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

MIAMI DIVISION

Case No. 16-CV-21224-MORENO

ANTHONY R. EDWARDS, et al.,

Plaintiffs,

vs.

PRICEWATERHOUSECOOPERS, LLP,

Defendant.

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PRICEWATERHOUSECOOPERS LLP'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR REMAND

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Introduction

Plaintiffs' remand motion should be denied. Federal jurisdiction is proper here for three independent reasons.

First, the Federal Home Loan Mortgage Corporation ("Freddie Mac") is the real party in interest, which automatically confers federal jurisdiction. Freddie Mac's federal charter provides that "all civil actions to which [Freddie Mac] is a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such actions." 12 U.S.C. § 1452(f). Plaintiffs *do not dispute* that if their fiduciary duty claims are derivative then those claims belong to Freddie Mac and jurisdiction is proper under § 1452(f). Plaintiffs further do not dispute that whether their fiduciary duty claims are derivative is determined by Virginia law. And black letter Virginia corporate governance law unequivocally establishes that plaintiffs' fiduciary duty claims are derivative claims that belong to Freddie Mac. Plaintiffs cannot cite a single case applying Virginia law that has *ever* recognized a direct breach of fiduciary duty claim by corporate shareholders. Jurisdiction is proper under § 1452(f).[1]

Second, jurisdiction is proper because plaintiffs' claims require resolution of disputed, important issues of federal law. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). Plaintiffs' complaint is a direct challenge to the policies adopted by Congress, the Department of the Treasury ("Treasury"), and the Federal Housing Finance Agency ("FHFA") in response to a national housing crisis that imperiled the U.S. economy.

In July 2008, Congress enacted the Housing and Economic Recovery Act ("HERA") to give Treasury and other federal regulators the necessary tools to oversee Freddie Mac and Fannie Mae so that the U.S. housing market and economy could recover. HERA created FHFA, an independent federal agency with the authority to place Freddie Mac into conservatorship. 12 U.S.C. § 4617(a). Exercising this authority, in September 2008 the Director of FHFA appointed FHFA as Freddie Mac's conservator. FHFA "immediately succeed[ed]" to "all rights, titles, powers, and privileges of [Freddie Mac], and of any stockholder, officer, or director of [Freddie Mac] with respect to [Freddie Mac] and the assets of [Freddie Mac]." 12 U.S.C. § 4617(b)(2)(A)(i). HERA also authorized the Secretary of the Treasury to make emergency

[1] The Court does not need to address whether Plaintiffs' claims under Restatement of Torts (2d) § 552 are direct or derivative because, at a minimum, the Court has supplemental jurisdiction over those claims under 28 U.S.C. § 1367(a).

purchases of Freddie Mac securities "on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine." 12 U.S.C. § 1455(l)(1)(A). Relying on the authority provided by HERA, FHFA and Treasury entered into the Preferred Stock Purchase Agreement ("PSPA"), whereby Treasury provided Freddie Mac with access to $100 billion of capital in exchange for Freddie Mac senior preferred stock, warrants to certain common stock, and other terms and conditions. Subsequent amendments to the PSPA increased the capital available to Freddie Mac and made other modifications to the terms and conditions.

Plaintiffs' complaint takes issue not only with FHFA's handling of Freddie Mac's conservatorship, Compl. ¶¶ 21, 31-32, 38, 59-60, 66-67, 93-94 [D.E. 1-1], but also with the congressionally authorized terms and conditions provided for in the PSPA and its amendments, particularly the Third Amendment which implemented what plaintiffs call the "Net Worth Sweep," *id.* ¶¶ 26-27, 31-34, 37-42, 69. As a result, plaintiffs' claims necessarily require the resolution of several important questions of federal law, any one of which is sufficient to support federal question jurisdiction under the test set forth in *Grable*:

- As a threshold matter, the Court must determine whether plaintiffs have standing to assert their claims given that FHFA, under HERA, succeeded to "all rights, titles, powers, and privileges" of Freddie Mac shareholders. 12 U.S.C. § 4617(b)(2)(A)(i).
- Each of plaintiffs' separate claims that PricewaterhouseCoopers LLP ("PwC") aided and abetted (1) Treasury, (2) FHFA, and (3) Freddie Mac's officers and directors to breach fiduciary duties owed to plaintiffs necessarily raises important federal questions by taking direct aim at the permissibility of the Net Worth Sweep under HERA. Plaintiffs themselves have put federal law at issue by alleging both that they are owed fiduciary duties and that the Net Worth Sweep "ran directly contrary" to FHFA's "statutory mission" under HERA and "violated . . . applicable federal law." Compl. ¶¶ 38, 41.
- All of plaintiffs' claims depend on their contention that but for PwC's allegedly deficient audits, the conservatorship would have been terminated "as required by law." *Id.* ¶¶ 93, 96. As explained below, the termination of Freddie Mac's conservatorship is governed by HERA, and plaintiffs' claims thus necessarily raise the federal issue of the circumstances under which Freddie Mac's conservatorship must be terminated.

Third, plaintiffs' fiduciary duty claims arise under federal law because Freddie Mac's bylaws and plaintiffs' stock certificates[2] affirmatively state that *federal law* governs claims relating to Freddie Mac's corporate governance. Although the bylaws and stock certificates

[2] In opposition to FHFA's renewed motion to substitute, plaintiffs state they "are all preferred stockholders" of Freddie Mac. Opp'n to Substitution at 11 n.5 [D.E. 35]. The stockholder certificates for each issuance of Freddie Mac preferred stock are attached as Exhibits A-Q.

indicate that Freddie Mac follows Virginia corporate law, they make clear that Virginia law merely supplies the substance for the "federal rule of decision" for this federally chartered corporation. Plaintiffs' fiduciary duty claims therefore arise under federal law.

I. The Court Has Jurisdiction Under 12 U.S.C. § 1452(f)

Freddie Mac is a federally chartered corporation formed to provide stability in the secondary market for mortgages and to promote access to mortgage credit. Congress established that all cases where Freddie Mac is a party are deemed to arise under federal law and belong in federal court. 12 U.S.C. § 1452(f).[3]

Federal jurisdiction is proper here under § 1452(f) for the following reasons:

(1) Federal jurisdiction, including on removal, is determined based on the real parties in interest to the action. *See Flylux, LLC v. Aerovias de Mexico S.A. de C.V.*, No. 14-20966-CIV, 2014 WL 4907966, at *3 (S.D. Fla. Sept. 30, 2014) (Moreno, J.) (finding that federal jurisdiction must be determined "by the citizenship of the real parties to the controversy"), *aff'd*, 618 F. App'x 574, 577-78 (11th Cir. 2015).[4]

(2) Plaintiffs' aiding and abetting breach of fiduciary duty claims are derivative claims that belong to Freddie Mac.

