IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUISE RAFTER, *et al.*, Plaintiffs, v. **THE DEPARTMENT OF THE TREASURY**, *et al.*, Defendants.	Civil Action No. 1:14-cv-01404-RCL

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' NOTICE OF VOLUNTARY DISMISSAL

Defendants ask this Court to rule retroactively that Plaintiffs were drafted into a set of different cases several months ago without anyone—the parties or the Court—realizing it, and then to hold, again retroactively, that Plaintiffs are bound by the Court's dismissal of those other cases. Defendants seek such a result notwithstanding that Plaintiffs never received notice of or an opportunity even to contest this secret consolidation, let alone to file a merits brief in *any* of the various cases. The basis for this argument is a Consolidation Order that, by its own terms, could not have been applied to Plaintiffs' case without following a set of specific procedures and providing Plaintiffs an opportunity to respond, none of which occurred here. Defendants thus attempt to revive Plaintiffs' case—which Plaintiffs voluntarily dismissed more than a month ago—so that it can be reinterred on Defendants' preferred terms. Moreover, as Defendants imply (Mot. to Strike at 2–3), they seek this relief solely so that they can try to use the resulting order to their advantage in proceedings before *other* courts.

Defendants' position is entirely meritless. Few Federal Rules are as straightforward as that governing voluntary dismissals: "before the opposing party serves either an answer or a motion for summary judgment," a plaintiff "may dismiss an action without a court order" and "without prejudice." Fed. R. Civ. P. 41(a)(1). Here, it is undisputed that Defendants *never* served an answer or summary-judgment motion on Plaintiffs. Thus, as a result of Rule 41(a)'s "simple, self-executing mechanism," *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987), this case is closed, as the docket reflects. *See Rafter v. Dep't of Treasury*, No. 14-1404 (D.D.C.) ("Date Terminated: 11/03/2014"); *see also Carter v. U.S. Dep't of Navy*, 258 F. App'x 342, 343 (D.C. Cir. 2007) (per curiam) ("[N]o further action is required when a plaintiff voluntarily dismisses his case before the defendant serves an answer or motions for summary judgment.").[1]

Defendants attempt to evade the unequivocal effect of Rule 41(a) by insisting that Plaintiffs' case was silently consolidated with other Net Worth Sweep actions, such that Defendants' summary-judgment motions in those *other* cases applied *here*. In other words, Defendants claim that Plaintiffs' right to take a non-suit was extinguished by summary-judgment motions *never served* on Plaintiffs, by virtue of a Consolidation Order that itself was *never served* on Plaintiffs, and that as a result Plaintiffs' claims were disposed of by an order that *also* was *never served* on Plaintiffs. This position contradicts the explicit terms of the Consolidation Order on which Defendants purport to rely and black-letter law regarding voluntary

[1] Plaintiffs are filing this brief solely to respond to Defendants' motion, and do not in so doing reopen this case.

dismissals. If adopted, it would also constitute a manifest violation of Plaintiffs' due-process rights. The Court should reject Defendants' absurd theory of retroactive, *sub silentio* consolidation followed by retroactive, *sub silentio* dismissal.

***First*, Plaintiffs' case indisputably was not consolidated with any other Net Worth Sweep cases.** Under the plain terms of the Consolidation Order this Court entered in other Net Worth Sweep cases—but not here—consolidation was by no means automatic. To the contrary, even if Plaintiffs had pleaded derivative claims, which they did not, consolidation still could not be imposed without following several crucial procedures. First, the Court would have had to actually implement the consolidation: the Clerk of the Court would have had to "file a copy of th[e Consolidation] Order in the separate file for [Plaintiffs'] action," "mail a copy of th[e] Order to" Plaintiffs' counsel, and "make the appropriate entry in the docket for th[e consolidated] action." Order for Consolidation and Appointment of Interim Co-Lead Class Counsel at ¶ 6, *In re Fannie Mae/Freddie Mac*, No. 13-mc-1288 (D.D.C. Nov. 18, 2013), ECF No. 1 ("Consolidation Order"). None of those things occurred.

