UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NERIS MONTILLA, on behalf of herself and all others so similarly situated; MICHAEL KYRIAKAKIS on behalf of himself and all others so similarly situated,	
Plaintiffs – Appellants,	
ROSELIA MONTUFAR, on behalf of herself and all others so similarly situated; RUBEN VELASQUEZ, on behalf of himself and all others so similarly situated,	
Plaintiffs,	
v.	
FEDERAL NATIONAL MORTGAGE ASSOCIATION; FEDERAL HOUSING FINANCE AGENCY,	**No. 20-1673**
Defendants – Appellees,	
MR. COOPER, f/k/a Nationstar Mortgage, LLC; SETERUS, INC.; C.I.T. BANK, N.A.,	
Defendants.	

APPELLANTS REPLY BRIEF

United States District Court for the
District of Rhode Island Appeal of CA# 18-632

Respectfully submitted

/s/ Todd S. Dion
Todd S. Dion, Esq. (#1152969)
15 Cottage Avenue, Ste. 202
Quincy, MA 02169
401-965-4131
toddsdion@msn.com
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I. Introduction

In reply to the Appellees' Brief, Appellants aver that the Appellees arguments, as well as the cases cited by the Appellees purporting to support the Appellees' arguments, against FHFA and FNMA's government actor status in this case contain only a mere perfunctory analyses of the questions before this Honorable Court. Thus, it is not surprising that that the closer one examines the specific anomalous facts of the arrangement between FHFA and FNMA, the more likely one is to consider the consistent application of the United States Supreme Court precedents in FDIC v. Meyer, 510 U.S. 471 (1994) and O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) as well as the distinguishing characteristics between the so-called "conservatorship" as opposed to the "receivership" in O'Melveny and conclude that FHFA not only does not "stand in the shoes of" FNMA but also that these characteristics have established an unequivocally permanent arrangement. Sisti v. Fed. Hous. Fin. Agency, 324 F.Supp.3d 273 (D.R.I. 2018). Each case supposed by the Appellees to imply that FHFA "steps into the shoes of" FNMA is exposed as unjustified and unsupported by the facts surrounding the arrangement between FHFA and FNMA while being labeled under the guise of a "conservator". Furthermore, the unchecked exorbitance of FHFA's so-called conservatorship powers over FNMA has an inextricable and indefinite link to FHFA's independent decision to choose to direct FNMA to conduct the less expensive form of non-judicial foreclosure in order to serve the government function of maximizing the profits and bottom line of the United States Treasury while ignoring the due process rights of the Appellants.

In further reply to Appellees' Brief, Appellants set forth that that FHFA did not "inherit" or "succeed" a *pre-existing* contractual right to conduct non-judicial foreclosures against the Appellants' properties under HERA's succession clause because FNMA did not hold the mortgages on the effective date of the conservatorship as the mortgages were assigned to the so-

called conservatorship 7 and 8 years into the conservatorship's existence in the first place. Therefore, the Appellees assertions that FHFA "inherited" or "succeeded" an "existing" contractual right to foreclose in a non-judicial manner is not supported by the facts. Appellants also set forth that as a so-called "conservator" FHFA did not "step into the shoes" of FNMA because the purpose of the conservatorship is to "conserve" the entity as opposed to "receive" claims from creditors as in a receivership. Finally, Appellants set forth that even if FHFA did "step into the shoes" of FNMA the indefinite nature of the conservatorship under the Lebron test and the actions of FHFA in siphoning billions in profits from FNMA directly into the United States Treasury via a 2012 amendment to the Conservatorship that allows the Treasury to receive all of FNMA's comprehensive income, rendered FHFA's decision to direct FNMA to conduct the less expensive non-judicial method of foreclosure in Rhode Island a government action subject to the due process requirements of the US Constitution. See Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995); Fairholme Funds, Inc. v. United States, 147 Fed. Cl. 1 (2019)

II. FHFA Is A Government Actor

A. FHFA Did Not "Inherit" Or "Succeed" An "Pre-Existing" Right To Conduct Non-Judicial Foreclosures Against The Appellants.

Appellees erroneously attempt to set forth that "any exercise during conservatorship of FNMA's *pre-existing* private powers, such as the power to conduct non-judicial foreclosures like the ones at issue here, does not involve any governmental function and does not make the conservator a government actor". Appellees' Brief at p. 11 (emphasis added). The fatal flaws with this contention, however, lie with the facts that not only was the so-called private power to non-judicially foreclose not a "pre-existing" right, but also that FHFA's decision to direct FNMA to proceed with the less expensive method of non-judicial foreclosure as opposed to judicial

foreclosure was designed to directly influence the Treasury's bottom line while the Treasury retained all of the profits of FNMA and thus served an obvious government function.

