IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

THOMAS SAXTON, IDA SAXTON, BRADLEY PAYNTER,	)	
Plaintiffs,	)	
v.	)	No. 1:15-cv-00047
FEDERAL HOUSING FINANCE AGENCY, *et al*.,	)	
Defendants.	)	

DEPARTMENT OF THE TREASURY'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

As was the case with the numerous lawsuits that preceded it, the claims in this suit fail for lack of jurisdiction and, further, fail to state a claim. The plaintiffs in this case are shareholders in the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, "the GSEs"), and they follow earlier, unsuccessful shareholder-plaintiffs in demanding a better deal for themselves at the expense of taxpayers, who committed hundreds of billions of dollars to stabilizing the GSEs. Parroting not only the claims raised by the previous plaintiffs but their legal arguments as well, the plaintiffs in this matter offer nothing new, and their complaint should be dismissed.

First, the complaint is barred by the anti-injunction provision of the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. § 4617(f), which precludes courts from ordering equitable relief that would interfere with the Federal Housing Finance Agency ("FHFA") in the exercise of its powers as conservator of the GSEs. It is well-established under both HERA and a materially identical provision in the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") that the anti-injunction provision applies regardless of whether the plaintiffs agree with the manner in which FHFA has exercised its conservatorship powers. Plaintiffs' reliance in their resistance brief on supposed "statutory duties" of the conservator misinterprets HERA, and does not establish jurisdiction over the claims. Nor may plaintiffs evade § 4617(f) by suing FHFA's counter-party, Treasury.

In addition, this suit runs afoul of HERA's prohibition against shareholder suits, 12 U.S.C. § 4617(b)(2)(A)(i). Plaintiffs assert that they can surmount this barrier by bringing a "direct" shareholder claim. This argument is doubly misconceived. Plaintiffs' claims are

derivative, because their alleged injury depends on an injury that the GSEs (allegedly) suffered, and because the "relief" that the plaintiffs seek would run to the GSEs. In any case, the distinction between "direct" and "derivative" claims does not matter for the purposes of HERA, which bars shareholders from bringing any claim with respect to the assets of the GSEs.

The complaint should also be dismissed on issue-preclusion grounds because plaintiffs are bringing a derivative suit on behalf of the GSEs, and the judgment of the *Perry Capital* Court with respect to an earlier-filed shareholder derivative-lawsuit has issue preclusive effect here.

For all of these reasons, the Court should dismiss the complaint for lack of subject-matter jurisdiction and for failure to state a claim.

ARGUMENT

I. HERA Forecloses the Plaintiffs' Attempt to Restrain the Actions of the Conservator

A. HERA Forbids Claims for Equitable Relief for Actions Taken by FHFA as the Conservator of the GSEs

HERA provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator" of the GSEs. 12 U.S.C. § 4617(f). This section "permit[s] the [conservator] to perform its duties as conservator . . . promptly and effectively without judicial interference." *Hindes v. FDIC*, 137 F.3d 148, 160 (3d Cir. 1998). As such, it bars review of FHFA's actions as conservator under the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 701(a) (APA does not apply where "statutes preclude judicial review"); *see also Heckler v. Chaney*, 470 U.S. 821, 843 (1985) (presumption of reviewability is "defeated if the substantive statute precludes review."). A unanimous body of precedent under

both HERA[1] and FIRREA[2] has applied this statutory language to bar claims, such as this one, that seek to overturn a conservator's or a receiver's exercise of its statutory powers.

Section 4617(f) forecloses this lawsuit, and the plaintiffs provide the Court with no reason to depart from the opinions in *Perry Capital* and *Continental Western* dismissing materially identical claims. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014) (appeal filed); *Cont'l W. Ins. Co. v. FHFA*, et al., 83 F.Supp.3d 828 (S.D. Iowa 2015). The plaintiffs argue that, in agreeing to the Third Amendment, FHFA used its authority with respect to the GSEs in a manner inconsistent with the alleged purpose of conservatorship. Pl. Resp. to Def. Motions to Dismiss, ECF No. 35, at 35 (hereinafter, "Opp."). This argument mistakes the nature of a court's inquiry under § 4617(f). The determination as to whether or not a particular action furthers the goal of the conservatorship is committed to the conservator. *See Bank of America*, 604 F.3d at 1244 (plaintiff's "fear of the FDIC's improper performance of its legitimate receivership functions" does not give the court jurisdiction over claims against FDIC); *Gross*, 974 F.2d at 408 ("the availability of injunctive relief does not hinge on our view of the proper exercise of otherwise-legitimate powers."). The court's inquiry is extremely limited: "A

[1] *See, e.g.*, *Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 993 (9th Cir. 2013) (holding that section 4617(f) barred APA claims against FHFA); *Leon Cnty. v. FHFA*, 700 F.3d 1273, 1278-79 (11th Cir. 2012) (holding that similar APA claim was barred by Section 4617(f)); *Town of Babylon v. FHFA*, 699 F.3d 221, 227 (2d Cir. 2012) (same); *Suero v. Federal Home Loan Mortg. Corp.*, -- F. Supp. 3d --, 2015 WL 4919999, at *10 (D. Mass. Aug. 18, 2015) (lawsuit asserting state law claims affecting conservator was barred by Section 4617(f)); *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 99-100 (D. Mass. 2014) (same), *appeal pending*, No. 14-2348 (1st Cir.).

[2] *See, e.g.*, *Bank of Am. Nat. Ass'n v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010); *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995); *Volges v. Resolution Trust Corp*., 32 F.3d 50, 52 (2d Cir. 1994); *Ward v. Resolution Trust Corp*., 996 F.2d 99, 103 (5th Cir. 1993); *Nat'l Trust for Historic Pres. v. FDIC*, 995 F.2d 238, 240 (D.C. Cir. 1993), *aff'd and reinstated on reh'g*, 21 F.3d 469 (D.C. Cir. 1994); *Gross v. Bell Sav. Bank*, 974 F.2d 403, 408 (3d Cir. 1992); *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707, 715 (8th Cir. 1996).

conclusion that the challenged acts were directed to an institution in conservatorship and within the powers given to the conservator ends the inquiry." *Town of Babylon*, 699 F.3d at 228 (internal citation omitted).

