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.
_____/

PLAINTIFFS' MOTION FOR REMAND

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Pursuant to 28 U.S.C. § 1447(c), Plaintiffs move to remand this action because Defendant, Deloitte & Touche LLP ("Deloitte"), has failed to demonstrate this Court has subject matter jurisdiction. Plaintiffs' state law claims do not fall within the small category of cases subject to federal "arising under" jurisdiction. Accordingly, Plaintiffs request that the Court remand the case to the Eleventh Judicial Circuit Court in Miami-Dade County, Florida.

Introduction

Plaintiffs are several of the private shareholders of the Federal National Mortgage Association ("Fannie") whose economic interests in the company were extracted and transferred to a single, dominant shareholder, the United States Department of Treasury ("Treasury").

In July 2008, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (July 30, 2008). HERA established the Federal Housing Finance Agency ("FHFA") as "an independent agency of the Federal Government" to supervise and regulate Fannie. 12 U.S.C. § 4511.

On September 6, 2008, FHFA placed Fannie into conservatorship pursuant to its authority under 12 U.S.C. § 4617. The next day, FHFA entered into the Preferred Stock Purchase Agreement ("PSPA") with Treasury. Generally, the PSPA gave Treasury one million shares of a new class of senior preferred stock and warrants to purchase 79.9% of Fannie's common stock, in exchange for a funding commitment that allowed Fannie to draw up to $100 billion from Treasury, an amount increased by later amendments to the PSPA. The senior preferred stock entitled Treasury to dividends at an annualized rate of 10% of the outstanding liquidation preference of Treasury's stock if paid in cash or 12% if paid in kind.

FHFA and Treasury operated under the PSPA (and its first two amendments) as follows: each quarter, FHFA reviewed Fannie's financial statements to determine whether its liabilities

exceeded its assets. If so, FHFA requested Treasury to draw on the funding commitment and provide funds in an amount equal to Fannie's net worth deficit. The greater the net worth deficit, the more Fannie was forced to borrow. FHFA always elected to have Fannie pay Treasury the 10% cash dividend rather than the in-kind dividend.

Deloitte, a purportedly independent accounting firm with "public watchdog" duties, was Fannie's auditor throughout the conservatorship and continues to be so today. Throughout the conservatorship, Deloitte falsely certified the accuracy of Fannie's financial statements, in violation of Generally Accepted Auditing Standards ("GAAS") and Generally Accepted Accounting Principles ("GAAP"). As alleged in the Complaint, Deloitte earned enormous fees for its auditor function, yet it ignored its most critical roles and assisted FHFA and Fannie to materially misstate Fannie's financial statements, which grossly undervalued deferred tax assets and overstated loan loss reserves. As a result of these materially misstated financial metrics, Fannie's paper net worth deficit was artificially increased, which caused Fannie to unnecessarily borrow large sums from Treasury at enormous costs.

By late 2011, it was clear that Fannie was returning to profitability, even when measured pursuant to the punitive and incorrect standards being applied by Fannie and certified by Deloitte. But, rather than reversing the accounting misstatements for Plaintiffs' benefit, Deloitte continued to write-off as worthless huge sums of deferred tax assets and maintain other faulty assumptions within Fannie's financials until FHFA and Treasury could consummate the Third Amendment to the PSPA, "the Net Worth Sweep," in August 2012. The Net Worth Sweep changed Treasury's fixed-rate preferred stock dividend to a quarterly dividend equal to all of Fannie's equity value, allowing Treasury to reap billions of dollars of profit to the detriment of minority shareholders like Plaintiffs. Although the government profited from Deloitte's conduct,

this dispute is between private parties involving purely state law claims and does not belong in federal court.

Procedural History

On February 9, 2016, Plaintiffs filed this lawsuit in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. On March 15, 2016, pursuant to 28 U.S.C. § 1407, FHFA filed a Motion for Transfer of Actions to the U.S. District Court for the District of Columbia (Initial Motion) before the United States Judicial Panel on Multidistrict Litigation ("JPML"). *See In re Federal Housing Finance Agency, et al., Preferred Stock Purchase Agreements Third Amendment Litigation, MDL No. 2713.*

On April 6, 2016, before being served, Deloitte filed its Notice of Removal (Doc. 1). On April 13, 2016, the Court entered its Order Granting Deloitte's Motion to Stay Pending Action by the JPML and administratively closed the case. (Doc. 12). On June 2, 2016, the JPML entered its Order Denying Transfer (Doc. 13), leading the Court to reopen the case. (Doc. 14).

