RECORD NO. 17-3794

In The

United States Court Of Appeals
For The Third Circuit

DAVID JACOBS; GARY HINDES,

Appellants,

v.

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

Appellees.

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

REPLY BRIEF OF APPELLANTS

Michael A. Pittenger
Christopher N. Kelly
Alan R. Silverstein
POTTER ANDERSON & CORROON LLP
1313 N. Market St.
6th Floor
Wilmington, DE 19801
(302) 984-6000

Counsel for Appellants

Myron T. Steele
POTTER ANDERSON & CORROON LLP
800 N. State St.
Suite 401
Dover, DE 19901
(302) 984-6000

Counsel for Appellants

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ P.O. Box 1460 (23218) ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 1

I. The Anti-Injunction Clause Does Not Bar Plaintiffs-Appellants' Claims Because FHFA Acted Outside Its Statutory Powers 1

A. 12 U.S.C. § 4617(f) Does Not Apply Where FHFA Acts Outside Its Statutory Powers 2

B. The NWS Violates State Law 4

C. HERA Granted FHFA Only Those Powers The Companies Had Before Conservatorship 6

D. Plaintiffs-Appellants' Position Does Not Allow Injunctive Relief For Violations Of Other Laws 8

E. Plaintiffs-Appellants Did Not Waive Their Request For Damages 10

F. By Improperly Repudiating Plaintiffs-Appellants' Contracts With The Companies, FHFA Violated HERA 11

II. HERA's Succession Clause Does Not Bar Stockholders From Prosecuting Claims During Conservatorship 12

A. HERA Does Not Bar Direct Claims 13

B. Plaintiffs-Appellants Plead Direct Claims 14

C. Even If Plaintiffs-Appellants' Claims Are Derivative, They Have Standing Because FHFA Has A Manifest Conflict Of Interest 19

D. Issue Preclusion Does Not Bar Plaintiffs-Appellants' Claims 21

III. Sovereign Immunity Does Not Bar Plaintiffs-Appellants' Claims Against Treasury 22

IV. The District Court Abused Its Discretion By Denying The Motion To Strike And Accepting Defendants-Appellees' Facts As True 25

A. The District Court Improperly Relied On Defendants-Appellees' Counterfactual Allegations 25

B. Defendants-Appellees' Brazen Factual Arguments Confirm Their Attempt To Controvert The Allegations of the Amended Complaint 26

CONCLUSION 29

COMBINED CERTIFICATES

TABLE OF AUTHORITIES

Page(s)

Cases

America's Cmty. Bankers v. FDIC,
200 F.3d 822 (D.C. Cir. 2000)....................24

Ark. Game & Fish Comm'n v. United States,
133 S. Ct. 511 (2012)....................13

Bank of Manhattan, NA v. FDIC,
778 F.3d 1133 (9th Cir. 2015)....................4

Bartlett v. Bowen,
816 F.2d 695 (D.C. Cir. 1987)....................19

Bender v. CenTrust Mortg. Corp.,
833 F. Supp. 1540 (S.D. Fla. 1992)....................12

Blue Chip Capital Fund II Ltd. P'ship v. Tubergen,
906 A.2d 827 (Del. Ch. 2006)....................15

Boilermakers Local 154 Ret. Fund v. Chevron Corp.,
73 A.3d 934 (Del. Ch. 2013)....................14

Bowen v. Massachusetts,
487 U.S. 879 (1988).................... 24-25

Citigroup Inc. v. AHW Inv. P'ship,
140 A.3d 1125 (Del. 2016)....................15

CMS Inv. Holdings, LLC v. Castle,
No. 9468-VCP, 2015 WL 3894021 (Del. Ch. June 23, 2015)....................17

Cnty. of Sonoma v. FHFA,
710 F.3d 987 (9th Cir. 2013)....................2, 4

Delta Sav. Bank v. U.S.,
265 F.3d 1017 (9th Cir. 2001)....................19, 21

Dep't of Army v. Blue Fox, Inc.,
525 U.S. 255 (1999).....24

Drewry, Hughes Co. v. Throckmorton,
92 S.E. 818 (Va. 1917) 5

Dubroff v. Wren Holdings, LLC,
No. 3940-VCN, 2011 WL 5137175 (Del. Ch. Oct. 28, 2011) 15

Edwards v. Deloitte & Touche, LLP,
No. 16-21221, 2017 WL 1291994 (S.D. Fla. Jan. 18, 2017) 18

El Paso Pipeline GP Co. v. Brinckerhoff,
152 A.3d 1248 (Del. 2016) 17, 18

Esther Sadowsky Test. Trust v. Syron,
639 F. Supp. 2d 347 (S.D.N.Y. 2009) 19

Firestone v. Wiley,
485 F. Supp. 2d 694 (E.D. Va. 2007) 14

First Hartford Corp. Pension Plan & Trust v. United States,
194 F.3d 1279 (Fed. Cir. 1999) 19, 21

Garza v. Citigroup Inc.,
881 F.3d 277 (3d Cir. 2018) 14, 24

Gentile v. Rossette,
906 A.2d 91 (Del. 2006).....17, 18

Gradient OC Master, Ltd. v. NBC Universal, Inc.,
930 A.2d 104 (Del. Ch. 2007) 16

Grayson v. Imagination Station, Inc.,
No. 5051-CC, 2010 WL 3221951 (Del. Ch. Aug. 16, 2010) 14

In re Activision Blizzard, Inc. S'holder Litig.,
124 A.3d 1025 (Del. Ch. 2015) 14

In re Asbestos Prods. Liab. Litig. (No. VI),
822 F.3d 125 (3d Cir. 2016) 26

In re Fed. Home Loan Mortg. Corp. Deriv. Litig.,
643 F. Supp. 2d 790 (E.D. Va. 2009) 19

