

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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683 CAPITAL PARTNERS, LP, THE	:	
MANGROVE PARTNERS MASTER FUND,	:	
LTD., CVI OPPORTUNITIES FUND I, LLLP,	:	
CAPITAL VENTURES INTERNATIONAL, CVI	:	
OPPORTUNITIES FUND II, LLLP, G1	:	
EXECUTION SERVICES, LLC,	:	No. 18-711 C
SUSQUEHANNA SECURITIES, SAL EQUITY	:	(Judge Sweeney)
TRADING, GP, and SUSQUEHANNA	:	
FINANCIAL GROUP, LLLP	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
THE UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	
	:	
----- X	:	

FIRST AMENDED COMPLAINT

683 Capital Partners, LP, The Mangrove Partners Master Fund, Ltd., CVI Opportunities Fund I, LLLP, Capital Ventures International, CVI Opportunities Fund II, LLLP, G1 Execution Services, LLC, Susquehanna Securities, SAL Equity Trading, GP, and Susquehanna Financial Group, LLLP (“Plaintiffs”), by and through their undersigned attorneys, hereby bring this action against the United States of America seeking, among other causes of actions and prayers for relief, compensation for the taking of their property in violation of the Fifth Amendment to the Constitution.

NATURE AND SUMMARY OF THE ACTION

1. This is an action to redress the United States’ wiping out of Plaintiffs’ shares in the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan

Mortgage Corporation (“Freddie Mac” and, collectively with Fannie Mae, the “Companies”) by seizing for itself all earnings of the solvent Companies in perpetuity.

2. On August 17, 2012, two arms of the United States—the Department of Treasury (“Treasury”) and the Federal Housing Finance Agency (“Agency” or “FHFA”), which was purportedly acting as the conservator of the Companies—agreed between themselves to a “Third Amendment to Amended and Restated Senior Preferred Stock Purchase Agreement” (the “Sweep Amendment”). Through the operation of the Sweep Amendment, the United States has expropriated hundreds of billions of dollars in net worth from the Companies, to benefit the government at the expense of the Companies’ other stockholders. Combined, Plaintiffs hold tens of millions of shares of the Companies’ common stock and several series of junior preferred stock issued by the Companies (the “Junior Preferred Stock”), with a “stated value” and/or “liquidation preference” (term varies by stock certificate) amounting to hundreds of millions of dollars. As a direct result of the Sweep Amendment and subsequent actions taken by Treasury and the Agency, including a Fourth Amendment, Plaintiffs have suffered severe economic losses to their property interests in the Junior Preferred Stock.

3. The Companies are (as Congress has provided) private, for-profit, stockholder-owned corporations whose purpose is to support liquidity, stability, and affordability in the secondary mortgage market by securitizing mortgage loans originated by primary market lenders and selling the bundled loans to investors.

4. In July 2008, amid the financial crisis in the housing and mortgage markets, Congress enacted the Housing and Economic Recovery Act of 2008 (the “Recovery Act”). The Recovery Act created the Agency and granted its director the discretion, under certain circumstances, to place the Companies into conservatorship or receivership. The Recovery Act

also granted to Treasury temporary emergency authority to purchase obligations or other securities of the Companies under certain circumstances.

5. On September 6, 2008, the Agency placed the Companies into conservatorship under itself. In such case, Congress in the Recovery Act expressly charged the Agency, as conservator, to seek to return the Companies to a “sound and solvent condition” and to “preserve and conserve the assets and property” of the Companies.

6. The next day, Treasury, via the Agency, entered into Senior Preferred Stock Purchase Agreements (the “Treasury SPAs”) with the Companies. Under the Treasury SPAs, Treasury committed to invest in the Companies in exchange for preferred stock that ranked senior to all series of Junior Preferred Stock (the “Treasury Senior Preferred Stock”). Treasury received for this commitment, among other things, (a) \$1 billion of Treasury Senior Preferred Stock, (b) a warrant to purchase up to 79.9% of the common stock of each Company for a nominal price, (c) a liquidation preference equal to the \$1 billion initial commitment fee plus the amount invested by Treasury in the applicable Company, and (d) a periodic commitment fee, in an undetermined amount, to be paid beginning in 2010. Through these and other provisions of the Treasury SPAs, Treasury acquired the ability to control the Companies.

7. Consistent with its statutory mandate under the Recovery Act, as well as historical understandings of conservatorship against which Congress had enacted it, the Agency assured the market that same day—and repeatedly for more than three years thereafter—that the goal of the conservatorship was to “return[] the entities to normal business operations”; that the conservatorship would be temporary and would terminate once the Companies had been restored “to a safe and solvent condition”; that the Junior Preferred Stock would remain outstanding and

continue to trade; and that stockholders would “continue to retain all rights in the stock’s financial worth, as such worth is determined by the market.”

8. At least by 2011, Treasury and the Agency recognized that the Companies had stabilized and their financial performance was improving. By the first and second quarters of 2012, Fannie Mae and Freddie Mac, respectively, reported positive net worth and announced that they would not be requesting a further draw under the Treasury SPAs. Moreover, the Companies’ renewed profitability suggested that they might well soon recognize sizeable deferred tax assets.

9. On the heels of such news, Treasury and the Agency (as purported conservator of the Companies) on August 17, 2012, entered into the Sweep Amendment, which eliminated the dividend payable under the Treasury Senior Preferred Stock (10% of the outstanding amount drawn, if paid in cash) and imposed a requirement that the Companies each quarter pay to Treasury their entire net worth in perpetuity. Thus, the Sweep Amendment barred the Companies from ever realizing a profit and from ever paying down Treasury’s liquidation preference. It thereby eliminated any possibility that Plaintiffs could ever receive any value from the Companies based on their property interests in the common and Junior Preferred Stock.

10. The Sweep Amendment appropriated the Companies’ net worth in perpetuity to the benefit of the United States at the expense of the Companies and their stockholders, including Plaintiffs. As Treasury has since admitted, the purpose was to take “every dollar of earnings each firm generates . . . to benefit taxpayers,” ensuring that stockholders other than the United States received *no* benefit from those earnings. The United States has paid no compensation to the Companies’ stockholders for this taking of their valuable property rights for the public benefit.

11. Plaintiffs purchased their shares both before and after the Agency and Treasury agreed to the Sweep Amendment. At all times, Plaintiffs believed in the future economic prospects of the Companies, reasonably relied upon the Agency's assurances of its intention that Plaintiffs and other holders of stock would retain their property rights, and expected the Companies to emerge from conservatorship as the Agency had promised repeatedly. At the time they acquired their shares, Plaintiffs had no reasonable basis to believe that the United States would permanently expropriate their investments and force stockholders into years of litigation to recoup their investments.

12. Accordingly, through this action, Plaintiffs seek the just compensation to which they are entitled under the Fifth Amendment to the United States Constitution for the government's taking of their property, as well as remedies under other causes of action detailed below—illegal exaction, breach of fiduciary duty, breach of implied contract, breach of contract, and breach of the implied covenant of good faith and fair dealing.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action, and venue is proper in this Court, pursuant to 28 U.S.C. § 1491(a)(1). Plaintiffs have claims under the Tucker Act that are worth more than \$10,000, and therefore can only adjudicate those claims in this Court.

THE PARTIES

14. Plaintiff 683 Capital Partner LP ("683") is a Delaware limited partnership that currently holds approximately 228,500 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of approximately \$11.4 million; approximately 926,000 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of approximately \$40 million; approximately 1.2 million common shares

of Fannie Mae; and approximately 100,000 common shares of Freddie Mac. As of August 16, 2012, 683 held 167,562 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of \$8,378,100, and 48,161 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of \$1,827,175. At various times, 683 has held substantially larger positions of both Fannie and Freddie Junior Preferred stock.

15. Plaintiff The Mangrove Partners Master Fund, Ltd. is a Cayman Islands exempted company that currently holds approximately 811,200 shares of Junior Preferred Stock issued by Fannie Mae with a stated value and/or liquidation preference of approximately \$40.6 million and approximately 554,900 shares of Junior Preferred Stock issued by Freddie Mac with a stated value and/or liquidation preference of approximately \$27.7 million.

16. Plaintiff CVI Opportunities Fund I, LLLP (“CVIOF”) is a Delaware limited liability limited partnership that currently holds approximately 2.63 million shares of Junior Preferred stock issued by Fannie Mae with a stated value and/or liquidations preference of approximately \$308 million and approximately 9.99 million shares of Junior Preferred stock issued by Freddie Mac with a stated value and/or liquidation preference of approximately \$344 million. At various times, CVIOF has held substantially larger positions of both Fannie and Freddie Junior Preferred stock.

17. Plaintiff Capital Ventures International (“CVI”) is a Cayman Islands exempted company that currently holds approximately 887,600 shares of Junior Preferred stock issued by Fannie Mae with a stated value and/or liquidations preference of approximately \$55.6 million; approximately 568,200 shares of Junior Preferred stock issued by Freddie Mac with a stated value and/or liquidation preference of approximately \$14.2 million; approximately 666,600

common shares of Fannie Mae; and approximately 519,900 common shares of Freddie Mac. At various times, CVI has held substantially larger positions of both Fannie and Freddie Junior Preferred and common stock.

18. Plaintiff CVI Opportunities Fund II, LLLP (“CVIOF II”) is a Delaware limited liability limited partnership that currently holds approximately 107,000 shares of Junior Preferred stock issued by Freddie Mac with a stated value and/or liquidations preference of approximately \$5.35 million

19. Plaintiff G1 Execution Services, LLC (“G1X”) is an Illinois limited liability company that currently holds approximately 2,000 shares of Junior Preferred stock issued by Fannie Mae with a stated value and/or liquidations preference of approximately \$87,000 and approximately 2,300 shares of Junior Preferred stock issued by Freddie Mac with a stated value and/or liquidation preference of approximately \$80,000. At various times, G1X has held substantially larger positions of both Fannie and Freddie Junior Preferred stock and also large positions of Fannie and Freddie common stock.

20. Plaintiff Susquehanna Securities (“SS”) is a Delaware general partnership that currently holds approximately 10.4 million shares of Fannie Mae common stock and approximately 143.8 thousand shares of Junior Preferred stock issued by Fannie Mae with a stated value and/or liquidation preference of approximately \$3.6 million. At various times, SS has held substantially larger positions of Fannie Junior Preferred stock and also large positions of Freddie common stock.

21. Plaintiff SAL Equity Trading, GP (“SALET”) is a Delaware general partnership that held on August 17, 2012 approximately 19.8 million shares of Fannie Mae common stock; approximately 9.6 million shares of Freddie Mac common stock; 26 shares of Junior Preferred

stock issued by Fannie Mae with a stated value and/or liquidation preference of \$1,300; and 123 shares of Junior Preferred stock issued by Freddie Mac with a stated value and/or liquidation preference of \$3,075. At various times since, SALET has held substantially larger positions of Freddie common stock and Fannie Mae Junior Preferred stock.

22. Susquehanna Financial Group, LLLP (“SFG”) is a Delaware limited liability limited partnership that has held at various times as much as approximately 5.9 million shares of Fannie Mae common stock, 426.8 thousand shares of Freddie Mac common stock, and tens of thousands of shares of Junior Preferred stock issued by Fannie and Freddie with a stated value and/or liquidation preference in excess of \$1.25 million.

23. Defendant United States includes Treasury, the Agency, the Secretary and Director thereof, respectively, and agents acting at their direction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

24. Plaintiffs’ claims for taking (or, in the alternative, illegal exaction) are founded on the Fifth Amendment to the United States Constitution, which provides in pertinent part that no person shall “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” Plaintiffs’ contract claims are under 28 U.S.C. § 1491(a), which provides for claims founded on a contract with the United States.

FACTUAL ALLEGATIONS

Fannie Mae and Freddie Mac

25. Fannie Mae is a private stockholder-owned Delaware corporation organized and existing under the Federal National Mortgage Association Charter Act, 12 U.S.C. §§ 1716 *et*

*seq.*¹ It was established in 1938 to promote affordable home ownership by facilitating the financing of home mortgages insured by the Federal Housing Administration. In 1968, Fannie Mae was privatized and reorganized into a government-sponsored entity with access to capital markets. In 1970, it was authorized to purchase conventional mortgages. From 1968 until 2010, Fannie Mae's stock was traded on the New York Stock Exchange.

26. Freddie Mac is a private stockholder-owned Virginia corporation organized and existing under the Federal Home Loan Mortgage Corporation Act, §§ 1451 *et seq.* It was established in 1970 to expand the secondary mortgage market. It was initially a wholly owned subsidiary of the Federal Home Loan Bank System, but Congress in 1989 reorganized and privatized it under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Under FIRREA, Freddie Mac became a for-profit corporation owned by private stockholders. From 1989 until 2010, Freddie Mac's stock was traded publicly on the New York Stock Exchange.

27. Three years after enacting FIRREA, Congress established the Office of Federal Housing Enterprise Oversight ("OFHEO"), through the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, to oversee and ensure the capital adequacy and financial safety and soundness of the Companies. OFHEO was authorized to place the Companies into conservatorship in certain circumstances, but did not employ this power.

28. Both Fannie Mae and Freddie Mac issued common stock listed on the New York Stock Exchange. Until 2008, each Company regularly declared and paid quarterly dividends to its common shareholders.

29. Prior to 2008, Fannie Mae and Freddie Mac issued numerous series of non-cumulative Junior Preferred Stock. These series, respectively as to each Company, are *pari*

¹ All citations of the U.S. Code are from Title 12 unless otherwise noted.

passu with one another with respect to dividend payments and liquidation preferences, but have priority over the Companies' common stock.

