IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

TIMOTHY J. PAGLIARA, Plaintiff, v. FEDERAL HOME LOAN MORTGAGE CORPORATION, Defendant.	No. 1:16-CV-00337 (JCC/JFA)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY THE CASE PENDING A DECISION ON TRANSFER TO MDL PROCEEDINGS OR, IN THE ALTERNATIVE, TO SUBSTITUTE THE FEDERAL HOUSING FINANCE AGENCY AS PLAINTIFF

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INTRODUCTION

Defendant Federal Home Loan Mortgage Corporation ("Freddie Mac") and its Conservator, the Federal Housing Finance Agency ("FHFA"), move to stay this suit pending a ruling on FHFA's motion to transfer the suit to a proposed multidistrict litigation ("MDL") proceeding involving several other related cases. Should this Court deny the requested stay, however, Freddie Mac and FHFA respectfully request that FHFA be immediately substituted for the plaintiff because, pursuant to federal law, FHFA has succeeded to all the rights of Freddie Mac's shareholders. If the stay is granted, upon lifting of the stay, FHFA will renew its motion for immediate substitution of FHFA for the plaintiff in the district court in which the action will proceed.

STATEMENT OF FACTS

A. Freddie Mac, Fannie Mae, and the Housing and Economic Recovery Act of 2008

Freddie Mac, along with the Federal National Mortgage Association ("Fannie Mae") (together, the "Enterprises"), is a federally-created enterprise that facilitates liquidity and efficiency in the housing market by purchasing loans from mortgage lenders, thereby freeing up capital for additional mortgage lending. *See* Compl. ¶¶ 23-26. 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. ¶ 51. HERA created FHFA, an independent federal agency, to supervise and regulate Freddie Mac, Fannie Mae, and certain other government-sponsored enterprises. 12 U.S.C. § 4501 *et seq.*; *see also* Compl. ¶ 51. HERA also granted FHFA's Director authority to place Freddie Mac and Fannie Mae in conservatorship or receivership in specific circumstances. *See* 12 U.S.C. § 4617(a); Compl. ¶ 51-52.

B. FHFA is Appointed Statutory Conservator of Freddie Mac and Fannie Mae, Succeeding by Operation of Law to All Rights of the Enterprises and Their Shareholders

In September 2008, shortly after enactment of HERA and at a time when the national housing market was deteriorating, the Director of FHFA placed both of the Enterprises into conservatorships, "for the purpose of reorganizing, rehabilitating, or winding up the[ir] affairs." 12 U.S.C. § 4617(a)(2); *see also* Compl. ¶¶ 53-56. Today, both Enterprises remain in conservatorships.

As Conservator, FHFA, "by operation of law, immediately succeed[ed] to . . . all rights, titles, powers, and privileges of the regulated entity, 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). The Conservator is responsible for the conduct of all aspects of each Enterprise's business and affairs, and HERA authorizes it to take such action as may be "necessary to put the regulated entity in a sound and solvent condition" and "appropriate to carry on the business of the regulated entity." *Id.* § 4617(b)(2)(D). FHFA as Conservator thus enjoys full authority to "operate the regulated entity" and "conduct all business of the regulated entity." *Id.* § 4617(b)(2)(B)(i). HERA bars courts, with limited and inapplicable exceptions, from granting any relief that would "restrain or affect" conduct undertaken within the Conservator's expansive powers and functions. *Id*. § 4617(f).

Shortly after becoming Conservator, FHFA entered into agreements with Treasury, commonly known as the Senior Preferred Stock Purchase Agreements ("PSPAs"). *See* Compl. ¶¶ 71-80. Under the PSPAs, Treasury agreed to provide hundreds of billions of dollars for the Enterprises' continued operations. In exchange, the PSPAs granted Treasury a comprehensive package of rights, including: (1) an initial senior liquidation preference of $1 billion for each Enterprise; (2) warrants to acquire 79.9% of the Enterprises' common stock for a nominal

payment; (3) payment from each Enterprise of a mandatory dividend in the amount of 10% per year of the total amount of funds Treasury provided; and (4) a periodic commitment fee ("PCF") "intended to fully compensate" taxpayers for the continuing Treasury commitment of hundreds of billions of dollars of taxpayer funds.

