IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

CHRISTOPHER ROBERTS, et al., Plaintiffs, vs. THE FEDERAL HOUSING FINANCE AGENCY, et al., Defendants.	Civil Action No. 1:16-CV-02107

PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF NEW AUTHORITY OF JANUARY 9, 2017

The dispute in *El Paso Pipeline GP Co. v. Brinckerhoff*, 2016 WL 7380418 (Del. Dec. 20, 2016), concerned claims that a General Partner caused a Partnership to overpay for assets transferred to the Partnership from the General Partner's parent. The Delaware Supreme Court ruled that these claims were derivative under state law because it was unwilling to create an exception that would "swallow the rule that claims of corporate overpayment are derivative." *Id.* at *12–13 (internal cites and quotation marks omitted). This is not a "corporate overpayment" case. Instead, it involves a controlling shareholder agreeing with the Companies to amend its preferred shareholder agreement to expropriate 100% of the economic rights of all minority shareholders. Under these circumstances, and with the Companies operating under conservatorship, Delaware law's distinction between direct and derivative claims does not depend on the "voting power [of] the minority stockholders." *Id.* at *12.

In all events, whether Plaintiffs may pursue their APA claims is ultimately a question of federal administrative law, not state corporation law. Plaintiffs have been "adversely affected or aggrieved" by the Net Worth Sweep, which transfers the entire economic value of Plaintiffs'

investments to Treasury in violation of federal statute. 5 U.S.C. § 702. No more is required for Plaintiffs to maintain this suit. *See* Plaintiffs' Consolidated Response in Opposition to Defendants' Motions to Dismiss at 47–48 (Aug. 12, 2016), Doc. 46 ("MTD Response"). Even if the Delaware Supreme Court's pronouncements could somehow trump that principle of federal law, its decision in *El Paso Pipeline* reaffirms the rule that a plaintiff may sue directly to assert "a claim based upon the plaintiff's own right." 2016 WL 7380418, at *9. Because Plaintiffs seek to vindicate their own rights under the APA, they may sue directly without regard to the test set out in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).

The distinction between direct and derivative claims is also irrelevant because HERA permits shareholders to bring derivative claims where, as here, FHFA has a manifest conflict of interest. *See* MTD Response 54–57. Indeed, Defendants' contrary reading of HERA would make nonsense out of 12 U.S.C. § 4617(a)(5), which authorizes the Companies to seek judicial review of FHFA's decision to impose conservatorship even though HERA's succession provision says that as conservator FHFA "immediately succeed[s]" to the Companies' rights, titles, powers, and privileges, *id.* § 4617(b)(2)(A). Courts have long understood FIRREA's succession provision to include a conflict of interest exception. *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1283 (Fed. Cir. 1999); *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1024 (9th Cir. 2001). Congress's decision to include materially identical language in HERA shows that it intended to adopt the prior judicial interpretations.

Date: January 12, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 12th day of January, 2017, via the Court's Electronic Case Filing system.

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