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)

REPLY 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

Plaintiff identifies nothing to justify denying a brief stay pending determination of whether this case will be transferred, along with seven other cases challenging the Third Amendment, to a proposed multi-district litigation proceeding ("MDL") for consolidated pretrial activity.[1] This Court should join the seven other courts (including one hearing a nearly identical case filed by Plaintiff in Delaware), which have already stayed their suits pending the Judicial Panel on Multidistrict Litigation's (the "Panel's") ruling on consolidation. Having waited years to pursue his challenge to the Third Amendment, Plaintiff identifies no specific prejudice he would suffer from the short period necessary to see if this case will be transferred. Plaintiff's arguments about the propriety of transfer should be addressed to the Panel, not this Court, and are in any event meritless. Finally, Defendants *will* suffer prejudice, if the Court refuses a stay, from the real risk of inconsistent pretrial rulings and time-consuming and duplicative proceedings.

Likewise, Plaintiff offers no justification for denying the Federal Housing Finance Agency's motion to be substituted for Mr. Pagliara as the Plaintiff in this suit. To the contrary, Mr. Pagliara admits that his suit asserts a shareholder "right" to inspect Freddie Mac's books and records, a dispositive concession in light of FHFA's succession, as Freddie Mac's Conservator, to "***all rights***, titles, powers, and privileges . . . of any stockholder" of Freddie Mac, including Plaintiff. 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added).

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[1] *See* Plaintiff's Opp. to Motion to Stay Case Pending a Decision on Motion for Transfer to MDL or, in the Alternative, to Substitute the Federal Housing Finance Agency as Plaintiff (filed Apr. 20, 2016) [ECF No. 21] ("Opp.").

ARGUMENT

I. To Prevent Inconsistent Pretrial Rulings and Duplicative Proceedings, the Court Should Stay This Suit Pending the Panel's Transfer Decision

Plaintiff's argument that a pending transfer motion does not deprive the district court of "jurisdiction over pretrial matters" (Opp. at 11-12) ignores that courts "frequently grant stays while awaiting a JPML decision about the inclusion of a pending case into an MDL, even when other motions remain pending before the district court." *Virginia ex rel. Integra Rec LLC v. Countrywide Secs. Corp.*, No. 14CV06, 2015 WL 222312, at *3 (E.D. Va. Jan. 14, 2015) (collecting cases); *see also Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1362 (C.D. Cal. 1997) ("[I]t appears that a majority of courts have concluded that it is often appropriate to stay preliminary pretrial proceedings while a motion to transfer and consolidate is pending with the MDL Panel because of the judicial resources that are conserved."); *Ritchie Capital Mgmt., LLC v. Gen. Elec. Capital Corp.*, No. 14 CIV. 8623 PAE, 2015 WL 170402, at *6 (S.D.N.Y. Jan. 13, 2015) ("It is common for courts to stay an action pending a transfer decision by the JPML").[2]

This is the only case subject to FHFA's motion to transfer currently pending in U.S. district court that has not yet been stayed awaiting the Panel's decision. Seven other courts presiding over challenges to the Third Amendment (including the court hearing Mr. Pagliara's Delaware suit seeking essentially the same records from Fannie Mae as he seeks here from Freddie Mac) already have granted stays. *See* Order, *Saxton v. FHFA*, No. 1:15-cv-00047 (N.D. Iowa Apr. 4, 2016), ECF No. 79; Order, *Jacobs v. FHFA*, No. 1:15-cv-00708 (D. Del. Mar. 30,

[2] Plaintiff's main authority, *Sehler v. Prospect Mortg., LLC*, No. 13-cv-473, 2013 WL 5184216 (E.D. Va. Sept. 16, 2013) (*see* Opp. at 11, 13, 14, 18, 19) is not to the contrary. In *Sehler*, this Court recognized that "staying the action pending the MDL decision may serve the interests of judicial economy by avoiding 'the needless duplication of work and the possibility of inconsistent rulings.'" *Id*. at *2 (citation omitted). The Court found a stay inappropriate in that case because, among other things, the risk of duplicative proceedings in that case was caused by defendants' agreement to decertify a class action that would have provided a single forum for all the related cases. *Id.* at *3.