(3) In a derivative claim, the corporation—here Freddie Mac—is the real party in interest. *See Little v. Cooke*, 652 S.E.2d 129, 136 (Va. 2007) ("In a stockholders' derivative action the corporation, not the complaining shareholder, is the real party in interest.") (quotation marks and citation omitted).

(4) If Freddie Mac is the real party in interest, jurisdiction is proper under the plain language of § 1452(f).

Plaintiffs' *only* argument that federal jurisdiction is not proper under § 1452(f) is that their claims are direct and not derivative. Mot. at 17-20 [D.E. 28]. They do not even address, much less dispute, any of the other points outlined above.

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[3] FHFA's conservatorship over Freddie Mac does not alter the application of § 1452(f). Under HERA, FHFA "immediately succeed[ed] to . . . all rights, titles, powers, and privileges of [Freddie Mac]," 12 U.S.C. § 4617(b)(2)(A)(i), which includes the rights and privileges Freddie Mac enjoys under § 1452(f).

[4] Courts have frequently found federal question jurisdiction by looking to the real party in interest. *See, e.g.*, *Law Office of Mark Kotlarsky Pension Plan v. Hillman*, No. TDC-14-3028, 2015 WL 5021399, at *2-3 (D. Md. Aug. 21, 2015) (denying motion to remand where the United States Department of Health and Human Services, and not a private contractor, was the "real party of interest"); *Hughes v. Meredith*, No. 2:05-CV-0007, 2005 WL 1491959, at *1 (N.D. Tex. May 24, 2005) (removal proper where "the United States was the true party in interest"); *Helle v. Blue Cross Blue Shield*, No. 1:90-cv-340, 1990 WL 10072803, at *1 (W.D. Mich. June 4, 1990) (denying motion to remand because the Health Care Finance Administration was the "real party in interest").

A. Plaintiffs' Claims Are Derivative Under Virginia Law

Freddie Mac follows Virginia law for corporate governance issues. Freddie Mac Bylaws § 11.3(a).[5] As such, whether plaintiffs' fiduciary duty claims are direct or derivative is determined by Virginia law. *See Mukamal v. Bakes*, 378 F. App'x 890, 897 (11th Cir. 2010).[6] Plaintiffs concede this point. Mot. at 6-7, 9, 18 n.8.[7]

Under Virginia law, claims for breach of fiduciary duty are derivative.[8] *Remora Invs., L.L.C. v. Orr*, 673 S.E.2d 845, 848 (Va. 2009) ("corporate shareholders cannot bring individual, direct suits against officers or directors for breach of fiduciary duty, but instead must seek their remedy derivatively on behalf of the corporation"). The same holds true for fiduciary duty claims asserted by minority shareholders against controlling shareholders. *Simmons v. Miller*, 544 S.E.2d 666, 674-75 (Va. 2001) (holding that a minority shareholder's fiduciary duty claim against the majority shareholder was derivative).

Plaintiffs contend their fiduciary duty claims are direct because they "do not claim that FHFA or Treasury violated a fiduciary duty to *Freddie*. Rather, Plaintiffs claim that FHFA and Treasury violated a fiduciary duty to *Plaintiffs*." Mot. at 7. Plaintiffs' argument does not defeat federal jurisdiction for at least two reasons. First, plaintiffs are incorrect that a fiduciary duty claim is direct merely because they allege that FHFA and Treasury violated a fiduciary duty to them. The Virginia Supreme Court held in *Remora* that corporate officers and directors owe fiduciary duties "to shareholders as a class and not individually." *Remora*, 673 S.E.2d at 848.

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[5] Freddie Mac's bylaws were amended during the time period relevant to this case, but § 11.3(a) was unaffected. *See* Freddie Mac Bylaws (as amended and restated June 6, 2008) [D.E. 1-3]; Freddie Mac Bylaws (as amended and restated June 3, 2011) [D.E. 1-2].

[6] Plaintiffs' complaint alleges "Freddie Mac is a stockholder-owned corporation organized under the laws of Delaware." Compl. ¶ 16. That statement, and other references to Delaware law in the complaint, are inaccurate. Freddie Mac is a federally chartered corporation formed pursuant to federal law that has elected to have Virginia corporate governance law supply the federal rule of decision for corporate governance issues. Freddie Mac Bylaws § 11.3(a) [D.E. 1-2, D.E. 1-3].

[7] The Court does not need to determine the applicable law for plaintiffs' claims under Restatement of Torts (2d) § 552 to rule on plaintiffs' remand motion. Although plaintiffs appear to take the position that Florida law governs those claims, Mot. at 11 n.6, they do not engage in a choice-of-law analysis. At the appropriate time PwC will demonstrate that a proper choice-of-law analysis requires the application of Virginia law to those claims.

[8] The analysis of whether plaintiffs' *aiding and abetting* breach of fiduciary claims are derivative is the same as the analysis as to whether a breach of fiduciary duty claim is derivative. *Wenzel v. Knight*, No. 3:14-cv-432, 2015 WL 222182, at *4 (E.D. Va. Jan. 14, 2015). Plaintiffs do not contend otherwise.

"Virginia limits claims of fiduciary breach to derivative actions rather than allowing shareholders to assert the breach as an individual injury in direct actions." *DCG&T ex rel. Battaglia/IRA v. Knight*, 68 F. Supp. 3d 579, 585-86 (E.D. Va. 2014).

Second, plaintiffs' misleading statement is repeatedly belied by their own complaint where plaintiffs allege that FHFA and Treasury violated fiduciary duties to *both* Freddie Mac and plaintiffs. Compl. ¶ 35 ("FHFA owes Freddie Mac and Plaintiffs fiduciary obligations"), ¶ 36 ("Treasury owed fiduciary duties of due care and loyalty to Freddie Mac and to Plaintiffs"), ¶ 38 ("The Net Worth Sweep was contrary to the best interests of Freddie Mac and their stockholders"), ¶ 41 ("FHFA and Treasury violated Delaware [sic] law and applicable federal law by breaching their fiduciary duties to Freddie Mac and Plaintiffs"), ¶ 112 ("FHFA assumed fiduciary duties of due care and loyalty to Freddie Mac"), ¶ 113 ("Treasury owed fiduciary duties . . . to Freddie Mac").

