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January 23, 2017

VIA ECF FILING

Hon. Mark Langer
Clerk of Court
United States Court of Appeals for the District
of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *Perry Capital LLC v. Lew*, Nos. 14-5243(L), 14-5254 (con.), 14-5262 (con.); Citation of Supplemental Authority Pursuant to Fed. R. App. P. 28(j)

Dear Mr. Langer:

I write to notify the Court of a recent decision from the United States District Court for the Southern District of Florida that addresses key issues presented in the above-referenced appeal. *Edwards v. Deloitte & Touche, LLP*, Civ. No. 16-21221 (S.D. Fla. Jan. 18, 2017) (Exhibit A).

In *Edwards*, a group of Fannie Mae shareholders sued the company's auditor for its alleged role in the Third Amendment and the Net Worth Sweep. The court granted FHFA's motion to substitute FHFA for the shareholders as the only proper plaintiff pursuant to HERA's succession provision, 12 U.S.C. § 4617(b)(2)(A)(i). Relying on *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), the court found the plaintiffs' claims to be derivative. *Slip op.* 8-9. *Compare* FHFA Br. 43-46.

The *Edwards* court also specifically rejected the plaintiffs' attempt to rely upon the narrow exception recognized in *Gentile v. Rosette*, 906 A.2d 91 (Del. 2006), whereby a corporate transaction can give rise to both direct and derivative claims: "the Third Amendment only altered the way in which the Treasury's dividends were calculated . . . Thus, their claims do not appear to fit within the narrow transactional paradigm identified by the *Gentile* court and are derivative." *Slip op.* 9-10 (internal cites and quotation marks omitted). *Compare* FHFA Br. 46-47.

Finally, the *Edwards* court rejected plaintiffs' claim that stockholders could pursue derivative claims, notwithstanding § 4617(b)(2)(A)(i), because of FHFA's purported "manifest conflict of interest." The court observed that "[n]ot only does the

Plaintiffs' argument rely on a different statute and cases from other circuits, but '[a]ll courts known to have considered that argument in the context of HERA have found the argument unavailing.'" *Slip op.* 10-11. *Compare* FHFA Br. 48-54. Accordingly, the court held that "there is no conflict of interest exception" to FHFA's succession to the rights, titles, powers, and privileges of shareholders. *Slip op.* at 11.

Respectfully Submitted,

/s/ Howard N. Cayne

Howard N. Cayne

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document and Exhibit A thereto were served upon the parties to this action by serving a copy upon each through the Electronic Filing System.

/s/ Howard N. Cayne
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Exhibit A

United States District Court
for the
Southern District of Florida

Master Sgt. Anthony R. Edwards, and others, Plaintiffs	)	
v.	)	Civil Action No. 16-21221-Civ-Scola
Deloitte & Touche, LLP, Defendant.	)	

Order Denying Motion to Remand and Granting Motion to Substitute

The Plaintiffs, shareholders of the Federal National Mortgage Association ("Fannie Mae"), sued Deloitte & Touche, LLP ("Deloitte") in state court, seeking to recoup losses allegedly caused by Fannie Mae, the Federal Housing Finance Agency ("FHFA"), the United States Department of the Treasury, and Deloitte following the housing mortgage crisis. Deloitte removed the case to this Court, asserting that the Plaintiffs' state claims arise under federal law. The Plaintiffs have moved to remand. The FHFA has also moved to be substituted for the Plaintiffs, claiming that federal law has removed the Plaintiffs' standing to bring this suit. For reasons more fully explained below, the Court finds that the Plaintiffs' breach of fiduciary duty claims arise under federal law and the Plaintiffs' bring only derivative claims which belong to the FHFA. Accordingly, the Court **denies** the Plaintiffs' motion to remand (ECF No. 23) and **grants** the FHFA's motion to substitute (ECF No. 15).

