230-31. We therefore conclude the Succession Clause does not permit shareholders to bring derivative suits on behalf of the Companies even where the FHFA will not bring a derivative suit due to a conflict of interest.

b. The class plaintiffs' claims for breach of fiduciary duty are derivative but their contract-based claims are direct and may proceed

Having concluded the Succession Clause extends to derivative, but not direct, claims, it follows that the class plaintiffs' claims for breach of fiduciary duty are barred but their contract-based claims may proceed. The class plaintiffs contend they asserted both direct and derivative claims for breach of fiduciary duty, alleging a direct claim against the FHFA "with respect to . . . Fannie Mae" under Delaware law.[24] Class Pls. Br. at 21-22. In order to determine whether these claims

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[24] The district court applied Delaware law to the class plaintiffs' common-law claims. *See Perry Capital LLC*, 70 F.Supp.3d at 235 n.39, 236, 238, 239 n.45. On appeal, all parties agree we should apply Delaware law to claims regarding Fannie Mae and Virginia law to those regarding Freddie Mac. The parties have thereby waived any objection to the district court's application of Delaware law to claims regarding Fannie Mae. *See A-L Assocs., Inc. v. Jorden*, 963 F.2d 1529, 1530 (D.C. Cir. 1992) (applying law "[t]he court below held, and the parties agree," was applicable); *Patton Boggs LLP v. Chevron Corp.*, 683 F.3d 397, 403 (D.C. Cir. 2012); *Jannenga v. Nationwide Life Ins. Co.*, 288 F.2d 169, 172 (D.C. Cir. 1961); *cf. Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 766 (D.C. Cir. 1992) (applying U.S. contract principles to determine whether a contractual choice-of-law provision was valid where the district court had applied those principles because "both parties here have assumed that American contract law principles control"). *Accord, e.g.*, *Williams v. BASF Catalysts LLC*, 765 F.3d 306, 316 (3d Cir. 2014) (holding that "parties may waive choice-of-law issues" in part because "choice-of-law questions do not go to the court's jurisdiction"). We have occasionally held a party forfeited any objection to the district court's choice of law in part because we could detect no "error," *Wash. Metro. Area Transit Auth. v. Georgetown Univ.*, 347 F.3d 941, 945 (D.C. Cir. 2003); *Nello L. Teer Co. v. Wash. Metro. Area Transit Auth.*, 921 F.2d 300, 302 n.2 (D.C. Cir. 1990), or "apparent error" in the district court's choice, *Burke v. Air Serv Int'l, Inc.*, 685 F.3d 1102, 1105 (D.C. Cir. 2012). We do not read these cases to have established a standard for forfeiture or waiver particular to choice of law, especially considering none indicated that the absence of an error or "apparent" error was necessary to the outcome. In this case, we see no reason to deviate from the district court's selection of Delaware law for the claims regarding Fannie Mae.

We need not address whether the district court should have applied Virginia law to the claims regarding Freddie Mac because, for purposes of this appeal, Delaware and Virginia law dictate the same result, *see Aref v. Lynch*, 833 F.3d 242, 262 (D.C. Cir. 2016) ("We need not determine which state's law applies . . . because the are direct or derivative, we must examine (1) "[w]ho suffered the alleged harm" and (2) "who would receive the benefit of the recovery." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004); *see also Gentile v. Rossette*, 906 A.2d 91, 99-101 (Del. 2006). A suit is direct if "[t]he stockholder . . . demonstrate[s] that the duty breached was owed to the stockholder" and that "[t]he stockholder's claimed direct injury [is] independent of any alleged injury to the corporation." *Tooley*, 845 A.2d at 1039.

The class plaintiffs did not plead a direct claim for breach of fiduciary duty because they did not seek relief that would accrue directly to them. They instead requested a declaration that, "through the Third Amendment, Defendant[ ] FHFA . . . breached [its] . . . fiduciary dut[y] to Fannie Mae," and sought an award of "compensatory damages and disgorgement in favor of Fannie Mae." J.A. 278 ¶¶ 4-5. Both forms of relief would benefit Fannie Mae directly and the shareholders only derivatively. *See Tooley*, 845 A.2d at 1035. The class plaintiffs also asked the district court to declare the Third Amendment was not "in the best interests of

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result is the same under all three" potentially applicable laws); *Skirlick v. Fid. & Deposit Co. of Md.*, 852 F.2d 1376, 1377 (D.C. Cir. 1988) (same), and the parties have waived any contention that yet another law should displace the district court's choice. The district court also cited federal case law in evaluating whether the class plaintiffs had a contractual right to dividends, *Perry Capital LLC*, 70 F.Supp.3d at 237 & n.41, but the cited federal decisions do not displace state contract law, *cf. O'Melveny & Myers*, 512 U.S. at 85-89 (rejecting the argument that federal common law should govern tort claims lodged by the FDIC).

Fannie Mae or its shareholders, and constituted waste and a gross abuse of discretion," J.A. 278 ¶ 3, but a declaration that only partially resolves a cause of action does not remedy any injury. *Cf. Calderon v. Ashmus*, 523 U.S. 740, 746-47 (1998) (holding that the case or controversy requirement of Article III was not satisfied where a prisoner sought a declaratory judgment as to the validity of a defense a state was likely to raise in his habeas action). In the introductory portion of their complaint, the class plaintiffs also sought rescission of the Third Amendment to remedy the alleged breach of fiduciary duty, but the class plaintiffs requested this relief only for their derivative claim. J.A. 215 ¶ 3 ("This is also a derivative action brought by Plaintiffs on behalf of Fannie Mae, seeking . . . equitable relief, including rescission, for breach of fiduciary duty"), 226 ¶ 27 ("[T]his action also seeks, derivatively on behalf of Fannie Mae, an award of . . . equitable relief with respect to such breach, including rescission of the Third Amendment").

In any event, the class plaintiffs forfeited in district court any argument that their claim for breach of fiduciary duty is direct. In its motion to dismiss, the FHFA contended the class plaintiffs' claims for breach of fiduciary duty were derivative, but the class plaintiffs did not respond by arguing they asserted a direct claim. Although they occasionally referred to the FHFA's fiduciary duties to the shareholders, the class plaintiffs did not develop any argument that the claims are direct and instead discussed separately why the Succession Clause does not bar "Their Direct Contract-Based Claims," Mem. in Opp'n to Mot. to Dismiss, Doc.

No. 33 at 25 *In re Fannie Mae/Freddie Mac*, 1:13-mc-01288 (Mar. 21, 2014) (hereinafter Class Pls. Opp'n to Mot. to Dismiss), and "Their Derivative Claims" for breach of fiduciary duty, *id.* at 32. The class plaintiffs then characterize their only count of breach of fiduciary duty as asserting "derivative claims." *Id.*

The class plaintiffs ask for a "remand to allow [them] to pursue their direct fiduciary breach claims regarding the Fannie Mae Third Amendment." Class Pls. Br. at 23. At oral argument they cited *DKT Memorial Fund v. Agency for International Development*, 810 F.2d 1236 (D.C. Cir. 1987), in which this court, "in the interest of justice," granted counsel's motion at oral argument to amend the complaint in order to correct an inadvertent error and then ruled the claims, as amended, were not subject to dismissal upon the grounds asserted by the defendants. *Id.* at 1239. In this case the class plaintiffs ask us to grant them leave to amend the complaint to add a new claim they are not asking us to rule on but instead want to pursue in district court. We see no reason to oust the district judge from making that decision in the first instance when the case returns to district court for further proceedings on certain of the plaintiffs' contract-based claims.

The district court also held the class plaintiffs' contract-based claims were derivative. *Perry Capital LLC*, 70 F.Supp.3d at 235 & n.39, 239 n.45. Contrary to the FHFA's assertions, the class plaintiffs sufficiently appealed this ruling. Their statement of issues on appeal comprises whether the Succession Clause "bars any of Appellants' claims in this action." Furthermore, that the class plaintiffs' contract-based claims are direct is apparent from their extensive discussion of the FHFA's alleged breach of their contractual rights and the harm the alleged breach caused them.

Indeed, the contract-based claims are obviously direct "because they belong to" the class plaintiffs "and are ones that only [the class plaintiffs] can assert." *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1138 (Del. 2016). These are "not claims that could plausibly belong to" the Companies because they assert that the Companies breached contractual duties owed to the class plaintiffs by virtue of their stock certificates. *Id.* We therefore do not subject them to the two-part test set forth in *Tooley*, which determines "when a cause of action for breach of fiduciary duty or to enforce rights belonging to the corporation itself must be asserted derivatively." *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 176 (Del. 2015). The two-part test is necessary "[b]ecause directors owe fiduciary duties to the corporation and its stockholders, [and] there must be some way of determining whether stockholders can bring a claim for breach of fiduciary duty directly, or whether a particular fiduciary duty claim must be brought derivatively." *Citigroup Inc.*, 140 A.3d at 1139 (footnote omitted). *Tooley* has no application "when a plaintiff asserts a claim based on the plaintiff's own right." *Id.* at 1139-40; *El Paso Pipeline GP Co. v. Brinckerhoff*, 2016 WL 7380418, at *9 (Del. Dec. 20, 2016) ("[W]hen a plaintiff asserts a claim based upon the plaintiff's own right . . . *Tooley* does not apply").[25]

2. The Class Plaintiffs' contract-based claims

As a preliminary matter, the class plaintiffs assert the bar to equitable relief of 12 U.S.C. § 4617(f), discussed above, does not apply "to equitable claims related to contractual breaches," Class Pls. Br. at 34-35, but this argument is forfeit because it was not raised in district court. *Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 22 (D.C. Cir. 2010). Accordingly, we evaluate the class plaintiffs' contract-based claims only insofar as they seek damages. As discussed in greater detail above, *supra* at 17-37, an award of equitable relief against the FHFA with respect to the Third Amendment would impermissibly "restrain or affect the exercise of powers or functions of the [FHFA] as a conservator," § 4617(f), and a similar award against the Companies would plainly achieve the same result.

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[25] The class plaintiffs (the only party to address on the merits whether the contract-based claims are direct or derivative) cite only Delaware law in addressing the claims for breach of contract as to both Fannie Mae and Freddie Mac despite their assumption that Virginia law governs claims against Freddie Mac. The issue need detain us no further because we have found no indication Virginia would classify the breach of contract claims as derivative. *Cf. Simmons v. Miller*, 261 Va. 561, 573, 544 S.E.2d 666, 674 (2001) ("A derivative action is an equitable proceeding in which a shareholder asserts, on behalf of the corporation, a claim that belongs to the corporation rather than the shareholder. . . . [A]n action for injuries to a corporation cannot be maintained by a shareholder on an individual basis and must be brought derivatively.").

The class plaintiffs next challenge the district court's dismissal under Rules 12(b)(1) and (6) of their claims against the FHFA and the Companies for breach of contract and breach of the implied covenant as to the provisions in the stock certificates dealing with voting and dividend rights and liquidation preferences. Upon *de novo* review, *Kim v. United States*, 632 F.3d 713, 715 (D.C. Cir. 2011), we affirm the dismissal of all claims except for those regarding the liquidation preferences and the claim for breach of implied covenant regarding dividend rights.

a. Voting rights

The class plaintiffs contend the Third Amendment violates their stock certificates that, with some variations not relevant here, provide that a vote of two thirds of the stockholders is required "to authoriz[e], effect[ ] or validat[e] the amendment, alteration, supplementation or repeal of any of the provisions of [the] Certificate if such [action] would materially and adversely affect the . . . terms or conditions of the [stock]." J.A. 251. The class plaintiffs claim they were entitled to vote on the Third Amendment because it "nullif[ied] their right ever to receive a dividend or liquidation distribution," and thereby "materially and adversely affect[ed]" them. Class Pls. Reply Br. at 11. The FHFA does not respond to this argument on appeal, and the district court nowhere addressed it in dismissing the contract-based claims. We nonetheless affirm the district court's dismissal. Although the Third Amendment makes it impossible for the class plaintiffs to receive dividends or a liquidation preference, it was not an "alteration, supplementation or repeal of . . . provisions" in the certificates. Those provisions guarantee only the right to vote on certain changes to the certificates, not on any corporate action that affects the rights guaranteed by the certificates.

b. Dividend rights

The class plaintiffs' various stock certificates provide (with irrelevant variations in wording) that stockholders will "be entitled to receive, ratably, when, as and if declared by the Board of Directors, in its sole discretion . . . [,] non-cumulative cash dividends," J.A. 248, or "shall be entitled to receive, ratably, dividends . . . when, as and if declared by the Board," J.A. 250. According to the class plaintiffs, the certificates thereby guarantee them a right to dividends, discretionary though they may be. We agree with the FHFA's response that the class plaintiffs have no enforceable right to dividends because the certificates accord the Companies complete discretion to declare or withhold dividends.

The class plaintiffs argue they nonetheless have a contractual right to discretionary dividends because Delaware and Virginia limit directors' discretion to withhold dividends. This limit upon a board's discretion stems from its fiduciary duties to shareholders, not from the terms of their stock certificates. *See Gabelli & Co. v. Liggett Grp. Inc.*, 479 A.2d 276, 280 (Del. 1984) (Dividends may not be withheld as a result of "fraud or gross abuse of discretion"); *Penn v. Pemberton & Penn, Inc.*, 189 Va. 649, 658, 53 S.E.2d 823, 828 (Va. 1949) (Failure to declare dividends is actionable if it "is so arbitrary, or so unreasonable, as to amount to a breach of trust"). Such fiduciary duties have no bearing upon whether the terms of the contracts imposed a duty to declare dividends, as the class plaintiffs alleged.

Lastly, the class plaintiffs advance a convoluted argument that the Third Amendment violated their rights to receive mandatory dividends (1) for their preferred stock before any distributions on common stock, and (2) for their common stock "ratably," along with other holders of such stock. Before the Third Amendment, the class plaintiffs assert, Treasury could have received a dividend exceeding the 10% coupon on its liquidation preference only by exercising its option to purchase up to 79.9% of the Companies' common stock, and the payment of any dividend on that common stock would have required distributions to the class plaintiffs as well. To the class plaintiffs, it follows that their right to mandatory dividends was breached by the provision of the Third Amendment for dividends to be paid to Treasury that could (and at times did) exceed the 10% coupon. This argument fails because the plaintiffs have not shown their certificates guarantee that more senior shareholders will not exhaust the funds available for distribution as dividends. The class plaintiffs contend the Third Amendment "was a fiduciary breach, and hence cannot be relied on as the basis for nullifying the *mandatory* priority and ratability rights," Class

Pls. Br. at 39, but this argument goes to their claims for breach of fiduciary duty, addressed above.

The class plaintiffs next challenge the district court's dismissal of their claim that the implied covenant prohibited the FHFA from depriving them of the opportunity to receive dividends. The class plaintiffs argue the district court wrongly concluded the FHFA did not breach the implied covenant because it acted within its statutory authority. *See Perry Capital LLC*, 70 F.Supp.3d at 238-39. The FHFA contends the plaintiffs "try to impose fiduciary and other duties on the Conservator to always act in the best interests of shareholders, when [the Recovery Act] instead authorizes the Conservator to '[act] in the best interests of the [Companies] or the Agency,'" FHFA Br. at 18 (citing § 4617(b)(2)(J)(ii)) (second alteration in original), and that "the Conservator's discretion to declare dividends, unlike that of a corporate board, is without limitation," *id.* at 56 n.21. Insofar as the FHFA argues (and the district court held) that the Recovery Act preempts state law imposing an implied covenant, this approach is foreclosed by the plain text of the Recovery Act and by our precedent.

Virginia and Delaware law imposing an implied covenant of good faith and fair dealing is not "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hillman v. Maretta*, 133 S.Ct. 1943, 1949-50 (2013), and is therefore not preempted by the Recovery Act. The Recovery Act provides that the FHFA, as conservator, "may disaffirm or repudiate any contract" the Companies executed before the conservatorship "the performance of which the conservator . . . determines to be burdensome," 12 U.S.C. § 4617(d)(1), "within a reasonable period following" the agency's appointment as conservator, *id.* § 4617(d)(2). That the Recovery Act permits the FHFA in some circumstances to repudiate contracts the Companies concluded before the conservatorship indicates that the Companies' contractual obligations otherwise remain in force. *Cf. Waterview Mgmt. Co. v. FDIC*, 105 F.3d 696, 700-01 (D.C. Cir. 1997) (so interpreting a nearly identical provision in FIRREA, 12 U.S.C. § 1821(e)). Furthermore, by providing for the FHFA to succeed to "all rights, titles, powers, and privileges of the [Companies]," 12 U.S.C. § 4617(b)(2)(A)(i), the Recovery Act places the FHFA " 'in the shoes' " of the Companies and "does not permit [the agency] to increase the value of the [contract] in its hands by simply 'preempting' out of existence pre-receivership contractual obligations." *Waterview Mgmt. Co.*, 105 F.3d at 701 (quoting *O'Melveny & Myers*, 512 U.S. at 87, in reaching the same conclusion for the Succession Clause of FIRREA, 12 U.S.C. § 1821(d)(2)(A)(i)).

The class plaintiffs next challenge the district court's conclusion that they failed to state a claim for breach of the implied covenant, which they contend required the Companies – and, therefore, their conservator – to act reasonably and not to deprive them of the fruits of their bargain, namely the opportunity to receive dividends. The FHFA urges us to affirm the district court's determination that the class plaintiffs' lack of an enforceable contractual right to dividends foreclosed the claim that the implied covenant instead provided such a right. *See Perry Capital LLC*, 70 F.Supp.3d at 238.

Under Delaware law, "[e]xpress contractual provisions always supersede the implied covenant," *Gerber v. Enter. Prod. Holdings, LLC*, 67 A.3d 400, 419 (Del. 2013), *overruled on other grounds by Winshall v. Viacom Int'l Inc.*, 76 A.3d 808, 815 n.13 (Del. 2013), and "one generally cannot base a claim for breach of the implied covenant on conduct authorized by the terms of the agreement," *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005). Here, however, the stock certificates upon which the class plaintiffs rely provide for dividends "if declared by the Board of Directors, in its sole discretion." J.A. 248. A party to a contract providing for such discretion violates the implied covenant if it "act[s] arbitrarily or unreasonably." *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010); *see also Gerber*, 67 A.3d at 419 ("When exercising a discretionary right, a party to the contract must exercise its discretion reasonably" (emphasis omitted)). Virginia law similarly provides "where discretion is lodged in one of two parties to a contract . . . such discretion must, of course, be exercised in good faith." *Historic Green Springs, Inc. v. Brandy Farm, Ltd.*, 32 Va. Cir. 98, at *3 (Va. Cir. 1993) (alteration in original); *see also Va. Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 156 F.3d 535, 542 (4th Cir. 1998).

We remand this claim, insofar as it seeks damages, for the district court to evaluate it under the correct legal standard, namely, whether the Third Amendment violated the reasonable expectations of the parties. We note that the class plaintiffs specifically allege that some class members purchased their shares before the Recovery Act was enacted in July 2008 and the FHFA was appointed conservator the following September, while others purchased their shares later, but the class plaintiffs define their class action to include more broadly "all persons and entities who held shares . . . and who were damaged thereby," J.A. 262-63. The district court may need to redefine or subdivide the class depending upon what that court determines were the various plaintiffs' reasonable expectations. If the district court determines the enactment of the Recovery Act and the FHFA's appointment as conservator affected these expectations, then it should consider, *inter alia,* (1) Section 4617(b)(2)(J)(ii) (authorizing the FHFA to act "in the best interests of the [Companies] or the Agency"), (2) Provision 5.1 of the Stock Agreements, J.A. 2451, 2465 (permitting the Companies to declare dividends and make other distributions only with Treasury's consent), and (3) pertinent statements by the FHFA, *e.g.,* J.A. 217 ¶ 8, referencing *Statement of FHFA Director James B. Lockhart at News Conference Announcing Conservatorship of Fannie Mae and Freddie Mac* (Sept. 7, 2008) (The "FHFA has placed Fannie Mae and Freddie Mac into conservatorship. [Conservatorship] is a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations. FHFA will act as the conservator to operate the Enterprises until they are stabilized.").

The district court also held the class plaintiffs "fail to plead claims of breach of the implied covenant against the [Companies]" because they allege only that the FHFA's actions were arbitrary and unreasonable. *Perry Capital LLC*, 70 F.Supp.3d at 239. This is a distinction without a difference because the action they challenge – the FHFA's adoption of the Third Amendment – was taken on behalf of the Companies. The Companies and the FHFA are thus identically situated for purposes of this claim.

c. Liquidation preferences

The class plaintiffs also allege the FHFA, by adopting the Third Amendment, breached the guarantees in their stock certificates and in the implied covenant to a share of the Companies' assets upon liquidation because it ensured there would be no assets to distribute. The FHFA urges us to affirm the district court's dismissal of these claims as unripe. *See Perry Capital LLC*, 70 F.Supp.3d at 234-35.

"The ripeness doctrine generally deals with when a federal court can or should decide a case," *Am. Petrol. Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012), and has both constitutional and prudential facets. Ripeness "shares the constitutional requirement of standing that an injury in fact be certainly impending." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996). We decide whether to defer resolving a case for prudential reasons by "evaluat[ing] (1) the fitness of the issues for judicial decision and

(2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003); *see Am. Petrol.*, 683 F.3d at 386.

These claims satisfy the constitutional requirement because the class plaintiffs allege not only that the Third Amendment poses a "certainly impending" injury, *Nat'l Treasury*, 101 F.3d at 1427, but that it immediately harmed them by diminishing the value of their shares. *Cf. State Nat'l Bank v. Lew*, 795 F.3d 48, 56 (D.C. Cir. 2015) (holding unripe a claim seeking recovery for a present loss in share-price in part because the plaintiffs failed to allege "their current investments are worth less now, or have been otherwise adversely affected now"). The class plaintiffs allege the Third Amendment, by depriving them of their right to share in the Companies' assets when and if they are liquidated, immediately diminished the value of their shares. The case or controversy requirement of Article III of the U.S. Constitution is therefore met.

The FHFA (like the district court) says the claims are not prudentially ripe because there can be no breach of any contractual obligation to distribute assets until the Companies are required to perform, namely, upon liquidation. Not so. Under the doctrine of anticipatory breach, "a voluntary affirmative act which renders the obligor unable . . . to perform" is a repudiation, RESTATEMENT (SECOND) OF CONTRACTS § 250(b), that "ripens into a breach prior to the time for performance . . . if the promisee elects to treat it as such" by, for instance, suing for damages, *Franconia Assocs. v.*

United States, 536 U.S. 129, 143 (2002) (internal quotation marks omitted); RESTATEMENT (SECOND) OF CONTRACTS §§ 253(1), 256 cmt. c. *Accord Lenders Fin. Corp. v. Talton*, 249 Va. 182, 189, 455 S.E.2d 232, 236 (Va. 1995); *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, C.A. No. 2742-VCN, 2009 WL 458779, at *5 & n.37 (Del. Ch. Feb. 23, 2009). An anticipatory breach satisfies prudential ripeness and therefore enables the promisee to seek damages immediately upon repudiation, *Sys. Council EM-3 v. AT & T Corp.*, 159 F.3d 1376, 1383 (D.C. Cir. 1998) ("[I]f a performing party unequivocally signifies its intent to breach a contract, the other party may seek damages immediately under the doctrine of anticipatory repudiation"). In other words, anticipatory breach is "a doctrine of accelerated ripeness" because it "gives the plaintiff the option to have the law treat the promise to breach [or the act rendering performance impossible] as a breach itself." *Homeland Training Ctr., LLC v. Summit Point Auto. Research Ctr.*, 594 F.3d 285, 294 (4th Cir. 2010) (citing *Franconia Assocs.*, 536 U.S. at 143).

The class plaintiffs' claims for breach of contract with respect to liquidation preferences are better understood as claims for anticipatory breach, so there is no prudential reason to defer their resolution.[26] Nor do

[26] Although the class plaintiffs do not describe the Third Amendment as "an anticipatory repudiation" until their reply brief, Class Pls. Reply Br. at 13, they have emphasized throughout this litigation that it "nullified – and thereby breached – the contractual rights to a liquidation distribution" by rendering performance impossible. Class Pls. Br. at 40-41; *see also*, *e.g.*, J.A. 223 ¶ 22 (alleging the Third Amendment "effectively eliminated the

we see any prudential obstacle to adjudicating the class plaintiffs' claim that repudiating the guarantee of liquidation preferences constitutes a breach of the implied covenant. Our holding that the claims are ripe sheds no light on the merit of those claims and, contrary to the assertions in the dissenting opinion (at 17), has no bearing upon the scope of the FHFA's statutory authority as conservator under the Recovery Act. Whether the class plaintiffs stated claims for breach of contract and breach of the implied covenant is best addressed by the district court in the first instance.[27]

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property and contractual rights of Plaintiffs and the Classes to receive their liquidation preference upon the dissolution, liquidation or winding up of Fannie Mae and Freddie Mac"); Class Pls. Opp'n to Mot. to Dismiss at 37 ("[T]he Third Amendment has made it impossible for [the Companies] ever to have . . . assets available for distribution to stockholders other than Treasury" and thereby "eliminated Plaintiffs' present . . . liquidation rights in breach of the Certificates" (internal quotation marks omitted)). The class plaintiffs allege they "paid valuable consideration in exchange for these contractual rights," which rights "had substantial market value . . . that [was] swiftly dissipated in the wake of the Third Amendment," J.A. 224 ¶ 23, causing the class plaintiffs to "suffer[] damages," *e.g.*, J.A. 269 ¶ 144.

[27] We remand the contract-based claims only insofar as they seek damages because the pleas for equitable relief are barred by 12 U.S.C. § 4617(f). "Because ripeness is a justiciability doctrine that is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction, we consider it first." *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 397 (D.C. Cir. 2008) (internal quotation marks and brackets omitted); *see also In re Aiken Cty.*, 645 F.3d 428, 434 (D.C. Cir. 2011) ("The ripeness doctrine, even in its prudential aspect, is a threshold inquiry that does not involve adjudication on the merits"). We therefore first determined the claims are ripe, *supra* at 70-73, and

That court's earlier conclusion in the negative was made for "largely the same reasons" that it had held the claims unripe, *Perry Capital LLC*, 70 F.Supp.3d at 236, and so must be reconsidered in light of our reversal of the court's holding on ripeness.

V. Conclusion

We affirm the judgment of the district court denying the institutional plaintiffs' claims against the FHFA and Treasury alleging arbitrary and capricious conduct and conduct in excess of their statutory authority because those claims are barred by 12 U.S.C. § 4617(f). With respect to the class plaintiffs' claims and those of the Arrowood and Fairholme plaintiffs, we affirm the judgment of the district court except for the claims alleging breach of contract and breach of the implied covenant of good faith and fair dealing regarding liquidation preferences and the claim for breach of the implied covenant with respect to dividend rights, which claims we remand to the district court for further proceedings consistent with this opinion.

So ordered.

BROWN, *Circuit Judge*, dissenting in part:

One critic has called it "wrecking-ball benevolence," James Bovard, Editorial, *Nothing Down: The Bush Administration's Wrecking-Ball Benevolence*, BARRON'S,

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only then concluded the requests for equitable relief are barred by § 4617(f).

Aug. 23, 2004, http://tinyurl.com/Barrons-Bovard; while another, dismissing the compassionate rhetoric, dubs it "crony capitalism," Gerald P. O'Driscoll, Jr., Commentary, *Fannie/Freddie Bailout Baloney*, CATO INST., http://tinyurl.com/Cato-O-Driscoll (last visited Feb. 13, 2017). But whether the road was paved with good intentions or greased by greed and indifference, affordable housing turned out to be the path to perdition for the U.S. mortgage market. And, because of the dominance of two so-called Government Sponsored Entities ("GSE"s) – the Federal National Mortgage Association ("Fannie Mae" or "Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie Mac" or "Freddie," collectively with Fannie Mae, the "Companies") – the trouble that began in the subprime mortgage market metastasized until it began to affect most debt markets, both domestic and international.

By 2008, the melt-down had become a crisis. A decade earlier, government policies and regulations encouraging greater home ownership pushed banks to underwrite mortgages to allow low-income borrowers with poor credit history to purchase homes they could not afford. Banks then used these risky mortgages to underwrite highly-profitable mortgage-backed securities – bundled mortgages – which hedge funds and other investors later bought and sold, further stoking demand for ever-riskier mortgages at ever-higher interest rates. Despite repeated warnings from regulators and economists, the GSEs' eagerness to buy these loans meant lenders had a strong incentive to make risky loans and then pass the risk off to Fannie and

Freddie. By 2007, Fannie and Freddie had acquired roughly a trillion dollars' worth of subprime and non-traditional mortgages – approximately 40 percent of the value of all mortgages purchased. And since more risk meant more profit and the GSEs knew they could count on the federal government to cover their losses, their appetite for riskier mortgages was entirely rational.

The housing boom generated tremendous profit for Fannie and Freddie. But then the bubble burst. Individuals began to default on their loans, wrecking neighborhoods, wiping out the equity of prudent homeowners, and threatening the stability of banks and those who held or guaranteed mortgage-backed assets. In March 2008, Bear Sterns collapsed, requiring government funds to finance a takeover by J.P. Morgan Chase. In July, the Federal Deposit Insurance Corporation (the "FDIC") seized IndyMac. But Bear Sterns and IndyMac – huge companies, to be sure – paled in comparison to Fannie and Freddie, which together backed $5 trillion in outstanding mortgages, or nearly half of the $12 trillion U.S. mortgage market. In late-July 2008, Congress passed and President Bush signed the Housing and Economic Recovery Act of 2008, authorizing a new government agency, the Federal Housing Finance Agency ("FHFA" or the "Agency"), to serve as conservator or receiver for Fannie and Freddie if certain conditions were met; Fannie and Freddie were placed into FHFA conservatorship the following month. Only weeks thereafter, Lehman Brothers failed, the government bailed out A.I.G., Washington

Mutual declared bankruptcy, and Wells Fargo obtained government assistance for its buy-out of Wachovia.

There is no question that FHFA was created to confront a serious problem for U.S. financial markets. The Court apparently concludes a crisis of this magnitude justifies extraordinary actions by Congress. Perhaps it might. But even in a time of exigency, a nation governed by the rule of law cannot transfer broad and unreviewable power to a government entity to do whatsoever it wishes with the assets of these Companies. Moreover, to remain within constitutional parameters, even a less-sweeping delegation of authority would require an explicit and comprehensive framework. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.") Here, Congress did *not* endow FHFA with unlimited authority to pursue its own ends; rather, it seized upon the statutory text that had governed the FDIC for decades and adapted it ever so slightly to confront the new challenge posed by Fannie and Freddie.

Perhaps this was a bad idea. The perils of massive GSEs had been indisputably demonstrated. Congress could have faced up to the mess forthrightly. Had both Companies been placed into immediate receivership, the machinations that led to this litigation might have been avoided. *See* Thomas H. Stanton, *The Failure of Fannie Mae and Freddie Mac and the Future of Government Support for the Housing Finance System*, 14-15 (Brooklyn L. Sch., Conference Draft, Mar. 27, 2009), http://tinyurl.com/Stanton-Conference (arguing Fannie and Freddie could have been converted into wholly owned government corporations with limited lifespans in order to stabilize the mortgage market). But the question before the Court is not whether the good guys have stumbled upon a solution. There are no good guys. The question is whether the government has violated the legal limits imposed on its own authority.

Regardless of whether Congress had many options or very few, it chose a well-understood and clearly-defined statutory framework – one that drew upon the common law to clearly delineate the outer boundaries of the Agency's conservator or, alternatively, receiver powers. FHFA pole vaulted over those boundaries, disregarding the plain text of its authorizing statute and engaging in *ultra vires* conduct. Even now, FHFA continues to insist its authority is *entirely without limit* and argues for a complete ouster of federal courts' power to grant injunctive relief to redress *any action* it takes while purporting to serve in the conservator role. *See* FHFA Br. 21. While I agree with much of the Court's reasoning, I cannot conclude the anti-injunction provision protects FHFA's actions here or, more generally, endorses FHFA's stunningly broad view of its own power. Plaintiffs – not all innocent and ill-informed investors, to be sure – are betting the rule of law will prevail. In this country, *everyone* is entitled to win that bet. Therefore, I respectfully dissent from the portion of the Court's opinion rejecting the Institutional and Class Plaintiffs' claims as barred by the anti-injunction provision and all resulting legal conclusions.

I.

The Housing and Economic Recovery Act of 2008 ("HERA" or the "Act"), Pub. L. No. 110-289, 122 Stat. 2654 (codified at 12 U.S.C. § 4511, *et seq*.), established a new financial regulator, FHFA, and endowed it with the authority to act as conservator or receiver for Fannie and Freddie. The Act also temporarily expanded the United States Treasury's ("Treasury") authority to extend credit to Fannie and Freddie as well as purchase stock or debt from the Companies. My disagreement with the Court turns entirely on its interpretation of HERA's text.

Pursuant to HERA, FHFA may supervise and, if needed, operate Fannie and Freddie in a "safe and sound manner," "consistent with the public interest," while "foster[ing] liquid, efficient, competitive, and resilient national housing finance markets." 12 U.S.C. § 4513(a)(1)(B). The statute further authorizes the FHFA Director to "appoint [FHFA] as conservator *or* receiver" for Fannie and Freddie "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs." *Id.* § 4617(a)(1), (2) (emphasis added). In order to ensure FHFA would be able to act quickly to prevent the effects of the subprime mortgage crisis from cascading further through the United States and global economies, HERA also provided "no court may take any action to restrain or affect *the exercise of powers or* *functions* of [FHFA] as a conservator or a receiver." *Id.* § 4617(f) (emphasis added).

By its plain terms, HERA's broad anti-injunction provision bars equitable relief against FHFA only when the Agency acts within its statutory authority – *i.e.* when it performs its "powers or functions." *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."). Accordingly, having been appointed as "conservator" for the Companies, FHFA was obligated to behave in a manner consistent with the conservator role as it is defined in HERA or risk intervention by courts. Indeed, this conclusion is consistent with judicial interpretations of HERA's sister statute and, more broadly, with the common law.

A.

FHFA's general authorization to act appears in HERA's "[d]iscretionary appointment" provision, which states, "The Agency may, at the discretion of the Director, be appointed conservator *or* receiver" for Fannie and Freddie. 12 U.S.C. § 4617(a)(2) (emphasis added). The disjunctive "or" clearly indicates FHFA may choose to behave either as a conservator or as a receiver, but it may not do both simultaneously. *See also id.* § 4617(a)(4)(D) ("The appointment of the Agency as receiver of a regulated entity under this section shall immediately terminate any conservatorship established for the regulated entity under this chapter."). The Agency chose the first option, publicly announcing it had placed Fannie and Freddie into conservatorship on September 6, 2008 after a series of unsuccessful efforts to capitalize the Companies. They remain in FHFA conservatorship today. Accordingly, we must determine the statutory boundaries of power, if any, placed on FHFA when it functions as a conservator and determine whether FHFA stepped out of bounds.

The Court emphasizes Subsection 4617(b)(2)(B)'s general overview of the Agency's purview:

> 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.

Id. § 4617(b)(2)(B). From this text, the Court intuits a general statutory mission to behave as a "conservator" in virtually all corporate actions, presumably transitioning to a "receiver" only at the moment of liquidation. Op. 27 ("[HERA] openly recognizes that sometimes conservatorship will involve managing the regulated entity in the lead up to the appointment of a liquidating receiver."); 32 ("[T]he duty that [HERA] imposes on FHFA to comply with receivership procedural protections textually turns on FHFA actually liquidating the Companies."). In essence, the Court's position holds that because there was a financial crisis and only Treasury offered to serve as White Knight, both FHFA and Treasury may take any action they wish, apart from formal liquidation, without judicial oversight. This analysis is dangerously far-reaching. *See generally* 2 James Wilson, *Of the Natural Rights of Individuals*, *in* THE WORKS OF JAMES WILSON 587 (1967) (warning it is not "part of natural liberty . . . to do mischief to anyone" and suggesting such a nonexistent right can hardly be given to the state to impose by fiat). While the line between a conservator and a receiver may not be completely impermeable, the roles' heartlands are discrete, well-anchored, and authorize essentially distinct and specific conduct.

For clarification of the general mission statement appearing in Subsection (B), the reader need only continue to read through Subsection 4617(b)(2). *See Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012) ("[T]o resolve this [statutory interpretation of HERA] issue, we need only heed Professor Frankfurter's timeless advice: '(1) Read the statute; (2) read the statute; (3) read the statute!'" (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 202 (1967))).

A mere two subsections later, HERA helpfully lists the specific "powers" that FHFA possesses once appointed conservator:

> The Agency may, as *conservator*, take such action as may be –
>
> > (i) necessary to put the regulated entity in a sound and solvent condition; and
> >
> > (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.

12 U.S.C. § 4617(b)(2)(D) (emphasis added). The next subsection defines FHFA's "[a]dditional powers *as receiver*:"

> In any case in which the Agency is acting as receiver, the Agency shall place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity in such manner as the Agency deems appropriate, including through the sale of assets, the transfer of assets to a limited-life regulated entity[,] . . . or the exercise of any other rights or privileges granted to the Agency under this paragraph.

Id. § 4617(b)(2)(E) (emphasis added). Apparently, when the Court asserts "for all of their arguments that FHFA has exceeded the bounds of conservatorship, the institutional stockholders have no textual hook on which to hang their hats," Op. 36, it refers solely to the limited confines of Subsection 4617(b)(2)(B).

Plainly the text of Subsections 4617(b)(2)(D) and (b)(2)(E) mark the bounds of FHFA's conservator or receiver powers, respectively, if and when the Agency chooses to exercise them in a manner consistent with its general authority to "operate the regulated entity" appearing in Subsection 4617(b)(2)(B).[1] Of course, this

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[1] The Court makes much of the statute's statement that a conservator "*may*" take action to operate the company in a sound and solvent condition and preserve and conserve its assets while a receiver "*shall*" liquidate the company. It concludes the statute permits, but does not compel in any judicially enforceable sense, FHFA to preserve and conserve Fannie's and Freddie's assets however it sees fit. *See* Op. 21-25. I disagree. Rather, read in the context of the larger statute – especially the specifically defined powers of a conservator and receiver set forth in Subsections 4617(b)(2)(D) and (b)(2)(E) – Congress's decision to use permissive language with respect to a conservator's duties is best understood as a simple concession to the practical reality that a conservator may not always succeed in rehabilitating its ward. The statute wisely acknowledges that it is "not in the power of any man to command success" and does not convert failure into a legal wrong. *See* Letter from George Washington to Benedict Arnold (Dec. 5, 1775), *in* 3 THE WRITINGS OF GEORGE WASHINGTON, 192 (Jared Sparks, ed., 1834). Of course, this does not mean the Agency may affirmatively sabotage the Companies' recovery by confiscating their assets quarterly to ensure they cannot pay off their crippling indebtedness. There is a vast difference between recognizing that flexibility is necessary to permit a conservator to address evolving circumstances and authorizing a conservator to

is not to say FHFA may take action *if and only if* the preconditions listed in the statute are met. Indeed, in provisions *following the specific articulation of powers contained in Subsections (D) and (E)*, and thus drafted in contemplation of the distinctions articulated in those earlier subsections, the statute lists certain powers that may be exercised by FHFA as either a "conservator or receiver." 12 U.S.C. § 4617(b)(2)(G) (power to "transfer or sell any asset or liability of the regulated entity in default" without prior approval by the regulated entity); *id.* § 4617(b)(2)(H) (power to "pay [certain] valid obligations of the regulated entity"). Indeed, each of these powers is entirely consistent with *either* the Subsection (D) conservator role or the Subsection (E) receiver role, and they do not override the distinctions between them. Congress cannot be expected to specifically address an entire universe of possible actions in its enacted text – assigning each to a "conservator," a "receiver," or both. *See*, *e.g.*, *id.* § 4617(b)(2)(C) (joint conservator/receiver power to "provide for the exercise of any function by any stockholder, director, or officer of any regulated entity"). But if a power is enumerated as that of a "receiver" (or fairly read to be a "receiver" power), FHFA cannot exercise that power while calling itself a "conservator." The statute confirms as much: the Agency "as conservator or receiver" may "exercise all powers and authorities *specifically granted to conservators or receivers, respectively*, under [Section 4617], and such *incidental powers* as shall be

undermine the interests and destroy the assets of its ward without meaningful limit.

necessary to carry out such powers." *Id.* § 4617(J)(i) (emphasis added).

A conservator endeavors to "put the regulated entity in a sound and solvent condition" by "reorganizing [and] rehabilitating" it, and a receiver takes steps towards "liquidat[ing]" the regulated entity by "winding up [its] affairs." 12 U.S.C. § 4617(a)(2), (b)(2)(D)-(E).[2] In short, FHFA may choose whether it intends to serve as a conservator or receiver; once the choice is made, however, its "hard operational calls" consistent with its "managerial judgment" are statutorily confined to acts within its chosen role. *See* Op. 23. There 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. *See* Op. 55-56 (noting HERA "terminates [shareholders] rights and claims" in receivership and acknowledging shareholders' direct claims against and rights in the Companies survive during conservatorship).[3]

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[2] The Director's discretion to appoint FHFA as " 'conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity' " does not suggest slippage between the roles. *See* FHFA Br. 41 (quoting 12 U.S.C. § 4617(a)(2)). Between the conservator and receiver roles, FHFA surely has the power to accomplish each of the enumerated functions; nonetheless, a conservator can no more "wind[] up" a company than a receiver can "rehabilitat[e]" it. *See* 12 U.S.C. § 4617(b)(3)(B) (using "liquidation" and "winding up" as synonyms).

[3] HERA's provision for judicial review over a claim promptly filed "within 30 days" of the Director's decision to appoint a conservator or receiver further indicates Congress contemplated continuity of the conservator or receiver role during the period the

Moreover, it is the proper role of courts to determine whether FHFA's challenged actions fell within its statutorily-defined conservator role. In *County of Sonoma v. FHFA*, for example, when our sister circuit undertook this inquiry, it observed, "If the [relevant] directive falls within FHFA's conservator powers, it is insulated from review and this case must be dismissed," but "[c]onversely, the anti-judicial review provision is inapplicable when FHFA acts beyond the scope of its conservator power." 710 F.3d 987, 992 (9th Cir. 2013); *see also Leon Cty. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012) ("FHFA cannot evade judicial scrutiny by merely labeling its actions with a conservator stamp."). Here, the Court abdicates this crucial responsibility, blessing FHFA with unreviewable discretion over any action – short of formal liquidation – it takes towards its wards.

B.

But HERA does not exist in an interpretive vacuum. Congress imported the powers and limitations FHFA enjoys in its "conservator" and "receiver" roles, as well as the insulation from judicial review that accompanies them, directly from the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, which

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conservatorship or receivership endured. 12 U.S.C. § 4617(a)(5). Here, therefore, in transitioning *sub silencio* from the conservator to receiver role, FHFA has escaped the statute's contemplated, though admittedly brief, period for judicial review following the transition.

governs the FDIC. *See* Mark A. Calabria, *The Resolution of Systemically Important Financial Institutions: Lessons from Fannie and Freddie* 10 (Cato Inst., Working Paper No. 25, 2015), http://tinyurl.com/Cato-Working-Paper ("In crafting the conservator and receivership provisions . . . the Committee staff . . . quite literally 'marked up' Sections 11 and 13 of the [Federal Deposit Insurance Act ("FDIA"), FIRREA's predecessor statute]. . . . The presumption was that FDIA powers would apply to a GSE resolution, unless there was a compelling reason otherwise."). Our interpretation of conservator powers and the judiciary's role in policing their boundaries under HERA is, therefore, guided by congressional intent expressed in FIRREA and the case law interpreting it. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (noting when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law" and to have "adopte[d] that interpretation"); *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("Statutory provisions *in pari materia* normally are construed together to discern their meaning."); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) [hereinafter *Reading of Statutes*] ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.").

In language later copied word-for-word into HERA, FIRREA lists the FDIC's powers "as conservator or receiver," 12 U.S.C. § 1821(d)(2)(A)-(B), and it later lists the FDIC's "[p]owers as conservator" alone, *id.* § 1821(d)(2)(D). Save for references to a "regulated entity" in place of a "depository institution," the conservator powers delineated in the two statutes are *identical*. In fact, FIRREA's text demonstrates the Legislature's clear intent to create a textual distinction between conservator and receiver powers:

> The FDIC is authorized to act as conservator or receiver for insured banks and insured savings associations that are chartered under Federal or State law. The title also distinguishes between the powers of a conservator and receiver, *making clear that a conservator operates or disposes of an institution as a going concern while a receiver has the power to liquidate and wind up the affairs of an institution*.

H.R. REP. NO. 101-209, at 398 (1989) (Conf. Rep.) (emphasis added). Courts have respected this delineation, noting "Congress did not use the phrase 'conservator or receiver' loosely." *1185 Ave. of Americas Assocs. v. RTC*, 22 F.3d 494, 497 (2d Cir. 1994) ("Throughout FIRREA, Congress used 'conservator or receiver' where it granted rights to both conservators and receivers, and it used 'conservator' or 'receiver' individually where it granted rights to the [agency] in only one capacity.").