I. Legal Standard for Removal

When any "action is removed from state court, the district court first must determine whether it has original jurisdiction over the plaintiff's claims." *Univ. of S. Alabama v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999). Because the "[f]ederal courts are courts of limited jurisdiction," they "may not proceed without requisite jurisdiction" and, therefore, must "constantly examine the basis of jurisdiction." *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013); *Save the Bay, Inc. v. U.S. Army*, 639 F.2d 1100, 1102 (5th Cir. 1981).

"[T]he party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). As such, the removing party bears the burden of showing that removal was proper. *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d

1290, 1294 (11th Cir. 2008). Removability is determined according to the plaintiff's pleading at the time of the petition for removal. *See Cmty. State Bank v. Strong*, 651 F.3d 1241, 1251 (11th Cir. 2011) (federal question at issue "must appear on the face of the plaintiff's well-pleaded complaint.").

Because removal jurisdiction raises significant federalism concerns, removal and jurisdictional statutes are strictly construed against jurisdiction and in favor of remand. *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999). Every doubt concerning whether removal was proper should be resolved in favor of remand. *Russell Corp. v. Am. Home Assur. Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001).

II. Legal Standard for "Arising Under" Jurisdiction

Deloitte asserts that Plaintiffs' state law claims are subject to federal "arising under" jurisdiction because they present embedded federal issues. Removal, ¶ 7. Under this "special and small category" of cases, federal jurisdiction may exist over state law claims only if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, *and* (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. *Gunn*, 133 S. Ct. at 1064-65.

A state law claim necessarily raises a federal issue when the claim *depends* or *turns on* a substantial issue of federal law. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 125 S. Ct. 2363, 2367-68 (2005) (affirming federal question jurisdiction because the adequacy of the notice under the federal statute was an *essential element* of the quiet title claim). To be substantial, the federal issue must be important to "the federal system as a whole," rather than the particular parties to the lawsuit. *Gunn*, 133 S. Ct. at 1066.

This Court has often declined jurisdiction when federal issues are not substantial, either because the asserted claims did not raise purely legal questions or because the federal issues raised were already settled. *See, e.g., Figueroa v. Szymoniak*, No. 13-61020, 2013 WL 4496512, at *5 (S.D. Fla. Aug. 22, 2013) (remanding fact-specific state law claims); *Daout v. Greenspoon Marder P.A.*, No. 13-20305, 2013 WL 2329931, at *4 (S.D. Fla. May 28, 2013) (remanding case that did not present context-free inquiry into the meaning of a federal law); *Meyer v. Health Management Associates, Inc.*, 841 F. Supp. 2d 1262, 1264 (S.D. Fla. 2012) (remanding case where interpretation of federal law was fact-specific); *Mitchell v. Osceola Farms Co.*, 447 F. Supp. 2d 1307, 1313-14 (S.D. Fla. 2006) (dismissing case for lack of jurisdiction when federal law had already settled the supposedly federal issue). Here, too, the Court should remand this fact-intensive case.

III. This Court Should Remand the Case Because Deloitte Has Not Shown that Plaintiffs' State Law Claims Necessarily Raise Substantial Federal Issues.

Deloitte identifies five allegedly "federal issues" to support the Removal: (A) Plaintiffs' causation theory requires construction of HERA; (B) Plaintiffs' claims require construction and application of federal auditing standards; (C) the conduct constituting the underlying breaches of fiduciary duty must be analyzed under HERA; (D) HERA's succession clause controls the question of whether Plaintiffs have the power to bring their claims; and (E) Plaintiffs claims are derivative and must be brought in federal court pursuant to Fannie's "sue or be sued" clause. Removal, ¶¶ 9, 10, 11, 12.

For the Removal to be proper, one of these issues must satisfy all four elements of "arising under" jurisdiction. However, as described below, none of Deloitte's identified issues raise a substantial issue of federal law. At best, "[t]he most that one can say is that a question of federal law is lurking in the background," which is "unavailing to extinguish the jurisdiction of

the states." *See Gully v. First Nat'l Bank,* 57 S. Ct. 96, 99-100 (1936). Accordingly, this Court should remand the case to state court.

