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

ANTHONY R. EDWARDS, *et al.*,

Plaintiffs,

v.

PRICEWATERHOUSECOOPERS, LLP,

Defendant.

No. 1:16-cv-21224

THE FEDERAL HOUSING FINANCE AGENCY'S RENEWED MOTION TO SUBSTITUTE AS PLAINTIFF AND SUPPORTING MEMORANDUM OF LAW

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INTRODUCTION

The Federal Housing Finance Agency ("FHFA" or the "Conservator"), as Conservator of the Federal Home Loan Mortgage Corporation ("Freddie Mac"), hereby renews its motion, pursuant to Local General Rule 7.1, for an order substituting the Conservator in the place of the shareholder plaintiffs in this action. When it was appointed as Conservator, FHFA "immediately succeed[ed] to . . . all rights, titles, powers, and privileges of [Freddie Mac], *and of any stockholder*" of Freddie Mac. 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added). In this case, Plaintiffs seek to assert their alleged rights as shareholders of Freddie Mac. But under the governing statutes, FHFA—not Plaintiffs—holds any and all such rights during conservatorship. As such, Plaintiffs lack standing to bring this suit and the Conservator is the only proper plaintiff. The Court thus should grant FHFA's motion to substitute.

Plaintiffs' suit challenges the federal government's response to the most serious economic crisis in generations, and PricewaterhouseCoopers, LLP's ("PwC") alleged role in that response. FHFA was created by Congress in the wake of a national crisis in the U.S. housing market in 2008 as an independent federal agency, to supervise and regulate Freddie Mac, the Federal National Mortgage Association ("Fannie Mae") and certain other government-sponsored enterprises. During the fall of 2008, FHFA concluded that Freddie Mac and Fannie Mae were at risk of failure. Given Freddie Mac and Fannie Mae's role in the national economy, and the systemic danger their potential collapse posed, FHFA's Director placed them into conservatorship on September 6, 2008. Soon thereafter, the Conservator and the U.S. Department of Treasury ("Treasury") entered into Preferred Stock Purchase Agreements ("PSPAs"), which made available to Freddie Mac and Fannie Mae a lifeline of hundreds of billions of dollars in capital.

In the complaint, Plaintiffs allege the Conservator and Treasury improperly amended the PSPAs via the so called Third Amendment, which exchanged a fixed 10% dividend and periodic commitment fee for a variable dividend equal to Freddie Mac's net worth. *See* Compl. ¶¶ 31-43. Plaintiffs allege the Third Amendment harmed Freddie Mac and Plaintiffs' interests as shareholders. *Id.* ¶¶ 31-32, 37-42. Plaintiffs allege the Conservator breached fiduciary duties owed to Freddie Mac, and that PwC, Freddie Mac's independent auditor, allegedly aided and abetted those breaches. *Id.* ¶¶ 110-16. Additionally, Plaintiffs allege PwC violated federal auditing standards and prolonged the conservatorship in issuing unqualified audit reports on Freddie Mac's financial statements, which reports Plaintiffs allege constituted negligent misrepresentations. *Id.* ¶¶ 44-109.

Though the complaint is obviously premised upon a litany of alleged wrongdoing by the Conservator and Treasury, Plaintiffs have strategically elected not to sue those parties, but instead have asserted claims in this complaint solely against PwC.[1] But Plaintiffs' complaint, at its core, is a shareholder challenge to the Third Amendment, and it therefore raises factual and legal issues that are materially identical to the issues raised in other lawsuits already filed by other Freddie Mac (and Fannie Mae) shareholders against the Conservator and Treasury that likewise challenge the Third Amendment. The two cases that have been decided both held that Freddie Mac and Fannie Mae shareholders lack standing to pursue such claims. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014), *appeal pending* No. 14-5243 (D.C. Cir.); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n. 6 (S.D. Iowa 2015).

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[1] Plaintiffs also have filed a nearly identical action against Deloitte & Touche, LLP, the independent auditor for Fannie Mae. *See Edwards v. Deloitte & Touche, LLC*, No. 1:16-cv-21221 (S.D. Fla. removed Apr. 6, 2016).