Appellants set forth that the so-called private power to non-judicially foreclose was not a "pre-existing" right and in fact did not exist at the time of the effective date of the conservatorship as of September 6, 2008. Rather, the mortgages upon which these so-called private rights to non-judicially foreclose existed were subsequently assigned to the conservatorship approximately 7 to 8 years after the creation of the conservatorship and 5 to 6 years after FHFA directed FNMA to conduct non-judicial foreclosures in Rhode Island pursuant to FHFA's Servicer Alignment Initiative. As set forth in the Appellants' Complaint at paragraphs 55 and 76, the Montilla Mortgage was assigned to FNMA on April 20, 2015 and the Kyriakakis Mortgage was assigned to FNMA on May 25, 2016. See SA p. 10-11. Contrary to the Appellees' contentions otherwise the so-called rights to conduct non-judicial foreclosures on the Appellants' properties were not FNMA's existing rights at the time of the effective date of the conservatorship on September 6, 2008 or rights that were "inherited" or "succeeded" as the Appellees and Judge Smith in the lower court erroneously concluded. Therefore, the HERA "successor clause" is inapplicable because the contractual right to conduct a non-judicial foreclosure was not a right or power that FNMA held or acquired at the time the successor clause became effective and were not rights encompassed by HERA's succession clause.

In response to the above noted stubborn fact Appellees may contend that the inherited rights that are subject to the HERA "succession clause" may include a right to be assigned a contractual right to non-judicially foreclose subsequent to the effective date of the conservatorship. Such abductive reasoning, however, fails to take into account the fact that despite FHFA's clear ability to direct FNMA and its' servicers to conduct judicial foreclosures in accordance with Rhode

Island law, FHFA made the affirmative and independent decision to choose the less expensive mode of non-judicial foreclosure by directing FNMA to conduct non-judicial foreclosures via the Servicer Alignment Initiative. For there is no doubt that FHFA, when directing FNMA to conduct the non-judicial foreclosures of the Appellants' subsequently assigned mortgages, considered the short-term profits that would be syphoned into the United States Treasury via the 2012 amendment to the conservatorship described in more detail later in this Appellants' Reply Brief. Furthermore, any contention that FHFA's independent and affirmative decision to direct FNMA to conduct non-judicial foreclosures in Rhode Island was not serving a government function in the form of increasing the bottom-line revenue of the United States Treasury is false and misleading. The shedding of a receiver's government character and stepping into an entities private shoes makes sense when a receiver is enforcing a private right that existed at the time of the receivership's creation. O'Melveny. However, when the right did not exist at the time of a conservatorship's creation and was an action chosen and directed by a government conservator after the conservatorship was created the conservator's government character remains. Meyer. Likewise, the FHFA did not shed its' government character when it chose to direct FNMA to proceed with the less expensive mode od non-judicial foreclosure on mortgages that FNMA did not hold at the time the conservatorship was created such as the Appellants' mortgages at issue. Therefore, in light of the circumstances described above, the Appellants set forth that the non-judicial foreclosures of the Appellants' properties were not pre-existing rights that were subject to HERA's succession clause and also that the affirmative decision to non-judicially foreclosure on the Appellants' properties were independent and affirmative actions by FHFA by virtue of its status as a government agent and to serve a government function.

B. The Applicability of Meyer and O'Melveny Consistently Support the Appellants' Contentions That FHFA Is A Government Actor That May Be Sued For Violations of Due Process.

While even the lower court's memorandum and order in this matter found "Judge McConnell's analysis in Sisti to be well-reasoned and sensible", the Appellees continue to assert that Sisti "misinterprets Meyer" and "erroneously disregards O'Melveny's application to FHFA as conservator". Appellees' Brief at p. 19-28. Consequently, the Appellees fail to repudiate the applicability of Meyer as dispositive and persist on improperly citing O'Melveny and HERA's succession clause to FHFA's status as a government actor.

In Meyer the U.S. Supreme Court determined that the FDIC as receiver and pursuant to a statutory sue and be sued clause, waived sovereign immunity as a government actor when defending itself as receiver against a violation of due process claim for actions that occurred after the receivership became effective and at the direction of a policy set by the FDIC as receiver. Likewise, in this case FHFA as conservator and subject to a similar sue and be sued clause has also presumably waived sovereign immunity as a government actor when defending itself as conservator against the Appellants' violation of due process claims for actions that occurred well after the effective date of the conservatorship and at the direction of the FHFA pursuant to a policy to conduct non-judicial foreclosures via the Servicer Alignment Initiative. Moreover, while the fired employee petitioner in Meyer at least was an employee at the time of the effective date of the receivership, the Appellants' mortgages were not even assigned to the conservatorship until 8 and 9 years into the conservatorships' exitance. This only further supports the Appellants' assertions that the non-judicial foreclosure of their homes were actions directed by the government to serve government functions.