1. Background

In July 2008, Congress, in response to the sub-prime mortgage crisis, enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110–289, 122 Stat. 2654, *codified at* 12 U.S.C. § 4617. Part of HERA created the FHFA to regulate the government-sponsored enterprises Fannie Mae and Freddie Mac. *See* 12 U.S.C. § 4511. The statute also granted the FHFA's director the authority to appoint the FHFA as conservator of the government-sponsored enterprises. 12 U.S.C. § 4617(a). On September 6, 2008, the FHFA's director exercised this power and appointed the FHFA conservator of Fannie Mae. (Compl., ECF No. 1–1, at ¶ 21.) As Conservator, the FHFA has the power to take any actions "necessary to put [Fannie Mae] in a sound and solvent condition" and to "preserve and conserve [Fannie Mae's] assets and property. 12 U.S.C. § 4617(b)(2)(D)(i)–(ii). The FHFA also "immediately succeed[ed] to . . . all rights, titles, powers, and privileges of [Fannie Mae], and of any

stockholder, officer, or director," *id.* at § 4167(b)(2)(A)(i), and acquired the authority to "take over the assets of and operate [Fannie Mae] with all the powers of the stockholders, the directors and the officers of [Fannie Mae] and conduct all business of [Fannie Mae]," *id.* at § 4167(b)(2)(B)(i).

After becoming Conservator, the FHFA entered into a senior preferred stock purchase agreement with the United States Department of the Treasury. (Compl. at ¶ 22.) Under the agreement, Fannie Mae issued a new class of stock, Senior Preferred Stock, of which the Treasury purchased one million shares in exchange for allowing Fannie Mae to draw upon one hundred billion dollars from the Treasury. (*Id.*) The Senior Preferred Stock entitled the Treasury to dividends at an annualized rate of 10% of the outstanding liquidation preference of the Treasury's stock if paid in cash or 12% if paid in kind. (*Id.* at ¶ 26.) The agreement between the FHFA and the Treasury also provided the Treasury with warrants to purchase 79.9% of Fannie Mae's common stock for a nominal price and prevented Fannie Mae from altering its capital structure or paying dividends to any stockholder but the Treasury without the Treasury's approval. (*Id.* at ¶ 22.) The stock purchase agreement was amended twice to provide additional funds to Fannie Mae. (*See id.*)

In August 2012, the Treasury and the FHFA amended the stock purchase agreement for a third time. (*Id.* at ¶ 31.) The Third Amendment required Fannie Mae to pay the Treasury a quarterly dividend equal to the amount of its net worth. (*Id.*) This agreement is commonly referred to as the Net Worth Sweep. (*Id.*) The Plaintiffs allege that Fannie Mae had already returned to profitability by the time the Net Worth Sweep occurred and "Fannie Mae was on track to repay [the] Treasury and the taxpayers every dollar Fannie Mae had borrowed with interest . . . ." (*Id.* at ¶¶ 31–32.) Because "[n]o consideration was paid to Fannie Mae or [its] stockholders in exchange for the Net Worth Sweep," the Plaintiffs claim that it "constituted a massive expropriation of value from the holders of Fannie Mae Stock . . . ." (*Id.*) Thus, according to the Plaintiffs, the FHFA, the Treasury, and Fannie Mae's directors and officers breached their fiduciary duties to Fannie Mae's minority shareholders by engaging in "an unfair, self-dealing transaction with Fannie Mae's controlling stockholder." (*Id.* at ¶ 39.)

Rather than suing the FHFA, the Treasury, and Fannie Mae's directors and officers directly, the Plaintiffs sued Deloitte, Fannie Mae's independent auditor, for negligent misrepresentation and aiding and abetting breach of fiduciary duty. The Plaintiffs allege that between 2008 and 2013, Deloitte's audits failed to comply with generally accepted auditing standards ("GAAP")