In re Gaylord Container Corp. S'holders Litig.,
747 A.2d 71 (Del. Ch. 1999) 17

In re Tri-Star Pictures, Inc. Litig.,
634 A.2d 319 (Del. 1993) 16, 18

Kain v. Angle,
69 S.E. 355 (Va. 1910) 5

Leon Cnty. v. FHFA,
700 F.3d 1273 (11th Cir. 2012) 2

Levin v. Miller,
763 F.3d 667 (7th Cir. 2014) 13

MBIA Ins. Corp. v. FDIC,
708 F.3d 234 (D.C. Cir. 2013) 12

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,
547 U.S. 71 (2006) 20

NAF Holdings, LLC v. Li & Fung (Trading) Ltd.,
118 A.3d 175 (Del. 2015) 15

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 13

Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.,
571 F.3d 299 (3d Cir. 2009) 22

Pagliara v. Freddie Mac,
203 F. Supp. 3d 678 (E.D. Va. 2016) 13

Perry Capital LLC v. Mnuchin,
864 F.3d 591 (D.C. Cir. 2017) .... *passim*

Roberts v. FHFA,
No. 17-1880, ___ F.3d ___, 2018 WL 2055940 (7th Cir. May 3, 2018) 18

Saxton v. FHFA,
245 F. Supp. 3d 1063 (N.D. Iowa 2017) 18, 21, 22

Sharpe v. FDIC,
126 F.3d 1147 (9th Cir. 1997) 4, 12

Smith v. Bayer,
564 U.S. 299 (2011)..22

Starr International Co. v. United States,
856 F.3d 953 (Fed. Cir. 2017) 17

Taylor v. Sturgell,
553 U.S. 880 (2008)..22

Tooley v. Donaldson, Lufkin & Jenrette, Inc.,
845 A.2d 1031 (Del. 2004)..15, 16

Town of Babylon v. FHFA,
699 F.3d 221 (2d Cir. 2012) 2

Trustees of Amalgamated Ins. Fund v. Sheldon Hall Clothing, Inc.,
862 F. 2d 1020 (3d Cir. 1988) 20

Statutes

5 U.S.C. § 702 ....23, 25

8 *Del. C.* § 151 4

8 *Del. C.* § 151(c)..4, 5

8 *Del. C.* § 154 5

8 *Del. C.* § 170 5

12 U.S.C. § 1821(j) 3, 4

12 U.S.C. § 4617(a)(5)..20

12 U.S.C. § 4617(b)(2)(A) 6, 12

12 U.S.C. § 4617(b)(2)(B) 6

12 U.S.C. § 4617(b)(2)(J) 2

12 U.S.C. § 4617(b)(2)(K)(i) 21

12 U.S.C. § 4617(d)(2)..12

12 U.S.C. § 4617(d)(3)(A)(i) 12

12 U.S.C. § 4617(f)...*passim*

Va. Code § 13.1-638 5

Va. Code § 13.1-653 5

Regulations

12 C.F.R. § 1710.10(b)(1)...7

Other Authorites

7 Charles Alan Wright & Arthur R. Miller,
Federal Practice & Procedure § 1840 (3d ed. 2016) 22

Black's Law Dictionary, p. 514 ("in preference to") (8th ed. 1999) 5

Oral Argument at 31:55-32:27, *Saxton v. FHFA*, No. 17-1727 (8th Cir.),
http://media-oa.ca8.uscourts.gov/OAaudio/2018/5/171727.mp3 9

INTRODUCTION

Despite submitting two separate briefs, Defendants-Appellees are unable to offer persuasive support for the district court's decision. There is none: Section 4617(f) does not bar damages claims, monetary restitution, or disgorgement, and it thus was an insufficient basis to dismiss the entire case. Defendants-Appellees did not even argue below that Section 4617(f) provides a basis to dismiss the entire case. Adding to its errors, the district court improperly accepted as true Defendants-Appellees' factual assertions purporting to controvert the well-pleaded allegations in the Amended Complaint. Recognizing these clear errors by the district court, Defendants-Appellees devote much of their briefs to arguing purported alternative bases for affirmance but none support dismissal. This Court should vacate the district court's dismissal and remand for further proceedings.

ARGUMENT

I. The Anti-Injunction Clause Does Not Bar Plaintiffs-Appellants' Claims Because FHFA Acted Outside Its Statutory Powers

The Companies have elected Delaware and Virginia corporation law for their corporate governance. Neither Company can ignore those laws. Because HERA granted FHFA only those powers the Companies have, FHFA cannot do what the Companies cannot do themselves. Defendants-Appellees' argument that FHFA can ignore the corporate governance schemes the Companies adopted is meritless. The NWS violates state corporate law governing preferred stock

dividends. As a result, FHFA acted outside its statutory powers by implementing it. HERA's anti-injunction clause thus has no bearing on this action.

A. 12 U.S.C. § 4617(f) Does Not Apply Where FHFA Acts Outside Its Statutory Powers.

As Defendants-Appellees admit, HERA's anti-injunction provision applies only where FHFA is "colorably acting within its enumerated powers" but not when FHFA is acting outside those powers. TB19; FB21;[1] *see also Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 992 (9th Cir. 2013); *Leon Cnty. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012); *Town of Babylon v. FHFA*, 699 F.3d 221, 228 (2d Cir. 2012). The latter is what Plaintiffs-Appellants allege—HERA granted FHFA the same powers the Companies themselves had before conservatorship and, by exceeding the Companies' powers (*i.e.*, acting *ultra vires*), FHFA exceeded its conservator powers.

Defendants-Appellees argue that FHFA, as conservator, can exercise its power to issue stock to Treasury so long as FHFA determines that it "is in the best interest of the [Enterprises] or the Agency [FHFA]." FB23; TB23. Their position ignores that Section 4617(b)(2)(J) states that FHFA as conservator may "take any action *authorized by this section*, which the Agency determines is in the best interests of the regulated entity or the Agency" (emphasis added). The emphasized

[1] "TB" and "FB" refer to Treasury's and FHFA's briefs, respectively.

language confirms that FHFA can exercise its powers within that statutory limit only; it does not mean that any action FHFA—by fiat—"determine[d] [to be] in the best interests" of the Companies constitutes a statutorily authorized action.