30. Following their privatization, including after the establishment of OFHEO, the Companies operated successfully for decades, raising private capital, generating profits, regularly declaring and paying dividends on their common stock and the various series of Junior Preferred Stock, and increasing stockholder value. Prior to 2007, Fannie Mae had not reported a full-year loss since 1985, and Freddie Mac had not since its privatization in 1989. Indeed, the Companies' preferred stock was generally viewed as a conservative and reliable investment—even as of August 8, 2008, after enactment of the Recovery Act and shortly before the imposition of the conservatorship, Fannie Mae's Junior Preferred Stock was rated AA- by S&P, A1 by Moody's, and A+ by Fitch. The Companies actively marketed their securities to a wide variety of investors. For instance, they had a variety of programs to encourage their midlevel employees to buy Company stock. *See Worker Assets Shrink at Fannie and Freddie*, N.Y. Times (Aug. 28, 2008).

The Housing Crisis And The Recovery Act

31. The housing and mortgage markets substantially weakened in 2007, which reduced the value of Fannie Mae and Freddie Mac's guarantee and investment portfolios. Both Companies suffered net losses beginning in 2007. These losses, however, were largely due to *estimates* of future credit losses that ultimately proved excessive. Actual credit losses from 2007 to 2011 were approximately \$140 billion less than anticipated. A significant portion of the losses recorded in that period related to the write-down of deferred tax assets, which the Companies would reclaim when they returned to profitability.

32. Notwithstanding these challenges, OFHEO assured the public that the Companies were stable. On March 19, 2008, James Lockhart, then-Director of OFHEO, announced that “both companies . . . have prudent cushions above the OFHEO-directed capital requirements and have increased their reserves,” adding that “[w]e believe they can play an even more positive role in providing the stability and liquidity the markets need right now.” He also called the idea of a bailout “nonsense in [his] mind,” as the Companies were “safe and sound, and they will continue to be safe and sound.” *As Crisis Grew, a Few Options Shrank to One*, N.Y. Times (Sept. 7, 2008).

33. Lockhart similarly explained four months later, on July 8, 2008, that the Companies were “adequately capitalized, which is our highest criteria.” Two days after that, on July 10, he again confirmed, in a public statement, that Fannie Mae and Freddie Mac were “adequately capitalized, holding capital well in excess of the OFHEO-directed requirement, which exceeds the statutory minimums. They have large liquidity portfolios, access to the debt market and over \$1.5 trillion in unpledged assets.” This same day, then-Treasury Secretary Henry Paulson testified to the House Financial Services Committee that the Companies’ “regulator has made clear that they are adequately capitalized.” The then-Chairman of the Federal Reserve, Ben Bernanke, echoed this, also testifying before that committee, on July 16, 2008, that the Companies were adequately capitalized and in no danger of failing. Further, upon information and belief, an August 2008 analysis for the Agency of Freddie Mac’s financial condition, by BlackRock, concluded that Freddie Mac’s “long-term solvency does not appear endangered—we do not expect Freddie Mac to breach critical capital levels even in stress case.”

34. At the end of July 2008, as the decline in the housing and mortgage markets accelerated, Congress passed and President George W. Bush signed the Recovery Act. That Act

created FHFA as a new federal agency, replacing OFHEO, and charged it with regulating the Companies. § 4511; § 4513. Mr. Lockhart, who had been running OFHEO, became the Agency's first Director.

35. The Recovery Act gave the Director discretion under certain circumstances to place the Companies into conservatorship or receivership under the Agency. In a sub-section specifying the Agency's "General powers," as either "conservator or receiver," it authorizes the Agency to do a variety of things that include "preserv[ing] and conserv[ing] the assets and property" of the Companies but do not include liquidating them or winding them down. § 617(b)(2)(B). The Agency as conservator or receiver may repudiate contracts, if done "within a reasonable period following such appointment," but must in such cases pay damages. § 617(d)(2).

36. The Recovery Act separately specifies the Agency's "Powers as conservator." It "may, as conservator, take such action as may be" (i) "necessary to put the [Company] in a sound and solvent condition" and (ii) "appropriate to carry on [its] business . . . and preserve and conserve [its] assets and property." § 4617(b)(2)(D). The Act allows a Company to consent to being placed into conservatorship, but also expressly authorizes a non-consenting Company to sue within 30 days to challenge that action. § 4617(a)(3)(I), (a)(5).

37. After specifying the Agency's powers as conservator, the Recovery Act in the next sub-section separately specifies its "Additional powers as receiver." Only here does the Act authorize (indeed, direct) the Agency to wind down a Company, stating that it "shall place the [Company] in liquidation." § 4617(b)(2)(E). Receivership would terminate any existing conservatorship and trigger an immediate right to judicial review. It also would require numerous other special procedures, including a detailed process for the receiver to determine

claims against a Company, which also incorporates an express right of judicial review.

§ 4617(b)(3); (b)(6).

38. The Recovery Act expressly provides that, even upon appointment of a receiver, the right of the Companies' stockholders "to payment, resolution, or other satisfaction of their claims" is not terminated. § 4617(b)(2)(K).

39. Under the Recovery Act, the Agency in its actions as a conservator or receiver is not to be "subject to the direction or supervision of any other agency of the United States." § 4617(a)(7).

40. In addition to these provisions concerning the Agency's imposition of conservatorship and receivership, the Recovery Act granted to Treasury the temporary emergency authority—but only until December 31, 2009—to "purchase any obligations and other securities" of the Companies and "determine" those securities' "terms and conditions [and] . . . amounts." § 1455(l)(1)(A); § 1455(l)(4); § 1719(g).

41. Prior to exercising this temporary authority, the Treasury Secretary was required to "determine that such actions are necessary to: (i) provide stability to the financial markets; (ii) prevent disruptions in the availability of mortgage finance; and (iii) protect the taxpayer." §§ 1455(l)(1)(B); 1719(g)(1)(B). He also had to take specified factors into account: (i) the need for preferences or priorities regarding payments to the government; limits on maturity or disposition of obligations or securities to be purchased; (iii) the Company's plan for the orderly resumption of private market funding or capital market access; (iv) the probability of the Company's fulfilling the terms of any such obligation or other security, including repayment; (v) the need to maintain the Company's status as private and stockholder owned; and (vi) restrictions on the use of Company resources, including limitations on the payment of dividends and

executive compensation and any such other terms and conditions as appropriate for those purposes. §§ 1455(l)(1)(C); 1719(g)(1)(C).

The Agency Makes Itself The Companies' Conservator, Enters Into (And Amends) The SPAs With Treasury During The Authorized Period, And Reassures The Markets

42. In letters to each Company dated August 22, 2008, the Agency found (consistent with the Director's public statements) that each Company met all relevant capital requirements, including additional capital requirements imposed by the Agency above the statutory minimums and requirements arising from the Agency's risk-based capital stress test.

43. Nevertheless, on information and belief, Treasury and the Agency around the beginning of September 2008 sought the consent of the Companies' boards of directors to place the Companies into conservatorship. The Agency obtained such consent on the ground, in part, that conservatorship would serve the interests of the Companies' stockholders.

44. On September 6, 2008, the Agency did place each of the Companies into conservatorship. As a result, the Agency, "as conservator," succeeded to "all rights, titles, powers, and privileges of the [Companies], and of any stockholder, officer, or director of [a Company] with respect to the [Company]." § 4617(b)(2)(A)(i). Conservatorship, unlike receivership, does not "terminate" any rights of stockholders. *Compare id. with* § 4617(b)(2)(K)(i) (providing for termination of rights of stockholders in event of receivership, "except for their right to payment, resolution or other satisfaction of their claims, as permitted under subsections (b)(9), (c), and (e)").

45. The next day, exercising its temporary authority under the Recovery Act, Treasury entered into the Treasury SPAs with the Companies (acting through the Agency as conservator). Treasury agreed to provide each Company with a commitment of up to \$100 billion, as and when necessary for the Companies to maintain a positive net worth. In

exchange, Treasury received one million shares of the Treasury Senior Preferred Stock. Treasury also received: (a) an initial liquidation preference of \$1000 per share (equal to \$1 billion), plus any outstanding amount drawn from the commitment; (b) a dividend of 10% per annum of the outstanding amount provided by Treasury (which also could be paid “in kind” by increasing the liquidation preference, subject to incurring a 12% accrual rate going forward); (c) warrants to buy up to 79.9% of each Company’s common stock for \$0.00001 per share, and (d) the right to receive payment of a periodic commitment fee, in an undetermined amount, to be paid by the Companies quarterly beginning on January 31, 2010. The Treasury Senior Preferred Stock was senior to all Junior Preferred Stock, so that no dividends or liquidation distributions on any Junior Preferred Stock could be paid until after Treasury had received its full dividend or liquidation distributions.

46. In addition, covenants in the Treasury SPAs granted Treasury substantial ability to control the Companies and the Agency’s conduct of the conservatorship, by restricting the ability to take certain actions without Treasury’s prior written consent. This included restricting their ability to: (a) declare dividends on any outstanding common or preferred stock other than the Treasury Senior Preferred Stock; (b) sell or issue equity interests; (c) terminate the conservatorship; (d) transfer assets; (e) incur indebtedness; (f) enter into a merger, reorganization or recapitalization, or make acquisitions; or (g) enter into transactions with affiliates.

47. The Treasury SPAs also prohibited the Companies from owning more than a specified amount of mortgage assets and restricted the Agency from drawing on the Treasury commitment to pay any subordinated liabilities, including “a claim against [a Company] arising from rescission of a purchase or sale of a security issued by [a Company] . . . or for damages arising from the purchase, sale, or retention of such a security.”

48. When he imposed the conservatorship and entered into the Treasury SPAs, Mr. Lockhart took pains to assure stockholders that their interests would be protected, stating that, “in order to conserve over \$2 billion in capital every year, the common stock and preferred stock dividends will be eliminated, but the common and all preferred stocks will continue to remain outstanding.” He added:

[I]n order to restore the balance between safety and soundness and mission, FHFA has placed Fannie Mae and Freddie Mac into conservatorship. *That is a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations.* FHFA will act as the conservator to operate the Enterprises until they are stabilized. (Emphasis added.)

49. The Agency in a fact-sheet at the time further stated that “[s]tockholders will continue to retain all rights in the stock’s financial worth; as such worth is determined by the market,” and that, “[u]pon the [Agency] Director’s determination that the Conservator’s plan to restore the Company to a safe and solvent condition has been completed successfully, *the Director will issue an order terminating the conservatorship.*” (Emphasis added.)

50. Consistent with these assurances, news reports reflected the view that the conservatorship was motivated more by political considerations than financial need: “[Treasury Secretary] Paulson’s decision seems to have been a philosophical one, rather than one forced by imminent crisis. Of course, for stagecraft purposes, it was played as impending disaster.” *Paulson’s Itchy Finger, on the Trigger of a Bazooka*, N.Y. Times (Sept. 9, 2008).

51. In a Form 8-K filing issued by Freddie Mac on September 11, 2008, Freddie Mac stated that, “The holders of Freddie Mac’s existing common stock and preferred stock . . . *will retain all their rights* in the financial worth of those instruments, as such worth is determined by the market.” (Emphasis added).

52. In Fannie Mae's September 11, 2008 Form 8-K, it stated that "FHFA, as Conservator, has the power to repudiate contracts entered into by Fannie Mae prior to the appointment of FHFA as Conservator if FHFA determines, in its sole discretion, that performance of the contract is burdensome and that repudiation of the contract promotes the orderly administration of Fannie Mae's affairs. FHFA's right to repudiate any contract must be exercised within a reasonable period of time after its appointment as Conservator." This statement reflected what is expressly set forth in the Recovery Act regarding FHFA's power to repudiate contracts. § 4617(d). Thus, if FHFA was to repudiate the contracts between the Companies and their stockholders, FHFA was required to do so "within a reasonable period of time after its appointment as conservator" on September 6, 2008.

53. FHFA did not, either within a reasonable period of time after its appointment as Conservator or at any other time before August 17, 2012, purport to repudiate any of the contracts governing the Companies' Preferred Stock or any of its other stockholder relationships.

54. At the time the conservatorship was imposed, FHFA's director stated that it was critical to complete key regulations implementing the Recovery Act governing minimum capital standards, prudential safety and soundness standards and portfolio limits "so that any new investor will understand the investment proposition," clearly showing that FHFA intended that private investors would continue to purchase Fannie Mae and Freddie Mac securities. Statement of FHFA Director James B. Lockhart (Sept. 7, 2008).

55. The Treasury SPAs were amended on September 26, 2008, to extend the commencement date for the periodic commitment fee by two months, until March 31, 2010. (The fee was never imposed.) The day before, Director Lockhart had again reaffirmed in public testimony to Congress that conservatorship was "a statutory process designed to stabilize a

troubled institution with the objective of maintaining normal business operations and restoring its safety and soundness,” and that the Agency would act as conservator only “until the [Companies] are stabilized.” He further assured Congress that the Companies remained “private” and that “both the preferred and common shareholders have an economic interest in the companies.”

56. The Companies did not exercise their express right under the Recovery Act to sue within thirty days to challenge being placed into conservatorships.

