

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

Case No.: 1:16-cv-21224-MORENO

ANTHONY R. EDWARDS, *et al.*,

Plaintiffs,

v.

PRICEWATERHOUSECOOPERS, LLP,

Defendant.

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

Plaintiffs file this Objection and Reply to the Federal Housing Finance Agency's ("FHFA") Amended Opposition to Plaintiffs' Motion to Remand (Doc. 39) (the "Opposition") and state:

**Introduction**

PwC 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. 33), which is pending before the Court. After Plaintiffs moved to remand the case, despite the fact that FHFA is not a party to this action, FHFA filed its Opposition. This Court should not consider FHFA's substantive arguments because FHFA has no standing to assert them. Further, this Court may not consider FHFA's motion to substitute without first finding it has jurisdiction.

**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. Consequently, FHFA is still a nonparty at this time, and as such, 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."). Indeed, multiple courts have found that a nonparty lacks standing to bring certain 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 PwC. 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. 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 May Not Make a Merits Decision Before Finding it has Jurisdiction.**

FHFA asserts that the Court should rule on its Motion to Substitute before ruling on Plaintiff's Motion to Remand. FHFA's argument, and the cases it cites in support of its position, are premised on the proposition that a Court may exercise its discretion to make rulings on non-merits based motions in any order it sees fit. FHFA's argument lacks merit because (a) Plaintiffs have established their standing without reference to HERA; (b) the Court must find it has

jurisdiction before ruling on merits issues; and (c) substitution based on HERA's succession clause is a merits issue.

The standing element of Plaintiffs' claims is not difficult to meet and can be easily established without reference to federal law. Virginia law provides that "one has standing to sue when he or she has sufficient interest at stake in the controversy which will be affected by the outcome of the litigation." *Milstead v. Bradshaw*, 43 Va. Cir. 428, 430 (Va. Cir. Ct. 1997). Plaintiffs allege they own Freddie stock and were damaged by PwC's conduct. *See* Complaint, ¶¶ 11, 109, 116. These allegations are all that are required under Virginia 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.

This Court must satisfy itself of its jurisdiction before addressing the merits of the case. 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”).

Despite FHFA’s characterization of its motion, FHFA’s Motion to Substitute concerns merits issues that cannot be decided prior to the Court determining whether it has subject-matter jurisdiction in this case. 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 issues raised by FHFA’s Motion to Substitute are merits issues, the Court must first address any jurisdictional issues before addressing FHFA’s Motion. Accordingly, the Court should 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.

*/s/ Brad F. Barrios*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 30, 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*  
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Attorney