IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ANTHONY R. EDWARDS, *et al.*, Plaintiffs, v. DELOITTE & TOUCHE, LLP, Defendant.	No. 1:16-cv-21221

THE FEDERAL HOUSING FINANCE AGENCY'S OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

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The Court should deny Plaintiffs' motion to remand.[1] This lawsuit arises under federal law and implicates important federal issues concerning FHFA's federally-regulated conservatorship of Fannie Mae. Plaintiffs seek to pursue claims against Fannie Mae's chosen auditors, but federal law (HERA) assigns to FHFA—and FHFA alone—the power to decide whether such claims should be pursued. Accordingly, this Court has jurisdiction.

FHFA respectfully urges the Court, moreover, to rule on its dispositive and fully-briefed motion to substitute[2] *before* reaching Plaintiffs' motion to remand. The Court is fully authorized to rule on substitution first, and doing so will promote judicial economy by putting an immediate end to Plaintiffs' effort to assert claims that belong, under clear federal law, to FHFA as Conservator.

BACKGROUND

Fannie Mae is a federally-chartered corporation that provides liquidity and stability to the national mortgage market. *See* Compl. ¶¶ 22, 25, 30. In July 2008, in the wake of a national crisis in the U.S. housing market, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (July 30, 2008); *see* Compl. ¶ 20. HERA created FHFA, an independent federal agency, to supervise and regulate Fannie Mae and Freddie Mac (together, the "Enterprises") and gave FHFA's Director authority to place those entities in conservatorship or receivership in specific circumstances. *See* 12 U.S.C. §§ 4501 *et seq.*; 4617(a). In September, 2008, FHFA placed both Fannie Mae and Freddie Mac into its conservatorship; they remain in conservatorship today. *See* Compl. ¶ 21.

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1 Pls.' Mot. for Remand, ECF No. 23 ("Remand Mot.").

2 *See* The Federal Housing Finance Agency's Renewed Mot. to Substitute as Pl. and Supporting Mem. of Law, ECF No. 15 ("Mot. to Subst.").

In HERA, Congress granted the Conservator "extraordinary" federal statutory powers to conduct, direct, and oversee all aspects of Freddie Mac and Fannie Mae's operations, activities and affairs.[3] To accomplish this, Congress provided for the statutory transfer to FHFA, immediately upon imposition of conservatorship, of "all rights, titles, powers, and privileges of the regulated entity [in conservatorship], and of any ***stockholder***, officer, or director of such regulated entity 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 Conservator, FHFA is statutorily empowered to "take over the assets of and operate" Fannie Mae and Freddie Mac, to "perform all [their] functions" and "conduct [their] business," to "preserve and conserve [their] assets and property," and to "put [them] in a sound and solvent condition." *Id.* §§ 4617(b)(2)(B), (D). Further, under HERA's jurisdiction-withdrawal provision, "no court may take any action to restrain or affect" the Conservator's "exercise of [its] powers or functions" under the statute. *Id.* § 4617(f). HERA also expressly bars any other agency or State from "direct[ing] or supervis[ing]" the Conservator's "exercise of [its] rights, powers, and privileges." *Id.* § 4617 (a)(7). In short, HERA gives FHFA as Conservator the broadest possible grant of rights, titles, powers, and privileges to operate the Enterprises. *Pagliara v. Fed. Home Loan Mortg. Corp.*, No. 116CV337JCCJFA, 2016 WL 4441978, at *10 (E.D. Va. Aug. 23, 2016) (HERA gave an "extraordinarily broad grant of operational discretion to FHFA.").

On February 29, 2016, Plaintiffs—shareholders of Fannie Mae—filed their complaint in the Circuit Court for the 11th Judicial Circuit in and for Miami-Dade County, Florida. *See*

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[3] *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 225 (D.D.C. 2014), *appeal pending* No. 14-5243 (D.C. Cir. filed Oct. 8, 2014).

Compl., ECF No. 1-1. Plaintiffs' complaint asserts two claims against Deloitte: (1) negligent misrepresentation (Restatement (2d) of Torts § 552), and (2) aiding and abetting alleged breaches of fiduciary duties by FHFA, Treasury, and Fannie Mae's directors and officers. *See, e.g.*, Compl. ¶¶ 100-118.

