UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

J. PATRICK COLLINS, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Civil Action No. 4:16-CV-03113

REPLY OF DEFENDANTS FEDERAL HOUSING FINANCE AGENCY AS CONSERVATOR FOR FANNIE MAE AND FREDDIE MAC AND FHFA DIRECTOR MELVIN L. WATT IN SUPPORT OF MOTION TO DISMISS

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SUMMARY OF ARGUMENT

Plaintiffs' Administrative Procedure Act ("APA") claims against FHFA and Melvin L. Watt (the "FHFA Defendants") are barred by multiple federal statutory provisions, each of which provides a separate and independent ground for dismissal. Several courts have addressed materially identical claims brought by other shareholders of Fannie Mae and Freddie Mac (together, the "Enterprises"), and *every* one of these courts has held them to be statutorily-barred. This Court should do the same.[1]

First, Section 4617(f) of the Housing and Economic Recovery Act of 2008 ("HERA") bars Plaintiffs' APA claims because they seek to restrain and affect the Conservator's exercise of its statutorily authorized powers and functions. *See* 12 U.S.C. § 4617(f). HERA broadly authorizes the Conservator to operate the Enterprises, carry on their businesses, enter into contracts on their behalf, transfer assets, provide for funding, and manage every aspect of their operations and activities—all in a manner the Conservator determines is in the best interests of the Enterprises or FHFA. Here, Plaintiffs ask the Court to void the Conservator's execution of the Third Amendment, asserting it was improperly motivated, unnecessary, and a bad deal for the Enterprises. But every court that has considered these arguments has rejected them. The D.C. Circuit is the latest court to hold that the Conservator acted within its statutory powers and functions in executing the Third Amendment and, therefore, that Section 4617(f) bars

[1] The FHFA Defendants also request that the court dismiss Plaintiffs' separation-of-powers claim (Count IV) for the reasons provided in its Opposition to Plaintiffs' Motion for Summary Judgment, filed contemporaneously with this motion and which the FHFA Defendants incorporate herein by reference.

APA claims that challenge the Third Amendment. *See Perry Capital LLC v. Mnuchin*, Nos. 14-5243, 14-5254, 14-5260, 14-5262, --- F.3d ----, 2017 WL 677589 (D.C. Cir. Feb. 21, 2017) (affirming *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014)).

Second, because the Conservator has succeeded to "all rights, titles, powers, and privileges" of the Enterprises *and their shareholders*, *see* 12 U.S.C. § 4617(b)(2)(A)(i), Plaintiffs currently have no right to bring this action.

Third, adjudication of Plaintiffs' APA claims would impermissibly require the Court to review the October 9, 2008 determination by FHFA's Director to suspend the Enterprises' capital classifications during conservatorship in light of Treasury's capital commitment; Section 4623(d) of HERA bars such review. *See* 12 U.S.C. § 4623(d).

Finally, the FHFA Defendants hereby adopt Treasury's arguments that Plaintiffs' APA claims are derivative in nature and that issue preclusion requires that they be dismissed. *See* Treasury Br. at 19-25.

NATURE AND STAGE OF PROCEEDINGS

The FHFA Defendants incorporate by reference the statement of the Nature and Stage of Proceedings from their opening brief, except to state that the D.C. Circuit has resolved the pending appeal mentioned therein. *See* Mem. of Defs. FHFA as Conservator for Fannie Mae & Freddie Mac and FHFA Director Melvin L. Watt in Supp. of Mot. to Dismiss ("FHFA Br.") at 3 & n.1 (Doc. # 24) (Jan. 9, 2017).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

The FHFA Defendants incorporate by reference the Statement of the Issues and Standard of Review from their opening brief. FHFA Br. at 9-10.

ARGUMENT

I. SECTION 4617(f) BARS PLAINTIFFS' APA CLAIMS

Section 4617(f) bars Plaintiffs' APA claims—which seek declaratory and equitable relief through vacatur of the Third Amendment and return of all dividends paid under it (Compl. ¶ 190(a)-(g))—because the Conservator's decision to execute that Amendment fits squarely within its broad powers and functions conferred by Congress. *See* FHFA Br. at 12-23.

Plaintiffs first attempt to sidestep the dispositive inquiry—whether the Conservator acted within its broad statutory "powers and functions"—by arguing that a "presumption" for judicial review of "administrative action" negates Section 4617(f). *See* Opp. 10, 31. That is wrong. Even if such a presumption would otherwise apply to the Conservator, it could not survive Section 4617(f), which "draws a sharp line in the sand against litigative interference—through judicial injunctions, declaratory judgments, or other equitable relief—with FHFA's statutorily permitted actions as conservator or receiver." *Perry Capital*, 2017 WL 677589, at *8; *see also Cty. of Sonoma v. FHFA*, 710 F.3d 987, 990 (9th Cir. 2013) ("HERA substantially limits judicial review of FHFA's actions as conservator."); *Robinson v. FHFA*, No. 7:15-cv-109, 2016 WL 4726555, at *6

(E.D. Ky. Sept. 9, 2016) ("With HERA, Congress enacted a statutory scheme that swept away courts' authority to enjoin FHFA conduct."), *appeal pending* No. 16-6680.[2]

A. The Third Amendment Is Within the Conservator's Statutory Powers

As the D.C. Circuit explained in *Perry Capital*, "FHFA's execution of the Third Amendment falls squarely within its statutory authority to '[o]perate the [Companies],' 12 U.S.C. § 4617(b)(2)(B), to 'reorganiz[e]' their affairs, *id.* § 4617(a)(2); and to 'take such action as may be . . . appropriate to carry on the[ir] business,' *id.* § 4617(b)(2)(D)(ii)." 2017 WL 677589, at *9. The D.C. Circuit added that "[r]enegotiating dividend agreements, managing heavy debt and other financial obligations, and ensuring ongoing access to vital yet hard-to-come-by capital are quintessential conservatorship tasks designed to keep the Companies operational." *Id.*

