ORAL ARGUMENT NOT YET SCHEDULED

Nos. 14-5243 (L), 14-5254 (con.), 14-5260 (con.), 14-5262 (con.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE FANNIE MAE/FREDDIE MAC SENIOR PREFERRED STOCK PURCHASE AGREEMENT CLASS ACTION

On Appeal from the United States District Court
For the District of Columbia, No. 13-mc-01288
(Royce C. Lamberth, District Judge)

INITIAL OPENING BRIEF FOR CLASS PLAINTIFFS

Hamish P.M. Hume
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Ave., NW, Suite 800
Washington, DC 20015
Tel: (202) 237-2727
Fax: (202) 237-6131

Interim Co-Lead Class Counsel for Appellants American European Insurance Company, Joseph Cacciapalle, John Cane, Francis J. Dennis, Marneu Holdings, Co., Michelle M. Miller, United Equities Commodities, Co., 111 John Realty Corp., Barry P. Borodkin and Mary Meiya Liao

[*Additional Appearances on Inside Cover*]

BERNSTEIN LITOWITZ BERGER& GROSSMAN LLP
David L. Wales
1285 Avenue of the Americas
New York, NY 10019
Tel: (212) 554-1409
Fax: (212) 554-1444
dwales@blbglaw.com

Blair A. Nicholas
David R. Kaplan
12481 High Bluff Drive, Suite 300
San Diego, CA 92130
Tel: (858) 793-0070
Fax: (858) 793-0323
blairn@blbglaw.com
davidk@blbglaw.com

GRANT & EISENHOFER P.A.
Jay W. Eisenhofer
485 Lexington Avenue
New York, NY 10017
Tel: (646) 722-8500
Fax: (646) 722-8501
jeisenhofer@gelaw.com

Geoffrey C. Jarvis
Michael J. Barry
123 Justison Street
Wilmington, DE 19801
Tel: (302) 622-7000
Fax: (302) 622-7100
gjarvis@gelaw.com
mbarry@gelaw.com

KESSLER TOPAZ MELTZER & CHECK, LLP
Lee D. Rudy
Eric L. Zagar
Matthew A. Goldstein
280 King of Prussia Road
Radnor, PA 19087
Tel: (610) 667-7706
Fax: (610) 667-7056

Interim Co-Lead Class Counsel for Appellants American European Insurance Company, Joseph Cacciapalle, John Cane, Francis J. Dennis, Marneu Holdings, Co., Michelle M. Miller, United Equities Commodities, Co., 111 John Realty Corp., Barry P. Borodkin and Mary Meiya Liao

CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici Curiae

Appellants in this case are American European Insurance Company, Joseph Cacciapalle, John Cane, Francis J. Dennis, Marneu Holdings, Co., Michelle M. Miller, United Equities Commodities, Co., 111 John Realty Corp., Barry P. Borodkin, Mary Meiya Liao, Perry Capital LLC, Fairholme Funds, Inc., the Fairholme Fund, Berkley Insurance Company, Acadia Insurance Company, Admiral Indemnity Company, Admiral Insurance Company, Berkley Regional Insurance Company, Carolina Casualty Insurance Company, Midwest Employers Casualty Insurance Company, Nautilus Insurance Company, Preferred Employers Insurance Company, Arrowood Indemnity Company, Arrowood Surplus Lines Insurance Company and Financial Structures Limited.

Appellees in this case are the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the United States Department of the Treasury, Jacob J. Lew, Melvin L. Watt and the Federal Housing Finance Agency.

The following parties appear in this Court as amici curiae: Investors Unite, Independent Community Bankers of America, 60 Plus Association and Rafter Plaintiffs.

B. Rulings Under Review

Appellants seek review of: (1) the Memorandum Opinion entered on September 30, 2014, by the United States District Court for the District of

Columbia (Lamberth, J.); (2) the Order Granting Defendants' Motions to Dismiss and Denying Plaintiffs' Cross-Motion for Summary Judgment entered on September 30, 2014, by the United States District Court for the District of Columbia (Lamberth, J.); (3) the Order Denying Plaintiffs' Motion for Supplementation of the Administrative Record, Limited Discovery, Suspension of Briefing on the Defendants' Dispositive Motions, and a Status Conference entered on September 30, 2014, by the United States District Court for the District of Columbia (Lamberth, J.).

C. Related Cases

This case has not previously been before this Court. Counsel is aware of the following ongoing, related cases in the District of Columbia, involving certain of the same defendants and arising out of the same Government action challenged here. The *Perry Capital*, *Fairholme* and *Arrowood* appeals listed below (Nos. 14-5243, 14-5254 and 14-5260) have been consolidated with this appeal (No. 14-5262) by order of the Court:

- *Perry Capital LLC v. Lew, et al.*, No. 14-5243 (D.C. Cir.)
- *Fairholme Funds, Inc., et al. v. Federal Housing Finance Agency, et al.*, No. 14-5254 (D.C. Cir.)
- *Arrowood Indemnity Inc., et al. v. Federal National Mortgage Association, et al.*, No. 14-5260 (D.C. Cir.)

- *Arrowood Indemnity, Inc., et al. v. United State*s, No. 1:13-cv-698-MMS (Fed. Cl.)
- *Cacciapalle v. United States*, No. 1:13-cv-466-MMS (Fed. Cl.)
- *Fairholme Funds, Inc., et al. v. United States*, No. 1:13-cv-465-MMS (Fed. Cl.)
- *Fisher, et al. v. United States*, No. 1:13-cv-608-MMS (Fed. Cl.)
- *Rafter, et al. v. United States*, No. 1:14-cv-740-MMS (Fed. Cl.)
- *Washington Federal, et al. v. United States*, No. 1:13-cv-385-MMS (Fed. Cl)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Appellants make the following disclosures:

Appellants Joseph Cacciapalle, John Cane, Francis J. Dennis, Michelle M. Miller, Barry P. Borodkin and Mary Meiya Liao are individuals and not corporations.

Appellant American European Insurance Company is a New Jersey corporation that invests in securities, including the Fannie Mae Preferred Stock and Freddie Mac Preferred Stock at issue in this action. It has no parent company, and no publicly held company owns 10 percent or more of its stock.

Appellant Marneu Holdings, Co. is a New York general partnership that invests in securities, including the Fannie Mae Preferred Stock and Freddie Mac Preferred Stock at issue in this action. It has no parent company, and no publicly held company owns 10 percent or more of its partnership interests.

Appellant United Equities Commodities, Co. is a New York general partnership that invests in securities, including the Fannie Mae Preferred Stock and Freddie Mac Preferred Stock at issue in this action. It has no parent company, and no publicly held company owns 10 percent or more of its partnership interests.

Appellant 111 John Realty Corp. is a New York "S" corporation that invests in securities, including the Fannie Mae Preferred Stock at issue in this action. It has no parent company, and no publicly held company owns 10 percent or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES[*]

Page(s)

Cases

[*] Authorities upon which Appellants chiefly rely are marked with asterisks.

Statutes

Other Authorities

GLOSSARY

Term	Abbreviation
Certificates of Designation of each series of preferred and common stock of Fannie Mae and Freddie Mac	Certificate
American European Insurance Company, Joseph Cacciapalle, John Cane, Francis J. Dennis, Marneu Holdings, Co., Michelle M. Miller, United Equities Commodities, Co., 111 John Realty Corp., Barry P. Borodkin and Mary Meiya Liao	Class Plaintiffs
Private owners of common stock in the Companies as of August 17, 2012	Common Shareholder Class
Class Plaintiffs' Consolidated Amended Class Action and Derivative Complaint, filed in the District Court on December 3, 2013	Consolidated Class Complaint
Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac")	The Companies
United States District Court for the District of Columbia (Lamberth, J.)	District Court
Federal Deposit Insurance Corporation	FDIC
Federal Housing and Finance Agency	FHFA
The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989)	FIRREA

The First Amendment to the Senior Preferred Stock Purchase Agreements between the United States Department of the Treasury and the Federal Housing Finance Agency, as conservator to Fannie Mae and Freddie Mac, dated May 6, 2009	The First Amendment
Senior Preferred Stock	Government Stock
Government Sponsored Enterprises	GSEs
The Housing and Economic Recovery Act of 2008, Pub. L. 110-289, 122 Stat. 2654 (2008)	HERA
The Third Amendment to the Senior Preferred Stock Purchase Agreements between the United States Department of the Treasury and the Federal Housing Finance Agency, as conservator to Fannie Mae and Freddie Mac, dated August 17, 2012, and the declaration of dividends Pursuant to the Third Amendment beginning January 1, 2013	The Net Worth Sweep, or the Third Amendment
Senior Preferred Stock Purchase Agreements	PSPAs, or Government Stock Agreements
Private owners of junior preferred stock in the Companies as of August 17, 2012	Preferred Shareholder Class
The Second Amendment to the Senior Preferred Stock Purchase Agreements between the United States Department of the Treasury and the Federal Housing Finance Agency, as conservator to Fannie Mae and Freddie Mac, dated December 24, 2009	The Second Amendment
United States Department of Treasury	Treasury

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over Class Plaintiffs' state law claims under 28 U.S.C. § 1332(d)(2)(A), in that at least some members of the Class (including named Plaintiffs) are citizens of States different from the States in which Defendants are citizens, and the matter in controversy exceeds $5 million. The District Court's jurisdiction is also supported by 12 U.S.C. §§ 1452(c)(7) and 1723a(a).

