IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

TIMOTHY J. PAGLIARA, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, Defendant.	C.A. No. 16-193-GMS

PLAINTIFF TIMOTHY J. PAGLIARA'S
REPLY BRIEF IN SUPPORT OF HIS MOTION TO REMAND
AND IN RESPONSE TO FHFA'S OPPOSITION

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I. INTRODUCTION[1]

As a non-party to this action, whose Motion to Substitute has not been granted, FHFA had no authority to file its brief in opposition to the Stockholder's Motion to Remand.[2] (*See* D.I. 16, cited herein as "Opp.") As detailed herein, FHFA wastes this Court's time and the Stockholder's time with a series of arguments that have been rejected by the courts.

FHFA contends that the Court should decide FHFA's Motion to Substitute (D.I. 8), before deciding the Stockholder's Motion to Remand. But the Motion to Substitute would require the Court to decide whether the Stockholder has a right to books and records from Fannie Mae. FHFA therefore asks the Court to decide an ultimate issue in the case, before determining whether it has jurisdiction to do so. To achieve this amazing result, FHFA argues that its Motion to Substitute raises a non-merits, standing issue that, according to FHFA, concerns the Court's jurisdiction, like the Motion to Remand, and therefore may be decided before the Motion to Remand. (Opp. at 4-5.) FHFA next argues that it would be more efficient for the Court to address the Motion to Substitute first. (Opp. at 10-11.) This is all wrong.

For at least three reasons, the Motion to Substitute raises a merits issue that is irrelevant to the jurisdiction analysis. It therefore may not be decided before the Court has determined, on the Motion to Remand, whether it has federal question jurisdiction.

First, as detailed in the Stockholder's reply brief in response to Fannie Mae's opposition to the Motion to Remand ("Reply to Fannie Mae"), whether the Court has federal question jurisdiction depends only upon the claim that is pled. (D.I. 22.) The only claim pled is a state

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1 Capitalized terms used herein shall have the meaning ascribed to them in Stockholder's opening brief in support of his Motion to Remand ("Opening Brief"). (D.I. 11.)

2 *DRFP, LLC v. Republica Bolivariana de Venezuela*, 2012 WL 995288, at *2 (S.D. Ohio Mar. 22, 2012) ("[A]bsent a specific reason to permit it, filings by non-parties have no place in litigation and ought not to be made.").

law claim for books and records under Section 220 of the Delaware General Corporation Law; the Court therefore lacks jurisdiction; and remand is required. The Motion to Substitute has nothing to do with this analysis.

Second, contrary to FHFA's assertion, its Motion to Substitute does not address a jurisdictional standing issue; it addresses the merits. FHFA correctly argues that its motion concerns whether the Stockholder has a right to assert his claim. (*See* Opp. at 4-5.) According to FHFA, the right was transferred to FHFA by federal statute. (*Id.*; *see also* D.I. 9, Memorandum of Law in Support of Motion to Substitute.) FHFA argues that disputing a plaintiff's right to relief raises a standing issue. (*See* Opp. at 4-5.) Of course, this is not correct. If it were correct, all defenses would raise standing issues and the Court's jurisdiction would depend upon the manner in which the Court resolves the merits of the case.

As detailed herein, courts uniformly hold that, *for standing*, it is enough that the plaintiff has a right to relief under *his interpretation of the applicable laws*. A dispute, like that raised by the Motion to Substitute, as to whether a plaintiff has a right to relief under the applicable laws is a merits issue. This is true regardless of whether the defendant argues, as FHFA argues here, that the plaintiff's right to relief was transferred to another person. As a merits issue, the Motion to Substitute is irrelevant to the jurisdiction analysis. It may not be decided before the Court determines whether it has jurisdiction to address the merits.

Third, even if the Motion to Substitute had raised a standing issue, resolution of the issue could not alter the ultimate outcome of this Court's jurisdiction analysis. As detailed in the Reply to Fannie Mae, the Court lacks jurisdiction because the only claim pled is a state law claim. Even if the Court agreed with FHFA and concluded that the Stockholder does not have standing, the Court would have simply determined that it lacked jurisdiction for an additional

reason. Even if the Motion to Substitute had addressed standing, there would have been no good reason to decide it before addressing the Motion to Remand.

The Motion to Substitute concerns a merits issue that may not be decided by this Court because it lacks jurisdiction. FHFA's contention that it would be more efficient to decide the Motion to Substitute ignores the Court's lack of jurisdiction to do so.