A. Plaintiffs' Causation Theories Do Not Raise Substantial Federal Issues.

Plaintiffs allege that FHFA would have been required to terminate Fannie's conservatorship, if not for Deloitte's conduct, Complaint, ¶ 98. Contrary to Deloitte's argument, the allegation that Fannie could have exited the conservatorship is not premised on a provision of HERA. HERA does not include any instruction on when Fannie may exit the conservatorship. Rather, Plaintiffs' argument, which is properly decided by the state court, is that common law principles of conservatorships would have been inconsistent with a continued conservatorship after the reversal of Deloitte's improper accounting. *See RTC v. United Trust Fund, Inc.*, 57 F.3d 1025, 1033 (11th Cir. 1995) (recognizing a "conservator's mission is to conserve assets"); *Del E. Webb McQueen Dev. Corp. v. RTC*, 59 F.3d 355, 361 (9th Cir. 1995) (A conservator "operates an institution with the hope that it might someday be rehabilitated…").

Further, Plaintiffs' allegation that FHFA would have terminated the conservatorship is not the sole causation argument that supports Plaintiffs' claims. In order for removal to be proper, federal law must be essential to each of Plaintiffs' asserted theories. *Christianson v. Colt Indus. Operating Corp.*, 108 S. Ct. 2166, 2174 (1988) ("the well-pleaded complaint rule …focuses on claims, not theories…") (internal citations omitted). Another plausible causation theory is that each Plaintiff relied on Deloitte's negligent audits in making a decision that caused him to suffer losses. *See, e.g.,* Complaint, ¶¶ 108-109. Plaintiffs also allege that the accounting manipulations certified by Deloitte caused Plaintiffs' stock to lose value. *Id.* at ¶ 97. These theories require *no reference* to HERA or federal law.

Finally, even if Plaintiffs must prove that a violation of HERA caused their damages, that does not automatically and properly confer federal jurisdiction upon this Court. In *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 106 S. Ct. 3229, 3234 (1986), the Court found: "it would…flout, or at least undermine, congressional intent to conclude that federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation…is said to be a…'proximate cause' under state law." Accordingly, Plaintiffs' causation theories do not raise a federal issue.

B. Whether Defendant Violated Auditing Standards is Not a Substantial Federal Issue.

Deloitte argues that federal jurisdiction exists because Plaintiffs allege violations of Public Company Accounting Oversight Board ("PCAOB") standards, including GAAS, which are federal law. Courts, including this one, have rejected this argument for multiple reasons. *See Ekas v. Burris*, Case No. 07-61156, 2007 WL 4055630, at *4 (S.D. Fla. Nov. 13, 2007) (remanding case in which the plaintiff alleged violations of the Sarbanes-Oxley Act and GAAP, and holding that "GAAP violations are not the exclusive province of federal law and state law claims can, of course, be based on GAAP violations"); *In re Lehman Bros. Secs. & ERISA Litig.*, Case. No. 09-MD-2017, 2012 WL 983561, at *5-6 (S.D.N.Y. Mar. 22, 2012) (remanding case where auditor allegedly "violated GAAS in a plethora of respects" and falsely asserted that it "performed its reviews in accordance with the standards of the PCAOB," because the complaint did not *necessarily* raise the issue of conformity with PCAOB standards); *Navistar Int'l Corp. v. Deloitte & Touche, LLP*, 837 F. Supp. 2d 926, 931 (N.D.Ill. 2011) (remanding negligent misrepresentation case against auditor "for at least three separate reasons" – the parties did not dispute the meaning of any audit standard; determining whether the auditor violated standards was fact-specific; and accepting jurisdiction merely because the court must apply PCAOB audit

standards would significantly upset the balance of federal and state judicial responsibilities and move a whole category of lawsuits to federal court). This Court has also rejected the argument that federal law, rather than state law, imposes a duty on an auditor to correct prior misstatements and, in turn, supports "arising under" jurisdiction. *See Batchelor v. Deloitte & Touche, LLP*, No. 08-CIV-22686, 2009 WL 1255449 at *1, 5 (S.D. Fla. Apr. 27, 2009) (granting motion to remand).

Even if the auditing standards at issue are "federal law," Deloitte's violation of the standards does not raise a substantial federal issue. The PCAOB does not create or imply a private cause of action. *Navistar Int'l Corp. v. Deloitte & Touche, LLP,* 837 F. Supp. 2d 926, 931 (N.D.Ill. 2011). In *Merrell Dow,* the plaintiffs brought negligence claims arising from an alleged misbranding of a drug in violation of the Federal Food, Drug, and Cosmetic Act ("FDCA"). The Supreme Court affirmed the reversal of the district court's denial of a motion to remand and held:

> We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that *the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.*

Id. at 3235 (emphasis added). Thus, Plaintiffs' claim that Deloitte violated PCAOB standards does not raise a substantial federal issue, even if it is a required element of the claims. Further, Plaintiffs do not dispute the meaning of the PCAOB standards. Instead, Plaintiffs' claims will require a fact-intensive analysis of what Deloitte knew and when, whether Deloitte should have acted differently, and how its actions or omissions harmed Plaintiffs. Finally, accepting jurisdiction merely because Plaintiffs allege violations of PCAOB standards would disrupt the federal-state balance approved by Congress.