FIRREA had assigned to "conservators" responsibility for taking "such action as may be . . . necessary to put the insured depository institution in a sound and solvent condition; and . . . appropriate to carry on the business of the institution and preserve and conserve [its] assets," 12 U.S.C. § 1821(d)(2)(D), and it imposed upon them a "fiduciary duty to minimize the institution's losses," 12 U.S.C. § 1831f(d)(3). "Receivers," on the other hand, "place the insured depository institution in liquidation and proceed to realize upon the assets of the institution." *Id.* § 1821(d)(2)(E). The proper interpretation of the text is unmistakable: "a conservator may operate and dispose of a bank as a going concern, while a receiver has the power to liquidate and wind up the affairs of an institution." *James Madison Ltd. ex rel. Hecht v. Ludwig*, 82 F.3d 1085, 1090 (D.C. Cir. 1996); *see also*, *e.g.*, *Del E. Webb McQueen Dev. Corp. v. RTC*, 69 F.3d 355, 361 (9th Cir. 1995) ("The RTC [a government agency similar to the FDIC], as conservator, operates an institution with the hope that it might someday be rehabilitated. The RTC, as receiver, liquidates an institution and distributes its proceeds to creditors according to the priority rules set out in the regulations."); *RTC v. United Tr. 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. The receiver's mission is to shut a business down and sell off its assets. A receiver and conservator consider different interests when making . . . strategic decision[s]."). The two roles simply do not overlap, and any conservator who "winds up the affairs of an institution" rather than operate it "as a going concern" – within the context of a formal liquidation or not – does so outside its authority as conservator under the statute.

Of course, parameters for the "conservator" and "receiver" roles are not the only things HERA lifted directly from FIRREA. The anti-injunction clause at issue here came too. Section 1821(j) of FIRREA provided, "[N]o court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." 12 U.S.C. § 1821(j). Another near-perfect fit.

Indeed, *National Trust for Historic Preservation in the United States v. FDIC* emphasized that, while FIRREA's anti-injunction clause prevented review of the FDIC's actions where it had "exercise[d the] powers or functions" granted to it as "conservator or receiver," the Court retained the ability to decide claims alleging the agency "ha[d] acted or propose[d] to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions." 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring); *see also Freeman v. FDIC*, 56 F.3d 1394, 1398 (D.C. Cir. 1995) ("'[Section] 1821(j) does indeed bar courts from restraining or affecting the exercise of powers or functions of the FDIC as a conservator or a receiver . . . unless it has acted or proposed to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions.'" (quoting *Nat'l Tr. for Historic Pres.*, 21 F.3d at 472 (Wald, J., concurring))). Insulating all actions *within* the conservator role is an entirely different proposition from exempting actions *outside* that role, and this Circuit's precedent leaves no doubt that a thorough analysis is required to determine where on the continuum an agency stands before applying FIRREA's – or HERA's – anti-injunction clause to bar a plaintiff's claims.

C.

When Congress lifted HERA's conservatorship standards verbatim from FIRREA, it also incorporated the long history of fiduciary conservatorships at common law baked into that statute. Indeed, "[i]t is a familiar maxim that a statutory term is generally presumed to have its common-law meaning." *Evans v. United States*, 504 U.S. 255, 259 (1992); *see Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."); *see generally* Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U. L. REV. 401 (1968) (discussing the interaction between statutes and judicial decisions across a number of fields, including commercial law). As Justice Frankfurter colorfully put it, "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Reading of Statutes*, *supra*, at 537.

We have an obvious transplant here. At common law, "conservators" were appointed to protect the legal interests of those unable to protect themselves. In the probate context, for example, a conservator was bound to act as the fiduciary of his ward. *See In re Kosmadakes*, 444 F.2d 999, 1004 (D.C. Cir. 1971). This duty forbade the conservator – whether overseeing a human or corporate person – from acting for the benefit of the conservator himself or a third party. *See RTC v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1453-54 (8th Cir. 1992) (observing "[a]t least as early as the 1930s, it was recognized that the purpose of a conservator was to maintain the institution as an ongoing concern," and holding "the distinction in duties between [RTC] conservators and receivers" is thus not "more theoretical than real").[4]

Consequently, today's *Black's Law Dictionary* defines a "conservator" as a "guardian, protector, or preserver," while a "receiver" is a "disinterested person appointed . . . for the protection or collection of property that is the subject of diverse claims (for example, because it belongs to a bankrupt [entity] or is otherwise being litigated)." BLACK'S LAW DICTIONARY 370,

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[4] While the execution of multiple contracts with Treasury "bears no resemblance to the type of conservatorship measures that a private common-law conservator would be able to undertake," Op. 34, that is a distinction in degree, not in kind.

1460 (10th ed. 2014). These "[w]ords that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning." *Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health & Human Res.*, 532 U.S. 598, 615 (2001) (Scalia, J., concurring).[5] They comprise the common law vocabulary that Congress chose to employ in FIRREA and, later, in HERA to authorize the FDIC and FHFA to serve as "conservators" in order to "preserve and conserve [an institution's] assets" and operate that institution in a "sound and solvent" manner. 12 U.S.C. § 1821(d)(2)(D).

The word "conservator," therefore, is not an infinitely malleable term that may be stretched and contorted to encompass FHFA's conduct here and insulate Plaintiffs' APA claims from judicial review. Indeed, the Court implicitly acknowledges this fact in permitting the Class Plaintiffs to mount a claim for anticipatory breach of the promises in their shareholder agreements. *See* Op. 71-73. A proper reading of the statute prevents FHFA from exceeding the bounds of the conservator role and behaving as a *de facto* receiver.

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[5] These legal definitions are reflected in the terms' ordinary meaning. For example, the *Oxford English Dictionary* defines a "conservator" as "[a]n officer appointed to conserve or manage something; a keeper, administrator, trustee of some organization, interest, right, or resource." 3 OXFORD ENGLISH DICTIONARY 766 (2d ed. 1989). In contrast, it defines a "receiver" as "[a]n official appointed by a government . . . to receive . . . monies due; a collector." 13 OXFORD ENGLISH DICTIONARY 317-18 (2d ed. 1989). Regardless of the terms' audience, therefore, a "conservator" protects and preserves assets for an entity while a "receiver" operates as a collection agent for creditors.

The Court suggests FHFA's incidental power to, "as conservator or receiver[,] . . . take any action authorized by [Section 4617], which the Agency determines is in the best interests of the regulated entity *or the Agency*" in 12 U.S.C. § 4617(b)(2)(J)(ii) erases any outer limit to FHFA's statutory powers despite the common law definition of "conservator" and, therefore, forecloses *any* opportunity for meaningful judicial review of FHFA's actions in conducting its so-called conservatorship at the time of the Third Amendment. *See* Op. 33-34. Of course, the Court's reading of Subsection 4617(b)(2)(J)(ii) directly contradicts the immediately-preceding subsection's authorization of FHFA "as conservator or receiver" to "exercise all powers and authorities specifically granted *to conservators or receivers, respectively*." 12 U.S.C. § 4617(b)(2)(J)(i) (emphasis added). It also upends Subsection 4617(a)(5)'s provision of judicial review for actions FHFA may take in certain facets of its receiver role. But even if that were not the case, Supreme Court precedent requires *an affirmative act by Congress* – an explicit "instruct[ion]" that review should proceed in a "contrary" manner – to authorize departure from a common law definition. *Morissette*, 342 U.S. at 263. And given the potential for disruption in the financial markets discussed in Part III *infra*, one would expect Congress to express itself explicitly in this matter. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."). Congress offered no such statement here.

Rather, the more appropriate reading of the relevant text merely permits FHFA to engage in self-dealing transactions, an authorization otherwise inconsistent with the conservator role. *See Gov't of Rwanda v. Johnson*, 409 F.3d 368, 373 (D.C. Cir. 2005) (discussing "the age-old principle applicable to fiduciary relationships that, unless there is a full disclosure by the agent, trustee, or attorney of his activity and interest in the transaction to the party he represents and the obtaining of the consent of the party represented, the party serving in the fiduciary capacity cannot receive any profit or emolument from the transaction"); *see also* 7 COLLIER ON BANKRUPTCY ¶ 1108.09 (16th ed.) (noting a trustee's duty of loyalty in bankruptcy law requires a "single-minded devotion to the interests of those on whose behalf the trustee acts"). FHFA operating as a conservator may act in its own interests to protect both the Companies and the taxpayers from whom the Agency was ultimately forced to borrow, but FHFA is not empowered to jettison every duty a conservator owes its ward, and it is certainly not entitled to disregard the statute's own clearly defined limits on conservator power.

In fact, FIRREA contains a nearly identical self-dealing provision, which provides, "The [FDIC] may, as conservator or receiver . . . take any action authorized by this chapter, which the [FDIC] determines is in the best interests of the depository institution, its depositors, or the [FDIC]." 12 U.S.C. § 1821(d)(2)(J)(ii). This authorization has not given courts pause in interpreting FIRREA to require the FDIC to behave within its statutory role. *See Nat'l Tr. for Historic Pres.*, 21 F.3d at 472 (Wald, J., concurring) ("[Section] 1821(j) does indeed bar courts from restraining or affecting the exercise of powers or functions of the FDIC as a conservator or a receiver, unless it has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions."); *see also Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997) (holding the statutory bar on judicial review of the FDIC's actions taken as a conservator or receiver "does not bar injunctive relief when the FDIC has acted beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions").[6]

II.

Having determined this Court may enjoin FHFA if it exceeded its powers as conservator of Fannie and Freddie, I now examine FHFA's conduct. It is important to note at the outset the *motives* behind any actions taken by FHFA are irrelevant to this inquiry, as no portion of HERA's text invites such an analysis.

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[6] The Court also suggests the authority to act " 'in the best interests of the regulated entity or *the Agency*' " is consistent with the Director's mandate to protect the " 'public interest.' " Op. 8 (quoting 12 U.S.C. § 4513(a)(1)(B)(v)). Of course, the FHFA Director is also bound to "carr[y] out [FHFA's] statutory mission only through activities that are authorized under and consistent with this chapter and the authorizing statutes." *Id.* § 4513(a)(1)(B)(iv). Indeed, this text only confirms what should have been evident: the availability of meaningful judicial review cannot bend to exigency, especially since Congress clearly did not believe the 2008 financial crisis required a more far-reaching statutory authorization than prior occasions of financial distress had commanded.

Rather, I examine whether or not FHFA acted beyond its authority, looking only to whether its actions are consistent either with (1) "put[ting] the regulated entity in a sound and solvent condition" by "reorganizing [and] rehabilitating" it as a conservator or (2) taking steps towards "liquidat[ing]" it by "winding up [its] affairs" as a receiver. 12 U.S.C. § 4617(a)(2), (b)(2)(D)-(E).

In September 2008, FHFA placed Fannie and Freddie into conservatorship; Director James Lockhart explained the conservatorship as "a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations" and promised FHFA would "act as the conservator to operate [Fannie and Freddie] until they are stabilized." Press Release, Fed. Hous. Fin. Agency, Statement of FHFA Director James B. Lockhart at News Conference Announcing Conservatorship of Fannie Mae and Freddie Mac (Sept. 7, 2008), http://tinyurl.com/Lockhart-Statement. FHFA even promised it would "continue to retain all rights in the [Fannie and Freddie] stock's financial worth; as such worth is determined by the market." JA 2443 (FHFA Fact Sheet containing "Questions and Answers on Conservatorship"). And, for a period of time thereafter, FHFA did in fact manage the Companies within the conservator role. It even enlisted Treasury to provide cash infusions that, while costly, preserved at least a portion of the value of the market-held shares in the corporations.

But the tide turned in August 2012 with the Third Amendment and its "Net Worth Sweep," transferring nearly all of the Companies' profits into Treasury's coffers. Specifically, the Third Amendment replaced Treasury's right to a fixed-rate 10 percent dividend with the right to sweep Fannie and Freddie's entire quarterly net worth (except for an initial capital reserve, which initially totaled $3 billion and will decline to zero by 2018). Additionally, the agreement provided that, regardless of the amount of money paid to Treasury as part of this Net Worth Sweep dividend, Fannie and Freddie would continue to owe Treasury the $187.5 billion it had originally loaned the Companies. It was, to say the least, a highly unusual transaction. Treasury was no longer another, admittedly very important, investor entitled to a preferred share of the Companies' profits; it had received a contractual right from FHFA to loot the Companies to the guaranteed exclusion of all other investors.

In an August 2012 press release summarizing the Third Amendment's terms, Treasury took a very different tone from Lockhart's 2008 statement: "[W]e are taking the next step toward responsibly *winding down* Fannie Mae and Freddie Mac, while continuing to support the necessary process of repair and recovery in the housing market." Press Release, Dep't of Treasury, Treasury Department Announces Further Steps To Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012), http://tinyurl.com/Treasury-Press-Release (emphasis added). Treasury further noted the Third Amendment would achieve the "important objective[ ]" of "[a]cting upon the commitment made in the Administration's 2011 White Paper that the GSEs will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." *Id.* The Acting FHFA Director echoed Treasury's sentiment in April 2013, explaining to Congress the following year the Net Worth Sweep would "wind down" Fannie and Freddie and "reinforce the notion that [they] will not be building capital as a potential step to regaining their former corporate status." Statement of Edward J. DeMarco, Acting Director, FHFA, Before the S. Comm. on Banking, Hous. & Urban Affairs (Apr. 18, 2013), http://tinyurl.com/DeMarco-Statement.

The evolution of FHFA's position from 2008 to 2013 is remarkable; it had functionally removed itself from the role of a HERA conservator. FHFA and Treasury even described their actions using HERA's *exact phrase defining a receiver's conduct*, yet FHFA still purported to exercise only its power as a conservator and operated free from HERA's constraints on receivers. *See* 12 U.S.C. § 4617(a)(4)(D), (b)(2)(E), (b)(3), (c) (establishing liquidation procedures and priority requirements); *id.* § 4617(a)(5) (providing for judicial review).

The shift in policy was borne out in FHFA's and Treasury's actions. Indeed, all parties agree the Net Worth Sweep had the effect of replacing a fixed-rate dividend with a quarterly transfer of each company's net worth above an initial (and declining) capital reserve of $3 billion. There is similarly no dispute that Treasury collected a $130 billion dividend in 2013, $40 billion in 2014, and $15.8 billion in 2015. In fact, during the period from 2008 to 2015, Fannie and Freddie together paid Treasury $241.2 billion, an amount well in excess of the $187.5 billion Treasury loaned the Companies. FHFA's decision to strip these cash reserves from Fannie and Freddie, consistently divesting the Companies of their near-entire net worth, is plainly antithetical to a conservator's charge to "preserve and conserve" the Companies' assets.

Of course, and as the Court observes, Op. 29-31, Fannie and Freddie continue to operate at a profit. Indeed, as early as the second quarter of 2012, the Companies had outearned Treasury's 10 percent cash dividend. Nonetheless, the Net Worth Sweep imposed through the Third Amendment – which was executed shortly after the second quarter 2012 earnings were released – confiscated all but a small portion of Fannie's and Freddie's profits. The maximum reserve of $3 billion, given the Companies' enormous size, rendered them extremely vulnerable to market fluctuations and risked triggering a need to once again infuse Fannie and Freddie with taxpayer money. *See* JA 1983 (2012 SEC filing stating "there is significant uncertainty in the current market environment, and any changes in the trends in macroeconomic factors that [Fannie] currently anticipate[s], such as home prices and unemployment, may cause [its] future credit-related expenses or income and credit losses to vary significantly from [its then-]current expectations"). In fact, FHFA has since referred to the Companies, even with their several-billion-dollar cushion, as "effectively balance-sheet insolvent" and "a textbook illustration of instability." Defs. Mot. to Dismiss at 19, *Samuels v. FHFA*, No. 13-cv-22399 (S.D. Fla. Dec. 6, 2013), ECF No. 38; *see also generally*, Statement of Melvin L. Watt, Director, FHFA, Statement Before the H. Comm. on Fin. Servs., at 3 (Jan. 27, 2015), http://tinyurl.com/Watt-Statement ("[U]nder the terms of the [contracts with Treasury], the [Companies] do not have the ability to build capital internally while they remain in conservatorship."). As time went on, and the maximum reserve decreased, the situation only deteriorated. Given the task of replicating their successful rise each quarter amid volatile market conditions, it is surprising the Companies managed to maintain consistent profitability until 2016, when Freddie Mac posted a $200 million loss in the first quarter. *See* FREDDIE MAC, FORM 10-Q FOR THE QUARTERLY PERIOD ENDED MARCH 31, 2016, at 7 (May 3, 2016). Under the circumstances, it strains credulity to argue FHFA was acting as a conservator to "observe [Fannie's and Freddie's] economic performance over time" and consider other regulatory options when it executed the Third Amendment. Op. 33. FHFA and Treasury are not "studying" the Companies, they are profiting off of them![7]

[7] Similarly, any argument that the Third Amendment was executed to avoid a downward spiral hardly saves FHFA at this juncture. *See*, *e.g.*, Op. 31-32. As an initial matter, the contention rests entirely upon an examination of motives. *But see id.* 32 (confirming motives are irrelevant to the legal inquiry). Second, even if one were to consider motives, the availability of an in-kind

Nonetheless, the Court suggests the Third Amendment was simply a logical extension of the principles articulated in the prior two agreements. Op. 25-26. This is incorrect; the Net Worth Sweep fundamentally transformed the relationship between the Companies and Treasury: a 10 percent dividend became a sweep of the Companies' near-entire net worth; an in-kind dividend option disappeared in favor of cash payments; the ability to retain capital above and beyond the required dividend payment evaporated; and, most importantly, the Companies lost any hope of repaying Treasury's liquidation preference and freeing themselves from its debt. Indeed, the capital depletion accomplished in the Third Amendment, regardless of motive, is patently incompatible with any definition of the conservator role. Outside the litigation context, even FHFA agrees: "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." 76 Fed. Reg. 35,724, 35,727 (June 20, 2011). But rendering Fannie and Freddie mere pass-through entities for huge amounts of money destined for Treasury does exactly that which FHFA has deemed impermissible.

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dividend and information recently obtained in this litigation creates, to put it mildly, a dispute of fact regarding the motivations behind FHFA and Treasury's decision to execute the Third Amendment.

Even Congress, in debating the Consolidated Appropriations Act of 2016, H.R. 2029, 114th Cong. § 702 (2015), acknowledged such action would require additional congressional authorization. *See* 161 Cong. Rec. S8760 (daily ed. Dec. 17, 2015) (statement of Sen. Corker) (noting the Senate Banking Committee passed a bipartisan bill to "protect taxpayers from future economic down-turns by replacing Fannie and Freddie with a privately capitalized system" that ultimately did not receive a vote by the full Senate).

Here, FHFA placed the Companies in *de facto* liquidation – inconsistent even with "managing the regulated entit[ies] in the lead up to the appointment of a liquidating receiver," as the Court incorrectly, and obliquely, defines the outer limits of the conservator role, Op. 27 – when it entered into the Third Amendment and captured nearly all of the Companies' profits for Treasury. To paraphrase an aphorism usually attributed to Everett Dirksen, a hundred billion here, a hundred billion there, and pretty soon you're talking about real money. But instead of acknowledging the reality of the Companies' situation, the Court hides behind a false formalism, establishing a dangerous precedent for future acts of FHFA, the FDIC, and even common law conservators.

III.

Finally, the practical effect of the Court's ruling is pernicious. By holding, contrary to the Act's text, FHFA need not declare itself as either a conservator or receiver and then act in a manner consistent with the well-defined powers associated with its chosen role, the Court has disrupted settled expectations about financial markets in a manner likely to negatively affect the nation's overall financial health.

Congress originally established the FDIC to rebuild confidence in our nation's banking system following the Great Depression, *see* Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162, and in the years that followed it has empowered the institution to insure deposits and serve as a conservator or receiver for failed banks, *see* Federal Deposit Insurance Act of 1950, Pub. L. No. 81-979, 64 Stat. 873 (FIRREA's predecessor statute, which incorporated the conservator and receiver roles). Consistent with its mission, the FDIC has provided assistance, up to and including conservatorship and receivership, for thousands of financial institutions over numerous periods of economic stress. 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.

Congress chose to import this effective statutory scheme into HERA in an effort to combat our most recent financial crisis, evidencing its belief that FIRREA's terms were equal to the task confronting FHFA. But FHFA's actions in implementing the Net Worth Sweep "bear no resemblance to actions taken in conservatorships or receiverships overseen by the FDIC." Amicus Br. for Indep. Comm. Bankers of Am. 6 (reflecting the views of former high-ranking officials of the FDIC). Yet today the Court holds that, in the context of HERA – and FIRREA by extension – any action taken by a regulator claiming to be a conservator (short of officially liquidating the company) is immunized from meaningful judicial scrutiny. All this in the context of the Third Amendment's Net Worth Sweep, which comes perilously close to liquidating Fannie and Freddie by ensuring they have no hope of survival past 2018. The Court's conservator is not your grandfather's, or even your father's, conservator. Rather, the Court adopts a dangerous and radical new regime that introduces great uncertainty into the already-volatile market for debt and equity in distressed financial institutions.

Now investors in regulated industries must invest cognizant of the risk that some conservators may abrogate their property rights entirely in a process that circumvents the clear procedures of bankruptcy law, FIRREA, and HERA. Consequently, equity in these corporations will decrease as investors discount their expected value to account for the increased uncertainty – indeed if allegations of regulatory overreach are entirely insulated from judicial review, private capital may even become sparse. Certainly, capital will become more expensive, and potentially *prohibitively* expensive during times of financial distress, for all regulated financial institutions.

More ominously, the existence of a predictable rule of law has made America's enviable economic progress possible. *See*, *e.g.*, TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE

AGES 3 (1998) ("When property is privatized, and the rule of law is established, in such a way that all including the rulers themselves are subject to the same law, economies will prosper and civilization will blossom."). Private individual and institutional investors in regulated industries rightly expect the law will protect their financial rights – either through an agency interpreting statutory text or a court reviewing agency action thereafter. They are also entitled to expect a conservator will act to conserve and preserve the value of the company in which they have invested, honoring the capital and investment conventions of governing law. A rational investor contemplating the terms of HERA would not conclude Congress had changed these prevailing norms. *See generally Yates v. United States*, 135 S.Ct. 1074, 1096 (2015) (Kagan, J., dissenting) (noting statutory text may be drafted "to satisfy audiences other than courts"). Today, however, the Court explains this rational investor was wrong. And its bold and incorrect statutory interpretation could dramatically affect investor and public confidence in the fairness and predictability of the government's participation in conservatorship and insolvency proceedings.

When assessing responsibility for the mortgage mess there is, as economist Tom Sowell notes, plenty of blame to be shared. Who was at fault? "The borrowers? The lenders? The government? The financial markets? The answer is yes. All were responsible and many were irresponsible." THOMAS SOWELL, THE HOUSING BOOM AND BUST 28 (2009). But that does not mean more irresponsibility is the solution. Conservation is not a synonym for nationalization. Confiscation may be. But HERA did not authorize either, and FHFA may not do covertly what Congress did not authorize explicitly. What might serve in a banana republic will not do in a constitutional one.

* * *

FHFA, like the FDIC before it, was given broad powers to enable it to respond in a perilous time in U.S. financial history. But with great power comes great responsibility. Here, those responsibilities and the authority FHFA received to address them were well-defined, and yet FHFA disregarded them. In so doing, FHFA abandoned the protection of the anti-injunction provision, and it should be required to defend against the Institutional and Class Plaintiffs' claims.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PERRY CAPITAL LLC, **Plaintiff,** **v.** **JACOB J. LEW, *et al.*,** **Defendants.**	**Civil No. 13-1025 (RCL)**
FAIRHOLME FUNDS, INC., *et al.*, **Plaintiffs,** **v.** **FEDERAL HOUSING FINANCE AGENCY, *et al.*,** **Defendants.**	**Civil No. 13-1053 (RCL)**
ARROWOOD INDEMNITY COMPANY, *et al.*, **Plaintiffs,** **v.** **FEDERAL NATIONAL MORTGAGE ASSOCIATION, *et al.*,** **Defendants.**	**Civil No. 13-1439 (RCL)**

In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations	)))))	**Miscellaneous No. 13-1288 (RCL)**
This Memorandum Opinion relates to: ALL CASES	)))	CLASS ACTION

MEMORANDUM OPINION

(Filed Sep. 30, 2014)

Before the Court are motions to dismiss or, in the alternative, for summary judgment, filed by the defendants United States Department of the Treasury ("Treasury") and Federal Housing Finance Agency ("FHFA"), as well as a cross-motion for summary judgment on Administrative Procedure Act ("APA") claims filed by the *Perry, Fairholme*, and *Arrowood* plaintiffs (collectively, "individual plaintiffs"). Upon consideration of the defendants' respective motions to dismiss, the individual plaintiffs' cross-motion for summary judgment, the various opposition and reply briefs thereto filed by the defendants, the individual plaintiffs, and the class action plaintiffs ("class plaintiffs"), the applicable law, and the entire record herein, the Court will GRANT the defendants' motions to dismiss and DENY the individual plaintiffs' cross-motion for summary judgment.

I. BACKGROUND

This matter is brought before the Court by both a class action lawsuit and a set of three individual lawsuits. These four lawsuits contain numerous overlapping, though not identical, claims. The purported class plaintiffs consist of private individual and institutional investors who own either preferred or common stock in the Federal National Mortgage Association ("Fannie Mae") or the Federal Home Loan Mortgage Corporation ("Freddie Mac"). Am. Compl. at ¶¶ 30-44, *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigs.*, No. 13-1288 (D.D.C. Dec. 3, 2013), ECF No. 4 ("*In re Fannie Mae/Freddie Mac Am. Compl.*"); Derivative Compl. at ¶¶ 19-21, *In re Fannie Mae/Freddie Mac*, No. 13-1288 (D.D.C. July 30, 2014), ECF No. 39 ("*In re Fannie Mae/Freddie Mac* Derivative Compl."). The individual plaintiffs comprise a collection of private investment funds and insurance companies. Compl. at ¶¶ 25-27, *Perry Capital LLC v. Lew*, No. 13-1025 (D.D.C. July 7, 2013), ECF No. 1 ("*Perry* Compl."); Compl. at ¶¶ 18-28, *Fairholme Funds, Inc., v. FHFA*, No. 13-1053 (D.D.C. July 10, 2013), ECF No. 1 ("*Fairholme* Compl."); Compl. at ¶¶ 15-19, *Arrowood Indem. Co. v. Fannie Mae*, No. 13-1439 (D.D.C. Sept. 20, 2013), ECF No. 1 ("*Arrowood* Compl.").

Fannie Mae and Freddie Mac are government-sponsored enterprises ("GSEs"),[1] born from statutory charters issued by Congress. *See* Federal National Mortgage Association Charter Act, 12 U.S.C. §§ 1716-1723; Federal Home Loan Mortgage Corporation Act, 12 U.S.C. §§ 1451-1459. Congress created the GSEs in order to, among other goals, "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(3). In other words, the GSEs' shared purpose was to make it easier (*i.e.*, less risky) for local banks and other lenders to offer mortgages to prospective home buyers. The GSEs sought to accomplish this objective by purchasing mortgage loans from lenders, thus relieving lenders of default risk and "freeing up lenders' capital to make additional loans." *See* Treasury Defs.'s Mot. to Dismiss, or, in the Alternative, for Summ. J. at 6 (D.D.C. Jan. 17, 2014) ("Treasury Mot.").[2] In order to finance this operation, the GSEs would, primarily, pool the many mortgage loans they purchased into various

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[1] While Fannie Mae and Freddie Mac are not the only GSEs, *see, e.g.*, Federal Home Loan Banks, for convenience, this Memorandum Opinion will employ the term "GSE" to refer to Fannie Mae and Freddie Mac exclusively.

[2] Rather than list each of the numerous dockets on which the briefs in this matter have been filed, this Memorandum Opinion will cite the name of the brief, the date on which it was filed on all relevant dockets, and the short form citation by which the brief will be referenced thereinafter.

mortgage-backed securities and sell these securities to investors. *See, e.g.*, Individual Pls.'s Opp'n and Cross-Mot. for Summ. J. at 4 (D.D.C. Mar. 21, 2014) ("Individual Pls.'s Opp'n").

Fannie Mae and Freddie Mac are considered government-*sponsored*, rather than government-*owned*, because both congressionally chartered entities were eventually converted, by statute, into publicly traded corporations. Housing and Urban Development Act, Pub. L. No. 90-448, § 802, 82 Stat. 536-538 (1968); Financial Institutions Reform, Recovery and Enforcement Act, Pub. L. No. 101-73, § 731, 103 Stat. 432-433 (1989). Yet despite this historically market-driven ownership structure, "the GSEs have benefitted from a public perception that the federal government had implicitly guaranteed the securities they issued; this perception allowed the GSEs to purchase more mortgages and [mortgage-backed securities], at cheaper rates, than would otherwise prevail in the private market." Treasury Mot. at 6-7.

By 2008, the United States economy faced dire straits, in large part due to a massive decline within the national housing market. *See* Individual Pls.'s Opp'n at 7. "As a result of the housing crisis, the value of the [GSEs'] assets . . . deteriorated and the [GSEs] suffered . . . credit losses in their portfolios." FHFA Mot. to Dismiss, or, in the Alternative, for Summ. J. at 7 (D.D.C. Jan. 17, 2014) ("FHFA Mot.").

Given the systemic danger that a Fannie Mae or Freddie Mac collapse posed to the already fragile national economy, among other housing market-related perils, Congress enacted the Housing and Economic Recovery Act ("HERA") on July 30, 2008. *See* Individual Pls.'s Opp'n at 6; Pub. L. No. 110-289, 122 Stat. 2654. HERA established FHFA as an independent agency to supervise and regulate the GSEs. 12 U.S.C. § 4511. HERA further granted FHFA's director the authority to appoint the agency as conservator or receiver for the GSEs. 12 U.S.C. § 4617(a). Of most relevance to the present litigation, HERA empowered FHFA, as conservator or receiver, to "immediately succeed to – (i) all rights, titles, powers, and privileges of the [GSE], and of any stockholder, officer, or director of such [GSE] with respect to the [GSE] and the assets of the [GSE]." 12 U.S.C. § 4617(b)(2)(A)(i). The statute also set forth a "[l]imitation on court action," noting that, "[e]xcept as provided in this section or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver." 12 U.S.C. § 4617(f). Moreover, apparently recognizing that Treasury (*i.e.*, taxpayer) funds may soon be necessary to capitalize the struggling GSEs,[3] Congress, under HERA, amended the

[3] The purpose of HERA's provision authorizing Treasury to invest in the GSEs was, in part, to "prevent disruptions in the availability of mortgage finance" – disruptions presumably due to the challenges confronting the GSEs in 2008. *See* 12 U.S.C. § 1455(*l*)(1)(B); 12 U.S.C. § 1719(g)(1)(B) ("Emergency determination required[.] In connection with any use of this [purchasing] authority, the [Treasury] Secretary must determine that such

GSEs' charters to temporarily authorize Treasury to "purchase any obligations and other securities issued by the [GSEs]." 12 U.S.C. § 1455(*l*)(1)(A) (Freddie Mac); 12 U.S.C. § 1719(g)(1)(A) (Fannie Mae).[4] This provision also provided that the "Secretary of the Treasury may, at any time, exercise any rights received in connection with such purchases." 12 U.S.C. § 1719(g)(2)(A). Treasury's authority to invest in the GSEs expired on December 31, 2009. 12 U.S.C. § 1719(g)(4).

Following the GSEs' unsuccessful effort to "raise capital in the private markets," FHFA Mot. at 7-8, FHFA placed the GSEs into conservatorship on September 6, 2008. *See, e.g.*, Class Pls.'s Opp'n at 7 (D.D.C. Mar. 21, 2014) ("Class Pls.'s Opp'n"). One day later, Treasury, pursuant to 12 U.S.C. § 1719(g), entered into Senior Preferred Stock Purchase Agreements ("PSPAs") with each of the GSEs. Individual Pls.'s Opp'n at 8. Under the initial PSPAs, Treasury committed to provide up to $100 billion in funding to each GSE "to ensure that their assets were equal to their liabilities" – *i.e.*, to "cure [the GSEs'] negative net worth" – at the end of any fiscal quarter. *Id.*; FHFA Mot. at 11. On May 6, 2009, Treasury and the GSEs, through FHFA, entered into the First Amendment to the PSPAs,

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actions are necessary to – (i) provide stability to the financial markets; (ii) prevent disruptions in the availability of mortgage finance; and (iii) protect the taxpayer.").

[4] Since 12 U.S.C. § 1455(*l*) and 12 U.S.C. § 1719(g) are identical provisions, this Memorandum Opinion, hereinafter, will refer only to the Fannie Mae provision, § 1719(g).

whereby Treasury doubled its funding cap to $200 billion for each GSE. Individual Pls.'s Opp'n at 11. On December 24, 2009, the parties executed the Second Amendment, which permitted the GSEs to continue to "draw unlimited sums from Treasury [as required to cure any quarterly negative net worth] until the end of 2012," and then, as of December 31, 2012, permanently fixed the funding cap for each GSE (at an amount that, in the end, totaled greater than $200 billion per GSE), in accordance with an agreed-upon formula. *Id.* at 11-12; FHFA Mot. at 12; *see also* Treasury AR at 190-91, 196-97.[5]

In exchange for its funding commitment, Treasury received senior preferred stock in each GSE, which entitled Treasury to four principal contractual rights under the PSPAs. *See, e.g.*, Treasury AR at 14. First, Treasury received a senior liquidation preference[6] of $1 billion for each GSE *plus* a dollar-for-dollar increase each time the GSEs drew upon Treasury's funding commitment. Individual Pls.'s Opp'n at 8-9 (citing Treasury AR at 100, 133). Second, the PSPAs entitled Treasury to dividends equivalent to 10% of Treasury's

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[5] Citations to the administrative record filed by the Treasury defendants, *e.g.*, Administrative R., *In re Fannie Mae/Freddie Mac*, No. 13-1288 (D.D.C. Dec. 17, 2013), ECF No. 6, are noted as "Treasury AR." Citations to the document compilation regarding the Third Amendment filed by the FHFA defendants, *e.g.*, *In re Fannie Mae/Freddie Mac*, ECF No. 7, are noted as "FHFA Docs."

[6] "A liquidation preference is a priority right to receive distributions from the [GSEs'] assets in the event they are dissolved." Individual Pls.'s Opp'n at 5.

existing liquidation preference, paid quarterly.[7] *Id.* at 9 (citing AR at 32-33, 67-68); Treasury Mot. at 13.

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[7] Given the Court's ruling to grant the defendants' motion to dismiss, there is no need to evaluate the merits of the defendants' decision to execute the Third Amendment instead of selecting other options in lieu of the cash dividend that, under the PSPAs, was equal to 10% of Treasury's liquidation preference. Nevertheless, the Court notes its disagreement with the plaintiffs' characterization of one purported alternative to the Third Amendment. The plaintiffs claim that the GSEs "had no obligation to pay the 10 percent dividend in cash," and instead could simply opt to pay a 12% dividend that would be added to the outstanding liquidation preference rather than be paid in cash each quarter. Individual Pls.'s Opp'n at 9, 66-67. However, the plaintiffs' contention that paying 10% in cash or adding 12% to the liquidation preference was merely a matter of choice, Class Pls.'s Opp'n at 11, directly contravenes the unambiguous language of the contract. The relevant provisions, which are identical, in Treasury's respective stock certificates with each of the GSEs, state:

> " 'Dividend Rate' means 10.0%; provided, however, that if at any time the [GSE] shall have for any reason *failed to pay dividends in cash in a timely manner as required by this Certificate*, then immediately following such *failure* and for all Dividend Periods thereafter until the Dividend Period following the date on which the Company shall have paid in cash full cumulative dividends (including any unpaid dividends added to the Liquidation Preference pursuant to Section 8), the 'Dividend Rate' shall mean 12.0%."

Treasury AR at 33, 67-68 (Treasury Senior Preferred Stock Certificates § 2(c)) (emphasis added). The provision makes clear that 10% cash dividends were "required by" the stock certificates, and that 12% dividends deferred to the liquidation preference were only triggered upon a "failure" to meet the 10% cash dividend requirement. Thus, classifying the 12% dividend feature as a "penalty," as Treasury does, is surely more accurate than classifying it as a "right." *Compare* Treasury Defs.'s Reply at 49-50 (D.D.C. May 2, 2014) ("Treasury Reply"), *with* Individual Pls.'s

Third, Treasury received warrants to acquire up to 79.9% of the GSEs' common stock at a nominal price. Individual Pls.'s Opp'n at 9; *e.g.*, Treasury AR at 15, 43. Fourth, beginning on March 31, 2010, Treasury would be entitled to a periodic commitment fee "to fully compensate [Treasury] for the support provided by the ongoing [funding] [c]ommitment." Treasury AR at 22, 56. The amount of the periodic commitment fee was to be determined by mutual agreement, and Treasury reserved the right to waive the fee for one year at a time "based on adverse conditions in the United States mortgage market." *Id.* Treasury waived the commitment fee in 2010 and 2011, and later, under the Third

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Opp'n at 9. The plaintiffs cannot gloss over this distinction by repetitively using the phrase "in kind" to describe the 12% dividend feature. *See* Individual Pls.'s Opp'n at 9, 66-67, 80-81; Class Pls.'s Opp'n at 16. Inclusion of "in kind" within § 2(c) would have slightly improved the plaintiffs' argument that the contract expressly permitted the GSEs to simply choose between a 10% cash dividend or 12% dividend deferred to the liquidation preference. But, as plaintiffs are certainly aware, "in kind" appears nowhere within the stock certificates' dividends provision. *See* Treasury AR at 33, 67-68.

With regard to the two other hypothetical alternatives presented by the individual plaintiffs – Treasury accepting lower dividends or allowing the GSEs to use excess profits to pay down the liquidation preference and, thus, the basis for the 10% dividend – the Court has no occasion to determine whether the plaintiffs' arguments demonstrate arbitrary and capricious decisionmaking or only amount to second-guessing decisionmakers charged with exercising predictive judgments. *Compare* Individual Pls.'s Opp'n at 79-82, *with* FHFA Defs.'s Reply at 52-58 (D.D.C. May 2, 2014) ("FHFA Reply").

Amendment, the fee was suspended. Treasury Mot. at 14, 18.

As of August 8, 2012, Treasury had provided $187.5 billion in funding to the GSEs,[8] and, thus, held a total $189.5 billion senior liquidation preference between both GSEs, including the initial $1 billion liquidation preferences from each GSE. Therefore, "the GSEs' dividend obligations to Treasury were nearly $19 billion per year." Treasury Mot. at 16.

On August 17, 2012, Treasury and the GSEs, through FHFA, agreed to the Third Amendment to the PSPA, which is the focus of this litigation. The Third Amendment "replaced the previous dividend formula with a requirement that the GSEs pay, as a dividend, the amount by which their net worth for the quarter exceeds a capital buffer of $3 billion. The capital buffer gradually declines over time by $600 million per year, and is entirely eliminated in 2018." Treasury Mot. at 18. In simpler terms, the amendment "requires Fannie Mae and Freddie Mac to pay a quarterly dividend to Treasury equal to the *entire net worth* of each Enterprise, minus a small reserve that shrinks to zero over time." Class Pls.'s Opp'n at 3. These dividend payments do not reduce Treasury's outstanding liquidation preferences. *See* Individual Pls.'s Opp'n at 16.

The plaintiffs cite multiple justifications offered publicly by the defendants for this "net worth sweep."

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[8] A figure that is unchanged through 2013. *See* Treasury AR 4351.

See Individual Pls.'s Opp'n at 16-17. First, Treasury asserted that the amendment will end "the circular practice of the Treasury advancing funds to the [GSEs] simply to pay dividends back to Treasury." *Id.* at 16 (citing Press Release, Treasury Dep't Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012), *available at* http://www.treasury.gov/press-center/press-releases/Pages/tg1684.aspx); *see also* Treasury Mot. at 2, 5, 50; FHFA Mot. at 3, 15-16. However, the plaintiffs counter that in 2012, the GSEs were once again profitable and, pertinently, able to pay the 10% dividend without drawing additional funds from Treasury. *Id.* at 14-15; *but see Fairholme* Compl. at ¶ 26 (stating that "approximately $26 billion" of Treasury's current liquidation preference "were required simply to pay the 10% dividend payments owed to Treasury"). Second, quoting from the same Treasury press release, the plaintiffs note Treasury's statement that the net worth sweep is consistent with the Obama Administration's "commitment . . . that the GSEs will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." *Id.* at 16-17. Third, according to the press release, the net worth sweep would "make sure that every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers for their investment in those firms." *Id.* at 17.

Under the Third Amendment net worth sweep, the GSEs paid Treasury nearly $130 billion in 2013.[9] Treasury AR at 4352. As mentioned above, under the former dividend arrangement requiring payment equivalent to 10% of Treasury's existing liquidation preference, the GSEs would have owed nearly $19 billion. Through 2013, the cumulative draws of Treasury funding taken by the GSEs remained $187.5 billion, *id.* at 4351, and the cumulative dividends paid to Treasury by the GSEs totaled $185.2 billion, *id.* at 4352.

Notwithstanding the plaintiffs' attempt to downplay the need for a GSE bailout in the first place, *see, e.g.*, Individual Pls.'s Opp'n at 6, 10-11, the plaintiffs do not contest the initial PSPA or subsequent two amendments to the PSPA, *see, e.g.*, Class Pls.'s Opp'n at 11, but rather only challenge the Third Amendment to the PSPA. The class plaintiffs have brought claims of breach of contract, regarding allegedly promised dividends and liquidation preferences, breach of the implied covenant of good faith and fair dealing, and an unconstitutional taking, as well as derivative claims of breach of fiduciary duty. The *Perry* plaintiff has brought claims under the Administrative Procedure Act ("APA"). The *Arrowood* plaintiffs have also brought APA claims, as well as claims of breach of contract, regarding allegedly promised dividends and liquidation preferences, and breach of the implied covenant of good

[9] Though this figure includes the outlier $59.3 billion dividend paid by Fannie Mae in the second quarter and $30.4 billion dividend paid by Freddie Mac in the fourth quarter. Treasury AR 4352.

faith and fair dealing. The *Fairholme* plaintiffs have brought the same claims as the *Perry* and *Arrowood* plaintiffs with an additional claim of breach of fiduciary duty against FHFA. The parties dispute whether the *Fairholme* plaintiffs' fiduciary duty claim is direct or derivative. *See infra* n.24.

On January 17, 2014, the defendants moved to dismiss the complaints against the Third Amendment for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). In the alternative, the defendants moved for summary judgment pursuant to Rule 56. In their opposition, filed March 21, 2014, the individual plaintiffs presented a cross-motion for summary judgment.

II. LEGAL STANDARD

"Federal courts are of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Under Rule 12(b)(1), the plaintiffs bear the burden of demonstrating that subject matter jurisdiction exists. *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008). The Court must "assume the truth of all material factual allegations in the complaint and construe the complaint liberally, granting [the] plaintiff[s] the benefit of all inferences that can be derived from the facts alleged." *Am. Nat. Ins. Co. v. F.D.I.C.*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (internal quotation marks and citation omitted). But "[b]ecause subject-matter jurisdiction focuses on the [C]ourt's power to hear the claim . . . , the [C]ourt must give the plaintiff[s'] factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim." *Youming Jin v. Ministry of State Sec.*, 475 F. Supp. 2d 54, 60 (D.D.C. 2007). Furthermore, when evaluating a Rule 12(b)(1) motion to dismiss, "it has been long accepted that the [Court] may make appropriate inquiry beyond the pleadings to satisfy itself on authority to entertain the case." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987) (internal quotation marks and citation omitted).

A motion to dismiss is also appropriate when the complaint fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The Court does not "require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Once again, "the complaint is construed liberally in the plaintiffs' favor, and [the Court] grant[s] plaintiffs the benefit of all inferences that can be derived from the facts alleged. However, the [C]ourt need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the [C]ourt accept legal conclusions cast in the form of factual allegations. *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994) (internal quotation marks and citation omitted). "If, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the

[C]ourt, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12.

III. ANALYSIS

A. HERA Bars the Plaintiffs' Prayers for Declaratory, Injunctive, and Other Equitable Relief against FHFA and Treasury

By this Court's calculation, twenty-four of the thirty-one substantive prayers for relief[10] requested by the plaintiffs across their five complaints seek declaratory, injunctive, or other equitable relief against FHFA or Treasury. *See also* FHFA Mot. at 22 n.13. Such relief runs up against HERA's anti-injunction provision, which declares 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." 12 U.S.C. § 4617(f).

While case law adjudicating HERA-related disputes is generally sparse, "[c]ourts interpreting the scope of [§] 4617(f) have relied on decisions addressing the nearly identical jurisdictional bar applicable to the Federal Deposit Insurance Corporation ('FDIC') conservatorships contained in 12 U.S.C.

[10] This thirty-one prayers for relief figure does not include the two prayers for "reasonable costs, including attorneys' fees, incurred in bringing this action" and "such other and further relief as this Court deems just and proper" that appear in each of the five complaints at issue here. *See, e.g.*, *Fairholme* Compl. at ¶ 146(i) and (j).

§ 1821(j)."[11] *Natural Res. Def. Council, Inc. v. FHFA*, 815 F. Supp. 2d 630, 641 (S.D.N.Y. 2011), *aff'd sub nom. Town of Babylon v. FHFA*, 699 F.3d 221 (2d Cir. 2012). Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, during the savings and loan crisis to enable the FDIC (and, formerly, the Resolution Trust Corporation ("RTC")) to serve as a conservator or receiver for troubled financial institutions. It was with this backdrop that the Court of Appeals for the District of Columbia Circuit, in *Freeman v. FDIC*, explained that the language of § 1821(j) "does indeed effect a sweeping ouster of courts' power to grant equitable remedies." 56 F.3d 1394, 1399 (D.C. Cir. 1995).[12] The Circuit held that the FIRREA provision precludes courts from granting "non-monetary remedies, including injunctive relief [ ] [and] declaratory relief" that would "effectively 'restrain' the [agency] from" exercising its statutorily authorized responsibilities. *Id.* (quoting 12 U.S.C. § 1821(j)). As the

[11] Section 1821(j) reads: " . . . no court may take any action . . . to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." 12 U.S.C. § 1821(j).

