Docket #0046 Date Filed: 6/28/2012

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: RESIDENTIAL CAPITAL, LLC, *et al*., Debtors.	Case No. 12-12020 (MG) Chapter 11 Jointly Administered
RESIDENTIAL CAPITAL, LLC, *et al*., Plaintiffs, v. ALLSTATE INS. CO., THE OTHER PARTIES LISTED ON EXHIBIT A TO THE COMPLAINT, JOHN DOES 1-1000, Defendants.	Adv. Case No. 12-01671 (MG)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO WITHDRAW THE REFERENCE AS TO DEFENDANT FEDERAL HOUSING FINANCE AGENCY

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The Federal Housing Finance Agency, as Conservator for Freddie Mac ("FHFA"), as defendant in the above-captioned adversary proceeding (the "Adversary Proceeding") respectfully submits this memorandum of law and the accompanying declaration of Kanchana Wangkeo Leung, dated June 28, 2012 (the "Leung Decl."), in support of its motion to the United States District Court for the Southern District of New York (the "District Court"), pursuant to 28 U.S.C. § 157(d), Rule 5011 of the Federal Rules of Bankruptcy Procedure and Rule 5011-1 of the Local Rules of the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), for an order withdrawing the reference to the Bankruptcy Court of the Adversary Proceeding as to claims made solely against FHFA by the debtors in the above-captioned Chapter 11 bankruptcy cases (the "Debtors").

PRELIMINARY STATEMENT

Presently pending before the Honorable Denise L. Cote is the lawsuit entitled *Federal Housing Finance Agency, as Conservator for the Federal Home Loan Mortgage Corporation v. Ally Financial Inc. f/k/a GMAC, LLC et al*., Case No. 11 Civ. 7010 (the "FHFA Case"). Through this action, the Debtors seek to enjoin FHFA from pursuing the FHFA Case against their solvent non-debtor affiliates including Ally Financial, Inc. f/k/a GMAC, LLC ("AFI") (the indirect parent of the Debtors), GMAC Mortgage Group, Inc. ("GMACM") and Ally Securities, LLC f/k/a Residential Funding Securities, LLC d/b/a GMAC RFC Securities ("Ally Securities" and collectively with AFI and GMG, the "Non–Debtor Affiliate Defendants") pursuant to Section 105 of the Bankruptcy Code, and then to discharge the Non-Debtor Affiliate Defendants through a plan of liquidation. The Debtors are no longer defendants in the FHFA Case.

FHFA has filed its opposition to the Debtors' motion to enjoin the prosecution of the FHFA Case and its own motion to dismiss FHFA from the Adversary Complaint on the basis that the Housing and Economic Recovery Act of 2008 ("HERA") precludes the granting of such

relief sought against FHFA, as conservator of Freddie Mac. In particular, HERA provides that "*no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or a receiver*." 12 U.S.C. § 4617(f) (the "Anti-Injunction Provision"). The Adversary Proceeding seeks to vitiate the effect of the Anti-Injunction Provision by enjoining FHFA from prosecuting the FHFA Case against the Debtors' solvent affiliates that are not debtors in the Chapter 11 cases.

The Court should withdraw the reference of the Adversary Proceeding against FHFA. Where, as here, a case or proceeding requires substantial consideration of a non-bankruptcy federal statute, 28 U.S.C. § 157(d) requires withdrawal of the reference. The Anti-Injunction Provision of HERA satisfies that requirement. The interplay between the Anti-Injunction Provision and the Bankruptcy Code is a matter of first impression and requires substantial consideration of HERA. Indeed, the Second Circuit has recognized that the reference should be withdrawn in nearly identical circumstances.

Accordingly, FHFA respectfully requests that the District Court withdraw the reference of the Adversary Proceeding solely as to FHFA.

FACTUAL BACKGROUND

A. The FHFA Amended Complaint.

On September 2, 2011, FHFA, in its capacity as conservator for Freddie Mac, commenced the FHFA Case as the action styled *Federal Housing Finance Agency, as Conservator for the Federal Home Loan Mortgage Corporation v. Ally Financial Inc. f/k/a GMAC, LLC et al.* in the Supreme Court of the State of New York, County of New York. The action was then removed to the District Court where it is pending before Judge Cote as Case No. 11 Civ. 7010. (Leung Decl. ¶ 14.)