On September 30, 2014, the District Court entered an order dismissing all of the claims in the Consolidated Class Complaint, thereby constituting a final judgment. Class Plaintiffs filed a timely notice of appeal on October 15, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES[1]

1. Whether the District Court erred in dismissing Class Plaintiffs' breach of fiduciary duty claims against the Federal Housing and Finance Agency ("FHFA") and the United States Department of Treasury ("Treasury"), including by –

    a. Dismissing a direct fiduciary breach claim on behalf of Fannie Mae shareholders without analysis;

    b. Holding that Class Plaintiffs' derivative claims on behalf of the Companies were barred by 12 U.S.C. § 4617(b)(2)(A), even in circumstances where FHFA faced a manifest conflict of interest in being asked *to sue itself* and a closely-related agency with whom FHFA is alleged to have jointly committed a fiduciary breach; and

    c. Holding that FHFA faces no manifest conflict of interest in being asked to sue Treasury for a fiduciary breach based on actions Treasury and FHFA took together as joint tortfeasors.

2. Whether the District Court erred in dismissing Class Plaintiffs' breach of contract and breach of implied covenant claims against the Companies and FHFA, including by –

    a. Holding that the diversion of all of the Companies' net profits to Treasury did not violate Class Plaintiffs' shareholder contracts or the implied covenant of good faith and fair dealing; and

    b. Holding that Class Plaintiffs' claims for breach of contractual rights to liquidation distributions were unripe.

---

[1] As explained in the Procedural History, the Class Plaintiff who sought to advance a "Little Tucker Act" Takings claim has chosen not to pursue that claim on appeal. While the District Court's ruling on the Takings claim was in error, that issue is not raised in this appeal.

STATEMENT OF THE CASE

A. Factual Background

1. For Decades, The Companies Were Financed By Private Shareholders Who Purchased Preferred Or Common Stock With Clear Contractual Rights.

The Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (together, the "Companies") are private, shareholder-owned corporations created by Congress to increase liquidity and stability in the secondary market for home mortgages. ¶45.[2]

While the Companies are commonly referred to as "Government Sponsored Enterprises" or "GSEs," they are for-profit corporations with traditional corporate governance structures – including shareholders, directors, and officers. ¶¶80-86. Pursuant to their bylaws, Fannie Mae elected to follow "the applicable corporate governance practices and procedures of the Delaware General Corporation Law," and Freddie Mac elected to follow "the corporate governance practices and procedures of the law of the Commonwealth of Virginia." ¶83.

For decades, the Companies were two of the world's largest privately-owned financial institutions. When they needed capital, they issued common stock, numerous classes of preferred stock ("Preferred Stock"), and debt securities, all of

[2] Citations herein are as follows (docket citations refer to 13-mc-01288): "¶" refers to the Consolidated Class Complaint [Dkt. 4]; "Op." refers to the Memorandum Opinion [Dkt.46]; "T__" refers to the Administrative Record filed by Treasury in the District Court.

which were publicly traded on the U.S. capital markets. ¶¶5-6, 45. Each series of Preferred Stock and common stock are governed by a Certificate that contains contractual provisions governing stockholders' dividend and liquidation rights. ¶¶84-85. The Certificates provide that their terms may not be amended in a way that has a material, adverse impact on stockholders unless the Companies first receive the permission of two-thirds of the affected holders. ¶86.

2. <u>In July 2008, Congress Created FHFA, Which In September 2008 Placed The Companies Into Conservatorship.</u>

In July 2008, in response to the crisis in the housing and mortgage markets, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"). ¶7. HERA created FHFA to provide added confidence to the mortgage and financial markets, *id.*, and gave FHFA the authority to serve as conservator or receiver of the Companies, *id.*; *see* 12 U.S.C. § 1455(l)(1)(A) (Freddie Mac); 12 U.S.C. § 1719(g)(1)(A) (Fannie Mae).

On September 6, 2008, FHFA placed the Companies into temporary conservatorship. ¶51. The goal of the conservatorship was to allow the Companies to return to normal business operations, and FHFA stated publicly that the conservatorship would be terminated once the Companies were returned to "a safe and solvent condition." *Id.* FHFA stressed that the conservatorship would be a temporary process that would "stabilize" the Companies, "with the objective of returning the entities to normal business operations." *Id.* Treasury and FHFA explained that while dividends were being suspended, the Companies' common and preferred stocks were not being eliminated and would continue to remain outstanding. ¶53. Relying on these official statements, public shareholders continued to trade in the Companies' stock. ¶¶8, 54.

3. In Exchange For Funding, FHFA Executed An Agreement Giving Treasury A 10% Senior Preferred Stock Dividend And Warrants To Buy 79.9% Of The Common Stock For A Nominal Price.

When the Companies were placed into conservatorship, FHFA and Treasury entered into Senior Preferred Stock Purchase Agreements ("PSPAs" or "Government Stock Agreements"). ¶56. Through these agreements, Treasury agreed to provide funding for the Companies, and in exchange Treasury received a newly created class of securities, known as Senior Preferred Stock ("Government Stock"). *Id.* The terms of the Government Stock provided in relevant part as follows:

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

(b) If cash was unavailable to pay that 10% cash dividend, Treasury would receive a dividend in the form of additional Government

Stock with a face value equal to 12% of the outstanding principal value of the Government Stock;

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

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

(e) Treasury also received warrants to acquire 79.9% of the common stock of each Company for a nominal price. *Id.*; T0014-17, T0032-40, T0066-74.

After placing the Companies into conservatorship, FHFA caused the Companies to take billions of dollars in write-downs and accounting adjustments.

¶¶61-64. These accounting adjustments caused the Companies' net worth to drop into negative territory, requiring the Companies to draw on Treasury's funding commitment. ¶62. By mid-2012, Treasury held $189 billion in Government Stock and had provided $187.5 billion in funding to the Companies, the majority attributable to these accounting adjustments, and the remainder to repay Treasury the 10% cash dividend on its outstanding Government Stock. ¶¶10, 71-73.

In May 2009, Treasury agreed to expand its funding commitment from $100 billion per Company to $200 billion per Company ("First Amendment"). ¶58. In December 2009, Treasury agreed to a funding commitment that would allow the Companies to satisfy their 2010, 2011, and 2012 capitalization requirements and a funding commitment up to a limit determined by an agreed-upon formula for subsequent years ("Second Amendment"). *Id.*

4. <u>In 2012, The Housing Market Rebounded And The Companies Returned To Profitability.</u>

By the second quarter of 2012, the housing and mortgage markets had rebounded, and the Companies returned to profitability. ¶¶64-65. For the first time since entering conservatorship, both Companies reported profits in excess of their dividend obligations to Treasury. *Id.* The Companies reported profits of more than $10 billion in the first two quarters of 2012, and disclosed that they expected to be consistently profitable for the foreseeable future. *Id.* The Companies were positioned to pay back the Government for the support they had received, with residual assets to provide a significant financial return to their private investors, leading to substantial increases in the trading prices of the Companies' preferred stock. ¶¶66-68.

5. In August 2012, FHFA And Treasury Amended Their Agreement To Give Treasury A Right To A Quarterly Dividend Equal To 100% Of The Companies' Net Worth Without Giving The Companies Anything In Return.

Rather than allow private shareholders to share in the Companies' return to profitability, on August 17, 2012, FHFA and Treasury executed an amendment to the Government Stock Agreements that swept *all* future profits to the Government, and ensured that no profits could ever be distributed to private shareholders ("Third Amendment" or "Net Worth Sweep"). ¶¶71-72.

In place of the 10% coupon on the Government Stock, the Third Amendment changed the Government Stock Agreements to require each Company to pay Treasury a dividend of 100% of its net worth each quarter, minus a reserve amount that shrinks to zero by 2018. *Id.* As a result of this "Net Worth Sweep," the Companies would be left with no funds to redeem Treasury's Government Stock, or to distribute to private shareholders—whether by dividend, redemption, or liquidation distribution. *Id.* The Government Stock Agreements provided that in the event of a liquidation of the Companies, the Government would receive a liquidation preference that included the amount of any prior unpaid dividend; thus, the Third Amendment guaranteed that even if the Companies were liquidated, Treasury would receive 100% of the Companies' net worth. ¶77.

