UNITED STATES COURT OF FEDERAL CLAIMS

JOSEPH CACCIAPALLE *et al.*, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 1:13-cv-466-MMS

FIRST AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

TABLE OF CONTENTS

NATURE AND SUMMARY OF THE ACTION 1

JURISDICTION AND VENUE 7

THE PARTIES 8

CONSTITUTIONAL PROVISION 8

I. THROUGH 2008, FANNIE MAE AND FREDDIE MAC WERE FINANCED BY PRIVATE INVESTMENT 9

II. IN JULY 2008, CONGRESS CREATED FHFA, WHICH IN SEPTEMBER 2008 PLACED THE COMPANIES INTO CONSERVATORSHIP 11

III. IN EXCHANGE FOR FUNDING, FHFA EXECUTED AN AGREEMENT GIVING TREASURY A 10% SENIOR PREFERRED STOCK DIVIDEND AND WARRANTS TO BUY 79.9% OF EACH COMPANY'S COMMON STOCK FOR A NOMINAL PRICE 14

IV. AT THE BEGINNING OF 2012, THE HOUSING MARKET REBOUNDED AND THE COMPANIES RETURNED TO PROFITABILITY 19

V. ON AUGUST 17, 2012 THE GOVERNMENT IMPOSED THE THIRD AMENDMENT, GIVING TREASURY A RIGHT TO A QUARTERLY DIVIDEND EQUAL TO 100% OF THE COMPANIES' NET WORTH (MINUS A SMALL RESERVE THAT SHRINKS TO ZERO IN 2018). 21

VI. IN DECEMBER 2017, TREASURY AND FHFA AGAIN CONFIRMED THAT THE NET WORTH SWEEP ENSURES THAT 100% OF ALL VALUE IN THE COMPANIES MUST GO TO TREASURY, NO MATTER HOW LARGE THAT VALUE MAY BE. 30

VII. THE GOVERNMENT HAS TAKEN PLAINTIFFS' PROPERTY WITHOUT PROVIDING JUST COMPENSATION. 31

VIII. THE GOVERNMENT ALSO HAS TAKEN PLAINTIFFS' RIGHT TO BRING CERTAIN CAUSES OF ACTION CHALLENGING THE THIRD AMENDMENT WITHOUT PROVIDING JUST COMPENSATION. 35

IX. THE GOVERNMENT ILLEGALLY EXACTED PLAINTIFFS' PROPERTY 36

X. THE THIRD AMENDMENT VIOLATED THE CONTRACTUAL RIGHTS OF HOLDERS OF THE COMPANIES' PREFERRED STOCK 40

XI. CLASS ACTION ALLEGATIONS 48

COUNTS 50

FIRST AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

Plaintiffs Joseph Cacciapalle and American European Insurance Company submit this First Amended Consolidated Class Action Complaint against the United States of America.

NATURE AND SUMMARY OF THE ACTION

1. This is a class action brought by Plaintiffs on behalf of themselves and classes (the "Classes," as defined herein) of holders of Preferred Stock issued by the Federal National Mortgage Association ("Fannie Mae" or "Fannie") and the Federal Home Loan Mortgage Corporation ("Freddie Mac" or "Freddie"; Fannie Mae and Freddie Mac together, the "Companies"). Plaintiffs and the Classes (together, the "Plaintiffs") seek just compensation for the taking of their private property, and, alternatively, damages for illegal exaction, breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty, in connection with the implementation of the Third Amendment to the Senior Preferred Stock Purchase Agreement, dated August 17, 2012 (the "Third Amendment") by the United States of America, including the Department of the Treasury ("Treasury"), the Federal Housing Finance Agency ("FHFA") and agents acting at their direction (collectively, the "Government").

2. Fannie Mae and Freddie Mac (the "Companies") are enterprises chartered by the U.S. Congress to facilitate liquidity and stability in the secondary market for home mortgages. While they have been commonly referred to as "Government Sponsored Enterprises" or "GSEs," Fannie Mae and Freddie Mac are not government agencies. Instead, Congress created the Companies to operate as private, for-profit corporations. As such, the Companies have stockholders, directors, and officers like other non-governmental corporations, and their debt and equity securities have for years been privately owned and publicly traded by individual

investors, including employees of the Companies, as well as by public pension funds, mutual funds, community banks, and insurance companies, among other institutional investors.

3. To raise capital, the Companies issued several publicly traded securities, including numerous classes of non-cumulative preferred stock ("Preferred Stock"). By 2008, Fannie Mae and Freddie Mac were two of the largest privately owned financial institutions in the world, and had been consistently profitable for decades. The Companies marketed their securities aggressively to investors, both large and small, and continued to do so through 2008. Indeed, when the Companies came into financial distress in 2007 and 2008, they successfully asked private shareholders to provide much needed capital by issuing new shares of preferred stock.

4. In July 2008, in response to the crisis in the residential housing and mortgage markets, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"), creating a new federal agency, FHFA, and empowering it to appoint itself as conservator of the Companies under certain circumstances.

5. On September 6, 2008, FHFA placed Fannie Mae and Freddie Mac into conservatorship. When FHFA became Conservator, Fannie Mae and Freddie Mac each entered into a Senior Preferred Stock Purchase Agreement ("PSPA") with Treasury. Under these contracts, Treasury agreed to invest in the Companies in exchange for the issuance of a newly created class of securities in the Companies, known as Senior Preferred Stock. In return for its commitment to purchase Senior Preferred Stock, Treasury received $1 billion of Senior Preferred Stock in each Company as a commitment fee (*i.e.,* that $1 billion did not reflect any investment), as well warrants to acquire 79.9% of the Common Stock of the Companies at a very low, nominal price. The PSPA also provided that the Treasury would hold a liquidation preference in

each Company equal to the $1 billion commitment fee plus the total amount Treasury invested in that respective Company. In addition, the Senior Preferred Stock ranked senior in priority to all other series of Fannie Mae and Freddie Mac Preferred Stock, and would earn an annual dividend, paid quarterly, equal to 10% of the outstanding liquidation preference, *i.e.*, 10% of the sum of the $1 billion commitment fee plus the total amount Treasury invested in that Company. If a Company elected not to pay the dividend in cash, Treasury would receive a dividend in the form of additional Senior Preferred Stock with a face value equal to 12% of the liquidation preference. The warrants to acquire a 79.9% ownership stake in the Companies gave Treasury a significant "long" position—over and above the substantial 10% coupon on its Senior Preferred Stock. If exercised, these warrants would allow Treasury to receive enormous profits in the event the Companies returned to profitability and started paying dividends on their common stock. However, any dividends paid on that common stock would be paid only after the Companies paid dividends to the privately held Preferred Stock which ranked junior to the Senior Preferred Stock, but senior to any and all common stock (whether privately held or held by the Treasury based on the exercise of the warrants).

6. These terms would have been nonsensical if the imposition of the conservatorship had somehow nullified the rights of all private shareholders. Indeed, the structure of the PSPAs between Treasury and FHFA reflected the shared understanding that (a) the Companies continued to be owned by shareholders with certain contractual rights, and had not been simply "taken over by the Government," and (b) in addition to Treasury's rights as a shareholder, there were other, private shareholders who continued to have an ownership interest in the Companies, but whose rights were now subordinated to Treasury's rights as a senior preferred shareholder and (in the case of common shareholders) subject to dilution because

Treasury held warrants to buy 79.9% of the common stock. That was the enormous price of Treasury's commitment to providing funding to the Companies. But while it was an enormous price, it did not eliminate the rights of private shareholders. Indeed, at the time these PSPAs were executed, FHFA's director told investors that "**the common and all preferred stocks will continue to remain outstanding**." Statement of FHFA Director James B. Lockhart (Sept. 7, 2008) (*available at* goo.gl/xMjTse). Likewise, Treasury Secretary Paulson made clear that "**conservatorship does not eliminate the outstanding preferred stock**, but does place preferred shareholders second, after the common shareholders, in absorbing losses." Statement by Secretary Henry M. Paulson, Jr. (Sept. 7, 2008) (*available at* goo.gl/weFLds).

7. In any event, this lawsuit does not challenge the foregoing arrangement made in September 2008. While Plaintiffs do not concede that all the measures taken in September 2008 were justified or necessary, they are not here to challenge the placement of Fannie and Freddie into conservatorship at the height of the financial crisis, or the original deal struck by Treasury and FHFA at that time.

8. But four years later, something very different happened. Just as the housing market was recovering and the Companies were returning to robust profitability, the Treasury and FHFA agreed to an "amendment" to the PSPAs under which the 10% Senior Preferred Stock dividend was converted into a "Net Worth Sweep" that required the Companies to pay the full amount of their net worth to Treasury every quarter, minus a small reserve that was set to shrink to zero by 2018. Under this "Net Worth Sweep" (formally called the "Third Amendment" to the PSPAs), it became impossible for any private shareholders ever to receive any dividend or liquidation distribution from the Companies. Even if the Companies generate trillions of dollars in profits and positive net worth, it all goes to the Treasury, and nothing can

ever be distributed to private shareholders—not as a dividend, and not even if the Companies are liquidated.

9. As of August 16, 2012, the day before the Net Worth Sweep, private shareholders had vested rights to dividends and liquidation proceeds, and those rights had economic value. Once the Net Worth Sweep was put in place, however, those legal rights were obliterated. Their economic value was therefore also wiped out. The only value the preferred stock has had since the Net Worth Sweep is a value that depends on the Net Worth Sweep being invalidated by the courts or Congress—or from a court awarding damages or just compensation for the Net Worth Sweep.

10. The rights that were expropriated by the Government through the Net Worth Sweep belonged to real people who made real investments into Fannie and Freddie. For years, Fannie and Freddie were able to fulfill their public mission because of investments made by private citizens—often very ordinary citizens who invested their life savings, or small institutions who were told by their regulators to invest in these entities. These private investments were made not only in good times but also when the Companies faced financial distress in 2007.

11. The Government has reaped immense profits from the Third Amendment. In total, the Companies have paid $278.9 billion in dividends to Treasury. Of that amount, approximately $55 billion was paid before the Net Worth Sweep, and approximately $223.9 billion was paid after the Net Worth Sweep. This total amount of $278.9 billion is approximately $87.5 billion more than Treasury's total investment in the Companies. Moreover, as of the date of this filing, the total amount of dividends paid under the Net Worth Sweep is roughly $125.5 billion more than Treasury would have received under the 10% dividend

provided for in the original PSPAs. Meanwhile, the principal amount of Treasury's Senior Preferred Stock has not been reduced at all, and still stands at $193.4 billion. Of course, under the Third Amendment, the true amount of Treasury's liquidation preference is infinite: no matter how much positive value is generated by the Companies, all of it must go to Treasury. Thus, it would not be truly accurate to say that Treasury's "liquidation preference" is $193.4 billion; if the Companies are liquidated and a positive surplus results that is greater than $193.4 billion, the Third Amendment guarantees that all of that positive value must be paid to Treasury.

12. While the Net Worth Sweep has thus far allowed Treasury to receive $125 billion more than it would have received under the original Senior Preferred Stock deal, Treasury could have captured most of that windfall amount under the original deal if it had simply exercised its common stock warrants and authorized dividends on common stock. If Treasury had taken that approach—which was obviously the approach contemplated by the original Senior Preferred Stock Agreement—then Treasury would have received most of the $125 billion in excess value, but not quite all of it. First, for Treasury to have received distributions on its common stock, as contemplated in the original deal, Treasury would have to have permitted the Companies to pay dividends to private preferred shareholders (*i.e.*, Plaintiffs and the class they represent), who have to be paid dividends before a common shareholder can be paid. In addition, Treasury would also have had to have authorized pro rata distributions to private common shareholders, who would have owned 20.1% of the common stock. Treasury still would have gotten most of the $125 billion in excess value. But Treasury wanted absolutely all of it, and did not want private shareholders to receive anything, no matter how profitable the Companies might become. That is what motivated the Net Worth Sweep.