Plaintiffs assert a variety of unfounded arguments that the Conservator lacked the statutory power to agree to the Third Amendment. First, they dispute that HERA gives the Conservator "plenary powers" and urge the Court to construe the Conservator's powers narrowly. *See* Opp. 12 n.3, 24-25. But Congress granted the Conservator "broad powers" to "assume complete control" over the Enterprises and "exclusive authority over [their] business operations." *FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1058, 1060 (N.D. Ill. 2013); *see also Perry Capital*, 2017 WL 677589, at *8 (HERA "endows FHFA

[2] Plaintiffs cite *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (Opp. 13), but that decision lends them no support because it does not address HERA, FIRREA, or any other jurisdiction-withdrawal statute, and has nothing to do with conservators or receivers. Rather, it addresses whether the FCC could impose time limits on local governments' consideration of wireless facility applications. 133 S. Ct. at 1866-67. And the Supreme Court held that courts should *defer* to federal agencies' interpretation of any statutory ambiguity about the scope of their authority. *Id.* at 1871-72. Thus, if applicable at all, *City of Arlington* favors deference to FHFA's assessment of the scope of its own powers.

with extraordinarily broad flexibility to carry out its role as conservator."). These powers are at least as great as those given to conservators and receivers under FIRREA, which courts have described as "extraordinary," *MBIA Ins. Corp. v. FDIC*, 708 F.3d 234, 236 (D.C. Cir. 2013), and "exceptionally broad," *In re Landmark Land Co. of Okla., Inc.*, 973 F.2d 283, 288 (4th Cir. 1992). Moreover, Plaintiffs do not—and cannot—dispute that the Third Amendment amended the Senior Preferred Stock Purchase Agreements ("PSPAs"), which are funding agreements that provide the Enterprises with a capital backstop of billions of dollars. "Such management of Fannie's and Freddie's assets, debt load, and contractual dividend obligations during their ongoing business operation sits at the core of FHFA's conservatorship function." *Perry Capital*, 2017 WL 677589, at *7; *see also* FHFA Br. 16-18.

Second, Plaintiffs argue that the Third Amendment exceeds the Conservator's statutory powers because it supposedly was a bad deal for the Enterprises and their shareholders.[3] But Plaintiffs cannot evade Section 4617(f) by alleging that the Conservator failed to strike a more favorable deal for the Enterprises or Plaintiffs. Courts have consistently held that Section 4617(f) and similar jurisdiction-withdrawal statutes bar courts from evaluating the *merits* of conservator or receiver conduct. *See* FHFA Br. 19-23. As the D.C. Circuit explained, "Section 4617(f) prohibits us from wielding our equitable relief to second-guess either the dividend-allocating terms that FHFA

[3] *See, e.g.*, Compl. ¶¶ 16, 118 (alleging Enterprises received no "meaningful consideration" for Third Amendment); *id.* ¶ 128 (alleging Third Amendment leaves the Enterprises with "no prospect of ever generating value for private shareholders"); Opp. 17, 22 (arguing Third Amendment "siphons off every dollar belonging to" the Enterprises, and fails to "maximize[]" the value of the Enterprises' assets).

negotiated on behalf of the Companies, or FHFA's business judgment that the Third Amendment better balances the interests of all parties involved, including the taxpaying public, than earlier approaches had." *Perry Capital*, 2017 WL 677589, at *15.[4]

For example, in *Ward v. Resolution Trust Corp.*, the plaintiff tried to avoid 12 U.S.C. § 1821(j), FIRREA's analogous jurisdiction-withdrawal provision, by alleging that a receiver acted outside of its statutory powers by selling an asset in a manner that involved "an inadequate price, inadequate competition, unequal treatment of [plaintiff] as a potential offeror, [and] failure of the [receiver] to make a determination regarding 'maximizing' the net present value return on the sale." 996 F.2d 99, 104 (5th Cir. 1993). The court "disagree[d] entirely," explaining "the difference between the exercise of a function or power that is clearly outside the statutory authority of the [conservator or receiver] on the one hand, and improperly or even unlawfully exercising a function or power that is clearly authorized by statute on the other." *Id.* at 103; *see also In re Island Reach Partners, Ltd.*, 161 B.R. 310, 313 (Bankr. S.D. Fla. 1993) (applying Section 1821(j) despite allegation that receiver failed to "maximize the return from the sale of failed institutions' assets"). The same principle applies here: Plaintiffs allege the Third Amendment favored Treasury and failed to "maximize the net present value return" to

[4] *See also Cty. of Sonoma*, 710 F.3d at 993 ("[I]t is not our place to substitute our judgment for FHFA's."); *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 101 n.7 (D. Mass. 2014) ("Congress has removed from the purview [of] the court the power to second-guess the FHFA's business judgment."); *accord Nat'l Tr. for Historic Preserv. in U.S. v. FDIC*, 995 F.2d 238, 240 (D.C. Cir. 1993) (Section 1821(j) "immuniz[es]" conservators and receivers "from outside second-guessing."), *reinstated in relevant part on reh'g*, 21 F.3d 469 (D.C. Cir. 1994); *MBIA Ins. Corp. v. FDIC*, 816 F. Supp. 2d 81, 103 (D.D.C. 2011) (applying Section 1821(j) despite allegation that receiver "came to the wrong conclusion" and another course "would have been preferable"), *aff'd*, 708 F.3d 234 (D.C. Cir. 2013).

the Enterprises. *See* Opp. 22. Allegations that the Conservator "improperly" exercised its powers by mismanaging Enterprise assets cannot overcome Section 4617(f).[5]

Third, Plaintiffs' allegation that the Enterprises received no "*meaningful* consideration" and "*virtually* nothing" (Compl. ¶¶ 16, 118; Opp. 23 (emphases added)) is contrary to the express terms of the Third Amendment and, moreover, ignores the "elementary" contract-law principle that courts "will not inquire into the adequacy of consideration as long as the consideration is otherwise valid or sufficient to support a promise." *See* 3 Williston on Contracts § 7:21 (4th ed.). Indeed, Plaintiffs themselves argue that the Third Amendment was a transaction in which the parties "obtain[ed] property for money or *other valuable consideration*." Opp. 34 (quoting Black's Law Dictionary 1430 (10th ed. 2014)) (emphasis added by Plaintiffs).

