IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ANTHONY R. EDWARDS, *et al.*,

Plaintiffs,

v.

DELOITTE & TOUCHE, LLP,

Defendant.

No. 1:16-cv-21221

THE FEDERAL HOUSING FINANCE AGENCY'S REPLY IN SUPPORT OF ITS MOTION TO SUBSTITUTE AS PLAINTIFF

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Plaintiffs' scattershot attempts to avoid the plain language of HERA fail. As Conservator, FHFA has succeeded to "all rights" of Fannie Mae and its stockholders, which includes any right Plaintiffs may have to pursue the claims at issue here. 12 U.S.C. § 4617(b)(2)(A)(i). Plaintiffs' effort to limit succession only to "derivative" (and not "direct") claims gets them nowhere because the claims are, in fact, derivative. Thus, even under Plaintiffs' analysis, Plaintiffs' claims were transferred to the Conservator. Moreover, Plaintiffs' proposed interpretation of § 4617(b)(2)(A) is wrong. By its plain and unambiguous terms, HERA transferred "all" shareholder rights to the Conservator without exception, not just the right to pursue derivative claims when there is no purported "conflict of interest." HERA attributes shareholder claims to FHFA for a reason: namely, that FHFA as Conservator is far better positioned than individual shareholders to consider all the ramifications of commencing a lawsuit against third parties, including Fannie Mae's auditor. Accordingly, the Court should substitute the Conservator as the sole plaintiff in this case.

ARGUMENT

I. THE COURT SHOULD SUBSTITUTE FHFA, FANNIE MAE'S CONSERVATOR, IN PLACE OF THE SHAREHOLDER PLAINTIFFS

A. Plaintiffs' Claims Are Derivative, Not Direct

Though Plaintiffs dedicate much of their brief to arguing that HERA does not transfer to the Conservator the ability of shareholders to pursue purportedly "direct claims" (Opp. 5-10), the Court need not reach that issue because Plaintiffs' claims are derivative, not direct. Plaintiffs do not—and cannot—dispute that the Conservator succeeds (at least) to all shareholder such claims.

Plaintiffs' claims are derivative because they are premised upon alleged harm to Fannie Mae. *See* FHFA Mot. 10-16. To state a direct (non-derivative) claim, Plaintiffs must at least allege that they "suffered a harm that was unique to them and independent of any injury to the corporation." *Gentile v. Rossette*, 906 A.2d 102-03 (Del. 2006); *see also Protas v. Cavanagh*, No. Civ.A. 6555, 2012 WL 1580969 at *6 (Del. Ch. May 4, 2012) (deeming claim derivative because the "claim is entirely dependent on the harm caused to the [company] by the alleged overpayment"). They have not done so here.

Plaintiffs do not dispute that the claims in their own complaint are based on a litany of allegations of harm to Fannie Mae. *See, e.g.*, Compl. ¶¶ 37-38, 40-42; Opp. 13 (asserting Plaintiffs' belief that the Third Amendment "injured Fannie"). Nor can they. At its core,

Plaintiffs' complaint contends that Fannie Mae's net worth was improperly stripped out through the execution of the Third Amendment. Compl. ¶¶ 31-43; *see also, e.g.*, Compl. ¶ 31 (noting amendment "so that Treasury had the right to take the entire positive net worth of Fannie Mae each quarter in perpetuity"), ¶ 33 ("[P]ursuant to the Net Worth Sweep, Fannie Mae paid a total of *$142.5 billion* to Treasury."). These are quite obviously harms to Fannie Mae, and the alleged harm to Plaintiff shareholders is purely derivative of that harm to the corporation.

Nor do Plaintiffs dispute that their claims are based purely on an alleged reduction in the "value" of their shares. *See* Compl. ¶¶ 5, 6, 31-32, 38-40, 68, 71-72, 97, 109. Reduced share value based on reduced corporate equity is a quintessential characteristic of a derivative claim. *See, e.g.*, *Feldman v. Cutaia*, 956 A.2d 644, 657 (Del. Ch. 2007) (citing "general rule that equity dilution claims are solely derivative"), *aff'd*, 951 A.2d 727 (Del. 2008); *see also* FHFA Mot. 12.[1]

Plaintiffs' primary argument is that the claims against Deloitte fit within a narrow exception under Delaware law whereby a certain type of shareholder claim may be "both derivative and direct in character." *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006); *see* Opp. 12-16.[2] But that exception applies only where (a) the company issues excessive shares to a third-party controlling shareholder without receiving assets of commensurate value in return, and (b) the share issuance increases that shareholder's voting power to the detriment of the minority shareholders. *See id.* at 100 (citing "improper transfer—or expropriation—of economic value and voting power"); *Gatz v. Ponsoldt*, 925 A.2d 1265, 1279 (Del. 2007) (citing expropriation of "value and voting power" of shares); *In re Tri-Star Pictures, Inc.*, 634 A.2d 319, 330 (Del. 1993) (citing "claim of stock dilution and a corresponding reduction in a stockholder's voting power").

