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 REPLY IN SUPPORT OF ITS RENEWED MOTION TO SUBSTITUTE AS PLAINTIFF

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In HERA, Congress transferred everything it could to the Conservator—"all rights, titles, powers and privileges" of Freddie Mac *and* its shareholders. Plaintiffs do not, and cannot, dispute that they are pursuing claims based on their purported rights as shareholders. But Plaintiffs no longer hold any such rights. Rather, the Conservator holds "all rights" of Freddie Mac's shareholders for the duration of the conservatorship. The Conservator holds those rights without regard to whether they are characterized as derivative or direct; such a distinction is irrelevant in light of HERA's breadth. Even if that distinction were relevant, Plaintiffs concede that HERA bars a shareholder's ability to pursue derivative claims, and Plaintiffs' claims are derivative. Plaintiffs cannot avoid the "rule" under Virginia law that breach of fiduciary duty claims may only be pursued derivatively. Nor can Plaintiffs avoid the allegations in their own complaint that PwC's alleged negligence harmed Freddie Mac, confirming Plaintiffs' negligent misrepresentation claims are derivative. HERA attributes all shareholder claims to FHFA for a reason: FHFA as Conservator is far better positioned than individual shareholders to consider all the ramifications of commencing a lawsuit against third parties, including Freddie Mac's auditor. The Court should grant the motion to substitute.

ARGUMENT

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

A. Plaintiffs' Claims Are Derivative, Not Direct

Though HERA transfers "all" shareholder rights and claims to the Conservator, however characterized, the Court need not reach that issue in order to grant substitution here. Plaintiffs do not dispute that HERA transfers at least derivative claims (*see, e.g.*, *Kellmer v. Raines*, 674 F.3d 848, 851 (D.C. Cir. 2012)), and Plaintiffs' claims are derivative.

1. Plaintiffs' Aiding and Abetting Fiduciary Duty Claims are Derivative

The "rule" under Virginia law 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).[1] In their attempt to avoid this rule, Plaintiffs first ask the Court to bypass Virginia law completely—and apply Delaware law

[1] Plaintiffs do not dispute that the analysis for whether aiding and abetting claims are derivative follow the same analysis as for the alleged underlying breach of fiduciary duty.

instead—due to the purported "absence of a recognized test for determining whether a breach of fiduciary duty claim is direct or derivative." Opp. 11. Plaintiffs are wrong; the Supreme Court of Virginia has repeatedly recognized a simple test: all breach of fiduciary duty claims must be pursued derivatively. *See Simmons*, 261 Va. at 576; *Remora Invs., L.L.C. v. Orr*, 277 Va. 316, 323 (2009). Plaintiffs assert that, in the *Remora* decision, the Supreme Court of Virginia "left open the possibility" of adopting Delaware's *Tooley* test (Opp. 11), but this Court should "not impose a test declined by the Supreme Court of Virginia," *DCG&T ex rel. Battaglia/Ira v. Knight*, 68 F. Supp. 3d 579, 586 (E.D. Va. 2014), particularly where the court in *Remora* unequivocally held "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." *Remora*, 277 Va. at 323 (emphases added).[2]

Plaintiffs also assert *Simmons* dealt only with the "narrow issue" of whether shareholders can assert claims "based on breaches of fiduciary duties *owed to the corporation*," and damage "to the corporation." Opp. 15 (emphasis in original). But Plaintiffs' complaint likewise alleges that the Conservator and Treasury owed fiduciary duties *to Freddie Mac*, and took actions that harmed Freddie Mac. *See, e.g.*, Compl. ¶¶ 35-38, 40-42. Moreover, allegations of direct shareholder injury do not alter the rule: "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." *DCG&T*, 68 F. Supp. 3d at 586; *see also Wenzel*, 2015 WL 222182, at *3 ("Virginia law makes no such distinction" between "individual" and corporate injuries).