Moreover, even if they had, Plaintiffs would then have received an opportunity to seek "relief from th[e Consolidation] Order." *Id.* ¶ 7. But because the Court rightly did not take any of the required steps to consolidate Plaintiffs' case, Plaintiffs obviously received no such opportunity. It is thus impossible to square the plain terms of the Consolidation Order with Defendants' claim that "Plaintiffs' action was immediately upon filing consolidated." Mot. to Strike at 5.

Furthermore, the Consolidation Order also calls for "the assistance of counsel in calling to the attention of the Clerk of this Court the filing or transfer of any case which might properly be consolidated as part of this Consolidated Class Action." Consolidation Order at ¶ 3. So far as Plaintiffs are aware, despite the involvement of literally dozens of attorneys in the consolidated cases, at no point did anyone—whether representing a plaintiff or Defendants—do any such thing.

Defendants' present position also contradicts their own prior treatment of Plaintiffs' claims. Until now, Defendants appropriately treated this case as separate from the other Net Worth Sweep matters on the Court's docket.[2] For example, even after the Court dismissed the consolidated actions, Defendants sought an extension of time "to respond to the complaint in this action," explaining that they "intend[ed] to prepare a dispositive motion." Motion for Enlargement of Time at 1 (Oct. 14, 2014), ECF No. 8. This request (and the envisioned dispositive motion) would have been wholly unnecessary if the Consolidation Order applied, because that Order states that "defendants shall not be required to answer, move, or otherwise respond to any complaints filed in … any action subsequently filed and

[2] Nearly two weeks after Plaintiffs filed their complaint—and were supposedly "immediately … consolidated," as Defendants now contend—Defendants FHFA and its director Melvin L. Watt submitted a notice of supplemental authority pertaining to the consolidated actions. Notice, *In re Fannie Mae/Freddie Mac*, No. 13-1288 (D.D.C. Aug. 26, 2014), ECF No. 44. That filing was entered on the dockets of each of the individual actions subject to the Consolidation Order (*see, e.g.*, *Liao v. Lew*, No. 13-1094, ECF No. 36), but not on *this* docket, in proper recognition of the fact that this case was never consolidated. Nor did Defendants *serve* Plaintiffs with this notice, thus further confirming that Defendants never thought Plaintiffs had been consolidated into these cases.

consolidated."[3] Consolidation Order at ¶ 8. Although Defendants now claim that the Court's order disposing of the consolidated cases "also dismissed this action" (Mot. to Strike at 1), they previously—and rightly—recognized that order as nothing more than "a decision in related litigation." ECF No. 8 at 1.

In the separate Net Worth Sweep litigation pending before the Court of Federal Claims, Defendants similarly indicated that Plaintiffs' case had not been consolidated with others before this Court. Specifically, when Defendants filed their motion to stay one of the Net Worth Sweep cases pending before that court, they distinguished Plaintiffs' case here from the consolidated actions, and explained that they "ha[d] not yet responded to" Plaintiffs' complaint. Defs.' Motion to Stay Proceedings at 4 n.3, *Fairholme Funds, Inc. v. United States*, No. 13-465 (Fed. Cl. Oct. 28, 2014), ECF No. 103. This, of course, directly contradicts Defendants' present representation that their summary-judgment motions in the consolidated actions "applied to this action" (Mot. to Strike at 2)—a contradiction Defendants have not even attempted to explain. Nor could they do so coherently, because Plaintiffs' case was never consolidated, and so Defendants would have been obligated to respond to Plaintiffs' complaint had Plaintiffs not voluntarily dismissed it. Because Plaintiffs properly filed their notice of dismissal before any such filing by Defendants, that notice was valid and this case is closed.