FHFA's amended complaint[1] in the FHFA Case (the "FHFA Amended Complaint") filed on June 13, 2012, names ten defendants (collectively, the "FHFA Litigation Defendants"), consisting of: (1) AFI, GMACM and Ally Securities and (2) seven underwriters that are neither Debtors nor affiliates of the Debtors (collectively, the "Non-Affiliate Defendants").[2] (Leung Decl. ¶ 15.)

The FHFA Amended Complaint contains seven claims against the FHFA Litigation Defendants arising from false and misleading statements and omissions in the registration statements, prospectuses and other offering materials relating to $6 billion of residential mortgage-backed securities ("RMBS" or "Certificates") purchased by Freddie Mac from 21 securitization trusts between September 23, 2005 and May 30, 2007. The FHFA Amended Complaint alleges, among other things, that the documents related to the Certificates misrepresented that the underlying mortgage loans complied with certain underwriting guidelines and standards and presented a false picture of the characteristics and riskiness of those loans. The specific claims in the FHFA Amended Complaint are as follows:

	Named Defendants	Claim
First Claim For Relief	**Non-Debtor Affiliate Defendants**: Ally Securities **Non-Affiliate Defendants**: JPMSI, Credit Suisse, RBS, Citi, Barclays, UBS and Goldman Sachs	Violation of section 11 of the Securities Act of 1933[3]
Second Claim For Relief	**Non-Debtor Affiliate Defendants**: Ally Securities	Violation of section 12(a)(2) of the Securities Act of 1933[4]

1 A copy of the FHFA Amended Complaint is annexed to Leung Declaration as Exhibit A.

2 The Debtor defendants were removed from the FHFA Case when the amended complaint was filed post-petition.

3 Section 11 applies to statutorily defined parties if a person acquired a security which "any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77(k).

4 Section 12(a)(2) liability will apply to "any person who offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by

	Non-Affiliate Defendants: JPMSI, Credit Suisse, RBS, Citi, Barclays, UBS and Goldman Sachs	
Third Claim For Relief	**Non-Debtor Affiliate Defendants**: GMACM, Ally Financial	Violation of section 15 of the Securities Act of 1933[5]
Fourth Claim For Relief	**Non-Debtor Affiliate Defendants**: Ally Securities **Non-Affiliate Defendants**: JPMSI, Credit Suisse, RBS, Citi, Barclays, UBS and Goldman Sachs	Primary Violations of Virginia Securities Act[6]
Fifth Claim For Relief	**Non-Debtor Affiliate Defendants**: GMACM, Ally Financial	Controlling Person Liability Under Virginia Securities Act
Sixth Claim For Relief	**Non-Debtor Affiliate Defendants**: Ally Securities **Non-Affiliate Defendants**: JPM,SI Credit Suisse, RBS, Citi, Barclays, UBS and Goldman Sachs	Common Law Fraud
Seventh Cause of Action	**Non-Debtor Affiliate Defendants**: Ally Financial, GMACM	Aiding and Abetting Fraud

(Leung Decl. ¶ 16.)

The FHFA Amended Complaint seeks as against all FHFA Litigation Defendants, jointly and severally, an award of (1) rescission and recovery of the consideration paid for the RMBS Certificates, with interest, (2) Freddie Mac's monetary losses, (3) punitive damages, (4) attorney's fees and costs and (5) prejudgment interest. (Leung Decl. ¶ 17.)

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means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading . . . ." 15 U.S.C. § 77(l).

5 Section 15 liability, commonly referred to as control person liability, will apply to "every person who, by or through stock ownership, agency, or otherwise, or who pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under Section 11 of 12." 15 U.S.C. § 77(o).

6 For the purposes of this opposition, Virginia Code Section 13.1-522(A)(ii) is equivalent to Section 11 and 12 liability while Section 13/1-522(C) is the equivalent of Section 15, control person liability.

Ally Securities is an SEC-registered broker-dealer that acted as an underwriter for eleven of the securitizations underlying the FHFA Amended Complaint; for five securitizations it was also the co-lead and selling underwriter. The FHFA Amended Complaint asserts five claims against Ally Securities for violations of section 11 and section 12(a)(2) of the Securities Act of 1933, two violations of the Virginia Securities Act, and common law fraud (collectively the "A/S Claims"). (Leung Decl. ¶ 18.)