57. Under the Obama Administration, the Treasury SPAs were amended twice more before Treasury’s temporary emergency purchase authority expired on December 31, 2009. The first was on May 6, 2009, to provide that Treasury could increase the commitment to \$200 billion as needed. That same month, the Agency submitted a report to Congress recognizing that “[c]onservatorship is a statutory process designed to restore safety and soundness while carrying on the business of a regulated entity and preserving and conserving its assets and property.” The following month, Director Lockhart in public congressional testimony emphasized that, “[a]s the conservator, FHFA’s most important goal is to preserve the assets of Fannie Mae and Freddie Mac over the conservatorship period. That is our statutory responsibility.” The month after that, in July 2009, the Agency issued a “Strategic Plan 2009-2014,” in which it included the following “strategic goal”: “The conservatorship of Fannie Mae and Freddie Mac allows the FHFA to preserve the assets of the [Companies], ensure they focus on their housing mission and are positioned to emerge from conservatorship as financially strong.” It again emphasized that the conservatorship was “designed to stabilize troubled institutions with the objective of maintaining normal business operations and restoring financial safety and soundness.”

58. The second amendment was executed on December 24, 2009. It provided a formulaic maximum commitment of either \$200 billion or the amount of the Companies' negative net worth from 2010 to 2012. Neither of these amendments affected the rights of the Companies' stockholders other than the United States.

59. A contemporaneous Treasury memorandum characterized the latter amendment as a "temporary" measure "to support [the Companies] until Congress determines a more sustainable long-term path." It also confirmed that "[c]onservatorship . . . preserves the status and claims of the preferred and common shareholders." (Emphasis added.) Indeed, Treasury officials, writing to the then-Secretary of the Treasury, explained that the Companies already had "moved from being a source of instability during the early stages of the crisis to a stable and critical source of mortgage financing to the market today," and that Fannie Mae and Freddie Mac had only drawn \$60 billion and \$51 billion, respectively, of the \$200 billion available to each.

60. Treasury officials at the time of the last of these amendments also recognized that, as the text of the Recovery Act provides, the deadline of December 31, 2009, "constrained" Treasury's "ability to make further changes to the [Treasury SPAs]."

The Agency Continues To Reassure The Markets, In The Years After Treasury's Emergency Stock-Purchase Authority Expires And As The Housing Market Rebounds

61. Over the next two years, throughout 2010 and 2011, the Agency continued to assure the markets that its intentions as conservator of the Companies were consistent with its statutorily specified "Powers as conservator" (to make the Companies "sound and solvent," "preserve and conserve" their assets and property, and "carry on" their businesses) and ordinary understandings of a conservator's duty to *conserve* a company. *See* § 4617(b)(2)(D). In February 2010, the Agency's new Acting Director, Edward J. DeMarco, told Senate and House leaders that "FHFA is focused on conserving the [Companies'] assets" and "put[ting] [them] in a

sound and solvent condition.” And in a report to Congress in June 2011, the Agency touted its goals of “preserv[ing] and conserv[ing] each [Company’s] assets and property and restor[ing] the [Companies] to a sound financial condition so they could continue to fulfill their statutory mission of promoting liquidity and efficiency in the nation’s housing finance markets.”

62. Also in June 2011, the Agency recognized in issuing a final rule that “allowing capital distributions to deplete [a Company]’s conservatorship assets would be inconsistent with the [A]gency’s statutory goals, as they would result in removing capital at a time when *the Conservator is charged with rehabilitating the regulated [Company]*.” 76 Fed. Reg. 35724, 35727 (June 20, 2011) (Emphasis added.) The rule underscored that, under the Recovery Act, “[a] conservator’s goal is to continue the operations of a [Company], rehabilitate it and return it to a safe, sound, and solvent condition.” *Id.* at 35730. In contrast, “[t]he ultimate responsibility of FHFA as receiver is to resolve and liquidate the [Company].” *Id.*

63. Later, on November 10, 2011, Mr. DeMarco continued this public theme, in a letter to the Senate: “By law, *the conservatorships are intended to rehabilitate the [Companies] as private firms.*” (Emphasis added.) On December 1, 2011, he reiterated to Congress—quoting his “powers as conservator” as specified in the Recovery Act—that, “as I have noted, FHFA has a statutory responsibility as conservator of the [Companies] to ‘take such action as may be: necessary to put the regulated entity in a sound and solvent condition; and appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.’”

64. By 2011, and consistent with the Agency’s repeated assurance that it was seeking as conservator to rehabilitate the Companies, it was obvious that (as Treasury officials had begun

to discern as early as December 2009), the Companies were past the trough in their financial performance. The United States recognized this repeatedly:

- As early as June 2011, on information and belief, in a meeting with restructuring experts from Blackstone, Treasury was told that the Companies were “showing improved financial performance and stabilized loss reserves,” and that their tax assets (unusable in the event of a loss, but valuable in the event of a profit) could generate significant value.
- In October 2011, the Agency observed, in a report published to the public on its website, that the Companies’ “actual results” were “substantially better than projected.”
- A November 8, 2011, report prepared for Treasury recognized that, “[f]rom December 31, 2012, through September 30, 2018, Freddie Mac is not projected to draw on the liquidity commitment to make its dividend payments [to Treasury under the SPA] because of increased earnings driven by significantly reduced credit losses in 2012 and 2014.”
- Upon information and belief, a December 2011 internal Treasury memorandum noted that “both Fannie Mae and Freddie Mac are expected to be net income positive (before dividends) on a stable, ongoing [basis] after 2012”
- Upon information and belief, a presentation sent to senior Treasury officials in February 2012 stated that “Fannie and Freddie could have the earnings power to provide taxpayers with enough value to repay Treasury’s net cash investments in the two entities.”

- Upon information and belief, in June 2012, Treasury memorialized in an email that “the [Companies] will be generating large revenues over the coming years, thereby enabling them to pay the 10% annual dividend well into the future even with the caps” on Treasury’s commitment. According to the email, this point was apparently discussed between then-Treasury Secretary Timothy Geithner and Mr. DeMarco at a June 24, 2012, meeting.
- On July 13, 2012, Agency officials circulated meeting minutes noting that Fannie Mae’s Chief Financial Officer had stated at an executive-management meeting four days before that the next eight years would likely be the “golden years of [Company] earnings,” that “[c]urrent projections show that cumulative [Company] dividends paid will surpass cumulative [Company] Treasury draws by 2020,” and that “[c]umulative 2012-2016 income is now forecast at \$56.6 billion, \$12.3 billion higher than the last projection.”
- In a July 30, 2012, “PSPA Covenant and Timing Proposal” regarding the Sweep Amendment, Treasury acknowledged the “[Companies] will report very strong earnings on August 7, that will be in-excess of the 10% dividend to be paid to Treasury.”
- At a meeting between senior Treasury officials and Fannie Mae on August 9, 2012, financial projections were introduced showing that, at no time between 2013 and 2022 would there be less than \$116.1 billion of remaining funding available to Fannie Mae, or less than \$148.3 billion available to Freddie Mac, under the Treasury SPAs. Furthermore, the projections showed that, even if the 10% dividends remained in

place, dividends paid to Treasury would exceed cumulative draws under the Treasury SPAs as of 2020 in the case of Fannie Mae, and as of 2019 in the case of Freddie Mac.

- At the same meeting on August 9, 2012, just days before the Sweep Amendment was implemented, Fannie Mae's Chief Financial Officer, Susan McFarland, told Treasury officials that release of the valuation allowance on the deferred tax assets would likely occur in mid-2013 and would generate profits in the range of \$50 billion.

65. These encouraging projections were well founded. On May 9, 2012, Fannie Mae announced a net worth of \$268 million and comprehensive income of \$3.1 billion for the quarter ending March 31, 2012, and announced that it would not request a draw from Treasury for the first time since being placed into conservatorship. Similarly, Freddie Mac on August 7, 2012, reported a net worth of \$1.1 billion for the quarter ending June 30, 2012, and announced that it too would not request a Treasury draw. Thereafter, on August 8, 2012, Fannie Mae announced net income of \$5.1 billion for the second quarter of 2012, more than sufficient to pay its \$2.9 billion quarterly dividend to Treasury, and announced, "we expect our financial results in 2012 to be substantially better than the past few years."

66. The Companies also had sizeable deferred tax assets in 2012: Fannie Mae disclosed \$64.1 billion on February 29, 2012, and Freddie Mac disclosed \$34.7 billion on August 7, 2012. The Companies' renewed profitability suggested that they would soon recognize these massive assets.

Treasury Effectively Nationalizes The Companies

67. Given the long history of assurances provided by the Agency and others, Plaintiffs were shocked when, on August 17, 2012—nearly three years after Treasury's

emergency authority to purchase the Companies' stock had expired and the Treasury SPAs had last been amended, but only days after the Companies' highly favorable second-quarter results had been announced—Treasury and the Agency (acting as purported conservator for the Companies) entered into the Sweep Amendment. It transformed the Companies' 10% dividend into a "dividend" of the "total assets of the Company . . . less the total liabilities of the Company" (subject to a capital reserve that diminished over time, initially set to be zero as of January 1, 2018, but reset to a nominal \$3 billion in December 2017). The Sweep Amendment has no termination date. In brief, it requires each of the Companies to turn over its entire net worth to Treasury—every quarter, in perpetuity (the "Net Worth Sweeps").

68. Treasury thereby appropriated to itself all future profits of the Companies, effectively nationalizing them. Correspondingly, Treasury kept the Companies from accumulating capital that could ensure their ongoing solvency and ability to operate as private, rehabilitated companies without depending on the government, from having any funds to pay dividends to any other stockholders, and, except in limited circumstances, from being able to pay down the balance on the commitment (the net-worth payments do not reduce this balance) so as to substantially decrease Treasury's liquidation preference over the Junior Preferred and common stockholders.

69. The effect was to extinguish any possibility that any stockholder other than the United States will receive any value from the Companies. The government's action also, while not benefitting but actually harming the Companies, provided Treasury an expected and actual windfall of billions of dollars per year without the need for any appropriation from Congress. And it placed the burden of a public program, designed and intended to benefit the government's purposes, disproportionately upon the relatively small group of Junior Preferred and common

stockholders who invested and believed in the Companies' prospects, rather than upon the public as a whole.

70. It turns out that, during much of the period that the Agency was assuring stockholders that its objective was to stabilize the Companies and terminate the conservatorship, Treasury had quietly been seeking a way to wind-down the Companies, which came to include seeking a way to seize all of their value notwithstanding that its emergency stock-purchasing authority had expired. An internal memorandum to Treasury Secretary Geithner from the then-Under Secretary of the Treasury for Domestic Finance, Jeffrey Goldstein, dated December 20, 2010, referred to a "commitment" by the Obama Administration to "ensure existing common equity holders *will not have access to any positive earnings from the [Companies] in the future.*" (Emphasis added). And in February 2011 Treasury issued a report expressing its intention to "us[e] a combination of policy levers to wind down Fannie Mae and Freddie Mac," claiming that the Administration would "work with [FHFA]" to this end—all while Mr. DeMarco continued throughout 2011 to assure Congress and the public that his goal was to *rehabilitate* the Companies. At the same time, Treasury stated its belief that, under the current Treasury SPAs, "there is sufficient funding to ensure the orderly and deliberate wind down of Fannie Mae and Freddie Mac, as described in our plan."

71. According to a senior Treasury official, Jeffrey Foster, the idea for a variable dividend payment based on positive net worth originated from a phone conversation between himself and Mario Ugoletti in 2010. Mr. Ugoletti had been appointed in 2009 as a special advisor to the Agency's Acting Director, and served as primary liaison to Treasury with respect to the Treasury SPAs and the amendments thereto. Before 2009, Mr. Ugoletti worked at Treasury for 14 years, from 1995 to 2009, serving as Director of the Office of Financial

Institutions Policy during the last five years of his tenure. In that capacity, he participated, on behalf of Treasury, in creating and implementing the Treasury SPAs.

72. Mr. Foster testified that, during the phone call in 2010, he suggested to Mr. Ugoletti that the Treasury SPAs needed to be restructured to avoid the circularity of drawing from Treasury to then pay Treasury (the so-called “death spiral”). This conclusion was supposedly based upon financial modeling work that Treasury itself had commissioned from Grant Thornton LLP (“Grant Thornton”).

73. Mr. Foster found a receptive audience in the 14-year veteran of Treasury. Mr. Ugoletti has testified to his understanding that Treasury “all along” wanted to see a wind-down of the Companies and a new housing finance structure. In his position as special advisor to the Agency’s Acting Director on the Treasury SPAs and the amendments thereto, he was in an ideal position to push Treasury’s agenda.

74. In addition to his clear understanding of the wind-down objectives of his prior longtime employer, Mr. Ugoletti also understood that Treasury had the ability to control the Agency and dictate whether the Companies would ever emerge from conservatorship. As he explained in deposition, even if the Companies had been able to raise \$189.5 billion in equity to pay off Treasury’s liquidation preference and become sufficiently well capitalized to get the Agency’s “stamp of approval on them,” “Treasury still has to approve [the Companies’] coming out of conservatorship.” As noted, the Treasury SPAs had given Treasury the right to block certain actions of the Agency as conservator in operating the Companies.

75. Treasury had used that power over the conservatorships to place the general interest of the government’s coffers—beyond Treasury’s interest in repayment of draws and in receiving dividends—ahead of the interests of stockholders and to hamper the Agency as

conservator in preserving the value of the Companies for any stockholders other than Treasury. For example, in September 2009, the Companies had proposed to sell to third-party investors their investments in low-income-housing tax credits, to decrease their draws and dividend payments to Treasury. Treasury withheld its approval, explaining that “the proposed sale would result in *a loss of aggregate tax revenues* that would be greater than the *savings to the federal government* from a reduction in the capital contribution obligations of Treasury” to the Companies under the Treasury SPAs.