13. Under the Third Amendment, the Government has expropriated Plaintiffs' vested property rights and transferred their value to the Treasury. That constitutes a taking of private property and the Fifth Amendment requires that the Government pay just compensation to the Plaintiffs. In addition, to the extent this action violated statutory law, it constitutes an illegal exaction and the Fifth Amendment requires the Government to pay damages to plaintiffs. Further, by imposing the Third Amendment, the Government has nullified, and thereby breached, Plaintiffs' express and implied contractual rights to dividends, liquidation payments, and voting rights, contained in the stock certificates. Plaintiffs are seeking remedies for those contractual breaches in a companion case in the U.S. District Court for the District of Columbia, but to the extent the Government is held to be the proper defendant against such claims, we advance them here as well.[1] Finally, the extraordinary control exercised by FHFA as conservator over Fannie and Freddie created a fiduciary relationship between FHFA, on the one hand, and the Plaintiffs on the other; the Net Worth Sweep violated FHFA's fiduciary duties. Plaintiffs and the classes they represent are entitled to recover damages caused by those breaches.

JURISDICTION AND VENUE

14. This Court has jurisdiction over this action, and venue is proper in this Court, pursuant to 28 U.S.C. § 1491(a). The named Plaintiffs have claims under the Tucker Act

---

[1] The Plaintiffs in this action are also pursuing contract-based claims for damages against the FHFA (and the Companies) in the U.S. District Court for the District of Columbia. *See* Second Amended Consolidated Class Action and Derivative Complaint, *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations,* No. 13-mc-1288 (D.D.C. filed Feb. 16, 2018). In that action, Plaintiffs proceed under the theory that their contract rights were breached by FHFA in its role as conservator for the Companies, assuming that role is not subject to governmental immunities. In this action, by contrast, Plaintiffs proceed under the alternative theory that their contract rights were breached by the United States. Plaintiffs do not seek a double recovery; they merely seek to ensure that the Plaintiffs receive damages and compensation to remedy the loss of their shareholder rights. We are required to proceed in two separate cases because of the jurisdictional rules governing claims against the Government. (The named Plaintiffs in this case were not the Plaintiffs who sought relief under the Little Tucker Act in the District Court case, as the Plaintiffs in this case have claims in excess of $10,000 each).

that are worth more than $10,000 each, and therefore can only adjudicate those claims in this Court.

THE PARTIES

15. Plaintiff Joseph Cacciapalle is a citizen of the state of New Jersey, and is a holder of Fannie Mae 8.25% Series S Preferred Stock, Fannie Mae 8.25% Series T Preferred Stock, and Freddie Mac 8.375% Series Z Preferred Stock. Mr. Cacciapalle purchased Fannie Mae Preferred Stock in January 2008, purchased Freddie Mac Preferred Stock in February 2008, and has been a holder of Fannie Mae Stock and Freddie Mac Preferred Stock continuously since then. He is recently retired, and purchased these securities to be a source of stable income in his retirement.

16. Plaintiff American European Insurance Company is a New Jersey corporation with offices in New York, New York, and is a holder of Fannie Mae 8.25% Series T Preferred Stock and Freddie Mac Variable Rate Series M Preferred Stock. American European Insurance Company held Fannie Mae Preferred Stock in May 2008 and Freddie Mac Preferred Stock in January 2001, and has been a holder of Fannie Mae Preferred Stock and Freddie Mac Preferred Stock continuously since then.

17. Defendant United States of America includes Treasury, FHFA, and agents acting at their direction.

CONSTITUTIONAL PROVISION

18. The Fifth Amendment to the United States Constitution provides in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FACTUAL ALLEGATIONS

I. THROUGH 2008, FANNIE MAE AND FREDDIE MAC WERE FINANCED BY PRIVATE INVESTMENT.

19. Fannie Mae and Freddie Mac are stockholder-owned corporations. Fannie Mae was established in 1938 to provide the mortgage market with supplemental liquidity, and was converted to a private corporation in 1968. Freddie Mac was created in 1970 as an alternative to Fannie Mae to make the secondary mortgage market more competitive and efficient and was converted to a private corporation in 1989. Both Companies are sometimes referred to as "Government Sponsored Enterprises" (or "GSEs"), which reflects the fact that they are private corporations created by Congress to increase mortgage market liquidity. They purchase mortgages originated by private banks and bundle them into mortgage-related securities to be sold to investors. By creating this secondary mortgage market, the Companies increase liquidity for private banks, which enables them to make additional loans to individuals for home purchases.

20. Notwithstanding that they were created by federal statute, until September 2008, Fannie Mae and Freddie Mac were financed by private investment. The Companies actively marketed their securities to a wide variety of investors – including through 2008. For instance, they had a variety of programs to encourage their midlevel employees to buy Company stock. *See Worker Assets Shrink at Fannie and Freddie,* N.Y. TIMES (Aug. 28, 2008).

21. The Companies marketed their securities well into 2008. For instance, in 2008, Fannie Mae issued at least two series of preferred stock. The first issuance – Series 2008-1 Preferred Stock – was announced on May 8, 2008 and raised over $2.5 billion. The second issuance – Series T Preferred Stock – was announced on May 13, 2008, and raised nearly $2 billion. In May 2008, Fannie Mae produced a "Capital Raise Roadshow" presentation in which

the company touted its "[l]ong-term growth and profitability prospects" and the "[c]ompelling investment opportunities in current environment." The "rationale" was to "[e]nhance long-term shareholder value" and the presentation noted that the "[m]ix of the offering maintains an appropriate ratio of preferred to common equity in our capital structure . . . ."

22. Prior to 2007, Fannie and Freddie were consistently profitable. In fact, Fannie had not reported a full-year loss since 1985 and Freddie had not reported a full-year loss since becoming owned by private shareholders in 1989. In addition, both companies regularly declared and paid dividends on each series of their respective Preferred Stock.

23. All three major credit rating agencies assigned high investment-grade ratings on the Companies' Preferred Stock from the dates of issuance until 2008. Banking regulators permitted banks to carry the Companies' Preferred Stock on their balance sheets at a lower risk weighting than other companies' preferred stock.

24. The Companies' federal regulators also actively promoted investment in the companies – including through 2008. The Office of Federal Housing Enterprise Oversight (the "OFHEO") continued to assure the marketplace of the Companies' soundness through 2008. On June 9, 2008, OFHEO published a news release stating that it classified Fannie Mae and Freddie Mac as "adequately capitalized as of March 31, 2008." And, in a March 19, 2008 statement, OFHEO director James Lockhart said "both companies have prudent cushions above the OFHEO-directed capital requirements and have increased their reserves" and "We believe they can play an even more positive role in providing the stability and liquidity the markets need right now." Lockhart also said that the idea of a bailout is "nonsense in my mind" because "The companies are safe and sound, and they will continue to be safe and sound." *As Crisis Grew, A Few Options Shrank To One*, N.Y. TIMES (Sept. 7, 2008).

II. IN JULY 2008, CONGRESS CREATED FHFA, WHICH IN SEPTEMBER 2008 PLACED THE COMPANIES INTO CONSERVATORSHIP.

25. In July 2008, in response to the crisis in the housing and mortgage markets, Congress enacted HERA. That Act established FHFA to replace the OFHEO as the Companies' regulator, and granted Treasury temporary authority to assist the Companies through the purchase of securities. HERA provided a specific list of enumerated circumstances under which FHFA would have the power to place the Companies into conservatorship or receivership.

26. Key leaders repeatedly reassured the public, including the Companies' private investors, that neither Company was approaching insolvency or operating unsafely. Rather, they explained, the goal of the legislation was to provide confidence to the housing market. For instance, while HERA was under consideration, both Treasury Secretary Henry Paulson and Federal Reserve Chairman Ben Bernanke testified before the House Financial Services committee that Fannie Mae and Freddie Mac were adequately capitalized. Similarly, while HERA was under consideration, the Companies' then-regulator, OFHEO, issued a statement that, as of 2008, Fannie Mae and Freddie Mac were "holding capital well in excess of the OFHEO-directed requirement[.]" Similarly, in support of HERA, Senator Isakson (R-GA) commented that:

> The bill we are doing tomorrow is not a bailout to Freddie Mac and Fannie Mae or the institutions that made bad loans. It is an infusion of confidence the financial markets need. Fannie and Freddie suffer by perception from the difficulties of our mortgage market. If anybody would take the time to go look at the default rates, for example, they would look at the loans Fannie Mae holds, and they are at 1.2 percent, well under what is considered a normal, good, healthy balance. The subprime market's defaults are in the 4 to 6 to 8-point range. That is causing the problem. That wasn't Fannie Mae paper, and it wasn't securitized by Fannie Mae. They have $50 billion in capital, when the requirement is to have $15 billion, so they are sound. But the financial markets, because of the collapse of the mortgage market, have gotten worse.

27. Nevertheless, despite these prior assurances as to the ample capitalization of the Companies, on September 6, 2008, FHFA placed the Companies into conservatorship.

28. As the Conservator, FHFA became responsible for "preserv[ing] and conserv[ing] [the Companies'] assets and property" and managing them in a manner that would restore them to a "sound and solvent condition." 12 U.S.C. § 4617(b)(2)(D). At the time, FHFA stated that the goal of this action was "to help restore confidence in Fannie Mae and Freddie Mac, enhance their capacity to fulfill their mission, and mitigate the systemic risk that has contributed directly to the instability in the current market." According to FHFA's press release, the conservatorship was "designed to stabilize a troubled institution with the objective of returning the entities to normal business operations. FHFA will act as the conservator to operate the Enterprises until they are stabilized." FHFA also issued a Fact Sheet indicating that, "[u]pon the [FHFA] Director's determination that the Conservator's plan to restore the Company to a safe and solvent condition has been completed successfully, the Director will issue an order terminating the conservatorship."

29. As FHFA noted in an October 2008 presentation, "[c]onservatorship statutes provide broad authority for a conservator to operate the institution until it is stabilized **and then returned to shareholders**." (FHFA00047705) (emphasis added).

30. Reporting indicates that FHFA's decision to place the Companies into conservatorship was based primarily on a political judgment, rather than an analysis of the HERA statutory factors. As the *New York Times* reported, the administration sought "to shrink drastically [Fannie Mae and Freddie Mac's] outsize influence on Wall Street and on Capitol Hill while at the same time counting on them to pull the nation out of its worst housing crisis in decades." *In Rescue To Stabilize Lending, U.S. Takes Over Mortgage Finance Titans*, N.Y.

TIMES (Sept. 7, 2008). And "In the end, [Treasury Secretary] Paulson's decision seems to have been a philosophical one, rather than one forced by imminent crisis. Of course, for stagecraft purposes, it was played as impending disaster." *Paulson's Itchy Finger, on the Trigger of a Bazooka*, N.Y. TIMES (Sept. 9, 2008).

31. The conservatorship did not purport to involve the appropriation of any privately held stock, to amend any of the shareholder Certificates of Designation, or otherwise to modify any contractual rights held by private shareholders such as Plaintiffs.

32. At the outset of conservatorship, FHFA's director told investors that "**the common and all preferred stocks will continue to remain outstanding**." Statement of FHFA Director James B. Lockhart (Sept. 7, 2008) (*available at* goo.gl/xMjTse).

33. Treasury Secretary Paulson likewise made clear that, "**conservatorship does not eliminate the outstanding preferred stock**, but does place preferred shareholders second, after the common shareholders, in absorbing losses." Statement by Secretary Henry M. Paulson, Jr. (Sept. 7, 2008) (*available at* goo.gl/weFLds).

34. In a Form 8-K filing issued by Freddie Mac on September 11, 2008, Freddie Mac stated that, "The holders of Freddie Mac's existing common stock and preferred stock . . . **will retain all their rights** in the financial worth of those instruments, as such worth is determined by the market." (emphasis added).

