

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No.: 1:16-cv-21221

ANTHONY R. EDWARDS, *et al.*,

Plaintiffs,

v.

DELOITTE & TOUCHE, LLP,

Defendant.

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**PLAINTIFFS' OBJECTION AND REPLY TO FHFA'S  
OPPOSITION TO PLAINTIFFS' MOTION FOR REMAND**

Plaintiffs file this Objection and Reply to the Federal Housing Finance Agency's ("FHFA") Opposition to Plaintiffs' Motion to Remand (Doc. 40) (the "Opposition") and state:

**Introduction**

Deloitte & Touche, LLP ("Deloitte") removed this case involving only state law claims on the alleged basis of "arising under" jurisdiction. FHFA then filed a motion to substitute as the plaintiff in this case (Doc. 9) ("Motion to Substitute"), which is pending before the Court. After Plaintiffs moved to remand the case, FHFA filed its Opposition despite the fact that FHFA is not a party to this action. This Court should not consider FHFA's substantive arguments because FHFA has no standing to assert them. Further, as this Court has already ruled, it "cannot rule on [FHFA's] motion to substitute until the Plaintiffs' attack on the Court's subject matter jurisdiction has been resolved." (Doc. 27).

**I. FHFA Has No Standing to Oppose Plaintiffs' Motion for Remand.**

FHFA is attempting to participate in this litigation even though it is not a party to this proceeding. While FHFA has a pending motion to substitute, that motion has not been decided

by the Court and will not be decided until the subject-matter jurisdiction question is addressed. See August 22, 2016 Order (Doc. 27). Consequently, FHFA is still a nonparty and has no standing or authority to oppose Plaintiffs' Motion to Remand. S.D. Fla. Local Rule 7.1(c) ("Each party opposing a motion shall serve an opposing memorandum of law . . . . No further or additional memoranda of law shall be filed without prior leave of court.") (emphasis added). Indeed, multiple courts have found that a nonparty lacks standing to bring various motions. *Rasmussen v. Fleetwood Enters.*, 2007 WL 1106138 (E.D. Mich. 2007) (finding a nonparty had no standing to assert a motion to remand); *Sunlust Pictures, LLC v. Cisa*, 2012 WL 5187837 (D. Colo. 2012) ("because Movants are not parties to this action, at least at this juncture, they do not have standing to seek to have this action dismissed"); *Wasson v. Riverside Cnty.*, 237 F.R.D. 423, 424 (C.D. Cal. 2006) (a nonparty lack standing to bring a motion to dismiss).

FHFA's Opposition is nothing more than an attempted second bite at the apple for Deloitte. FHFA did not file this motion with the intention that it would only be heard if it became a party to the litigation. If FHFA was substituted as the party plaintiff, it need not oppose a motion filed by the Plaintiffs, but rather could simply withdraw the Motion for Remand. In fact, FHFA openly states that "upon substitution as plaintiff, FHFA will dismiss this lawsuit." Opposition, p. 3 (Doc. 40). Accordingly, it is clear that FHFA is endeavoring to participate in this lawsuit as a nonparty even though such participation is prohibited.

**II. This Court Has Already Ruled it will not Decide the Motion to Substitute until it Resolves the Pending Subject-Matter Jurisdiction Question.**

As acknowledged by FHFA in its Opposition, this Court has already entered an Order providing the sequence in which it will decide the pending Motion to Substitute and the Motion for Remand. Specifically, the Court's order provides, in part:

Substituting the Federal Housing Authority, if it occurs, could drastically alter this case. Therefore, in order to conserve judicial and party resources, the Defendant's answer to the Complaint is due within thirty days of the Court's order on the motion to substitute. Because this case was removed from state court, the parties must meet-and-confer within 21 days of the Court's order on the motion to substitute. The Court notes, however, **that it cannot rule on the motion to substitute until the Plaintiffs' attack on the Court's subject matter jurisdiction has been resolved.**

(Doc. 27) (emphasis added). The Court's order is unequivocal. Nonetheless, FHFA questions the Court's ruling and asserts that it should rule on FHFA's Motion to Substitute before addressing the Motion to Remand.

