No. 17-3794

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DAVID JACOBS; GARY HINDES,
Plaintiffs-Appellants,
v.

FEDERAL HOUSING FINANCE AGENCY; U.S. DEPARTMENT OF TREASURY; FEDERAL NATIONAL MORTGAGE ASSOCIATION; FEDERAL HOME LOAN MORTGAGE CORPORATION,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Delaware, No. 1:15-cv-00708

BRIEF OF DEFENDANTS-APPELLEES FEDERAL HOUSING FINANCE AGENCY, FEDERAL NATIONAL MORTGAGE ASSOCIATION, AND FEDERAL HOME LOAN MORTGAGE CORPORATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Third Circuit Rule 26.1, Defendants-Appellees hereby state:

Appellee Federal Housing Finance Agency ("FHFA") is a federal government agency. As such, it has no parent corporation and has issued no stock.

Appellee Federal Home Loan Mortgage Corporation ("Freddie Mac") is a publicly held corporation. Freddie Mac has no parent corporation and, according to public securities filings, no publicly held corporation or other publicly held entity owns 10% or more of Freddie Mac's common stock.

Appellee Federal National Mortgage Association ("Fannie Mae") is a publicly held corporation. Fannie Mae has no parent corporation and no publicly held corporation or other publicly held entity owns 10% or more of Fannie Mae's stock.

Other than Fannie Mae and Freddie Mac, there are no other publicly held corporations that have a direct financial interest in the outcome of this litigation.

/s/ Howard N. Cayne
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INTRODUCTION

This is another in a long line of suits brought by stockholders of Fannie Mae and Freddie Mac (the "Enterprises") seeking rescission of an amendment to the financing agreements between the Federal Housing Finance Agency ("FHFA"), as Conservator for the Enterprises, and the U.S. Department of the Treasury. When the Enterprises were placed into federal conservatorships in 2008, in the midst of the financial crisis, these financing agreements with Treasury provided the Enterprises a critical lifeline of hundreds of billions of taxpayer dollars in exchange for preferred stock and other compensation. The agreements and the capital lifeline they provide remain in force today.

Plaintiffs challenge the 2012 amendment to the financing agreements, known as the Third Amendment, which restructures the formula for compensation owed to Treasury under the agreements. Every court that has considered similar efforts to rescind and invalidate the Third Amendment—including the D.C. and Sixth Circuits—has dismissed them as barred by federal law. *See Robinson v. FHFA*, 876 F.3d 220 (6th Cir. 2017); *Perry Capital LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017); *Collins v. FHFA*, 254 F. Supp. 3d 841 (S.D. Tex. 2017); *Saxton v. FHFA*, 245 F. Supp. 3d 1063 (N.D. Iowa 2017); *Roberts v. FHFA*, 243 F. Supp. 3d 950 (N.D. Ill. 2017); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828 (S.D. Iowa 2015).

Controlling provisions of federal law likewise foreclose Plaintiffs' attempt here to challenge the Third Amendment under state law—namely, Delaware and Virginia statutes relating to preferred stock. Specifically, 12 U.S.C. § 4617(f) provides that "no court may take any action to restrain or affect the exercise of [FHFA's] powers or functions" as Conservator. In the Third Amendment, the Conservator agreed to modify the structure of the Enterprises' compensation to Treasury for its massive financial assistance and ongoing financial commitment. The district court correctly recognized—consistent with each of the courts referenced above—that this action was an exercise of the Conservator's broad statutory powers and functions to make business decisions on behalf of the Enterprises. Accordingly, the district court correctly held that Section 4617(f) bars Plaintiffs' claims seeking rescission of the Third Amendment.

Plaintiffs' claims also fail on the merits. Federal law, not state law, governs the capital structure of the federally chartered, regulated, and supervised Enterprises, with state corporate law only serving a limited, gap-filling function that is not implicated here. And even if federal law did not control, the Third Amendment is consistent with the permissive, enabling state statutes that Plaintiffs claim apply.

Plaintiffs attempt to resuscitate their failed claims by reframing them on appeal and presenting new—yet equally ineffective—arguments they never made

before the district court. For example, Plaintiffs attempt to reshape their state statutory claims into common law breach of contract claims. But the operative amended complaint does not assert a breach of contract claim. In fact, Plaintiffs voluntarily dismissed, for their own strategic reasons, the breach of contract claims they had asserted in the original complaint. Further, Plaintiffs chastise the district court for allegedly "ignoring" their request for money damages against FHFA and the Enterprises. But Plaintiffs ignored this request too. Though Plaintiffs included a generic reference to money damages in their prayer for relief, Plaintiffs' briefs before the district court opposing dismissal did not include a single reference to this request for money damages, nor a single argument why their request for damages is not barred by Section 4617(f). Plaintiffs thus waived the arguments they present for the first time on appeal in support of money damage claims.

In all events, Plaintiffs' claims—including any seeking money damages—should be dismissed for multiple additional reasons, including because they are barred by HERA's Succession Clause.

The district court got it right and this Court should affirm.

STATEMENT OF JURISDICTION

This case arises under 28 U.S.C. § 1331. The district court entered final judgment on November 27, 2017. Plaintiffs noticed their appeal on December 21, 2017. This Court accordingly has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

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

II. Whether dismissal of Plaintiffs' complaint should also be affirmed on the following additional and independently dispositive grounds, which the district court did not reach:

A. Whether 12 U.S.C. § 4617(b)(2)(A)(i)—which provides that FHFA as Conservator succeeds to "all rights, titles, powers, and privileges" of the Enterprises and their stockholders, and which courts have uniformly held bars derivative claims—bars Plaintiffs' stockholder claims, which are brought "derivatively on behalf of and for the benefit of" the Enterprises.

B. Whether Plaintiffs state a claim for violation of Delaware and Virginia statutes pertaining to preferred stock where (a) the powers and operations of the federally chartered, regulated and supervised Enterprises are governed by federal law, which provides the Enterprises (and thus the Conservator) flexibility in issuing preferred stock; and (b) the variable

dividend set by the Third Amendment is clearly defined and set forth in the Treasury preferred stock certificate.

III. Whether the district court acted within its broad discretion to deny as moot Plaintiffs' motion for judicial notice or to strike where the district court did not rely upon the alleged assertions of fact in the motions to dismiss, and those assertions did not in fact dispute any of the allegations in the complaint.

STATEMENT OF RELATED CASES

This case has not previously been before this Court and there are no pending related cases in this Court. Additional cases raising similar challenges in other courts are listed in Plaintiffs' brief. *See* Jacobs Brief 2-3 (hereinafter "Br.").

STATEMENT OF THE CASE

1. The Enterprises and Their Importance to the National Economy

The Enterprises are government-sponsored enterprises chartered by Congress to provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thus freeing up capital for those lenders to make additional loans. JA57. The Enterprises, which own or guarantee trillions of dollars of mortgages and mortgage-backed securities, play a vital role in housing finance and the U.S. economy.

Throughout the first half of 2008, the Enterprises suffered multi-billion dollar losses on their mortgage portfolios and guarantees, as the housing market

collapsed and homeowners defaulted on mortgages at accelerating rates. JA59. On July 30, 2008, "[c]oncerned that a default by Fannie and Freddie would imperil the already fragile national economy," *Perry Capital*, 864 F.3d at 599, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, § 1101, 122 Stat. 2654, 2661 (codified at 12 U.S.C. § 4511 *et seq*.).

2. FHFA Is Appointed Conservator of the Enterprises and Succeeds to All Rights of the Enterprises and Their Stockholders

HERA created FHFA, an independent federal agency, to supervise and regulate the Enterprises and Federal Home Loan Banks. 12 U.S.C. § 4511. HERA granted FHFA's Director the discretionary authority to place the Enterprises in conservatorship and to act as their conservator "for the purpose of reorganizing, rehabilitating, or winding up the[ir] affairs." 12 U.S.C. § 4617(a)(2). On September 6, 2008, having concluded that the Enterprises could not operate safely and soundly and fulfill their critical statutory mission, FHFA's Director placed the Enterprises into conservatorships. JA59.

HERA provides that, upon its appointment as Conservator, FHFA "immediately succeed[ed] to . . . *all rights*, titles, powers, and privileges of the [Enterprises], and of *any stockholder*, officer, or director of such [Enterprises] with respect to the [Enterprises] and the assets of the [Enterprises]." 12 U.S.C. § 4617(b)(2)(A) (emphasis added).

In addition, HERA accords FHFA as Conservator broad powers to "operate" and "conduct all business" of the Enterprises. *Id.* § 4617(b)(2)(B)(i). Specifically, HERA empowers the Conservator to:

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

Further, HERA authorizes the Conservator to "take any [authorized action], which the Agency determines is in the best interests of the [Enterprises] or the Agency." *Id.* § 4617(b)(2)(J)(ii).

Reinforcing and facilitating the exercise of the Conservator's plenary operational authority, Congress shielded the Conservator's actions from judicial review. Under 12 U.S.C. § 4617(f), "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator."

3. Treasury Provides Unprecedented and Continuing Financial Support to the Enterprises in Exchange for Compensation

In tandem with conferring conservatorship powers on FHFA, Congress authorized Treasury to provide what would become over $400 billion in support of

the continued operations of the Enterprises in conservatorship. HERA amended the Enterprises' statutory charters to authorize Treasury to purchase securities issued by the Enterprises, provided Treasury and FHFA as the Enterprises' Conservator reach "mutual agreement" on the terms. *See* 12 U.S.C. §§ 1455(*l*)(1)(A) (Freddie Mac), 1719(g)(1)(A) (Fannie Mae). Treasury exercised this authority in September 2008, purchasing senior preferred stock in the Enterprises. Treasury and the Conservator entered into Senior Preferred Stock Purchase Agreements (the "PSPAs"), through which Treasury agreed to infuse hundreds of billions of taxpayer dollars into the two Enterprises to allow them to continue operating. JA145-210 (PSPAs).