[12] "Although this limitation on courts' power to grant equitable relief may appear drastic, it fully accords with the intent of Congress at the time it enacted FIRREA in the midst of the savings and loan insolvency crisis to enable the FDIC and the [RTC] to expeditiously wind up the affairs of literally hundreds of failed financial institutions throughout the country." *Id.* at 1398. Whether or not FHFA is "winding up the affairs of" the GSEs, the Circuit's interpretation of congressional intent to grant the FDIC enormous discretion to act as a conservator or receiver during the savings and loan crisis of 1989 applies with equal force to the mortgage finance crisis of 2008.

parties both agree, an equivalent bar on jurisdiction derives from HERA's substantially identical anti-injunction provision. *E.g.*, Individual Pls.'s Opp'n at 31-32.

Like a number of its sister circuits, however, this Circuit has established that, if the agency "has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions," then 12 U.S.C. § 4617(f) shall not apply. *Nat'l Trust for Historic Pres. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring) (internal quotation marks and citation omitted) (referring to 12 U.S.C. § 1821(j)); *see also Leon Cnty., Fla. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012) ("'[I]f the FHFA were to act beyond statutory or constitutional bounds in a manner that adversely impacted the rights of others, § 4617(f) would not bar judicial oversight or review of its actions.'") (quoting *In re Freddie Mac Derivative Litig.*, 643 F. Supp. 2d 790, 799 (E.D. Va. 2009)); *Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 992 (9th Cir. 2013) ("[T]he anti judicial review provision is inapplicable when FHFA acts beyond the scope of its conservator power."). Thus, the question for this Court is whether the plaintiffs sufficiently plead that FHFA acted beyond the scope of its statutory "powers or functions . . . as a conservator" when the agency executed the Third Amendment to the PSPAs with Treasury. 12 U.S.C.

§ 4617(f). If not, the Court must dismiss all of the defendants' claims for declaratory, injunctive, or other equitable relief.[13]

1. Section 4617(f) Bars Claims of Arbitrary and Capricious Conduct, under APA § 706(2)(A), Which Seek Declaratory, Injunctive, or Other Equitable Relief

While there is a "strong presumption that Congress intends judicial review of administrative action," *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986), that presumption is "defeated if the substantive statute precludes review." *Heckler v. Chaney*, 470 U.S. 821, 843 (1985) (citing 5 U.S.C. § 701(a)(1)). The plaintiffs do not discuss the applicability of 5 U.S.C. § 701(a)(1) of the APA to the present case in any of their oppositions, except to cite *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 63-64 (1993), in the individual plaintiffs' opposition and reply briefs for the proposition that the Court can preclude APA review "only if presented with clear and convincing evidence" of congressional intent to preclude such review. *E.g.*, Individual Pls.'s Reply to Defs.'s Mot. for Summ. J. at 15-16 (D.D.C. June 2, 2014) ("Individual Pls.'s Reply"). The individual plaintiffs are correct in that the "presumption of judicial review [under the APA] is, after all, a presumption, and like all presumptions used in

[13] As the Court will explain below, this is true regardless of whether the defendants have levied some of their non-monetary claims against Treasury instead of FHFA.

interpreting statutes, may be overcome by, *inter alia*, specific language . . . that is a reliable indicator of congressional intent . . . to preclude judicial review." *Bowen*, 476 U.S. at 673 (internal quotation marks and citation omitted). HERA's express anti-injunction provision, which, as explained below, necessarily covers litigation arising out of contracts executed by FHFA in accordance with its duties as a conservator, qualifies as a reliable indicator of congressional intent to preclude review of non-monetary APA claims brought against both FHFA and Treasury. Importantly, when applying FIRREA's anti-injunction provision, 12 U.S.C § 1821(j), this Circuit has only considered whether the FDIC acted beyond "its statutorily prescribed, constitutionally permitted, powers or functions" under FIRREA, specifically, and not whether it acted beyond any of its more general APA obligations under 5 U.S.C. § 702(2). *See Nat'l Trust*, 21 F.3d at 472 (Wald, J., concurring and further noting that, "given the breadth of the statutory language [of § 1821(j)], untempered by any persuasive legislative history pointing in a different direction, the statute would appear to bar a court from acting in virtually all circumstances"); *Freeman*, 56 F.3d at 1398-99; *MBIA Ins. Corp. v. FDIC*, 816 F. Supp. 2d 81, 103 (D.D.C. 2011), *aff'd*, 708 F.3d 234 (D.C. Cir. 2013); *see also Leon Cnty.*, 700 F.3d at 1278-79. In other words, this Circuit, like the APA itself, implicitly draws a distinction between acting beyond the scope of the constitution or a statute, *see* § 702(2)(B) and (C), and acting within the scope of a statute, but doing so arbitrarily and capriciously, *see* § 702(2)(A). This distinction arises directly from the text of

§ 4617(f), which prohibits the Court from restraining "the *exercise* of powers or functions of [FHFA]" – *i.e.*, restraining *how* FHFA employs its powers or functions – but does not prohibit review based upon the statutory or constitutional origin of the powers or functions themselves. 12 U.S.C. § 4617(f) (emphasis added). Consequently, it does appear that § 4617(f) bars all declaratory, injunctive, or other equitable relief stemming from claims of arbitrary and capricious decisionmaking, under APA § 706(2)(A). Thus, the two counts in each of the *Perry, Fairholme*, and *Arrowood* Complaints, and related prayers for relief, that claim APA violations for arbitrary and capricious conduct by both Treasury and FHFA are hereby dismissed pursuant to Rule 12(b)(1).[14]

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[14] The class, *Arrowood*, and *Fairholme* plaintiffs each present a claim of breach of the implied covenant of good faith and fair dealing that closely parallels the individual plaintiffs' APA claims for arbitrary and capricious conduct. *See, e.g.*, *In re Fannie Mae/Freddie Mac* Am. Compl. at ¶ 161 (" . . . Fannie Mae, acting through FHFA, acted arbitrarily and unreasonably and not in good faith or with fair dealing toward the members of the Fannie Preferred Class."). Given the breadth of HERA and this Circuit's wariness toward evaluating *how* FHFA carries out its conservatorship responsibilities, *any* claim – APA- or contract-based – dependent upon allegations of arbitrary and capricious behavior coupled with a request for equitable relief probably should be summarily dismissed under § 4617(f). Yet regardless of whether the Circuit sees fit to establish a categorical rule, the plaintiffs' claims of breach of the implied covenant which seek equitable relief are still generally dismissed on § 4617(f) grounds because the Court finds that FHFA acted within its statutory authority under HERA. *See infra* Section III(A)(4). And because some plaintiffs include within their breach of the implied covenant allegations a

2. Section 4617(f) Applies to Treasury's Authority under HERA

As a threshold matter, the plaintiffs contend that § 4617(f) does not bar claims against Treasury because the provision only governs claims against FHFA. However, the defendants' argument that granting relief against the counterparty to a contract with FHFA would directly restrain FHFA's ability as a conservator vis-à-vis that contract is based on sound reasoning. *See, e.g.*, Treasury Reply at 12-13 (collecting cases outside of this Circuit). Conduct by a counterparty that is required under a contract with FHFA does not merely constitute "a peripheral connection to FHFA's activities as the [GSEs'] conservator." *See* Individual Pls.'s Opp'n at 29. To the contrary, such interdependent, contractual conduct is directly connected to FHFA's activities as a conservator. A plaintiff is not entitled to use the technical wording of her complaint – *i.e.*, bringing a claim against a counterparty when the contract in question is intertwined with FHFA's responsibilities as a conservator – as an end-run around HERA. Therefore, § 4617(f) applies generally to litigation concerning a contract signed by FHFA pursuant to its powers as a conservator.

Additionally, when the counterparty to FHFA's contract – Treasury – is also a government entity operating based on authority derived from HERA, *e.g.* 12 U.S.C. § 1719(g) (temporarily authorizing Treasury to

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request for monetary relief, dismissal is also proper on ripeness and failure to state a claim grounds. *See infra* Section III(C).

purchase GSE securities), HERA's anti-injunction provision may be logically extended to that government counterparty. Likewise, if FHFA, as a conservator or receiver, signs a contract with another government entity that is acting beyond the scope of its HERA powers, then FHFA is functionally complicit in its counterparty's misconduct, and such unlawful actions may be imputed to FHFA. Here, as noted above, there can be little doubt that enjoining Treasury from partaking in the Third Amendment would restrain FHFA's uncontested authority to determine how to conserve the viability of the GSEs. Accordingly, the Court must decide whether Treasury acted in contradiction of its temporary power, under HERA, to invest in the GSEs.

The individual plaintiffs argue that Treasury acted beyond the scope of HERA because the Third Amendment constitutes the purchase of new GSE securities after HERA's December 31, 2009 sunset provision and because Treasury violated the APA by acting arbitrarily and capriciously when entering into the net worth sweep. Here, given § 4617(f)'s bar on nonmonetary claims of arbitrary and capricious decisionmaking under the APA, the Court must only consider whether Treasury purchased new securities through the Third Amendment.

3. Treasury's Execution of the Third Amendment Does Not Constitute the Purchase of New Securities in Contravention of HERA

The individual plaintiffs argue that Treasury violated the sunset provision associated with its authority to purchase GSE securities under 12 U.S.C. § 1719(g) because the Third Amendment was not an "exercise of rights" under the statute and because the Third Amendment was effectively a purchase of new securities after December 31, 2009. Individual Pls.'s Opp'n at 37. Both claims are unpersuasive.

Asserting that the Third Amendment was not the exercise of a right, as allegedly required for any "market participa[tion]" after 2009, the individual plaintiffs state that, "[a]s of 2010, Treasury's authority as a market participant was limited to 'hold[ing], exercis[ing] any rights received in connection with, or sell[ing] any obligations or securities purchased' " from the GSEs. Individual Pls.'s Opp'n at 36-37 (quoting 12 U.S.C. § 1719(g)(2)(D)). But this contention overreads the provision governing the application of the statutory expiration date to purchased securities. While § 1719(g)(2)(D) notes that holding securities, exercising any rights under the securities contract, or selling securities are specifically *exempt* from the sunset provision, the existence of that provision does not therefore preclude other non-security-purchasing activities otherwise permitted under an already agreed-upon, pre-2010 investment contract with the GSEs.[15] To then say that the purchase authority sunset provision also categorically prohibits any provision within Treasury's contracts with the GSEs that requires "mutual assent" is to reach too far. *Cf.* Individual Pls.'s Opp'n at 38. Thus, whether or not amending the PSPA is a "right," as understood under § 1719(g), is irrelevant, as long as the Third Amendment did not constitute a purchase of new securities.

Here, Treasury purchased one million senior preferred shares in each GSE in exchange for a number of contractual entitlements. *E.g.*, Treasury AR at 21-22 (Fannie Mae PSPA). This "purchase" of GSE securities required Treasury to provide the GSEs with a funding commitment. While in all three amendments that followed this purchase Treasury never received additional GSE shares, under the first two amendments, Treasury provided the GSEs with an expanded funding commitment. The individual plaintiffs cite the "Action Memorandum for [Treasury] Secretary Geithner," which invokes Treasury's statutory purchasing authority under § 1719(g) as a justification for the funding expansion, as evidence that the Third Amendment was also a purchase of securities. Individual Pls.'s Reply at 21 (Treasury AR at 181-88). The Court, however, does not accept that a reference to Treasury's general

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[15] While legislative history on this issue is unrevealing, the Court can easily imagine that Congress, with its exclusion from the sunset provision of Treasury's ability to "exercise any rights received in connection with . . . securities purchased," was contemplating an investment agreement whereby Treasury maintained future rights to purchase more GSE securities.

purchasing authority in a memorandum to Secretary Geithner regarding the Second Amendment means that the Second Amendment (and First Amendment, for that matter) was, in fact, a purchase of new obligations or securities according to § 1719(g)(1)(a). While Treasury's funding commitment is the currency by which Treasury purchased shares, which came with additional rights for Treasury, in the original PSPAs, no new shares or obligations were purchased during the first two amendments. Treasury's receipt of "valuable consideration" – *i.e.*, the potential for increased liquidation preferences as the GSEs drew more funding – for these amendments does not, on its own, constitute the purchase of new GSE securities under § 1719(g)(1)(a).[16] *Cf.* Individual Pls.'s Reply at 21.

Yet regardless of whether the first two amendments to the PSPAs should be considered a purchase of new securities, the Court finds that Treasury did not purchase new securities under the Third Amendment. Under the Third Amendment – unlike the first two amendments – Treasury *neither* granted the GSEs additional funding commitments *nor* received an increased liquidation preference. Instead, Treasury agreed to a net worth sweep in exchange for eliminating the cash dividend equivalent to 10% of the GSEs'

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[16] Similarly, the fact that Treasury, prior to executing the First and Second Amendments, made § 1719(g)(1)(B) "emergency determinations" generally required before purchasing new securities does not, alone, signify the purchase of new securities. *See* Treasury Reply at 37-38 (determinations made "because [Treasury] was pledging additional taxpayer funds to the GSEs").

liquidation preference. This net worth sweep represented a new formula of dividend compensation for a $200 billion-plus investment Treasury had already made. As FHFA further claims, the agency executed the Third Amendment to ameliorate the existential challenge of paying the dividends it *already* owed pursuant to the GSE securities Treasury purchased through the PSPA; it did not do so in order to sell more GSE securities. FHFA Mot. at 3 ("The [GSEs] were unable to meet their 10% dividend obligations without drawing more from Treasury, causing a downward spiral of repaying *preexisting obligations* to Treasury through additional draws from Treasury.") (emphasis added). Notwithstanding plaintiffs' contentions regarding the "fundamental change doctrine," Treasury's own tax regulations, or otherwise, the present fact pattern strikes the Court as straightforward, at least in the context of the applicability of § 1719(g)'s sunset provision. Without providing an additional funding commitment or receiving new securities from the GSEs as consideration for its Third Amendment to the already existing PSPAs, Treasury cannot be said to have purchased new securities under § 1719(g)(1)(a). Treasury may have amended the compensation structure of its investment in a way that plaintiffs find troubling, but doing so did not violate the purchase authority sunset provision. § 1719(g)(4).

4. FHFA Acted within Its Statutory Authority

The individual plaintiffs put forth a number of claims that FHFA violated HERA by entering into the Third Amendment.[17] These arguments concern both FHFA's conduct and the purported reasons *for* FHFA's conduct – the *what* and the *why*, so to speak.[18]

At bottom, the Third Amendment sweeps nearly all GSE profit dollars to Treasury. The result for non-Treasury shareholders is virtually no likelihood of dividend payments (given the lack of profits along with Treasury's discretion to pay dividends, *see, e.g.* Treasury AR at 58 (Freddie Mac PSPA § 5.1)) and a decrease in the potential liquidation preference they would receive if the company liquidated during a period of profitability. Both parties essentially admit this same depiction in their briefs, biased adjectives aside. Looking past the financial engineering involved in the PSPAs and subsequent amendments, the question for this Court, simply, is whether the net worth sweep amendment represents conduct that exceeds FHFA's authority under HERA – a statute of exceptional scope that gave immense discretion to FHFA as a conservator. It is surely true that "FHFA cannot evade judicial

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[17] The class plaintiffs appear to adopt the individual plaintiffs' briefing on this issue. *See* Class Pls.'s Opp'n at 25.

[18] The Court has already dismissed, *supra*, claims of arbitrary and capricious decisionmaking brought pursuant to 5 U.S.C. 706(2)(A). This subsection, then, will address all other claims for equitable relief against FHFA.

scrutiny by merely labeling its actions with a conservator stamp." *Leon Cnty. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012). Yet construing the allegations in a light most favorable to the plaintiffs, the Court finds that the plaintiffs fail to demonstrate by a preponderance of the evidence – if at all – that FHFA's execution of the Third Amendment violated HERA. *See, e.g.*, *Pitney Bowes, Inc. v. U.S. Postal Serv.*, 27 F. Supp. 2d 15, 19 (D.D.C. 1998) ("The plaintiff bears the burden of persuasion to establish subject matter jurisdiction by a preponderance of the evidence."). As such, the plaintiffs cannot overcome § 4617(f)'s jurisdictional bar on equitable relief.

a. FHFA's Justifications for Executing the Third Amendment and, Consequently, the Accompanying Administrative Record, Are Irrelevant for § 4617(f) Analysis

The extraordinary breadth of HERA's statutory grant to FHFA as a conservator or receiver for the GSEs, likely due to the bill's enactment during an unprecedented crisis in the housing market, *Cf. Freeman*, 56 F.3d at 1398, coupled with the anti-injunction provision, narrows the Court's jurisdictional analysis to *what* the Third Amendment entails, rather than *why* FHFA executed the Third Amendment. *See also id.* (the anti-injunction provision applies "unless [the conservator] has acted . . . beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions."). Nevertheless, the individual plaintiffs focus a sizable portion of their opposition and reply briefs on disputing FHFA's *justifications* for the Third Amendment. *See* Individual Pls.'s Opp'n at 58-73; Individual Pls.'s Reply at 31-39. Similarly, the individual plaintiffs argue that FHFA violated HERA by not producing the full administrative record. Individual Pls.'s Opp'n at 46-51; Individual Pls.'s Reply at 26-29. Both sets of claims ask the Court, directly or indirectly, to evaluate FHFA's rationale for entering into the Third Amendment – a request that contravenes § 4617(f).

Claims that FHFA's varying explanations for entering into the Third Amendment reveal that the agency's conduct went beyond its statutory authority under HERA – which are merely extensions of the individual plaintiffs' arbitrary and capricious arguments under a different subheading – share the same fate as the plaintiff's APA arbitrary and capricious claims. Once again, to determine whether it has jurisdiction to adjudicate claims for equitable relief against FHFA as a conservator, the Court must look at *what* has happened, not *why* it happened. For instance, the Court will examine whether the Third Amendment *actually* resulted in a *de facto* receivership, *infra*; not what FHFA has publicly stated regarding any power it may or may not have, as conservator, to prepare the GSEs for liquidation, *see* Individual Pls.'s Opp'n at 58-66. FHFA's underlying motives or opinions – *i.e.*, whether the net worth sweep would arrest a downward spiral of dividend payments (*see also supra* n.7), increase payments to Treasury, or keep the GSEs in a holding pattern, Individual Pls.'s Opp'n at 66-73 – do not matter for the purposes of § 4617(f). *Cf. Leon Cnty., Fla. v. FHFA*, 816 F. Supp. 2d 1205, 1208 (N.D. Fla. 2011) *aff'd*, 700 F.3d 1273 (11th Cir. 2012) ("Congress surely knew, when it enacted § 4617(f), that challenges to agency action sometimes assert an improper motive. But Congress barred judicial review of the conservator's actions without making an exception for actions said to be taken from an improper motive."). Moreover, contrary to the individual plaintiffs' assertion, *id.* at 46-51, and consistent with the Court's ruling regarding the bar on arbitrary and capricious review under § 4617(f), *supra*, the Court need not view the full administrative record to determine whether the Third Amendment, *in practice*, exceeds the bounds of HERA.

Generally, "[i]t is not [the Court's] place to substitute [its] judgment for FHFA's," *Cnty. of Sonoma*, 710 F.3d at 993, let alone in the face of HERA's "sweeping ouster of courts' power to grant equitable remedies," *Freeman*, 56 F.3d at 1398. *See also MBIA Ins. Corp.*, 816 F. Supp. 2d at 103 ("In seeking injunctive or declaratory relief, it is not enough for [the plaintiffs] to allege that [conservator] came to the wrong conclusion. . . ."). Requiring the Court to evaluate the merits of FHFA's decisionmaking each time it considers HERA's jurisdictional bar would render the anti-injunction provision hollow, disregarding Congress' express intention to divest the Court of jurisdiction to restrain FHFA's "exercise of [its] powers or functions" under HERA – *i.e., how* FHFA employs its powers or functions. *See* 12 U.S.C. § 4617(f). Therefore, the Court will only consider FHFA's actual conduct.

b. FHFA Has Not Violated 12 U.S.C. § 4617(a)(7)

The individual plaintiffs briefly argue that FHFA violated HERA's prescription "not [to] be subject to the direction or supervision of any other agency of the United States . . . in the exercise of the rights, powers, and privileges of the Agency." 12 U.S.C. § 4617(a)(7); *see* Individual Pls.'s Opp'n at 51; *Fairholme* and *Arrowood* Plaintiffs' Supplemental Opp'n at 7-10 (D.D.C. Mar. 21, 2014) ("Sup. Opp'n"); Individual Pls.'s Reply at 13, 40. However, "records" showing that Treasury "invented the net-worth sweep concept with no input from FHFA" do not come close to a reasonable inference that "FHFA considered itself bound to do whatever Treasury ordered." *See* Individual Pls.'s Opp'n at 51. The plaintiffs cannot transform subjective, conclusory allegations into objective facts. *See* Sup. Opp'n at 9-10 (claiming that "[o]nly a conservator that has given up the will to exercise its independent judgment could agree to forfeit so much"). Notwithstanding the plaintiffs' perspective that the Third Amendment was a "one-sided deal" favoring Treasury, the amendment was executed by two sophisticated parties, and there is nothing in the pleadings or the administrative record provided by Treasury that hints at coercion actionable under § 4617(a)(7). *See* Individual Pls.'s Opp'n at 51 (citing Treasury AR at 3775-802, 3833-62, 3883-94, 3895-903). Undoubtedly, many negotiations arise from one party conjuring up an idea, and then bringing their proposal to the other party. This claim does not pass muster under either Rule 12(b)(1) or Rule 12(b)(6).

c. *FHFA Has Not Placed the GSEs in* De Facto *Liquidation*

The individual plaintiffs further contend that the Third Amendment amounts to a *de facto* liquidation, which exceeds FHFA's statutory authority as a conservator. By entering into an agreement that sweeps away nearly all GSE profits, they argue, FHFA has forsaken its statutory responsibility to "rehabilitate" the GSEs and, instead, has effectively placed the GSEs in receivership. Individual Pls.'s Opp'n at 55-58; *see* 12 U.S.C. § 4617(a)(2). But FHFA counters that full-scale rehabilitation is not the only possible statutory duty of a conservator – that the statute also permits a conservator to "reorganize" or "wind up" the affairs of a GSE. FHFA Mot. at 30 (citing 12 U.S.C. § 4617(a)(2)). The Court has no occasion to decide whether the conservator is empowered to wind down the GSEs. It is unnecessary to engage in a lengthy debate over statutory interpretation because the facts, as stated in the plaintiffs' pleadings, belie the individual plaintiffs' claims of *de facto* liquidation under receivership authority.

Here, the Court need not look further than the current state of the GSEs to find that FHFA has acted within its broad statutory authority as a conservator. Four years ago, on the brink of collapse, the GSEs went into conservatorship under the authority of FHFA.

E.g., *Fairholme* Compl. at ¶ 3. Today, both GSEs continue to operate, and have now regained profitability. *E.g.*, *Fairholme* Compl at ¶¶ 8, 60, 63 ("Fannie and Freddie are now immensely profitable."); *cf. id.* at ¶ 14 (noting that prior to the Third Amendment, "[t]he conservatorship of Fannie and Freddie achieved the purpose of restoring the Companies to financial health"). Unquestionably, the plaintiffs take great issue with FHFA's conduct between and since these two bookend facts. However, when the Court is asked to determine whether FHFA acted beyond, or contrary to, its responsibilities as conservator under a statute that grants the agency expansive discretion to act as it sees fit, it is the current state of affairs that must weigh heaviest on this analysis. If the Third Amendment were really part of a scheme to liquidate the GSEs, then the GSEs would, presumably, be in liquidation rather than still be "immensely profitable." *See Fairholme* Compl. at ¶ 60. There is no dispute that the Third Amendment substantially changed the flow of profits, directing billions of dollars into Treasury's coffers.[19] But that

[19] It is worth noting that Treasury's insistence on receiving cash dividends, as required under the PSPAs, rather than accepting a 12% dividend deferred to the liquidation preference, suggests that Treasury believed there was no intention to imminently liquidate the GSEs. *See* Treasury Reply at 49-50; *see also supra* n.7. A belief that there was no planned liquidation – and thus no forthcoming receipt of liquidation payments – would mean that adding owed dividends to Treasury's ever-growing liquidation preference would produce increased risk for the taxpayer.

alteration, alone, is in no way sufficient to reclassify a conservatorship into a receivership.[20]

[20] The individual plaintiffs specifically argue that the net worth sweep exceeds FHFA's authority as a conservator because it (1) depletes available capital; (2) "eliminates the possibility of normal business operations"; and (3) carries an ultimate intent to wind down the GSEs. Individual Pls.'s Opp'n at 56-58. First, the original dividend distribution scheme under the PSPAs also depleted the GSEs' capital. Dividends distributed to security holders, by nature, constitute a depletion of available capital. Second, there is no HERA provision that requires a conservator to abide by every public statement it has made. To the contrary, HERA permits a conservator wide latitude to flexibly operate the GSEs over time. *See* 12 U.S.C. § 4617(b)(2) Third, even if FHFA has explicitly stated an intent to eventually wind down the GSEs, such an intent is not automatically inconsistent with acting as a conservator. There surely can be a fluid progression from conservatorship to receivership without violating HERA, and that progression could very well involve a conservator that acknowledges an ultimate goal of liquidation. FHFA can lawfully take steps to maintain operational soundness and solvency, conserving the assets of the GSEs, until it decides that the time is right for liquidation. *See* 12 U.S.C. § 4617(b)(2)(D) ("[p]owers as conservator").

Moreover, since the Third Amendment remains consistent with FHFA's wide-ranging authority as a conservator, there is no need for the Court to further resolve whether the amendment falls within FHFA's authority to "transfer or sell any asset" under § 4617(b)(2)(G). *Compare* FHFA Mot. at 27-29 *and* FHFA Reply at 5-7, *with* Individual Pls.'s Opp'n at 63-66 *and* Individual Pls.'s Reply at 31-33. The plaintiffs essentially argue that the Third Amendment runs counter to FHFA's power to transfer assets *because* FHFA is not seeking to "rehabilitate" the GSEs when making this transfer. Individual Pls.'s Opp'n at 64-66. Yet, as explained, the Court finds the plaintiffs' premise – that FHFA's conduct is inconsistent with a conservatorship – to be lacking. Therefore, whether or not FHFA classifies the Third Amendment as a transfer of assets is of no moment. The breadth of Congress'

The individual plaintiffs cite no precedent stating that a net worth sweep, or some equivalent, is functionally akin to liquidation. The case law cited in their opposition actually supports the position that FHFA is acting as a conservator. Individual Pls.'s Opp'n at 52-54 (collecting cases). In sum, these cases stand for the proposition that a conservator should "carry on the business of the institution," *MBIA Ins. Corp. v. FDIC*, 708 F.3d 234, 236 (D.C. Cir. 2013), and "take actions necessary to restore a financially troubled institution to solvency," *McAllister v. RTC*, 201 F.3d 570, 579 (5th Cir. 2000). Here, the GSEs maintain an operational mortgage finance business and are, once again, profitable – two facts indicative of a successful conservatorship.[21] Thus, the plaintiffs plead no facts demonstrating that FHFA has exceeded its statutory authority as a conservator.

Given that § 4617(f) bars subject matter jurisdiction[22] over all declaratory, injunctive, and other equitable relief requested against the defendants that would

grant of authority to FHFA under HERA means that the Court's analysis must center much more on the ends than the means.

[21] Indeed, the GSE's current profitability is the fundamental justification for the plaintiffs' prayers for equitable and monetary relief. In other words, this litigation only exists *because* the GSEs have, under FHFA's authority, progressed from insolvency to profitability.

[22] The Court acknowledges that there appears to be some confusion over whether Rule 12(b)(1) or Rule 12(b)(6) applies to § 4617(f). This Circuit has framed FIRREA's substantially identical anti-injunction provision, 12 U.S.C. § 1821(j), as a bar on *relief*. *See Freeman*, 56 F.3d at 1396, 1398, 1406; *see also MBIA Ins. Corp.*, 816 F. Supp. 2d at 104, 106 (explicitly dismissing claims on

restrain the conservator's ability to "exercise [its statutory] powers or functions," all claims related to these prayers for relief must be dismissed pursuant to Rule 12(b)(1). Included are the individual plaintiffs' APA claims against both FHFA and Treasury,[23] the *Fairholme* plaintiffs' claim of breach of fiduciary duty against FHFA, and any part of the plaintiffs' claims of breach of the implied covenant of good faith and fair dealing which request declaratory relief.

B. HERA Bars the Plaintiffs' Derivative Claims against FHFA and Treasury

The class plaintiffs bring derivative claims against both FHFA and Treasury on behalf of Fannie Mae and Freddie Mac. *In re Fannie Mae/Freddie Mac* Am. Compl. at ¶¶ 72-79 (Fannie Mae); *In re Fannie Mae/Freddie Mac* Derivative Compl. at ¶¶ 175-82

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§ 1821(j) grounds pursuant to Rule 12(b)(6)). However, recent rulings by courts in the Second, Ninth, and Eleventh Circuits framing § 4617(f) as a *jurisdictional* bar, *see Town of Babylon*, 699 F.3d at 227-28; *Cnty. of Sonoma*, 710 F.3d at 990, 994-95; *Leon Cnty.*, 700 F.3d at 1275 n.1, 1276, coupled with the parties in this case doing the same, *see, e.g.*, Individual Pls.'s Opp'n at 31-32 ("HERA's jurisdictional bar"); FHFA Mot. at 28 ("[t]he jurisdictional bar of Section 4617(f)"), leads the Court to believe that the breadth of § 4617(f) better represents a jurisdictional bar, with related claims subject to dismissal under Rule 12(b)(1), than a bar on relief. But regardless of the proper basis for dismissal, the Court would dismiss the plaintiffs' claims for equitable relief under 12(b)(1) *or* 12(b)(6).

[23] Accordingly, the *Perry* Complaint is dismissed in its entirety.

(Freddie Mac).[24] Under HERA, FHFA "shall, as conservator or receiver, and by operation of law, immediately

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[24] The Court need not determine whether the individual plaintiffs' APA claims should be considered derivative, since all such claims are dismissed pursuant to § 4617(f). *Compare* Treasury Mot. at 30-33, *with* Individual Pls.'s Reply at 9-11.

Similarly, the *Fairholme* plaintiffs' fiduciary duty claim against FHFA, which seeks only equitable relief, is also dismissed pursuant to § 4617(f). *See* Sup. Opp'n at 13 ("The Fairholme Plaintiffs, moreover, have expressly limited their fiduciary duty claim to seek only 'equitable and declaratory relief' aimed at unwinding the Sweep Amendment and eliminating its harmful effect on Plaintiffs' interests in Fannie and Freddie.") (internal quotations and citation to Complaint omitted). As such, there is no requirement for the Court to decide whether such claims are derivative or direct. However, if such a determination were necessary, the Court notes that it would find that the *Fairholme* plaintiffs' fiduciary duty claim is derivative in nature and, therefore, barred under § 4617(b)(2)(A)(i) as well. Without resolving whether Delaware and/or Virginia law applies to the *Fairholme* plaintiffs' fiduciary duty claim, the Court – like both parties – will briefly utilize the analysis established by the Supreme Court of Delaware in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004). To determine whether a shareholder's claim is derivative or direct, the Court asks: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Id.* at 1033. Regardless of whether the *Fairholme* plaintiffs plead injuries to both the GSEs and the individual plaintiff shareholders, *see* FHFA Reply at 23; *but see* Sup. Opp'n at 12-13, the claim qualifies as derivative, not direct, under *Tooley*'s second prong. Here, recovery or relief will not flow "directly to the stockholders." *Tooley*, 845 A.2d at 1036. Instead, the equitable relief *Fairholme* seeks – "namely, vacating the Third Amendment and returning its resulting dividends from Treasury to the Enterprises (*Fairholme* Compl. ¶ 146(d)-(e)) – would flow first and foremost to the [GSEs]." *FHFA Reply* at 24. That relief will *not* flow directly to the *Fairholme* succeed to (i) all rights, titles, powers, and privileges of the [GSE], and of any stockholder. . . ." 12 U.S.C. § 4617(b)(2)(A)(i).[25] The Circuit has held that "[t]his language plainly transfers shareholders' ability to bring derivative suits – a 'right[ ], title[ ], power[ ], [or] privilege[ ]' – to FHFA." *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012).

1. An Exception to HERA's Bar on Shareholder Derivative Claims Would Contravene the Plain Language of the Statute

The plaintiffs argue that, despite the general bar against derivative suits, they have standing to sue derivatively because FHFA, due to a conflict of interest,

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plaintiffs is especially true since, after signing the PSPAs, Treasury effectively maintained discretion over GSE dividend payments, *see, e.g.*, Treasury AR at 24 (Fannie Mae PSPA § 5.1), and the GSEs, still in conservatorship, are not liquidating assets pursuant to any liquidation preferences.

Finally, Treasury's argument that the plaintiffs lack prudential standing, Treasury Mot. at 34-36, does not require consideration here. *Cf. Louisiana Envtl. Action Network v. Browner*, 87 F.3d 1379, 1384 (D.C. Cir. 1996) ("[The Court has] no difficulty dismissing a case based on one jurisdictional bar rather than another. . . . Because issues of standing, ripeness, and other such 'elements' of justiciability are each predicate to any review on the merits, a court need not identify all such elements that a complainant may have failed to show in a particular case.").

[25] The statute also provides that FHFA may, as conservator, " . . . operate the [GSE] with all the powers of the shareholders." 12 U.S.C. § 4617(b)(2)(B)(i).

would be unwilling to sue itself or Treasury.[26] Class Pls.'s Opp'n at 32-35; Sup. Opp'n at 14-16. In passing, *Kellmer* notes the existence, among other circuits, of an exception to the equivalent bar on shareholder derivative actions brought against the FDIC under the substantially similar FIRREA provision, 12 U.S.C. § 1821(d)(2)(A), for instances of "manifest conflict of interest." *Kellmer*, 674 F.3d at 850. The defendants are right, however, that this Circuit has not adopted such an exception. *E.g.*, Treasury Mot. at 31. While *Kellmer* concerned a suit against officers and directors rather than one against FHFA and Treasury, *see* Class Pls.'s Opp'n at 31, the Circuit's holding puts no limitations on HERA's rule against shareholder derivative suits. Based on the Circuit's discussion of the text of 12 U.S.C. § 4617(b)(2)(A)(i), it stands to reason that if the *Kellmer* Court had occasion to consider the purported conflict of interest exception, it would not have found that such an exception exists.

The idea of an exception to HERA's rule against derivative suits comes from two cases, both considering FIRREA § 1821(d)(2)(A). First, the Federal Circuit held that, notwithstanding the "general proposition" that the FDIC assumed "the right to control the prosecution of legal claims on behalf of the insured depository institution now in its receivership," a plaintiff has standing to bring a derivative suit when the FDIC has

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[26] "The party invoking federal jurisdiction bears the burden of establishing [standing]." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

a "manifest conflict of interest" – *i.e.*, when the plaintiffs ask the receiver to bring a suit based on a breach allegedly caused by the receiver. *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295-96 (Fed. Cir. 1999). Then, the Ninth Circuit "adopt[ed] the *First Hartford* exception" in *Delta Savings Bank v. United States*, 265 F.3d 1017 (9th Cir. 2001), for instances of conflict of interest between sufficiently "interdependent entities." *Id.* at 1021-23.[27]

It strikes this Court as odd that a statute like HERA, through which Congress grants immense discretionary power to the conservator, § 4617(b)(2)(A), and prohibits courts from interfering with the exercise of such power, § 4617(f), would still house an *implicit* end-run around FHFA's conservatorship authority by means of the shareholder derivative suits that the statute explicitly bars. "To resolve this [oddity, however,] we need only heed Professor Frankfurter's timeless advice: '(1) Read the statute; (2) read the statute; (3) read the statute!'" *Kellmer*, 674 F.3d at 850 (second internal quotation marks omitted) (citing Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes, in* Benchmarks 196, 202 (1967)). The Circuit tells the Court that HERA, by its unambiguous text, removes the power to bring derivative suits from shareholders and gives it to FHFA. *Id.* (citing

[27] The Court can reasonably presume the Ninth Circuit's exception would also apply to instances where a plaintiff demands that the FDIC sue itself.

§ 4617(b)(2)(A)).[28] As the *basis* for its exception to the rule against shareholder derivative suits, the Federal Circuit explained that "the very object of the derivative suit mechanism is to permit shareholders to file suit on behalf of a corporation when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation." *First Hartford*, 194 F.3d at 1295; *see also* Class Pls.'s Opp'n at 32 (quoting the same). Yet the existence of a rule against shareholder derivative suits, § 4617(b)(2)(A)(i), indicates that courts cannot use the *rationale* for why derivative suits are available to shareholders as a legal tool – including the conflict of interest rationale – to carve out an *exception* to that prohibition. Derivative suits largely exist so that shareholders can protect a corporation from those who run it – and HERA takes the right to such suits away from shareholders.[29] How, then, can a court base the exception to a rule barring shareholder derivative suits on the purpose of the "derivative suit mechanism" that rule seeks to bar? *See*

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[28] *See also La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188, 191 (4th Cir. 2011) (affirming and quoting *In re Freddie Mac Derivative Litig.*, 643 F. Supp. 2d 790, 795 (E.D. Va. 2009) ("[T]he plain meaning of the statute is that *all* rights previously held by Freddie Mac's stockholders, including the right to sue derivatively, now belong exclusively to the [Agency].")).

[29] "Indeed, as the Supreme Court has explained, 'the purpose of the derivative action was to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of faithless directors and managers.' " *First Hartford*, 194 F.3d at 1295 (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991)).

First Hartford, 194 F.3d at 1295. Such an exception would swallow the rule.[30]

By looking outside HERA's statutory language to find an exception to the rule against derivative suits that is based on the reason the judicial system permits derivative suits in the first place, a court would effectively be asserting its disagreement with the breadth of HERA's text. HERA provides no qualification for its bar on shareholder derivative suits, and neither will this Court. § 4617(b)(2)(A) (the conservator "shall . . . immediately succeed to . . . *all* rights, titles, powers, and privileges . . . of any stockholder) (emphasis added).[31] It is a slippery slope for the Court to poke

[30] The Court further notes that the *First Hartford* and *Delta Savings* decisions both involved the FDIC in receivership. Applying an exception to the statutory rule against derivative suits makes still less sense in the conservatorship context, where FHFA enjoys even greater power free from judicial intervention. Consistent with congressional intent to decrease restrictions governing the emergency scenario during which FHFA would need to conserve the viability of the GSEs, under HERA, court involvement on issues brought by outside stakeholders, and not by the GSEs themselves, *cf.* § 4617(a)(5), is most available throughout the *receivership* claims process. *E.g.*, § 4617(b)(5), (6).

[31] The Court respectfully disagrees with the Ninth Circuit's argument that "strict adherence to an absolute rule would be at least impracticable, and arguably absurd." *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1023-24 (9th Cir. 2001). This Court believes that an unequivocal, "absolute rule" against shareholder derivative suits enacted by Congress during a time of economic crises requires "strict adherence." HERA's anti-injunction provision, § 4617(f), is illustrative of Congress' intention to transfer "all" shareholder rights to the conservator so that it could work, unimpeded, to save the GSEs from impending collapse, without a

holes in, or limit, the plain language of a statute, especially when, as here, the plaintiffs have not asked the Court to weigh in on the statute's constitutionality. Therefore, the Court finds that HERA's plain language bars shareholder derivative suits, without exception.

2. Even If the Exception Applies, There Is No Conflict of Interest between FHFA and Treasury

Even assuming *arguendo* that the *First Hartford* and *Delta Savings* exceptions to HERA's prohibition on shareholder derivative suits applied to HERA § 4617(b)(2)(A)(i), there is no conflict of interest between FHFA and Treasury, and the class plaintiffs' fiduciary duty claims against Treasury would be dismissed. The *First Hartford* decision would not apply to the Treasury fiduciary duty claims because the plaintiffs are not demanding that FHFA sue itself or sue another government entity on account of FHFA's own breach, 194 F.3d at 1295 – the plaintiffs' claims against Treasury are due to Treasury's alleged breach. *E.g.*, *In re Fannie Mae/Freddie Mac* Am. Compl. at ¶¶ 177-79. In *Delta Savings*, the Ninth Circuit's finding of a "manifest conflict of interest" was not just based on the presence of two government entities, but rather two sufficiently *interrelated* government agencies. 265 F.3d at 1023 ("We do not suggest that the FDIC-as-receiver is faced with a disqualifying conflict

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concern for preserving any such shareholder rights to derivative suits.

every time a bank-in-receivership is asked to sue another federal agency; it is the nature of the [Office of Thrift Supervision ('OTS')] – FDIC relationship that raises the conflict here."). As the *Delta Savings* Court explained, the FDIC and the OTS were "interrelated agencies with overlapping personnel, structures, and responsibilities." *Id.* at 1021-22. The relationship between FHFA and Treasury fails the Ninth Circuit's interrelatedness test. The class plaintiffs point to no "operational or managerial overlap," and the agencies do not "share a common genesis." *Id.* at 1022-23. Unlike OTS, which supervised thrift institutions and retained the ability to "choose the FDIC to be the conservator," *id.* at 1023, Treasury plays no role in choosing FHFA to act as a conservator for the GSEs. While Treasury and FHFA, *inter alia*, have jointly proposed regulations, *e.g.*, Credit Risk Retention, 78 Fed. Reg. 183 (proposed Sept. 20, 2013), the fact that both entities exist within the financial regulation space cannot, on its own, satisfy *Delta Savings'* narrowly applied interrelatedness test. *See* 265 F.3d at 1022-1023.

Furthermore, the Court understands that Treasury represented the only feasible entity – public or private – capable of injecting sufficient liquidity into and serving as a backstop for the GSEs within the short timeframe necessary to preserve their existence in September 2008. There was no other investment partner at FHFA's disposal. *See* FHFA Mot. at 7-8. In fact, Congress expressly foresaw the need for a Treasury-FHFA relationship, specifically authorizing Treasury to invest in the GSEs. 12 U.S.C. § 1719(g); *see also* 12

U.S.C. § 4617(b)(5)(D)(iii)(I) (Congress highlighted Treasury's potential role as creditor to the GSEs by explicitly creating an exception to FHFA's authority, as receiver, to disallow creditor claims made by Treasury).[32] A relationship-based conflict of interest analysis, *see Delta Sav. Bank*, 265 F.3d at 1023, does not require the Court to ignore the harsh economic realities facing the GSEs – and the national financial system if the GSEs collapsed – when FHFA and Treasury executed the PSPAs in 2008. Courts, generally, should be wary of labeling a transaction with an investor of last resort as a conflict of interest.[33]

Thus, the class plaintiffs' derivative claims, on behalf of the GSEs, for breach of fiduciary duty by FHFA and Treasury, are dismissed pursuant to Rule 12(b)(1) for lack of standing.[34]

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[32] Notably, Congress omitted Treasury from its list of potential credit providers exempt from FDIC's authority to disallow claims under FIRREA. *See* 12 U.S.C. § 1821(d)(5)(D)(iii)(I).

[33] A recent ruling by Judge Jackson provides additional persuasive reasoning that, even if the conflict of interest exception existed in this Circuit, the FHFA – Treasury relationship does not constitute such a conflict. *Gail C. Sweeney Estate Marital Trust v. U.S. Treasury Dep't*, No. 13-0206, 2014 WL 4661983 (D.D.C. Sept. 19, 2014).

[34] "[T]he defect of standing is a defect in subject matter jurisdiction." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987).

C. The Plaintiffs' Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing Claims for Monetary Damages Must Also Be Dismissed

The plaintiffs further request monetary damages for claims of breach of contract and breach of the implied covenant of good faith and fair dealing, specifically regarding the dividends and liquidation preference provisions within their respective GSE stock certificates. *See In re Fannie Mae/Freddie Mac* Am. Compl. at 64 (¶ 7); *Arrowood* Compl. at 52 (¶ E);[35] *Fairholme* Compl. at ¶ 146(h). As the class plaintiffs correctly assert, HERA's anti-injunction provision, § 4617(f), does not bar requests for *monetary* relief. *See* Class Pls.'s Opp'n at 21-22 (citing, among other cases, *Hindes v. FDIC.*, 137 F.3d 148, 161 (3d Cir. 1998); *Willow Grove, Ltd. v. Fed. Nat'l Mortg. Ass'n*, No. 13-0723, 2013 WL 6865127, at *2 (D. Colo. Dec. 31, 2013)); *see also Freeman*, 56 F.3d at 1399 (concluding that FIRREA § 1821(j) precluded nonmonetary remedies, but noting that "aggrieved parties will [still] have opportunities to seek money damages"). Nevertheless,

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[35] It is unclear to the Court whether the *Arrowood* plaintiffs incorporate their claim of breach of the implied covenant into their request for monetary relief, *Arrowood* Compl. at 52 (¶ E). Yet, regardless of the *Arrowood* plaintiff's intention, the claim is dismissed. If the claim of breach of the implied covenant is included within ¶ E, then the claim is dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(6). *See infra*. If the *Arrowood* plaintiffs only intended to seek declaratory relief for the alleged breach of the implied covenant, then Count VI of the *Arrowood* Complaint is dismissed, under HERA § 4617(f), pursuant to Rule 12(b)(1). *See supra* Section III(A).

the plaintiffs' contract-based claims seeking monetary damages must also be dismissed under the threshold analyses required by Rule 12(b)(1) and Rule 12(b)(6).