Although not styled as such, FHFA is asking the Court to reconsider its prior order. However, "a motion for reconsideration should only be granted if there is (1) an intervening change in controlling law, (2) newly discovered evidence, or (3) the need to correct clear error or prevent manifest injustice." *Grupo Televisa, S.A. v. Telemundo Communications Group, Inc.*, 2007 WL 4699017 (S.D. Fla. Oct. 12, 2007) (citing *Burger King Corp. v. Ashland Equities, Inc.*, 181 F.Supp.2d, 1366, 1369 (S.D. Fla. 2002)). A motion for reconsideration cannot be used "to simply reargue, or argue for the first time, an issue the court has once determined. Court opinions are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Kirkland v. Mosaic Fertilizer, LLC*, 2015 WL 5009112 (M.D. Fla. Aug. 20, 2015) (internal citations omitted). Further, a "motion for reconsideration is not an opportunity to rethink what the Court already thought through – rightly or wrongly." *Grupo Televisa, S.A.*, 2007 WL 4699017, at \*1 (citation and quotation omitted).

In this instance, FHFA is arguing an issue that the Court has already thought through and determined. There is no change in controlling law, no newly discovered evidence, and no identified need to correct error or prevent manifest injustice. Instead, FHFA is simply unhappy

with the Court's determination as to how it will address the pending motions. This is an insufficient basis for the Court to reconsider its prior ruling. As such, the Court should disregard FHFA's argument on this issue, and proceed as ruled in its August 22, 2016 Order.

**III. This Court's Order was Proper as the Court May Not Make a Merits Decision Before Finding it has Jurisdiction.**

Even if the Court were to reconsider its August 22, 2016 Order, it should reach the same result with respect to the sequence in which it will address the pending motions because the Court may not make a merits decision – which ruling on FHFA's Motion to Substitute would require – before finding that it has jurisdiction. FHFA argues that its Motion to Substitute attacks Plaintiffs' standing and is therefore a non-merits based motion. FHFA asserts that a Court may exercise its discretion to make rulings on non-merits based motions in any order it sees fit. However, FHFA's argument lacks merit because (a) Plaintiffs have established proper standing; and (b) FHFA's Motion to Substitute based on HERA's succession clause is a merits based issue that cannot be ruled upon until the Court determines that it has jurisdiction.

FHFA asserts that HERA eliminated Plaintiffs' standing to pursue the claims asserted in the Complaint. However, the standing element of Plaintiffs' claims is not difficult to meet and can be easily established without reference to federal law. Delaware law provides:

The concept of "standing," in its procedural sense, refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or redress a grievance. It is concerned only with the question of *who* is entitled to mount a legal challenge and not with the merits of the subject matter of the controversy. In order to achieve standing, the plaintiff's interest in the controversy must be distinguishable from the interest shared by other members of a class or the public in general.

*Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991) (citations omitted).

Plaintiffs allege they own Fannie stock and were damaged individually by Deloitte's conduct.

See Complaint, ¶¶ 11, 111, 118. These allegations are sufficient to establish Plaintiffs' entitlement to mount a legal challenge and are all that are required under Delaware law to have standing to sue.

To the extent they are relevant, Plaintiffs also meet federal standing requirements. Generally, to satisfy the "case" or "controversy" requirement of Article III, a plaintiff must generally demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision. *Bennett v. Spear*, 117 S. Ct. 1154, 1161 (1997). The requirement of standing focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). This Court recognizes that a shareholder of a company has standing to assert claims in which he or she has a direct, personal interest. See *Elandia Intn'l, Inc. v. Koy*, No. 09-20588, 2010 WL 2179770, at \*6 (S.D. Fla. Feb. 22, 2010). As such, Plaintiffs have standing to press their direct claims.

Additionally, FHFA's Motion to Substitute is not a non-merits based attack on Plaintiffs' standing. FHFA argues that federal courts may appropriately choose among threshold non-merits grounds when considering various potential issues to rule upon in a case. However, despite FHFA's characterization of its motion, FHFA's Motion to Substitute concerns merits issues. The evaluation and determination of whether FHFA has succeeded to Plaintiffs' right to bring their claims concerns the merits of the case—not standing. See *Pitt Cty. v. Hotels.com, L.P.*, 553 F.3d 308, 312 (4th Cir. 2009) (The issue of whether a plaintiff had the right to relief under a statute, which required an evaluation of each party's interpretation of the statute, concerned the merits of a case rather than standing).

Recently, the court in *Pagliara v. Federal Home Loan Mortgage Corp.*, 2016 WL 4441978 (E.D. Va. Aug. 23, 2016) directly addressed the issue of whether HERA's succession clause was a merits-based inquiry. In *Pagliara*, Freddie Mac argued that the court should dismiss the complaint because the plaintiff did not have standing and lacked the "right" to inspect Freddie Mac's corporate records. However, the court concluded that Freddie Mac's argument was "better framed as a merits challenge to the existence of the right [plaintiff] asserts, rather than a question of his standing to pursue the right." *Id.* at \*4. The court found that "Pagliara unquestionably seeks to assert his own right as a stockholder..." which "satisfies Pagliara's obligation regarding standing." *Id.* "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 substitution argument is "better framed as a merits challenge," and defeating HERA's succession clause is not required to establish standing, any dispute about the scope of the clause is a dispute on the merits, insufficient to confer federal jurisdiction.