FHFA has moved to substitute itself as the only proper plaintiff in this shareholder case, given HERA's transfer to FHFA of "***all*** rights, titles, powers, and privileges" of "the stockholders" of Fannie Mae. *See* Mot. to Subst. That fully briefed motion is dispositive as upon substitution as plaintiff, FHFA will dismiss this lawsuit.

On April 6, 2016, Deloitte removed the action to this Court on the basis of federal-question jurisdiction. *See* Notice of Removal, ECF No. 1. Plaintiffs now move to remand.

ARGUMENT

I. THE COURT SHOULD DENY REMAND BECAUSE PLAINTIFFS' CASE ARISES UNDER FEDERAL LAW

The Court should deny remand because Plaintiffs' claims arise under, and necessarily turn on, substantial and disputed questions of federal law.[4]

A. Plaintiffs' Affirmative Case Turns on Whether They Have Standing to Pursue Shareholder Claims Notwithstanding HERA's Transfer of "All" Shareholder Rights and Powers to FHFA

It has been black-letter law "for nearly 100 years" that federal-question jurisdiction is available for cases that "implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). Under *Grable*, federal jurisdiction is proper whenever any claim in the complaint presents a federal issue that is: "(1) necessarily raised, (2)

[4] FHFA addresses here the remand issue most important to the Agency.

actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013).

One "element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 976 (11th Cir. 2005) (citation omitted); *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (A "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." (citation omitted)).

Thus, Plaintiffs must establish as part of their affirmative case that they have standing to pursue the shareholder claims asserted in their Complaint.[5] Typically, "the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 606 (1992); *see also Bochese*, 405 F.3d at 976 (Plaintiffs have the burden to "clearly and specifically set forth facts" in the Complaint sufficient to demonstrate standing. (citation omitted)). Plaintiffs' claims, therefore, necessarily turn on the substantial and

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[5] In *Pagliara*, the Eastern District of Virginia opined that FHFA's argument—that HERA transferred shareholder rights for inspection of corporate books and records to FHFA—was better addressed as a challenge to the merits than as a standing argument, and dismissed the case "because Pagliara does not possess the right he seeks to enforce." *Pagliara*, 2016 WL 4441978, at *4, *8. The court also noted, however, "many courts have proceeded under the standing rubric when discussing whether HERA . . . destroyed stockholders' standing" to sue. *Id.*; *see also, e.g.*, *In re Fed. Nat'l Mortg. Ass'n Sec., Derivatives & ERISA Litig.* ("*In re Fannie Mae*"), 629 F. Supp. 2d 1, 4 (D.D.C. 2009) (Because of HERA, "only the FHFA has standing to pursue the claims asserted" in that action.); *In re Fed. Home Loan Mortg. Corp. Derivative Litig.* ("*In re Freddie Mac*"), 643 F. Supp.2d 790, 798 (E.D. Va. 2009) (Because of HERA, "the plaintiffs lack standing to pursue these claims."); *Perry Capital LLC*, 70 F. Supp. 3d at 233 (dismissing claims "for lack of standing" based on HERA). As these cases make clear, HERA's transfer of shareholder rights to FHFA is an insurmountable obstacle to Plaintiffs' ability to meet their affirmative burden of showing that they have standing here.

disputed federal law question whether Plaintiffs can assert *shareholder* rights when HERA plainly and unambiguously transferred "all" such rights and powers to FHFA as Conservator. *See* 12 U.S.C. § 4617(b)(2)(A). Plaintiffs do not dispute that the claims they assert here are "shareholder" claims. *See, e.g.*, Compl. ¶ 11. But eight years ago, when FHFA placed Fannie Mae in conservatorship, § 4617(b)(2)(A) transferred "***all*** rights, titles, powers, and privileges of [Fannie Mae], and of any ***stockholder***, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity" to FHFA (emphasis added). The fact that Plaintiffs' affirmative claims turn on this federal issue is sufficient to provide *Grable* jurisdiction, regardless of the Court's ultimate ruling on the issue.