Thus, Plaintiffs cannot evade the jurisdictional barrier simply by alleging that FHFA and Treasury have acted at odds with what is (in the plaintiffs' view) the proper purpose of a conservatorship. Nor can plaintiffs evade § 4617(f) by claiming that the conservator's actions were foolish, unnecessary, or ill-motivated. *See Cnty. of Sonoma*, 710 F.3d at 993 ("it is not our place to substitute our judgment for FHFA's"); *Leon Cnty., Fla. v. FHFA*, 816 F. Supp. 2d 1205, 1208 (N.D. Fla. 2011), *aff'd*, 700 F.3d 1273 (11th Cir. 2012) ("Congress surely knew, when it enacted § 4617(f), that challenges to agency action sometimes assert an improper motive. But Congress barred judicial review of the conservator's actions without making an exception for actions said to be taken from an improper motive."). So long as FHFA exercised a power within the scope of the authorities granted to it as the conservator by HERA, any claim for injunctive relief is barred.

B. Section 4617(f) Forbids Plaintiffs' Attempt to Overturn FHFA's Exercise of its Conservatorship Authority

Plaintiffs' complaint contains no plausible allegation that FHFA exceeded its powers under HERA, and their resistance brief fails to remedy that fatal defect.[3] Agreeing to the terms of the Third Amendment, including the change to the dividend and periodic commitment fee provisions, falls squarely within FHFA's statutory powers as conservator.

[3] The scope of the conservator's statutory authority is a legal question that this Court should resolve on a motion to dismiss. *See Tri-State Hotels*, 79 F.3d at 715 (affirming the dismissal of claims for declaratory and equitable relief for lack of subject matter jurisdiction under FIRREA's jurisdictional bar).

Plaintiffs wrongly assert that the statute forbids FHFA, as conservator, from altering the GSEs' capital retention, limiting its capital reserves, or winding up the Companies' operations, and plaintiffs then compound this error by claiming that they can sue under the APA to enforce their conception of FHFA's "statutory duties." Opp. at 47-51. On the contrary, HERA empowers the conservator with the discretion to carry on the ongoing operations of the GSEs as the conservator sees fit. *See* 12 U.S.C. § 4617(b)(2)(B) ("The Agency *may*, as conservator or receiver . . . 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") (emphasis added); 12 U.S.C. § 4617(b)(2)(D) ("The Agency *may*, as conservator, take such action as may be . . . appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.") (emphasis added). "The word 'may,' when used in a statute, usually implies some degree of discretion." *United States v. Rodgers*, 461 U.S. 677, 706 (1983); *see also Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401-02 (D.C. Cir. 1995) ("When a statute uses a permissive term such as 'may' rather than a mandatory term such as 'shall,' this choice of language suggests that Congress intends to confer some discretion on the agency").[4] The "exercise" of this statutory authority is precisely what § 4617(f) insulates from judicial review, even where a plaintiff alleges that the conservator has misused it. The Fifth Circuit, for example, held that a plaintiff's allegation that the Resolution Trust Corporation's agreement to "dispose of an asset for a viciously low price [] frustrates the direct intent of

[4] Plaintiffs repeatedly cite *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), but the question the Court addressed in *City of Arlington* was the degree of deference due an agency's construction of its own jurisdiction. That case had nothing to do with jurisdictional statutes, such as § 4617(f), that limit APA review altogether, and *City of Arlington* is thus of no relevance here.

Congress," did not establish jurisdiction in light of § 1821(j). *Ward*, 996 F.2d at 103 ("Ward fails (or refuses) to recognize the difference between the exercise of a function or power that is clearly outside the statutory authority of the RTC on the one hand, and improperly or even unlawfully exercising a function or power that is clearly authorized by statute on the other.").[5]

HERA also gives FHFA the authority as conservator to compensate the taxpayers, in the form of dividends or commitment fees, for their investment in the GSEs. HERA authorizes the conservator to "transfer or sell any asset or liability of the regulated entity in default, and may do so without any approval, assignment, or consent with respect to such transfer or sale." 12 U.S.C. § 4617(b)(2)(G). Plaintiffs argue that this otherwise unambiguous grant of authority must be implicitly conditioned by unstated "statutory goals;" according to them, "FHFA lacks the authority to 'transfer assets' to *prevent*, rather than to *promote*, rehabilitation of the Companies." Opp. at 56 (emphasis in original). But the plain language of the asset transfer provision refutes that assertion; it states that FHFA's authority does not require "*any* approval, assignment, or consent with respect to such transfer or sale." 12 U.S.C. § 4617(b)(2)(G) (emphasis added). Plaintiffs cite no case (and we are aware of none) permitting a challenge to a conservator's or a receiver's transfer of assets based on the allegation that the transfer (allegedly) conflicted with a litigant's view of the statutory purpose of conservatorship or receivership. *See also United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1329 (6th Cir. 1993) (finding that a challenge to the Resolution Trust Corporation's decision to "transfer[] all the assets" of a failed

[5] Plaintiffs cite the Supreme Court's interpretation of FIRREA's predecessor in *Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp. (FSLIC)*, 489 U.S. 561, 573-74 (1989), and argue that the conservator's powers are implicitly limited by HERA's purpose. *See* Opp. at 57. *Coit*, however, did not rely upon the statutory purpose behind receivership. Rather, it concluded that FSLIC's power to adjudicate creditor claims was not included in any of the statutory provisions upon which the agency relied. 489 U.S. at 574.

bank was barred by § 1821(j)).

Further, plaintiffs cannot circumvent § 4617(f) by alleging that the Third Amendment is an unlawful wind-down of the GSEs. First, as the *Perry Capital* court recognized, this argument is at odds with the reality that the GSEs "maintain an operational mortgage finance business and are, once again, profitable." *Perry Capital*, 70 F. Supp. 3d at 228. Even assuming *arguendo* the truth of plaintiff's "wind-down" assertion, HERA allows for the appointment of FHFA as "conservator *or* receiver for the purpose of reorganizing, rehabilitating, *or* winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2) (emphasis added); *see also* Department of the Treasury's Mem. in Support of its Mot. to Dismiss (ECF No. 19-1) at 16-17 ("Treasury Mem."). Plaintiffs argue that the term "winding up" is synonymous with liquidation, such that the statute only empowers FHFA to "wind up" the affairs of the GSEs if FHFA acts as receiver. Opp. at 53-54. Plaintiffs are mistaken. Although HERA contains separate provisions addressing FHFA's specific powers as conservator or as receiver, *see, e.g.*, 12 U.S.C. §§ 4617(b)(2)(B), 4617(b)(2)(D), those provisions do not negate the separate provision stating that FHFA can be appointed as conservator or receiver for the purpose of "reorganizing, rehabilitating, or winding up" the GSEs.[6] *See* 12 U.S.C. § 4617(a)(2); *see also* FHFA Reply Br. at 13-16. HERA allows the conservator to take prudential steps to make the