As Treasury stated on the day the Third Amendment was announced, the purpose of the Third Amendment was to ensure that "every dollar of earnings that Fannie Mae and Freddie Mac generate will … benefit taxpayers"—*i.e.*, that no dollar of earnings would ever be paid to the private shareholders. ¶94. The Third Amendment completely eliminated the contractual rights of the private preferred and common shareholders, and transferred the economic value of these privately-held securities to the Government. ¶¶87-91. Nevertheless, the Government imposed the Third Amendment without seeking or obtaining the consent of these private shareholders. ¶88.

Neither the Companies nor the private shareholders received anything of value in return for the Third Amendment. ¶¶91, 108-109.

Treasury has reaped immense profits via the Third Amendment. ¶¶73, 96. On or about June 30, 2013, the Companies collectively paid Treasury a $66.3 billion dividend – more than fourteen times the $4.7 billion that Treasury would have received under the original 10% coupon on its Government Stock. ¶73. As a result of the Third Amendment, Treasury's annualized rate of return on its Government Stock for the quarter was a staggering 140%. ¶19. By the end of 2013, Fannie Mae paid a total of approximately $114 billion in dividends to

Treasury, and Freddie Mac paid a total of over $71 billion – for total dividend payments of $185.2 billion as of December 2013. ¶¶20, 73. As of the first quarter of 2015, Fannie Mae has paid a total of $138.2 billion in dividends to Treasury (exceeding the $116.1 billion in prior Treasury funding),[3] and Freddie Mac has paid a total of $92.6 billion (exceeding the $71.3 billion in prior Treasury funding).[4]

B. Procedural History

On July 29, 2013, the first of a series of class action complaints were filed in the District Court seeking to recover damages for the harm caused by the Net Worth Sweep to the shareholders of Fannie Mae and Freddie Mac. On December 3, 2013, Class Plaintiffs filed the Consolidated Class Complaint, asserting breach of contract claims and breach of fiduciary duty claims on behalf of all Fannie Mae and Freddie Mac preferred and common shareholders who held their stock as of the date of the Net Worth Sweep, as well as derivative claims on behalf of Fannie Mae. *See* ¶¶129-38; 139-74; 175-82. The Consolidated Class Complaint advances

[3] Fannie Mae May 7, 2015 Press Release, *available at* http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2015/q12015_release.pdf (last visited June 26, 2015).

[4] Freddie Mac May 5, 2015 Press Release, *available at* http://www.freddiemac.com/investors/er/pdf/2015er-1q15_release.pdf (last visited June 26, 2015). This Court may take judicial notice of the public earnings statements posted on the Companies' websites, as their contents can be accurately and readily determined from sources not subject to reasonable dispute. *See Nebraska v. EPA*, 331 F.3d 995 (D.C. Cir. 2003).

claims both on behalf of the private owners of junior preferred stock in the Companies as of August 17, 2012 ("Preferred Shareholder Class"), and on behalf of the private owners of common stock in the Companies as of August 17, 2012 ("Common Shareholder Class").

In addition, the Consolidated Class Complaint advanced a Takings Clause claim under the Little Tucker Act on behalf of plaintiffs whose individual claims were for less than $10,000, as was the case for one of the class representatives in the complaint. *Id.* at ¶¶120, 183-92.[5]

On July 30, 2014, certain of the Class Plaintiffs filed a Derivative Complaint advancing derivative claims on behalf of Freddie Mac, and alleging that Class

---

[5] On July 10, 2013, prior to any of the District Court class action filings, plaintiffs Joseph Cacciapalle and Melvin Bareiss had commenced an action in the United States Court of Federal Claims on behalf of themselves and similarly situated holders of Fannie and Freddie preferred stock, seeking just compensation for the taking of their private property under the Fifth Amendment of the United States Constitution. The Court of Federal Claims Complaint brought claims under the "Big Tucker Act" on behalf of class members with claims of greater than $10,000. 28 U.S.C. § 1491(a). Thus, the Cacciapalle plaintiffs (and all other Class Plaintiffs with claims of more than $10,000) were not party to the Little Tucker Act Takings claim in District Court. As the *Cacciapalle* District Court complaint made clear, the Cacciapalle plaintiffs commenced two actions because "to the extent the Government seeks to defend the [Court of Federal Claims] Complaint by claiming that the FHFA was not acting as an arm of the government…then it must concede that FHFA, Fannie, and Freddie can be sued as non-governmental entities." *See id.* at ¶12.

Plaintiffs had satisfied their demand requirement with respect to Freddie Mac. Dkt. 39.

In addition to the class action filings referenced above, three non-class plaintiffs filed individual actions in the District Court challenging the Net Worth Sweep. In November 2013, the District Court consolidated the shareholder class actions and issued an order for coordinated briefing of the class action case with the non-class cases. *See* Dkt. No. 1 at 2.

On September 30, 2014, the District Court granted defendants' motions to dismiss all four cases. This appeal followed.[6]

[6] The Class Plaintiff with the Little Tucker Act Takings claim does not pursue the Takings claim on appeal. Thus, while the Cacciappalle plaintiffs (and all other Class Plaintiffs with claims for more than $10,000) continue to pursue their Big Tucker Act Takings claim in the Court of Federal Claims (and strongly maintain that the District Court's decision on the Takings issue was in error), that issue is no longer presented in this appeal. Any future class action advancing a Little Tucker Act Takings claim would need to be brought by a class representative other than those advancing this appeal.

SUMMARY OF ARGUMENT

By August 2012, the Companies had commenced generating sufficient profits to satisfy all of their obligations to the Treasury, with substantial profits left over that were available to distribute to private shareholders. FHFA and Treasury then created the Net Worth Sweep, which required 100% of all of the Companies' profits to be paid to Treasury, and which was specifically designed to ensure that not a single penny would be ever be distributed to private shareholders.

As a matter of law, both FHFA (as conservator and hence effectively the management and director of the Companies) and Treasury (as the controlling shareholder) owed a fiduciary duty to both the Companies and the private shareholders. By agreeing to the Net Worth Sweep, FHFA and Treasury breached those fiduciary duties: they gratuitously gave away assets of the Companies that were available for distribution to Class Plaintiffs. Class Plaintiffs have a direct fiduciary breach claim against Appellees with respect to the Fannie Mae Net Worth Sweep. Class Plaintiffs are also entitled to bring derivative fiduciary breach claims on behalf of both Companies.

The District Court erred in holding that 12 U.S.C. § 4617(b)(2)(A) prevents the Class Plaintiffs from bringing a derivative claim. The overall structure of HERA demonstrates that Fannie Mae and Freddie Mac's shareholders retain significant rights as shareholders, notwithstanding FHFA's appointment as conservator. Although HERA may be read as giving FHFA the right to pursue derivative actions generally, it does not bar shareholders from pursuing such claims when FHFA faces a manifest conflict of interest. Both the Federal Circuit and Ninth Circuit held that a virtually identical provision in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), did not bar derivative claims brought by shareholders of banks that had been placed into federal conservatorship or receivership when the claim was against the Government or another federal agency: in essence, those courts held that it would be absurd to interpret a statute as preventing private shareholders from bringing a claim that would otherwise have to be brought by the Federal Deposit Insurance Corporation ("FDIC") against itself or one of its sister Government agencies. This Court should likewise so hold. Where such a "manifest conflict of interest" exists, private shareholders of institutions in federal conservatorships must be permitted to bring derivative claims.

The District Court also erred in dismissing Class Plaintiffs' breach of contract claims. The Net Worth Sweep permanently nullified the contractual rights of Class Plaintiffs to receive any dividends or liquidation distributions without seeking or obtaining the Class Plaintiffs' contractually-required consent. By nullifying any right to receive economic value from the stockholder Certificates, the Net Worth Sweep breached the contractual voting and economic rights of those

Certificates. That future dividends may be subject to the discretion of the Board does not change the fact that plaintiffs' contractual right to receive such dividends has now been permanently eliminated. Moreover, the Net Worth Sweep violated mandatory dividend rights of Class Plaintiffs to be paid dividends prior to, or ratably with, any dividends paid to the Government over and above the 10% dividend provided for in the Government Stock Agreement. Prior to the Net Worth Sweep, the only way the Government could receive dividends in excess of its annual 10% cash dividend (or 12% stock dividend) was by exercising its warrants for 79.9% of the common stock; however, if it had done that, then the contractual rights of Class Plaintiffs would have *required* the Companies to first pay dividends to the Preferred Shareholder Class, and also to pay dividends to the Common Shareholder Class on a ratable, pro rata basis. By gratuitously giving Treasury dividends in excess of its 10% coupon, the Net Worth Sweep breached these contractual rights to *mandatory* dividends.