The narrow *Gentile* exception has no application here. First, Plaintiffs' claims against Deloitte do not fit the *Gentile* scenario. The only transaction Plaintiffs attempt to squeeze into the *Gentile* exception is the execution of the Third Amendment. Opp. 12-16. However,

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1 Plaintiffs' causation theory also confirms that their claims are derivative, as the alleged harms suffered by Plaintiffs and caused by Deloitte flows through Fannie Mae—specifically the prevention of Fannie Mae's exit from conservatorship. *See* Compl. ¶¶ 95, 98.

2 *See Thermopylae Capital Partners, L.P. v. Simbol, Inc.*, No. CV 10619, 2016 WL 368170, at *10 (Del. Ch. Jan. 29, 2016) (describing "limited exception" to rule that "[c]laims based on diminution in value of the stock held by plaintiffs are generally derivative in nature"); *Halpert v. Zhang*, No. CV 12-1339, 2015 WL 1530819, at *3 n.1 (D. Del. Apr. 1, 2015) (describing "narrow exception").

Plaintiffs do not and cannot allege that Deloitte executed the Third Amendment—FHFA and Treasury did. *See* Compl. ¶¶ 31-43. Rather, Plaintiffs allege Deloitte assisted Treasury, FHFA, and Fannie Mae by issuing unqualified audit opinions on Fannie Mae's purportedly misstated financial statements at various points during the conservatorship period.[3] Because the actual allegations of misconduct against Deloitte do not resemble in any way a company's unfair issuance of excessive shares to a controlling shareholder, the *Gentile* exception is inapplicable.

Second, an essential element of the exception is missing because Treasury is not a controlling shareholder of Fannie Mae. Treasury does not own a majority of Fannie Mae's voting shares, and does not exercise actual control over its affairs. *See Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987).[4] Its rights as a senior preferred shareholder are entirely contractual under the PSPAs. Plaintiffs argue that certain of those rights make Treasury a controlling shareholder (Opp. 11), but even "a significant shareholder, who exercises a duly-obtained contractual right that somehow limits or restricts the actions that a corporation otherwise would take, does not become, without more, a controlling shareholder for that particular purpose." *Superior Vision Servs. v. ReliaStar Life Ins. Co.*, No. Civ.A. 1668-N, 2006 WL 2521426, at *5 (Del. Ch. 2006). This alone is sufficient to reject application of the *Gentile* exception. *See, e.g.*, *Thermopylae Capital* 2016 WL 368170, at *13-14 (dismissing where facts alleged did not demonstrate dilution was performed by "controlling shareholder").

Third, even if there were allegations that Deloitte played a role in the Third Amendment—and there are not—the exception still would not apply because the Third Amendment did not result in the issuance of any additional shares to Treasury, let alone "excessive" shares. Nor did it affect any Treasury voting rights because Treasury has no voting

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3 *See, e.g.,* Compl. ¶ 28 (alleging Deloitte provided false certifications "for the audit years 2008-2012"); *id.* ¶ 49 (alleging "Deloitte's audits of Fannie Mae's financial statements were negligently performed for the audit years 2008-2013"); *id.* ¶¶ 53-76 (alleging Deloitte "manipulat[ed]" Fannie Mae's deferred tax assets beginning in "the fall of 2008" through 2013); *id.* ¶ 82 (alleging Deloitte improperly certified loan loss reserves from 2008 to 2013).