The A/S Claims are asserted against Ally Securities because of its independent role as an underwriter for the Certificates. (Leung Decl. ¶ 19; s*ee e.g.* FHFA Compl. ¶ 280 (First Claim For Relief) ("The Underwriter Defendants[7] acted as underwriters in connection with the sale of the Certificates for each of the twenty-one Securitizations . . ."); ¶ 290 (Second Claim for Relief) ("The Underwriter Defendants offered, promoted, and/or sold the Certificates publicly, including selling to Freddie Mac their Certificates . . ."); ¶ 317 (Fourth Claim For Relief) ("The Underwriter Defendants offered the Certificates publicly, including selling to Freddie Mac the Certificates . . ."); ¶ 344 (Sixth Claim For Relief) ("[T]he Fraud Defendants'[8] representations falsely and misleadingly misrepresented and omitted material statements of fact.").)

Debtor ResCap is wholly-owned by Non-Debtor GMACM, which in turn is wholly-owned by Non-Debtor Ally Financial. The FHFA Amended Complaint contains three claims against GMACM and Ally Financial.

Two claims allege control person liability against GMACM and Ally Financial under section 15 of the Securities Act of 1933 and the Virginia Securities Act (the "Control Person

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7 The FHFA Amended Complaint provides that "Defendants Barclays, Citi, Credit Suisse, Goldman, JPMSI, RBS, and UBS are referred to together herein as the 'Non-Ally Defendants,' and together with Ally Securities as the 'Underwriter Defendants.'" (¶ 28.)

8 The FHFA Amended Complaint defines "Fraud Defendants" as "Ally Securities, JPMSI and Goldman." (¶ 178.)

Causes of Action"). As to GMACM, those claims allege control person liability for the culpable conduct of the Debtors. As to Ally Financial, however, the control person claims also allege secondary liability for the culpable conduct of non-debtor Ally Securities. (*See* FHFA Compl. ¶¶ 309, 337). The third claim against GMACM and Ally Financial is for aiding and abetting fraud committed by Ally Securities, JPMSI and Goldman Sachs. (Leung Decl. ¶ 20.)

B. The District Court Proceeding.

The FHFA Case is one of 16 similar securities actions brought by FHFA. All of these cases have been assigned to Judge Denise L. Cote for coordinated pretrial proceedings. In November 2011, to help coordinate the various cases and avoid unnecessary duplication, Judge Cote issued an Order staying all cases, but permitted the defendants in one focus case, *FHFA v. UBS Americas, Inc.*, to move for dismissal. Judge Cote indicated that once the UBS motion to dismiss was decided, the Court would lift the stay of discovery in all cases. However, Judge Cote permitted the defendants to make applications to the Court to maintain the stay in their particular cases. On May 4, 2012, Judge Cote granted in part and denied in part the motion to dismiss, leaving intact most of the claims against the UBS defendants. (Leung Decl. ¶ 21.)

Judge Cote held a scheduling a conference on May 14, 2012, at which the Court discussed coordinating litigation schedules for all of the cases. (*Id.*) The Debtors filed their Chapter 11 petition on the same day (the "Petition Date"). During the May 14, 2012 conference, Judge Cote addressed the Debtors' bankruptcy filing, stating as follows:

> unless I hear a good reason otherwise, that obviously the automatic bankruptcy stay affects [the FHFA Case] insofar as it affects the parties *who have filed* for bankruptcy court protection, but that *the remainder of the case go forward*, including against the underwriter defendants.

(Leung Decl. Ex. B (Excerpt of Transcript of May 14, 2012 Hearing) at 14 (emphasis added).) Nobody in attendance -- including counsel to the Debtors and Ally Financial -- objected or

voiced any concerns with this approach.

On May 15, 2012, Judge Cote entered a scheduling order applicable to all sixteen actions specifically providing that the FHFA Case was stayed as to "any defendant that is subject to the 'automatic stay' codified in section 362 of the Bankruptcy Code, 11 U.S.C. § 362(a)." (Leung Decl. ¶ 22, Ex. C at 4.) The scheduling order further provided the following timeline for discovery in all actions, including the FHFA Case:

- Document discovery to be substantially completed by September 30, 2012;
- Depositions to begin in January 2013;
- Depositions to be coordinated so that each deponent is deposed once;

(*Id.* at 5.)