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[2] Numerous courts applying Virginia law have followed the rule that breach of fiduciary duty claims can only be pursued derivatively. *See, e.g., Office of Strategic Servs. v. Sadeghian*, 528 F. App'x 336, 347 (4th Cir. 2013) (Under Virginia law, "[c]orporate shareholders cannot bring direct individual suits against officers and directors for breaches of fiduciary duty; their remedy is derivative on behalf of the corporation."); *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 and corporate mismanagement, seeking recovery of the lost value of her stock. Under Virginia law, such claims unquestionably are derivative in nature."); *Wenzel v. Knight*, No. 3:14-CV-432, 2015 WL 222182, at *3 (E.D. Va. Jan. 14, 2015) ("[S]hareholders may assert claims of fiduciary breach against corporate directors only through shareholder derivate suits."); *Firestone v. Wiley*, 485 F. Supp. 2d 694, 702-703 (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." (internal quotation marks and citation omitted)).

Plaintiffs also argue—with zero authority—that Virginia law may permit breach of fiduciary duty claims against controlling shareholders. Opp. 15-16. In *Simmons*, however, the Supreme Court of Virginia held that a minority shareholder could *not* pursue a direct breach of fiduciary duty claim against the majority and controlling shareholder, who was also the sole officer and director of the corporation. *Simmons*, 261 Va. at 565, 574-75. The court declined to adopt an exception that would have permitted direct claims where recovery of derivative claims could "inure to the benefit of all shareholders, including, in some cases, those who have engaged in wrongdoing." *Id.* at 575-76. Under Virginia law, Plaintiffs' claims are derivative.

Even if the Court were to look to Delaware law on this issue—and it should not—the outcome would be the same. To state a direct claim under Delaware law, Plaintiffs must at least allege they "suffered a harm that was unique to them and independent of any injury to the corporation." *Gentile v. Rossette*, 906 A.2d 91, 103 (Del. 2006). Here, the fundamental alleged harm—the transfer of Freddie Mac's net worth—is borne first by Freddie Mac, and any alleged harm to Plaintiffs is purely derivative of that corporate harm. *See* Compl. ¶¶ 37-38, 40-42 (alleging harm to Freddie Mac). Indeed, Plaintiffs' claims are based expressly on an alleged reduction in the "value" of their shares (*see* Compl. ¶¶ 5, 6, 31-32, 38-40, 66, 69-70, 95, 107), and "[c]laims based on the diminution in value of the stock held by plaintiffs are generally derivative in nature." *Thermopylae Capital Partners, L.P. v. Simbol, Inc.*, No. CV 10619-VCG, 2016 WL 368170, at *10 (Del. Ch. Jan. 29, 2016).

Plaintiffs argue that the claims against PwC fit within a "limited exception" (*id.*) under Delaware law whereby a certain type of shareholder claim may be "both derivative and direct in character." *Gentile*, 906 A.2d at 99; *see* Opp. 12-16. But that exception applies only where (a) the company issues excessive shares to a controlling shareholder without receiving assets of commensurate value in return, and (b) the share issuance increases that shareholder's voting power to the detriment of the minority shareholders. *See id.* at 100; *Gatz v. Ponsoldt*, 925 A.2d 1265, 1278 (Del. 2007) (citing expropriation of "value and voting power").

The *Gentile* exception has no application here. First, the Third Amendment did not result in the issuance of any additional shares to Treasury, let alone "excessive" shares. Nor did it affect any Treasury voting rights because Treasury has no voting rights. Further, the non-Treasury shareholders' ownership stakes and voting rights are unaffected by the Third Amendment. *See Innovative Therapies, Inc. v. Meents*, No. 12–3309, 2013 WL 2919983, at *5

(D. Md. June 12, 2013) (declining to apply *Gentile* exception where, as here, the "allegations rest solely on a purported loss in the economic value of [plaintiff's] ownership stake rather than any loss of voting power"); *Nikoonahad v. Greenspun Corp.*, No. C09-02242, 2010 WL 1268124, at *5 (N.D. Cal. Mar. 31, 2010) (same).[3] Second, Treasury is not a controlling shareholder of Freddie Mac. Treasury does not own a majority of Freddie Mac's voting shares, and does not exercise actual control over its affairs. *See Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987).[4] Its rights as a senior preferred shareholder are entirely contractual, and even "a significant shareholder, who exercises a duly-obtained contractual right that somehow limits or restricts the actions that a corporation otherwise would take, does not become, without more, a 'controlling shareholder' for that particular purpose." *Superior Vision Servs. v. ReliaStar Life Ins. Co.*, No. Civ.A. 1668-N, 2006 WL 2521426, at *5 (Del. Ch. Aug. 25, 2006).[5] And Third, Plaintiffs' claims against PwC do not fit the *Gentile* scenario. Plaintiffs focus on the Third Amendment (Opp. 12-16), but Plaintiffs do not allege PwC played any role in connection with that Amendment, which was executed by FHFA and Treasury. *See* Compl. ¶¶ 31-43. Rather, Plaintiffs allege PwC assisted Treasury, FHFA, and Freddie Mac in connection with *other* alleged misconduct—*i.e.*, by improperly issuing unqualified audit opinions during the conservatorship period. *See, e.g.*, Compl. ¶¶ 28, 47, 51-74, 80-81.

