UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CONTINENTAL WESTERN INSURANCE COMPANY, Plaintiff, v. THE FEDERAL HOUSING FINANCE AGENCY, in its capacity as Conservator of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, MELVIN L. WATT, in his official capacity as Director of the Federal Housing Finance Agency, and THE DEPARTMENT OF THE TREASURY, Defendants.	No. 4:14-cv-00042

REPLY IN SUPPORT OF MOTION TO DISMISS, TRANSFER, OR STAY BY DEFENDANTS FEDERAL HOUSING FINANCE AGENCY AS CONSERVATOR FOR FANNIE MAE AND FREDDIE MAC, AND FHFA DIRECTOR MELVIN L. WATT

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INTRODUCTION

Plaintiff objects to an agreement between FHFA, acting as the Enterprises' Conservator, and the U.S. Treasury. Specifically, Plaintiff challenges the Third Amendment to the stock purchase agreements by which Treasury saved the Enterprises from insolvency and receivership when the housing market collapsed in 2008. Plaintiff's allegations confirm that the Third Amendment was supported by consideration flowing both ways: FHFA exchanged future payments (a variable dividend equal to profits earned) for relief from future obligations (fixed dividends and commitment fees). Plaintiff (which provided no capital to the Enterprises after they defaulted) nevertheless contends that the deal was too favorable to Treasury (which invested massive amounts of taxpayer money and remains contractually bound to do so again if necessary) and asks the Court to undo it.

Defendants' pending motion to dismiss presents two issues—each purely legal and each fully dispositive. The first is whether 12 U.S.C. § 4617(f), which provides that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator," bars Plaintiff's claims. It does. The second is whether the Conservator's statutory succession to "all rights, titles, powers, and privileges of the [Enterprises], and of any stockholder, officer, or director of [the Enterprises] with respect to the [Enterprises] and [their] assets" independently bars Plaintiff's claims. *See* 12 U.S.C. § 4617(b)(2)(A). It does.

Section 4617(f) bars this Complaint because the actions Plaintiff challenges fall squarely within the Conservator's statutory powers. Congress authorized the Conservator to "transfer or sell any [Enterprise] asset or liability … without any approval, assignment, or consent," and to exercise that power however it "determines is in the best interests of the [Enterprises] or the Agency." 12 U.S.C. 4617(b)(2)(G), (J)(ii). As part of a bilateral exchange, the Conservator

transferred assets to Treasury; Section 4617(f) keeps Plaintiff's second-guessing out of the courts.

In its opposition, Plaintiff initially argues as a general proposition that Section 4617(f) does not apply to the claims it asserts, but each of Plaintiff's grounds fails:

- Plaintiff claims a "presumption for judicial review" trumps Section 4617(f)'s explicit terms. But the statute applies as enacted.
- Plaintiff says Section 4617(f) cannot preclude claims that FHFA acted arbitrarily and capriciously. But numerous cases—including cases on which Plaintiff relies—hold that Section 4617(f) bars such claims.
- Plaintiff claims Treasury improperly "supervised and directed" the Conservator. But while HERA protects the Conservator from being involuntarily subjected to other agencies' directives, it permits the Conservator to contract with such parties as it determines appropriate.

Plaintiff then argues that Section 4617(f) does not apply in the specific circumstances alleged, because the Conservator purportedly exceeded its statutory powers. These arguments also fail:

- Plaintiff contends that the Conservator's powers should be construed narrowly. But courts universally acknowledge that the statutory powers of federal conservators are extraordinary and broad.
- Plaintiff asserts that the Conservator exercised its powers based on an improper motive and argues that makes the actions *ultra vires*. But an allegedly improper motive does not remove an otherwise-authorized action from the scope of the Conservator's powers.
- Plaintiff claims the Third Amendment was unnecessary and wasteful—in substance, that the Conservator exercised its powers poorly. But this "bad job" iteration of Plaintiff's argument fares no better than the "bad motive" version.
- Plaintiff contends that the Conservator usurped the receiver's power to liquidate. But no liquidation is underway and HERA expressly grants the Conservator the power to wind up the Enterprises' affairs.

Independently of Section 4617(f), HERA's succession provision bars Plaintiff's claims. Upon its appointment, the Conservator "immediately succeed[ed]" to "all rights, titles, powers, and privileges of the [Enterprises], and of any stockholder, officer, or director of [the Enterprises] with respect to the [Enterprises] and [their] assets." 12 U.S.C. § 4617(b)(2)(A).

The only interpretive tool needed to apply this provision is the simplest one: "[R]ead the statute!" *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012) (internal quotation marks and citation omitted). Plaintiff purports to assert "rights … of [a] stockholder," but under Section 4617(b)(2)(A), "all [such] rights" belong to the Conservator, leaving Plaintiff with no claim.

In response, Plaintiff argues that the succession provision bars only derivative claims and asserts that its claims are direct. Plaintiff is wrong on both counts. Congress transferred materially "all" of Plaintiff's share-based rights—not just Plaintiff's ability to bring derivative claims—to the Conservator. In any event, Plaintiff's claims are derivative. Plaintiff complains of a diversion of profits that would otherwise have benefitted the Enterprises and enhanced the value of its shares. That is a classic description of a derivative claim: The alleged injury affects the Enterprises directly; any effect on Plaintiff—and all shareholders—flows indirectly from the alleged corporate injury. Plaintiff has no unique rights and has suffered no distinct injury.

Plaintiff also implores the Court to override the statute and fashion a "conflict-of-interest" exception that Congress never enacted. "The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (internal quotation marks and citation omitted). Here, Congress transferred "all" shareholder interests to the Conservator, with only a single, narrow, and here-inapplicable exception: Shareholders maintain a contingent statutory interest in liquidation proceeds. When Congress provides exceptions in a statute, it shows that Congress considered whether any should apply and enacted those it deemed appropriate. Congress provided no conflict-of-interest exception in HERA; Plaintiff cannot append one to the statute.

ARGUMENT

I. Section 4617(f) Bars Plaintiff's Claims

In HERA, Congress granted the Conservator "broad powers to operate Fannie and Freddie" as it sees fit. *FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1058 (N.D. Ill. 2013). Of particular relevance here, Congress empowered the Conservator to "transfer or sell any [Enterprise] asset or liability … without any approval, assignment, or consent," and authorized the Conservator to exercise that power however it "determines is in the best interests of the [Enterprises] or the Agency." 12 U.S.C. § 4617(b)(2)(G), (b)(2)(J)(ii).

