RECORD NO. 17-3794

In The

United States Court Of Appeals
For The Third Circuit

DAVID JACOBS; GARY HINDES,

Appellants,

v.

FEDERAL HOUSING FINANCE AGENCY, IN ITS CAPACITY AS CONSERVATOR OF THE FEDERAL NATIONAL MORTGAGE ASSOCIATION AND THE FEDERAL HOME LOAN MORTGAGE CORPORATION; UNITED STATES DEPARTMENT OF THE TREASURY; FEDERAL NATIONAL MORTGAGE ASSOCIATION; FEDERAL HOME LOAN MORTGAGE CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, CASE NO.: 1-15-CV-00708
GREGORY M. SLEET, U.S. DISTRICT JUDGE

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 12 U.S.C. §§ 1452(c) and (f) and 4617, as well as 28 U.S.C. §§ 1331 and 1332(d)(2)(A). Plaintiffs-Appellants have standing because the Net Worth Sweep caused harm and damages to them by usurping the bundle of rights associated with their securities and eliminating the value of their stock. The district court entered a final order dismissing all claims in favor of Defendants-Appellees on November 27, 2017, and Plaintiffs-Appellants filed a timely notice of appeal on December 21, 2017. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred by concluding that 12 U.S.C. § 4617(f), which only forbids court actions that would "restrain or affect the exercise of powers or functions of [FHFA] as conservator," bars Plaintiffs-Appellants' claim that the Net Worth Sweep is invalid under 8 *Del. C.* § 151(c). A4.

2. Whether the district court erred by concluding that 12 U.S.C. § 4617(f), which only forbids court actions that would "restrain or affect the exercise of powers or functions of [FHFA] as conservator," bars Plaintiffs-Appellants' claim that the Net Worth Sweep is invalid under Va. Code § 13.1-638. A4.

3. Whether the district court erred by concluding that 12 U.S.C. § 4617(f), which only forbids court actions that would "restrain or affect the exercise

of powers or functions of [FHFA] as conservator," bars Plaintiffs-Appellants' claim that Treasury was unjustly enriched by the Net Worth Sweep. A4.

4. Whether the district court erred by denying as moot Plaintiffs-Appellants' motion for judicial notice of documents or, in the alternative, to strike certain arguments in Defendants-Appellees' briefs in support of their motions to dismiss. A4.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court and there are no previous or pending appeals before this Court arising out of the same case or proceeding. Below is a list of cases that may relate to this appeal:

Cacciapalle v. FHFA, No. 17-578 (U.S.)

Perry Capital LLC v. Mnuchin, No. 17-580 (U.S.)

Fairholme Funds, Inc. v. FHFA, No. 17-591 (U.S.)

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Arrowood Indemnity Co. v. FHFA, No. 13-1439 (D.D.C.)

STATEMENT OF THE CASE

Relevant Facts

This case about Delaware and Virginia corporate law is a class action brought by Plaintiffs-Appellants on behalf of themselves and several classes (the "Classes") of holders of preferred and common stock issued by either the Federal National Mortgage Association ("Fannie") or the Federal Home Loan Mortgage Corporation ("Freddie," and, together with Fannie, the "Companies"), seeking damages and equitable relief, as well as rescission and restitution, and a derivative action brought by Plaintiff-Appellant Jacobs on behalf of the Companies, seeking damages and equitable relief, as well as rescission and restitution, in each case in

connection with the Third Amendments to the Amended and Restated Senior Preferred Stock Purchase Agreements, dated August 17, 2012, between Defendant-Appellee United States Department of the Treasury ("Treasury") and Defendant-Appellee Federal Housing Finance Agency ("FHFA"), in its capacity as conservator of the Companies.[1] These amendments, known as the "Net Worth Sweep," granted Treasury an unlimited, cumulative cash dividend equal to the entire net worth of each Company, minus a small capital reserve, each quarter <u>for all time</u>, effectively stealing all the Companies' value previously held by their private investors.

I. The Companies

Fannie and Freddie operate for profit and their securities are privately owned and publicly traded. A57-58 at ¶ 31. They are organized and exist under the Federal National Mortgage Association Charter Act and the Federal Home Loan Mortgage Corporation Act, respectively. A57 at ¶ 30. Congress established Fannie in 1938 to provide the mortgage market with supplemental liquidity, and converted it to a private corporation in 1968. *Id.* Congress created Freddie as an alternative to Fannie to make the secondary mortgage market more competitive. *Id.*

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[1] The district court questioned the adequacy of Plaintiff Hindes as a representative for the derivative claims. A8 n.1. But the district court ignored that only Plaintiff Jacobs asserts the derivative claims on behalf of and for the benefit of Fannie and Freddie. A69 at ¶ 68.

Until the imposition of the conservatorships (discussed below), the Companies' businesses were self-sustaining, consistently profitable, and funded exclusively with private capital raised through the issuance of common stock and several series of preferred stock, including the stock that Plaintiffs-Appellants and the other members of the Classes purchased. A48 at ¶ 3. The Companies' securities were considered safe investments, and the Companies regularly declared and paid dividends on their common and preferred stock. A57 at ¶ 31. Despite the imposition of the conservatorships in 2008, the Companies continue to have private stockholders, including Plaintiffs-Appellants. *Id.*

Federal regulation requires each of the Companies to designate "the law of the jurisdiction in which [its] principal office . . . is located, [or] . . . [the] Delaware General Corporation Law" to control its corporate governance. 12 C.F.R. § 1710.10. Fannie elected the Delaware General Corporation Law ("DGCL") under Section 1.05 of its bylaws. A241; A58 at ¶ 32. Freddie elected the Virginia Stock Corporation Act ("VSCA") under Section 11.3 of its bylaws. A291; A58 at ¶ 32.

II. The Companies Are Placed Into Conservatorship

Beginning in 2006, the global economy experienced a severe recession and the national economy suffered housing market and mortgage crises. A59 at ¶ 33. Despite this turmoil, the Companies remained "adequately capitalized" and "safe and sound" according to high-ranking government officials. A48 at ¶ 4, A59 at ¶

33. Fannie's and Freddie's assets exceeded their liabilities by $50 billion as of July 2008. A59 at ¶ 35. When Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA") in July 2008, it did so to provide the markets with added confidence, not because the Companies were insolvent or operating unsafely. A48 at ¶ 4, A59 at ¶ 34. HERA created FHFA to replace the Office of Federal Housing Enterprise Oversight as the Companies' regulator and authorized FHFA to appoint itself as conservator of the Companies in certain specified circumstances. A48 at ¶ 4. HERA also granted Treasury limited, temporary authority to purchase securities from the Companies. A59 at ¶ 34.

HERA left in place the Companies' charters and their election of Delaware and Virginia law to govern their internal corporate affairs. A48 at ¶ 4. Congress did not authorize Treasury to nationalize the Companies; rather, HERA expressly required Treasury, in exercising its temporary authority to purchase the Companies' securities, to consider "the need to maintain [Fannie's and Freddie's] status as . . . private shareholder-owned compan[ies]" and their "plan for the orderly resumption of private market funding or capital market access." 12 U.S.C. §§ 1455(l)(1)(C), 1719(g)(1)(C); *see also* A59 at ¶¶ 34-35.

On September 6, 2008, five weeks after HERA was signed into law, FHFA placed the Companies under conservatorship and appointed itself conservator. A59 at ¶ 35. FHFA stated at the time that the conservatorships would be

terminated once the Companies were restored to a safe and solvent condition. *Id*. FHFA publicly emphasized that the purpose of the conservatorships was, as prescribed by HERA, to rehabilitate the Companies, return them to a safe and sound financial condition and only "act as the conservator to operate [the Companies] until they are stabilized." *Id*.; A300. FHFA explained that "[t]he purpose of appointing the Conservator is to preserve and conserve the Compan[ies'] assets and property and to put the Compan[ies] in a sound and solvent condition." A307. FHFA repeatedly emphasized that, as required by HERA, the Companies would remain "private shareholder-owned compan[ies]" during conservatorship, *see* 12 U.S.C. §§ 1455(l)(1)(C)(v), 1719(g)(1)(C)(v), and that their stockholders would retain an economic interest in the Companies. *See* A59 at ¶ 35 ("the common and all preferred stocks [of the Companies] will continue to remain outstanding"); A308 (the Companies' stockholders "will continue to retain all rights in the stock's financial worth" during conservatorship). Finally, FHFA vowed, in keeping with HERA's requirements, that the conservatorships would be temporary. *See* A59 at ¶ 35; A307 ("Upon the Director's determination that the Conservator's plan to restore the [Companies] to a safe and solvent condition has been completed successfully, the Director will issue an order terminating the conservatorship.").

The day after the conservatorships were imposed, FHFA, purporting to act in its capacity as conservator, and Treasury entered into two virtually identical senior preferred stock purchase agreements (the "PSPAs"), whereby Fannie and Freddie each created and issued a new series of preferred stock ("Senior Preferred Stock") under their authority to create and issue preferred stock under Delaware and Virginia law, respectively. A59-60 at ¶ 36. Two virtually identical Senior Preferred Stock Certificates of Designation (one for each Company) (the "Certificates of Designation") (A384, A394) set forth the rights, powers and preferences of the Senior Preferred Stock. *Id.* Treasury purchased one million shares of each Company's Senior Preferred Stock in exchange for a funding commitment that allowed each Company to draw up to $100 billion from Treasury (this cap was later increased by two subsequent amendments to the PSPAs). A49-50 at ¶ 8. The one million shares of each Company's Senior Preferred Stock have an aggregate liquidation preference equal to $1 billion ($1,000 per share) plus the sum of all additional amounts drawn by each Company on Treasury's funding commitment. A50 at ¶ 9. The Senior Preferred Stock ranks senior to all other classes and series of stock, and initially entitled Treasury to receive a cumulative cash dividend from each Company of 10% of the liquidation preference (12% for dividends paid in kind). A49-50 at ¶ 8. Absent consent from Treasury and FHFA, the Companies generally cannot

redeem the Senior Preferred Stock. A59-60 at ¶ 36. Through the PSPAs, each Company also gave Treasury warrants to purchase 79.9% of its common stock. *Id.*

Soon after, FHFA took steps that unnecessarily required the Companies to draw billions of dollars on Treasury's funding commitment. A51-52 at ¶ 12. FHFA first declared that the Companies purportedly suffered substantial non-cash accounting losses, including write-downs of the value of tax assets and loss reserves. *Id.*; A61 at ¶ 38. Also, inexplicably for Companies purportedly suffering massive losses, FHFA caused the Companies to pay Treasury discretionary dividends on the Senior Preferred Stock in cash (rather than in kind), resulting in the Companies needing additional capital to fund the dividend payments, which they obtained from Treasury under the funding commitment. A51-52 at ¶ 12. By 2012, it became clear that the losses FHFA declared for the Companies had been improperly overestimated by more than $100 billion and the associated accounting reserves would eventually have to be reversed. A61 at ¶ 38.

III. The Companies Return To Profitability, But FHFA And Treasury Seize All Profits In Perpetuity Through The Net Worth Sweep

In early August 2012, due largely to rising housing prices and reductions in credit losses, the Companies reported significant income for the second quarter 2012, and neither took a draw from Treasury under the PSPAs. A61 at ¶ 39; *see also* A416. In the first two quarters of 2012, the Companies posted profits totaling

more than $11 billion, more than enough to pay a 10% dividend. A61 at ¶ 39. The Companies' return to profitability led to a substantial increase in the trading prices of the Companies' other series of preferred stock. A61 at ¶ 40.

With the return to profitability, stockholders reasonably believed that the Companies would soon exit conservatorship in accordance with the purpose of the conservatorships and FHFA's public statements made when the conservatorships were established. A61 at ¶ 41. Treasury and FHFA, however, soon broke those promises they never intended to keep. A62 at ¶ 42. Unbeknownst to the public, the government was committed "to ensur[ing] existing common equity holders [would] not have access to any positive earnings from the [Companies] in the future." A433. As shown in documents released to the public after briefing had been completed on the motions to dismiss below and which formed the basis for Plaintiff-Appellants' Motion for Judicial Notice, by 2011 and perhaps even earlier, FHFA and Treasury secretly intended to prevent the Companies from returning to profitability and to instead wind them down, contrary to HERA's mandate. For example, an internal Treasury email states that the Net Worth Sweep is part of an "overall set of changes" under which the Companies "will NOT be allowed to return to profitable entities . . . but instead [will be] wound down and replaced . . . ." A454. Similarly, a "PSPA Next Steps" document shows that Defendants-Appellees intended that "[t]he GSEs will

be wound down faster and will not return to their past state. GSEs will not be allowed to build capital and exit conservatorship in their prior form." A519. FHFA, at the direction of Treasury, executed a plan that would give Treasury alone—at the expense of all of the Companies' other stockholders—all the benefits of the Companies' renewed profitability in the form of cash payments, without ever reducing the amount of Treasury's liquidation preference. A52-53 at ¶ 15; *see also* A62-64 at ¶¶ 42-49. The government called the plan the "Net Worth Sweep." A52-53 at ¶ 15.