2016), ECF No. 44; Order, *Edwards v. Deloitte & Touche, LLP*, No. 1:16-cv-21221 (S.D. Fla. Apr. 13, 2016), ECF No. 12; Order, *Edwards v. PricewaterhouseCoopers, LLP*, No. 1:16-cv-21224 (S.D. Fla. Apr. 21, 2016), ECF No. 11[3]; Minute Order, *Robinson v. FHFA*, No. 7:15-cv-00109 (E.D. Ky. Apr. 21, 2016), ECF No. 45 (staying action until July 1, 2016 or pending the Panel's decision, whichever is earlier); Minute Order, *Roberts v. FHFA*, No. 1:16-CV-02107 (N.D. Ill. Apr. 8, 2016), ECF No. 34 (staying action pending Panel's decision on FHFA's motion to transfer); Minute Order, *Pagliara v. Fed. Nat'l Mortg. Ass'n*, 1:16-cv-00193 (D. Del. Apr. 4, 2016) (same). This Court should follow suit.

A. Having Waited for Years to Pursue His Challenge to the Third Amendment, Plaintiff Cannot Now Claim Prejudice Based on the Brief Stay Requested Here

Plaintiff argues that a stay would prejudice him because, under Virginia law, the case is to be "expedited" and could be resolved on the merits before the Panel rules on FHFA's motion to transfer. *See* Opp. at 2-3, 12-14, 19-20. But he concedes that the whole point of his suit is to gather documents *to aid in a potential future challenge* to the Preferred Stock Purchase Agreement ("PSPA"), particularly the Third Amendment thereto. *See* Opp. at 1, 7-10 (explaining that Pagliara's inspection request is designed to "investigate potential wrong doing" in connection with the "so-called 'Net Worth Sweep'" accomplished by the Third Amendment).

Plaintiff thus admits that this suit is designed to investigate alleged misconduct that occurred years ago, and may be the subject of litigation for years to come. The Third Amendment was executed in *2012*. *See* Opp. at 8. Other lawsuits challenging the Third Amendment were filed as early as *2013*, and were dismissed in a final judgment now on appeal

[3] The *Edwards v. Price Waterhouse Coopers* Order went on to note that the Clerk should mark the case as "closed" for statistical purposes and should place the matter in a civil suspense file.

to the D.C. Circuit. *See Perry Capital LLC v. Lew*, No. 14-5243 (D.C. Cir. filed Oct. 8, 2014).[4] Plaintiff apparently intends to consider similar challenges to the Third Amendment after reviewing the massive volume of documents he now demands to inspect. Having waited years to initiate yet another challenge to the Third Amendment, Plaintiff cannot establish prejudice simply by asserting that a stay will delay resolution of this suit by a few months or less.

B. Plaintiff's Arguments Concerning Transfer Are Properly Presented to the Panel Rather Than This Court, and Are Meritless in Any Event

Plaintiff argues that this Court should deny a stay based on Plaintiff's professed certainty that the Panel will ultimately deny transfer of this case to the proposed MDL proceeding. *See* Opp. at 15-19. But the Panel—not Plaintiff and not this Court—is the proper tribunal to assess the parties' arguments about MDL transfer. When the Northern District of Illinois granted a stay in another case covered by FHFA's MDL motion, it rejected those plaintiffs' virtually identical attempt to oppose the requested stay by litigating the merits of transfer, explaining that "[t]he MDL Panel is the right forum to consider the Plaintiffs' arguments." Minute Entry, *Roberts v. Fed. Hous. Fin. Agency*, *supra*. Indeed, just like the plaintiffs in *Roberts*, Plaintiff's brief to this Court largely parrots arguments Plaintiff and his allies are advancing to the Panel. *Compare* Opp. at 15-19 *with* Opp. Ex. 3 (Plaintiff's opposition to transfer as filed with the Panel).