As Defendants-Appellees concede, *Perry Capital LLC v. Mnuchin* confirmed that Section 4617(f) bars equitable relief only where it would interfere with FHFA's exercise of "*statutorily permitted* actions as conservator." 864 F.3d 591, 606 (D.C. Cir. 2017) (emphasis added). Defendants-Appellees also acknowledge that Section 4617(f) is materially identical to 12 U.S.C. § 1821(j), the analogous provision of FIRREA. FB21; TB19. Defendants-Appellees' reliance on purported authority to suggest that Section 1821(j) applies even when a conservator violates state or federal laws or other statutory schemes fails because these cases mean only that Sections 4617(f) and 1821(j) bar suit when a conservator violates some law other than HERA or FIRREA. TB26; FB26-28. This case, in contrast, concerns FHFA exceeding its powers under HERA because, under HERA, FHFA was bound by the same limitations on powers that applied to the Companies before conservatorship. That is, *ultra vires* conduct exceeding the Companies' corporate powers under governing state corporation law necessarily violates HERA.

Defendants-Appellees' cases recognize that which they dispute: a "statutory bar on judicial review of [government agency] actions taken as conservator or

receiver 'does not bar injunctive relief when the [agency] has acted beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions.'" *Cnty. of Sonoma*, 710 F.3d at 992. FHFA's distinction of *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997) (FB34-35) rests on a meaningless factual difference. *Sharpe* confirms the proposition that Section 1821(j) is inapplicable when the FDIC acts outside its statutorily authorized powers, including breaching preexisting contracts. *Id.* at 1155; *see also Bank of Manhattan, NA v. FDIC*, 778 F.3d 1133, 1136–37 (9th Cir. 2015).

The NWS was not within FHFA's statutory authority as conservator. Therefore Section 4617(f) does not apply here.

B. The NWS Violates State Law

FHFA's argument that the preferred dividend is set at a rate—100% of all net worth in perpetuity—confuses the point of reference and misapprehends the meaning of a dividend rate. DGCL Section 151 allows preferred stockholders to receive dividends "*at such rates*, on such conditions and at such times . . . ." 8 *Del. C.* § 151(c) (emphasis added). The dividends must be "payable *in preference to, or in . . . relation to*, the dividends payable on" other classes or series of stock. *Id.* (emphasis added).

The NWS is not set at 100% of Treasury's capital investment; it is—*without precedent*—set at 100% of the Companies' net worths. That is not a "rate"

contemplated by corporate statute as evidenced by the impermissible impairment to the Companies' capital accounts necessarily resulting from such formulation. *See* 8 *Del. C.* §§ 154, 170; VSCA § 13.1-653. Because the NWS diverts, *forever*, all the Companies' net worth to Treasury to the exclusion of any dividends ever on junior stock, it is not payable "in preference to" or "in relation to" dividends payable to other classes or series. *See Black's Law Dictionary*, p. 514 ("in preference to") (8th ed. 1999); *see also*, *id*., p. 1456 ("cumulative preferred stock"). The NWS eliminates the economic stake of all stockholders except Treasury. It is therefore invalid under 8 *Del. C.* § 151(c).

Likewise, the NWS violates Virginia law. The VSCA requires shares authorized by a corporation to "have preference over any other class or series of shares with respect to distributions." Va. Code § 13.1-638. Virginia law characterizes preferred stock as entitling holders "to receive dividends from the earnings of the company *before the common stock can receive a dividend* from such earnings." *Kain v. Angle*, 69 S.E. 355, 357 (Va. 1910) (emphasis added). A preference to dividends is "nothing more than that which is paid to one class of shareholders *in priority to that to be paid to another class*." *Id.* (emphasis added); *see also Drewry, Hughes Co. v. Throckmorton*, 92 S.E. 818, 819 (Va. 1917) (construing privileges of preferred dividend as "*definitely fixed*" and constituting "*a preferred charge over*" and "*in preference to*" common stock)

(emphases added). Thus, the NWS violates the DGCL and VSCA by making it impossible for there ever to be a dividend paid to another class.

Even Defendants-Appellees' own documents prove that the NWS is not paid at a rate or in preference to other Company stock. *See* OB n.5.

C. HERA Granted FHFA Only Those Powers The Companies Had Before Conservatorship

The powers granted FHFA under HERA are restricted to the powers the Companies had before conservatorship such that FHFA can do only what the Companies could do.

Under HERA, FHFA "immediately succeed[s] to . . . all rights, titles, powers, and privileges *of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity* . . . ," may "take over the assets of and operate the regulated entity *with all the powers of the shareholders, the directors, and the officers of the regulated entity* and conduct all business of the regulated entity," and may "perform all functions of the regulated entity in the name of the regulated entity which are consistent with the appointment as conservator or receiver." 12 U.S.C. §§ 4617(b)(2)(A), (B) (emphases added). This is unambiguous.

As to FHFA's argument that the NWS was an exercise of the power to "operate" and "carry on [the] business" of the Companies, those powers too are necessarily no broader than the powers the Companies themselves have to operate

and carry on their businesses. HERA does not suggest otherwise—rather, HERA imposes an *additional* limitation on FHFA's power "to carry on the business" of the Companies, linking this power with FHFA's duty to "preserve and conserve [their] assets and property." The NWS does the *opposite* of preserving and conserving. It transfers all the Companies' net worth to Treasury forever.

Although FHFA has the power to "operate the Companies" and "reorganize their affairs" (FB21), it cannot do anything it wants. FHFA is bound by the powers HERA granted, which—as they relate to the terms of stock the Companies may issue—necessarily are not broader than the powers the Companies themselves have under state law governing their internal affairs.

Treasury argues that HERA preempts any conflicting state law requirements, thus rendering the state corporation laws unenforceable. TB28-29. But, where HERA is silent on specific powers, the DGCL and VSCA remain effective. There is no conflict between state law and HERA, and preemption concepts are inapplicable. Field preemption cannot apply because federal law authorizes and directs the Companies to select state law to govern their internal affairs. 12 C.F.R. § 1710.10(b)(1). The Certificates of Designation governing Treasury's Senior Preferred Stock acknowledge that Delaware and Virginia law "shall serve as the federal rule of decision." A115, 124 § 10(e). HERA's grant of power to Treasury to purchase Company securities did not do away with state law governing the

permissible terms of those securities. Nor does conflict preemption apply because it is not impossible for Defendants to comply with both federal and state law, and because state law is no obstacle to achieving HERA's full purposes and objectives.