That being said, the law is clear that Plaintiffs no longer enjoy the shareholder rights they seek to assert here. "As many courts have recognized, the language 'all rights, titles, powers, and privileges . . . of any stockholder' is *extremely broad* and evidences Congress's intent 'to shift as much as possible to the FHFA.'" *Pagliara*, 2016 WL 4441978, at *5 (emphasis added) (quoting *In re Fannie Mae*, 629 F. Supp. 2d at 3). Congress "transferred everything it could to the [conservator] and that includes a stockholder's right, power, or privilege . . . to sue directors or others when action is not forthcoming." *Kellmer v. Raines*, 674 F. 3d 848, 851 (D.C. Cir. 2012). "In other words, the language means what it plainly says; HERA transferred 'all rights previously held by [Fannie Mae]'s shareholders'" to the Conservator. *Pagliara*, 2016 WL 4441978, at *5 (quoting *In re Freddie Mac*, 643 F. Supp. 2d at 795).[6]

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[6] *See also Montgomery Cty. Comm'n v. FHFA*, 776 F.3d 1247, 1255 (11th Cir. 2015) (applying "straightforward interpretation" of HERA's exemption from "all taxation" as providing an "exempt[ion] from *all* state taxation" (emphasis in original)). HERA provides only one exception to the transfer of shareholder rights: following appointment of a receiver, Fannie Mae shareholders are permitted to prosecute claims they may have to liquidation proceeds. *See* 12 U.S.C. § 4617(b)(2)(K)(i). The existence of this lone, express exception prohibits courts from

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Whether Plaintiffs can establish standing is a substantial and disputed question of federal statutory interpretation. Plaintiffs here argue (without merit) that § 4617(b)(2)(A)'s transfer of ***all*** shareholder rights and powers to FHFA does not apply to their case; the same question is being litigated in federal courts across the country.[7] Plaintiffs are wrong that HERA's substitution provision is merely a defense and therefore is not a basis for federal court jurisdiction. Remand Mot. 14-15. As explained above, HERA is federal law that eliminated Plaintiffs' standing to pursue the shareholder claims in their Complaint, preventing them from making out an affirmative case here. This is exactly the kind of substantial and disputed federal issue necessary to invoke *Grable* jurisdiction.

Plaintiffs are also wrong in asserting that HERA does not present a substantial federal law question because "the question of Plaintiffs' ability to bring direct claims has already been settled" by *Lubin v. Skow*, 382 Fed. App'x 866 (11th Cir. 2010). *See* Remand Mot. 15. As FHFA explained in the briefing on its pending motion to substitute, *Lubin* is not dispositive, for several independent reasons:

First, although the *Lubin* court made a passing statement that "FIRREA would not be a bar to standing" if the shareholder had asserted direct claims, that statement was pure dicta

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(footnote continued)
creating any additional, implicit exceptions. *See United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.").

[7] *See, e.g.*, *Saxton v. FHFA*, No. 1:15-cv-00047 (N.D. Iowa May 28, 2015) (whether HERA transferred shareholder rights to challenge Third Amendment to FHFA); *Jacobs v. FHFA*, No. 1:15-cv-00708 (D. Del. Aug. 17, 2015) (same); *Robinson v. FHFA*, No. 7:15-cv-00109 (E.D. Ky. Oct. 23, 2015) (same); *Roberts v. FHFA*, No. 1:16-cv-02107 (N.D. Ill. Feb. 10, 2016) (same); *see also Perry Capital LLC*, 70 F. Supp. 3d 208 (same); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828 (S.D. Iowa 2015) (same).

because the court held that *all* of the claims asserted against the individual officers of the institution in receivership were derivative, not direct. *See* 382 F. App'x at 871.[8] Indeed, the issue whether FIRREA's succession provision extends to all shareholder claims (including direct claims) was not even argued in *Lubin*.

Second, the only authority cited by *Lubin* with respect to standing was *FDIC v. Jenkins*, 888 F.2d 1537 (11th Cir. 1989). But the *Jenkins* decision is even further afield: it does not cite, quote, or otherwise address FIRREA's analogous succession provision, which is unsurprising since that provision was not at issue. *See Jenkins*, 888 F.2d at 1538 n.1. In *Jenkins*, the FDIC as receiver was appointed several years before FIRREA's enactment, and had acquired all claims belonging to the failed institution (not its shareholders) via a *contract* (a purchase and assumption agreement), not through any statutory succession provision.