The Net Worth Sweep also violated the implied covenant of good faith. By design, it deprives the private shareholders of any ability to enjoy the fruits of the contractual bargain contained in their stock Certificates. Under established law, that is a breach of the implied covenant.

Finally, the District Court erred in holding that Class Plaintiffs did not yet have a ripe claim for the breach of their contractual rights to liquidation distributions. That claim is purely legal, is based on final agency action, and no future development is needed to make it more fit for judicial resolution. It will also visit a substantial harm on Class Plaintiffs to defer resolution of that claim.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews an appeal from a decision granting a motion to dismiss a complaint on a *de novo* basis. *Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009); *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197-98 (D.C. Cir. 1992). This standard of review applies to the dismissal of all of Class Plaintiffs' claims.

II. THE DISTRICT COURT ERRED IN DISMISSING CLASS PLAINTIFFS' BREACH OF FIDUCIARY DUTY CLAIMS.

A. The Net Worth Sweep Was An Inherently Unfair, Self-Dealing Transaction Executed In Violation Of The Fiduciary Duties Owed By Both FHFA And Treasury.

FHFA and the Treasury each owe fiduciary duties to both the Companies and to the private shareholders of the Companies. FHFA and the Treasury violated those fiduciary duties when they executed the Third Amendment.

When FHFA became the conservator of the Companies, it assumed the authority of the management and board of the Companies. Although the Companies continue to have directors and officers, those officers and directors may exercise their authority only "as directed by the conservator," and must "consult with it and obtain its written approval before taking action." *See* ¶104; Dkt. 39 ¶¶56. Thus, FHFA is the effective manager and director of the Companies, and therefore owes a fiduciary duty of loyalty to the Companies themselves and to the shareholders of the Companies. *See* ¶102; Dkt. 39 ¶¶54-57; *see also Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998); *Rowland v. Kable*, 6 S.E.2d 633, 635 (Va. 1940). Courts have recognized that federal conservators, like corporate directors, owe a fiduciary duty of loyalty to shareholders. *See, e.g. Gibralter Fin. Corp. v. Fed. Home Loan Bank Bd.,* 1990 WL 394298, at *2 (C.D. Cal. June 15, 1990).

The Treasury also owes a fiduciary duty of loyalty to the Companies and the Companies' other shareholders. Under Delaware law (which applies to Fannie Mae), a shareholder owes a fiduciary duty of loyalty to the corporation and to its minority stockholders "if it owns a majority interest in or exercises control over the business affairs of the corporation." *Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1344 (Del. 1987); *see also Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am.*, 120 A. 486, 491 (Del. 1923) (holding that controlling shareholders owe a duty of loyalty to minority shareholders). A shareholder may qualify as a controlling shareholder either by owning more than 50% of a corporation's outstanding stock, or by exercising "actual control of corporation conduct" and thereby having a "dominating relationship" vis-à-vis the other shareholders. *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989);

Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1114 (Del. 1994). Likewise, under Virginia law (which applies to Freddie Mac), the existence of *de facto* control is sufficient to trigger a fiduciary obligation, irrespective of the specific means by which the shareholder exercises that control. *See Parsch v. Massey*, 2009 WL 7416040, at *11 (Va. Cir. Ct. Nov. 5, 2009).

Treasury exercises *de facto* control over the Companies. By entering into the Government Stock Agreements, Treasury obtained 100% of the Senior Preferred Stock, the right to acquire 79.9% of the common stock of both Companies for a nominal value, and extraordinary control over the day-to-day affairs of the Companies. Without Treasury's consent, the Companies cannot, *inter alia*: (1) issue capital stock of any kind, T0024, T0058; (2) pay dividends to any shareholder other than Treasury, T0024, T0058; (3) enter into any new or adjust any existing compensation agreements with officers, T0027, T0061; and (4) sell, convey or transfer any of its assets outside the ordinary course of business, T0024-25, T0058-59. Based on the foregoing, Treasury was and is a controlling stockholder in each of the Companies, and therefore owes a fiduciary duty to the Companies and their minority private shareholders. *See Odyssey Partners, LP v. Fleming Cos., Inc.*, 1996 WL 422377 (Del. Ch. July 24, 1996) (stockholder who had warrant to acquire 50.1% of a corporation's shares, combined with loan and credit supply agreements, was deemed to have control and thus owe fiduciary duties for purposes of a motion to dismiss).

Both FHFA and Treasury violated their fiduciary duties when they executed the Third Amendment. A fiduciary duty prohibits the consideration or representation of interests "other than the best interests of the corporation and its stockholders in making a business decision," and requires that actions be taken in good faith. *See* Del. L. of Corp. and Bus. Org. § 4.16R, 2006 WL 2450303. As a result, "[a] controlling shareholder, director, or officer breaches a duty to the corporation and its minority shareholders by exercising control over the management and affairs of the corporation to his or her benefit and to the detriment of the corporation and the minority stockholders." *See id.* (citing cases); *see also Brown v. Scott Cnty. Tobacco Warehouses, Inc.*, 5 Va. Cir. 75 (1983).

In addition, a fiduciary duty generally precludes a party from engaging in a self-dealing transaction, unless it can carry the substantial burden of proving it is entirely fair to the corporation. *See Kahn*, 638 A.2d at 1115; *Giannotti v. Hamway*, 387 S.E.2d 725, 731 (Va. 1990).

Here, Treasury and FHFA are both agencies of the United States Government. Thus, the Government stood on both sides of the Third Amendment. Moreover, as the controlling shareholder in the Companies, Treasury stood on both sides of the transaction: it was a controlling shareholder of the Companies who stood on one side of the transaction, and it was the recipient of the Net Worth Sweep on the other side of the transaction.

Where a self-dealing transaction involves a party who owes a fiduciary duty of loyalty, "the requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts." *Weinberger v. UOP, Inc*., 457 A.2d 701, 710 (Del. 1983). The fairness inquiry formally has two prongs – fair dealing and fair price – but "[a]ll aspects of the issue must be examined as a whole since the question is one of entire fairness." *See id*. at 711.

Here, the Third Amendment is patently *unfair*, and cannot possibly pass the stringent fairness tests required of a self-dealing transaction. Prior to the Third Amendment, the Government was entitled to receive 10% cash dividends on its Senior Preferred Stock, or 12% preferred stock dividends if the Companies did not have cash to pay the cash dividend. In the event that the Companies generated profits in an amount greater than was needed to pay the 10% cash dividend to Treasury, they could pay that dividend and then use the additional cash for investment, to pay dividends to the private shareholders, or to increase its reserves—all of which are actions that would benefit the Companies and the private shareholders. Following the Third Amendment, the Companies were no longer able to do any of those things: instead, they were required to pay *all* of their net profits as dividends to the Treasury (minus a small and shrinking reserve amount), and were not permitted to distribute any of their profits to private shareholders. *Cf.* FHFA, "Strategic Plan for Enterprise Conservatorships: The Next Chapter in a Story that Needs an Ending," (Feb. 21, 2012) (explaining that FHFA's overriding objectives as conservator were "[g]etting the most value for taxpayers and bringing stability and liquidity to housing finance during this long…."), T2390. This is a blatant divestiture of *all* of the economic rights owned by the private shareholders and *all* of the rights of the Companies to invest or distribute its profits in whatever manner was in the best interests of the Companies and its shareholders. And in exchange for this acquisition of all rights to the Companies' future profits, the Treasury provided the Companies precisely *nothing* in return.[7] It is hard to imagine a more unfair or one-sided transaction.

B. The District Court Erred In Holding That HERA Barred Class Plaintiffs' Fiduciary Breach Claims.

1. <u>The District Court Erred In Dismissing Class Plaintiffs' Direct Fiduciary Breach Claims Relating To Fannie Mae's Third Amendment.</u>

The District Court read Class Plaintiffs' fiduciary duty claims as solely derivative (Op. at 9), and dismissed those claims based solely on its analysis of

[7] *See* Richard A. Epstein, *The Government Takeover of Fannie Mae and Freddie Mac: Upending Capital Markets with Lax Business and Constitutional Standards*, 10 NYU J. L. & BUS. 379, 409 (2014) (opining that the Net Worth Sweep essentially was "all *quid* without any *pro quo*").

whether the Class Plaintiffs possessed standing to bring a derivative suit. Op. at 26-32. However, with respect to the Fannie Mae Third Amendment, Class Plaintiffs allege that FHFA and Treasury violated their fiduciary duties not only to Fannie Mae but also to the private shareholders in Fannie Mae, thereby asserting both direct claims (addressing the direct harm to the Fannie Mae shareholders) and derivative claims (addressing the harm to Fannie Mae). ¶¶102-09, 176-78; Dkt. 33 at 41-43.