The Appellees' contention that Meyer did not address the government actor question is belied by subsequent U.S. Supreme Court decisions that further indicate that FDIC as receiver was a government actor and did not shed its' government character by virtue of the receivership. See Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71 (2001) ("If deterring the conduct of policymaking was the purpose of Bivens then Meyer would have implied a damages remedy against the FDIC; it was after all an agency policy that led to Meyers constitutional deprivation, Meyer *supra* at 473-474. But Bivens from its inception has been based not on that purpose, but on the deterence of individual officers who commit unconstitutional acts".); Minneci v. Pollard, 565 U.S. 118, 125 (2012) (listing instances where the Supreme Court refused to recognize Bivens damages remedy). Indeed, this Honorable Court itself has cited Meyers on several occasions to support its acknowledgment that a government actor may shield itself via sovereign immunity. See Villanueva v. United States, 662 F.3d 124, 126 (1st. Cir. 2011) ["Absent a waiver, sovereign immunity (which is jurisdictional in nature) shields the United States from suit. See Meyer at 475"]; Tapia-Tapia v. Potter, 322 F.3d 742, 745 (1st. Cir 2003) ("the doctrine of sovereign immunity bars such claims against the United States. Meyer at 475"); Estate of Barrett v. United States, 462 F.3d 28, 36 (1st. Cir 2006) ("The United States, as a sovereign, cannot be sued absent an express waiver of its' immunity" Meyer at 475); Morales-Melecio v. United States, 890 F.3d. 361, 366 (1st. 2018) ("It is axiomatic that, absent an explicit waiver, the United States is safeguarded from suit in any court in accordance with sovereign immunity. Meyer at 475").

The Appellees' denial of the applicability of Meyer to the question of FHFA's government actor status is an exercise in gaslighting. For no matter how one reviews and analyzes the Meyers opinion in comparison to the case at bar, there is no escaping the fact that the Meyers Court factually conceded to the FDIC as receiver's status as a government actor. Furthermore, the

Appellees' contention that the Meyer Court did not reach the due process issue overlooks the fact that the court was referring to the substantive merits of the procedural due process claim (ie. whether or not the petitioner was denied a hearing) rather than the prerequisite question of whether or not the FDIC as receiver was a government actor which the court acknowledged in the affirmative by considering and answering the question of sovereign immunity. Likewise, the Meyer Court answered the government actor question in the affirmative by the court's consideration and determination that the FDIC as receiver was a government actor that waived sovereign immunity by virtue of the sue and be sued clause. Id. at 475.

The O'Melveny case, on the other hand only interpreted the FDIC's succession clause as it related to a choice of state law over federal law issue when considering the FDIC as receiver stepping in the shoes of its' private ward pursuant to a sue and be sued clause for the purposes of affirmatively bringing a suit on behalf of its private ward in tort for actions that occurred prior to the receivership. While O'Melveny concerns a state law claim brought by the government for pre-receivership actions, Meyer concerned a constitutional claim against the government while acting as receiver. Needless to say, the Meyer case is dispositive of the facts in this case. The O'Melveny case failed to mention anything about the FDIC as receiver's government actor status because the case had nothing to do with a constitutional claim in the first place and presented the polar opposite of the outcome determinative facts in the Meyer case and in the case at bar. Most notably the O'Melveny case expressly limited the scope of rights covered by the succession clause to "rights . . . that existed prior to the receivership" and further limited the scope of the decision by expressly and clearly stating the following:

> "The rules of decision at issue here do not govern th eprimary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to conduct on the part of private actors that has already occurred."

Id. at 88.

Likewise, the scope of rights covered by the identical sucession clause in HERA in the case at bar are subject to the same express limitations to rights that were pre-exiting and actions that "already occurred" prior to the receivership. In this case the right to foreclose was not a pre-existing right because FNMA did not even hold the mortgages until 8 years after the conservatorship was created, the actions to foreclose in a non-judicial manner were not directed by FHFA's policy pursuant to the Servicer Alignment Initiative until 2 years after the conservatorship was created and the non-judicial foreclosure were not actually conducted until over 9 years after the conservatorship was created. Furthermore, while Meyer supports FHFA as conservator's government actor status when defending itself against a constitutional claim, O'Melveny also supports the Appellants claims because the "sue and be sued clause" was among the "rights, titles powers and privileges" FHFA succeeded to pursuant to HERA's succession clause since the clause was a right that existed prior to the conservatorship and may serve as FHFA's waiver of sovereign immunity. Therefore, the distinctions outlined in the O'Melveny case to the case at bar actually supports FHFA's status as a government actor that may be sued by a waiver of sovereign immunity, rather than refute it as the Appellees erroneously contend.