II. ARGUMENT

A. THE COURT'S JURISDICTION DEPENDS ONLY UPON THE CLAIM THAT WAS PLED.

As detailed in the Stockholder's opening brief and his Reply to Fannie Mae, the Court's federal question jurisdiction depends only upon the claim that the Stockholder pled. As the Supreme Court explained in *Caterpillar, Inc. v. Williams*, the well-pleaded complaint rule "provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." 482 U.S. 386, 392 (1987) (citations omitted).[3] The Stockholder's Section 220 books and records claim relies exclusively upon state law, and the Court therefore lacks federal jurisdiction. The issue raised in the Motion to Substitute plays no role in this analysis. Regardless of whether HERA is interpreted as permitting or barring the Stockholder's claim, the claim will still be a state law claim and the Court will still lack federal jurisdiction.

[3] *See also Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1255-56 (3d Cir. 1996) ("[T]he plaintiff is the master of the complaint and 'may, by eschewing claims based on federal law, choose to have the cause heard in state court.'") (quoting *Caterpillar, Inc.*, 482 U.S. at 399); *Alessi v. Beracha*, 244 F. Supp. 2d 354, 356 (D. Del. 2003) ("[A] defendant may not remove a state law claim, even on federal preemption grounds, if the plaintiff pleads only state law claims.").

B. THE MOTION TO SUBSTITUTE DOES NOT ADDRESS JURISDICTION; IT ADDRESSES THE MERITS.

FHFA contends that its Motion to Substitute challenges the Stockholder's standing and therefore concerns a jurisdictional issue, albeit a different jurisdictional issue than the federal question jurisdiction issue addressed by the Motion to Remand. (Opp. at 4-5.) FHFA therefore contends that both the Motion to Remand and the Motion to Substitute concern jurisdictional issues, with the result that they may be considered in any order. *Id.* FHFA is wrong.

The Motion to Substitute does not concern the Stockholder's standing and therefore does not address a jurisdictional issue. Under well-established law, a plaintiff "need not prove the merits of [its] case in order to demonstrate that [it] ha[s] . . . standing." *Pitt Cty. v. Hotels.com, L.P.*, 553 F.3d 308, 312 (4th Cir. 2009); *see also In re Brokerage Antitrust Litig.*, 579 F.3d 241, 275 (3d Cir. 2009) (Plaintiffs are "not required to prove the merits of their case . . . to establish standing.").

A plaintiff has standing if he has a right to the relief requested under *his own interpretation of the applicable law*. *See Pitt Cty.*, 553 F.3d at 312 (finding standing and jurisdiction proper and applying rule that a "district court has jurisdiction if 'the right of the [plaintiffs] to recover under their complaint will be sustained if the [applicable laws] are given one construction and will be defeated if they are given another' . . . .") (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)); *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 38 F.3d 582, 584-86 (D.C. Cir. 1994) (finding petitioners had standing because "if the [petitioners'] interpretations of [a federal statute and related administrative policy statement] were correct[,] . . . the alleged injury would be fairly traceable to the [respondent's challenged action]" and "redressable by the relief petitioners seek"); *see also Freudenberg v. Harvey*, 364 F. Supp. 1087, 1091 (E.D. Pa. 1973) (finding jurisdiction where defendant "claim[ed] that plaintiff ha[d] no

right to recovery" under a federal statute it invoked as a defense, and explaining that such a defense "goes to the merits of the cause and not to the jurisdiction of the Court").

FHFA does not dispute that the Stockholder has a right to relief under his own interpretation of the applicable law. Under the well-established law, whether the Stockholder is entitled to books and records – the issue raised by the Motion to Substitute – is therefore not a standing issue, but a merits issue. *Pitt Cty.*, 553 F.3d at 312-15 (The issue of whether plaintiff had a right to relief under a statute, which required the court to evaluate plaintiff's interpretation of the statute, concerned the merits of plaintiff's cause of action, not standing.); *Ass'n of Am. R.Rs.*, 38 F.3d at 585-89 (The question of whether petitioners had a right to relief, which required the court to consider the validity of petitioners' interpretation of a federal statute and related administrative policy statement, was a merits inquiry, not a standing inquiry.); *Novartis Seeds, Inc. v. Monsanto Co.*, 190 F.3d 868, 870-71 (8th Cir. 1999) (Where plaintiff alleged a legal theory that defendant had caused it redressable injury, defendant's contention that plaintiff had "no legal right" to bring its claim did not concern plaintiff's standing, and was regarded as "no more than a defense on the merits."); *Freudenberg*, 364 F. Supp. at 1090-91, 1093 (The issue of whether plaintiff had a right to recover, which depended on the interpretation of a federal statute defendant invoked, went to the merits of plaintiff's claim, not the court's jurisdiction.).

In addressing a similar issue, the United States Court of Appeals for the Fourth Circuit held that not a standing issue, but a merits issue was raised by the defendant's argument that a county did not have a right to impose a specified tax under a disputed tax statute. It explained,

> That the district court ultimately disagreed with the County regarding [its right to relief under a tax statute], does not mean that the County failed to allege an injury in fact [as required to establish standing]. To hold otherwise would reduce all merits inquiries in cases of this type into standing inquiries.