Both Fannie Mae and Freddie Mac were required to take their first Treasury draws shortly after their placement in conservatorships, and to date, they have drawn more than $187 billion in funds from Treasury to cure negative net worth positions and avoid mandatory receivership under HERA. Both Enterprises have also paid dividends to Treasury pursuant to the PSPAs.

On August 17, 2012, FHFA and Treasury executed a third amendment to the PSPAs ("the Third Amendment") to (1) replace the annual, fixed-rate 10% cash dividend with a variable quarterly dividend equal to the net worth of the Enterprises, minus a prescribed capital reserve, and (2) waive the PCF for so long as the variable dividend is in place. *See* Compl. ¶¶ 9-10. Thus, under the Third Amendment, Treasury agreed to accept the risk that the Enterprises' profits in any given year might be less than 10% of Treasury's liquidation preference, currently $189 billion (making the 10% dividend equal to $18.9 billion per year), plus the amount of the PCF, which was to fully compensate the taxpayers for Treasury's ongoing commitment to invest additional funds in the Enterprises should their net worth become negative.

C. Pagliara Files Two Lawsuits Demanding Inspection of Fannie Mae's and Freddie Mac's Books and Records, and Institutes this Litigation

On January 19, 2016, Pagliara's counsel sent demands to both Freddie Mac and Fannie Mae seeking to inspect their books and records in order to evaluate claims relating to the Third Amendment. These requests were denied. Pagliara then filed this suit seeking to compel access to Freddie Mac's records. He filed a similar suit in Delaware Chancery Court, seeking access to

Fannie Mae's records. *See Pagliara v. Fed. Nat'l Mortg. Ass'n*, No. 12105-CVM (Del. Ch. filed Mar. 14, 2016).

On March 25, 2016, Freddie Mac removed this lawsuit to this Court on the basis of federal question jurisdiction. *See* Notice of Removal, ECF No. 1. That same day, Fannie Mae removed Pagliara's related suit for access to documents from the Delaware Chancery Court to the United States District Court for the District of Delaware. *See* Notice of Removal Pursuant to 28 U.S.C. §§ 1331, 1441(a), 1446, *Pagliara v. Fed. Nat'l Mortg. Ass'n*, No. 1:16-cv-00193 (D. Del. Mar. 25, 2016).

D. FHFA's Pending Request That the JPML Transfer This and Other Third Amendment Cases for Coordinated Pretrial Proceedings

Freddie Mac and Fannie Mae shareholders have filed multiple actions in federal court to challenge the Third Amendment. Plaintiff's complaint here and his copycat suit filed in Delaware are based on the same, central factual allegations and raise common and dispositive legal issues, including jurisdictional issues that must be resolved at the outset of these cases. On March 15, 2016, FHFA filed a motion with the U.S. Judicial Panel on Multidistrict Litigation ("JPML") to transfer four cases to the U.S. District Court for the District of Columbia for consolidated or coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407.[1] On March 28, 2016, FHFA further advised the JPML that the two pending *Pagliara* cases (this and the one pending in the District of Delaware) are related to—and should be transferred to—that MDL proceeding. *See* Notice of Filing With the Judicial Panel on Multidistrict Litig. (filed Mar. 29, 2016) [Dkt. No. 6].

[1] *See Saxton v. FHFA*, No. 1:15-cv-00047 (N.D. Iowa filed May 28, 2015); *Jacobs v. FHFA*, No. 1:15-cv-00708 (D. Del. filed Aug. 17, 2015); *Robinson v. FHFA*, No. 7:15-cv-00109 (E.D. Ky. filed Oct. 23, 2015); and *Roberts v. FHFA*, No. 1:16-CV-02107 (N.D. Ill. filed Feb. 10, 2016).