76. Armed with its power to prevent the Agency from allowing the Companies to emerge from the conservatorships, Treasury sought to exert its influence upon the Agency’s senior officials to adopt Treasury’s vision for the Companies and their stockholders. Upon information and belief, on January 4, 2012, Mary Miller of Treasury transmitted an agenda to Acting Director DeMarco claiming that Treasury and the Agency had “common goals” to “promote a strong housing market recovery, reduce government involvement in the housing market over time and to provide the public and financial markets with a clear *plan to wind down the [Companies].*” (Emphasis added.) One section of this agenda was titled, “Establish meaningful policies that demonstrate *a commitment to winding down the [Companies].*” (Emphasis added.)

77. As the financial condition of the Companies continued to improve dramatically, and the need for the Companies to remain in conservatorship diminished, the efforts of Treasury to implement the Sweep Amendment intensified. On June 13, 2012, Treasury prepared a “sensitive” and “pre-decisional” presentation, which stated that “Treasury would like to modify the [Treasury] SPAs given the challenges and circularity embedded in the current structure.” In support of its modification proposal, which essentially mirrored the eventual Sweep Amendment,

Treasury offered forecasts prepared by its own consultant, Grant Thornton, which showed a “base case” and a “downside case” that did not properly reflect the performance and prospects of the Companies. For example, under the base cases for Fannie Mae and Freddie Mac, the forecasts (made in June 2012) assumed, for 2012, a combined net comprehensive loss of \$6.4 billion—even though their combined net comprehensive income of \$4.9 billion for the first quarter alone exceeded that figure. Indeed, for full year 2012, the Companies reported positive comprehensive income of \$34.8 billion—a combined difference of \$41.2 billion between the assumptions used by Grant Thornton and actual results. For 2013, the differences were even larger—the base cases projected combined net comprehensive positive income of \$14.9 billion for the Companies, whereas their combined actual comprehensive income, excluding any deferred tax assets, was \$64.5 billion, more than 425% higher than projected.

78. The need for Treasury to implement the Sweep Amendment took on even greater urgency following the meeting on August 9, 2012, attended by representatives of Treasury and Fannie Mae, at which Ms. McFarland advised Treasury officials that Fannie Mae would deliver sustainable profits over time and benefit from the likely near-term allowance of the deferred tax assets. The promising news conveyed at that meeting did not cause Treasury to reconsider its proposal to implement the Sweep Amendment. To the contrary, the same day as that meeting, Mr. Ugoletti emailed Mr. DeMarco and other Agency officials, advising them that, “[a]s a heads up, there appears to be a renewed push to move forward on [Treasury] SPA amendments.” Mr. Ugoletti advised his Agency colleagues that he had not seen the proposed documents yet, but he understood that they were largely the same as previous versions he had reviewed, in terms of net income sweep, eliminating the commitment fee, and faster portfolio wind-down.

79. Treasury made the decision, on behalf of itself and the Agency, to cause the execution of the Sweep Amendment. This is evident from the fact that the Sweep Amendment was designed to promote Treasury's policy objectives. On information and belief, on August 13, 2012, just four days before the Sweep Amendment was executed, a draft presentation was circulated among Treasury officials, indicating that the Sweep Amendment was "consistent with Treasury's policy to wind-down the [Companies]," and specifically intended to "ensure that the [Companies] will not be able to rebuild capital as they are wound down." Similarly, in an email between Treasury and White House officials on August 15, 2012, which did not copy the Agency or the Companies, Treasury official Adam Chepenik declared that, "[b]y taking all of their profits going forward, we are making clear that the [Companies] will *not* ever be allowed to return to profitable entities at the center of our housing finance system," and he confirmed that "taxpayers will receive every dollar of profit the [Companies] make." (Emphasis in original.)

80. While Treasury was pressing the Agency, through its liaison Mr. Ugoletti, to finalize the Sweep Amendment, neither Treasury nor the Agency apprised officials at the Companies about the existence of the Sweep Amendment, let alone invited them to discuss their own future. According to Mr. Ugoletti, representatives of the Companies received the near-final version of the Sweep Amendment not long before its execution and were "not too happy." Susan McFarland (who as Fannie Mae's Chief Financial Officer had met with Treasury on August 9, 2012) testified:

So when the amendment went into place, part of my reaction was they did that in response to my communication of our forecasts and the implication of those forecasts, that it was probably a desire not to allow capital to build up within the enterprises and not to allow the enterprises to recapitalize themselves.

81. Had the Agency been acting as a conservator for the Companies, rather than as a federal regulator to implement Treasury's policy goals, the Agency would have had good reason to consult with the Companies' boards and management to determine whether the Sweep Amendment was or was not in the best interests of the Companies and their stockholders. On information and belief, this never happened. This failure of the Agency to consult with the boards and management of the Companies for which it was purporting to act as conservator reinforces that the Agency was not acting as the conservator it had claimed it would be.

82. In short, Treasury orchestrated the Sweep Amendment, and the Agency was, to the extent it had any involvement, merely a federal agency acting at Treasury's direction, under its supervision, and for its purposes.

Treasury Acknowledges That It Seized The Companies' Profits In Perpetuity

83. After imposing the Sweep Amendment, Treasury made no attempt to hide from the public that Treasury's purpose was to expropriate the entirety of the Companies' stockholders' private property rights for public use and a public purpose on an ongoing basis. In a press release the day it imposed the Sweep Amendment, Treasury announced that the so-called revised dividend would "replace the 10 percent dividend payments made to Treasury on its preferred stock investments in Fannie Mae and Freddie Mac with a quarterly sweep of every dollar of profit that each firm earns going forward," and "*make sure that every dollar of earnings each firm generates is used to benefit taxpayers.*" (Emphasis added.) The press release further stated that the Sweep Amendment was a commitment 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.*" (Emphasis added.)

84. Treasury did not indicate that, in entering into the Sweep Amendment, it had taken into consideration the need to maintain the Companies' status as private stockholder-owned companies. *See* § 1719(g)(1)(C)(v), § 1455(l)(1)(C)(v). Rather, its overriding concern was the government's conception of the public interests.

85. Treasury made no effort in its press release to justify its authority for entering into the Sweep Amendment in the face of the expiration—nearly three years before, with no purported amendments since—of its emergency purchasing authority. Nor did it attempt to justify its effective winding down of the Companies without putting them into receivership and providing stockholders the Recovery Act's protections in that event.

86. Furthermore, a White House senior advisor, in an email written to a senior Treasury official on the date of the Sweep Amendment, stated that “we’ve closed off [the] possibility that [Fannie and Freddie] ever[] go. . . private again,” and forwarded an email expressing the advisor's view that the Sweep Amendment would “ensur[e] that [the Companies] can't recapitalize.” The same White House advisor sent another email to Treasury officials that day characterizing the Sweep Amendment as a “policy,” stating: “Team T[reasur]y, [y]ou guys did a remarkable job on the [Treasury] SPAs this week. You delivered *a policy change of enormous importance that's actually being recognized as such by the outside world . . .* and as a credit to the Secretary and the President.” (Emphasis added.)

87. These emails confirm that the Sweep Amendment emanated from the highest levels of the Administration, that it was intended to serve a perceived public policy with no regard for the conservation obligations of the Agency, and that the Administration recognized it was sharply diverging from the path that the government had drawn for the Companies and their investors.

The Agency Abrogated Its Public Commitments To Act As A “Conservator”

88. The Sweep Amendment did not make commercial or economic sense for the Companies (or their non-controlling stockholders), nor did the United States seriously claim otherwise. Rather, the Sweep Amendment enabled Treasury to expropriate valuable property belonging to Plaintiffs and other stockholders for the benefit of the United States and its coffers, while implementing Treasury policy objectives.

89. Thus, the Agency in “agreeing” to the Sweep Amendment had ceased to act in the best interests of the Companies and as the conservator that it had—repeatedly, for years—assured the markets that it would be, namely that it would act consistent with its “Powers as conservator” under the Recovery Act and with common, settled understandings of a conservator’s role.

90. Thereafter, the Agency abdicated its conservatorship responsibilities and wholly adopted Treasury’s policy objectives, which elevated the interests of “taxpayers” (*i.e.*, Treasury) over the interests of the Companies’ soundness and solvency, let alone the Companies’ stockholders other than the United States. Various documents and statements subsequent to the Sweep Amendment confirm the Agency’s public switch to Treasury’s position, notwithstanding Mr. DeMarco’s reassurances to the market as recently as December 2011 that his duty as conservator was to rehabilitate the Companies. For example:

- On October 9, 2012, about two months after the Sweep Amendment, the Agency released its Strategic Plan for 2013-2017, which included the strategic goals of “minimiz[ing] taxpayer losses during the Enterprises’ conservatorships” and “contract[ing] [Company] operations.”

- On October 22, 2012, Timothy J. Mayopoulos, the President and CEO of Fannie Mae, stated that “[t]he [C]ompany is no longer run for the benefit of private shareholders.”
- On March 20, 2013, the Agency’s Office of Inspector General issued an Analysis of the Sweep Amendments in which it stated that, “[i]n overseeing the Enterprises, FHFA has to balance its responsibilities for maintaining the viability of the Enterprises and for protecting the interests of taxpayers.”
- In April 2013, Mr. DeMarco himself stated that “[t]he Administration has made clear that their preferred course of action is to wind down the [Companies],” and he explained that the “recent changes to the [Treasury SPAs], replacing the 10 percent dividend with a net worth sweep, reinforce the notion that *the [Companies] will not be building capital as a potential step to regaining their former corporate status.*” (Emphasis added.)
- In May 2014, Agency Director Melvin L. Watt stated: “I don’t lay awake at night worrying about what’s fair to the shareholders.” He added: “I just don’t have time to think about what might happen in the future with the shareholders.”

91. After lawsuits were filed challenging the Sweep Amendment, the Agency attempted to offer pre-textual justifications for its agreement to the amendment. In a declaration the Agency submitted in proceedings in the United States District Court for the District of Columbia, Mr. Ugoletti claimed that the Agency had agreed to the Sweep Amendment due to concerns that the burden of paying the 10% dividend owed to Treasury might reduce the amount of Treasury’s commitment that remained available to the Companies because the Companies would have to draw on the commitment to pay the dividend. As noted above, however, Treasury knew that the Companies could pay the dividend “well into the future even with the caps,” and

projections available to both Treasury and the Agency indicated that the Companies would have more than sufficient funding through 2022. (As of the beginning of 2013, Freddie Mac had over \$140 billion still available on its commitment from Treasury, and Fannie Mae had over \$117.6 billion.) In fact, in an internal mark-up of a document explaining the reasoning for the sweep, a Treasury official wrote that the argument that the “10 percent dividend was likely to be unstable as the businesses were reduced” “[d]oesn’t hold water.” Concerns that the 10% dividends were “circular” were unfounded for the additional reason that the dividends could be paid in-kind at a 12% rate, which would not require a further draw. Indeed, upon information and belief, a Treasury official involved in developing the Sweep Amendment was unable to identify any “problems of the circularity [in dividend payments that] would have remained had the [payment in kind] option been adopted,” and internal Treasury documents recognized that, “[t]o the extent that required dividend payments exceed net income, FHFA, as conservator, could consider not declaring dividends pursuant to the certificates of designation for the preferred shares, so that draws on the [Treasury] SPAs are not used to pay dividends, preserving as much funding as possible to cover any unanticipated losses at Fannie Mae and Freddie Mac.”

92. Rather than acting as a true conservator, or in the interests of the stockholders whose rights, titles, powers, and privileges with respect to the Companies it had assumed as conservator (§ 4617(b)(2)(A)), the Agency was acting under the de facto authority of Treasury.

93. Acting through Treasury—and in the face of Congress’s assurance in § 4617(a)(7) that the Agency would *not* “be subject to the direction or supervision of any other agency of the United States” when “acting as conservator”—the United States by means of the Treasury SPAs, as well as through pressure and influence, came to exercise direction and control over the business and affairs of the Companies and caused the Agency to become hopelessly conflicted

with respect to its obligations to the Companies and their stockholders, culminating with the Sweep Amendment.

94. In sum, the Agency abdicated its responsibility to act as conservator for the Companies, and instead, acting in its capacity as regulator and an agency of the United States, acquiesced and succumbed to Treasury's mandate to execute the Sweep Amendment.

The United States' Windfall At The Companies' Expense

95. Treasury's actions to nationalize the Companies, stripping their stockholders (other than itself) of any benefit from the Companies' improving operations, proved well timed for the United States, in light of the Companies' results and market expectations as of August 2012.

96. In the first quarter of 2012, five months before the Sweep Amendment was announced, the Companies already had reported positive net income of over \$3.2 billion and in the fourth quarter of 2012, the first quarter after Treasury imposed the Sweep Amendment, Fannie Mae reported pre-tax income of \$7.6 billion. The quarter after that (first quarter of 2013), it reported positive net income of \$8.1 billion—the largest quarterly pre-tax income in the Company's history. In its 10-Q for the first quarter of 2013, Fannie Mae stated that it expected “our annual earnings to remain strong over the next few years” and “to remain profitable for the foreseeable future.” For 2017, Fannie Mae reported pre-tax income of approximately \$18 billion, and Freddie Mac reported pre-tax income of approximately \$17 billion.

97. In addition, and as had been long and widely anticipated, Fannie Mae announced on May 9, 2013, that it would release the valuation allowance on its deferred tax assets, resulting in a benefit for its federal income taxes of \$50.6 billion. This would have had the effect of

increasing the Company's capital, which would have freed further assets to pay down the Treasury Senior Preferred Stock.

98. Under the Sweep Amendment, all of this went to Treasury. None went to ensuring the soundness and solvency of the Companies.