As the D.C. Circuit explained, before the Third Amendment, the PSPAs required the Enterprises to pay Treasury a fixed annual cash dividend equal to 10% of the

[5] Plaintiffs argue that cases like *Ward* are "best understood to mean only that Section 1821(j) applies . . . when a conservator or receiver violates a law other than" FIRREA. Opp. 13 n.4. But this argument ignores that *Ward* itself addressed a receiver's alleged failure "to maximize the net present value return" to the receivership estate—not an alleged violation of separate substantive laws. 996 F.2d at 103-04. Further, Plaintiffs' reliance on the Ninth Circuit's decision in *Sharpe* is likewise unpersuasive. *See* Opp. 11 (citing *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997)). The Ninth Circuit and other courts have since limited that decision to its facts—*i.e.*, an alleged breach of a pre-receivership settlement agreement concerning the recording of the reconveyance of a deed of trust. *See, e.g.*, *Meritage Homes of Nev., Inc. v. FDIC*, 753 F.3d 819, 825 (9th Cir. 2014) ("*Sharpe* is not controlling outside of its limited context."); *Deutsche Bank Nat'l Tr. Co. v. FDIC*, 744 F.3d 1124, 1136-37 (9th Cir. 2014) (similar); *McCarthy v. FDIC*, 348 F.3d 1075, 1078-79 (9th Cir. 2003) (similar). And *Sharpe* is inconsistent with numerous other precedents holding an alleged breach of contract is insufficient to overcome Section 1821(j). *See, e.g.*, *RPM Invs., Inc. v. RTC*, 75 F.3d 618, 621 (11th Cir. 1996); *Volges v. RTC*, 32 F.3d 50, 52 (2d Cir. 1994); *In re Landmark Land Co. of Carolina*, No. 96-1404, 1997 WL 159479, at *4 (4th Cir. Apr. 7, 1997).

liquidation preference.[6] *Perry Capital*, 2017 WL 677589, at *1. By the time of the Third Amendment, the 10% cash dividend had grown to $18.9 billion per year, an amount that exceeded the Enterprises' historical annual earnings for nearly every year since their founding.[7] In addition, the Enterprises could be required to pay Treasury an annual periodic commitment fee ("PCF"), which was intended to compensate taxpayers fully for Treasury's massive and ongoing commitment of public funds to maintain the Enterprises' operations. *See id.* at *3. In the Third Amendment, the Conservator agreed to trade (a) a stream of profits that historically averaged less than $19 billion in exchange for relief from (b) $19 billion per year in fixed dividends *and* payment of the PCF. Thus, consideration for the Third Amendment flowed in both directions, with Treasury accepting the risk that the Enterprises would earn less than 10% of the liquidation preference plus the amount of the PCF. Indeed, if the Enterprises earned no profits in a year, they would owe Treasury *no* dividend. *Id.* at *4. Section 4617(f) bars Plaintiffs and the courts from second-guessing whether the consideration for the Third Amendment was

[6] The 10% cash dividend was to be paid quarterly. If the Enterprises failed to pay it, the dividend would be accrued at the rate of 12% and added to Treasury's liquidation preference. *See* Treasury Stock Certificate § 2(b), (c) (Doc. # 24-2).

[7] *See* Fannie Mae, Quarterly Report (Form 10-Q), at 4 (Aug. 8, 2012) *available at* http://goo.gl/bGLVXz; Freddie Mac, Quarterly Report (Form 10-Q), at 8 (Aug. 7, 2012) *available at* http://goo.gl/2dbgey.

favorable enough to the Enterprises or Plaintiffs. Congress vested the Conservator alone with responsibility for making such fundamental decisions.[8]

Fourth, Plaintiffs argue that the Third Amendment was not an authorized "transfer" or sale of assets under 12 U.S.C. § 4617(b)(2)(G). Opp. 22-24. But HERA's asset-transfer provision "does not provide any limitation," and "[i]t is hard to imagine more sweeping language." *See Gosnell v. FDIC*, No. CIV. 90-1266L, 1991 WL 533637, at *6 (W.D.N.Y. Feb. 4, 1991), *aff'd*, 938 F.2d 372 (2d Cir. 1991) (interpreting identical language from FIRREA). Plaintiffs argue that the Third Amendment allows FHFA to "completely ignore" the receivership distribution-priority scheme outlined in HERA. *See* Opp. 21-23 (citing 12 U.S.C. § 4617(b)(3)-(9), (c)). But the Enterprises are not in receivership, so the priority scheme is inapplicable here. *See Perry Capital*, 2017 WL 677589, at *14 ("the duty that [HERA] imposes on FHFA to comply with receivership procedural protections textually turns on FHFA actually liquidating the Companies."); *Cobell v. Norton*, 283 F. Supp. 2d 66, 91 n.12 (D.D.C. 2003) ("The notion of a '*de facto* receivership' is rather akin to the concept of 'semi-pregnancy': an entity is either in *de jure* receivership or it is not."), *vacated in part on other grounds*, 392 F.3d 461 (D.C. Cir. 2004). In all events, allegations that a conservator's conduct violates the statutory order

[8] Plaintiffs' argument that imposing a PCF would have been "inappropriate," *see* Compl. ¶ 119, in no way diminishes Treasury's legal right to do so under the pre-Third Amendment contract. Plaintiffs say that, in their opinion, the dividends "provided a more than adequate return" to Treasury. *Id*. But that hollow assertion of opinion contravenes the contract, which specifies that dividends relate to funds *already drawn* against the commitment, while the commitment fees relate separately to additional funds *available to be drawn in the future*. *See Centers v. Centennial Mortg., Inc.*, 398 F.3d 930, 933 (7th Cir. 2005) (in considering a motion to dismiss, "to the extent that the terms of an attached contract conflict with the allegations of the complaint, the contract controls").

of priority for receiverships are insufficient to overcome Section 4617(f). For example, in *Courtney v. Halleran*, the Seventh Circuit rejected the plaintiff's argument that an asset transfer was purportedly a "thinly disguised way of circumventing the statutory priority scheme and allowing the [investor] to get more than its proper share." 485 F.3d 942, 945 (7th Cir. 2007). The "glaring problem" with this argument, the court held, was that under FIRREA (like HERA), a conservator or receiver is authorized to "transfer assets or liabilities without any further approvals," and thus "the anti-injunction language of § 1821(j)" barred the relief requested. *Id.* at 948.[9]

B. Plaintiffs' Allegations that the Third Amendment Was Improperly Motivated Cannot Overcome Section 4617(f)

Plaintiffs argue throughout their Opposition that because the Conservator supposedly acted for improper purposes or motives—*e.g.*, to maintain "the Administration's plans to hold [the Enterprises] in perpetual conservatorship," (Opp. 8), to "move the housing industry to a new state" (Opp. 20), or to "wind down" the Enterprises (Opp. 20, 29)—Section 4617(f) does not apply. Plaintiffs are wrong.