35. In Fannie Mae's September 11, 2008 Form 8-K, it stated that "FHFA, as Conservator, has the power to repudiate contracts entered into by Fannie Mae prior to the appointment of FHFA as Conservator if FHFA determines, in its sole discretion, that performance of the contract is burdensome and that repudiation of the contract promotes the orderly administration of Fannie Mae's affairs. FHFA's right to repudiate any contract must be

exercised within a reasonable period of time after its appointment as Conservator." This statement reflected what is expressly set forth in HERA regarding FHFA's power to repudiate contracts. 12 U.S.C. § 4617(d). Thus, if FHFA was to repudiate the contracts between the Companies and their shareholders, FHFA was required to do so "within a reasonable period of time after its appointment as conservator" on September 6, 2008.

36. FHFA did not, either within a reasonable period of time after its appointment as Conservator or at any other time before August 17, 2012, purport to repudiate any of the contracts governing the Companies' Preferred Stock or any of its other shareholder relationships.

37. At the time the conservatorship was imposed, FHFA's director stated that it was critical to complete key regulations implementing HERA governing minimum capital standards, prudential safety and soundness standards and portfolio limits "so that any new investor will understand the investment proposition," clearly showing that FHFA intended that private investors would continue to purchase Fannie Mae and Freddie Mac securities. Statement of FHFA Director James B. Lockhart (Sept. 7, 2008) (*available at* goo.gl/xMjTse).

III. IN EXCHANGE FOR FUNDING, FHFA EXECUTED AN AGREEMENT GIVING TREASURY A 10% SENIOR PREFERRED STOCK DIVIDEND AND WARRANTS TO BUY 79.9% OF EACH COMPANY'S COMMON STOCK FOR A NOMINAL PRICE.

38. When the Companies were placed into conservatorship, Treasury entered into PSPAs with FHFA, which acted on behalf of both Companies. The PSPAs for Fannie Mae and Freddie Mac are identical in all material respects. Through these agreements, Treasury agreed to make investments in the Companies in exchange for Senior Preferred Stock plus warrants to acquire common stock equal to 79.9% of the common stock in the Companies. Under the instruments laying out the terms of the Senior Preferred Stock for each Company:

(a) Treasury was given the right to receive a senior preferred dividend each quarter in an amount equal (on an annual basis) to 10% of the outstanding principal value of the Senior Preferred Stock if the dividend was paid in cash;

(b) If a Company elected not to pay the dividend in cash, Treasury would receive a dividend in the form of additional Senior Preferred Stock with a face value equal to 12% of the outstanding principal value of the Senior Preferred Stock;

(c) The principal value of the Senior Preferred Stock in each Company would equal the amount invested by Treasury in each Company, plus $1 billion to reflect a commitment fee with respect to each Company (plus any stock dividends distributed based upon the 12% dividend right referenced above);

(d) The Senior Preferred Stock ranked senior in priority to all other Fannie Mae and Freddie Mac Stock, so that no dividends or liquidation distributions could be paid to any other owner of stock in the Companies until after Treasury had received its dividend or liquidation distributions under its Senior Preferred Stock (the liquidation preference was equal to the principal value of the Senior Preferred Stock plus any unpaid dividends);

(e) Treasury also received warrants to acquire 79.9% of the common stock of each Company for a nominal price; and

(f) Treasury was also given the right to receive a quarterly periodic commitment fee, to be set for five-year periods by agreement of the Companies and Treasury, but Treasury had the option to waive the fee for up to a year at a time.

39. The foregoing terms, particularly those referring to priority over the rights of other (private) shareholders, would have been nonsensical if the rights of other shareholders had been nullified by the conservatorship. The PSPAs clearly contemplate that private shareholders retained their rights to dividends and liquidation distributions, albeit subject to the preferences given to the Treasury under the PSPAs.

40. This can also be seen by looking at Treasury's statutory authority to purchase stock in the Companies, and statements made by the Treasury Secretary in connection with those purchases. In general, Treasury does not have the statutory authority to purchase corporate stock. However, HERA gave Treasury temporary authority to purchase securities issued by the Companies. *See* 12 U.S.C. §§ 1455(*l*), 1719(g). To exercise that authority, the Secretary of the Treasury was required to determine that purchasing the Companies' securities was "necessary to . . . provide stability to the financial markets; . . . prevent disruptions in the availability of mortgage finance; and . . . protect the taxpayer." 12 U.S.C. §§ 1455(*l*)(1)(B), 1719(g)(1)(B). In making those determinations, the Secretary was required to consider six factors:

> (i) The need for preferences or priorities regarding payments to the Government.
>
> (ii) Limits on maturity or disposition of obligations or securities to be purchased.
>
> (iii) *The [Companies'] plan[s] for the orderly resumption of private market funding or capital market access.*

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

(v) *The need to maintain the [Companies'] status as . . . private shareholder-owned compan[ies].*

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

Id. §§ 1455(*l*)(1)(C), 1719(g)(1)(C) (emphasis added).

41. In approving the exercise of Treasury's temporary authority under HERA to purchase securities of the Companies, Treasury Secretary Paulson determined (1) "[u]nder conservatorship, Fannie Mae and Freddie Mac will continue to operate as going concerns"; (2) "Fannie Mae and Freddie Mac may emerge from conservatorship to resume independent operations"; and (3) "[c]onservatorship **preserves the status and claims of the preferred and common shareholders**." Action Memorandum for Secretary Paulson (Sept. 7, 2008) (emphasis added). None of this would have made any sense if the conservatorship and original PSPAs were intended to nullify the rights of the Companies' private shareholders.

42. After FHFA took control of the Companies, it claimed that it did not expect them to be profitable, and that they would likely incur large losses in the coming years. These projections were based on extremely pessimistic and unrealistic assumptions regarding the Companies' future financial prospects. FHFA relied on these overly pessimistic projections to direct the Companies to book substantial loss reserves—recording anticipated mortgage loan losses before they were actually incurred—and require the Companies to eliminate from their balance sheets the value of deferred tax assets that would only be of use if the Companies became profitable (*i.e.*, generated positive taxable income).

43. As the Government was well aware in 2008, these write-downs and accounting decisions led to the payment of some circular dividend payments. To pay a quarterly dividend payment to Treasury, the FHFA caused the Companies to draw on Treasury's funding commitment. This, in turn, increased the amount of stock held by Treasury, which further increased the amount of dividends the Companies were required to pay.

44. Treasury's authority under HERA to purchase the Companies' securities expired on December 31, 2009. *See* 12 U.S.C. §§ 1455(*l*)(4), 1719(g)(4). After that date, HERA authorized Treasury only "to hold, exercise any rights received in connection with, or sell" previously purchased securities. *Id.* §§ 1455(*l*)(2)(D), 1719(g)(2)(D).

45. During 2009, Treasury and FHFA amended the PSPAs twice. First, in May 2009, Treasury agreed to expand its funding commitment to $200 billion per Company from $100 billion per Company. Then, on December 24, 2009, it agreed to a funding commitment that would be sufficient to allow the Companies to satisfy their 2010, 2011, and 2012 capitalization requirements and a funding commitment up to a limit determined by an agreed-upon formula for subsequent years.

46. Throughout this time, the Companies continued to be managed in conservatorship by FHFA. HERA empowered FHFA to force the Companies into receivership and to liquidate their assets under certain circumstances, 12 U.S.C. § 4617(b)(2)(E), but FHFA always has maintained that its relationship with the Companies is that of Conservator rather than liquidator. *See* News Release FHFA, *A Strategic Plan For Enterprise Conservatorships: The Next Chapter In A Story That Needs An Ending*, at 9 (Feb. 21, 2012) (asserting that "[w]ithout action by Congress, FHFA must continue to look to the existing statutory provisions that guide

the conservatorships.”). FHFA has never stated that it was placing the Companies into receivership.

IV. AT THE BEGINNING OF 2012, THE HOUSING MARKET REBOUNDED AND THE COMPANIES RETURNED TO PROFITABILITY.

47. By the beginning of 2012, it became clear that the Government had (perhaps deliberately) overestimated the Companies’ likely losses and underestimated the possibility of a return to profitability. Contrary to FHFA’s 2008 projections, the Companies posted profits of more than $10 billion for the first two quarters of 2012. Even more importantly, the Companies disclosed that they expected to be consistently profitable for the foreseeable future, such that they would soon be able to reverse the valuation allowance against their deferred tax assets, worth approximately $100 billion. In addition, the Companies’ actual loan losses were far less than anticipated. Between the beginning of 2007 and the second quarter of 2012, more than $234 billion had been set aside by the Companies to absorb anticipated loan losses, whereas loan losses of just over $125 billion were actually recognized during that period, such that the projected losses had been overestimated by $109 billion. The reversal of these excess reserves would lead to a substantial increase in profitability.

48. By the beginning of 2012, the Companies, FHFA, and Treasury were very well aware that Fannie Mae and Freddie Mac were expected to be sufficiently profitable for years to come to pay the 10% dividend on the Senior Preferred Stock without the necessity of drawing from the Treasury.

49. In fact, as early as November 8, 2011, the accounting and consulting firm Grant Thornton LLP prepared a report for Treasury acknowledging that “[f]rom December 31, 2012 through September 30, 2018, Freddie Mac is not projected to draw on the liquidity commitment to make its dividend payments because of increased earnings driven by significantly

reduced credit losses in 2012 and 2014." (GT007342.) A December 2011 internal Treasury memorandum acknowledged that "both Fannie Mae and Freddie Mac are expected to be net income positive (before dividends) on a stable, ongoing basis after 2012 . . . ." (UST00473633.)

50. In June 2012, Treasury was aware that "the GSEs will be generating large revenues over the coming years, thereby enabling them to pay the 10% annual dividend well into the future even with the caps." (UST00533645.) Similarly, an August 1, 2012 Treasury presentation acknowledged that earnings for the Companies would be "in excess of current 10% dividend paid to Treasury." (UST00385572).

51. By the end of 2011 and the beginning of 2012, the Companies, FHFA, and Treasury were aware that, beginning in 2012, the Companies were forecast to be so consistently profitable that the Companies could afford to repay Treasury its initial investment within eight years. In her 2015 deposition, Susan McFarland, Fannie Mae's then-Chief Financial Officer, testified that at a meeting with Treasury that was also "probably" attended by FHFA, shortly before learning of the Third Amendment, she had expressed her view that Fannie Mae was "**able to deliver sustainable profits over time**." (McFarland Tr., 45:2-4, 46) (emphasis added).

52. According to July 13, 2012 documents circulated among FHFA officials regarding a Fannie Mae Executive Management Meeting held on July 9, 2012, the following eight years were likely to be the "**golden years of GSE earnings**." (FHFA00047889) (emphasis added). In the same documents, Fannie Mae official Ann Gehrig noted that "[c]umulative 2012 – 2016 income is now forecast at $56.6 billion, $12.3 billion higher than the last projection." (FHFA00047890.) The Fannie Mae Executive Management Meeting documents also included a report from Fannie Mae Treasurer Dave Benson acknowledging that "[c]urrent projections show that cumulative GSE dividends paid will surpass cumulative GSE Treasury draws by 2020."

(FHFA00047889.) The report by David Benson, dated July 19, 2012 and distributed to the Fannie Mae board of directors, included projections demonstrating that "[th]e cumulative dividends from both GSEs exceed government investment by 2020 in baseline scenario" as well as forecasts of positive annual Total Comprehensive Income from 2012 through 2022. (FM_Fairholme_CFC-00000220-221, 231-232.)

53. In addition, as FHFA and Treasury were aware, the Companies had certain deferred tax credits that would further enhance their profitability in the very near term. In a May 29, 2012 meeting between Treasury and various financial advisors, there was a discussion of "[r]eturning the deferred tax asset to the GSE balance sheets." (UST00405880.) A series of August 14, 2012 emails between FHFA officials acknowledged that "re-recording certain deferred tax assets" had been discussed "on the view that" the Companies "were going to be profitable going forward." (FHFA00038592.) In her 2015 deposition, McFarland testified that shortly before learning of the Third Amendment, she had expressed her view at a meeting with Treasury that approximately $50 billion of deferred tax assets might soon be released. (McFarland Tr., 45:8; 59:18.)