Under Delaware law, Class Plaintiffs have a right to bring the fiduciary duty claim as a direct claim. *See Gatz v. Ponsoldt*, 925 A.2d 1265, 1274 & 1281 (Del. 2007) (when a claim is based on the exercise of "control over the corporate machinery to cause an expropriation of economic value and voting power from the public shareholders," "a separate and distinct harm results to the public shareholders, apart from any harm caused to the corporation, and from which the public shareholders may seek relief in a direct action"); *see also Feldman v. Cutaia*, 951 A.2d 727, 734-35 (Del. 2008) ("claims of mismanagement resulting in a decrease in the value of corporate stock are derivative in nature, while 'attacks involving fair dealing or fair price' in a corporate transaction are direct in nature"); *Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006) (under Delaware law minority shareholders have the right to advance direct claims where there has been "an improper transfer – or expropriation – of economic value and voting power from the public shareholders to the majority or controlling stockholder."); *Dubroff v. Wren Holdings, LLC*, 2011 WL 5137175, at *8 (Del. Ch. Oct. 28, 2011).

At a minimum, this Court should reverse and remand to allow Class Plaintiffs to pursue their direct fiduciary breach claims regarding the Fannie Mae Third Amendment.

2. The District Court Erred In Holding That Stockholders May Not Bring Derivative Claims Even In Circumstances Where FHFA Faces A Manifest Conflict Of Interest.

HERA provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to … all rights, titles, powers, and privileges … of any stockholder[.]" 12 U.S.C. § 4617(b)(2)(A). Relying on this Court's decision in *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012), the District Court held that this provision in HERA bars all stockholder derivative claims without exception, even when the derivative claim is against another arm of the Government such that FHFA faces a manifest conflict of interest. Op. at 27-30. *Kellmer* provides no such support. *Kellmer* held that § 4617(b)(2)(A) generally transfers the right to bring derivative actions to FHFA, but also expressly recognized that a "manifest conflict of interest" exception to that general rule might exist. 674 F.3d at 850 (recognizing that in analyzing an identical provision in FIRREA, "courts have found that, ***absent a manifest conflict of interest by the conservator not at issue here***, the statutory language bars shareholder derivative actions.") (emphasis added). As the District Court itself acknowledged, *Kellmer* was a case against officers and directors rather than against a Government agency, and *Kellmer* therefore did not have occasion to consider the "manifest conflict of interest" at issue here. Op. at 28.

Thus, there should be no dispute that *Kellmer* does not control this Court's resolution of the issue presented, which is this: does HERA bar shareholders from bringing derivative claims on behalf of the Companies against FHFA itself, and against another Government agency who acted in close concert with FHFA, where FHFA would have a "manifest conflict of interest" in bringing such claims? There are numerous courts holding that the answer to that question must be no, and this Court should likewise so hold.

HERA was in large part modeled on FIRREA.[8] As recognized in *Kellmer*, the HERA provision giving FHFA the rights and powers of stockholders is "virtually identical" to that found in FIRREA (specifically in 12 U.S.C. § 1821(d)(2)(A)). 674 F.3d at 850. Two Courts of Appeal have held that this virtually identical provision from FIRREA does *not* bar a shareholder in a seized financial institution from bringing a derivative claim where the federal receiver or conservator would face a manifest conflict of interest in bringing such a claim.

[8] *Compare, e.g.,* 12 U.S.C. § 1821(d)(2)(A)(i) *with* 12 U.S.C. § 4617(b)(2)(A)(i); 12 U.S.C. § 1821(d)(2)(B)(i) *with* 12 U.S.C. § 4617(b)(2)(B)(i).

First, in 1999, the Federal Circuit recognized that stockholder plaintiffs of a financial institution in FDIC conservatorship was, under certain circumstances, entitled to bring a derivative suit on behalf of the financial institution, notwithstanding that FIRREA's statutory language generally "vests in the FDIC, in its capacity as the receiver, all rights and powers of the insured depository institution, including the authority to file suit." *First Hartford Corp. Pension Plant & Trust v. U.S.*, 194 F.3d 1279, 1294-95 (Fed. Cir. 1999). In that case, the claim was against the United States for breach of contract caused by a regulatory action taken by the FDIC, and therefore—absent a derivative claim—the claim could have been brought only *by the FDIC* (acting as conservator, on behalf of the financial institution) against the United States for conduct that was *caused by the FDIC* (acting as regulator). The court concluded "that the manifest conflict of interest presented here warrants standing for a derivative suit." *Id.* at 1295.

Similarly, in 2001, the Ninth Circuit, following *First Hartford*, held that a stockholder in a bank that had been placed into federal conservatorship and then receivership was entitled to bring a derivative claim against the Office of Thrift Supervision ("OTS"). *Delta Savings Bank v. U.S.*, 265 F.3d 1017, 1023-24 (9th Cir. 2001). The plaintiffs sought to bring a claim on behalf of the bank against OTS alleging a race-based conspiracy to subject the bank to heightened scrutiny. *Id.* at 1019-20. As the Ninth Circuit explained: "The FDIC was asked to demand a lawsuit, refuse this demand, and proceed derivatively with the lawsuit against one of its closely-related, sister agencies. This was one hat too many to be placed atop the head of the FDIC." *Id.* at 1023-24. As the Court held: "strict adherence to an absolute rule [barring such suits] would be at least impracticable, and arguably absurd." *Id.*[9]

The decisions in *First Hartford* and *Delta Savings* are not the only ones to hold that a manifest conflict of interest exception must exist in interpreting statutes that confer the rights and powers of shareholders to Government agencies. *See also Branch v. FDIC*, 825 F. Supp. 384, 405 (D. Mass. 1993) (FIRREA "does not alter the settled rule that shareholders of failed national banks may assert derivative claims"); *Suess v. U.S.*, 33 Fed. Cl. 89, 95 (1995) (same); *Slattery v. U.S.*, 35 Fed. Cl. 180, 183-84 (1996) (same). This Court has also recognized that shareholders may bring derivative suits in some circumstances under FIRREA. *See Gaubert v. Fed. Home Loan Bank Bd.*, 863 F.2d 59, 69-70 (D.C. Cir. 1988) (shareholders may derivatively assert a regulated entity's right to challenge appointment of a

---

[9] Prior to its *Delta Savings* decision, the Ninth Circuit held that FIRREA generally transferred to the FDIC the right to bring a derivative suit "unless, of course, the result would be absurd or impractical." *Pareto v. FDIC*, 139 F.3d 696, 700 (9th Cir. 1998). But *Pareto* did not involve a suit against another agency of the Government. Thus, *Pareto* is analogous to *Kellmer*, and *Delta Savings* is analogous to this case, and its reasoning should be followed here.

conservator or receiver, so long as the shareholder makes demand on the Board or demand is excused).

In refusing to follow the decisions holding that a "manifest conflict of interest" exception exists under the FIRREA provision that is virtually identical to HERA's § 4617(b)(2)(A), the District Court failed to consider that when Congress adopts a new statute that adopts identical language from a prior statute, it is presumed to have incorporated the prior judicial interpretation of that statutory language. *City of Dania Beach v. F.A.A.*, 628 F.3d 581, 593 (D.C. Cir. 2010) ("repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its… judicial interpretations as well."); *Gordon v. U.S. Capitol Police*, 778 F.3d 158, 165 (D.C. Cir. 2015). Congress should therefore be deemed to have adopted the interpretations of *First Hartford, Delta Savings* and the other courts allowing derivative claims under FIRREA when a Government agency would face a manifest conflict in being asked to sue the government for its own conduct or that of a closely-related agency.[10]

The District Court's rationale for refusing to follow *First Hartford* and *Delta Savings* was that the existence of a conflict of interest between a corporation's management and the target of a potential lawsuit is the central rationale for the "derivative suit mechanism"; according to the District Court, since HERA

[10] *Suess*, 33 Fed. Cl. at 95.

"explicitly bars" derivative suits, there cannot be an "exception" to that prohibition based on the central rationale for bringing derivative claims in the first place. Op. at 28-29. This rationale is erroneous for at least three reasons.

First, HERA does not "explicitly bar" derivative suits. Section 4617(b)(2)(A) provides that FHFA succeeds to the "rights, titles, powers, and privileges" of "any stockholder, officers, or director" of the Companies. Neither it nor any other provision of HERA "explicitly" references derivative suits at all. Instead, this provision has been *interpreted* as *generally* barring derivative claims because that is a right, power, or privilege of a stockholder. *Kellmer*, 674 F.3d at 850. But that holding in *Kellmer* relied on cases which also recognized that a different interpretation might be appropriate if there is a "manifest conflict of interest." *Id.* Thus, the District Court based its reasoning on a false premise regarding an "explicit" bar in the statute itself. The general bar on derivative claims comes from an *interpretation* of the statute; that interpretation can (and does) have exceptions when it would otherwise produce absurd or manifestly unjust and unintended results. *See First Hartford*, 194 F.3d at 1295; *Delta Savings*, 265 F.3d at 1023-24. Moreover, where a statutory interpretation would result in private shareholders losing their ability to seek redress against concerted action by one or more Government agencies whose actions are taking away or infringing their property rights, it would raise serious constitutional issues, and hence should be avoided. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979).