Treasury waived the argument that "subsequent legislation confirms that FHFA was acting within its statutory authority" by not fairly presenting it below. It also is meritless. Section 702 of the Consolidated Appropriations Act only places limits on the sale of preferred stock and makes no determination whether FHFA acted within its powers implementing the NWS. Further, the Act was introduced nearly four months before Plaintiffs-Appellants filed their complaint. Defendants-Appellees cite no evidence indicating Congress considered or was aware of Plaintiffs-Appellants' claims that FHFA acted outside its statutory powers by violating state corporate law. Mere assumption is not enough to invoke a presumption that Congress agrees that FHFA correctly interpreted the scope of its powers here.

D. Plaintiffs-Appellants' Position Does Not Allow Injunctive Relief For Violations Of Other Laws

Defendants-Appellees characterize Plaintiffs-Appellants' argument as suggesting injunctive relief is allowed against FHFA whenever state laws or other statutory schemes are violated. That is not true. The state corporation laws at issue here are not just any other laws—the Companies adopted them to govern their corporate affairs, including regulating the permissible terms of stock the

Companies can issue. That places the Companies in a unique position, binding the Companies' actions where other laws may not. Here, FHFA violated HERA because it succeeded to the powers of the Companies; FHFA's statutory powers to cause the Companies to issue stock are no broader than the powers of the Companies themselves under state corporate law.

Plaintiffs-Appellants do not seek to render Section 4617(f) "superfluous" as Defendants-Appellees and the district court incorrectly contend. Rather, Plaintiffs-Appellants assert that FHFA exceeded its authority under HERA both by purporting to exercise powers beyond those to which it succeeded from the Companies pursuant to HERA and by breaching the Companies' contractual obligations to their stockholders without following the statutory requirements HERA prescribes.

In fact, Treasury recently admitted that "the enterprises have a charter…. So if FHFA were to attempt to operate them in a way contrary to their charter, there might be an *ultra vires* action." *See* Oral Argument at 31:55-32:27, *Saxton v. FHFA*, No. 17-1727 (8th Cir.), http://media-oa.ca8.uscourts.gov/OAaudio/2018/5/171727.mp3. Here, FHFA's actions directly violated those very state law charters by issuing stock with terms not permitted under the governing state laws. Thus, the acts were *ultra vires*. Even if FHFA were correct that it was acting in the Companies' interest (a specious proposition), such acts are

nevertheless outside the powers HERA grants because they are not within the Companies' own limits on their power. This is precisely the situation Treasury confesses Section 4617(f) would not protect.

Accordingly, the cases FHFA cites holding that Section 4617(f) (or its FIRREA analogue) bars equitable relief where a plaintiff argued only that a conservator did not properly exercise otherwise-legitimate powers, violated provisions of other law, or acted with a bad motive, are inapposite.

E. Plaintiffs-Appellants Did Not Waive Their Request For Damages

Plaintiffs-Appellants did not waive their claims for damages and restitution or disgorgement because neither FHFA nor Treasury moved to dismiss those claims under Section 4617(f), which was the sole basis on which the district court improperly dismissed Plaintiffs-Appellants' entire suit.

FHFA moved to dismiss below arguing "Section 4617(f) Bars Plaintiffs' Claims Seeking Equitable and Declaratory Relief," and conceded that Section 4617(f) *did not* bar Plaintiffs-Appellants' requests for compensatory damages, restitution and/or disgorgement. Dkt. 68 at 10-12 (arguing that Section 4617(f) "bars *nearly all* of the relief Plaintiffs seek here"; omitting Prayers for relief ¶¶ G, I-K) (emphasis added). Treasury argued "HERA Bars Any Equitable Relief Directed at the Conservator or Treasury…." Dkt. 66 at 10, 12 (arguing Section 4617(f) bars only "*nonmonetary* remedies") (emphasis added). Neither argued that

Section 4617(f) bars Plaintiffs-Appellants' claims for damages or restitution, nor could they. Indeed, even *Perry Capital* expressly permitted judicial review of damages claims against FHFA as conservator. 864 F.3d at 613-14.

The cases FHFA cites (FB38) are distinguishable. They feature waivers by parties who failed to raise claims in pleadings or arguments in briefs. In contrast, here, Defendants-Appellees did not make (and therefore waived) the argument. There was no reason for Plaintiffs-Appellants to brief an argument Defendants-Appellees did not make.

F. By Improperly Repudiating Plaintiffs-Appellants' Contracts With The Companies, FHFA Violated HERA

Defendants-Appellees' defense relies on HERA's anti-injunction clause, but as explained above, that clause does not apply where FHFA acts outside its statutory powers. That includes not only exceeding its authority under HERA by purporting to exercise powers beyond those to which it succeeded from the Companies, but also where it violates HERA's requirements for repudiating the Companies' contractual obligations to their stockholders. The latter HERA violation serves as an independent basis precluding application of HERA's anti-injunction clause, and its relevance to this case—with or without a standalone breach-of-contract claim—is obvious.

As explained in Plaintiffs-Appellants' Opening Brief (OB43-44), HERA "does not permit [FHFA] to increase the value of the [contract] in its hands by

simply 'preempting' out of existence pre-receivership contractual obligations." *Perry Capital*, 864 F.3d at 630; *see also Sharpe*, 126 F.3d at 1155. FHFA may, however, repudiate the Companies' contractual obligations in accordance with 12 U.S.C. § 4617(d)(2). Should it repudiate any contract, FHFA must compensate the counterparty. 12 U.S.C. § 4617(d)(3)(A)(i).