4 That Treasury holds warrants to purchase common stock and contractual rights of refusal over the issuance of stock or debt does not establish control of the GSEs. An alleged "potential ability to exercise control" does not suffice to create a fiduciary duty; the plaintiff must instead plead and show "the actual exercise of that ability." *In re Sea-Land Corp. S'holders Litig.*, Civ. A. No. 8453, 1987 WL 11283, at *5 (Del. Ch. May 22, 1987).

rights. As for the non-Treasury shareholders, the Third Amendment did not affect their ownership stakes or voting rights in any way. The Third Amendment only altered the way Treasury's dividends are calculated under the PSPAs. Accordingly, the Third Amendment did not alter the percentage of Fannie Mae shares outstanding that Treasury owns, or decrease the percentage owned by private investors. *See Innovative Therapies, Inc. v. Meents*, No. 12–3309, 2013 WL 2919983, at *5 (D. Md. June 12, 2013) (declining to apply *Gentile* exception where, as here, the "allegations rest solely on a purported loss in the economic value of [plaintiff's] ownership stake rather than any loss of voting power"); *Nikoonahad v. Greenspun Corp.*, No. C09-02242, 2010 WL 1268124, at *5 (N.D. Cal. Mar. 31, 2010) (same).[5]

Finally, even if Plaintiffs' claims could be considered "dual-natured" in that they have derivative and direct characteristics, the Conservator still succeeded to such claims. The same authorities relied upon by Plaintiffs confirm that "dual-natured claim[s]" should be treated as derivative in certain respects, including for threshold issues of "claim initiation." *See In re El Paso Pipeline Partners, L.P. Derivative Litig.*, 132 A.3d 67, 75 (Del. Ch. 2015). This approach "achieves the important goals of screening out weak claims and providing an efficient and centralized mechanism for conducting the litigation." *Id.*

Because Plaintiffs' claims are derivative, not direct, they fit squarely within the well-established body of cases substituting the Conservator in place of shareholder plaintiffs.

B. There is No Direct-Claims Exception to HERA

In any event, Plaintiffs' effort to limit HERA's succession provision to only derivative claims is wrong. *See* Opp. 5-10. The Conservator succeeded, without exception, to "all rights" of Fannie Mae's shareholders, including Plaintiffs' purportedly direct claims.

1. HERA's Plain Text Does Not Support a Direct-Claims Exception

Even if Plaintiffs' claims could be properly construed as direct, the Court nonetheless should grant the Conservator's motion to substitute. "As many courts have recognized, the language 'all rights, titles, powers, and privileges . . . of any stockholder' is *extremely broad* and

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[5] In citing *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50 (2012), appeal docketed, Case Nos. 15-5103, 15-5133 (Fed. Cir. Aug. 14, 2015) (*see* Opp. 14), Plaintiffs overlook a key distinction—that that case did not concern an entity in conservatorship. Further, the plaintiffs in *Starr* alleged that new shares were issued that diluted the plaintiffs' shares, another critical element missing from Plaintiffs' allegations here.

evidences Congress's intent 'to shift as much as possible to the FHFA.'" *Pagliara v. Fed. Home Loan Mortgage Corp.*, No. 1:16cv337, 2016 WL 4441978, at *5 (E.D. Va. Aug. 23, 2016) (emphasis added) (quoting *In re Fed. Nat'l Mortg. Assoc. Sec., Derivative, & ERISA Litig.*, 629 F. Supp. 2d 1, 3 (D.D.C. 2009) ("*In re Fannie Mae*")). "In other words, the language means what it plainly says; HERA transferred 'all rights previously held by [Fannie Mae]'s shareholders'" to the Conservator. *Id.* (quoting *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 795 (E.D. Va. 2009) ("*In re Freddie Mac*")); *see also Montgomery Cty. Comm'n v. FHFA*, 776 F.3d 1247, 1255 (11th Cir. 2015) (applying "straightforward interpretation" of HERA's exemption from "all taxation" as providing an "exempt[ion] from *all* state taxation") (emphasis in original).[6]

Plaintiffs argue that the language "with respect to [the Enterprises] and the assets of [the Enterprises]" somehow limits HERA's succession provision only to shareholders' right to pursue derivative claims. *See* Opp. 6, 8. But Plaintiffs offer no textual support for this argument and none exists. "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (internal quotation marks and citation omitted). Here, as one court recently observed when addressing the very same statutory provision, "[t]he Court must enforce [it] as written because the statute has a plain meaning that is not absurd." *Pagliara*, 2016 WL 4441978, at *5. Accordingly, the phrase in HERA "'[w]ith respect to' plainly means 'about or concerning' or 'relating to.'" *Id.* at *7. Indeed, as *Pagliara* court rightly observed, "it would strain any reasonable interpretation" of HERA to conclude that the phrase "with respect to the regulated entity and [its] assets" carves out any shareholder rights—in that case, the right to inspect Freddie Mac's books and records—from HERA's succession provision. *Id.* So too here: the alleged shareholder rights Plaintiffs