54. Thus, as of the first half of 2012, FHFA, Treasury, and the Companies all knew that the Companies were positioned to pay back the Government for the support they had received, with money left over to provide a financial return to their other stockholders.

V. ON AUGUST 17, 2012 THE GOVERNMENT IMPOSED THE THIRD AMENDMENT, GIVING TREASURY A RIGHT TO A QUARTERLY DIVIDEND EQUAL TO 100% OF THE COMPANIES' NET WORTH (MINUS A SMALL RESERVE THAT SHRINKS TO ZERO IN 2018).

55. With the Companies' return to consistent, and indeed record profitability, the private stockholders had reason to believe and expect that the Companies would soon become healthy enough to redeem the Senior Preferred Stock, exit conservatorship, and be

"return[ed] to normal business operations," as FHFA's director had vowed when the conservatorship was established. Certainly, the holders of the Preferred Stock had reason to believe and expect that the economic value of their shares, and the rights they had as stockholders, would likely be increasing. They had no reason to believe those rights would be taken by the Government without just compensation.

56. But, rather than taking steps to enable the Companies to redeem the Senior Preferred Stock or at least to accumulate capital for the benefit of the Companies and their private shareholders, the Government took the unprecedented step of radically changing the deal FHFA and Treasury had originally made so as to seize 100% of all value the Companies could ever generate, and to eliminate any possibility that private shareholders would ever receive anything. On August 17, 2012, FHFA, purportedly acting as Conservator for the Companies, and the Treasury "agreed to" a so-called "Third Amendment" to the PSPAs. This Third Amendment was not really an "agreement" between two different entities negotiating at arm's length, but was instead a unilateral action by two government entities acting in concert. It provides that in place of the 10% coupon due on Treasury's Senior Preferred Stock under the original PSPAs, the Treasury would now receive a dividend equal to ***100% of the Companies' net worth*** (minus a small reserve that shrinks to zero in 2018). And, since the PSPAs provided that in the event of a liquidation of Fannie Mae or Freddie Mac, the Government would receive a liquidation distribution that included the amount of any prior unpaid dividend, the Third Amendment guaranteed that even if the Companies were liquidated, Treasury would receive ***100% of their net worth*** in that liquidation. No matter how much value the Companies generate, the Third Amendment provides that 100% of it has to go to the Treasury.

57. The Third Amendment, which Fannie Mae, Freddie Mac, and the Government implemented without seeking or obtaining the vote or consent of the holders of Preferred Stock as contractually required, sidestepped the rules of priority, eliminated the contractual rights of the Preferred Stockholders, and expropriated for the Government the economic value of these privately-held securities. As Treasury stated on the day of the announcement, the Third Amendment was intended to ensure that "every dollar of earnings that Fannie Mae and Freddie Mac generate will benefit taxpayers" – *i.e.,* not the private preferred stockholders.

58. Neither the Companies nor the stockholders received any meaningful consideration in exchange for the Third Amendment. Under the Third Amendment, the amount of cash the Companies transfer to Treasury as a dividend does not reduce the amount of the Senior Preferred Stock outstanding. Furthermore, the Companies have not been permitted to redeem Treasury's Senior Preferred Stock. Thus, regardless of how much money the Companies send to Treasury, all of the Senior Preferred Stock will remain outstanding, and Treasury will continue to take all of the Companies' net worth. The Third Amendment thus takes tens (if not hundreds) of billions of dollars of value from the Companies' private shareholders and transfers that value to the federal government.

59. The Government implemented the Third Amendment to promote the economic and political interests of one stockholder—the U.S. Treasury—at the expense of all others. The Net Worth Sweep furthered the Government's goal of ensuring that all future profits be transferred to Treasury (sometimes referred to as "taxpayers"), and not to the private stockholders. It also appears that the Third Amendment was designed to support the Treasury's political goal, at least as of 2012, of winding down the Companies (and winding them down in a

way that captured 100% of the surplus value for the Treasury). For instance, in a draft Question and Answer presentation circulated among Treasury officials on August 13, 2012, Treasury stated that the Third Amendment was "consistent with Treasury's policy to wind-down the GSEs," and specifically intended to "ensure that the GSEs will not be able to rebuild capital as they are wound down." (UST00406551; UST00406544.)

60. On August 15, 2012, Treasury officials circulated emails regarding an update to the "PSPA Q&As" in which the sought-after demise of the Companies was discussed. "By taking all of their profits going forward, we are making clear that the GSEs will *not* ever be allowed to return to profitable entities at the center of our housing finance system." (UST00554584; UST00505919) (emphasis in originals).

61. The Government's determination to eradicate private stockholder rights dates back to before 2012, although this was not publicly known. For example, jurisdictional discovery in this case has revealed that as early as December 20, 2010, then Under Secretary for Domestic Finance Jeffrey A. Goldstein authored an "ACTION MEMORANDUM" for Secretary Geithner noting that referred to "the Administration's commitment to ensure existing common equity holders will not have access to any positive earnings from the GSEs in the future." *See* 13-cv-1053 (D.D.C.) ECF No. 23-5 at TREASURY-0202.

62. Similarly, jurisdictional discovery in this case has shown that at least as early as January 2012, FHFA had also determined to "wind down" the Companies, a "goal" FHFA explicitly shared in "common" with Treasury. For example, a document produced in discovery shows that on January 4, 2012 Mary Miller (of Treasury) sent then-FHFA Director DeMarco an Agenda noting the "common goals" shared by FHFA and Treasury to "promote a strong housing market recovery, reduce government involvement in the housing market over

time and to provide the public and financial markets *with a clear plan to wind down the GSEs*" (FHFA00025816) (emphasis added). Subsection 2 of the Agenda was titled "Establish meaningful policies that demonstrate a commitment to winding down the GSEs." *Id.*

63. Discovery has also revealed August 14, 2012 emails between FHFA officials under the subject line "SPSPA Meeting," which acknowledged that the Third Amendment was "designed to demonstrate wind down," notwithstanding that the Companies "were going to be profitable going forward." (FHFA00038592.) On August 17, 2012, FHFA official Mario Ugoletti emailed colleagues, noting that the Third Amendment "does not allow the [Companies] to build up retained surplus, which may give the impression that they are healthy institutions." (FHFA00031721.)

64. At a dividend rate of 10%, Treasury's approximately $189 billion in outstanding Senior Preferred Stock (as of August 16, 2012) would have yielded annual dividends of some $18.9 billion, payable in quarterly installments of approximately $4.7 billion. Thus, ***but for the Third Amendment,*** in any quarter in which the Companies' combined profits exceeded $4.7 billion (or more precisely, any quarter in which Fannie Mae or Freddie Mac's profits exceed the dividend owed on their Senior Preferred Stock), that value would inure to the benefit of the private stockholders. As *Fortune* magazine reported:

> Why did the Treasury enact the so-called Third Amendment that so radically altered the preferred-stock agreement? By mid-2012, Fannie and Freddie were beginning to generate what would become gigantic earnings as the housing market rebounded. If the original agreement remained in place, the GSEs would build far more than $100 billion in retained earnings, and hence fresh capital, in 2013 alone. That would exert pressure for Congress to allow Fannie and Freddie to pay back the government in full, and reemerge as private players. Timothy Geithner was strongly opposed to the rebirth of the old Fannie and Freddie. The "sweep clause" that grabbed the entire windfall in profits was specifically designed to ensure that Fannie and Freddie remained wards of the state that would eventually be liquidated.

What's Behind Perry Capital's Fannie and Freddie Gambit, FORTUNE (July 8, 2013).

65. In an August 17, 2012 press release announcing the Third Amendment, Treasury said that the changes would "help expedite the wind down of Fannie Mae and Freddie Mac, make sure that every dollar of earnings each firm generates is used to benefit taxpayers, and support the continued flow of mortgage credit during a responsible transition to a reformed housing finance market." It called the Third Amendment a full sweep of "**every dollar of profit that [the] firm earns going forward**," and that the amendment will fulfill the "commitment made in the Administration's 2011 White Paper that [Fannie Mae and Freddie Mac] will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form."

66. This language was in stark contrast to the earlier public representations by Treasury and FHFA that they sought only to "stabilize" the Companies and return them "to normal business operations" (as well as Demarco's February 2, 2010 statement that "[t]here are a variety of options available for post-conservatorship outcomes, but the only one that FHFA may implement today under existing laws is to reconstitute the two companies under their current charters.")

67. Winding down the Companies via the Net Worth Sweep offered much higher returns to Treasury than the pre-amendment 10% dividend, an opportunity not lost on Treasury. A "KEY POINTS TO MAKE" document made clear that the Net Worth Sweep "means the taxpayer will benefit from <u>all</u> future earnings of the GSEs. Under the current framework we are limited to the 10% dividend." (UST00061421) (emphasis in original). The document describes taxpayers as being in a "better position" because they are not "capped at the 10% dividend." (UST00061422.) Similarly, an August 13, 2012 email to Bowler (of Treasury)

confirmed that "**[t]he taxpayer will thus ultimately collect more money with the changes**" and "**not just the 10% dividend**." (UST00061143.)

68. Thus, there can be no doubt about the intention behind the Third Amendment and its Net Worth Sweep: it was intended to give Treasury "more money" by ensuring that ***all*** the profits of the Companies would be swept to Treasury, "not just the 10% dividend." Regardless of whether the Companies are actually wound down or not, that is both the clear effect of the Net Worth Sweep and its stated intent. It takes the residual value held by private shareholders and transfers 100% of it to the Treasury.

69. After the Net Worth Sweep was finalized, a senior White House advisor involved in the process wrote that Treasury was "ensuring that [the Companies] can't recapitalize" and "clos[ing] off [the] possibility that [Fannie and Freddie] ever[] go (pretend) private again." The same official wrote in another email that the Net Worth Sweep would ensure that the Companies "can't repay their debt and escape."

70. The Government has received and will continue to receive a massive windfall pursuant to the terms of the Third Amendment. As of the date of this filing, the Treasury has received approximately $125.54 billion ***more*** under the Net Worth Sweep than it would have received under the 10% cash dividend payable under the original terms of the PSPAs. In total, Treasury has received $278.9 billion in dividends from the Companies; that is over $87.5 billion more than Treasury's total investment into both Companies. Yet the principal value of Treasury's Senior Preferred Stock has not been reduced at all, and it continues to receive quarterly dividends equal to the net worth of the two Companies.

71. The Third Amendment has even captured the Companies' recoveries on legal claims that preceded the conservatorships. For example, on October 1, 2013, Freddie Mac

announced that it had entered into a $1.3 billion settlement with three financial institutions concerning Freddie Mac's claims relating to representations and warranties on loans that it had purchased. FHFA, as Freddie Mac's Conservator, had approved the settlement. The claims at issue involved loans that Freddie Mac purchased between 2000 and 2012, most of which preceded the conservatorship by several years, yet none of the funds recouped will go to benefit Freddie Mac stockholders. Rather, Freddie Mac's CEO stated that, "[w]ith these settlements, Freddie Mac is recouping funds effectively due to the nation's taxpayers." On May 28, 2013, FHFA announced a $3.5 billion settlement of claims of alleged violations of federal and state securities laws in connection with private-label residential mortgage-backed securities purchased by Fannie Mae and Freddie Mac in the years prior to the conservatorships. Similarly, on October 25, 2013, FHFA announced a $1.1 billion settlement with JP Morgan relating to claims based on loans sold to Fannie and Freddie in the years leading up to the financial crisis and a separate $4 billion settlement with JP Morgan relating to claims for violations of federal securities laws in connection with the sales and securitizations of loans to the Companies from 2005 to 2007. In 2013 alone FHFA announced similar settlements with General Electric ($549 million), UBS ($885 million), Wells Fargo ($335 million), and Bank of America ($404 million), every penny of which went to Treasury. In 2014, FHFA announced settlements, in its role as Conservator to the Companies, totaling approximately $9.7 billion with Bank of America ($9.33 billion aggregate payment), Barclays Bank PLC ($280 million) and RBS Securities ($99.5 million) which cover private-label MBS purchased by the Companies from 2005 to 2007. More recently, in 2017, FHFA reached a $5.5 billion settlement with the Royal Bank of Scotland. The entirety of the Companies' recoveries in these settlements has been paid to Treasury, even though the claims belonged to the Companies for wrongdoing and harm suffered before the conservatorship.