This Court should substitute FHFA as Conservator in place of these shareholder Plaintiffs.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Freddie Mac, Fannie Mae, and the Housing and Economic Recovery Act of 2008

Freddie Mac, along with Fannie Mae (together, the "Enterprises"), is a federally-created enterprise that facilitates liquidity and efficiency in the housing market by purchasing loans from mortgage lenders, thereby freeing up capital for additional mortgage lending. In July 2008, in the wake of a national crisis in the U.S. housing market, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (July 30, 2008); *see* Compl. ¶ 20. HERA created FHFA, an independent federal agency, to supervise and regulate Freddie Mac, Fannie Mae, and certain other government-sponsored enterprises. 12 U.S.C. § 4501 *et seq*. HERA also granted FHFA's Director authority to place Freddie Mac and Fannie Mae in conservatorship or receivership in specific circumstances. *See* 12 U.S.C. § 4617(a).

B. FHFA is Appointed Statutory Conservator of Freddie Mac and Fannie Mae, Succeeding by Operation of Law to All Rights of the Enterprises and Their Shareholders

In September 2008, shortly after enactment of HERA and at a time when the national housing market was deteriorating, the Director of FHFA placed both of the Enterprises into conservatorships "for the purpose of reorganizing, rehabilitating, or winding up the[ir] affairs." 12 U.S.C. § 4617(a)(2); *see also* Compl. ¶ 21. Both Enterprises remain in conservatorships.

As Conservator, FHFA, "by operation of law, immediately succeed[ed] to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated

entity." 12 U.S.C. § 4617(b)(2)(A)(i). The Conservator is responsible for the conduct of all aspects of each Enterprise's business and affairs, and HERA authorizes it 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." *Id.* § 4617(b)(2)(D). FHFA as Conservator thus enjoys full authority to "operate the regulated entity" and "conduct all business of the regulated entity." *Id.* § 4617(b)(2)(B)(i). HERA bars courts from granting any relief that would "restrain or affect" conduct undertaken within the Conservator's expansive powers and functions. *Id.* § 4617(f).

Shortly after becoming Conservator, FHFA entered into the PSPAs with Treasury. *See* Compl. ¶ 22. Under the PSPAs, Treasury agreed to provide hundreds of billions of dollars for the Enterprises' continued operations. In exchange, the PSPAs granted Treasury a comprehensive package of rights, including: (1) a senior liquidation preference of $1 billion for each Enterprise, plus the amount of funds drawn from Treasury; (2) warrants to acquire 79.9% of the Enterprises' common stock for a nominal payment; (3) payment from each Enterprise of a mandatory dividend in the amount of 10% per year of the total amount of funds Treasury provided (or, if the Enterprises fail to pay the dividend, 12% per year added to the Enterprises' outstanding liquidation preference); and (4) a periodic commitment fee ("PCF") "intended to fully compensate" taxpayers for the continuing Treasury commitment of hundreds of billions of dollars of taxpayer funds.[2]

Both Freddie Mac and Fannie Mae took their first Treasury draws shortly after their placement in conservatorships, and to date, they have drawn more than $187 billion in funds

[2] The PSPAs and each of their amendments are publicly available on FHFA's website at www.fhfa.gov/conservatorship/pages/senior-preferred-stock-purchase-agreements.aspx.

from Treasury to cure negative net worth positions and avoid mandatory receivership under HERA. Freddie Mac has drawn approximately $71.3 billion in funds from the Treasury commitment. *See* Compl. ¶ 27. Both Enterprises have also paid dividends to Treasury pursuant to the PSPAs. *Id.* ¶ 33.

On August 17, 2012, FHFA and Treasury executed a third amendment to the PSPAs ("the Third Amendment") to (1) replace the annual, fixed-rate 10% cash dividend with a variable quarterly dividend equal to the net worth of the Enterprises, minus a prescribed capital reserve, and (2) waive the PCF for so long as the variable dividend is in place. *See* Compl. ¶¶ 31-43. Thus, under the Third Amendment, Treasury agreed to accept the risk that the Enterprises' profits in any given year might be less than the fixed 10% dividend amount ($18.9 billion per year), plus the amount of the PCF (which was intended to fully compensate the taxpayers for Treasury's ongoing commitment to invest additional funds in the Enterprises, as necessary).