The PSPAs remain in effect and work as follows: if in any quarter an Enterprise's net worth is negative—defined as liabilities exceeding assets in accordance with Generally Accepted Accounting Principles ("GAAP")—then Treasury must invest additional funds in the Enterprise sufficient to cure its negative net worth. JA148 (PSPA § 2.2). The PSPAs thus provide the Enterprises with "unprecedented access to guaranteed capital." *Perry Capital*, 864 F.3d at 609.

As consideration for this massive and continuing commitment, the PSPAs gave Treasury a comprehensive bundle of rights, including the following:

- A senior liquidation preference starting at $1 billion per Enterprise, which increases dollar-for-dollar whenever the Enterprises draw Treasury funds. JA59-60; JA150.

- A 10% annual dividend, assessed quarterly, based on the total amount of the liquidation preference. JA59-60; JA212-13. If not paid in cash, the dividend would accrue at a 12% rate and be added to Treasury's liquidation preference. JA213.

- A periodic commitment fee "intended to fully compensate [Treasury] for the support provided by the ongoing Commitment," and to be set to reflect "the market value of the Commitment as then in effect." JA150.

- Warrants to acquire 79.9% of the Enterprises' common stock. JA49-50; JA59-60; JA148-150.

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

4. The Enterprises Draw Billions from Treasury, and the Treasury Commitment Is Increased

By late 2008, the Enterprises' liabilities exceeded their assets under GAAP; Treasury thus began infusing billions of dollars into the Enterprises. JA60-61. While the PSPAs initially capped Treasury's commitment at $100 billion per Enterprise, the parties amended the PSPAs via the "First Amendment" to double the cap to $200 billion per Enterprise. JA60; JA173-182. Later, the parties amended the PSPAs again via a "Second Amendment," which permitted the

Enterprises to draw *unlimited* amounts from Treasury to cure net-worth deficits through 2012. JA60; JA183-94. Pursuant to the Second Amendment, Treasury's commitment became fixed at the end of 2012, and future draws would reduce the remaining funds available. JA60; JA184.

By August 2012, the Enterprises had drawn a total of $187.4 billion ($116.1 billion drawn by Fannie Mae and $71.3 billion drawn by Freddie Mac). JA64. Pursuant to the formula established by the Second Amendment, the remaining amount of the commitment available after 2012 was $117.6 billion for Fannie Mae, and $140.5 billion for Freddie Mac.[1] Accordingly, Treasury had committed to infuse an additional $258.1 billion, as needed, for a total of $445.5 billion (infused and available to be infused) to the Enterprises.

5. The Third Amendment to the PSPAs

Due to the substantial amounts drawn from Treasury, the Enterprises' dividend obligations—calculated as 10% of the Treasury liquidation preference—were also substantial. Between 2009 and 2011, the Enterprises' income and net worth were insufficient to pay the Treasury dividend. The Enterprises drew billions more from Treasury to make their dividend payments. Those draws, in turn, increased Treasury's liquidation preference and the Enterprises' future

[1] *See* Fannie Mae News Release at 4 (May 9, 2013), http://goo.gl/dgTofA; Freddie Mac News Release at 3 (May 8, 2013), http://goo.gl/cmgzSH.

dividend obligations. After the amount of the Treasury commitment became fixed in 2012, any such draws would reduce the finite amount remaining in the Treasury commitment.

By June 30, 2012, the Enterprises were obligated to pay Treasury approximately $19 billion per year—which exceeded the Enterprises' average historical earnings per year[2]—plus commitment fees equal to the market value of Treasury's massive and historic commitment. Further, in August 2012, just before the Third Amendment, the Enterprises stated in SEC filings that they "d[id] not expect to generate net income or comprehensive income in excess of our annual dividend obligation to Treasury over the long term." Fannie 10-Q at 12; *see also* Freddie 10-Q at 10.

On August 17, 2012, FHFA and Treasury executed the Third Amendment to the PSPAs. The Third Amendment (1) eliminated the fixed-rate 10% annual dividend, (2) added a quarterly variable dividend in the amount of each Enterprise's positive net worth, if any, subject to a declining reserve, and (3) suspended the periodic commitment fee while the quarterly variable dividend is in effect. JA195-210. Thus, after the Third Amendment, the Enterprises owe

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[2] *See* Fannie Mae, Quarterly Report (Form 10-Q), at 4 (Aug. 8, 2012), http://goo.gl/bGLVXz; Freddie Mac, Quarterly Report (Form 10-Q), at 8 (Aug. 7, 2012), http://goo.gl/2dbgey. "SEC filings . . . are matters of public record of which the court can take judicial notice." *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014).

variable net-worth dividends, and no periodic commitment fees. If the Enterprises' net worth is negative for a quarter, they pay no dividend. If the Enterprises' net worth is positive for a quarter, they pay that amount as a dividend, even if that amount is less or greater than the prior 10% dividend obligation.

6. Procedural History

Plaintiffs filed their complaint in August 2015, asserting claims for violation of certain Delaware and Virginia statutes (Counts I and II), breach of contract (Counts III and IV), breach of the implied covenant of good faith and fair dealing (Counts V and IV), and breach of fiduciary duty (Counts VII through X).

In 2016, with multiple stockholder challenges to the Third Amendment pending, FHFA moved the Judicial Panel on Multidistrict Litigation ("JPML") for centralization of the cases, including this one. Doc. # 39.[3] FHFA argued, among other things, that Plaintiffs' claims in this case raised common issues with other stockholder claims, and could have subjected FHFA to duplicative discovery demands in multiple jurisdictions. Doc # 39-1. Plaintiffs opposed consolidation and, to that end, notified Defendants that they intended to voluntarily dismiss their contract and fiduciary duty claims, which were common to the other stockholder cases. Plaintiffs then told the JPML that this case raised unique issues and would

[3] "Doc. # ___" as used herein refers to the document number as it appears on the docket for case number 1:15-cv-00708 (D. Del.) (Sleet, J.)

not subject Defendants to any discovery demands because Plaintiffs' remaining claims (Counts I and II asserting violations of Delaware and Virginia statutes) were based on the alleged "prima facie invalidity" of the Third Amendment,[4] and thus "require[] no discovery because it's a purely legal issue based on the language of the net worth sweep."[5]

The JPML denied consolidation of the Third Amendment cases on the ground that there were an insufficient number of cases, and the pending cases "involv[ed] primarily common legal, rather than factual, issues." *See In re FHFA Preferred Stock Purchase Agreements Third Amendment Litig.*, 190 F. Supp. 3d 1356, 1357 (J.P.M.L. 2016).

Consistent with their representations to the JPML, Plaintiffs moved to amend the complaint to voluntarily dismiss their contract and fiduciary duty claims: "To streamline this litigation, Plaintiffs are voluntarily dismissing the

[4] Plaintiffs' Opposition to FHFA's Motion for Transfer at 7, 16, *In re FHFA, Preferred Stock Purchase Agreements Third Amendment Litig.*("*In re FHFA PSPAs*"), MDL No. 2713 at Doc. # 21 (J.P.M.L. Apr. 6, 2016). When considering a motion to dismiss, "a court may properly look at public records, including judicial proceedings, in addition to the allegations in the complaint." *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999).

[5] Transcript of Oral Argument at 19, *In re FHFA PSPAs*, MDL No. 2713 at Doc. # 38 (J.P.M.L. May 26, 2016); *see also* Plaintiffs' Notice of Supplemental Information at 2, *In re FHFA PSPAs*, MDL No. 2713 at Doc. # 35 (J.P.M.L. May 19, 2016) ("[N]o discovery will be needed in the Delaware Action as Counts I and II are both questions of law that can be answered based on facts that are not capable of dispute.").

claims for breach of contract and fiduciary duty related to the Net Worth Sweep in favor of the primary issue raised by the Complaint, the violations of the DGCL and VSCA." Doc # 48 at 7. As Plaintiffs advised the district court, this voluntary dismissal was "in direct response to Defendants' objections [before the JPML] to allegedly having to defend similar issues in multiple jurisdictions." *Id.* Plaintiffs also sought to add two claims for unjust enrichment against Treasury, which were "predicated on the claim that the Net Worth Sweep violates the DGCL and VSCA" and thus "rise and fall with these statutory claims. *Id.*

The district court granted the motion for leave to amend (Doc # 61) and Plaintiffs filed the First Amended Complaint ("FAC"). JA46. The FAC asserts two claims for violation of Delaware and Virginia statutes (JA71-74 (Counts I and II), and two claims for unjust enrichment against Treasury (JA74-76 (Counts III and IV). In the Prayer for Relief, Plaintiffs request, among other things, (a) "equitable and injunctive relief . . . including rescission of the Net Worth Sweep and restitution of the monies paid by the Companies to Treasury pursuant thereto," (b) "restitution, and/or disgorgement" as against Treasury and FHFA, and (c) "compensatory damages" as against FHFA. JA76-78.

Defendants then moved to dismiss the First Amended Complaint on multiple grounds, including that the claims are barred by multiple provisions of federal law (namely, the anti-injunction provision of 12 U.S.C. § 4617(f), and the Succession

Clause of 12 U.S.C. § 4617(b)(2)(A)), and that Plaintiffs' claims also failed to state a claim under federal or state law. Doc ## 65, 67. Plaintiffs opposed, contending primarily that the alleged violations of state law render Section 4617(f) inapplicable, and also opposing the other grounds for dismissal. Doc # 69. Plaintiffs did not oppose dismissal on the ground that their claims sought money damages. Indeed, Plaintiffs never mentioned their request for compensatory damages in any of the motion to dismiss briefing before the district court.