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[6] HERA provides only one exception to the transfer of shareholder rights: following appointment of a receiver, Fannie Mae shareholders are permitted to prosecute claims they may have to liquidation proceeds. *See* 12 U.S.C. § 4617(b)(2)(K)(i)). The existence of this lone, express exception prohibits courts from creating any additional, implicit exceptions. *See United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.").

seek to vindicate indisputably concern or relate to Fannie Mae and its assets. Plaintiffs specifically allege the Conservator "manipulat[ed] the books of Fannie Mae to overstate its losses and understate its *assets* by hundreds of billions of dollars with Deloitte's participation and endorsement." Compl. ¶ 5 (emphasis added). And Plaintiffs further allege that the Conservator and Treasury improperly executed the Third Amendment, which allegedly harmed Plaintiffs by transferring Fannie Mae's *assets* to Treasury. *Id.* ¶¶ 31-43.

Plaintiffs rely heavily on *Levin v. Miller*, 763 F.3d 667 (7th Cir. 2014) to argue for a direct-claims exception. Opp. 7-10. But the suggestion in *Levin* that a conservator's succession to "all rights" of a stockholder would not extend to direct claims was not an issue of contention in that litigation. Indeed, the parties in that case did not even brief the issue. *See* 763 F.3d at 672. The only judicial exploration of the issue in *Levin* was Judge Hamilton's persuasively reasoned concurrence. As Judge Hamilton correctly concluded, FIRREA's succession language cannot be read as limited in application to derivative claims:

> It is not obvious to me that the language must be interpreted so narrowly, nor did the cases cited at page 2 of the opinion confront this issue or require that result. ***The FDIC [as conservator or receiver] can already pursue what would be a derivative claim because the claim really belongs to the failed depository institution itself.*** So what does the language referring to "the rights . . . of any stockholder" add to the meaning and effect of the statute? The doctrine that statutes should not be construed to render language mere surplusage is not absolute, but it weighs in favor of a broader reach that could include direct claims. If "rights . . . of any stockholder" was meant to refer only to derivative claims, it's a broad and roundabout way of expressing that narrower idea.

Id. at 673 (Hamilton, J., concurring) (emphasis added).

In the recent *Pagliara* decision, the court followed this approach, holding that, under HERA, the Conservator succeeds to all shareholder rights, even those rights that are "enforceable through a direct lawsuit, not a derivative lawsuit"—such as the right to inspect books and records and the right to vote to elect directors. *See Pagliara*, 2016 WL 4441978, at *6. In so doing, the court expressly followed the rationale of Judge Hamilton's concurrence. *See id.* at *7. The

Court should follow the same approach here and order the Conservator substituted for Plaintiffs, irrespective of whether Plaintiffs' claims could be characterized as direct or derivative.[7]

2. *Lubin* Does Not Foreclose Substitution of the Conservator

Contrary to Plaintiffs' arguments (Opp. 6-7), the Eleventh Circuit's decision in *Lubin v. Skow*, 382 F. App'x 866 (11th Cir. 2010) (per curiam)—an unpublished, and therefore non-binding decision (*see* 11th Cir. R. 36-2, I.O.P. 6-7)—does not prohibit substitution in this case.

First, although the *Lubin* court made a passing statement that "FIRREA would not be a bar to standing" if the shareholder had asserted direct claims, that statement was pure dicta because the court held that *all* of the claims asserted against the individual officers of the institution in receivership were derivative, not direct. *See* 382 F. App'x at 871.[8] Indeed, the issue of whether FIRREA's succession provision extends to all shareholder claims (including direct claims) was not argued in that case, and it appears no party even briefed the issue.

Second, the only authority cited by *Lubin* in support of its statement was *FDIC v. Jenkins*, 888 F.2d 1537 (11th Cir. 1989). But the *Jenkins* decision is even further afield: it does not cite, quote, or otherwise address FIRREA's analogous succession provision, which is unsurprising since that provision was not at issue, and had only been enacted three months prior to the Court's decision in late 1989. *See id.* at 1538 n.1. In *Jenkins*, the FDIC as receiver was appointed several years before FIRREA's enactment, and had acquired all claims belonging to the failed institution (not its shareholders) via a *contract* (a purchase and assumption agreement), not through any statutory succession provision.