***Second*, Plaintiffs' case cannot now be consolidated retroactively because this Court lacks jurisdiction over both it and the consolidated**

[3] Indeed, this is precisely the position Defendants now take. Mot. to Strike at 2.

cases. Conceding that the Court had not previously "formally consolidated Plaintiffs' action," Defendants now ask the Court to declare a retroactive consolidation. Mot. to Strike at 1, 5. But there is nothing for this Court to consolidate, as Plaintiffs are no longer before the Court. It is black-letter law that a voluntary dismissal under Rule 41(a)(1) "takes effect automatically: the trial judge has no role to play at all." *Randall*, 820 F.2d at 1320. Here, Defendants concede that this case was never consolidated before Plaintiffs filed their notice of dismissal. Mot. to Strike at 5. Thus, the plain terms of Rule 41(a) govern, and the Court's docket is correct in declaring this case "CLOSED."

What Defendants really seek is to reopen this closed matter, which would require them to seek relief under Rule 60. Defendants have made no such argument, but even if they had, Rule 60 relief is categorically unavailable to them here. "[N]otices of dismissal filed in conformance with the explicit requirements of Rule 41(a)(1)(i) are not subject to vacatur" on a defense motion. *Thorp v. Scarne*, 599 F.2d 1169, 1176 (2d Cir. 1979); *see also, e.g.*, *Netwig v. Georgia Pac. Corp.*, 375 F.3d 1009, 1011 (10th Cir. 2004) (holding that district court "lacked jurisdiction to reinstate" a case "over plaintiff's objection" where plaintiff had voluntarily dismissed without prejudice).[4]

[4] *Cf. Marex Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 2 F.3d 544, 547–48 (4th Cir. 1993) ("[T]he district court had no discretion to allow Titanic Ventures to intervene in the defunct action filed by Marex."). Notably, *Randall* distinguished *Thorp* and permitted vacatur because Rule 60 relief was sought "on the original *plaintiff's* motion." 820 F.2d at 1320 (emphasis added). That, of course, is not the case here. Furthermore, *Randall* permitted Rule 60 relief explicitly because the second voluntary dismissal in that case "operated as an adjudication on

Moreover, even if Rule 60 *could* somehow override Plaintiffs' unilateral right to dismiss, Defendants still could not succeed. Vacatur under Rule 60 is improper where it would be "an empty exercise or a futile gesture." *Murray v. District of Columbia*, 52 F.3d 353, 355 (D.C. Cir. 1995). Here, the plaintiffs in the other Net Worth Sweep cases have all filed notices of appeal. *See, e.g.*, Notice of Appeal, *In re Fannie Mae/Freddie Mac*, No. 13-1288 (D.D.C. Oct. 15, 2014) (ECF No. 49). "The filing of a notice of appeal … 'confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal.'" *United States v. DeFries*, 129 F.3d 1293, 1302 (D.C. Cir. 1997) (per curiam) (citation omitted). Thus, even if the Court accepted Defendants' argument, there is simply nothing to consolidate Plaintiffs' case *into*, since the Court no longer has jurisdiction over the consolidated cases. Exhuming Plaintiffs' suit would be entirely pointless, and could not possibly accomplish Defendants' desired result.

***Third*, adopting Defendants' position would plainly violate due process.** For the reasons above, the outcome Defendants seek is factually unsupported and legally impossible. Moreover, retroactive consolidation—to say nothing of retroactive dismissal—would deprive Plaintiffs of their fundamental due-process right to "notice and opportunity to be heard." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

(continued…)
the merits" or a "final judgment" for purposes of Rule 60. *Id.*; Fed. R. Civ. P. 41(a)(1)(B); *see also, e.g.*, *Warfield v. AlliedSignal TBS Holdings, Inc.*, 267 F.3d 538, 541–42 (6th Cir. 2001). *Defendants* cannot use Rule 60 to vacate a voluntary dismissal over Plaintiffs' objection, much less a first voluntary dismissal without prejudice. And in any event, Defendants have never invoked Rule 60.