1. The Plaintiffs' Liquidation Preference Claims Are Not Ripe

FHFA's entrance into the Third Amendment, allegedly in contravention of the GSEs' existing contract – *i.e.*, stock certificates – with the plaintiffs, constitutes a decision by an administrative agency. *See* 12 U.S.C. § 4511(a) ("There is established the Federal Housing Finance Agency, which shall be an independent agency of the Federal Government."). While the class and *Arrowood* plaintiffs also include the GSEs as targets of their claims of breach of contract and breach of the implied covenant, the action in question was undeniably one taken by FHFA. As such, the ripeness doctrine, which is most often applied to pre-enforcement review of agency determinations, may also govern the Court's assessment of subject matter jurisdiction here.[36] "Ripeness entails a functional, not a formal, inquiry." *Pfizer Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999). "Determining whether administrative action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (citing *Abbott Labs. v. Gardner*, 387 U.S.

[36] "The question of ripeness goes to [the Court's] subject matter jurisdiction. . . ." *Duke City Lumber Co. v. Butz*, 539 F.2d 220, 221 n.2 (D.C. Cir. 1976).

136, 149 (1967)). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 580-81 (1985)).

An analysis of the plaintiffs' contentions regarding the liquidation preference written into their preferred stock certificates is uncomplicated. The certificates grant the plaintiffs "a priority right to receive distributions from the Companies' assets in the event they are dissolved." Individual Pls.'s Opp'n at 5.[37] Therefore, by definition, the GSEs owe a liquidation preference payment to a preferred shareholder only during liquidation. It follows that there can be no loss of a liquidation preference prior to the time that such a preference can, contractually, be paid. Here, the GSEs remain in conservatorship, not receivership, and there is no evidence of *de facto* liquidation.[38] *See supra* Section III(A)(4)(c).

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[37] The common stockholders among the class plaintiffs similarly claim deprivation "of any possibility of receiving dividends or a liquidation preference." *E.g.*, *In re Fannie Mae/Freddie Mac* Am. Compl. at ¶ 155.

[38] The *Arrowood* and *Fairholme* plaintiffs' citation to *Quadrangle Offshore (Cayman) LLC v. Kenetech Corp.*, No. 16362, 1998 WL 778359 (Del. Ch. Oct. 21, 1998) is, thus, inapposite, since that case concerns what the plaintiffs would aptly classify as *de facto* liquidation. *See* Sup. Opp'n at 41-42, 45 ("In *Quadrangle*, the defendant company had pursued no business and sold most of its assets to pay creditors, but because the company did not formally declare that it was in liquidation, it did not pay the preferred shareholders their contractually-specified liquidation preference.").

The question for the Court cannot be whether the Third Amendment diminishes an *opportunity* for liquidation preferences at some point in the future, but rather whether the plaintiffs have suffered an injury to their right to a liquidation preference in fact and at present. Yet the individual plaintiffs assert that the Third Amendment "has clearly injured Plaintiffs in a direct and personal way" because "[t]heir right to an opportunity to benefit from the liquidation preferences in their preferred stock – once valuable – is now worthless. . . ." Individual Pls.'s Opp'n at 36. But, just as there was a Third Amendment, the Court cannot definitively say there will be no Fourth or Fifth Amendment that will transform the current "opportunity to benefit from the liquidation preferences in [the plaintiffs'] preferred stock." A ripeness requirement prevents the Court from deciding a case "contingent [on] future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. at 300. Indeed, the purpose of the ripeness doctrine is to ensure the Court hears only an "actual case or controversy." *Cf. Pfizer*, 182 F.3d at 980. Thus, the plaintiffs' liquidation preference claims are not fit for a judicial decision until liquidation occurs.[39]

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[39] Even if the plaintiffs could presently claim damages as a result of a prospective contractual breach regarding the plaintiff shareholders' liquidation preference, this claim would, at best, be one of damage to the price of their GSE shares, as valued by the market "based in part on the existence of their attendant . . . liquidation rights." Class Pls.'s Opp'n at 37-38. Such claims are considered derivative under Delaware law, and would be barred

Given that the plaintiffs maintain no current right to a liquidation preference while the GSEs are in conservatorship, the plaintiffs are no worse off today than they were before the Third Amendment. Therefore, there is no hardship imposed on the plaintiffs by withholding court consideration until this contingent right matures at the moment of liquidation. Once again, any present injury is, at most, a decrease in share value, which can only be claimed as part of a derivative action that would be barred by HERA. *See supra* n.39. "Moreover, no irremediable adverse consequences flow from requiring a later challenge to" the Third Amendment with regard to liquidation preferences since, as the defendants acknowledge, FHFA Mot. at 34-35, the right to a liquidation preference can be adjudicated during the statutorily prescribed receivership claims process. *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967); *see also* 12 U.S.C. § 4617(b)(2)(K)(i), (b)(3)-(10). Until then, the plaintiffs have no direct claims to liquidation preference-related damages that are ripe for judicial review, and their existing claims must be dismissed under Rule 12(b)(1).[40]

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under HERA § 4617(b)(2)(A)(i), *supra* Section III(B). *E.g.*, *Labovitz v. Wash. Times Corp.*, 172 F.3d 897, 904-05 (D.C. Cir. 1999) ("the loss [plaintiffs] suffered in share value is a derivative harm") (citing *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988), for the proposition that "Delaware courts have long recognized that actions charging mismanagement which depress[] the value of stock [allege] a wrong to the corporation; *i.e.*, the stockholders collectively, to be enforced by a derivative action") (internal quotation marks and citation omitted).

[40] FHFA and Treasury further argue that, under 12 U.S.C. § 4617(e)(2), which limits the maximum liability of FHFA during

In addition, for largely the same reasons that lead the Court to conclude that the plaintiffs' liquidation preference claims lack ripeness, the plaintiffs' breach of contract and breach of implied covenant claims regarding liquidation preferences fail to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The right to this elevated preference for asset distribution, given to preferred shareholders under

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receivership, the plaintiffs liquidation preference claims are limited "to the amount that shareholders would have received had the GSEs' assets and liabilities been liquidated at the time the conservator was appointed in September 2008." Treasury Mot. at 28, 34. The Court is unable to identify any case law discussing this HERA provision, though a number of courts, including a handful within this Circuit, have examined FIRREA's similar provision capping liability, 12 U.S.C. § 1821(i)(2). *E.g.*, *Bank of Am., N.A. v. F.D.I.C.*, 962 F. Supp. 2d 165, 173 (D.D.C. 2013) ("12 U.S.C. § 1821(i)(2) unequivocally limits the maximum liability of the FDIC to the amount a claimant would have received in liquidation under the distribution scheme set forth in FIRREA."). The Tenth Circuit has noted that § 1821(i)(2) limits creditor claims against the agency to the "pro rata share of the assets which would have been available *on the day the institution was placed in receivership*." *Castleglen, Inc. v. RTC*, 984 F.2d 1571, 1583 (10th Cir. 1993) (emphasis added). Identifying the point at which to measure FHFA's maximum liability as "the day the institution was placed in receivership" – as opposed to the day the GSEs were placed in conservatorship, like the defendants suggest here – is consistent with the fact that this maximum liability is set only in reference to "a claim against the *receiver* or the regulated entity for which such *receiver* is appointed." 12 U.S.C. § 1821(i)(2) (emphasis added). As such, § 4617(e)(2) "has no relevance outside of receivership," and provides the court with no guidance regarding potential damages – or lack thereof – from claims made against FHFA as a conservator or against the GSEs while in conservatorship. *See* Individual Pls.'s Opp'n at 23; *see also* Class Pls.'s Opp'n at 39.

GSE stock certificates, is only triggered during liquidation. Consequently, the plaintiffs' direct breach of contract claims for injuries related to their liquidation preference rights can provide them no "plausible" relief against FHFA – or against the GSEs, for that matter – until the agency places the GSEs into receivership and commences the dissolution process. *See Twombly*, 550 U.S. at 570; *see also supra* n.39 (the plaintiffs' attempt to amorphously straddle the line between direct injury to their contingent right to a liquidation preference and derivative injury to the present "value" of their GSE holdings further demonstrates the uncertainty of their claims). The Court's reasoning requiring dismissal of such breach of contract claims also requires dismissal of the plaintiffs' claims of breach of the implied covenant of good faith and fair dealing, insofar as such claims request monetary relief. "Although an implied covenant of good faith and honest conduct exists in every contract, . . . such subjective standards cannot override the literal terms of an agreement." *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1143 (Del. 1990). As mentioned, the stock certificates, on their face, only require liquidation preference payments when the GSEs enter liquidation. Since no liquidation has occurred, the plaintiffs' implied covenant claims relating to liquidation preference rights cannot stand at this time.

2. The Plaintiffs' Dividend Claims Fail to State a Claim upon Which Relief Can Be Granted

The stock certificates upon which the plaintiffs base their claims of breach of contract and breach of the implied covenant state that "holders of outstanding shares of . . . Preferred Stock . . . shall be entitled to receive, ratably, *when, as and if declared by the Board of Directors, in its sole discretion*, out of funds legally available therefor, non-cumulative cash dividends. . . ." *E.g.*, Individual Pls.'s Opp'n Ex. A at A-1 (Fannie Mae Preferred Stock Series S); Ex. B at A-1 (Freddie Mac Preferred Stock) (emphasis added). The "right" to dividends to which the plaintiffs refer throughout their briefs, then, is, in actuality, wholly dependent upon the discretion of the GSEs' board of directors. As the individual plaintiffs stress, "[a] contractual 'right' is an entitlement to certain performance from the counterparty, and it is 'exercised' through unilateral action that does not require negotiation or mutual assent." Individual Pls.'s Opp'n at 38. Here, the payment of a dividend expressly requires "mutual assent," since, under the contract, plaintiffs cannot receive such payment without board approval.

This Court – like many courts over the past two centuries – agrees with the defendants that shareholders do not have a present or absolute right to dividends which are subject to the discretion of the board. FHFA Mot. at 41-42. As Justice Holmes fittingly explained eighty-four years ago, an investment in stock "presupposes that the business is to go on, and therefore even if there are net earnings, the holder of stock, preferred as well as common, is entitled to have a dividend declared only out of such part of them as can be applied to dividends consistently with a wise administration of a going concern." *Wabash Ry. Co. v. Barclay*, 280 U.S. 197, 203-04 (1930) (further noting that dividend payments are "in the first instance at least a matter for the directors to determine").[41]

The history of case law finding no contractual right to discretionary dividends is only bolstered by the specific facts of this case. Under HERA, FHFA succeeded to all rights and powers of the board of directors. *See* 12 U.S.C. § 4617(b)(2)(A)(i) ("[FHFA] shall, as conservator or receiver, and by operation of law, immediately succeed to – (i) all rights, titles, powers, and

[41] *See also New York, L.E. & W.R. Co. v. Nickals*, 119 U.S. 296, 305-07 (1886) (By qualifying dividend payments with "as declared by the board" language, the preferred stock contract did "not intend[] to confer upon the former an absolute right to a dividend in any particular year. . . . We are of opinion that . . . preferred stockholders . . . are not entitled, of right, to dividends, payable out of the net profits accruing in any particular year, unless the directors of the company formally declare, or ought to declare, a dividend payable out of such profits."); *In re Terex Corp.*, No. 91-3864, 1993 WL 7519, at *1 (6th Cir. Jan. 12, 1993) ("The decision to pay (or not to pay) a dividend was within the sole discretion of Metropolitan's board of directors; accordingly, Terex had no contractual right to receive a dividend for any given year."); *Crawford Drug Stores v. United States*, 220 F.2d 292, 296 (10th Cir. 1955) ("[I]n ordinary circumstances the holder of preferred stock has no such absolute right to the payment of dividends."); *Comm'r of Internal Revenue v. Meridian & Thirteenth Realty Co.*, 132 F.2d 182, 187 (7th Cir. 1942) (unlike a creditor's absolute right to interest, "[s]tockholders have no absolute right to dividends until they are declared").

privileges of the [GSEs], and of any . . . director of such regulated entity with respect to the regulated entity and *the assets of the [GSEs].*") FHFA's power over the assets of the GSEs surely includes the power to declare discretionary dividends from the surplus assets of the GSEs. Consistent with FHFA's assumption of the board's power, FHFA's director, James Lockhart, stated that "the common stock and preferred stock dividends will be eliminated." *In re Fannie Mae/Freddie Mac* Am. Compl. at ¶ 53 (quoting Statement of FHFA Director James B. Lockhart at News Conference Announcing Conservatorship of Fannie Mae and Freddie Mac (Sept. 7, 2008), *available at* http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-FIFA-Director-James-B--Lockhart-at-News-Conference-Annnouncing-Conservatorship-of-Fannie-Mae-and-Freddie-Mac.aspx). Once the agency executed the PSPAs, however, FIFA effectively transferred discretionary power over dividend issuance to Treasury. *See* Treasury AR at 24, 58 (Fannie Mae and Freddie Mac PSPAs § 5.1, requiring Treasury's written consent for declaration of any dividends, "preferred or otherwise"). Thus, not only do the plaintiffs lack a right to dividend payments under their original stock certificates, but FIFA – the primary target of the plaintiffs' breach of contract and breach of the implied covenant claims concerning dividends – no longer has exclusive discretion to issue such dividends.

Without a contractual right to dividends, the plaintiffs cannot state a claim for breach of contract specifically based on their alleged dividend entitlements. *See In re Fannie Mae/Freddie Mac* Am. Compl. at ¶¶ 155, 161, 167; *Fairholme* Compl. at ¶ 122.[42] And when the contract is unambiguous regarding a lack of contractual right, there cannot be a coinciding claim of breach of the implied covenant of good faith and fair dealing. *Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992), *aff'd sub nom. David Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, No. 64, 1992 WL 135147 (Del. 1992) ("[W]here the subject at issue is expressly covered by the contract, or where the contract is intentionally silent as to that subject, the implied duty to perform in good faith does not come into play."); *see also Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) ("Existing contract terms control, however, such that implied good faith cannot be used to circumvent the parties' bargain, or to create a free-floating duty . . . unattached to the underlying legal document.") (internal quotation marks and citation omitted); *QVT Fund LP v. Eurohypo Capital Funding LLC I*, No. 5881, 2011 WL 2672092, at *14 (Del. Ch. July 8, 2011) ("If the contract clearly delineates the parties' rights, there is no room for the implied covenant because it

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[42] While the *Arrowood* Complaint does not specify dividends and liquidation preferences as the "rights" affected by the Third Amendment, *see Arrowood* Compl. ¶¶ 135-38, other sections of the Complaint clarify that dividends and liquidation preferences are the rights for which the *Arrowood* plaintiffs seek monetary damages. *See, e.g.*, *id*. at ¶ 7.

cannot override the express terms of a contract.") (internal quotation marks and citation omitted).[43] As such, the plaintiffs' claims for breach of contract[44] and breach of the implied covenant regarding the dividend provisions of the plaintiffs' stock certificates must be dismissed pursuant to Rule 12(b)(6).

Even if the implied covenant was applicable to this case – and it is not – the plaintiffs would have failed to plead such a cause of action. The Court has ruled that the plaintiffs fail to demonstrate through their pleadings that FHFA violated its statutory authority under HERA by entering into the Third Amendment with Treasury. *See supra* Section III(A)(4). Yet the plaintiffs attempt to brand agency actions that fall within FHFA's statutorily established powers to succeed to

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[43] The individual plaintiffs' citation to *QVT Fund*, Sup. Opp'n at 40-41, 44-45, is distinguishable from this case. In *QVT Fund*, the plaintiffs claim that the alleged breach of an "implied obligation" – which the Court of Chancery deemed sufficiently pleaded – is the reason why *mandatory* dividend payments were not triggered. *See* 2011 WL 2672092, at *14-15. Here, no contractual obligation – implicit or explicit – exists that could transform unmistakably discretionary dividends into mandatory dividends.

[44] The Court rejects the individual plaintiffs' additional contention that the Third Amendment "effectively converted [Treasury's stock] into common stock," which would "represent a distribution to the common shareholder ahead of and in violation of the contractual rights of Plaintiffs and other preferred shareholders." Sup. Opp'n at 30. Here, the characteristics of preferred stock "that distinguish that stock from common stock" – *e.g.*, senior-most dividend and liquidation rights – remain "expressly and clearly stated" under the Third Amendment. *See Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 852 (Del. 1998); *see also* FHFA Reply at 35-37.

all the rights of shareholders and stabilize the GSEs as performed in "bad faith." *E.g.*, *In re Fannie Mae/Freddie Mac* Am. Compl. at ¶¶ 90-91, 161. But the plaintiffs cannot overcome FHFA's sweeping congressional mandate with conclusory statements regarding the Third Amendment's effect on the plaintiffs' *prospective* – and not present – rights to dividends and liquidation preferences. *E.g.*, *Arrowood* Compl. at ¶¶ 96, 141.[45] Furthermore, the class and *Arrowood* plaintiffs fail to plead claims of breach of the implied covenant against the GSEs, since the plaintiffs attribute all alleged "arbitrar[y] and unreasonabl[e]" conduct only to FHFA, as a conservator that assumed all rights of the GSEs, and not to the GSEs themselves.[46]

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[45] Since the plaintiffs have not demonstrated, through their pleadings, that FHFA acted in bad faith, Delaware case law under which discretionary dividends will only be compelled in the rare instance of a judicial finding of "fraud or gross abuse of discretion" by the board of directors is inapposite. *See, e.g.*, *Gabelli & Co. v. Liggett Grp. Inc.*, 479 A.2d 276, 280 (Del. 1984); *Moskowitz v. Bantrell*, 190 A.2d 749, 750 (Del. 1963).

Additionally, even if the plaintiffs presented allegations of "gross abuse of discretion" resulting in *present* damage to the "value" of the plaintiffs' investment, such claims would be considered derivative and barred under HERA § 4617(b)(2)(A)(i). *See supra* n.39; *cf. U.S. v. Byrum*, 408 U.S. 125, 141 (1972) ("Although vested with broad discretion in determining whether, when, and what amount of dividends shall be paid, that discretion is subject to legal restraints. If, in obedience to the will of the majority stockholder, corporate directors disregard the interests of shareholders by accumulating earnings to an unreasonable extent, they are vulnerable to a derivative suit.")

[46] The *Fairholme* plaintiffs bring their claims only against FHFA. *See Fairholme* Compl. Count VI.

E.g., *In re Fannie Mae/Freddie Mac* Am. Compl. at ¶¶ 161, 167, 173; *see also* FHFA Reply at 32-33.[47]

D. The Class Plaintiffs Fail to Plead That the Third Amendment Is an Unconstitutional Taking

Finally, the class plaintiffs claim that the Third Amendment effected an unconstitutional taking of their alleged dividend entitlements and liquidation rights without just compensation. U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"); *see In re Fannie Mae/Freddie Mac* Am. Compl. at ¶¶ 110-16, 183-92. Takings claims are reviewed as either physical or regulatory takings. A "paradigmatic" physical taking "is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, (2005). Since the class plaintiffs do not allege a physical taking, the Court must decide whether they adequately plead a taking as a result of government regulation. Class Pls.'s Opp'n at 67-70. Before determining which takings rubric to utilize for its

[47] The reasoning of this section would also apply to dividend and liquidation preference claims for non-monetary relief *even if* § 4617(f) did not bar such claims. "In assessing whether a declaratory judgment action is ripe, courts must determine 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' " *RDP Technologies, Inc. v. Cambi AS*, 800 F. Supp. 2d 127, 136 (D.D.C. 2011) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)).

analysis, a court must first evaluate whether a plaintiff has a cognizable property interest protected by the Fifth Amendment. *See, e.g.*, *Conti v. United States*, 291 F.3d 1334, 1339 (Fed. Cir. 2002); *Nat'l Leased Hous. Ass'n v. U.S. Dep't of Hous. & Urban Dev.*, No. 03-1509, 2007 WL 148829, at *11 (D.D.C. Jan. 16, 2007). Here, the class plaintiffs do not allege a cognizable property interest and, as such, fail to state a claim against FHFA and Treasury for a violation of the Fifth Amendment's Takings Clause.

1. The Jurisdictional Defect in the Class Plaintiffs' Pleadings Is Not Dispositive of Their Takings Claims

As an initial matter, the defendants argue that the class plaintiffs' takings claims belong in the Court of Federal Claims rather than in this Court. Pursuant to the so-called "Big" Tucker Act, 28 U.S.C. § 1491(a)(1), the Court of Claims maintains exclusive jurisdiction over claims against the United States that exceed $10,000. Under the "Little" Tucker Act, 28 U.S.C. § 1346(a)(2), the Court of Claims shares concurrent jurisdiction with federal district courts over claims against the United States not exceeding $10,000. In this Circuit, for complaints that include *potential* claims over $10,000, Little Tucker Act jurisdiction is only satisfied by a "clearly and adequately expressed" waiver of such claims. *See Waters v. Rumsfeld*, 320 F.3d 265, 271-272 (D.C. Cir. 2003) ("[F]or a district court to maintain jurisdiction over a claim that might otherwise exceed $10,000, a plaintiff's waiver of amounts over that threshold must be clearly and adequately expressed.") (internal quotation marks and citation omitted). Here, the class plaintiffs argue that "expressly limit[ing] the prospective takings class to individuals who suffered losses less than $10,000" is an adequate alternative to waiver, and that waiver is "premature" until the class certification phase. Class Pls.'s Opp'n at 53. Yet the plaintiffs' refusal to clearly and adequately waive claims exceeding $10,000 in either their pleadings or subsequent opposition brief contravenes Circuit precedent. *See Goble v. Marsh*, 684 F.2d 12, 15-16 (D.C. Cir. 1982); *Stone v. United States*, 683 F.2d 449, 454 n.8 (D.C. Cir. 1982) ("Generally a plaintiffs' waiver should be set forth in the initial pleadings."). Nevertheless, the Circuit has also made clear its preference that the District Court should not transfer a case that is defective on Little Tucker Act grounds to the Court of Claims "without first giving [the plaintiffs] an opportunity to amend their complaints to effect an adequate waiver." *Goble*, 684 F.2d at 17.

Thus, while the class plaintiffs' takings pleading is inadequate for jurisdiction in this Court under the "Little" Tucker Act, in keeping with the tenor of Circuit case law, the Court would generally provide the class plaintiffs "an opportunity to amend their complaints to effect an adequate waiver." *Id*. However, doing so here is unnecessary, since the Court finds that the class plaintiffs' takings claims are dismissed on alternative grounds.

2. The Class Plaintiffs Fail to Plead a Cognizable Property Interest

Any property rights that the class plaintiffs claim can only arise from their GSE stock certificates. Yet "existing rules," "understandings," or "background principles" derived from legislation enacted prior to the share purchase inhere in the plaintiffs' title to the stock certificates and "define the range of interests that qualify for protection as 'property' under the Fifth" Amendment. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1028-30 (1992); *see also Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1379 (Fed. Cir. 2004).[48] Since 1992, when Congress established FHFA's predecessor, the Office of Federal Housing Enterprise Oversight ("OFHEO"), the GSEs have been subject to regulatory oversight, including the specter of conservatorship or receivership under which the regulatory agency succeeds to "all rights" of the GSEs and shareholders. *See* Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, §§ 1301-1395, 106 Stat. 3672, 3941-4012 (establishing OFHEO); 12 U.S.C. § 4617(b)(2)(i). This enduring regulatory scheme governing the GSEs at the time the class plaintiffs purchased their shares represents the "background principle" that inheres in the stock certificates.

[48] Given the extensive history of Takings Clause jurisprudence within the Court of Appeals for the Federal Circuit, the Court will look to such cases for guidance.

The defendants argue that the plaintiffs fail to plead a cognizable property interest, for takings purposes, because the GSEs – and, therefore, the plaintiff shareholders – lack the right to exclude the government from their property. Treasury Mot. at 59-60; FHFA Mot. at 60-62; *but see* Class Pls.'s Opp'n at 61-65. The Court agrees. "[T]he 'right to exclude' is doubtless . . . 'one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). The defendants analogize the "federal oversight and regulation" to which the GSEs have been subject to that of regulated financial institutions. *See* Treasury Mot. at 59. Utilizing this analogy, the defendants cite Federal Circuit case law for the proposition that the plaintiff shareholders have no present cognizable property interest in the dividends or liquidation preferences referenced in their stock certificates.

In two cases involving statutorily regulated financial institutions, placed under the authority of either the FDIC or RTC, the Federal Circuit found that the shareholders of these institutions lacked the requisite property interests to support a takings claim. *Golden Pac. Bancorp v. United States*, 15 F.3d 1066 (Fed. Cir. 1994); *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992).[49] On account of the existing regulatory structure permitting the appointment

[49] The fact that the *California Housing* Court only considered the "permanent physical occupation" rubric of regulatory takings analysis from *Loretto v. Teleprompter Manhattan CATV*

of a conservator or receiver, the financial institutions "lacked the fundamental right to exclude the government from its property at those times when the government could legally impose a conservatorship or receivership on [the institutions]." *Golden Pac.*, 15 F.3d at 1073 (quoting *Cal. Hous.*, 959 F.2d at 958) (internal quotation marks omitted). And the result of this "regulated environment" is imputed to the shareholders of the financial institution, who thus hold "less than the full bundle of property rights." *Id.* (internal quotation marks omitted).

The Court finds this reasoning to be persuasive. By statutory definition, the GSEs are subject to governmental control at the discretion of FHFA's director. 12 U.S.C. § 4617(a)(2). Therefore, the GSE shareholders necessarily lack the right to exclude the government from their investment when FHFA places the GSEs under governmental control – *e.g.*, into conservatorship.[50] This conclusion is especially true since the statute explicitly grants FHFA the power to assume

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Corp., 458 U.S. 419 (1982), which would not apply to the present facts, has no effect on its holding regarding the threshold determination of a cognizable property interest.

[50] The Court notes that FHFA overreads the Federal Circuit holdings. Unlike FHFA's contention that "shareholders had no cognizable property interest within the meaning of the Takings Clause *before* conservatorship," FHFA Mot. at 61, the shareholders only lose their cognizable property interests "when [the GSEs are] in conservatorship," Treasury Mot. at 58.

"all rights . . . of the regulated entity, and of any stockholder. . . ." *See* 12 U.S.C. § 4617(b)(2)(i).[51]

Without disputing the broader analogy that the defendants draw between regulated financial institutions and the GSEs,[52] the class plaintiffs seek to distinguish the Federal Circuit decisions based on *why* FHFA and Treasury entered into the Third Amendment. *Id.* at 63. But motives are irrelevant, for takings purposes, if the plaintiffs possess no cognizable property interests in the first place. *Golden Pacific* and *California Housing* stand for the general notion that investors have no right to exclude the government from their alleged property interests when the regulated institution in which they own shares is placed into conservatorship or receivership. *See Cal. Hous.*, 959 F.2d at 958 (no right to exclude when a conservatorship or receivership is legally imposed). Whether

[51] The class plaintiffs' alarmist assertion that a holding like the one at present "would mean that the defendants could expropriate all of the shares in the most profitable and stable financial institutions in the country without triggering the Takings Clause" is unwarranted. Class Pls.'s Opp'n at 63-64. There is no right to exclude, and therefore no cognizable property interest upon which to state a takings claim, only when the government may "legally impose a conservatorship" – *i.e.*, when necessary to stabilize a stressed financial institution. *See Cal. Hous.*, 959 F.2d at 958; 12 U.S.C. § 4617(a)(2).

[52] *See* Class Pls.'s Opp'n at 61-62 ("Those cases hold that shareholders in regulated financial institutions are on notice that government regulators may place the institution into conservatorship or receivership if they conclude that the institution is insolvent or being operated in an unsafe and unsound manner, and therefore those shareholders lack the 'right to exclude' the government in such circumstances.")

the defendants executed the Third Amendment to generate profits for taxpayers or to escape a "downward spiral" of the GSEs seeking funding in order to pay owed dividends back to Treasury, it does not change the fact that it was executed during a period of conservatorship and, thus, after the plaintiffs' property interests – whatever they may have been prior to the Third Amendment – were extinguished. Unless the plaintiffs can demonstrate that FHFA could not legally impose a conservatorship upon the GSEs at the time of the Third Amendment, allegations of mischievous intentions during a conservatorship do not revive already eliminated cognizable property interests. *See id.* And here, the class plaintiffs only plead that the Third Amendment was inconsistent with FHFA's responsibilities *as* conservator – not that FHFA lacked any legal right to *be* a conservator on August 17, 2012. *E.g.*, *In re Fannie Mae/Freddie Mac* Am. Compl. at ¶¶ 92-101 (alleging that "the Third Amendment was inconsistent and in conflict with FHFA's statutory responsibilities as a conservator"); *see also* 12 U.S.C. § 4617(a)(2) ("[FHFA] may, *at the discretion of the Director*, be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity.") (emphasis added). Given that the class plaintiffs cannot repair the overarching threshold defect of having no cognizable property interest at stake, their takings claim must be dismissed under Rule 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)

("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.").[53]

3. The Class Plaintiffs Further Fail to Plead a Regulatory Taking

Even if the class plaintiffs could claim a cognizable property interest – and they cannot – their claims

[53] In consideration of the class plaintiffs' takings claims concerning dividends, specifically, the Court further acknowledges the multitude of federal cases, in different contexts, finding a lack of a cognizable property interest when another party maintains *discretion* to grant a plaintiff's alleged property interest. *E.g.*, *Toxco, Inc. v. Chu*, 801 F. Supp. 2d 1, 10 (D.D.C. 2011) ("[I]f the government is vested with complete discretion as to whether or not it must undertake any of its contractual obligations, the plaintiff does not have a constitutional property interest in that contract.") (citing *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1295-96 (5th Cir. 1994); *Christ Gatzonis Elec. Contractor, Inc. v. N.Y. City Sch. Constr. Auth.*, 23 F.3d 636, 640 (2d Cir. 1994)); *Barrington Cove Ltd. P'ship v. R.I. Hous. & Mortg. Fin. Corp.*, 246 F.3d 1, 5-6 (1st Cir. 2001) (finding that a plaintiff has no cognizable property interest in "'promised' federal income tax credits" because a state agency maintained "absolute discretion to determine whether" such tax credits are awarded); *Nello L. Teer Co. v. Orange Cnty.*, No. 92-2240, 1993 WL 177872, at *2 (4th Cir. 1993) ("Under our precedents, if a local zoning authority possesses any significant discretion in granting a permit, there is no cognizable property interest in the issuance of that permit.") (internal quotation marks, alteration, and citation omitted). The logic of these decisions would appear to extend to dividends that are issued at the "sole discretion" of a GSE board – or, in this case, the regulatory entity that has succeeded to all the rights of the board. Much like how plaintiffs cannot claim that discretionary dividends amount to a contractual right, the class plaintiffs cannot contend that such dividend provisions constitute a cognizable property interest.

would still fail on a motion to dismiss under existing Supreme Court regulatory takings precedent. "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Supreme Court has developed a series of analytical rubrics under which courts are to determine "whether a regulation 'reaches a certain magnitude' in depriving an owner of the use of property." *See Dist. Intown Props. Ltd. P'ship v. D.C.*, 198 F.3d 874, 878 (D.C. Cir. 1999) (quoting *Mahon*, 260 U.S. at 413). There are two principal "narrow categories" of *per se* takings. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). First, "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 426. Here, the government has not physically occupied the plaintiffs' property.[54] Second, a government regulation that deprives an owner of "*all* economically beneficial uses" of his property is also a taking. *Lucas v. South Carolina*

[54] The Supreme Court has also held that "when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, 'a *per se* [takings] approach' is the proper mode of analysis." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003)). Despite citing this language in their opposition brief, Class Pls.'s Opp'n at 67, the class plaintiffs have not alleged that the government has commanded them to *relinquish* any funds – or property, for that matter – already owned or possessed. *See* Treasury Reply at 56 ("The plaintiffs' claim, instead, is that the value of their expectation of dividends or a liquidation preference has been diminished. . . .").

Coastal Council, 505 U.S. 1003, 1019 (1992). Regardless of whether *Lucas* only applies to real property, *compare* Treasury Mot. at 61, *with* Class Pls.'s Opp'n at 67-68, the plaintiffs cannot find relief under a "total wipeout" theory. *See* Class Pls.'s Opp'n at 67-68. The plaintiffs maintain "economically beneficial use" of their shares, since the stock very much remains a tradable equity. Indeed, GSE shares are traded daily on public over-the-counter (OTC) exchanges.[55] And given the Court's rejection of the plaintiffs' alleged present rights to dividends and liquidation payments, it is clear that the government has not "seized [the plaintiffs'] private property and kept that property for itself." Class Pls.'s Opp'n at 67.

A regulatory taking, on the other hand, is evaluated under the "ad hoc" inquiry set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *Id.* at 124. *Penn Central* identified three "factors that have particular significance" in evaluating regulatory takings claims: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character

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[55] That the plaintiffs retained value in their market traded shares is consistent with the statement from Freddie Mac's Form 8-K filing on September 8, 2011, which the class plaintiffs quote in the Amended Complaint. *See In re Fannie Mae/Freddie Mac* Am. Compl. at ¶ 53 ("The holders of Freddie Mac's existing common stock and preferred stock . . . will retain all their rights in the financial worth of those instruments, *as such worth is determined by the market*.") (emphasis added) (quoting Freddie Mac 2011 8-K (Sept. 11, 2008)).

of the governmental action." *Id.* A plaintiff is not required to demonstrate favorable results under all three *Penn Central* factors in order for the Court to find a taking – it is a balancing test. *See Dist. Intown Props.*, 198 F.3d at 878-79 (*Penn Central* submits "three primary factors [to be] weigh[ed] in the balance"). While regulatory takings require a "more fact specific inquiry", *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002), no supplementation of the factual record could alter dismissal here.

At present, the Third Amendment has had no economic impact on the plaintiffs' alleged dividend or liquidation preference rights. In view of the unambiguous language of the stock certificate's dividend provision coupled with Treasury's discretion to pay dividends under the PSPAs, the plaintiffs cannot show that the Third Amendment rendered their prospects of receiving dividends any less discretionary than they were prior to the amendment. Additionally, since liquidation preference rights only ripen *during liquidation*, any impact on such rights is, at best, theoretical while the GSEs remain in conservatorship.

"A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). "In determining whether a reasonable investment-backed expectation exists, one relevant consideration is the extent of government regulation within an industry."

Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv., 885 F. Supp. 2d 156, 195 (D.D.C. 2012) (collecting cases). For decades – and at the time each of the class plaintiffs purchased their GSE stock – the GSEs have been under the watchful eye of regulatory agencies and subject to conservatorship or receivership largely at the government's discretion. *See supra* Section III(D)(2).[56] As the Federal Circuit's holdings in *California Housing* and *Golden Pacific* elucidate, by lacking the right to exclusive possession of their stock certificates – and therefore lacking a cognizable property interest – at the time of the Third Amendment, the plaintiff shareholders could not have "developed a historically rooted expectation of compensation" for any possible seizures that occurred during FHFA's conservatorship. *See Cal. Hous.*, 959 F.2d at 958. The plaintiffs "voluntarily entered into [investment contracts with] the highly regulated" GSEs. *See Golden Pac.*, 15 F.3d at 1073.[57] In fact, a number of the class plaintiffs purchased their

[56] Furthermore, as FHFA cogently explains, "[b]ecause the [GSEs] benefited from preferential tax treatment, far lower capital requirements, and a widely perceived government guarantee, [the] [p]laintiffs should have anticipated that the [GSEs] would be subject to . . . regulation." FHFA Mot. at 61 n.37 (citation omitted). The tradeoff when investing in government-sponsored entities that receive meaningfully different benefits than private corporations is increased regulation and the prospect of a government takeover.

[57] Both Fannie Mae and Freddie Mac preferred stock certificates provide notice that "[t]he ability of the Board of Directors to declare dividends may be restricted by [FHFA's predecessor] OFHEO." *See* Individual Pls.'s Opp'n Ex. A at 20 (Fannie Mae Preferred Stock Series S); Ex. B at 27 (Freddie Mac Preferred Stock).

shares mere months before or shortly after FHFA exercised its statutory authority to place the GSEs into conservatorship. *E.g.*, *In re Fannie Mae/Freddie Mac* Am. Compl. at ¶¶ 30-35; *In re Fannie Mae/Freddie Mac* Derivative Compl. at ¶¶ 20-2 1. There can be no doubt that the plaintiff shareholders understood the risks intrinsic to investments in entities as closely regulated as the GSEs, and, as such, have not now been deprived of any *reasonable* investment-backed expectations.

Looking to the character of the governmental action in dispute, the *Penn Central* Court explained that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. Here, the plaintiffs do not plead a physical invasion of their property. Whether the regulatory action taken by FHFA and Treasury when executing the Third Amendment "promote[s] the common good" or advances a public purpose, however, is in dispute. The Supreme Court in *Kelo v. City of New London*, a public use case, reaffirmed that courts should take a deferential stance regarding what constitutes a legitimate public purpose. 545 U.S. 469, 487-88 (2005) ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts."); *see also Hilton Washington Corp. v. D.C.*, 777 F.2d 47, 49-50 (D.C. Cir. 1985) (looking only for a "valid public purpose" when examining *Penn Central*'s "character of the governmental action" factor). The plaintiffs would be hard pressed to argue that actions taken to "benefit taxpayers" do not qualify as a legitimate public purpose. *E.g.*, Class Pls.'s Opp'n at 15. To reach this conclusion with certainty, however, the Court would likely need to permit additional fact-finding. Nevertheless, more discovery is unnecessary because *Penn Central*'s first two factors weigh strongly enough against the plaintiffs' takings claims that dismissal would be proper in this case. *See Monsanto*, 467 U.S. at 1005 ("[T]he force of [the reasonable investment-backed expectations] factor [here] is so overwhelming . . . that it disposes of the taking question. . . .").

4. Claims of an Unconstitutional Taking of Liquidation Rights Are Not Ripe

Moreover, the Court would also dismiss the class plaintiffs' takings claims, at least in relation to liquidation preference rights, on ripeness grounds. As mentioned above, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. at 300 (internal quotation marks and citation omitted). Liquidation preferences only entitle a preferred stockholder to payment in the event of liquidation. Consistent with the Court's reasoning discussed *supra*, Section III(C)(1), the government cannot take a property right that has not yet matured. This Court's findings concerning cognizable property interests aside, a claim of an unconstitutional taking of liquidation preference rights may only be brought once a liquidation process has commenced.[58]

IV. CONCLUSION

It is understandable for the Third Amendment, which sweeps nearly all GSE profits to Treasury, to raise eyebrows, or even engender a feeling of discomfort. But any sense of unease over the defendants' conduct is not enough to overcome the plain meaning of HERA's text. Here, the plaintiffs' true gripe is with the

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[58] Regarding another possible basis for dismissal, the Court appreciates the logical appeal of FHFA's comparison of the *Omnia* Court's finding that consequential – rather than direct – injuries to a third party do not entitle that third party to a takings remedy and the alleged injury caused to the plaintiffs here by the Third Amendment agreement between FHFA and Treasury. FHFA Mot. at 62-63; FHFA Reply at 40-45 (citing *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923)); *but see* Class Pls.'s Opp'n at 70-72. However, the Court is wary of applying to the present facts a decision that came just five months after the concept of a regulatory taking was born, *see Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and many decades before the Supreme Court began actively developing its regulatory takings jurisprudence. *See Lingle*, 544 U.S. at 536-40 (outlining the evolution of regulatory takings case law since the Supreme Court's *Penn Central* decision in 1978).

The Court need not address whether the class plaintiffs' takings claims are further barred because FHFA is not the United States for takings purposes, FHFA Mot. at 59-60, or because Treasury entered into the Third Amendment as a "market participant," Treasury Mot. at 64-65. Such additional arguments are unnecessary to consider in order to resolve the takings issue at the motion to dismiss stage.

language of a statute that enabled FHFA and, consequently, Treasury, to take unprecedented steps to salvage the largest players in the mortgage finance industry before their looming collapse triggered a systemic panic. Indeed, the plaintiffs' grievance is really with Congress itself. It was Congress, after all, that parted the legal seas so that FHFA and Treasury could effectively do whatever they thought was needed to stabilize and, if necessary, liquidate, the GSEs. Recognizing its role in the constitutional system, this Court does not seek to evaluate the merits of whether the Third Amendment is sound financial – or even moral – policy. The Court does, however, find that HERA's unambiguous statutory provisions, coupled with the unequivocal language of the plaintiffs' original GSE stock certificates, compels the dismissal of all of the plaintiffs' claims.

Thus, for the foregoing reasons, the Court GRANTS the defendants' motions to dismiss and DENIES the individual plaintiffs' cross-motion for summary judgment.

A separate Order consistent with this Memorandum Opinion shall issue this date.

9-30-14 /s/ Royce C. Lamberth
Date ROYCE C. LAMBERTH
United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5243 **September Term, 2016**

1:13-cv-01025-RCL
1:13-cv-01053-RCL
1:13-cv-01439-RCL
1:13-mc-01288-RCL

Filed On: July 17, 2017

Perry Capital LLC, for and on behalf of investment funds for which it acts as investment manager,

Appellant

v.

Steven T. Mnuchin, in his official capacity as the Secretary of the Department of the Treasury, et al.,

Appellees

Consolidated with 14-5254, 14-5260, 14-5262

BEFORE: Brown and Millett, Circuit Judges; Ginsburg, Senior Circuit Judge

ORDER

Upon consideration of the petitions of Fairholme and Arrowood Plaintiffs and the Class Plaintiffs for panel rehearing, the responses thereto, the motion of the Class Plaintiffs for leave to file a reply to FHFA's response to their petition for panel rehearing and the lodged reply, it is

ORDERED that the motion for leave to file a reply be denied. The Clerk is directed to note the docket accordingly. It is

FURTHER ORDERED that the petitions be granted and the opinion issued February 21, 2017 be amended, both as set forth in the opinion issued this date. The amendments in *Perry Capital LLC v. Mnuchin,* 848 F.3d 1072 (D.C. Cir. 2017), are as follows:

(1) 848 F.3d at 1097-98: In the first paragraph following the section "IV. The Class Plaintiffs' Claims", delete:

> in district court (in addition to their APA claims), but they did not preserve their appeal against the dismissal of those claims: They did not raise in their opening brief their claims for breach of contract. The Fairholme plaintiffs also forfeited their claim for breach of fiduciary duty against the FHFA by failing to raise in their opening brief the district court's alternative holding that the "claim is derivative . . . and, therefore, barred under § 4617(b)(2)(A)(i)," *Perry Capital LLC,* 70 F. Supp. 3d at 229 n.24. *See Jankovic v. Int'l Crisis Grp.,* 494 F.3d 1080, 1086 (D.C. Cir. 2007).

In lieu thereof, insert:

(in addition to their APA claims) in district court. Because they neither made their arguments for breach of contract and breach of the implied covenant of good faith and fair dealing in their opening brief nor incorporated those arguments by reference to the class plaintiffs' brief, they did not properly preserve their appeal against the dismissal of those claims. In view, however, of the unusual circumstances presented by the separate briefing for the consolidated cases that we required in this case, we shall exercise our discretion under Federal Rule of Appellate Procedure 2 to permit appeal of the order dismissing those claims as if their arguments had been properly preserved. Therefore, subsequent references to the class plaintiffs are also applicable to the Arrowood and Fairholme plaintiffs insofar as they concern claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

The Fairholme plaintiffs also forfeited their claim for breach of fiduciary duty against the FHFA by failing to raise in their opening brief the district court's alternative holding that the "claim is derivative . . . and, therefore, barred under § 4617(b)(2)(A)(i)," *Perry Capital LLC,* 70 F. Supp. 3d at 229 n.24. *See Jankovic v. Int'l Crisis Grp.,* 494 F.3d 1080, 1086 (D.C. Cir. 2007). We see no reason to relieve them of the consequences of this forfeiture.

(2) 848 F.3d at 1111: In the paragraph beginning "Under Delaware law" delete:

> What is arbitrary or unreasonable depends upon "the parties' reasonable expectations at the time of contracting." *Nemec,* 991 A.2d at 1126; *see also Gerber,* 67 A.3d at 419.

(3) 848 F.3d at 1111-12: Delete the paragraph beginning "We remand this claim", and in lieu thereof, insert:

> We remand this claim, insofar as it seeks damages, for the district court to evaluate it under the correct legal standard, namely, whether the Third Amendment violated the reasonable expectations of the parties. We note that the class plaintiffs specifically allege that some class members purchased their shares before the Recovery Act was enacted in July 2008 and the FHFA was appointed conservator the following September, while others purchased their shares later, but the class plaintiffs define their class action to include more broadly "all persons and entities who held shares . . . and who were damaged thereby," J.A. 262-63. The district court may need to redefine or subdivide the class depending upon what that court determines were the various plaintiffs' reasonable expectations. If the district court determines the enactment of the Recovery Act and the FHFA's appointment as conservator affected these expectations, then it should consider, *inter alia,* (1) Section 4617(b)(2)(J)(ii) (authorizing the

> FHFA to act "in the best interests of the [Companies] or the Agency"), (2) Provision 5.1 of the Stock Agreements, J.A. 2451, 2465 (permitting the Companies to declare dividends and make other distributions only with Treasury's consent), and (3) pertinent statements by the FHFA, *e.g.,* J.A. 217 ¶ 8, referencing *Statement of FHFA Director James B. Lockhart at News Conference Announcing Conservatorship of Fannie Mae and Freddie Mac* (Sept. 7, 2008) (The "FHFA has placed Fannie Mae and Freddie Mac into conservatorship. [Conservatorship] is a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations. FHFA will act as the conservator to operate the Enterprises until they are stabilized.").