The Conservator's alleged motives are irrelevant to the Section 4617(f) analysis. As the D.C. Circuit explained in *Perry Capital*: "for purposes of applying Section 4617(f)'s strict limitation on judicial relief, allegations of motive are neither here nor

[9] Plaintiffs also argue that the Conservator's power to transfer assets is limited to "routine" or "specific" transfers, while the Third Amendment is far broader in scope. Opp. 23-24. But the application of the jurisdictional bar plainly does not depend upon whether the Conservator transferred a single asset or many assets. *See Cty. of Sonoma*, 710 F.3d at 994 (applying Section 4617(f) and rejecting distinction between "case-by-case" and "categorical" actions because "nothing precludes a conservator from making business decisions that are both broad in scope and entirely prospective").

there . . . ." 2017 WL 677589, at *13. Likewise, in *Continental Western Insurance Co. v. FHFA*, the court observed that "it is not the role of this Court to wade into the merits *or motives* of FHFA and Treasury's actions—rather the Court is limited to reviewing those actions on their face and determining if they were permissible under the authority granted by HERA." 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015) (emphasis added). Consistent with *Perry Capital* and *Continental Western*, other courts have applied 12 U.S.C. § 1821(j)—the analogous jurisdictional bar applicable to bank conservators and receivers—in cases where plaintiffs also alleged the receiver acted with improper motives. *See, e.g.*, *Hindes v. FDIC*, 137 F.3d 148, 153 (3d Cir. 1998) (barring challenge to alleged "conspiracy with state officials to close the bank"); *In re Landmark Land Co. of Okla., Inc.*, 973 F.2d at 288-90 (barring challenge to action allegedly taken for conservator's "own benefit" and to other interested parties' detriment).[10] These decisions rest on sound policy: if motives *were* relevant, jurisdictional bars such as Section 4617(f) would be meaningless because plaintiffs could plead around them simply by alleging an improper purpose.

Plaintiffs mistakenly rely on *Leon County v. FHFA*, 816 F. Supp. 2d 1205 (N.D. Fla. 2011), *aff'd*, 700 F.3d 1273 (11th Cir. 2012), *see* Opp. 27-28, but that case fully supports dismissal here. Indeed, the D.C. Circuit cited *Leon County* for the proposition

[10] An analogous jurisdictional bar to most claims against court-appointed receivers and bankruptcy trustees—the *Barton* doctrine—functions similarly: an exception allows claims where a receiver or trustee acted outside its statutory authority, but not claims based on alleged "improper motives." *Satterfield v. Malloy*, 700 F.3d 1231, 1236 (10th Cir. 2012); *see also In re McKenzie*, 716 F.3d 404, 422 (6th Cir. 2013) (holding allegation of "ulterior purposes" insufficient to overcome jurisdictional bar).

that motives are irrelevant under Section 4617(f). *Perry Capital*, 2017 WL 677589, at *13 (citing *Leon Cty.*, 816 F. Supp. 2d at 1208). The plaintiff in *Leon County* sought to evade Section 4617(f) by alleging the Conservator's conduct (there, a directive to the Enterprises) was an improperly motivated litigation tactic. The court squarely rejected that argument: "Congress surely knew, when it enacted § 4617(f), that challenges to agency action sometimes assert an improper motive. *But Congress barred judicial review of the conservator's actions without making an exception for actions said to be taken from an improper motive*." 816 F. Supp. 2d at 1208 (emphasis added). Unable to rebut this key holding, Plaintiffs point to language in the *Leon County* appellate opinion referring to the "purpose" of FHFA's actions. Opp. 28 (citing 700 F.3d at 1278). But that reference came in the context of analyzing a different issue: how "to determine whether [the directive] was issued pursuant to the FHFA's powers as conservator *or as regulator*." *Leon Cty.*, 700 F.3d at 1278 (emphasis added). That issue is absent here, as there is no dispute FHFA acted as Conservator in executing the Third Amendment.

C. Plaintiffs' Allegations that the Third Amendment Failed to Adequately Preserve and Conserve Assets and Improperly "Winds Down" the Enterprises Cannot Overcome Section 4617(f)

Plaintiffs attempt to overcome Section 4617(f) by alleging that, in agreeing to the Third Amendment, the Conservator failed to adequately preserve and conserve Enterprise assets (Opp. 14-20, 25, 28-30), to maximize value in transferring Enterprise assets (Opp. 22), or to put the Enterprises in sound and solvent condition (Opp. 14-20). But these allegations are, at bottom, attacks on the *merits* of the Conservator's decision to execute the Third Amendment, which—as discussed above—are barred by Section 4617(f). *See*

supra Sec. I(A)-(B). Just as there is no "bad motive" exception to Section 4617(f), there also is no "bad job" exception, which would expose the Conservator's decision-making to all manner of second-guessing and hindsight analysis. *See id.*

Plaintiffs attempt to convert the Conservator's broad powers and functions—*i.e.*, to preserve and conserve assets—into limitations on its conduct, inviting the Court to evaluate whether the Conservator *effectively* preserved and conserved assets in agreeing to execute the Third Amendment. *See* Opp. 14-20. Section 4617(f) permits no such inquiry, as it would enable any plaintiff to simply plead around Section 4617(f) by alleging the Conservator failed to preserve and conserve assets with respect to any decision, gutting the purpose of Section 4617(f). As the D.C. Circuit explained, HERA provides that FHFA "may" preserve and conserve assets "but does not compel it in any judicially enforceable sense[] to preserve and conserve Fannie's and Freddie's assets and to return the Companies to private operation." *Perry Capital*, 2017 WL 677589, at *9.[11]