The differences between the facts of O'Melveny and Meyer and the facts of this case are succinctly and artfully explained in the Appellees' Brief in the Boss v. FHFA, et al. appeal that was coordinated with this appeal to address the identical questions of law and fact. See Appellee Cynthia Boss's Brief CA# 20-2025 p. 10-20. While the Appellants in this case stated in the lower court that applying Meyer to the government actor question requires a certain degree of deductive reasoning, the Appellants in no way shape or form waived the applicability of Meyer as a matter of common sense and reliance on Judge McConnell's "well-reasoned and sensible" analysis in

Sisti. Likewise, a thorough review of Meyer and O'Melveny as applied to the case at bar lead to the inevitable conclusion that Judge McConnell's analysis and conclusion in Sisti is the only decision that adequately and consistently considered and applied the controlling precedents of the holdings in these two unanimously decided U.S Supreme Court opinions that were decided in the same 1994 term. Therefore the only way to properly apply and consistently reconcile these two binding U.S. Supreme Court precedents, as opposed to applying the non-binding Herron line of cases, is to affirm the "well-reasoned and sensible" analysis of Judge McConnell in Sisti as conceded by Judge Smith in the lower court decision in the case at bar.

C. FHFA As "Conservator" Did Not "Step Into The Shoes" Of FNMA When It Directed FNMA To Conduct Non-Judicial Foreclosures Against The Appellants.

The Appellees and the decisions supporting their arguments ignore the plain meaning of words, ignore the specific facts surrounding the so-called conservatorship and gaslight the sound and correct logic of Sisti in finding that FHFA and FNMA are government actors when they conducted the non-judicial foreclosures on the Appellants' properties. Sisti v. Fed. Hous. Fin. Agency, 324 F.Supp.3d 273 (D.R.I. 2018). The very different duties and purposes of a conservator as opposed to a receiver are clearly apparent when simply considering the plain meaning of the words "conservator" and "receiver". While the purpose of a conservator is to "conserve" the controlled entity by protecting it from claims against creditors in order to preserve the entity's continued existence, the purpose of a receivership is for the receiver to "receive" and resolve claims from creditors against the entity by liquidating the entity and wrapping up and finishing the entity's existence. Furthermore, while a receiver is generally established to "wind down" a company, conservatorship is typically used to return entities to a "sound and solvent" condition in which they can continue to operate. See David Reiss, *An Overview of the Fannie and Freddie Conservatorship Litigation*, 10 N.Y.U.J.L. & Bus. 479, 483 n. 4. Therefore, the Appellees'

erroneous contentions that the words "conservator" and "receiver" can be used interchangeably when considering the language of HERA's succession clause and whether or not FHFA and FNMA were government actors when they conducted the non-judicial foreclosures on the Appellants' properties are effectively asking this Court to ignore the plain and ordinary meaning of these words.

Consistent with the receiver's purpose, the receiver divvies out the entity's liquidated capital to the creditors in accordance with the receiver's fiduciary duty to the creditors. See 12 USC § 4617 (b)(2)(E). Furthermore, a receiver must resolve the claims of creditors in order to wrap up the entity's affairs and conclude the existence of the entity. This is why a substantial portion of HERA's statutory scheme devouts many whole sections of the law to procedures for creditors to file claims against a receiver as opposed to a conservator as well as imposing notice requirements to creditors in the case of a receiver. See 12 USC § 4617 (b)(3-9). Therefore, in the context of a receiver it may be a seemingly logical analysis in concluding that a receiver steps in the shoes of the entity pursuant to HERA's succession clause. O'Melveny, at 79.[1]

In the case of FHFA's so-called conservatorship over FNMA, however, it is not that simple and indeed the closer one examines the facts surrounding this anomalous and arguably unprecedented arrangement the more likely one is apt to consider the inevitable conclusion that this particular factual arrangement warrants FHFA and FNMA government actor status when they conducted the non-judicial foreclosures of the Appellants' properties. Notably it may presumably be consistent with FHFA's purpose to "conserve" FNMA into a "sound and solvent condition" by

[1] O'Melveny did not concern "the primary conduct of the United States or any of its agents" but rather "only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that ha[d] already occurred". Id. at 88. This case by contrast concerns primary conduct on the part of FHFA after the effective date of the conservatorship concerning so-called rights that did not exist at the time of the effective date of the conservatorship while seeking to advance the Government interest in increasing revenue to the Treasury by directing FNMA to conduct the less expensive mode of non-judicial foreclosure.

assuming government actor status in order to insulate the conservatorship from claims via sovereign immunity.[2] See FDIC v. Meyer, 510 U.S. 471 (1994) and 12 U.S.C § 4617(b)(2)(D) [" conservator "may" also "take such action as may be . . . necessary to put the (Enterprise) in a sound and solvent condition . . . and appropriate to carry on the business of the (Enterprise) and preserve and conserve the assets and property of the (Enterprise)". . This does not, however, insulate the conservatorship from violations of due process as is the case in this matter.