and that Deloitte issued the following untrue statements: "(i) Fannie Mae's consolidated financial statements presented fairly, in all material respects, the financial position of Fannie Mae and its subsidiaries in conformity with GAAP; (ii) Fannie Mae has a reasonable basis for making the statements contained in its Independent Auditors' Reports; (iii) Fannie Mae conducted its audits in accordance with the Auditing Standards; and (iv) the financial statements [of Fannie Mae] were free of material misstatements." (*Id.* at ¶ 108.) The Plaintiffs also allege that Deloitte failed to disclose material facts about the actions of the FHFA, the Treasury, and Fannie Mae's directors and officers. (*Id.* at ¶ 109.) The actions of the FHFA, the Treasury, and Fannie Mae's directors and officers "led directly to the loss of value of Fannie Mae Stock, including the stock held by [the] Plaintiffs." (*See id.* at ¶97.) "Had Deloitte performed its audits correctly, "Fannie Mae would have been able to exit the conservatorship as required by law and [the] Plaintiffs would not have suffered their losses." (*Id.* at ¶ 98.) Thus, Deloitte "provided substantial assistance or encouragement" to the FHFA, the Treasury, and Fannie Mae's directors and officers in their breaches of their fiduciary duties. (*See id.* at ¶¶ 117–18.)

On April 6, 2016, Deloitte removed the Plaintiffs' suit to this Court. (ECF No. 1.) In June, the FHFA moved to substitute as Plaintiff in this action under HERA's succession clause. (ECF No. 15.) Before the Court could rule on the motion, the Plaintiffs challenged the Court's subject matter jurisdiction and moved to remand. (ECF No. 23.) Both motions are fully briefed and ripe for the Court's review.

2. The Plaintiffs' Motion to Remand

As an initial matter, the FHFA and Deloitte have requested that the Court rule on the motion to substitute before the motion to remand. The FHFA and Deloitte assert that the Court is empowered to rule on threshold procedural issues in any order, even if the Court's subject matter jurisdiction has been challenged. Although the Eleventh Circuit has held that district courts may rule on a procedural motion to substitute under Federal Rule of Civil Procedure 17 before resolving a jurisdictional challenge, *In re Engle Cases*, 767 F.3d 1082, 1108–09 (11th Cir. 2014), the FHFA's motion is not a simple procedural issue. Instead, the FHFA's motion requires a consideration of the merits of the Plaintiffs' claims. Accordingly, the Court must first resolve the jurisdictional challenge.[1]

[1] Even if the motion to substitute was merely procedural, the Court would decline to exercise its discretion to rule on the motion before considering the motion to remand.

A. Legal Standard

A party may remove a civil action from state court to federal district court if the action is one over which the federal district court had original jurisdiction. 28 U.S.C. § 1441(a). Under 28 U.S.C. 1331(b), district courts have original jurisdiction in "all civil actions arising under the Constitution, laws, or treaties of the United States." "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). "The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Id.* "Therefore, in general terms, removal is improper if based solely upon a plaintiff's allegation of an anticipated defense or if based upon a defendant's responsive pleading." *Lazuka v. FDIC*, 931 F.2d 1530, 1534 (11th Cir. 1991) (citing *Merrell Dow Pharmaceuticals Inc. v. Thompson,* 478 U.S. 804, 808, 809 n. 6 (1986)).

On the other hand, "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for So. Cal.*, 463 U.S. 1, 22 (1983). The "artful-pleading" doctrine, thus, provides exceptions to the well-pleaded complaint rule. Under one of these exceptions, even if it appears from the complaint that only state-law causes of action are actually pleaded, a federal question will be inferred where "the vindication of a right under state law necessarily turn[s] on some construction of federal law." *Merrel Dow*, 478 U.S. at 808. Under this analysis, "in limited circumstances, federal-question jurisdiction may be . . . available if a substantial, disputed, question of federal law is a necessary element of a state cause of action." *Jairath v. Dyer*, 154 F.3d 1280, 1282 (11th Cir. 1998). In making this determination, "[t]he removing court looks to the substance of the complaint, not the labels used in it." *In re Carter*, 618 F.2d 1093, 1101 (5th Cir. 1980).

The removing defendant bears the burden of establishing that federal jurisdiction is proper. *Leonard v. Enter. Rent a Car*, 279 F.3d 967, 972 (11th Cir. 2002). Additionally, federal courts are directed to construe removal statutes strictly and "all doubts about jurisdiction should be resolved in favor of remand to state court." *Univ. of So. Ala. v. American Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999).