After briefing was complete, Plaintiffs filed a motion asking the district court to take judicial notice of various discovery materials produced in other litigation concerning the Third Amendment. Doc # 75. That motion asked, in the alternative, for the court to strike portions of the motions to dismiss for allegedly raising "factual arguments" contrary to the allegations in the amended complaint.

The district court granted Defendants' motions to dismiss, holding that 12 U.S.C. § 4617(f) barred all of Plaintiffs' claims. JA8-19. The district court also denied as moot the motion for judicial notice or to strike because the district court did not rely on any statements in the motions to dismiss that allegedly conflicted with the amended complaint. JA19. Plaintiffs did not move for reconsideration or clarification, and this appeal followed.

SUMMARY OF ARGUMENT

I. The district court correctly recognized that the plain text of HERA resolves Plaintiffs' claims: while the Enterprises are in conservatorship, "no court may take any action to restrain or affect the exercise of powers or functions" of FHFA as their Conservator. 12 U.S.C. § 4617(f). The powers and functions of the Conservator are far-reaching and include, *inter alia*, the power to conduct all business of the Enterprises, reorganize their affairs, transfer or sell any Enterprise assets, and take all such actions in a manner the Conservator determines is in the best interests of the Enterprises or FHFA. *Id*. § 4617(a)(2), (b)(2). The district court correctly held that FHFA acted within its statutory powers and functions in agreeing to the Third Amendment, and thus Section 4617(f) bars the claims.

Plaintiffs assert two primary arguments in their attempt to avoid Section 4617(f). Both fail. First, Plaintiffs argue that the Conservator is bound to comply with all state laws that apply to the Enterprises, and that they may avoid Section 4617(f) with an allegation that the Conservator did not so comply. This is wrong. Not only does this argument directly contradict multiple decisions of this Court, it would eviscerate Section 4617(f) and give the Conservator no greater protection from injunctive or declaratory relief than the Enterprises outside of conservatorship, which is clearly contrary to Congress's intent.

Second, Plaintiffs argue that Section 4617(f) does not apply because the Conservator allegedly failed to comply with the contract repudiation procedures outlined in HERA. This argument likewise fails for many reasons. A claim for repudiation is a claim for breach of contract, and Plaintiffs long ago dismissed all of their claims for breach of contract. Plaintiffs dropped that claim early in the litigation. Moreover, as the district court correctly recognized, an alleged failure to comply with HERA's repudiation procedures is not sufficient to avoid Section 4617(f).

Plaintiffs also argue for the first time on appeal that the district court erred by not finding that their damages claims survived Section 4617(f). But Plaintiffs waived that argument by never even mentioning it to the district court, let alone opposing dismissal on this basis. Plaintiffs thus cannot revive their request for money damages on the basis of arguments not presented below.

II. Plaintiffs' claims—including the waived claims for money damages—also fail for several additional reasons. While the district court did not reach these issues, this Court can affirm on any basis supported in the record, which the following grounds are.

A. HERA's Succession Clause, which provides that the Conservator succeeds to "all rights" of the Enterprises and their stockholders (including Plaintiffs), independently bars Plaintiffs' Claims. Courts universally hold that

HERA's Succession Clause bars stockholder derivative claims while the Enterprises are in conservatorship. In the amended complaint, Plaintiffs characterize their claims as being brought "derivatively on behalf of and for the benefit of" the Enterprises. HERA thus bars those claims. To the extent Plaintiffs urge this Court to create a "conflict of interest" exception to this bar, this Court should join the courts that have uniformly rejected that invitation. In all events, issue preclusion bars Plaintiffs from relitigating that issue, which has already been resolved against Enterprise stockholders in other derivative cases.

B. Plaintiffs fail to state a claim for violation of the Delaware and Virginia statutes pertaining to preferred stock. Federal law—not state law—applies and authorizes the Third Amendment. Moreover, even if state law did apply, the broad and enabling state statutes upon which Plaintiffs rely merely require that the preferred stock preference be expressly stated in the certificate of designation (or stock certificate). That requirement is easily met here, and thus Plaintiffs fail to state a claim.

III. The district court acted well within its broad discretion to deny as moot Plaintiffs' motion for judicial notice or to strike. Defendants' motions to dismiss did not dispute any factual allegations in the complaint and, in all events, the district court expressly and accurately stated that it did not rely upon any portion of those motions that allegedly disputed facts. The district court also did

not abuse its discretion by refusing to take judicial notice of the extraneous documents submitted by Plaintiffs, which purportedly evidence the alleged motives behind the Third Amendment. As every court that has considered this issue has recognized, allegations of motive are irrelevant to the Section 4617(f) analysis.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of a motion to dismiss. *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 632 (3d Cir. 2017). This Court reviews the district court's denial of Plaintiffs' motion for judicial notice or to strike for abuse of discretion. *See Meditz v. City of Newark*, 658 F.3d 364, 367 n.1 (3d Cir. 2011); *In re NAHC, Inc. Sec. Litig.,* 306 F.3d 1314, 1323 (3d Cir. 2002).

ARGUMENT

I. SECTION 4617(f) BARS PLAINTIFFS' CLAIMS

The district court correctly dismissed Plaintiffs' claims as barred by 12 U.S.C. § 4617(f). Plaintiffs' claims seek far-reaching declaratory and equitable relief, including rescission of the Third Amendment and restitution of billions of dollars in dividends paid to Treasury thereunder. JA76-78. There is no dispute that this relief, if granted, would restrain or affect the exercise of the Conservator's powers and functions. Because the Conservator's decision to execute the Third

Amendment falls squarely within its express responsibilities and broad statutory powers and functions, Section 4617(f) bars Plaintiffs' claims.

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

To enable the Conservator to carry out its functions, Congress insulated the Conservator's actions from judicial intervention, mandating that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator." 12 U.S.C. § 4617(f). As the D.C. Circuit explained in affirming the dismissal of other Third Amendment claims, the "plain statutory text draws a sharp line in the sand against litigative interference—through judicial injunctions, declaratory judgments, or other equitable relief—with FHFA's statutorily permitted actions as conservator." *Perry Capital*, 864 F.3d at 606.

The language of Section 4617(f) "is not new." *Robinson*, 876 F.3d at 227. It is materially identical to 12 U.S.C. § 1821(j), the provision governing Federal Deposit Insurance Corporation ("FDIC") conservatorships and receiverships. *Id.* This Court and others have interpreted 12 U.S.C. § 1821(j) to bar claims seeking injunctive or other equitable relief against conservators or receivers. In *Hindes*, this Court recognized that the statutory language is intended "to permit the FDIC to perform its duties as conservator or receiver promptly and effectively without judicial interference." *Hindes v. FDIC*, 137 F.3d 148, 160 (3d Cir. 1998). Like

Section 4617(f), Section 1821(j) "effect[s] a sweeping ouster of courts' power to grant equitable remedies," *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995), and applies "regardless of [the plaintiff]'s likelihood of success on the underlying claims." *281-300 Joint Venture v. Onion*, 938 F.2d 35, 39 (5th Cir. 1991).

The analysis to determine whether Section 4617(f) precludes judicial review is straightforward and "quite narrow." *Bank of Am. Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010) (discussing 12 U.S.C. § 1821(j)). "[A]s long as the [conservator] is exercis[ing] judgment under one of its enumerated powers such as running the affairs of a troubled financial institution . . . the courts may not enjoin the [conservator's] activities." *Ward v. Resolution Tr. Corp.*, 996 F.2d 99, 103 (5th Cir. 1993) (quotation marks omitted). As this Court has recognized, if the Conservator is "colorably acting within its enumerated powers," the statutory bar applies. *Gross v. Bell Sav. Bank PaSA*, 974 F.2d 403, 408 (3d Cir. 1992) (applying Section 1821(j). Indeed, injunctive relief is available only if the Conservator acts "*clearly outside* its statutory powers." *Id.* at 407 (emphasis added); *see also Cty. of Sonoma v. FHFA*, 710 F.3d 987, 992 (9th Cir. 2013) ("If the [challenged action] falls within FHFA's conservator powers, it is insulated from review and th[e] case must be dismissed."); *Town of Babylon v. FHFA*, 699 F.3d 221, 228 (2d Cir. 2012) ("A conclusion that the challenged acts were directed to an institution in

conservatorship and within the powers given to the conservator ends the [Section 4617(f)] inquiry.").

Thus, the dispositive question under Section 4617(f) is whether the Third Amendment fits within FHFA's statutory powers as conservator. As numerous courts have held, it does.

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

HERA "endows FHFA with extraordinarily broad flexibility to carry out its role as conservator." *Perry Capital*, 864 F.3d at 606. HERA grants the Conservator "broad powers to operate Fannie and Freddie," to "assume complete control" over the Enterprises in conservatorship, and to exercise "exclusive authority over [their] business operations." *FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1058, 1060 (N.D. Ill. 2013); *see also Roberts*, 243 F. Supp. 3d at 955 (recognizing conservator powers are "expansive"). FHFA's statutory powers are at least as sweeping as those given to FDIC conservators and receivers under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), which courts have also described as "extraordinary," *MBIA Ins. Corp. v. FDIC*, 708 F.3d 234, 236 (D.C. Cir. 2013), and "exceptionally broad," *In re Landmark Land Co. of Okla., Inc.*, 973 F.2d 283, 288 (4th Cir. 1992).