In a Pretrial Scheduling Order dated June 14, 2012, which was entered following a conference held on June 13, 2012, Judge Cote further specified the following dates and deadlines:

- Motions to dismiss the FHFA Case due by July 13, 2012, with oppositions due October 5, 2012 and replies due October 26, 2012;
- Document discovery to be substantially completed by September 30, 2012;
- Depositions to begin January 2, 2013;
- All fact and expert discovery to be completed by December 6, 2013;
- Summary judgment motions in the FHFA Case due by January 24, 2014, with oppositions due March 21, 2014 and replies due April 11, 2014;
- Trial in the FHFA Case would not begin before January 2015.

(Leung Decl. ¶ 23, Ex. D.)

C. The Debtors' Proposed Plan Of Liquidation And Settlement.

On the Petition Date, the Debtors disclosed that, subject to Court approval, they had negotiated and entered into three agreements. (*See* Affidavit of James Whitlinger [Ch. 11 Case Docket No. 6] ¶ 7.) First, the Debtors entered into a stalking horse agreement with Nationstar Mortgage LLC for the sale of their mortgage loan origination and servicing businesses (the "Platform Sale APA"). Second, the Debtors had entered into a stalking horse agreement with

Ally Financial for the sale of the Debtors' "legacy" portfolio consisting mainly of mortgage loans and other residual financial assets (the "Ally Legacy Sale APA"). Third, the Debtors had entered into a plan support agreement with Ally Financial and certain creditors (the "Plan Support Agreement").

The Plan Support Agreement outlines the anticipated terms for the Debtors' reorganization. (*Id.* Ex. 8.) It provides that (1) Ally Financial will contribute $750 million "to fund the settlement of pending and future claims and to secure the releases in favor of the Released Parties … including third party releases . . ." (*Id.* at § 2.1(a)) and (2) Ally Financial will serve as the stalking horse bidder pursuant to the Ally Legacy Sale APA (*id.* at § 2.1(b)).

In exchange, the Plan Support Agreement binds the Debtors to pursue a plan that contains terms dictated by Ally Financial. (*Id.* at § 3.1(b).) The onerous terms include a requirement that the Debtors seek confirmation of a plan that imposes sweeping non-consensual third-party releases on the Debtors' creditors (the "Proposed Third Party Releases"). (*Id.* at § 3.1(d)(ii).) Those releases would run in favor of Ally Financial, "its [non-Debtor] direct and indirect subsidiaries and affiliates" (*id.* at preamble) and each of their "members, officers, directors, agents, financial advisors, attorneys, employees, partners, affiliates and representatives" (*id.* at § 1.2 (definition of "Released Parties").)

Notably, the Proposed Third Party Releases do not carve-out fraud, willful misconduct or any other intentional torts. (*Id.* at 3.1(d)(ii).). To the contrary, the Proposed Third Party Releases expressly cover any and all claims "whether known or unknown, whether for tort, *fraud*, contract, *violations of federal or state securities laws* . . . including those in any way related to residential mortgage backed securities issued and/or sold by the Debtors . . ." (*Id.*) (emphasis added.) In pertinent part, the Third Party Releases were designed to relieve Ally

Financial and other Non-Debtor Affiliate Defendants from liability in the FHFA Case.

The Plan Support Agreement contains certain milestone dates (the "Milestones") and provides that the Debtors' failure to comply with those dates terminates the Plan Support Agreement. (*See* Affidavit of James Whitlinger Ex. 8 at Ex. A.) Of particular relevance herein, the Milestones include: (1) "[o]n or before May 25, 2012, the Debtors shall have filed a motion, in form and substance satisfactory to AFI, to extend the automatic stay of section 362(a) of the Bankruptcy Code to AFI and certain of its affiliates," (2) "[o]n or before October 31, 2012, the Bankruptcy Court shall have entered the Confirmation Order, which such order will grant final approval of the Plan . . . in form and substance satisfactory to AFI," and (3) "*[o]n or before December 15, 2012, the effective date of the Plan shall have occurred*." (*Id.*) (emphasis added) Accordingly, the Debtors have committed to an expedited bankruptcy process with an emergence during 2012.