C. Plaintiffs File the Present Lawsuit

On March 9, 2016, Plaintiffs—a mixture of individual and institutional shareholders of Freddie Mac—filed the present complaint in the Circuit Court for the 11th Judicial Circuit in and for Miami-Dade County, Florida. Doc. # 1-1. The complaint asserts two claims on behalf of each plaintiff against PwC: (1) negligent misrepresentation, and (2) aiding and abetting alleged

breaches of fiduciary duties by FHFA, Treasury, and Freddie Mac's directors and officers. *See, e.g.*, Compl. ¶¶ 98-116.[3]

On April 6, 2016, PwC removed the action to this Court on the basis of federal question jurisdiction. *See* Notice of Removal (Doc. # 1).

On April 7, 2016, FHFA filed a motion to substitute itself in place of Plaintiffs. Doc. # 7.

On April 13, 2016, PwC moved the Court to stay all proceedings (Doc. # 8) in light of FHFA's pending motion with the Judicial Panel for Multidistrict Litigation ("JPML") to transfer this and several other cases to the U.S. District Court for the District of Columbia for consolidated or coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407.

On April 21, 2016, the Court granted the motion to stay and denied all pending motions, which included FHFA's motion to substitute, and directed the parties to refile any pending motions once the stay was lifted. Doc. # 11.

On June 3, 2016, Defendants notified the Court that the JPML issued an order denying FHFA's motion to transfer. Doc. # 12. Accordingly, on August 9, 2016, this Court issued an order reopening this case. Doc. # 27.

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[3] Though Plaintiffs allege Freddie Mac's directors and officers breached fiduciary duties owed to Freddie Mac's shareholders (*see, e.g.*, Compl. ¶ 111), those directors and officers have acted only through the authority expressly delegated to them by the Conservator, which has succeeded to "all rights, titles, powers, and privileges" of "any . . . officer, or director" of Freddie Mac. 12 U.S.C. § 4617(b)(2)(A)(i). As Freddie Mac disclosed in its SEC filings: "The Conservator has delegated certain authority to the Board of Directors to oversee, and management to conduct, day-to-day operations. The Conservator retains overall management authority, including the authority to withdraw its delegations of authority at any time." Freddie Mac, Annual Report (Form 10-K) (2008), at 20, *available at* http://goo.gl/encrgA. *See also* Fannie Mae, Annual Report (Form 10-K) (2008), at 20, *available at* http://goo.gl/QxqVYi ("Our directors do not have any duties to any person or entity except to the conservator. Accordingly, our directors are not obligated to consider the interests of the company, the holders of our equity or debt securities or the holders of Fannie Mae MBS unless specifically directed to do so by the conservator.").

ARGUMENT

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

HERA unambiguously provides that, as Conservator, FHFA alone possesses all "rights, titles, powers, and privileges" of Freddie Mac's shareholders. 12 U.S.C. § 4617(b)(2)(A)(i). Accordingly, Plaintiffs lack standing to bring the complaint in this case; only the Conservator has standing to bring the shareholder complaint here.

A. HERA's Plain and Unambiguous Language Mandates Substitution of the Conservator as Plaintiff

HERA's succession provision is far-reaching and clear. During conservatorship, the Conservator "succeed[s] to . . . *all* rights, titles, powers, and privileges . . . of [Freddie Mac] and *of any stockholder* [of Freddie Mac]." 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added). By this provision, "Congress . . . transferred everything it could to the conservator." *Kellmer v. Raines*, 674 F.3d 848, 851 (D.C. Cir. 2012) (quoting *Pareto v. FDIC*, 139 F.3d 696, 700 (9th Cir. 1998)) (alteration omitted). "[T]he plain meaning of the statute is that *all* rights previously held by Freddie Mac's stockholders . . . now belong exclusively to the FHFA." *In re Fed. Home Loan Mortg. Corp. Deriv. Litig.*, 643 F. Supp. 2d 790, 795 (E.D. Va. 2009) ("*In re Freddie Mac*"), *aff'd sub nom La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. 2011) (emphasis in original). HERA's succession provision "clearly demonstrates Congressional intent to transfer as much control of [the Enterprises] as possible to the FHFA," *In re Freddie Mac*, 643 F. Supp. 2d at 797, and serves to "assure the expeditious and orderly protection of all who are interested in [Freddie Mac] by placing the pursuit of its rights, protection of its assets, and payment of its liabilities firmly in the hands of a single, congressionally designated agency." *Pareto*, 139 F.3d at 700 (interpreting a materially-identical provision in the Financial Institutions

Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101–73, 103 Stat. 183).