Even if plaintiffs were correct—and they are not—that they have cognizable direct claims under Virginia law, the fact that plaintiffs have also indisputably alleged derivative claims concerning breaches of fiduciary duty to Freddie Mac is *alone sufficient* to establish jurisdiction under § 1452(f). For example, every plaintiff separately alleges that "Treasury owed fiduciary duties of due care and loyalty *to Freddie Mac*" and that "Treasury has breached *those fiduciary duties*." *See, e.g.*, Compl. ¶ 113 (emphasis added). For these claims Freddie Mac is indisputably the proper plaintiff and jurisdiction is proper under § 1452(f).[9]

B. Inapplicable Delaware Law Does Not Establish That Plaintiffs' Claims Are Direct

Plaintiffs do not cite any cases applying Virginia law holding that shareholders can bring direct fiduciary duty claims. Instead, plaintiffs incorrectly assert that Virginia law is not developed on this issue, Mot. at 18 n.8, and instead rely on: (1) *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004); and (2) a series of Delaware cases that discuss "a species of corporate overpayment claim[s]," *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006), that Delaware recognizes give rise to "dual-attribute" (both derivative and direct) fiduciary duty claims. *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1052 (Del. Ch. 2015);

[9] *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988), discussed *infra* pp. 13-15, does not apply to this basis for jurisdiction. The rule articulated in *Christianson* is only directed at determining whether a state law claim necessarily includes an important federal question.

Mot. at 17-20. These Delaware cases are inapplicable here. And even if they applied, none establish that plaintiffs' fiduciary duty claims are direct.

1. Delaware Law Does Not Apply to Plaintiffs' Fiduciary Duty Claims

Plaintiffs do not cite a single case applying Virginia law that recognizes a direct breach of fiduciary duty claim, much less a Virginia case following the various Delaware authorities plaintiffs discuss at length in their brief. Plaintiffs ignore Virginia law because Virginia law is clear—breach of fiduciary duty claims are always derivative. *Knight*, 68 F. Supp. 3d at 585-86 ("Virginia corporate law funnels fiduciary claims into derivative actions rather than allowing shareholders to sue directly."); *Casden v. Burns*, 306 F. App'x 966, 976 (6th Cir. 2009) ("[Plaintiff] asserts claims against [the corporation's] officers and directors for breach of fiduciary duty . . . seeking recovery of the lost value of her stock. Under Virginia law, such claims unquestionably are derivative in nature."); *Wenzel*, 2015 WL 222182, at *3 ("[S]hareholders may assert claims of fiduciary breach against corporate directors only through shareholder derivate suits."); *Firestone v. Wiley*, 485 F. Supp. 2d 694, 702-03 (E.D. Va. 2007) ("Virginia strictly adheres to the derivative-claim rule" and "plaintiff's individual claim for breach of fiduciary duties must be dismissed."); *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431, 456 (E.D. Va. 2002) (same).

Plaintiffs nevertheless contend the Virginia Supreme Court would follow *Tooley*, a Delaware case that holds in certain circumstances shareholders that can show a unique, individual injury may bring a direct fiduciary duty claim. But no court applying Virginia law has ever followed *Tooley*. To the contrary, the Virginia Supreme Court determined it "need not decide whether to adopt the analysis employed by the Delaware Supreme Court in *Tooley*." *Remora*, 673 S.E.2d at 848. This Court should follow the Eastern District of Virginia and "not impose a test declined by the Supreme Court of Virginia" and hold instead that "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." *Knight*, 68 F. Supp. 3d at 586. *Tooley* is inconsistent with numerous cases applying Virginia law that do not permit direct fiduciary duty claims *even where* the shareholder alleges an individual injury. *Knight*, 68 F. Supp. 3d at 584-86; *Wenzel*, 2015 WL 222182, at *3 ("Virginia law makes no such distinction" between "individual injuries" and injuries to the corporation); *Firestone*, 485 F. Supp. 2d at 702-703 (E.D. Va. 2007) (dismissing direct claims for breach of fiduciary duty that allegedly caused individual injuries

because those claims must be brought derivatively under Virginia law). These cases likewise establish that the Delaware "dual attribute" fiduciary duty cases cited by plaintiffs are inapplicable.

Finally, plaintiffs' allegation that Treasury (as the purportedly controlling shareholder of Freddie Mac) breached fiduciary duties it owed to plaintiffs as minority shareholders does not alter the analysis. Under Virginia law the fact that plaintiffs—as minority shareholders—allege a breach of fiduciary duty claim against the purportedly controlling shareholder and beneficiary of the breach does not transform the claim from derivative to direct. The Virginia Supreme Court explicitly rejected this reasoning in *Simmons*, 544 S.E.2d at 673-75. In *Simmons* a minority shareholder brought a direct fiduciary duty claim against the majority and controlling shareholder who was also the sole officer and director of the closely held corporation. *Id.* at 669-70. The Virginia Supreme Court held that the minority shareholder could not bring a direct fiduciary duty claim against the controlling shareholder and beneficiary of the alleged breach. *Id.* at 673-75. The Virginia Supreme Court "decline[d] to adopt a closely held corporation exception to the rule requiring 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." *Id.* at 675. The same reasoning applies here.

Virginia law is clear. All of plaintiffs' fiduciary duty claims are derivative, and this Court has jurisdiction under § 1452(f).

2. Plaintiffs' Fiduciary Duty Claims Would Be Derivative Under *Tooley*

Even if *Tooley* applied, plaintiffs' fiduciary duty claims would still be derivative. *Tooley* explained that under Delaware law whether a claim is direct or derivative "must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley*, 845 A.2d at 1033. The answer to the first question turns on whether the stockholder "can prevail *without showing an injury to the corporation*." *Id.* at 1039 (emphasis added).

Plaintiffs assert their claims are direct under *Tooley* because "the gravamen of Plaintiffs' Complaint is not that the Net Worth Sweep has diminished Freddie's overall corporate profits and thus harmed all shareholders indirectly, but rather because of PwC's actions and inactions, the Net Worth Sweep improperly allocated to a single, dominant shareholder whatever profits

Freddie makes, harming minority shareholders and destroying Plaintiffs' economic interest in Freddie." Mot. at 18-19.

Any injury plaintiffs suffered from the Net Worth Sweep *depends* on harm to Freddie Mac. Plaintiffs allege that through the Net Worth Sweep "FHFA and Treasury chose to seize the totality of Freddie Mac's profits and net worth in perpetuity," Compl. ¶ 32, thereby injuring plaintiffs. Plaintiffs cannot establish their claim without establishing an injury to Freddie Mac. *See id*. ¶ 38 ("The Net Worth Sweep was contrary to the best interests of Freddie Mac and their stockholders. Indeed, it was specifically intended to ensure that Freddie Mac's stockholders (other than Treasury) could never again recover any value from their investments, and to ensure that Freddie Mac could not function as a private enterprise and would have to be wound down."); ¶ 34 ("[U]nder the terms of the Net Worth Sweep, Freddie Mac has no way to ever pay down these liquidation preferences . . . ."). Plaintiffs' claims are derivative. *See Parsch v. Massey*, 72 Va. Cir. 121, 128 (Va. Cir. Ct. 2006) ("Loss of share value is a classic derivative claim.").