To enable the Conservator to carry out its functions effectively, Congress insulated the Conservator's actions from judicial second-guessing, mandating that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator." 12 U.S.C. § 4617(f). The analysis required to determine whether Section 4617(f) precludes judicial review is straightforward and "quite narrow." *Bank of Am. Nat. Ass'n v. Colonial Bank,* 604 F.3d 1239, 1243 (11th Cir. 2010) (discussing 12 U.S.C. § 1821(j)). Under Eighth Circuit law, the court "must first determine whether the challenged action is within the [Conservator]'s power or function" under HERA. *Dittmer Props., L.P. v. F.D.I.C.*, 708 F.3d 1011, 1017 (8th Cir. 2013) (citing *Bank of Am.*, 604 F.3d at 1243). If so, the Conservator "is protected from all court action that would 'restrain or affect' the exercise of those powers or functions." *Bank of Am.*, 604 F.3d at 1243.

By definition, conservators are appointed only in difficult circumstances—here, billions of taxpayer dollars are at issue—where difficult choices must be made. Inevitably, shareholders will disagree with some of these decisions, as Plaintiff does here. But if conservators can be hauled into court and put through the rigors of protracted litigation every time a shareholder

questions a conservator's decision, conservators will spend an inordinate amount of time litigating past decisions. Jurisdiction-withdrawal statutes such as Section 4617(f) embody Congress's policy judgment that enabling conservators to focus on the work Congress created and empowered them to do without the distraction of litigation is more important than leaving the courthouse doors open to all claims. Undermining Section 4617(f)'s jurisdictional bar as Plaintiff seeks to do here would impermissibly overturn this Congressional determination.

A. Plaintiff's Attempts to Short-Circuit Section 4617(f) Fail

Before engaging the dispositive issue of whether agreeing to the Third Amendment falls within the Conservator's broad statutory powers, Plaintiff unsuccessfully attempts to sidestep the required Section 4617(f) inquiry. First, Plaintiff suggests that a "presumption" for judicial review of "administrative action" somehow negates Section 4617(f). *See* Opp. at 23, 28-29. Even assuming that such a presumption applies to FHFA as Conservator, which it does not, the plain language of Section 4617(f) overcomes it.[1] Plaintiff repeatedly cites *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (cited in Opp. at 26-29), but that decision is inapt because, *inter alia*, it does not address HERA, FIRREA, or any jurisdiction-withdrawal statute pertaining to conservators and receivers. Rather, the Supreme Court holds that courts should *defer* to federal agencies' interpretation of any statutory ambiguity concerning the scope of their authority. Thus, if anything, the decision favors deference to FHFA's assessment of the scope of its own powers.

[1] *See, e.g.*, *Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 990 (9th Cir. 2013) ("HERA substantially limits judicial review of FHFA's actions as conservator."); *Town of Babylon v. FHFA*, 790 F. Supp. 2d 47, 50 (E.D.N.Y. 2011) ("Congress has specifically limited the power of courts to review the actions of the FHFA when acting as a conservator."), *aff'd* 699 F.3d 221 (2d Cir. 2012); *Bank of Am.*, 604 F.3d at 1244 (Section 1821(j) "clearly and unambiguously reflects congressional intent to bar courts from granting the precise type of injunctive relief sought here … ."); *Volges v. RTC*, 32 F.3d 50, 52 (2d Cir. 1994) (Section 1821(j) "is a direct manifestation of Congress's intent to prevent courts from interfering with the [conservator or receiver] in the exercise of its statutory powers.").

Second, Plaintiff argues that Section 4617(f) does not protect Conservator actions alleged to be arbitrary and capricious under the APA. Opp. at 29-30. But by its own terms, the APA does not apply where other "statutes preclude judicial review," and Section 4617(f) plainly is such a statute. 5 U.S.C. § 701(a)(1); *see also Heckler v. Chaney*, 470 U.S. 821, 828 (1985). Indeed, several of the cases on which Plaintiff relies—APA cases challenging certain Conservator directives as arbitrary and capricious—specifically hold that Section 4617(f) bars such claims.[2] Plaintiff's failure to reconcile its argument with the many decisions squarely rejecting it confirms that Plaintiff cannot overcome the "hurdle of [APA] § 701(a)." *See Heckler*, 470 U.S. at 828.

Third, Plaintiff asserts that Section 4617(f) is inoperative because Treasury allegedly "supervised" or "directed" the Conservator, purportedly in violation of 12 U.S.C. § 4617(a)(7). Opp. at 32-33. Section 4617(a)(7) states that the Conservator "shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of [the Conservator's] rights, powers, and privileges." It exempts the Conservator from being *involuntarily* subjected to legally binding directives of other federal agencies or states; it does not preclude the Conservator from *voluntarily* negotiating and executing agreements with other federal agencies or states. *See, e.g.*, *Gail C. Sweeney Estate Marital Trust v. Treasury*, --- F. Supp. 3d ----, 2014 WL 4661983, at *7 (D.D.C. Sept. 19, 2014) (observing that, in the Preferred Stock Purchase Agreements, FHFA and Treasury "occupy opposite sides of a contract, which is supported by consideration and requires each to perform in accordance with its

[2] *See, e.g.*, *Cnty. of Sonoma*, 710 F.3d at 993 (holding APA claims barred by Section 4617(f)); *Leon Cnty., Fla. v. FHFA*, 700 F.3d 1273, 1279 (11th Cir. 2012) (same); *Town of Babylon*, 699 F.3d at 228 (same).

terms").[3] Indeed, HERA expressly authorizes the Conservator to enter into contracts on behalf of the Enterprises, *see* 12 U.S.C. § 4617(b)(2)(B)(v) (FHFA may "provide by contract for assistance in fulfilling any function, activity, action, or duty" of the Conservator), and to do so in a manner the Conservator "determines is in the best interests of the [Enterprises] or the Agency," *id*. § 4617(b)(2)(J)(ii). The Conservator did just that, so Section 4617(a)(7) is inapposite.

Section 4617(f) applies, and the requisite inquiry is straightforward—if the Conservator acted within its statutory "powers and functions," Plaintiff's claims are barred.

B. Section 4617(f) Bars Plaintiff's Claims Because the Third Amendment Falls Within the Conservator's Express Statutory Powers

Plaintiff launches a fusillade of arguments that the Conservator lacked statutory power to agree to the Third Amendment, thereby rendering Section 4617(f) inapplicable here. Each misses the mark. Plaintiff first urges the Court to "construe FHFA's conservatorship powers narrowly." Opp. at 28. But Congress granted the Conservator "*broad* powers" to "assume complete control" over the Enterprises and "exclusive authority over [their] business operations." *City of Chicago*, 962 F. Supp. 2d at 1058, 1060 (emphasis added).[4] These powers generally match those given to conservators and receivers under FIRREA, which courts have described as "extraordinary," *MBIA Ins. Corp. v. F.D.I.C.*, 708 F.3d 234, 236 (D.C. Cir. 2013) (internal quotation marks and citation omitted) and "exceptionally broad," *In re Landmark Land Co. of Okla., Inc.*, 973 F.2d 283, 288 (4th Cir. 1992). Moreover, the Eighth Circuit has specifically

[3] *See also City of Chicago*, 962 F. Supp. 2d at 1056-57, 1061 (holding Section 4617(a)(7) impliedly preempts city ordinances that city was attempting to impose on the Conservator's operations); *Branch Banking & Trust Co. v. Frank*, No. 2:11-cv-1366, 2013 WL 6669100, at *11-12 (D. Nev. Dec. 17, 2013) (holding materially identical provision in FIRREA preempts state laws that plaintiff was trying to impose on receiver).