In light of HERA's succession provision, courts consistently substitute the FHFA as Conservator in place of plaintiffs asserting claims based on their status as shareholders of Freddie Mac and Fannie Mae. *See Kellmer*, 674 F.3d at 850-51 (affirming FHFA's substitution in place of Fannie Mae shareholder asserting claims against former officers and directors and various third parties for, *inter alia*, aiding and abetting breach of fiduciary duty and negligence); *Gail C. Sweeney Estate Marital Tr. v. U.S. Treasury Dep't*, 68 F. Supp. 3d 116, 117 (D.D.C. 2014) (granting FHFA motion to substitute in place of a Fannie Mae shareholder asserting claims for breach of fiduciary duty, abuse of control, waste, and mismanagement); *Esther Sadowsky Testamentary Tr. v. Syron*, 639 F. Supp. 2d 347, 350 (S.D.N.Y. 2009) (same, for Freddie Mac shareholder asserting similar claims). For example, in *In re Federal Home Loan Mortgage Corporation Derivative Litigation*, shareholders of Freddie Mac brought claims against, *inter alia*, PwC for claims very similar to those asserted here: namely, aiding and abetting alleged breaches of fiduciary duties by Freddie Mac's officers and directors and also for professional malpractice. *In re Freddie Mac*, 643 F. Supp. 2d at 793.[4] Relying on HERA's succession provision, the Court granted FHFA's motion to substitute itself in place of these plaintiffs, observing that "the plain meaning of the statute is that *all* rights previously held by Freddie Mac's stockholders" can now be exercised *only* by the Conservator. *Id.* at 795. The Fourth Circuit affirmed. *See La. Mun. Police Employees Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. 2011).

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[4] The complaint that asserted claims against PwC is available at *R.S. Bassman v. Syron*, No. 1:08-cv-1247 (E.D. Va.) (Doc. # 47 at ¶¶ 173-176)

For the same reasons, courts also have dismissed shareholder claims for lack of standing in light of HERA's succession provision and FIRREA's materially-identical provision. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 229 (D.D.C. 2014) (dismissing breach of fiduciary duty claims asserted by Fannie Mae and Freddie Mac shareholders for lack of standing in light of HERA's succession provision), *appeal pending* No. 14-5243. For example, in *Pareto*, the Ninth Circuit interpreted FIRREA's succession provision to deprive shareholders of standing to assert derivative claims on behalf of a bank in receivership. 139 F.3d at 701.

In this case, Plaintiffs seek to assert their purported rights as shareholders of Freddie Mac—namely, the rights to bring claims in connection with alleged breaches of fiduciary duty committed by FHFA and Treasury (Compl. ¶¶ 112-118), and alleged misrepresentations by PwC (*id.* ¶¶ 100-111). Yet Plaintiffs lack standing to pursue these claims. Because FHFA has succeeded to "all rights, titles, powers, and privileges" of Freddie Mac and its shareholders—including Plaintiffs—during conservatorship, the FHFA as Conservator has succeeded to the rights Plaintiffs seek to assert through this suit. Accordingly, the Court should grant FHFA's motion and substitute the FHFA as Conservator of Freddie Mac in place of the shareholder Plaintiffs.

B. Plaintiffs' Claims Are Derivative, Not Direct

HERA's plain text provides that the Conservator succeeds to "all" shareholder rights, regardless of how those rights are characterized. In all events, the claims Plaintiffs assert are *derivative* (*i.e.*, asserted on behalf of Freddie Mac) not *direct* (*i.e.*, asserted on behalf of the shareholder itself), which confirms that substitution of the Conservator is appropriate. *See Kellmer*, 674 F.3d at 851 (ordering substitution of Conservator in place of shareholder plaintiffs asserting derivative claims on behalf of Fannie Mae); *In re: Freddie Mac*, 643 F. Supp. 2d at 795

(E.D. Va. 2009), *aff'd*, 434 F. App'x 188 (4th Cir. 2011) (same regarding derivative claims on behalf of Freddie Mac) .