A strong analogy to the meaning of the term "conservator" and the fiduciary duties a conservator owes to its' ward can be drawn from the use of the term "conservator" in other contexts throughout the country. Lucerno v. Lucerno, 884 P.2d 527,531 (N.M. 1994) (conservator's duty of loyalty is to its' ward); Estate of Bodman v. Bodman, 674 So. 2d 1245, 1247-1250 (Miss. 1996) (court extended duty to marshal the assets of its ward to conservators). Needless to say, The Appellees' contention that Judge McConnell's assertion that a conservator's fiduciary duty runs to its' ward has no support other than a law review article is dubious at best. For example, in Bodman the Supreme Court of Mississippi examined the fiduciary duty of a conservator that withdrew funds from joint accounts the ward held with other parties to pay for the necessities of the ward while saving funds held within a joint account the conservator shared with her ward. The Bodman Court held that this self-interested cherry picking of assets from the ward presented a breach of the conservator's fiduciary duty to her ward. Likewise, in this case the more egregious action of FHFA's syphoning of its' ward's profits as described below while directing its' ward to proceed with the less expensive mode of non-judicial foreclosure to increase the Treasury's bottom

[2] See also Nicole Summers, Fannie Mae and Freddie Mac's Subversion of State Consumer Protection Law Under The Guise Of HERA: Post-Foreclosure Litigation in Massachusetts, 20 U.Pa.J.L. & Soc. Change 273 (2017) ("HERA created FHFA and authorized it to act as both regulator and conservator of Fannie Mae . . . The statute grants broad immunities to FHFA when it is acting as conservator – from judicial review . . . Fannie Mae and Freddie Mac are now invoking these immunities in their own right, and claiming that they should apply to themselves as well in their roles as owners of occupied properties . . . The Article argues that courts have erroneously interpreted HERA by immunizing Fannie Mae and Freddie Mac from liability. . ."

line revenue presents a fiduciary duty that was breached at the expense of the Appellants' due process rights. Furthermore, the fact that the right to foreclose on the Appellants' mortgages was not a pre-existing contractual right of the ward covered by HERA's succession clause only underscores FHFA's self-dealing government action in directing the non-judicial foreclosures of the Appellants' homes.

In Fairholme Funds, Inc. v. United States, 147 Fed. Cl. 1 (2019) the Federal Claims Court considered a question of whether or not an amendment of the conservatorship in August of 2012 that required FNMA to pay to the U.S. Treasury a quarterly dividend equal to 100 % of FNMA's net worth was a "taking" by the government from FNMA's private shareholders. This amendment to the conservatorship has been in effect since August 2012 and has been referred to as the "Net Worth Sweep" which the plaintiffs in Fairholme argued rendered their stake in FNMA effectively worthless. In Fairholme the plaintiff argued that a federal conservator is the United States when it expropriates its' ward's assets for the benefit of the government such as the case of this so-called Net Worth Sweep. See Slattery v. United States, 583 F.3d 800, 826-29 (Fed. Cir. 2009) ("whether the FDIC as receiver is 'the government' depends on the context of the claim" and the FDIC as receiver could be sued in Federal Claims Court for a taking when it retained a bank's liquidation surplus for the Government rather than distributing the surplus to shareholder). Similar to the syphoning of 100% of FNMA's net worth via the Net Worth Sweep, FHFA's decision to direct FNMA to conduct the less expensive method of non-judicial foreclosure in Rhode Island via the Servicer Alignment Initiative at the expense of the Appellants' due process rights also was intended to serve the government function of increasing the bottom line profits of the Net Worth Sweep and the bottom line revenue of the U.S. Treasury. For it is not surprising that FHFA's

directive of non-judicial foreclosures was implemented shortly after the effective date of the Net Worth Sweep amendment.