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[7] Contrary to Plaintiffs' argument, there is nothing about *Kellmer v. Raines*, 674 F.3d 848, 850-51 (D.C. Cir. 2012), or any motion filed in that litigation, that is "inconsistent" with the Conservator's position here. *See* Opp. 8. That the Conservator, more than eight years ago, opted not to exercise its substitution rights with respect to one particular claim presented by one particular plaintiff in one particular litigation in no way suggests FHFA did not have the right to seek substitution had it wished to do so. Nor did the *Kellmer* court suggest any limitation on FHFA's statutory substitution rights. To the contrary, in light of the breadth of HERA's succession provision, the *Kellmer* court granted substitution as to all the claims for which FHFA requested it. 674 F.3d at 850-51.

[8] *See Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 762 (11th Cir. 2010) (dicta includes statements "not necessary to the decision of an appeal given the facts and circumstances of the case"); *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010) ("dicta is not binding on anyone for any purpose")

Third, *Lubin* focused on an issue not presented here—how to determine the nature of claims against individual defendants who had overlapping roles as officers of the institution in receivership, and officers of a holding company that owned that institution in receivership. *Id.* at 869. While the court held that all of the claims asserted against solely officers of the institution in receivership were derivative (*id.* at 870-71), the court also noted that the FDIC would not succeed to the rights of the holding company-owner against its *own* officers for alleged breaches of fiduciary duty owed *to the holding company*. *Id.* at 872 n.9. Here, Fannie Mae has no holding company. Nor is FHFA an officer of any shareholder of Fannie. Rather, the complaint alleges that FHFA as Conservator allegedly breached fiduciary duties owed *to Fannie Mae*. *See* Compl. ¶¶ 111-12. Like the claims asserted against the bank officers in *Lubin*, the claims in this case are derivative. *See supra* Sec. I(B).[9]

Contrary to Plaintiffs' assertion, there is no controlling Eleventh Circuit precedent interpreting FIRREA's analogous succession provision. The Court therefore can, and should, follow the approach outlined in *Pagliara*, and interpret HERA according to its plain terms as transferring to the Conservator all rights of Fannie Mae's stockholders during conservatorship.

3. Interpreting HERA Consistent with its Plain Language Does Not Raise Constitutional Concerns

Plaintiffs argue that interpreting HERA to mean that the Conservator succeeds to "all" shareholder claims, even if such claims could be considered direct, would raise constitutional concerns. Opp. 9-10. But the doctrine of constitutional avoidance has no application in this case because it "is a tool for choosing between competing plausible interpretations of a provision," *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (citation and internal quotation marks omitted), and "has no application in the absence of statutory ambiguity," *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 494 (2001). Here, there is *no* ambiguity in HERA's succession provision, and thus no need to seek out an alternative interpretation to avoid purported constitutional concerns. *See Pagliara*, 2016 WL 4441978, at *7-8 (holding the court

[9] This Court's decision in *Official Comm. of Unsecured Creditors of BankUnited Fin. Corp. v. FDIC*, No. 11-20305-CIV, 2011 WL 10653884 (S.D. Fla. Sept. 28, 2011) ("*BankUnited*"), is similarly inapt. Like the Eleventh Circuit's decision in *Lubin*, *BankUnited* focused on claims against individuals with overlapping roles as officers of the bank in receivership and the holding company-owner of that bank, and the issue of whether FIRREA's succession provision extends to all shareholder claims was not argued or briefed.

"need not resort to the interpretive cannon of constitutional avoidance here because HERA is not ambiguous within the context of this case") (internal citations omitted). This Court should follow the same approach here. Indeed, "[i]t is a slippery slope for the Court to poke holes in, or limit, the plain language of a statute, especially when, as here, the plaintiffs have not asked the Court to weigh in on the statute's constitutionality." *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 232 (D.D.C. 2014).

C. There Is No "Conflict of Interest" Exception to HERA

Plaintiffs argue that, even if the Conservator is found to have succeeded to the right to pursue the claims at issue in this case, the Conservator would not be able to pursue those claims because of an alleged conflict of interest. Opp. 16-19. But there is simply no "conflict of interest" exception to HERA's succession provision, and no court has ever applied one. Plaintiffs point to nothing in HERA to suggest that Congress limited the Conservator's succession to "all rights, titles, powers, and privileges" of the shareholders and the Enterprises. Instead, they rely on two inapplicable, out-of-circuit decisions that have manufactured a conflict-of-interest exception for FDIC receiverships—not conservatorships. Opp. 17 (discussing *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1295-96 (Fed. Cir. 1999) and *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021-23 (9th Cir. 2001)).