In any event, Plaintiff's objections to transfer are meritless. Plaintiff argues transfer is inappropriate because the Third Amendment cases allegedly share only legal rather than factual questions. *See* Opp. at 15-17. Plaintiff is wrong, and his argument is belied by his own Complaint. In seeking to show that his inspection demand serves a "proper purpose" (*see* Compl. ¶ 38), Plaintiff includes no less than twenty-five pages detailing an array of facts that

[4] Another case, filed soon after the U.S. District Court for the District of Columbia issued its opinion in *Perry Capital*, was similarly dismissed. *Cont'l W. Ins. Co. v. FHFA*, 83 F.Supp.3d 828, 839-40 & n.6 (S.D. Iowa 2015). Plaintiff in that action did not appeal.

purportedly show the Third Amendment was unreasonable and unlawful. *See* Compl. ¶¶ 5-17, 43-114; *see also* Opp. at 5-10 (reciting facts allegedly showing that Third Amendment was unreasonable).[5] These are the very same factual allegations relied upon by all of the Third Amendment cases proposed for consolidation in the MDL.

Plaintiff is attempting to use the vehicle of a books and records action to gain discovery that he—and, inevitably, other plaintiffs—hope to use in litigating their Third Amendment challenges, if they, unlike the cases already litigated, survive a motion to dismiss. Indeed, Mr. Pagliara is the Founder of Investors Unite, an association of Fannie Mae and Freddie Mac shareholders that is actively involved in other Third Amendment challenges, including the submission of multiple amicus briefs to the D.C. Circuit in the pending *Perry Capital* appeal. *See* No. 14-5243 (D.C. Cir.) (amicus briefs filed July 6, 2015 and April 22, 2016). Attempting to avoid the fate of plaintiffs in *Perry Capital* of being dismissed for lack of jurisdiction prior to the commencement of discovery, Plaintiff has bifurcated his own Third Amendment challenge into two phases: (1) the books and records phase, in which he is attempting to conduct full blown discovery prior to litigating the same jurisdictional issues that defeated the *Perry Capital* and *Continental Western* plaintiffs, and (2) a claim prosecution phase, in which he will attempt to use the discovery he obtained to prosecute his claims on the merits. Moreover, there is little doubt that other plaintiffs pursuing Third Amendment cases will attempt to use information gained from this proceeding in their cases.[6]

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[5] Plaintiff's argument that "Freddie Mac and FHFA have not disputed these facts" (Opp. at 13) ignores that the litigation has not yet reached the point at which it would be appropriate for Freddie Mac and FHFA to answer or otherwise indicate disagreement with Plaintiff's recitation of allegedly relevant facts.

[6] Mr. Pagliara has described this action (and his parallel Delaware action) as the pursuit of an "avenue[] to demonstrate that the Net Worth Sweep violates both federal law and, I strongly believe, state law." *See* Investors Unite Press Release, Tim Pagliara Files Suit to Inspect Fannie

Footnote continued on next page

Mr. Pagliara's argument seems to be that because this preliminary proceeding is limited to the gathering of evidence rather than itself advancing a substantive challenge to the Third Amendment, it cannot be included in the proposed MDL. *See, e.g.*, Opp. at 15-16. That position finds no support in the Panel's jurisprudence. To the contrary, the Panel has held that collateral actions *can and should* be transferred where—as here—their purpose concerns gathering facts that would support the claims or defenses at issue in the other cases proposed for transfer.

In *In re: Online DVD Rental Antitrust Litig.*, 744 F. Supp.2d 1378 (J.P.M.L. 2010), for example, the Panel considered a stand-alone proceeding concerning a motion to quash a subpoena that had been served in connection with a consolidated MDL proceeding. As here, the collateral proceeding was limited to determining whether a specific procedure for garnering evidence for use in the underlying substantive cases had been properly invoked, and also, as here, the merits of the substantive cases were not at issue in the collateral proceeding. The Panel nevertheless transferred the action on the ground that the subpoenaed party was "an important third-party with information central to the issues in [the] MDL," and the discovery sought "involve[d] questions of fact relating to the conspiracy alleged in [the] MDL." *Id*. at 1378. The same factors warrant the same outcome here: this preliminary discovery proceeding is expressly aimed at obtaining documents for the purpose of litigating a promised-to-be filed substantive challenge to the Third Amendment. Accordingly, transfer is appropriate.