[6] Plaintiffs' reliance on FIRREA is misplaced. FIRREA permits the appointment of the FDIC as receiver "for the purpose of liquidation or winding up the affairs of an insured Federal depository institution," without explicitly listing a similar purpose for the FDIC as conservator. 12 U.S.C. § 1821(c)(2)(A)(ii). In HERA, however, Congress listed "winding up" as a purpose of appointment for either a conservator or a receiver. Plaintiffs may not ask this Court to re-write the statute to separate the purposes of conservatorship and receivership where Congress determined it was not necessary to do so. *See Resolution Trust Corp. v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1451-52 (8th Cir. 1992).

GSEs' operations less risky.

Finally, plaintiffs also contend that FHFA exceeded its authority as the conservator by purportedly acting at the direction of Treasury. *See* Opp. at 40-42. Echoing exactly the words of the *Perry Capital* plaintiffs, plaintiffs insist that "[o]nly a conservator that has given up the will to exercise its independent judgment could agree to forfeit so much." *Compare* Opp. at 41 with *Perry Capital*, 70 F. Supp. 3d at 226-27. As the *Perry Capital* Court held, regardless of plaintiffs' view that the Third Amendment was a "one-sided deal" –and it was not – such conclusory allegations are not actionable under § 4617(a)(7). *Perry Capital*, 70 F. Supp. 3d at 227. In response, plaintiffs argue the *Perry Capital* Court was wrong not to examine FHFA's underlying motives behind entering the Third Amendment, and that this Court must "determine whether FHFA's actions are 'necessary' or 'appropriate' to achieve its statutory goals generally" as a predicate to determining whether the Court has jurisdiction under § 4617(f). Opp. at 60. Such an inquiry is neither required nor appropriate under the statute, however: "[r]equiring the Court to evaluate the merits of FHFA's decisionmaking each time it considers HERA's jurisdictional bar would render the anti-injunction provision hollow" because Congress expressly "divest[ed] the Court of jurisdiction to restrain FHFA's 'exercise of [its] powers or functions' under HERA." *Perry Capital*, 70 F. Supp. 3d at 226; *see also supra* p. 4.[7] Plaintiffs'

[7] Neither of the cases cited by plaintiffs is to the contrary. Opp.at 42-43. The courts in *Leon County v. FHFA* and *Massachusetts v. FHFA* addressed allegations that FHFA had acted in its capacity as a regulator rather than a conservator. *See Leon County*, 700 F.3d at 1278 ("we must consider all relevant factors pertaining to the directive to determine whether it was issued pursuant to the FHFA's powers as conservator or as regulator"); *Massachusetts*, 54 F. Supp. 3d at 99 ("The Commonwealth next argues that even if the FHFA acted, it did so outside its limited authority as a conservator, but instead in its capacity as the GSEs' regulator."). In both cases, the court rejected arguments that it should evaluate the merits of FHFA's business decisions. *Leon County,* 700 F.3d at 1278-79; *Massachusetts*, 54 F. Supp. 3d at 102 n.8 ("Congress has

allegations regarding FHFA's motives are not a basis for disregarding the limitation that § 4617(f) places on this Court's jurisdiction.

C. Section 4617(f) Also Precludes Claims against the Conservator's Counter-Party, Treasury

Nor may plaintiffs evade the jurisdictional limit of § 4617(f) by suing Treasury as well as the conservator. The Eighth Circuit, like numerous other courts, has squarely held that the anti-injunction provisions of HERA and FIRREA forbid courts from granting equitable relief directed at counter-parties, as such relief would simply provide a plaintiff with another method to restrain the conservator. *See Dittmer Properties, L.P. v. FDIC*, 708 F.3d 1011, 1017-18 (8th Cir. 2013). Plaintiffs try to avoid this binding Eighth Circuit precedent by arguing, implausibly, that *Dittmer* and related precedents apply only to "efforts to enforce the legal obligations of a *federal receiver or conservator or its charge* by suing a third party." Opp. at 62 (emphasis in original). But the cases do not support that supposed distinction.

The Eighth Circuit in *Dittmer* did not employ the test that plaintiffs invent. Instead, the court followed the statutory language, and asked, "whether the challenged action is within the receiver's power or function," and "whether the challenged action would indeed 'restrain or affect' the FDIC's receivership powers." *Id*. at 1017. Answering both questions in the affirmative, the Eighth Circuit barred the suit against the FDIC's counter-party. *Id.* The other circuit courts of appeal employ the same approach: the question is whether the relief requested would, from the conservator's perspective, "restrain or affect" the exercise of conservatorship powers. *See Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir. 1992)

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removed from the purview [of] the court the power to second-guess the FHFA's business judgment.").

("Permitting Telematics to attach the certificate of deposit, if that attachment were effective against the FDIC, would have the same effect, from the FDIC's perspective, as directly enjoining the FDIC from attaching the asset. In either event, the district court would restrain or affect the FDIC in the exercise of its powers as receiver.").[8]

Plaintiffs cite to two inapposite cases as support for their claim that they may seek to "restrain or affect the exercise of powers or functions of [FHFA] as a conservator" of the GSEs by suing FHFA indirectly through its counter-party, Treasury, despite the express language of 12 U.S.C. § 4617(f). In neither case was the conservator or receiver a party, as the conservator is here. In one case, the court held that the anti-injunction provision did not apply where the lawsuit "focused on [the third-party's] actions not the actions of the FDIC," and it did "not believe" that the relief sought "would have a chilling effect on the FDIC's ability to transfer bundles of trust deeds to third parties." *Stommel v. LNV Corp.*, No. 2:13CV821DAK, 2014 WL 1340676 (D. Utah Apr. 4, 2014). In the other case, plaintiffs had sought a recovery only against the third-party, and the court held that relief "would not restrain or affect [the FDIC as receiver] in any way." *LNV Corp. v. Outsource Serv. Mgmt., LLC*, No. CIV 13-1926 JNE/LIB, 2014 WL 834977 at *4 (D. Minn. Mar. 4, 2014).

