

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

No. 14-14526

---

D.C. Docket No. 1:12-cv-20695-MGC

HUGH F. CULVERHOUSE,  
individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

versus

PAULSON & CO. INC.,  
PAULSON ADVISERS LLC,

Defendants-Appellees.

---

Appeal from the United States District Court  
for the Southern District of Florida

---

(February 17, 2016)

Before WILLIAM PRYOR, JULIE CARNES, and SILER,\* Circuit Judges.

WILLIAM PRYOR, Circuit Judge:

---

\* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

We certified the following question of state law to the Delaware Supreme Court:

Does the diminution in the value of a limited liability company, which serves as a feeder fund in a limited partnership, provide the basis for an investor's direct suit against the general partners when the company and the partnership allocate losses to investors' individual capital accounts and do not issue transferable shares and losses are shared by investors in proportion to their investments?

*Culverhouse v. Paulson & Co.*, 791 F.3d 1278, 1281 (11th Cir. 2015). The Delaware Supreme Court answered our question in the negative. *See Culverhouse v. Paulson & Co.*, No. 349, 2015, slip op. 1, 2 (Del. Jan. 26, 2016). Based on its answer, we now affirm the dismissal of the complaint.

## **I. BACKGROUND**

Hugh Culverhouse invested in HedgeForum Paulson Advantage Plus, LLC, a "feeder" fund that invested in Paulson Advantage Plus, L.P. When the latter lost \$460 million on a bad investment, Culverhouse sued its general partners for breach of fiduciary duty, gross negligence, and unjust enrichment. Culverhouse alleged that his claims are "direct" under Delaware law. The district court disagreed and concluded that his claims are "derivative." The district court ruled that Culverhouse lacked "standing" under Article III of the Constitution and dismissed his complaint for lack of "subject matter jurisdiction." The district court also denied Culverhouse's request for jurisdictional discovery and dismissed his complaint without leave to amend.

On appeal, we concluded that the question whether Culverhouse's claims are direct or derivative is "unsettled" in Delaware. *Culverhouse*, 791 F.3d at 1281. We certified the question to the Delaware Supreme Court, which held that Culverhouse's claims are derivative. *Culverhouse*, slip op. at 7–8. We must now resolve Culverhouse's appeal.

## II. STANDARDS OF REVIEW

We review the dismissal of a complaint *de novo*. See *Lord Abbett Mun. Income Fund, Inc. v. Tyson*, 671 F.3d 1203, 1206 (11th Cir. 2012). We review the denial of jurisdictional discovery and the denial of leave to amend for abuse of discretion. See *Reese v. Herbert*, 527 F.3d 1253, 1262 n.13 (11th Cir. 2008).

## III. DISCUSSION

The district court correctly dismissed Culverhouse's complaint. Now that the Delaware Supreme Court has answered our certified question, we know that Culverhouse's claims are derivative, not direct. His derivative claims fail because Culverhouse was never a partner of Paulson Advantage Plus, L.P. See Del. Code Ann. tit. 6, § 17-1002.

Although the district court correctly concluded that Culverhouse's claims are derivative, it incorrectly described this defect as jurisdictional. In his complaint, Culverhouse alleged that his claims are direct under Delaware law. Because his theory was "not 'immaterial and made solely for the purpose of obtaining

jurisdiction’ or ‘wholly insubstantial and frivolous,’” *Black v. Wigington*, No. 15-10848, slip op. 1, 20 (11th Cir. Jan. 22, 2016) (quoting *Bell v. Hood*, 327 U.S. 678, 682–83 (1946)), the district court should have accepted it as correct for purposes of jurisdiction, see *Mr. Furniture Warehouse, Inc. v. Barclays Am./Commercial Inc.*, 919 F.2d 1517, 1520 n.2 (11th Cir. 1990). “[I]n reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims.” *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) (citing *Warth v. Seldin*, 422 U.S. 490, 502 (1975)). When the district court later concluded that Culverhouse was wrong and that his claims were derivative, its ruling should have been on the merits. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014); *Bond v. United States*, 131 S. Ct. 2355, 2362 (2011). That is, the district court should have dismissed Culverhouse’s complaint for failure to state a claim, Fed. R. Civ. P. 12(b)(6), not for lack of subject-matter jurisdiction, Fed. R. Civ. P. 12(b)(1). See *Williamson v. Tucker*, 645 F.2d 404, 415–16 (5th Cir. 1981).

Nevertheless, this labeling error is harmless because Culverhouse’s complaint should have been dismissed. See *McCallum v. City of Athens*, 976 F.2d 649, 650 & n.1 (11th Cir. 1992). Because the complaint fails to state a claim, Culverhouse was also not entitled to jurisdictional discovery. See *Chatham Condo.*

*Ass'ns v. Century Vill., Inc.*, 597 F.2d 1002, 1011–12 (5th Cir. 1979). And amending his complaint would have been futile. *See Sibley v. Lando*, 437 F.3d 1067, 1073 (11th Cir. 2005).

#### **IV. CONCLUSION**

We **AFFIRM** the dismissal of Culverhouse's complaint.