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Mae and Freddie Mac Corporate Records (Mar. 14, 2016) (reprinted on PR Newsire), *available at* http://goo.gl/dy18Nx. Further, other Freddie Mac and Fannie Mae shareholders monitoring the Third Amendment litigations have described the strategy behind Plaintiff's suit as follows: "Tim Pagliara . . . who is also involved in FHFA/Treasury litigation will be able to match what is uncovered in this [books and records] litigation to what has been disclosed in the other [Third Amendment] litigation and find the omissions (and we KNOW there will be some). That will give plaintiffs in those [Third Amendment] cases amo [sic] in front of a judge for more disclosure there (probably the reason for the expedited hearing request [in the Delaware books and records action])." Todd Sullivan, *GSE Reform: Tim Pagliara Files Suit in Delaware*, ValueWalk (Mar. 14, 2016), *available at* http://goo.gl/pmPL1D.

Plaintiff also is wrong in asserting that there are no common factual questions between this case and Mr. Pagliara's suit in the District of Delaware seeking to inspect the records of Fannie Mae. *See* Opp. at 15 n.4. Pagliara seeks to inspect documents from Freddie Mac (in this Court) and from Fannie Mae (in Delaware) that relate to virtually identical issues. *Compare* Compl. Ex. A *with* Compl. Ex A, *Pagliara v. Fed. Nat'l Mortg. Ass'n*, No. 12105-CVM (Del. Ch. filed Mar. 14, 2016) ("Del. Compl."). Because Plaintiff is required to show that his requests are "directly connected" to a "proper purpose," it is inevitable that there will be overlapping factual disputes about the relevance of various categories of documents to the investigation Mr. Pagliara claims to be pursuing that can be consistently decided, if necessary, by the transferee court. *See* Compl. ¶ 35 (acknowledging need to show that inspection requests are directly related to a proper purpose); Del. Compl. ¶ 3 (acknowledging need to show that documents are requested for a proper purpose).[7] To give one example, the courts addressing this suit and Mr. Pagliara's Delaware suit will each have to decide the factual question whether Pagliara is entitled to inspect "***[a]ll*** FHFA and/or Treasury directives to the Company," regardless of whether those

[7] With respect to Delaware, *see also Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 371 (Del. 2011) ("A shareholder who has discharged his burden of showing his entitlement to a [document] inspection must also satisfy an additional burden—to show that the specific books and records he seeks to inspect are 'essential to [the] accomplishment of the stockholder's articulated purpose for the inspection.'" (second alteration in original; citation omitted)); *Sec. First Corp. v. U.S. Die Casting and Dev. Co.*, 687 A.2d 563, 568 (Del. 1997) ("The plaintiff bears the burden of proving that each category of books and records is essential to the accomplishment of the stockholder's articulated purpose for the inspection."). Virginia follows the same rule, requiring by statute that the "shareholder may inspect and copy the records [requested] only if: . . . The records are directly connected with the shareholder's purpose." Va. Code 13.1-771(D)(4); *see also Bank of Giles Cty v. Mason*, 98 S.E.2d 905 (Va. 1957) (the shareholder "should not be granted a roving commission to pore at will through the books and records of the corporation without regard to the purpose for which he seeks the extraordinary remedy which the law gives to him." *Id.* at 908 (internal quotes and citations omitted).

In the event the Court denies the stay motion and denies the Conservator's motion to substitute, FHFA and Freddie Mac would challenge—through separate briefing—the scope of documents Mr. Pagliara seeks to inspect both in Virginia and in Delaware.

directives have *anything* to do with the Third Amendment. *See* Compl., Ex. A at 3; Del. Compl., Ex. at 3 (same) (emphasis added).[8]

Moreover, Plaintiff does not dispute that each and every one of the Third Amendment cases proposed for MDL coordination—including this one—present the same overarching dispositive issue concerning the rights of shareholders to prosecute their claims as such while Freddie Mac and Fannie Mae are in conservatorship. Plaintiff in this case purports to assert shareholder rights to inspect Freddie Mac's books and records for the stated "proper purpose" of filing suit seeking the same relief as Plaintiffs in the other Third Amendment cases. HERA's succession provision, 12 U.S.C. § 4617(b)(2)(A)), however, vests "all" shareholder rights in the Conservator and, therefore, Plaintiffs cannot assert their rights as shareholders while the Enterprises are in conservatorship. Consolidation would allow the transferee court to decide this issue, conserving judicial resources and eliminating the risk that Freddie Mac and FHFA will face inconsistent decisions regarding the scope of the Conservator's succession. *See In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 990 F. Supp. 834, 836 (J.P.M.L. 1997) (One purpose of MDL consolidation is to "prevent inconsistent or repetitive pretrial rulings.").