[8] *See also Hindes*, 137 F.3d at 160 ("the statute, by its terms, can preclude relief even against a third party, including the FDIC in its corporate capacity, where the result is such that the relief 'restrain[s] or affect[s] the exercise of powers or functions of the [FDIC] as a conservator or a receiver.'") (alterations in original); *Kuriakose v. Fed. Home Loan Mortgage Corp.*, 674 F. Supp. 2d 483, 494 (S.D.N.Y. 2009) ("By moving to declare unenforceable the non-participation clause in Freddie Mac severance agreements, in essence Plaintiffs are seeking an order which restrains the FHFA from enforcing this contractual provision in the future …. HERA clearly provides that this Court does not have the jurisdiction to interfere with such authority."); *In re Fed. Home Loan Mortgage Corp. Derivative Litig.* ("*In re Freddie Mac*"), 643 F. Supp. 2d 790, 799 (E.D. Va. 2009), *aff'd sub nom. La. Mun. Police Employees Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. 2011) ("A court action can 'affect' a conservator even if, as in the cases at bar, the litigation is not directly aimed at the conservator itself.").

The contrast with the present case is obvious. Plaintiffs seek to rewrite key agreements that the conservator entered into in order to ensure the solvency of the GSEs after the financial crisis, and they pursue relief that would apply equally to FHFA and Treasury: rewriting the PSPAs to retain features that plaintiffs like (the unprecedented and continuing commitment of taxpayer funds to the GSEs) but invalidating features that they dislike (the variable dividend payments of the Third Amendment). Relief that sets aside contracts entered into by the conservator with respect to the entities in conservatorship is relief that would "restrain or affect" the conservator's ability to, among other things, "carry on the business" of the GSEs, 12 U.S.C. § 4617(b)(2)(D)(ii), and is barred under 12 U.S.C. § 4617(f). *See Hanson v. FDIC*, 113 F.3d 866, 871-72 (8th Cir. 1997) (imposition of a constructive trust would restrain or affect, *inter alia*, FDIC's right to transfer assets, and was barred by § 1821(j)).

Even assuming *arguendo* that plaintiffs can overcome § 4617(f), plaintiffs err by claiming that Treasury has violated the statutory limits on its purchase authority. *See* Opp. at 64-68. As the *Perry Capital* court held in rejecting an identical argument, Treasury did not commit any additional funds to the Enterprises under the Third Amendment, and FHFA did not grant Treasury any additional shares of stock in the Enterprises. *Perry Capital*, 70 F. Supp. 3d at 224. Plaintiffs assert that "the existence of a funding commitment is not determinative of whether there is a purchase," Opp. at 66, but under any plain meaning interpretation, a "purchase" requires that additional stock be exchanged for money. "Under the Third Amendment—unlike the first two amendments—Treasury *neither* granted the Enterprises additional funding commitments *nor* received an increased liquidation preference." *Perry Capital*, 70 F. Supp. 3d at 224 (emphasis in original). With no funds or stock being exchanged, there was no "purchase" under any sense of

that term. *Id*. Finally, contrary to plaintiffs' assertion, the sunset provision does not prohibit changes to the PSPAs. Opp. at 66. The statute expressly authorizes Treasury to "exercise any rights" obtained through the PSPAs after the sunset date, and the PSPAs permit amendments. 12 U.S.C. §§ 1719(g)(2)(D), 1455(*l*)(2)(D). Because the sunset provision applies only to new purchases, "it does not therefore preclude other non-security-purchasing activities otherwise permitted under an already agreed-upon, pre–2010 investment contract with the GSEs." *Perry Capital*, 70 F. Supp. 3d at 223. As the *Perry Capital* court recognized, the purpose of the sunset provision in § 1719(g)(4) was to limit purchases of new securities by pledging additional taxpayer funds, *id.* at 223-24, something that the Third Amendment did not do. Plaintiffs' claim that the sunset provision will be "wholly illusory," Opp. at 66, unless HERA is interpreted to prohibit amendments to the PSPAs is therefore baseless.

Unable to demonstrate that the Third Amendment was a "purchase" within the ordinary meaning of the term, plaintiffs argue that the Court engraft onto the word "purchase" in HERA the "fundamental change[]" exception to the purchaser-seller standing requirement for the implied right of action under § 10b of the Securities Exchange Act of 1934. Opp. at 66-67.

Contrary to Plaintiffs' argument, the "fundamental change" doctrine sheds no light on the meaning of the word "purchase" as it is used in HERA, 12 U.S.C. §§ 1455(*l*), 1719(g). In the § 10b cases that plaintiffs cite, the courts are not interpreting the word "purchase" in statutory text. They are instead construing the scope of an *exception* to the judicially created "purchaser-seller" limitation on the implied cause of action under § 10b. *See 7547 Corp. v. Parker & Parsley Dev. Partners, L.P.*, 38 F.3d 211, 226 (5th Cir. 1994) ("Standing under these provisions requires that a plaintiff be an actual 'purchaser' or 'seller' of securities who has been injured by deception or

fraud 'in connection with' the purchase or sale[.] . . . The federal courts have created an exception to this rule when [an] investor's interest in a company is fundamentally altered through a merger, acquisition, or liquidation.") (internal citation omitted).[9] Cases defining the implied right of action under § 10b shed no light on HERA's meaning.

Moreover, federal courts sharply disagree about the existence of the "fundamental change" doctrine. *See Isquith by Isquith v. Caremark Int'l, Inc.*, 136 F.3d 531, 535-36 (7th Cir. 1998) (describing the "esoteric and dubious judge-made doctrine, called the 'fundamental change' doctrine" and admitting "very much doubt that the doctrine retains any validity in any class of case, even in squeeze-out cases"); *see also Katz v. Gerardi*, 655 F.3d 1212, 1221 (10th Cir. 2011). Thus, there can be no plausible claim that Congress could have intended for courts to import this contested judge-made doctrine into HERA. *Cf. Bruesewitz v. Wyeth*, 562 U.S. 223, 243 (2011) ("When 'all (or nearly all) of the' relevant judicial decisions have given a term or concept a consistent judicial gloss, we presume Congress intended the term or concept to have that meaning when it incorporated it into a later-enacted statute . . . . We cannot make the same assumption when widespread disagreement exists among the lower courts. We must make do with giving the term its most plausible meaning using the traditional tools of statutory interpretation."); *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 349 (2005).[10]

[9] For this reason, contrary to plaintiffs' suggestion, *SEC v. Nat'l Securities, Inc.*, 393 U.S. 453 (1969), does not stand for the proposition that "holders of a fundamentally changed security are considered purchasers of new securities," *see* Opp. at 67. That case makes clear that it was not relying on the "purchase" language of section 10(b), but rather the "broad antifraud purposes" of section 10(b) which were "furthered" by their application to an alleged deceptive scheme in which shareholders exchanged their stock as part of a merger. 393 U.S. at 467.