D. The Adversary Proceeding.

On May 25, 2012 – as required by the Plan Support Agreement – the Debtors initiated this Adversary Proceeding by filing a complaint (the "Adversary Complaint") and *Motion to Extend Automatic Stay or, in the Alternative, for Injunctive Relief Enjoining Prosecution of Certain Pending Litigation Against Debtors' Directors and Officers and Non-Debtor Corporate Affiliates* (the "Motion"). The Adversary Complaint seeks two forms of relief against 42 defendants in 27 lawsuits.[9] First, it asks the Court to issue a declaratory judgment extending the automatic stay in Sections 362(a)(1) and (a)(3) of the Bankruptcy Code, until the effective date of a plan, to litigation against the Non-Debtor Affiliates, including FHFA's claims against Ally Financial, GMACM and Ally Securities in the FHFA Case. Second, the Complaint asks the

[9] FHFA is informed that the Debtors have reached agreement with 39 defendants, excluding FHFA and two other parties. FHFA only seeks relief in this Court for itself.

Court to issue an injunction pursuant to Section 105(a) of the Bankruptcy Code enjoining lawsuits, including FHFA's continuation of the FHFA Case as against Ally Financial, GMACM and Ally Securities until the effective date of a plan.

ARGUMENT

I.

WITHDRAWAL OF THE REFERENCE IS MANDATORY.

A. Governing Legal Standards.

District courts have original jurisdiction over cases "arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). District courts are, however, permitted to refer cases or proceedings within that jurisdiction to bankruptcy judges. 28 U.S.C. § 157(a). In this District, a standing order automatically refers such matters to the Bankruptcy Court. *See* Amended Standing Order of Reference, M-431, dated Jan. 31, 2012 (Preska, C.J.).

Nevertheless, Congress has provided that a district court may, and in certain circumstance, must, withdraw the reference from bankruptcy courts:

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. *The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce*.

28 U.S.C. § 157(d) (emphasis added). The decision to withdraw the reference is made by the district court, not the bankruptcy court. Fed. R. Bankr. P. 5011(a) (2011) ("A motion for withdrawal of a case of proceeding shall be heard by a district judge."); Fed. R. Bankr. P. 5011, Advisory Committee's Note ("The withdrawal decision is committed exclusively to the district court."). For the reasons set forth below, withdrawal of the reference of the Adversary

Proceeding is mandatory.

Withdrawal under section 157(d) is required "of cases or issues that would otherwise require a bankruptcy court judge to engage in significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes." *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991); *see also In re Boston Generating, LLC*, No. 10 Civ. 6528, 2010 U.S. Dist. LEXIS 116073 (S.D.N.Y. Nov. 1, 2010) (Cote, J.); *Picard v. Flinn Investments, LLC*, 463 B.R. 280, 283 (S.D.N.Y. 2011); *Picard v. HSBC Bank PLC*, 450 B.R. 406, 409 (S.D.N.Y. 2011). "Section 157(d) is meant to 'assure that an Article III judge decides issues calling for more than routine application of [federal laws] outside the Bankruptcy Code.'" *Picard v. JPMorgan Chase & Co.*, 454 B.R. 307, 315 (S.D.N.Y. 2011) ("*JPMorgan Chase*") (quoting *Enron Power Mktg., Inc. v. Cal. Power Exch. Corp.*, No. 04 Civ. 8177 (RCC), 2004 WL 2711101, at *2 (S.D.N.Y. Nov. 23, 2004) (amendment in original)).

Mandatory withdrawal is not limited to issues of first impression. *See Enron Power Mktg.,* 2004 WL 2711101, at *2. Indeed, "[r]egardless of a bankruptcy court's familiarity with a statute outside of Title 11, the requirements for mandatory withdrawal are satisfied if the proceeding requires consideration of a law outside of Title 11." *JPMorgan Chase.,* 454 B.R. at 316. Where, as here "matters of first impression are concerned, the burden of establishing a right to mandatory withdrawal *is more easily met*." *Chemtura Corp. v. United States*, No. 10 Civ. 503, 2010 WL 1379752, at *1 (S.D.N.Y. Mar. 26, 2010) (quoting *In re Manhattan Invest. Fund Ltd.*, 343 B.R. 63, 67 (S.D.N.Y. 2006)) (citations omitted).