C. Plaintiffs' Aiding and Abetting Breach of Fiduciary Duty Claims Do Not Arise Under Federal Law or Raise Substantial Federal Issues.

Deloitte argues that the conduct constituting the underlying breaches of fiduciary duty must be analyzed under federal law. Plaintiffs' aiding and abetting claims are plead alternatively to require proof of breach of the fiduciary duties owed to them as shareholders of Fannie by *only one* of the following: (1) the directors and officers of Fannie; (2) FHFA; or (3) Treasury. Complaint, ¶ 97.[1] As described below, the claims rely on and are governed purely by state law.

1. Fannie's Bylaws do not require application of federal law to Plaintiffs' aiding and abetting claims.

Deloitte identifies that Fannie's bylaws provide that Fannie's corporate governance practices "shall comply with applicable chartering acts and other Federal law, rules, and regulations," but also candidly recognizes that Fannie will follow state law where "not inconsistent" with applicable federal law. Removal, ¶ 11; 12 C.F.R. § 1710.10.

Specifically, Fannie's bylaws dictate that, "to the extent not inconsistent with the Charter Act and other Federal law, rules, and regulations, the corporation has elected to follow the applicable corporate governance practices and procedures of the Delaware General Corporation Law, as the same may be amended from time to time." Bylaws of Fannie, § 1.05, http://www.fanniemae.com/resources/file/aboutus/pdf/bylaws.pdf.

As a result, Fannie's bylaws do not require reference to federal law to determine to the scope and breach of the underlying fiduciary duties owed by Fannie's officers and directors to Plaintiffs. Instead, Delaware law, which is not inconsistent with federal law, controls the

[1] The elements of aiding and abetting a breach of fiduciary duty are: (1) a fiduciary duty on the part of the primary wrongdoer; (2) a breach of that fiduciary duty; (3) knowledge of the breach by the alleged aider and abettor; and (4) the aider and abettor's substantial assistance or encouragement of the wrongdoing. *In re Caribbean K Line, Ltd.*, 288 B.R. 908, 919 (S.D. Fla. 2002).

fiduciary duties of Fannie's corporate officers and majority shareholders. *See infra,* p. 12. Because they require following state law, Fannie's bylaws do not implicate a substantial federal issue in Plaintiffs' state law aiding and abetting claims.

2. State Law Provides the Rule of Decision for Plaintiffs' Claims.

FHFA's fiduciary duty to Fannie's shareholders derives from either standing in the shoes of Fannie's officers and directors, *see United States ex rel. Adams v. Aurora Loan Servs.*, 813 F.3d 1259, 1261 (9th Cir. 2016) (finding the conservatorship "places FHFA in the shoes of Fannie Mae and Freddie Mac, and gives the FHFA their rights and duties…"), or from established common law conservatorship principles, *see In re Kosmadakes*, 444 F.2d 999, 1004 (D.C. Cir. 1971) (applying fiduciary standards to a conservator); *Henry v. United States*, 396 F. Supp. 1300, 1301 (D.D.C. 1975) (noting that a conservator has a "special fiduciary position"); *Allen v. Utley*, No. 88-cv-545, 1988 WL 90105, at *1 (D.D.C. Aug. 19, 1988) (referring to a conservator as a trustee).

Fannie's officers' and directors' fiduciary duties to Fannie's shareholders are governed by state law. *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Raines*, 534 F.3d 779, 789 (D.C. Cir. 2008) (measuring Fannie's officers' and directors' fiduciary duties by Delaware law).[2] Thus, it follows that FHFA owes the same duties to Fannie's shareholders measured by the same state law standards that ordinarily apply to Fannie's officers and directors. *See Gibraltar Fin. Corp. v. Fed. Home Loan Bank Bd.*, No. 89-3489, 1990 WL 394298, at *2 (C.D. Cal. June 15, 1990); *see also* Steven Davidoff Solomon & David T. Zaring, *After the Deal: Fannie, Freddie and the Financial Crisis Aftermath*, 95 B.U. L. Rev. 371, 390–94 (2015). These