99. The Sweep Amendment has even captured the Companies' recoveries on legal claims that preceded the conservatorships. For example, on October 1, 2013, Freddie Mac announced that it had entered into a \$1.3 billion settlement with three financial institutions concerning Freddie Mac's claims relating to representations and warranties on loans that it had purchased. The Agency, as Freddie Mac's Conservator, had approved the settlement. The claims at issue involved loans that Freddie Mac purchased between 2000 and 2012, most of which preceded the conservatorship by several years, yet none of the funds recouped will go to benefit Freddie Mac stockholders. Rather, Freddie Mac's CEO stated that, "[w]ith these settlements, Freddie Mac is recouping funds effectively due to the nation's taxpayers." On May 28, 2013, the Agency announced a \$3.5 billion settlement of claims of alleged violations of federal and state securities laws in connection with private-label residential mortgage-backed securities purchased by Fannie Mae and Freddie Mac in the years prior to the conservatorships. Similarly, on October 25, 2013, the Agency announced a \$1.1 billion settlement with JP Morgan relating to claims based on loans sold to Fannie and Freddie in the years leading up to the financial crisis and a separate \$4 billion settlement with JP Morgan relating to claims for violations of federal securities laws in connection with the sales and securitizations of loans to the Companies from 2005 to 2007. In 2013 alone the Agency announced similar settlements with General Electric (\$549 million), UBS (\$885 million), Wells Fargo (\$335 million), and Bank of America (\$404 million), all of which went to Treasury. In 2014, the Agency announced

settlements, in its role as conservator to the Companies, totaling approximately \$9.7 billion with Bank of America (\$9.33 billion aggregate payment), Barclays Bank PLC (\$280 million) and RBS Securities (\$99.5 million) which cover private-label MBS purchased by the Companies from 2005 to 2007. More recently, in 2017, the Agency reached a \$5.5 billion settlement with the Royal Bank of Scotland. The entirety of the Companies' recoveries in these settlements has been paid to Treasury, even though the claims belonged to the Companies for wrongdoing and harm suffered before the conservatorship.

100. As shown in the below table, Fannie Mae and Freddie Mac have, as of the end of 2017, handed over to Treasury over \$223 billion in dividends under the Sweep Amendment. (That is in addition to the \$55.2 billion in dividends paid to Treasury between 2008 and 2012.)

Dividend Payments Under The Sweep Amendment (in Billions of Dollars)

	Fannie	Freddie	Combined
2013	82.5	47.6	130.1
2014	20.6	19.6	40.2
2015	10.3	5.5	15.8
2016	9.6	5.0	14.6
2017	12.0	10.9	22.9
Total	135	88.6	223.6

101. By contrast, had the Companies continued to pay only 10% cash dividends under the earlier (authorized) Treasury SPAs, they would have paid Treasury from 2013 through the end of 2017 a total of approximately \$94.7 billion. Alternatively, if they had been permitted to repay principal during this period, they would have had sufficient quarterly profits in excess of the 10% dividend to *fully redeem* the Treasury Senior Preferred Stock and to rebuild capital. The amount paid to Treasury under the Sweep Amendment exceeds by billions of dollars the amount that Treasury provided to the Companies through its commitment under the Treasury SPAs. A February 15, 2018, Freddie Mac presentation on fourth quarter 2017 financial results reveals that Freddie Mac has paid a cumulative total of \$112.4 billion in dividends to Treasury, while it had,

as of December 31, 2017, only requested \$71.3 billion in draws. In fact, on August 16, 2012, “Sensitive and Pre-Decisional” “[Treasury SPA] Amendment Q&A” answered the question why the Companies could not use profits to buy back Senior Preferred Stock from Treasury by saying that “this would have reduced the amount taxpayers are reimbursed for their substantial contribution to support the [Companies].” This reveals the real intent behind the Sweep Amendment—to benefit the government at the expense of the Junior Preferred stockholders and common stockholders.

102. All told, had the Companies not entered into the Sweep Amendment, they would have retained at least \$128.9 billion in capital, which they could have used to protect themselves from future downturns and reassure stockholders of the soundness of their investment. Moreover, if the Agency and Treasury were legitimately concerned about the Companies entering a “death spiral,” they could have caused the Companies to elect to pay the dividend “in kind” by adding 12% annually to the liquidation preference of the Treasury Senior Preferred Stock. This would have had the effect of creating an additional \$94.7 billion in capital, since cash that would have been paid as dividends would instead have been retained to increase the Companies’ safety and soundness. Instead, the United States has forced the Companies to operate in effective insolvency (with the attendant economic consequences, such as increased borrowing costs) and thus in perpetual dependency on the government. Meanwhile, the government pockets all of this money for its own purposes.

103. Moreover, because the Companies’ dividend payments under the Sweep Amendment do not reduce the liquidation preference (and leave no other funds with which to do so), Treasury’s massive liquidation preference under the Treasury SPAs, due to the Companies’ having drawn on the commitment prior to 2012, is set in stone—as to Fannie Mae, \$117.1

billion; and as to Freddie Mac, \$72.3 billion, prior to December 31, 2017. Thus, in addition to the over \$223 billion that Treasury has already expropriated from the Companies, Treasury and the Agency contend that Treasury retains, forever, a further \$189.5 billion liquidation preference. Thus, the diversion of profits under the Sweep Amendment also ensures the perpetual nullification of the liquidation rights of all other stockholders, particularly the Junior Preferred stockholders, who would be first in line but for Treasury's holdings.

**In December 2017, Treasury And FHFA Took Additional Steps
To Ensure That 100% Of All Value In The Companies
Will Go To Treasury, No Matter How Large That Value May Be**

104. Under the original Treasury SPAs, the Sweep Amendment required the entire net worth of the Companies to be paid to Treasury, minus a small reserve that would shrink gradually to zero by January 1, 2018. The intent was obvious: the Companies were to be wound down, and Treasury was to capture 100% of all their value.

105. By December 2017, however, Treasury and the Agency apparently concluded they were not ready to immediately liquidate the Companies, or to operate them with zero capital. Accordingly, in December 2017, Treasury and the Agency agreed (in the "Fourth Amendment") to prolong the existence of a \$3 billion capital reserve while the Companies were in operation, so that the quarterly dividend is equal to the "Net Worth Amount" minus that \$3 billion reserve. Letter to M. Watt (Dec. 21, 2017).

106. However, Treasury and the Agency also made sure that this capital reserve did not create any possible risk of any amount ever being available for distribution to private stockholders. They agreed that "the Liquidation Preference [*i.e.*, the Liquidation Preference held by Treasury] shall be increased by \$3,000,000,000.00." *Id.* Thus, even the capital reserve has to be paid out to Treasury. No matter what happens—no matter how much money or positive net

value Fannie and Freddie make—there is *zero chance* that private stockholders can ever receive anything in a liquidation.

The Agency’s Actions Pursuant To The Sweep Amendment And The Fourth Amendment Were Unlawful

107. The Agency’s structure violates Article II of the U.S. Constitution because it is impermissibly insulated from control by the Executive branch as a result of the fact that the Agency’s Director may only be removed for cause, the Agency is led by a single Director, there is no bipartisan leadership requirement, and the Agency sits outside of the normal appropriations process. In addition, at the time of the Sweep Amendment, the Agency was controlled by an “Acting Director,” who was designated on August 25, 2009. There was no properly appointed and confirmed Director leading the Agency until January 2014. Thus, due both to the Agency’s unconstitutional structure and the lack of the constitutionally appointed Director, the Agency’s actions pursuant to the Sweep Amendment were unlawful. Due to the Agency’s unconstitutional structure—which persists to the present—the Agency’s actions pursuant to the Fourth Amendment have also been unlawful.

Treasury And The Agency Took Plaintiffs’ Property

108. Plaintiffs had property rights in the economic value of their shares of stock in the Companies, including the equity and market value of their shares, and the expectation of future dividend payments. In addition, Plaintiffs had contractual property rights in their shares.

109. The Certificate of Designation for each series of Junior Preferred Stock issued by the Companies grants the holders rights to non-cumulative dividends to be declared at the discretion of the applicable Company’s board of directors. For example, the Certificate of Designation for Fannie Mae’s Series O Junior Preferred Stock provides:

Holders of record of Series O Preferred Stock (each individually a “Holder”, or collectively the “Holders”) will be entitled to receive, when, as and if declared by the Board of Directors of Fannie Mae, or a duly authorized committee thereof, in its sole discretion out of funds legally available therefor, non-cumulative quarterly dividends which will accrue from and including the date of issuance and will be payable on March 31, June 30, September 30 and December 31 of each year (each, a “Dividend Payment Date”), commencing March 31, 2005.

110. The Certificates of Designation for each series of Junior Preferred Stock also provide for liquidation rights and preferences. For example, the Certificate of Designation for Fannie Mae’s Series O Junior Preferred Stock provides in part:

(a) Upon any voluntary or involuntary dissolution, liquidation or winding up of Fannie Mae, after payment or provision for the liabilities of Fannie Mae and the expenses of such dissolution, liquidation or winding up, the Holders of outstanding shares of the Series O Preferred Stock will be entitled to receive out of the assets of Fannie Mae or proceeds thereof available for distribution to stockholders, before any payment or distribution of assets is made to holders of Fannie Mae’s common stock (or any other stock of Fannie Mae ranking, as to the distribution of assets upon dissolution, liquidation or winding up of Fannie Mae, junior to the Series O Preferred Stock), the amount of \$50 per share plus an amount, determined in accordance with Section 2 above, equal to the dividend (whether or not declared) for the then-current quarterly Dividend Period accrued to but excluding the date of such liquidation payment, but without accumulation of unpaid dividends on the Series O Preferred Stock for prior Dividend Periods.

(b) If the assets of Fannie Mae available for distribution in such event are insufficient to pay in full the aggregate amount payable to Holders of Series O Preferred Stock and holders of all other classes or series of stock of Fannie Mae, if any, ranking, as to the distribution of assets upon dissolution, liquidation or winding up of Fannie Mae, on a parity with the Series O Preferred Stock, the assets will be distributed to the Holders of Series O Preferred Stock and holders of all such other stock pro rata, based on the full respective preferential amounts to which they are entitled (but without, in the case of any noncumulative preferred stock, accumulation of unpaid dividends for prior Dividend Periods).

111. Delaware law applies to Fannie Mae pursuant to Section 1.05 of its bylaws, which provides that “the corporation has elected to follow the applicable corporate governance practices and procedures of the Delaware General Corporation Law.” Virginia law applies to Freddie Mac pursuant to Section 11.3 of its bylaws, which provides that, “[T]he Corporation shall follow the corporate governance practices and procedures of the law of the Commonwealth of Virginia[.]” Under both Delaware and Virginia law, certificates of designation are deemed to be contractual agreements between the stockholders and the company.

112. Thus, the Certificate of Designation for each series of Junior Preferred Stock constitutes a contract with provisions governing the holders’ dividend, liquidation, and voting rights.

113. Pursuant to the Certificate of Designation for the Common Stock issued by Freddie Mac, Plaintiffs 683, CVI, G1X, SS, SALET and SFG also had contractual rights to dividends and liquidation rights, as well as a right to exclude the Companies from destroying those rights, associated with their Freddie Mac common stock.

114. In addition, Plaintiffs 683, CVI, G1X, SS, SALET and SFG had contractual rights that arise from the Companies’ respective charters between and among the government, as the granter of the charters, each Company, and that Company’s respective shareholders. Both Companies’ charters provide for the issuance of common stock, and general corporate law principles, the Companies’ common shareholders have a right to the Companies’ residual value, including to share in the Companies’ earnings.

115. Plaintiffs paid valuable consideration in exchange for these contractual rights, and in doing so helped provide financial support for Fannie Mae and Freddie Mac’s business both before and after the imposition of the conservatorship.

116. Treasury and the Agency became parties to these contracts when the Agency succeeded to all rights, titles, powers and privileges of Fannie Mae and its shareholders, officers or directors and was otherwise authorized to act on behalf of Fannie Mae and its shareholders, officers and directors. § 4617(b)(2).

117. Treasury and the Agency neither sought nor obtained the permission of the Companies' stockholders before entering into the Sweep Amendment or the Fourth Amendment or in executing the Net Worth Sweeps. The Sweep Amendment and the Fourth Amendment made "materially adverse" changes to rights of the stockholders, such that it violates Plaintiffs' contractual rights. The Certificates of Designation prohibited any such material adverse change to the rights of Plaintiffs and their fellow stockholders absent a stockholder vote approving the change, with the sole exception to that requirement of a vote being if the Companies issued a new series of stock. The Sweep Amendment was not the issuance of new securities, and the Agency and Treasury have claimed in prior litigation that the Sweep Amendment was not an issuance of stock.

118. Through the Sweep Amendment and its subsequent actions, including the Fourth Amendment, the Agency breached and repudiated these contracts by eliminating the stockholders' contractual rights to receive dividends and to receive a pro rata distribution of any liquidation proceeds available after Treasury received full recovery of the face amount of its Senior Preferred Stock. Thus, Treasury and the Agency amended, altered, and repealed the terms of the Certificates of Designation (*e.g.*, the contractual terms governing the holders' rights to receive liquidation distributions) in a manner that destroyed the rights and interests of the Junior Preferred and common stockholders.

119. Fannie Mae's and Freddie Mac's agreement to the Sweep Amendment did not purport to create and issue any other class or series of Fannie Mae or Freddie Mac stock, nor did it purport to be an increase in the authorized or issued amount of any other class or series of Fannie Mae or Freddie Mac stock. Rather, the Sweep Amendment that Treasury and the Agency imposed in August 2012 was described simply as an amendment to the terms of the Senior Preferred Stock that Fannie Mae and Freddie Mac had issued to Treasury in September 2008. Accordingly, the amendment, alteration, and repeal of the terms of the Certificates via their agreement to the Sweep Amendment was not exempt from the two-thirds vote requirement set forth in the Certificates.