B. The Adversary Proceeding Involves Novel Issues And Requires Substantial And Material Consideration Of HERA.

Here, the Adversary Proceeding raises novel issues that will require "substantial and material consideration" of a non-bankruptcy federal statute. Indeed, the Court must consider, as

a matter of first impression, whether HERA's Anti-Injunction Provision precludes the Debtors from obtaining the relief sought in the Complaint.

1. The Housing and Economic Recovery Act of 2008.

On July 30, 2008, in the midst of what is known as the "Great Recession," Congress enacted HERA, creating the FHFA as an "independent agency of the Federal Government." 12 U.S.C. § 4511(a). On September 6, 2008, pursuant to the authority granted under HERA, and after determining Fannie Mae and Freddie Mac could not "continue to operate safely and soundly and fulfill their critical public mission," the Director of FHFA placed Fannie Mae and Freddie Mac under the conservatorship of FHFA.[10] As conservator, FHFA, "immediately succeeded to all rights, titles, powers, and privileges of the regulated entity." 12 U.S.C. § 4617(b)(2)(A) and was empowered to "conserve and preserve the assets" of the GSEs, "collect all obligations and money due the regulated entity" and to "take such action as may be . . . necessary to put the regulated entity in a sound and solvent condition." 12 U.S.C. § 4617(b)(2)(B)(ii), (b)(2)(D)(i). Such actions include issuing subpoenas, § 4617(b)(2)(I), administering claims against the GSEs, § 4617(b)(3), commencing litigation within the new time periods established for lawsuits by the FHFA, § 4617(b)(12), (13) and recovering fraudulent transfers made by the GSEs, § 4617(b)(15).

2. HERA's Anti-Injunction Provision Precludes The Relief Sought In The Adversary Proceeding.

The role of FHFA as conservator is crucial to the efficacy of HERA. To ensure that FHFA had all of the powers necessary to act as conservator free of outside interference, Congress included HERA's anti-injunction provision prohibiting any court from interfering with FHFA's mandate. Specifically, the Anti-Injunction Provisions in 12 U.S.C. § 4617(f) provides,

[10] (*See* Leung Decl. Ex. I (Statement of FHFA Dir. James B. Lockhart) at 5 (Sept. 7, 2008).)

> Except as provided in this section or at the request of the Director, *no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver*.

12 U.S.C. § 4617(f) (emphasis added). The Anti-Injunction Provision "clearly and specifically limits the power of courts to review the actions of the FHFA when acting as a conservator." *Town of Babylon v. Fed. Hous. Fin. Agency*, 790 F. Supp.2d 47, 54 (E.D.N.Y. 2011). Courts are prohibited from granting any relief that would restrain or affect FHFA's authority as conservator. *See, e.g., NRDC, Inc. v. Fed. Hous. Fin. Agency*, 815 F. Supp.2d 630, 642 (S.D.N.Y. 2011) ("Under HERA, the FHFA has the authority to preserve and conserve the assets of the Enterprises, as well as take any action to put the Enterprises in a sound and solvent condition . . . Because the FHFA was acting within its authority under HERA when it issued the Letter, section 4617(f) applies and bars adjudication of this suit."); *Town of Babylon v. Fed. Hous. Fin. Agency,* 790 F. Supp 2d at 54 ("[T]here is no question that the acts sought to be nullified here were undertaken pursuant to FHFA's broad and important statutory charge as conservator of the GSE's. As such, this action is barred by 12 U.S.C. § 4617."); *Kuriakose v. Fed. Home Loan Mortg. Co.*, 674 F. Supp.2d 483, 494 (S.D.N.Y. 2009) ("By moving to declare unenforceable the non-participation clause in Freddie Mac severance agreements, in essence Plaintiffs are seeking an order which restrains the FHFA from enforcing this contractual provision in the future. The FHFA is well within its statutory authority to enforce the contracts of Freddie Mac and take any other action it determines to be in the best interest of Freddie Mac. HERA clearly provides that this Court does not have the jurisdiction to interfere with such authority."); *Esther Sadowsky Testamentary Trust v. Syron*, 639 F. Supp. 2d 347, 351 (S.D.N.Y. 2009) ("This ban is an essential part of HERA's comprehensive scheme for conservatorships and receiverships. Here, the suit brought by the Trust would interfere with and potentially usurp precisely the powers granted to the FHFA by HERA. As such, maintenance of this suit would violate Section 4617(f)