Both *Hansberry* and its descendant, *Martin v. Wilks*, 490 U.S. 755 (1989), demonstrate why the Consolidation Order required a copy of that Order to be served on future plaintiffs, and such plaintiffs to be given an opportunity to object to its application: such service was necessary to bind any future plaintiff as a party to the rulings in the consolidated actions. *See Hansberry*, 311 U.S. at 40 ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party *by service of process*." (emphasis added)); *Martin*, 490 U.S. at 765 ("Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.").[5] Having received neither notice nor an opportunity to be heard in the consolidated matter, Plaintiffs cannot, consistent with due process, be bound by the decision in that matter. Indeed, this is precisely why the rule governing consolidation requires cases to be actively pending "before the court" in order to be consolidated (Fed. R. Civ. P. 42(a)): consolidating yet-to-be-filed cases, without any opportunity for parties to those cases to seek relief from consolidation, would fly in the face of the due-process principles outlined in *Hansberry* and *Martin*. *See also, e.g.*, *Jaars v. Gonzales*, 148 F. App'x 310, 319–20 (6th Cir. 2005) (rejecting "retroactive

[5] *See also Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 17 (1907) ("'[N]o one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard*.'") (quoting *Galpin v. Page*, 85 U.S. 350, 368-69 (1873)).

consolidation" and explaining that "when a person has no hearing or opportunity to be heard whatsoever, the process is automatically inadequate").

Here, retroactively consolidating Plaintiffs' case would leave Plaintiffs without any opportunity to be heard on a number of issues. As an initial matter, it would deprive Plaintiffs of their right, set forth in the Consolidation Order, to make "an application for relief from [that] Order."[6] Consolidation Order ¶ 7. Moreover, if the Court had rejected their application, Plaintiffs would have had the option, under Rule 15(a), to amend their complaint so as to dismiss the supposedly derivative claims, at which point there obviously would have been no basis for consolidating Plaintiffs' case. Likewise, even if Plaintiffs had proceeded as part of the consolidated action, the Consolidation Order would have given them the right to seek "permi[ssion] by the Court" to proceed on their own complaint (*id.* ¶ 8), and at the very least they could have submitted briefing on the merits of their unique

[6] Plaintiffs would have had several bases for seeking relief from consolidation. Plaintiffs specifically pleaded direct—not derivative—claims based on the "unique harm" they suffered as a result of the expropriation of the economic value of their common shares by the companies' controlling shareholder (Treasury) and their conservator (FHFA and its director). Complaint at ¶¶ 137, 153 (Aug. 15, 2014), ECF No. 1. Under well-established state-law principles, Defendants' conduct can give rise to direct or derivative claims. *See Gentile v. Rossette*, 906 A.2d 91, 99–100 (Del. 2006); *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 655–61 (Del. Ch. 2013); *In re Nine Sys. Corp. S'holders Litig.*, 2014 WL 4383127, at *21–32 (Del. Ch. Sept. 4, 2014). Plaintiffs pleaded only direct claims. Under such circumstances, consolidating Plaintiffs' claims with purely derivative claims would not have been justified. In any event, the nature of shareholder claims challenging the Net Worth Sweeps is, at minimum, a debatable point of law that was addressed in a *different* case. Plaintiffs' complaint included claims—for example, a books-and-records claim—that were unique and unquestionably not derivative. There is no basis for simply assuming, as Defendants apparently do, that Plaintiffs could not have been entitled to relief from consolidation.

claims (challenging, for example, the conversion of Defendants' preferred stock into a novel form of super-common stock).[7] Defendants, however, would have the Court deprive Plaintiffs of an opportunity to be heard on *any* of these issues, instead treating dismissal as a foregone conclusion.[8]