B. Analysis

In its notice of removal, Deloitte acknowledges that the Plaintiffs' Complaint only states claims under state law. Deloitte, however, asserts that the claims arise under federal law because (1) the Plaintiffs' causation theory requires construction of HERA; (2) the negligent misrepresentation claim relies on federal auditing standards; (3) the alleged breaches of fiduciary duty rely on HERA and other federal law; (4) the Plaintiffs no longer have authority to bring their claims because of HERA's succession clause; and (5) Fannie Mae's Charter provides federal jurisdiction for derivative claims. Because the Court finds that the Plaintiffs' breach of fiduciary duty claims arise under federal law, the Court has subject matter jurisdiction over this suit and need not offer an opinion on Deloitte's remaining arguments.

As previously stated, a federal question can be presented by a complaint where "the vindication of a right under state law necessarily turned on some construction of federal law." *Merrell Dow*, 478 U.S. at 808. However, "'the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction,' even where the interpretation of federal law may constitute an element of the state cause of action." *Madzimoyo v. Bank of NY Mellon Trust Co.*, 440 F. App'x. 728, 730 (11th Cir. 2011) (quoting *Merrell Dow*, 478 U.S. at 813). The test, then, for deciding when a federal court should exercise federal question jurisdiction over a removed case is whether "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). Courts have noted that under this analysis, "federal question jurisdiction should be narrowly construed." *Madzimoyo*, 440 F. App'x. at 730.

Here, the Plaintiffs' Complaint asserts an aiding and abetting breach of fiduciary duty claim against Deloitte. Under Florida law, this claim requires the Plaintiffs to prove (1) a fiduciary duty on the part of the primary wrongdoer, (2) a breach of this duty, (3) knowledge of the breach by the alleged aider and abettor, and (4) the aider and abettor's substantial assistance or encouragement of the wrongdoing. *AmeriFirst Bank v. Bomar*, 757 F. Supp. 1365, 1380 (S.D. Fla. 1991) (Hoeveler, J.). The federal question in this case concerns the first element.

The Plaintiffs allege three separate wrongdoers—the FHFA, the Treasury, and Fannie Mae's officers and directors. Thus, although the Plaintiffs' state one count of aiding and abetting breach of fiduciary duty against Deloitte, it can

logically be viewed as three distinct claims, one involving each wrongdoer. *See Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 810 (1988) ("Petitioners' antitrust count can readily be understood to encompass both a monopolization claim under § 2 of the Sherman Act and a group-boycott claim under § 1.); *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 194–95 (2d Cir. 2005) (separating a single breach of contract count into two separate claims for analyzing jurisdiction). Under its bylaws, Fannie Mae elected to be governed by Delaware law in regard to its fiduciary duties. Therefore, no federal question is at issue with the Plaintiffs' claim that Deloitte aided and abetted Fannie Mae's officers and directors' breach of fiduciary duty. The existence of the FHFA's and the Treasury's duties, however, require the interpretation of HERA and other federal law.

Deloitte asserts that the FHFA and the Treasury owe no fiduciary dutyto Fannie Mae's shareholders and, if such a duty exists, it would by based on federal law. (*See* ECF No. 41 at 19–20). The Plaintiffs argue that "state law provides the rule of decision for [the] Plaintiffs' claims," arguing that the FHFA's and the Treasury's duties are governed by Delaware law. (ECF No. 23 at 11–14.) What the Plaintiffs fail to recognize, however, is that they analyzed federal law for several pages, including HERA, in order to show the Court that the FHFA and the Treasury have fiduciary duties which are governed by Delaware law. (*Id.*) In essence, the Plaintiffs ask the Court to resolve the federal question in this case—if HERA allows the FHFA and the Treasury to have fiduciary duties and, if so, under what law—in order to conclude that there are no pending federal questions.