3. Inapplicable Delaware Cases Concerning "Dual-Attribute" Fiduciary Duty Claims Do Not Support Remand

Plaintiffs do not seriously dispute that the Net Worth Sweep and the failure to terminate the conservatorship, as alleged by plaintiffs, harmed Freddie Mac and that all of plaintiffs' alleged injuries flow from harm to Freddie Mac. Instead, plaintiffs contend *Tooley* "does not imply that a stockholder must show that the action which harmed his or her own interests did not also harm the corporation—to the contrary, some wrongs harm *both* the corporation and its stockholders directly and can be challenged through *either* derivative or direct actions." Mot. at 18. Plaintiffs rely on a series of Delaware cases discussing "dual attribute" fiduciary duty claims that are inapplicable and irrelevant here.

As an initial matter, even if Virginia law recognized "dual attribute" fiduciary duty claims—and it does not and would not—plaintiffs' remand motion should still be denied. As discussed above, even if plaintiffs had alleged claims for breaches of fiduciary duties to *both* Freddie Mac and plaintiffs, jurisdiction would still be proper under § 1452(f). The fact that the claims could be "dual" in nature proves plaintiffs have alleged derivative claims.

Plaintiffs also overstate the reach of the Delaware cases that address the circumstances where a fiduciary duty claim can be both derivative and direct. All of those cases involve a particular corporate transaction—first recognized in Delaware in *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319 (Del. 1993). *Tri-Star* recognized "one transactional paradigm—a species of

corporate overpayment claim—that Delaware case law recognizes as being both derivative and direct in character." *Gentile*, 906 A.2d at 99. "Dual character" claims arise where "(1) a stockholder having . . . control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Id.* at 99-100.

This results in "an extraction from the public shareholders, and a redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest." *Id.* at 100. All of plaintiffs' Delaware cases discussing dual-natured fiduciary duty claims are confined to this species of corporate transaction. *Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 129 (Del. Ch. 2007) ("Plaintiffs make a *Tri-Star* extraction argument . . . ."); *In re Activision*, 124 A.3d at 1052 ("Corporate transactions that reallocate stock ownership percentages and voting rights often give rise to dual-attribute claims."); *Gatz v. Ponsoldt*, 925 A.2d 1265, 1278-79 (Del. 2007) (discussing and applying *Tri-Star* and *Gentile*).

Tri-Star and its progeny are inapplicable here. The Third Amendment did not issue additional Freddie Mac stock thereby diluting plaintiffs' economic and voting power to the corresponding benefit of Treasury. In fact, the Third Amendment had no impact on either the voting power of plaintiffs or Treasury because *neither* plaintiffs *nor* Treasury have ever had voting power in Freddie Mac.[10] The *Tri-Star* cases do not apply where the relative voting rights of the minority and majority shareholders are not altered. *Caspian Select Credit Master Fund Ltd. v. Gohl*, C.A. No. 10244-VCN, 2015 WL 5718592, at *3-5 (Del. Ch. Sept. 28, 2015) (distinguishing *Tooley*, *Gentile*, *Gatz*, and *Tri-Star* in finding that plaintiff shareholders had only derivative claims where controlling shareholders purportedly diluted the value of plaintiffs' stock and expropriated equity from the company because plaintiffs' voting power was unaffected).

Plaintiffs have not and cannot allege that the Third Amendment transferred value from plaintiffs based on a change to any rights plaintiffs enjoyed as preferred Freddie Mac shareholders. As preferred shareholders, plaintiffs did not have a *right* to dividends. *Perry Capital LLC. v. Lew*, 70 F. Supp. 3d. 208, 236-37 (D.D.C. 2014). And plaintiffs' dividend

[10] Freddie Mac preferred shareholders do not enjoy voting rights. 12 U.S.C. § 1455(f). Nor has Treasury ever enjoyed voting rights in Freddie Mac.

payments were terminated by the initial PSPA, which plaintiffs do not allege resulted from any wrongdoing by PwC. Compl. ¶ 22. Likewise, the initial PSPA created Treasury's senior liquidation preference and required FHFA to approve the termination of the conservatorship. Plaintiffs' injury, if any, is purely to the value of their shares based on Treasury's "right to take the entire positive net worth of Freddie Mac each quarter in perpetuity," Compl. ¶ 31, which is a harm to Freddie Mac and *not* to plaintiffs as minority shareholders.

The value Treasury received from the Third Amendment came exclusively from Freddie Mac and was based on rights Treasury negotiated as a senior preferred stockholder. The value Treasury received was not based on a dilution of plaintiffs' ownership or the value of their shares, nor did it result in a modification to any rights plaintiffs had as shareholders. The facts here are far afield from plaintiffs' "dual attribute" cases. There is no reason to believe Delaware law would support application of the *Tri-Star* rule to this case, much less Virginia law.

II. Even if Plaintiffs' Claims Are Governed by State Law, They Raise Substantial Questions of Federal Law

Under 28 U.S.C. § 1331, this Court has "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." A cause of action may arise under the laws of the United States in at least two circumstances. First, "a case arises under federal law when federal law creates the cause of action asserted." *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013). Second, a cause of action may also arise under the laws of the United States if a "state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

As set forth below in Part III, plaintiffs' aiding and abetting claims arise under federal common law; thus there is jurisdiction under 28 U.S.C. § 1331. But even if plaintiffs are correct that state law alone governs their claims, there is still federal question jurisdiction under the test set forth in *Grable.* First, plaintiffs' complaint necessarily raises the threshold question of whether these shareholders have the power to bring their claims in light of HERA's succession provision. Second, plaintiffs' challenge to the Net Worth Sweep—what they call the "gravamen" of their complaint—presents the question of whether the Third Amendment was permissible under HERA. Third, all of plaintiffs' claims rest on a causation theory that, but for PwC's alleged conduct, FHFA would have been required to end the conservatorship under HERA. The

resolution of these important questions of federal law—any one of which is sufficient to support jurisdiction—will have an impact far beyond this litigation, and require a federal forum.