[4] *See also Cnty. of Sonoma*, 710 F.3d at 989 (recognizing FHFA's "broad powers" as Conservator); *Leon Cnty.*, 700 F.3d at 1279 (same).

directed that the jurisdictional bar is "construed *broadly* to constrain the court's equitable powers" when conservator action is at issue. *Dittmer*, 708 F.3d at 1016 (emphasis added) (discussing 18 U.S.C. § 1821(j)).[5] In HERA, Congress granted the Conservator extraordinary powers so it could address extraordinary circumstances. Plaintiff's efforts to constrain the Conservator's statutory powers so severely as not to encompass the Third Amendment cannot be reconciled with HERA or the governing case law, such as *Dittmer*.

1. The Third Amendment Was an Exercise of the Conservator's Power to Transfer or Sell Any Asset of the Enterprises

The Conservator has the express statutory power to "transfer or sell any asset" of the Enterprises "without any approval, assignment, or consent," 12 U.S.C. § 4617(b)(2)(G), and to do so in the manner "[FHFA] determines is in the best interests of the [Enterprises] or [FHFA]," *id*. § 4617(b)(2)(J). This transfer provision "does not provide any limitation"; indeed, "[i]t is hard to imagine more sweeping language." *Gosnell v. FDIC*, No. 90-1266L, 1991 WL 533637, at *6 (W.D.N.Y. Feb. 4, 1991), *aff'd*, 938 F.2d 372 (2d Cir. 1991). In its opposition, Plaintiff does not dispute that the Third Amendment effects a "transfer" of Enterprise assets. That should end the Section 4617(f) inquiry, but Plaintiff asserts a variety of arguments that the Conservator somehow exceeded its powers in agreeing to the transfer. None has merit.

As Magistrate Judge Walters recognized—in a statement Plaintiff adopts on the very first page of its brief—"[t]he core of [Plaintiff]'s Complaint" is that the Conservator acted "*without legitimate motive* when it agreed to the net worth sweep." Opp. at 1 (quoting Order at 4 (emphasis added)); *see also* Order at 4, 6 (observing the Complaint alleges the Third

[5] *See also Bank of Am.*, 604 F.3d at 1243 (Section 1821(j) is "interpreted broadly"); *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 706-07 (1st Cir. 1992) (finding argument that "Congress intended section 1821(j) to have only a very narrow meaning" to be "untenable").

Amendment was "unnecessary and improperly motivated"). Plaintiff reiterates the point throughout its Opposition by (among other things): (1) ascribing to FHFA and Treasury a desire to "harvest" or "loot" the Enterprises' profits for the benefit of Treasury and the U.S. taxpayer (Opp. at 17, 31); (2) asserting that FHFA intended to "nationalize" the Enterprises based on a desire to "expropriate" their value (*id*. at 1, 2, 10, 17, 19, 21, 26, 30, 31 & n.9, 34, 39 n.11, 52); and (3) arguing that FHFA offered "pretextual" explanations for its actions (*id*. at 34).

Plaintiff impugns FHFA's motives because Plaintiff's argument assumes improper motives can overcome Section 4617(f). *See* Opp. at 32. Plaintiff's assumption is incorrect. Authorized conservator action does not somehow become *ultra vires* if undertaken with an allegedly improper motive. For example, in *Leon County v. FHFA*, 816 F. Supp. 2d 1205, 1208 (N.D. Fla. 2011), *aff'd*, 700 F.3d 1273, the plaintiff challenged the Conservator's issuance of a directive as an improperly motivated litigation tactic. The court squarely rejected that argument, ruling that "Congress surely knew, when it enacted § 4617(f), that challenges to agency action sometimes assert an improper motive. *But Congress barred judicial review of the conservator's actions without making an exception for actions said to be taken from an improper motive.*" *Id*. (emphasis added). Plaintiff has no response to that holding.[6]

Moreover, courts have applied 12 U.S.C. § 1821(j)—the analogous jurisdictional bar

[6] Tellingly, Plaintiff makes no attempt to reconcile—or even acknowledge—the district court's decision in *Leon County*. Plaintiff claims that courts "regularly look to the purpose and function of an act when deciding whether it may be enjoined … ." Opp. at 34. This is wrong and, ironically, the *sole* decision Plaintiff cites is the Eleventh Circuit's decision in *Leon County*, which *affirmed* the district court's holding that an allegation of "improper motive" cannot overcome Section 4617(f). *See Leon Cnty. v. FHFA*, 700 F.3d 1273 (11th Cir. 2012). And the Eleventh Circuit's only consideration of the "purpose" of FHFA's action was in an entirely different context: determining whether the action was taken by FHFA in its capacity as conservator versus regulator. *See id*. at 1278. No such analysis is warranted here because there is no dispute that FHFA executed the Third Amendment in its capacity as conservator, not as regulator. *See* Compl. ¶ 101.

applicable to bank conservators and receivers—in numerous cases where plaintiffs allege the receiver acted with suspect motives. *See, e.g.*, *Landmark Land Co.*, 973 F.2d at 288-90 (barring challenge to action allegedly taken for conservator's "own benefit" and to other interested parties' detriment); *Hindes v. FDIC*, 137 F.3d 148 (3d Cir. 1998) (barring challenge to actions allegedly part of "conspiracy with state officials to close the bank"); *Darden v. RTC*, No. Civ A. 393CV13-D-D, 1995 WL 1945486, at *2-3 (N.D. Miss. June 25, 1995) (barring claim that RTC receiver improperly favored RTC employee's bid over unaffiliated party's bid).[7] And an analogous jurisdictional bar to most claims against court-appointed receivers and bankruptcy trustees—the *Barton* doctrine—functions similarly: An exception allows claims that a receiver or trustee acted outside its statutory authority, but not claims that it acted with "improper motives." *Satterfield v. Malloy*, 700 F.3d 1231, 1236 (10th Cir. 2012). *See also In re McKenzie*, 716 F.3d 404, 422 (6th Cir. 2013) (holding allegation of "ulterior purposes" insufficient to overcome jurisdictional bar); *Price v. Deeba*, No. CIV-14-319-D, 2014 WL 4660810, at *3 (W.D. Okla., Sept. 17, 2014) (holding that allegations of "improper motives" and "retaliatory intent are irrelevant" to jurisdictional bar). All these decisions rest on sound policy: If motives *were* relevant, jurisdictional bars such as Section 4617(f) (and FIRREA's materially-identical Section 1821(j)) would be rendered nugatory, as plaintiffs could always plead around them by simply alleging an improper motive.