(4) 848 F.3d at 1114: Delete the paragraph in section "V. Conclusion", and in lieu thereof, insert:

> We affirm the judgment of the district court denying the institutional plaintiffs' claims against the FHFA and Treasury alleging arbitrary and capricious conduct and conduct in excess of their statutory authority because those claims are barred by 12 U.S.C. § 4617(f). With respect to the class plaintiffs' claims and those of the Arrowood and Fairholme plaintiffs, we affirm the judgment of the district court except for the claims alleging breach of contract and breach of the implied covenant of good faith and fair dealing regarding liquidation preferences and the claim for breach of the implied covenant with respect to dividend

> rights, which claims we remand to the district court for further proceedings consistent with this opinion.

The Clerk is directed to issue the mandate seven days after the issuance of this order. *See* Fed. R. App. P. 41; D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5243 **September Term, 2016**
FILED ON: FEBRUARY 21, 2017

PERRY CAPITAL LLC, FOR AND ON BEHALF OF INVESTMENT FUNDS FOR WHICH IT ACTS AS INVESTMENT MANAGER,

APPELLANT

V.

STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE DEPARTMENT OF THE TREASURY, ET AL.,

APPELLEES

Consolidated with 14-5254, 14-5260, 14-5262

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cv-01025)
(No. 1:13-cv-01053)
(No. 1:13-cv-01439)
(No. 1:13-cv-01288)

Before: BROWN and MILLETT, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge.*

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court be affirmed in part and the claims be remanded in part, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: February 21, 2017

Opinion for the court filed by Circuit Judge Millett and Senior Circuit Judge Ginsburg.

Dissenting opinion filed by Circuit Judge Brown.

12 U.S.C. § 1455

. . . .

(*l*) Temporary authority of Treasury to purchase obligations and securities; conditions

(1) Authority to purchase

(A) General authority

In addition to the authority under subsection (c) of this section, the Secretary of the Treasury is authorized to purchase any obligations and other securities issued by the Corporation under any section of this chapter, on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine. Nothing in this subsection requires the Corporation to issue obligations or securities to the Secretary without mutual agreement between the Secretary and the Corporation. Nothing in this subsection permits or authorizes the Secretary, without the agreement of the Corporation, to engage in open market purchases of the common securities of the Corporation.

(B) Emergency determination required

In connection with any use of this authority, the Secretary must determine that such actions are necessary to-

(i) provide stability to the financial markets;

(ii) prevent disruptions in the availability of mortgage finance; and

(iii) protect the taxpayer.

(C) Considerations

To protect the taxpayers, the Secretary of the Treasury shall take into consideration the following in connection with exercising the authority contained in this paragraph:

(i) The need for preferences or priorities regarding payments to the Government.

(ii) Limits on maturity or disposition of obligations or securities to be purchased.

(iii) The Corporation's plan for the orderly resumption of private market funding or capital market access.

(iv) The probability of the Corporation fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the Corporation's status as a private shareholder-owned company.

(vi) Restrictions on the use of Corporation resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

. . . .

(2) Rights; sale of obligations and securities

(A) Exercise of rights

The Secretary of the Treasury may, at any time, exercise any rights received in connection with such purchases.

(B) Sale of obligation and securities

The Secretary of the Treasury may, at any time, subject to the terms of the security or otherwise upon terms and conditions and at prices determined by the Secretary, sell any obligation or security acquired by the Secretary under this subsection.

. . . .

(D) Application of sunset to purchased obligations or securities

The authority of the Secretary of the Treasury to hold, exercise any rights received in connection with, or sell, any obligations or securities purchased is not subject to the provisions of paragraph (4).

(3) Funding

For the purpose of the authorities granted in this subsection, the Secretary of the Treasury may use the proceeds of the sale of any securities issued under chapter 31 of Title 31, and the purposes for which securities may be issued under chapter 31 of Title 31 are extended to include such purchases and the exercise of any rights in connection with such purchases. Any funds expended for the purchase of, or modifications to, obligations and securities, or the exercise of any rights received in connection with such purchases under this subsection shall be deemed appropriated at the time of such purchase, modification, or exercise.

(4) Termination of authority

The authority under this subsection (*l*), with the exception of paragraphs (2) and (3) of this subsection, shall expire December 31, 2009.

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12 U.S.C. § 1719

. . . .

(g) Temporary authority of Treasury to purchase obligations and securities; conditions

(1) Authority to purchase

(A) General authority

In addition to the authority [to purchase obligations] under subsection (c) of this section, the Secretary of the Treasury is authorized to purchase any obligations and other securities issued by the corporation under any section of this chapter, on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine. Nothing in this subsection requires the corporation to issue obligations or securities to the Secretary without mutual agreement between the Secretary and the corporation. Nothing in this subsection permits or authorizes the Secretary, without the agreement of the corporation, to engage in open market purchases of the common securities of the corporation.

(B) Emergency determination required

In connection with any use of this authority, the Secretary must determine that such actions are necessary to –

(i) provide stability to the financial markets;

(ii) prevent disruptions in the availability of mortgage finance; and

(iii) protect the taxpayer.

(C) Considerations

To protect the taxpayers, the Secretary of the Treasury shall take into consideration the following in connection with exercising the authority contained in this paragraph:

(i) The need for preferences or priorities regarding payments to the Government.

(ii) Limits on maturity or disposition of obligations or securities to be purchased.

(iii) The corporation's plan for the orderly resumption of private market funding or capital market access.

(iv) The probability of the corporation fulfilling the terms of any such obligation or other security, including repayment.

(v) The need to maintain the corporation's status as a private shareholder-owned company.

(vi) Restrictions on the use of corporation resources, including limitations on the payment of dividends and executive compensation and any such other terms and conditions as appropriate for those purposes.

. . . .

(2) Rights; sale of obligations and securities

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The Secretary of the Treasury may, at any time, exercise any rights received in connection with such purchases.

(B) Sale of obligation and securities

The Secretary of the Treasury may, at any time, subject to the terms of the security or otherwise upon terms and conditions and at prices determined by the Secretary, sell any obligation or security acquired by the Secretary under this subsection.

. . . .

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The authority of the Secretary of the Treasury to hold, exercise any rights received in connection with, or sell, any obligations or securities purchased is not subject to the provisions of paragraph (4).

(3) Funding

For the purpose of the authorities granted in this subsection, the Secretary of the Treasury may use the proceeds of the sale of any securities issued under chapter 31 of Title 31, and the purposes for which securities may be issued under chapter 31 of Title 31 are extended to include such purchases and the exercise of any rights in connection with such purchases. Any funds expended for the purchase of, or modifications to, obligations and securities, or the exercise of any rights received in connection with such purchases under this subsection shall be deemed appropriated at the time of such purchase, modification, or exercise.

(4) Termination of authority

The authority under this subsection (g), with the exception of paragraphs (2) and (3) of this subsection, shall expire December 31, 2009.

---

12 U.S.C. § 1821

. . . .

(d) Powers and duties of Corporation as conservator or receiver

. . . .

(2) General powers

(A) Successor to institution

The Corporation shall, as conservator or receiver, and by operation of law, succeed to –

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

(B) Operate the institution

The Corporation may (subject to the provisions of section 1831q of this title), as conservator or receiver –

(i) take over the assets of and operate the insured depository institution with all the powers of the members or shareholders, the directors, and the officers of the institution and conduct all business of the institution;

(ii) collect all obligations and money due the institution;

(iii) perform all functions of the institution in the name of the institution which are consistent with the appointment as conservator or receiver; and

(iv) preserve and conserve the assets and property of such institution.

. . . .

(D) Powers as conservator

The Corporation may, as conservator, take such action as may be –

(i) necessary to put the insured depository institution in a sound and solvent condition; and

(ii) appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution.

(E) Additional powers as receiver

The Corporation may (subject to the provisions of section 1831q of this title), as receiver, place the insured depository institution in liquidation and proceed to realize upon the assets of the institution, having due regard to the conditions of credit in the locality.

. . . .

(J) Incidental powers

The Corporation may, as conservator or receiver –

(i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this chapter and such incidental powers as shall be necessary to carry out such powers; and

(ii) take any action authorized by this chapter, which the Corporation determines is in the best interests of the depository institution, its depositors, or the Corporation.

. . . .

(j) Limitation on court action

Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

12 U.S.C. § 4617

(a) Appointment of the Agency as conservator or receiver

. . . .

(2) Discretionary appointment

The Agency may, at the discretion of the Director, be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity.

. . . .

(4) Mandatory receivership

(A) In general

The Director shall appoint the Agency as receiver for a regulated entity if the Director determines, in writing, that –

(i) the assets of the regulated entity are, and during the preceding 60 calendar days have been, less than the obligations of the regulated entity to its creditors and others; or

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

. . . .

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

. . . .

(2) General powers

(A) Successor to regulated entity

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

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

(B) Operate the regulated entity

The Agency may, as conservator or receiver –

(i) take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct all business of the regulated entity;

(ii) collect all obligations and money due the regulated entity;

(iii) perform all functions of the regulated entity in the name of the regulated entity which are consistent with the appointment as conservator or receiver;

(iv) preserve and conserve the assets and property of the regulated entity; and

(v) provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver.

. . . .

(D) Powers as conservator

The Agency may, as conservator, take such action as may be –

(i) necessary to put the regulated entity in a sound and solvent condition; and

(ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.

(E) Additional powers as receiver

In any case in which the Agency is acting as receiver, the Agency shall place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity in such manner as the Agency deems appropriate, including through the sale of assets, the transfer of assets to a limited-life regulated entity established under subsection (i), or the exercise of any other rights or privileges granted to the Agency under this paragraph.

. . . .

(G) Transfer or sale of assets and liabilities

The Agency may, as conservator or receiver, transfer or sell any asset or liability of the regulated entity in default, and may do so without any approval, assignment, or consent with respect to such transfer or sale

. . . .

(J) Incidental powers

The Agency may, as conservator or receiver –

(i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this section, and such incidental powers as shall be necessary to carry out such powers; and

(ii) take any action authorized by this section, which the Agency determines is in the best interests of the regulated entity or the Agency.

. . . .

(3) Authority of receiver to determine claims

. . . .

(B) Notice requirements

The receiver, in any case involving the liquidation or winding up of the affairs of a closed regulated entity, shall –

(i) promptly publish a notice to the creditors of the regulated entity to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the date of publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the date of publication under clause (i).

. . . .

(11) Additional rights and duties

. . . .

(E) Disposition of assets

In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets of a regulated entity for which the Agency has been appointed conservator or receiver, the Agency shall conduct its operations in a manner which –

(i) maximizes the net present value return from the sale or disposition of such assets;

(ii) minimizes the amount of any loss realized in the resolution of cases; and

(iii) ensures adequate competition and fair and consistent treatment of offerors.

. . . .

(c) Priority of expenses and unsecured claims

(1) In general

Unsecured claims against a regulated entity, or the receiver therefor, that are proven to the satisfaction of the receiver shall have priority in the following order:

(A) Administrative expenses of the receiver.

(B) Any other general or senior liability of the regulated entity (which is not a liability described under subparagraph (C) or (D).

(C) Any obligation subordinated to general creditors (which is not an obligation described under subparagraph (D)).

(D) Any obligation to shareholders or members arising as a result of their status as shareholder or members

. . . .

(f) Limitation on court action

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

. . . .

(k) Prohibition of charter revocation

In no case may the receiver appointed pursuant to this section revoke, annul, or terminate the charter of an enterprise.

FEDERAL HOUSING FINANCE AGENCY

[LOGO] [LOGO]

STATEMENT

Contact: Corinne Russell (202) 414-6921
Stefanie Mullin (202) 414-6376

For Immediate Release
September 7, 2008

STATEMENT OF FHFA DIRECTOR JAMES B. LOCKHART

Good Morning

Fannie Mae and Freddie Mac share the critical mission of providing stability and liquidity to the housing market. Between them, the Enterprises have $5.4 trillion of guaranteed mortgage-backed securities (MBS) and debt outstanding, which is equal to the publicly held debt of the United States. Their market share of all new mortgages reached over 80 percent earlier this year, but it is now falling. During the turmoil last year, they played a very important role in providing liquidity to the conforming mortgage market. That has required a very careful and delicate balance of mission and safety and soundness. A key component of this balance has been their ability to raise and maintain capital. Given recent market conditions, the balance has been lost. Unfortunately, as house prices, earnings and capital have continued to deteriorate, their ability to fulfill their mission has deteriorated. In particular, the capacity of their capital to absorb further losses while supporting new business activity is in doubt.

Today's action addresses safety and soundness concerns. FHFA's rating system is called GSE Enterprise Risk or G-Seer. It stands for Governance, Solvency, Earnings and Enterprise Risk which includes credit, market and operational risk. There are pervasive weaknesses across the board, which have been getting worse in this market.

Over the last three years OFHEO, and now FHFA, have worked hard to encourage the Enterprises to rectify their accounting, systems, controls and risk management issues. They have made good progress in many areas, but market conditions have overwhelmed that progress.

The result has been that they have been unable to provide needed stability to the market. They also find themselves unable to meet their affordable housing mission. Rather than letting these conditions fester and worsen and put our markets in jeopardy, FHFA, after painstaking review, has decided to take action now.

Key events over the past six months have demonstrated the increasing challenge faced by the companies in striving to balance mission and safety and soundness, and the ultimate disruption of that balance that led to today's announcements. In the first few months of this year, the secondary market showed significant deterioration, with buyers demanding much higher prices for mortgage backed securities.

In February, in recognition of the remediation progress in financial reporting, we removed the portfolio caps on each company, but they did not have the capital to use that flexibility.

In March, we announced with the Enterprises an initiative to increase mortgage market liquidity and market confidence. We reduced the OFHEO-directed capital requirements in return for their commitments to raise significant capital and to maintain overall capital levels well in excess of requirements.

In April, we released our Annual Report to Congress, identifying each company as a significant supervisory concern and noting, in particular, the deteriorating mortgage credit environment and the risks it posed to the companies.

In May OFHEO lifted its 2006 Consent Order with Fannie Mae after the company completed the terms of that order. Subsequently, Fannie Mae successfully raised $7.4 billion of new capital, but Freddie Mac never completed the capital raise promised in March.

Since then credit conditions in the mortgage market continued to deteriorate, with home prices continuing to decline and mortgage delinquency rates reaching alarming levels. FHFA intensified its reviews of each company's capital planning and capital position, their earnings forecasts and the effect of falling house prices and increasing delinquencies on the credit quality of their mortgage book.

In getting to today, the supervision team has spent countless hours reviewing with each company various forecasts, stress tests, and projections, and has evaluated the performance of their internal models in these analyses. We have had many meetings with each company's management teams, and have had frank exchanges regarding loss projections, asset valuations, and capital adequacy. More recently, we have gone the extra step of inviting the Federal Reserve and the OCC to have some of their senior mortgage credit experts join our team in these assessments.

The conclusions we reach today, while our own, have had the added benefit of their insight and perspective.

After this exhaustive review, I have determined that the companies cannot continue to operate safely and soundly and fulfill their critical public mission, without significant action to address our concerns, which are:

- the safety and soundness issues I mentioned, including current capitalization;
- current market conditions;
- the financial performance and condition of each company;
- the inability of the companies to fund themselves according to normal practices and prices; and

- the critical importance each company has in supporting the residential mortgage market in this country,

Therefore, in order to restore the balance between safety and soundness and mission, FHFA has placed Fannie Mae and Freddie Mac into conservatorship. That is a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations. FHFA will act as the conservator to operate the Enterprises until they are stabilized.

The Boards of both companies consented yesterday to the conservatorship. I appreciate the cooperation we have received from the boards and the management of both Enterprises. These individuals did not create the inherent conflict and flawed business model embedded in the Enterprises' structure. I thank the CEOs for their service in these difficult times.

The goal of these actions is to help restore confidence in Fannie Mae and Freddie Mac, enhance their capacity to fulfill their mission, and mitigate the systemic risk that has contributed directly to the instability in the current market. The lack of confidence has resulted in continuing spread widening of their MBS, which means that virtually none of the large drop in interest rates over the past year has been passed on to the mortgage markets. On top of that, Freddie Mac and Fannie Mae, in order to try to build capital, have continued to raise prices and tighten credit standards.

FHFA has not undertaken this action lightly. We have consulted with the Chairman of the Board of Governors of the Federal Reserve System, Ben Bernanke, who was appointed a consultant to FHFA under the new legislation. We have also consulted with the Secretary of the Treasury, not only as an FHFA Oversight Board member, but also in his duties under the law to provide financing to the GSEs. They both concurred with me that conservatorship needed to be undertaken now.

There are several key components of this conservatorship:

First, Monday morning the businesses will open as normal, only with stronger backing for the holders of MBS, senior debt and subordinated debt.

Second, the Enterprises will be allowed to grow their guarantee MBS books without limits and continue to purchase replacement securities for their portfolios, about $20 billion per month without capital constraints.

Third, as the conservator, FHFA will assume the power of the Board and management.

Fourth, the present CEOs will be leaving, but we have asked them to stay on to help with the transition.

Fifth, I am announcing today I have selected Herb Allison to be the new CEO of Fannie Mae and David Moffett the CEO of Freddie Mac. Herb has been the Vice Chairman of Merrill Lynch and for the last eight years chairman of TIAA-CREF. David was the Vice Chairman and CFO of US Bancorp. I appreciate the willingness of these two men to take on these tough jobs during these challenging times. Their compensation will be significantly lower than the outgoing CEOs. They will be joined by equally strong non-executive chairmen.

Sixth, at this time any other management action will be very limited. In fact, the new CEOs have agreed with me that it is very important to work with the current management teams and employees to encourage them to stay and to continue to make important improvements to the Enterprises.

Seventh, in order to conserve over $2 billion in capital every year, the common stock and preferred stock dividends will be eliminated, but the common and all preferred stocks will continue to remain outstanding. Subordinated debt interest and principal payments will continue to be made.

Eighth, all political activities – including all lobbying – will be halted immediately. We will review the charitable activities.

Lastly and very importantly, there will be the financing and investing relationship with the U.S. Treasury, which Secretary Paulson will be discussing. We believe that these facilities will provide the critically needed support to Freddie Mac and Fannie Mae and importantly the liquidity of the mortgage market.

One of the three facilities he will be mentioning is a secured liquidity facility which will be not only for Fannie Mae and Freddie Mac, but also for the 12 Federal Home Loan Banks that FHFA also regulates. The Federal Home Loan Banks have performed remarkably well over the last year as they have a different business model than Fannie Mae and Freddie Mac and a different capital structure that grows as their lending activity grows. They are joint and severally liable for the Bank System's debt obligations and all but one of the 12 are profitable. Therefore, it is very unlikely that they will use the facility.

During the conservatorship period, FHFA will continue to work expeditiously on the many regulations needed to implement the new law. Some of the key regulations will be minimum capital standards, prudential safety and soundness standards and portfolio limits. It is critical to complete these regulations so that any new investor will understand the investment proposition.

This decision was a tough one for the FHFA team as they have worked so hard to help the Enterprises remain strong suppliers of support to the secondary mortgage markets. Unfortunately, the antiquated capital requirements and the turmoil in housing markets over-whelmed all the good and hard work put in by the FHFA teams and the Enterprises' managers and employees. Conservatorship will give the Enterprises the time to restore the balances between safety and soundness and provide affordable housing and stability and liquidity to the mortgage markets. I want to thank the

FHFA employees for their work during this intense regulatory process. They represent the best in public service. I would also like to thank the employees of Fannie Mae and Freddie Mac for all their hard work. Working together we can finish the job of restoring confidence in the Enterprises and with the new legislation build a stronger and safer future for the mortgage markets, homeowners and renters in America.

Thank you and I will now turn it back to Secretary Paulson.

FEDERAL HOUSING FINANCE AGENCY

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FACT SHEET

Contact: Corinne Russell (202) 414-6921
Stefanie Mullin (202) 414-6376

QUESTIONS AND ANSWERS ON CONSERVATORSHIP

Q: What is a conservatorship?

A: A conservatorship is the legal process in which a person or entity is appointed to establish control and oversight of a Company to put it in a sound and solvent condition. In a conservatorship, the powers of the Company's directors, officers, and shareholders are transferred to the designated Conservator.

Q: What is a Conservator?

A: A Conservator is the person or entity appointed to oversee the affairs of a Company for the purpose of bringing the Company back to financial health.

In this instance, the Federal Housing Finance Agency ("FHFA") has been appointed by its Director to be the Conservator of the Company in accordance with the Federal Housing Finance Regulatory Reform Act of 2008 (Public Law 110-289) and the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501, et seq., as amended) to keep the Company in a safe and solvent financial condition.

Q: How is a Conservator appointed?

A: By statute, the FHFA is appointed Conservator by its Director after the Director determines, in his discretion, that the Company is in need of reorganization or rehabilitation of its affairs.

Q: What are the goals of this conservatorship?

A: The purpose of appointing the Conservator is to preserve and conserve the Company's assets and property and to put the Company in a sound and solvent condition. The goals of the conservatorship are to help restore confidence in the Company, enhance its capacity to fulfill its mission, and mitigate the systemic risk that has contributed directly to the instability in the current market.

There is no reason for concern regarding the ongoing operations of the Company. The Company's operation will not be impaired and business will continue without interruption.

Q: When will the conservatorship period end?

A: Upon the Director's determination that the Conservator's plan to restore the Company to a safe and solvent condition has been completed successfully, the Director will issue an order terminating the conservatorship. At present, there is no exact time frame that can be given as to when this conservatorship may end.

Q: What are the powers of the Conservator?

A: The FHFA, as Conservator, may take all actions necessary and appropriate to (1) put the Company in a sound and solvent condition and (2) carry on the Company's business and preserve and conserve the assets and property of the Company.

Q: What happens upon appointment of a Conservator?

A: Once an "Order Appointing a Conservator" is signed by the Director of FHFA, the Conservator immediately succeeds to the (1) rights, titles, powers, and privileges of the Company, and any stockholder, officer, or director of such the Company with respect to the Company and its assets, and (2) title to all books, records and assets of the Company held by any other custodian or third-party. The Conservator is then charged with the duty to operate the Company.

Q: What does the Conservator do during a conservatorship?

A: The Conservator controls and directs the operations of the Company. The Conservator may (1) take over the assets of and operate the Company with all the powers of the shareholders, the directors, and the officers of the Company and conduct all business of the Company; (2) collect all obligations and money due to the Company; (3) perform all functions of the Company which are consistent with the Conservator's appointment; (4) preserve and conserve the assets and property of the Company; and (5) contract for assistance in fulfilling any function, activity, action or duty of the Conservator.

Q: How will the Company run during the conservatorship?

A: The Company will continue to run as usual during the conservatorship. The Conservator will delegate authorities to the Company's management to move forward with the business operations. The Conservator encourages all Company employees to continue to perform their job functions without interruption.

Q: Will the Company continue to pays its obligations during the conservatorship?

A: Yes, the Company's obligations will be paid in the normal course of business during the Conservatorship. The Treasury Department, through a secured lending credit facility and a Senior Preferred Stock Purchase Agreement, has significantly enhanced the ability of the Company to meet its obligations. The Conservator does not anticipate that there will be any disruption in the Company's pattern of payments or ongoing business operations.

Q: What happens to the Company's stock during the conservatorship?

A: During the conservatorship, the Company's stock will continue to trade. However, by statute, the powers of the stockholders are suspended until the conservatorship is terminated. Stockholders will continue to retain all rights in the stock's financial worth; as such worth is determined by the market.

Q: Is the Company able to buy and sell investments and complete financial transactions during the conservatorship?

A: Yes, the Company's operations continue subject to the oversight of the Conservator.

Q: What happens if the Company is liquidated?

A: Under a conservatorship, the Company is not liquidated.

Q: Can the Conservator determine to liquidate the Company?

A: The Conservator cannot make a determination to liquidate the Company, although, short of that, the Conservator has the authority to run the company in whatever way will best achieve the Conservator's goals (discussed above). However, assuming a statutory ground exists and the Director of FHFA determines that the financial condition of the company requires it, the Director does have the discretion to place any regulated entity, including the Company, into receivership. Receivership is a statutory process for the liquidation of a regulated entity. There are no plans to liquidate the Company.

Q: Can the Company be dissolved?

A: Although the company can be liquidated as explained above, by statute the charter of the Company must be transferred to a new entity and can only be dissolved by an Act of Congress.

EXECUTION VERSION

SENIOR PREFERRED STOCK PURCHASE AGREEMENT

SENIOR PREFERRED STOCK PURCHASE AGREEMENT (this "*Agreement*") dated as of September 7, 2008, between the UNITED STATES DEPARTMENT OF THE TREASURY ("*Purchase*") and FEDERAL NATIONAL MORTGAGE ASSOCIATION ("*Seller*"), acting through the Federal Housing Finance Agency (the "*Agency*") as its duly appointed conservator (the Agency in such capacity, "*Conservator*"). Reference is made to Article 1 below for the meaning of capitalized terms used herein without definition.

Background

A. The Agency has been duly appointed as Conservator for Seller pursuant to Section 1367(a) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (as amended, the "*FHE Act*"). Conservator has determined that entry into this Agreement is (i) necessary to put Seller in a sound and solvent condition; (ii) appropriate to carry on the business of Seller and preserve and conserve the assets and property of Seller; and (iii) otherwise consistent with its powers, authorities and responsibilities.

B. Purchaser is authorized to purchase obligations and other securities issued by Seller pursuant to Section 304(g) of the Federal National Mortgage Association Charter Act, as amended (the "*Charter Act*"). The Secretary of the Treasury has determined, after taking into consideration the matters set forth in Section 304(g)(1)(C) of the Charter Act, that the purchases contemplated herein are necessary to (i) provide stability to the financial markets; (ii) prevent disruptions in the availability of mortgage finance; and (iii) protect the taxpayer.

THEREFORE, the parties hereto agree as follows:

Terms and Conditions

1. DEFINITIONS

As used in this Agreement, the following terms shall have the meanings set forth below:

"*Affiliate*" means, when used with respect to a specified Person (i) any direct or indirect holder or group (as defined in Sections 13(d) and 14(d) of the Exchange Act) of holders of 10.0% or more of any class of capital stock of such Person and (ii) any current or former director or officer of such Person, or any other current or former employee of such Person that currently exercises or formerly exercised a material degree of Control over such Person, including without limitation each current or former Named Executive Officer of such Person.

"*Available Amount*" means, as of any date of determination, the lesser of (a) the Deficiency Amount as of such date and (b) the Maximum Amount as of such date.

"*Business Day*" means any day other than a Saturday, Sunday or other day on which commercial banks are authorized to close under United States federal law and the law of the State of New York.

"*Capital Lease Obligations*" of any Person shall mean the obligations of such Person to pay rent or other amounts under any lease of (or other similar arrangement conveying the right to use) real or personal property, or a combination thereof, which obligations are required to be classified and accounted for as capital leases on a balance sheet of such Person under GAAP and, for purposes hereof, the amount of such obligations at any time shall be the capitalized amount thereof at such time determined in accordance with GAAP.

"*Control*" shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

"*Deficiency Amount*" means, as of any date of determination, the amount, if any, by which (a) the total liabilities of Seller exceed (b) the total assets of Seller (such assets excluding the Commitment and any unfunded amounts thereof), in each case as reflected on the balance sheet of Seller as of the applicable date set forth in this Agreement, prepared in accordance with GAAP; *provided, however*, that:

(i) for the avoidance of doubt, in measuring the Deficiency Amount liabilities shall exclude any obligation in respect of any capital stock of Seller, including the Senior Preferred Stock contemplated herein;

(ii) in the event that Seller becomes subject to receivership or other liquidation process or proceeding, "Deficiency Amount" shall mean, as of any date of determination, the amount, if any, by which (a) the total allowed claims against the receivership or other applicable estate (excluding any liabilities of or transferred to any LLRE (as defined in Section 5.4(a)) created by a receiver) exceed (b) the total assets of such receivership or other estate (excluding the Commitment, any unfunded amounts thereof and any assets of or transferred to any LLRE, but including the value of the receiver's interest in any LLRE);

(iii) to the extent Conservator or a receiver of Seller, or any statute, rule, regulation or court of competent jurisdiction, specifies or determines that a liability of Seller (including without limitation a claim against Seller arising from rescission of a purchase or sale of a security issued by Seller (or guaranteed by Seller or with respect to which Seller is otherwise liable) or for damages arising from the purchase, sale or retention of such a security) shall be subordinated (other than pursuant to a contract providing for such subordination) to all other liabilities of Seller or shall be treated on par with any class of equity of Seller, then such liability shall be excluded in the calculation of Deficiency Amount; and

(iv) the Deficiency Amount may be increased above the otherwise applicable amount by the mutual written agreement of Purchaser and Seller, each acting in its sole discretion.

"*Designated Representative*" means Conservator or (a) if Conservator has been superseded by a receiver pursuant to Section 1367(a) of the FHE Act, such receiver, or (b) if Seller is not in conservatorship or receivership pursuant to Section 1367(a) of the FHE Act, Seller's chief financial officer.

"*Director*" shall mean the Director of the Agency.

"*Effective Date*" means the date on which this Agreement shall have been executed and delivered by both of the parties hereto.

"*Equity Interests*" of any Person shall mean any and all shares, interests, rights to purchase or otherwise acquire, warrants, options, participations or other equivalents of or interests in (however designated) equity, ownership or profits of such Person, including any preferred stock, any limited or general partnership interest and any limited liability company membership interest, and any securities or other rights or interests convertible into or exchangeable for any of the foregoing.

"*Exchange Act*" means the Securities Exchange Act of 1934, as amended, and the rules and regulations of the SEC promulgated thereunder.

"*GAAP*" means generally accepted accounting principles in effect in the United States as set forth in the opinions and pronouncements of the Accounting Principles Board and the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board from time to time.

"*Indebtedness*" of any Person means, for purposes of Section 5.5 only, without duplication, (a) all obligations of such Person for money borrowed by such Person, (b) all obligations of such Person evidenced by bonds, debentures, notes or similar instruments, (c) all obligations of such Person under conditional sale or other title retention agreements relating to property or assets purchased by such Person, (d) all obligations of such Person issued or assumed as the deferred purchase price of property or services, other than trade accounts payable, (e) all Capital Lease Obligations of such Person, (f) obligations, whether contingent or liquidated, in respect of letters of credit (including standby and commercial), bankers' acceptances and similar instruments and (g) any obligation of such Person, contingent or otherwise, guaranteeing or having the economic effect of guaranteeing any Indebtedness of the types set forth in clauses (a) through (f) payable by another Person other than Mortgage Guarantee Obligations.

"*Liquidation End Date*" means the date of completion of the liquidation of Seller's assets.

"*Maximum Amount*" means, as of any date of determination, $100,000,000,000 (one hundred billion dollars), less the aggregate amount of funding under the Commitment prior to such date.

"*Mortgage Assets*" of any Person means assets of such Person consisting of mortgages, mortgage loans, mortgage-related securities, participation certificates, mortgage-backed commercial paper, obligations of real estate mortgage investment conduits and similar assets, in each case to the extent such assets would appear on the balance sheet of such Person in accordance with GAAP as in effect as of the date hereof (and, for the avoidance of doubt, without giving effect to any change that may be made hereafter in respect of Statement of Financial Accounting Standards No. 140 or any similar accounting standard).

"*Mortgage Guarantee Obligations*" means guarantees, standby commitments, credit enhancements and other similar obligations of Seller, in each case in respect of Mortgage Assets.

"*Named Executive Officer*" has the meaning given to such term in Item 402(a)(3) of Regulation S-K under the Exchange Act, as in effect on the date hereof.

"*Person*" shall mean any individual, corporation, limited liability company, partnership, joint venture, association, joint-stock company, trust, estate, unincorporated organization or government or any agency or political subdivision thereof, or any other entity whatsoever.

"*SEC*" means the Securities and Exchange Commission.

"*Senior Preferred Stock*" means the Variable Liquidation Preference Senior Preferred Stock of Seller, substantially in the form of Exhibit A hereto.

"*Warrant*" means a warrant for the purchase of common stock of Seller representing 79.9% of the common stock of Seller on a fully-diluted basis, substantially in the form of Exhibit B hereto.

2. COMMITMENT

2.1. *Commitment.* Purchaser hereby commits to provide to Seller, on the terms and conditions set forth herein, immediately available funds in an amount up to but not in excess of the Available Amount, as determined from time to time (the "*Commitment*"); *provided*, that in no event shall the aggregate amount funded under the Commitment exceed $100,000,000,000 (one hundred billion dollars). The liquidation preference of the Senior Preferred Stock shall increase in connection with draws on the Commitment, as set forth in Section 3.3 below.

2.2. *Quarterly Draws on Commitment.* Within fifteen (15) Business Days following the determination of the Deficiency Amount, if any, as of the end of each fiscal quarter of Seller which ends on or before the Liquidation End Date, the Designated Representative may, on behalf of Seller, request that Purchaser provide immediately available funds to Seller in an amount up to but not in excess of the Available Amount as of the end of such quarter. Any such request shall be valid only if it is in writing, is timely made, specifies the account of Seller to which such funds are to be transferred, and contains a certification of the Designated Representative that the requested amount does not exceed the Available Amount as of the end of the applicable quarter. Purchaser shall provide such funds within sixty (60) days of its receipt of such request or, following any determination by the Director that the Director will be mandated by law to appoint a receiver for Seller if such funds are not received sooner, such shorter period as may be necessary to avoid such mandatory appointment of a receiver if reasonably practicable taking into consideration Purchaser's access to funds.

2.3. *Accelerated Draws on Commitment.* Immediately following any determination by the Director that the Director will be mandated by law to appoint a receiver for Seller prior to the Liquidation End Date unless Seller's capital is increased by an amount (the "*Special Amount*") up to but not in excess of the then current Available Amount (computed based on a balance sheet of Seller prepared in accordance with GAAP that differs from the most recent balance sheet of Seller delivered in accordance with Section 5.9(a) or (b)) on a date that is prior to the date that funds will be available to Seller pursuant to Section 2.2, Conservator may, on behalf of Seller, request that Purchaser provide to Seller the Special Amount in immediately available funds. Any such request shall be valid only if it is in writing, is timely made, specifies the account of Seller to which such funds are to be transferred, and contains certifications of Conservator that (i) the requested amount does not exceed the Available Amount (including computations in reasonable detail and satisfactory to Purchaser of the then existing Deficiency Amount) and (ii) the requested amount is required to avoid the imminent mandatory appointment of a receiver for Seller. Purchaser shall provide such funds within thirty (30) days of its receipt of such request or, if reasonably practicable taking into consideration Purchaser's access to funds, any shorter period as may be necessary to avoid mandatory appointment of a receiver.

2.4. *Final Draw on Commitment.* Within fifteen (15) Business Days following the determination of the Deficiency Amount, if any, as of the Liquidation End Date (computed based on a balance sheet of Seller as of the Liquidation End Date prepared in accordance with GAAP), the Designated Representative may, on behalf of Seller, request that Purchaser provide immediately available funds to Seller in an amount up to but not in excess of the Available Amount as of the Liquidation End Date. Any such request shall be valid only if it is in writing, is timely made, specifies the account of Seller to which such funds are to be transferred, and contains a certification of the Designated Representative that the requested amount does not exceed the Available Amount (including computations in reasonable detail and satisfactory to Purchaser of the Deficiency Amount as of the Liquidation End Date). Purchaser shall provide such funds within sixty (60) days of its receipt of such request.

2.5. *Termination of Purchaser's Obligations.* Subject to earlier termination pursuant to Section 6.7, all of Purchaser's obligations under and in respect of the Commitment shall terminate upon the earliest of (a) if the Liquidation End Date shall have occurred, (i) the payment in full of Purchaser's obligations with respect to any valid request for funds pursuant to Section 2.4 or (ii) if there is no Deficiency Amount on the Liquidation End Date or if no such request pursuant to Section 2.4 has been made, the close of business on the 15th Business Day following the determination of the Deficiency Amount, if any, as of the Liquidation End Date; (b) the payment in full of, defeasance of or other reasonable provision for all liabilities of Seller, whether or not contingent, including payment of any amounts that may become payable on, or expiry of or other provision for, all Mortgage Guarantee Obligations and provision for unmatured debts; and (c) the funding by Purchaser under the Commitment of an aggregate of $100,000,000,000 (one hundred billion dollars). For the avoidance of doubt, the Commitment shall *not* be terminable by Purchaser solely by reason of (i) the conservatorship, receivership or other insolvency proceeding of Seller or (ii) the Seller's financial condition or any adverse change in Seller's financial condition.

3. PURCHASE OF SENIOR PREFERRED STOCK AND WARRANT; FEES

3.1. *Initial Commitment Fee.* In consideration of the Commitment, and for no additional consideration, on the Effective Date (or as soon thereafter as is practicable) Seller shall sell and issue to Purchaser, and Purchaser shall purchase from Seller, (a) one million (1,000,000) shares of Senior Preferred Stock, with an initial liquidation preference equal to $1,000 per share ($1,000,000,000 (one billion dollars) liquidation preference in the aggregate), and (b) the Warrant.

3.2. *Periodic Commitment Fee.* (a) Commencing March 31, 2010, Seller shall pay to Purchaser quarterly, on the last day of March, June, September and December of each calendar year (each a "*Periodic Fee Date*"), a periodic commitment fee (the "*Periodic Commitment* Fee"). The Periodic Commitment Fee shall accrue from January 1, 2010.

(b) The Periodic Commitment Fee is intended to fully compensate Purchaser for the support provided by the ongoing Commitment following December 31, 2009. The amount of the Periodic Commitment Fee shall be set not later than December 31, 2009 with respect to the ensuing five-year period, shall be reset every five years thereafter and shall be determined with reference to the market value of the Commitment as then in effect. The amount of the Periodic Commitment Fee shall be mutually agreed by Purchaser and Seller, subject to their reasonable discretion and in consultation with the Chairman of the Federal Reserve; *provided*, that Purchaser may waive the Periodic Commitment Fee for up to one year at a time, in its sole discretion, based on adverse conditions in the United States mortgage market.

(c) At the election of Seller, the Periodic Commitment Fee may be paid in cash or by adding the amount thereof ratably to the liquidation preference of each outstanding share of Senior Preferred Stock so that the aggregate liquidation preference of all such outstanding shares of Senior Preferred Stock is increased by an amount equal to the Periodic Commitment Fee. Seller shall deliver notice of such election not later than three (3) Business Days prior to each Periodic Fee Date. If the Periodic Commitment Fee is not paid in cash by 12:00 pm (New York time) on the applicable Periodic Fee Date (irrespective of Seller's election pursuant to this subsection), Seller shall be deemed to have elected to pay the Periodic Commitment Fee by adding the amount thereof to the liquidation preference of the Senior Preferred Stock, and the aggregate liquidation preference of the outstanding shares of Senior Preferred Stock shall thereupon be automatically increased, in the manner contemplated by the first sentence of this section, by an aggregate amount equal to the Periodic Commitment Fee then due.

3.3. *Increases of Senior Preferred Stock Liquidation Preference as a Result of Funding under the Commitment.* The aggregate liquidation preference of the outstanding shares of Senior Preferred Stock shall be automatically increased by an amount equal to the amount of each draw on the Commitment pursuant to Article 2 that is funded by Purchaser to Seller, such increase to occur simultaneously with such funding and ratably with respect to each share of Senior Preferred Stock.

3.4. *Notation of Increase in Liquidation Preference.* Seller shall duly mark its records to reflect each increase in the liquidation preference of the Senior Preferred Stock contemplated herein (but, for the avoidance of doubt, such increase shall be effective regardless of whether Seller has properly marked its records).

4. REPRESENTATIONS

Seller represents and warrants as of the Effective Date, and shall be deemed to have represented and warranted as of the date of each request for and funding of an advance under the Commitment pursuant to Article 2, as follows:

4.1. *Organization and Good Standing.* Seller is a corporation, chartered by the Congress of the United States, duly organized, validly existing and in good standing under the laws of the United States and has all corporate power and authority to carry on its business as now conducted and as proposed to be conducted.

4.2. *Organizational Documents.* Seller has made available to Purchaser a complete and correct copy of its charter and bylaws, each as amended to date (the "*Organizational Documents*"). The Organizational Documents are in full force and effect. Seller is not in violation of any provision of its Organizational Documents.

4.3. *Authorization and Enforceability.* All corporate or other action on the part of Seller or Conservator necessary for the authorization, execution, delivery and performance of this Agreement by Seller and for the authorization, issuance and delivery of the Senior Preferred Stock and the Warrant being purchased under this Agreement, has been taken. This Agreement has been duly and validly executed and delivered by Seller and (assuming due authorization, execution and delivery by the Purchaser) shall constitute the valid and legally binding obligation of Seller, enforceable against Seller in accordance with its terms, except to the extent the enforceability thereof may be limited by bankruptcy laws, insolvency laws, reorganization laws, moratorium laws or other laws of general applicability affecting creditors' rights generally or by general equitable principles (regardless of whether enforcement is sought in a proceeding in equity or at law). The Agency is acting as conservator for Seller under Section 1367 of the FHE Act. The Board of Directors of Seller, by valid action at a duly called meeting of the Board of Directors on September 6, 2008, consented to the appointment of the Agency as conservator for purposes of Section 1367(a)(3)(1) of the FHE Act, and the Director of the Agency has appointed the Agency as Conservator for Seller pursuant to Section 1367(a)(1) of the FHE Act, and each such action has not been rescinded, revoked or modified in any respect.

4.4. *Valid Issuance.* When issued in accordance with the terms of this Agreement, the Senior Preferred Stock and the Warrant will be duly authorized, validly issued, fully paid and non-assessable, free and clear of all liens and preemptive rights. The shares of common stock to which the holder of the Warrant is entitled have been duly and validly reserved for issuance. When issued and delivered in accordance with the terms of this Agreement and the Warrant, such shares will be duly authorized, validly issued, fully paid and nonassessable, free and clear of all liens and preemptive rights.

4.5. *Non-Contravention.*

(a) The execution, delivery or performance by Seller of this Agreement and the consummation by Seller of the transactions contemplated hereby do not and will not (i) conflict with or violate any provision of the Organizational Documents of Seller; (ii) conflict with or violate any law, decree or regulation applicable to Seller or by which any property or asset of Seller is bound or affected, or (iii) result in any breach of, or constitute a default (with or without notice or lapse of time, or both) under, or give to others any right of termination, amendment, acceleration or cancellation of, or result in the creation of a lien upon any of the properties or assets of Seller, pursuant to any note, bond, mortgage, indenture or credit agreement, or any other contract, agreement, lease, license, permit, franchise or other instrument or obligation to which Seller is a party or by which Seller is bound or affected, other than, in the case of clause (iii), any such breach, default, termination, amendment, acceleration, cancellation or lien that would not have and would not reasonably be expected to have, individually or in the aggregate, a material adverse effect on the business, property, operations or condition of the Seller, the authority of the Conservator or the validity or enforceability of this Agreement (a "*Material Adverse Effect*").

(b) The execution and delivery of this Agreement by Seller does not, and the consummation by Seller of the transactions contemplated by this Agreement will not, require any consent, approval, authorization, waiver or permit of, or filing with or notification to, any governmental authority or any other person, except for such as have already been obtained.

5. COVENANTS

From the Effective Date until such time as the Senior Preferred Stock shall have been repaid or redeemed in full in accordance with its terms:

5.1. *Restricted Payments.* Seller shall not, and shall not permit any of its subsidiaries to, in each case without the prior written consent of Purchaser, declare or pay any dividend (preferred or otherwise) or make any other distribution (by reduction of capital or otherwise), whether in cash, property, securities or a combination thereof, with respect to any of Seller's Equity Interests (other than with respect to the Senior Preferred Stock or the Warrant) or directly or indirectly redeem, purchase, retire or otherwise acquire for value any of Seller's Equity Interests (other than the Senior Preferred Stock or the Warrant), or set aside any amount for any such purpose.

5.2. *Issuance of Capital Stock*. Seller shall not, and shall not permit any of its subsidiaries to, in each case without the prior written consent of Purchaser, sell or issue Equity Interests of Seller or any of its subsidiaries of any kind or nature, in any amount, other than the sale and issuance of the Senior Preferred Stock and Warrant on the Effective Date and the common stock subject to the Warrant upon exercise thereof, and other than as required by (and pursuant to) the terms of any binding agreement as in effect on the date hereof.

5.3. *Conservatorship*. Seller shall not (and Conservator, by its signature below, agrees that it shall not), without the prior written consent of Purchaser, terminate, seek termination of or permit to be terminated the conservatorship of Seller pursuant to Section 1367 of the FHE Act, other than in connection with a receivership pursuant to Section 1367 of the FHE Act.