Third, *Lubin* focused on an issue not presented here—how to determine the nature of claims against individual defendants who had overlapping roles as officers of the institution in receivership, and officers of a holding company that owned that institution in receivership. 382 F. App'x at 869. While the court held that all of the claims asserted solely against officers of the institution in receivership were derivative (*id.* at 870-71), the court also noted that the FDIC would not succeed to the rights of the holding company-owner against its *own* officers for alleged breaches of fiduciary duty owed *to the holding company*. *Id.* at 872 n.9. Here, Fannie Mae has no holding company and the claims that Plaintiffs seek to advance are against a third

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[8] *See Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 762 (11th Cir. 2010) (Dicta includes statements "not necessary to the decision of an appeal given the facts and circumstances of the case." (citation omitted)); *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010) ("[D]icta is not binding on anyone for any purpose.").

party, Fannie Mae's outside auditors. Like the claims asserted against the bank officers in *Lubin*, the claims in this case are derivative.[9]

Finally, Plaintiffs are wrong that because they assert purportedly "direct" claims, they are unaffected by HERA's transfer of ***"all"*** shareholder rights to FHFA. *See* Remand Mot. 15-19. As FHFA explained in connection with its motion to substitute, all of the claims Plaintiffs assert here are derivative, not direct, claims. *See* Reply in Support of its Mot. to Subst. 7-8, ECF No. 34. Regardless, HERA transferred "***all***" shareholder rights to FHFA; it did not transfer only "derivative" claims. *See, e.g.*, *Pagliara*, 2016 WL 4441978, at *6 (FHFA succeeded to all shareholder rights, even those rights that are "enforceable through a direct lawsuit, not a derivative lawsuit.")

B. Plaintiffs' Claims Raise Numerous Additional Substantial Federal Law Issues

Plaintiffs' claims present multiple, additional substantial federal issues, any one of which independently supports the Court's denying remand: (1) whether Plaintiffs can pursue shareholder rights despite HERA's assignment of those rights to FHFA (*see* 12 U.S.C. § 4617(b)(2)(A)); (2) when HERA contemplates termination of Fannie Mae's conservatorship; (3) whether FHFA as Conservator, Fannie Mae's officers and directors, or the Department of the Treasury have breached any fiduciary duties.[10]

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[9] This Court's decision in *Official Comm. of Unsecured Creditors of BankUnited Fin. Corp. v. FDIC* ("*BankUnited*"), No. 11-20305-CIV, 2011 WL 10653884 (S.D. Fla. Sept. 28, 2011), is similarly inapt. Like the Eleventh Circuit's decision in *Lubin*, *BankUnited* focused on claims against individuals with overlapping roles as officers of the bank in receivership and the holding company-owner of that bank, and the issue of whether FIRREA's succession provision extends to all shareholder claims was neither argued nor briefed.

[10] Indeed, Deloitte's own conduct—and Plaintiffs' proof of causation predicated on compliance with federal audit standards—also implicate federal law. Congress in the Sarbanes-Oxley Act of 2002 created the Public Company Accounting Advisory Board ("PCAOB"), whose

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First, Plaintiffs concede that their aiding and abetting (§ 552) claims require them to prove that there was an underlying breach of fiduciary duty by "(1) the directors and officers of Fannie [Mae]; (2) FHFA; or (3) Treasury." Remand Mot. 9 & n.1 (citing *In re Caribbean K Line, Ltd.*, 288 B.R. 908, 919 (S.D. Fla. 2002)). Contrary to Plaintiffs' suggestion (Remand Mot. 6), federal-question jurisdiction is established if the Court finds a substantial issue of federal law raised by the aiding and abetting claims with respect to *any* of these entities. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 810-11 (1988) (single "antitrust count" is in fact two separate claims for purposes of assessing jurisdiction); *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 194 (2d Cir. 2005) (The key "question is whether at least one federal aspect of Broder's complaint is a logically separate claim, rather than merely a separate theory that is part of the same claim as a state-law theory.").

In fact, each of Plaintiffs' three § 552 claims (*e.g.*, the claim with respect to FHFA, with respect to Fannie Mae's officers and directors, and with respect to the Treasury Department) raises substantial issues concerning the federal statutory standards governing the conservatorship. The Complaint alleges that FHFA owed Fannie Mae and Plaintiffs fiduciary duties "[b]y reason of its purported conservatorship of Fannie Mae . . . ." Compl. ¶ 35. It asserts no fewer than 39 separate times that "***[b]y imposing a conservatorship over Fannie Mae*** . . . FHFA assumed fiduciary duties of due care and loyalty to Fannie Mae . . . ."[11] Plaintiffs go on to assert that FHFA and Treasury's conduct was "a violation of law and fiduciary duty" because it

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(footnote continued)
accounting guidelines Plaintiffs accuse Deloitte of violating, as a federal "Government-created, Government-appointed entity, with expansive powers to govern an entire industry." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 485 (2010).