Defendants' argument would also deprive Plaintiffs of due process with respect to their appellate rights. If Plaintiffs' claims truly had been adjudicated by the Court's order in the consolidated cases, Plaintiffs would have had 60 days to file a notice of appeal from that order. Fed. R. App. P. 4(a)(1)(B). Defendants, however, waited until *65* days after that order to file a brief for the first time suggesting that the order also disposed of Plaintiffs' claims, which would thus leave Plaintiffs without any avenue to secure relief from that binding judgment. Alternatively,

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[7] Furthermore, the Consolidation Order specifically states that it was "entered without prejudice to the rights of any party to apply for severance of any claim or action, for good cause shown"—yet another opportunity that Defendants would deny Plaintiffs. *Id.* ¶ 8.

[8] In a footnote at the end of their brief, Defendants attempt to draw a similarity between this case and the "Freddie Derivative Action," which asserted derivative claims. Mot. to Strike at 12 n.6. But the cases could not be more different, and indeed illustrate why Defendants' current motion is without factual or legal basis. Plaintiffs in the Freddie Derivative Action had already filed a complaint that had been consolidated—in fact, those plaintiffs had joined in requesting the Consolidation Order. *See, e.g.*, Joint Status Report, *Cacciapelle v. Fed. Nat'l Mortgage Ass'n* (D.D.C. Nov. 6, 2013), ECF No. 33. Moreover, those plaintiffs filed the Freddie Derivative Action in the Master Docket for the consolidated action—*i.e.*, as a part of the consolidated case. The procedures spelled out in the Consolidation Order were thus neither necessary nor warranted. Indeed, they were moot, since the plaintiffs filed the Freddie Derivative Action in the consolidated case. The Freddie Derivative Action thus implicates none of the issues here. That case was in fact consolidated at the time, and the parties and the Court treated it as such. The Court had jurisdiction over it at the time. Neither its consolidation at the time nor its subsequent dismissal violated due process.

because the Court's order did not dispose of Plaintiffs' books-and-records claim (which is unsurprising, since the Court never consolidated Plaintiffs' case), treating Plaintiffs as consolidated would mean that there is not yet a final judgment not only in Plaintiffs' case, but in *any* of the consolidated cases.[9] This would have significant implications, as it would mean that the D.C. Circuit lacks jurisdiction over all of the appeals in the other cases, and that Defendants have defaulted on Plaintiffs' books-and-records claim (since they never filed a responsive pleading in this case).

If Defendants respond to this last point by contending that Plaintiffs could appeal this Court's order on their motion, they will have revealed that their consolidation argument is just a fig leaf, and that their true objective is to alchemize a dismissal without prejudice into a dismissal with prejudice.[10] While such a result would have no effect on the situation before this Court, given that Plaintiffs have already dismissed their claims, it would be worth its weight in gold to Defendants, who would then advise the Court of Federal Claims to ignore Plaintiffs' recent amicus brief opposing a stay of a different Net Worth Sweep case pending in that court. In this way, what Defendants really seek is an advisory opinion from this Court that they can then rely on for *res judicata* effect on Plaintiffs' claims in an entirely different court.

The Court should deny Defendants' motion.

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[9] Indeed, Defendants concede that the Court did not rule on Plaintiffs' books-and-records claim. Mot. to Strike at 10 n.3.

[10] This is obviously improper. *See, e.g., In re Wolf*, 842 F.2d 464, 466 (D.C. Cir. 1988) (granting petition for writ of mandamus where district court converted voluntary dismissal without prejudice into a dismissal with prejudice).

Respectfully submitted,

/s/ James E. Gauch

Thomas F. Cullen (D.C. Bar No. 224733)
Michael A. Carvin (D.C. Bar No. 366784)
James E. Gauch (D.C. Bar No. 447839)
Paul V. Lettow (D.C. Bar No. 502440)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: 202-879-3939
Fax: 202-626-1700
jegauch@jonesday.com

Counsel for Plaintiffs

December 22, 2014