[10] Even if the "forced sale" or "fundamental change" doctrine *could* be applied to HERA, it would not apply in this case. Plaintiffs characterize the Third Amendment as a fundamental

Finally, plaintiffs can draw no support from Treasury regulations concerning when a change to the terms of a debt security can be considered an "exchange of property" under 26 C.F.R. § 1.1001(a). *See* Opp. at 67. The relevant term in those regulations is "exchange," not "purchase," and the question is whether such an exchange can be considered income or loss for tax purposes. *See* 26 C.F.R. § 1.1001(a) ("the gain or loss realized . . . from the exchange of property for other property differing materially either in kind or in extent, is treated as income or as loss sustained."); 26 C.F.R. § 1.001-3(a)(1) ("This section provides rules for determining whether a modification of the terms of a debt instrument results in an exchange for purposes of § 1.1001–1(a).").[11] Those tax regulations are entirely irrelevant here.

II. Plaintiffs Cannot Bring Claims Based on Their Status as Shareholders in the GSEs

Plaintiffs' suit also fails under a second, independent bar in HERA, which prohibits suits by shareholders of the GSEs during conservatorship. FHFA, as the conservator of the GSEs, has succeeded to all of the rights of the GSEs' shareholders for the duration of the conservatorship, including the right to bring any lawsuit predicated on a plaintiff's status as a shareholder of one or both of those entities. *See* 12 U.S.C. § 4617(b)(2)(A). This Court should follow the plain language of § 4617(b)(2)(A), and dismiss this suit.

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change because it transformed a fixed dividend obligation into a variable dividend obligation. Opp. at 66. However, plaintiffs ignore the fact that the vast bulk of the original PSPA agreements remained the same before and after the Third Amendment. The modification to the PSPAs through the Third Amendment was altogether different from the limited circumstances in which the "fundamental change" doctrine has been applied such as "a merger, when shareholders are left with an investment in a new entity" and "an exchange of common stock for bonds, where 'the nature of the security has been changed in the sense that an interest in an ongoing concern is converted exclusively into a right to cash.'" *Allard v. Arthur Andersen & Co. (U.S.A.)*, 957 F. Supp. 409, 420-21 (S.D.N.Y. 1997) (citing *Nat'l Sec., Inc.*, 393 U.S. at 467 and *Broad v. Rockwell Int'l Corp.*, 614 F.2d 418, 437–38 (5th Cir. 1980)).

[11] There is no comparable regulation for equity securities, such as the preferred stock in the GSEs held by Treasury.

A. Plaintiffs' Right to Bring This Suit Has Been Transferred to the Conservator for the Duration of the Conservatorship

1. Plaintiffs' Claims Are Derivative

The claims that plaintiffs seek to assert here are derivative, not direct. To distinguish between a derivative and direct claim,

> a court should look to the nature of the wrong and to whom the relief should go. To be a direct claim, the stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail *without showing an injury to the corporation*.

Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1039 (Del. 2004) (emphasis added).[12] Plaintiffs here cannot prevail on their claims "without showing an injury to the corporation." *Id.* at 1039. As explained previously, plaintiffs' APA claims are based on allegations that Treasury's and FHFA's actions have injured the GSEs, and the requested relief would flow to the GSEs. *See* Treasury Mem. at 22-24.

Plaintiffs nonetheless assert that their claims are direct "because the [Third Amendment] destroyed the value of [the plaintiffs'] investments through the transfer of the entities' entire net worth to Treasury." Opp. at 26. Allegations regarding the depletion of corporate assets assert a "classically derivative" injury, and do not transform the claims from derivative to direct. *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 771 (Del. 2006). Plaintiffs rely on *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006), for the proposition that their challenge to an alleged "improper extraction or expropriation" of corporate profits to one class of shareholders qualifies as a direct claim. Opp. at 26. Plaintiffs misapprehend *Gentile*. There, the corporation had issued

[12] The same standard applies under Virginia law. *See Parsch v. Massey*, 72 Va. Cir. 121, 128 (2006).

excess shares to a majority shareholder, and "the shares representing the 'overpayment' embod[ied] both economic value and voting power." 906 A.2d at 95-96. In such a case, "[a] separate harm also results: an extraction from the public shareholders, and redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest." *Id.* The Third Amendment does not fit within the *Gentile* exception. Treasury is not a majority shareholder of the GSEs, and the alleged "overpayment" of dividends on Treasury's senior preferred stock is in the form of cash, not additional voting stock.[13]

Further, the Third Amendment did not affect the voting power or dividend rights of any other stockholder. Treasury does not hold voting rights, and other shareholders' voting tights were suspended when the conservatorships began, before the PSPAs (let alone the Third Amendment) were entered into. Similarly, dividend payments have been suspended since the conservatorships began, and the plaintiff's liquidation preference (in the event of receivership) was fixed by HERA's maximum liability provision. Plaintiffs' inability to show that the Third Amendment changed the status of their voting rights or their liquidation preference distinguishes this case from the direct claims described in *Gatz v. Ponsoldt*, 925 A.2d 1265, 1280-81 (Del. 2007) and other cases cited by plaintiffs.[14] Plaintiffs' claims instead depend upon an assertion of

[13] *Gradient OC Master, Ltd v. NBC Universal, Inc.*, 930 A.2d 104 (Del. Ch. 2007), which plaintiffs also cite, only undermines their position. In *Gradient OC Master*, the court held that plaintiffs failed to show that either defendant NBCU or Citadel constituted "a *de facto* or controlling shareholder" of the ION corporation in the absence of evidence that defendants had "close to a majority of shares," regardless of allegations concerning NBCU's "impact on the Board's decisions" as a "result of contractual obligations between NBCU and ION." *Id.* at 130-31.