Plaintiffs also argue the Conservator is acting in the "exclusive[] . . . province of a receiver" because the Third Amendment is "winding up" the Enterprises' affairs. Opp. 20-21. As an initial matter, Plaintiffs' argument fails because the Third Amendment is

[11] Plaintiffs also incorrectly assert that FHFA owes fiduciary duties to the Enterprises' shareholders. Opp. 45; Compl. ¶ 61. As *Robinson* held in response to similar assertions, "there is no indication that such fiduciary duties exist." 2016 WL 4726555, at *6 n.4. Plaintiffs cite no authority that a conservator, as opposed to a receiver, has fiduciary duties to shareholders under HERA. Rather, "[i]n HERA, Congress did not intend that acts lying fully within the FHFA's discretion as Conservator of Freddie Mac would violate some residual fiduciary duty owed to the shareholders. The shareholders' rights are now the FHFA's." *Esther Sadowsky Testamentary Tr. v. Syron*, 639 F. Supp. 2d 347, 351 (S.D.N.Y. 2009); *see also* 12 U.S.C. § 4617(b)(2)(J)(ii) (authorizing the Conservator to act in the interests of "the Enterprises *or the Agency*") (emphasis added); *Perry Capital*, 2017 WL 677589, at *14 (recognizing the Conservator's statutory authority to act in its "own interest, which here includes the public and governmental interests").

not winding up the Enterprises. The Amendment was executed over four years ago and, as the D.C. Circuit correctly recognized in *Perry Capital*, the Enterprises "continue to operate long-term, purchasing more than 11 million mortgages and issuing more than $1.5 trillion in single-family mortgage-backed securities," and "remain fully operational entities with combined operating assets of $5 trillion." *Perry Capital*, 2017 WL 677589, at *12. In all events, contrary to Plaintiffs' contention, the plain language of HERA authorizes FHFA acting as "conservator *or* receiver" to "wind[] up the affairs" of the Enterprises. 12 U.S.C. § 4617(a)(2) (emphasis added). Plaintiffs argue that HERA uses the terms "liquidation" and "winding up" synonymously, and because the Conservator is not permitted to do the former, it must not be permitted to do the latter. Opp. 20-21. But winding up is different from liquidation; it includes prudential steps short of liquidation, such as transferring Enterprise assets without approvals and shrinking the Enterprises' operations to ensure soundness until an ultimate resolution is determined. *See* 12 U.S.C. § 4617(b)(2)(G). Accordingly, "[u]ndertaking permissible conservatorship measures even with a receivership mind would not be out of statutory bounds." *Perry Capital*, 2017 WL 677589, at *14; *see also Robinson*, 2016 WL 4726555, at *8 ("[t]here surely can be a fluid progression from conservatorship to receivership without violating HERA, and that progression could very well involve a conservator that acknowledges an ultimate goal of liquidation." (quoting *Perry Capital*, 70 F. Supp. 3d at 228 n.20)).

For similar reasons, Plaintiffs' reliance on *RTC v. CedarMinn Building Limited Partnership*, 956 F.2d 1446 (8th Cir. 1992) (Opp. 16), is inapt. First, *CedarMinn* expressly recognizes that where, as here, Congress authorizes an agency to "exercise a

duty, right or power in its capacity as 'a conservator *or* receiver,'" that generally means "the duty, right, or power [is] to be enjoyed or exercised by *both* the conservator and the receiver." *Id.* at 1451-52 (emphases added). This is particularly true if Congress has taken care, in *other* portions of the statue, to delineate the "duties, rights, and powers" that can be pursued only by a receiver, or only by a conservator, but not in both. *Id.* at 1452; *see also* 12 U.S.C. § 4617(b)(2)(D)-(E). Second, while *CedarMinn* describes the "mission" of a conservator as "maintain[ing] the institution as an ongoing concern," that does not foreclose it from acting in ways that a receiver may also act—*i.e.*, transferring assets and reducing the obligations of the institution—where the statute gives such powers to both types of entities. *See* 956 F.2d at 1454.

Plaintiffs contend that Defendants' straightforward interpretation "cannot be" because it would allow FHFA, if appointed as receiver, to act with a purpose of "rehabilitation," as opposed to liquidation. Opp. 21. But Defendants' interpretation is correct. HERA directs the receiver not only to liquidate Enterprise assets, but also to "rehabilitat[e]" the business of the Enterprise by creating a limited-life regulated entity ("LLRE"). 12 U.S.C. § 4617(i). An LLRE, once established, "succeed[s] to the charter" of the Enterprise and "thereafter operate[s] in accordance with, and subject to, such charter." *Id.* § 4617(i)(2)(A). An LLRE then rehabilitates and reorganizes the Enterprises through a selective transfer of assets and liabilities.

Finally, HERA does not require FHFA to "rehabilitate" the Enterprises and "return[] [them] to private control," as Plaintiffs argue. *See* Opp. 2, 13-17, 23, 28-30. Rather, HERA simply provides that FHFA "may, at the discretion of the Director, be

appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2). HERA thus contemplates a conservator exercising judgment to address a range of challenges and possible actions by including a bar against judicial review to facilitate decision-making. It does not require the Conservator to return the Enterprises to private control, to the shareholders, or to their prior form. *See Perry Capital*, 2017 WL 677589, at *10 ("Even if [HERA] did impose a primary duty to preserve and conserve assets, nothing in [HERA] says that FHFA must do that in a manner that returns them to their prior private, capital-accumulating, and dividend-paying condition for all stockholders.").