[11] *See* Compl. ¶¶ 114, 133, 152, 171, 190, 209, 228, 247, 266, 285, 304, 323, 342, 361, 380, 399, 418, 437, 456, 475, 494, 513, 532, 551, 570, 589, 608, 627, 646, 665, 684, 703, 722, 741, 760, 779, 798, 817, 836 (emphasis added).

"ran directly contrary to FHFA's purported [federal] statutory mission to 'put the regulated entity in a sound and solvent condition,' 'carry on the business of the regulated entity,' and 'preserve and conserve the assets and property of the regulated entity.'" Compl. ¶ 38 (quoting 12 U.S.C. § 4617(b)(2)(D)). As a result, Plaintiffs allege, "FHFA and Treasury violated Delaware law ***and applicable federal law*** by breaching their fiduciary duties to Fannie Mae and Plaintiffs." *Id.* ¶ 41 (emphasis added).

As Plaintiffs appear to acknowledge in these statements, the existence and scope of any fiduciary duties owed by FHFA, Treasury, or Fannie Mae's officers and directors are defined by *federal law* (HERA), not by state law.[12] As the Eastern District of Kentucky just ruled, neither FHFA nor the Treasury Department owe *any* fiduciary duty to Fannie Mae shareholders. *See Robinson v. FHFA*, No. 7:15-cv-109-KKC, 2016 WL 4726555, at ** 4, 6 nn. 3-4 (E.D. Ky. Sept. 9, 2016). Because the events at issue here took place during the Conservatorship, when HERA had transferred all the powers and rights of Fannie Mae's officers and directors to FHFA (*see* 12 U.S.C. § 4617(b)(2)(A)), Plaintiffs' claims against the officers and directors are really claims against FHFA and thus are governed by HERA, not by state law. Pursuant to § 4617(b)(2)(A), the officers and directors had no powers to act and, accordingly, could not have owed fiduciary duties to anyone.[13]

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[12] Because HERA defines the fiduciary duties relevant to this case, Plaintiffs' reliance on *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) is misplaced. As Plaintiffs' note, *O'Melveny* involved whether federal ***common*** law supplemented FIRREA with respect to whether an officer's knowledge could be imputed to the company. Remand Mot. 11. Here, Congress has defined any relevant fiduciary duties by statute (HERA).

[13] As such, Plaintiffs' § 552 aiding and abetting claims against the officers and directors reflect a form of "artful pleading" that "make federal jurisdiction disappear." *See Roe v. Michelin N. Am.*, 613 F.3d 1058, 1065 (11th Cir. 2010) (citation omitted).

HERA's definition of the duties owed shareholders, moreover, is different from that generally provided by state law.[14] Congress specifically authorized FHFA as Conservator, for example, to take "***any***" action authorized by HERA which FHFA "determines is in the best interests of the regulated entity or [FHFA]." 12 U.S.C. § 4617(b)(2)(J)(ii). Congress thus authorized FHFA to take actions it deems in the best interests of FHFA or of Fannie Mae, even if those actions might otherwise have constituted a breach of state fiduciary responsibilities.

HERA further prohibits state-law efforts to interfere with FHFA's decisions regarding the best interests of FHFA and Fannie Mae: "[The Conservator] shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of [its] rights, powers, and privileges." 12 U.S.C. § 4617(a)(7). Thus, no State, acting through state fiduciary duty laws or otherwise, may interfere with the core powers of the Conservator.

Plaintiffs are incorrect in arguing that Fannie Mae is bound to follow Delaware corporate governance principles. *See* Remand Mot. 9-10. Fannie Mae has only *elected* to follow Delaware's corporate law "to the extent not inconsistent with [the Company's] Charter Act and other Federal law, rules, and regulations." Fannie Mae Bylaws § 1.05. Plaintiffs fail to advise the Court, moreover, that Fannie Mae's *post-conservatorship* Bylaws further provide that "[n]othing in these Bylaws shall be deemed to affect the regulatory or conservatorship powers of [FHFA] under [HERA]." Fannie Mae Bylaws, art. 8. The Bylaws thus cannot undermine the

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[14] For this reason alone, Plaintiffs are mistaken that *Atherton v. FDIC*, 519 U.S. 213 (1997) has any relevance to this case. *See* Remand Mot. 11-12. *Atherton* involved whether courts should apply federal ***common*** law or state law in determining whether a bank's officers and directors acted negligently. The Court made clear, however, that "[n]o one doubts the power of Congress to legislate rules for deciding cases like the one before us." *Atherton*, 519 U.S. at 219. Here, unlike in *Atherton*, Congress did legislate rules in HERA making clear that the fiduciary duty analysis should be different from that provided by state law.

broad discretion HERA granted FHFA, as a matter of federal law, with respect to all the claims Plaintiffs seek to assert here.