[2] *Pirelli* is also instructive in that the court independently examined its subject matter jurisdiction only under Fannie's "sue or be sued" clause, without considering "arising under" jurisdiction, even though, like here, Fannie's officers' and directors' fiduciary duties were at issue.

include duties of care and loyalty, which exist to protect the interests of minority shareholders. *Id.*

Federal law does nothing to alter these fiduciary duty standards established by state law. First, there is no federal common law that governs FHFA's fiduciary role as Fannie's conservator. FHFA is *not* deemed to be an agent of the United States. *Aurora Loan Servs.*, 813 F.3d at1260-61 (recognizing, with the government's agreement, that Fannie is a private corporation). Accordingly, even if there is a federal common law that governs claims against government agents, as described in *Boyle v. United Techs. Corp.*, 108 S. Ct. 2510, 2515-16 (1988), it does not apply to FHFA in its capacity as conservator. Next, federal common law does not supplement HERA to create standards of conduct which do not exist in HERA. While "HERA governs the powers and conduct of FHFA as Fannie Mae's conservator," Removal, ¶ 9, it is silent as to FHFA's fiduciary duty to Fannie's shareholders. *See* 12 U.S.C. § 4617(b).

In *O'Melveny & Myers v. F.D.I.C.,* 114 S. Ct. 2048, 2054 (1994), the Supreme Court "demolished" the argument that federal common law supplemented or modified the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") with respect to imputing an officer's knowledge to a company.[3] The Court opined that matters left unaddressed in federal statutory schemes are "left subject to the disposition provided by state law." *Id.*

Similarly, and consistent with Fannie's bylaws, the Supreme Court held in *Atherton v. F.D.I.C.,* 117 S. Ct. 666, 676 (1997) that state law sets the standard of conduct for officers and directors of federally chartered and insured savings institutions, as long as the standard does not

[3] Because FIRREA's provisions regarding the powers of conservators, including the succession clause, are materially identical to those of HERA, *compare* 12 U.S.C. § 1821(d)(2)(A)(i) *with* 12 U.S.C. § 4617(b)(2)(A)(i); *see also In re Fed. Home Loan Morg.Corp. Derivative Litig.*, 643 F.Supp.2d 790, 795 (E.D. Va. 2009) (*In re Freddie Mac*), *aff'd sub nom La. Mun. Police Emples. Ret. Sys. v. Fed. Hous. Fin. Agency,* 434 Fed.Appx. 188 (4th Cir. 2011), the Court may rely upon decisions like *O'Melveny* to similarly interpret HERA.

conflict with a federal policy or interest. In *Atherton*, the federal interest was explicitly set forth in a federal statute, 12 U.S.C. § 1821(k), that provided a gross negligence standard of conduct for officers of federally insured banks. As such, the Court found that the federal statute acted as a floor and as long as a state statute met that floor, *state law set the appropriate standard of conduct* for claims, including breach of fiduciary duty, against officers of the institutions. *Id.* at 675.

HERA does not define FHFA's fiduciary duties to minority shareholders. But, HERA provides FHFA may "operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulated entity…" 12 U.S.C. § 4617(b)(2)(B). Thus, if anything, the statute aligns FHFA's duties with Fannie's officers' and directors' duties, which arise from Delaware corporate law. *See Pirelli*, 534 F.3d at 789. With state law providing equally stringent duties, *Atherton* requires that state law controls the scope of FHFA's fiduciary duties to Plaintiffs as Fannie minority shareholders. *See also O'Melveny,* 114 S. Ct. at 2055 ("cases in which judicial creation of a special federal rule would be justified…are…'few and restricted.'")

Further, HERA does not address Treasury's duties as Fannie's majority shareholder. "State law fiduciary duties accordingly regulate the types of actions Treasury took when it imposed the Third Amendment." *See* Solomon, *supra,* at 390-91. Treasury thus is a "controlling shareholder[] with fiduciary duties to the remaining public shareholders of Fannie and Freddie." *Id., citing Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971); *see also, Harman v. Masoneilan International, Inc*., 442 A.2d 487, 492 (Del. 1982) (discussing the "settled rule of law in Delaware that a majority shareholder and its director designees occupy a fiduciary relationship to the minority shareholders from which springs a duty of fairness in dealing with the minority's property interests").

Finally, even if there exists a federal law addressing aiding and abetting breach of fiduciary duty claims brought by minority shareholders against company officers (or a conservator standing in the shoes of those officers) or a controlling shareholder (which there does not), that still would not confer federal jurisdiction because state courts can (and routinely do) apply federal law. *See Allen v. McCurry*, 101 S. Ct. 411, 420 (1980) (discussing obligation and ability of state courts to uphold federal law).[4] For these reasons, the state court can determine the appropriate legal standards and apply them to the facts of the case to decide whether Fannie's officers and directors, FHFA, and/or Treasury breached its fiduciary duty to Plaintiffs.