Similarly, Plaintiff argues that the Third Amendment was "unnecessary" (Opp. at 2, 22, n.9 (quoting Order at 6)) and that the Conservator should have utilized alternatives that Plaintiff

[7] *See also Sinclair v. Hawke*, 314 F.3d 934, 938, 942 (8th Cir. 2003) (holding that "comprehensive statutory regime" including Section 1821(j) barred claims alleging OCC took actions, including the appointment of receiver, "for retaliatory and vindictive purposes").

believes would have been more favorable to the Enterprises and its private shareholders (Compl. ¶¶ 88-89, 110), such as by accruing the dividends-in-kind at a 12% rate rather than paying them in cash at 10%. *See id*. ¶¶ 47, 55, 72. But these allegations merely embody an attempt to displace the judgment of the Conservator, which Section 4617(f) expressly precludes. *See Cnty. of Sonoma*, 710 F.3d at 993 (applying Section 4617(f) and observing "it is not our place to substitute our judgment for FHFA's"); *Leon Cnty.*, 700 F.3d at 1279 (same, despite plaintiff's "disagreement with [the Conservator's] business assessment regarding the level of an investment risk"); *Nat'l Trust for Historic Preserv. v. FDIC*, 995 F.2d 238, 240 D.C. Cir. 1993) (jurisdictional bar provides "immuni[ty] from … second-guessing" of conservator actions).

Just as there is no "bad motive" exception to Section 4617(f), there also is no "bad job" exception. *See Gross v. Bell Sav. Bank PaSA*, 974 F.2d 403, 408 (3d Cir. 1992) (jurisdictional bar "does not hinge on [the court's] view of the proper exercise of otherwise-legitimate powers").[8] Accordingly, Plaintiff's allegations that the Third Amendment is "waste[ful]," fails to "maximize[] the net present value return" for the Enterprises, and prevents the rehabilitation of the Enterprises cannot overcome Section 4617(f); they boil down to a contention that the Conservator could have done a better job. *See* Opp. at 47-50. The Fifth Circuit applied the analogous FIRREA jurisdictional bar to preclude a claim that a receiver had transferred an asset "in a way that failed to maximize the net present value return." *Ward v. RTC*, 996 F.2d 99, 103 (5th Cir. 1993). The court explained that "even if the [conservator or receiver] improperly or unlawfully exercised an authorized power or function, it clearly did not engage in an activity

[8] For the same reasons, Section 4617(f) bars Plaintiff's claims seeking to set aside the pre-Third Amendment draws made by the Enterprises to pay Treasury 10% cash dividends. Opp. at 50-52; Compl. ¶¶ 72, 112, 159-64.

outside its statutory powers." *Id*.[9] As in *Ward*, Plaintiff's allegations cannot overcome Section 4617(f).[10]

Next, Plaintiff asserts that the contractual transfer amounts to a "giveaway." Opp. at 48. That characterization contravenes the contract documents (and Plaintiff's own allegations), which recite an exchange of consideration flowing in both directions—the Enterprises promised uncertain, but potentially larger, future dividends (equal to the Enterprises' future profits) in exchange for relief from potentially massive future obligations (periodic commitment fees and increases in Treasury's liquidation preference). *See* Opp. at 7, 13-14, 18-19. Retreating from the position that the parties did not exchange *any* consideration, Plaintiff now says that the Enterprises received "no *meaningful* benefit," "*virtually* nothing," and less than "*adequate* consideration." Opp. at 1, 2, 31 n.8, 48 (emphases added).[11] But arguing the exchange favored

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[9] *See also Bank of Am.*, 604 F.3d at 1244 (applying jurisdictional bar despite allegations that the receiver carried out its functions in an "improper" and "erroneous" manner); *Nat'l Trust for Historic Preserv.*, 995 F.2d at 240 (recognizing that the jurisdictional bar provides "immuni[ty] from … second-guessing" of conservator actions); *Hindes v. FDIC*, No. CIV. A. 94-2355, 1995 WL 82684, at *1 (E.D. Pa. Feb. 28, 1995), *aff'd*, 137 F.3d 148 (3d Cir. 1998) (alleged "misconduct and derelictions of duty" by the conservator or receiver do not defeat bar).

[10] Plaintiff's attempts to distinguish *Ward* fail. First, Plaintiff asserts that *Ward* concerned only a conservator or receiver's "sale of a single" property, while the Third Amendment is far broader in scope. Opp. at 26. But the application of the jurisdictional bar plainly does not depend upon whether the Conservator transferred a single asset or many assets. *See Cnty. of Sonoma*, 710 F.3d at 994 (applying Section 4617(f) and rejecting distinction between "case-by-case" and "categorical" actions because "nothing precludes a conservator from making business decisions that are both broad in scope and entirely prospective"). Second, Plaintiff asserts that *Ward* addressed only a conservator or receiver's alleged violations of "separate substantive law[s]" (Opp. at 27), but Plaintiff also alleges that the Conservator violated separate substantive laws—*i.e.*, state contract law (Counts V-VI), state fiduciary duty law (Count VII), and the APA (Counts I-IV)—while carrying out its powers as Conservator. Further, an allegation that the Conservator "violated HERA" (Opp. at 27) is a purely legal conclusion that need not be accepted as true for purposes of a motion to dismiss.

[11] In any event, an allegation that the Enterprises received *no* consideration would embody a legal contention that the Court should disregard, because it is plainly contradicted by the contract documents. *See Centers v. Centennial Mortg., Inc.*, 398 F.3d 930, 933 (7th Cir. 2005) (in considering a motion to dismiss, "to the extent that the terms of an attached contract conflict with the allegations of the complaint, the contract controls"); *Ohlendorf v. Wells Fargo Bank N.A.*, No. C09-4028, 2009 WL 2475294, *2 (N.D. Iowa Aug. 11, 2009) (similar). Here, Plaintiff's

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Treasury ignores the "elementary" contract-law principle that courts "will not inquire into the *adequacy* of consideration as long as the consideration is otherwise *valid or sufficient* to support a promise." *See* 3 Williston on Contracts § 7:21 (4th ed.) (emphasis added). In any event, the Conservator's discretion to "determine[] [what] is in the best interests of the [Enterprises] or the Agency" empowers it, not Plaintiff or the courts, to evaluate the merits of the transaction. *See* 12 U.S.C. § 4617(b)(2)(J)(ii).