By implementing the NWS, FHFA did exactly what *Perry Capital* holds is not allowed: preempting itself out of the existing contractual obligations under state corporation laws made applicable to the Companies through their election in their bylaws and incorporation into their charters. OB44-45. FHFA repudiated the contracts with the Companies' stockholders—long after the statutory time period—and never compensated them. A breach-of-contract claim is unnecessary—FHFA violated HERA and, therefore, acted outside its statutory powers. Section 4617(f) consequently does not bar relief.[2]

II. <u>HERA's Succession Clause Does Not Bar Stockholders From Prosecuting Claims During Conservatorship</u>

Defendants-Appellees' arguments that HERA's succession clause, 12 U.S.C. § 4617(b)(2)(A), bars Plaintiffs-Appellants' claims mischaracterize the Amended

[2] Defendants-Appellees and the district court rely on *MBIA Ins. Corp. v. FDIC*, 708 F.3d 234 (D.C. Cir. 2013), and *Bender v. CenTrust Mortg. Corp.*, 833 F. Supp. 1540 (S.D. Fla. 1992), to argue that "a conservator does not exceed its statutory authority by failing to comply with the 18 month timing requirement." Neither case, however, allows a conservator to ignore the repudiation period and then "self-help" itself to preempt existing contracts.

Complaint, the record, and controlling law. Plaintiffs-Appellants' statutory and quasi-contract claims are (and are pleaded as) direct claims and are not barred. Even if these claims were derivative (they are not), HERA's succession clause is no bar because FHFA has a manifest conflict of interest.

A. HERA Does Not Bar Direct Claims

The D.C. Circuit held in *Perry Capital* that HERA's succession clause does not bar direct stockholder suits. 864 F.3d at 624; *see also Levin v. Miller*, 763 F.3d 667, 672 (7th Cir. 2014). This court should follow that holding. That FHFA disagrees with it is irrelevant, and the one case FHFA cites—*Pagliara v. Freddie Mac*, 203 F. Supp. 3d 678, 686-88 (E.D. Va. 2016)—explicitly states that its interpretation of HERA "does not affect th[e] right" of a Company stockholder "to bring a direct lawsuit." *Id.* at 689 n.16. Indeed, contrary interpretation would raise grave constitutional concerns as a government taking of private property without just compensation. *See Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 515 (2012); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593-94 (2012). Therefore, the clause does not bar stockholders from pursuing direct claims to protect their personal rights and economic interests in the Companies.

B. Plaintiffs-Appellants Plead Direct Claims

Contrary to Defendants-Appellees' arguments,[3] Plaintiffs-Appellants plead direct claims.

Plaintiffs-Appellants do not concede their claims are derivative, as Treasury contends (TB42). Quite the opposite—Counts I and II plead direct claims for relief (*see* A71-74; A77) because they seek redress for violations of corporate statute. *See Grayson v. Imagination Station, Inc.*, No. 5051-CC, 2010 WL 3221951, at *5 (Del. Ch. Aug. 16, 2010). Stockholders can sue directly to enforce constraints imposed by corporate charter, bylaws, or provisions of corporate statute. *See In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1050 (Del. Ch. 2015). A violation of a corporate statute may be redressed by direct suit the same as a breach of contract can because a corporate statute *is* a contract between the corporation, its directors, officers, and stockholders.[4] *See Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013); *Firestone v. Wiley*, 485 F. Supp. 2d 694, 705 (E.D. Va. 2007). Here,

---

[3] Treasury also argues that federal law governs whether Plaintiffs-Appellants' claims are direct or derivative (*see* TB37-41; *cf.* Dkt. 66 at 15 n.6) and that it was not a controlling stockholder of the Companies (*see* TB44-45; *cf.* Dkt. 66 at 18-19). Treasury failed to fairly present either argument below and therefore waived both. *Garza v. Citigroup Inc.*, 881 F.3d 277, 284 (3d Cir. 2018).

[4] Thus, Treasury's contention that Plaintiffs-Appellants are attempting to "recast their claims as direct merely by alleging that the Third Amendment violated unspecified contractual rights that they purportedly possess" (TB42) is frivolous.

Plaintiffs-Appellants plead direct claims for violations of the DGCL and VSCA, which are part of the Companies' charters and are binding, the violation of which gives rise to direct stockholder claims. *See Blue Chip Capital Fund II Ltd. P'ship v. Tubergen*, 906 A.2d 827, 828 (Del. Ch. 2006). Such direct claims may seek as relief "compensation for the diminution in value of its stock." *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 (Del. 2015).

Counts III and IV likewise state direct claims. Of course, the direct-derivative analysis for a quasi-contract claim produces the same result as for a breach of contract (or statutory) claim—they are quintessentially direct claims. *See Perry Capital*, 864 F.3d at 627-28; *Dubroff v. Wren Holdings, LLC*, No. 3940-VCN, 2011 WL 5137175 at *11 ns. 60, 62 (Del. Ch. Oct. 28, 2011).

Counts I through IV plead claims that "belong to" Plaintiffs-Appellants and that are "not claims that could plausibly belong to" the Companies because the claims assert that FHFA, as the Companies' purported conservator, and Treasury, as controlling stockholder, breached statutory and quasi-contract rights belonging personally to Plaintiffs-Appellants and other stockholders. *Perry Capital*, 864 F.3d at 628. "*Tooley* [*v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004)] has no application 'when a plaintiff asserts a claim based on the plaintiff's own right.'" *Id.* (quoting *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1139-40 (Del. 2016)).

Even under *Tooley*, Plaintiffs-Appellants' claims are direct. Plaintiffs-Appellants and other stockholders have suffered a distinct injury caused by the NWS's extraction and redistribution of all economic value in their stock to Treasury, the Companies' controlling stockholder. Delaware courts recognize this as "cash-value dilution." *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 330-32 (Del. 1993); *see also Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 130 (Del. Ch. 2007). While the Companies too may have suffered harm as a result of the NWS, it has not affected the values of all Company stock equally. Rather, the Companies still are incredibly valuable and, after the NWS, Treasury's Senior Preferred Stock could be the most valuable corporate stock in the world, far more valuable than it was before the NWS when it had only a 10% dividend. In contrast, the NWS wiped out all value of all other Company stock, unjustly transferring to Treasury all minority stockholders' personal rights to participate in the Companies' earnings and net worth. *See* A428 ("Making sure that every dollar of earnings that Fannie Mae and Freddie Mac generate will be used to benefit taxpayers for their investment in those firms."); A433 ("Makes clear the Administration's commitment to ensure existing common equity holders will not have access to any positive earnings from the GSEs in the future."); A454 ("[The Companies] will NOT be allowed to return to profitable entities…but instead wound down…."). As such, Plaintiffs-Appellants and the other private

stockholders have suffered distinct, individual harm. *CMS Inv. Holdings, LLC v. Castle*, No. 9468-VCP, 2015 WL 3894021, at *8-9 (Del. Ch. June 23, 2015). Because Plaintiffs-Appellants and other stockholders were directly harmed by the NWS while Treasury benefited from it, the remedy should take place at the stockholder level. *See In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 80-84 (Del. Ch. 1999).