The Net Worth Sweep transfers all the net worth of each Company to Treasury in perpetuity and prevents the public stockholders from ever again sharing in the Companies' profits. Specifically, the Third Amendment to the Amended and Restated Senior Preferred Stock Purchase Agreements (A366, A375) and amendments to the Certificates of Designation for the Companies' Senior Preferred Stock set forth the new terms of that stock (A384, A394). Gone is the initial preferred dividend payable at a 10% cash (and 12% in kind) rate. Instead, FHFA agreed to give Treasury a perpetual quarterly "dividend" equal to essentially the *entire positive net worth* of each Company. A368-69, A377-78, A386, A396; *see also* A62-63 at ¶¶ 42-43. The Companies and their public

stockholders received no consideration in exchange for the imposition of the Net Worth Sweep. A52-53, A62 at ¶¶ 15, 42.[2]

While couched in "dividend" terminology, the Net Worth Sweep is not really a dividend; it is a self-dealing expropriation by the government of all the value of the private investors' stock forever. A53 at ¶ 16. Treasury and FHFA have both acknowledged that, under this unprecedented structure, Treasury will receive—in perpetuity—any and all profits that Fannie and Freddie earn. *Id*. Thus, it will be impossible for either Company to ever have a positive net worth beyond a small capital reserve buffer, to ever pay a dividend on other classes or series of stock, or to ever emerge from conservatorship. *Id*.

Specifically, the Third Amendment to the PSPAs (A368, A377) and the corresponding Amended and Restated Certificates of Designation (A385, A395) provide, in pertinent part, that, as holder of the Senior Preferred Stock, Treasury will receive "cumulative cash dividends in an amount equal to the then-current Dividend Amount." A62-63 at ¶ 43.

The "Dividend Amount" is defined as follows:

[2] In connection with implementing the Net Worth Sweep, Treasury suspended the periodic commitment fee associated with Treasury's funding commitment. This suspension, however, only addressed what was already the practice—Treasury had waived the fee every quarter that it was due. In any event, under the Net Worth Sweep, Treasury would be receiving the Companies' entire net worth in perpetuity; thus, the suspension of the fee was meaningless.

> 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.

Id. (emphasis added). Thus, under the Net Worth Sweep, from January 1, 2013 through December 31, 2017, each Company paid to Treasury, in the form of a purported "dividend," that Company's "Net Worth Amount" (*i.e.*, total assets less total liabilities) less the "Applicable Capital Reserve Amount" (which started at $3 billion and decreased to $0 on January 1, 2018). A63 at ¶ 44. Beginning January

1, 2018 and continuing in perpetuity, the Net Worth Amount was to be paid out each quarter to Treasury without any capital reserve whatsoever. *Id.*[3]

The public stockholders stand no chance of ever receiving dividends because the Net Worth Sweep "dividends" payable forever to Treasury are cumulative. A63 at ¶ 45. In other words, if the Net Worth Amount is positive and the board of directors of a Company does not declare a "dividend" on the Senior Preferred Stock, then the "dividend" accumulates. Under the Certificates of Designation, no dividends may be paid on any other classes or series of stock unless and until full cumulative "dividends" (*i.e.*, the full Net Worth Sweep amount) are paid on the Senior Preferred Stock. A63 at ¶ 45*; see also* A385-387 and A395-397. Because the net worth of each Company is payable in perpetuity to the Senior Preferred Stock, no dividends can ever be paid on other classes or series of stock. A63 at ¶ 45.

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[3] In December 2017, an agreement was reached that allows the Companies to each hold a $3 billion capital reserve. *See* Letter from Steven T. Mnuchin to Melvin L. Watt, December 21, 2017, https://www.fhfa.gov/Media/PublicAffairs/Documents/GSEletteragreementfnm12-21-2017.pdf (last accessed February 26, 2018). But this small buffer does not change the essential facts—that Treasury is taking essentially all of the Companies' worth under the Net Worth Sweep. Moreover, in the fourth quarter of 2017, the Companies announced that they will be forced to take a draw as a result of a reduction of the corporate tax rate, which will result in further increasing Treasury's liquidation preference. This would never happen if the Companies were properly capitalized and there were no Net Worth Sweep.

As explained more fully below, neither Company had power under the applicable law governing their internal affairs (Delaware and Virginia) to create and issue preferred stock with a purported "dividend" feature of this nature. Thus, FHFA had no such power.

The Net Worth Sweep has already resulted in historic payments to Treasury of *$166.4 billion* and *$112.4 billion* from Fannie and Freddie, respectively, including the "dividends" payable on their fourth quarter 2017 earnings distributed under the Net Worth Sweep.[4] Worse, under the PSPAs, those substantial payments do not reduce the Companies' obligation to Treasury, because the "dividend" payments cannot be used to offset prior Treasury draws. A64 at ¶ 48. Accordingly, Treasury maintains a liquidation preference of $117.1 billion as to Fannie and $72.3 billion as to Freddie. *Id*. Considering that Treasury has received $279 billion under the Net Worth Sweep, Treasury has been more than paid back.

Procedural History

On August 17, 2015, Plaintiffs-Appellants filed a Complaint in the district court against FHFA and Treasury. Plaintiffs-Appellants moved for leave to amend

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[4] These figures have been updated from those alleged in the amended complaint (*see* A53-54 at ¶ 17) to reflect additional distributions made to Treasury under the Net Worth Sweep during the intervening period. Current dividend data is publicly available, not subject to reasonable dispute, and may be considered by the Court on this appeal. *See* Table 2: Dividends on Enterprise Draws from Treasury, https://www.fhfa.gov/DataTools/Downloads/Documents/Market-Data/Table_2.pdf (last accessed February 26, 2018).

the complaint (A29 at D.I. 48) and, following the district court granting Plaintiffs-Appellants' motion, on March 16, 2017, Plaintiffs-Appellants docketed a First Amended Class Action and Derivative Complaint (A30-1 at D.I. 62) ("Amended Complaint"). On April 17, 2017, FHFA and Treasury moved to dismiss the Amended Complaint (A31 at D.I. 65, 67), which Plaintiffs-Appellants opposed (A31 at D.I. 69). After the parties completed briefing on the motions to dismiss, Plaintiffs-Appellants filed a motion for judicial notice, or, in the alternative, to strike certain of Defendants-Appellees' arguments in light of government documents that were publicly released after briefing on the motions to dismiss had concluded. A32 at D.I. 75. On November 27, 2017, the district court granted FHFA's and Treasury's motions to dismiss and denied as moot Plaintiffs-Appellants' motion for judicial notice. A19.

On December 21, 2017, Plaintiffs-Appellants filed a notice of appeal. A33 at D.I. 82.

Rulings Presented For Review

The district court erred in granting Defendants-Appellees' motions to dismiss and in denying Plaintiffs-Appellants' motion for judicial notice. A19.

SUMMARY OF THE ARGUMENT

This case concerns unauthorized actions FHFA took that exceeded its statutory powers and thus were *ultra vires* and void *ab initio*. The Net Worth

Sweep is an absurdity under state corporate law, as it gives Treasury a perpetual quarterly "dividend" equal to the *entire* positive net worth of Fannie and Freddie, now less a small capital reserve. Preferred stock of a Delaware or Virginia corporation cannot be given a cumulative dividend right committing the corporation to pay all profits every quarter, no matter how great, to the holder for all time to the absolute, permanent exclusion of dividends to all other stockholders. By virtue of the Companies' election of Delaware and Virginia corporate law to govern their internal affairs as required by federal regulation, those state laws apply to the Companies and define and delimit the extent of their corporate powers, including in relation to the permissible rights, powers, and preferences of capital stock the Companies may issue. So fundamental did the Companies consider their respective elections of Delaware and Virginia corporate law that each designated that its bylaw provisions should be included in the Companies' respective certificates of incorporation for "all purposes" of the DGCL and VSCA. *See* A241 § 1.05; A291 § 11.3(b). Congress, in turn, bound FHFA as conservator to abide by those same state laws through HERA's succession clause, which states that, when FHFA steps into the shoes of the Companies as conservator, it succeeds 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 . . . ." 12 U.S.C. § 4617(b)(2)(A) (emphasis added). It necessarily

follows that FHFA may not cause the companies to do what the Companies and their directors have no underlying corporate power to do.

The district court dismissed the Amended Complaint on a number of erroneous grounds, holding, in essence, that FHFA's actions were unreviewable no matter how flagrantly it flouts HERA and the state corporate laws applicable to the Companies.

First, the district court erred as a matter of law by holding that Plaintiffs-Appellants' claims are barred by Section 4617(f), the so-called "anti-injunction clause" of HERA. A8-9, 13, 17-19. The district court's decision contradicts cases throughout the federal circuits holding that FHFA may be enjoined when acting beyond the scope of its statutory powers as conservator, because the anti-injunction clause applies only to actions that would "restrain or affect *the exercise of powers or functions of [FHFA] as conservator or receiver*." 12 U.S.C. § 4617(f) (emphasis added). Even *Perry Capital LLC v. Mnuchin*—a D.C. Circuit case on which the district court otherwise relied—recognizes that Section 4617(f) bars equitable relief only where such relief would interfere with FHFA's exercise of "*statutorily permitted* actions as conservator." 864 F.3d 591, 606 (D.C. Cir. 2017). The district court's error stems from its failure to distinguish between improper exercises of otherwise legitimate powers, which may not be enjoined under Section 4617(f), and unauthorized actions that exceed

FHFA's power under HERA. Here, because FHFA does not have any power or authority to create or issue preferred stock that Fannie and Freddie themselves could not create or issue, FHFA did not have the power or authority to implement the Net Worth Sweep. Therefore, its actions fall outside the scope of HERA's anti-injunction clause.

No court has decided the unique claim Plaintiffs-Appellants bring regarding fundamental corporate powers. The district court selectively relied on the holding in *Perry Capital* that the Net Worth Sweep "falls squarely within the powers granted to the Agency under HERA" (A11-12), yet failed to recognize that neither *Perry Capital* nor the other cases relating to the Net Worth Sweep addressed the unique corporate law claim here—*i.e.*, FHFA did not have the statutory power under HERA to implement the Net Worth Sweep because FHFA cannot exercise powers that the Companies themselves do not have, particularly the non-existent power under state corporation law to confer a supposed right to a preferred stock "dividend" equal to the Companies' net worth in perpetuity.

Fannie and Freddie long ago bound themselves to the laws of Delaware and Virginia, respectively, to govern their internal affairs and delimit their corporate powers. Congress, in turn, bound FHFA as conservator to abide by the same state laws through HERA's succession clause. FHFA cannot simply ignore state law limitations on the Companies' corporate powers under cover of its role as

conservator, because the succession clause permits it to exercise only those corporate powers held by Fannie and Freddie themselves. Thus, Section 4617(f) does not bar Plaintiffs-Appellants' request for equitable relief because FHFA acted beyond the scope of its statutory powers as conservator.

Second, the district court ignored that, in addition to equitable relief, Plaintiffs-Appellants' Amended Complaint seeks damages. The anti-injunction clause upon which the district court relied as the sole basis for dismissing the Amended Complaint does not apply to claims for damages, as *Perry Capital* made clear. 864 F.3d at 613-14. For that reason alone, the district court's decision should be reversed and the case remanded. But FHFA's implementation of the Net Worth Sweep cannot be protected from any of Plaintiffs-Appellants' claims for still other reasons. FHFA failed to repudiate Plaintiffs-Appellants' contracts with the Companies within the statutorily required 18-month time period and therefore exceeded its statutory power. Even if FHFA had properly repudiated, HERA's "repudiation of contracts" clause makes clear that FHFA remains liable for "actual direct compensatory damages." 12 U.S.C. § 4617(d)(3)(A)(i).

The district court also erred by rejecting additional bases for jurisdiction. Among other things, the district court erred by discounting the argument that the Net Worth Sweep violated HERA's provisions governing the order of distribution

of assets upon liquidation by ensuring that there would be no assets to distribute if the Companies were liquidated. In addition, the district court erred by not recognizing the obvious limitation under HERA's succession clause that FHFA cannot cause the Companies to effect transfers or sales of assets that the Companies themselves have no power to effect, a limitation that FHFA violated when it transferred the entirety of the Companies' residual economic value to Treasury for nothing in return. Simply put, regardless of HERA, a corporation, and therefore its conservator—in this case, FHFA—has no power or authority to waste corporate assets. Further, the district court incorrectly concluded that FHFA was not obligated to put the Companies in a "sound and solvent condition" and to "preserve and conserve their assets and property." The overall context of HERA as well as the specific powers granted by HERA show that these were mandatory duties and not permissive powers.