3. The State court will not make controlling federal decisions.

A fact-intensive finding that FHFA or Treasury breached its fiduciary duty owed to Plaintiffs would not control any particular issue on a federal level going forward. Plaintiffs' allegations and state law claims against Deloitte are specifically centered on accounting manipulations and misstatements. These Plaintiffs are the only Fannie shareholders presenting such a narrow issue based on state law, and the only Fannie shareholders suing Deloitte. Plaintiffs will not ask the state court to decide an issue of statutory interpretation or make any other decision that could be carried over and used against the government in any other litigation. *See Empire Healthchoice Assur., Inc. v. McVeigh*, 126 S. Ct. 2121, 2137 (2006) (finding no federal jurisdiction and describing *Grable's* issue as "a nearly pure issue of law, one that could be settled once and for all and thereafter would govern numerous tax sale cases"). This case involves an evaluation of facts under state law standards, not a construction of a federal statute, and, as such, the Court should remand it to state court. *See MDS (Can.), Inc. v. RAD Source*

[4] At this stage, and in order to properly remand this case, it is not essential to determine which state's laws control the various duties at issue, only that federal law does not provide the rule of decision for the claims.

Techs., Inc., 720 F.3d 833, 842 (11th Cir. 2013) (cautioning against "arising under" jurisdiction in cases that involve fact-specific applications "of rules that come from both federal and state law rather than a context-free inquiry into the meaning of a federal law.") (internal quotations omitted).

D. Deloitte's Succession Defense Does Not Raise a Substantial Federal Issue.

The Removal indicates that Deloitte intends to raise the *defense* that HERA transfers to FHFA Plaintiffs rights as shareholders of Fannie. Removal, ¶ 12. This anticipated defense, which does not appear on the face of the Complaint, is rooted in HERA's "succession clause," which provides that FHFA as conservator succeeds to "all rights, titles, powers, and privileges of . . . any stockholder . . . of the regulated entity [i.e., Fannie] *with respect to the regulated entity and the assets of the regulated entity*." 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added). As such, Deloitte argues, HERA, a federal law, controls whether Plaintiffs have the power to bring their claims.

First, Deloitte cannot argue that it intends to invoke a defense at some point in this litigation that is based on a federal law to manufacture federal jurisdiction now. Indeed, even the actual presence and assertion of a federal defense does not suffice to create federal-question jurisdiction, "even if the parties concede that the defense is the only disputed issue in the case" and, in that sense, "necessary to the resolution" of the state law claim. *Shinnecock Indian Nation*, 686 F.3d at 138-40 & n.5; *see id.* at 140 n.4 (stating that jurisdiction is inappropriate under *Grable* where a federal issue is "not necessarily raised by [the plaintiff's] affirmative claims," but rather "comes into the case as a defense"); *see also, Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for Southern Cal.*, 103 S. Ct. 2841, 2848 (1983) ("a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption,

even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case").; *Mobil Oil Corp. v. Coastal Petroleum Co.*, 671 F. 2d 419, 422 (11th Cir. 1982) (to determine arising under jurisdiction, court must "look to the complaint unaided by anticipated defenses"). Accordingly, Deloitte cannot invoke HERA's succession clause to create federal jurisdiction where none exists, ending the jurisdictional inquiry.

Alternatively, the succession clause defense does not raise a substantially federal issue because the question of Plaintiffs' ability to bring direct claims has already been settled, and the anticipated defense will not require the state court to construe HERA. A federal issue is not substantial when "prior cases have settled the issue one way or another." *Mitchell*, 447 F. Supp. 2d at 1312 (citing *Nicodemus v. Union Pac. Corp*., 440 F.3d 1227, 1236 (10th Cir 2006).

Established federal precedent, including in the Eleventh Circuit, distinguishes between direct claims and derivative claims when determining whether a plaintiff's claim belongs to the conservator pursuant to the succession clause of HERA or the materially-identical FIRREA. *See Lubin v. Skow*, 382 F. App'x 866 (11th Cir. 2010) (finding the FDIC had succeeded to the plaintiff's derivative claims but providing that "FIRREA would not be a bar to standing" if the plaintiff had brought a direct claim); *FDIC v. Jenkins*, 888 F.2d 1537, 1545 (11th Cir. 1989) ("FIRREA does not prohibit shareholders from proceeding against solvent third-parties in *non-derivative* shareholder suits"); *Official Committee of Unsecured Creditors of BankUnited Financial Corporation v. Federal Deposit Insurance Corporation,* Case No. 11-20305-CIV, 2011 WL 10653884, at *2 (S.D. Fla. Sept. 28, 2011) ("Therefore, all derivative claims in the Appellant's proposed complaint belong to [FDIC], and all direct claims belong to [Stockholder]").