The Sisti Court espoused the rational that FHFA retained its government character when acting as conservator over FNMA because FHFA as conservator of FNMA did not "step into the shoes" of FNMA when acting as conservator "to establish control and oversight of a company to put it in a sound and solvent condition". Sisti, 324 F.Supp. 3d at 282-83. HERA created FHFA as a new independent federal agency so there is no doubt that FHFA is a government actor. 12 U.S.C. § 4511(a). Also under HERA, however, while FHFA has "general supervisory and regulatory authority" over FNMA, FHFA appojnted itself as conservator of FNMA. 12 U.S.C. § 4511(b) and 12 U.S.C. § 4617 (a) (2). Pursuant to this authority as supervisor of FNMA, FHFA may, through its' Director, "issue any regulations guidelines or orders necessary to carry out the duties of the Director under this chapter or the authorizing statutes, and to ensure the purposes of this chapter and the authorizing statutes are accomplished 12 U.S.C. § 4526(a). For it is arguably under the above cited independent authority as government actor that FHFA directed FNMA to conduct the non-judicial foreclosures of the Appellants' homes rather than any status as a so-called conservator. Therefore, the application of O'Melveny to this matter is inapposite to the specific facts surrounding FHFA's conservatorship over FNMA and FHFA's affirmative and independent decision to direct FNMA to conduct the less expensive method of non-judicial foreclosure on the Appellants' homes based on contractual rights that did not exist on the effective date of the conservatorship and are thus not subject to HERA's succession clause and in violation of the Appellants' due process rights.

III. Fannie Mae Is A Government Actor

A. The Non-Judicial Foreclosures Of The Appellants' Properties Is Attributable To The Government Because FNMA Is A Government Instrumentality under Lebron.

Even if FHFA as conservator is construed as stepping into the shoes of FNMA, the non-judicial foreclosure of the Appellants' properties is attributable to the Government because FNMA is itself a federal instrumentality under the Lebron test. For if FNMA is a government actor under the Lebron Test than FHFA is stepping into the shoes of a government actor in the first place. First, FHFA is undoubtedly an "agency of the Federal Government," 12 U.S.C. § 4511 (a), and that remains the case when it acts as conservator, see § 4617 (a)(7) (conservator shall not be subject to direction of "any other agency of the United States"). Second, under the Lebron test the syphoning of FNMA's profits via the so-called Net Worth Sweep amendment of the conservatorship as previously described in this Reply Brief and its' inextricably linked connection to increasing the revenue of the U.S. Treasury by virtue of FHFA's direction to proceed with the less expensive mode of non-judicial foreclosure of the Appellants' properties strongly supports the Appellants' contention that the indefinite status of the conservatorship is not temporary.

As conceded by the Appellees FNMA satisfies the first two elements of the Lebron test since Congress created FNMA to accomplish government objectives, including to "provide stability" and "ongoing assistance" to "the secondary mortgage market for residential mortgages". Lebron at 399. As for the third prong of Lebron regarding FHFA's "permanent authority" over FNMA[3], the Net Worth Sweep confirms Judge McConnell's conclusion in Sisti because the Net Worth Sweep deprived FNMA of its' ability to reduce debt or accumulate capital reserves. Thus,

[3] 12 U.S.C. § 4617(b)(2)(A)(i) successor clause serves function of allowing FHFA the pre-existing right as conservator to select the boards of FNMA permanently. This is an example of a right succeeded or inherited by FHFA as conservator as opposed to allowing FHFA to step into the shoes of FNMA for the purpose of conducting a non-existent right of non-judicial foreclosures in violation of the Appellants' due process rights.

FNMA has no reasonable prospect of becoming "adequately capitalized" under 12 U.S.C. § 4614 which would presumably be a goal of the conservatorship. Under this arrangement, FNMA remained undercapitalized and, as such, subject to the perpetual discretionary or mandatory power of the Director of FHFA to act as its' conservator. 12 U.S.C. § 4617(a)(3)(J), (K). Indeed, the Government imposed the Net Worth Sweep to prohibit FNMA from exiting the conservatorship to begin with.[4]

The facts surrounding the Net Worth Sweep in conjunction with FHFA's direction that FNMA conduct the less expensive method of non-judicial foreclosure in Rhode Island run contrary to the Appellees' argument that "the purpose of the conservatorship is to restore [the companies] to a stable condition' and conservatorship is therefore a form of "indefinite but temporary control" that "does not transform [the Companies] into . . . government actor[s]". Herron v. Fannie Mae, 861 F.3d 160, 169 (D.C Cir. 2017). For the Net Worth Sweep and the subsequent Servicer Alignment Initiative directly FNMA to conduct the less expensive method of non-judicial foreclosure in order to increase the value of the Net Worth Sweep contradicts the notion that FHFA is seeking to restore FNMA to a stable condition. Furthermore, characterizing the Government's control of FNMA more than a decade into the conservatorship as "indefinite but temporary" is implausible.

