

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

CHRISTOPHER ROBERTS, et al.,

Plaintiffs,

vs.

THE FEDERAL HOUSING FINANCE
AGENCY, et al.,

Defendants.

Civil Action No. 1:16-CV-02107

**PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE
OF NEW AUTHORITY OF JANUARY 24, 2017**

The plaintiffs in *Edwards v. Deloitte & Touche, LLP*, No. 16-21221 (S.D. Fla. Jan. 18, 2017), did not bring APA claims, and the court in that case had no occasion to decide whether HERA's succession provision permits such claims only if FHFA agrees to sue itself. Because the APA gives a direct claim to anyone who is "adversely affected or aggrieved by agency action," 5 U.S.C. § 702, Plaintiffs' APA claims are direct as a matter of federal law, *see* Plaintiffs' Consolidated Response in Opposition to Defendants' Motions to Dismiss at 47–48 (Aug. 12, 2016), Doc. 46 ("MTD Response").

Furthermore, *Edwards* is distinguishable even if the Court ultimately looks to Delaware law to decide whether Plaintiffs may pursue their APA claims. The *Edwards* plaintiffs sought damages from the Companies' auditors, not an injunction against an action by the Companies' management that effectively eliminated private shareholders from the capital structure by donating their investments to Treasury. With Plaintiffs' entire investment having been expropriated by the federal government and the Companies operating under conservatorship, Delaware law's distinction between direct and derivative claims does not turn on whether the Net

Worth Sweep involved “a dilution of voting power.” Order Denying Motion to Remand and Granting Motion to Substitute at 10, *Edwards v. Deloitte & Touche, LLP*, No. 16-21221 (Jan. 18, 2017), ECF No. 50.

Finally, the *Edwards* court’s analysis adds nothing to the parties’ prior briefing on whether HERA’s succession provision bars derivative claims when FHFA has a manifest conflict of interest. *See* MTD Response at 54–57. The only two Courts of Appeals to consider this issue have allowed such claims to go forward. *See First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d 1279, 1283 (Fed. Cir. 1999); *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1024 (9th Cir. 2001). And contrary to the *Edwards* court’s suggestion, the fact that these rulings concerned FIRREA—and that Congress subsequently reenacted materially identical language in HERA—only further strengthens the conclusion that these appellate decisions are correct.

Date: January 30, 2017

Respectfully submitted,

/s/ Christian D. Ambler

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 30th day of January, 2017, via the Court's Electronic Case Filing system.

s/ Christian D. Ambler
Christian D. Ambler