Plaintiff also argues that the Conservator's transfer of assets pursuant to the Third Amendment is improper because it allegedly allows FHFA to "circumvent" the receivership-claims process. *See* Opp. at 46-7; Compl. ¶¶ 13; 18. Plaintiff is wrong. As the Seventh Circuit recognized in rejecting this exact argument, the Conservator's broad powers under HERA are not constrained by HERA's receivership-distribution priority provisions. *See Courtney v. Halleran*, 485 F.3d 942, 949 (7th Cir. 2007) ("As we see it, plaintiffs are reading language into [the priority statute] that is not there…. In our view, [the priority statute] cannot be read to limit the [conservator or receiver]'s authority under [the transfer provision] so significantly.").[12]

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allegation that imposing a commitment fee would have been "inappropriate" does not in any way diminish Treasury's legal right to do so under the pre-Third Amendment contract. Opp. at 31 n.8. Plaintiff says dividends already "compensated Treasury for its remaining commitment," *id.*, but that assertion contravenes the contract, which specifies that dividends relate to funds *already actually drawn* against the commitment, while commitment fees relate separately to additional funds a*vailable to be drawn in the future*. *See* Opp. at 14. Likewise, Plaintiff's assertion that "Treasury's authority to purchase additional securities … had already expired" at the time of the Third Amendment, *id.*, is irrelevant—even under Plaintiff's implausible definition of a securities purchase, imposition of a periodic commitment fee would not constitute or require one.

[12] Plaintiff attempts to distinguish *Courtney* as concerning only a receiver's power to settle legal claims under a different provision (12 U.S.C. § 1821(p)(3)(A)). *See* Opp. at 49. But the Seventh Circuit addressed that provision only in connection with a different issue—whether the assets at issue were subject to liquidation. *See Courtney*, 485 F.3d at 949. Accordingly, Plaintiff's characterization of *Courtney* as being "very far afield" is simply incorrect. Opp. at 49.

2. The Third Amendment Was Also an Exercise of the Conservator's Power to Operate the Enterprises and Preserve Treasury's Capital Commitment

HERA also empowers the Conservator with plenary authority to "operate the [Enterprises]" and to "conduct all business of the [Enterprises]," all in the manner FHFA "determines is in the [Enterprises' or FHFA's] best interests." 12 U.S.C. § 4617(b)(2)(B)(i), (B)(iv), (J)(ii). The Conservator acted within these powers and functions in executing the Third Amendment. *See* FHFA Mot. to Dismiss at 14-17. As the Conservator explained at the time, that Amendment preserved the availability of Treasury's finite funding commitment. *Id*. This provided greater assurance to the market,[13] and thus is well within the Conservator's statutory powers to "carry on the business" of the Enterprises. *See* 12 U.S.C. § 4617(b)(2)(D)(ii).

For substantially the same reasons set forth above in the context of FHFA's express power to transfer assets, Plaintiff's arguments that the Third Amendment does not embody an exercise of this power—or that the Conservator's explanation of the Third Amendment was "pretextual"—fail, and Section 4617(f) therefore bars Plaintiff's claims.

C. Congress Granted the Conservator the Power to Wind Up the Enterprises and the Conservator Has Not Usurped the Receiver's Power to Liquidate

Plaintiff also contends that the Conservator usurped a power reserved exclusively to receivers—the power to liquidate. Opp. at 34-39, 43-47. As Plaintiff concedes, however, no liquidation is underway. Compl. ¶¶ 30, 46, 112, 159. So Plaintiff asserts that the Conservator is "winding up" or "winding down" some of the Enterprises' affairs and characterizes that as a "*de facto* receiver[ship]" and a "*de facto* liquidation." Opp. at 43-44. But "[t]he notion of a '*de facto*

[13] *See* OIG Report at 14 (Mar. 20, 2013) (Ex. E to FHFA Mot. to Dismiss) (Doc. # 23-5) ("The change to the dividends [via the Third Amendment] provides the market with greater assurance that the Enterprises will have sufficient capital to fulfill their obligations … , which encourages continued liquidity in the mortgage market."); *see also* FHFA Mot. to Dismiss at 16 n.11 (explaining why OIG report can be considered in resolving the motion to dismiss).

receivership' is rather akin to the concept of 'semi-pregnancy': an entity is either in *de jure* receivership or it is not." *See Cobell v. Norton*, 283 F. Supp. 2d 66, 91 n.12 (D.D.C. 2003), *vacated in part on other grounds*, 392 F.3d 461 (D.C. Cir. 2004). Here, the Enterprises remain in operation. They are neither in receivership nor liquidation. Indeed, this lawsuit is predicated on *increased* revenues the Enterprises have earned in conservatorship.

In all events, HERA expressly authorizes the Conservator to "wind[] up the affairs" of the Enterprises. 12 U.S.C. § 4617(a)(2); *see also* FHFA Mot. to Dismiss at 22-24. Plaintiff nevertheless argues that the power to "wind[] up" is one reserved for the FHFA as receiver, not conservator. Not so. In Section 4617(a)(7), Congress granted the "wind[] up" power to FHFA acting as "conservator or receiver," and "Congress [does] not use the phrase 'conservator *or* receiver' loosely." *1185 Ave. of Americas Assocs. v. RTC*, 22 F.3d 494, 497 (2d Cir. 1994) (emphasis added). Indeed, as the Eighth Circuit has recognized, by using this phrase, "it is clear that Congress intended the duty, right, or power to be enjoyed or exercised by *both* the conservator and the receiver." *RTC v. CedarMinn Bldg. Ltd. P'ship*, 956 F.2d 1446, 1452 (8th Cir. 1992) (emphasis added).[14]

Plaintiff also argues that HERA uses the terms "liquidation" and "winding up" synonymously, and because the Conservator is not permitted to do the former, it must not be

[14] FIRREA does not include the provision, present in HERA, that explicitly grants FHFA the power to "wind[] up the affairs" of the Enterprises. 12 U.S.C. § 4617(a)(2). Therefore, even if the authorities Plaintiff cites supported the position Plaintiff asserts here (which they do not), each would be facially distinguishable because none involves a statute expressly granting conservators "wind up" powers. Moreover, even Plaintiff's authorities acknowledge the exercise of wind-up powers by conservators. *See, e.g., Managing the Crisis: The FDIC and RTC Experience* 216 n.9 (1998) (cited at Opp. at 35) (describing how RTC exercised powers as conservator to "downsize[] and stabilize[] the operations of the failed institutions until a more permanent solution could be found," rather than "operating [the] institutions with the objective of returning them to a sound position").

permitted to do the latter. Opp. at 43-47. But the Court must "presume that the use of different terminology within a statute indicates that Congress intended to establish a different meaning," and thus should "give[] effect to all of its provisions" to avoid rendering any part of the statute "a mere redundancy." *Beef Nebraska, Inc. v. United States*, 807 F.2d 712, 717 (8th Cir. 1986) (internal quotation marks and citation omitted). In HERA, Congress gave both the "conservator or receiver" the power to "reorganiz[e]" and "wind[] up" the Enterprises. 12 U.S.C. § 4617(a)(2). Winding up includes a variety of prudential steps—short of liquidation—that the Conservator can take to shrink the Enterprises' operations to ensure their safety and soundness and to prepare for their potential liquidation.