5.4. *Transfer of Assets*. Seller shall not, and shall not permit any of its subsidiaries to, in each case without the prior written consent of Purchaser, sell, transfer, lease or otherwise dispose of (in one transaction or a series of related transactions) all or any portion of its assets (including Equity Interests in other persons, including subsidiaries), whether now owned or hereafter acquired (any such sale, transfer, lease or disposition, a "*Disposition*"), other than Dispositions for fair market value:

(a) to a limited life regulated entity ("*LLRE*") pursuant to Section 1367(i) of the FHE Act;

(b) of assets and properties in the ordinary course of business, consistent with past practice;

(c) in connection with a liquidation of Seller by a receiver appointed pursuant to Section 1367(a) of the FHE Act;

(d) of cash or cash equivalents for cash or cash equivalents; or

(e) to the extent necessary to comply with the covenant set forth in Section 5.7 below.

5.5. *Indebtedness.* Seller shall not, and shall not permit any of its subsidiaries to, in each case without the prior written consent of Purchaser, incur, assume or otherwise become liable for (a) any Indebtedness if, after giving effect to the incurrence thereof, the aggregate Indebtedness of Seller and its subsidiaries on a consolidated basis would exceed 110.0% of the aggregate Indebtedness of Seller and its subsidiaries on a consolidated basis as of June 30, 2008 or (b) any Indebtedness if such Indebtedness is subordinated by its terms to any other Indebtedness of Seller or the applicable subsidiary. For purposes of this covenant the acquisition of a subsidiary with Indebtedness will be deemed to be the incurrence of such Indebtedness at the time of such acquisition.

5.6. *Fundamental Changes.* Seller shall not, and shall not permit any of its subsidiaries to, in each case without the prior written consent of Purchaser,

(i) merge into or consolidate or amalgamate with any other Person, or permit any other Person to merge into **or** consolidate or amalgamate with it, (ii) effect a reorganization or recapitalization involving the common stock of Seller, a reclassification of the common stock of Seller or similar corporate transaction or event or (iii) purchase, lease or otherwise acquire (in one transaction or a series of transactions) all or substantially all of the assets of any other Person or any division, unit or business of any Person.

5.7. *Mortgage Assets.* Seller shall not own, as of any applicable date, Mortgage Assets in excess of (i) on December 31, 2009, $850 billion, or (ii) on December 31 of each year thereafter, 90.0% of the aggregate amount of Mortgage Assets of Seller as of December 31 of the immediately preceding calendar year; *provided*, that in no event shall Seller be required under this Section 5.7 to own less than $250 billion in Mortgage Assets,

5.8. *Transactions with Affiliates.* Seller shall not, and shall not permit any of its subsidiaries to, without the prior written consent of Purchaser, engage in any transaction of any kind or nature with an Affiliate of Seller unless such transaction is (i) pursuant to this Agreement, the Senior Preferred Stock or the Warrant, (ii) upon terms no less favorable to Seller than would be obtained in a comparable arm's-length transaction with a Person that is not an Affiliate of Seller or (iii) a transaction undertaken in the ordinary course or pursuant to a contractual obligation or customary employment arrangement in existence as of the date hereof.

5.9. *Reporting.* Seller shall provide to Purchaser:

(a) not later than the time period specified in the SEC's rules and regulations with respect to issuers as to which Section 13 and 15(d) of the Exchange Act apply, annual reports on Form 10-K (or any successor or comparable form) containing the information required to be contained therein (or required in such successor or comparable form);

(b) not later than the time period specified in the SEC's rules and regulations with respect to issuers as to which Section 13 and 15(d) of the Exchange Act apply, reports on Form 10-Q (or any successor or comparable form) containing the information required to be contained therein (or required in such successor or comparable form);

(c) promptly from time to time after the occurrence of an event required to be therein reported (and in any event within the time period specified in the SEC's rules and regulations), such other reports on Form 8-K (or any successor or comparable form);

(d) concurrently with any delivery of financial statements under paragraphs (a) or (b) above, a certificate of the Designated Representative, (i) certifying that Seller is (and since the last such certificate has at all times been) in compliance with each of the covenants contained herein and that no representation made by Seller herein or in any document delivered pursuant hereto or in connection herewith was false or misleading in any material respect when made, or, if the foregoing is not true, specifying the nature and extent of the breach of covenant and/or representation and any corrective action taken or proposed to be taken with respect thereto, and (ii) setting forth computations in reasonable detail and satisfactory to the Purchaser of the Deficiency Amount, if any;

(e) promptly, from time to time, such other information regarding the operations, business affairs, plans, projections and financial condition of Seller, or compliance with the terms of this Agreement, as Purchaser may reasonably request; and

(f) as promptly as reasonably practicable, written notice of the following:

(i) the occurrence of the Liquidation End Date;

(ii) the filing or commencement of, or any written threat or notice of intention of any Person to file or commence, any action, suit or proceeding, whether at law or in equity or by or before any governmental authority or in arbitration, against Conservator, Seller or any other Person which, if adversely determined, would reasonably be expected to have a Material Adverse Effect;

(iii) any other development that is not a matter of general public knowledge and that has had, or would reasonably be expected to have, a Material Adverse Effect.

5.10. *Executive Compensation*. Seller shall not, without the consent of the Director, in consultation with the Secretary of the Treasury, enter into any new compensation arrangements with, or increase amounts or benefits payable under existing compensation arrangements of, any Named Executive Officer of Seller.

6. MISCELLANEOUS

6.1. *No Third-Party Beneficiaries.* Until the termination of the Commitment, at any time during the existence and continuance of a payment default with respect to debt securities issued by Seller and/or a default by Seller with respect to any Mortgage Guarantee Obligations, any holder of such defaulted debt securities or beneficiary of such Mortgage Guarantee Obligations (collectively, the "*Holders*") may (a) deliver notice to the Seller and the Designated Representative requesting exercise of all rights available to them under this Agreement to draw on the Commitment up to the lesser of the amount necessary to cure the outstanding payment defaults and the Available Amount as of the last day of the immediately preceding fiscal quarter, and (b) if Seller and the Designated Representative fail to act as requested within thirty (30) days of such notice, or if Purchaser shall fail to perform its obligations in respect of any draw on the Commitment and Seller and/or the Designated Representative shall not be diligently pursuing remedies in respect of such failure, seek judicial relief requiring Seller to draw on the Commitment or Purchaser to fund the Commitment, as applicable. The Holders shall have no other rights under or in respect of this Agreement, and the Commitment shall not otherwise be enforceable by any creditor of Seller or by any other Person other than the parties hereto, and no such creditor or other Person is intended to be, or shall be, a third party beneficiary of any provision of this Agreement.

6.2. *Non-Transferable; Successors.* The Commitment is solely for the benefit of Seller and shall not inure to the benefit of any other Person (other than the Holders to the extent set forth in Section 6.1), including any entity to which the charter of Seller may be transferred, to any LLRE or to any other successor to the assets, liabilities or operations of Seller. The Commitment may not be assigned or otherwise transferred, in whole or in part, to any Person (including, for the avoidance of doubt, any LLRE to which a receiver has assigned all or a portion of Seller's assets) without the prior written consent of Purchaser (which may be withheld in its sole discretion). In no event shall any successor to Seller (including such an LLRE) be entitled to the benefit of the Commitment without the prior written consent of Purchaser. Seller and Conservator, for themselves and on behalf of their permitted successors, covenant and agree not to transfer or purport to transfer the Commitment in contravention of the terms hereof, and any such attempted transfer shall be null and void *ab initio.* It is the expectation of the parties that, in the event Seller were placed into receivership and an LLRE formed to purchase certain of its assets and assume certain of its liabilities, the Commitment would remain with Seller for the benefit of the holders of the debt of Seller not assumed by the LLRE.

6.3. *Amendments; Waivers.* This Agreement may be waived or amended solely by a writing executed by both of the parties hereto, and, with respect to amendments to or waivers of the provisions of Sections 5.3, 6.2 and 6.11, the Conservator; *provided*, *however*, that no such waiver or amendment shall decrease the aggregate Commitment or add conditions to funding the amounts required to be funded by Purchaser under the Commitment if such waiver or amendment would, in the reasonable opinion of Seller, adversely affect in any material respect the holders of debt securities of Seller and/or the beneficiaries of Mortgage Guarantee Obligations, in each case in their capacities as such, after taking into account any alternative arrangements that may be implemented concurrently with such waiver or amendment. In no event shall any rights granted hereunder prevent the parties hereto from waiving or amending in any manner whatsoever the covenants of Seller hereunder.

6.4. *Governing Law; Jurisdiction; Venue.* This Agreement and the Warrant shall be governed by, and construed in accordance with, the federal law of the United States of America if and to the extent such federal law is applicable, and otherwise in accordance with the laws of the State of New York. The Senior Preferred Stock shall be governed as set forth in the terms thereof. The United States District Court for the District of Columbia shall have exclusive jurisdiction over all civil actions arising out of this Agreement, the Commitment, the Senior Preferred Stock and the Warrant, and venue for any such civil action shall lie exclusively in the United States District Court for the District of Columbia.

6.5. *Notices*. Any notices delivered pursuant to or in connection with this Agreement shall be delivered to the applicable parties at the addresses set forth below:

If to Seller:

Federal National Mortgage Association
c/o Federal Housing Finance Authority
1700 G Street, NW
4th Floor
Washington, DC 20552
Attention: General Counsel

If to Purchaser:

United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington DC 20220
Attention: Under Secretary for Domestic Finance

with a copy to:

United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington DC 20220
Attention: General Counsel

If to Conservator:

Federal Housing Finance Authority
1700 G Street, NW
4th Floor
Washington, DC 20552
Attention: General Counsel

All notices and other communications provided for herein shall be in writing and shall be delivered by hand or overnight courier service, mailed by certified or registered mail. All notices hereunder shall be effective upon receipt.

6.6. *Disclaimer of Guarantee.* This Agreement and the Commitment are not intended to and shall not be deemed to constitute a guarantee by Purchaser or any other agency or instrumentality of the United States of the payment or performance of any debt security or any other obligation, indebtedness or liability of Seller of any kind or character whatsoever.

6.7. *Effect of Order; Injunction; Decree.* If any order, injunction or decree is issued by any court of competent jurisdiction that vacates, modifies, amends, conditions, enjoins, stays or otherwise affects the appointment of Conservator as conservator of Seller or otherwise curtails Conservator's powers as such conservator (except in each case any order converting the conservatorship to a receivership under Section 1367(a) of the FHE Act), Purchaser may by written notice to Conservator and Seller declare this Agreement null and void, whereupon all transfers hereunder (including the issuance of the Senior Preferred Stock and the Warrant and any funding of the Commitment) shall be rescinded and unwound and all obligations of the parties (other than to effectuate such rescission and unwind) shall immediately and automatically terminate.

6.8. *Business Day.* To the extent that any deadline or date of performance of any right or obligation set forth herein shall fall on a day other than a Business Day, then such deadline or date of performance shall automatically be extended to the next succeeding Business Day.

6.9. *Entire Agreement.* This Agreement, together with the Senior Preferred Stock and Warrant, contains the entire agreement between the parties hereto with respect to the transactions contemplated hereby and supersedes and cancels all prior agreements, including, but not limited to, all proposals, term sheets, statements, letters of intent or representations, written or oral, with respect thereto.

6.10. *Remedies.* In the event of a breach by Seller of any covenant or representation of Seller set forth herein, Purchaser shall be entitled to specific performance (in the case of a breach of covenant), damages and such other remedies as may be available at law or in equity; *provided*, that Purchaser shall not have the right to terminate the Commitment solely as a result of any such breach, and compliance with the covenants and the accuracy of the representations set forth in this Agreement shall not be conditions to funding the Commitment.

6.11. *Tax Reporting.* Neither Seller nor Conservator shall take, or shall permit any of their respective successors or assigns to take, a position for any tax, accounting or other purpose that is inconsistent with Internal Revenue Service Notice 2008-76 (or the regulations to be issued pursuant to such Notice) regarding the application of Section 382 of the Internal Revenue Code of 1986, as amended, a copy of which Notice has been provided to Seller in connection with the execution of this Agreement.

6.12. *Non-Severability.* Each of the provisions of this Agreement is integrated with and integral to the whole and shall not be severable from the remainder of the Agreement. In the event that any provision of this Agreement, the Senior Preferred Stock or the Warrant is determined to be illegal or unenforceable, then Purchaser may, in its sole discretion, by written notice to Conservator and Seller, declare this Agreement null and void, whereupon all transfers hereunder (including the issuance of the Senior Preferred Stock and the Warrant and any funding of the Commitment) shall be rescinded and unwound and all obligations of the parties (other than to effectuate such rescission and unwind) shall immediately and automatically terminate.

[Signature Page Follows]

FEDERAL NATIONAL
MORTGAGE ASSOCIATION, by

Federal Housing Finance Agency,
its Conservator

/s/ James B. Lockhart III
James B. Lockhart III
Director

UNITED STATES
DEPARTMENT OF
THE TREASURY

/s/ Henry M. Paulson, Jr.
Henry M. Paulson, Jr.
Secretary of the Treasury

Acknowledged and, solely
as to Sections 5.3, 6.2
and 6.11, agreed:

FEDERAL HOUSING
FINANCE AGENCY,
as Conservator

/s/ James B. Lockhart III
James B. Lockhart III
Director

Signature Page to Senior Preferred Stock Purchase Agreement

EXECUTION VERSION

CERTIFICATE OF DESIGNATION OF TERMS OF VARIABLE LIQUIDATION PREFERENCE SENIOR PREFERRED STOCK, SERIES 2008-2

1. Designation, Par Value, Number of Shares and Priority

The designation of the series of preferred stock of the Federal National Mortgage Association (the "Company") created by this resolution shall be "Variable Liquidation Preference Senior Preferred Stock, Series 2008-2" (the "Senior Preferred Stock"), and the number of shares initially constituting the Senior Preferred Stock is 1,000,000. Shares of Senior Preferred Stock will have no par value and a stated value and initial liquidation preference per share equal to $1,000 per share, subject to adjustment as set forth herein. The Board of Directors of the Company, or a duly authorized committee thereof, in its sole discretion, may reduce the number of shares of Senior Preferred Stock, provided such reduction is not below the number of shares of Senior Preferred Stock then outstanding.

The Senior Preferred Stock shall rank prior to the common stock of the Company as provided in this Certificate and shall rank, as to both dividends and distributions upon dissolution, liquidation or winding up of the Company, prior to (a) the shares of preferred stock of the Company designated "5.25% Non-Cumulative Preferred Stock, Series D", "5.10% Non-Cumulative Preferred Stock, Series E", "Variable Rate Non-Cumulative Preferred Stock, Series F", "Variable Rate

Non-Cumulative Preferred Stock, Series G", "5.81% Non-Cumulative Preferred Stock, Series H", "5.375% Non-Cumulative Preferred Stock, Series I", "5.125% Non-Cumulative Preferred Stock, Series L", "4.75% Non-Cumulative Preferred Stock, Series M", "5.50% Non-Cumulative Preferred Stock, Series N", "Non-Cumulative Preferred Stock, Series O", "Non-Cumulative Convertible Series 2004-1 Preferred Stock", "Variable Rate Non-Cumulative Preferred Stock, Series P", "6.75% Non-Cumulative Preferred Stock, Series Q", "7.625% Non-Cumulative Preferred Stock, Series R", "Fixed-to-Floating Rate Non-Cumulative Preferred Stock, Series S", and "8.75% Non-Cumulative Mandatory Convertible Preferred Stock", Series 2008-1", (b) any other capital stock of the Company outstanding on the date of the initial issuance of the Senior Preferred Stock and (c) any capital stock of the Company that may be issued after the date of initial issuance of the Senior Preferred Stock.

2. Dividends

(a) For each Dividend Period from the date of the initial issuance of the Senior Preferred Stock, holders of outstanding shares of Senior Preferred Stock shall be entitled to receive, ratably, when, as and if declared by the Board of Directors, in its sole discretion, out of funds legally available therefor, cumulative cash dividends at the annual rate per share equal to the then-current Dividend Rate on the then-current Liquidation Preference. Dividends on the Senior Preferred Stock shall accrue from but not including the date of the initial issuance of the Senior Preferred Stock and will be payable in arrears when, as and if declared by the Board of Directors quarterly on March 31, June 30, September 30 and December 31 of each year (each, a "Dividend Payment Date"), commencing on December 31, 2008. If a Dividend Payment Date is not a "Business Day," the related dividend will be paid not later than the next Business Day with the same force and effect as though paid on the Dividend Payment Date, without any increase to account for the period from such Dividend Payment Date through the date of actual payment. "Business Day" means a day other than (i) a Saturday or Sunday, (ii) a day on which New York City banks are closed, or (iii) a day on which the offices of the Company are closed.

If declared, the initial dividend will be for the period from but not including the date of the initial issuance of the Senior Preferred Stock through and including December 31, 2008. Except for the initial Dividend Payment Date, the "Dividend Period" relating to a Dividend Payment Date will be the period from but not including the preceding Dividend Payment Date through and including the related Dividend Payment Date. The amount of dividends payable on the initial Dividend Payment Date or for any Dividend Period that is not a full calendar quarter shall be computed on the basis of 30-day months, a 360-day year and the actual number of days elapsed in any period of less than one month. For the avoidance of doubt, in the event that the Liquidation Preference changes in the middle of a Dividend Period, the amount of dividends payable on the Dividend Payment Date at the end of such Dividend Period shall take into account such change in Liquidation Preference and shall be computed at the Dividend Rate on each Liquidation Preference based on the portion of the Dividend Period that each Liquidation Preference was in effect.

(b) To the extent not paid pursuant to Section 2(a) above, dividends on the Senior Preferred Stock shall accrue and shall be added to the Liquidation Preference pursuant to Section 8, whether or not there are funds legally available for the payment of such dividends and whether or not dividends are declared.

(c) "Dividend Rate" means 10.0%; provided, however, that if at any time the Company shall have for any reason failed to pay dividends in cash in a timely manner as required by this Certificate, then immediately following such failure and for all Dividend Periods thereafter until the Dividend Period following the date on which the Company shall have paid in cash full cumulative dividends (including any unpaid dividends added to the Liquidation Preference pursuant to Section 8), the "Dividend Rate" shall mean 12.0%.

(d) Each such dividend shall be paid to the holders of record of outstanding shares of the Senior Preferred Stock as they appear in the books and records of the Company on such record date as shall be fixed in advance by the Board of Directors, not to be earlier than 45 days nor later than 10 days preceding the applicable Dividend Payment Date. The Company may not, at any time, declare or pay dividends on, make distributions with respect to, or redeem, purchase or acquire, or make a liquidation payment with respect to, any common stock or other securities ranking junior to the Senior Preferred Stock unless (i) full cumulative dividends on the outstanding Senior Preferred Stock in respect of the then-current Dividend Period and all past Dividend Periods (including any unpaid dividends added to the Liquidation Preference pursuant to Section 8) have been declared and paid in cash (including through any pay down of Liquidation Preference pursuant to Section 3) and (ii) all amounts required to be paid pursuant to Section 4 (without giving effect to any prohibition on such payment under any applicable law) have been paid in cash.

(e) Notwithstanding any other provision of this Certificate, the Board of Directors, in its discretion, may choose to pay dividends on the Senior Preferred Stock without the payment of any dividends on the common stock, preferred stock or any other class or series of stock from time to time outstanding ranking junior to the Senior Preferred Stock with respect to the payment of dividends.

(f) If and whenever dividends, having been declared, shall not have been paid in full, as aforesaid, on shares of the Senior Preferred Stock, all such dividends that have been declared on shares of the Senior Preferred Stock shall be paid to the holders pro rata based on the aggregate Liquidation Preference of the shares of Senior Preferred Stock held by each holder, and any amounts due but not paid in cash shall be added to the Liquidation Preference pursuant to Section 8.

3. Optional Pay Down of Liquidation Preference

(a) Following termination of the Commitment (as defined in the Preferred Stock Purchase Agreement referred to in Section 8 below), and subject to any limitations which may be imposed by law and the provisions below, the Company may pay down the Liquidation Preference of all outstanding shares of the Senior Preferred Stock pro rata, at any time, in whole or in part, out of funds legally available therefor, with such payment first being used to reduce any accrued and unpaid dividends previously added to the Liquidation Preference pursuant to Section 8 below and, to the extent all such accrued and unpaid dividends have been paid, next being used to reduce any Periodic Commitment Fees (as defined in the Preferred Stock Purchase Agreement referred to in Section 8 below) previously added to the Liquidation Preference pursuant to Section 8 below. Prior to termination of the Commitment, and subject to any limitations which may be imposed by law and the provisions below, the Company may pay down the Liquidation Preference of all outstanding shares of the Senior Preferred Stock pro rata, at any time, out of funds legally available therefor, but only to the extent of (i) accrued and unpaid dividends previously added to the Liquidation Preference pursuant to Section 8 below and not repaid by any prior pay down of Liquidation Preference and (ii) Periodic Commitment Fees previously added to the Liquidation Preference pursuant to Section 8 below and not repaid by any prior pay down of Liquidation Preference. Any pay down of Liquidation Preference permitted by this Section 3 shall be paid by making a payment in cash to the holders of record of outstanding shares of the Senior Preferred Stock as they appear in the books and records of the Company on such record date as shall be fixed in advance by the Board of Directors, not to be earlier than 45 days nor later than 10 days preceding the date fixed for the payment.

(b) In the event the Company shall pay down of the Liquidation Preference of the Senior Preferred Stock as aforesaid, notice of such pay down shall be given by the Company by first class mail, postage prepaid, mailed neither less than 10 nor more than 45 days preceding the date fixed for the payment, to each holder of record of the shares of the Senior Preferred Stock, at such holder's address as the same appears in the books and records of the Company. Each such notice shall state the amount by which the Liquidation Preference of each share shall be reduced and the pay down date.

(c) If after termination of the Commitment the Company pays down the Liquidation Preference of each outstanding share of Senior Preferred Stock in full, such shares shall be deemed to have been redeemed as of the date of such payment, and the dividend that would otherwise be payable for the Dividend Period ending on the pay down date will be paid on such date. Following such deemed redemption, the shares of the Senior Preferred Stock shall no longer be deemed to be outstanding, and all rights of the holders thereof as holders of the Senior Preferred Stock shall cease, with respect to shares so redeemed, other than the right to receive the pay down amount (which shall include the final dividend for such shares). Any shares of the Senior Preferred Stock which shall have been so redeemed, after such redemption, shall no longer have the status of authorized, issued or outstanding shares.

4. Mandatory Pay Down of Liquidation Preference Upon Issuance of Capital Stock

(a) If the Company shall issue any shares of capital stock (including without limitation common stock or any series of preferred stock) in exchange for cash at any time while the Senior Preferred Stock is outstanding, then the Company shall, within 10 Business Days, use the proceeds of such issuance net of the direct costs relating to the issuance of such securities (including, without limitation, legal, accounting and investment banking fees) to pay down the Liquidation Preference of all outstanding shares of Senior Preferred Stock pro rata, out of funds legally available therefor, by making a payment in cash to the holders of record of outstanding shares of the Senior Preferred Stock as they appear in the books and records of the Company on such record date as shall be fixed in advance by the Board of Directors, not to be earlier than 45 days nor later than 10 days preceding the date fixed for the payment, with such payment first being used to reduce any accrued and unpaid dividends previously added to the Liquidation Preference pursuant to Section 8 below and, to the extent all such accrued and unpaid dividends have been paid, next being used to reduce any Periodic Commitment Fees (as defined in the Preferred Stock Purchase Agreement referred to in Section 8 below) previously added to the Liquidation Preference pursuant to Section 8 below; provided that, prior to the termination of the Commitment (as defined in the Preferred Stock Purchase Agreement referred to in Section 8 below), the Liquidation Preference of each share of Senior Preferred Stock shall not be paid down below $1,000 per share.

(b) If the Company shall not have sufficient assets legally available for the pay down of the Liquidation Preference of the shares of Senior Preferred Stock required under Section 4(a), the Company shall pay down the Liquidation Preference per share to the extent permitted by law, and shall pay down any Liquidation Preference not so paid down because of the unavailability of legally available assets or other prohibition as soon as practicable to the extent it is thereafter able to make such pay down legally. The inability of the Company to make such payment for any reason shall not relieve the Company from its obligation to effect any required pay down of the Liquidation Preference when, as and if permitted by law.

(c) If after the termination of the Commitment the Company pays down the Liquidation Preference of each outstanding share of Senior Preferred Stock in full, such shares shall be deemed to have been redeemed as of the date of such payment, and the dividend that would otherwise be payable for the Dividend Period ending on the pay down date will be paid on such date. Following such deemed redemption, the shares of the Senior Preferred Stock shall no longer be deemed to be outstanding, and all rights of the holders thereof as holders of the Senior Preferred Stock shall cease, with respect to shares so redeemed, other than the right to receive the pay down amount (which shall include the final dividend for such redeemed shares). Any shares of the Senior Preferred Stock which shall have been so redeemed, after such redemption, shall no longer have the status of authorized, issued or outstanding shares.

5. No Voting Rights

Except as set forth in this Certificate or otherwise required by law, the shares of the Senior Preferred Stock shall not have any voting powers, either general or special.

6. No Conversion or Exchange Rights

The holders of shares of the Senior Preferred Stock shall not have any right to convert such shares into or exchange such shares for any other class or series of stock or obligations of the Company.

7. No Preemptive Rights

No holder of the Senior Preferred Stock shall as such holder have any preemptive right to purchase or subscribe for any other shares, rights, options or other securities of any class of the Company which at any time may be sold or offered for sale by the Company.

8. Liquidation Rights and Preference

(a) Except as otherwise set forth herein, upon the voluntary or involuntary dissolution, liquidation or winding up of the Company, the holders of the outstanding shares of the Senior Preferred Stock shall be entitled to receive out of the assets of the Company available for distribution to stockholders, before any payment or distribution shall be made on the common stock or any other class or series of stock of the Company ranking junior to the Senior Preferred Stock upon liquidation, the amount per share equal to the Liquidation Preference plus an amount, determined in accordance with Section 2(a) above, equal to the dividend otherwise payable for the then-current Dividend Period accrued through and including the date of payment in respect of such dissolution, liquidation or winding up; provided, however, that if the assets of the Company available for distribution to stockholders shall be insufficient for the payment of the amount which the holders of the outstanding shares of the Senior Preferred Stock shall be entitled to receive upon such dissolution, liquidation or winding up of the Company as aforesaid, then, all of the assets of the

Company available for distribution to stockholders shall be distributed to the holders of outstanding shares of the Senior Preferred Stock pro rata based on the aggregate Liquidation Preference of the shares of Senior Preferred Stock held by each holder.

(b) "Liquidation Preference" shall initially mean $1,000 per share and shall be:

(i) increased each time a Deficiency Amount (as defined in the Preferred Stock Purchase Agreement) is paid to the Company by an amount per share equal to the aggregate amount so paid to the Company divided by the number of shares of Senior Preferred Stock outstanding at the time of such payment;

(ii) increased each time the Company does not pay the full Periodic Commitment Fee (as defined in the Preferred Stock Purchase Agreement) in cash by an amount per share equal to the amount of the Periodic Commitment Fee that is not paid in cash divided by the number of shares of Senior Preferred Stock outstanding at the time such payment is due;

(iii) increased on the Dividend Payment Date if the Company fails to pay in full the dividend payable for the Dividend Period ending on such date by an amount per share equal to the aggregate amount of unpaid dividends divided by the number of shares of Senior Preferred Stock outstanding on such date; and

(iv) decreased each time the Company pays down the Liquidation Preference pursuant to Section 3 or Section 4 of this Certificate by an amount per share equal to the aggregate amount of the pay down divided by the number of shares of Senior Preferred Stock outstanding at the time of such pay down.

(c) "Preferred Stock Purchase Agreement" means the Preferred Stock Purchase Agreement, dated September 7, 2008, between the Company and the United States Department of the Treasury.

(d) Neither the sale of all or substantially all of the property or business of the Company, nor the merger, consolidation or combination of the Company into or with any other corporation or entity, shall be deemed to be a dissolution, liquidation or winding up for the purpose of this Section 8.

9. Additional Classes or Series of Stock

The Board of Directors shall have the right at any time in the future to authorize, create and issue, by resolution or resolutions, one or more additional classes or series of stock of the Company, and to determine and fix the distinguishing characteristics and the relative rights, preferences, privileges and other terms of the shares thereof; provided that any such class or series of stock may not rank prior to or on parity with the Senior Preferred Stock without the prior written consent of the holders of at least two-thirds of all the shares of Senior Preferred Stock at the time outstanding.

10. Miscellaneous

(a) The Company and any agent of the Company may deem and treat the holder of a share or shares of Senior Preferred Stock, as shown in the Company's books and records, as the absolute owner of such share or shares of Senior Preferred Stock for the purpose of receiving payment of dividends in respect of such share or shares of Senior Preferred Stock and for all other purposes whatsoever, and neither the Company nor any agent of the Company shall be affected by any notice to the contrary. All payments made to or upon the order of any such person shall be valid and, to the extent of the sum or sums so paid, effectual to satisfy and discharge liabilities for moneys payable by the Company on or with respect to any such share or shares of Senior Preferred Stock.

(b) The shares of the Senior Preferred Stock, when duly issued, shall be fully paid and non-assessable.

(c) The Senior Preferred Stock may be issued, and shall be transferable on the books of the Company, only in whole shares.

(d) For purposes of this Certificate, the term "the Company" means the Federal National Mortgage Association and any successor thereto by operation of law or by reason of a merger, consolidation, combination or similar transaction.

(e) This Certificate and the respective rights and obligations of the Company and the holders of the Senior Preferred Stock with respect to such Senior Preferred Stock shall be construed in accordance with and governed by the laws of the United States, provided that the law of the State of Delaware shall serve as the federal rule of decision in all instances except where such law is inconsistent with the Company's enabling legislation, its public purposes or any provision of this Certificate.

(f) Any notice, demand or other communication which by any provision of this Certificate is required or permitted to be given or served to or upon the Company shall be given or served in writing addressed (unless and until another address shall be published by the Company) to Fannie Mae, 3900 Wisconsin Avenue NW, Washington, DC 20016, Attn: Executive Vice President and General Counsel. Such notice, demand or other communication to or upon the Company shall be deemed to have been sufficiently given or made only upon actual receipt of a writing by the Company. Any notice, demand or other communication which by any provision of this Certificate is required or permitted to be given or served by the Company hereunder may be given or served by being deposited first class, postage prepaid, in the United States mail addressed (i) to the holder as such holder's name and address may appear at such time in the books and records of the Company or (ii) if to a person or entity other than a holder of record of the Senior Preferred Stock, to such person or entity at such address as reasonably appears to the Company to be appropriate at such time. Such notice, demand or other communication shall be deemed to have been sufficiently given or made, for all purposes, upon mailing.

(g) The Company, by or under the authority of the Board of Directors, may amend, alter, supplement or repeal any provision of this Certificate pursuant to the following terms and conditions:

(i) Without the consent of the holders of the Senior Preferred Stock, the Company may amend, alter, supplement or repeal any provision of this Certificate to cure any ambiguity, to correct or supplement any provision herein which may be defective or inconsistent with any other provision herein, or to make any other provisions with respect to matters or questions arising under this Certificate, provided that such action shall not adversely affect the interests of the holders of the Senior Preferred Stock.

(ii) The consent of the holders of at least two-thirds of all of the shares of the Senior Preferred Stock at the time outstanding, given in person or by proxy, either in writing or by a vote at a meeting called for the purpose at which the holders of shares of the Senior Preferred Stock shall vote together as a class, shall be necessary for authorizing, effecting or validating the amendment, alteration, supplementation or repeal (whether by merger, consolidation or otherwise) of the provisions of this Certificate other than as set forth in subparagraph (i) of this paragraph (g). The creation and issuance of any other class or series of stock, or the issuance of additional shares of any existing class or series of stock, of the Company ranking junior to the Senior Preferred Stock shall not be deemed to constitute such an amendment, alteration, supplementation or repeal.

(iii) Holders of the Senior Preferred Stock shall be entitled to one vote per share on matters on which their consent is required pursuant to subparagraph (ii) of this paragraph (g). In connection with any meeting of such holders, the Board of Directors shall fix a record date, neither earlier than 60 days nor later than 10 days prior to the date of such meeting, and holders of record of shares of the Senior Preferred Stock on such record date shall be entitled to notice of and to vote at any such meeting and any adjournment. The Board of Directors, or such person or persons as it may designate, may establish reasonable rules and procedures as to the solicitation of the consent of holders of the Senior Preferred Stock at any such meeting or otherwise, which rules and procedures shall conform to the requirements of any national securities exchange on which the Senior Preferred Stock may be listed at such time.

(h) **RECEIPT AND ACCEPTANCE OF A SHARE OR SHARES OF THE SENIOR PREFERRED STOCK BY OR ON BEHALF OF A HOLDER SHALL CONSTITUTE THE UNCONDITIONAL ACCEPTANCE BY THE HOLDER (AND ALL OTHERS HAVING BENEFICIAL OWNERSHIP OF SUCH SHARE OR SHARES) OF ALL OF**

THE TERMS AND PROVISIONS OF THIS CERTIFICATE. NO SIGNATURE OR OTHER FURTHER MANIFESTATION OF ASSENT TO THE TERMS AND PROVISIONS OF THIS CERTIFICATE SHALL BE NECESSARY FOR ITS OPERATION OR EFFECT AS BETWEEN THE COMPANY AND THE HOLDER (AND ALL SUCH OTHERS).

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Company this 7th day of September, 2008.

[Seal]

FEDERAL NATIONAL MORTGAGE ASSOCIATION, by

Federal Housing Finance Agency, its Conservator

/s/ James B. Lockhart III
James B. Lockhart III
Director

Signature Page to Certificate of Designations of Senior Preferred Stock

From: Ugoletti, Mario
Sent: Wednesday, October 15, 2008 10:45 AM
To: Lingebach, James
Subject: Re: Valuation of GSE Stock/Warrant/Commitment

Jim, I will back on monday october 20, the afternoon would work, I will still be in south america on friday, mario.

From: Lingebach, James
To: Ugoletti, Mario
Cc: Carfine, Ken; Norton, Jeremiah; Winborne, Serita; Runnels, Al; Geiger, Donald; Wong, Chantale; Foster, Wesley; Legge, David
Sent: Wed Oct 15 10:17:52 2008
Subject: Valuation of GSE Stock/Warrant/Commitment

Mario,

I realize you are out of the office but we have an urgent need to schedule a meeting with you for this Friday, October 17.

We have engaged a contractor, Grant Thornton, to perform the valuation of the GSE preferred stock, common stock warrant, and Treasury's $200 billion preferred stock commitment in order to properly value these items in the Department's 9/30/08 financial statements. Grant Thornton wants to discuss several aspects of the preferred stock liquidity arrangement, such as whether we expect the GSEs to pay the preferred stock dividends in cash or to just accrue the payments, what the Department's future intent may for the preferred stock and common stock warrant, and other aspects of the agreement. A related question is whether the preferred stock really has any value if it is determined that we have a significant future liability under this commitment.

Please let me know at your earliest convenience what a good time is and we can work out the particulars.

Thanks,

Jim

James R. Lingebach
Director, Office of Accounting and Internal Control
Office of the Deputy Chief Financial Officer
Department of the Treasury
(202) 622-0818
james.lingebach@do.treas.gov

Freddie
Mac
We make home possible®

2012 Corporate Forecast –
3-Year Outlook

Financial Planning & Analysis
March 8, 2012

* * *

	Sensitivity on Commitment Fee				
		Sensitivity (bps)			
	($ Billions)	25	50	75	100
6	**Annual Impact on Equity**	0.4	0.7	1.1	1.5
7	**2012-14 Impact on Equity**	1.0	2.2	3.4	4.5

* * *

- Our sensitivity to a commitment fee based on remaining commitment available beginning in 2013 of $149 billion shows that a 25 bps fee results in a $0.4 billion annual impact on Stockholders' Equity.

* * *

OVERSIGHT HEARING TO EXAMINE RECENT TREASURY AND FHFA ACTIONS REGARDING THE HOUSING GSEs

Thursday, September 25, 2008

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

* * *

Ms. SPEIER. Thank you, Mr. Chairman.

Director Lockhart, the Federal Government, the taxpayers, have injected $250 billion into Fannie and Freddie, correct?

Mr. LOCKHART. No, that is not correct. They actually haven't invested anything yet. What they have done is, they have put facilities in place that they might draw down in the future if needed. At this point, there has been no taxpayer money put into Fannie and Freddie.

Ms. SPEIER. So they continue to be private companies?

Mr. LOCKHART. They are private companies in conservatorship, which means that the Agency, FHFA, has replaced the board of directors as the executive, if you will, and we have chosen new CEOs to take over the companies. The shareholders are still in place; both the preferred and common shareholders have an economic interest in the companies.

* * *

Mr. CAPUANO. And I understand that. If everything works out the way we hope it works out and people hold on to what they have – again, I know there are some bumps in the middle of the road – in theory, there is no reason to believe that anybody, in the final analysis, should lose any money when this is all said and done?

Mr. LOCKHART. I can’t say that.

Mr. CAPUANO. I understand. I said it. I didn’t think you would, but I thought I would try.

Mr. LOCKHART. I would think that the common shareholders have already lost a significant amount of money, and certainly the preferreds. It is hard to imagine they would go all the way back.

At any rate, they still have some economic interest in this company, and going forward there may be some value.

Mr. CAPUANO. Okay. Thank you very much.

* * *

From:	Martin, Bradford [/O=FHFA/OU= EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN= RECIPIENTS/CN=MARTINB]
Sent:	7/13/2012 3:36:21 PM
To:	DeMarco, Edward [edward.demarco@fhfa.gov]; Greenlee, Jon [jon.greenlee@fhfa.gov]; DeLeo, Wanda [wanda.deleo@fhfa.gov]; Pollard, Alfred [alfred.pollard@fhfa.gov]; Ugoletti, Mario [mario.ugoletti@fhfa.gov]; Burns, Meg [meg.burns@fhfa.gov]; Lawler, Patrick [patrick.lawler@fhfa.gov]; Spohn, Jeffrey [jeffrey.spohn@fhfa.gov]
CC:	Johnson, Mary [mary.johnson@fhfa.gov]; Keyes, Robert [robert.keyes@fhfa.gov]; Highfill, Owen [owen.highfill@fhfa.gov]; Bungenstock, Lindsey [lindsey.bungenstock@fhfa.gov]; Anderson, Philip [philip.anderson@fhfa.gov]; Martin, Bradford [bradford.martin@fhfa.gov]
Subject:	Fannie Mae Executive Management Meeting on July 9, 2012
Attachments:	Agenda 7.9.12 MC Meeting.pdf; Strategy Update – July 2012_070612_v1.pptx; Item IV.b ASF WhitePaper2012.pdf; Item IV.c.2012 FHFA Scorecard May Assessment and FHFA Summary Combined 7-5-12.pdf; Item IV.d. May 2012 Financial Update_Forecast v6.pdf

Fannie Mae Executive Management Meeting on July 9, 2012

Tim Mayopoulos began by welcoming Pascal Boillat as a new committee member to replace Ed Watson. Tim then recited a list of recent activities. He thought last week's joint Fannie/Freddie/FHFA meeting comparing notes on securitization efforts was both productive and illuminating. Fannie had pursued a technology focus whereas Freddie had concentrated on larger 'ecosystem' issues involving rules, guides and standards posed by the new regime. In many ways, the two approaches were "very additive". While Fannie would wait for FHFA to set up the next meeting, he wondered when Fannie might share with Freddie what they were actively building.

Tim told members that he had initiated a series of personal introduction calls to all key customers. A similar introductory letter would soon go out to all 1,400 business heads. As a prelude to next week's Board meeting, Phil Laskawy would attend this week's Operating Committee meeting.

GSE Strategy Update

Dave Benson walked through a draft copy of next week's Board strategy planning discussion intended to review areas where Fannie might facilitate the ongoing secondary market transition. The discussion was divided into three sections: (a) recap of current open questions (the existence and form of guarantee, prospects for private capital, potential business models);

(b) the strategic goal of building a new infrastructure (the 'engine on the bench' plus integration of surrounding securitization functions); and (c) promoting public support for the goals of conservatorship through defined initiatives (e.g., credit risk transfer; REO-to-rental). Dave focused on the GSEs return to profitability as a key factor in building public support for the conservatorship. Current projections show that cumulative GSE dividends paid will surpass cumulative GSE Treasury draws by 2020. He referred to the next 8 years as likely to be "the golden years of GSE earnings". How the government divests itself of the GSEs is not yet clear—the legacy GSE debt and MBS book cannot be fully privatized. Dave intends to close by noting that SPSA amendments might be used to better serve conservatorship goals.

ASF Single Security White Paper

Dave Benson gave a brief recap of the American Securitization Forum's recent white paper – published "as a resource to FHFA" – that outlines somewhat disparate originator, investor and dealer views on a unified agency security. To achieve the goal of making GSE securities "fungible", all parties agree on the need for Fannie/Freddie standardization of: (1) underwriting guidelines; (2) loan delivery and pooling requirements; (3) payment and remittance schedules; (4) servicing standards and loan repurchase policies; (5) data disclosure policies; and (6) refinance programs terms. However, originators and investors disagree on the need for uniform guarantee pricing and public identification of

GSE guarantor. Originators want fee competition, investors want identical terms. Investors want to know the counterparty, originators want a joint credit guarantee. Dave found it "fascinating" that the white paper promoted a near-term solution whereby Freddie Mac would outsource its loan delivery mechanism to Fannie Mae which would then issue a Single Agency Security.

<u>2012 FHFA Scorecard Update</u>

Susan McFarland summarized a thick packet on scorecard status to be presented at next week's Board meeting. She said that all items are either "on track or haven't yet started". When pressed, she agreed that several items could quickly turn to yellow or even red (i.e., initiate new risk sharing transactions) if FHFA were to disagree with Fannie Mae's prioritization proposals. The packet highlighted areas where Fannie required further guidance from FHFA to define the actual 2012 scorecard deliverable. Andrew Bon Salle mentioned that completion of the state-level pricing grid now rests entirely with FHFA.

<u>Financial Forecast Update</u>

Ann Gehring discussed highlights of the latest financial forecast. She noted that Q2's record projected income of $6.2 billion [since reduced to $5.5 billion] was twice the first quarter's and was all due to improved credit-related expenses. A planned new loss model release should make Q3 and Q4 results look better than previously forecast. Comprehensive income is now expected to be sufficient to cover the dividend obligation throughout 2012. Small Treasury draws are forecast throughout 2013. Cumulative 2012-2016 income is now forecast at $ 56.6 billion, $12.3 billion higher than the last projection. Given this large change from the prior forecast, Tim Mayopoulos wondered whether the Board might question the credibility of management's financial projections. He noted that the models seem to lag or underestimate both downturns and upturns. Ann explained that projections are closely tied to recent history and thus aren't well suited to capturing accelerating trends. Terry Edwards reminded members that a 1% change in home price projections produces a $6-$7 billion income delta. As regards home prices, Anne said that Fannie Mae's projections have been shown to be consistently more accurate than other sources. Terry noted that the housing market seems to be improving despite the fact the shadow inventory is still massive – "it's as if the market is saying that it's going to remain out there and not flow through". Susan McFarland added that Jon Greenlee believes that a more conservative approach to projecting future market conditions may be warranted given the limited number of improved data points.

Roundtable Discussion

Zach Oppenheimer said that June loan deliveries topped $63 billion with 25% coming through the cash window. Total mortgage originations for the full year are now estimated at $1.5 trillion. Fannie Mae had about a 50% share of the $762 billion originated in the year's first half. Zach noted that the average charged guarantee fee had increased by another 2.5 bps to a level of 42.5 bps in June. With most of the increases hitting larger lenders, the favorable gap enjoyed by large lenders had now declined to about 1.7 bps. Despite offering some of the highest mortgage rates, Zach said that BofA still appeared to be volume constrained.

Jeff Hayward said that multifamily volumes are on track to hit $25 billion for the year, up from around $20 billion last year. The average charged fee is now 80 bps. Jeff said that this fee level reflected market price levels, mentioning Freddie as the other market player. Some expressed concern that banks and life insurance companies seemed to be largely out of the market. John Nichols wondered whether their absence might indicate that the market was getting a bit frothy.

Dave Benson said that BlackRock's Green Package analytic software was now up and running. Fannie Mae's June lender conduit activity was a record $500 million.

John Nichols relayed that 11 MRAs had been submitted for closeout in June.

Pascal Boillat said that Fannie's main campus, unlike Freddie's, had not experienced any power problems during the recent storms.

Andrew Bon Salle said that HARP deliveries totaled 61,000 loans in June, up from 40,000 in May. More than 21,000 of these were from >125% LTV borrowers. Andrew noted that most of these came through the Quicken/Seterus pipeline which investors recognize as showing faster prepay speeds and should therefore tighten the Fannie/Freddie price spread.

Susan McFarland said that internal audit had completed its exam of the forecasting process with the finding that senior management should be more involved given that the forecast impacts financial statements.