ARGUMENT

I. THE COURT SHOULD STAY THIS ACTION PENDING ISSUANCE OF THE JPML'S RULING WHETHER TO TRANSFER THIS CASE TO AN MDL PROCEEDING

Defendant and FHFA[2] respectfully request that the Court stay all proceedings in this suit pending the JPML's decision whether to transfer the case for coordination or consolidation with other related cases for pretrial proceedings. Granting a stay is well within the Court's "inherent power . . . to ensure both the 'efficient management of [its] docket'" as well as "economy of time and effort for itself, for counsel, and for litigants." *Hawley v. Johnson & Johnson*, No. 3:11-cv-195, 2011 WL 7946243 (E.D. Va. Apr. 29, 2011) (quoting *Williford v. Armstrong World Indus.*, 715 F.2d 124, 127 (4th Cir. 1983); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). As the JPML has explained, the purpose of a MDL proceeding is to "eliminate duplicative discovery, prevent inconsistent or repetitive pretrial rulings[,] and conserve the resources of the parties, their counsel, and the judiciary." *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 990 F. Supp. 834, 836 (J.P.M.L. 1997).

To safeguard these benefits of coordinated pretrial proceedings, courts commonly stay lawsuits pending the JPML's decision whether to grant transfer.[3] Indeed, the District of

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[2] Though currently a non-party, FHFA is entitled to join in this motion to stay or, in the alternative, to substitute. *See, e.g.*, *Robertshaw v. Pudles*, No. CIV.A. 11-7353, 2014 WL 1976890, at *3 (E.D. Pa. May 15, 2014) (granting a non-party's motion to stay pending appeal); *Cason v. Anderson*, No. CV 114-186, 2014 WL 7272545, at *1-2 (S.D. Ga. Dec. 17, 2014) (considering a non-party's motion to stay though plaintiffs argued that a non-party was not entitled to bring such a motion); *Chuhar v. AMCO Ins. Co.*, No. 2:09-CV-332, 2012 WL 589369, at *8 (N.D. Ind. Feb. 22, 2012) (granting, in part, a non-party's motion to substitute as plaintiff).

[3] *See, e.g.*, *Virginia ex rel. Integra Rec LLC v. Countrywide Sec. Corp.*, No. 3:14CV 706, 2015 WL 222312, at *3 (E.D. Va. Jan. 14, 2015) (staying case "so that the JPML can make its determination on whether systemic judicial economy will be served by inclusion, on a tag-along basis," of the lawsuit in a pending MDL proceeding); *see also Hawley*, 2011 WL 7946243, at *1 (staying suit pending JPML's decision on transfer).

Delaware has already stayed one of the related cases pending the JPML's decision on transfer. *See* Order, *Jacobs v. FHFA*, Civ. No. 15-708-GMS (D. Del. March 30, 2016 [Dkt. No. 44].

When deciding a motion to stay, this Court considers three factors: "(1) whether judicial resources will be saved and duplicative litigation avoided if the case is consolidated in an MDL; (2) prejudice to the party opposing the stay; and[,] (3) the moving party's hardship and inequity if the action is not stayed." *Integra Rec LLC*, 2015 WL 222312, at *3 (alteration in original); *see also Hawley*, 2011 WL 7946243, at *1 (court faced with motion to stay pending decision on MDL transfer must "weigh competing interests and maintain an even balance" (citation omitted)). Each of these three factors cut sharply in favor of staying this action pending the Panel's decision on FHFA's Motion to Transfer.

A. Staying this Action Will Save Judicial Resources and Avoid Duplicative Litigation

This action as well as Pagliara's Delaware case present substantially similar pretrial issues, and will require the Court to interpret the same comprehensive federal statutory scheme (and the same provisions of that scheme) which are at issue in the other Enterprise shareholder litigations concerning the Third Amendment. Staying this action will allow a potential transferee court to decide any jurisdictional or pretrial matters in an efficient and consistent fashion.