Plaintiff also charges that FHFA's statutory interpretation would lead to the purportedly "absurd result[]" that the FHFA as receiver would have the power to "rehabilitat[e]." *See* Opp. at 45. This argument is unavailing because HERA *does* authorize the receiver to rehabilitate by requiring the receiver to organize limited-life regulated entities ("LLREs"). 12 U.S.C. § 4617(i). An LLRE "succeed[s] to the charter" of the Enterprise for which it is established and "thereafter operate[s] in accordance with, and subject to, such charter," in anticipation of the entity being returned to private hands. *Id.* § 4617(i)(2)(A).[15] Thus, receivers are not only empowered but directed to rehabilitate the business and operations of an Enterprise by creating an LLRE, which restores the Enterprise's financial condition through a reorganization involving the selective

[15] Indeed, as former Acting Director DeMarco stated in 2010—in a quote cited by Plaintiff as a description of FHFA's rehabilitative mission—"the only [post conservatorship option] that FHFA may implement today under existing law is to reconstitute [Fannie and Freddie] under their current charters." Compl. ¶ 79 (alterations in original) (quoting Letter of Edward J. DeMarco, Acting Dir., FHFA, to Chairmen and Ranking Members of the S. Comm. on Banking, Hous., & Urban Affairs and the H. Comm. on Fin. Servs. at 7 (Feb. 2, 2010)); *see also* Opp. at 16 (quoting same). This option involves the creation of an LLRE by the receiver, which is a statutory reorganization of an Enterprise under its existing charter.

transfer of assets and liabilities.

In sum, because the Conservator's execution of the Third Amendment was squarely within its broad statutory powers and functions, Section 4617(f) bars Plaintiff's claims, all of which would "restrain or affect" the Third Amendment. *Id.* § 4617(f).

II. HERA Bars Shareholder Claims During Conservatorship

Plaintiff's claims fail for a second, independently dispositive reason: HERA bars prosecution of shareholder claims during conservatorship. Congress provided that when FHFA is appointed Conservator, it "immediately succeeds to … *all rights*, titles, powers, and privileges of the [Enterprises], and *of any stockholder*" of the Enterprises. 12 U.S.C. § 4617(b)(2)(A) (emphases added); *see also* FHFA Mot. to Dismiss at 24-26. Here, Plaintiff purports to assert "rights … of [a] stockholder"—all of its claims relate to shareholder interests—but the Conservator now holds materially "all" such rights, leaving Plaintiff with no presently enforceable claim.

Plaintiff responds that "HERA does *not* grant the conservator *all* of the rights of the shareholders." Opp. at 57 (first emphasis added). Dismissing the Conservator's straightforward reading of the statute as "unexplained and unsupported," *id.* at 59, Plaintiff asserts that the Enterprises' shareholders still maintain a "right" to assert direct claims against the Conservator arising out of their ownership of stock, *id*. at 57-60, and also the ability to pursue derivative claims on behalf of the Enterprises against the Conservator, so long as the shareholders allege a purported conflict of interest, *id*. at 64-68. That is wrong.

A. The Conservator Has Succeeded to "All" Shareholder Rights, Not Just the Right to Bring Derivative Claims

Plaintiff's argument that Section 4617(b)(2)(A) does not cover "direct" claims arising out

of its purported rights as a shareholder, Opp. 58, cannot survive the statute's plain language. As the D.C. Circuit recognized, the only interpretive tool needed to analyze this provision is adherence to Justice Frankfurter's admonition: "(1) Read the statute; (2) read the statute; (3) read the statute!" *Kellmer*, 674 F.3d at 850. When Congress conveyed "*all* rights … of any stockholder … with respect to [the Enterprises] and [their] assets," it meant *all* rights—not *almost all* such rights exclusive of those that support direct claims. Indeed, as the Eighth Circuit recently recognized in interpreting another HERA provision, "all means all." *Hennepin Cnty. v. Fed. Nat. Mortgage Ass'n*, 742 F.3d 818, 822 (8th Cir. 2014) (citation omitted).

To be sure, Congress included a limited and presently inapplicable exception that authorizes shareholders to prosecute any claims they might have to liquidation proceeds following appointment of a receiver. *See* 12 U.S.C. § 4617(b)(2)(K)(i). That express exception's presence precludes any inference that Congress intended others to apply implicitly: "When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference … is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000); *see also Hennepin Cnty.*, 742 F.3d at 821-22. Congress provided no exception for direct claims in conservatorship—even claims concerning Plaintiff's liquidation preference, which ripens only in receivership—and Plaintiff cannot amend the statute to suit its desire.

Plaintiff's attempt to insert a never-enacted "direct claims" exception into the succession provision fails for another reason: It would render part of the statute meaningless. The Conservator can already pursue what would be a derivative claim because the claim really belongs to the Enterprise in conservatorship. Accordingly, for the phrase "rights … of any stockholder" to add anything to the meaning and effect of the statute, it must encompass direct

claims that arise out of shareholder interests. Plaintiff also points out that the Conservator's succession is limited to "all" shareholder rights "with respect to the [Enterprises] and the assets of the [Enterprises]." *See* Opp. 57 (citing 12 U.S.C. § 4617(b)(2)(A)(i)). But this qualifier merely precludes the Conservator from succeeding to shareholder "right[s]" that are *not* "with respect to the Enterprises" or the Enterprises' assets, an irrelevant consideration here. The Conservator succeeded to all of Plaintiff's claims, not just its derivative claims.

B. In Any Event, Plaintiff's Claims Are Derivative, Not Direct

Though Plaintiff disputes whether the Conservator's succession to "all" shareholder rights encompasses direct shareholder claims, Plaintiff does not dispute that the Conservator succeeds to all derivative claims that may be asserted by the Enterprises' shareholders. *See* FHFA Mot. to Dismiss at 24-26 (collecting cases). This concession is dispositive because, despite Plaintiff's self-serving characterizations, the claims are derivative, not direct. *See id*. at 26 n.19.