1. Plaintiffs' Aiding and Abetting Breach of Fiduciary Duty Claims Are Derivative

Plaintiffs allege that FHFA and Treasury breached fiduciary duties owed to Freddie Mac and its shareholders by executing the Third Amendment, and that PwC aided and abetted FHFA and Treasury in connection with their alleged breach. Compl. ¶¶ 31-43, 110-116.

Plaintiffs' aiding and abetting claims are derivative because the underlying alleged breaches of fiduciary are derivative. The "rule" under Virginia law[5] is that "suits for breach of fiduciary duty against officers and directors *must* be brought derivatively on behalf of the corporation and *not* as individual shareholder claims." *Simmons v. Miller*, 261 Va. 561, 576 (2001) (emphases added); *see also Remora Investments, LLC v. Orr*, 277 Va. 316, 323 (2009) (explaining that "corporate shareholders *cannot* bring individual direct suits against officers or directors for breach of fiduciary duty, but instead shareholders must seek their remedy derivatively on behalf of the corporation") (emphasis added); *Wenzel v. Knight*, No. 3:14-CV-432, 2015 WL 222182, at *3 (E.D. Va. Jan. 14, 2015) ("In Virginia, shareholders may assert claims of fiduciary breach against corporate directors only through shareholder derivative

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[5] The Enterprises must comply with federal law and their federal charters, which were created by Congress. *See* 12 U.S.C. § 1716 *et seq.*; *id.* § 1451 *et seq.*; 12 C.F.R. § 1239.3(a). For issues not addressed by federal law or their charters, the Enterprises may follow the applicable corporate governance practices and procedures of Delaware law, or the law of the jurisdiction in which the principal office of the Enterprise sits, but only to the extent that state law is not inconsistent with federal law or the charters. *Id.* § 1239.3(b). In its bylaws, Freddie Mac elected to follow the applicable corporate governance practices and procedures of Virginia law for such issues. *See* Freddie Mac Bylaws Section 11.3(a), *available at* http://goo.gl/9S8jnf. Those bylaws further provide that they "shall be construed in accordance with, and governed by, the laws of the United States, using the law of the Commonwealth of Virginia as the federal rule of decision in all instances." *Id.* Here, for purposes of the present motion only, FHFA assumes without conceding that Virginia law concerning whether a claim is direct or derivative is not inconsistent with federal law.

suits."); *DCG & T ex rel. Battaglia/Ira v. Knight*, 68 F. Supp. 3d 579, 585 (E.D. Va. 2014) ("Virginia corporate law funnels fiduciary claims into derivative actions rather than allowing shareholders to sue directly").

Even allegations that shareholders suffered direct, individual injuries are insufficient to state a direct shareholder claim for breach of fiduciary duty. *See Wenzel*, 2015 WL 222182, at *3 (observing that "Virginia law makes no such distinction" between "individual injuries" and injuries to the corporation); *DCG & T*, 68 F. Supp. 3d at 586 ("Ultimately, whether the corporation or the shareholder sustained the injury, a breach of fiduciary duty by a director can be redressed only through a derivative action."); *Firestone v. Wiley,* 485 F.Supp.2d 694, 702–03 (E.D. Va.2007) (dismissing direct claims for breaches of fiduciary duty that allegedly caused individual injuries because those claims must be brought derivatively under Virginia law). In all events, Plaintiffs' complaint contains numerous allegations of harm to the Enterprises. *See* Compl. ¶¶ 37-38, 40-42 (alleging the Third Amendment was "detriment[al]" and "contrary to the best interests of Freddie Mac," "offered no benefits whatsoever to Freddie Mac," was "directly contrary" to putting Freddie Mac in a "sound and solvent condition," was "not entirely fair to Freddie Mac," and did not "further any valid business purpose of Freddie Mac.").