[14] Plaintiffs cite *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50 (2012) *appeal pending*, Case Nos. 15-5103, 15-5133 (Fed. Cir.), but overlook the key distinction that *Starr International* did not concern an entity in conservatorship. As explained above, in formulating their allegations of a non-derivative injury plaintiffs conflate the loss of shareholder voting rights and

alleged wrongdoing that "deplete[d] corporate assets that might otherwise be used to benefit the stockholders, such as through a dividend," and their claims are therefore derivative. *Protas v. Cavanaugh*, No CIV.A 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012).[15]

Plaintiffs are also incorrect in asserting that the limits on shareholder derivative actions do not apply to APA claims given the breadth of the "zone of interests" test. Opp. at 24. On the contrary, the shareholder standing rule applies just as forcefully in APA cases as in any other context. *See Sec. Indus. & Fin. Markets Ass'n v. United States Commodity Futures Trading Comm'n*, 67 F. Supp. 3d 373, 407 (D.D.C. 2014) (finding that shareholders failed to establish standing for APA challenge in light of shareholder standing rule).[16] Plaintiffs cite to a single

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dividend payments when the conservatorships began with the Third Amendment. Further, because the Third Amendment did not result in the issuance of any new shares to any party, there is no way for plaintiffs to allege that the agreement diluted their shares, as the plaintiff in *Starr International* did. *Id.* at 64.

[15] Plaintiffs' contractual relationship as stockholders in the GSEs is irrelevant to whether their two APA claims against Treasury are direct or derivative. Regardless, all of Plaintiffs' claims here, including their contractual claims, are derivative under *Tooley*, a legal conclusion reached by the *Perry Capital* Court, *see* 70 F. Supp. 3d at 235 n. 39, 239, n. 45, that is consistent with the recent holding of *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175 (Del. 2015). In *NAF Holdings*, the Delaware Supreme Court was addressing a contractual claim brought by NAF Holdings, LLC, a parent corporation, alleging that Li & Fung had violated a commercial contract entered into with NAF's two wholly-owned subsidiaries for purposes of effectuating a public company acquisition. *NAF Holdings*, 118 A.3d at 177. Although the Delaware Supreme Court held that NAF could bring its commercial contractual claim as a direct rather than derivative claim, it specifically distinguished NAF's commercial contractual suit, based on its individual rights under the contract, from the plaintiff-stockholders in *Tooley*, because in *Tooley*, the plaintiffs had no separate contractual right to bring a claim and had no contractual rights under the merger agreement. 118 A.3d at 182, n. 10. So too here, plaintiffs have no actionable contractual right to payment for their stock. *See* Treasury Mem. at 24 n.12, 25 n. 13.

[16] The Eighth Circuit has applied the shareholder standing rule for decades. *Brictson v. Woodrough*, 164 F.2d 107, 109 (8th Cir. 1947) ("[a]ctions to enforce corporate rights or redress injuries to the corporation cannot be maintained by a stockholder in his own name … even though the injury to the corporation may incidentally result in the depreciation or destruction of the value of the stock."); *see also Potthoff v. Morin*, 245 F.3d 710, 716 (8th Cir. 2001) (same); *In re AFY*, 734 F.3d 810, 820 (8th Cir. 2013) (same).

case, *FAIC Sec. Inc. v. United States*, 768 F.2d 352 (D.C. Cir. 1985), discussing, not the shareholder standing rule, but the "zone of interests" test. *Id.* at 357. First, plaintiffs simply do not fall within the "zone of interests" of any provision of HERA at issue in this action. *See* FHFA Reply Br. at 9 fn.8. Indeed, the only statutes which plaintiffs' cite in Counts II and III of their complaint relevant to Treasury are 12 U.S.C. § 1719(g) and 12 U.S.C. § 1455(*l*). The "considerations" set forth in those sections are expressly limited "[t]o protect the taxpayers," and thus do not include private shareholders in the GSEs.[17] Further, the "zone of interests" test is "an aspect of prudential standing distinct from third party standing." *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1357 (D.C. Cir. 2000). *FAIC Securities* itself treated third party standing and the "zone of interests" inquires as distinct, and the holding of the case concerns only whether a plaintiff can satisfy the "zone of interests" test by asserting the interests of third-parties, when the plaintiff has appropriate third-party standing with respect to those absent parties. *Id.* at 358, 360-61; *see also Nat'l Cottonseed Products Ass'n v. Brock*, 825 F.2d 482, 490 (D.C. Cir. 1987) (discussing *FAIC Securities*). Plaintiffs cannot cite a single case in which a court has held that shareholder claims alleging an injury to a corporation can be brought directly under the APA, and that proposition is at odds with the shareholder standing rule.

2. HERA Bars Both Direct and Derivative Shareholder Claims Over the Assets of the GSEs

"[T]he plain meaning of [§ 4617(b)(2)(A)] is that *all* rights previously held by [the GSEs'] stockholders, including the right to sue derivatively, now belong exclusively to the FHFA." *In re*

[17] Plaintiff's reliance on the fifth item in the statutory list of considerations – "[t]he need to maintain the GSE's status as a private shareholder-owned company" – is thus misplaced. *See* 12 U.S.C. §§ 1719(g)(1)(C)(v), 1455(*l*)(1)(C)(v). Congress directed Treasury to consider that factor only insofar as it may affect "the taxpayers." *Id.*

Freddie Mac, 643 F. Supp. 2d at 795; *see also Perry Capital*, 70 F. Supp. 3d at 231 n.28. The plaintiffs contend, however, that the statute transferred only some shareholder rights to FHFA, and has preserved a shareholder's right to bring a direct claim, if not a derivative claim. Opp. at 68-71. Their premise is incorrect; their claim is derivative, as explained above. But no matter how plaintiffs characterize their claims, they may not proceed with any claim regarding the assets of the GSEs while the conservatorships remain in effect. The plaintiffs' ability to bring any action with respect to the assets of the GSEs, whether the action is called direct or derivative, is one of the "rights, titles, powers, or privileges" of shareholders that was transferred to FHFA upon its appointment as conservator. 12 U.S.C. § 4617(b)(2)(A)(i).