Second, Plaintiffs continue to assert that their central allegation here is that "FHFA would have been required to terminate [Fannie Mae's] conservatorship, if not for Deloitte's conduct." Remand Mot. 6 (citing Compl. ¶ 98).[15] But HERA specifically prohibits state-law interference with FHFA's administration of the Conservatorship (including such fundamental powers as whether and when to terminate the Conservatorship), *see* 12 U.S.C. § 4617(a)(7), and provides federal law standards for determining when Conservatorship is appropriate. *See* 12 U.S.C. §§ 4617(a) (governing appointment of FHFA as conservator or receiver), 4617(a)(3) (defining grounds for initiating conservatorship or receivership). Thus, FHFA would make any decision to terminate the conservatorship pursuant to federal law (HERA), not according to state law.[16]

Proper resolution of these federal issues is critical to FHFA's ability to conduct the Fannie Mae and Freddie Mac Conservatorships. Congress took care to ensure that HERA granted FHFA exclusive authority to examine, regulate, and supervise the financial safety and

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[15] Plaintiffs argue that they could claim damages that do not result from Fannie Mae's failure to exit the conservatorship earlier, but their Complaint fails to make the allegations Plaintiffs speculate that they could make. *See* Remand Mot. at 6. For example, Plaintiffs allege that "the accounting manipulations certified by Deloitte caused Plaintiffs' stock to lose value." Remand Mot. 6 (citing Compl. ¶ 97). Plaintiffs fail to advise the Court, however, that the next paragraph of the Complaint makes clear this supposed loss in stock value was directly attributable to the alleged failure to exit the conservatorship earlier: "[h]ad Deloitte performed its public duty . . . Fannie Mae *would have been able to exit the conservatorship as required by law* and Plaintiffs would not have suffered their losses." Compl. ¶ 98 (emphasis added).

[16] The statute governing the Office of Federal Housing Enterprise Oversight ("OFHEO"), FHFA's predecessor, provided explicit guidance on when OFHEO was required to terminate a conservatorship. *See* former 12 U.S.C. § 4619. HERA repealed § 4619 as part of a statute that affords FHFA greater discretion in supervising and operating the Enterprises including determining whether and when to terminate a conservatorship.

soundness and overall management practices and operations of Fannie Mae and Freddie Mac, providing that the Conservator "shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of [its] rights, powers, and privileges." 12 U.S.C. § 4617(a)(7). This important safeguard would be undermined by Plaintiffs' effort here to litigate in Florida state court the propriety of FHFA, Treasury, and Fannie Mae's conduct. Defendant is entitled to have a federal court decide the propriety of Plaintiffs' effort, through this suit, to direct and supervise the conduct of FHFA's chosen auditors.

II. THE COURT SHOULD RULE ON FHFA'S MOTION TO SUBSTITUTE BEFORE RULING ON PLAINTIFFS' MOTION TO REMAND

On August 22, 2016, this Court issued an Order stating that "it cannot rule on [FHFA's] motion to substitute until the Plaintiffs' attack on the Court's subject matter jurisdiction has been resolved." Paperless Order, ECF No. 27. With respect, the Court not only is empowered to, but ***should***, address FHFA's motion to substitute, which raises fundamental jurisdictional questions, before turning (if still necessary) to the motion to remand.