The court in *Perry Capital* rightly rejected any application of those decisions to FHFA under HERA. The court explained that those cases were wrongly decided because they improperly relied on the historic rationale for shareholder derivative actions while disregarding the statutory language of FIRREA (and HERA) that bars such actions in these circumstances. 70 F. Supp. 3d at 231. Additionally, *First Hartford* and *Delta Savings* involved receiverships, and their flawed rationale "makes still less sense in the conservatorship context." *Id.* at 231 n.30. Accordingly, there is no basis for creating "an *implicit* end-run around FHFA's conservatorship authority by means of the shareholder derivative suits that the statute explicitly bars." 70 F. Supp. 3d at 231. Other courts are in accord. *See Pagliara*, 2016 WL 4441978, at *9 n.20 (rejecting as "not persua[sive]" the identical conflict of interest argument asserted by shareholder against FHFA as Conservator); *Gail C. Sweeney Estate Marital Trust on behalf of Fed. Nat'l Mortgage Ass'n v. United States Treasury Dep't*, 68 F. Supp. 3d 116, 119 (D.D.C. 2014) (observing "no court has held that a conflict-of-interest exception applies to this [HERA]

provision" and criticizing *First Hartford* and *Delta Savings* as "unclear [on] how those courts squared their decisions with the anti-injunction provision of FIRREA").[10]

No court has ever applied a conflict-of-interest exception to HERA. This Court should reject Plaintiffs' invitation to be the first.

D. Permitting Plaintiffs to Continue to Pursue the Claims Would Violate Section 4617(f), HERA's Jurisdiction-Withdrawal Provision

Plaintiffs make no attempt to address the numerous cases holding that to permit a shareholder to pursue claims during conservatorship would run afoul of Section 4617(f), as it would "restrain or affect" the exercise of the Conservator's powers and functions. *See* FHFA Mot. 16-17 (citing *Sweeney Estate Marital Tr.*, 68 F. Supp. 3d at 119; *Sadowsky*, 639 F. Supp. 2d at 350; *In re Fannie Mae*, 629 F. Supp. 2d at 4 n.4; *In re Freddie Mac*, 643 F. Supp. 2d at 797). Instead, Plaintiffs merely repackage their arguments in favor of a direct-claims exception and conflict-of-interest exception as arguments against Section 4617(f). *See* Opp. 19. These arguments fail for the same reasons described above. Plaintiffs also argue that Section 4617(f) is inapplicable because it may not bar claims for money damages. *Id.* at 20. But whether Section 4617(f) bars claims against FHFA or the Enterprises for money damages is a different issue from whether Section 4617(f) bars a shareholder's ability to pursue claims based on his status as a shareholder, notwithstanding the Conservator's succession to those claims. It is in the latter context that numerous courts have held Section 4617(f) does, in fact, bar such shareholder claims. Plaintiffs have no answer to these authorities. Accordingly, the Court may grant the Conservator's motion to substitute on this basis alone.

CONCLUSION

The Court should substitute FHFA as Conservator in place of Plaintiffs.

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[10] Indeed, it would be odd if "a statute like HERA, through which Congress grants immense discretionary power to the conservator, § 4617(b)(2)(A), and prohibits courts from interfering with the exercise of such power, § 4617(f), would still house an implicit end-run around FHFA's conservatorship authority by means of the shareholder derivative suits that the statute explicitly bars." *Perry Capital*, 70 F. Supp. 3d at 230-31. The very point of a derivative action is to permit shareholders to assert the corporation's interests where managers or directors have a conflict that prevents them from doing so. "[T]he existence of a rule against shareholder derivative suits, § 4617(b)(2)(A)(i), indicates that courts cannot use the rationale for why derivative suits are available to shareholders as a legal tool—including the conflict of interest rationale—to carve out an exception to that prohibition. . . . Such an exception would swallow the rule." *Id.*

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on August 29, 2016, a true and correct copy of the foregoing was filed electronically using the Court's CM/ECF system, causing a true and correct copy to be served on all counsel of record. I also served the following counsel of record via e-mail:

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