Other circuits agree that shareholders retain their rights to bring direct claims. In fact, "[n]o federal court has read" section 4617(b)(2) or the analogous provision of FIRREA to transfer direct shareholder claims to the conservator or receiver. *Levin v. Miller*, 763 F.3d 667, 672 (7th Cir. 2014); *see also Barnes v. Harris*, 783 F.3d 1185, 1193, 1195 (10th Cir. 2015); *In re Beach First Nat'l Bancshares, Inc.*, 702 F.3d 772, 778, 780 (4th Cir. 2012).[5]

Accordingly, when Deloitte raises the succession *defense*, one of the first decisions the trial court will make is whether Plaintiffs' claims are direct or derivative claims. That decision is not at all a federal issue that would support removal. Rather, state courts regularly determine the nature of minority shareholder claims. *See, e.g., Dinuro Investments, LLC v. Camacho*, 141 So.3d 731 (Fla. 3d DCA 2014) (providing detailed analysis of Florida's derivative test and discussing Delaware's test).

The state court should conclude that Plaintiffs' claims are direct. *See infra.* pp. 17-20; *see generally* Plaintiffs' Response in Opposition to Motion to Substitute (Doc. 20). In that case, the settled nature of federal law dictates that the issue raised by HERA's succession clause is not a substantial federal one. The state court will simply follow established federal precedent. In the unlikely event the state court finds Plaintiffs' claims to be derivative, although they may be entitled to pursue the claims despite HERA's succession clause because of FHFA's manifest conflict of interest, Plaintiffs will dismiss their claims. Plaintiffs have no interest in pursuing a recovery for Fannie that will be promptly *swept away* to Treasury, resulting in no benefit to the harmed Fannie shareholders. As a result, the state court will never have to determine whether

[5] The settled law on direct claims is further described in FHFA's Renewed Motion to Substitute (Doc. 15) (citing no cases in which a court has transferred a direct claim to a conservator), and Plaintiffs' Response in Opposition to Motion to Substitute (Doc. 20).

HERA includes a manifest conflict of interest exception to the general rule that FHFA succeeds to shareholders' rights to bring derivative claims.

Finally, the MDL Panel did not believe the standing issue was substantial enough to justify consolidation. In other words, the Panel was not concerned with multiple federal courts deciding the supposed threshold legal issue. *See Order* ("we have held that '[m]erely to avoid two federal courts having to decide the same issue is, by itself, usually not sufficient to justify Section 1407 centralization." *Citing In re: Medi-Cal Reimbursement Rate Reduction Litig.,* 652 F. Supp. 2d 1378, 1378 (J.P.M.L.2009)). Likewise, the issue is not substantially federal enough to prohibit a state court from deciding whether the succession clause bars Plaintiffs' rights to bring their claims.

E. Plaintiffs' Claims are Direct and Do Not Confer Jurisdiction on the Court.

Lastly, Deloitte argues that because Plaintiffs' claims are derivative, Fannie is the real party in interest, therefore conferring jurisdiction under 12 U.S.C. § 1723(a), Fannie's "sue or be sued" clause. Deloitte's argument fails because Plaintiffs' claims, which seek to redress FHFA's, with Deloitte's assistance, improper expropriation of share value and rights from Plaintiffs to Fannie's controlling shareholder, Treasury, are direct claims.

"A stockholder who is directly injured . . . retain[s] the right to bring *an individual action* for injuries affecting his or her legal rights as a stockholder." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004). "[W]hether a stockholder's claim is derivative or direct" turns "*solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." *Id*. at 1033. In analyzing the first question, the court considers "whether the stockholder has demonstrated that

he or she has suffered an injury that is not dependent on an injury to the corporation"—that is, whether the plaintiff has "demonstrated that he or she can prevail without showing an injury to the corporation." *Id*. at 1036. Once this first inquiry is conducted, "[t]he second prong of the analysis should logically follow." *Id*.