Because the Motion to Substitute raises issues that address the merits of the case, the Court must first satisfy itself of its jurisdiction before addressing that motion. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998), the Supreme Court affirmed the "long and venerable line" of cases holding that "[w]ithout jurisdiction the court cannot proceed at all in any cause," and the "requirement that jurisdiction be established as a threshold matter...is inflexible and without exception." (internal citations omitted); *see also Belleri v. United States*, 712 F.3d 543, 547 (11th Cir.2013) ("We may not consider the merits of [a] complaint unless and until we are assured of our subject matter jurisdiction"); *Poole v. Caso*, 2010 WL 4687822 (S.D. Fla. 2010) ("Subject-matter jurisdiction is a threshold inquiry that a court is

required to consider before addressing the merits of any claim”). Accordingly, the Court may not rule on the Motion to Substitute until it addresses the jurisdictional concerns raised in the Motion to Remand.

Notwithstanding the *Pagliara* decision, FHFA still asserts that its Motion to Substitute raises non-merits based issues and therefore can be and should be heard before Plaintiffs’ Motion to Remand. FHFA primarily relies on *In re Facebook, Inc. IPO Derivative Litigation*, 797 F.3d 148 (2d Cir. 2015) to support its position. However, *In re Facebook* is easily distinguishable from the present case. In that case, the plaintiffs were purportedly shareholders of Facebook asserting a derivative claim against Facebook’s directors. The district court dismissed the case because plaintiffs were not Facebook stockholders at the time of the alleged wrongdoing, and thus did not have standing to proceed as derivative plaintiffs. *Id.* at 151. On appeal, plaintiffs argued that the district court erred in considering the bases for dismissal before addressing the subject matter jurisdiction issues raised in plaintiffs’ motion to remand. *Id.* The Court concluded that it was not error for the district court to decide the threshold dismissal matter before it addressed the subject-matter jurisdiction issues raised in the motion to remand. *Id.* at 152

However, the dismissal was based on the fact that plaintiffs failed to meet the requirement set forth in Federal Rule of Civil Procedure 23.1 that a plaintiff in a derivative action demonstrate possession of an ownership interest in the company it seeks to represent that is contemporaneous with the conduct for which it seeks recovery. *Id.* at 159-160. The Court explained that “a determination as to whether the contemporaneous stock ownership was adequately pleaded does not bear on the underlying merits of a plaintiff’s claim” and could therefore properly be considered and decided prior to subject matter jurisdiction. *Id.* at 157-158

(emphasis added). Since the plaintiffs failed to adequately allege ownership of the stock during the period of the alleged misconduct, they lacked standing to proceed in a derivate capacity and the case was dismissed. *Id.*

Distinct from defendant's motion to dismiss in *In re Facebook*, which was not a merits based motion, FHFA's Motion to Substitute is a merits based motion that goes beyond a threshold standing issue, as explained above. Therefore, the *In re Facebook* court's suggestion that it is "good craft" to decide threshold standing questions before addressing a subject-matter jurisdiction inquiry is inapplicable.

FHFA's entire argument is premised on the notion that "federal courts may appropriately choose among threshold non-merits grounds" to rule on a case. Opposition, p. 13 (Doc. 40). However, it is clear that its Motion to Substitute is a merits-based argument. As such, the Court must first address the jurisdictional issues raised in the Motion to Remand before addressing FHFA's Motion to Substitute.<sup>1</sup> Accordingly, the Court should proceed in the manner set forth in its August 22, 2016 Order, and withhold ruling on FHFA's Motion to Substitute until it rules on the jurisdictional issues raised in Plaintiffs' Motion for Remand.

### **Conclusion**

This Court should decline to consider FHFA's Opposition because it is not a party to this case and thus does not have standing to oppose Plaintiffs' Motion for Remand. Alternatively, the Court should deny FHFA's request to rule on its Motion to Substitute before addressing its subject-matter jurisdiction.

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<sup>1</sup>Even if FHFA's Motion to Substitute was a non-merits motion (which it is not), the cases cited by FHFA only state that the Court has the discretion to decide these types of issues in any manner it pleases. In this case, the Court has already exercised that discretion and determined the order in which it will hear the motions. *See* August 22, 2016 Order (Doc. 27).

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on October 12, 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