This action shares with the other proposed MDL cases common issues with respect to a shareholder's rights, while Freddie Mac (and Fannie Mae) are in conservatorships. Here, Plaintiff seeks to inspect the books and records of Freddie Mac, inspection rights afforded only to shareholders. Similarly, the plaintiffs in the other proposed MDL cases attempt to assert shareholder rights and seek to void the Third Amendment and ask for rescission and restitution of the monies the Enterprises paid to Treasury under the Third Amendment. In all cases, the plaintiffs purport to assert "rights . . . of [a] stockholder," but under Section 4617(b)(2)(A), "all

[such] rights" belong to the Conservator, leaving Plaintiff here, as well as the Third Amendment cases, with no claim. And, of course, the two cases brought by Pagliara (this and the Delaware case) present very similar issues of how HERA impacts a shareholder's right to inspect the records of Freddie Mac (and Fannie Mae) during conservatorship.

Under these circumstances, "[r]equiring the parties to engage in duplicative litigation before a determination is made by the Judicial Panel on Multidistrict Litigation would be an inefficient use of the time and resources of the parties and this Court." *Hawley*, 2011 WL 7946243, at *1. The Court need not expend resources to familiarize itself "with the intricacies of a case that may be coordinated or consoli[dated] for pretrial purposes in another court." *See Paul v. Aviva Life & Annuity Co.*, No. 09-1038, 2009 WL 2244766, at *1 (N.D. Ill. July 27, 2009) (citation omitted). A stay would ensure that the court does not expend "judicial resources by addressing various pre-trial motions that could have been resolved in the transferee court." *See id.* Because this motion to stay is filed in the early stages of litigation, this factor weighs strongly in favor of a stay.

B. Staying this Action Will Not Cause Plaintiff Undue Prejudice

A stay will not cause Plaintiff undue prejudice. The stay will likely be very brief: the motion to transfer was filed on March 15, 2016, the notice of this related action was filed on March 28, 2016, and the JPML endeavors to rule on motions to transfer "in relatively short order." *Paul*, 2009 WL 2244766, at *1. Because the Complaint focuses on conduct related to the Third Amendment executed in August 2012, moreover, there is no urgency to the relief Plaintiff seeks. *See, e.g.*, Compl. ¶¶ 92-99, 107, 114. Indeed the claims Plaintiff purports to investigate related to the Third Amendment are already the subject of extensive litigation, including a D.C. Circuit appeal. *See, e.g.*, *Perry v. Lew*, No. 14-5243 (D.C. Cir. filed Oct. 8, 2014). Nor will staying this action give Freddie Mac any tactical advantage. The only impact of

the short stay requested will be to allow the JPML to determine whether this case should be coordinated or consolidated for pretrial purposes with the other cases around the country relating to the Third Amendment in a MDL proceeding.

This action is in the earliest stages of litigation. The Complaint was filed on March 14, 2016, and no scheduling order has issued. *See Am. Tech. Servs., Inc. v. Universal Travel Plan, Inc.*, No. Civ. A1:04CV802(JCC), 2005 WL 2218437, at *3 (E.D. Va. Aug. 8, 2005) ("Because this case is still in the very early stages of litigation, there is little prejudice to either side if the Court stays the case . . . .").

C. Denying the Requested Stay Will Cause Defendant Hardship and Inequity

Finally, denying the requested stay will harm Defendant and FHFA. They will risk duplicative litigation and the real possibility of inconsistent results on preliminary motions. As this Court noted in *Hawley*, denying a stay pending the JPML's ruling would be an inefficient use of the parties' time and resources. *See Hawley*, 2011 WL 7946243, at *1.