[4] See Fairholme Funds at 5 ("the Enterprises can never be rehabilitated to a sound and solvent condition because, by transferring their profits to Treasury, they will perpetually operate on the brink on insolvency"; "FHFA's former Acting Director, Edward DeMarco, testified before the United States Senate that the PSPA Amendments 'reinforce the notion that the [Enterprises] will not be building capital as a potential step to regaining their former corporate status . . . he also stated that he had no intention of returning the Enterprises to private control under their existing charters, while another FHFA official testified that the agency's objective "was not for Fannie and Freddie . . . to emerge from conservatorship."

B. Lebron Requires A Factual Determination As To The Practical Analysis Of Whether Or Not Government Control Is Permanent And Expressly Prohibits The Use Of Labels To Determine Whether Government Control Is Permanent.

Although in the lower court Judge Smith found Judge McConnell's "analysis in Sisti to be well-reasoned and sensible", Judge Smith ultimately and incorrectly held that the "conservatorship" label rather than the "practical analysis" required by Lebron dictated the lower court's decision. In support of the lower court's erroneous conclusion that the statutorily indefinite conservatorship was nonetheless temporary, Judge Smith cited the Fairtholme Court's judicial notice of statements made approximately 2 years ago by the Secretary of Treasury and the FHFA Director "suggesting they are 'committed to ending the conservatorships". See Decision at p. 8 ft. nt. 4. In response to these statements Appellants set forth that these so-called commitments to end the conservatorship are just words with no parameters, limitations or cognizably predictable substance. For there is no telling what future events or circumstances will affect any plan to end the conservatorships if there ever was a serious plan to begin with.[5] Indeed it goes without saying that the United States government is now controlled by a new executive administration and a new Treasury Secretary that could very well modify these so-called commitments.[6]

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[5] See R. Christopher Whalen, The Myth of GSE Release, The Institutional Risk Analyst, Nov. 27, 2020, https://www.theinstitutionalriskanalyst.com/post/the-myth-of-gse-release ("The prospective ejection of the GSEs, Fannie Mae and Freddie Mac, from government control seems finally to be dead for the next four years. While Federal Housing Finance Agency head Mark Calabria has made a lot of noise about ending the conservatorship of the GSEs, in fact the possibility was never real. All that noise just provided opportunities for insider trading, Washington's favorite choice of entertainment and enrichment"

[6] See Kelsey Ramirez, FHFA: GSEs Can't Exit Conservatorship on Retained Earnings, HousingWire.com, January 15, 2021, https://www.housingwire.com/articles/fhfa-gses-cant-exit-conservatorship-on-retained-earnings/ ("The FHFA and US Treasury announced an agreement Thursday that would allow Fannie . . to retain more of their earnings, but now the FHFA is saying this money alone will not be enough to remove the mortgage giants from conservatorship. . . the increase in capital retention capabilities came at a cost. The cost is a dollar-for-dollar increase in the liquidation preference of the UST's senior preferred position, which makes raising outside capital incredibly difficult if not impossible")
Also See Joe Light, Trump Clears Fannie-Freddie Capital Boost, Leaves Fates to Biden, Bloomberg, January 14, 2021, https://www.msn.com/en-us/money/markets/trump-clears-fannie-freddie-capital-boost-leaves-fates-to-biden/ar-BB1cLhLJ ("taxpayers' ownership interest in the mortgage giants will continue to increase as they add to their capital buffers, and Treasury didn't address how that issue would be resolved . . .A senior FHFA official estimated that it could take decades for the companies to meet their capital requirements through retained earnings alone.")

There is no telling what unpredicted future events, such as the effect of the current Covid 19 pandemic, may have on the economy and mortgage market that may require the conservatorship to continue on in perpetuity. While the Appellees and Judge Smith contend that a conservatorship is temporary in nature, the Appellant must remind them that a conservatorship is supposed to be rehabilitative in nature as well. Needless to say, the arrangement in the case at bar as allowed by HERA and supported by the actions of FHFA support neither contention and are repugnant to this stated nature. Likewise a plan is just a plan and even if the conservatorship were to somehow end at some point it does not moot the non-judicial foreclosures of the Appellants' homes and the indefinite nature of this so-called conservatorship that could theoretically go on forever and appears to be going nowhere but a continuous and indefinite political circle anytime sooner or later. Therefore, the Appellants aver that a statutory scheme such as HERA that allows this so-called conservatorship to continue indefinitely in perpetuity without limitations is not consistent and indeed directly contradicts the temporary nature of the conservatorship label espoused by the Herron line of cases.

IV. The Merits of Appellants' Due Process Claims and Appellee's Judicial Estoppel Defense Were Not Decided In The Lower Court And Should Be Remanded.