First, Plaintiff does not dispute that all of its claims are based on an alleged injury to its stock value. *See* Opp. at 61 (Third Amendment "destroyed the value of its investment" in preferred stock); Compl. ¶¶ 13, 19, 69, 74, 135. But courts universally hold that "shareholders cannot sue in their own names and on their own behalf to recover for a loss resulting from depreciation of the value of their stock as the result of an injury to the corporation." 12B Fletcher Cyc. Corp. § 5913.[16] Reduction in stock value is an "*indirect* injury" that is contingent upon an injury to the company itself; "[i]t does not arise out of any independent or direct harm to

[16] *See, e.g.*, *Winer Family Trust v. Queen*, 503 F.3d 319, 338 (3d Cir. 2007) (claim derivative where alleged misconduct "ultimately resulted in a diminution in value of [company] stock"); *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) ("Injury to the 'use and enjoyment' of [plaintiff]'s stock or investment merely alleges depreciation of stock value, an indirect result of the injury to [the company] … . That is the language of derivative claims.").

the stockholders, individually." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1037 (Del. 2004) (emphasis in original).[17] Thus, where—as here—alleged wrongdoing "deplete[d] corporate assets that might otherwise [have] be[en] used to benefit the stockholders, such as through a dividend," the claims are derivative because the wrongdoing "harms the stockholders only derivatively so far as their stock loses value." *Protas v. Cavanagh*, No. CIV.A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012) (citing *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006)). Plaintiff simply has no response to this principle.

Second, Plaintiff's claims plainly are derivative under Delaware's *Tooley* test. To answer the first *Tooley* prong—which asks "who suffered the alleged harm (the corporation or the suing stockholders, individually)"?—the Court need look no further than Plaintiff's own complaint, which alleges that the Third Amendment "*plainly harms*, rather than promotes, the soundness and solvency" of the Enterprises, puts the Enterprises in a "worse position," and is "detriment[al]" to the Enterprises. Compl. ¶¶ 77, 83, 99 (emphasis added). Indeed, Plaintiff's entire theory of the case is that the Third Amendment allegedly depletes the Enterprises' assets, thereby leaving no money to distribute to shareholders via dividends and liquidation preferences. Because Plaintiff cannot "prevail without showing an injury to the corporation[s]"—indeed, it *alleges* injury to the corporations—Plaintiff's claims are derivative. *Tooley*, 845 A.2d at 1036.

Plaintiff's claims also fail under the second *Tooley* prong, by which a claim is direct only

[17] The Enterprises are federally chartered entities whose corporate practices are governed by federal law and, to the extent not inconsistent with federal law, Delaware law (Fannie Mae) and Virginia law (Freddie Mac). *See* Opp. at 60 n.13 (citing bylaws). Accordingly, for purposes of the present motion only, FHFA assumes—without conceding—that Delaware's *Tooley* test (and similar Virginia law) is not inconsistent with federal law, and thus could apply here. However, serious questions abound concerning whether Plaintiff's state law claims—which seek to impose duties on the Conservator inconsistent with its determination of the best interests of the Enterprises or FHFA (12 U.S.C. § 4617(b)(2)(J))—are preempted in their entirety by federal law.

if the relief sought "flows directly to the stockholders, not to the corporation." *Id.*; *see also Big Lots Stores, Inc. v. Bain Capital Fund VII, LLC*, 922 A.2d 1169, 1179 (Del. Ch. 2006) (claim is direct only where "no relief flows to the corporation"). Here, the relief sought—namely, vacating the Third Amendment and returning its resulting dividends from Treasury to the Enterprises (or applying those dividends towards the liquidation preference owed to Treasury) (Compl. ¶ 167)—would flow first and foremost to the Enterprises.[18]

Plaintiff's derivative claims also are barred by Section 4617(f). Every court that has addressed shareholder derivative claims under HERA has held that "allowing plaintiffs to continue to pursue derivative claims independent of FHFA would require this Court to take action that would 'restrain or affect' FHFA's discretion, which HERA explicitly prohibits." *See In re Fannie Mae Sec. Derivative ERISA Litig.*, 629 F. Supp. 2d 1, 4 n. 4 (D.D.C. 2009), *aff'd sub nom. Kellmer*, 674 F.3d 848 (quoting 12 U.S.C. § 4617(f)).[19] Indeed, allowing Plaintiff to pursue such claims would unlawfully permit private parties, separate and apart from the Conservator, to control, direct, manage, and dispose of claims belonging to the Enterprises.

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[18] Plaintiff's suggestion that their claims fit into a narrow Delaware-law exception by which shareholders can assert both direct *and* derivative claims is incorrect. *See* Opp. at 63 (citing *Gentile*, 906 A.2d 91). That exception applies only where (a) the company issues excessive shares (not cash) to a majority shareholder without receiving assets of commensurate value in return, *and* (b) that share issuance increases the majority shareholders' voting power to the detriment of the minority shareholders. *See Gentile*, 906 A.2d at 99-100. Neither of these elements is present here, and courts do not apply the *Gentile* exception where the "allegations rest solely on a purported loss in the economic value of [plaintiff's] ownership stake rather than any loss of voting power." *E.g.*, *Innovative Therapies, Inc. v. Meents*, No. CIV.A. 12-3309, 2013 WL 2919983, at *5 (D. Md. June 12, 2013); *Protas*, 2012 WL 1580969, at *6; *Nikoonahad v. Greenspun Corp.*, No. C09-02242, 2010 WL 1268124, at *5 (N.D. Cal. Mar. 31, 2010).

[19] *See also Sweeney*, 2014 WL 4661983 at *9 ("to permit plaintiff to bring an action which the conservator has declined to bring would interfere with and potentially usurp precisely the powers granted to the FHFA by HERA") (internal quotation marks and citation omitted); *In re Freddie Mac Derivative Litig.*, 643 F. Supp. 2d 790, 799 (E.D. Va. 2009) ("allowing the [shareholder] plaintiffs to remain in this action would violate § 4617(f)"), *aff'd sub nom. Louisiana Mun. Police Employees Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. 2011); *Esther Sadowsky Testamentary Trust v. Syron*, 639 F. Supp. 2d 347, 351 (S.D.N.Y. 2009) ("maintenance of this suit would violate Section 4617(f) of HERA and cannot be permitted").

Such dual management of Enterprise assets necessarily would restrain or affect the Conservator and frustrate clear congressional intent.

C. No "Conflict-of-Interest" Exception Applies to Plaintiff's Claims

Plaintiff next contends that the Court should disregard HERA's plain language and adopt a "conflict-of-interest" exception to Section 4617(b)(2)(A)(i), the statute mandating that the Conservator succeeds to "all" shareholder rights under. But "no court has held that a conflict-of-interest exception applies to this provision" of HERA. *Sweeney*, 2014 WL 4661983 at *3. And for good reason: As the Eighth Circuit has ruled, "all means all," so the presence of the lone statutory exception permitting shareholders to participate in the distribution of liquidation proceeds precludes any implied exceptions. *See Hennepin Cnty*., 742 F.3d at 821-22. Thus, the Court should reject Plaintiff's invitation to be the first to create one.