Finally, in addition to the legal errors explained above, the district court erred by accepting Defendants-Appellees' factual assertions as true (instead of those in the Amended Complaint), ignoring the legal standard on a motion to dismiss. The district court compounded that error by denying Plaintiffs-Appellants' motion for judicial notice of publicly available facts and documents contradicting the very factual assertions made by Defendants-Appellees that the district court accepted. As a result, the district court failed to view the Amended

Complaint in the light most favorable to Plaintiffs-Appellants. That alone, in the context of the facts upon which the district court relied, is reversible error.

ARGUMENT

Standard of Review

This court reviews *de novo* a district court's determination of jurisdiction and its decision to grant a motion to dismiss for failure to state a claim. *Marathon Petroleum Corp. v. Sec'y of Fin. for Delaware*, 876 F.3d 481, 488 (3d Cir. 2017).

I. Plaintiffs-Appellants' Claims Are Not Barred By HERA

The district court improperly granted the motions to dismiss solely on the ground that it lacked subject matter jurisdiction under 12 U.S.C. § 4617(f), the so-called "anti-injunction clause" of HERA. A5-6 ("[T]he court finds that the anti-injunction clause in Section § 4617(f) deprives it of subject matter jurisdiction."). Section 4617(f) states:

> **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.

12 U.S.C. § 4617(f).

By relying solely on Section 4617(f) to grant Defendants-Appellees' motions to dismiss, the district court effectively held that FHFA has near limitless power to "conduct all business of the companies" and "transfer or sell any asset of the Companies without any approval, assignment or consent." A11 (quotation

marks omitted). Although the district court cited cases where other courts found that the Net Worth Sweep "falls squarely within the powers granted to the Agency under HERA," (A11-12), none of those other courts addressed the fundamental corporate power issues under Delaware and Virginia law raised by Plaintiffs-Appellants here. Because Defendants-Appellees purported to exercise powers that the Companies themselves never had in the first place—to implement a perpetual net worth "dividend"—Section 4617(f) cannot remove the power of the courts to review Defendants-Appellees' actions which created the legal and financial absurdity that is the Net Worth Sweep.

A. Section 4617(f) Does Not Bar Claims For Equitable Relief Where FHFA Exceeds Its Statutory Authority As Conservator

The district court's decision contradicts cases in several federal circuits holding that FHFA may be enjoined when it acts beyond the scope of its statutory powers as conservator because HERA's anti-injunction provision, Section 4617(f), applies only to actions that would "restrain or affect *the exercise of powers or functions of [FHFA] as conservator or receiver*." 12 U.S.C. § 4617(f) (emphasis added). It follows that Section 4617(f) "is inapplicable when FHFA acts beyond the scope of its conservator power." *Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 992 (9th Cir. 2013); *see also Leon Cnty. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012); *Town of Babylon v. FHFA*, 699 F.3d 221, 228 (2d Cir. 2012). Even *Perry Capital* recognized that Section 4617(f) bars equitable relief only where such relief

would interfere with FHFA's exercise of "*statutorily permitted* actions as conservator." 864 F.3d at 606.

In its reliance on *Perry Capital* and the cases that came after it, the district court failed to acknowledge that none of those decisions addressed the Delaware and Virginia corporate law issues raised by Plaintiffs-Appellants here. A11-12. In particular, *Perry Capital* did not address whether Section 4617(f) bars equitable relief where Plaintiffs-Appellants claim that FHFA did not have the statutory power to implement the Net Worth Sweep because it cannot exercise corporate powers that the Companies themselves do not possess, including the non-existent power under state corporation law to confer a supposed right to a perpetual, cumulative "dividend" on preferred stock in an amount equal to the net worth of each Company.

Moreover, as the district court acknowledged, courts interpreting Section 4617(f) of HERA have relied on decisions construing 12 U.S.C. § 1821(j)—the virtually identical provision of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") on which Section 4617(f) was modeled, and federal courts have granted equitable relief in that context. A14. *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997), a case concerning that section of FIRREA, is illustrative. In *Sharpe*, the Ninth Circuit allowed claims for equitable relief against a receiver and held Section 1821(j) inapplicable where "the FDIC as receiver" had

"assert[ed] authority beyond that granted to it as a receiver" by breaching a contract without statutory authorization. *Id*. at 1155; *see also Bank of Manhattan, NA v. FDIC*, 778 F.3d 1133, 1136–37 (9th Cir. 2015) (same); *Dittmer Props., LP v. FDIC*, 708 F.3d 1011, 1017 (8th Cir. 2013) (Section 1821(j) applies only when "the challenged action is within the [conservator's] power or function").

The district court's decision contradicts longstanding precedent holding that a conservator may be enjoined for acting beyond the scope of its statutory powers. The Third Circuit cases the district court erroneously characterized as fatal to Plaintiffs-Appellants' argument turn on a distinction that the district court missed: statutorily unauthorized actions may be enjoined under FIRREA's anti-injunction provision, but merely improper or even illegal actions may not. *Gross v. Bell Sav. Bank PaSA*, 974 F.2d 403, 407 (3d Cir. 1992); *see also Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 397 (3d Cir. 1991) (dismissing plaintiffs' claim that conservator should be enjoined for merely "illegal" violations of ERISA). Here, as in *Gross*, "the availability of injunctive relief does not hinge on [the Court's] view of the proper exercise of otherwise-legitimate powers" because Plaintiffs-Appellants contend that FHFA did not have the legitimate power to implement the Net Worth Sweep in the first place. 974 F.2d at 408. "Of course, the [conservator's] power is not limitless." *Id*. at 407.

The Third Circuit in *Gross* relied on Supreme Court precedent when emphasizing that "federal courts have the ability to restrain the [conservator] where [it] is acting clearly outside its statutory powers." *Id*. (citing *Coit Independence Joint Venture v. Federal Savings & Loan Insurance Corp*, 489 U.S. 561, 572-73 (1989)). Any suggestion that a federal court may not enjoin FHFA from violating the very statute from which it derives its authority also conflicts with a more recent Supreme Court decision, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013). There, the Supreme Court clarified that no *Chevron* deference is owed to an agency's interpretation of its own "*ultra vires*" actions that "go[] beyond what Congress has permitted it to do," because the dispositive question for a reviewing court "is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *Id.* at 1868-9 (emphasis in original).

The district court, by ignoring Supreme Court and Third Circuit cases that establish judicially enforceable limits on an agency's *ultra vires* actions, held that *Gross* and *Rosa* deny equitable relief "even where the [conservator] acts in violation of other statutory schemes." A13. That holding is irrelevant because the conservator violated HERA *itself*, not some ancillary statutory scheme like ERISA that lies outside HERA's purview. Nor can the state law provisions here be dismissed as mere "other statutory schemes" given HERA's succession clause, which subjects FHFA to the same state corporate laws that govern the internal

affairs of the Companies themselves and which necessarily delineate the scope of their authorized powers. Further, no provision of HERA states that limitations on a corporation's powers no longer apply because the corporation was placed into conservatorship. On the contrary, HERA's succession clause imports state law standards governing fundamental corporate "powers" into its own statutory scheme.

B. The Net Worth Sweep Exceeds And Contravenes FHFA's Authority As Conservator Under HERA's Succession Clause

FHFA lacked the authority to implement the Net Worth Sweep under fundamental principles of corporate law. Fannie and Freddie designated the DGCL and VSCA, as the law to govern their internal affairs, as required by federal regulation, thereby obligating themselves to abide by state law limitations on corporate powers as they relate to authority to fix the rights and preferences of preferred stock, including dividend rights. HERA's succession clause, in turn, bound FHFA to comply with the Companies' pre-existing obligations and powers. By succeeding to "all rights, titles, powers, and privileges" previously held by the Companies, 12 U.S.C. § 4617(b)(2)(A), FHFA "step[ped] into the shoes" of the Companies and obtained only those rights and powers that existed before conservatorship. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994). But FHFA exceeded its statutory power under HERA when it did what the Companies themselves could not do under Delaware and Virginia law—namely, create an

impermissible "dividend" right that expropriates all of the economic value held by the Companies and their private investors.

i. The Net Worth Sweep Violated Delaware And Virginia Corporation Law And The Companies' Bylaws

The district court betrayed its fundamental misunderstanding of the underlying basis for the powers enjoyed by corporate entities by likening the Delaware and Virginia state corporation laws that govern the Companies' internal affairs (as designated in their respective bylaws, as required by federal regulation) to "other statutory schemes" like ERISA. A13. Yet requiring FHFA to comply with the state corporate laws that the Companies adopted to govern their internal corporate affairs is not the same as requiring FHFA to comply with a generalized statutory scheme like ERISA that does not regulate the internal governance of corporate entities, the scope of those entities' powers, and the fiduciary relationship between management (here, a supposed conservator) and stockholders. Because there is no federal corporation law that provides rules for the internal corporate governance of federally chartered entities, including the scope of their powers with respect to the creation and issuance of capital stock, it was necessary for Fannie and Freddie to have some corporate governance framework under which to conduct their internal affairs. Thus, the Companies' federal charter acts authorized, and federal regulations required, that the Companies select a state law

to govern their internal affairs. 12 C.F.R. § 1710.10. They chose the laws of Delaware and Virginia, respectively.

It is well-settled law that corporate charters and bylaws—together with the broader DGCL or VSCA incorporated therein—form a binding contract among the corporation and its directors, officers, and stockholders. *See, e.g.*, *Allen v. El Paso Pipeline GP Co., LLC*, 90 A.3d 1097, 1107 (Del. Ch. 2014); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013); *Firestone v. Wiley*, 485 F. Supp. 2d 694, 705 (E.D. Va. 2007); *Lee v. Va. Educ. Ass'n, Inc.*, 2 Va. Cir. 319, 1969 WL 101681 (Va. Cir. Mar. 19, 1969). The district court's error in miscomprehending this well-settled law is discussed in detail below. *See* Section I.B.ii, *infra*. By selecting Delaware and Virginia corporation laws to govern their internal affairs, and by subsequently using those laws to create preferred stock and fix the rights, powers, and preferences of that stock by way of certificates of designation, the Companies were necessarily bound by limitations on their power with respect to the rights, powers, and preferences of capital stock that permissively may be fixed under state law. The Companies had (and have) no power or authority to undertake *ultra vires* acts, including imbuing preferred stock with features that are not permitted under applicable state laws.

Indeed, the federal acts that govern the Companies preclude the Companies' directors from taking actions contrary to the law, including the state laws adopted

by the Companies. *See* 12 U.S.C. § 1452 (with respect to Freddie: "Within the limitations of law and regulation, the Board of Directors shall determine the general policies that govern the operations of the Corporation."); 12 U.S.C. § 1723 (with respect to Fannie: "Within the limitations of law and regulation, the board shall determine the general policies which shall govern the operations of the corporation…").

The Net Worth Sweep is an absurdity under state corporation law. Under the relevant provisions of the DGCL and VSCA, preferred stock cannot be given a cumulative dividend right equal to a corporation's net worth in perpetuity, to the absolute, permanent exclusion of dividends to other stockholders. *See* 8 *Del. C.* §§ 102(a)(4), 151(c); Va. Code § 13.1-638. First, under Delaware law, Section 151 of the DGCL allows preferred stockholders to receive dividends only "*at such rates*, on such conditions and at such times as shall be stated in the certificate of incorporation or in the [board] resolution . . . ." 8 *Del. C.* § 151(c) (emphasis added). Such dividends must be "payable *in preference to*, or *in . . . relation to*, the dividends payable on" other classes or series of stock. *Id.* (emphasis added). The Net Worth Sweep violated Section 151.

The Net Worth Sweep is not paid at a "rate" because Treasury's participation in corporate earnings growth is unlimited and perpetual. Likewise, the Net Worth Sweep is not payable "in preference to" or "in relation to" the

dividends payable to other classes or series of stock because it is payable to the permanent exclusion of dividends to other stockholders. The Net Worth Sweep effectively eliminates the economic stake of all stockholders other than Treasury, as the government's own statements concede.[5] While Section 151(c) permits corporations to establish a dividend "preference" that operates as a priority, it does not permit corporations to establish dividend provisions that operate as a singularity—without regard for or in relation to the interests of other classes or series of stock.[6] A dividend preference may not preclude all other stockholders in perpetuity from receiving dividends; that would not be a preference at all, but

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[5] In a white paper published by FHFA Office of Inspector General in March of 2013, the government admits "*[t]he 2012 Amendments significantly altered the structure of the dividend payment*[.] . . . As of January 1, 2013, the dividend payment is no longer based on a fixed percentage of the liquidation preference. Instead, the dividend is based on the amount of positive net worth reported by each Enterprise. . . . In its press release announcing the 2012 Amendments, Treasury called this a full income sweep of '*every dollar of profit that each firm earns going forward*.'" A416-17 (emphases added). Similarly, an internal Treasury email discussing a draft of a press release to be issued in connection with the Net Worth Sweep states: "We are making sure that each of these entities pays the taxpayer <u>every dollar of profit they make</u>, not just a 10% dividend." A454 (emphasis in original). The district court refused to consider these documents and instead accepted Defendants-Appellees' facts as true as explained in Section V, *infra*.