2. Plaintiffs' Negligent Misrepresentation Claims are Derivative

Plaintiffs' negligent misrepresentation claims are also derivative (*see* FHFA Mot. at 12-13), and Plaintiffs make no attempt to demonstrate they are direct under Virginia law. Nor could

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

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

[5] Even if Plaintiffs' claims could be considered "dual-natured" under Delaware law—and they are not—the Conservator would still succeed to such claims. Even "dual-natured" claims should be treated as derivative for threshold issues of "claim initiation." *See In re El Paso Pipeline Partners, L.P. Derivative Litig.*, 132 A.3d 67, 75 (Del. Ch. 2015).

they: these claims—like Plaintiffs' aiding and abetting claims—are based on alleged harm to the value of Plaintiffs' stock over time, a purely derivative harm. Moreover, even if Delaware law applied—and it does not—the Delaware Supreme Court's decision in *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1126 (Del. 2016), does not alter the conclusion. *See* Opp. 16-17. That case addressed only claims by a *former* shareholder, asserted against the company (not an auditor), based on the company's *own* negligent misrepresentations. The court in *Citigroup* held those claims were direct because they "could not possibly belong to the corporation" who made the alleged misrepresentations. 140 A.3d at 1140. The court contrasted such claims with claims for breach of fiduciary duty against corporate directors, which could belong to the corporation "[b]ecause directors owe fiduciary duties to the corporation and its stockholders." *Id.* at 1139. Here, Plaintiffs are pursuing negligent misrepresentation claims against PwC—not Freddie Mac. Further, while Plaintiffs allege PwC owes a duty directly to Plaintiffs as shareholders to exercise reasonable care and diligence in issuing their audit reports (*see* Compl. ¶ 107), PwC in fact owes such duties only *to Freddie Mac*, the party with whom PwC is in privity and the recipient of PwC's audit reports.[6] Because Freddie Mac can pursue negligent misrepresentation claims against PwC, such claims belong to Freddie Mac and thus are derivative.[7]

Because Plaintiffs' claims are derivative—under Virginia *or* Delaware law—they fit squarely within the body of law substituting the Conservator in place of shareholder plaintiffs.

B. There is No Direct-Claims Exception to HERA

In all events, Plaintiffs' effort to limit HERA's succession provision to only derivative claims is wrong. *See* Opp. 5-10. However Plaintiffs' claims are characterized, the Conservator has succeeded to "all rights" of the shareholders, thus requiring substitution here.

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[6] *See Ward v. Ernst & Young*, 246 Va. 317, 328 (1993) (dismissing shareholder negligence claim because the plaintiff "lack[ed] privity of contract with Ernst & Young"); *Waterside Capital Corp. v. Hales, Bradford & Allen, LLP*, 319 F. App'x 263, 265 (4th Cir. 2009) (dismissing negligent misrepresentation against accounting firm, noting that "Virginia law bars recovery for purely economic losses due to negligence, unless the parties are in privity").

[7] Moreover, unlike the former shareholders in *Citigroup*, who could not benefit from an award of damages to the company, Plaintiffs have not sold their stock in Freddie Mac; they continue to hold it today. Accordingly, Plaintiffs could benefit from an award of damages to the company. Indeed, any alleged harm suffered by Plaintiffs would be measured by the alleged lost value of their stock, and thus would be coextensive with any alleged harm to Freddie Mac.