A. Plaintiffs' Complaint Raises the Substantial and Disputed Question of Whether Their Claims Now Belong to FHFA Under HERA

As Freddie Mac's conservator, FHFA "immediately succeed[ed] to (i) all rights, titles, powers, and privileges of [Freddie Mac], and of any stockholder, officer, or director of [Freddie Mac] with respect to [Freddie Mac] and the assets of [Freddie Mac]." 12 U.S.C. § 4617(b)(2)(A). HERA's "extremely broad" statutory grant reflected "Congress's intent to transfer as much power as possible to the FHFA when acting as Freddie Mac's conservator." *Pagliara v. Fed. Home Loan Mortg. Corp.*, No. 16-cv-337, 2016 WL 4441978, at *5, *8 (E.D. Va. Aug. 23, 2016). In the view of FHFA (and PwC), this provision of HERA strips plaintiffs of their standing to pursue the claims they assert in this action. While plaintiffs disagree about the meaning of HERA's succession provision, all that matters for this Court's jurisdictional analysis is that this disputed question of federal law is central to this case and other pending shareholder cases related to the Third Amendment.[11]

Plaintiffs offer three arguments in an effort to evade federal question jurisdiction based on HERA's succession provision, none of which withstands scrutiny. First, plaintiffs try to characterize the succession provision as a "defense" PwC "intends to invoke . . . at some point in this litigation," Mot. at 14, a puzzling description given that FHFA has *already* raised the succession issue in a motion to substitute that will soon be fully briefed before this Court. [D.E. 33]. More fundamentally, the meaning of HERA's succession provision is not a defense but instead a threshold question of whether plaintiffs have the authority to pursue their claims. A plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the rights and interests of third parties." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982). The scope and meaning of HERA's

[11] Freddie Mac and Fannie Mae shareholders have filed numerous cases challenging the Third Amendment. *See, e.g.*, *Pagliara v. Fed. Nat'l Mortg. Ass'n*, No. 1:16-cv-193 (D. Del. filed March 25, 2016); *Pagliara v. Fed. Home Loan Mortg. Co.*, No. 1:16-cv-337 (E.D. Va. filed Mar. 25, 2016); *Saxton v. FHFA*, No. 1:15-cv-47 (N.D. Iowa filed May 28, 2015); *Jacobs v. FHFA*, No. 1:15-cv-708 (D. Del. filed Aug. 17, 2015); *Robinson v. FHFA*, No. 7:15-cv-109 (E.D. Ky. filed Oct. 23, 2015); *Roberts v. FHFA*, No. 1:16-cv-2107 (N.D. Ill. filed Feb. 10, 2016); *Edwards v. Deloitte & Touche LLP*, No. 1:16-cv-21221 (S.D. Fla. filed Apr. 6, 2016); *see also Perry Capital*, 70 F. Supp. 3d at 208; *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828 (S.D. Iowa 2015). The FHFA has raised HERA's succession provision in each of these actions.

succession provision—whether analogized to Article III or prudential standing—is necessarily raised by plaintiffs' attempt to pursue claims that may in fact belong to FHFA by operation of law. *See Warth v. Seldin*, 422 U.S. 490, 518 (1975) ("It is the *responsibility of the complainant* clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.") (emphasis added).

Second, plaintiffs argue that the meaning of HERA's succession provision does not raise a substantial question of federal law because the issue has been "settled." Mot. at 15-16. This is not true. Neither this Court, the Eleventh Circuit, nor the Supreme Court has ever addressed the scope of HERA's succession provision. And prior cases on the meaning of a succession provision in another federal statute (FIRREA) do not resolve the issue. That is especially true when the only two Eleventh Circuit cases offered by plaintiffs on FIRREA either (1) do not mention the succession provision, *FDIC v. Jenkins*, 888 F.2d 1537 (11th Cir. 1989), or (2) are unpublished and address FIRREA's succession language only in dicta, *Lubin v. Skow*, 382 F. App'x 866 (11th Cir. 2010).[12] *Compare Esther Sadowsky Testamentary Trust v. Syron*, 639 F. Supp. 2d 347, 350 (S.D.N.Y. 2009) ("[U]nder the plain language of HERA, 'all rights, titles, powers, and privileges' of Freddie Mac's shareholders are now vested in the FHFA.").

Third, plaintiffs assert that the Judicial Panel on Multidistrict Litigation's ("JPML") decision not to consolidate a number of cases related to the Third Amendment shows that the federal issues raised by HERA's succession provision are not substantial. Mot. at 17. The reasoning of the JPML, far from helping plaintiffs, actually undermines their assertion that factual issues predominate over questions of federal law. The JPML denied consolidation precisely because the primary common issues in these cases are legal, not factual. *In re FHFA et al. PSPA Third Amendment Litigation*, MDL No. 2713, 2016 WL 3101835, at *1-2 (J.P.M.L. June 2, 2016). The JPML noted that each of the pending cases related to the Third Amendment presented the question of whether "plaintiffs lack standing" because of HERA's succession provision. *Id.* at *2 (citing 12 U.S.C. § 4617). The impact of the succession issue across multiple cases—which the JPML acknowledged—supports PwC's contention that this question of federal

[12] FHFA's opposition to plaintiffs' motion to remand offers a more detailed explanation for why plaintiffs' reliance on *Lubin* is misplaced. *See* FHFA's Opp'n to Remand at 6-8 (filed Sept. 14, 2016).

law merits a federal forum. *See Gunn*, 133 S. Ct. at 1066 ("The substantiality inquiry under *Grable* looks [ ] to the importance of the issue to the federal system as a whole.").[13]

B. Plaintiffs' Fiduciary Duty Claims Raise Disputed Questions of Federal Law Under HERA

1. Plaintiffs' Complaint Presents Three Distinct Fiduciary Duty Claims, Any One of Which Is Sufficient to Support Jurisdiction

In their motion to remand, plaintiffs assert that their fiduciary duty claims are pled "alternatively to require proof of breach of fiduciary duties . . . by *only one* of the following: (1) the directors and officers of Freddie; (2) FHFA; or (3) Treasury." Mot. at 6. These are discrete claims, and the Court has jurisdiction if any one of these three fiduciary duty claims raises a federal question since all plaintiffs' claims derive from a common nucleus of operative facts. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164 (1997); 28 U.S.C. § 1367(a).

Plaintiffs challenge this framework, asserting in a footnote that PwC must show that each of the three separate aiding and abetting claims presents a question of federal law for removal to be proper under *Grable* and *Gunn*. Mot. at 10 n.4. In support of their position, plaintiffs rely on *Christianson*, 486 U.S. at 800, a case which involved appellate jurisdiction over antitrust claims that raised certain patent issues. In holding that the case did not arise under federal patent law for the purposes of 28 U.S.C. § 1338, the Supreme Court stated that "a claim supported by alternative theories in the complaint may not form the basis jurisdiction unless patent law is essential to each of those theories." *Christianson*, 486 U.S. at 810-13; *see also id.* at 811 ("The well-pleaded complaint rule, however, focuses on claims, not theories . . . ."). Based on *Christianson*, plaintiffs argue that federal law must be raised by each of what it characterizes as their "asserted theories" of aiding and abetting by PwC.