[6] Once the Net Worth Sweep is paid each quarter, there necessarily will be no assets remaining that would ever be available for the payment of dividends on any other classes or series of stock regardless of how valuable the Company may become in the future. Section 151(c), however, expressly contemplates that, after payment of preferential dividends on senior preferred stock, "a dividend on the remaining class or classes or series of stock may then be paid out of the remaining assets of the corporation available for dividends . . . ." 8 *Del. C.* § 151(c).

instead a complete elimination of the economic value of all other classes and series. Accordingly, the Net Worth Sweep is void *ab initio* and unenforceable under Section 151(c) of the DGCL that Fannie incorporated into its bylaws.

For the same reasons, the Net Worth Sweep violates Virginia corporation law that Freddie incorporated into its bylaws. The VSCA provides that a corporation may authorize "one or more classes or series of shares that . . . *have preference over* any other class or series of shares with respect to distributions [such as dividends]." Va. Code § 13.1-638 (emphasis added). Virginia law does not permit corporations to enter into unconditional agreements to pay dividends without regard to the corporation's financial condition. *See* 11 *Fletcher Cyclopedia of the Law of Corporations* § 5332 (perm. ed.) (citing *Drewry, Hughes Co. v. Throckmorton*, 92 S.E. 818 (Va. 1917)). Nor does it permit corporations to establish dividend provisions that operate to preclude all other classes of stockholders from the potential to receive dividends in perpetuity. The Virginia Supreme Court has long recognized that the "common understanding" of preferred stock is that the holders thereof are entitled to "limited dividends" without the opportunity for "unlimited gain," which belongs to the common stockholders. *Johnson v. Johnson & Briggs, Inc.*, 122 S.E. 100, 103 (Va. 1924). The Net Worth Sweep was an unauthorized and thus unenforceable corporate act under Virginia

law because, as in Delaware, a dividend preference may not forever preclude all other stockholders from receiving dividends.

As the next section explains, FHFA became bound by the same laws when it stepped into the shoes of the Companies as conservator.

ii. The Net Worth Sweep Violates HERA's Succession Clause Because The Succession Clause Requires Compliance With Delaware And Virginia Law

FHFA as conservator may not cause the Companies to do what the Companies themselves lack the corporate power and authority to do. As conservator or receiver, FHFA succeeds to "all rights, titles, powers, and privileges" of the Companies. 12 U.S.C. § 4617(b)(2)(A). It follows that because the Companies had no power to implement the Net Worth Sweep under state law and their respective corporate bylaws, FHFA also lacks the power to do so as conservator and nothing in HERA grants this power where state law does not.

In addition to enumerating specific powers that FHFA may exercise as conservator or receiver, HERA provides that when FHFA assumes control of the Companies in either capacity, it "immediately succeed[s] to . . . *all rights, titles, powers, and privileges of the regulated entit*y, *and of any stockholder, officer, or director of such regulated entity* with respect to the regulated entity . . . ." 12 U.S.C. § 4617(b)(2)(A)(emphasis added). HERA also provides that FHFA "take[s] over the assets of and operate[s] the regulated entity with all the *powers of the*

*shareholders, the directors, and the officer*s of the regulated entity and conduct[s] all business of the regulated entity," and "perform[s] all functions of the regulated entity *in the name of the regulated entity* which are consistent with the appointment as conservator or receiver." 12 U.S.C. § 4617(b)(2)(B) (emphases added). Thus, as conservator, FHFA "steps into the shoes" of Fannie and Freddie, "obtaining the rights [of those entities] that existed prior to [conservatorship]." *O'Melveny & Myers*, 512 U.S. at 86.

While FHFA has discretion to act on behalf of the Companies within the scope of its authority under HERA, it cannot simply breach or otherwise ignore the Companies' pre-conservatorship obligations, especially when doing so causes the Companies to take actions outside of the power given under applicable state law governing their internal affairs. As held in *Perry Capital*, HERA's succession clause does not permit an agency "to increase the value of the [contract] in its hands by simply 'preempting' out of existence pre-receivership contractual obligations." 864 F.3d at 630. Likewise, when interpreting the nearly identical succession clause in FIRREA, the Ninth Circuit has acknowledged that while "[i]t is true that some provision in the extensive framework of FIRREA might, in theory, afford the FDIC as receiver greater powers than those possessed by a failed financial institution," to "permit the FDIC to succeed to powers greater than those held by the insolvent bank" in the absence of such a provision would be "an

implausible result when FIRREA provides that the FDIC, as receiver, 'shall . . . succeed to . . . all rights, titles, powers, and privileges of the insured depository institution.'" *Bank of Manhattan*, 778 F.3d at 1136 (quoting 12 U.S.C. § 1821(d)(2)(A)) (quotation marks omitted); *Sharpe*, 126 F.3d at 1156 ("…to allow the FDIC to avoid its contractual obligations…would effectively preempt state contract law").

Plaintiffs-Appellants' interpretation of the succession clause mirrors judicial treatment in authoritative cases that the district court strained to distinguish. The Supreme Court in *O'Melveny & Myers* interpreted the nearly identical provision in FIRREA (upon which HERA's succession clause was modeled) to mean that when the FDIC "steps into the shoes" of the entity in receivership, it must "work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." 512 U.S. at 87. Here, despite Defendants-Appellees' contention, no provisions in HERA suggest otherwise. Therefore, under *O'Melveny & Myers*, "work[ing] out" claims under state law here means that Plaintiffs-Appellants prevail, because the Net Worth Sweep was an unauthorized act under Delaware and Virginia state law, as explained above.

The Ninth Circuit has applied *O'Melveny & Myers* to grant "equitable relief related to contractual breaches" when the FDIC breached contracts it inherited under FIRREA's succession clause. *Bank of Manhattan*, 778 F.3d at 1135. *Bank*

of Manhattan held that the succession clause prohibited the FDIC, as receiver, from exercising "powers greater than those held by" an insolvent bank in its charge. *Id.* at 1136 (citing 12 U.S.C. § 1821(d)(2)(A)); *see also O'Melveny & Myers*, 512 U.S. at 86-87 ("It is hard to avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S&L"). Likewise in *Sharpe*, the Ninth Circuit concluded that "the FDIC did not act within its statutorily granted powers" when it breached a contract, holding that FIRREA's analogue to the anti-injunction clause here did not bar equitable relief relating to the breach. 126 F.3d at 1155. Further, also in the context of FIRREA, the Third Circuit has held that the FDIC as receiver must comply with corporate bylaws, including provisions relating to the indemnification of employees' legal expenses. *Ridder v. City Fed Fin. Corp.*, 47 F.3d 85, 86–87 (3d Cir. 1995); *Fleischer v. FDIC*, 70 F. Supp. 2d 1238, 1241–43 (D. Kan. 1999).

The cases interpreting FIRREA's nearly identical succession clause teach two applicable lessons: first, the succession clause means that state laws governing the power of the entity under conservatorship may not be violated except when the federal statute explicitly provides otherwise (*O'Melveny & Myers*); second, the succession clause prohibits an agency from breaching pre-existing contractual obligations of the entity under its charge (*Bank of Manhattan, Sharpe, Ridder, Fleischer*). Both elements apply here because this case involves violations of

fundamental state law delimiting the Companies' powers—the unauthorized grant of preferred stock dividend rights and the unauthorized payment of preferred dividends. Moreover, the relevant state laws became binding contractual obligations on the Companies when they were included in the Companies' bylaws, as required by federal regulation. FHFA cannot walk away from the Companies' obligations under cover of its role as conservator because the succession clause permits it to exercise only those powers held by Fannie and Freddie under state law.

The district court's attempt to distinguish these cases fails because it ignores the analysis of the succession clause in favor of factual distinctions that do not matter here. The district court claimed that the Supreme Court in *O'Melveny & Myers* "did not address, in any manner whatsoever, whether the FDIC's statutory powers were curtailed by state law when it stepped in the shoes of a failed bank." A14. Yet the Supreme Court held that the succession clause in FIRREA "places the FDIC in the shoes of the [entity in receivership], to work out its claims under state law…." 512 U.S. 79, 86-87; *see also Perry Capital*, 864 F.3d at 622 (citing same). Thus, the question whether the FDIC's powers were subject to state law under FIRREA's succession clause was very much at issue in *O'Melveny & Myers*. Similarly, FHFA was subject to state corporation law under HERA's nearly identical succession clause when it stepped into the shoes of the Companies' directors.

Likewise, the district court's attempt to distinguish *Sharpe* and *Bank of Manhattan* shows how applicable those precedents are to Plaintiffs-Appellants' case. The district court erroneous believed that those cases do not apply here because they dealt with contract breaches where "the FDIC was bound by the terms of a private commercial contract executed by Plaintiffs-Appellants and the bank before the receivership." A14. Those facts, however, make those two cases *similar* to the instant case, not distinguishable. The corporate bylaws at issue here, and the state-law statutory schemes they invoked, were also private contracts executed before conservatorship between the stockholders and the Companies. *See, e.g., El Paso Pipeline*, 90 A.3d at 1107 (emphasizing "the Delaware Supreme Court's longstanding recognition that the DGCL, the certificate of incorporation, and the bylaws together constitute a multi-party contract among the directors, officers, and stockholders of the corporation"); *Firestone*, 485 F. Supp. 2d at 705 ("the VSCA is deemed a part of the contract between a corporation and its shareholders"). Because FHFA stepped into the shoes of the Companies, all of their pre-conservatorship contracts—including, of course, the multi-party contract under the state incorporation laws of Delaware and Virginia made applicable by virtue of the Companies' bylaws and federal regulation—remain in force. Therefore FHFA breached its contractual obligations because it did what the

Companies had no authority to do under the laws of Delaware and Virginia—the laws the Companies chose to govern their internal corporate affairs.

Further, the district court erred by adopting Defendants-Appellees' position that FHFA acted within its statutory powers under HERA. A11-12. Both the court and Defendants-Appellees cherry-pick their quotations of the statute, ignoring the explicit limitations HERA places on actions like the Net Worth Sweep that fall outside the scope of FHFA's powers as conservator. For example, the district court indicated that FHFA may "take over," "operate" and "conduct all business of the [Companies]," as it sees fit under 12 U.S.C. § 4617(b)(2)(B)(i). A11. Yet the district court failed to quote the complete text of the provision, which states that FHFA may only "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.*" 12 U.S.C. § 4617(b)(2)(B) (emphasis added). The key phrase the district court omitted limits FHFA to take only those actions that fall within the Companies' pre-conservatorship powers. It follows that the Net Worth Sweep is not authorized under HERA because the directors of the pre-conservatorship Companies themselves had no power to implement it under applicable state corporate law governing the Companies' internal affairs. *Perry Capital*, meanwhile, presents no obstacle to this interpretation because the D.C. Circuit never addressed the claim Plaintiffs-Appellants bring here.

Similarly, the supposedly broad grant of authority FHFA has to "preserve and conserve" the Companies' assets under Section 4617(b)(2)(D)(ii) contains an important qualifier that the district court chose not to discuss: FHFA may only take actions that are "*appropriate* to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." *Id*. (emphasis added). Other provisions of the statute provide guidance as to what actions are considered appropriate. Section 4617(b)(2)(B)(i) states that FHFA may "conduct all business" of the Companies only by exercising those "powers" that the pre-conservatorship Companies possessed. It follows that any action beyond that grant of authority would be inappropriate, both as a matter of statutory interpretation and common sense. The Net Worth Sweep cannot be salvaged as an "appropriate" means of preserving and conserving the Companies' assets, because it accomplishes the precise opposite by depleting the Companies' assets.

Finally, the limits HERA places on FHFA to act within the "powers" of the Companies tempers the district court's broad reading of Section 4617(b)(2)(G), which states that FHFA may "transfer or sell any asset" of Fannie or Freddie "without any approval, assignment, or consent." A11. The district court's construction of this latter provision as providing FHFA with limitless discretion would render Section 4617(b)(2)(B)(i) a nullity. Taken together, the two provisions in Sections 4617(b)(2)(B)(i) and 4617(b)(2)(G) mean that FHFA may transfer or sell

assets without "approval, assignment, or consent" only when doing so lies within its fundamental powers under the succession clause. FHFA never had the authority to implement the Net Worth Sweep in the first place because the Companies themselves had no power to implement it. The Net Worth Sweep was *ultra vires*.

Likewise, HERA's succession clause is not a mere technicality that FHFA could disregard when supposedly acting to preserve and conserve the assets of the Companies, as the district court appears to hold. Instead, the succession clause circumscribes FHFA's fundamental power as a *conservator*, limiting FHFA to take only those actions that the Companies themselves would have been authorized to take under Delaware and Virginia law. Because neither a Delaware nor a Virginia corporation has statutory authority to implement the Net Worth Sweep, under HERA, neither does FHFA.