D. Recent Legislation Confirms That Treasury and FHFA Acted Within the Scope of Their Authority Under HERA

Plaintiffs argue that the Court should ignore recently enacted legislation in which Congress expressly incorporated the Third Amendment and instructed Treasury not to sell its senior preferred stock until 2018. *See* Consolidated Appropriations Act of 2016 ("the Act"), H.R. 2029 § 702(b), 114th Cong. (2015). The principles on which Plaintiffs rely, *see* Opp. 26-27, are inapposite. Here, the inference of congressional approval "is supported by more than mere congressional inaction." *See Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965). Plaintiffs do not dispute that Congress *explicitly* incorporated the Third Amendment—including Treasury's rights to receive a variable dividend—into the scope of the new legislation. *See* FHFA Br. 18 n.10 (citing Act, § 702(a)(2)(A), (b)). Plaintiffs thus fail to refute the evidence in the Act that Congress was fully aware of the Third Amendment and considered it a valid exercise of Treasury's authority under HERA.

Although Plaintiffs contend that no presumption of ratification can apply because the Act "does not address the *propriety* of the Net Worth Sweep . . . ," Opp. 27, the doctrine of ratification does not require Congress to explicitly express its approval of an agency's action. Rather, Congress is *presumed* to ratify an agency's interpretation of a statute if Congress amends the statute fully aware of that interpretation but takes no steps to halt the agency action. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982). The presumption applies here because Congress made other changes to Treasury's authority under HERA without indicating any disapproval of the Third Amendment.[12]

II. HERA'S SUCCESSION PROVISION BARS PLAINTIFFS' APA CLAIMS

A separate provision of HERA independently bars Plaintiffs' APA claims. Section 4617(b)(2)(A)(i) provides that the Conservator succeeds to "all rights, titles, powers, and privileges" of the Enterprises and their shareholders. *See* FHFA Br. 23-29. Plaintiffs thus have no right to bring their APA claims, which relate to, or arise from, their status as shareholders. In opposition, Plaintiffs contend that HERA's succession provision only applies to shareholder derivative claims, not direct claims, and is further limited by an implied conflict-of-interest exception. Opp. 40-43, 51-54. All of this is incorrect: the succession provision applies to "***all*** rights, titles, powers and privileges" of the Enterprises and their shareholders, whether derivative or direct, without exception. 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added). In all events, Plaintiffs' APA claims are, in fact, derivative. *See* Treasury Br. at 19-23.

[12] Plaintiffs' reliance on isolated remarks of legislators, *see* Opp. 27, is unavailing because the legislation *itself* acknowledges the Third Amendment but leaves the parties' authority to execute it "completely untouched." *See Zemel*, 381 U.S. at 12.

A. There is No Direct-Claims Exception to HERA

Even if Plaintiffs' APA claims could be considered direct shareholder claims, this would not change the outcome. The Conservator succeeds to "all rights" of the Enterprises' shareholders, including Plaintiffs' purportedly direct APA claims.[13]

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. 1:16cv337, --- F. Supp. 3d ----, 2016 WL 4441978, at *5 (E.D. Va. Aug. 23, 2016) (quoting *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & ERISA Litig.*, 629 F. Supp. 2d 1, 3 (D.D.C. 2009)). "In other words, the language means what it plainly says; HERA transferred 'all rights previously held by [Enterprise] shareholders'" to the Conservator. *Id.* (quoting *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 795 (E.D. Va. 2009)).[14]

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'

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[13] Contrary to Plaintiffs' argument, FHFA did not "concede[]" in any motion filed in *Kellmer v. Raines* that "Section 4617(b)(2) does not bar direct claims." *See* Opp. 42 n.17. That the Conservator, eight years ago, opted not to exercise its substitution rights with respect to one particular claim presented by one particular plaintiff in one particular case in no way suggests FHFA lacked the right to seek substitution had it wished to do so.

[14] HERA provides only one exception to the transfer of shareholder rights: following appointment of a receiver, Enterprise 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) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.").

right to pursue derivative claims. *See* Opp. 40-41. But Plaintiffs offer no textual support for this argument, and none exists. Indeed, in *Pagliara*, the court rejected the same argument (asserted in that case by a Freddie Mac shareholder), observing that the phrase " '[w]ith respect to' plainly means 'about or concerning' or 'relating to.' " *Pagliara*, 2016 WL 4441978, at *7 (citing, *inter alia*, Merriam Webster Dictionary). The *Pagliara* court thus observed that "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—in that case, the right to inspect Freddie Mac's books and records—from HERA's succession provision. *Id.* So too here: the alleged shareholder rights Plaintiffs seek to vindicate indisputably concern or relate to the Enterprises and their assets. Indeed, Plaintiffs' Complaint is based largely on the premise that the Third Amendment is allegedly inconsistent with the Conservator's purported duty to preserve and conserve the Enterprises' "assets." Compl. ¶¶ 4, 28, 53, 55, 57, 59, 127, 129, 158.

Plaintiffs rely on *Levin v. Miller*, 763 F.3d 667 (7th Cir. 2014), to argue for a direct-claims exception. Opp. 41-42. But the suggestion in *Levin* that a conservator's succession to "all rights" of a stockholder would not extend to direct claims was not a contested issue in that litigation. Indeed, the parties in that case did not even brief the issue. *See* 763 F.3d at 672.[15] The only in-depth exploration of the issue in *Levin* was Judge Hamilton's persuasively reasoned concurrence. As Judge Hamilton correctly concluded, FIRREA's succession language cannot be read as limited to derivative claims:

[15] Likewise, the other decisions cited by Plaintiffs in this regard, Opp. 42, did not squarely present the issue of whether the FDIC succeeded to direct claims and simply assumed with little to no analysis that the FDIC succeeded only to derivative claims.

> 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).

The *Pagliara* court held that, under HERA, the Conservator succeeds to all shareholder rights—even those that are "enforceable through a direct lawsuit, not a derivative lawsuit"—such as the right to inspect books and records and the right to vote to elect directors. *See* 2016 WL 4441978, at *6. In so doing, the court refused to extend the *Levin* majority's approach to HERA conservatorships, and instead followed the rationale of Judge Hamilton's concurrence. *See id.* at *7 ("[A]s Judge Hamilton recognized in *Levin v. Miller*, '[i]f 'rights . . . of any stockholder' was meant to refer only to derivative claims, it's a broad and roundabout way of expressing that narrower idea.'") (quoting 763 F.3d at 673). The Court should follow the same approach and hold that Plaintiffs' APA claims are barred, irrespective of whether they are direct or derivative.