Treasury relies on *Starr International Co. v. United States*, 856 F.3d 953 (Fed. Cir. 2017), to suggest Plaintiffs-Appellants' claims are derivative. But that case demonstrates Plaintiffs-Appellants' claims are direct. In finding an AIG stockholder's challenge to the government's takeover of AIG was a derivative suit, the court distinguished AIG's issuance of new equity to the government, which was not an existing stockholder and as such "necessarily results in 'an equal dilution of the economic value and voting power of each of the corporation's outstanding shares,'" *id.* at 967 (quoting *Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006)), from "a direct exaction from shareholders" to an existing stockholder, *id.* at 969, which would constitute "a direct and individual injury," *id.* at 967. That direct injury is pleaded here—Treasury was an existing (and controlling) stockholder at the time of the NWS.

Contrary to Treasury's intimations, *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016), does not suggest Plaintiffs-Appellants' claims are

derivative. The *El Paso* court cited *Tri-Star* and did not overrule or limit it, stating only that it would not *expand* it. 152 A.3d at 1251 & n.3. Further, the dropdown in *El Paso* allegedly involved an "overpayment" by the *partnership*, whereas the NWS was designed to expropriate the entire economic value of the *minority stockholders'* interest in the Companies and transfer the value of their interests to Treasury. With the Companies in conservatorship and already under government control, the distinction between direct and derivative does not depend on dilution of the "voting power of [the] minority stockholders." *Id.* at 1266. Lastly, the breach of contract claim in *El Paso* is distinguishable because the contractual duty was owed to the partnership (not unitholders) under its operating agreement, *id.* at 1257-58; in contrast, the statutory and quasi-contract claims here concern violations of personal rights held directly by the Companies' stockholders under state corporate law. As to these claims, *El Paso* reaffirmed that, where a plaintiff "asserts a claim based upon the plaintiff's own right," the plaintiff's claim is direct. *Id.* at 1259.[5]

---

[5] The two NWS cases cited by Treasury in which courts purportedly "have rejected application of the *Gentile* exception" (TB46 (citing *Edwards v. Deloitte & Touche, LLP*, No. 16-21221, 2017 WL 1291994 (S.D. Fla. Jan. 18, 2017); *Saxton v. FHFA*, 245 F. Supp. 3d 1063 (N.D. Iowa 2017)) are inapposite because they did not consider *Tri-Star* or cash-value dilution.

Further, although FHFA suggests that the recent Seventh Circuit decision in *Roberts v. FHFA*, No. 17-1880, ___ F.3d ___, 2018 WL 2055940 (7th Cir. May 3, 2018) is determinative of the issue, for the reasons explained herein, these are direct claims.

C. Even If Plaintiffs-Appellants' Claims Are Derivative, They Have Standing Because FHFA Has A Manifest Conflict Of Interest

Even if Plaintiffs-Appellants' claims are derivative, HERA permits them because it is a manifest conflict of interest for FHFA to decide to sue or not to sue itself and Treasury. That has long been the interpretation of FIRREA, *see First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1293 (Fed. Cir. 1999); *Delta Sav. Bank v. U.S.*, 265 F.3d 1017, 1024 (9th Cir. 2001), and Congress's decision to include near-identical language in HERA demonstrates it intended to adopt that interpretation. Indeed, even in the HERA context, courts have recognized a conflict-of-interest exception to the general prohibition on derivative claims urged by Defendants-Appellees here. *See In re Fed. Home Loan Mortg. Corp. Deriv. Litig.*, 643 F. Supp. 2d 790, 798 (E.D. Va. 2009); *Esther Sadowsky Test. Trust v. Syron*, 639 F. Supp. 2d 347, 350 (S.D.N.Y. 2009).

The *Perry Capital* majority erred by interpreting HERA to bar derivative suits even when a conservator is conflicted. 864 F.3d at 624-25. That is wrong because Congress may not regulate federal jurisdiction "to deprive a party of a right created by the Constitution." *Bartlett v. Bowen*, 816 F.2d 695, 705 (D.C. Cir. 1987). HERA therefore cannot be read to bar stockholders from obtaining meaningful judicial review of claims, including constitutional claims, where FHFA has a manifest conflict of interest preventing it from protecting stockholder rights.

Moreover, the *Perry Capital* majority should have accorded deference to earlier judicial constructions of FIRREA when interpreting HERA—given that every appellate court to address this question under FIRREA interpreted it to include a conflict-of-interest exception. When Congress reenacted nearly identical language in HERA, it presumably accepted the judicial construction of that language as including a conflict-of-interest exception. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006). This is particularly appropriate given the importance of financial markets' "settled expectations" and Congress' intent to reassure investors by modeling HERA on the familiar FIRREA. *See Perry Capital*, 864 F.3d at 647 (Brown, J., dissenting).