Here, while Plaintiffs intentionally elected not to assert breach of fiduciary duty claims against FHFA or Treasury, they nevertheless allege such breaches as an element of their aiding and abetting claim against PwC. But "[l]ogic indicates that an aiding and abetting claim should take on the same character as the fiduciary duty claim that underlies it." *In re Tri-Star Pictures, Inc. Litig.*, No. CIV. A. 9477, 1990 WL 82734, at *6 (Del. Ch. June 14, 1990) (finding claim for aiding and abetting breach of fiduciary duty to be derivative after finding underlying breach claim derivative). For example, in *Wentzel*, the court dismissed a shareholders' attempt to assert

direct breach of fiduciary duty claims, holding that such claims only can be asserted derivatively. 2015 WL 222182, at *3-4. The court then dismissed the aiding and abetting claims, holding that because the plaintiff "does not sufficiently plead claims for breach of fiduciary duty," then "the claims for aiding and abetting likewise fail. *Id.* at *4; *see also In re NC12, Inc.*, 478 B.R. 820, 836 (Bankr. S.D. Tex. 2012) ("The Plaintiffs' claim for aiding and abetting breach of fiduciary duty is dependent on the underlying breach of fiduciary duty claim. Because the breach of fiduciary duty claim is property of the estate, the aiding and abetting claim is also property of the estate."); *Manzo v. Rite Aid Corp.*, No. CIV. A. 18451-NC, 2002 WL 31926606, at *6 (Del. Ch. Dec. 19, 2002) ("Finally, for the same reasons that require dismissal of the underlying breach of fiduciary duty claim, the claim against KPMG for aiding and abetting a breach of fiduciary duty is similarly dismissed with prejudice."), *aff'd*, 825 A.2d 239 (Del. 2003). Here, because the underlying breach of fiduciary duty claims against FHFA and Treasury are derivative, so too are the aiding and abetting breach of fiduciary duty claims.

2. Plaintiffs' Negligent Misrepresentation Claims Are Derivative

Plaintiffs also allege PwC acted negligently and made a variety of untrue statements (or failures to disclose) in its audit reports, and that Plaintiffs relied on those allegedly deficient reports to their detriment. Compl. ¶¶ 98-109. However, where—as here—a shareholder alleges that an auditor's negligent statements in audit reports on a company's financial statements caused the shareholder to hold his stock, leading to alleged damages, such claims are derivative, not direct. For example, in *Stephenson v. PricewaterhouseCoopers, LLP*, 482 F. App'x 618, 621 (2d Cir. 2012), the Second Circuit held that a limited partner (akin to a shareholder) "lacks standing to assert a claim based on his decision to remain invested" in the company after receiving allegedly negligent statements by PwC, the company's independent auditor. This was because the limited partner "cannot prevail [on his holding claim] without showing injury to the

[partnership as a whole]: his holding claim involves no harm to an individual partner and seeks no recovery for any individual partner, distinct from other partners." *Id.* The court thus found the claims were derivative, not direct. *Id.*[6]

That Plaintiffs also tack on the conclusory and imprecise allegation that they relied on PwC's alleged misrepresentations in "*purchasing or* holding" their stock does not render their claims direct. *See, e.g.*, Compl. ¶¶ 103, 122, 141 (emphasis added). For example, in *Ernst & Young Ltd. v. Quinn*, No. CIV.A. 09-CV-1164JCH, 2009 WL 3571573, at *6 (D. Conn. Oct. 26, 2009), investors asserted claims of negligent misrepresentation against Ernst & Young, the company's auditor, alleging that, absent Ernst & Young's alleged misrepresentations, the investors—much like Plaintiffs here—"would not have purchased, continued to purchase, or retained their . . . investment interests in the [company]." The court held that such a claim was derivative because it was dependent upon injury to the company in the first instance. *See id.*[7]