II. IN THE ALTERNATIVE, THE COURT SHOULD SUBSTITUTE FREDDIE MAC'S CONSERVATOR, FHFA, IN PLACE OF THE CURRENT SHAREHOLDER PLAINTIFF

Should this Court deny the requested stay, Freddie Mac and FHFA respectfully move for an Order substituting FHFA for the current Plaintiff in this litigation. As explained below, HERA unambiguously provides that FHFA alone possesses all rights, titles, powers, and privileges of Freddie Mac's shareholders, and accordingly only FHFA has standing to bring the shareholder complaint here.

A. HERA's Plain and Unambiguous Language Mandates Substitution of the Conservator as Plaintiff

HERA's succession provision is far-reaching and clear. During conservatorship, the Conservator "succeed[s] to . . . *all* rights, titles, powers, and privileges . . . of any stockholder [of

Freddie Mac]." 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added). By this provision, "Congress . . . transferred everything it could to the conservator." *Kellmer v. Raines*, 674 F.3d 848, 851 (D.C. Cir. 2012) (quoting *Pareto v. FDIC*, 139 F.3d 696, 700 (9th Cir. 1998)) (alteration omitted). "[T]he plain meaning of the statute is that *all* rights previously held by Freddie Mac's stockholders . . . now belong exclusively to the FHFA." *In re Fed. Home Loan Mortg. Corp. Deriv. Litig.*, 643 F. Supp. 2d 790, 795 (E.D. Va. 2009), *aff'd sub nom La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. 2011) (emphasis in original). HERA's succession provision thus "clearly demonstrates Congressional intent to transfer as much control of [the Enterprises] as possible to the FHFA," *id*. at 797, and serves to "assure the expeditious and orderly protection of all who are interested in the [entity under conservatorship] by placing the pursuit of its rights, protection of its assets, and payment of its liabilities firmly in the hands of a single, congressionally designated agency." *Pareto*, 139 F.3d at 700 (interpreting a materially-identical provision in the Financial Institutes Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101–73, 103 Stat. 183).

Plaintiff's sole claim in this case is a demand for inspection of Freddie Mac's books and records pursuant to Virginia Code §§ 13.1-771, 13.1-773. *See* Compl. ¶¶ 19, 34. This claim plainly seeks to enforce a shareholder "right[], title[], power[], and privilege[]." 12 U.S.C. § 4617(b)(2)(A)(i). Although Freddie Mac disputes its applicability here, these statutory provisions codify "the rules of the common law with respect to the rights of a *stockholder* to inspect the books and records of a corporation." *Retail Prop. Inv'rs, Inc. v. Skeens*, 471 S.E.2d 181, 183 (Va. 1996) (emphasis added). And under Section 13.1-771, only a shareholder of record for at least six months has the right, provided they satisfy the requirements of that statute, to inspect the books and records. *See* § 13.1-771(D)(1); *see Foti v. W. Sizzlin Corp.*, 64 Va. Cir.

64, 64 (2004) (Sections 13.1-771 through 13.1-773 "outline the requirements for *shareholders* to inspect and copy the records of a corporation." (emphasis added)); *Firestone v. Wiley*, 485 F. Supp. 2d 694, 705 (E.D. Va. 2007) ("[O]nce plaintiff . . . turned in her MTC stock, and ceased to be a shareholder, she had no inspection right.").

Because FHFA has succeeded to all "rights, titles, powers, and privileges" of Freddie Mac's stockholders—including Plaintiff—during conservatorship, the Conservator has succeeded to any right Plaintiff may have to demand inspection. "HERA, by its unambiguous text, removes the power" of Freddie Mac's shareholders to exercise their rights—including any inspection rights—and "gives it to FHFA." *See Perry Capital*, 70 F. Supp. 3d at 231; *see also Pareto*, 139 F.3d at 700 ("Congress has transferred . . . to the [Conservator] . . . a stockholder's right, power, or privilege to demand corporate action.").