Here, as the district court correctly recognized, the Conservator's execution of the Third Amendment fell squarely within the Conservator's broad statutory

powers and functions: the Conservator exercised its power to "take over the assets of and operate the [Enterprises]," "carry on [their] business," "perform all functions" of the Enterprises, "contract" on their behalf, and "conduct all business of the [Enterprises]"—all in the manner the Conservator "determines is in the best interests of the [Enterprises] or the Agency [FHFA]." 12 U.S.C. § 4617(b)(2)(B)(i), (iii), (v), (D)(ii), (J)(ii). Indeed, HERA specifically authorized the PSPAs, which were later amended by the Third Amendment, authorizing the Enterprises (and thus the Conservator) to issue stock to Treasury based on their "mutual agreement." *Id*. §§ 1455(*l*)(1)(A), 1719(g)(1)(A).

At their core, the PSPAs are funding agreements that provide the Enterprises with a capital backstop of hundreds of billions of dollars. Just as securing funding is a quintessential act for the conservator of a financial institution—a proposition Plaintiffs do not dispute—so too is agreeing to amend the PSPAs in a manner the Conservator determines is in the best interests of the Enterprises or FHFA. *See id*. § 4617(b)(2)(J)(ii).

Further, HERA specifically authorizes the Conservator to "transfer or sell any asset" of the Enterprises "without any approval, assignment, or consent," *id*. § 4617(b)(2)(G), and Plaintiffs themselves characterize the Third Amendment as a "transfer" of Enterprise assets (at Br. 11, 21, 52). *See United Liberty Life Ins. Co.*

v. Ryan, 985 F.2d 1320, 1323-29 (6th Cir. 1993) (Section 1821(j) barred rescission of receiver transaction "transferr[ing] substantially all" institution assets.).

To date, *every* court that has considered the issue—including the D.C. Circuit and Sixth Circuit—has held that the Conservator acted within its statutory authority in executing the Third Amendment: "FHFA's execution of the Third Amendment falls squarely within its statutory authority to '[o]perate the [Companies,]' 12 U.S.C. § 4617(b)(2)(B); to 'reorganiz[e]' their affairs, *id.* § 4617(a)(2); and to 'take such action as may be . . . appropriate to carry on the[ir] business,' *id.* § 4617(b)(2)(D)(ii)." *Perry Capital*, 864 F.3d at 607 (alterations in original); *Robinson*, 876 F.3d at 231 ("FHFA's agreement to the Third Amendment is well within its statutory conservator authority."). "Renegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital are quintessential conservatorship tasks designed to keep the Companies operational." *Perry Capital*, 864 F.3d at 607. Accordingly, "HERA does not bar FHFA's decision as conservator to restructure the Companies' dividend payments to Treasury." *Robinson*, 876 F.3d at 231; *see also supra* at 1 (collecting additional cases).

The district court correctly followed these decisions in holding that the Third Amendment "falls squarely within the powers granted to the Agency under HERA, because renegotiating dividend agreements, managing debt obligations, and

ensuring ongoing access to capital are some of the quintessential tasks of reorganizing, operating, and preserving a business." JA12. Accordingly, the district court rightly held that Section 4617(f) bars Plaintiffs' claims seeking to undo the exercise of those powers through, *inter alia*, rescission and restitution.

C. Plaintiffs' Attempts to Circumvent Section 4617(f) Are Meritless

1. Allegations of State-Law Violations Cannot Overcome Section 4617(f)

Plaintiffs' primary argument is that Section 4617(f) does not apply because the Third Amendment is allegedly contrary to state law. Plaintiffs contend that the Enterprises themselves would not have been permitted to execute the Third Amendment because it allegedly violates state corporate law. Plaintiffs argue that, because HERA's Succession Clause provides that the Conservator succeeds to "all rights, titles, powers, and privileges" of the Enterprises (12 U.S.C. § 4617(b)(2)(A)), the Conservator is authorized "to take only those actions that the Companies themselves would have been authorized to take under Delaware and Virginia law." Br. 41. According to Plaintiffs, the Conservator "may not cause the companies to do what the Companies and their directors have no underlying corporate power to do." Br. 18; *see also id*. at 23-24, 27, 33-34, 39, 41.

As the district court correctly found, Plaintiffs' argument is "unpersuasive for many reasons." JA13. Before addressing Plaintiffs' argument, it is important to note that, as set forth below, the state law limitations on dividends relied on by

Plaintiffs do not apply to the Enterprises and, even if they did, the Third Amendment does not violate them. *See infra* § II(B)(1).

More fundamentally, Plaintiffs' argument that Section 4617(f) does not apply to their claims is flatly contrary to this Court's precedent. This Court repeatedly has held—when interpreting FIRREA's materially-identical statutory bar (12 U.S.C. § 1821(j))—that a conservator or receiver's powers is defined exclusively by its governing statute (*i.e.*, FIRREA or HERA), and is not limited by other laws that may have been applicable to the entity in conservatorship or receivership. So long as a conservator or receiver is carrying out one of its FIRREA- or HERA-defined powers, courts are prohibited from enjoining that conduct, regardless of whether the conservator or receiver is alleged to have violated *other* state or federal law in the process. As set forth above, every court to have addressed the issue has held that the Third Amendment is within the conservator's HERA-based powers.

In *Rosa v. Resolution Trust Corp.*, 938 F.2d 383 (3d Cir. 1991), the RTC as conservator and receiver terminated a bank's retirement plan, and the plan beneficiaries filed suit against the RTC, alleging the termination violated ERISA and seeking an injunction to halt the termination. As here, the plaintiffs in *Rosa* argued that "while RTC as conservator and receiver is authorized to run the affairs of a troubled institution . . . it is only authorized to run them in a legal manner."

Id. at 397. The plaintiffs argued that "illegal" conduct "was not among the 'powers or functions of the Corporation as a conservator or a receiver.'" *Id*. This Court squarely rejected this argument, "find[ing] no such limitation in the language of § 1821(j)." *Id.* The Court instead held that the powers of the conservator and receiver are "defined by" their governing statute (FIRREA, in that case), without any exception or limitation for compliance with other laws. *Id*. at 398. Thus, regardless of "the alleged wrongfulness of RTC's conduct," as to which this Court "naturally express[ed] no opinion," Section 1821(j) barred plaintiffs' claims so long as the challenged actions fit within the RTC's "quite broad" statutory powers as conservator and receiver. *Id*. at 398, 400.

This Court subsequently reaffirmed *Rosa*, emphasizing that "where the [conservator or receiver] performs functions assigned it under the statute, injunctive relief will be denied *even where [it] acts in violation of other statutory schemes*." *Gross*, 974 F.2d at 407 (emphasis added).[6]

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[6] Other circuits are in accord. *See, e.g.*, *In re Landmark Land Co. of Carolina*, No. 96-1404, 1997 WL 159479, at *4 (4th Cir. Apr. 7, 1997) ("The mere fact that an action of the FDIC [as conservator or receiver] may violate state contract law . . . does not entitle a federal court to enjoin the FDIC . . . ."); *RPM Invs., Inc. v. RTC*, 75 F.3d 618, 621 (11th Cir. 1996) ("Even claims seeking to enjoin the RTC from taking allegedly unlawful actions are subject to the jurisdictional bar of 1821(j)."); *Volges v. RTC*, 32 F.3d 50, 52 (2d Cir. 1994) ("The fact that the [conservator's or receiver's conduct] might violate [plaintiff]'s state law contract rights does not alter the calculus."); *Ward v. RTC*, 996 F.2d 99, 103 (5th Cir. 1993) (observing the plaintiff "fails (or refuses) to recognize the difference between the

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In this case, the district court correctly observed that "[t]he powers of the Agency, as conservator, are 'defined by' its governing statute, HERA, without any exception or limitation for compliance with other laws." JA10 (quoting *Rosa*, 938 F.2d at 398). The district court thus correctly rejected Plaintiffs' argument as being "contrary to well-established case law that equitable relief will be denied, 'even where the [conservator] acts in violation of other statutory schemes.' If a conservator exceeded its statutory powers when it violated state law, then claims based on violations of other statutory schemes would not have been barred by Section 1821(j) or Section 4617(f)." JA13 (quoting *Gross*, 974 F.3d at 407 and citing *Rosa*, 938 F.2d at 397). The district court also correctly recognized that the contrary argument would "render[] 4617(f) superfluous." JA13; *see also Rosa*, 938 F.2d at 397 (observing that a limitation on Section 1821(j) for compliance with other laws "would undermine the purpose of the statute, namely, to permit [the] conservator or receiver to function without judicial interference"); *Volges*, 32 F.3d at 52-53 ("If every party to an executory contract entered into by the [conservator

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exercise of a function or power that is clearly outside the statutory authority of the RTC on the one hand, and improperly or even unlawfully exercising a function or power that is clearly authorized by statute on the other"); *Nat'l Tr. for Historic Pres. v. FDIC,* 995 F.2d 238, 240 (D.C. Cir. 1993) ("We do not think it possible, in light of the strong language of § 1821(j), to interpret the FDIC's 'powers' and 'authorities' to include the limitation that those powers be subject to—and hence enjoinable for non-compliance with—any and all other federal laws.").

or receiver] could obtain injunctive relief to prevent an alleged breach, the anti-injunction mandate would be severely restricted, if not meaningless.”).

Plaintiffs’ attempts to overcome *Rosa* and *Gross* are unavailing. Plaintiffs contend that these decisions involved mere “illegal” conduct (violations of ERISA) while the present case involves “statutorily unauthorized actions.” Br. 25. This argument fails because it *equates* “statutorily unauthorized actions” with “illegal” actions under state law. That is, Plaintiffs argue that the Conservator was not statutorily authorized to execute the Third Amendment *because* it allegedly would have violated Delaware and Virginia statutes for the Enterprises to do the same thing. But a conservator or receiver’s statutory authority is “defined by” FIRREA (or HERA in this case) alone, and allegations that the challenged conduct may violate “other statutory schemes” is irrelevant to the analysis. *See Rosa*, 938 F.2d at 398; *Gross*, 974 F.2d at 407-08. Just as an alleged violation of ERISA does not remove the protections of Section 1821(j) (in *Rosa*), an alleged violation of Delaware and Virginia statutes does not remove the protections of Section 4617(f).