There is no doubt that the existence of the FHFA's and the Treasury's duties is a necessary part of the Plaintiffs' claims, *see Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013) (analyzing the elements of the plaintiff's claim under Texas law to determine if the federal question was "necessary" to the case); *AmeriFirst Bank*, 757 F. Supp. at 1380 (stating that the existence of a fiduciary duty on the part of the primary wrongdoer is a necessary element of the aiding and abetting claim), and that this element is actually disputed by the parties. Therefore, the Court moves to the third prong of the arising under jurisdiction analysis: whether the federal issue raised is substantial. "The substantiality analysis focuses not on whether a federal issue is 'significant to the particular parties in the immediate suit,' but 'looks instead to the importance of the issue to the federal system as a whole.'" *Figueroa v. Szymoniak*, No. 13-61020-CIV, 2013 WL 4496512, at *3 (S.D. Fla. Aug. 22, 2013) (Cohn, J.) (quoting *Gunn*,

133 S. Ct. at 1066). The Eleventh Circuit looks to three factors to "assist in [the substantiality] inquiry:"

> 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., 730 F.3d 833, 842 (11th Cir. 2013) (per curiam) (citations omitted). Here, the issue of what, if any, duties are owed to Fannie Mae's shareholders involves federal actors and is a pure question of law, requiring the interpretation of HERA and federal case law. Further, there are currently several suits in the federal system seeking to determine if the actors in the Net Worth Sweep are liable to the shareholders of Fannie Mae and Freddie Mac. Thus, despite the Plaintiffs' protestations, there is clearly a substantial federal issue in this case. *See, e.g.*, *Meyer v. Health Mgmt. Assocs., Inc.*, 841 F. Supp. 2d 1262, 1268 (S.D. Fla. 2012) (Scola, J.) (concluding that a claim did not present a substantial federal issue because it did "not directly involve or implicate the actions of any federal player, it d[id] not present a 'nearly pure issue of [federal] law,' and its resolution [was] quintessentially 'fact-bound and situation-specific'").

Finally, deciding this issue in a federal forum would not "disturb[] any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314. The Court sees no state interest in this issue nor any detrimental effect on the state-federal division of judicial labor. The parties fail to even dispute this prong in their briefing. Accordingly, because Plaintiffs claims raise a "federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities," the Court has subject matter jurisdiction over this case.

3. The FHFA's Motion to Substitute As Plaintiff

The FHFA moves to substitute as plaintiff, arguing that the FHFA succeeded to all the rights of Fannie Mae's stockholders under HERA's succession clause, including the Plaintiffs' rights to bring this suit. Neither party addresses the standard the Court should apply to this motion. Because the parties are disputing the Plaintiffs' statutory standing to bring this claim, and "statutory standing is part and parcel of the merits of a particular claim,"

the Court will apply the familiar standard under Rule 12(b)(6), taking all reasonable inferences for the non-moving party. *Vander Luitgaren v. Sun Life. Assur. Co. of Canada*, 765 F.3d 59, 63 (1st Cir. 2014); *see also Jackson v. Sedgwick Claims Mgmt. Servs. Inc.*, 732 F.3d 557, 562 n. 2 (6th Cir. 2013) (explaining that statutory standing is a merits determination and should be addressed through a 12(b)(6) motion rather than a motion under Rule 12(b)(1)); *Pagliara v. Fed. Home Mortg. Corp.*, No. 16-cv-337, 2016 WL 4441978, at *4 (E.D. Va. Aug. 23, 2016) (determining that Freddie Mac's argument that the plaintiff lacked standing under HERA's succession clause was truly an attack on the merits rather than an Article III standing inquiry).

Under HERA's succession clause, the FHFA "immediately succeed[ed] to . . . all rights, titles, powers, and privileges of [Fannie Mae], and of any stockholder, officer, or director," 12 U.S.C. § 4167(b)(2)(A)(i). Through this provision, Congress "transferred everything it could" to the FHFA. *Kellmer v. Raines*, 674 F.3d 848, 851 (D.C. Cir. 2012). The FHFA argues that this clause placed all shareholder suits—direct and derivative—in the hands of the FHFA. The Plaintiffs agree that the clause bars derivative suits, but argue that HERA does not affect direct suits by shareholders against third parties. The Court need not resolve this issue because an analysis of the Plaintiffs' claims shows that they are derivative and, therefore, barred by HERA.