Courts have consistently applied HERA's unequivocal succession language and granted the Conservator's motions to substitute where the right sought to be enforced "is fairly described as a 'right[]' or 'power[]' of owning stock." *Kellmer*, 674 F.3d at 850-51 (affirming grant of FHFA's motion to substitute for derivative shareholder plaintiff); *see also, e.g., In re Fed. Home Loan Mortg. Corp.*, 643 F. Supp. 2d at 795 ("As the FHFA argues, the plain meaning of the statute is that *all* rights previously held by Freddie Mac's stockholders . . . now belong exclusively to the FHFA."); *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, ERISA Litig.*, 629 F. Supp. 2d 1, 4 (D.D.C. 2009) ("HERA's plain language compels the conclusion that, as Conservator for Fannie Mae, only the FHFA has standing to pursue the claims asserted in these actions, and therefore its motion to substitute . . . must be granted immediately."); *Esther Sadowsky Testamentary Tr. v. Syron*, 639 F. Supp. 2d 347, 350 (S.D.N.Y. 2009) ("[U]nder the plain language of HERA, 'all rights, titles, powers, and privileges' of Freddie Mac's

shareholders are now vested in the FHFA. . . . FHFA is therefore the true party at interest in this case and should be substituted.").

B. The Conservator Has Succeeded to "All" Shareholder Rights, Not Just the Right to Bring Derivative Claims

Plaintiff contends that the Conservator cannot have succeeded to his claim because § 4617(b)(2)(A)(i) "prevents a shareholder only from bringing derivative claims on behalf of the corporation during the conservatorship, and even then, only in certain situations." Compl. ¶ 128. Plaintiff contends that § 4617(b)(2)(A)(i) "is no bar to direct claims—like this lawsuit—seeking to assert the shareholders's individual rights." *Id.* Plaintiff's argument is belied by HERA's plain text transferring "all" shareholder rights, and also mischaracterizes the nature of the right he seeks to exercise by this litigation.[4]

First, the distinction between direct and derivative claims is beside the point in this context. Section § 13.1-771(A) affords shareholders "the right[] . . . to inspect the books and records of a corporation." *Bank of Giles Cty. v. Mason*, 98 S.E.2d 905, 908 (Va. 1957). Putting aside a shareholder's potential direct or derivative claims, it is this right to inspect itself to which the Conservator has succeeded. Accordingly, the Conservator is the true party in interest in any litigation seeking to enforce that right. *See, e.g., In re Fed. Home Loan Mortg. Corp.*, 643 F. Supp. 2d at 796 (substituting FHFA for shareholder plaintiff where "[t]he plain meaning [of the

[4] Plaintiff's letter demanding access to Freddie Mac's books and records also asserts that HERA's succession provision does not transfer shareholder rights to the Conservator where "FHFA and/or Treasury have a conflict of interest." Compl., Ex. A at 7. To the extent Plaintiff is arguing that HERA's succession provisions do not compel substitution of FHFA here because of a supposed "conflict of interest," Plaintiff is incorrect. HERA contains no "conflict of interest" exception. As the court in *Perry Capital* explained in considering claims brought by Enterprise shareholders challenging the Third Amendment, adoption of a conflict of interest exception to Section 4617(b)(2)(A)(i) "[w]ould [c]ontravene the [p]lain [l]anguage of the [s]tatute" which provides "no [conflict-of-interest] qualification for its bar." 70 F. Supp. 3d at 230-31.

statute] is that federal receivers and conservators of covered entities . . . succeed to all rights of stockholders"). Plaintiff's assertion that courts have held Section 4617(b)(2)(A)(i) of HERA to "prevent[] a shareholder only from bringing derivative claims" is thus meaningless to the Court's resolution of the present motion to substitute. Compl. ¶ 128. The reasoning of the numerous cases holding that the Conservator succeeds to derivative claims based on HERA's plain language alone applies with equal force here. *See Kellmer*, 674 F.3d at 850-51; *In re Fed. Home Loan Mortg. Corp.*, 643 F. Supp. 2d at 795-96; *In re Fed. Nat'l Mortg. Ass'n*, 629 F. Supp. 2d at 4; *Sadowsky*, 639 F. Supp. 2d at 350.[5]