II. Plaintiffs-Appellants' Claims for Damages and Restitution Cannot Be Dismissed Under Section 4617(f)

A. The District Court Ignored That The Amended Complaint Seeks Relief Other Than "Equitable and Injunctive Relief"

As explained above, the district court improperly granted the motions to dismiss solely on the basis of lack of subject matter jurisdiction premised on 12 U.S.C. § 4617(f). A5-6. In addition to its error concerning the applicability of Section 4617(f) to Defendants-Appellees' *ultra vires* acts, the district court ignored that in addition to injunctive relief, Plaintiffs-Appellants' Amended Complaint also

seeks damages and monetary restitution. *The anti-injunction clause does not apply to claims for damages and Defendants-Appellees never argued that it did.* For this reason alone, the district court committed reversible error and the case should be remanded.

Perry Capital holds that damages claims are not subject to the anti-injunction clause:

> [T]he 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***.

864 F.3d at 613–14 (emphasis added).

Despite the district court's reliance on *Perry Capital*, it ignored this key holding, in part, because it failed to consider the Amended Complaint's claims for damages (as well as its claims for monetary relief based on principles of restitution). The district court erroneously believed that Plaintiffs-Appellants only sought "equitable and injunctive relief" (A9), citing paragraphs 84, 92, 99, 106 and the Prayer for Relief of the Amended Complaint. But, the neighboring paragraphs of the Amended Complaint make clear that Plaintiffs-Appellants sought damages. *See* A72 at ¶ 85 ("Fannie Mae and its stockholders, including Plaintiffs and the Fannie Classes, have suffered damages"); A74 at ¶ 93 ("Freddie Mac and its stockholders, including Plaintiffs and the Freddie Classes, have suffered

damages"); and Prayer for Relief, A77 at ¶¶ F-G ("Awarding compensatory damages…").

The district court's fifteen-page opinion fails to address Plaintiffs-Appellants' claims for damages (other than as mentioned in the next section regarding the repudiation of contracts clause). It is axiomatic that when a court neglects to consider a stated ground for relief, the case must be remanded so the court can consider the neglected claim. *See, e.g.*, *On Davis v. The Gap, Inc.*, 246 F.3d 152, 159 (2d Cir. 2001); *Vente v. Gonzales*, 415 F.3d 296, 302-03 (3d Cir. 2005). Further, the district court cited no authority for the proposition that an order of restitution would impermissibly affect a conservator's powers. A10 at n.4. Here, the district court's only purported basis for granting the motions to dismiss was the inapplicable anti-injunction clause. For this reason alone, this case should be remanded so that the district court can consider its jurisdiction over Plaintiffs-Appellants' claims for damages and restitution.

B. The Net Worth Sweep Exceeds and Contravenes FHFA's Authority as Conservator under HERA's Repudiation of Contracts Clause

FHFA's implementation of the Net Worth Sweep cannot be protected by HERA for another reason: HERA's repudiation of contracts clause makes clear that FHFA remains liable for "actual direct *compensatory damages*." 12 U.S.C. § 4617(d)(3)(A)(i) (emphasis added). According to the succession clause, FHFA

steps "in the shoes" of the Companies, and HERA "does not permit [FHFA] to increase the value of the [contract] in its hands by simply 'preempting' out of existence pre-receivership contractual obligations." *Perry Capital*, 864 F.3d at 630 (citing *O'Melveny & Myers*, 512 U.S. at 86-87). While FHFA may, under HERA, repudiate Fannie's and Freddie's contractual obligations "within a reasonable period following [its] appointment" as conservator, *i.e.*, 18 months (*Id*. at § 4617(d)(2); *see also* 12 C.F.R. § 1237.5 (defining "a reasonable period… as a period of 18 months following the appointment of a conservator or receiver")), FHFA must compensate the transaction counterparty when it repudiates a contract. 12 U.S.C. § 4617(d)(3)(A)(i).

According to the district court, the supposedly critical flaw of Plaintiffs-Appellants' repudiation argument was that "[p]laintiffs ask the court to equate a violation of a state statute with the act of repudiating a contract, but cite no authority to support that assertion." A15. First, Plaintiffs-Appellants did not ask the court to "equate" statutory and contractual violations. Instead, Plaintiffs-Appellants argued that the state corporate laws governing the Companies' internal affairs are an integral part of the multi-party contract between the corporation, its directors, and its stockholders, made applicable to the Companies through the election of state law in their bylaws. *See, e.g.*, *Firestone*, 485 F. Supp. 2d at 705 ("the VSCA is deemed a part of the contract between a corporation and its

shareholders”); *Boilermakers*, 73 A.3d at 940; *see also* 8 *Del. C.* § 394 (“This chapter and all amendments thereof shall be a part of the charter or certificate of incorporation of every corporation except so far as the same are inapplicable and inappropriate to the objects of the corporation.”). By violating state corporate laws through the purported exercise of powers the Companies did not possess and so fundamentally depriving the Companies’ stockholders of their bargained-for contractual rights under those laws and the Companies’ charters and bylaws, Defendants-Appellees repudiated the contracts between the Companies and their public stockholders.

Not only did Defendants-Appellees repudiate Plaintiffs-Appellants’ contracts with the Companies by implementing the Net Worth Sweep, they did so long after the 18-month period for repudiation under HERA had passed. Accordingly, FHFA violated Section 4617(d)(2) of HERA. In turn, Section 4617(f) cannot save Defendants-Appellees from Plaintiffs-Appellants’ claims. As the Ninth Circuit explained in the analogous context of FIRREA, “the FDIC can escape the obligations of contracts . . . only through the prescribed mechanism. Section 1821(e) allows the FDIC to disaffirm or repudiate any contract it deems burdensome and pay only compensatory damages. FIRREA does not permit the FDIC to breach contracts at will.” *Sharpe*, 126 F.3d at 1155; *see also Bank of Manhattan*, 778 F.3d at 1135. FHFA did not comply with the requirements of

Section 4617(d) for repudiating the Companies' contractual obligations to their stockholders to comply with their bylaws and with governing principles of state corporation law. In implementing the Net Worth Sweep in violation of these contractual obligations, FHFA thus "did not act within its statutorily granted powers," and its actions "cannot be considered a statutorily authorized function" under HERA. *Sharpe*, 126 F.3d at 1155. Accordingly, Section 4617(f) does not bar "equitable claims related to [FHFA's] contractual breaches." *Bank of Manhattan*, 778 F.3d at 1135.

Second, regardless of the allowed equitable claim described above, it remains that Defendants-Appellees repudiated, and whether that was within the reasonable period established by HERA or not, damages are still owed under the statute. 12 U.S.C. § 4617(d)(3)(A)(i).

Third, contrary to the district court's footnote misinterpreting the contractual nature of bylaws (A15 at n.6), well-settled Delaware and Virginia law holds that bylaws create binding contractual obligations. The very case cited by the district court, *El Paso Pipeline* (*id.*), reiterated "the Delaware Supreme Court's longstanding recognition that the DGCL, the certificate of incorporation, and the bylaws together constitute a multi-party contract among the directors, officers, and stockholders of the corporation." 90 A.3d at 1107. The district court also ignored *Boilermakers*, which held "our Supreme Court has long noted that bylaws, together

with the certificate of incorporation and the broader DGCL, form part of a flexible contract between corporations and stockholders." 73 A.3d at 940. The Delaware Supreme Court has held the same. *See, e.g., Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) ("Corporate charters and bylaws are contracts among a corporation's shareholders…"); *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991) ("[A] corporate charter is both a contract between the State and the corporation, and the corporation and its shareholders.").

Virginia authorities are no less clear that state laws form part of an enforceable contract between stockholders and the corporation. Under Virginia law "the VSCA is deemed a part of the contract between a corporation and its shareholders." *Firestone*, 485 F. Supp. at 705. Similarly, "[c]orporate bylaws when not in contravention of any statute have all of the force of contracts as between the corporation and its members and as between the members themselves." *Lee*, 1969 WL 101681 at *1. The district court plucked the phrase "have all the force of contracts" from *Lee* but missed the rest of the sentence, which shows that "force" refers to binding obligations between contractual parties, not simply principles of contract interpretation. A11 at n.6. The district court's failure to apprehend well-settled principles of Delaware and Virginia law led it to erroneously reject Plaintiffs-Appellants' claims for damages and restitution.

III. Plaintiffs-Appellants' Other Arguments Also Support Jurisdiction

The district court cursorily dispatched arguments that it called a "hodgepodge." A16. In doing so, it repeated a series of errors that plagued the rest of the opinion.

First, the district court once again selectively ignored parts of *Perry Capital* by dismissing Plaintiffs-Appellants' argument that the Net Worth Sweep violated HERA's provisions governing the order of priorities for distribution of assets upon liquidation, § 4617(b)(3)–(9), (c). The district court incorrectly concluded that the "Companies, however, are not in liquidation, so those provisions do not apply to the Net Worth Sweep." A16. *Perry Capital* rejected a similar argument, holding that the district court erred by requiring that the Companies actually be "in liquidation" to find that the Net Worth Sweep breached the stockholders' contractual rights to receive assets upon liquidation. 864 F.3d at 632-33. Under the doctrine of anticipatory breach, the D.C. Circuit upheld the claim that the Net Worth Sweep was a repudiation that "immediately" deprived plaintiffs-appellants' of their contractual right to the Companies' assets by "diminishing the value of their shares." *Id*. at 632. As in *Perry Capital*, Plaintiffs-Appellants here do not have to wait for liquidation to assert their right to a proper distribution of assets because the Net Worth Sweep impermissibly "ensured there would be no assets to distribute" if and when the Companies are ever liquidated. *Id*.

Second, the district court once again failed to recognize the distinction between FHFA acting outside its statutory powers and simply exercising an authorized power improperly. In dismissing Plaintiffs-Appellants' argument that the Net Worth Sweep exceeded the Agency's conservator powers by failing to "maximize[] the net present value return" as required under § 4617(b)(11)(E)(i), the district court stated that Plaintiffs-Appellants' claims fail because "the Agency, *as conservator*, is statutorily authorized to transfer or sell assets of the Companies." A17 (emphasis added). But that misses the point of this lawsuit. Plaintiffs-Appellants never claimed that FHFA improperly exercised the powers granted to it under HERA. Instead, Plaintiffs-Appellants challenge the Net Worth Sweep on the grounds that FHFA was *not* acting within its powers as a conservator in the first place because it acted outside of the powers it inherited through HERA's succession clause. The district court missed this distinction because, among other reasons, it impermissibly assumed that FHFA was acting within its powers in contradiction to Plaintiffs-Appellants' factual allegations. These allegations demonstrate that FHFA was acting in Treasury's interest, and not the Companies' interest, and acting in a manner the Companies' themselves had no power to act, when implementing the Net Worth Sweep, which was a waste of the Companies' assets. Obviously, waste of corporate assets exceeds the powers of a conservator. A52-53 at ¶15, A62-64 at ¶¶ 42-49. Only by ignoring the factual allegations could the district court

erroneously state that Plaintiffs-Appellants "made no argument and cited no authority" to show that FHFA was not acting in its role as conservator when it implemented the Net Worth Sweep. A16.

Similarly, the district court mischaracterized Plaintiffs-Appellants' argument about exceeding statutory power when it stated that "Plaintiffs suggest that the powers granted to the Agency under Section 4617 are limited to 'routine transfers of discrete assets'" and that "reading such a limitation into Section 4617 would be contrary to the very purpose for which HERA was enacted." A18. The district court's analysis is upside down here: Plaintiffs-Appellants never adopted the position that Section 4617 powers are limited to routine transfers of discrete assets. Rather, Plaintiffs-Appellants contend that the routine transfer cases have no application here and that, in any event, even routine transfers would not necessarily escape judicial review because receivers are not "wholly above the law," and "truly ultra vires or arbitrary and capricious acts on its part may be enjoined." *See* D.I. 69 at 44 (*citing Gosnell v. FDIC*, Civ. No. 90-1266L, 1991 WL 533637, at *6 (W.D.N.Y. Feb. 4, 1991)).

Third, the district court also erred by ignoring Plaintiffs-Appellants' exhibits and arguments that address the public statements made by FHFA directors, which contradict the district court's holding and Defendants-Appellees' position that HERA's provisions do not require FHFA as conservator to place the Companies in a "sound and solvent condition" and "preserve and conserve their assets." A17.

Outside the context of this litigation, FHFA repeatedly stated that the disputed statutory provisions are mandatory, not merely permissive. Yet nowhere did the district court address the indisputable fact that FHFA's own directors, even after the first issuance of the *Perry Capital* decision, no less, contradicted the Agency's position taken in this litigation and in *Perry Capital* that FHFA does not have a mandatory obligation to keep the Companies "sound and solvent" and to "preserve and conserve" their assets.

Melvin L. Watt, FHFA's director, recently testified before Congress that FHFA's "statutory mandates *obligate*" it to "[c]onserve and preserve the assets of the Enterprises while they are in conservatorship."[7] While this May 2017 statement was of course not available when the D.C. Circuit issued its first opinion in *Perry Capital* on February 21, 2017, it was very much available to the district court here by November 2017, having been submitted by Plaintiffs-Appellants. Yet the district court blindly relied upon the majority opinion in *Perry Capital* instead. A17.