Plaintiffs also argue that state laws that “regulate the internal governance of corporate entities,” including the “fiduciary relationship” between management and stockholders, are outside Section 4617(f) because the Enterprises, pre-conservatorship, elected to follow such state laws. Br. 28. That is incorrect. Plaintiffs cite no authority for this purported exception to Section 4617(f) because

there is none. Indeed, courts consistently apply Section 4617(f) and Section 1821(j) to bar state law claims seeking injunctive relief for alleged breaches of fiduciary duty. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 228-29 (D.D.C. 2014) (holding Section 4617(f) bars fiduciary duty claims seeking to vacate Third Amendment), *aff'd* 864 F.3d 591; *Cont'l W.*, 83 F. Supp. 3d at 840 n.6 (same). Moreover, in *Rosa*, the entity in conservatorship was bound to comply with ERISA—just as Plaintiffs contend that the Enterprises are bound to comply with state law. But that did not change the outcome because alleged violations of other laws are insufficient to overcome Section 1821(j) or Section 4617(f).

Additionally, Plaintiffs' attempt to read the Succession Clause as a limitation on Section 4617(f) is flatly contrary to the purpose of HERA, which was to "endow[] FHFA with *extraordinarily broad flexibility* to carry out its role as conservator." *Perry Capital*, 864 F.3d at 606 (emphasis added); *see also* JA13 ("Congress' intent [was] to broadly empower the Agency to act in times of extraordinary financial crisis."). Plaintiffs tellingly cite no authority to support their argument that the Succession Clause limits the scope of Section 4617(f). Notably, a materially identical Succession Clause appears in FIRREA, 12 U.S.C. § 1821(d)(2)(A)(i), yet this Court held in *Rosa* and *Gross* that the anti-injunction language of Section 1821(j) still applies, even where there are allegations that the

conservator violated laws that otherwise applied to the entity in conservatorship. *See Rosa*, 938 F.2d at 398-400; *Gross*, 974 F.2d at 407.

Finally, the cases cited by Plaintiffs are, as the district court recognized, "easily distinguishable." JA14. The Supreme Court's decision in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) (cited at Br. 34-37) merely "addressed whether 'federal common law' preempted state common law when the FDIC asserted state tort claims, in its capacity as a receiver." JA14. It did not address Section 1821(j) at all, let alone whether it applies in the face of allegations that a conservator or receiver violated state law.[7] Likewise, "neither *Fleischer* [*v. FDIC*, 70 F. Supp. 2d 1238 (D. Kan. 1999)] nor *Ridder* [*v. CityFed Fin. Corp.*, 47 F.3d 85 (3d Cir. 1995)] mention FIRREA [or HERA] . . . let alone address whether FIRREA's grant of authority to the FDIC incorporated state law restrictions on the bank's powers." JA14.

2. Alleged Repudiation of Contracts Cannot Overcome Section 4617(f)

Plaintiffs next argue that Section 4617(f) does not apply because the Conservator, by executing the Third Amendment, allegedly repudiated a contract

[7] Plaintiffs also cite *City of Arlington v. FCC*, 569 U.S. 290 (Br. 26), but that decision does not address HERA or FIRREA, or even conservators or receivers. Further, the Court held that courts should *defer* to agencies' interpretation of statutory ambiguity about the scope of their authority. *Id.* at 301-05. Thus, if applicable at all, *City of Arlington* favors deference to FHFA's assessment of the scope of its own powers.

between Plaintiffs and the Enterprises without compensating Plaintiffs for it under 12 U.S.C. § 4617(d). Br. 43-47. Indeed, throughout their brief, Plaintiffs invoke contract principles in an attempt to avoid Section 4617(f). *See id.* at 20, 29, 34-38, 43-48. These efforts fail for multiple reasons, and the district court rightly rejected Plaintiffs' repudiation argument. JA14-16.

First, Plaintiffs' repudiation argument would have to depend on breach of contract claim, but no such claim appears in their operative complaint.

Claims for improper repudiation are, in substance, claims for breach of contract. Under HERA (and FIRREA), conservators and receivers are authorized to "disaffirm or repudiate" contracts to which the company was a party that the conservator or receiver determines to be "burdensome." 12 U.S.C. § 4617(d)(1). For such repudiation, the conservator or receiver may be held liable for "actual direct compensatory damages," but generally not any other damages. *Id.* § 4617(d)(2)-(3). As such, this Court and others have recognized that "repudiation gives rise to an ordinary claim for breach of contract." *McCarron v. FDIC*, 111 F.3d 1089, 1095 (3d Cir. 1997) (addressing FIRREA); *see also*, *e.g.*, *Piszel v. United States*, 833 F.3d 1366, 1377 (Fed. Cir. 2016) ("That [repudiation] section [of HERA] plainly preserves a breach of contract claim . . . '").

However, as the district court recognized, "Plaintiffs are not asserting a breach of contract claim." JA14. Plaintiffs assert only two counts for alleged

violations of Delaware and Virginia statutes pertaining to preferred stock (JA71-74), and two claims for unjust enrichment against Treasury (JA74-76), which Plaintiffs state are "predicated on" the same alleged violations of state statutory law as in Counts I and II, and thus "rise and fall with [] these statutory claims." Doc # 48 at 4, 7. Accordingly, the district court correctly rejected Plaintiffs' request "to equate a violation of a state statute [Counts I and II] with the act of repudiating a contract." JA15.

In fact, Plaintiffs' decision to not plead a breach of contract claim was intentional and strategic. In their original complaint, Plaintiffs *did* assert claims for breach of contract, along with their state statutory and unjust enrichment claims. *See* Complaint ¶¶ 107-152 (Doc. # 1). However, when Defendants moved the JPML to consolidate this and many other Third Amendment challenges, Plaintiffs strategically dropped those contract claims in order to "streamline this litigation . . . in favor of the primary issue raised by the Complaint"—namely, the alleged state statutory violations. Doc. # 48 at 7; *see supra* at 13-14. Plaintiffs may not now revive their long-ago abandoned breach of contract claims under the thin guise of a contractual repudiation argument.

Second, even if the Court were to characterize Plaintiffs' state law claims as constituting repudiation, those claims would not overcome Section 4617(f). It is well-established that breach of contract claims are subject to Section 4617(f). *See*

supra at 32 and n.6 (collecting cases). Moreover, as the district court recognized, consistent with other decisions, "a conservator does not exceed its statutory authority by failing to comply with the 18 month timing requirement" for repudiating contracts. JA16 (citing *MBIA Ins. Corp. v. FDIC*, 708 F.3d 234, 247 (D.C. Cir. 2013)) and *Bender v. CenTrust Mortg. Corp*., 833 F. Supp. 1540, 1542-43 (S.D. Fla. 1992) *aff'd*, 51 F.3d 1027 (11th Cir. 1995). Accordingly, this Court should affirm the district court's conclusion that "even if the Third Amendment violated state law and that violation should be treated like a repudiation of a contract, the Agency did not exceed its statutory powers in failing to repudiate the contract in a timely manner." JA16

Plaintiffs also cite two Ninth Circuit decisions—*Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997), and *Bank of Manhattan v. FDIC*, 778 F.3d 1133 (9th Cir. 2015). Br. 24, 35-38, 45-46. But those decisions are both inapplicable and wrongly decided. Most significantly, both addressed breach of contract claims that had actually been pleaded, unlike here. *See Meritage Homes v. FDIC*, 753 F.3d 819, 825 (9th Cir. 2014) ("*Sharpe* is not controlling outside of its limited context."). Further, *Bank of Manhattan* did not address Section 1821(j) at all; it held only that FIRREA does not "immunize the FDIC [as receiver] from *damage claims* if it elects to breach pre-receivership contractual arrangements." 778 F.3d at 1134 (emphasis added). While *Sharpe* declined to apply Section 1821(j) to a

claim for alleged breach of a *pre-receivership contract*, that ruling *conflicts* with this Court's decisions in *Rosa* and *Gross* (and the decisions of several other circuits), which hold that the statutory bar applies even where the conservator or receiver is alleged to have acted unlawfully. *See supra* 26-27 and n.6; *see also LNV Corp. v. Outsource Servs. Mgmt., LLC*, 869 F.3d 662, 668 (8th Cir. 2017) (finding *Sharpe* "unpersuasive"); *Mile High Banks v. FDIC*, No. 11-cv-01417, 2011 WL 2174004, at *3 (D. Colo. June 2, 2011) (finding *Sharpe* "not . . . persuasive" and citing *Gross*).

3. Plaintiffs' Miscellaneous Other Arguments Against Section 4617(f) Fail

The district court rightly rejected Plaintiffs' "hodgepodge of weaker arguments as to how the Agency exceeded its statutory powers under HERA." JA16. Plaintiffs do no better in reasserting these arguments on appeal. Indeed, a consistent theme among these various arguments is how unmoored they are from Plaintiffs' actual allegations and narrow claims for relief.