But plaintiffs' argument begs the question of whether they have in fact presented one claim with three alternative theories or, instead, three distinct claims that PwC aided and abetted the alleged breach of fiduciary duties of Freddie Mac's directors and officers, FHFA, and Treasury. Plaintiffs' tactical decision to style their fiduciary duty claims as one count is

[13] PwC joins FHFA's request that this Court consider FHFA's substitution motion prior to or contemporaneously with plaintiffs' motion to remand. *See* FHFA's Opp'n to Remand at 13-15. *See also In re Facebook, Inc., IPO Derivative Litig.*, 797 F.3d 148, 157-58 (2d Cir. 2015) (holding that it was "a proper exercise of judicial power—and good craft" for the district court to resolve a question of shareholder standing before reaching a "difficult and novel question of subject matter jurisdiction").

irrelevant to resolving this issue, as *Christianson* itself demonstrates. The Supreme Court, in evaluating the jurisdictional issue, ignored the plaintiff's decision to group his antitrust allegations together in a single count and instead treated the plaintiff's complaint as presenting two distinct antitrust claims for jurisdictional purposes. 486 U.S. at 810. Although the Court found that neither claim arose under patent law, the lesson of *Christianson* is clear: in evaluating jurisdiction, the court should look at the substance of the plaintiff's allegations, not the plaintiff's own characterization of those claims.

The Second Circuit has explained that, in evaluating whether a state law claim raises a federal question, the court first "must ascertain which portions of [the plaintiff's] complaint comprise distinct 'claims.'" *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 194 (2d Cir. 2005). *Broder* affirmed the district court's decision to allow removal after determining that two of plaintiffs' counts should be treated as each presenting two distinct claims for jurisdictional purposes. *Id.* at 194-96 ("[W]hat a plaintiff presents as one 'count' may be understood to encompass more than one 'claim,'" and a "single claim over which federal question jurisdiction exists is sufficient to allow removal."). The key factor, according to the court, was its determination that "at least one federal aspect of [the plaintiff's] complaint" was "a logically separate claim, rather than merely a separate theory that is part of the same claim as a state-law theory." *Id.* at 194-95;[14] *see also Gamoran v. Neuberger Berman Mgmt., LLC*, No. 10 Civ. 6234 (LBS), 2010 WL 4537056, at *3 (S.D.N.Y. Nov. 8, 2010) (allowing removal after finding that plaintiff's state law causes of action, including a claim for breach of fiduciary duty, should be construed as presenting multiple claims, including claims that raised questions of federal law).

Following the approach set forth in *Christianson* and *Broder*, this Court should treat plaintiffs' fiduciary duty allegations as three distinct claims against PwC relating to Treasury, FHFA, and Freddie Mac's officers and directors, respectively. There is little question that if plaintiffs brought their fiduciary duty allegations directly against Treasury, FHFA, and Freddie, that these counts—regardless of how plaintiffs styled them—would be treated as separate claims.

[14] *Broder* states that one characteristic of a theory, "as opposed to a distinct claim, is that a plaintiff may obtain the relief he seeks without prevailing on it." 418 F.3d at 195. But this cannot be determinative since it is often the case that two claims which are unquestionably separate—*e.g.*, breach of contract and breach of implied covenant of good faith—seek the same relief.

The analysis should be no different where the plaintiffs have instead alleged that PwC aided and abetted breaches by these three separate entities.

That plaintiffs' fiduciary duty allegations are "logically separate" claims, as opposed to alternative theories, is further demonstrated by the fact that the elements of these claims are not interchangeable. In order to prevail against PwC, plaintiffs must show that *a single entity*: (a) owed a fiduciary duty to plaintiffs, (b) breached that duty, and (c) caused damage to plaintiffs, in addition to demonstrating that PwC had knowledge of the breach and provided the breaching party substantial assistance or encouragement. *See Wenzel*, 2015 WL 222182, at *4 ("[T]here can be no claim for aiding and abetting of a breach of fiduciary duty without an underlying breach by a fiduciary.").[15] Plaintiffs cannot, for example, combine an alleged breach by Treasury with an alleged duty owed by FHFA. Given that plaintiffs' proof must stand alone for Treasury, FHFA, and Freddie Mac's officers and directors, respectively, common sense dictates treating plaintiffs' fiduciary duty counts as three separate claims for jurisdictional purposes.[16] As a result, if any one of these claims presents a substantial question of federal law under *Grable*, removal was proper.

2. Each of Plaintiffs' Fiduciary Duty Claims Requires an Interpretation of HERA

a) Plaintiffs' Fiduciary Duty Claim Related to Treasury Supports Federal Question Jurisdiction

In seeking to avoid federal jurisdiction, plaintiffs assert they will "not ask the state court to decide an issue of statutory interpretation or make any other decision that could be carried over and used against the government in any other litigation." Mot. at 11. But the complaint shows otherwise. Plaintiffs allege that the "Net Worth Sweep ran directly contrary to FHFA's purported statutory mission" as set forth in HERA and "as such" "was a violation of law and

[15] This discussion assumes that Virginia law would recognize a separate tort for aiding and abetting breach of fiduciary duty, a question the Virginia Supreme Court has not decided. *See Halifax Corp. v. Wachovia Bank*, 604 S.E.2d 403, 411-12 (Va. 2004) (assuming without deciding that aiding and abetting breach of fiduciary duty is cognizable in Virginia).

[16] Such an approach is supported by Eleventh Circuit precedent more generally, which "permits district courts to make reasonable deductions, reasonable inferences, or other reasonable extrapolations from the pleadings to determine whether it is facially apparent that a case is removable." *Roe v. Michelin N. Am., Inc*., 613 F.3d 1058, 1061-64 (11th Cir. 2010) (holding that "a district court need not suspend reality or shelve common sense in determining" whether the jurisdictional amount is met and warning against "artful pleading" that could "simply make federal jurisdiction disappear").

fiduciary duty." Compl. ¶ 38 (citing 12 U.S.C. § 4617(b)(2)(D)). Plaintiffs further claim that "[t]hrough the Net Worth Sweep, FHFA and Treasury violated Delaware law [sic] and *applicable federal law* by breaching their fiduciary duties to Freddie Mac and Plaintiffs." *Id.* ¶ 41 (emphasis added).