72. In public statements and filings in this and other related cases, the Government has claimed that the Third Amendment was implemented for the purpose of ending the "circularity" or "downward spiral" caused by the Companies' drawing on Treasury funding to pay dividends to Treasury, which in turn increased Treasury's stake. This is false. When it implemented the Third Amendment, the Government knew the Companies had returned to profitability and were projected to be able to pay the dividends owed to the Treasury without drawing on additional funds long into the future. Indeed, the Government imposed the Net Worth Sweep after the Companies disclosed that they had returned to stable profitability and had earned several billion dollars more than was necessary to pay the Treasury dividend in cash. The real motive behind the Third Amendment was the U.S. Government's desire to cut off the Companies' private shareholders from receiving any money, maximize the amount of money flowing into the U.S. Treasury, and ensure that the Companies be wound down and ultimately eliminated (or at least not permitted to return to private ownership). Again, whether the Government chooses to wind down the Companies or not is a separate question from whether the Government is permitted to appropriate all of the shareholder rights held by private shareholders, and to transfer those rights to the Treasury. There is nothing that permits the Government to do that – at least not without paying just compensation or appropriate damages to the private shareholders.

73. In sum, since the implementation of the Third Amendment, the Government has expropriated "every dollar of earnings that each firm earns" on a quarterly basis, and will continue to do so forever (whether the Companies are wound down or not). This guarantees that there can never be a distribution to the holders of Preferred Stock no matter how much income the Companies earn and no matter how much their assets are worth – whether in

normal operations or in any liquidation. The intent and the effect are clear: private shareholders cannot ever receive a dime; everything goes to Treasury, no matter how many hundreds of billions in profit that means Treasury receives over and above what it has invested and what it would have received under the original PSPAs.

VI. IN DECEMBER 2017, TREASURY AND FHFA AGAIN CONFIRMED THAT THE NET WORTH SWEEP ENSURES THAT 100% OF ALL VALUE IN THE COMPANIES MUST GO TO TREASURY, NO MATTER HOW LARGE THAT VALUE MAY BE.

74. Under the original PSPA, the Net Worth Sweep required the entire net worth of the Companies to be paid to Treasury, minus a small reserve that would shrink gradually to zero by January 1, 2018. The intent was obvious: the Companies were to be wound down, and Treasury was to capture 100% of all the value.

75. By December 2017, however, Treasury and FHFA apparently concluded they were not ready to liquidate the Companies just yet, or to operate them with literally zero capital. Accordingly, in December 2017, Treasury and FHFA agreed to prolong the existence of a $3 billion capital reserve while the Companies were in operation, so that the quarterly dividend is equal to the "Net Worth Amount" minus that $3 billion reserve. Letter to M. Watt (Dec. 21, 2017) (*available at* goo.gl/hnPmKL).

76. However, Treasury and FHFA also made sure that this capital reserve did not create any possible risk of any amount ever being available for distribution to private shareholders. They expressly agreed that "the Liquidation Preference [*i.e.*, the Liquidation Preference held by Treasury] shall be increased by $3,000,000,000.00." *Id.* Thus, even the capital reserve has to be paid out to Treasury. No matter what happens—no matter how much money or positive net value Fannie and Freddie make—there is ***zero chance*** that private shareholders can ever receive anything in a liquidation.

VII. THE GOVERNMENT HAS TAKEN PLAINTIFFS' PROPERTY WITHOUT PROVIDING JUST COMPENSATION.

77. Prior to the imposition of the Net Worth Sweep, Plaintiffs had valuable vested property rights in their shares of Fannie Mae and Freddie Mac Preferred Stock, including the right to participate in the profits and increased net worth of Fannie and Freddie (whether through dividends, redemptions, liquidation or otherwise) to the extent those profits and increased net worth exceeded the amounts needed to fully satisfy all obligations on the Senior Preferred Stock issued to Treasury in 2008. The economic rights owned by the holders of Preferred Stock vested in their respective holders upon the holders' acquisition of shares of Preferred Stock.

78. The rights associated with the Preferred Stock were an essential part of those stocks, and Plaintiffs invested in these stocks based upon the economic value of those rights.

79. The economic rights owned by Plaintiffs constitute private property protected by the Fifth Amendment of the United States Constitution.

80. At all times prior to the imposition of the Net Worth Sweep – including after the enactment of HERA, imposition of the conservatorship, and execution of the PSPAs – Plaintiffs had a reasonable, investment-backed expectation that their property would not be appropriated by the Government without payment of just compensation.

81. Like investors in many publicly traded corporations and financial institutions, Plaintiffs' property rights were not unlimited. Like many Preferred Shareholders, Plaintiffs' right to receive dividends was, in part, subject to the discretion of the Companies' boards, and Plaintiffs' right to receive liquidation payments was conditional on the companies being in liquidation and there being enough assets to pay out to more senior creditors (if any).

And, like investors in every U.S. financial institution, the Plaintiffs' investments in the Companies was subject to the possibility that the Companies could be placed into conservatorship or receivership or bankruptcy in appropriate circumstances. Plaintiffs' economic rights were nevertheless vested and valuable property protected by the Fifth Amendment.

82. Simply because a dividend right may be subject to the discretion of a board of directors or majority shareholder does not render it valueless. A contrary view would mean the Government could appropriate all the dividend rights of every share of stock in the country without paying just compensation. Likewise, simply because the right to a distribution in liquidation depends on certain contingencies does not render it valueless. A contrary view would mean the Government could appropriate all liquidation rights of every shareholder in the country without paying just compensation. Further, when both dividend rights and liquidation rights are appropriated, and when a company is forced to pay 100% of its net worth to the majority shareholder (thereby eliminating the possibility of redemption rights as well), then the economic rights of otherwise valuable stock has been fully eliminated. That is what the Third Amendment does without providing any just compensation in return. There is no precedent for the Government being able to do this to the shareholders of any kind of institution under any circumstances.

83. No holder of Preferred Stock could have reasonably foreseen that the Government would effectively confiscate their shares by implementing the Net Worth Sweep. The Net Worth Sweep was unprecedented and contrary to the Governments' public statements that the Companies would be returned to shareholders. Never before in the history of the nation has the Government caused the *de facto* nationalization of a private corporation under the guise

of a "conservatorship" by a federal agency and an "investment" by the Treasury. Prior to the Net Worth Sweep, such an action would have been unthinkable.

84. Further, prior to the imposition of the Net Worth Sweep, Plaintiffs had a reasonable expectation that the Companies would be operated at a profit for the benefit of *all* stockholders and that the Companies would exercise their discretion to pay dividends in good faith. As described herein, such expectations were based upon numerous things including, at a minimum, the historical treatment of shareholders in all companies, including distressed companies and distressed financial institutions placed in federal conservatorship or receivership; the historical payment of dividends by the Companies; the Certificates of Designation; the provisions of HERA providing for the purposes of conservatorships in restoring the Companies to sound operating condition, and even providing for shareholders to retain their residual ownership rights even in a receivership and liquidation (which was never announced here); and the repeated public statements from the Government that the Companies, once stabilized, would be returned to normal operation and to the control and benefit of private shareholders.

85. The Government's imposition of the Net Worth Sweep categorically deprived Plaintiffs of all economic value in their economic rights as shareholders, including rights to dividends, redemptions, or liquidation distributions, and thereby appropriated their property without payment of just compensation.

86. Under the Net Worth Sweep, the Companies are no longer operated at a profit for the benefit of all stockholders, but are instead operated for the sole and exclusive benefit of Treasury. The Net Worth Sweep has made it impossible for Plaintiffs ever to receive dividends or their respective liquidation preferences, or any portion thereof, because the Net Worth Sweep has the purpose and effect of ensuring that Fannie Mae and Freddie Mac will never

have any funds available to pay a dividend on the Preferred Stock, to redeem the Government's Senior Preferred Stock (or any privately held stock), or to pay any liquidation proceeds to the holders of Preferred Stock. Thus, Fannie and Freddie will never have any funds available to distribute to the private holders of the Preferred Stock, whether as dividends, redemptions, or liquidation proceeds. The Net Worth Sweep permanently deprives Plaintiffs of their right to receive either dividends or their respective liquidation distributions upon liquidation of Fannie Mae and Freddie Mac *no matter how much net worth* Fannie Mae and Freddie Mac accumulate, or would have accumulated but for the Net Worth Sweep.

87. The Government's imposition of the Net Worth Sweep has categorically rendered Plaintiff's and the Class' economic rights a nullity and completely eradicated the value of those rights. As described above, Treasury has to date received $87.5 billion more than its total investment in the Companies and $125.54 billion more than it would have received under the 10% dividend provided for in the original Agreements. But for the Net Worth Sweep, the Companies would have been in a position to pay billions of dollars in profits to the private holders of Preferred Stock.

88. Although the Government plainly has many other means of raising revenue and supporting the economic recovery that would not appropriate the economic value of the Preferred Stock, the Net Worth Sweep has become a major source of revenue for the Government at the expense of Plaintiffs.

89. While the Government has collected, and will continue to collect billions of dollars from Fannie Mae and Freddie Mac, Plaintiffs have not been provided just compensation, nor any compensation, for the Government's taking of all of the economic rights that they previously owned by virtue of their ownership of Preferred Stock.

VIII. THE GOVERNMENT ALSO HAS TAKEN PLAINTIFFS' RIGHT TO BRING CERTAIN CAUSES OF ACTION CHALLENGING THE THIRD AMENDMENT WITHOUT PROVIDING JUST COMPENSATION.

90. The Supreme Court has recognized that a cause of action is a species of property protected by the Due Process Clause. *E.g.*, *Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 804 (1996). The Court has also suggested that a cause of action is property for purposes of the Takings Clause. *E.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 691 (1981) (Powell, J., concurring). The Federal Circuit has held unequivocally that a cause of action constitutes a property right protected by the Takings Clause. *Adams v. United States*, 391 F.3d 1212, 1225-1226 (Fed. Cir. 2004); *Abrahim-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997); *All. of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994).

91. In the District Court for the District of Columbia, the Plaintiffs in this action filed various direct claims seeking to enjoin the Third Amendment, as well as derivative claims on behalf of Fannie and Freddie challenging the Third Amendment. In its July 2017 opinion, the D.C. Circuit ruled that Plaintiffs' claims seeking injunctive relief were barred by HERA, and the right to pursue derivative claims had been taken from the Companies' private shareholders by FHFA. *Perry Capital LLC v. Mnuchin,* 864 F.3d 591, 617-34 (D.C. Cir. 2017). Plaintiffs petitioned the Supreme Court for review of the latter holding, which conflicts with (*inter alia*) the Federal Circuit's interpretation of a nearly identical provision. *See First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279 (Fed. Cir. 1999). The Supreme Court denied the petition on February 20, 2018.

92. Plaintiffs continue to take the position that the Federal Circuit's decision in *First Hartford* was correct, and therefore HERA cannot be read as taking from the Companies' shareholders the right to bring derivative claims on behalf of the Companies where those claims are against the FHFA or Treasury, given the "manifest conflict of interest"

preventing FHFA from ever bringing such claims. There are companion cases in this Court advancing such derivative claims. However, to the extent that any courts continue to hold that such derivative claims are not possible and thereby block the shareholders in Fannie and Freddie from obtaining a full and just recovery for the loss of their shareholder rights, we assert that such an interpretation of HERA, as applied to the facts of these cases and the Third Amendment, is itself a Taking without just compensation. We do not challenge the succession provision in HERA as a Taking on its face, and we do not claim that the conservatorship was a Taking. But the Third Amendment was a Taking and a nullification of Plaintiffs' shareholder rights, and the application of any HERA provision that prevents Plaintiffs from obtaining full relief from the Third Amendment is a Taking without payment of just compensation. This claim is advanced if and to the extent that Takings claim (or other claims) fail to provide the full just compensation to which Plaintiffs are entitled due to the application of any HERA provision to the cases that challenge the Third Amendment.