The district court should have looked afresh at the dissent in *Perry Capital*, which made a series of well-reasoned arguments showing that the disputed

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[7] Statement of Melvin L. Watt, Director, FHFA, Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs at 1 (May 11, 2017), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-Melvin-L-Watt-Director-FHFA-Before-the-US-Senate-Committee-on-Banking-Housing-and-Urban-Affairs-05112017.aspx (emphasis added).

provisions create mandatory obligations for FHFA. 864 F.3d at 636-43 (Brown, J., dissenting). The dissent first stressed HERA's statutory scheme as a whole, which distinguishes the roles FHFA may play as either "conservator or receiver," but not both at once. *Id*. at 638-639 (citing 12 U.S.C. § 4617(b)(2)(G)). Yet FHFA failed to act like a conservator, despite its role, by effectively wasting the assets of the Companies and impermissibly transferring them to Treasury for nothing in return. Consistent with the common-law understanding of a conservator, the text of HERA requires FHFA as conservator to "preserve and conserve" the Companies' assets, and to "rehabilitate" the Companies by returning them to a "sound and solvent condition." *Id*. at 637-640 (citing 12 U.S.C. § 4617(a)(2)(D), (b)(2)(D)-(E)).

Yet FHFA here violated the first principle of conservatorship—to protect and preserve the institution in its charge—by acting for its own benefit and for that of Treasury. *Id*. at 641. FHFA continues to strip the Companies' assets and transfer them to Treasury, ensuring that the Companies will never have enough capital to return to private control. Not only do these actions violate all established definitions of conservatorship, they undercut FHFA's original mission—to return Fannie and Freddie to a safe and sound financial condition.

Fundamentally, Plaintiffs-Appellants take issue with the district court's failure to recognize that, by implementing the Net Worth Sweep, FHFA acted contrary to the purpose of HERA—*i.e.*, to put the Companies in a "sound and solvent

condition" and "to preserve and conserve [their] assets and property" on the path to "rehabilitation." *See* § 4617(b)(2)(D); 76 Fed. Reg. 35,724, 35,730 (June 20, 2011).

IV. **HERA Does Not Bar Claims Against Treasury**

HERA contains no provision limiting judicial review of claims against Treasury or anyone but the conservator. The district court erred by stating that Section 4617(f) nonetheless bars judicial relief against Treasury because the requested relief would "affect" FHFA's power to enter into the Net Worth Sweep. A18-19. This argument is of no moment: as explained above, Section 4617(f) does not "affect" FHFA's exercise of statutorily permissible powers because the Net Worth Sweep did not involve the exercise of a statutorily permissible power but rather exceeded FHFA's powers under HERA.[8]

V. **The District Court Erred When Denying Plaintiffs-Appellants' Motion for Judicial Notice**

In addition to the legal errors explained above, the district court erred by accepting certain of Defendants-Appellees' factual allegations as true, even though they find no support in the Amended Complaint. That error was compounded by the district court's denial of Plaintiffs-Appellants' motion for judicial notice. A19. As a result, the district court failed to view the Amended Complaint in the light

[8] Plaintiffs-Appellants reserve the right to argue on remand that Treasury did not have the authority to purchase new securities or implement the Net Worth Sweep.

most favorable to Plaintiffs-Appellants and that alone, in the context of the facts upon which the district court relied, is reversible error.

The district court does not have the discretion to ignore well-pleaded facts in the Amended Complaint. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009); *Melo-Sonics Corp. v. Cropp*, 342 F.2d 856, 858 (3d Cir. 1965).

Here, the district court ignored Plaintiffs-Appellants' allegation that Treasury and FHFA amended the PSPAs to "capitalize on the Companies' strong recovery (and ensure that their stockholders could not capitalize on it)." A62 at ¶ 42. Instead, the district court adopted Defendants-Appellees' representation (found nowhere in the Complaint) by stating that "[t]he Stock Purchase Agreement and Third Amendment thereto provide a funding commitment intended to ensure that the Companies remained in a sound and solvent condition." A11. Although the district court cited a recital in the Amended and Restated Stock Purchase Agreement for this proposition, by doing so the district court accepted FHFA's and Treasury's self-serving characterization, even though the statement is contrary to the allegations of the Amended Complaint.

The district court's adoption of the Defendant-Appellees' statement of supposed fact is far from immaterial to its decision and to the proper resolution of the motions to dismiss. Rather, whether FHFA and Treasury were acting to conserve and preserve or whether they were acting to unlawfully extract the value

of the Companies is at the very heart of this dispute. FHFA cannot claim that it had the power as conservator to transfer all of the value of the Companies to Treasury. By accepting Defendants-Appellees' factual argument that FHFA's actions that enacted the Net Worth Sweep were to conserve and preserve, the district court reached the conclusion that FHFA was within its powers without ever questioning whether FHFA's actions were actions the Companies themselves could have taken. The district court's order on the motions to dismiss should be vacated because it failed to accept as true the well-pleaded allegations of the Amended Complaint.

This error is further compounded by the district court's denial of Plaintiffs-Appellants' motion for judicial notice. A19. The district court recognized that Plaintiffs-Appellants sought to strike Defendants-Appellees' argument that "the Agency entered into the Third Amendment ***in order to preserve and conserve the assets of the companies***." *Id.* The district court goes on to say that it "did not rely on these assertions or any facts related to these assertions" when deciding the motion to dismiss. *Id.* The district court's representation about what it relied on cannot be reconciled with its clear adoption of the position that the Third Amendment was "intended to ensure that the Companies remained in a sound and solvent condition." A11. Indeed, Plaintiffs-Appellants filed their motion for judicial notice because they (rightly) were concerned that the district court would

adopt facts contrary to the allegations of the Amended Complaint, particularly given that documents that had recently become publicly available showed the allegations of the Amended Complaint to be true and belied the contrary arguments of Defendants-Appellees. The denial of the motion for judicial notice as moot thus was error as well.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's dismissal with prejudice and remand for further proceedings.

Respectfully Submitted,

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COMBINED CERTIFICATIONS

I, the undersigned, hereby certify the following:

1. That I am a member of the Bar or the United States Court of Appeals for the Third Circuit.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

4. That the text of the electronic and paper versions of the foregoing brief are identical.

5. That a virus check was performed on this brief using Avast Antivirus Software, and that no virus was indicated.

6. That, on February 27, 2018, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered users.

Dated: February 27, 2018: /s/ Myron T. Steele

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RECORD NO. 17-3794

In The United States Court Of Appeals For The Third Circuit

DAVID JACOBS; GARY HINDES,

Appellants,

v.

FEDERAL HOUSING FINANCE AGENCY, IN ITS CAPACITY AS CONSERVATOR OF THE FEDERAL NATIONAL MORTGAGE ASSOCIATION AND THE FEDERAL HOME LOAN MORTGAGE CORPORATION; UNITED STATES DEPARTMENT OF THE TREASURY; FEDERAL NATIONAL MORTGAGE ASSOCIATION; FEDERAL HOME LOAN MORTGAGE CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE, CASE NO.: 1-15-CV-00708
GREGORY M. SLEET, U.S. DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAVID JACOBS and GARY HINDES, on behalf of themselves and all others similarly situated, and derivatively on behalf of the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation, *Plaintiffs*, v. THE FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, and THE UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants*, and THE FEDERAL NATIONAL MORTGAGE ASSOCIATION and THE FEDERAL HOME LOAN MORTGAGE CORPORATION, *Nominal Defendants.*	Civil Action No.: 15-708-GMS **CLASS ACTION** **JURY TRIAL DEMANDED**

PLAINTIFFS' NOTICE OF APPEAL

Plaintiffs David Jacobs and Gary Hindes (collectively, "Plaintiffs") hereby give notice that they are taking this appeal to the United States Court of Appeals for the Third Circuit from this Court's Order granting Defendants Federal Housing Finance Agency's ("FHFA"), in its capacity as conservator of the Companies, and United States Department of the Treasury's ("Treasury") Motions to Dismiss (D.I. 81); and from any and all adverse rulings incorporated in, or antecedent to, or ancillary to the Court's Order, including the Court's November 27, 2017 Memorandum Opinion (D.I. 80) and the Court's denial of Plaintiffs' Motion For Judicial Notice

of Documents or, in the Alternative, to Strike Certain Arguments in Defendants' Briefing in Support of Their Motions to Dismiss (D.I. 75; *see* D.I. 80 at 15).

Included herewith is payment of the filing fee ($5.00) and the docketing fee ($500.00) as required by 28 U.S.C. §§ 1913 and 1917, Third Circuit Local Appellate Rules 3.3 and 39.2, Federal Rule of Appellate Procedure 3(e), and the United States District Court for the District of Delaware fee schedule (effective December 1, 2016).

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Dated: December 21, 2017
5592234/42717

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

DAVID JACOBS and GARY HINDES, on behalf of themselves and all others similarly situated, and derivatively on behalf of the Federal National Mortgage Assoc. and Federal Home Loan Mortgage Corp., *Plaintiffs*, v. THE FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator of the Federal National Mortgage Assoc. and the Federal Home Loan Mortgage Corp., and THE UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants*, and THE FEDERAL NATIONAL MORTGAGE ASSOC. and THE FEDERAL HOME LOAN MORTGAGE CORP., *Nominal Defendants*.	)	Civ. No. 15-708-GMS

ORDER

Consistent with the memorandum opinion issued this same date, IT IS HEREBY ORDERED that:

1. Defendants' motions to dismiss (D.I. 65, D.I. 67) are GRANTED;

2. Plaintiffs' first amended class action and derivative complaint (D.I. 62) is DISMISSED WITH PREJUDICE; and

3. The Clerk of the Court is directed to close the case.

Dated: November 27, 2017

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAVID JACOBS and GARY HINDES, on behalf of themselves and all others similarly situated, and derivatively on behalf of the Federal National Mortgage Assoc. and Federal Home Loan Mortgage Corp., *Plaintiffs*, v. THE FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator of the Federal National Mortgage Assoc. and the Federal Home Loan Mortgage Corp., and THE UNITED STATES DEPARTMENT OF THE TREASURY, *Defendants*, and THE FEDERAL NATIONAL MORTGAGE ASSOC. and THE FEDERAL HOME LOAN MORTGAGE CORP., *Nominal Defendants*.	Civ. No. 15-708-GMS

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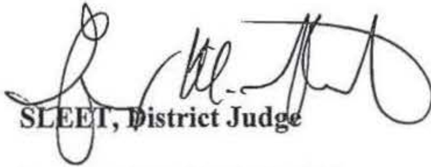
MEMORANDUM OPINION

Dated: November 27, 2017
Wilmington, Delaware



SLEET, District Judge

I. INTRODUCTION

This action is one of several lawsuits filed by the stockholders of the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Association ("Freddie Mac") challenging what the parties call a "Net Worth Sweep," which is a provision in the Third Amendment to the Amended and Restated Senior Preferred Stock Purchase Agreements (the "Third Amendment") governing the payment of dividends. The Third Amendment was entered into by the United States Department of the Treasury ("Treasury") and the Federal Housing Finance Agency (the "Agency," and collectively with Fannie Mae, Freddie Mac, and Treasury, the "Defendants"). At the time, the Agency was acting in its capacity as conservator of Fannie Mae and Freddie Mac (each a "Company," and collectively, the "Companies"). Plaintiffs David Jacobs and Gary Hines (collectively, "Plaintiffs") seek equitable relief based on their assertion that the Net Worth Sweep violates state statutory schemes governing corporations and unjustly enriches Defendants. (D.I. 62 ¶¶ 79-108).

The court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1332, and 1367. Currently pending before the court are Defendants' motions to dismiss the complaint. (D.I. 65, D.I. 67). Defendants have raised a multitude of arguments as to why the complaint should be dismissed, including the anti-injunction clause in the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. § 4617(f), the succession clause in HERA, 12 U.S.C. § 4617(b)(2)(A)(i), the requirement to state a claim under Fed. R. Civ. P. 12(b)(6), issue preclusion and, with respect to Treasury alone, sovereign immunity. (D.I. 66, D.I. 68). For the reasons discussed below, the court finds that the anti-injunction clause in Section § 4617(f) deprives it of

subject matter jurisdiction. Because Plaintiffs do not clear this threshold hurdle, the court is dismissing the complaint without reaching Defendants' other arguments.

II. BACKGROUND

A. Fannie Mae and Freddie Mac

Fannie Mae and Freddie Mac are government-sponsored enterprises (a "GSE") created to increase liquidity in the mortgage market. (D.I. 68 at 5; D.I. 62 ¶¶ 30-31). A GSE is a corporation established by congressional charter but privately owned, meaning its stock is owned by private entities and individuals. 2 U.S.C. 622(8). For purposes of corporate governance, the Companies had to designate the law of the state in which its principal office is located or Delaware General Corporation Law. (D.I. 62 at ¶ 32 (citing 12 C.F.R. § 1710.10)). Fannie Mae selected Delaware law, and Freddie Mac selected Virginia law. (*Id.* at ¶ 32).