By expressly pleading that Treasury owes fiduciary duties to Freddie Mac or its shareholders and that the Net Worth Sweep violated federal law (and HERA in particular), plaintiffs have themselves raised federal questions through their fiduciary duty claims against PwC. *See Robinson v. FHFA*, No. 15-cv-109-KKC-EBA, 2016 WL 4726555, at *4 n.3 (E.D. Ky. Sept. 9, 2016) (holding that there is "no basis for applying" state fiduciary duty law to Treasury's actions regarding Freddie Mac in conservatorship as there is "no evidence of Congressional intent to graft state fiduciary duties onto the Treasury's responsibilities under HERA"). This satisfies the first requirement under *Grable*, which is whether a state law claim "necessarily raise[s]" a federal issue. *Grable*, 545 U.S. at 314.

The second *Grable* requirement—the federal issue must be "actually disputed," *id.*—is also satisfied. PwC disputes plaintiffs' claim that Treasury violated HERA through the Net Worth Sweep. To the contrary, HERA expressly granted the Secretary of Treasury temporary authority to "purchase obligations and securities" from Freddie "*on such terms and conditions as the Secretary may determine* and in such amounts as the Secretary may determine." 12 U.S.C. § 1455(l)(1)(A) (emphasis added). Before exercising this authority, the Secretary was required to first make a determination that it was necessary to "(i) provide stability to the financial markets; (ii) prevent disruptions in the availability of mortgage finance; and (iii) protect the taxpayer. *Id* § 1455(l)(1)(B). HERA also set forth considerations to guide Treasury in the exercise of its authority but made clear that the overriding goal was "to protect the taxpayers." *Id* § 1455(l)(1)(C). Courts have recognized that the Third Amendment was within Treasury's statutory authority under HERA. *Robinson*, 2016 WL 4726555, at *4-5. Plaintiffs may contest PwC's interpretation of HERA, but that does not eliminate the question of federal law.

The third *Grable* requirement asks whether the question of federal law is "substantial" and "looks [ ] to the importance of the issue to the federal system as a whole." *Gunn*, 133 S. Ct. at 1066. The Supreme Court has identified several factors to assist in determining whether a federal issue is substantial. "First, a pure question of law is more likely to be a substantial federal question. Second, a question that will control many other cases is more likely to be a substantial

federal question. Third, a question that the government has a strong interest in litigating in a federal forum is more likely to be a substantial federal question." *MDS (Canada) Inc. v. Rad Source Techs., Inc*., 720 F.3d 833, 842 (11th Cir. 2013); *see also Iberiabank v. Beneca 41-I, LLC*, 701 F.3d 916, 919 & n.4 (11th Cir. 2012) (finding federal question jurisdiction over a state law contract action that raised the federal issue of the FDIC's power to transfer a sublease).

Plaintiffs' allegations that Treasury owed fiduciary duties to Freddie Mac or its shareholders and violated HERA through the Net Worth Sweep meet the test for substantiality. These questions of law will not, contrary to plaintiffs' assertions, require a "fact-intensive" analysis of Treasury's actions. The Court will be asked to determine whether Treasury's actions were sanctioned by HERA's provisions allowing Treasury to purchase securities on "such terms and conditions as the Secretary may determine" and to act to "protect the taxpayers," rather than Freddie's shareholders. 12 U.S.C. § 1455(l)(1). And far from being limited to this case, the Court's determination as to the duties owed by Treasury, if any, and the propriety of Treasury's actions will have an impact on many cases pending in federal court that seek to challenge the Net Worth Sweep. Finally, it is hard to imagine a case with greater significance to the government than one that challenges the Treasury's response to the worst housing crisis in a generation.

Plaintiffs' fiduciary duty claim related to Treasury also satisfies the last requirement of *Grable*. This factor looks at whether the dispute is "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 133 S. Ct. at 1065; *see also Grable*, 545 U.S. at 314. Like *Grable* itself, exercising jurisdiction over plaintiffs' claim does not threaten to bring a significant number of other cases into federal court. It will be the unusual case that challenges the powers of Treasury or requires an interpretation of HERA.

b) Plaintiffs' Fiduciary Duty Claims Related to FHFA and Freddie Mac Also Raise Questions of Federal Law

Even if plaintiffs' fiduciary duty claims are treated as a single claim, federal question jurisdiction is proper because plaintiffs' allegations related to FHFA and Freddie Mac's officers and directors also raise disputed questions of federal law. As noted above, plaintiffs have expressly alleged that FHFA violated "applicable federal law" and HERA by virtue of the Net Worth Sweep. These allegations necessarily implicate Freddie Mac's officers and directors as well, since the attack on the Net Worth Sweep is the basis of plaintiffs' fiduciary duty claim related to Freddie Mac's officers and directors, Compl. ¶¶ 31-43, and these officers and directors

operate under FHFA's direction during the conservatorship pursuant to HERA. 12 U.S.C. § 4617(b)(2)(B), (C).

By alleging that the Net Worth Sweep violated the statutory purpose of HERA, plaintiffs themselves have raised the question of whether plaintiffs are owed any duties under HERA while Freddie Mac remains in conservatorship. PwC disputes plaintiffs' position that FHFA and Freddie Mac's officers and directors have violated HERA. *See, e.g.*, 12 U.S.C. § 4617(b)(2)(J)(ii) (authorizing FHFA to take "any" action authorized by HERA which FHFA "determines is in the best interests of [Freddie Mac] or [FHFA]"); *Id.* § 4617(b)(2) (granting FHFA broad powers to "operate" Freddie Mac, "carry on [its] business," enter into contracts on its behalf, and "transfer or sell any [Freddie Mac] asset . . . without any approval"). As with the questions of federal law raised by the allegations against Treasury, whether FHFA and Freddie Mac's officers and directors continue to owe duties to Freddie Mac's shareholders under HERA is significant both to this case and other pending cases challenging the Third Amendment.[17] And these claims are capable of resolution in federal court without disrupting the federal-state balance approved by Congress for the same reason as plaintiffs' claim against Treasury.