Pitt Cty., 553 F.3d at 312; *see also Ass'n of Am. R.Rs.*, 38 F.3d at 585-89 (While the court ultimately disagreed with petitioners' interpretation of a relevant statute and policy statement, and therefore denied petitioners relief on the merits, it declined to consider the validity of petitioners' interpretation in terms of a "threshold . . . standing inquiry."); *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 80 (3d Cir. 2003) (explaining that the Supreme Court has "criticized the implications of treating the validity of a cause of action as jurisdictional," because that approach would "essentially eviscerat[e] the distinction between the jurisdictional and merits inquiry").

The result is not changed by FHFA's allegation that HERA not only bars the Stockholder's right to books and records, but transfers it to another person, specifically FHFA. Under the authority cited above, all that matters for purposes of standing is that the Stockholder has a right to books and records under his own interpretation of HERA. In other cases, in which the defendant has made substantially the same argument made by FHFA here, the courts have held that the alleged transfer did not raise a standing issue, but a merits issue. *See, e.g.*, *Residential Funding Co. v. Acad. Mortg. Corp.*, 59 F. Supp. 3d 935, 945 (D. Minn. 2014) ("Whether [plaintiff] can, in fact, enforce those Agreements, or whether it has assigned away its rights to do so, goes to the merits of the claim and is not an issue of standing.").[4]

In the Stockholder's case against Freddie Mac, the United States District Court for the Eastern District of Virginia addressed substantially the same issue. *See Pagliara v. Fed. Home Loan Mortg. Ass'n*, 2016 WL 4441978 (E.D. Va. Aug. 23, 2016). In that case, the court addressed Freddie Mac's argument that, under HERA, the Stockholder's right to books and

[4] *See also Flextronics Int'l USA Inc. v. Sparkling Drink Sys. Innovation Ctr. Ltd.*, 2016 WL 2344586, at *3 (N.D. Ill. May 4, 2016) ("If Defendants are right and [the third party] never validly assigned the Agreement to [plaintiff], then the proper remedy is a judgment against [plaintiff] on the merits rather than for lack of jurisdiction.").

records vis-à-vis Freddie Mac had been transferred to FHFA. *Id.* at *5-8. Consistent with the authorities cited above, the court held that the issue did not concern standing, but rather concerned the merits. *Id.* at *4. Although the Stockholder vehemently disagrees with the court's other determinations, the court's standing-versus-merits determination was correct.[5] This Court should similarly hold that the issue concerns not standing, but the merits.

C. THE COURT MAY NOT ADDRESS THE MOTION TO SUBSTITUTE BEFORE ADDRESSING THE MOTION TO REMAND.

By FHFA's own authority, the Court must resolve the question of subject matter jurisdiction before addressing the merits. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (An "Article III court must be sure of its own jurisdiction before getting to the merits." (citing *Steel Co.*, 523 U.S. at 88-89)); *In re LimitNone, LLC*, 551 F.3d 572, 576 (7th Cir. 2008) (The "Supreme Court [has] mandated that issues of jurisdiction precede a determination of the merits."). The Court therefore must resolve the Motion to Remand before addressing the Motion to Substitute.

D. AS FHFA'S ARGUMENT ADDRESSES THE MERITS, IT DOES NOT MATTER WHETHER THE COURT COULD NOW ADDRESS NON-MERITS ISSUES.

FHFA's contention that the Court could now address threshold, non-merits issues is beside the point. (Opp. at 5-10.) As detailed above, FHFA's Motion to Substitute does not raise a threshold non-merits issue; it raises a merits issue that may not be decided before the Court has determined, on the Motion to Remand, whether it has jurisdiction to do so. As FHFA concedes, the issues addressed by the authorities it cites are non-merits issues. Aside from the

[5] The Stockholder will address the other determinations in its response to FHFA's recently-filed Supplemental Motion to Substitute FHFA as Plaintiff. (D.I. 24.)

jurisdictional issues of sovereign immunity[6] and prudential standing, they address where the plaintiff may bring suit (*forum non-conveniens,* transfer pursuant to 28 U.S.C. § 1404(a) and personal jurisdiction). They otherwise address whether the plaintiff may pursue his claims on behalf of others (class certification, derivative standing and the demand requirement in a derivative suit).[7]

E. JUDICIAL ECONOMY DOES NOT PERMIT THE COURT TO MAKE A MERITS DETERMINATION BEFORE RESOLVING WHETHER IT HAS JURISDICTION.