Second, Plaintiff's argument that Section 4617(b)(2)(A) does not cover "direct" claims cannot survive the statute's plain language. As the D.C. Circuit has recognized, the only interpretative tool needed to analyze this provision and resolve whether FHFA may substitute for a stockholder plaintiff is adherence to Justice Frankfurter's admonition: "(1) Read the statute; (2) read the statute; (3) read the statute!" *Kellmer*, 674 F.3d at 850. When Congress conveyed "*all* rights . . . of any stockholder" with respect to Freddie Mac and its assets, it meant just that—*all* rights. *See id.* at 851 (noting that "Congress has transferred everything it could" to the Conservator and declining, in light of the clear statutory language, to "delv[e] deep into pre-HERA common law [or] expound[] HERA's legislative history" to resolve the question of succession).[6] There is no "direct claims" exception to HERA's succession provision.

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[5] Notably, none of these decisions purport to limit their holdings or rationale to derivative claims, as Plaintiff suggests. *See also Perry Capital*, 70 F. Supp. 3d at 231 ("It is a slippery slope for the Court to poke holes in, or limit, the plain language of [Section 4617(b)(2)(A)] especially when, as here, the plaintiffs have not asked the Court to weigh in on the statute's constitutionality.").

[6] *See also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous,

(footnote continued on next page)

Furthermore, to conclude otherwise and apply a "direct claims" exception, would render part of the statute meaningless. The Conservator can already pursue what would be derivative claims because those claims belong to the Enterprise in conservatorship, and not to the shareholder bringing the action. *See, e.g.*, *Ross v. Bernhard*, 396 U.S. 531, 538 (1970) ("The claim pressed by the stockholder against directors or third parties is not his own but the corporation's." (internal quotation marks and citation omitted)); *Little v. Cooke*, 652 S.E.2d 129, 136 (Va. 2007) ("A derivative action . . . belongs to the corporation rather than the shareholder." (citation omitted)); *see also* 12 U.S.C. § 4617(b)(2)(A)(i) (The Conservator "immediately succeed[s] to . . . all rights, titles, powers, and privileges of *the regulated entity*." (emphasis added)).

Accordingly, limiting the phrase "rights . . . of any stockholder" to derivative claims as Plaintiff posits would add nothing to the meaning or effect of the statute. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("[O]ne of the most basic interpretative canons," is that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous."); *United States v. Le*, 327 F. Supp. 2d 601, 614 (E.D. Va. 2004) ("[A] basic canon of statutory interpretation is that a statute should be construed, if possible, in a manner that allows all of its provisions to be given effect, so that no part of the statute is rendered inoperative or superfluous."). There is no basis to depart from the statute's plain text, which unambiguously provides that *all* shareholders' rights "with respect to the regulated entity

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(footnote continued)
then, this first canon is also the last: judicial inquiry is complete.") (internal citations and quotation marks omitted); *Scott v. United States*, 328 F.3d 132, 138-39 (4th Cir. 2003) ("When interpreting a statute, the goal is always to ascertain and implement the intent of Congress. The first step of this process is to determine whether the statutory language has a plain and unambiguous meaning. If the statute is unambiguous and if the statutory scheme is coherent and consent, our inquiry ends there." (internal citations omitted)).

and the assets of the regulated entity"—not just its derivative claims—are transferred to FHFA during conservatorship.[7]

C. Plaintiff's Purported Investigation is Barred by 12 U.S.C. § 4617(f)

Finally, to permit Plaintiff to inspect Freddie Mac's records and investigate alleged wrongful conduct would also violate HERA's anti-injunction provision, 12 U.S.C. § 4617(f). Pursuant to Section 4617(f), "no court may take any action to restrain or affect the exercise of powers or functions of the [FHFA] as a conservator." Under HERA, FHFA alone is authorized during the conservatorship to "[o]perate the regulated entity." 12 U.S.C. § 4617(b)(2)(B). If there is to be any investigation into Plaintiff's alleged claims of mismanagement or misconduct, such investigation falls within the Conservator's powers and functions, which specifically include authority to "operate [Freddie Mac] with all the powers of the shareholders, the directors, and the officers," to "conduct all business of [Freddie Mac]," and to "perform all functions of [Freddie Mac] consistent with the appointment as conservator," *id.* 4617(b)(2)(B) (i),(iii), and would be undertaken, pursuant to the Conservator's discretion and powers.