The FHFA Defendants respectfully disagree with the D.C. Circuit's conclusion in *Perry Capital* that HERA's succession language does not apply to direct claims. *See Perry Capital*, 2017 WL 677589, at *23-24. The D.C. Circuit stated that shareholders' rights "with respect to the regulated entity and [its] assets" are "only those an investor

asserts derivatively on the Company's behalf." *Id.* at *23. But, as *Pagliara* explained, this reading "would strain any reasonable interpretation" of HERA, since direct claims such as those that shareholders assert here are unquestionably related to the Enterprises and their assets. *See Pagliara*, 2016 WL 4441978, at *7. Also, the D.C. Circuit erred in reasoning that the fact "that [12 U.S.C. § 4617(b)(2)(K)(i)] terminates [shareholders'] rights and claims in receivership" against the assets or charter of the Enterprises "indicates that shareholders' direct claims against and rights in the Companies survive during conservatorship." *Perry Capital*, 2017 WL 677589, at *23. But the succession clause does not *terminate* any rights when the Enterprises enter conservatorship; rather, it transfers these rights to the Conservator for the duration of the conservatorship. Only when the Enterprises enter receivership would any shareholder rights be terminated—but Section 4617(b)(2)(K)(i) excludes certain rights from termination and provides that shareholders can assert these rights through the administrative process.

2. The Constitutional Avoidance Doctrine Does Not Apply

Plaintiffs argue that interpreting HERA to mean that the Conservator succeeds to "all" shareholder claims, whether derivative or direct, would raise constitutional concerns. Opp. 43. But the doctrine of constitutional avoidance does not apply in this case because it "is a tool for choosing between competing plausible interpretations of a provision," *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (citation and internal quotation marks 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 to avoid purported constitutional concerns. Indeed, the court in *Pagliara* recently considered—and rejected—a similar constitutional-avoidance argument with respect to HERA's succession provision, holding that the court "need not resort to the interpretive canon of constitutional avoidance here because HERA is not ambiguous within the context of this case. . . . Accordingly, the Court will not adopt an unreasonable interpretation of a plain statute to avoid Pagliara's unsubstantiated constitutional concerns." *Pagliara*, 2016 WL 4441978, at *7-8 (internal citations omitted). This Court should follow the same approach here, especially because Plaintiffs have not brought any constitutional claims other than their separation of powers claim.[16]

B. 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 the APA claims in this case, shareholders still have the right to pursue those claims because of an alleged conflict of interest. Opp. 51-54. But there is simply no "conflict of interest" exception to HERA's succession provision, and no court has ever held that there is. The D.C. Circuit is the latest in a string of courts to hold that no such exception to HERA exists. *Perry Capital*, 2017 WL 677589, at *24; *see also FHFA v.*

[16] Moreover, any purported constitutional concerns are alleviated by the fact that the Conservator holds all shareholder rights only for the duration of the conservatorship, 12 U.S.C. § 4617(b)(2)(A)(i), and, in any subsequent receivership, the shareholders have the right to assert certain claims against the receivership estate, *see id.* § 4617(b)(2)(K)(i).

Deloitte & Touche, LLP, No. 1:16-cv-21221 (S.D. Fla. Jan. 18, 2017) ("*Deloitte* Op.") (Ex. 1) (holding that there is no conflict of interest exception under HERA).[17]

Plaintiffs identify nothing in HERA to suggest that Congress intended to create a conflict-of-interest exception. Instead, they rely on two inapplicable, out-of-circuit decisions that manufactured a conflict-of-interest exception for FDIC receiverships—not conservatorships. *See* Opp. 54 (citing *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1295-96 (Fed. Cir. 1999), and *Delta Savs. Bank v. United States*, 265 F.3d 1017, 1021-23 (9th Cir. 2001)). In *Perry Capital*, the D.C. Circuit rightly rejected any application of those decisions to FHFA under HERA, explaining that they were wrongly decided because they improperly relied on the " 'purpose of the "derivative suit mechanism," ' rather than the plain statutory text to the contrary." *Perry Capital*, 2017 WL 677589, at *24 (quoting *Perry Capital*, 70 F. Supp. 3d at 231).[18] Accordingly, the D.C. Circuit "conclude[d] the Succession Clause does not permit shareholders to bring derivative suits on behalf of the Companies even where the FHFA will not bring a derivative suit due to a conflict of interest." *Id.* Other courts are in accord. *See Deloitte*

[17] The *Deloitte* plaintiffs filed a Rule 59(e) motion to alter the judgment, but the motion does not challenge the court's ruling on the "conflict of interest" issue. *See* Pls.' Mot. Under Fed. R. Civ. P. 59(e), *Deloitte*, No. 1:16-cv-21221 (S.D. Fla. Feb. 15, 2017).

[18] Plaintiffs argue that any conflict of interest exception would be limited in scope because, according to Plaintiffs, the Conservator would retain the ability to pursue derivative claims regarding pre-conservatorship conduct that led to the appointment of the conservator. Opp. 52. But nothing in HERA's text supports the notion that Congress intended to transfer pre-conservatorship derivative claims to the Conservator but not others. Moreover, a conflict of interest exception would make it easy to evade HERA as a matter of pleading. A plaintiff could bring a claim that the Conservator exceeded its authority by failing to pursue a claim based on pre-conservatorship conduct, and the Conservator's purported "conflict of interest" would prevent it from controlling the claim against itself—effectively giving shareholders control of the underlying claim.

Op. 11 ("Looking at the plain wording of HERA's succession clause, there is no exception to the bar on derivative suits. . . . Accordingly, there is no conflict of interest exception and the Plaintiffs' derivative claims remain barred under HERA."); *Pagliara*, 2016 WL 4441978, at *9 n.20 (rejecting as "not persua[sive]" the same conflict of interest argument).[19] This Court should reject Plaintiffs' invitation to be the first court to apply a conflict-of-interest exception to HERA.[20]

III. SECTION 4623(D) BARS PLAINTIFFS' APA CLAIMS

Section 4623(d) also bars Plaintiffs' APA claims because adjudicating them would require the Court to review and affect FHFA's regulatory action to suspend capital classifications in light of the Treasury commitment. *See* FHFA Br. 29-33.