120. In addition to their explicit terms, inherent in the Certificates was an implied covenant by Fannie Mae and Freddie Mac, and the Agency (pursuant to the Recovery Act) to deal fairly with the stockholders and to fulfill the issuers' contractual obligations in good faith. This covenant required the Agency not to take actions that would violate the stockholders' reasonable expectations regarding their dividend and liquidation rights.

121. Plaintiffs had a reasonable expectation that the Companies and the Agency (as their conservator) would not completely nullify their contractual dividend and liquidation rights in exchange for no meaningful consideration from Treasury. Plaintiffs also had reasonable expectations that the Companies and the Agency (as their conservator) would not exercise their discretion regarding dividends and liquidation preference in bad faith with the purpose of harming the Junior Preferred and common stockholders. And Plaintiffs had a reasonable expectation that the Companies would be operated at a profit for the benefit of *all* stockholders; that the Companies would exercise their discretion to pay dividends in good faith; that the Companies would not self-liquidate to avoid and eliminate stockholders' liquidation rights; and

that even if the Companies were liquidated (or put on a path to liquidation), the Junior Preferred stockholders would receive their pro rata distributions in accordance with the established priority scheme, without the Treasury being given 100% of all surplus value no matter how large, and the common stockholders would receive the residual value in the Companies.

Plaintiffs Had Reasonable, Investment-Backed Expectations

122. Given the conditions of the market and the Companies, together with the assurances of the Agency in light of its powers as conservator under the Recovery Act (as well as the longstanding record of the Companies, and statements of the United States, before conservatorship), Plaintiffs reasonably expected that the mortgage market would recover; that the Companies would return as bulwarks in housing; and that the Agency, having ensured the soundness and solvency of the Companies, accordingly would eventually be in a position to terminate their conservatorships. Moreover, Plaintiffs reasonably believed that the valuation allowance on the Companies' sizeable deferred tax assets would soon be released.

123. Plaintiffs further expected that, in any event, the Agency would—as it had assured markets it would do, and as the Recovery Act reasonably indicated it should and would do—act with a view to rehabilitating the Companies and not as an accomplice to Treasury's secret plan to seize, for itself, the entire value of the Companies in disregard of the property interests of Plaintiffs and other stockholders.

124. As such, Plaintiffs reasonably anticipated that the Companies would eventually be in a position to emerge from conservatorship (as two Directors of the Agency had publicly predicted), from which they would be in a position to redeem the Treasury Senior Preferred Stock and allow Plaintiffs to realize benefits from its reasonable investment-backed expectations in the property interests represented by the Junior Preferred Stock and the Companies' common

stock. Plaintiffs, in any event, did not reasonably expect that Treasury and the Agency would take steps, including the Sweep Amendment and the Fourth Amendment, that would make the conservatorship *antithetical* to those goals and in fact make them impossible to achieve.

125. Indeed, the terms of the Recovery Act's conservatorship provisions (among others) are materially identical to the longstanding ones in FIRREA by which the Federal Deposit Insurance Corporation ("FDIC") acts as conservator of troubled banks. *See* § 1821(d)(2)(D). Until the Sweep Amendment, this language had always been interpreted to mean that FDIC has a mandatory duty to preserve and protect the assets of banks when acting as conservator. Moreover, historically the United States' regulation of the Companies has been less extensive than its regulation of banks. Nor were Plaintiffs aware of any prior use of a senior preferred stock instrument to strip 100% of a company's profits in perpetuity, to the derogation of the property rights of other holders of stock. Prior to the implementation of the Sweep Amendment and subsequent actions by Treasury and the Agency, including the adoption of the Fourth Amendment, the holders of Junior Preferred and common stock could not have reasonably anticipated such a permanent divergence from historical precedent. Indeed, the *de facto* nationalization of a private corporation under the guise of a "conservatorship" by a federal agency and an "investment" by the Treasury is unprecedented.

126. Treasury and the Agency have deprived Plaintiffs of their economic and contractual property rights with respect to the Junior Preferred Stock and the Companies' common stock and made it impossible for Plaintiffs to realize the future value of their property interests in the Companies.

127. By executing the Sweep Amendment and the Fourth Amendment, Treasury and the Agency have violated the reasonable expectations of Plaintiffs regarding the fruits of their

agreements with Fannie Mae and Freddie Mac. As a result of actions by Treasury, Plaintiffs are forever precluded from being eligible to receive a dividend, liquidation distribution, or any value from these contractual rights. Similarly, under the Sweep Amendment, the Companies are no longer operated at a profit for the benefit of all stockholders, but rather are operated for the sole and exclusive benefit of Treasury. Further, the Agency has ensured that the Companies are not exercising their discretion to pay dividends in good faith with regard to all stockholders, but rather are continuously paying enormous dividends only to Treasury. And, under the Sweep Amendment and the Fourth Amendment, Treasury and the Agency have required the Companies to pay all of their net worth each quarter to Treasury without diminishing Treasury's outstanding liquidation preference. Further, the Sweep Amendment and the Fourth Amendment guarantee that in a liquidation it will be impossible for any private stockholder to ever receive anything, no matter how much surplus value exists in that liquidation, because 100% of the net worth must be paid to Treasury. Accordingly, the Agency has not only breached the express terms of Plaintiffs' stockholder contracts, but has also acted unfairly and in bad faith with respect to the stockholders and breached the implied covenant of good faith and fair dealing.

128. Plaintiffs have been provided neither just compensation nor any compensation at all in return for the United States' taking of all the economic value associated with their Junior Preferred Stock and common stock in the Companies.

The United States, Which Controls The Companies, Has Disproportionately Harmed Stockholders Other Than The United States And, In Any Event, Has A Conflict Of Interest With Respect To The Rights Of The Companies

129. The United States, as the result of the Treasury SPAs as well as its conservatorships of the Companies via the Agency, was a stockholder that controlled the Companies prior to the Sweep Amendment.

130. The Sweep Amendment, together with the Fourth Amendment, in radically altering the Treasury SPAs, effectively created a new security for the United States. Treasury, in obtaining this result by means of its control of the Agency and the Companies did not, in exchange, provide to the Companies anything of the same value, but rather provided (at best) significantly lesser value. Further, Treasury's new rights to receive, every quarter in perpetuity, "dividends" equal to the entire net worth of the Companies increased its rights with respect to the Companies while correspondingly reducing the rights of all other stockholders.

131. In so doing, the United States engaged in self-dealing and breached its fiduciary duty arising from its control of the Companies.

132. As a result, any claim raised by Plaintiffs that might be considered derivative on behalf of the Company is in fact direct, on behalf of Plaintiffs themselves.

Treasury And The Agency Also Have Taken Stockholders' Right To Bring Certain Causes of Action Challenging The Sweep Amendment Without Providing Just Compensation

133. The Supreme Court has recognized that a cause of action is a species of property protected by the Due Process Clause. *E.g., Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 804 (1996). The Federal Circuit has held unequivocally that a cause of action constitutes a property right protected by the Takings Clause. *Adams v. United States*, 391 F.3d 1212, 1225-1226 (Fed. Cir. 2004); *Abraham-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997); *All. of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994).

134. In the U.S. District Court for the District of Columbia, Junior Preferred stockholders filed various direct claims seeking to enjoin the Sweep Amendment, as well as derivative claims on behalf of Fannie and Freddie challenging the Sweep Amendment. In its July 2017 opinion, the D.C. Circuit ruled that the Junior Preferred stockholders' claims seeking injunctive relief were barred by the Recovery Act, and the right to pursue derivative claims had

been taken from the Companies' Junior Preferred stockholders by the Agency. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 617-34 (D.C. Cir. 2017). The Junior Preferred stockholders petitioned the Supreme Court for review of the latter holding, which conflicts with (*inter alia*) the Federal Circuit's interpretation of a nearly identical provision. *See First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279 (Fed. Cir. 1999). The Supreme Court denied the petition on February 20, 2018.

135. Plaintiffs take the position that the Federal Circuit's decision in *First Hartford* was correct, and therefore the Recovery Act cannot be read as taking from the Companies' stockholders the right to bring derivative claims on behalf of the Companies where those claims are against the Agency or Treasury, given the "manifest conflict of interest" preventing the Agency from ever bringing such claims. There are companion cases in this Court advancing such derivative claims. However, to the extent that any courts continue to hold that such derivative claims are not possible and thereby block the stockholders in Fannie and Freddie from obtaining a full and just recovery for the loss of their stockholder rights, Plaintiffs assert that such an interpretation of the Recovery Act, as applied to the facts of these cases and the Sweep Amendment, is itself a Taking without just compensation. The Sweep Amendment was a Taking and a nullification of Plaintiffs' stockholder rights, and the application of any Recovery Act provision that prevents Plaintiffs from obtaining full relief from the Sweep Amendment is a Taking without payment of just compensation. This claim is advanced if and to the extent that the Takings claim (or other claims) fails to provide the full just compensation to which Plaintiffs are entitled due to the application of any the Recovery Act provision to the cases that challenge the Sweep Amendment.

**The Agency Did Not Repudiate The Stockholder Contracts
Within A Reasonable Period Following Its Appointment As Conservator**

136. As discussed above, the Recovery Act grants the Agency the authority to “disaffirm or repudiate any contract” the Companies entered into prior to conservatorship when “the conservator determines” the “performance” of such contracts “to be burdensome” to the Companies. But such repudiation must occur “within a reasonable period following” the Agency’s appointment as conservator. §§ 4617(d)(1) & (2). The Agency failed to repudiate the stockholder contracts (Certificates of Designation) held by Plaintiffs and other Junior Preferred stockholders “within a reasonable period” following the September 6, 2008 appointment of the Agency as conservator. Instead, the Agency extinguished Plaintiffs’ rights as Junior Preferred stockholders only in August 2012 by entering into the Sweep Amendment. The Sweep Amendment is unlawful for this additional reason.

CLAIMS FOR RELIEF

COUNT I

**Just Compensation Under The Fifth Amendment
For The Taking Of Private Property For Public Use
(All Plaintiffs)**

137. Plaintiffs incorporate by reference and re-allege each allegation set forth above, as though fully set forth herein.

138. The Fifth Amendment provides that no person shall “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

139. All Plaintiffs had cognizable property interests in the Junior Preferred Stock, including contract rights to dividends, to liquidation rights and preferences, and to voting rights, and in its economic interests in the Junior Preferred Stock, including their proportionate share of the Company’s future earnings and the equity and value of the Junior Preferred Stock. Plaintiffs

683, CVI, G1X, SALET, SS, and SFG additionally had cognizable property interests in common stock issued by the Companies, including voting rights, dividends, and residual value of the Companies.

140. Plaintiffs had investment-backed expectations to participate in the Companies' future earnings and to receive a share of any residual value of the Companies in the event of liquidation, and those expectations were reasonable.

141. By way of the Sweep Amendment and the subsequent Fourth Amendment, executed under the purported authority of the Recovery Act and by one arm of the federal government (Treasury) imposing its will and dominion over another arm (the Agency) under its control, the United States directly appropriated for itself Plaintiffs' property interests in the Junior Preferred and common stock. Both Amendments, although unlawful, were an authorized act of the government, done within the general scope of the duties of the agencies and officers who executed it.

142. The Sweep Amendment and the Fourth Amendment diminished the value of Plaintiffs' shares in the Companies, extinguished Plaintiffs' contractual property rights, and directly and proximately caused a severe, present, continuing and actual economic injury to Plaintiffs' property interests. Indeed, Plaintiffs have been deprived of all economically beneficial uses of their common and Junior Preferred Stock in Fannie Mae and Freddie Mac, while the United States has received payments from the Companies of more than \$200 billion in dividends since the Sweep Amendment, without any corresponding reduction in the liquidation preference payable to the United States. Thus, contrary to the United States' position asserted in other litigation, Plaintiffs' takings claims are ripe.

143. Plaintiffs have suffered, and are continuing to suffer, a taking and are entitled to just compensation.

COUNT II
Illegal Exaction In Violation Of The Fifth Amendment
(All Plaintiffs)

144. Plaintiffs incorporate by reference and re-allege each allegation set forth above, as though fully set forth herein.

145. Alternatively, the Sweep Amendment and the subsequent Fourth Amendment were imposed by the United States without authority. Under the Recovery Act, the Agency “as conservator” was to act to put the Companies “in a sound and solvent condition,” to “preserve and conserve [their] assets,” and to “carry on” their business. Contrary to these objectives, the Sweep Amendment, together with the Fourth Amendment, ensures that the Companies will perpetually be on the verge of insolvency, wastes their assets, and destroys their ability to carry on their mandate as private, stockholder-owned companies. The amendments do the opposite of conserving the Companies, and accomplish a wind-down in contravention of the Recovery Act’s separate provisions (and protections) for a receivership. Moreover, the Sweep Amendment and therefore the Fourth Amendment were *ultra vires* on the part of Treasury as well, because they were executed contrary to the provisions of the Recovery Act (and the Companies’ charters) granting Treasury only temporary emergency authority to purchase and determine the terms, conditions, and amounts of securities of the Companies.

146. In addition, the Agency acted unlawfully because it is an unconstitutional “independent” agency. It also acted unlawfully because it had no lawfully appointed and confirmed director, but instead had only an “Acting Director” who had been in place for over three years at the time of the Sweep Amendment, which is constitutionally impermissible.

147. Through the Sweep Amendment and the Fourth Amendment, the United States, in obtaining for itself a quarterly payment in perpetuity equal to the Companies' entire net worth, has appropriated to itself the property of Plaintiffs. This appropriation was, in effect, a forced payment of money by Plaintiffs to the government.