Second, the District Court misunderstood both the scope and rationale of the exception articulated in *First Hartford* and *Delta Savings*. It was not merely the existence of any conflict of interest that triggered the exception in those cases. It was the existence of a unique and manifest conflict of interest that arises when a Government agency acting as conservator or receiver for a financial institution is asked *to sue the Government* for conduct that it (or a closely-connected agency) was responsible for creating. *See, e.g.*, *First Hartford*, 194 F.3d at 1295; *Delta Savings* 265 F.3d at 1022-23. The "rationale for why derivative suits are available" is far broader than this highly unusual and limited circumstance. Op. at 29. Thus, allowing an exception based on such an unusual circumstance does not create an "end-run" around an interpretation that the statute generally gives control to the conservator to bring suits on behalf of the entity in conservatorships.

Third, the District Court's decision is inconsistent with the overall "structure," "context," and "purpose" of HERA. *See King v. Burwell*, __U.S.__ 2015 WL 2473448 (June 25, 2015). The structure and other provisions of HERA show that § 4617(b)(2)(A) is intended to convey control over the Companies to FHFA, but is not intended to extinguish all economic rights held by private stockholders, or their ability to protect those rights through litigation, including derivative claims where a manifest conflict exists. HERA expressly provides for stockholders to retain important economic rights, including rights to future distributions. *See* 12 U.S.C. § 4617(b)(2)(K)(i); 12 U.S.C. § 4617(c)(1). HERA nowhere says the stockholders may not sue to protect those economic rights; indeed, the District Court notably did not hold that § 4617 barred the right of plaintiffs to bring their *direct* claims, and therefore it implicitly agreed that § 4617 does not convey *those* shareholder rights to FHFA.

HERA expressly provides that stockholders retain the right to participate in a statutory claims process regarding the Companies' residual assets. *See* 12 U.S.C. § 4617(b)(2)(K)(i); 12 U.S.C. § 4617(c)(1). If HERA really transferred *all* stockholder "rights, titles, powers and privileges" to FHFA without exception (which it does not), then the stockholders' right to the Companies' residual assets would itself accrue to FHFA, and there would be no need to include stockholders in the priority scheme. That is clearly incorrect, and any such interpretation would be in conflict with the plain text of HERA itself. In analyzing the juxtaposition of directly analogous provisions in FIRREA, a court held as follows:

> In light of the language and juxtaposition of these two sections, this Court cannot conclude that Congress intended to preserve shareholders' rights to the residual assets of the failed financial institution, yet terminate the shareholders' ability to protect the failed institution's interests…. Accordingly, the Court rules that section 1821(d)(2)(A)(i) does not alter the settled rule that

> shareholders of failed national banks may assert derivative claims.

Branch, 825 F. Supp. at 404-405; *id.* (analyzing FIRREA analogue to § 4617(b)(2)(A): "despite its strong language, section 1821(d)(2)(A)(i) does not transfer all incidents of stock ownership."); *see also Suess*, 33 Fed. Cl. at 96.

The existence of the private stockholders' right to surplus assets underscores the importance to the overall structure of HERA for stockholders to retain their right to institute derivative actions where FHFA would have a manifest conflict of interest. Under HERA, the private stockholders retain the right to collect whatever assets remain after all higher-priority claims have been satisfied. But as the Third Amendment demonstrates, FHFA (as a Government agency) has an incentive to transfer those same residual assets *to the Government*. Since traditional corporate law mechanisms (such as the right to vote for and remove directors) are unavailable, the derivative suit is one of the few mechanisms that stockholders possess to ensure that the limited property rights they continue to possess under HERA will be protected. *See First Hartford*, 194 F.3d at 1295.[11]

Finally, HERA also makes clear that stockholders have more rights when their institution is placed in conservatorship than when it is placed in receivership.

---

[11] When it executed the Government Stock Agreements, Treasury admitted that HERA did not transfer all stockholder rights to FHFA, stating: "***Conservatorship preserves the status and claims of the preferred and common shareholders***[.]" T0005 (emphasis added).

When FHFA is appointed "***as receiver***," HERA provides that such appointment "***shall terminate all rights and claims that the stockholders and creditors of the regulated entity may have against the assets or charter of the regulated entity or the Agency arising as a result of their status as stockholders or creditors***…" 12 U.S.C. § 4617(b)(2)(K)(i) (emphasis added). There is no such language associated with the appointment of FHFA as conservator. The fact that this broad provision does *not* apply in conservatorship provides a strong indication that § 4617(b)(2)(A) is not intended to eliminate completely the economic and contractual rights of the shareholders, and their abilities to protect those rights through litigation.[12]

3. The District Court Erred In Finding That There Is No Conflict Of Interest Between FHFA And Treasury.

The District Court also erred in finding no conflict of interest between FHFA and Treasury. Op. at 30. First, its analysis overlooks the fact that FHFA at a minimum has a conflict of interest in *suing itself*. The derivative claim seeks to sue FHFA for breach of its fiduciary duties; asking FHFA to bring such a claim

[12] The District Court attempted to distinguish *First Hartford* and *Delta Savings* on the grounds that these decisions both involved receiverships rather than conservatorships, and that in conservatorships "FHFA enjoys even greater power free from judicial intervention." Op. at 30 n.30. The language of 12 U.S.C. § 4617(b)(2)(K)(i) shows this is backwards.

obviously triggers a manifest conflict of interest. *See First Hartford*, 194 F.3d at 1295.[13]

A similar conflict is triggered in asking FHFA to sue its co-tortfeasor, Treasury. The District Court looked solely to whether FHFA and Treasury were "interrelated agencies with overlapping, personnel structures, and responsibilities," whether they had an "operational or managerial overlap," whether they share a "common genesis," and whether Treasury had a role in choosing FHFA as conservator. Op. at 31. But that inquiry overlooks the fact that Treasury and FHFA were deeply "interrelated" in their decision to execute the Third Amendment. Class Plaintiffs allege that FHFA and Treasury collaborated to create the Third Amendment and thereby together breached their respective fiduciary duties to Fannie Mae, and that FHFA would never have brought suit against either itself or its joint tortfeasor. ¶¶129-36; 175-82. The District Court did not address the common-sense proposition that FHFA faces a manifest conflict of interest when considering whether to bring suit against both itself and its co-tortfeasor. Indeed, if FHFA ***were*** to sue Treasury over its breaches of fiduciary duty in

[13] *See also id.* at 1283.

connection with the Third Amendment, FHFA would likely expose itself to a defense of unclean hands.[14]

Furthermore, FHFA and Treasury ***are*** interrelated agencies with overlapping responsibilities, managerial overlap, and a common genesis. Treasury is the controlling stockholder of the Companies with extraordinary control over their day-to-day affairs, and FHFA was created specifically to regulate the Companies during the same time period when Treasury made its investment.[15]

III. THE DISTRICT COURT ERRED IN DISMISSING CLASS PLAINTIFFS' BREACH OF CONTRACT CLAIMS.

The Certificates held by private shareholders constitute contracts between those shareholders and the Companies. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 & n.3 (Del. 1996). The District Court erred in suggesting that HERA's jurisdictional bar applies to equitable claims related to contractual

[14] *Gail C. Sweeney Estate Marital Trust v. U.S. Treasury Dep't*, 2014 WL 4661983 (D.D.C. Sept. 19, 2014), which the District Court cited in support of its holding that no conflict of interest exists between FHFA and Treasury, (Op. at 32 n.33), is inapplicable here because in *Sweeney*, FHFA did not itself participate in Treasury's alleged breach of fiduciary duty. 2014 WL 4661983 at *2-3.

[15] The District Court stated that it was "wary" to label the relationship between Treasury and FHFA as a conflict of interest because in 2008, Treasury was an "investor of last resort" for the Companies. Op. 31-32. This argument fails for two reasons. *First*, the relevant time frame for the conduct at issue is August 2012, not September 2008. There is no evidence that Treasury was an "investor of last resort" in August 2012, when both Companies had returned to profitability and were producing billions of dollars in profits. ¶12. *Second*, even an investor of last resort is not entitled to change the terms of its investment agreement years after the fact in order to extract all of the assets belonging to minority stockholders.

breaches. Op. at 15 n.14. *See Bank of Manhattan v. FDIC*, 778 F.3d 1133, 1135 (9th Cir. 2015).

The District Court recognized that HERA does not bar breach of contract claims for damages. It nonetheless dismissed Class Plaintiffs' breach of contract claims for erroneous reasons, as shown below.

A. The Class Plaintiffs Stated A Valid Claim For Breach of Their Dividend Rights.

The District Court held that Class Plaintiffs failed to state a claim for breach of contract because Class Plaintiffs were only entitled to dividends if and when they are declared in the sole discretion of the Board. Op. at 37-41. This was erroneous for three reasons.