In 2008, a global financial crisis and nationwide decline in the housing market caused the Companies to suffer loses. (*Id.* at ¶ 33). To address the crisis, Congress passed HERA, which authorized the Agency to place the Companies into conservatorship or receivership. (*Id.* ¶ 34; *see also* 12 U.S.C. § 4617(2)). On September 6, 2008, the Agency exercised its power under HERA and placed the Companies into conservatorship. (D.I. 62 ¶ 35). Shortly thereafter, each Company, acting through the Agency as a conservator, entered into a Preferred Stock Purchase Agreement (a "Stock Purchase Agreement") with Treasury. (*Id.* at ¶ 36). Under the Stock Purchase Agreements, Treasury committed to advance funds to the Companies for each quarter in which the Companies' liabilities exceeded its assets, so as to maintain the Companies' positive net worth. (D.I. 68 at 7). The funding commitment was capped at $100 billion for each Company. (D.I. 62 ¶¶ 8, 36). In return, Treasury received from each Company shares of a newly created class of senior preferred stock worth $1 billion and warrants to purchase 79.9% of the common stock. (*Id.* ¶ 8). The Stock

Purchase Agreements gave Treasury the right to: (1) an aggregate liquidation preference equal to $1 billion plus the sum of all additional amounts drawn on Treasury's funding commitment; and (2) a quarterly dividend equal to a percentage of the outstanding liquidation preference: 10%, if paid in cash, or 12%, if paid "in-kind." (*Id.* at ¶¶ 8-9). If the quarterly dividend was in-kind, the amount would be added to the liquidation preference. (*Id.* at ¶ 8).

The Stock Purchase Agreements were amended twice in 2009—first, on May 6, 2009, to raise the funding commitment for each Company from $100 billion to $200 billion and, again, on December 24, 2009, to raise the funding commitment according to a formula that would be capped at the end of 2012. (D.I. 68 at 8). On August 17, 2012, Treasury and the Agency, acting as conservator for the Companies, entered into the Third Amendment. (D.I. 62 ¶ 1). Among other things, the Third Amendment changed the formula for calculating the quarterly dividend. (D.I. 68 at 9). Now, the Companies would owe a quarterly dividend in the amount (if any) of the Company's positive net worth, minus a capital reserve. (D.I. 66 at 9). Plaintiffs refer to this dividend formula as a "Net Worth Sweep," and allege that Defendants agreed to the Net Worth Sweep as way to improperly expropriate for the federal government the value the Companies were generating after they returned to profitability in 2012. (D.I. 62 ¶¶ 39, 42, 46).

B. Plaintiffs

Plaintiff Jacobs has continuously held stock in Fannie Mae and Freddie Mac since November 2009. (D.I. 62 ¶ 24). According to the complaint, Plaintiff Hindes "has been an investor in Fannie Mae and Freddi Mac since 2011." (*Id.* at ¶ 25). The complaint does not allege, however, that Hindes currently holds any Fannie Mae stock. In addition, Hindes currently holds Freddie

Mac stock purchased in February 2015, i.e., purchased *after* Defendants executed the Third Amendment that serves as the basis for his claims.[1] (*Id.*).

III. STANDARD OF REVIEW

Under Fed. R. Civ. P. 12(b)(1), a complaint may be dismissed for "lack of subject-matter jurisdiction." Challenges to subject matter jurisdiction may be facial or factual. *Lincoln Ben. Life Co. v. AEI Life, LLC*, 800 F.3d 99, 105 (3d Cir. 2015). A facial attack contests the sufficiency of the pleadings, whereas a factual attack contests the sufficiency of jurisdictional facts. *Id.* According to Defendants, Section 4617(f) is a facial attack to subject matter jurisdiction.[2] (D.I. 66 at 9; D.I. 68 at 9). In reviewing a facial attack, "the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elec. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000).

IV. DISCUSSION

Section 4617(f) of HERA states, in relevant part, that "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." 12 U.S.C. § 4617(f). Courts construing the scope of Section 4617(f) have relied on decisions addressing Section 1821(j), a nearly identical jurisdictional bar applicable to conservatorships with the Federal Deposit Insurance Corporation ("FDIC") and its predecessor, the Resolution Trust

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[1] The timing of Hindes' investments in the Companies raises questions regarding his standing and adequacy as a representative plaintiff. *See, e.g.*, *Quadrant Structured Prod. Co., Ltd. v. Vertin*, 102 A.3d 155, 178 (Del. Ch. 2014) (describing Delaware's contemporaneous and continuous ownership requirements for derivative plaintiffs); *In re Heckmann Corp. Sec. Litig.*, 2013 WL 2456104, at *11 (D. Del. June 6, 2013) (stating that the interests of the putative class representative is usually similar to and sufficiently aligned with the potential class members, because all class members suffered the same harm).

[2] Plaintiffs have not challenged this assertion.

Corporation ("RTC").[3] *Natural Res. Def. Council, Inc. v. Fed. Housing Fin. Agency*, 815 F. Supp. 2d 630, 641 (S.D.N.Y. 2011), *aff'd sub nom. Town of Babylon v. Fed. Housing Fin. Agency*, 699 F.3d 221 (2d Cir. 2012); *Saxton v. Fed. Housing Fin. Agency*, 245 F. Supp. 3d 1063, 1075 (N.D. Iowa 2017) (stating that Section 4617(f) has the same scope as the substantially similar anti-injunction provision in Section 1821(j)).

As construed, Section 4617(f) deprives the court of subject matter jurisdiction over claims seeking equitable and injunctive relief, unless the challenged actions are outside the Agency's statutory powers. *See Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 612 (D.C. Cir. 2017) (Plaintiffs burden is to show that the Agency's actions were "frolicking outside of statutory limits as a matter of law"); *see also Gross v. Bell Sav. Bank PA SA*, 974 F.2d 403, 407 (3d Cir. 1992) (stating that Section 1821(j) permits review only "where the [FDIC] is acting clearly outside its statutory powers"). As a threshold matter, Plaintiffs seek "equitable and injunctive relief" against both the Agency and Treasury. (D.I. 62 ¶ C). Specifically, Plaintiffs seek: (i) a declaratory judgment that the Net Worth Sweep is void and unenforceable under Section 151 of the Delaware General Corporation Law ("DGCL") and Section 13.1-638 of the Virginia Stock Corporation Act ("VSCA"); (ii) a declaratory judgment that Treasury was unjustly enriched, (ii) rescission of the Net Worth Sweep; and (iv) restitution. (*Id.* at ¶ 84, 92, 99, 106, and Prayer for Relief). There is no dispute that this relief, if granted against the Agency when the Agency was acting within its

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[3] Section 1821(j) is codified in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), and states in relevant part: "no court may take any action ... to restrain or affect the exercise of powers or functions of the [FDIC or RTC] as a conservator or a receiver." 12 U.S.C. § 1821(j).

power, would restrain or affect the Agency's use of its power.[4] (D.I. 69 at 33-35, 39). This leaves two questions for the court. Was the Third Amendment outside the Agency's statutory powers? Would the same equitable relief, if granted against Treasury, restrain or affect the Agency's use of its powers? Each of these questions will be addressed in turn.

A. Claims Against The Agency

The powers of the Agency, as conservator, are "defined by" its governing statute, HERA, without any exception or limitation for compliance with other laws. *See Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 398 (3d Cir. 1991) (stating that the powers of the RTC as conservator or receiver "are defined by FIRREA"). Where the Agency performs functions assigned to it under HERA, equitable and injunctive relief will be denied "even where [it] acts in violation of other statutory schemes." *Gross*, 974 F.2d at 407; *see also Rosa*, 938 F.2d at 398 ("[T]o the extent of a conflict between [Section 1821(j)] and provisions of ERISA authorizing relief, § 1821(j) controls"). Plaintiffs try to avoid this adverse precedent by arguing that the purported violations of the DGCL and VSCA (i.e., state corporate law) are not claims based on "other statutory schemes." (D.I. 69 at 39). Instead, these violations "contravened and exceeded [the Agency's] statutory authority under HERA itself." (*Id.*). For the reasons explained below, the court disagrees.

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[4] Courts have consistently held that rescission, restitution, and declaratory judgments restrain or affect the conservator's powers. *See, e.g., BKWSpokane, LLC v. Fed. Deposit Ins. Corp.*, 663 Fed. App'x 524, 527 (9th Cir. 2016) (stating that Section 1821(j) bars a claim for unjust enrichment); *Hindes v. Fed. Deposit Ins. Corp.*, 137 F.3d 148, 159 (3d Cir. 1998) (agreeing that Section 1821(j) precluded claims for declaratory judgment and rescission); *Freeman v. Fed. Deposit Ins. Corp.*, 56 F.3d 1394, 1399 (D.C. Cir. 1995) (stating that Section 1821(j) bars declaratory relief and rescission); *Centennial Assocs. Ltd. P'ship v. Fed. Deposit Ins. Corp.*, 927 F. Supp. 806, 812 (D.N.J. 1996) (stating that Section 1821(j) deprives courts of the power to grant rescission).

The court will first explain why the Agency was acting within its statutory powers when it executed the Third Amendment and then explain why it rejects Plaintiffs' arguments to the contrary. Only two of Plaintiffs' arguments require extended discussion: (1) that HERA's succession clause incorporates into the Agency's powers any limitations the DGCL and VSCA placed on the Companies' powers, and (2) that the Agency exceeded its powers by failing to follow HERA's procedures for repudiating private contracts. Plaintiffs' remaining arguments are a hodgepodge that can be summarily rejected.

1. The Agency's Statutory Powers

This court concludes, like several other courts, that the Agency acted within its powers under HERA when it entered into the Third Amendment. Under Section 4617(b), the Agency may be appointed conservator "for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2). The Agency has the power to: (i) "take over the assets of and operate" the Companies, (ii) "conduct all business" of the Companies, and (iii) "transfer or sell any asset" of the Companies "without any approval, assignment, or consent." 12 U.S.C. § 4617(b)(2)(B)&(G). In addition, the Agency has the power to take any actions: (i) "necessary to put [the Companies] in a sound and solvent condition;" and (ii) "appropriate to … preserve and conserve the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(D).

The Stock Purchase Agreement and the Third Amendment thereto provided a funding commitment intended to ensure that the Companies remained in a sound and solvent condition. (*See* D.I. 66-1 at ¶ A). In exchange for the funding commitment, the Agency transferred or sold (or committed to transfer or sell) assets of the Companies to the U.S. Treasury, in the form of quarterly dividends and a liquidation preference. (*Id.* at § 3). The Third Amendment changed the terms by which those assets would be transferred or sold. (D.I. 66-3). Accordingly, as several

other courts have found, the Third Amendment falls squarely within the powers granted to the Agency under HERA, because renegotiating dividend agreements, managing debt obligations, and ensuring ongoing access to capital are some of the quintessential tasks of reorganizing, operating, and preserving a business. *See Perry Capital*, 864 F.3d at 607 (finding that the Agency's execution of the Third Amendment fell squarely within its statutory authority to operate the Companies, reorganize their affairs, and take such action as may be appropriate to carry on their business); *Collins v. Fed. Housing Fin. Agency*, 254 F. Supp. 3d 841, 846 (S.D. Tex. 2017) (stating that plaintiffs failed to demonstrate that the Third Amendment was "outside the scope of [the Agency's] broad authority as conservator"); *Saxton*, 245 F. Supp. 3d at 1076 (finding that the Agency's powers as conservator "plainly allow for the actions contemplated by the Third Amendment"); *Roberts*, 243 F. Supp. 3d at 963 ("All told, the Plaintiffs have not sufficiently alleged that [the Agency] acted outside the bounds of its statutory authority" when executing the Third Amendment); *Robinson v. Fed. Housing Fin. Agency*, 223 F. Supp. 3d 659, 667-71 (E.D. Ky. 2016) (holding that the Third Amendment was within the Agency's powers and functions).

2. HERA's Succession Clause

Plaintiffs argue that the Third Amendment exceeded the Agency's statutory powers under HERA, because it contravened the DGCL and VSCA, i.e., the state corporate law of Delaware and Virginia respectively. (D.I. 69 at 36-38). According to Plaintiffs, HERA incorporated all of the restrictions state corporate law imposes on the Companies and, as a result, the Agency "may not take actions as conservator that Fannie [Mae] and Freddie [Mac] could not themselves have taken." (*Id.* at 36-37). Plaintiffs base this argument on the succession clause in HERA, which states that the Agency, as conservator, "immediately succeed[s] to … all rights, titles, powers, and privileges

of the regulated entity, and of any stockholder, officer, or director of [the Companies] with respect to the [Companies]."[5] (*Id.* at 36 (citing 12 U.S.C. § 4617(b)(2)(A)).