First, Plaintiffs argue that the Third Amendment violates "HERA's provisions governing the order of priorities for distribution of assets upon liquidation." Br. 48 (citing 12 U.S.C. § 4617(b)(3)-(9), (c)). The district court correctly rejected this argument because the Enterprises "are not in liquidation, so those provisions do not apply." JA16. Further, allegations that a conservator purportedly violated the statutory order of priority in liquidation are still

insufficient to overcome Section 4617(f). *See Courtney v. Halleran*, 485 F.3d 942, 948-50 (7th Cir. 2007) (applying Section 1821(j)). On appeal, Plaintiffs respond by citing *Perry Capital* (Br. 48), but there the D.C. Circuit held that Section 4617(f) bars *all claims* attempting to vacate the Third Amendment. 864 F.3d. at 606-15. While the D.C. Circuit held that certain *contract* claims seeking *money damages* for alleged loss of liquidation preference may be ripe, *id*. at 632-33, that ruling has no bearing here because Plaintiffs assert no such claims.

Second, Plaintiffs argue that the Third Amendment was a "waste of the Companies' assets" and was executed to further "Treasury's interest, and not the Companies' interest." Br. 49. But as numerous courts have agreed, allegations that the Third Amendment was unwise, ineffective, or improperly motivated are insufficient to overcome Section 4617(f). *See, e.g.*, *Robinson*, 876 F.3d at 231 ("[Plaintiff] may disagree about the necessity or financial wisdom of the Third Amendment," but "FHFA's agreement to the Third Amendment is well within its statutory conservator authority); *Perry Capital*, 864 F.3d at 612 ("allegations of motive are neither here nor there" in applying Section 4617(f)); *Cont'l W.*, 83 F. Supp. 3d at 840 n.6 ("[I]t is not the role of this Court to wade into the merits or motives of FHFA and Treasury's actions . . .").

Third, Plaintiffs argue that HERA requires the Conservator to "preserve and conserve" Enterprise assets, and the Third Amendment allegedly violates this

purported mandate. Br. 50-53. But, as the district court held, "these are permissive powers under HERA, not obligatory," JA17, and numerous other courts are in accord. *See, e.g.*, *Robinson*, 876 F.3d at 230; *Perry Capital*, 864 F.3d at 606-607; *Roberts*, 243 F. Supp. 3d at 962; *Saxton*, 245 F. Supp. 3d at 1076. Plaintiffs also argue that the Conservator allegedly failed to "maximize[] the net present value return" of Enterprise assets (Br. 49), but the district court correctly followed the Fifth Circuit's decision in *Ward*, which rejected this identical argument. JA17. Finally, contrary to Plaintiffs' suggestions (at Br. 50-51), "what FHFA has publicly stated about its role as the Companies' conservator or the Third Amendment" is irrelevant to the analysis. *Robinson*, 876 F.3d at 229 n.7.[8]

D. Plaintiffs Waived Their Request for Money Damages

Plaintiffs also contend—for the first time on appeal—that their claims were improperly dismissed because the "Amended Complaint . . . seeks damages and monetary restitution," to which Plaintiffs assert Section 4617(f) does not apply. Br. 41-42. Plaintiffs never argued below that any of their claims should survive dismissal for this reason. In opposing dismissal, Plaintiffs did not bring to the district court's attention that their amended complaint included a request for money damages. Nevertheless, Plaintiffs now criticize the district court for "ignor[ing]" their damages claim and seek remand to require the district court to "consider

[8] The FHFA Defendants incorporate by reference Treasury's argument that Section 4617(f) applies to the claims against Treasury. Treasury Br. § I(C).

[their] neglected claim." *Id*. at 43. By failing to present this argument to the district court at all—despite numerous opportunities—Plaintiffs waived it.

Under this Court's precedent, in order for an issue to be preserved for appeal, a party "must unequivocally put its position before the trial court at a point and in a manner that permits the court to consider its merits." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 262 (3d Cir. 2009) (quotation marks omitted); *see also C.A.C. v. United States*, 449 F. App'x 194, 198 (3d Cir. 2011) (failure to sufficiently raise argument that district court had subject matter jurisdiction in response to motion to dismiss waived argument in favor of jurisdiction on appeal). Issues that are not presented below "are deemed to be waived and may not be heard on appeal." *Simpson v. Nicklas*, 500 F. App'x 185, 187 (3d Cir. 2012).

Here, Plaintiffs argue that, while the district court cited the portions of the amended complaint that sought equitable and injunctive relief, the court should have looked to the "neighboring paragraphs" to locate the request for money damages. Br. 42. But "the crucial question regarding waiver is whether [the litigant] presented [its] argument with sufficient specificity to alert the district court," *Keenan v. City of Philadelphia*, 983 F.2d 459, 471 (3d Cir. 1992), not whether the basis for an argument that was never made may have been buried in a pleading. Under this standard, "fleeting reference[s] . . . to an issue," including in a litigant's complaint, "will not suffice to preserve it for appeal." *C.A.C.*, 449 F.

App'x at 198 (quotation marks omitted). Thus, even though the complaint mentioned compensatory damages as against FHFA in the Prayer for Relief, Plaintiffs waived that request by never arguing that claims for damages escape the bar of Section 4617(f). *See Cty. of McHenry v. Ins. Co. of the West*, 438 F.3d 813, 817 (7th Cir. 2006) (allegations in complaint were insufficient to preserve for appeal argument that "was not presented in response to a motion to dismiss").

Plaintiffs also argue that the district court ignored their "claims for monetary relief based on principles of restitution." Br. 42. Not so. In fact, before the district court, Plaintiffs specifically argued that their request for restitution was *not* a request for money damages, but rather a request for disgorgement of "monies that never should have been distributed to Treasury" under the Third Amendment. Doc. # 69 at 30; *see also id*. at 30 (describing restitution as request for relief "other than money damages"). This argument was consistent with the FAC's Prayer for Relief, in which Plaintiffs sought, *inter alia*, "equitable and injunctive relief . . . *including* rescission of the Net Worth Sweep *and restitution* of the monies paid by the Companies to Treasury pursuant thereto." JA77 (emphasis added). Thus, Plaintiffs explicitly pled that their claim for restitution was subsumed within and part of their claim s for equitable and injunctive relief. Plaintiffs never argued that their request for restitution was akin to a request for money damages—in fact, they pled and argued the opposite. Nor did Plaintiffs ever argue that their request for

restitution, however characterized, was outside the reach of Section 4617(f). Plaintiffs thus waived the issue.

Moreover, even if the district court had "ignored" claims for relief that Plaintiffs presented below, Plaintiffs—as a practical matter—could and should have sought relief from the district court directly by moving for reconsideration. *See, e.g., Boretsky v. Governor*, 433 F. App'x 73, 78 (3d Cir. 2011) (motions for reconsideration appropriate to "identify pertinent law or facts that the District Court overlooked"). Plaintiffs failed to do so here.

In all events, even if Plaintiffs had properly preserved their claims for money damages, those claims still would fail for myriad reasons, as explained below.

II. THE COURT CAN AFFIRM ON MULTIPLE ALTERNATIVE BASES NOT REACHED BY THE DISTRICT COURT

Because it correctly held that Section 4617(f) barred all of Plaintiffs' claims, the district court did not reach multiple additional arguments in favor of dismissal that Defendants presented below. Nevertheless, this Court could also affirm on any of the following, purely legal alternative grounds. *See CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 622 n.6 (3d Cir. 2013).

A. HERA's Succession Clause Bars Plaintiffs' Claims

Courts uniformly hold that HERA's Succession Provision bars stockholders from asserting derivative claims during the conservatorships. *See Perry Capital*, 864 F.3d at 623-25; *La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188,

191 (4th Cir. 2011). Pursuant to that provision, upon its appointment, the Conservator "immediately succeed[ed] to . . . all rights, titles, powers, and privileges of the [Enterprises], and of any stockholder, officer, or director of [the Enterprises] with respect to the [Enterprises] and the assets of the [Enterprises]." 12 U.S.C. § 4617(b)(2)(A). This broad, unequivocal language evidences Congress's intent to ensure "that nothing was missed" and to "transfer[] everything it could to the [Conservator]." *Kellmer v. Raines*, 674 F.3d 848, 851 (D.C. Cir. 2012) (quotation marks omitted). Accordingly, "[t]he shareholders' rights are now the FHFA's." *Esther Sadowsky Testamentary Tr. v. Syron*, 639 F. Supp. 2d 347, 351 (S.D.N.Y. 2009).

1. The Conservator Succeeds to "All" of Plaintiffs' Claims, Whether Considered Direct, Derivative, or Both

Plaintiffs bring this action "*derivatively* on behalf of and for the benefit of Fannie Mae [and Freddie Mac] to redress injuries suffered by Fannie Mae [and Freddie Mac]." JA69 (emphasis added). As explained in Treasury's brief, Plaintiffs' claims are indeed derivative—not direct—and the FHFA Defendants adopt and incorporate by reference Treasury's argument in this regard. *See* Treasury Brief § II(A). Plaintiffs' claims thus fall within the well-settled rule that HERA bars all shareholder derivative claims during conservatorship.