Contrary to the plaintiff's characterization, the D.C. Circuit in *Kellmer* did not hold that HERA's transfer of all rights to the conservator silently carved out an exception for direct claims where the claim involves the assets of the failed institution. Rather, that court held that Congress's transfer of "everything it could to the conservator" included the transfer of the right to bring any shareholder suit with respect to the GSEs' assets, no matter how that suit is labeled. The court recognized that Congress intended HERA's transfer of rights to the conservator to be all-encompassing, for the duration of the conservatorship. "'Congress also included privileges just to be sure that nothing was missed. Congress has transferred everything it could to the conservator, and that includes a stockholder's right, power, or privilege to demand corporate action or to sue directors or others when action is not forthcoming.'" *Id.* (quoting *Pareto v. FDIC*, 139 F.3d 696, 700 (9th Cir. 1998)) (internal alterations omitted).

The cases cited by plaintiff in support of their contention that they can present "direct" claims against FHFA and Treasury confirm that any suit, like theirs, which presents a claim on the

assets of the GSEs is a derivative claim that shareholders may not pursue. Opp. at 70-71. In *Levin v. Miller*, 763 F.3d 667 (7th Cir. 2014), the Seventh Circuit held that under FIRREA, any claim "with respect to . . . the assets of the institution" constitutes a derivative action. *Id.* at 672 (citing 12 U.S.C. § 1821(d)(2)(A)(i)). The direct claims in that case were managerial liability claims separate from a claim on the assets of the failed institution. *Id.* at 670-72. Claims depending upon the disposition of the assets of the bank – including a claim alleging a breach of a fiduciary duty allegedly owed to the holding company investors – were held to be derivative and thus transferred to the conservator. *Id.* at 670-71. In *Vieira v. Anderson (In re Beach First National Bancshares, Inc.)*, 702 F.3d 772 (4th Cir. 2012), the Fourth Circuit held that all but one of plaintiffs' claims were derivative, and barred by FIRREA, because the complaint alleged "causes of action for liability derivative of the alleged failures at the [b]ank level." *Id.* at 777. Only one claim, involving an injury to a holding company's interest in an LLC rather than the failed bank itself, asserted "direct harm to [the holding company] unrelated to any defalcation at the [b]ank level," and was thus allowed to proceed. *Id.* at 780; *see also Barnes v. Harris*, 783 F.3d 1185, 1193 (10th Cir. 2015) (bank holding company had failed to establish "any harm to the Holding Company that is distinct and separate from the harm to the Bank.") These cases emphasize that where a plaintiff places a claim upon the assets of the failed institution; artful pleading of a supposed individual injury should not draw "a veneer over a derivative claim." *Levin*, 763 F.3d at 670.[18]

[18] Finally, in *Plaintiffs in All Winstar-Related Cases at Court v. United States*, 44 Fed. Cl. 3, 10 (1999), the court stated that, "[t]he critical factor here is that the corporation, the thrift, has been or will be liquidated." The court's "holding … is limited to the liquidation context in which any surplus, as a matter of law, must be distributed to the shareholders," *id*. at 11-12, and does not permit a claim outside of a liquidation proceeding.

Under HERA, claims such as those asserted by the plaintiff here, regarding a "right to payment, resolution, or other satisfaction of their claims" can be presented only in receivership, and only then if the claims have been properly exhausted under the claims administration process. *See* 12 U.S.C. § 4617(b)(2)(K)(i). HERA establishes procedures for a shareholder to submit a claim for payment, in the event of the liquidation of a GSE. *See* 12 U.S.C. § 4617(c)(1)(D). Congress also provided that such a claim shall be subject to the priority-of-claims and maximum-liability provisions of HERA. *See id*. ("right to payment, resolution, or other satisfaction of their claims, as permitted under subsections (b)(9), (c), and (e)."). By bringing an action concerning their liquidation preferences now, during the conservatorship, at a time when all "rights, titles, powers, and privileges" of shareholders are held by FHFA, the plaintiff simply ignores the process that Congress established to determine its claims in the event of liquidation.[19]

For similar reasons, plaintiffs' claims are not ripe for review now. The plaintiffs assert that they are challenging "the complete nullification of their contractual rights to participate in the

[19] The plaintiff also argues that FHFA somehow has acknowledged that shareholders retain rights to payment by "expressly suspend[ing] payment of dividends to private shareholders of Fannie and Freddie during conservatorship." Opp. at 69 n.21. This argument is difficult to comprehend. FHFA's suspension of dividends was entirely consistent with the statutory provision that transferred all of a shareholder's rights to the conservator, for as long as the conservatorship remained in effect. And it made eminent sense for FHFA to announce the suspension of dividends, so that shareholders, creditors, and the public at large would be informed of the financial status of the GSEs during the conservatorship. In the same footnote, plaintiffs claim that if defendants' interpretation of § 4617(b)(2)(A) is correct, "Treasury's dividend rights would belong to FHFA, and these payments should have been retained by FHFA rather than given to Treasury. Opp. at 69 n.21. Plaintiffs overlook that FHFA and Treasury entered into the PSPAs *after* the GSEs were placed into conservatorship. Compl., ¶¶ 35, 41. HERA authorized the conservator to "take such action as may be … necessary to put the regulated entity in a sound and solvent condition." 12 U.S.C. § 4617(b)(2)(D). FHFA, as the conservator, reasonably determined in September 2008 that Treasury's commitment of hundreds of billions of dollars in capital to the GSEs, in exchange for dividend rights, commitment fees, and other economic benefits, would assist the conservator in its efforts to keep the GSEs solvent.

liquidation process in the event that Fannie and Freddie are liquidated." Opp. at 87. Plaintiffs' hyperbole aside, their claim in fact is that the Third Amendment makes it less likely that they will be able to claim any assets at the time of liquidation. But the liquidation process is not ongoing and may never take place. *See Perry Capital*, 70 F. Supp. 3d at 234 ("The question for the Court cannot be whether the Third Amendment diminishes an opportunity for liquidation preferences at some point in the future, but rather whether the plaintiffs have suffered an injury to their right to a liquidation preference in fact and at present.").

B. HERA's Explicit Transfer of All Shareholder Rights to the Conservator Contains No Exception That Would Permit Plaintiffs' Claims

Plaintiffs' claims fail under the plain language of 12 U.S.C. § 4617(b)(2)(A). In apparent recognition of this fact, they ask this Court to depart from the statute's text to create a judicial exception that would permit shareholder suits alleging a "manifest conflict of interest" on the part of the conservator. Opp. 71-76. This Court should not create such an exception where Congress did not see fit to do so.