Plaintiffs first argue that the October 2008 Action was not a "classification[] or action[]" to which Section 4623(d) applies. Opp. 59-60. This is wrong. Section 4623(d) applies to "*any* classification or action of the Director under this subchapter [II]," 12 U.S.C. § 4623(d) (emphasis added), and Subchapter II empowers the Director to take a host of supervisory actions concerning the Enterprises' capital, *see, e.g.*, *id.* §§ 4615, 4616. The October 2008 Action falls well within the provisions of this Subchapter.

Plaintiffs also argue that Section 4623(d) does not apply because the October 2008 Action "may not" have been a regulatory action, but rather could have been a

[19] *See also Gail C. Sweeney Estate Marital Tr. v. U.S. Treasury Dep't*, 68 F. Supp. 3d 116, 119 (D.D.C. 2014) (observing "no court has held that a conflict-of-interest exception applies to [HERA]" and criticizing *First Hartford* and *Delta Savings* as "unclear [on] how those courts squared their decisions with the anti-injunction provision of FIRREA").

[20] Additionally, *First Hartford* and *Delta Savings* involved receiverships, and their flawed rationale "makes still less sense in the conservatorship context." *Perry Capital*, 70 F. Supp. 3d at 231 n.30.

Conservator action. Opp. 60 (citing 12 C.F.R. § 1237.3(c)). But the text of the October 2008 Action demonstrates it was taken by the Director in his regulatory capacity. *See* Ex. E, FHFA Br. (Doc. # 24-5) (referring to FHFA's Director as "the safety and soundness *regulator* for" the Enterprises, and stating that "[t]he *Director*" had made the determination and announcement) (emphases added).[21]

Finally, contrary to Plaintiffs' assertions, Plaintiffs are asking this Court to review and affect the October 2008 Action. By that Action, FHFA as regulator declared that the Enterprises *can* operate with zero capital without being deemed unsafe and unsound. Here, Plaintiffs contend that the Third Amendment is unlawful *because* it allegedly renders the Enterprises unsafe and unsound due to their limited retained capital. *See* Compl. ¶¶ 28, 113-17, 128; Opp. 17-20. Because Plaintiffs' claims necessarily challenge the FHFA Director's contrary determination, Section 4623(d) bars these claims.[22]

CONCLUSION

For the foregoing reasons and those in the Defendants' other filings, the FHFA Defendants respectfully request the Court dismiss with prejudice all of Plaintiffs' claims.

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[21] That the Conservator is also empowered to suspend capital classifications during conservatorship (12 C.F.R. § 1237.3) does not mean FHFA acted as Conservator when it suspended the capital classification in 2008, three years *before* the regulation was revised to state the Conservator's capital suspension power. *See* 76 Fed. Reg. 35733 (June 20, 2011). Further, the regulation is expressly derived from provisions of HERA also applicable to FHFA as regulator. *See* 12 C.F.R. § 1237.3(c) (citing 12 U.S.C. § 4614).

[22] While *Perry Capital* held that Section 4623(d) was inapplicable to similar claims, the court failed to consider the "affect" language in the statute. Instead, the court focused on whether the plaintiffs were challenging the October 2008 Action *directly*. *See* 2017 WL 677589, at *6 (stating that the 2008 actions "are not the actions that the [plaintiffs] challenge"). The court failed to consider that, by vacating the Third Amendment due to its impact on the Enterprises' capital levels, the court would necessarily "affect" the "effectiveness" of the October 2008 Action, thereby running afoul of Section 4623(d). The FHFA Defendants thus respectfully disagree with this portion of *Perry Capital*.

Dated: February 27, 2017

Respectfully submitted,

/s/ Thad T. Dameris
Thad T. Dameris
S.D. Texas Bar No. 7667
Texas Bar No. 05345700
Thad.Dameris@apks.com
ARNOLD & PORTER KAYE SCHOLER LLP
700 Louisiana Street, Suite 1600
Houston, TX 77002-2755
Telephone: (713) 576-2402
Facsimile: (713) 576-2499

Howard N. Cayne
D.C. Bar No. 331306, *admitted pro hac vice*
Howard.Cayne@apks.com
Asim Varma
D.C. Bar No. 426364, *admitted pro hac vice*
Asim.Varma@apks.com
Robert J. Katerberg
D.C. Bar No. 466325, *admitted pro hac vice*
Robert.Katerberg@apks.com
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue NW
Washington, D.C. 20001
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

Attorney for Defendants Federal Housing Finance Agency and Director Melvin L. Watt

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the parties to this action by serving a copy upon each party listed below on February 27, 2017, by the Electronic Filing System.

Chad Flores Owen J. McGovern Parth S. Gejji BECK REDDEN LLP 1221 McKinney St., Suite 4500 Houston, TX 77010 *Attorneys for Plaintiffs*	

/s/ Thad T. Dameris
Thad T. Dameris

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

J. PATRICK COLLINS, *et al.*, Plaintiffs, v. THE FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Civil Action No. 4:16-CV-03113

APPENDIX OF FHFA TO REPLY OF DEFENDANTS FEDERAL HOUSING FINANCE AGENCY AS CONSERVATOR FOR FANNIE MAE AND FREDDIE MAC AND FHFA DIRECTOR MELVIN L. WATT IN SUPPORT OF MOTION TO DISMISS

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Exhibit 1

United States District Court
for the
Southern District of Florida

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

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

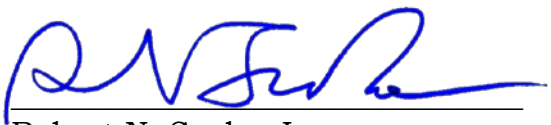
F.3d 1017 (9th Cir. 2001). No other circuit has adopted *First Hartford Corp.*'s approach in relation to FIRREA.

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