Meeting Adjourned.
***** PLEASE DO NOT FORWARD EXECUTIVE MEETING MINUTES *****

Brad Martin
Principal Advisor
Office of Conservatorship Operations

DRAFT

FannieMae

As of 7/06 – 6pm

Strategic Planning Session

Board of Directors

David Benson

July 19, 2012

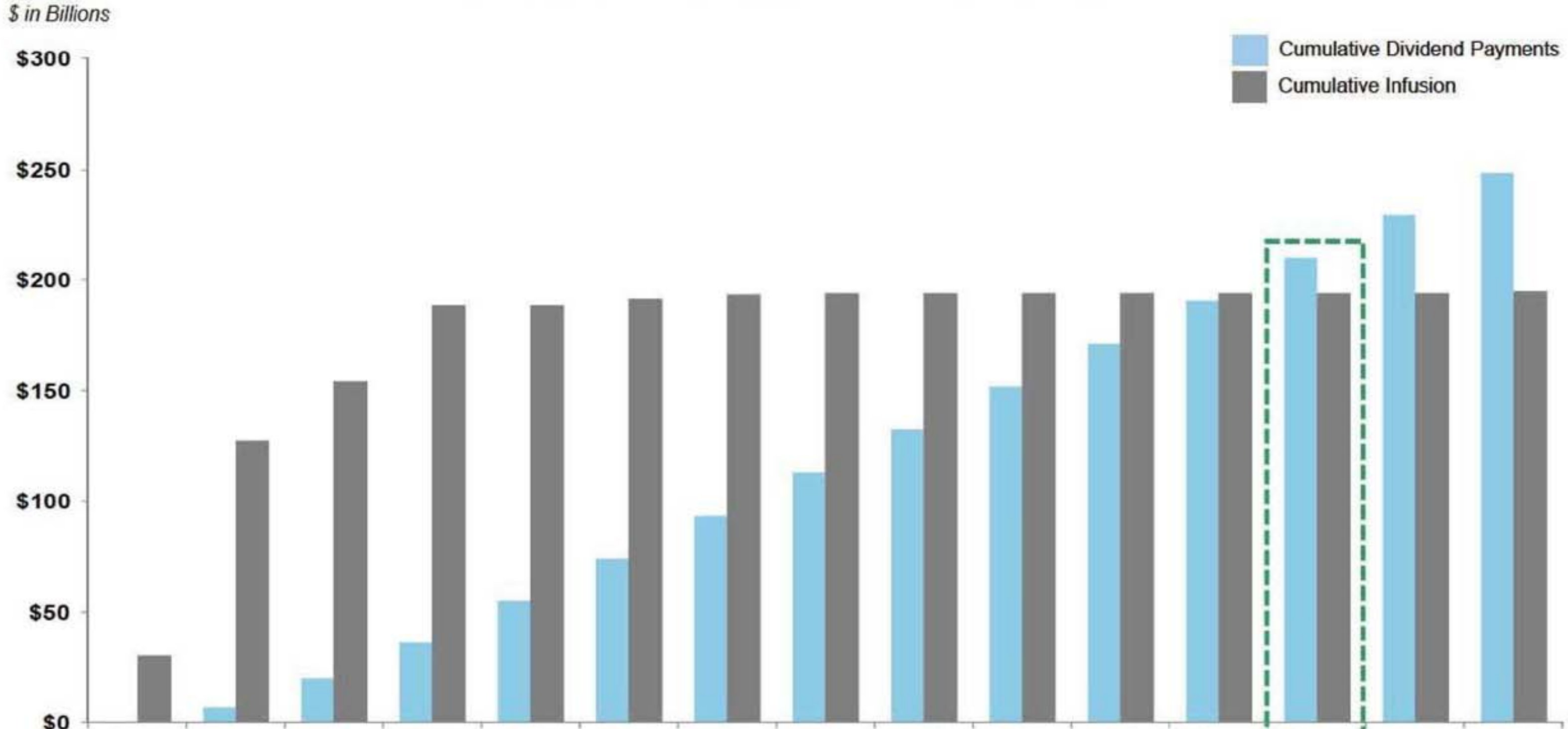
Confidential – Restricted

*　　　*　　　*

DRAFT

Strategic enabler: Profitable GSEs

Cumulative "Repayment" for Both GSEs



	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Net "Repayment" to Government ($B)	($30)	($120)	($134)	($152)	($134)	($117)	($100)	($81)	($62)	($42)	($23)	($3)	$16	$35	$54
Residual Equity ($B)	-	-	-	-	$3	$4	$7	$9	$14	$18	$20	$22	$23	$23	$25

The cumulative dividends from both GSEs exceed government investment by 2020 in baseline scenario.

Verification and Review in Progress

DRAFT

Annual view of net "repayment" to the US Government

Fannie Mae

($ in billions)

	2008-2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Comprehensive Income		11.2	7.4	11.0	12.4	13.8	12.9	12.2	11.6	11.2	10.9	11.2
Preferred Dividend Payment	19.8	11.6	11.8	12.1	12.2	12.2	12.1	12.1	12.1	12.1	12.2	12.2
Residual Equity	0.0	0.0	0.0	0.0	0.2	1.8	2.5	2.5	2.0	1.0	0.0	0.0
Cumulative Dividends	19.8	31.4	43.2	55.3	67.6	79.8	92.0	104.1	116.3	128.4	140.6	152.8
Cumulative Infusion	(116.1)	(116.1)	(119.0)	(121.2)	(121.5)	(121.5)	(121.5)	(121.5)	(121.5)	(121.5)	(121.7)	(122.7)
Net "Repayment" to Gov't	*(96.3)*	*(84.7)*	*(75.8)*	*(65.9)*	*(53.9)*	*(41.7)*	*(29.5)*	*(17.4)*	*(5.2)*	*6.9*	*18.9*	*30.1*
SPSPA Funding Cap	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9
Remaining Funding under SPSPA	124.8	124.8	122.0	119.7	119.5	119.5	119.5	119.5	119.5	119.5	119.3	118.3

Combined GSE "repayment" could occur in 2020

Freddie Mac

($ in billions)

	2008-2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Comprehensive Income		7.3	8.1	8.9	9.4	9.8	10.2	9.8	9.4	9.1	8.9	9.0
Preferred Dividend Payment	16.3	7.2	7.2	7.2	7.2	7.2	7.2	7.2	7.2	7.2	7.2	7.2
Residual Equity	0.0	3.1	4.5	6.6	9.2	12.2	15.2	17.7	19.9	21.8	23.4	25.2
Cumulative Dividends	16.3	23.5	30.8	38.0	45.2	52.5	59.7	66.9	74.1	81.4	88.6	95.8
Cumulative Infusion	(72.2)	(72.3)	(72.3)	(72.3)	(72.3)	(72.3)	(72.3)	(72.3)	(72.3)	(72.3)	(72.3)	(72.3)
Net "Repayment" to Gov't	*(55.9)*	*(48.8)*	*(41.6)*	*(34.3)*	*(27.1)*	*(19.9)*	*(12.6)*	*(5.4)*	*1.8*	*9.1*	*16.3*	*23.5*
SPSPA Funding Cap	220.5	220.6	220.6	220.6	220.6	220.6	220.6	220.6	220.6	220.6	220.6	220.6
Remaining Funding under SPSPA	148.3	148.3	148.3	148.3	148.3	148.3	148.3	148.3	148.3	148.3	148.3	148.3

Our approach is analogous to analyses by Moody's, OMB, and Millstein.

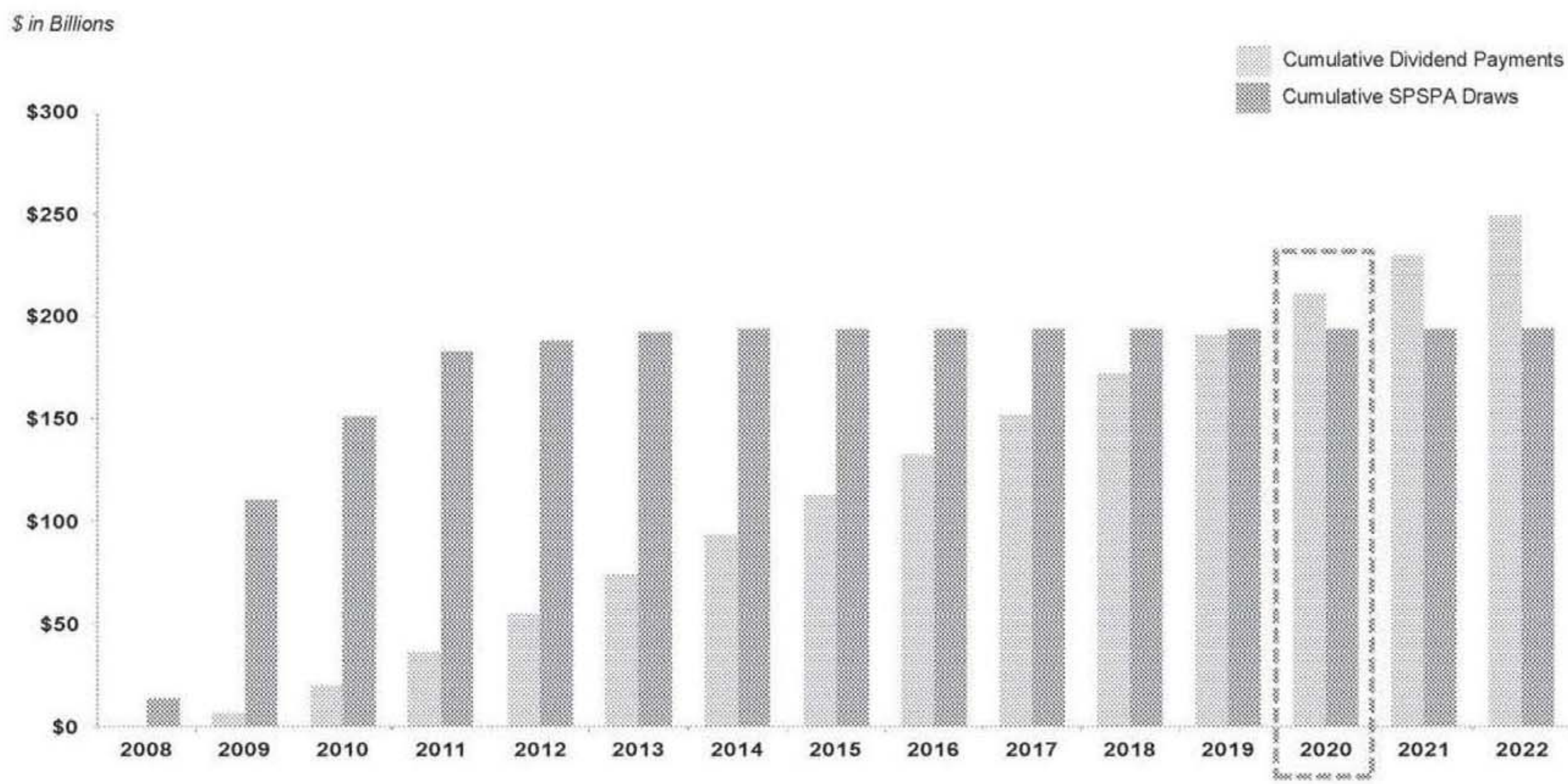
Note: Numbers may not foot due to rounding

From:	Benson, David C <david_c_benson@fanniemae.com>
Sent:	Saturday, August 11, 2012 12:16 PM
To:	Bowler, Timothy
Subject:	Fw: Corrected data with assumptions
Attachments:	GSE model_Aug 2012.pdf

Tim: See attached. I am away on vacation this week. Speak with you when I return. Dave.

-----Original Message-----
From: DAVID BENSON [mailto:bensondavidc@aol.com]
Sent: Saturday, August 11, 2012 12:11 PM
To: Benson, David C
Subject: Corrected data with assumptions

Cumulative GSE Dividend Payments vs. Cumulative SPSPA Draws



	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
SPSPA Draws Less Dividends ($B)	($14)	($104)	($131)	($147)	($133)	($117)	($100)	($80)	($61)	($41)	($22)	($2)	$17	$36	$53
Residual Equity ($B)	-	-	-	-	$0	$1	$2	$4	$8	$10	$11	$11	$9	$8	$8

Note: Figures above based on extended earnings forecast for both Fannie Mae and Freddie Mac. Forecast incorporates actual results through May 2012 for Fannie Mae and through 2011 for Freddie Mac.

Annual Detail of Modeled Cumulative Dividends and SPSPA Draws

Fannie Mae

($ in Billions)	2008-2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Comprehensive Income		11.6	7.5	11.0	12.5	13.9	13.2	12.2	11.4	10.9	10.5	10.5
Preferred Dividend Payment	19.8	11.6	11.8	12.1	12.2	12.2	12.2	12.2	12.2	12.2	12.3	12.5
Residual Equity	0.0	0.0	0.0	0.0	0.2	1.8	2.8	2.7	1.9	0.5	0.0	0.0
Cumulative Dividends	19.8	31.4	43.2	55.3	67.6	79.8	92.1	104.3	116.6	128.8	141.1	153.6
Cumulative SPSPA Draws [1]	(111.6)	(116.1)	(119.0)	(121.2)	(121.5)	(121.5)	(121.5)	(121.5)	(121.5)	(121.5)	(122.9)	(124.8)
Cumulative Draws Less Dividends	*(91.8)*	*(84.7)*	*(75.8)*	*(65.9)*	*(53.9)*	*(41.7)*	*(29.4)*	*(17.2)*	*(4.9)*	*7.3*	*18.3*	*28.8*
SPSPA Funding Cap [2]	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9
Remaining Funding under SPSPA	124.8	124.8	121.9	119.7	119.4	119.4	119.4	119.4	119.4	119.4	118.0	116.1

1 Draw requests related to net deficit occurring in Q4 are included in the following year. Treasury draw requests do not include the initial $1B liquidation preference of Fannie Mae's senior preferred stock, for which Fannie Mae did not receive any cash proceeds.

2 Pursuant to the amended senior preferred stock purchase agreement, cash draws attributable to deficits occurring in 2010-2012 do not count against the $200B funding cap.

Note: Figures from Fannie Mae July BoD corporate forecast incorporate actual results through May 2012. 2017-2022 figures are based on simplifying assumptions derived from trends observed within the 2012-2016 horizon.

Freddie Mac

($ in Billions)	2008-2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Comprehensive Income		6.7	7.8	8.7	9.1	9.6	8.7	8.4	7.7	7.2	6.7	6.6
Preferred Dividend Payment	16.3	7.3	7.3	7.3	7.3	7.3	7.3	7.3	7.3	7.3	7.3	7.3
Residual Equity	0.0	0.0	0.5	2.0	3.8	6.1	7.5	8.6	9.0	8.9	8.3	7.6
Cumulative Dividends	16.3	23.6	30.8	38.1	45.4	52.7	60.0	67.3	74.5	81.8	89.1	96.4
Cumulative SPSPA Draws [1]	(71.2)	(71.8)	(71.8)	(71.8)	(71.8)	(71.8)	(71.8)	(71.8)	(71.8)	(71.8)	(71.8)	(71.8)
Cumulative Draws Less Dividends	*(54.9)*	*(48.3)*	*(41.0)*	*(33.7)*	*(26.4)*	*(19.2)*	*(11.9)*	*(4.6)*	*2.7*	*10.0*	*17.3*	*24.6*
SPSPA Funding Cap [2]	220.6	221.1	221.1	221.1	221.1	221.1	221.1	221.1	221.1	221.1	221.1	221.1
Remaining Funding under SPSPA	149.3	149.3	149.3	149.3	149.3	149.3	149.3	149.3	149.3	149.3	149.3	149.3

1 Draw requests related to net deficit occurring in Q4 are included in the following year. Treasury draw requests do not include the initial $1B liquidation preference of Freddie Mac's senior preferred stock, for which Freddie Mac did not receive any cash proceeds.

2 Pursuant to the amended senior preferred stock purchase agreement, cash draws attributable to deficits occurring in 2010-2012 do not count against the $200B funding cap.

Note: 2012-2022 figures are based on simplifying assumptions derived from Fannie Mae forecast trends and observed relationships between key Fannie Mae and Freddie Mac performance metrics. These figures incorporate actual results through 2011 only.

Note: Numbers may not foot due to rounding

FannieMae

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Fannie Mae Annual Detail of Modeled Dividends, Draws, and Key Metrics

($ in Billions)

	2008-2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Comprehensive Income		11.6	7.5	11.0	12.5	13.9	13.2	12.2	11.4	10.9	10.5	10.5
Preferred Dividend Payment	19.8	11.6	11.8	12.1	12.2	12.2	12.2	12.2	12.2	12.2	12.3	12.5
Residual Equity	0.0	0.0	0.0	0.0	0.2	1.8	2.8	2.7	1.9	0.5	0.0	0.0
Cumulative Dividends	19.8	31.4	43.2	55.3	67.6	79.8	92.1	104.3	116.6	128.8	141.1	153.6
Cumulative SPSPA Draws [1]	(111.6)	(116.1)	(119.0)	(121.2)	(121.5)	(121.5)	(121.5)	(121.5)	(121.5)	(121.5)	(122.9)	(124.8)
Cumulative Draws Less Dividends	*(91.8)*	*(84.7)*	*(75.8)*	*(65.9)*	*(53.9)*	*(41.7)*	*(29.4)*	*(17.2)*	*(4.9)*	*7.3*	*18.3*	*28.8*
SPSPA Funding Cap [2]	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9	240.9
Remaining Funding under SPSPA	124.8	124.8	121.9	119.7	119.4	119.4	119.4	119.4	119.4	119.4	118.0	116.1
Market Metrics:												
SF First-Lien MDO Beginning ($B)		9,418	9,409	9,511	9,680	9,794	9,983	10,193	10,426	10,681	10,962	11,269
Total Market SF Originations ($B)		1,306	1,072	1,050	1,166	1,359	1,370	1,470	1,570	1,680	1,842	2,026
Total Market SF Liquidations ($B)		(1,315)	(969)	(881)	(1,053)	(1,170)	(1,160)	(1,238)	(1,314)	(1,399)	(1,535)	(1,690)
SF First-Lien MDO Ending ($B)		9,409	9,511	9,680	9,794	9,983	10,193	10,426	10,681	10,962	11,269	11,605
Annual MDO Growth Rate		-0.1%	1.1%	1.8%	1.2%	1.9%	2.1%	2.3%	2.5%	2.6%	2.8%	3.0%
Enterprise Metrics:												
SF Acquisition Volume ($B)		589	433	385	410	462	466	500	534	571	626	689
SF Market Share (Acquisitions/Originations)		45%	40%	37%	35%	34%	34%	34%	34%	34%	34%	34%
Total Mortgage Loans ($B) [3]		2,921	2,845	2,780	2,751	2,753	2,819	2,909	3,019	3,149	3,314	3,516
SF Charge-Fee on New Acquisitions, net (bps) [4]		30	31	32	33	33	35	35	35	35	35	35
SF Effective Guaranty Fee, net (bps) [4,5]		24	25	25	26	27	29	30	31	32	33	35

1 Draw requests related to net deficit occurring in Q4 are included in the following year. Treasury draw requests do not include the initial $1B liquidation preference of Fannie Mae's senior preferred stock, for which Fannie Mae did not receive any cash proceeds.

2 Pursuant to the amended senior preferred stock purchase agreement, cash draws attributable to deficits occurring in 2010-2012 do not count against the $200B funding cap.

3 Total Single-family and Multi-family conventional mortgage credit book of business.

4 Net of Temporary Payroll Tax Cut Continuation Act (TCCA) fee of 10bps. TCCA effective as of April 1, 2012.

5 Total guaranty fee income for the year divided by average SF credit book of business.

Note: Figures from Fannie Mae July BoD corporate forecast incorporate actual results through May 2012. 2017-2022 figures are based on simplifying assumptions derived from trends observed within the 2012-2016 horizon.

Note: Numbers may not foot due to rounding.

Freddie Mac Annual Detail of Modeled Dividends, Draws, and Key Metrics

Freddie Mac

($ in Billions)

	2008-2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Comprehensive Income		6.7	7.8	8.7	9.1	9.6	8.7	8.4	7.7	7.2	6.7	6.6
Preferred Dividend Payment	16.3	7.3	7.3	7.3	7.3	7.3	7.3	7.3	7.3	7.3	7.3	7.3
Residual Equity	0.0	0.0	0.5	2.0	3.8	6.1	7.5	8.6	9.0	8.9	8.3	7.6
Cumulative Dividends	16.3	23.6	30.8	38.1	45.4	52.7	60.0	67.3	74.5	81.8	89.1	96.4
Cumulative SPSPA Draws [1]	(71.2)	(71.8)	(71.8)	(71.8)	(71.8)	(71.8)	(71.8)	(71.8)	(71.8)	(71.8)	(71.8)	(71.8)
Cumulative Draws Less Dividends	*(54.9)*	*(48.3)*	*(41.0)*	*(33.7)*	*(26.4)*	*(19.2)*	*(11.9)*	*(4.6)*	*2.7*	*10.0*	*17.3*	*24.6*
SPSPA Funding Cap [2]	220.6	221.1	221.1	221.1	221.1	221.1	221.1	221.1	221.1	221.1	221.1	221.1
Remaining Funding under SPSPA	149.3	149.3	149.3	149.3	149.3	149.3	149.3	149.3	149.3	149.3	149.3	149.3
Market Metrics:												
SF First-Lien MDO Beginning ($B)		9,418	9,409	9,511	9,680	9,794	9,983	10,193	10,426	10,681	10,962	11,269
Total Market SF Originations ($B)		1,306	1,072	1,050	1,166	1,359	1,370	1,470	1,570	1,680	1,842	2,026
Total Market SF Liquidations ($B)		(1,315)	(969)	(881)	(1,053)	(1,170)	(1,160)	(1,238)	(1,314)	(1,399)	(1,535)	(1,690)
SF First-Lien MDO Ending ($B)		9,409	9,511	9,680	9,794	9,983	10,193	10,426	10,681	10,962	11,269	11,605
Annual MDO Growth Rate		-0.1%	1.1%	1.8%	1.2%	1.9%	2.1%	2.3%	2.5%	2.6%	2.8%	3.0%
Enterprise Metrics:												
SF Acquisition Volume ($B)		331	232	209	227	259	260	279	298	319	350	385
SF Market Share (Acquisitions/Originations)		25%	22%	20%	19%	19%	19%	19%	19%	19%	19%	19%
Total Mortgage Loans ($B)[3]		1,781	1,734	1,695	1,677	1,678	1,680	1,701	1,738	1,790	1,865	1,964
SF Effective Guaranty Fee, net (bps)[4,5]		21	22	23	24	25	27	29	30	31	32	34

1 Draw requests related to net deficit occurring in Q4 are included in the following year. Treasury draw requests do not include the initial $1B liquidation preference of Freddie Mac's senior preferred stock, for which Freddie Mac did not receive any cash proceeds.

2 Pursuant to the amended senior preferred stock purchase agreement, cash draws attributable to deficits occurring in 2010-2012 do not count against the $200B funding cap.

3 Total Single-family and Multi-family conventional mortgage credit book of business.

4 Freddie Mac does not disclose SF charged fees. As a result, the forecast of guaranty fee income is based on the forecast for Fannie Mae's effective guaranty fees, adjusted for the observed relationship between Freddie Mac and Fannie Mae historically. This is also presented net of the Temporary Payroll Tax Cut Continuation Act (TCCA) fee of 10bps. TCCA effective as of April 1, 2012.

5 Total guaranty fee income for the year divided by average SF credit book of business.

Note: 2012-2022 figures are based on simplifying assumptions derived from Fannie Mae forecast trends and observed relationships between key Fannie Mae and Freddie Mac performance metrics. These figures incorporate actual results through 2011 only.

Note: Numbers may not foot due to rounding.

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS
NO. 13-465 C
(FILED FEBRUARY 26, 2014)

--- x

FAIRHOLME FUNDS, INC., ET AL	RCFC 12(b);
VS.	RCFC 12(b)(6);
THE UNITED STATES	RCFC 56(d)

--- x

ORAL DEPOSITION OF
MS. SUSAN MCFARLAND

HOUSTON, TEXAS

JULY 15TH, 2015

10:01 A.M.

*   *   *

[44] Q. (BY MR. THOMPSON) Did you think it was the effective nationalization of the companies?

MR. LAUFGRABEN: Objection; form.

MR. BARTOLOMUCCI: Objection; form.

A. No, I didn't view it as nationalizing. It borders on that; I can see.

But I had, shortly before that, had [45] a meeting with Treasury whereby we reviewed our forecasts. I had expressed a view that I believed we were now in a sustainable profitability, that we would be able to deliver sustainable profits over time. I even mentioned the possibility that it could get to a point in the not-so-distant future where the factors might exist whereby the allowance on the deferred tax asset would be released. We were not there yet, but, you know, you could see positive things occurring.

So when the amendment went into place, part of my reaction was they did that in response to my communication of our forecasts and the implication of those forecasts, that it was probably a desire not to allow capital to build up within the enterprises and not to allow the enterprises to recapitalize themselves.

* * *

[58] Q. Okay. And when you say that you would have had dialogue with people at FHFA about the deferred tax assets, with who would you have had the dialogue?

Would that have been Mario Ugoletti?

MR. LAUFGRABEN: Object to the form of the question; vagueness as to time period.

A. Yeah.

So early on, it's probably through the Chief Accountant's office of the FHFA, because it is a technical accounting matter.

Q. And do you happen to recall –

A. I can pick him out of a lineup.

Q. Okay. We'll show you some names later on.

A. I tell you, I ask me a number, I can probably give it to you. Peoples names . . .

It would have started there. Eventually there were conversations with Director DeMarco and key direct reports of his, but that – the – those – the [59] DeMarco conversations occurred when we were actually in the serious mode of potentially – we were looking – we did a full analysis at the end of the second quarter; no release. We did a full analysis at the end of the third quarter; no release.

When we were doing the analysis for the fourth quarter of 2012, we started to get to a point where we were tipping towards release, and that's when I began to have conversations with more senior folks at FHFA on it. But they were already aware of the statement that I made to Treasury. I mean, in general, I put it on people's radar screens that it's something that could happen in the not-so-distant future.

I will say that I believe Mary Miller asked me in this meeting about how large would it be and did I have any idea of when.

Q. Yeah.

A. And I believe my response was around 50 billion, but that could be larger or smaller depending upon when. The further out in time it is, the smaller it probably would be. It is part of the evidence that it might be good.

So the further out in time that it would be released, the smaller the release size would be. But I said probably in the [60] 50-billion-dollar range and probably sometime mid 2013 at that time when I met with them late July, early August 2012.

But I said we had not done a real in-depth analysis, so I was just kind of giving her kind of my off-the-cuff perspective in the moment.

Q. And FHFA was on notice that you had sent this message to Treasury?

A. Yes.

* * *

AGENDA
May 29, 2012 Meeting
Treasury, KPMG, and Grant Thornton

New Valuation Issues

- Taxation of the GSEs
- Returning the deferred tax asset to the GSE balance sheets
- Impact of the allocation of the g-fee increase to fund payroll taxes
- Principal reduction/modifications
- Other policy announcements or changes

Timing

1. May 29 – Meeting with Treasury, KPMG, and Grant Thornton
2. May 29-June 1 – Obtain copies of the most recent GSE forecasts
3. June 4-12 – Initial meetings with the GSEs
    a. Review the GSE-prepared forecasts
    b. Meet with members of the GSEs' forecasting staff to walk through the mechanics of their modeling process
    c. Communicate expectations of requirements from the GSEs to complete our task

i. forecasting methodologies

ii. forecast of the anticipated Liquidity Commitment drawdown at September 30 (no later than October 16)

iii. number of outstanding common shares at September 30, 2012 (October 3)

iv. projected tax payments

v. treatment of deferred tax asset

d. Participants:

i. FHFA

ii. GSE forecasting teams

iii. Treasury Domestic Finance

iv. Representative from Treasury DCFO

v. Representative from Treasury OIG

vi. Grant Thornton

4. June 29 – Circulate an outline of the required data sources and the methodologies to be used to

a. value the Common Stock Warrants

b. value the Senior Preferred Shares

c. calculate the Liquidity Commitment

d. Recipients:

i. Treasury DCFO

ii. Treasury OIG

iii. Treasury Domestic Finance

iv. KPMG

5. Week of July 9-13 – Conference call to discuss progress toward preparation of the draft models with placeholder figures

a. Participants:

i. Treasury DCFO

ii. Treasury OIG

iii. Treasury Domestic Finance

iv. KPMG

v. Grant Thornton

6. July 19 – Circulate copies of the two GSE models and a draft report for one of the GSEs with placeholder figures based on recent forecasts

a. Senior Preferred Shares valuation

b. Liquidity Commitment calculation

c. Recipients:

i. Treasury DCFO

ii. Treasury OIG

iii. Treasury Domestic Finance

iv. KPMG

7. Week of August 6-10 – Meeting to discuss placeholder models and report

a. Participants:

i. Treasury DCFO

ii. Treasury OIG

iii. Treasury Domestic Finance

iv. KPMG

v. Grant Thornton

8. September 14 – Obtain GSE-provided stress tests from FHFA; check-in conference call

9. September 21 – Check-in conference call

10. September 28 – Check-in conference call

11. October 3-10 – Receive from the GSEs the number of outstanding common shares

12. October 5 – Check-in conference call

13. October 8-15 – Circulate the Common Stock Warrants valuation reports for Fannie Mae and Freddie Mac with September 30, 2012 information. **[This deadline is subject to the availability of the number of outstanding common shares from each of the GSEs.]**

    a. Recipients:

        i. Treasury DCFO

        ii. Treasury OIG

        iii. KPMG

14. October 12 – Check-in conference call

15. October 16 – Receive from the GSEs the forecasted drawdowns at September 30, 2011

16. October 17 – Conference call to discuss GSE forecasted drawdowns as of September 30

    a. Participants:

        i. Treasury DCFO

        ii. Treasury Domestic Finance

        iii. Grant Thornton

17. October 22- Circulate the Liquidity Commitment calculation memos for Fannie Mae and Freddie Mac with September 30, 2011 information. **[This deadline is subject to the timely availability of the stress tests provided by the GSEs to FHFA and the GSE-forecasted draws for the quarter ending September 30.]**

    a. Recipients:

        i. Treasury DCFO

        ii. Treasury OIG

        iii. KPMG

18. October 25 – Circulate the Senior Preferred Shares valuation reports for Fannie Mae and Freddie Mac with September 30, 2012 information. **[This deadline is subject to the timely availability of the stress tests provided by the GSEs to FHFA and the GSE-forecasted draws for the quarter ending September 30.]**

    a. Recipients:

        i. Treasury DCFO

   ii. Treasury OIG

   iii. KPMG

19. October 26 – Check-in conference call to provide final valuation figures to be included in the financial statements

20. October 29 – Final reports due to Treasury

    a. Common Stock Warrants valuation – Fannie Mae

    b. Common Stock Warrants valuation – Freddie Mac

    c. Senior Preferred Shares valuation – Fannie Mae

    d. Senior Preferred Shares valuation – Freddie Mac

    e. Liquidity Commitment calculation – Fannie Mae

    f. Liquidity Commitment calculation – Freddie Mac

21. October 31 – Treasury DCFO-AIC records the valuation and calculation results

BRIEFING MEMORANDUM FOR UNDER SECRETARY MILLER

Event:	**Meetings with Freddie Mac and Fannie Mae Management Teams**
Date/Loc:	Freddie Mac – August 9, 2012 at 11:00 AM, DIP Room Fannie Mae – August 9, 2012 at 2:00 PM, DIP Room
Press:	Closed
From:	Timothy Bowler, Deputy Assistant Secretary for Capital Markets

Attached below are several key questions and areas for discussion we believe you should raise during your meetings with the Fannie Mae and Freddie Mac management teams tomorrow. Both Enterprises also plan to provide you with a status update on their financial position, including the most recent earnings results as well as human capital conditions at the GSEs.

KEY QUESTIONS/TOPICS TO DISCUSS

DISCUSS AT BOTH MEETINGS

Earnings

- We should receive an update on the GSEs' near and long-term financial forecasts, including additional forecasted PSPA draws in Q3 and Q4, expectations for future capital reserve takings or reserve releases, and potential increases in the delinquency rates on the GSEs' post-2008 books of business. We would also like to know how quickly they forecast releasing credit reserves and when they expect their reserve balances to stabilize.

- We would like the management teams to explain how each Enterprise utilizes derivatives to hedge their books of business and which holdings are the most volatile.

- We would like to know approximately how much of the reduction in credit losses this past quarter arose from the recent rise in home prices verses other factors. Do they foresee additional credit loss reductions in the third and fourth quarters?

- Both Enterprises recently decreased their debt issuance in the market (Debt outstanding at Fannie decreased 11% YTD; Freddie decreased 13% YTD). We would like to know what feedback they have received from market participants on this change.

- From the first to the second quarter, the overall single-family serious delinquency rates at both Enterprises declined. We would like to know whether they anticipate continued declines in this figure in the third and fourth quarters.

Management and sale of non-performing loans

- Treasury is supportive of reducing risk on the GSEs' balance sheets and finding ways to transfer servicing of NPLs from poorer performing servicers to special servicers as well as potentially executing outright sales. We would like to know what hurdles they see as that may prevent this effort from moving forward.

Single securitization platform & single security effort

- We would like a general update on how discussions are proceeding with FHFA and how Treasury can help to move the single securitization platform initiative forward.

DISCUSS WITH FREDDIE MAC ONLY

Credit risk syndication

- FHFA is preparing directives to the GSEs regarding a data release and transaction that will likely take place in Q4 Freddie expressed concern this initiative will not be profitable in the near term and may cost taxpayers money. They also expressed concern with releasing loan level information to the market.

- Treasury fully supports FHFA's credit risk syndication efforts and the release of adequate loan level information. We believe releasing this information is not only helpful for GSE risk syndication, but also for helping restart the private securitization markets. We also believe credit risk syndication efforts should be programmatic and not a single one-off transaction (Freddie Mac would like to start with one and may not commit to more).

- We would like to see whether Freddie would be able to move forward with an August announcement of the program initiative and loan level data release so that a pilot transaction can be completed in Q4.

REO-to-rental financing

- FHFA recently denied Freddie Mac's request to develop a debt guarantee pilot program to support scattered-site single family rental investment and long-term management. We would like to know how they plan to respond to FHFA's decision.

Human capital concerns

- We would like to know what the plans are for staff retention, new hiring and the progress of rebuilding the broader team at Freddie Mac.
- Freddie also recently announced a series of structural/personnel changes to their various lines of business. We would like to know how they believe this will improve efficiencies at the Enterprise and if Treasury should be aware of any further management changes that may occur in the near future.

<u>DISCUSS WITH FANNIE MAE ONLY</u>

Earnings

- The number of loan modifications and repayment plans/forbearances at Fannie decreased substantially this past quarter. We would like to know the main reason for this decline.

Future REO-to-rental efforts

- We would like to get an update on Fannie Mae's plans for additional bulk REO sales.

[SEAL]

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

December 20, 2010

ACTION MEMORANDUM FOR SECRETARY GEITHNER

FROM: Jeffrey A. Goldstein
Under Secretary for Domestic Finance
[JG]

SUBJECT: Periodic Commitment Fee for GSE Preferred Stock Purchase Agreements (PSPAs)

Recommendation

That you waive the Periodic Commitment Fee (PCF) for 2011 and reconsider next year.

TFG Approve ___ Disapprove ___ Let's Discuss

Background:

- The amended PSPA agreements between Treasury and GSEs specify that a Periodic Commitment Fee (PCF) be set by December 31, 2010.
- The date for setting the PCF was previously moved from December 31, 2009 to December 31, 2010 as part of the broader amendments to the PSPAs on December 24, 2009. Therefore, no PCF has been set or paid to date.

- Treasury may waive the PCF for one year at a time in its sole discretion based on adverse conditions in the mortgage market
- The PCF is to be mutually agreed to by Treasury and FHFA, in consultation with the Federal Reserve. The PCF was designed to fully compensate Treasury for providing its ongoing financial commitment.

Considerations:

<u>Reasons to Waive the PCF for 2011</u>

Housing markets remain fragile

- Private capital has yet to return to the market
    - o Fannie Mae, Freddie Mac, and FHA/ GNMA currently account for over 95% of mortgage originations – the historic average is around 40%
    - o The spread between prime jumbos and conforming mortgages is still elevated and is currently around 100 basis points – the historic average is closer to 20 basis points
    - o Since September 2008, there has only been one private label new issue securitization to come to the market (Redwood Sequoia deal)
- Nearly 11 million borrowers are underwater on their mortgages

- Mortgage delinquency rates remain elevated (5.2% for prime, 36.5% for subprime, and 11.9% for FHA)
- Foreclosure starts and completions remain elevated

Given the size of current GSE draws, imposing a PCF would only lead to increased Treasury draws and not generate increased return for the taxpayer

- According to the FHFA stress tests in the base case, both GSEs are expected to require additional draws through the end of 2011 to cover net income losses and required dividend payments (although projected draws are < $1 billion for Freddie Mac in Q3 and Q4) (see appendix)

Other than timing, no real additional taxpayer value is created

- Even if the GSEs generated positive surplus of net income after dividends, that surplus can be used to offset potential draws in future quarters

Potentially confusing message to the market

- Last year we stated that the fragility of the housing market was one of the rationales for postponing setting the commitment fee; by setting the fee this year (at any level), we could be viewed as implicitly making an affirmative statement on the health of the housing market

Waiving the PCF for 2011 preserves full optionality to set the PCF next year if housing markets are more stable and if the GSEs are generating positive net income in excess of their dividend commitments

Reasons to Set the PCF

- Makes clear the Administration's commitment to ensure existing common equity holders will not have access to any positive earnings from the GSEs in the future
- Illustrates further commitment to recouping taxpayer support

If you decided to set the PCF, there are two potential options:

Option 1 – Set the PCF as a percentage of the liquidation preference of the outstanding preferred stock

Option 2 – Set the PCF equal to any generated positive net income (subject to further legal review)
These would have to be mutually agreed by FHFA in consultation with the Federal Reserve

U.S. DEPARTMENT OF THE TREASURY

Press Center

Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac

8/17/2012

Modifications to Preferred Stock Purchase Agreements Will Make Sure That Every Dollar of Earnings Fannie Mae and Freddie Mac Generate Will Benefit Taxpayers

Announcement Will Support the Continued Flow of Mortgage Credit during a Responsible Transition to a Reformed Housing Finance Market

WASHINGTON – The U.S. Department of the Treasury today announced a set of modifications to the Preferred Stock Purchase Agreements (PSPAs) between the Treasury Department and the Federal Housing Finance Agency (FHFA) as conservator of Fannie Mae and Freddie Mac (the Government Sponsored Enterprises or GSEs) that will help expedite the wind down of Fannie Mae and Freddie Mac, make sure that every dollar of earnings each firm generates is used to benefit taxpayers, and support the continued flow of mortgage credit during a responsible transition to a reformed housing finance market.

"With today's announcement, we are taking the next step toward responsibly winding down Fannie Mae and Freddie Mac, while continuing to support the necessary process of repair and recovery in the housing market," said Michael Stegman, Counselor to the Secretary of the Treasury for Housing Finance Policy. "As we continue to work toward bi-partisan housing finance reform, we are committed to putting in place measures right now that support continued access to mortgage credit for American families, promote a responsible transition, and protect taxpayer interests."

The modifications to the PSPAs announced today are consistent with FHFA's strategic plan for the conservatorship of Fannie Mae and Freddie Mac that it released in February 2012. The modifications include the following key components:

Accelerated Wind Down of the Retained Mortgage Investment Portfolios at Fannie Mae and Freddie Mac

The agreements require an accelerated reduction of Fannie Mae and Freddie Mac's investment portfolios. Those portfolios will now be wound down at an annual rate of 15 percent – an increase from the 10 percent annual reduction required in the previous agreements. *As* a result of this change, the GSEs' investment portfolios must be reduced to the $250 billion target set in the previous agreements four years earlier than previously scheduled.

Annual Taxpayer Protection Plan

To support a thoughtfully managed wind down, the agreements require that on an annual basis, each GSE will – under the direction of their conservator, the Federal Housing Finance Agency – submit a plan to Treasury on its actions to reduce taxpayer exposure to mortgage credit risk for both its guarantee book of business and retained investment portfolio.

Full Income Sweep of All Future Fannie Mae and Freddie Mac Earnings to Benefit Taxpayers for Their Investment

The agreements will replace the 10 percent dividend payments made to Treasury on its preferred stock investments in Fannie Mae and Freddie Mac with a quarterly sweep of every dollar of profit that each firm earns going forward.

This will help achieve several important objectives, including:

- Making sure that every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers for their investment in those firms.
- Ending the circular practice of the Treasury advancing funds to the GSEs simply to pay dividends back to Treasury.
- Acting upon the commitment made in the Administration's 2011 White Paper that the

GSEs will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form.

- Supporting the continued flow of mortgage credit by providing borrowers, market participants, and taxpayers with additional confidence in the ability of the GSEs to meet their commitments while operating under conservatorship.

- Providing greater market certainty regarding the financial strength of the GSEs.

THIRD AMENDMENT TO AMENDED AND RESTATED SENIOR PREFERRED STOCK PURCHASE AGREEMENT

THIRD AMENDMENT dated as of August 17, 2012, to the AMENDED AND RESTATED SENIOR PREFERRED STOCK PURCHASE AGREEMENT dated as of September 26, 2008, between the UNITED STATES DEPARTMENT OF THE TREASURY ("*Purchaser*"), and FEDERAL NATIONAL MORTGAGE ASSOCIATION ("*Seller*"), acting through the Federal Housing Finance Agency (the "*Agency*") as its duly appointed conservator (the Agency in such capacity, "*Conservator*").

Background

A. Purchaser and Seller have heretofore entered into the Amended and Restated Senior Preferred Stock Purchase Agreement dated as of September 26, 2008 (the "*Amended and Restated Agreement*").

B. In the Amended and Restated Agreement, Purchaser committed itself to provide to Seller, on the terms and conditions provided in the Amended and Restated Agreement, immediately available funds in an amount as determined from time to time as provided in the Amended and Restated Agreement, but in no event in an aggregate amount exceeding $100,000,000,000.

C. In consideration for Purchaser's commitment, Seller agreed to sell, and did sell, to Purchaser

1,000,000 shares of senior preferred stock, in the form of the Variable Liquidation Preference Senior Preferred Stock of Seller attached as Exhibit A to the Amended and Restated Agreement, with an initial liquidation preference equal to $1,000 per share.

D. The Amended and Restated Agreement provides that the aggregate liquidation preference of the outstanding shares of senior preferred stock shall be automatically increased by an amount equal to the amount of each draw under Purchaser's funding commitment, and the senior preferred stock sold by Seller to Purchaser provides that the senior preferred stock shall accrue dividends at the annual rate per share equal to 10 percent on the then-current liquidation preference.

E. Purchaser and Seller have heretofore entered into the Amendment dated as of May 6, 2009, to the Amended and Restated Agreement (the "*First Amendment*").

F. In the First Amendment, Purchaser increased to $200,000,000,000 the maximum aggregate amount permitted to be provided to Seller under the Amended and Restated Agreement, and amended the terms of the Amended and Restated Agreement in certain other respects.

G. Purchaser and Seller have heretofore entered into the Second Amendment dated as of December 24, 2009, to the Amended and Restated Agreement (the "*Second Amendment*").

H. In the Second Amendment, Purchaser modified the maximum aggregate amount permitted to be provided to Seller under the Amended and Restated Agreement, as previously amended, by replacing the fixed maximum aggregate amount with the new formulaic maximum amount specified therein, and amended the terms of the Amended and Restated Agreement, as previously amended, in certain other respects.

I. Purchaser and Seller are each authorized to enter into this Third Amendment to the Amended and Restated Agreement ("*this Third Amendment*") that (i) includes an agreement by Seller to modify the dividend rate provision of the senior preferred stock sold by Seller to Purchaser, and (ii) amends the terms of the Amended and Restated Agreement, as previously amended, in certain other respects.

THEREFORE, for and in consideration of the mutual agreements herein contained and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Purchaser and Seller agree as follows:

Terms and Conditions

1. Definitions.

Capitalized terms used and not defined in this Third Amendment shall have the respective meanings given such terms in the Amended and Restated Agreement, as amended by the First Amendment and the

Second Amendment (the Amended and Restated Agreement, as amended by the First Amendment and the Second Amendment, being the "*Existing Agreement*").

2. Amendment to Paragraph 2(a) of Senior Preferred Stock (Relating to Dividend Payment Dates and Dividend Periods).

With respect to the Certificate of Designation of Terms of Variable Liquidation Preference Senior Preferred Stock, Series 2008-2, dated September 7, 2008 (the "*Senior Preferred Stock Certificate*"), sold by Seller to Purchaser and purchased by Purchaser from Seller, Seller agrees either to amend the existing paragraph 2(a) of the Senior Preferred Stock Certificate, or to issue a replacement Senior Preferred Stock Certificate, in either case so that, by not later than September 30, 2012, paragraph 2(a) reads as follows:

> (a) For each Dividend Period from the date of the initial issuance of the Senior Preferred Stock through and including December 31, 2012, holders of outstanding shares of Senior Preferred Stock shall be entitled to receive, ratably, when, as and if declared by the Board of Directors, in its sole discretion, out of funds legally available therefor, cumulative cash dividends at the annual rate per share equal to the then-current Dividend Rate on the then-current Liquidation Preference. For each Dividend Period from January 1, 2013, holders of outstanding shares of Senior Preferred Stock shall be entitled to receive,

ratably, when, as and if declared by the Board of Directors, in its sole discretion, out of funds legally available therefor, cumulative cash dividends in an amount equal to the then-current Dividend Amount. Dividends on the Senior Preferred Stock shall accrue from but not including the date of the initial issuance of the Senior Preferred Stock and will be payable in arrears when, as and if declared by the Board of Directors quarterly on March 31, June 30, September 30 and December 31 of each year (each, a "Dividend Payment Date"), commencing on December 31, 2008. If a Dividend Payment Date is not a "Business Day," the related dividend will be paid not later than the next Business Day with the same force and effect as though paid on the Dividend Payment Date, without any increase to account for the period from such Dividend Payment Date through the date of actual payment. "Business Day" means a day other than (i) a Saturday or Sunday, (ii) a day on which New York City banks are closed, or (iii) a day on which the offices of the Company are closed.