The U.S. District Court for the District of Columbia recently considered—and rejected—an invitation to find and apply a conflict-of-interest exception to HERA where Fannie Mae shareholders brought similar, but not identical, claims against Treasury as those presented here. *See Sweeney*, 2014 WL 4661983 at *3-6. In *Sweeney*, as here, the shareholders alleged that the Conservator improperly favored Treasury's interests over those of the shareholders, and that Treasury forced Fannie Mae to "waste" its assets in contravention of the Conservator's mission. The court refused to apply a conflict-of-interest exception, finding that "no court has held a conflict-of-interest exception applies to [HERA]," and granted FHFA's motion to substitute the Conservator for the shareholders. *See id*. at *3 (noting that "the Court may not be empowered to authorize plaintiff to pursue litigation that the Conservator has declined to pursue").

Plaintiff bases its argument on the only two courts to have created and applied a conflict-of-interest exception under FIRREA. *See* Opp. at 64-68 (citing *First Hartford Corp. Pension*

Plan & Trust v. United States, 194 F.3d 1279 (Fed. Cir. 1999); *Delta Savs. Bank v. United States*, 265 F.3d 1017 (9th Cir. 2001)). But neither explained how it could imply an un-enacted exception into the statute when Congress already had "considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *See Johnson*, 529 U.S. at 58; *Hennepin Cnty.*, 742 F.3d at 821-22. Moreover, *First Hartford* and *Delta Savings* are readily distinguished, as each involved shareholder derivative claims being asserted while the failed financial institutions were in *receivership*, not conservatorship. Accordingly, the shareholder's contingent right to a liquidation preference had ripened. Not so here. *See supra* Section II.A.

Additionally, neither *First Hartford* nor *Delta Savings* is persuasive. Neither addressed or even considered the impact of the key statutory language—namely, the conservator or receiver's succession to "all rights … *of any stockholder*" of the institution, 12 U.S.C. § 1821(d)(2)(A) (emphasis added), and the bar on court action that would "restrain or affect the exercise of powers or functions" of the FDIC, 12 U.S.C. § 1821(j). *See also Sweeney*, 2014 WL 4661983 at *9 n.13 ("It is unclear how those [two] courts squared their decisions with the anti-injunction provision of FIRREA"). In *First Hartford*, the court relied heavily on the traditional derivative litigation concept, rooted in common law, that shareholders may be permitted to bring suit on behalf of the corporation "when the managers or directors of the corporation, perhaps due to a conflict of interest, are unable or unwilling to do so, despite it being in the best interests of the corporation." *First Hartford*, 194 F.3d at 1295 (discussing *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 95 (1991)). But HERA's succession provision wholly *eliminates* the distinction between shareholder interests on the one hand, and officer and director interests on the other—the conservator or receiver succeeds to *all* such interests. And HERA specifically provides that the Conservator alone "determines [what] is in the best interests" of the Enterprises. 12 U.S.C.

§ 4617(b)(2)(J)(ii). Together, these provisions vest all control over the corporation in the conservator alone, not between the conservator and any shareholder. The *First Hartford* and *Delta Savings* courts failed to acknowledge this principle or discuss the underlying provision.[20]

D. HERA's Maximum Liability Provision Limits Plaintiff's Liquidation Preference in Receivership

As Treasury has explained, Plaintiff's claims are unripe and Plaintiff overlooks the liability cap Section 4617(e) imposes. Treasury Mot. to Dismiss at 24. Plaintiff's responsive arguments fail, and its claims should be dismissed for the additional reason that they are unripe.

An Enterprise can be placed into conservatorship or receivership for many reasons. 12 U.S.C. § 4617(a)(3). Upon receivership (which can, but need not, follow conservatorship), all shareholder interests except claims for liquidation proceeds are statutorily terminated. *Id.* § 4617(a)(4)(d), (b)(2)(K)(i). Section 4617(e)(2) limits FHFA's liability to "the amount that [a] claimant would have received if the Agency had liquidated the assets and liabilities of the regulated entity" upon statutory default, which (if a receivership follows a conservatorship) is the inception of conservatorship. *See* 12 U.S.C. § 4617(e)(1) (maximum-liability provision applies "to a regulated entity in default or in danger of default"); *id.* § 4502(8)(A) ("default" includes "any … official determination by … the Agency [appoints] a conservator").[21]

Plaintiff responds that (1) the cap applies only if FHFA as receiver "decides" to create an LLRE, because subsection (e)(2) caps the Agency's liability at "the amount that such claimant

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[20] *Sweeney* criticized *Delta Savings* as "a significant expansion of what … *First Hartford* expressly warned was supposed to be a 'very narrow' holding." 2014 WL 4661983, at *4.

[21] *See also First Ind. Fed. Sav. Bank v. FDIC*, 964 F.2d 503, 507 (5th Cir. 1992) (longstanding "[c]ongressional policy requires . . . creditors of failed institutions [to] look only to the assets of the institution for recovery of their losses, and not to the taxpayers."); *Vill. S. Joint Venture v. FDIC*, 733 F. Supp. 50, 52 (N.D. Tex. 1990) (similar).

would have received if the Agency had liquidated the assets and liabilities of the regulated entity *without exercising the authority of the Agency [to create an LLRE],*"*see* Opp. at 70-71 (quoting 12 U.S.C. § 4617(e)(2)) (emphasis added by Plaintiff); and (2) the hypothetical liquidation is assumed to occur when the receiver is appointed, *see id*. at 71. Plaintiff misreads the statute on both counts. First, there is no "deci[sion]" to make—the creation of an LLRE is mandatory for an Enterprise in receivership. *See* 12 U.S.C. § 4617(i)(1)(A)(ii) (using the mandatory "shall"). Second, as explained above, both the statutory text and clear congressional policy indicate that the timing for the hypothetical liquidation is fixed at the moment the Conservator is appointed.

Thus, the creation of an LLRE does not trigger the maximum-liability provision's application or calculation, as Plaintiff erroneously suggests. Rather, the clause on which Plaintiff relies specifies that the hypothetical liquidation must be computed without regard to the creation of the LLRE. Indeed, the provision cannot be read as Plaintiff suggests because Section 4617(e)(1) specifies that the cap applies "*regardless of the method which the Agency determines to utilize* with respect to a regulated entity in default or in danger of default." 12 U.S.C. § 4617(e)(1). It applies to all methods "*including* transactions authorized under subsection (i)," but "including" clauses are illustrative, not restrictive. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994). Moreover, subsection (e)(2) mandates that the maximum-liability provision applies whether the Agency is "acting as receiver or *in any other capacity*." 12 U.S.C. § 4617(e)(2) (emphasis added). Plaintiff's reading cannot be squared with the text of the statute.

CONCLUSION

FHFA respectfully requests that the Court dismiss all claims with prejudice, or, in the alternative, transfer the action to the U.S. District Court for the District of Columbia or stay proceedings in this case pending resolution of the cases in that forum.

Dated: September 29, 2014

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the parties to this action by serving a copy upon each of the attorneys listed below on September 29, 2014, via CM/ECF.

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