of HERA and cannot be permitted."). In sum, the "only relevant question" in conducting an analysis under Section 4617(f) "is whether the conservator or receiver is carrying out a statutory function or power." *Furgatch v. Resolution Trust Corp.*, No. 93-20304, 1993 WL 149084, *2 (N.D. Cal. April 30, 1993) (decided under parallel provisions in FIRREA (discussed *infra*).) If so, equitable relief is entirely precluded against FHFA.

Courts have barred other injunction actions under the nearly identical statutes anti-injunction provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). These precedents are particularly persuasive because Congress modeled the conservatorship provisions of HERA after FIRREA. *See* H.R. 110-142 ("The conservatorship and receivership provisions were modeled after similar provisions in the Federal Deposit Insurance Act that apply to federally insured depository institutions"); *Kuriakose*, 674 F. Supp. 2d at 493 ("In analyzing the limits of the Court's authority under § 4617(f) of [HERA], the Court may turn to precedent relating to the nearly identical anti-injunction statute under [FIRREA]"); *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 795 (E.D. Va. 2009) ("[T]he Court is persuaded by decisions that have reached the same conclusion when interpreting [FIRREA], whose provisions regarding the powers of federal bank receivers and conservators are substantially identical to those of HERA.").

Courts have refused to enjoin the activities of the Federal Deposit Insurance Company ("FDIC") under FIRREA's analogous anti-injunction provision. As the Second Circuit has explained:

> FIRREA's anti-injunction provision is but part of a broader scheme enacted to allow the RTC expeditiously to wind up the affairs of defunct savings and loan institutions without judicial interference. Consistent with that purpose, the anti-injunction provision is a direct manifestation of Congress's intent to prevent

> courts from interfering with the RTC in the exercise of its statutory powers.

Volges v. Resolution Trust Corp., 32 F.3d 50, 52 (2d Cir. 1994); *see also Kuriakose*, 674 F. Supp.2d at 493 (S.D.N.Y. 2009) ("[C]ourts generally have interpreted the anti-injunction provision broadly, holding that FIRREA bars all equitable relief relating to the statutorily provided powers of the receiver.") (*citing Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995) ("Not only does [FIRREA] bar injunctive relief, but in the circumstances of the present case where appellants seek a declaratory judgment that would effectively 'restrain' the FDIC from foreclosing on their property, [it] deprives the court of power to grant that remedy as well.")).

Courts have also upheld the anti-injunction principle in the bankruptcy context. As explained by the First Circuit when interpreting HERA's analog, FIRREA, "[t]he bankruptcy court is a creature of statute, and [the debtor] has not suggested that it is beyond Congress's lawful powers to limit the remedies available to that court or to remove selected matters from its jurisdiction. Here, Congress exercised that very power, limiting the authority of all courts -- the bankruptcy court included -- to enjoin the FDIC." *Sunshine Dev. v. FDIC*, 33 F.3d 106, 116 (1st Cir. 1994) ((emphasis added). By contrast, the statutory prohibition is not violated when a court is merely recognizing the self-effectuating provisions of the automatic stay in favor of a debtor. *See id.* at 117 (holding that "we are confident that the automatic stay does not violate FIRREA's anti-injunction provision because it arises directly from the operation of a legislative enactment, not by court order.); *see also In re Colonial Realty Co.*, 980 F.2d 125, 137 (2d Cir. 1992) (holding that "the injunctive order issued in this case to implement the stay was in a sense superfluous" because "[t]he stay imposed by § 362(a) is automatically 'applicable to all entities' without any need for the intervention of any court or ruling."). Indeed, the very fact that the

Debtors commenced the Adversary Proceeding confirms that they rely on Section 105(a). *See In re Adelphia Communications Corp.,* 302 B.R. 439, 442 (Bankr. S.D.N.Y. 2003) ("Because seeking relief under 105(a) would require commencing an adversary proceeding and then seeking an injunction (as compared and contrasted to requests for relief under section 362, which is self-effectuating, and requires neither), ACC and ABIZ have commenced the necessary adversary proceedings to do so, and have filed preliminary injunction motions.")