This analysis does not imply that a stockholder must show that the action which harmed his or her own interests did not also harm the corporation—to the contrary, some wrongs harm *both* the corporation and its stockholders directly and can be challenged through *either* derivative or direct actions. *See, e.g*., *Gatz v. Ponsoldt*, 925 A.2d 1265, 1278 (Del. 2007) ("claim could have been brought either as a direct or as a derivative claim"); *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006) (holding that claim "was both derivative and direct"). Rather, it means only that the stockholder must be able to prove his own injury *without regard to* whether the corporation was also harmed.

In this case, the gravamen of Plaintiffs' Complaint is not that the Net Worth Sweep has diminished Fannie's overall corporate profits and thus harmed all shareholders indirectly, but rather because of Deloitte's actions and inactions, the Net Worth Sweep improperly allocated to a single, dominant shareholder whatever profits Fannie makes, harming minority shareholders and destroying Plaintiffs' economic interest in Fannie to which they are entitled as owners of stock. It follows that Plaintiffs "can prevail without showing an injury" to Fannie, *Tooley*, 845 A.2d at 1036, and thus that Plaintiffs—not Fannie—suffered the specific injury complained of here.

Significantly, the Delaware Supreme Court has approved direct stockholder suits to redress the same type of "improper extraction or expropriation, by the controlling shareholder, of economic value and voting power that belonged to the minority stockholders." *Rossette*, 906

A.2d at 102; *see also, e.g.*, *Gatz*, 925 A.2d at 1278, 1280–81 (allowing direct suit in analogous circumstances raising the same policy concerns as *Rossette*); *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 330–32 (Del. 1993); *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1052–54 (Del. Ch. 2015); *Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 130 (Del. Ch. 2007). As the Delaware Supreme Court explained, although in such cases the corporation may "suffer[ ] harm (in the form of a diminution of its net worth), the minority shareholders also suffer[ ] a harm that [is] unique to them and independent of any injury to the corporation." *Rossette*, 906 A.2d at 103.

Here, also, the crux of Plaintiffs' claims is not that there has been "an equal dilution of the economic value . . . of each of [Fannie's] outstanding shares," *Rossette*, 906 A.2d at 100, due to mismanagement or waste. Rather, it is that Deloitte certified accounting improprieties at Fannie and helped facilitate an unlawful "extraction from [Plaintiffs], and a redistribution to [Treasury,] the controlling shareholder, of . . . the economic value" of their stock. *Id.* It is Plaintiffs, not Fannie, who have suffered this harm.[6]

Given that Plaintiffs' claims qualify as direct under the first prong of *Tooley*, "[t]he second prong of the analysis should logically follow." *Tooley*, 845 A.2d at 1036. Because Plaintiffs seek relief that would flow directly to them, their claims are direct under *Tooley*'s second prong.

[6] Courts have found the same claims that Plaintiffs have brought in this action to be direct. *See CMS Inv. Holdings, LLC v. Castle*, Case. No. 9468-VCP, 2015 WL 3894021, *8 (Del. Ch. Jun. 23, 2015) (finding breach of fiduciary duty claims to be direct); *BankUnited*, 2011 WL 10653884 at *4 (finding claims based on failure to provide accurate disclosures resulting in individual damages were direct); *KPMG LLP v. Cocchi*, 88 So.3d 327, 330 (Fla. 4th DCA 2012) (applying Delaware law and finding misrepresentation claims against auditing firm relating to ponzi scheme were direct).

To say that all shareholders have been indirectly harmed by a diminution of Fannie's value is to ignore the reality of Treasury reaping billions of dollars of profit to the detriment of minority shareholders like Plaintiffs. As a result, Plaintiffs' claims cannot be derivative. If Plaintiffs were to recover damages from Deloitte for its improper accounting and assistance of FHFA and Treasury in monetizing the reversal of the accounting transactions, and the damages were awarded to Fannie pursuant to the law of derivative claims, then Treasury would merely *sweep the damages away* the following quarter. Plaintiffs would receive no benefit from prevailing on claims on behalf of Fannie. Such a result would be an absurd injustice.

Simply stated, Plaintiffs' claims are direct and do not implicate Fannie's "sue or be sued" clause to create federal jurisdiction because Plaintiffs are not suing on behalf of Fannie.

Conclusion

This Court does not have jurisdiction pursuant to the narrow category of "arising under" jurisdiction and, as a result, should remand the case to state court.

Local Rule 7.1(a)(3) Certification

Before filing this Motion, Plaintiffs conferred with Deloitte and Deloitte opposes the requested relief.

Respectfully submitted,

/s/ Brad F. Barrios

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 15, 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