> HERA's plain language provides, in a broad stroke, that the FHFA succeeds to 'all rights, titles, powers, and privileges' of the stockholders of Fannie Mae …. This directive implies no exception, and plaintiffs[] fail to identify any accompanying statutory text to persuade this Court that, when read as a whole, HERA carved out or otherwise permits the exception they propound.

In re Fed. Nat'l Mortg. Ass'n Sec., Derivative & "ERISA" Litig., 629 F. Supp. 2d 1, 4 (D.D.C. 2009), *aff'd sub nom., Kellmer v. Raines*, 674 F.3d 848 (D.C. Cir. 2012). *See also In re Freddie Mac*, 643 F. Supp. 2d at 797 ("the broad, sweeping language of HERA . . . clearly demonstrates Congressional intent to transfer as much control of Freddie Mac as possible to the FHFA, including any right to sue on behalf of the corporation.").

Despite the lack of any statutory exception, the plaintiffs urge the Court to adopt a version

of the judicially-created "manifest conflict of interest" exception described in two cases arising under FIRREA. *See Delta Sav. Bank v. United States*, 265 F.3d 1017 (9th Cir. 2001); *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279 (Fed. Cir. 1999). Both of those cases concerned derivative suits over *pre-receivership* claims against federal agencies, and neither case supports the proposition that shareholders can sue the conservator itself, or the counter-party to an action taken by the conservator.

If a "conflict of interest" exception could be grafted on to the language of HERA, and then extended to apply to suits that challenge the actions of the conservator itself, the exception would swallow the rule that forbids shareholder suits in the first place. Under the plaintiffs' theory, the statute could be evaded as a simple matter of pleading, so long as the complaint includes an allegation that the conservator is improperly exercising its authority by refusing to pursue the claim. Such a result is inconsistent with the limitations on review that Congress created in HERA. *See Kellmer*, 674 F.3d at 850 ("to resolve this issue, we need only heed Professor Frankfurter's timeless advice: '(1) Read the statute; (2) read the statute; (3) read the statute!'").

The plaintiffs argue that HERA must not be read literally, because the statute's express prohibition of shareholder claims might prevent "meaningful judicial review" of "constitutional claims." Opp. at 72. No constitutional claims have been raised here, and thus there is no need to consider the extent to which § 4617(b)(2)(A) might bar review of a constitutional challenge. Moreover, the doctrine of constitutional avoidance "has no application in the absence of statutory ambiguity," *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001), and there is no ambiguity in the text of § 4617(b)(2)(A)(i).

In any event, plaintiffs misapprehend the effect of § 4617(b)(2)(A); the statute does not

prohibit a shareholder plaintiff from ever bringing a claim. Instead, it provides that the right to bring such a claim is transferred to the conservator, while the conservatorship lasts. *See Nat'l Trust for Historic Pres. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald and Silberman, JJ., concurring). The statute's simple deferral of review of the plaintiffs' claim would raise no constitutional concerns, even if any constitutional claim had been raised here. *See Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2132 (2012).

III. The Judgment in the *Perry Capital* Actions Precludes Plaintiffs' Claims

Finally, plaintiffs' claims are barred by the doctrine of issue preclusion, or collateral estoppel: the court in *Perry Capital* already considered and dismissed shareholder derivative claims against both FHFA and Treasury holding that § 4617(f) barred the equitable relief, including rescission, that the derivative action sought against the conservator's exercise of its authority, that § 4617(b)(2)(A) barred any derivative claims by shareholders concerning the PSPAs, and that no "conflict of interest" exception to the application of § 4617(b)(2)(A) exists. *Perry Capital*, 70 F. Supp. 3d at 229-33. Issue preclusion bars plaintiffs from re-litigating those issues in another derivative action. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) ("Issue preclusion, in contrast, bars successive litigation . . . even if the issue recurs in the context of a different claim.") (internal citations omitted); *Cottrell v. Duke*, 737 F.3d 1238, 1242-43 (8th Cir. 2013) (issue preclusion principles apply in shareholder derivative actions).

Plaintiffs argue that even if their claims are derivative, that the plaintiffs in *Perry Capital* and *Continental Western* were not seeking to bring their APA claims derivatively and cannot be said to have intended to adequately represent or bind the corporations. Opp. 29-30. But plaintiffs overlook the fact that the *Perry Capital* opinion did address an "avowed derivative

action." *See Perry Capital*, 70 F. Supp. 3d at 229-33. The Court's holdings with respect to that derivative action "bars relitigation of those issues even in the context of a suit based on an entirely different claim." *In re Sonus Networks, Inc, S'holder Derivative Litig.*, 499 F.3d 47, 56 (1st Cir. 2007). For the reasons explained in Section II A.1, plaintiffs' complaint is derivative, and should be subject to the issue-preclusive effect of the *Perry Capital* opinion with respect to the availability of equitable relief, the transfer of shareholder rights to the conservator, and the inapplicability of any conflict-of-interest exception.[20] These issues were litigated in *Perry Capital*, and their resolution was an essential element of that opinion. Because the GSEs were the real parties in interest in these derivative claims, and *Perry Capital* is considered a valid and final judgment regardless of the pending appeal, the Eighth Circuit's standards for issue preclusion are fully satisfied. *See* Treasury Mem. at 29.

CONCLUSION

For the foregoing reasons, the Court should dismiss the complaint with prejudice.

Dated: November 23, 2015

Respectfully submitted,

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[20] Plaintiffs' cite Judge Lamberth's order in *Rafter v. Dep't of Treasury* in which the court held that that *Rafter*, a later-filed case, was not consolidated with the prior actions filed in *Perry Capital*. *See* Memorandum & Order at 5, *Rafter v. Dep't of Treasury*, No. 1:14-cv-01404-RCL (D.D.C. Jan. 21, 2015) (ECF No. 20). But the *Rafter* order simply stated that the *Perry Capital* Court's analysis of the derivative nature of Fairholme plaintiffs' fiduciary claims was dicta; the *Perry Capital* opinion also dismissed avowedly derivative claims, and it is that aspect of the opinion that has issue preclusion effect here.

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Certificate of Service

I hereby certify that on November 23, 2015, I electronically filed the foregoing with the Clerk of the Court using the ECF system. To my knowledge, a copy of this document will be served on the parties or attorneys of record through the ECF system.

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