Fannie Mae is governed by its federal charter and federal law. *See* 12 U.S.C. § 1716 *et seq.*; *id.* at § 1451 *et. seq.*; 12 C.F.R. § 1710.10(a). For issues not addressed by the charter or federal law, Fannie Mae may follow applicable corporate law of Delaware so long as that law is not inconsistent with federal law. 12 C.F.R. § 1710.10(b); Fannie Mae Bylaws Section 1.05. For the purposes of the motion to substitute, the FHFA "assumes without conceding that Delaware law concerning whether a claim is direct or derivative" may apply. (ECF No. 15 at 11 n. 6.) Under Delaware law, the issue of whether a stockholder's claim is derivative or direct "must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).

When analyzing the first prong, a court should "look[]at the body of the complaint and considering the nature of the wrong alleged and the relief requested, [determine if] the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation[.]" *Id.* at 1036. In the Complaint, the Plaintiffs allege that the Net Worth Sweep "offered no benefits" to Fannie

Mae, was contrary to placing Fannie Mae in "a sound and solvent condition," and depleted Fannie Mae's assets. (*See* Compl. at ¶¶ 37–38, 40–42.) Based on the test in *Tooley*, these alleged harms are premised on harms to Fannie Mae rather than the Plaintiffs independently. *See also In re J.P Morgan Chase & Co. Shareholder Litig.*, 906 A.2d 766, 771 (Del. 2006) (concluding that a breach of fiduciary duty claim premised on waste of corporate assets was "classically derivative").

The Complaint also claims that the value of the Plaintiffs' shares was harmed by the Net Worth Sweep. (*See* Compl. at ¶¶ 5, 6, 31–32, 38–40, 68, 71–72, 97, 109.) The Delaware courts, however, have explicitly and emphatically rejected the argument that the loss of stock value is an independent harm to the shareholder. *See Tooley*, 845 A.2d at 1038 ("[T]he *indirect* injury to the stockholders arising out of the harm to the corporation comes about solely by virtue of their stockholdings. It does not arise out of any independent or direct harm to the stockholders, individually."); *Protos v. Cavanagh*, No. 6555-VCG, 2012 WL 1580969, at *5–6 (Del. Ch. May 4, 2012) ("Claims of overpayment naturally assert that the corporation's funds have been wrongfully depleted, which, though harming the corporation directly, harms the stockholders only derivatively so far as their stock loses value.").

The Plaintiffs recognize that harm to the corporation and loss of stock value are signs of a classically derivative suit, but argue that their claim falls under the narrow exception laid out in *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006). In *Gentile*, the Delaware Supreme Court held that

> where a significant or controlling stockholder causes the corporation to engage in a transaction wherein shares having more value than what the corporation received in exchange are issued to the controller, thereby increasing the controller's percentage of stock ownership at the public shareholders' expense, a separate and distinct harm results to the public shareholders, apart from any harm caused to the corporation, and from which the public shareholders may seek relief in a direct action.

Gatz v. Ponsoldt, 925 A.2d 1265, 1274 (Del. 2007) (describing *Gentile*). Thus, the Plaintiffs argue that their claims depend on the "improper extraction or expropriation" which "destroyed the value of their investments." (*See* ECF No. 20 at 13.)

Even if the Court were to ignore the Plaintiffs' allegations throughout the Complaint that the Net Worth Sweep harmed Fannie Mae and their stock value, the *Gentile* exception still would not apply to the Plaintiffs claims. *Gentile*

and its related cases are premised on "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a 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." *Gentile*, 906 A.2d at 100. Further, the cases in which the *Gentile* exception applied involved "an improper transfer of *both* economic value and voting power from the minority stockholders to the controlling stockholder." *Feldman v. Cutaia*, 951 A.2d 727, 732 n. 26 (Del. 2008) (emphasis added).