FHFA contends that judicial economy counsels in favor of resolving FHFA's Motion to Substitute before the Motion to Remand, but its reliance on the concept of judicial economy is misplaced. FHFA's authority supports only the proposition that a court may use its discretion and consider judicial economy to resolve a *non-merits* issue as a threshold matter, in advance of addressing subject matter jurisdiction. *See, e.g.*, *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007) (holding that a district court may address a "non-merits" issue prior to resolving subject matter jurisdiction "when considerations of convenience, fairness, and judicial economy so warrant"); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586-88 (1999) (same). By contrast, as established in Part C, the mandate that a court resolve subject matter jurisdiction before addressing the merits is not a matter of discretion. A court may not invoke judicial economy to render a merits decision before it resolves whether it has subject matter

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[6] *Galvan v. Fed. Prison Indus.*, 199 F.3d 461, 463 (D.C. Cir. 1999) ("The Supreme Court has characterized the defense [of sovereign immunity] as jurisdictional.").

[7] *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453 (1974) is irrelevant here because, in that decision, the Court did not address the merits prior to resolving federal question jurisdiction or any other Article III issue. The Court only considered whether a statutory cause of action existed before determining whether the plaintiff had statutory standing. *See Steel Co.*, 523 U.S. at 96-97 & n.2 (discussing *Nat'l R.R.*). Unlike the contested issue of federal question jurisdiction in this Action, statutory standing "has nothing to do with . . . Article III." *Id.* at 97.

jurisdiction in the first place. *See, e.g.*, *Steel Co.*, 523 U.S. at 99 (indicating it would be improper for a court to consider "an 'easy' merits question . . . on the assumption of jurisdiction").

Even if the Motion to Substitute had addressed a non-merits issue and the Court had discretion whether to decide it first, judicial economy would nevertheless counsel in favor of resolving subject matter jurisdiction first. As set forth in the Stockholder's Motion to Remand and supporting papers, the elements of the Stockholder's single state law claim raise no federal issue, and the Court is therefore without jurisdiction. The Court may expeditiously remand this Action to the Delaware Court of Chancery on a straightforward application of the well-pleaded complaint rule. *Cf. Ruhrgas*, 526 U.S. at 587-88 (considering non-merits threshold issue in advance of subject matter jurisdiction, but observing: "[I]n most instances subject matter jurisdiction will involve no arduous inquiry. . . . In such cases, both expedition and sensitivity to state courts' coequal stature should impel the federal court to dispose of that issue first.").

F. EVEN IF THE MOTION TO SUBSTITUTE CONCERNED STANDING, ITS RESOLUTION COULD NOT AFFECT THE JURISDICTION ANALYSIS.

Even if the Motion to Substitute had raised a standing issue, resolution of the issue could not alter the ultimate outcome of this Court's jurisdiction analysis. As detailed in its Opening Brief and Reply to Fannie Mae, the Court lacks jurisdiction because the only claim pled is a state law claim. If the Motion to Substitute had raised a standing issue, and the Court resolved the issue by concluding that the Stockholder does have standing, the Court would still lack federal question jurisdiction because the only claim pled would still be a state law claim. If the Court rather concluded that the Stockholder does not have standing, the Court would have determined that it lacked jurisdiction for an additional and therefore redundant reason. *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 537 (3d Cir. 1994) ("[I]f a district court finds that a plaintiff in a removed case does not have standing, it will remand the case to the state court."); *Giordano v. Wachovia*

Sec., LLC, 2006 WL 2177036, at *5 (D.N.J. July 31, 2006) ("[H]aving found lack of standing -- and thus lack of subject matter jurisdiction -- this Court must remand this case to state court."). The Court lacks federal subject matter jurisdiction to hear claims for which the plaintiff lacks standing. *See Wheeler*, 22 F.3d at 537, 540. In response to a motion to remand, the *removing* party bears the burden to establish that this Court has federal subject matter jurisdiction. *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990).

FHFA oddly positions itself on the wrong side of this issue, arguing – as the Stockholder does – that there is no federal jurisdiction over the Stockholder's claim. Of course, FHFA takes this position because the Motion to Substitute actually addresses the merits. If FHFA could persuade the Court to decide the merits in its favor (under the guise of a jurisdictional issue), before remanding to state court, FHFA would not care whether its position ultimately led to a determination that the Court lacked jurisdiction. The Court should not permit FHFA to play this game. *See N. Jersey Ctr. for Surgery, P.A. v. Horizon Blue Cross Blue Shield of N.J., Inc.*, 2008 WL 4371754, at *4 (D.N.J. Sept. 18, 2008) (remanding action because defendant "[could not] reconcile its removal burden of proving Plaintiff's standing . . . and its defense that would effectively negate Plaintiff's standing").

III. CONCLUSION

For the foregoing reasons, and for the reasons stated in his Opening Brief (D.I. 11) and Reply to Fannie Mae (D.I. 22), the Stockholder respectfully requests that the Court address his Motion to Remand before FHFA's Motion to Substitute and remand this Action to the Delaware Court of Chancery.

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CERTIFICATE OF SERVICE

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