

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

ANTHONY R. EDWARDS, *et al.*,

Case No.: 1:16-cv-21221-Scola

Plaintiffs,

v.

DELOITTE & TOUCHE, LLP,

Defendant.

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**PLAINTIFFS' SUR-REPLY IN OPPOSITION TO  
FHFA'S REPLY IN SUPPORT OF ITS MOTION TO SUBSTITUTE**

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FHFA's Motion to Substitute ("Motion") attacks Plaintiffs' standing "to assert their alleged rights as shareholders of Fannie Mae." Motion p. 1 (Doc. 15). In *Pagliara v. Federal Home Loan Mortgage Corporation*, No. 1:16-cv-337, 2016 WL 4441978, \*4 (E.D. Va. Aug. 23, 2016), the court dispensed with the same argument advanced by Freddie Mac on a Rule 12(b)(1) motion to dismiss, finding that "Pagliara unquestionably seeks to assert his own right as a stockholder..." which "satisfies Pagliara's obligation regarding standing." This holding alone should persuade this Court to deny FHFA's Motion. HERA did not take Plaintiffs' standing to sue Fannie's auditor, a right they seek to assert as stockholders. "Only if the Court accepts [FHFA's] interpretation of HERA" would Plaintiffs no longer possess the rights they seek to enforce, which "goes to the merits...not to [their] jurisdictional allegations." *Id.* Because FHFA's argument is "better framed as a merits challenge," the Court should deny the Motion. *Id.*

With Pagliara's standing established, the court addressed whether his *underlying right* to inspect Freddie's books was transferred to FHFA. *Id.* at \*5. The court found HERA's "*with respect to*" limiting language to be synonymous with "concerning" or "relating to," *Id.* at \*7, and held that "a stockholder's right to inspect corporate records is a stockholder right with respect to Freddie Mac or its assets," like the rights to elect directors, to seek removal of directors, to petition the court to force Freddie to hold an annual meeting, and to call a special meeting. *Id.* at \*6-7. Thus, despite Pagliara's standing to bring a direct claim, HERA transferred his right to inspect Freddie's records to FHFA, which comports with the conservator's role to operate the company.

The *Pagliara* court distinguished stockholder rights with respect to Freddie or its assets from rights to bring direct claims, finding that "standing to bring a lawsuit to remedy a personal injury is not easily categorized as a right with respect to the corporation." *Id.* at \*6. The court

recognized that shareholders retain the right to bring direct claims that are not foreclosed by the “with respect to” language of HERA when it decided not to “rely upon a [derivative-versus-direct] distinction that was adopted in a completely different interpretive context...” *Id.* at \*7. Thus, in cases unrelated to corporate governance, the distinction is pertinent because the right to sue derivatively is a right with respect to the corporation, while the right to sue directly is not.

The *Pagliari* court’s merits discussion supports Plaintiffs’ rights to bring their particular underlying claims. Unlike corporate governance rights, the right to sue Fannie’s auditor for aiding and abetting breach of fiduciary duty and negligent misrepresentation cannot be categorized as a right with respect to Fannie or its assets because it does not concern Fannie or its assets. Instead, the right concerns Plaintiffs’ ability to seek redress for the destruction of their economic rights, through accounting improprieties and misleading communications. Unlike inspection rights, these claims do not arise from the company’s bylaws, *see id.* at \*2, and will not inject Plaintiffs into Fannie’s governance. Plaintiffs’ claims concern Defendant, not Fannie.

FHFA overstates *Pagliari*’s discussion on the breadth of the succession clause. The court rejected *Pagliari*’s argument that “FHFA succeeded to *only* the right to bring a derivative lawsuit,” and found inspection rights were also transferred. *Id.* at \*6. The court limited its holding, finding “HERA’s clear intention to transfer as [much] *governance authority* to FHFA as possible,” *Id.* at \*6, and “HERA is not ambiguous *within the context of this case.*” *Id.* at \*7. In rejecting the *Pagliari*’s constitutional avoidance argument, the court emphasized that even if HERA deprives shareholders of their right to inspect Freddie’s books, this “does not affect” their “right to bring a direct lawsuit”—a cognizable property interest. *Id.* at \*7, n.16. As a result, *Pagliari* accepted the many judicial opinions that hold that during conservatorship shareholders retain the right “to bring a lawsuit to remedy [their] own direct injuries.” *Id.* at \*6.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 9, 2016, the foregoing document was filed with the Court's CM/ECF system, which will send electronic notice to all counsel of record.

/s/ Brad F. Barrios

Attorney