C. Plaintiffs' Causation Theory Raises Federal Questions Under HERA

The causation element for all of plaintiffs' claims relies on the common allegation that if PwC had "not issu[ed] its false audit opinions," or "issu[ed] audit opinions with [additional] disclosures," "Freddie Mac would have been able to exit the conservatorship *as required by law* and Plaintiffs would not have suffered their losses." Compl. ¶ 96 (emphasis added); *see id.* ¶ 93. Plaintiffs are notably silent in their complaint as to what law governs the end of the conservatorship, but this effort at artful pleading should not be rewarded. As FHFA explains in its opposition to remand, HERA—the very law that set the terms for the creation of the conservatorship—is the only law that could govern its termination. Whether HERA constrains

[17] Plaintiffs' assertion that FHFA and Freddie Mac's officers and directors continue to owe state law fiduciary duties to Freddie Mac's shareholders during the conservatorship is wrong. The cases plaintiffs rely on do not involve HERA or FHFA's powers and duties as conservator. Mot. at 7-8. As the Eastern District of Kentucky noted in its ruling last week, "there is no indication that such [state] fiduciary duties exist" with respect to FHFA as Freddie Mac's conservator. *Robinson*, 2016 WL 472655, at *6 n.4; *cf. Starr Int'l Co., Inc. v. Fed. Reserve Bank of New York*, 742 F.3d 37, 41-42 (2d Cir. 2014) (holding that federal common law preempted state fiduciary duty claims against the Federal Reserve Bank of New York related to the rescue of AIG because state law "cannot be applied to [the government's] rescue activities consistently with adequate protection of the federal interests at stake in stabilizing the national economy").

FHFA's discretion on whether and when to the end the conservatorship is another substantial, disputed question of federal law that supports federal question jurisdiction.

Plaintiffs' arguments to the contrary are unavailing. First, plaintiffs suggest that the end of the conservatorship might be governed by so-called "common law principles of conservatorships." Mot. at 12. But plaintiffs cite no authority showing that such a body of common law exists, let alone that it might constrain the decisions of an independent federal agency.[18] Second, plaintiffs seek to retreat from their own complaint by arguing that the end-of-the-conservatorship causation allegation is simply one of several possible theories they have advanced. Any fair reading of plaintiffs' complaint shows otherwise. The portions of the complaint that plaintiffs rely on are either boilerplate allegations designed to satisfy *other* elements of plaintiffs' claims, *see* Compl. ¶¶ 108-09 (alleging justifiable reliance, proximate causation, and damages), or allegations expanding on plaintiffs' theory that the conservatorship should have come to an end, *id.* ¶ 95. Plaintiffs cannot avoid the fact that their claims all share a causation allegation related to the end of the conservatorship, which necessarily raises disputed questions of federal law under HERA.

III. Plaintiffs' Fiduciary Duty Claims Arise Under Federal Law

Plaintiffs' fiduciary duty claims arise under federal law because Freddie Mac's bylaws and plaintiffs' stock certificates specifically provide that those claims arise under and are governed by federal law.

Section 11.3(a) of Freddie Mac's bylaws is entitled "Corporate Governance Practices and Procedures and Governing Law" and provides:

> The corporate governance practices and procedures of the Corporation shall comply with the Corporation's enabling legislation and other Federal law, rules, and regulations, and shall be consistent with the safe and sound operation of the Corporation. To the extent not inconsistent with the foregoing, the Corporation shall follow the corporate governance practices and procedures of the law of the Commonwealth of Virginia, including without limitation the Virginia Stock Corporation Act as the same may be amended from time to time. Subject to all of the foregoing, these Bylaws and any rights and obligations created by these Bylaws 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*.

[18] Neither of the two cases plaintiffs rely on—*RTC v. United Trust Fund, Inc.*, 57 F.3d 1025, 1032-33 (11th Cir. 1995) and *Del E. Webb McQueen Dev. Corp. v. RTC*, 69 F.3d 355, 357 (9th Cir. 1995)—mention a common law of conservatorship, let alone explain its content.

[D.E. 1-2, 1-3] (emphasis added).

Section 11.3(a) thus provides the "Governing Law" for claims related to Freddie Mac's corporate governance, such as plaintiffs' fiduciary duty claims. Under this provision, plaintiffs' fiduciary duty claims arise under and are governed by federal law, with Virginia law supplying the substance for the "federal rule of decision." *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) ("federal courts should 'incorporate state law as the federal rule of decision' unless 'application of the particular state law in question would frustrate specific objectives of federal programs'"). The stock certificates for plaintiffs' shares makes this crystal clear:

> This Certificate and the respective rights and obligations of Freddie Mac and the holders of the Non-Cumulative Preferred Stock with respect to such Non-Cumulative Preferred Stock shall be construed in accordance with and governed by the laws of the United States, provided that the law of the Commonwealth of Virginia shall serve as the federal rule of decision in all instances except where such law is inconsistent with Freddie Mac's enabling legislation, its public purposes or any provision of this Certificate.

Exs. A-Q, Preferred Stock Certificates § 9(f).

Plaintiffs contend that the references to Virginia law in Section 11.3(a) undermine federal jurisdiction. But the bylaws do not say that Virginia law governs claims concerning Freddie Mac's corporate governance. Rather, the bylaws and stock certificates are clear that Freddie Mac *follows* Virginia corporate governance law which supplies the substance for "the federal rule of decision in all instances" that is the "governing law" for corporate governance claims.

Plaintiffs' reliance on *Atherton v. FDIC*, 519 U.S. 213 (1997) and *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) is misplaced. Those cases concerned whether, in general, federal common law supplied the rule of decision for actions concerning federally insured savings institutions (*Atherton*) or actions brought by the FDIC as receiver (*O'Melveny & Myers*). Neither addresses the situation where the corporation's bylaws and stock certificates provide that federal law governs, with state law supplying the substance of the federal rule of decision.

Plaintiffs' fiduciary duty claims arise under federal law because Freddie Mac has determined through its bylaws and stock certificates to have corporate governance disputes "governed by" federal law. This Court thus has jurisdiction under § 1331.

Conclusion

Plaintiffs' remand motion should be denied. This Court has jurisdiction under § 1452(f), which alone supports removal. The Court also has jurisdiction under § 1331 because plaintiffs' claims raise important questions of federal law, both under HERA and federal common law.

Request for Hearing

PwC, pursuant to Local Rule 7.1(b)(2), respectfully requests that the Court exercise its discretion to set a hearing on Plaintiffs' Motion for Remand.

A hearing is desired so that all of the parties are able to adequately expound their positions on the issues raised by Plaintiffs' Motion for Remand, such as the workings of the Housing and Economic Recovery Act, as well as of the federal response to the housing crisis. Further, this case raises issues of national importance, as Plaintiffs' complaint challenges the federal government's response to the worst housing crisis in a generation. PwC believes that a hearing is appropriate in a case with such important national implications.

The time estimated in order to allow for full argument on this motion is one hour.

Date: September 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September 2016, a true and correct copy of the foregoing was filed with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing on all counsel or parties of record on the attached Service List.

/s/ *Charles S. Davant*
Charles S. Davant

Master Sgt. Anthony R. Edwards, USAF vs. PricewaterhouseCoopers LLP
Case No.: 1:16-CV-21224-MORENO
United States District Court, Southern District of Florida

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