Here, the Third Amendment and Net Worth Sweep did not involve the issuance of any new shares let alone "excessive" shares. Nor did the exchange cause an increase in the percentage of outstanding shares owned by the Treasury. Instead, the Third Amendment only altered the way in which the Treasury's dividends were calculated under the stock purchase agreement. Moreover, the Third Amendment in no way affected the Treasury's or the Plaintiffs' voting power. The Plaintiffs claims rest entirely on economic harm to the value of their shares. Thus, their claims do "not appear to fit within the narrow 'transactional paradigm' identified by the *Gentile* court" and are derivative. *Innovative Therapies, Inc. v. Meents*, No. 12-3309, 2013 WL 2919983, at *5 (D. Md. June 12, 2013) (declining to find the plaintiff's claims direct when they were based solely on economic harm and did not involve a dilution of voting power).

Finally, the Plaintiffs argue that even if their claims are derivative, HERA does not bar their suit because FHFA has a manifest conflict of interest. In support of this argument, the Plaintiffs rely on two cases interpreting the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101–73, 103 Stat. 183. The Federal Circuit in *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1295–96 (Fed. Cir. 1999), ruled that "notwithstanding the 'general proposition' that the FDIC assumed 'the right to control the prosecution of legal claims on behalf of the insured depository institution now in its receivership,' a plaintiff has standing to bring a derivative suit when the FDIC has a "manifest conflict of interest"—*i.e.,* when the plaintiffs ask the receiver to bring a suit based on a breach allegedly caused by the receiver. *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 230 (D.D.C. 2014) (describing *First Hartford Corp.*). This reasoning was later adopted by the Ninth Circuit. *Delta Savings Bank v. United States,* 265

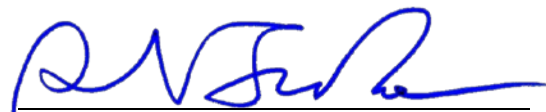
F.3d 1017 (9th Cir. 2001). No other circuit has adopted *First Hartford Corp.*'s approach in relation to FIRREA.

Not only does the Plaintiffs' argument rely on a different statute and cases from other circuits, but "[a]ll courts known to have considered that argument in the context of HERA have found the argument unavailing." *Pagliara*, 2016 WL 4441978, at *9 n. 20; *see e.g.*, *Perry Capital*, 70 F. Supp. 3d at 230–31; *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 797–98 (E.D. Va. 2009), *aff'd sub nom.* 434 F. App'x. 188 (4th Cir. 2011); *Esther Sadowsky Testamentary Trust v. Syron*, 639 F. Supp. 2d 347, 350 (S.D.N.Y. 2009). Looking at the plain wording of HERA's succession clause, there is no exception to the bar on derivative suits. *See United States v. Silva,* 443 F.3d 795, 797–98 (11th Cir. 2006) ("The first rule in statutory construction is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute. If the statute's meaning is plain and unambiguous, there is no need for further inquiry."); *United States v. Fisher,* 289 F.3d 1329, 1338 (11th Cir. 2002) ("The plain language is presumed to express congressional intent and will control a court's interpretation."); *Perry Capital*, 70 F. Supp. 3d at 230–31 ("By looking outside HERA's statutory language to find an exception to the rule against derivative suits that is based on the reason the judicial system permits derivative suits in the first place, a court would effectively be asserting its disagreement with the breadth of HERA's text. HERA provides no qualification for its bar on shareholder derivative suits, and neither will this Court."). Accordingly, there is no conflict of interest exception and the Plaintiffs' derivative claims remain barred under HERA.

4. Conclusion

Because Deloitte had met its burden in establishing that one of the Plaintiffs' claims arise under federal law and the Plaintiffs' derivative claims belong to the FHFA under HERA, the Court **denies** the Plaintiffs' Motion to Remand (ECF No. 23) and **grants** the FHFA's Motion to Substitute As Plaintiff (ECF No. 15). The Clerk is **directed** to substitute the FHFA for the Plaintiffs in this action

Done and ordered, at Miami, Florida, on January 18, 2017.



Robert N. Scola, Jr.
United States District Judge