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

"As many courts have recognized, the language 'all rights, titles, powers, and privileges . . . of any stockholder' is *extremely broad* and evidences Congress's intent 'to shift as much as possible to the FHFA.'" *Pagliara v. Fed. Home Loan Mortg. Corp.*, No. 1:16-cv-337, 2016 WL 4441978, at *5 (E.D. Va. Aug. 23, 2016) (emphasis added) (citation omitted). With this statutory language, "to be sure that nothing was missed . . . Congress has transferred everything it could" to the Conservator. *Kellmer*, 674 F.3d at 851 (quoting *Pareto v. FDIC*, 139 F.3d 696, 700 (9th Cir.1998)). "In other words, the language means what it plainly says; HERA transferred 'all rights previously held by Freddie Mac's shareholders'" to the Conservator. *Id.* (citation omitted); *see also Montgomery Cty. Comm'n v. FHFA*, 776 F.3d 1247, 1255 (11th Cir. 2015) (interpreting HERA's exemption from "all taxation" as providing an "exempt[ion] from *all* state taxation" (emphasis in original)).[8]

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

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[8] HERA provides only one exception to the transfer of shareholder rights: following appointment of a receiver, Freddie Mac shareholders are permitted to prosecute claims they may have to liquidation proceeds. *See* 12 U.S.C. § 4617(b)(2)(K)(i)). The existence of this lone, express exception prohibits courts from creating any additional, implicit exceptions. *See United States v. Johnson*, 529 U.S. 53, 58 (2000).

Plaintiffs' attempts to minimize *Pagliara* fail. Plaintiffs try to cabin *Pagliara* to the particular type of "right" at issue in that case—shareholder inspection of corporate books and records—but fail to acknowledge the key feature of *Pagliara*: namely, that the court *rejected* the shareholder's attempts to limit HERA's succession provision to derivative claims. The court held that, in light of HERA, shareholders now lack the right to demand an inspection of Freddie Mac's books and records, which is a shareholder "right" that is "enforceable through a *direct* lawsuit." 2016 WL 4441978, at *6 (emphasis added). The court thus rejected the direct/derivative distinction as "counter to HERA's context and intent." *Id.* at *7.[9]

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

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

Id. at 673 (Hamilton, J., concurring) (emphasis added). In *Pagliara*, the court relied on Judge Hamilton's concurrence, holding that the Conservator succeeds to all shareholder rights, even

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[9] In noting that the plaintiffs in *Pagliara* remained free to attempt to bring a "direct lawsuit," 2016 WL 4441978, at *7 n.16, the court did not confer standing on those shareholders to bring any purportedly direct claims. The court simply observed that the decision (as opposed to its reasoning) was limited to books-and-records inspection demands.

those rights that are "enforceable through a direct lawsuit, not a derivative lawsuit." 2016 WL 4441978, at *6-7. The Court should follow the same approach here.[10]

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

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

First, although the *Lubin* court made a passing statement that "FIRREA would not be a bar to standing" if the shareholder had asserted direct claims, that statement was pure dicta because the court held that *all* of the claims asserted against the individual officers of the institution in receivership were derivative, not direct. *See* 382 F. App'x at 871.[11] Indeed, the issue of whether FIRREA's succession provision extends to all shareholder claims (including direct claims) was not argued in that case, and it appears no party even briefed the issue.

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

Third, *Lubin* focused on an issue not presented here—how to classify claims against individual defendants who had overlapping roles as officers of the institution in receivership, and officers of a holding company that owned that institution. *Id.* at 869. While the court held all of

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[10] Contrary to Plaintiffs' argument (Opp. 8), there is nothing about *Kellmer v. Raines*, 674 F.3d 848, 850-51 (D.C. Cir. 2012), that is "inconsistent" with the Conservator's position here. That the Conservator, more than eight years ago, opted not to exercise its substitution rights with respect to one particular claim presented by one particular plaintiff in one particular litigation in no way suggests FHFA did not have the right to seek substitution had it wished to do so.