First, the Net Worth Sweep nullified the contractual right of the private shareholders to receive dividends under any circumstances. Prior to the Net Worth Sweep, Class Plaintiffs had a right to dividends if and when declared by the board of directors. After the Net Worth Sweep, that right no longer exists. Indeed, the stated goal of the Net Worth Sweep was to ensure that funds will ***never*** be "legally available" to flow from the Companies to private shareholders. ¶94. Thus, the Net

Worth Sweep violated the contractual right of shareholders to receive dividends when properly declared.[16]

Second, while generally "the declaration and payment of a dividend rests in the discretion of a corporation's board of directors," that discretion is not unlimited. *Litle v. Waters*, 1992 WL 25758, at *321 (Del. Ch. Feb. 11, 1992), *quoting Gabelli & Co., Inc v. Liggett Grp., Inc.* 479 A.2d 276, 280 (Del. 1984). Rather, the withholding of dividends is subject to judicial challenge where it stems from "an oppressive or fraudulent abuse of discretion." *See id* at 322.[17] For example, in *Litle*, the Court found that the plaintiff-stockholder met this standard where he pled that the director responsible for making the decision not to declare dividends served his own personal financial interests by not doing so. *See id.* at 323-24. *See also QVT Fund LP v. Eurohypo Capital Funding LLC I*, 2011 WL 2672092 (Del. Ch. July 8, 2011).[18]

---

[16] The District Court observed that the original terms of the Government Stock Agreements provided that FHFA no longer had exclusive discretion to issue dividends. Op. at 39. That is irrelevant. Granting Treasury veto rights over the issuance of dividends (which would have to be exercised consistent with its fiduciary duties) is a very different proposition than granting Treasury *all corporate profits* such that no dividend will ever be possible.

[17] *See also Penn v. Pemberton & Penn, Inc.*, 189 Va. 649, 649 (1949).

[18] The District Court distinguished *QVT Fund* on the grounds that that case involved the alleged breach of an implied obligation of mandatory dividend payments, and "[h]ere, no contractual obligation – implicit or explicit – exists that

Third, the Net Worth Sweep violated the rights of the private shareholders to *mandatory* dividends by paying Treasury more than the 10% cash dividend (or 12% stock dividend) to which it was entitled under the Government Stock Agreements. Prior to the Net Worth Sweep, the only way Treasury could receive dividends in excess of the 10% cash dividend (or 12% stock dividend) called for in its agreement was for Treasury to exercise its right to acquire 79.9% of the Companies' common stock for a nominal value. If it had done so, Treasury could have received additional dividends through its ownership of that common stock. However, under the plain terms of the Certificates held by private shareholders, that would have triggered a *mandatory contractual obligation* on the Companies (a) to first pay dividends to the private preferred shareholders, whose Certificates expressly provide contractual rights to receive dividends before any dividend can be paid to common stockholders or any stockholder with junior rights,[19] and (b) to

---

could transform unmistakably discretionary dividends into mandatory dividends." Op. at 40 n.43. This distinction fails for two reasons. First, as explained above, the Companies do have a mandatory obligation to pay dividends to the private shareholders consistent with the priority rights held by the private preferred shareholders, and the ratability rights of the private common shareholders—both of which were violated by the Net Worth Sweep. Second, the Net Worth Sweep also nullified the explicit contractual obligation entitling Class Plaintiffs to the possibility of discretionary dividend payments in the future.

[19] The Certificates held by private preferred shareholders provide: "No dividend … may be declared or paid or set apart for payment on Fannie Mae's common stock (or on any other stock of Fannie Mae ranking, as to the payment of dividends,

pay pro rata dividends to the private common shareholders, whose Certificates expressly provide that they have the right to receive dividends "ratably" with other common shareholders (¶85). Rather than comply with the priority rights and ratability rights of the private shareholders, FHFA and Treasury tried to sidestep them by executing the Third Amendment, which gratuitously promised to pay Treasury dividends massively in excess of what it was entitled to receive on a senior preferred basis. The Third Amendment was therefore a breach of the contractual priority rights of preferred shareholders and the contractual ratability rights of the common shareholders.

If FHFA had simply started gratuitously paying Treasury billions of dollars in dividends in excess of the 10% coupon it was entitled to receive on a senior preferred basis (i.e., dividends Treasury could receive only by exercising its warrants for 79.9% of the common stock), that would clearly have violated the priority rights of the private preferred shareholders, and the ratability rights of the private common shareholders. FHFA cannot avoid that contractual liability by

junior to the Series T Preferred Stock) unless dividends have been declared and paid or set apart (or ordered to be set apart) on the Series T Preferred Stock for the then-current quarterly Dividend Period…." Def. App. __ (Certificates to be added in deferred joint appendix). The Certificates also make clear that if any dividend "is paid on Fannie Mae's common stock (or any other stock of Fannie Mae ranking, as to the payment of dividends, junior to the Series T Preferred Stock)," then Series T Preferred Shareholders shall have a "claim in respect of the unpaid amount" that should have been paid to them "for such Dividend Period." *Id.*

papering it over with a gratuitous "amendment" to its agreement with Treasury that gives Treasury the right to 100% of all future profits without receiving any consideration in return. As shown above, the Third Amendment was a fiduciary breach, and hence cannot be relied on as the basis for nullifying the *mandatory* priority and ratability rights of the private shareholders.

B. Class Plaintiffs Have A Ripe Claim For Breach Of Their Contractual Rights To A Liquidation Preference.

By providing Treasury with a liquidation preference equal to 100% of the Companies' net worth, the Net Worth Sweep breached the contractual rights of private shareholders to receive a distribution of assets in liquidation. ¶¶84-85. The District Court erred in holding that this claim was unripe.

A court's ripeness inquiry evaluates two factors: (1) the "fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." *Nat'l Oilseed Processors Ass'n v. Occupational Safety & Health Admin.*, 769 F.3d 1173, 1182 (D.C. Cir. 2014) (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967)). The Class Plaintiffs' liquidation rights claim presents a legal issue that is fit for immediate judicial decision, and withholding a court decision would impose substantial hardship on the plaintiffs. The claim is therefore ripe.

1. Class Plaintiffs' Claim Is Fit For Judicial Decision.

When evaluating the first prong of a ripeness inquiry, the "fitness" for judicial resolution, this Court has instructed that the relevant factors to consider are "whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Nat'l Oilseed Processors*, 769 F.3d at 1182 (internal quotations and citations omitted). If the issue is purely legal, a court must "assume its threshold suitability for judicial determination." *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985); *see also Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock,* 783 F.2d 237, 249 (D.C. Cir. 1986) (holding that a claim satisfies the fitness requirement if it is "essentially legal" and "sufficiently final").

The liquidation rights claim is "purely legal," at least as to liability. It presents the issue whether the Net Worth Sweep breached the contractual rights of private shareholders to liquidation distributions by providing that 100% of all assets, profits, and net worth in the Companies shall be distributed to Treasury, with not a penny for private shareholders. That issue can be resolved by comparing the terms of the Certificates providing contractual rights to the private shareholders with the terms of the original Government Stock Agreement and the Third Amendment. A review of these contractual terms makes clear that the Third Amendment nullified—and thereby breached—the contractual rights to a liquidation distribution held by private shareholders. This pure legal issue is ripe for review. *See, e.g.*, *Quadrangle Offshore (Cayman) LLC v. Kenetech Corp.*, 1998 WL 778359, at *7 (Del. Ch. Oct. 21, 1998) (unpublished) (holding that plaintiff shareholders could bring a breach of contract suit for liquidation preference even though the company was not yet in liquidation at the time of the alleged breach).

FHFA's action is also "final." It has executed the Third Amendment, and has paid billions of dollars to Treasury pursuant to that Amendment. ¶¶73-76. Both FHFA and Treasury have stated that they have no intention of allowing the Companies to exit conservatorship. ¶¶94, 95. Treasury has also stated that the Net Worth Sweep would "expedite the wind down of Fannie Mae and Freddie Mac," and emphasized that the Net Worth Sweep ensured that the Companies "will be wound down and will not be allowed to retain profits, rebuild capital, and return to the market in their prior form." ¶¶72, 94. FHFA has likewise stated that the Net Worth Sweep reinforces "the notion that the [Companies] will not be building capital as a potential step to regaining their former corporate status." ¶95. In its 2012 report to Congress, FHFA explained that it had begun "prioritizing [its] actions to move the housing industry to a new state, one without Fannie Mae and Freddie Mac." *Id.* These statements confirm that the Third Amendment is more than "sufficiently final" to be ripe for review.