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[6] *See also Smith v. Waste Mgmt., Inc.*, 407 F.3d 381, 385 (5th Cir. 2005) (holding shareholder claims of negligent misrepresentation that induced shareholder to hold stock were derivative); *Broyles v. Cantor Fitzgerald & Co.*, No. CIV.A. 10-857-JJB, 2013 WL 1681150, at *8 (M.D. La. Apr. 17, 2013) (holding claims that shareholders "held their shares . . . based on alleged misrepresentation . . . do not rise to a direct claim"); *In re Phar-Mor, Inc. Sec. Litig.*, 900 F. Supp. 777, 783-84 (W.D. Pa. 1994) (holding claim based on auditor's negligence to be derivative because it "resulted in, first and foremost, an injury to [the company], to-wit, a decline in corporate worth," and the shareholders' losses were "merely incidental to that decline")

[7] Additionally, to the extent Plaintiffs are attempting to assert claims based purely on a negligent inducement to purchase Fannie Mae stock, they have failed to plead such a claim by, *inter alia*, failing to allege the timing of any Plaintiff's purchase of Fannie Mae stock—*i.e.*, whether it was before or after the alleged misrepresentation, and based on which alleged misrepresentations. In fact, Plaintiffs allege that they all "were shareholders of Fannie Mae during all times relevant to this action." Compl. ¶ 11.

C. Congress's Grant of Authority Over "All" Shareholder Rights Is Not Limited To the Right to Bring Derivative Claims

Plaintiffs in other cases have opposed the Conservator's substitution by arguing—unsuccessfully—that HERA's succession provision applies *only* to derivative claims and not to direct claims. As explained above, Plaintiffs' claims are derivative, not direct. Accordingly, the Court need not even reach the issue of HERA's impact on any purportedly direct claims. In all events, such an argument by Plaintiffs would fail.

By its plain text, HERA transfers "*all*" shareholder rights to the Conservator, not just the right to assert derivative claims. "It is well settled that the starting point for interpreting a statute is the language of the statute itself. When [a] statute's language is plain, the sole function of the courts ... is to enforce it according to its terms." *Montgomery Cty. Comm'n v. FHFA*, 776 F.3d 1247, 1255 (11th Cir. 2015) (internal quotation marks and citations omitted). Accordingly, to interpret HERA's succession provision one needs only to adhere to Justice Frankfurter's admonition: "(1) Read the statute; (2) read the statute; (3) read the statute!" *Kellmer*, 674 F.3d at 850. The statute provides that FHFA as Conservator succeeded to "*all* rights . . . of any stockholder" with respect to Freddie Mac and its assets. "[A]ll rights" means just that—*all* rights. *See Montgomery Cty.*, 776 F.3d at 1255 (holding the "straightforward interpretation" of HERA's exemption from "all taxation" was that the Enterprises are "exempt from *all* state taxation"). Furthermore, "courts must not interpret one provision of a statute to render another provision meaningless." *Huff v. DeKalb County,* 516 F.3d 1273, 1280 (11th Cir. 2008). The Conservator already can pursue what would be derivative claims, as those claims belong to Freddie Mac, not any shareholder. *See* 12 U.S.C. § 4617(b)(2)(A)(i) (The Conservator "immediately succeed[s] to . . . all rights, titles, powers, and privileges of *the regulated entity*, and of any stockholder . . . ") (emphasis added)); *Ross v. Bernhard*, 396 U.S. 531, 538 (1970)

("The claim pressed by the stockholder against directors or third parties is not his own but the corporation's.") (internal quotation marks and citation omitted)). Because creating a "direct claims" exception would render part of the statute meaningless, such an exception should be rejected.

In advocating for a direct claims exception, Plaintiffs may also cite *Lubin v. Skow*, 382 F. App'x 866 (11th Cir. 2010) (*per curiam*), an unpublished—and therefore non-binding (*see* 11th Cir. R. 36-2, I.O.P. 6-7)—Eleventh Circuit decision in which the court held a shareholder plaintiff lacked standing to assert derivative claims of an institution in receivership in light of FIRREA's succession provision. 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 all of the claims asserted against the individual officers of the institution in receivership were derivative, not direct. *See Lubin*, 382 F. App'x at 871.[8] Indeed, *Lubin* focused on an issue not presented here—how to determine the nature of claims against individual defendants who served as (a) officers of the institution in receivership, (b) officers of a holding company that owned that institution in receivership, and (c) officers who held both roles simultaneously. *Id.* at 869. The court held that all of the claims asserted against the officers of the institution in receivership were derivative. *Id.* at 870-71. The court went on to note that, under FIRREA, 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-owner*. *Id.* at 872 n.9. But because the claims against the individuals who owed duties

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[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")

to the bank were all derivative, the court conducted no analysis of—and had no need to analyze—FIRREA's impact on direct claims.[9]

Here, moreover, Freddie Mac has no holding company. Nor is FHFA is an officer for any shareholder of Freddie Mac. Rather, the complaint alleges that FHFA as Conservator owed fiduciary duties *to Freddie Mac*, and allegedly breached those duties after assuming the powers of Freddie Mac's officers and directors. *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).