[11] *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) ("[D]icta is not binding on anyone for any purpose.")

the claims asserted against officers of the institution in receivership were derivative (*id.* at 870-71), the court also noted that the FDIC would not succeed to the rights of the holding company-owner against its *own* officers for alleged breaches of fiduciary duty owed *to the holding company*. *Id.* at 872 n.9. Here, Freddie Mac has no holding company. Nor is FHFA an officer of any shareholder of Freddie Mac. Rather, the complaint alleges the Conservator allegedly breached fiduciary duties owed *to Freddie Mac*. *See* Compl. ¶¶ 111-12. Like the claims asserted against the bank officers in *Lubin*, the claims here are derivative. *See supra* Sec. I(B).[12]

Contrary to Plaintiffs' assertion, there is no controlling Eleventh Circuit precedent interpreting FIRREA's analogous succession provision. The Court therefore can, and should, follow the approach outlined in *Pagliara*, and interpret HERA according to its plain terms.

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

Plaintiffs argue that interpreting HERA to mean the Conservator succeeds to "all" shareholder claims would raise constitutional concerns. Opp. 9-10. But the doctrine of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a provision," *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (internal quotation marks and citation omitted), and "has no application in the absence of statutory ambiguity," *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 494 (2001). Here, there is no ambiguity in HERA's succession provision, and thus no need to seek out an alternative interpretation. *See Pagliara*, 2016 WL 4441978, at *7-8 (rejecting constitutional avoidance argument). "It is a slippery slope for the Court to poke holes in, or limit, the plain language of a statute, especially when, as here, the plaintiffs have not asked the Court to weigh in on the statute's constitutionality." *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 232 (D.D.C. 2014).

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

Plaintiffs argue that, even if the Conservator is found to have succeeded to the right to pursue these claims, the Conservator would be barred from doing so because of a purported conflict of interest. Opp. 16-19. But there is simply no "conflict of interest" exception to

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[12] 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), is similarly inapt. Like the Eleventh Circuit's decision in *Lubin*, the issue of whether FIRREA's succession provision extends to all shareholder claims was not argued or briefed.

HERA's succession provision, and no court has ever applied one. Plaintiffs rely on two inapplicable, out-of-circuit decisions that have manufactured a conflict-of-interest exception for FDIC receiverships—not conservatorships. Opp. 17 (discussing *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1295-96 (Fed. Cir. 1999) and *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021-23 (9th Cir. 2001)). The court in *Perry Capital* rightly rejected any application of those decisions to FHFA under HERA, explaining that they were wrongly decided because they improperly relied on the historic rationale for shareholder derivative actions while disregarding the statutory language of FIRREA (and HERA) that bars such actions. 70 F. Supp. 3d at 231. Additionally, those decisions involved receiverships, and their flawed rationale "makes still less sense in the conservatorship context." *Id.* at 231 n.30. There is thus no basis for creating "an *implicit* end-run around FHFA's conservatorship authority by means of the shareholder derivative suits that the statute explicitly bars." *Id.* at 231; *see also Pagliara*, 2016 WL 4441978, at *9 n.20 (rejecting as "not persua[sive]" the identical conflict of interest argument asserted by a shareholder against FHFA as Conservator).

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

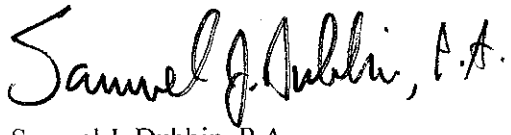
Finally, Plaintiffs do not address the numerous cases holding that to permit a shareholder to pursue claims during conservatorship would run afoul of Section 4617(f), as it would "restrain or affect" the exercise of the Conservator's powers and functions. *See* FHFA Mot. 16-17 (citing cases). Instead, Plaintiffs merely repackage their arguments in favor of a direct-claims exception and conflict-of-interest exception as arguments against Section 4617(f). *See* Opp. 19. These arguments fail for the same reasons described above. Plaintiffs also argue that Section 4617(f) is inapplicable because it may not bar claims for money damages. *Id.* at 20. But that issue is distinct from the issue of whether Section 4617(f) bars a shareholder's ability to pursue claims based on its status as a shareholder. It is in the latter context that numerous courts have held Section 4617(f) does, in fact, bar such shareholder claims. Plaintiffs have no answer to these authorities. Accordingly, the Court may grant the motion to substitute on this basis alone.

CONCLUSION

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

Dated: September 16, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that, on September 16, 2016, a true and correct copy of the foregoing was filed electronically using the Court's CM/ECF system, causing a true and correct copy to be served on all counsel of record. I also served the following counsel of record via e-mail:

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