While both parties in this Appeal have presented arguments with regard to the merits of the Appellants' due process claims as well as the Appellees' judicial estoppel defense to the claims of Appellant Kyriakakis, Appellants set forth that the lower court in this case as well as the lower court in the Boss and Sisti Appeals that have been coordinated with this appeal did not reach these issues and should be remanded in the event that this Honorable Court finds that FHFA and FNMA are government actors.

In response to the Appellees' judicial estoppel defense regarding Appellant Kyriakakis' claim, however, Appellant avers that the Appellee's position is based on a misinterpretation of the

bankruptcy laws. Contrary to the Appellees' view, Appellant's chapter 7 discharge had no effect on his substantive property rights under the mortgage. After the discharge Appellees still had to foreclose in compliance with due process. Appellant's temporary surrender of his interest in the mortgage to the chapter 7 trustee for the purpose of bankruptcy administration had no impact on Appellant's rights in the property. See Johnson v. Home Loan Bank, 501 U.S. 78, 84 (1991) ("[a] bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor in personam — while leaving intact another — namely, an action against the debtor in rem."); In re Claflin, 249 B.R. 840, 849 n.6 (B.A.P. 1st Cir. 2000). "the 'surrender' contemplated in § 521(2) appears to involve the surrender of property to the Chapter 7 trustee administering the estate, not the relevant creditor."); In re Best, 540 B.R. 1, 11 (B.A.P. 1st Cir. 2015); In re Harris, 2016 WL 3412640 * 9 (Bankr. D. Mass. May 27, 2016). The bankruptcy trustee chose not to liquidate the property to pay creditors. At the close of the bankruptcy case the trustee transferred the bankruptcy estate's interest in the property back to Appellant Kyriakakis, as is required by 11 U.S.C. § 554(c). Sections 521(a)(2)(A) and (B) of the Bankruptcy Code do not address how mortgagees enforce their rights outside of bankruptcy. These enforcement ssues are left to state law and applicable federal nonbankruptcy law. In re Donnell, 234 B.R. 567, 575 (Bankr. D. N.H. 1999); In re Rathbun, 275 B.R. 434, 438 (Bankr. D. R. I. 2001). Appellees' interpretation of 11 U.S.C. § 521(a)(2) as allowing transfer of property of the bankruptcy estate to a creditor had no basis in the Bankruptcy Code and was contrary to specific Code sections, including 11 U.S.C. §§ 541(a), 521(a)(4), 554(c), and 362(a). Allowing a void foreclosure to stand encourages title defects to persist.

V. Conclusion

FHFA is a government actor. The consistent and non-contradictory application of the binding US Supreme Court precedents in Meyer and O'Melveny as described herein and supported by the "well-reasoned" and sensible" analysis and inevitable conclusion by Judge McConnell in Sisti are dispositive in the affirmation that FHFA is indeed a government actor in the case at bar. Likewise the post-conservatorship acquiring of the Appellants' mortgages and non-judicial foreclosures of the Appellants' homes as directed by FHFA in its role as a government actor via the servicer alignment initiative designed to serve the government function of maximizing revenue to the US Treasury and should be construed as an action of the federal government.

FNMA is a government actor. The "practical analysis" supported by the indefinite, unlimited and unchecked government control allowed by HERA as well as the factual actions, amendments and arrangements between the US Treasury, FHFA and FNMA themselves, rather than the label of this arrangement as being a temporary conservatorship "in nature", are dispositive of the affirmation that this so-called "conservatorship" is not "permanent" under Lebron. For not only does "indefinite" not mean "temporary" but the actions of FHFA towards its ward FNMA in having the freedom allowance and control under HERA to enact and enforce an amendment to funnel FNMAs net profits into the government served no purpose to rehabilitate FNMA but only to serve the government function of increasing the revenue of the Treasury for nearly a decade.

Therefore, this Court must hold that both FHFA and FNMA are government actors and reverse the decision of the District Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 40(b)(1) and Fed. R. App. P. 35(b)(2)(A).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 6,495 words. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of Microsoft Word in preparing this certificate.
2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 365 in 12-point Times New Roman font.

/s/ Todd S. Dion
Todd S. Dion, Esq.
15 Cottage Avenue, Ste 202
Quincy, MA 02169
401-965-4131 Phone
401-270-2202 Fax
toddsdion@msn.com

CERTIFICATE OF COUNSEL

I, Todd S. Dion, Esq., hereby certify that the foregoing document was filed with this Court on February 19, 2021 through the Court's ECF System and will be sent electronically to the registered participants as identified in the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on February 19, 2021

/s/ Todd S. Dion

Todd S. Dion, Esq.