Accordingly, any act to enjoin FHFA as to the Non-Debtor Affiliate Defendants beyond the scope of the automatic stay under Section 362 of the Bankruptcy Code would violate § 4617(f) of HERA. And yet, it is this expanded relief that the Debtors seek through the Adversary Proceeding to preclude the FHFA Case against the Non-Debtor Affiliate Defendants and interfere with the present status of the FHFA Case.

HERA's Anti-Injunction Provision requires material and substantial consideration to determine whether, as a matter of first impression, it precludes the relief sought in the Adversary Proceeding. In fact, this issue is one of the main arguments raised by FHFA in *Defendant Federal Housing Finance Agency's Memorandum of Law (I) In Support of FHFA's Motion to Dismiss the Complaint Fro Lack of Jurisdiction and (II) In Opposition To Debtors' Motion To Extend Automatic Stay and To Enjoin Litigation Against Non-Debtors*.

The continuation of the FHFA Case plainly is an "exercise of powers or functions of the [FHFA] as a conservator" for Freddie Mac. *See* 12 U.S.C. § 4617(f). In its lawsuit, FHFA seeks to redress wrongs that the FHFA Litigation Defendants committed against Freddie Mac and seeks to compensate Freddie Mac for the losses that the FHFA Litigation Defendants caused Freddie Mac to suffer. The FHFA Case squarely fits within FHFA's mandated duties and authorizations that include "collect[ing] all obligations and money due" to Freddie Mac and

"tak[ing] such action as may be . . . necessary to put [Freddie Mac] in a sound and solvent condition." *See* 12 U.S.C. § 4617(b)(2)(B)(ii), (b)(2)(D)(i); *see also Town of Babylon*, 790 F. Supp.2d at 50 ("The FHFA is charged by statute with the responsibility of, *inter alia*, identifying and minimizing further financial risk to [Freddie Mac] to ensure [its] future economic safety and viability."). Yet, through its Adversary Proceeding, the Debtors seek to enjoin the FHFA Case in outright contradiction with HERA's Anti-Injunction Provision.

The Second Circuit has recognized in an analogous case that the conflict presented in this case warrants withdrawal of the reference. In *Colonial Realty*, the court considered the FDIC's pursuit of fraudulent claims as conservator under FIRREA violated the automatic stay. The court noted that:

> [a]lthough the issue is moot at this juncture, it would appear that the FDIC's motion [to withdraw the reference] *should have been granted*, pursuant to § 157(d), in view of the FDIC's timely motion and the asserted conflict between provisions of the Bankruptcy Code and other federal statutes.

Colonial Realty Co., 980 F.2d at 128 n.5. The Second Circuit held that the FDIC had violated the automatic stay and that FIRREA's anti-injunction provision did not trump Section 362 of the Bankruptcy Code because it is "imposed by Congressional mandate and not by court order. . . . By its very terms, no action by any court is necessary for the stay to take effect"). *Id.* at 137 ("We accordingly conclude that the § 1821(j) ban upon 'court . . . action . . . to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver' does not inhibit the operation of *the automatic statutory stay imposed by § 362(a)*") (emphasis added). Importantly, *Colonial* did not involve an extension of the automatic stay as in this case. Because this case involves a Section 105 injunction that is not "automatic" under the Bankruptcy Code,

the conflict between HERA and the Bankruptcy Code is even sharper than that in *Colonial Realty*. *See In re Adelphia Communications Corp.,* 302 B.R. at 442.

Accordingly, the adjudication of the Adversary Proceeding necessarily involves the substantial and material consideration of HERA to determine whether the attempts by the Debtors to enjoin the FHFA case are precluded – this overwhelmingly mandates withdrawal of the reference.

CONCLUSION

For the foregoing reasons, FHFA respectfully requests that the District Court enter an order withdrawing from the Bankruptcy Court the reference of this action.

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Respectfully submitted,

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