IX. THE GOVERNMENT ILLEGALLY EXACTED PLAINTIFFS' PROPERTY.

93. In the alternative to Plaintiffs' Takings Claims, the Third Amendment constitutes an Illegal Exaction of Plaintiffs' property in violation of the Fifth Amendment.

94. Under the Third Amendment, the Government took money from Plaintiffs by extracting the entire net worth of the Companies as a dividend on an ongoing and permanent basis, thereby assuring that Plaintiffs would not receive any future value from their investments in the company in the form of dividends or liquidation payments or in any other manner.

95. The Third Amendment was not authorized by statute. HERA directs that the FHFA, when acting as conservator, "may take such action as may be – (i) necessary to put the regulated entity in a sound and solvent condition; and (ii) appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity."

12 U.S.C. § 4617(b)(2)(D). As FHFA has recognized in numerous statements, this is a binding and mandatory obligation that limits the scope of FHFA's authority when it acts as a conservator:

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

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

- FHFA's "statutory ***mandates*** obligate" it to "[c]onserve and preserve the assets of the Enterprises while they are in conservatorship." Statement of Melvin L. Watt, Dir., FHFA, Before the U.S. Senate Comm. on Banking, Housing, and Urban Affairs (May 11, 2017) (emphasis added), https://goo.gl/h44qRf;

- "FHFA, acting as conservator and regulator, ***must follow the mandates*** assigned to it by statute. . . . FHFA's authority as both conservator and regulator of the Enterprises is based upon ***statutory mandates*** enacted by Congress to ensure a liquid, efficient, competitive, and resilient national housing finance market, ensure safe and sound Enterprise operations, as well as to preserve and conserve their assets." FHFA STRATEGIC PLAN: FISCAL YEARS 2015-2019 5, 14 (Aug. 15, 2014) (emphasis added), https://goo.gl/5BCKem;

- FHFA has a "conservatorship ***mandate*** to preserve and conserve the [Companies'] assets." Statement of Edward J. DeMarco, Acting Dir., FHFA, Before the U.S. Senate Comm. on Banking, Housing and Urban Affairs at 3 (Apr. 18, 2013) (emphasis added), https://goo.gl/ZrHAUF;

- As conservator, FHFA has a " 'preserve and conserve' ***mandate***." FHFA, A STRATEGIC PLAN FOR ENTERPRISE CONSERVATORSHIPS: THE NEXT CHAPTER IN A STORY THAT NEEDS AN ENDING 7 (Feb. 21, 2012) (emphasis added), https://goo.gl/XwZxT7;

- "[T]he Conservator's ***mandate*** [is] to put the regulated entity in a sound and solvent condition and to preserve and conserve the assets and property of the regulated entity." Conservatorship and Receivership, 75 Fed. Reg. 39,462, 39,469 (July 9, 2010) (emphasis added);

- "The statutory role of FHFA as conservator ***requires*** FHFA to take actions to preserve and conserve the assets of the Enterprises and restore them to safety and soundness." FHFA, REPORT TO CONGRESS 2009 at 99 (May 25, 2010) (emphasis added), https://goo.gl/5BK9kH.

96. HERA also limits the scope of FHFA's powers as conservator by distinguishing between the powers granted to FHFA when it acts in that role and when it acts as a receiver. Specifically, HERA directs that when FHFA acts as a receiver, it must "place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity," and then distribute the proceeds to various stakeholders (including shareholders) according to a carefully-defined distribution schedule and pursuant to delineated statutory procedures. 12 U.S.C. §§ 4617(b)(2)(E), (b)(3)-(9), (c). Under HERA – as under common law – receivership is aimed at winding down a company's affairs and liquidating its assets, while conservatorship aims to rehabilitate the company and return it to normal operation.

97. By giving away all of the Companies' net assets to the Treasury, the Third Amendment does not "preserve" or "conserve" those assets or move the companies toward a "sound and solvent condition." The Government has admitted that the Third Amendment rendered the Companies "effectively balance-sheet insolvent, a textbook illustration of financial instability." Further, as alleged above, the Government implemented the Third Amendment for the purpose of "winding down" the companies, to prevent them from ever accruing capital, and to ensure that they could not "escape" Government control or return to functioning as private entities. Each of these goals are fundamentally incompatible with HERA's statutory mandate that FHFA act as conservator to preserve and conserve the Companies' assets and demonstrates that the Third Amendment was an unlawful end run around HERA's careful delineation between the roles of conservatorship and receivership.

98. The Third Amendment also violates HERA for several additional reasons. HERA grants FHFA the authority to "disaffirm or repudiate any contract" the Companies entered into prior to conservatorship when "the conservator determines" the "performance" of

such contracts "to be burdensome" to the Companies. But such repudiation must occur "within a reasonable period following" FHFA's appointment as conservator. 12 U.S.C. § 4617(d)(1) & (2).

99. The FHFA failed to repudiate the shareholder contracts (Certificates of Designation) held by Plaintiffs and other Preferred Shareholders "within a reasonable period" following the September 6, 2008 appointment of FHFA as conservator. Instead, the FHFA effected this repudiation only in August 2012 – four years after its appointment as conservator – by entering into the Third Amendment. That amendment fully repudiates and nullifies Plaintiffs' contract rights to dividends, liquidation distributions, and voting rights, but did so ***long after*** the expiration of the "reasonable" period in which the FHFA had statutory authority to do so. It was unlawful for this additional reason.

100. Finally, HERA granted Treasury the authority to purchase securities issued by the Companies, but dictated that this authority expired on December 31, 2009. 12 U.S.C. §§ 1455(l), 1719(g). In a recent filing in a related action, FHFA has characterized the Third Amendment as accomplishing "exactly the same thing" as a new issuance. Because the Third Amendment was implemented long after the expiration of Treasury's authority to purchase new shares, FHFA's characterization of the Third Amendment as "exactly the same" as the issuance of new securities would establish, if accepted, an additional basis for holding the Third Amendment to be unlawful.

101. The government appropriated Plaintiffs' valuable property and contract rights and has the Plaintiffs' money in its pocket. Because the Third Amendment was unlawful under HERA for the numerous reasons set forth above, it constitutes an Illegal Exaction.

X. THE THIRD AMENDMENT VIOLATED THE CONTRACTUAL RIGHTS OF HOLDERS OF THE COMPANIES' PREFERRED STOCK.

102. Prior to September 6, 2008, Fannie Mae had issued several series of Preferred Stock, including:

FANNIE MAE PREFERRED STOCK

Security	CUSIP	Ticker Symbol
5.25% Non-Cumulative Preferred Stock, Series D	313 586 505	FDDXD
5.10% Non-Cumulative Preferred Stock, Series E	313 586 604	FNMFM
Variable Rate Non-Cumulative Preferred Stock, Series F	313 586 703	FNMAP
Variable Rate Non-Cumulative Preferred Stock, Series G	313 586 802	FNMAO
5.81% Non-Cumulative Preferred Stock, Series H	313 586 885	FNMAM
5.375% Non-Cumulative Preferred Stock, Series I	313 586 877	FNMAG
5.125% Non-Cumulative Preferred Stock, Series L	313 586 844	FNMAN
4.75% Non-Cumulative Preferred Stock, Series M	313 586 836	FNMAL
5.50% Non-Cumulative Preferred Stock, Series N	313 586 828	FNMAK
Variable Rate Non-Cumulative Preferred Stock, Series O	313 586 794	FNMFN
5.375% Non-Cumulative Convertible Series 2004-1 Pref. Stock	313 586 810	FNMFO
Variable Rate Non-Cumulative Preferred Stock, Series P	313 586 786	FNMAH
6.75% Non-Cumulative Preferred Stock, Series Q	313 586 778	FNMAI
7.625% Non-Cumulative Preferred Stock, Series R	313 586 760	FNMAJ
Fixed-to-Floating Rate Non-Cumulative Preferred Stock, Series S	313 586 752	FNMAS
8.25% Non-Cumulative Preferred Stock, Series T	313 586 737	FNMAT

103. Likewise, prior to September 6, 2008, Freddie Mac had issued several series of Preferred Stock, including:

FREDDIE MAC PREFERRED STOCK

Security	CUSIP	Ticker Symbol
5.1% Preferred Stock, due 12/31/2049	313 400 814	FREJO
5.3% Non-Cumulative Perpetual Preferred Stock	313 400 822	FREJP
5.81% Perpetual Preferred Stock	313 400 889	FREGP
Variable-Rate Preferred Stock, Series B	313 400 608	FMCCI
5% Preferred Stock, Series F	313 400 863	FMCKK
Variable-Rate Preferred Stock, Series G	313 400 848	FMCCG
5.1% Preferred Stock, Series H	313 400 855	FMCCH
5.79% Preferred Stock, Series K	313 400 830	FMCCK
Variable-Rate Preferred Stock, Series L	313 400 798	FMCCL
Variable-Rate Preferred Stock, Series M	313 400 780	FMCCM
Variable-Rate Preferred Stock, Series N	313 400 764	FMCCN
5.81% Preferred Stock, Series O	313 400 772	FMCCO
6% Preferred Stock, Series P	313 400 749	FMCCP
Variable-Rate, Series Q	313 400 756	FMCCJ
5.7% Preferred Stock, Series R	313 400 731	FMCKP
Variable-Rate, Series S	313 400 715	FMCCS

104. The Preferred Stock listed above, which was issued prior to the issuance of the Senior Preferred Stock, is held by private investors such as pension funds, community banks, insurance companies, and individual investors. As of March 31, 2013, the Companies' outstanding Preferred Stock had an aggregate face amount and liquidation preference of over $33 billion. Each series of Preferred Stock has its own contractual dividend rate and liquidation value.

105. Prior to September 8, 2008, each series of Fannie Mae Preferred Stock ranked on a parity with all other issued and outstanding series of Fannie Mae Preferred Stock as to the payment of dividends and the distribution of assets upon dissolution, liquidation, or winding up of Fannie Mae. Likewise, each series of Freddie Mac Preferred Stock ranked on a parity with all other issued and outstanding series of Freddie Mac Preferred Stock as to the payment of dividends and the distribution of assets upon dissolution, liquidation, or winding up of Freddie Mac. In other words, each series of Fannie Mae and Freddie Mac Preferred Stock carried equal contractual rights with regards to the priority of payment of dividends, and each series of Fannie Mae and Freddie Mac Preferred Stock carried equal liquidation preferences (or their respective pro rata portions thereof) upon dissolution, liquidation, or winding up of Fannie Mae and Freddie Mac. Prior to September 6, 2008, Fannie Mae and Freddie Mac each regularly declared and paid dividends on each series of their respective Preferred Stock.

106. Delaware law applies to Fannie Mae pursuant to Section 1.05 of its bylaws, which provides that "the corporation has elected to follow the applicable corporate governance practices and procedures of the Delaware General Corporation Law." Virginia law applies to Freddie Mac pursuant to Section 11.3 of its bylaws, which provides that, "[T]he Corporation shall follow the corporate governance practices and procedures of the law of the

Commonwealth of Virginia[.]" Under both Delaware and Virginia law, certificates of designation are deemed to be contractual agreements between the stockholders and the company.