To be sure, Plaintiffs attempt to characterize their claims as "direct and derivative." JA71, JA73-75. However, Plaintiffs' characterization of their claims

as direct is not controlling, and is ultimately irrelevant because HERA's Succession Provision applies equally to all shareholder claims, including those "enforceable through a direct lawsuit, not a derivative lawsuit." *Pagliara v. Freddie Mac*, 203 F. Supp. 3d 678, 686-87, 692 (E.D. Va. 2016) (succession to shareholder right to inspect books and records). Under HERA, the Conservator succeeded to "all" shareholder rights, 12 U.S.C. § 4617(b)(2)(A)(i), and when interpreting HERA, "all" means "all." *See Delaware Cty. v. FHFA*, 747 F.3d 215, 223 (3d Cir. 2014) (interpreting HERA's "phrase 'all taxation' to mean precisely what it says"); *Hennepin Cty. v. Fed. Nat. Mortg. Ass'n*, 742 F.3d 818, 822 (8th Cir. 2014) ("'all' means all"); *Pagliara*, 203 F. Supp. 3d at 686 (Succession Clause "is extremely broad" and "means what it plainly says").[9]

2. HERA Contains No Conflict of Interest Exception

In the court below, Plaintiffs argued that their claims can survive HERA's Succession Clause based upon a so-called "conflict of interest" exception. As

[9] FHFA respectfully disagrees with the conclusion in *Perry Capital* that HERA's Succession Clause does not cover direct claims. *See* 864 F.3d at 624-25. Though the D.C. Circuit stated that shareholders' rights "'with respect to' [the regulated entity] and its assets are only those an investor asserts derivatively on the Company's behalf," *id*. at 624, this reading "strain[s] any reasonable interpretation" of HERA, because Plaintiffs' claims are unquestionably related to the Enterprises and their assets. *Pagliara*, 203 F. Supp. 3d at 688; *see also Levin v. Miller*, 763 F.3d 667, 673 (7th Cir. 2014) (Hamilton, J., concurring) (observing analogous FIRREA language "could be interpreted, for sound policy reasons, more broadly to include a stockholder's *direct* claims").

Treasury explains in its brief, and the FHFA Defendants hereby adopt and incorporate by reference, issue preclusion bars Plaintiffs from advancing this argument. *See* Treasury Brief § II(B).

In all events, there is no "conflict of interest" exception. Every court to have addressed this issue under HERA has rejected any such judicially created exception as "contrary" to "the plain statutory text." *Perry Capital*, 864 F.3d at 625; *see also Edwards*, 2017 WL 1291994, at *7 ("Looking at the plain wording of HERA's succession clause, there is no exception to the bar on derivative suits."); *Saxton*, 245 F. Supp. 3d at 1079; *Pagliara*, 203 F. Supp. 3d at 691 n.20.

In the court below, Plaintiffs cited the only two decisions that have applied a conflict-of-interest exception to FIRREA's succession provision. *See First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1295-96 (Fed. Cir. 1999); *Delta Savs. Bank v. United States*, 265 F.3d 1017, 1021-24 (9th Cir. 2001)). Those decisions are outliers, and *Perry Capital* correctly rejected them as being poorly reasoned, "mak[ing] little sense," and contradicting FIRREA's (and HERA's) plain language. 864 F.3d at 625. Moreover, the limited holdings of *First Hartford* and *Delta*, both receivership cases, "make[] still less sense in the conservatorship context, where FHFA enjoys even greater power free from judicial intervention." *Perry Capital*, 70 F. Supp. 3d at 231 n.30.

B. Plaintiffs' State Statutory Claims Fail to State a Claim

In addition to being barred by multiple provisions of HERA, Plaintiffs' state statutory claims (Counts I and II) also fail to state a claim under Rule 12(b)(6), and can be dismissed on this basis as well. Federal law is the only law that applies, and the Third Amendment complies with it. In all events, the Third Amendment also complies with the state statutes upon which Plaintiffs rely.

1. Federal Law Applies and Permits the Third Amendment

The Enterprises are creatures of federal law—*not* state law. Congress itself issued the federal charters creating the Enterprises, and those charters do not incorporate any state law. *See* 12 U.S.C. § 1716 *et seq*.; *id*. § 1451 *et seq*. Further, the Enterprises' federal statutory charters expressly address the precise issues raised by Counts I and II: the issuance of stock and payment of dividends by the Enterprises. The charters authorize the Enterprises (and thus the Conservator) to: (1) issue preferred stock "on such terms and conditions as the board of directors shall prescribe," 12 U.S.C. § 1718(a); *id*. § 1455(f); and (2) make dividend payments to Enterprise stockholders in the manner "as may be declared by the board of directors." *Id*. § 1718(c)(1); *id*. § 1452(b)(1). Accordingly, the Enterprises' boards of directors (and thus the Conservator) have broad, unqualified authority under *federal* law to issue preferred stock and dividends in the manner

the Enterprises' boards (and the Conservator) see fit. This necessarily includes the Third Amendment and the resulting net worth dividend.

In their complaint, Plaintiffs point to a regulation, 12 C.F.R. § 1710.10, issued in 2002 by FHFA's predecessor agency, to argue that state law applies here. JA47; JA58. But that regulation provides first and foremost that the Enterprises "shall comply with [their] applicable chartering acts and other *Federal* law, rules, and regulations." 12 C.F.R. § 1710.10(a) (emphasis added); *see also* 12 C.F.R. § 1710.10(b) (state law applies only "[t]o the extent not *inconsistent* with" the Enterprises' charters and other federal law) (emphasis added). In other words, the regulation simply directs the Enterprises to follow state law *only* with respect to issues *not* already addressed in the Enterprises' federal charters, subject to agency oversight. *See* 67 Fed. Reg. 38361 (Jun. 4, 2002); *Edwards v. Deloitte & Touche, LLP*, No. 16-21221-CIV, 2017 WL 1291994, at *6 (S.D. Fla. Jan. 18, 2017) (recognizing that Fannie Mae follows Delaware law only "[f]or *issues not addressed* by the charter or federal law" and only "so long as that [state] law is not inconsistent with federal law") (emphasis added).[10] In promulgating the regulation, FHFA's predecessor agency specifically noted that one of the areas

[10] In the same manner, the Enterprises elected in their bylaws (pursuant to the 2002 regulation) to "follow" Delaware and Virginia law on corporate governance issues, but only "to the extent not inconsistent with the [federal] Charter Act and other Federal law, rules, and regulations." JA241 (Fannie Bylaws § 1.05); *see also* JA291 (Freddie Bylaws § 11.3).

already addressed in the Enterprises' federal charters was "common and preferred stock." *Id*. at 38362. Here, because the charters are not "silent" regarding the terms for issuance of stock and payment of dividends by the Enterprises—they address those topics directly—no state law applies.

Additionally, the Treasury stock certificates themselves were issued pursuant to federal law (12 U.S.C. § 1718(a); § 1455(f)), and state expressly that federal law governs those certificates. JA218 at § 10(e); JA227 at § 10(e). While the Treasury stock certificates also provide that state law "shall serve as the federal rule of decision"—that is, as a gap-filling measure—they also provide that state law does *not* apply "where such [state] law is inconsistent with the Company's enabling [federal] legislation, its public purposes *or any provision of this Certificate*." JA115 at § 10(e) (emphasis added). Thus, because the Treasury stock certificates provide for the dividend called for by the Third Amendment, no state law can negate that dividend pursuant to the stock's own terms.

If there were any conflict between federal and state law—and as discussed above there is not—Plaintiffs' claims would be preempted by federal law. Plaintiffs' interpretation of state law necessarily would limit the Enterprises' broad discretion in issuing preferred stock, and "impose[] . . . additional conditions' not contemplated by Congress," *Surrick v. Killion*, 449 F.3d 520, 530 (3d Cir. 2006) (quotation marks omitted), and thereby "frustrate the federal scheme," *Allis-*

Chalmers Corp v. Lueck, 471 U.S. 202, 209 (1985); *see also Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274, 283 (3d Cir. 2006) (state law that would have limited Federal Reserve Banks' "relatively unfettered employment discretion" preempted by federal law). Here, Congress provided the Enterprises with broad, unqualified discretion to issue preferred stock and dividends, thus preempting state statutes that would otherwise limit or impose conditions on that discretion. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("[S]tate law is nullified to the extent that it actually conflicts with federal law," such as "when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (quotation marks omitted).

2. Even If State Law Applied, the Third Amendment Complies With Delaware and Virginia Law

Even if Plaintiffs were correct that state law applies—and they are not—Plaintiffs' claims would fail because the variable net worth dividend instituted through the Third Amendment is valid under the Delaware General Corporation Law ("DGCL") and the Virginia Stock Corporation Act ("VSCA").

The DGCL and the VSCA are broad, enabling statutes that permit corporations to issue preferred stock with contractually-defined dividend rights. The DGCL is "widely regarded as the most flexible in the nation." *Jones Apparel Grp., Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 845 (Del. Ch. 2004). Indeed, DGCL § 151—the primary section on which Plaintiffs rely—is specifically

designed to enable corporations "to provide for the flexible financing that is necessary to meet the unique funding needs of [a particular] enterprise." *Matulich v. Aegis Commc'ns Grp., Inc.*, 942 A.2d 596, 599 (Del. 2008). This section provides the company with "a *blank slate* on which to fill in the rights of different classes" of stock, and "the drafter may parse those rights among multiple classes of stock as he or she sees fit." *Id.* at 599-600 (emphasis added). Section 151(c) thus provides "considerable latitude in creating classes of stock," and permits corporations to issue preferred stock that is "entitled to certain preferences over other stock." *Shintom Co. v. Audiovox Corp.*, 888 A.2d 225, 227-228 (Del. 2005). It "does not . . . require" any particular rate or "any particular form of preference." *Id*. at 230.

Section 151(c) simply states that, if a preferred stock provides for dividends, then the holders of that stock "shall be entitled to receive dividends at such rates . . . as shall be stated in" the corporate documents authorizing the issuance of the stock, such as the certificates of incorporation or applicable board resolutions. *See Shintom*, 888 A.2d at 229 (alterations omitted). Similarly, the VSCA provides flexibility and does not purport to exhaustively describe the possible preferences, rights, and limitations of classes of stock, so long as they are stated in the authorizing documents. Va. Code § 13.1-638(A), (F). The VSCA broadly provides that a corporation may authorize classes or series of shares that "[h]ave

preference over any other class or series of shares with respect to distributions. . . .” *Id.* § 13.1-638(C); *see also Kain v. Angle*, 69 S.E. 355, 357 (Va. 1910).