148. The Sweep Amendment and the Fourth Amendment thus effect an illegal exaction imposed in violation of the Due Process Clause of the Fifth Amendment.

149. Plaintiffs are entitled to compensation for their illegally exacted property.

COUNT III
Taking Without Just Compensation
(All Plaintiffs)

150. Plaintiffs incorporate by reference and re-allege each and every allegation contained in the preceding paragraphs, as though fully set forth herein.

151. The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

152. As holders of Junior Preferred Stock and common stock, Plaintiffs have the right to protect their investment by filing certain causes of action, including derivative lawsuits and claims seeking injunctive and declaratory relief.

153. These causes of action constitute property rights protected by the Fifth Amendment.

154. After Treasury and the Agency imposed the Sweep Amendment, other stockholders filed direct claims seeking to enjoin the Sweep Amendment, as well as derivative claims on behalf of the Companies challenging the Sweep Amendment. The D.C. Circuit has ruled that these derivative claims, which accrued on August 17, 2012—the date of the Sweep Amendment—were taken away from Junior Preferred stockholders by Treasury and the Agency.

That D.C. Circuit decision conflicts with a decision of the Federal Circuit in *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279 (Fed. Cir. 1999). The D.C. Circuit also ruled that all of the Junior Preferred stockholders' claims for injunctive relief were barred by the Recovery Act.

155. To the extent Plaintiffs are prevented from receiving a full remedy for the harm caused by the Sweep Amendment and the Fourth Amendment by virtue of any court's holding that certain Recovery Act provisions block legal actions needed to fully remedy the harm caused by the Sweep Amendment, the application of those provisions to the Plaintiffs' challenges to the Sweep Amendment constitutes a taking of private property without payment of just compensation.

156. Plaintiffs suffered harm as a direct and proximate result of the foregoing unconstitutional taking. Plaintiffs' injuries are direct and independent of any injury to the Companies and any recovery for this Taking claim would benefit the stockholders directly, and not the Companies.

COUNT IV
Breach Of Fiduciary Duty
(All Plaintiffs)

157. Plaintiffs incorporate by reference and re-allege each allegation set forth above, as though fully set forth herein.

158. As alleged above, the Treasury SPAs are contracts that gave the United States (via Treasury) control over the Companies and over the Agency as conservator of the Companies, which it exercised; moreover, the Agency as conservator under the Recovery Act controlled the Companies, succeeded to the rights of stockholders, and assumed the obligations of the then-existing contracts of the Companies. The United States thereby assumed fiduciary duties to Plaintiffs and the other non-controlling stockholders, including (at a minimum) a duty not to

manage the Companies for the United States' own pecuniary and policy interests at the expense of the interests of the stockholders other than the United States and not to engage in arbitrary or unreasonable conduct that would prevent non-controlling stockholders from benefitting from the fruit of their bargain with the Companies, such as in the Certificates of Designation of Plaintiffs' Junior Preferred Stock and the implied-in-fact contract between the United States and the Companies.

159. The United States breached its fiduciary duty to Plaintiffs by entering into the Sweep Amendment and the Fourth Amendment, which were not in the best interests of the Companies' stockholders (other than the United States), but rather were contrary to their interests and arbitrarily and unreasonably provided a windfall to the United States at the expense of non-controlling stockholders. The Agency abdicated its responsibility to Treasury; and Treasury, by virtue of the Treasury SPAs, was conflicted. The Agency and Treasury acted together as a controlling group to implement their shared goal in the interests of the United States rather than the best interests of the Companies and their stockholders, and thus in breach of their fiduciary duties to other stockholders including Plaintiffs.

160. Plaintiffs as a result suffered injury and loss of property, and is entitled to damages.

161. To the extent that rescission has been rendered impossible or impracticable, and because this Court may not grant that remedy, Plaintiffs are entitled (without limitation) to rescissory damages.

COUNT V
Breach Of Implied-in-Fact Contract
(All Plaintiffs)

162. Plaintiffs incorporate by reference and re-allege each allegation set forth above, as though fully set forth herein.

163. Prior to appointing itself conservator on September 6, 2008, the Agency unambiguously offered to place Fannie Mae and Freddie Mac into conservatorship by consent, under § 4617(a)(3)(I), with certain conditions described below, and the boards of directors of the Companies accepted this offer. The Agency made no finding of insolvency, undercapitalization, or any other ground to impose conservatorship under § 4617(a)(3)(A)-(H) or (J)-(L).

164. The Agency offered, and the boards of Fannie Mae and Freddie Mac accepted, a conservatorship that would aim to “preserve and conserve the [Companies’] assets and property” and restore the Companies to a “sound and solvent condition.” *See* § 4617(b)(2)(D). The offer was also of a conservatorship that would end when that goal was achieved. Neither of these conditions was ambiguous, and both would benefit the known and distinct class of the stockholders of the Companies, on whose behalf the boards of directors of the Companies had a fiduciary duty to act. In fact, the Agency obtained the boards’ consent on the ground, in part, that conservatorship would serve the interests of the Companies’ stockholders.

165. Underlying the Agency’s offer was its promise that the Agency would not, as conservator, wind down or liquidate the Companies. The Agency stated contemporaneously with its offer that it could not, as conservator, place the Companies into liquidation. The Agency stated at the time, and for several years into the conservatorship, that its goal was instead to “restore the [Companies’] assets and property to a sound and solvent condition,” which continued course of performance constitutes evidence of the offer’s original terms.

166. When consenting to the conservatorship, the boards of the Companies furnished good and valuable consideration to the Agency by agreeing to forbear from a judicial or legislative challenge that the United States feared. *See* § 4617(a)(5). This forbearance was

unambiguously furnished in exchange for the Agency's promises to act to restore the Companies to a safe and solvent condition.

167. The United States and the Companies, through the acts described above, entered into an implied-in-fact contract. The terms of that contract, as relevant here, were that the Agency if made conservator would "preserve and conserve the [Companies'] assets and property," that its conservatorship would continue only until the Companies were placed in a safe and solvent condition, and that, in exchange, the boards of the Companies would consent to, and not challenge or litigate, such a course of action. Both the Agency and the Companies intended that an implied contract would exist. That contract required the Agency to preserve the Companies' assets and property, and forbade it from diminishing or expropriating the Companies' assets and property. This intent was demonstrated through the offer and acceptance detailed above. The Agency's offer was not ambiguous in its terms, and the boards' acceptance was manifested in the Agency's subsequent imposition of conservatorship based on the boards' consent.

168. Under these terms of the implied-in-fact contract, and given the known fiduciary duty of the boards of directors of the Companies, the stockholders of the Companies were intended beneficiaries of the contract.

169. The Agency had actual authority, as an agency of the United States Government, to bind the United States.

170. The Sweep Agreement and the Fourth Amendment breached the contract by rendering it impossible for the Companies to build and retain the capital necessary to exit conservatorship and return to normal business operations.

171. Each subsequent payment pursuant to the Sweep Amendment and the Fourth Amendment independently breaches that contract by depleting the Companies of capital (rather than “preserv[ing] and conserv[ing]” it), in a manner that the Agency has expressly recognized undermines the goals of conservatorship.

172. Had the United States adhered to the contract, it would have protected the rights of holders of stock (other than itself) in the Companies. Through the Sweep Amendment and then the Fourth Amendment, however, the United States instead engaged in self-dealing, benefitting itself while harming the stockholders other than itself.

173. The Sweep Amendment and the Fourth Amendment, thus, directly harmed Plaintiffs, by preventing the termination of the conservatorship, stripping the Companies of their ability to generate and retain funds to ever distribute as dividends to holders of the Junior Preferred Stock, and nullifying Plaintiffs’ contractual rights, as holders of Junior Preferred Stock, to ever receive a liquidation preference upon the dissolution, liquidation, or winding up of the Companies. Plaintiffs are accordingly entitled to damages.

COUNT VI
Breach Of Contract And Anticipatory Repudiation
Of Junior Preferred Stock Certificates
(All Plaintiffs)

174. Plaintiffs incorporate by reference and re-allege each and every allegation contained in the preceding paragraphs, as though fully set forth herein.

175. The Certificates for the Fannie Mae and Freddie Mac Junior Preferred Stock constitute contracts between Plaintiffs, on the one hand, and Fannie Mae and Freddie Mac, on the other.²

² Plaintiff CVIOF II does not allege a breach of contract claim related to the Certificates of Fannie Mae Junior Preferred Stock because it has only owned Junior Preferred Stock of Freddie Mac. Plaintiff SS does not allege a

176. Pursuant to 12 U.S.C. § 4617(b)(2), the Agency, as conservator of Fannie Mae, succeeded to all rights, titles, powers and privileges of Fannie Mae, Freddie Mac and their shareholders, officers and directors, and became otherwise authorized to act on behalf of Fannie Mae, Freddie Mac and their shareholders, officers and directors, and, thus, was bound by the Certificates for the Fannie Mae and Freddie Mac Junior Preferred Stock.

177. These contracts include certain rights to dividends, liquidation payments, and voting rights as alleged above.

178. Plaintiffs paid valuable consideration in exchange for these contractual rights.

179. The Agency assumed the responsibility to act consistently with the Companies' contractual obligations when it became the Companies' conservator.

180. The Sweep Amendment and the Fourth Amendment were developed and implemented by the Agency and Treasury to advance the economic and political interests of the U.S. government.

181. By entering into the Sweep Amendment and the Fourth Amendment, Treasury and the Agency have deprived Plaintiffs of any possibility of receiving any dividends or any liquidation distribution, and have done so without providing Plaintiffs any opportunity to vote. Accordingly, the Agency has breached and unequivocally repudiated Plaintiffs' contractual rights.

182. Plaintiffs suffered damages as a direct and proximate result of the foregoing breach of contract. Plaintiffs' injuries are direct and independent of any injury to the Companies and any recovery would benefit the stockholders directly, and not the Companies.

breach of contract claim related to Certificates for Freddie Mac Junior Preferred Stock because it has only owned Junior Preferred Stock of Fannie Mae.

COUNT VII
Breach Of The Implied Covenant Of Good Faith And Fair Dealing –
Junior Preferred Stock Certificates
(All Plaintiffs)

183. Plaintiffs incorporate by reference and re-allege each and every allegation contained in the preceding paragraphs, as though fully set forth herein.

184. The Certificates for Fannie Mae and Freddie Mac Junior Preferred Stock were and are, for all purposes relevant hereto, contracts between the Plaintiffs and the Companies.³

185. Pursuant to 12 U.S.C. § 4617(b)(2), the Agency, as conservator of Fannie Mae, succeeded to all rights, titles, powers and privileges of Fannie Mae, Freddie Mac and their shareholders, officers and directors, and became otherwise authorized to act on behalf of Fannie Mae, Freddie Mac and their shareholders, officers and directors, and, thus, was bound by the Certificates for the Fannie Mae and Freddie Mac Junior Preferred Stock.

186. The Certificates provide for certain rights to dividends, liquidation payments, and voting rights. Also inherent in these contracts was, and is, an implied covenant of good faith and fair dealing, requiring the Companies to deal fairly with Plaintiffs, to fulfill their obligations in good faith, and not to deprive Plaintiffs of the fruits of their bargain.

187. Plaintiffs paid valuable consideration in exchange for these contractual rights.

188. The Agency assumed the responsibility to act consistently with the Companies' contractual obligations when it became the Companies' conservator, including the covenant of good faith and fair dealing.

³ Plaintiff CVIOF II does not allege a breach of the implied covenant of good faith and fair dealing arising out of Certificates of Fannie Mae Junior Preferred Stock because it has only owned Junior Preferred Stock of Freddie Mac. Plaintiff SS does not allege a breach of the implied covenant of good faith and fair dealing arising out of Certificates for Freddie Mac Junior Preferred Stock because it has only owned Junior Preferred Stock of Fannie Mae.

189. The Sweep Amendment and the Fourth Amendment were developed and implemented by the Agency and Treasury to advance the economic and political interests of the U.S. government.

190. By entering into the Sweep Amendment and the Fourth Amendment with the purpose of depriving Plaintiffs of any possibility of receiving dividends or a liquidation preference without any opportunity to vote, the Agency has breached the implied covenant of good faith and fair dealing inherent in the certificates for the Junior Preferred Stock.

191. Plaintiffs suffered damages as a direct and proximate result of the foregoing breach of the implied covenant of good faith and fair dealing. Plaintiffs' injuries are direct and independent of any injury to the Companies and any recovery for this claim would benefit the stockholders directly, and not the Company.

COUNT VIII

Breach And Anticipatory Repudiation Of Fannie Mae Common Stock Contract (683, CVI, GIX, SS, SALET and SFG)

192. Plaintiffs incorporate by reference and re-allege each and every allegation contained in the preceding paragraphs, as though fully set forth herein.

193. Together, Fannie Mae's Charter, its by-laws and the Delaware General Corporation Law ("DGCL") form a contract (the "Fannie Mae Contract") to which the government became party when FHFA, as conservator of Fannie Mae, succeeded to all rights, titles, powers and privileges of Fannie Mae and its shareholders, officers or directors, see 12 U.S.C. §4617(b)(2)(A)(i), and was otherwise authorized to act on behalf of Fannie Mae and its shareholders, officers and directors, *see, e.g., id.* §4617(b)(2)(B)-(D), (G)-(J). The Fannie Mae Contract obliges the Government, through FHFA as conservator of Fannie Mae, to operate in a manner that does not extinguish the rights of Fannie Mae's private shareholders, as recognized in Fannie Mae's Charter, and to refrain from actions that violate applicable Delaware laws. The

government breached the contract by agreeing to replace the Treasury Senior Preferred Stock's original dividend with the Net Worth Sweeps, which capture Fannie Mae's entire value for the government by appropriating all of Fannie Mae's net worth and eliminating the residual value that belonged to the common shareholders.