107. Thus, the Certificate of Designation for each series of Preferred Stock constitutes a contract with provisions governing the holders' dividend, liquidation, and voting rights. These provisions are materially similar to, for example, the Certificate of Designation for Fannie Mae's Series T Preferred Stock, as described below:

> **1. Dividends.**
>
> (a) Holders of record of Series T Preferred Stock (each individually a "Holder," or collectively the "Holders") will be entitled to receive, ratably, when, as and if declared by the Board of Directors, in its sole discretion out of funds legally available therefore, non-cumulative cash dividends at [specified rate] per annum of the [specified] stated value . . . of Series T Preferred Stock.
>
> * * *
>
> 4. Liquidation Rights.
>
> (a) Upon any voluntary or involuntary dissolution, liquidation or winding up of Fannie Mae, after payment or provision for the liabilities of Fannie Mae and the expenses of such dissolution, liquidation or winding up, the Holders of outstanding shares of the Series T Preferred Stock will be entitled to receive out of the assets of Fannie Mae or proceeds thereof available for distribution to stockholders, before any payment or distribution of assets is made to holders of Fannie Mae's common stock (or any other stock of Fannie Mae ranking, as to the distribution of assets upon dissolution, liquidation or winding up of Fannie Mae, junior to the Series T Preferred Stock), the amount of [the stated value] per share plus an amount . . . equal to the dividend (whether or not declared) for the then-current quarterly Dividend Period accrued to but excluding the date of such liquidation payment, but without accumulation of unpaid dividends on the Series T Preferred Stock for prior Dividend Periods.
>
> (b) If the assets of Fannie Mae available for distribution in such event are insufficient to pay in full the aggregate amount payable to Holders of Series T Preferred Stock and holders of all other classes or series of stock of Fannie Mae, if any, ranking, as to the distribution of assets upon dissolution, liquidation or winding up of Fannie Mae, on a parity with the Series T Preferred Stock, the assets will be distributed to the Holders of Series T Preferred Stock and holders of all such other stock pro rata, based

> on the full respective preferential amounts to which they are entitled (but without, in the case of any non-cumulative preferred stock, accumulation of unpaid dividends for prior Dividend Periods).
>
> * * *
>
> 7. Voting Rights; Amendments.
>
> * * *
>
> (b) Without the consent of the Holders of Series T Preferred Stock, Fannie Mae will have the right to amend, alter, supplement or repeal any terms of this Certificate or the Series T Preferred Stock (1) to cure any ambiguity, or to cure, correct or supplement any provision contained in this Certificate of Designation that may be defective or inconsistent with any other provision herein or (2) to make any other provision with respect to matters or questions arising with respect to the Series T Preferred Stock that is not inconsistent with the provisions of this Certificate of Designation so long as such action does not materially and adversely affect the interests of the Holders of Series T Preferred Stock; provided, however, that any increase in the amount of authorized or issued Series T Preferred Stock or the creation and issuance, or an increase in the authorized or issued amount, of any other class or series of stock of Fannie Mae, whether ranking prior to, on a parity with or junior to the Series T Preferred Stock, as to the payment of dividends or the distribution of assets upon dissolution, liquidation or winding up of Fannie Mae, or otherwise, will not be deemed to materially and adversely affect the interests of the Holders of Series T Preferred Stock.
>
> (c) Except as set forth in paragraph (b) of this Section 7, the terms of this Certificate or the Series T Preferred Stock may be amended, altered, supplemented, or repealed only with the consent of the Holders of at least two- thirds of the shares of Series T Preferred Stock then outstanding, given in person or by proxy, either in writing or at a meeting of stockholders at which the Holders of Series T Preferred Stock shall vote separately as a class. On matters requiring their consent, Holders of Series T Preferred Stock will be entitled to one vote per share.

108. Thus, the Plaintiffs had contractual rights to dividends, liquidation distributions and voting rights, as well as a right to exclude the Companies and a federal agency acting on their behalf from repudiating these rights. Plaintiffs paid valuable consideration in exchange for these contractual rights, and in doing so helped provide financial support for Fannie

Mae and Freddie Mac's business—financial support that existed both before and after the imposition of the conservatorship.

109. The Government neither sought nor obtained the permission of the Companies' stockholders before entering into the Third Amendment. There can be no doubt that the Third Amendment made "materially adverse" changes to rights of the stockholders, such that it violated Plaintiffs' contractual rights. The Certificates of Designation prohibited any such material adverse change to the rights of Plaintiffs and their fellow shareholders absent a shareholder vote approving the change, with the sole exception to that requirement of a vote being if the Companies issued a new series of stock. In executing the Third Amendment, FHFA, Fannie Mae, and Freddie Mac have *not* purported to issue a new series of stock. Indeed, in prior litigation, FHFA and Treasury have vigorously disputed that the Third Amendment was an issuance of stock, since such an issuance would have been illegal because Treasury's authority to acquire securities in the Companies expired at the end of 2009. 12 U.S.C. §§ 1455(l)(4), 1719(g)(4). Moreover, FHFA and Treasury previously *won* the argument that the Third Amendment was not the issuance of new securities. *Perry Capital LLC v. Lew,* 70 F. Supp. 3d 208, 224 (D.D.C. 2014) ("Treasury did *not* purchase new securities under the Third Amendment.") (emphasis added). FHFA and Treasury should not now be allowed to have it both ways. The Third Amendment was not the issuance of new securities. It was instead a gross violation of the rights of other shareholders that was as "materially adverse" to private Preferred Shareholders as anything could be, and was never approved by any shareholder vote. It thereby violated Plaintiffs' contractual rights under their Certificates of Designation (*i.e.*, shareholder contracts).

110. Through the Third Amendment, the Government breached and repudiated these contracts by eliminating the stockholders' contractual rights to receive dividends and to receive a pro rata distribution of any liquidation proceeds available after the Government received full recovery of the face amount of its Senior Preferred Stock. Thus, the Third Amendment amended, altered, and repealed the terms of the Certificates of Designation (*e.g.*, the contractual terms governing the holders' rights to receive liquidation distributions) in a manner that materially and adversely affected—indeed, completely destroyed—the rights and interests of the private preferred stockholders.

111. Fannie Mae's and Freddie Mac's agreement to the Third Amendment did not purport to create and issue any other class or series of Fannie Mae or Freddie Mac stock, nor did it purport to be an increase in the authorized or issued amount of any other class or series of Fannie Mae or Freddie Mac stock. Rather, the Third Amendment that the Government imposed in August 2012 was described simply as an amendment to the terms of the Senior Preferred Stock that Fannie Mae and Freddie Mac had issued to Treasury in September 2008. Accordingly, the amendment, alteration, and repeal of the terms of the Certificates via their agreement to the Third Amendment was not exempt from the two-thirds vote requirement set forth in the Certificates.

112. In addition to their explicit terms, inherent in the Certificates was an implied covenant by Fannie Mae and Freddie Mac, and FHFA (as their conservator) to deal fairly with the stockholders and to fulfill the issuers' contractual obligations in good faith. This covenant required FHFA not to take actions that would violate the stockholders' reasonable expectations regarding their dividend and liquidation rights.

113. Plaintiffs had a reasonable expectation that the Companies and FHFA (as their conservator) would not completely nullify their contractual dividend and liquidation rights in exchange for no meaningful consideration from Treasury. Plaintiffs also had reasonable expectations that the Companies and FHFA (as their conservator) would not exercise their discretion regarding dividends and liquidation preference in bad faith with the purpose of harming the Shareholders. And Plaintiffs had a reasonable expectation that the Companies would be operated at a profit for the benefit of *all* stockholders; that the Companies would exercise their discretion to pay dividends in good faith; that the Companies would not self-liquidate to avoid and eliminate stockholders' liquidation rights; and that even if the Companies were liquidated (or put on a path to liquidation), the private shareholders would receive their pro rata distributions in accordance with the established priority scheme, without the Treasury being given 100% of all surplus value no matter how large.

114. By executing the Third Amendment, the Government has violated the reasonable expectations of Plaintiffs and other class members regarding the fruits of their agreements with Fannie Mae and Freddie Mac. Under the Third Amendment, Plaintiffs and class members are absolutely and forever precluded from ever being eligible to receive a dividend, liquidation distribution, or any value from these contractual rights. Similarly, under the Third Amendment, the companies are no longer operated at a profit for the benefit of all stockholders, but rather are operated for the sole and exclusive benefit of a single controlling stockholder: the U.S. Treasury. Further, under the Third Amendment, the Government has ensured that the Companies are not exercising their discretion to pay dividends in good faith with regard to all stockholders, but rather are continuously paying enormous dividends only to a single, controlling stockholder: the U.S. Treasury. And, under the Third Amendment, the

Government has required the Companies to pay all of their Net Worth each quarter to the U.S. Treasury without diminishing Treasury's outstanding liquidation preference. Further, the Net Worth Sweep (and the recent December 2017 amendment) absolutely guarantee than in a liquidation it is impossible for any private shareholder to ever receive anything, no matter how much surplus value exists in that liquidation, because 100% of the net worth must be paid to Treasury. Accordingly, by executing the Third Amendment, the Government has not only breached the express terms of the Plaintiffs' shareholder contracts, but has also acted unfairly and in bad faith with respect to the stockholders and breached the implied covenant of good faith and fair dealing.

XI. CLASS ACTION ALLEGATIONS.

115. Plaintiffs bring this action on behalf of themselves and as a class action pursuant to the Court of Federal Claims' Rule of Civil Procedure 23on behalf of: a class consisting of all persons and entities who held shares of any series of Fannie Mae Preferred Stock on August 17, 2012 and who were damaged thereby, and their successors in interest (meaning current shareholders) (the "Fannie Preferred Class"); and a class consisting of all persons and entities who held shares of any series of Freddie Mac Preferred Stock on August 17, 2012 and who were damaged thereby, and their successors in interest (meaning current shareholders) (the "Freddie Preferred Class"). Excluded from both classes are the Defendants.

116. The members of the Classes are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe that there are at least thousands of members in the proposed Classes. As of August 17, 2012, and the date of the filing of this action, there were hundreds of millions of shares of Fannie Mae and Freddie Mac Preferred Stock outstanding. As of December 31, 2017, there were 556 million shares of Fannie

Mae Preferred Stock outstanding. As of December 31, 2017, there were 464 million shares of Freddie Mac Preferred Stock outstanding. Record owners and other members of the Classes may be identified from records maintained by Fannie Mae and Freddie Mac and/or their transfer agent and may be notified of the pendency of this action by mail, using the form of notice similar to that customarily used in securities class actions.

117. Plaintiffs' claims are typical of the claims of the other members of the Classes, as all members of the Classes were similarly affected by Defendants' wrongful conduct that is complained of herein.

118. Plaintiffs will fairly and adequately protect the interests of the members of the Classes, and have retained counsel competent and experienced in class action, derivative, securities, and constitutional litigation. Plaintiffs have no interests that are adverse or antagonistic to the Classes.

119. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Because the damages suffered by individual members of the Classes may be relatively small, the expense and burden of individual litigation make it impracticable for Class members individually to seek redress for the wrongful conduct alleged herein.

120. Common questions of law and fact exist as to all members of the Classes and predominate over any questions solely affecting individual members of the Classes. Among the questions of law and fact common to the Classes are:

(a) Whether Defendant took Plaintiffs' property without just compensation;

(b) Whether Defendant illegally exacted Plaintiffs' property;

(c) Whether Defendant breached the terms of the Certificates for the Fannie Preferred Stock, the Freddie Preferred Stock, and/or the implied covenant of good faith and fair dealing inherent in those Certificates;

(d) Whether Defendant breached its fiduciary duties;

(e) Whether Defendant is liable for just compensation or damages to the members of the Classes, and the proper measure thereof, for taking, illegal exaction, breach of contract, breach of the implied covenant of good faith and fair dealing, and/or breach of fiduciary duties.

121. The prosecution of separate actions by individual Class members would create the risk of inconsistent or varying adjudications with respect to the individual Class members, or adjudications with respect to individual Class members that would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair their ability to protect their interests.

122. Defendant has acted on grounds generally applicable to the Classes with respect to the matters complained of herein, thereby making appropriate the relief sought herein with respect to the Classes as a whole.