If declared, the initial dividend will be for the period from but not including the date of the initial issuance of the Senior Preferred Stock through and including December 31, 2008. Except for the initial Dividend Payment Date, the "Dividend Period" relating to a Dividend Payment Date will be the period from but not including the preceding Dividend Payment Date through and including the related Dividend Payment Date. For each Dividend

Period from the date of the initial issuance of the Senior Preferred Stock through and including December 31, 2012, the amount of dividends payable on the initial Dividend Payment Date or for any Dividend Period through and including December 31, 2012, that is not a full calendar quarter shall be computed on the basis of 30-day months, a 360-day year and the actual number of days elapsed in any period of less than one month. For the avoidance of doubt, for each Dividend Period from the date of the initial issuance of the Senior Preferred Stock through and including December 31, 2012, in the event that the Liquidation Preference changes in the middle of a Dividend Period, the amount of dividends payable on the Dividend Payment Date at the end of such Dividend Period shall take into account such change in Liquidation Preference and shall be computed at the Dividend Rate on each Liquidation Preference based on the portion of the Dividend Period that each Liquidation Preference was in effect.

3. Amendment to Paragraph 2(c) of Senior Preferred Stock (Relating to Dividend Rate and Dividend Amount).

With respect to the Senior Preferred Stock Certificate sold by Seller to Purchaser and purchased by Purchaser from Seller, Seller agrees either to amend the existing paragraph 2(c) of the Senior Preferred Stock Certificate, or to issue a replacement Senior Preferred

Stock Certificate, in either case so that, effective September 30, 2012, paragraph 2(c) reads as follows:

> (c) For each Dividend Period from the date of the initial issuance of the Senior Preferred Stock through and including December 31, 2012, "Dividend Rate" means 10.0%; provided, however, that if at any time the Company shall have for any reason failed to pay dividends in cash in a timely manner as required by this Certificate, then immediately following such failure and for all Dividend Periods thereafter until the Dividend Period following the date on which the Company shall have paid in cash full cumulative dividends (including any unpaid dividends added to the Liquidation Preference pursuant to Section 8) the "Dividend Rate" shall mean 12.0%.
>
> For each Dividend Period from January 1, 2013, through and including December 31, 2017, the "Dividend Amount" for a Dividend Period means the amount, if any, by which the Net Worth Amount at the end of the immediately preceding fiscal quarter, less the Applicable Capital Reserve Amount, exceeds zero. For each Dividend Period from January 1, 2018, the "Dividend Amount" for a Dividend Period means the amount, if any, by which the Net Worth Amount at the end of the immediately preceding fiscal quarter exceeds zero. In each case, "Net Worth Amount" means (i) the total assets of the Company (such assets excluding the Commitment and any unfunded amounts thereof) as reflected on the balance sheet of the Company as of the applicable date

set forth in this Certificate, prepared in accordance with GAAP, less (ii) the total liabilities of the Company (such liabilities excluding any obligation in respect of any capital stock of the Company, including this Certificate), as reflected on the balance sheet of the Company as of the applicable date set forth in this Certificate, prepared in accordance with GAAP. "Applicable Capital Reserve Amount" means, as of any date of determination, for each Dividend Period from January 1, 2013, through and including December 31, 2013, \$3,000,000,000; and for each Dividend Period occurring within each 12-month period thereafter, \$3,000,000,000 reduced by an equal amount for each such 12-month period through and including December 31, 2017, so that for each Dividend Period from January 1, 2018, the Applicable Capital Reserve Amount shall be zero. For the avoidance of doubt, if the calculation of the Dividend Amount for a Dividend Period does not exceed zero, then no Dividend Amount shall accrue or be payable for such Dividend Period.

4. Amendment to Section 3.2 (Relating to the Periodic Commitment Fee).

Section 3.2 of the Existing Agreement is hereby amended to read as follows:

3.2. *Periodic Commitment Fee.* (a) Commencing March 31, 2011, Seller shall pay to Purchaser quarterly, on the last day of March, June, September and December of each calendar year (each a "Periodic Fee Date"), a periodic commitment fee (the "Periodic Commitment Fee"). The Periodic Commitment Fee shall accrue from January 1, 2011.

(b) The Periodic Commitment Fee is intended to fully compensate Purchaser for the support provided by the ongoing Commitment following December 31, 2010. The amount of the Periodic Commitment Fee shall be set not later than December 31, 2010 with respect to the ensuing five-year period, shall be reset every five years thereafter and shall be determined with reference to the market value of the Commitment as then in effect. The amount of the Periodic Commitment Fee shall be mutually agreed by Purchaser and Seller, subject to their reasonable discretion and in consultation with the Chairman of the Federal Reserve; *provided*, that Purchaser may waive the Periodic Commitment Fee for up to one year at a time, in its sole discretion, based on adverse conditions in the United States mortgage market.

(c) At the election of Seller, the Periodic Commitment Fee may be paid in cash or by adding the amount thereof ratably to the liquidation preference of each outstanding share of Senior Preferred Stock so that the aggregate liquidation preference of all such outstanding shares of Senior Preferred Stock is increased by an amount equal to the Periodic Commitment Fee. Seller shall deliver notice of such election not later than three (3) Business Days prior to each Periodic Fee Date. If the Periodic Commitment Fee is not paid in cash by 12:00 pm (New York time) on the applicable Periodic Fee Date (irrespective of Seller's election pursuant to this subsection), Seller shall be deemed to have elected to pay the Periodic Commitment Fee by adding the amount thereof to the liquidation preference of the Senior Preferred Stock, and the aggregate liquidation preference of the outstanding shares of Senior Preferred Stock shall thereupon be automatically increased, in the manner contemplated by the first sentence of this section, by an aggregate amount equal to the Periodic Commitment Fee then due.

(d) Notwithstanding anything to the contrary in paragraphs (a), (b), or (c) above, and in consideration of the modification made to the Senior Preferred Stock effective September 30, 2012, for each quarter commencing January 1, 2013, and continuing for as long as paragraph 2 of the Senior Preferred Stock remains in form and content substantially the same as the form and content of the Senior Preferred Stock in effect on September 30, 2012, no Periodic Commitment Fee shall be set, accrue, or be payable.

5. Amendment to Section 5.4 (Relating to Transfer of Assets).

Section 5.4 of the Existing Agreement is hereby amended to read as follows:

5.4. *Transfer of Assets.* Seller shall not, and shall not permit any of its subsidiaries to, in each case without prior written consent of Purchaser, sell, transfer, lease or otherwise dispose of (in one transaction or a series of related transactions) all or any portion of its assets (including Equity Interests in other persons, including subsidiaries), whether now owned or hereafter acquired (any such sale, transfer, lease or disposition, a "*Disposition*"), other than Dispositions for fair market value:

(a) to a limited life regulated entity ("*LLRE*") pursuant to Section 1367(i) of the FHE Act;

(b) of assets and properties in the ordinary course of business, consistent with past practice;

(c) of assets and properties having fair market value individually or in aggregate less than $250,000,000 in one transaction or a series of related transactions;

(d) in connection with a liquidation of Seller by a receiver appointed pursuant to Section 1367(a) of the FHE Act;

(e) of cash or cash equivalents for cash or cash equivalents; or

(f) to the extent necessary to comply with the covenant set forth in Section 5.7 below.

6. <u>Amendment to Section 5.7 (Relating to Owned Mortgage Assets)</u>.

Section 5.7 of the Existing Agreement is hereby amended to read as follows:

> 5.7. Mortgage Assets. Seller shall not own, as of any applicable date, Mortgage Assets in excess of (i) on December 31, 2012, $650 billion, or (ii) on December 31 of each year thereafter, 85.0% of the aggregate amount of Mortgage Assets that Seller was permitted to own as of December 31 of the immediately preceding calendar year; *provided*, that in no event shall Seller be required under this Section 5.7 to own less than $250 billion in Mortgage Assets.

7. <u>Amendment to Section 5 (Adding New Section 5.11 Relating to "Annual Risk Management Plans")</u>.

Section 5 of the Existing Agreement is hereby amended by inserting after section 5.10 the following:

> 5.11. Annual Risk Management Plans. Not later than December 15, 2012, and not later than December 15 of each year thereafter while Seller remains in conservatorship pursuant to Section 1367 of the FHE Act,

> Seller shall, under the direction of Conservator, deliver a risk management plan to Purchaser. Each annual risk management plan shall set out Seller's strategy for reducing its enterprise-wide risk profile and shall describe, in reasonable detail, the actions Seller will take, to reduce both the financial and operational risk associated with each reportable business segment of Seller. Plans delivered subsequent to December 15, 2012 shall also include an assessment of Seller's performance relative to the planned actions described in the prior year's plan. The submission of annual risk management plans under this section shall not in any way limit or affect the Agency in any of its capacities to carry out its statutory responsibilities, including but not limited to providing direction to and oversight of Seller."

8. Existing Agreement to Continue, as Amended.

Except as expressly modified by this Third Amendment, the Existing Agreement shall continue in full force and effect.

9. Effective Date.

This Third Amendment shall not become effective until it has been executed by both of Purchaser and Seller. When this Third Amendment has been so executed, it shall become effective as of the date first above written.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, by

Federal Housing Finance Agency,
its Conservator

/s/ Edward J. DeMarco
Edward J. DeMarco
Acting Director

UNITED STATES DEPARTMENT OF THE TREASURY

/s/ Timothy F. Geithner
Timothy F. Geithner
Secretary of the Treasury

From:	Ugoletti, Mario [/O=FHFA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=UGDETTIM]
Sent:	8/9/2012 10:52:11 AM
To:	DeMarco, Edward [edward.demarco@fhfa.gov]; Pollard, Alfred [alfred.pollard@fhfa.gov]; Laponsky, Mark [mark.laponsky@fhfa.gov]; Spohn, Jeffrey [jeffrey.spohn@fhfa.gov]; Greenlee, Jon [jon.greenlee@fhfa.gov]; Lawler, Patrick [patrick.lawler@fhfa.gov]; DeLeo, Wanda [wanda.deleo@fhfa.gov]; Satriano, Nicholas [nicholas.satriano@fhfa.gov]
CC:	Brown, Jan [jan.brown@fhfa.gov]
Subject:	PSPA Alert

Close Hold

As a heads up, there appears to be a renewed push to move forward on PSPA amendments. I have not seen the proposed documents yet, but my understanding is that largely the same as previous versions we had reviewed in terms of net income sweep, eliminating the commitment fee, faster portfolio wind down, and a deminimus safe harbor for ordinary course transactions. The one potential difference is not having separate covenants on g-fees, risk reduction, etc., but potentially one covenant requiring the Enterprises to present a plan to Treasury on how they are managing or reducing risk. Depending on the language that could be an improvement.

I am leaving for the day at around 11:00. When I get the proposed language I will have Jan forward it to this group. I have told Treasury we should plan on meeting on Monday morning, perhaps around 11:00 to discuss further. Mario.

[1] **Current as of 8/16/2012 at 10:51 AM**
Sensitive and Pre-Decisional

PSPA Amendment Q&As

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[3] **<u>KEY FRAMING/TALKING POINTS</u>**

- We are announcing steps to wind-down the enterprises more quickly and responsibly and make sure they are not allowed to recapitalize and return to the market in their prior form.
- First, we will increase the minimum amount by which they wind-down their portfolios from 10 percent to 15 percent a year, which will

mean they hit their wind down target four years earlier than currently scheduled.

- Second, each year, both enterprises will have to submit to Treasury a detailed plan to reduce taxpayer exposure to the mortgage market, which will help us manage their wind-down thoughtfully and responsibly.

- And third, we are replacing the circular 10 percent annual dividend obligation with a quarterly sweep of all of their net income in that period, so that every dollar of profit they make goes back to the taxpayer. That full income sweep will mean that Fannie Mae and Freddie Mac *will be not be allowed* to retain their profits, rebuild capital, and return to the market in their prior form.

- In making these changes, Treasury is protecting the taxpayers' interest and supporting the continued flow of mortgage credit to households during a time of ongoing market stress.

And for capital markets folks:

- By reducing the GSEs' need to continue to borrow unnecessarily from the Treasury to pay the dividend, gradually chipping away at their caps, these changes will also enable the GSEs to provide consistent, reliable support to the mortgage market as we wind them down and transition to a new system in the years to come.

MOST CHALLENGING QUESTIONS

1. **Aren't you giving up a 10 percent dividend owed to taxpayers to prop up the GSEs?**

   - This is wrong. We are putting in place a better deal for taxpayers.

   - This is because, going forward, each of these entities pays the taxpayer back all the profit they make – not just a 10 percent dividend.

   - Today, when a GSE loses money, it has to borrow money from Treasury to pay Treasury back – a circular process that isn't helping taxpayers. And when the GSEs make a profit, as they did last quarter, they don't have to pay all of that back to taxpayers.

   - The new arrangement changes that – it ends the shell game and makes sure that all profit goes where it should, to repaying taxpayers.

2. **You say you are requiring they pay back all profits, but the agreement creates a $3 billion reserve fund for the GSEs? Why?**

   - This agreement requires that the GSEs return all profits back to the taxpayer, period.

   - Over the next five years, a modest, temporary reserve account will protect taxpayers from having to inject more capital into the GSEs due to short term swings in earnings.

   [4] • But 100 percent of the funds in the reserve account, and 100 percent of the profit of these entities generate, will be returned to Treasury and ultimately to taxpayers.

3. Why didn't you use your leverage in negotiating this arrangement to force the GSEs to do principal reduction?

- As you know we have been aggressive and public in our position that the FHFA should allow the GSEs to provide principal reduction.
- While we remain adamant that that is the right position, and disappointed with FHFA' s response to date, as an independent regulator and conservator of the two GSEs, FHFA is *solely* responsible for the ultimate decision whether the GSEs can participate or not.
- The PSPA amendments, which require the agreement of both Treasury and the FHFA, do not change that fact. We will continue to advocate for their participation, but it is ultimately up to FHFA.

4. Does this change simply open the door to keeping the GSEs on perpetual life support rather than winding them down?

- The opposite is true. With today's announcement, we are achieving three key things:
    - o We are accelerating our commitment to responsibly wind down the GSEs and end forever their flawed model of privatized benefits and socialized losses;
    - o By requiring the GSEs to increase the pace of reducing their retained portfolios from 10 percent to 15 percent per year, we are accelerating that wind down;

- o We are mandating the development of an annual plan that details the steps the GSEs will take to reduce their financial and operational risk profile

- By taking all of their profits going forward, we are making clear that the GSEs will *not* ever be allowed to return to profitable entities at the center of our housing finance system.

- Reinforces the Administration's commitment to responsibly wind down these institutions and replace them with a system driven by private capital with lower risk to taxpayers.

GENERAL QUESTIONS

5. What were the last terms of the Senior Preferred Stock Purchase Agreements (PSPAs)?

- When the GSEs were put into conservatorship in 2008, Treasury entered into a Preferred Stock Purchase Agreement with each GSE in order to protect the housing market.

- In any quarter when the GSEs' assets were less than their liabilities, Treasury agreed to provide capital, in the form of senior preferred stock, to ensure the GSEs' solvency.

- The dividend rate on the senior preferred stock is currently 10% and will be changed to a "net worth sweep" as a result of the modification announced today.

- To date, Treasury has provided $116.2 billion of capital to Fannie Mae and earned $25.4 billion of dividends, and provided $71.3 billion of capital to Freddie Mac and earned $20.1 billion of dividends.

[5] **6. What does this agreement change?**

- *Replace the fixed 10 percent dividend with a net worth sweep dividend* – Quarterly dividend payments starting in 2013 will equal the positive net worth of the GSEs (i.e., GAAP assets less liabilities at quarter end), less a defined Capital Reserve Amount.

- *Accelerate the wind-down of the retained investment portfolios* – The required reduction rate for the retained investment portfolios will be increased to 15 percent from 10 percent per annum beginning at year-end 2013 (from a base amount of $650 billion at year end).

    - The annual cap will decline from $650 billion at year end 2012 to $250 billion in 2018 ($250 billion is the "wind down" target in the existing PSPA)

    - Under the existing agreement, the $250 billion cap will not be reached until 2022

    - *Note: the current retained portfolio size at Fannie Mae is $673 billion and the retained portfolio size at Freddie Mac is $581 billion (as of June 30, 2012).*

- *Require an annual taxpayer protection plan be delivered to Treasury* – In order to help protect taxpayers from future losses, each year the GSEs will submit a plan that details the steps it will take to reduce the financial and operational risk profile associated with both their mortgage guarantee and retained investment portfolio businesses

- *Suspend the Periodic Commitment Fee setting process* – Treasury will continue to suspend setting any Periodic Commitment Fee, which is an optional fee not utilized to date intended as an additional means to compensate taxpayers for the financial support that Treasury provides to the GSEs through the PSPAs. This fee is no longer relevant because the GSEs will now be paying all of their profits to Treasury.

- *Allow for more flexibility when making non ordinary course asset and property sales less than $250 million in fair market value without prior written consent from Treasury* – Previously, Treasury had to give prior written consent before the GSEs may sell any assets and properties outside of the GSEs' "ordinary course" of business. In order to facilitate a more rapid wind-down of the GSEs' legacy assets, the change will provide the GSEs and FHFA with the flexibility to sell blocks of assets under $250 million without Treasury's written consent.

7. When will these changes become effective?

- The amendment is effective immediately, and the dividend payment change first applies to the GSEs' financial results as of March 31, 2013 (i.e. the end of the first quarter).

8. What is the purpose, necessity and benefits of these changes?

- In making these changes, Treasury has sought to achieve two key objectives: (1) protecting the taxpayers' interest, and (2) ensuring the continued flow of mortgage credit to households during a time of ongoing market stress.

- The proposed modification has several benefits.

  - o Taxpayers will receive every dollar of profit the GSEs make.

  - o It reduces the risk of future draws under the PSPAs as future draws will only be needed to fund operating losses.

    [6] ▪ This eliminates the circularity associated with the GSE's drawing from Treasury in order to pay Treasury the 10 percent dividend.

  - o Preserves remaining capacity for its original intended use – to support the financial capacity of the GSEs so they can continue providing mortgage finance to families.

  - o Provides financial clarity for investors in the GSEs MBS & debt instruments.

9. How much PSPA funding capacity is remaining for each GSE?

- After 2012, the funding capacity cap under the PSPAs will be fixed permanently, and the remaining PSPA funding capacity will be limited to approximately $149 billion for Freddie Mac and $125 billion for Fannie Mae.

10. Without this amendment, would the GSEs have become insolvent? If so, when?

- The GSEs' future earnings will depend upon a variety of factors, including the pace of repair and recovery in the housing market, the path of home prices, and how those firms our wound down.
- In some quarters, such as the most recent quarter, the GSEs have generated earnings greater than their 10 percent dividend, allowing them to retain profits.
- In other quarters, the GSEs have been unable to generate sufficient earnings to fully pay their 10 percent dividend – creating a circular practice where the GSEs use draws from Treasury to simply pay dividends back to Treasury.
- The changes will take both those issues off the table in a way that protects taxpayer interests and better supports the housing market.
- The modifications will ensure that all future positive earnings from the GSEs will be used to pay back taxpayers for their investment in those firms – and that Fannie and Freddie

will not be permitted to rebuild capital as they are wound down.

- Additionally, the changes would reduce future PSPA draws and ensure that those draws are dedicated to supporting the housing market. That will help maintain the continued flow of mortgage credit during a responsible transition by providing the market with greater confidence about the GSEs' ability to meet their commitments.

11. How does the net worth sweep operate?

- Beginning with the financial results as of 1Q 2013, and each quarter thereafter, all positive net worth above a pre-set Capital Reserve Amount will be transferred to Treasury in the form of a dividend.
  - o Net worth is defined as net assets minus net liabilities (per GAAP).
  - o No dividends are paid or accrued when there is a net worth deficit or net worth is below the Capital Reserve Amount.
- Over time, this will result in all comprehensive income generated by the GSEs being paid to the government and thus the taxpayer.

[7] **12. Why not just lower the dividend rate to 5 percent and allow the GSEs to use earnings to pay back the capital Treasury has invested in them?**

- Lowering the dividend percent paid would reduce the amount taxpayers are reimbursed for their substantial contribution made to support the GSEs.

- We made these changes to make sure that these entities pay the taxpayer every dollar of profit that they make.

13. Why can't the GSE simply use profits to buy back preferred stock from Treasury?

- Similar to reducing the dividend rate, this would have reduced the amount taxpayers are reimbursed for their substantial contribution made to support the GSEs.

14. How large is the Capital Reserve Amount and why does it exist?

- This agreement requires that the GSEs return all profits back to taxpayers.

- There is a modest, temporary Capital Reserve Amount is $3.0 billion in 2013 and will decrease by $600 million per annum until it reaches zero in 2018.

- The Capital Reserve Amount will provide a cushion against temporary swings in the GSEs earnings due to accounting and hedging practices (i.e. mark-to-market volatility).

- Inclusion of a modest, temporary buffer will protect the taxpayer from having to inject more capital into the GSEs due to quarterly losses that are driven by swings in earnings as result of mark-to-market volatility *(note: if Treasury has to inject funds due to mark-to-market volatility it will reduce the finite PSPA capacity going forward).*

- The Reserve will fall over time in conjunction with the reduction in the GSEs investment portfolios, which historically have been the key drivers in earnings swings.
- 100 percent of the funds in the reserve account, and 100 percent of the profit that these entities generate, will ultimately be returned to taxpayers.

15. What information will be included in the "Taxpayer Protection Plan" that Fannie Mae and Freddie Mac submit to Treasury? What is the report's purpose? Are there any enforcement or accountability mechanisms?

- Fannie Mae and Freddie Mac will be required to submit a risk management action plan each year that will provide clear goals and timetables for the GSEs to reduce risk in each of their core business segments.
- In the plan, the GSEs will lay out, in reasonable detail, specific goals, targets and timetables so both Treasury and their conservator, FHFA, have a clear understanding of how they will improve their management of risk.
- We expect the implementation of the plans will result in a number of meaningful steps that will reduce taxpayer exposure to the GSEs. These will likely include:
    - o Working with private investors to syndicate a portion of the credit risk associated with their mortgage guarantees;

- o Selling complex securities in their investment portfolios;

- o Reducing their non-performing loan balances on a more rapid time table;

[8] o Shedding other "non-core" assets that were purchased prior to the enterprises entering into conservatorship.

- FHFA, as the GSEs' regulator and conservator, will oversee the implementation of the steps outlined in this report. In addition, each GSE will be required to assess the progress it has made in meeting the goals and timetables set forth in the previous year's plan.

16. Why are GSEs allowed to keep portfolios of $250 billion each in 2018 if they are to be wound down?

- Given the size of the current portfolios, transitioning to a balance of $250 billion in only six years represents a substantial reduction within a short timeframe.

- We do not believe it is necessary to change the $250 billion portfolio limit at this time.

- Through their portfolios, the GSEs provide critical functions and services to the mortgage market that will need to exist as long as they are in operation:

  - o Purchasing multifamily loans that can't be securitized to make credit available to the multifamily sector;

- o Purchasing loans from community banks to facilitate lending;
- o Purchasing delinquent loans bought out of trusts.

17. What is the Periodic Commitment Fee? Has it ever been set?

- The Periodic Commitment Fee is an additional quarterly fee provided for in the original PSPA agreement that Treasury can charge the GSEs as compensation for the substantial taxpayer support provided by the PSPAs.
- Treasury may waive the quarterly Periodic Commitment Fee for up to one year at a time at its sole discretion based on adverse conditions in the mortgage market.
- To date, the fee has been waived by Treasury for two reasons:
  - o The expected financial draws from Fannie Mae and Freddie Mac were in excess of dividends those firms pay back to taxpayers under the PSPAs; accordingly, setting a PCF would not produce any additional income for taxpayers.
  - o Setting the PCF could place greater strains on the housing market recovery, which remains fragile.

18. How will this plan help families seeking mortgage credit, troubled homeowners, and the broader housing market?

- *Preserves available mortgage credit on reasonable terms* – Until the private sector reemerges as a significant source of capital to invest in mortgage credit risk, the GSEs will continue to serve as a critical provider of liquidity to first-time homebuyers and borrowers looking to refinance their loans into a lower rate.

- *Maintains market confidence in the GSEs' guarantee obligations* – By changing the former 10 percent dividend to a net worth sweep, this amendment helps preserve confidence in the market and retains borrowing capacity for future net operating losses.

[9] • *Accelerates the sale of non-performing loans* – Selling non-performing loans to private market participants and their specialty servicers can provide greater assistance to troubled borrowers, which should help more troubled homeowners stay in their home.

- *Fuels the recovery of the housing market and the broader economy* – Preserving access to mortgage credit for creditworthy homebuyers helps reduce excess housing inventory in communities hit hardest by the housing downturn. Additionally, enabling ongoing refinancings at lower rates allows more money to be channeled to families' pockets, allowing them to pay off debt or allocate funds for other daily expenses.

19. How will these changes help bring private capital back to take credit risk in the mortgage market?

- This is the next step in the "wind-down" process. In combination with the goals laid out in FHFA's strategic plan for the enterprises, these changes will help bring private market participants back to the housing market in a more meaningful role.

- As part of the taxpayer protection plan, we expect the GSEs to shift credit risk associated with its mortgage guarantee business to private market participants (i.e. risk syndication). This will not only help protect taxpayers, but also provide a platform for private investors to once again take on mortgage credit risk.

20. Why does this agreement exclude a requirement for principal reduction? Did FHFA's decision not to accept Treasury's invitation to participate in HAMP PRA complicate this agreement on the PSPAs?

- As you know Treasury has been aggressive and public in its position that FHFA should allow the GSEs to provide principal reduction. We continue to help these homeowners by addressing troubled, non-performing loans.

- While we remain disappointed with FHFA's decision to not have the GSEs participate in the HAMP PRA program, we recognize that as an independent regulator and conservator of the two GSEs, FHFA is *solely* responsible for the ultimate decision of whether or not the GSEs may participate.

- Because the PSPAs are financial contracts between Treasury and the GSEs, through FHFA as their conservator, all changes to the PSPAs needed to receive support and agreement from both Treasury and FHFA.

21. What were the previous amendments to the PSPAs and why were those made?

- Over last several years Treasury has taken several steps to ensure the financial stability of the housing market.
- In September 2008, FHFA, as regulator of the GSEs, placed both into conservatorship.
- At the same time that FHFA placed the GSEs into conservatorship, Treasury provided capital support by entering into a Senior Preferred Stock Purchase Agreement (PSPA) with each GSE, acting through FHFA as their conservator. The PSPAs were intended to provide confidence to the market that the GSEs would remain solvent.
    - o The initial Treasury funding commitment was $100 billion for each GSE.
    - [10] o In May 2009, Treasury increased the funding commitment caps to $200 billion for each GSE.
    - o In December 2009, Treasury replaced the fixed $200 billion cap with a formulaic cap that increases the amount of capital support available through the PSPAs by

the amount of draws between January 1, 2010 and December 31, 2012.

22. Why didn't Treasury and FHFA get this right in December 2009? Why must we revisit this issue again?

- In late 2009, Treasury took an important step to stabilize the GSEs and help ensure the continued flow of credit into the mortgage market.
- We believe that action was appropriate at the time.
- However, due to the inherent uncertainty of the market, the length of the necessary transition could not be predicted, nor were we able to foresee how the GSEs' financial profile would evolve.
- Given the GSEs improving operating performance and our goal to wind down the enterprises, we believe this change is appropriate today.
    - o Potential for near-term earnings to exceed the 10% dividend.
    - o Need for financial flexibility as the GSEs are wound down over time.

23. Can Treasury make further amendments to the PSPAs? If so, until when?

- Treasury and FHFA have authority to make changes to legal agreements, but changing amount of remaining capital support that is available to the GSEs would require Congressional approval.

  - o *Note: Commitment authority was fixed in December of 2009 with the expiration of Treasury's authority under HERA.*

- Treasury and FHFA do not anticipate additional changes at this time.

24. What control and authority does Treasury have over Fannie Mae and Freddie Mac?

- Fannie Mae and Freddie Mac are in conservatorship, with FHFA as their conservator.
- Treasury has no operational control or authority over them.
- Notwithstanding Treasury's lack of authority or legal mandate over the Enterprises, we have a common interest in helping families and homeowners as well as protecting the taxpayers' interest in the GSEs.
  - o *Note: Treasury and FHFA worked constructively to improve the HARP program that has led to nearly 500,000 streamlined refinancings over the past 9 months.*

25. What enforcement mechanisms ensure the GSEs will meet these new requirements?

- The PSPAs and their amendments constitute legally binding contracts between the GSEs and Treasury. Therefore, these amendments, like the rest of the agreements are valid and legally binding obligations.

[11] **FINANCIAL/TAXPAYER IMPACT**

26. How does this change impact taxpayers and the federal budget?

- The federal budget will continue to maintain the existing non-budgetary presentation for Fannie Mae and Freddie Mac, as it does for the other GSEs.
- All federal programs that provide direct support to the GSEs, including the Senior Preferred Stock Purchase Agreements (PSPAs), are shown on-budget.
- Taxpayers will receive all positive net worth from the GSEs. While limited in value at this time, Treasury also retains its ability to exercise its GSE stock warrants.

27. How much has the government's investment in Fannie Mae and Freddie Mac cost taxpayers to date? What is the expected lifetime cost?

- Through June 30, 2012, Fannie Mae has drawn $116.2 billion and Freddie Mac had drawn $71.3 billion, excluding the initial $1.0 billion liquidation preference for which the GSEs did not receive cash proceeds.
- Fannie Mae has paid $25.6 billion in dividends back to Treasury and Freddie Mac has paid $20.1 billion in dividends back to Treasury.
- As a result, the current net investment in the GSEs is $141.8 billion – $90.6 billion for Fannie Mae and $51.2 billion for Freddie.

- The overall expected lifetime costs are inherently uncertain. Treasury will continue to work with FHFA and the GSEs to ensure we maximize proceeds returned to taxpayers.

28. How does this change impact existing preferred and common shareholders, including community banks? Does this mean their investments are worthless?

- The preferred and common shareholders of the GSEs do not have voting/governance rights while the GSEs are in conservatorship. These amendments do not change that.
- Because all positive net worth will be swept to Treasury going forward, preferred and common shareholders should not expect to receive any dividends or economic gains while the PSPAs are in effect.
- Most community banks have previously written down their preferred stock holdings and therefore these changes should not affect their financial positions.

<u>HOUSING FINANCE REFORM</u>

29. Will this change reduce the urgency for fundamental long-term housing finance reform? Moreover, now that the GSEs are profitable again, can they just continue operating indefinitely as a public utility?

- No. The Administration remains committed to winding clown the GSEs, as the PSPA revisions help accelerate/reinforce, and will continue to work with Congress in a bipartisan manner to identify a path forward on long-term housing finance reform.

30. Over how long a time period will the transition take place?

- Treasury supports a transition to a long-term housing finance system as soon as practical.

[12] • We look forward to working with Congress to determine what that future housing system should look like and the steps needed to get there.

31. When is the Administration going to submit a long-term housing finance reform plan?

- As Secretary Geithner has stated, we are continuing to work with members of Congress to identify a path forward on housing finance reform.
- At the same time, we'll continue to put in place measures right now – including today's announcement – that ensure continued access to mortgage credit for American families, promote a responsible transition, and protect taxpayer interests.

<u>HOMEOWNER IMPACT</u>

32. Why are you giving up leverage with the GSEs by agreeing to make this change without further concessions? Why didn't you use this as leverage to get the GSEs to do more

to help homeowners (e.g. principal reduction and/or greater opportunities to refinance)?

- The PSPAs have a very narrow but important scope – to strengthen and stabilize the financials of the GSEs.
- Treasury remains actively engaged with FHFA in exploring ways to help troubled homeowners and to facilitate streamlined refinancing activity for those that are current.

33. Will these changes in the PSPAs make it easier for families to buy a home? Will it lower avg. FICO scores or down payment requirements currently required by lenders?

- We believe that the agreements should give mortgage market participants continued confidence that the GSEs will fulfill their future obligations as they are wound down. That should enable them to continue to play a critical role supplying mortgage credit to families in the near-term until more private capital returns to the market.
- However, access to mortgage credit remains tempered by a still-fragile housing market.
- We are very attuned to the challenges faced by many families seeking to refinance or obtain a mortgage, especially lower-wealth and first-time homebuyers, and we are exploring ways to ease the situation.

34. FHFA recently announced plans to raise mortgage guarantee fees by year end. Why is it necessary to raise the cost of mortgage loans when the market is still struggling?

- Consistent with their strategic plan, FHFA made the decision to raise guarantee fees in order to help bring back private capital back to the housing market.

<u>IMPACT ON THE HOUSING FINANCE MARKET AND THE GSES</u>

35. How will the net worth sweep reassure investors in GSE obligations?

- This change will eliminate the potential for circularity associated with the GSEs requesting additional draws to cover dividend payments. This will make sure the finite amount of PSPA capacity is used only to support the financial stability of the GSEs.

- Given this change, we expect investors to remain confident in the financial stability and strength of the GSEs and be assured that the GSEs will meet their respective obligations.

[13] **36. What does this change mean for employees at the GSEs? When you say "wind down," what do you mean by that if the GSEs can still keep their systems, still retain people and still have a capital reserve?**

- The employees of the GSEs have an important role to play in restoring the strength and vitality of the housing market and the stability of the GSEs.
- Through their continued dedication and hard work, these valued employees have made substantial contributions towards achieving these ends.
- By taking steps today to solidify the financials of the GSEs, we are enabling the employees to continue their efforts to meet these goals.
- The employees of the GSEs will play an important role in the transition to a reformed housing market that provides a sustainable source of mortgage credit for homeowners.
- As discussed earlier, the Capital Reserve is temporary in nature and exists to protect the tax payer against future GSEs draws.

37. Will accelerating the wind down of GSEs' retained portfolio adversely impact their operations or the housing market?

- No. In fact, it will put the GSEs on more sound financial footing by giving them the opportunity to reduce their troubled and more complex assets.

38. Will any of the changes affect Freddie Mac differently from Fannie Mae?

- Both GSEs will be required to implement these changes.
- The management of each GSE will tailor their strategies according to their own individual risk profiles and needs.

TIMING/STRATEGY

39. How long will it take to wind down Fannie Mae and Freddie Mac? Why not wind down Fannie Mae and Freddie Mac at a faster pace? Why did you not come out with a specific proposal for pace of unwind?

- We are seeking to balance our desire to wind down the GSEs as quickly as possible with the need to help ensure the continued flow of mortgage credit in a fragile housing market.
- Any changes to this system should be made with great care.
- These agreements will give mortgage market participants continued confidence that the GSEs will be able to fulfill their obligations.
- Any wind down will only be effective as part of a broader plan to reform the housing market, and that will require bi-partisan support.

40. Why make this change now, particularly after the GSEs had such a profitable quarter?

- We believe this is the appropriate time to take this step for two key reasons:

  o The change protects the taxpayers' interest in the GSEs by ensuring that they will be the full beneficiary of any profits that the GSEs generate;

  [14] o The adjustment will make sure that future PSPA capacity is only used to support the financial stability of the GSEs.

41. Who were the parties that had to agree to this change? When did that happen?

- Treasury and FHFA, acting as conservator for the GSEs, agreed to the amendment.

- After extensive discussions between Treasury and FHFA, the formal document execution occurred on Friday, August 17.

- The GSE senior management teams were briefed by Treasury and FHFA before changes were executed.

From: Bowler, Timothy
Sent: Friday, August 17, 2012 3:42 PM
To: Parrott, Jim

I focused on contract and build. . . .

FHFA identifies three strategic goals for the next phase of the conservatorships:
■ **Build.** Build a new infrastructure for the secondary mortgage market;
■ **Contract.** Gradually contact the Enterprises' dominant presence in the marketplace while simplifying and shrinking their operations; and
■ **Maintain.** Maintain foreclosure prevention activities and credit availability for new and refinanced mortgages.

From: Parrot, Jim [mailto:James_M_Parrott@who.eop.gov]
Sent: Friday, August 17, 2012 3:20 PM
To: Bowler, Timothy
Subject: RE: Garrett Statement on Treasury Decision to Amend Terms of Fannie and Freddie Bailout

will call him, but this the right answer?

we've closed off possibility that they every go (pretend) private again and sped up the clock on the wind-down of their portfolio, all while increasing the stability of the market by removing concern that these guys run out of support before we have a place to which to transition.

from below seems like you'd want to give up on some or all of that to force Congress to make a decision, strikes me as mighty high risk (and pessimistic about the prospects that we, collectively, would want to sort this out).

From: Russell, Chris [mailto:Chris.Russell@mail.house.gov]
Sent: Friday, August 17, 2012 2:34 PM
To: Parrott, Jim
Subject: RE: Garrett Statement on Treasury Decision to Amend Terms of Fannie and Freddie Bailout

Preference is not to have two defacto public utilities with a $274 bill capital cushion

Where is the impetus now to deal with the issue? The dividends were initially set like that for a reason

In regards to them keeping additional profits, in my mind that is only an accounting issue, gov recoups now (per new method) or later when we liquidate them and then realize those gains for the taxpayer

As far as market perception, I don't think current yields on agencies indicate any additional concerns by investors – and I think it's a good thinking if investors realize they won't always have 90 percent of mortgage market going though government, then there might be incentives for market participants to develop some new methods to get mortgages to investors

If I am a potential issuer now, what incentive do j have with a higher regulatory burden via dfa and higher costs vs gse's?? None

Does this make sense?

Sent from my iPhone

On Aug 17, 2012, at 2:05 PM, “Parrott, Jim” <James_M_Parrott@who.eop.gov> wrote:

your preference would be to continue to have them pay a dividend that in any given month either requires them to eat into their headroom under the caps (after next year), scaring the hell out of the market, or pays less than their profits in that quarter, allowing them to recapitalize? idea being, I guess, that the former will force congress to act?

From: Russell, Chris [mailto:Chris.Russell@mail.house.gov]
Sent: Friday, August 17, 2012 1:57 PM
To: Parrott, Jim
Subject: RE: Garrett Statement on Treasury Decision to Amend Terms of Fannie and Freddie Bailout

It MIGHT be net positive WHEN they r turning a profit

But based on the discussions I had this morning with other experts in the field, the consensus is that this essentially removes any pressure points to do something eventually with them and puts it well after 16. As u well know, politicians sometimes don’t act unless they are forced to

Happy to talk with u on it whenever

202-870-8348

Sent from my iPhone

On August 17, 2012, at 1:37 PM, "Parrott, Jim" <James_M_Parrott@who.eop.gov> wrote:

> must say that this caught me by surprise. we're not reducing their dividend but including in it every dime these guys make going forward and ensuring that they can't recapitalize.
>
> If there's any misunderstanding give me a shout – glad to loop you into cap markets folks to clarify.
>
> ---
>
> **From:** Rice, Adam [mailto:Adam.Rice@mail.house.gov]
> **Sent:** Friday, August 17, 2012 12:52 PM
> **To:** Rice, Adam
> **Subject:** Garrett Statement on Treasury Decision to Amend Terms of Fannie and Freddie Bailout
>
> <image001.jpg>
>
> FOR IMMEDIATE RELEASE
> August 17, 2012
>
> Contact: Amy Smith
> Phone: 202-225-4465

-----Original Message-----
From: Parrott, Jim [mailto:James_M_Parrott@who.eop.gov]
Sent: Friday, August 17, 2012 10:53 PM
To: Peter J. Wallison; 'Timothy.Bowler@treasury.gov'
Subject: Re: PSPAs

No principal is written down no matter what the quartely payment is. Dividend is variable, set at whatever profit for quarter is, eliminating ability to pay down principal (so they can't repay their debt and escape as it were).

-----Original Message-----
From: Peter J. Wallison [mailto:PWallison@AEI.org]
Sent: Friday, August 17, 2012 09:36 PM
To: Parrott, Jim; 'Timothy.Bowler@treasury.gov'
<Timothy.Bowler@treasury.gov>
Subject: Re: PSPAs

One question: Do the dividend payments amortize principal, and if so how? For example, if the 10% dividend rate were in effect, a payment of more than 10% would amortize principal, but from the press release it sounds as though the profits that are swept into Treasury are replacing the 10% dividend.

Peter

Peter J. Wallison
Arthur F. Burns Fellow in Financial Policy
Studies American Enterprise Institute
(o) 202-862-5864
(f) 202-862-4875

-----Original Message-----
From: Parrott, Jim [mailto:James_M_Parrott@who.eop.gov]
Sent: Friday, August 17, 2012 8:30 AM
To: Alex J. Pollock; Peter J. Wallison; Edward Pinto
Cc: 'Timothy.Bowler@treasury.gov'
Subject: PSPAs

Hey guys. If you're interested, be glad to talk you through the changes we're announcing on pspas today.

Feel like fellow travelers at this point so I owe it to you.

Just let me know, and suggest a few times. I'm also looping Tim, who runs the capital markets show over at Tsy and is more adept at the mechanics should we want to go there.

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

FAIRHOLME FUNDS INC., et al.,	:	
Plaintiffs,	:	
v.	:	Case No. 13-465C
THE UNITED STATES,	:	
Defendant.	:	

Washington, DC

Thursday, May 7, 2015

Videotaped Deposition, of EDWARD DEMARCO, a witness herein, called for examination by counsel for Plaintiffs in the above-entitled matter, pursuant to notice, the witness being duly sworn by REBECCA L. STONEROCK, a Notary Public in and for the District of Columbia, taken at the offices of Cooper & Kirk, 1523 New Hampshire Avenue NW, Washington, DC, at 9:11 a.m., Thursday, May 7, 2015, and the proceedings being taken down by Stenotype by REBECCA L. STONEROCK, RPR, and transcribed under her direction.

* * *

[145] [David Thompson] Q. Sure. Yeah, sure. So it says on that second page under "Reasons to Set the PCF," it says, "Makes clear the Administration's commitment to ensure existing common equity holders will

not have access to any positive earnings from the GSEs in the future."

[146] And my question is: Was that a commitment that you shared?

A. No.

Q. Why not?

A. I'm not the administration.

Q. I know you're not. I'm saying –

A. Oh, was I committed to the outcome?

Q. Yes, sir.

A. No.

Q. Why not?

A. My commitment was to ensure that the conservatorship carried out its function and responsibility so that these two companies were capable of continuing to operate in a sound and solvent condition so the United States of America had a functioning secondary mortgage market, and that we kept these things together such that the Congress of the United States would ultimately determine what the – the end of the conservatorship or the future of national housing policy, how these things would be resolved.

It was important to me to keep these [147] companies functioning in a sound and solvent way and that the ultimate resolution of this was to be determined somewhere down the road.

It was my expectation, which I've stated numerous times, that this would involve action by the United States Congress.

Q. Why was that your expectation? You had the power, if they were rehabilitated and in capital compliance, to set them back.

A. No, because I made clear, and I believe my predecessor had, but that the – the authorities that we had could not make changes to these flawed charters and structure which gave rise to this failure in the first place. So it was my expectation that the right – that what would happen here is for these companies to be resolved so that the things that contributed to this massive failure, this tremendous disruption to families around the United States and disruption to the financial system, would not be allowed to happen again. Because the things that contributed to it, including the structure of these companies and their peculiar charter set by [148] Congress and not changeable by FHFA, that there was an opportunity for Congress to determine whether and how they wanted to make any changes to – to those charters. They retained that right to themselves.

* * *

[150] BY MR. THOMPSON:

Q. What was your understanding of the public mission of the companies that you were trying to effectuate as conservator?

A. So both Fannie Mae and Freddie Mac, part of what makes them a government-sponsored enterprise, one of the characteristics of a called GSE, is that unlike most any other corporation in the United States, they don't receive their corporate charter [151] from a state. They receive it from an act of Congress.

And so this act of Congress set up Fannie Mae and Freddie Mac, as well as the other GSEs, with a charter that Congress controlled. That charter, rather than a general business charter in which you can take your business charter and typically do whatever you want to do with it, the charter actually limits the business functions, the permissible business functions of the companies. It also gives the companies a set of – let's call them benefits, subsidies, access to the market, privileges that are generally unavailable to other companies.

And in – in this package is expressing, through the charter, a set of public purposes to the companies. We want to limit you to these business activities for the fulfillment of this public purpose. And those things are all spelled out in the Fannie Mae charter act and the Freddie Mac charter act and so forth.

So the charter acts, without – you know, we'd have to pull up the acts to go through the [152] details, but let's say that Fannie Mae and Freddie Mac's charters, as set forth by Congress, says you've got a general responsibility to create secondary market facilities that are going to maximize the application of private capital to supporting and financing mortgage credit in the

United States. And there's a series of things that you're supposed to do to accomplish that, and there are certain things you're supposed to do with regard to ensuring that this liquidity is broadly available, including affordable housing markets and so forth. So these details are spelled out, and these are the responsibilities of the companies under their public charter. That's part of what makes a GSE such a unique entity, is that it is a private company, but it is given a public purpose through its charter by Congress.

And again, only the Congress of the United States could amend, multiply, or reduce the number of these charters. FHFA, while it could put a company in conservatorship or receivership, ultimately had no power to modify, alter, increase the number, or [153] decrease the number of these charters.

* * *