The *Perry Capital* majority also violated the canon of statutory construction that a statute be read as a whole and interpreted to give effect to its purpose and all of its components. *Trustees of Amalgamated Ins. Fund v. Sheldon Hall Clothing, Inc.*, 862 F. 2d 1020, 1022 (3d Cir. 1988). The succession clause does not address derivative suits; nor does it purport to eliminate any stockholder rights, providing only that FHFA temporarily "succeed[s]" to them. In contrast, another HERA provision expressly contemplates that during conservatorship a "regulated entity" may sue "for an order requiring the Agency to remove itself as conservator." 12 U.S.C. § 4617(a)(5). Since FHFA controls the Companies in conservatorship, and the Constitution would not permit FHFA to sue itself, this provision would be

meaningless if stockholders could not sue the conservator derivatively on behalf of the Companies. Accordingly, the Court should follow *Delta Savings* and *First Hartford*, which are directly on point and not "outliers" (FB43) as Defendants-Appellees contend.[6] There is a manifest conflict here—Plaintiffs-Appellants challenge a purported "agreement" between FHFA and Treasury, a sister federal agency that acquired a controlling interest in the Companies and with which FHFA has obediently coordinated its actions and supinely abandoned its conservator role.[7]

D. Issue Preclusion Does Not Bar Plaintiffs-Appellants' Claims

Contrary to Treasury's contentions (TB46-47), issue preclusion does not bar Plaintiffs-Appellants' claims because Defendants-Appellees fail to establish the prerequisites of identity of issues and parties. It is troubling that Treasury argues preclusion based on *Saxton* (TB47), but omits that the *Saxton* court *rejected* the government's argument that issue preclusion barred the *Saxton* suit as a result of

---

[6] Defendants-Appellees' attempts to distinguish *Delta Savings* and *First Hartford* are meritless, ignoring the allegations of the Amended Complaint and the record evidence showing Treasury's influence and control over FHFA. A50-53 ¶¶10-16.

[7] FHFA's suggestion that a conflict-of-interest exception is less suited to conservatorship than receivership (FB43) has it backwards. Unlike appointment of a receiver, appointment of a conservator does not "terminate" stockholder claims and relegate them to a statutory claims process. 12 U.S.C. § 4617(b)(2)(K)(i). Without the protections of this process, there is greater need for a conflict-of-interest exception to protect stockholders in conservatorship than receivership.

Perry Capital. 245 F. Supp. 3d at 1073-75. As in *Saxton*, issue preclusion is inapplicable here.

Regardless, giving preclusive effect to *Perry Capital* or *Saxton* would violate Plaintiffs-Appellants' due process rights as neither case was a "properly conducted" representative action. A derivative action is not a representative action and cannot bind absent stockholders until Rule 23.1 has been satisfied—a contrary holding would circumvent Rule 23.1's protections and violate absent stockholders' due process rights. *Smith v. Bayer*, 564 U.S. 299, 313-15 (2011); *Taylor v. Sturgell*, 553 U.S. 880, 901-04 (2008). Tellingly, Treasury does not even address the due process implications, which are fatal to its argument.

Further, the *Perry Capital* and *Saxton* plaintiffs did not adequately represent the Companies or absent stockholders because those decisions involved different claims and were not decided on their merits but on the plaintiffs' incapacity to bring derivative suits. *Perry Capital*, 864 F.3d at 624; *Saxton*, 245 F. Supp. 3d at 1073; *see also Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 313 (3d Cir. 2009); 7 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1840 (3d ed. 2016).

III. Sovereign Immunity Does Not Bar Plaintiffs-Appellants' Claims Against Treasury

Plaintiffs-Appellants' claims against Treasury seeking monetary relief in the form of restitution and/or disgorgement of the distributions it has received under

the NWS fall within the waiver of sovereign immunity set forth in 5 U.S.C. § 702. Try as it might to distort Plaintiffs-Appellants' claims and the record, Treasury cannot escape this conclusion.

Treasury's primary argument is that "the district court did not err in failing to address money damages claims that plaintiffs had neither asserted in their amended complaint nor briefed in district court." TB51-52. Treasury contends the district court need not have addressed Plaintiffs-Appellants' claims for damages because, "[i]n an attempt to fit their claims against Treasury within the Administrative Procedure Act's (APA) limited waiver of sovereign immunity, plaintiffs asserted that they were *not* seeking money damages" and thus waived the argument. TB52. This argument is frivolous.

In Counts I and II, Plaintiffs-Appellants asserted claims for "declaratory, equitable and compensatory relief" based on the NWS being void and unenforceable as a matter of state corporate law. A71-73. On these claims, Plaintiffs-Appellants sought, *inter alia*, compensatory damages against FHFA (A77 ¶G) and restitution and/or disgorgement against FHFA and Treasury (A77 ¶I). In Counts III and IV, Plaintiffs-Appellants asserted claims for unjust enrichment against Treasury (A74-76) and requested, *inter alia*, an award of restitution and/or disgorgement (A78 ¶K). Plaintiffs-Appellants thus plainly

asserted claims for damages and monetary relief in their Amended Complaint, contrary to Treasury's arguments.

Moreover, Treasury's contentions ignore *its own waiver* in the district court—Treasury did not contend before the district court that sovereign immunity barred Counts I or II. *See* Dkt. 69 at 28 n.26 (citing Dkt. 66 at 20-23). Treasury therefore waived any argument that sovereign immunity barred these claims or the monetary relief requested. *Garza v. Citigroup Inc.*, 881 F.3d 277, 284 (3d Cir. 2018). And, given that Treasury did not even make the argument below, Plaintiffs-Appellants could not have waived *anything* about Counts I and II.

More fundamentally, Treasury's waiver argument—which must be limited to Counts III and IV for unjust enrichment and monetary relief in the form of restitution and/or disgorgement (A78 ¶K)—ignores the critical distinction between "monetary relief" and "money damages." TB51-52. Treasury misleadingly conflates these to erroneously assert Plaintiffs-Appellants' waiver. These claims neither were waived nor, as Treasury alternatively asserts, does sovereign immunity bar them.

As Plaintiffs-Appellants explained below (and thus did not waive), "[n]ot all forms of monetary relief are money damages." Dkt. 69 at 29 (quoting *America's Cmty. Bankers v. FDIC*, 200 F.3d 822, 829 (D.C. Cir. 2000)); *see also Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999); *Bowen v. Massachusetts*, 487

U.S. 879, 893 (1988); A438-44. Rather, as Plaintiffs-Appellants' Amended Complaint and district court briefing show, restitution and/or disgorgement to remedy unjust enrichment are not "money damages" and thus would fall within the exception to sovereign immunity provided by Section 702. A75-76; Dkt. 69 at 29.[8]

IV. The District Court Abused Its Discretion By Denying The Motion To Strike And Accepting Defendants-Appellees' Facts As True

A. The District Court Improperly Relied On Defendants-Appellees' Counterfactual Allegations

Plaintiffs-Appellants do not contend that Defendants-Appellees' motives are necessary to resolve their affirmative claims. Rather, Defendants-Appellees put those motives at issue by relying on factual assertions of motive contrary to the Amended Complaint to support their HERA defenses. The district court then improperly relied on those counterfactual assertions to dismiss Plaintiffs-Appellants' suit.