194. The Fannie Mae Contract is a product of both federal and Delaware law. Fannie Mae's Charter, including the powers and privileges set forth therein, is a contract between and among the government, as the granter of the charter, Fannie Mae and Fannie Mae's shareholders as a matter of federal law.

195. In addition, Fannie Mae's Charter, the Fannie Mae Bylaws and the DGCL form a binding and enforceable contract among Fannie Mae, its directors, officers and shareholders under Delaware law, to the extent that contract is not inconsistent with Fannie Mae's Charter and other federal law, rules and regulations. Pursuant to Section 1710.10 of the OFHEO corporate governance regulation, 12 C.F.R. §1710.1, *et seq.*, to the extent not inconsistent with Fannie Mae's Charter, other federal laws, rules and regulations, and the "safe and sound" operations of Fannie Mae, Fannie Mae must follow the corporate governance practices and procedures of the law of the jurisdiction in which the principal office of Fannie Mae is located; the DGCL; or the Revised Model Business Corporation Act. Section 1.05 of the Fannie Mae Bylaws provides that, to the extent not inconsistent with Fannie Mae's Charter and other federal laws, rules and regulations, Fannie Mae "has elected to follow the applicable corporate governance practices and procedures of the Delaware General Corporation Law, as the same may be amended from time to time." Under Delaware law, the DGCL, a corporation's charter and its bylaws together form a contract among the corporation, its directors, officers and shareholders. Thus—to the extent not inconsistent with Fannie Mae's Charter and other federal law, rules and regulations—Fannie

Mae's Charter, the Fannie Mae Bylaws and the DGCL form the Fannie Mae Contract, a binding and enforceable contract among Fannie Mae, its directors, officers and shareholders.

196. Pursuant to 12 U.S.C. §4617(b)(2), FHFA, as conservator of Fannie Mae, succeeded to all rights, titles, powers and privileges of Fannie Mae and its shareholders, officers and directors, and became otherwise authorized to act on behalf of Fannie Mae and its shareholders, officers and directors, and, thus, was bound by Fannie Mae's Charter and the Fannie Mae Contract.

197. Fannie Mae's Charter provides that Fannie Mae "shall have common stock," 12 U.S.C. §1718(a), contemplates that such "shares of common stock" will be "purchase[d]," "h[e]ld," and "dispose[d] of . . . subject to the provisions of [Fannie Mae's Charter]," *id.* §1718(d) and expressly recognizes Fannie Mae's status as a "private shareholder-owned company." *Id.* §1719(g)(1)(C)(v).

198. The DGCL recognizes property rights associated with common stock. *See, e.g.*, DGCL §159 (common stock "shall be deemed personal property"). DGCL §151(c) expressly protects one of these rights, the common shareholders' right to participate in any net profits or residual value by providing that preferred shareholders "shall be entitled to receive dividends at such rates" as stated and which "shall be . . . payable in preference to, or in such relation to, the dividends payable on any other class" of stock, so that "[w]hen dividends upon the preferred . . . stock, if any, to the extent of the preference to which such stock are entitled, shall have been paid . . . a dividend on the remaining class or classes or series of stock may then be paid out of the remaining assets of the corporation available for dividends." One of the most material rights incident to common stock ownership, in addition to the right to participate in net profits, is the right of common shareholders to the residual value of the corporation.

199. The property rights associated with private ownership of Fannie Mae's common stock are explicitly recognized by Fannie Mae's Charter. The property rights associated with private ownership of common stock under the DGCL are consistent with Fannie Mae's Charter and are not inconsistent with any other Federal law, rules and regulations (including HERA). These property rights comprise binding and enforceable provisions of the Fannie Mae Contract.

200. The Net Worth Sweeps extinguish the right and ability of the common shareholders to participate in any net profits or residual value of Fannie Mae. By appropriating all of Fannie Mae's profits and all of its net worth, less a dwindling capital reserve, the common shareholders are deprived of any and all actual or potential value of the shares they own in perpetuity, in violation of the Fannie Mae Contract.

201. The Net Worth Sweeps do not constitute "dividends at such rates," as required by Section 151(c). The Net Worth Sweeps set no rate and replace the 10% fixed dividend rate on the Treasury Senior Preferred Stock with a perpetual, unlimited requirement that Fannie Mae pay its entire profit to Treasury without regard to the capital attributable to Treasury or other shareholders, or the common shareholders' right to a return in the amount of Fannie Mae's residual value.

202. The Net Worth Sweeps also violate Section 151(c)'s requirement that dividends be "payable in preference to, or in . . . relation to, the dividends payable on any other class or classes or of any other series of stock[.]" Because no earnings remain available to pay any dividends to shareholders other than Treasury after payment of the Net Worth Sweeps, the Treasury Senior Preferred Stock does not carry a permissible dividend "preference," nor are the Net Worth Sweeps "in . . . relation to" dividends payable to any other shareholders.

203. The DGCL does not permit a corporation to have preferred stock if the corporation does not also have common stock entitled to receive the residual value that remains after the preferred stock's preference has been paid. Preferred stock that entitles its holder to receive all the value of the corporation, leaving no residual value for common shareholders under any set of circumstances, is unlawful.

204. The Net Worth Sweeps on the Treasury Senior Preferred Stock make it impossible for Fannie Mae to pay dividends or other distributions in respect of its common shares. Because the Net Worth Sweeps entitle the government to Fannie Mae's entire value, they violate the DGCL, which is part of the Fannie Mae Contract.

205. By entering into the Sweep Amendment and the Fourth Amendment, Treasury and the Agency have deprived Plaintiffs of any possibility of receiving any dividends or any liquidation distribution, and have done so without providing Plaintiffs any opportunity to vote. Accordingly, the Agency has breached and unequivocally repudiated Plaintiffs' contractual rights.

206. Plaintiffs suffered damages as a direct and proximate result of the foregoing breach of contract. Plaintiffs' injuries are direct and independent of any injury to the Companies and any recovery would benefit the stockholders directly, and not the Companies.

COUNT IX
Breach Of The Implied Covenant Of Good Faith And Fair Dealing –
Fannie Mae Common Stock Contract
(683, CVI, GIX, SS, SALET and SFG)

207. Plaintiffs incorporate by reference and re-allege each and every allegation contained in the preceding paragraphs, as though fully set forth herein.

208. As alleged above, Fannie Mae's Charter is a contract between and among the government, as the grantor of the charter, Fannie Mae, and Fannie Mae's shareholders. When

FHFA, as conservator of Fannie Mae, succeeded to all rights, titles, powers and privileges of Fannie Mae and its shareholders, officers or directors, *see* 12 U.S.C. §4617(b)(2)(A)(i), and was otherwise authorized to act on behalf of Fannie Mae and its shareholders, officers and directors, *see, e.g., id.* §4617(b)(2)(B)-(D), (G)-(J), the government also succeeded to Fannie Mae's position as a party to the contract that is Fannie Mae's Charter.

209. Fannie Mae's Charter provides that Fannie Mae "shall have common stock" and expressly recognizes Fannie Mae's status as a "private shareholder-owned company." 12 U.S.C. §1718(a), §1719(g)(1)(C)(v). Under general corporate law principles, a corporation's common shareholders have, collectively, a right to the corporation's residual value through a right to participate in the corporation's residual earnings and a right, upon dissolution, to share in any residual proceeds from liquidation of the assets. Thus, under Fannie Mae's Charter, the Government agreed that common shareholders of Fannie Mae would have common stock that is vested with a right to the residual value of Fannie Mae, including to share in Fannie Mae's earnings.

210. Fannie Mae has issued common stock.

211. Because Fannie Mae's Charter is a contract, it imposes on the government an implied covenant of good faith and fair dealing in its performance and enforcement of the contract. The covenant of good faith and fair dealing requires the government to refrain from taking actions that interfere with other contracting parties' enjoyment of the benefits contemplated by the contract.

212. Through the Net Worth Sweeps, the government has breached the implied covenant of good faith and fair dealing by depriving Fannie Mae's shareholders of expected benefits under Fannie Mae's Charter. Specifically, Fannie Mae's shareholders have a right,

under Fannie Mae's Charter, to share in Fannie Mae's residual value. But as a result of the Net Worth Sweeps, the government has subverted the shareholders' right to participate in the residual value of Fannie Mae by sending Treasury all of Fannie Mae's profits and net worth, less a dwindling capital reserve. Thus, the common shareholders are deprived of any and all actual or potential value of the shares they own in perpetuity.

213. Plaintiffs suffered damages as a direct and proximate result of the foregoing breach of the implied covenant of good faith and fair dealing. Plaintiffs' injuries are direct and independent of any injury to the Companies and any recovery for this claim would benefit the stockholders directly, and not the Company.

COUNT X
**Breach And Anticipatory Repudiation Of Freddie Mac Common Stock Contract
(683, CVI, G1X, SS, SALET and SFG)**

214. Plaintiffs incorporate by reference and re-allege each and every allegation contained in the preceding paragraphs, as though fully set forth herein.

215. The Certificates for the Freddie Mac Common Stock constitute contracts between shareholders, on the one hand, and Freddie Mac, on the other.

216. These contracts include certain rights to dividends, liquidation payments, and voting rights as alleged above.

217. Plaintiffs paid valuable consideration in exchange for these contractual rights.

218. The Agency assumed the responsibility to act consistently with the Freddie Mac's contractual obligations when it became Freddie Mac's conservator.

219. The Net Worth Sweeps were developed and implemented by the Agency and Treasury to advance the economic and political interests of the government.

220. By entering into the Third Amendment, the Fourth Amendment, and executing the Net Worth Sweeps, the government has deprived Plaintiffs of any possibility of receiving any

dividends or any liquidation distribution, and has done so without providing Plaintiffs any opportunity to vote. Accordingly, the Government has breached and unequivocally repudiated the contractual rights of 683, CVI, G1X, SS, SALET and SFG.

221. Plaintiffs suffered damages as a direct and proximate result of the foregoing breach of contract. Plaintiffs' injuries are direct and independent of any injury to the Companies and any recovery would benefit the stockholders directly, and not the Companies.

COUNT XI

**Breach Of The Implied Covenant Of Good Faith And Fair Dealing –
Freddie Mac Common Stock Contract
(683, CVI, G1X, SS, SALET and SFG)**

222. Plaintiffs incorporate by reference and re-allege each and every allegation contained in the preceding paragraphs, as though fully set forth herein.

223. Freddie Mac's Charter is a contract between and among the government, as the granter of the charter, Freddie Mac, and Freddie Mac's shareholders. When FHFA, as conservator of Freddie Mac, succeeded to all rights, titles, powers and privileges of Freddie Mac and its shareholders, officers or directors, *see* 12 U.S.C. §4617(b)(2)(A)(i), and was otherwise authorized to act on behalf of Freddie Mac and its shareholders, officers and directors, *see, e.g., id.* §4617(b)(2)(B)-(D), (G)-(J), the government also succeeded to Freddie Mac's position as a party to the contract that is Freddie Mac's Charter.

224. Freddie Mac's Charter provides that: "The common stock of the Corporation shall consist of voting common stock, which shall be issued to such holders in the manner and amount, and subject to any limitations on concentration of ownership, as may be established by the Corporation." 12 U.S.C. §1453(a). Under general corporate law principles, a corporation's common shareholders have, collectively, a right to the corporation's residual value through a right to participate in the corporation's residual earnings and a right, upon dissolution, to share in

any residual proceeds from liquidation of the assets. Thus, under Freddie Mac's Charter, the Government has agreed that common shareholders of Freddie Mac would have common stock vested with a right to the residual value of Freddie Mac, including to share in Freddie Mac's earnings.

225. Freddie Mac has issued common stock.

226. Because Freddie Mac's Charter is a contract, it imposes on the government an implied covenant of good faith and fair dealing in its performance and enforcement of the contract. The covenant of good faith and fair dealing requires the government to refrain from taking actions that interfere with other contracting parties' enjoyment of the benefits contemplated by the contract.

227. Through the Net Worth Sweeps the government has breached the implied covenant of good faith and fair dealing by depriving Freddie Mac's shareholders of expected benefits under Freddie Mac's Charter. Specifically, Freddie Mac's shareholders have a right, under Freddie Mac's Charter, to share in Freddie Mac's residual value. But as a result of the Net Worth Sweeps, the government has subverted the shareholders' right to participate in the residual value of Freddie Mac by sending Treasury all of Freddie Mac's profits and net worth, less a dwindling capital reserve. Thus, the common shareholders are deprived of any and all actual or potential value of the shares they own in perpetuity.

228. Plaintiffs suffered damages as a direct and proximate result of the foregoing breach of the implied covenant of good faith and fair dealing. Plaintiffs' injuries are direct and independent of any injury to the Companies and any recovery for this claim would benefit the stockholders directly, and not the Company.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs seek a judgment as follows:

- A. Finding that the United States has taken or illegally exacted Plaintiffs' private property in violation of the Takings or Due Process clauses of the Constitution;
- B. Awarding Plaintiffs just compensation under the Fifth Amendment for the United States' taking of their property;
- C. Determining and awarding to Plaintiffs the damages sustained by them as a result of the violations set forth above;
- D. Awarding rescissory damages, based upon the breach of fiduciary duty that occurred;
- E. Awarding to Plaintiffs the costs and disbursements of this action, including reasonable attorneys' and experts' fees, costs and expenses;
- F. Awarding to Plaintiffs pre-judgment and post-judgment interest; and
- G. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted:

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