

**Get on IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

MICHAEL ROP, STEWART KNOEPP, and  
ALVIN WILSON,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE  
AGENCY, MELVIN L. WATT, in his official  
capacity as Director of the Federal Housing  
Finance Agency, and THE DEPARTMENT  
OF THE TREASURY,

Defendants.

Case No. 1:17-cv-00497

Hon. Paul L. Maloney

**PLAINTIFFS' RESPONSE TO TREASURY'S NOTICE OF  
SUPPLEMENTAL AUTHORITY CONCERNING CALIFORNIA STATE  
TEACHERS' RETIREMENT SYSTEM v. ALVAREZ**

In *California State Teachers' Retirement System v. Alvarez*, --- A.3d ---, 2018 WL 547768 (Del. Jan. 25, 2018), the Delaware Supreme Court held that issue preclusion bars shareholders pursuing a derivative claim from relitigating the issue of demand futility decided against different shareholders pursuing derivative claims in earlier litigation. *Alvarez* should not affect the outcome of this case for four reasons.

First, Plaintiffs' claims are direct, not derivative. (*See* R.31, Plfs.' Br. in Opp'n to Treasury's Mot. to Dismiss 11–14, PgID 594–97.) The matter of issue preclusion with respect to derivative claims therefore is irrelevant.

Second, *Alvarez* held that “differing groups of shareholders *who can potentially stand in a corporation's stead* are in privity for the purposes of issue preclusion.” 2018 WL 547768, at \*17 n.133 (emphasis added). But here, the purportedly preclusive D.C. Circuit decision held that

the shareholder-plaintiffs asserting derivative claims in that case *could not* potentially stand in the corporation's stead because of HERA's Succession Clause. *See Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1106 (D.C. Cir. 2017). The tie that bound the differing groups of shareholders in privity in *Alvarez* is thus lacking here.

Third, claim preclusion only applies if: (1) Plaintiffs are in privity with the plaintiffs who sued derivatively in *Perry Capital*; (2) the dismissal of derivative claims in *Perry Capital* was a decision "on the merits" for claim preclusion purposes; and (3) Plaintiffs' suit is based on the same cause of action as the derivative claims in *Perry Capital*. *See Bergeron v. Mackie*, 2016 WL 6122601, at \*3 (W.D. Mich. Oct. 20, 2016). *Alvarez* is only relevant to the first of those three requirements, and Plaintiffs' response to Treasury's motion to dismiss explains why the second and third requirements are not satisfied. (R.31, Plfs.' Br. in Opp'n to Treasury's Mot. to Dismiss 18–24, PgID 601–07.)

Fourth, *Alvarez* is not binding on this Court, and it would violate due process to extend its reasoning to hold that Plaintiffs are in privity with the *Perry Capital* plaintiffs and therefore bound by *Perry Capital*'s Succession Clause holding. (*See id.* at 20–21, PgID 603–04.)

Dated: February 15, 2018

Respectfully submitted,

/s/ Matthew T. Nelson  
Matthew T. Nelson  
Ashley G. Chrysler  
WARNER NORCROSS & JUDD LLP  
900 Fifth Third Center  
111 Lyon Street, N.W.  
Grand Rapids, Michigan 49503-2487  
616.752.2000  
mnelson@wnj.com  
achrysler@wnj.com

Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15th day of February 2018, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system, causing a true and correct copy to be served on all counsel of record.

/s/ Matthew T. Nelson  
Matthew T. Nelson