The court finds this argument unpersuasive for many reasons. First, Plaintiffs' reading of Section 4617(f)—which would make equitable relief against the Agency available in every situation where it would be available against the Companies—renders Section 4617(f) superfluous. As a general rule of statutory construction, courts "strive to avoid a result that would render statutory language superfluous, meaningless, or irrelevant." *Cushman v. Trans Union Corp.*, 115 F.3d 220, 225 (3d Cir. 1997). Second, Plaintiffs' reading is contrary to well-established case law that equitable relief will be denied, "even where the [conservator] acts in violation of other statutory schemes." *Gross*, 974 F.2d at 407; *Rosa*, 938 F.2d at 397 (rejecting argument that the FDIC exceeds its statutory authority for purposes of Section 1821(j) when the challenged acts are illegal under ERISA). If a conservator exceeded its statutory powers when it violated state law, then claims based on violations of other statutory schemes would not have been barred by Section 1821(j) or Section 4617(f). Third, Plaintiffs' interpretation is inconsistent with the purpose of HERA itself. The sweeping limitations Section 4617(f) places on judicial review "may appear drastic," but that fully accords with Congress' intent to broadly empower the Agency to act in times of extraordinary financial crisis. *Perry Capital*, 864 F.3d at 605.

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[5] Plaintiffs also base their argument on two other HERA provisions: the Agency's discretionary authority to perform all functions of the Companies "in the name of" the Companies," and to operate the Companies "with all the powers of the shareholders, the directors, and the officers." (D.I. 69 at 36 (citing 12 U.S.C. § 4617(b)(2)(B))). Because these grants of authority "are permissive powers of [the Agency] and not duties with which they are required to comply," *see Robinson*, 223 F. Supp. 3d at 669 (emphasis in original omitted), they are far weaker statutory grounds for Plaintiffs' argument than the succession clause. So the court will not address them.

Finally, the cases Plaintiffs cite in support of their argument are easily distinguishable. (*See*, D.I. 69 at 36-37). *O'Melveny & Myers* addressed whether "federal common law" preempted state common law when the FDIC asserted state tort claims, in its capacity as a receiver. *O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 512 U.S. 79, 86 (1994). *O'Melveny & Myers* did not address, in any manner whatsoever, whether the FDIC's statutory powers were curtailed by state law when it stepped into the shoes of a failed bank. In *Bank of Manhattan* and *Sharpe*, the courts found that Section 1821(j) did not bar plaintiffs from asserting a breach of contract claim against the FDIC, in its capacity as receiver for a bank, because the FDIC was bound by the terms of a private commercial contract executed by plaintiffs and the bank before the receivership. *See Bank of Manhattan, N.A. v. Fed. Deposit Ins. Corp.*, 778 F.3d 1133, 1135-36 (9th Cir. 2015); *Sharpe v. Fed. Deposit Ins. Corp.*, 126 F.3d 1147, 1154-55 (9th Cir. 1997). Here, Plaintiffs are not asserting a breach of contract claim. Indeed, Plaintiffs do not have a private commercial contract with either Fannie Mae or Freddie Mac. Finally, neither *Fleischer* nor *Ridder* mention FIRREA (the act containing Section 1821(j)), let alone address whether FIRREA's grant of authority to the FDIC incorporated state law restrictions on the bank's powers. *See Ridder v. CityFed Fin. Corp.*, 47 F.3d 85, 87 (3d Cir. 1995); *Fleischer v. Fed. Deposit Ins. Corp.*, 70 F. Supp. 2d 1238 (D. Kan. 1999). For all of these reasons, the court is not persuaded that HERA incorporated state law limitations on the Companies' authority in such a manner that the Agency exceeds its statutory authority under HERA when it violates state law.

3. HERA's Repudiation of Contracts Clause

Plaintiffs argue that the Agency exceeded its statutory authority under HERA by not complying with the requirements of Section 4617(d), which governs the Agency's repudiation of contracts between the Companies and third-parties. (D.I. 69 at 38-39). Plaintiffs' argument on

this point is cryptic, but it appears to string together the following assertions. The bylaws of a corporation are treated by the courts like contracts. (*Id.*). Thus, Plaintiffs had a contract with the Companies. The bylaws of Fannie Mae and Freddie Mac specified that they would be governed by the state law of Delaware and Virginia, respectively. (D.I. 62 ¶ 32). Thus, the terms of Plaintiffs' contract with the Companies incorporated the DGCL and the VSCA. (*Id.* at ¶¶ 52, 55). The Third Amendment purportedly violated Section 151 of the DGCL and Section 13.1-638 of the VSCA. (*Id.* at ¶¶ 55, 83). Thus, the Third Amendment "repudiated" the Companies' contract with Plaintiffs. (D.I. 69 at 38-39). HERA requires that any contracts repudiated by the Agency must be repudiated within the 18 months following the Agency's appointment as a conservator. (*Id.*). The Agency became conservator of the Companies in 2008 and the Third Amendment was executed in 2012. (D.I. 62 ¶ 1, 35). Thus, the Agency did not repudiate Plaintiffs' contract with the Companies within 18 months of its appointment. (D.I. 69 at 38-39). The failure to repudiate a contract within the time allowed under Section 4617(d) means the Agency exceeded its statutory powers granted in Section 4617(b) to operate the business and sell or transfer its assets. (*Id.*).

Laid out in this way, the flaws in Plaintiffs' argument become clear. Plaintiffs ask the court to equate a violation of a state statute with the act of repudiating a contract, but cite no authority to support their assertion.[6] Plaintiffs also cite no authority for the proposition that the Agency's failure to comply with the 18 month requirement for repudiating contracts means the Agency exceeded its powers to operate the business. Indeed, cases dismissing equitable claims under

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[6] Plaintiffs cite to cases stating that bylaws "have all the force of contracts." (D.I. 69 at 38 (citing *Lee v. Va. Educ. Ass'n, Inc.*, 1969 WL 101681, at *1 (1969); *Allen v. El Paso Pipeline GP Co., LLC*, 90 A.3d 1097, 1107 (Del. Ch. 2014)). But this only shows that courts will rely on contract principles in deciding how to construe and enforce bylaws.

Section 1821(j), notwithstanding allegations that the conservator failed to timely repudiate a contract, indicate that the conservator does not exceed its statutory authority by failing to comply with the 18 month timing requirement. *See MBIA Ins. Corp. v. Fed. Deposit Ins. Corp.*, 708 F.3d 234, 247 (D.C. Cir. 2013) (dismissing claims seeking a declaratory judgment and injunctive relief under Section 1821(j) notwithstanding fact that claims were based on receiver's failure to repudiate a contract in a timely manner); *Bender v. CenTrust Mortg. Corp.*, 833 F. Supp. 1540, 1542-43 (S.D. Fla. 1992) *aff'd*, 51 F.3d 1027 (11th Cir. 1995) (same). Accordingly, the court finds that, even if the Third Amendment violated state law and that violation should be treated like a repudiation of a contract, the Agency did not exceed its statutory powers in failing to repudiate the contract in a timely manner.

4. Plaintiffs' Hodgepodge of Other Arguments

Plaintiffs raise a hodgepodge of weaker arguments as to how the Agency exceeded its statutory powers under HERA. Each of these arguments are rejected for the reasons explained below. First, Plaintiffs argue that the transfer of the Companies assets "ignore HERA's detailed procedures and order of priorities for the distribution of assets during liquidation," codified at 12 U.S.C. § 4617(b)(3)-(9), (c). (D.I. 69 at 42). The Companies, however, are not in liquidation, so those provisions do not apply to the Net Worth Sweep.

Second, Plaintiffs make the cursory assertion that, under Section 4617(b)(2)(G), the Agency may only transfer assets "as conservator or receiver," but the Agency "was not acting in either capacity" when it paid the Net Worth Sweep in accordance with the terms of the Third Amendment. (*Id.*). The Agency has only three capacities: conservator, receiver, or regulator. Plaintiffs have made no argument and cited no authority to show that the Agency was acting as a regulator when it executed the Third Amendment. In addition, the Complaint alleges that the Third

Amendment was executed by the Agency "in its capacity as conservator of Fannie Mae and Freddie Mac." (D.I. 62 ¶ 1). Accordingly, this argument fails.

Third, Plaintiffs assert that the Net Worth Sweep exceeded the Agency's powers, because it did not put the Companies in a "sound and solvent condition," and/or "preserve and conserve their assets and property," as HERA purportedly requires. (*Id.* at 43 (internal brackets omitted)). As several other courts have explained in rejecting similar arguments, these are permissive powers under HERA, not obligatory. *Perry Capital*, 864 F.3d at 606-07. The Agency's "alleged failure to exercise its permissive power … does not remove Plaintiff's claims from the ambit of Section 4617(f)'s bar on equitable relief." *Robinson*, 223 F. Supp. 3d at 670; *Roberts*, 243 F. Supp. 3d at 962–63; *Saxton*, 245 F. Supp. 3d at 1076.

Similarly, Plaintiffs argue that the Net Worth Sweep exceeded the Agency's powers, because it did not "maximize the net present value return." (D.I. 69 at 43). As the Fifth Circuit explained in rejecting this same argument: "[Plaintiffs] fail[] (or refuse[]) to recognize the difference between the exercise of a function or power that is clearly outside the statutory authority of the [Agency] on the one hand, and improperly or even unlawfully exercising a function or power that is clearly authorized by statute on the other." *Ward v. Resolution Trust Corp.*, 996 F.2d 99, 103 (5th Cir. 1993). None can question that the Agency, as conservator, is statutorily authorized to transfer or sell the assets of the Companies. *Id.* So, "even assuming arguendo, that (as alleged by [Plaintiffs]) the [Agency] exercised the power or function of [transferring or selling assets] in a way that failed to maximize the net present value return or to afford fair and consistent treatment to all [stockholders], [Plaintiffs] could not prevail." *Id.* "For, even if the [Agency] improperly or unlawfully exercised an authorized power or function, it clearly did not engage in an activity outside its statutory powers." *Id.*

Finally, Plaintiffs suggest that the powers granted to the Agency under Section 4617 are limited to "routine transfers of discrete assets," which the Net Worth Sweep purportedly was not. (D.I. 69 at 44). Plaintiffs, again, cite no authority supporting this suggestion. The plain text of Section 4617 includes no such limitation. And, reading such a limitation into Section 4617 would be contrary to the very purpose for which HERA was enacted—to mitigate the effects of a global financial crisis that was far from routine.

B. Claims Against Treasury

It is well established that Plaintiffs cannot make an end-run around Section 4617(f) by asserting claims for equitable and injunctive relief against the Agency's contractual counterparty, when the contract in question was within the scope of the Agency's powers. *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 222 (D.D.C. 2014). Section 4617(f) bars claims that "restrain or affect" the Agency's exercise of its powers, and a claim against the Agency's counterparty "affect[s]" the Agency's exercise of its powers. *See Perry Capital*, 864 F.3d at 615 ("[T]he 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 [the Agency]."); *Dittmer Prop., L.P. v. Fed. Deposit Ins. Corp.*, 708 F.3d 1011, 1017 (8th Cir. 2013) (finding that a claim against the FDIC's counterparty "would certainly restrain or affect FDIC's powers"); *Hindes v. Fed. Deposit Ins. Corp.*, 137 F.3d 148, 160 (3d Cir. 1998) (barring a claim against a third party which would "have the same practical result as an order directed against the FDIC"); *Roberts*, 243 F. Supp. 3d at 960 ("It takes two to tango, and undoing one side of the Third Amendment against Treasury necessarily affects [the Agency], which is, after all, the other party to the Third Amendment."). Accordingly, Section 4617(f) bars Plaintiffs' claims against Treasury. *See Saxton*, 245 F. Supp. 3d at 1078 (holding that plaintiffs' claims against Treasury are barred by

Section 4617(f) because such relief would undoubtedly restrain or affect the Agency's functions as a conservator); *Robinson*, 223 F. Supp. 3d at 666 (same).

C. Motion to Strike

Plaintiffs have asked the court to take judicial notice of documents purportedly undermining any assertion by Defendants that: (1) the Net Worth Sweep was necessary to stop the Companies' circular practice of borrowing funds from Treasury in order to pay Treasury the quarterly dividend; and (2) the Agency entered into the Third Amendment in order to preserve and conserve the assets of the Companies. (D.I. 75 at 3). In the alternative, Plaintiffs ask the court strike any arguments that rely on these assertions. The court denies the motion as moot. The court did not rely on these assertions or any facts related to these assertions in deciding the motion to dismiss, as that would have been improper under the standard of review for a facial attack on subject matter jurisdiction.

V. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss (D.I. 65, D.I. 67) are granted. The complaint (D.I. 62) is dismissed with prejudice, because lack of subject matter jurisdiction cannot be cured by amendment. *See U.S. ex rel. Schumann v. Astrazeneca Pharm. L.P.*, 769 F.3d 837, 849 (3d Cir. 2014). Plaintiffs' motion for judicial notice of documents or, in the alternative, to strike certain arguments in Defendants' briefs (D.I. 75) is denied as moot. An appropriate order will be entered.