* * *

In sum, Plaintiffs' claims are derivative. But even if they were direct, the Court should nevertheless substitute the Conservator in place of Plaintiffs in light of HERA's plain and unambiguous language providing that the Conservator succeeds to "all" shareholder rights.

D. Permitting Plaintiffs to Proceed With Their Claims Would Violate 12 U.S.C. § 4617(f)

Finally, permitting Plaintiffs to continue to prosecute this action, despite the Conservator's succession to "all rights" of the shareholders, would violate HERA's jurisdiction-withdrawal provision, 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 [FHFA] as a conservator." The decision whether to pursue any of Plaintiffs' claims against PwC falls within the Conservator's powers and functions, which specifically include authority to "operate [Freddie Mac] with all the

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[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*, this Court's decision in *BankUnited* focused on claims against individuals with overlapping roles as officers of the bank in receivership and the holding company-owner of that bank. *Id.* at *1. Moreover, because the issue of whether FIRREA's succession provision extends to all shareholder claims (including direct claims) was not argued in that case—indeed, it appears no party even briefed the issue—the Court was not asked to decide the issue.

powers of the shareholders, the directors, and the officers," to "conduct all business of [Freddie Mac]," and to "perform all functions of [Freddie Mac] consistent with the appointment as conservator," *id.* §§ 4617(b)(2)(B)(i),(iii). *See Sweeney Estate Marital Tr.*, 68 F. Supp. 3d at 125-26 (observing that "whether or not to spend Fannie Mae's assets on a lawsuit against Treasury is plainly the type of business decision Congress entrusted to the Conservator in HERA"). Thus, "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." *Id.* at 126 (internal quotation marks and citation omitted).

Indeed, in numerous decisions granting FHFA's motions to substitute in place of Freddie Mac or Fannie Mae shareholder plaintiffs, courts have also held that Section 4617(f) bars the shareholder from continuing the action. *See, e.g.*, *id.* at 119 (granting substitution in part because Section 4617(f) "suggests that the Court may not be empowered to authorize plaintiff to pursue litigation that the Conservator has declined to pursue"); *Sadowsky*, 639 F. Supp. 2d at 350 (Without substitution, suit would violate Section 4617(f) "since maintenance of this suit with the shareholders acting as Plaintiffs would be inconsistent with the Conservator's exercise of its statutory purposes."); *In re Fed. Nat'l Mortg. Ass'n Sec., Deriv., & "ERISA" Litig.*, 629 F. Supp. 2d 1, 4 n.4 (D.D.C. 2009) ("[A]llowing 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" in violation of § 4617(f).), *aff'd Kellmer*, 674 F.3d at 851; *In re Freddie Mac*, 643 F. Supp. 2d at 797 (Section 4617(f) "clearly demonstrates Congressional intent to transfer as much control of Freddie Mac as possible to the FHFA, including any right to sue on behalf of the corporation."). So too here: denying FHFA's substitution and allowing Plaintiffs to

continue prosecuting their claims would "be inconsistent with the Conservator's exercise of its statutory power" and thus would violate Section 4617(f). *Sadowsky*, 639 F. Supp. 2d at 350.

CONCLUSION

For the reasons stated, the Court should substitute FHFA as Conservator in place of the current Plaintiffs in this suit.

LOCAL RULE 7.1 CERTIFICATION

The undersigned certifies that counsel for the movant has conferred with counsel for plaintiffs in a good faith effort to resolve the issues raised in this motion, and plaintiffs do not agree with the relief requested.

Dated: August 17, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on August 17, 2016, I filed a true and correct copy of the foregoing 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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