COUNT I

TAKING WITHOUT JUST COMPENSATION

123. Plaintiffs incorporate by reference and reallege each and every allegation contained in the preceding paragraphs, as though fully set forth herein.

124. The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

125. As holders of Preferred Stock, Plaintiffs owned fully vested property rights in the form of the rights to receive dividends, liquidation proceeds, or other distributions in accordance with the terms of their Preferred Stock. These property rights included a claim on the companies' equity that could be paid out in the form of dividends or liquidation payment. They also included a right to protect those economic rights through voting rights that would prevent a material adverse change to their property rights.

126. These property rights survived the events of 2008, including the enactment of HERA, the imposition of conservatorships over the Companies, and the issuance of Senior Preferred Stock to the U.S. Treasury pursuant to the PSPA.

127. At all relevant times up to the imposition of the Third Amendment, Plaintiffs had a reasonable, investment-backed expectation that their property rights would be preserved and would not be taken by the Government without just compensation.

128. By imposing the Net Worth Sweep, the Government took Plaintiffs' vested property rights without just compensation. The Net Worth Sweep expropriated Plaintiffs' property interests, destroyed Plaintiffs' investment-backed expectations, and deprived Plaintiffs of all economically beneficial uses of their Preferred Stock.

129. The Net Worth Sweep was implemented by two federal agencies – the FHFA and the U.S. Treasury – to advance the economic and political interests of the U.S. Government. The U.S. Government (including FHFA and Treasury) provided no compensation whatsoever, let alone just compensation, to Plaintiffs and other private holders of Preferred Stock for the expropriation of their property rights.

130. Plaintiffs are entitled to just compensation for the Government's taking of their property.

131. Plaintiffs suffered harm as a direct and proximate result of the foregoing unconstitutional taking. Plaintiffs' injuries are direct and independent of any injury to the Companies and any recovery for this Taking claim would benefit the stockholders directly, and not the Companies.

COUNT II

TAKING WITHOUT JUST COMPENSATION (CAUSES OF ACTION)

132. Plaintiffs incorporate by reference and reallege each and every allegation contained in the preceding paragraphs, as though fully set forth herein.

133. The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

134. As holders of Preferred Stock, Plaintiffs had the right to protect their investment by filing certain causes of action, including derivative lawsuits and claims seeking injunctive and declaratory relief.

135. These causes of action constitute property rights protected by the Fifth Amendment.

136. After the Government imposed the Third Amendment, Plaintiffs filed direct claims seeking to enjoin the Third Amendment, as well as derivative claims on behalf of the Companies challenging the Third Amendment. The D.C. Circuit has ruled that these derivative claims, which accrued to Plaintiffs on August 17, 2012 – the date of the Third Amendment – were taken away from Plaintiffs by the Government. That D.C. Circuit decision conflicts with a decision of the Federal Circuit in *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279 (Fed. Cir. 1999). The D.C. Circuit also ruled that all of Plaintiffs' claims for injunctive relief were barred by HERA.

137. To the extent Plaintiffs are prevented from receiving a full remedy for the harm caused by the Third Amendment by virtue of any court's holding that certain HERA provisions block legal actions needed to fully remedy the harm caused by the Third Amendment, the application of those provisions to the Plaintiffs' challenges to the Third Amendment constitute a taking of private property without payment of just compensation.

138. Plaintiffs suffered harm as a direct and proximate result of the foregoing unconstitutional taking. Plaintiffs' injuries are direct and independent of any injury to the Companies and any recovery for this Taking claim would benefit the stockholders directly, and not the Companies.

COUNT III

ILLEGAL EXACTION

139. Plaintiffs incorporate by reference and reallege each and every allegation contained in the preceding paragraphs, as though fully set forth herein.

140. The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

141. As holders of Preferred Stock, Plaintiffs had vested property rights to participate in the Companies' income stream and share their residual value. These property rights included a claim on the companies' equity that could be paid out in the form of dividends or liquidation payment.

142. These property rights survived the events of 2008, including the enactment of HERA, the imposition of conservatorships over the Companies, and the issuance of Senior Preferred Stock to the U.S. Treasury.

143. Plaintiffs had a reasonable, investment-backed expectation that their property rights would not be illegally exacted by the Government.

144. By imposing the Net Worth Sweep, the Government expropriated Plaintiffs' vested property rights and now has the Plaintiffs' money in its pocket.

145. The Net Worth Sweep was developed and implemented by two federal agencies – the FHFA and the U.S. Treasury – to advance the economic and political interests of the U.S. Government.

146. By agreeing to and implementing the Third Amendment, FHFA and Treasury each violated the scope of their statutory authority under HERA.

147. Plaintiffs are entitled to damages to compensate them for the loss of these illegally exacted property rights and funds.

148. Plaintiffs suffered damages as a direct and proximate result of the foregoing illegal exaction. Plaintiffs' injuries are direct and independent of any injury to the Companies and any recovery for this claim would benefit the stockholders directly, and not the Company.

COUNT IV

BREACH OF CONTRACT AND ANTICIPATORY REPUDIATION

149. Plaintiffs incorporate by reference and reallege each and every allegation contained in the preceding paragraphs, as though fully set forth herein.

150. The Certificates for the Fannie Mae and Freddie Mac Preferred Stock constitute contracts between Plaintiffs, on the one hand, and Fannie Mae and Freddie Mac, on the other.

151. These contracts include certain rights to dividends, liquidation payments, and voting rights as alleged above.

152. Plaintiffs paid valuable consideration in exchange for these contractual rights.

153. FHFA assumed the responsibility to act consistently with the Companies' contractual obligations when it became the Companies' conservator.

154. The Net Worth Sweep was developed and implemented by the FHFA and the U.S. Treasury to advance the economic and political interests of the U.S. Government.

155. By entering into the Third Amendment, the Government has deprived Plaintiffs of any possibility of receiving any dividends or any liquidation distribution, and has done so without providing Plaintiffs any opportunity to vote. Accordingly, the Government has breached and unequivocally repudiated the Plaintiffs' contractual rights.

156. Plaintiffs suffered damages as a direct and proximate result of the foregoing breach of contact. Plaintiffs' injuries are direct and independent of any injury to the Companies and any recovery would benefit the stockholders directly, and not the Companies.

COUNT V

BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

157. Plaintiffs incorporate by reference and reallege each and every allegation contained in the preceding paragraphs, as though fully set forth herein.

158. The Certificates for Fannie Mae and Freddie Mac Preferred Stock were and are, for all purposes relevant hereto, contracts between the Plaintiffs and the Companies.

159. The Certificates provide for certain rights to dividends, liquidation payments, and voting rights. Also inherent in these contracts was, and is, an implied covenant of good faith and fair dealing, requiring the Companies to deal fairly with Plaintiffs, to fulfill their obligations in good faith, and not to deprive Plaintiffs of the fruits of their bargain.

160. Plaintiffs paid valuable consideration in exchange for these contractual rights.

161. FHFA assumed the responsibility to act consistently with the Companies' contractual obligations when it became the Companies' conservator, including the covenant of good faith and fair dealing.

162. The Net Worth Sweep was developed and implemented by two federal agencies – the FHFA and the U.S. Treasury – to advance the economic and political interests of the U.S. Government.

163. By entering into the Third Amendment with the purpose of depriving Plaintiffs of any possibility of receiving dividends or a liquidation preference without any opportunity to vote, the Government has breached the implied covenant of good faith and fair dealing inherent in the Certificates for the Preferred Stock.

164. Plaintiffs suffered damages as a direct and proximate result of the foregoing breach of the implied covenant of good faith and fair dealing. Plaintiffs' injuries are direct and independent of any injury to the Companies and any recovery for this claim would benefit the stockholders directly, and not the Company.

COUNT VI

BREACH OF FIDUCIARY DUTY

165. Plaintiffs incorporate by reference and reallege each and every allegation contained in the preceding paragraphs, as though fully set forth herein.

166. The conservatorship provisions of HERA create a fiduciary relationship between an agency of the United States Government (FHFA), on the one hand, and the Companies' shareholders, on the other. The Government therefore has a fiduciary responsibility

to manage the conservatorships of Fannie and Freddie for the benefit of the Companies' shareholders—or at least in a manner that is not expressly understood and intended to be directly adverse to the interests of the shareholders, and intended to benefit the Government and to harm the shareholders.

167. Given the existence of a fiduciary relationship between FHFA and the Companies' shareholders, it follows that the Government should be liable in damages for the breach of its fiduciary duties.

168. The Net Worth Sweep is a self-dealing transaction between two sister agencies of the Government, and improperly (and in bad faith) expropriates the economic interest in Fannie and Freddie held by the Companies private Preferred Stockholders for the benefit of the Government.

169. The Net Worth Sweep was neither entirely fair nor intrinsically fair. It was manifestly unfair.

170. The Net Worth Sweep constituted waste, gross and palpable overreaching and a gross abuse of discretion.

171. The Net Worth Sweep did not further any valid business purpose or reasonable business objective of Fannie and Freddie, did not reflect FHFA's good faith business judgment of what was in the best interest of Fannie and Freddie or their shareholders, and was unfair to the Companies and their Preferred Stockholders.

172. Thus, by entering the Net Worth Sweep, FHFA violated its fiduciary duty to Plaintiffs.

173. Plaintiffs suffered damages as a direct and proximate result of the foregoing breach of fiduciary duties. Plaintiffs' injuries are direct and independent of any injury

to the Companies and any recovery for this claim would benefit the stockholders directly, and not the Company.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief and judgment, as follows:

1. Certifying that this action is a proper class action under Rule 23 of the Rules of the United States Court of Federal Claims on behalf of the Classes defined herein;

2. Finding that the Defendant has taken Plaintiffs' property without just compensation, has illegally exacted Plaintiffs' property, and has breached the express and implied terms of Plaintiffs' contracts;

3. Determining and awarding to Plaintiffs the just compensation and/or damages sustained by them as a result of the violations set forth above;

4. Awarding Plaintiffs prejudgment interest on any damages or just compensation to which Plaintiffs are entitled;

5. Awarding Plaintiffs their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

6. Granting such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

Dated: March 8, 2018

/s/ Hamish P.M. Hume

Hamish P.M. Hume
Attorney of Record
BOIES SCHILLER FLEXNER LLP
1401 New York Ave. NW
Washington, DC 20005
Tel: (202) 237-2727
Fax: (202) 237-6131
hhume@bsfllp.com

OF COUNSEL:

Interim Co-Lead Class Counsel

BOIES SCHILLER FLEXNER LLP
Stacey K. Grigsby
Jonathan M. Shaw
Alexander I. Platt
1401 New York Ave. NW
Washington, DC 20005
Tel: (202) 237-2727
Fax: (202) 237-6131
sgrigsby@bsfllp.com
jshaw@bsfllp.com
aplatt@bsfllp.com

KESSLER TOPAZ MELTZER & CHECK LLP
Eric L. Zagar
280 King of Prussia Rd.
Radnor, PA 19087
Tel: (610) 667-7706
Fax: (610) 667-7056
ezagar@ktmc.com

Additional Counsel for Plaintiffs

POMERANTZ LLP
Jeremy A. Lieberman
600 Third Avenue, 20th Floor
New York, New York 10016
Tel: (212) 661-1100
Fax: (212) 661-8665
jalieberman@pomlaw.com

Patrick V. Dahlstrom
Ten South LaSalle Street, Suite 3505
Chicago, Illinois 60603
Tel: (312) 377-1181
Fax: (312) 377-1184
pdahlstrom@pomlaw.com

BROWER PIVEN
A PROFESSIONAL CORPORATION
Charles J. Piven
1925 Old Valley Road
Stevenson, MD 21153
Tel: (410) 332-0030
Fax: (410) 685-1300
piven@browerpiven.com

GRANT & EISENHOFER P.A.
Michael J. Barry
123 Justison Street
Wilmington, DE 19801
Tel: (302) 622-7000
Fax: (302) 622-7100
mbarry@gelaw.com