Here, Plaintiffs argue that the Treasury Stock Certificates, as amended by the Third Amendment, fail to comply with 8 Del. Code 151(c) and Va. Code § 13.1-638(C) because the net worth dividend is not set at a “rate” that is “payable in preference to” other classes of stock. Br. 30-33. But the Delaware Chancery Court has explained that “[c]hoosing to set dividend rates at zero is as much an act of setting rates as choosing a substantive rate.” *Shintom Co. v. Audiovox Corp.*, No. Civ.A. 693-N, 2005 WL 1138740, at *2 (Del. Ch. May 4, 2005), *aff’d*, 888 A.2d 225. Thus, Plaintiffs’ position boils down to the implausible thesis that a dividend rate of 100% (with a diminishing capital buffer) is prohibited by the DGCL while a dividend rate of 0% is permissible. Not surprisingly, Plaintiffs provide no support for this nonsensical proposition.

“The Delaware statutory scheme *does not . . . require any particular form of preference*. It allows private parties,”—*i.e.*, the Enterprises, through the Conservator, as the issuing corporations, and Treasury as the purchaser of the preferred stock—“to contract for preferences between themselves.” *Shintom*, 888 A.2d at 230 (emphasis added). The only requirement imposed by Section 151 is that the dividend rates be stated in the authorizing documents—here, the Treasury Stock Certificates. *See id.* at 229; *see also Elliott Assocs., L.P. v. Avatex Corp.*,

715 A.2d 843, 852 (Del. 1998) ("Any rights, preferences and limitations of preferred stock that distinguish that stock from common stock must be expressly and clearly stated, as provided by statute.") (citing 8 Del. Code § 151(a)). Likewise, Section 13.1-638 of the VSCA allows corporations to issue preferred shares that "[e]ntitle the holders" to dividends "*calculated in any manner*." *See* Va. Code § 13.1-638(C) (emphasis added). Indeed, the VSCA does not even include language that preferred stock dividends must be paid "at such rates," and only provides that corporations may issue shares that "[h]ave preference over any other class or series of shares with respect to distributions. . . . " Va. Code § 13.1-638(C).

The Third Amendment fully conforms to these statutes: the Treasury Stock Certificates, as amended, clearly state that Treasury's preferred stock ranks senior to all other outstanding classes of stock as to dividends, and that the net-worth dividend is calculated every quarter based on the Enterprises' quarterly performance. There is no requirement under Delaware or Virginia law that the rate used to calculate a dividend be a percentage (although 100% is both a percentage and a rate), and Plaintiffs' proposed interpretation to the contrary is unprecedented and reads into the DGCL and the VSCA restrictive requirements that are contrary to their broad, enabling statutory schemes. Moreover, section 151(a) of the DGCL provides that "[a]ny of the . . . preferences, [and] rights [of preferred shares] may

be made dependent upon facts ascertainable outside the certificate of incorporation or of any amendment thereto . . . . The term 'facts' . . . includes . . . the occurrence of any event, including a determination or action by any person or body, including the corporation." 8 Del. C. § 151(a); *see also* Va. Code § 13.1-638(D) ("Any of the terms of shares may be made dependent upon facts objectively ascertainable outside the articles of incorporation . . . ."). Thus, it is permissible for a preferred dividend rate to be tied to an interest rate that changes over time (such as LIBOR) or the performance of the corporation (such as its net income for the quarter).

Plaintiffs assert that the Third Amendment is impermissible because it may preclude the payment of dividends to junior shareholders like Plaintiffs. Br. 31. But "[t]his argument fails" because Plaintiffs' certificates simply do not "guarantee that more senior shareholders will not exhaust the funds available for distribution as dividends." *Perry Capital*, 848 F.3d at 1110. In fact, Plaintiffs' stock certificates expressly authorize the Enterprises to issue more senior stock, despite the resulting diminution in the existing shareholders' ability to receive dividends. *See, e.g.*, JA237 at § 9; JA448 at § 9. Plaintiffs have not identified any case recognizing a right of junior stockholders to dividends that warrants prohibiting payment of dividends to senior stockholders. Even *Johnson v. Johnson & Briggs, Inc.*, 122 S.E. 100, 103 (Va. 1924), cited by Plaintiffs (Br. 32), describes the possibility of "unlimited gain" for the common stockholder as merely a "hope."

Further, Plaintiffs' cases authorized payments to preferred shareholders by applying the plain language of agreements that advantaged preferred shareholders over common shareholders. *See id.*; *Drewry-Hughes Co. v. Throckmorton*, 92 S.E. 818, 819 (Va. 1917) (observing "[t]he character and privileges of the preferred stock are definitely fixed *by a sentence in the stock certificate* issued to the preferred stockholders."). That is unsurprising: Delaware and Virginia law authorize a corporation to issue stock in classes that have preference over other classes; neither state's laws *require* that the preference given be limited to ensure that junior stockholders receive a dividend. The Treasury stock certificates plainly comply with these state law provisions.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING PLAINTIFFS' MOTION FOR JUDICIAL NOTICE OR, IN THE ALTERNATIVE, TO STRIKE

After briefing closed on Defendants' motions to dismiss, Plaintiffs asked the district court to take judicial notice of various extraneous documents or, in the alternative, to strike certain portions of the motions to dismiss. Doc. # 75. It was clear that the primary purpose of Plaintiffs' motion was to put before the district court documents that were produced in other litigation (and not cited in the amended complaint), which Plaintiffs believed substantiated their allegations about the motives behind the Third Amendment. *See id*. at 7 (arguing the documents undermine the "purported justification" for the Third Amendment and show what

Defendants "intended"). But the district court already was required to—and, in fact, did—accept as true all of the complaint's well-pleaded factual allegations, making judicial notice improper. *See Whiting v. AARP*, 637 F.3d 355, 364-65 (D.C. Cir. 2011) (judicial notice improper where materials "merely contain[] facts alleged in the Complaint") (quotation marks omitted)). Plaintiffs' allegations, even when assumed true, made no difference to the district court's application of Section 4617(f), as discussed above.

This is because *why* Defendants executed the Third Amendment is irrelevant even under Plaintiffs' theory of the case. While Plaintiffs now contend that Defendants' motives behind the Third Amendment are "at the very heart of this dispute" (Br. 55) that is not what they told the JPML. Rather, Plaintiffs said their claims were based on the alleged "prima facie invalidity" of the Third Amendment and "require[] no discovery because it's a purely legal issue based on the language of the net worth sweep." *See supra* nn. 4-5. Plaintiffs had it right before the JPML: their claims are technical and based on particular state statutory requirements.

In all events, allegations of improper motive are irrelevant to the Section 4617(f) analysis, as discussed above. *See supra* 36-37. Indeed, every judge that has considered the issue—including even the dissenting judge in *Perry Capital*—agreed that motives are irrelevant. *See Perry Capital*, 864 F.3d at 644 ("It is

important to note at the outset the *motives* behind any actions taken by FHFA are irrelevant to this inquiry, as no portion of HERA's text invites such an analysis.") (J. Brown, dissenting).

Further, the premise of Plaintiffs' argument is wrong. Defendants' motions to dismiss did not make any "factual arguments" about the necessity of or motives behind the Third Amendment. Br. 55. On appeal, Plaintiffs do not cite any particular arguments they contend should have been stricken. Before the district court, Plaintiffs pointed only to two sentences from the background section of FHFA's motion to dismiss, which merely described the undisputed terms of the Third Amendment (a copy of which FHFA submitted for the Court's review (JA195-211)) and identified the Enterprises' annual historical profits as reported in their SEC filings. Doc # 68 at 9. These statements did not conflict with the complaint, nor did they assert any argument. As the district court itself stated, it "did not rely on these assertions or any facts related to these assertions in deciding the motion[s] to dismiss." JA19.

Plaintiffs argue that, notwithstanding the district court's statement to the contrary, it *did* "accept" a view of the facts that were contrary to the complaint. Plaintiffs point to an immaterial statement by the district court that the PSPAs and Third Amendment "provide a funding commitment intended to ensure that the Companies remained in a sound and solvent condition." Br. 54 (citing JA11).

Plaintiffs claim that, through this statement, the district court "ignored" their allegations of improper motive, and "accepted FHFA's and Treasury's self-serving characterization" of the Third Amendment. *Id*. at 54. Not at all. The district court merely described the PSPAs as a "funding commitment" (JA11), and cited one of the recitals in the PSPAs, where FHFA and Treasury recited that the "Conservator has determined that entry into this Agreement is (i) necessary to put [Enterprises] in a sound and solvent condition; [and] (ii) appropriate to carry on the business of [Enterprises] . . . ." JA145. The district court's rationale for finding that the Conservator acted within its statutory powers and functions did not depend in any way upon *why* Defendants executed the Third Amendment or whether it was *effective* in putting the Enterprises in a sound and solvent condition. The only question is whether the challenged action is within the Conservator's powers and functions under HERA. As explained above, it was. The district court did not abuse its discretion in denying Plaintiffs' motion for judicial notice or to strike.

CONCLUSION

The Court should affirm the judgment dismissing the Amended Complaint.

Dated: April 26, 2018

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. Multiple attorneys whose names appear on this brief (including Howard N. Cayne and Dirk C. Phillips) are members of the bar of this Court.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because the brief contains 12,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

3. On April 26, 2018, I electronically filed the foregoing with the Court via the appellate CM/ECF system, and that copies were served on all counsel of record by operation of the CM/ECF system on the same date.

4. The text of the electronic version of this document is identical to the text of the paper copies that will be provided.

5. The PDF version of this document was scanned for viruses using System Center Endpoint Protection and no virus was detected.

Dated: April 26, 2018

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