The district court relied on Defendants-Appellees' assertions that in implementing the NWS, Defendants-Appellees acted to "ensure that the Companies remained in a sound and solvent condition" (A11), despite allegations

[8] At the same time, as explained above and in Plaintiffs-Appellants' Opening Brief, Plaintiffs-Appellants' claims against FHFA for compensatory damages and against FHFA and Treasury for monetary relief in the form of restitution and/or disgorgement are not barred by Section 4617(f), HERA's anti-injunction clause. Indeed, Defendants-Appellees *never* argued otherwise. OB42; *see also* Dkt. 66 at 10-14; Dkt. 68 at 11-12. It was reversible error for the district court to dismiss the entire action based on Section 4617(f) alone.

in the Amended Complaint and record evidence to the contrary (A52-53 ¶¶15-16). The district court erred by adopting Defendants-Appellees' assertions as "facts" rather than accepting as true the Amended Complaint's well-pleaded factual allegations, an error that the district court compounded by refusing to consider the Defendants-Appellees' own public documents attached to the motion to strike, which disprove their assertions of "facts." *In re Asbestos Prods. Liab. Litig*. *(No. VI)*, 822 F.3d 125, 133-34 (3d Cir. 2016).[9]

B. Defendants-Appellees' Brazen Factual Arguments Confirm Their Attempt To Controvert The Allegations of the Amended Complaint

Defendants-Appellees double-down on their inappropriate counterfactual assertions in this appeal, ignoring the well-pleaded allegations of the Amended Complaint and trying to rewrite their own documents so as to fit their misconduct within FHFA's conservator functions. Rather than accepting the allegations of the Amended Complaint as true, Defendants-Appellees improperly introduce their own counterfactual narrative, effectively conceding that the facts actually pleaded in the Amended Complaint state cognizable claims.

[9] To the extent this Court examines whether FHFA was obligated to put the companies in a sound and solvent condition, this Court should adopt the dissent's reasoning in *Perry Capital* concluding that FHFA's charge as conservator is mandatory. *See* 864 F.3d at 638 n.1.

This chart illustrates just some of Defendants-Appellees' arguments that contradict the Amended Complaint, the allegations of which must be accepted as true on a motion to dismiss:

Defendants-Appellees' Briefs	**Amended Complaint**
"By September 2008, [the Companies] found themselves on the brink of insolvency." TB1.	In September 2008, the Companies were "adequately capitalized—indeed, Fannie Mae's and Freddie Mac's assets exceeded their liabilities by ***$50 billion*** in aggregate—and operating in a safe and sound fashion." A59 ¶ 35.
"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." FB1.	When placed into conservatorship, "the Companies remained adequately capitalized and, as described by OFHEO director James Lockhart, 'safe and sound.'" A59 ¶ 33.
In August 2012, the Companies "d[id] not expect to generate net income or comprehensive income in excess of [their] annual dividend obligation to Treasury over the long term." FB11.	"By mid-2012, [the Companies] began to experience a vigorous recovery," and "it became evident" that accounting adjustments would soon "add tens of billions of dollars to the Companies' balance sheets and eventually generate cash available for distribution to stockholders other than Treasury after paying Treasury its dividends on account of the Senior Preferred Stock." A52 ¶ 14.

Defendants-Appellees' Briefs	Amended Complaint
"By exchanging a fixed dividend for a variable one, Treasury thus accepted more risk under the Third Amendment." TB12	"While the Companies were on track to repay Treasury and the taxpayers every dollar they were owed with interest, that was not enough for FHFA and Treasury. Rather, FHFA and Treasury chose to seize the totality of the Companies' profits and net worth in perpetuity. The President of the United States' proposed fiscal year 2014 budget estimated that Fannie Mae and Freddie Mac will together pay ***$238.5 billion*** in dividends to Treasury over the next ten years, far outstripping the government's investments." A63 ¶ 46.
"To protect the remaining commitment, Treasury and FHFA thus needed to end the cycle of the enterprises paying dividends by drawing on Treasury's commitment." TB11.	"The terms of the Senior Preferred Stock . . . gave Fannie Mae and Freddie Mac the discretion to pay dividends in kind rather than in cash." A50 ¶ 8.
"In short, the Third Amendment was structured to, among other things, preserve the enterprises' assets and avoid increasing their debts in years (such as 2015 and 2016) when the GSEs earned less than the $19 billion they otherwise would have owed Treasury." TB34.	"To capitalize on the Companies' strong recovery (and ensure that their stockholders could not capitalize on it), Treasury and FHFA decided to amend the PSPAs such that rather than taking 10% of the liquidation preference as a dividend, Treasury would instead take the entire positive net worth of each of Fannie Mae and Freddie Mac each quarter in perpetuity." A62 ¶ 42.

This Court should not accept these counterfactual allegations, which conflict with the well-pleaded allegations of the Amended Complaint. The District Court

erred by relying on such counterfactual assertions and by denying the Motion to Strike, which explained that the Defendants-Appellees' assertions conflicted not only with the Amended Complaint but with their own recently available documents.

CONCLUSION

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

Respectfully Submitted,

Dated: May 24, 2018:

/s/ Myron T. Steele
Myron T. Steele
POTTER ANDERSON & CORROON LLP
800 N. State St., Suite 401
Dover, DE 19901
(302) 984-6000

Michael A. Pittenger
Christopher N. Kelly
Alan R. Silverstein
POTTER ANDERSON & CORROON LLP
1313 N. Market St., 6th Floor
Wilmington, DE 19801
(302) 984-6000

Counsel for Appellants

COMBINED CERTIFICATIONS

I, the undersigned, hereby certify the following:

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

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,493 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

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

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

6. That, on May 24, 2018, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered users.

Dated: May 24, 2018: /s/ Myron T. Steele

Myron T. Steele

Counsel for Appellants