To override the Conservator's rejection of Plaintiff's demand by authorizing Plaintiff access to Freddie Mac's books and records to pursue an investigation the Conservator has not undertaken "would interfere with and potentially usurp precisely the powers granted to the

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[7] Moreover, the alleged claims Plaintiff seeks to investigate—premised on allegations that the Third Amendment dividends and other investments were to "the detriment of *the Company* and [its] stockholders" and amounted to "corporate waste"—are themselves derivative. *E.g.* Compl. ¶¶ 107, 111, 123, 128 (emphasis added); *see also Little*, 652 S.E.2d at 136-37 (recovery in a derivative suit flows to the corporation, though the shareholder plaintiff may benefit); *Cattano v. Bragg*, 727 S.E.2d 625, 628 (Va. 2012) (Claims for "injuries to a corporation . . . must be brought derivatively."). Thus, as even Plaintiff appears to acknowledge, HERA generally bars shareholders from pursuing such claims during conservatorship because the Conservator has succeeded to them. *See* Compl. ¶ 128. It would make little sense to conclude, notwithstanding HERA's succession provision, that Plaintiff retains his shareholder right to inspect Freddie Mac's books and records for the purpose of investigating claims he cannot bring because the Conservator has succeeded to them.

FHFA by HERA." *Sweeney v. U.S. Dep't of Treasury*, 68 F. Supp. 3d 116, 126 (D.D.C. 2014) (quoting *Sadowsky*, 639 F. Supp. 2d at 351). Section 4617(f) thus provides "a second, independent basis for . . . grant[ing] the Conservator's motion to substitute." *Id.* at 125-26 (decision on whether to bring suit arising from the sale of Fannie Mae's assets during conservatorship is "plainly the type of business decision Congress entrusted to the Conservator in HERA.").

Indeed, in numerous decisions granting FHFA's motions to substitute in place of Freddie Mac or Fannie Mae shareholder plaintiffs, courts have held in the alternative that Section 4617(f) also bars the shareholder from continuing the action. *See, e.g.*, *Sweeney*, 68 F. Supp. 3d at 119 (granting substitution in part because § 4617(f) "suggests that the Court may not be empowered to authorize plaintiff to pursue litigation that the Conservator has declined to pursue"); *Sadowsky*, 639 F. Supp. 2d at 350 (Without substitution, suit would violate § 4617(f) "since maintenance of this suit with the shareholders acting as Plaintiffs would be inconsistent with the Conservator's exercise of its statutory purposes."); *In re Fed. Nat'l Mortg. Ass'n*, 629 F. Supp. 2d at 4 n.4 ("[A]llowing plaintiffs to continue to pursue derivative claims independent of FHFA would require this Court to take action that would 'restrain or affect' FHFA's discretion" in violation of § 4617(f).); *In re Fed. Home Loan Mortg. Corp.*, 643 F. Supp. 2d at 797 (Section 4617(f) "clearly demonstrates Congressional intent to transfer as much control of Freddie Mac as possible to the FHFA, including any right to sue on behalf of the corporation."). So too here: allowing Plaintiff to pursue his investigation would "be inconsistent with the Conservator's exercise of its statutory power" and thus would violate Section 4617(f). *Sadowsky*, 639 F. Supp. 2d at 350.

CONCLUSION

For the foregoing reasons, the Court should stay this action until the JPML rules on FHFA's pending motion to transfer. In the alternative, the Court should substitute FHFA as Conservator in place of the current Plaintiff in this suit.

Dated: March 30, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on March 30, 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.

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