The District Court held the claim is unripe because "there can be no loss of a liquidation preference prior to the time that such a preference can, contractually, be paid"—i.e., prior to an actual liquidation. Op. at 34. If that were correct, the Government could pass legislation appropriating all liquidation rights of all shareholders in publicly-traded companies, and could avoid any legal challenge to such a measure by saying it is unripe until the companies actually go into liquidation. That is not and cannot possibly be the law. The claim is ripe because it presents an immediate nullification of a contractual right. That the contractual right relates to future distributions of an uncertain amount is relevant only to the damages analysis and the expert opinions as to the value of what has been lost; it is irrelevant to the purely legal question of whether FHFA is liable for this nullification of private contractual rights.

The District Court speculated that "just as there was a Third Amendment, the Court cannot definitively say there will be no Fourth or Fifth Amendment" that may undo the Net Worth Sweep. Op. at 35. This is not a basis for holding a claim unripe. *See Am. Petroleum Inst. v. EPA*, 906 F. 2d 729, 739-40 (D.C. Cir. 1990) (possibility of future agency action is not sufficient to foreclose judicial review of a definitive action); *see also Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 122–25 (1974) (finding hardship sufficient to ripen the controversy and to create a present injury where the challenged statute threatened a taking for which the plaintiffs would never be compensated); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 506–08, (1972) (finding sufficient injury and ripeness where boat owners were effectively required, by a soon-to-be-implemented state law, to install new sewage pumping facilities on their boats); *Navegar, Inc. v. U.S.*, 103 F.3d 994, 999 (D.C. Cir. 1997).

Moreover, FHFA and Treasury have unequivocally stated they will not permit the Companies to make liquidation distributions to private shareholders. ¶¶94-95. The District Court's holding therefore conflicts with the settled doctrine of contract repudiation. "'[R]epudiation' is a 'statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach.'" *Mobil Oil Exploration & Producing Se., Inc. v. U.S.*, 530 U.S. 604, 608 (2000) (quoting Restatement (Second) of Contracts § 250 (1981)).

2. The Class Plaintiffs Will Suffer Hardship From Delay In Resolution Of The Claim.

The District Court held that "plaintiffs are no worse off today than they were before the [Net Worth Sweep]." Op. at 35. That is not correct. Prior to the Net Worth Sweep, Class Plaintiffs held contractual rights to future dividends and liquidation distributions, and had a reasonable expectation that those rights would result in billions of dollars of distributions. After the Net Worth Sweep, Class Plaintiffs have no contractual right to any distribution. Moreover, FHFA is distributing billions of dollars to Treasury that, but for the Net Worth Sweep, would be distributed to the private shareholders. For Class Plaintiffs to be told they have to accept that result and wait until a future liquidation before bringing suit causes a substantial hardship.

C. The Net Worth Sweep Violates The Contractual Voting Rights of The Class Plaintiffs.

The Certificates held by private shareholders provide that their terms may be amended, altered, supplemented, or repealed in a way that adversely affects the interests of the stockholders only with the consent of two-thirds of the outstanding shares of each series of stock. ¶85. The Net Worth Sweep had a material and adverse effect on both the Preferred Shareholder Class and the Common Shareholder Class. In effect, it repealed or nullified the dividend and liquidation rights of all private shareholders. Yet it was not put to a vote of any of the shareholders whose interests it nullified. The Net Worth Sweep therefore violates the Class Plaintiffs' contractually-guaranteed voting rights. The District Court ignored this point.

D. The Class Plaintiffs Stated A Valid Claim For Breach Of The Implied Covenant Of Good Faith And Fair Dealing.

The District Court held that Class Plaintiffs could not state a claim for breach of the implied covenant of good faith because the Court had rejected the argument of the non-class plaintiffs that FHFA had acted outside its statutory authority under HERA. Op. at 40. But the District Court's reasoning for why FHFA did not exceed its statutory authority had nothing to do with whether it acted in good faith; to the contrary, the Court held that FHFA's "justification" and "underlying motives" were irrelevant to its statutory analysis. *Id.* at 21-22. A conclusion that FHFA acted within its statutory authority, therefore, says nothing about whether FHFA complied with the implied covenant of good faith and fair dealing with respect to the Companies' shareholder contracts.

The implied covenant precludes unreasonable actions by a contractual party that "'has the effect of preventing the other party to the contract from receiving the fruits' of the bargain." *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (citation omitted); *see also Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 541–42 (4th Cir. 1998).

Thus, the implied covenant prevented the Companies from taking actions that nullified the value of the contractual rights held by the private shareholders (i.e., that deprived them of the "fruits of the bargain"). That is exactly what the Net Worth Sweep did. As shown above, it prevents private shareholders from ever receiving a dividend or liquidation distribution (or distribution of any kind). But for the Net Worth Sweep, the Companies would have billions of dollars available to distribute to the private shareholders; because of the Net Worth Sweep, private shareholders can never receive those assets. It gave to Treasury *all* the fruits of the bargain. Corporate actions that negate any possibility of a dividend or liquidation preference constitute a breach of the implied covenant. *See, e.g., QVT Fund*, 2011 WL 2672092, at *14-15 (denying motion to dismiss implied covenant claims where a "Domination Agreement" transferring all profits to the controlling entity made it impossible for dividends to be paid, since "the Bank's action of entering into the Domination Agreement might not have been foreseeable to the Trusts' U.S. investors, who reasonably might have expected the Bank to remain a profit-seeking entity and not take action deliberately to change that status."); *Quadrangle*, 1998 WL 778359, at *6 ("Implicit in that [liquidation preference] provision is that [the company] would refrain from arbitrary and unreasonable conduct which would have the effect of preventing the Preferred Stockholders from receiving the Liquidation Preference.").

Class Plaintiffs further allege that the Companies, through their conservator FHFA, entered into the Third Amendment "with the purpose of effectively depriving Plaintiffs … of any possibility of receiving dividends or a liquidation preference.…" ¶¶161, 167, 173; *see also* T0202 (discussing "the Administration's commitment to ensure existing common equity holders will not have access to any positive earnings from the GSEs in the future"). The Companies' deliberate nullification of Class Plaintiffs' dividend and liquidation rights without seeking or obtaining Class Plaintiffs' consent was fundamentally inconsistent with the bargain between Class Plaintiffs and the Companies contained in the Certificates. Class Plaintiffs have therefore properly stated a claim for breach of the implied covenant of good faith and fair dealing.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court and remand with instructions permitting Class Plaintiffs to proceed with their fiduciary and contract breach claims.

DATED: June 30, 2015

Respectfully submitted,

/s/ *Hamish P.M. Hume*

Hamish P.M. Hume
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Ave., NW, Suite 800
Washington, DC 20015
Tel: (202) 237-2727
Fax: (202) 237-6131

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and this Court's May 6, 2015 Order, I hereby certify that this brief complies with the type-volume limitation because it contains 10,952 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as determined by the word count function of Microsoft Word. I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Times New Roman font using Microsoft Word.

DATED: June 30, 2015

/s/ *Hamish P.M. Hume*
Hamish P.M. Hume

ADDENDUM OF STATUTORY AUTHORITIES

Table of Contents

Page

12 U.S.C.A. § 1455
Obligations and securities of the Corporation
…
(l) Temporary authority of Treasury to purchase obligations and securities; conditions

(1) Authority to purchase

(A) General authority

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

12 U.S.C. § 1719
Secondary market operations
…
(g) Temporary authority of Treasury to purchase obligations and securities; conditions

(1) Authority to purchase

(A) General authority

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

Secretary, without the agreement of the corporation, to engage in open market purchases of the common securities of the corporation.

12 U.S.C.A. § 4617
Authority over critically undercapitalized regulated entities
…
b) Powers and duties of the Agency as conservator or receiver
…
(2) General powers

(A) Successor to regulated entity

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

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

(ii) title to the books, records, and assets of any other legal custodian of such regulated entity.

…

(K) Other provisions

(i) Shareholders and creditors of failed regulated entity

Notwithstanding any other provision of law, the appointment of the Agency as receiver for a regulated entity pursuant to paragraph (2) or (4) of subsection (a) and its succession, by operation of law, to the rights, titles, powers, and privileges described in subsection (b)(2)(A) shall terminate all rights and claims that the stockholders and creditors of the regulated entity may have against the assets or charter of the regulated entity or the Agency arising as a result of their status as stockholders or creditors, except for their right to payment, resolution, or other satisfaction of their claims, as permitted under subsections (b)(9), (c), and (e).

…

(c) Priority of expenses and unsecured claims

(1) In general

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

(A) Administrative expenses of the receiver.

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

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

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

12 U.S.C.A. § 1821
Insurance Funds
…
(d) Powers and duties of Corporation as conservator or receiver
…
(2) General powers

(A)Successor to institution

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

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

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

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R. 25, that on June 30, 2015, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

DATED: June 30, 2015

/s/ *Hamish P.M. Hume*
Hamish P.M. Hume