Long-established Supreme Court precedent teaches that the Court is not bound to rule on removal first; instead, federal courts may appropriately choose among threshold non-merits grounds. In *Ruhrgas AG v. Marathon Oil Co.*, for example, the Supreme Court held that when a motion to remand is pending, the district court is *not* obligated to "accord[] priority to the requirement of subject-matter jurisdiction because it . . . delimits federal-court power." 526 U.S. 574, 583 (1999). Where the parties' filings raise other "threshold grounds for denying audience to [the] case on the merits," the district court may properly "choose among [those grounds]." *Id.*

at 585; *see also Ballew v. Roundpoint Mortg. Servicing Corp.*, 491 Fed. App'x 25, 26 (11th Cir. 2012) (same).[17]

FHFA's motion to substitute asks the Court to decide that Plaintiffs cannot proceed with this action because they do not hold the shareholder right they purport to assert. Multiple courts have determined that similar threshold inquiries about a shareholder plaintiff's standing to maintain an action are properly resolved before addressing questions of subject matter jurisdiction. In *In re Facebook, Inc. IPO Derivative Litigation*, for example, the Second Circuit addressed a putative shareholder complaint dismissed by the district court "not based on any deficiency as to the merits of the allegations pleaded" but instead, on, "*inter alia*, [the shareholder-plaintiffs'] lack of standing to proceed in a derivative capacity [in the absence of] contemporaneous stock owner[ship]." 797 F.3d 148, 155-56 (2d Cir. 2015). The district court dismissed the complaint *without* resolving pending motions to remand, which asked "whether any of plaintiffs' claims necessarily raise[d] a federal question." *Id.* at 154. In affirming the dismissal, the Second Circuit noted that it was both "a proper exercise of judicial power—and good craft—to decide [the threshold] question" of shareholder standing instead of the "difficult or novel" subject matter jurisdiction inquiry. *Id.* at 157-58; *see also Fla. Ass'n of Med. Equip.*

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[17] *See also Sinochem Int'l v. Malaysia Int'l Shipping*, 549 U.S. 422, 431 (2007) (district court's disposal of an action pursuant to the *forum non conveniens* doctrine was proper even though the district court had not resolved a pending question of subject matter jurisdiction). As one court observed, there are "an array of non-merits questions that . . . may [be] decide[d] in any order" before addressing subject matter jurisdiction. *Galvan v. Fed. Prison Indus., Inc.*, 199 F.3d 461, 463 (D.C. Cir. 1999) ("Sovereign immunity questions clearly belong among the non-merits decisions that courts may address even where subject matter jurisdiction is uncertain."); *see also, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (prudential standing properly decided without resolution of jurisdictional questions); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 612 (1997) (class certification appropriate for threshold resolution without addressing subject matter jurisdiction); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) ("[T]he class certification issues . . . pertain to statutory standing, which may properly be treated before Article III [concerns].").

Dealers, Med-Health Care v. Apfel, 194 F.3d 1227, 1230 (11th Cir. 1999) ("[E]very court has an independent duty to review standing as a basis for jurisdiction at any time, for every case it adjudicates.").[18]

Resolution of FHFA's motion to substitute here is particularly appropriate because doing so will further judicial economy for both "federal and state courts." *Ruhrgas*, 526 U.S. at 576. Regardless of whether Plaintiffs' action continues here or in the Florida state courts, HERA requires substitution because Plaintiffs no longer have the shareholder rights they assert here. Accordingly, both this Court and any Florida court would be faced with the same question: whether federal statutory law deprive Plaintiffs of standing to maintain this action. In instances like this, where a potential ground for disposing of a case "turns on federal . . . issues" and "removal is nonfrivolous," any risk of "federal intrusion into state courts' authority . . . is minimized." *Ruhrgas*, 526 U.S. at 586-87 (quoting *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 566-567 (5th Cir. 1993)). This consideration strongly counsels against the return of this case to state court simply to be disposed of there on the threshold federal law grounds that the parties have already fully briefed in this federal forum.

CONCLUSION

Because this case presents threshold questions of federal law, the Court should not remand it to state court and instead should grant FHFA's motion to substitute on the basis that federal law has transferred to FHFA as Conservator all of the "rights, titles, powers, and privileges" that Plaintiffs seek to exercise here.

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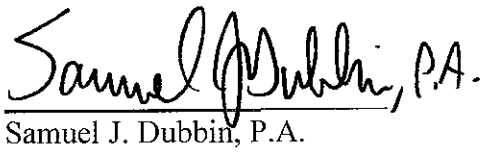
[18] *See also Potter v. Hughes*, 546 F.3d 1051 (9th Cir. 2008) (affirming dismissal for lack of standing notwithstanding "doubts about the foundation for federal question jurisdiction" over case).

Dated: September 14, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that, on September 14, 2016, a true and correct copy of the foregoing was filed electronically using the Court's CM/ECF system, causing a true and correct copy to be served on all counsel of record. I also served the following counsel of record via e-mail:

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