Plaintiff's reliance on FHFA's opposition to an MDL in the *Transfer Tax* cases (Opp. at 15) is misplaced because those cases presented an entirely different situation. *First,* the *Transfer Tax* Cases involved no serious factual disputes. All parties agreed on what had happened—Fannie Mae and Freddie Mac had not paid transfer taxes that various state and local

[8] Whether particular categories of requested documents are "essential" to Mr. Pagliara's stated purpose of investigating Third Amendment-related misconduct is a factual question. *See, e.g., CM&M Group, Inc. v. Carroll*, 453 A.2d 788, 793 (Del. 1982) (Where a stated purpose of inspection was to determine value of plaintiff's shares, determination of the "data essential thereto" is "in large part, [a] factual determination[] to be overturned only if clearly wrong.").

entities claimed they were required to pay. The cases turned on a straightforward question of federal statutory interpretation. *See In re: Real Estate Transfer Tax Litig.*, 895 F. Supp. 2d 1350, 1351 (J.P.M.L. 2012) (noting that the cases involved a "fairly straightforward dispute" that raised "primarily a *legal* question," with facts that were "largely undisputed" and "neither numerous nor complex." (emphasis in original)). No matter which way the courts resolved that question, the cases would be over as soon as that question was resolved (with the exception of calculating damages if defendants lost). As explained above, the cases FHFA now proposes for MDL consolidation present significant factual disputes that will need to be resolved if FHFA does not prevail on the threshold legal issue.

Second, the danger posed by inconsistent rulings is significantly greater here than in the *Transfer Tax* Cases, which involved different taxes imposed by different states and localities. If FHFA and the Enterprises lost a case in one jurisdiction and won in another, both decisions could stand, since the Enterprises could pay one jurisdiction's tax without paying others. But conflicting Third Amendment decisions cannot be similarly reconciled, because each PSPA is a *single* contract that cannot be valid in one jurisdiction but not in another. Absent transfer, shareholders will have virtually unlimited opportunities to relitigate the same issues over and over. Thus, the risk of inconsistent rulings provides a far more compelling justification for transfer here than in the Transfer Tax Cases.

Finally, there is no merit to Plaintiff's assertion that a stay is inappropriate because the MDL transfer would be only for pretrial proceedings, and this Court would ultimately decide the merits in any event. *See* Opp. at 14-15. This is nothing more than a restatement of the basic rules governing *all* MDL transfers. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 32 (1998) (holding that MDL transferee court lacks authority to "entertain a

§ 1404(a) transfer motion to keep the case for trial"). Here, there will likely be no need for the transferee court to return this case because a decision by that court substituting FHFA for Mr. Pagliara as the proper plaintiff, as is explicitly required by the controlling federal statute, will be fully dispositive of both this action and Plaintiff's parallel action in the District of Delaware.

C. Defendant Freddie Mac and the FHFA Will Suffer Prejudice if the Stay is Denied

Plaintiff is wrong that denial of a stay will not prejudice Freddie Mac and FHFA. The bulk of Plaintiff's argument reduces to whether transfer is appropriate. Opp. at 17-19. The Panel, rather than this Court, will decide that issue; thus, Plaintiff's arguments regarding forum shopping and common legal questions are inapposite. As explained above, this case shares common *factual* issues with the other related cases, including the facts surrounding the execution and effect of the Third Amendment. Disputes about the proper scope of discovery in the other Third Amendment cases will inevitably overlap with disputes about what documents requested in this and Mr. Pagliara's Delaware suit really serve his stated purpose of investigating misconduct in connection with the execution and implementation of the Third Amendment. *See supra* pages 5-6. Accordingly, Freddie Mac and FHFA risk exactly the kind of prejudice the MDL procedure was intended to prevent: "duplicative discovery . . . inconsistent or repetitive pretrial rulings," and the waste of the " resources of the parties, their counsel and the judiciary." *In re Diet Drugs*, 990 F. Supp. at 836.

II. If the Court Does Not Stay the Case, It Should Substitute the Conservator as the Proper Plaintiff

In this case, Plaintiff seeks to enforce a purported statutory "right" as a Freddie Mac stockholder to inspect Freddie Mac's books and records. *See* Va. Code. Ann. § 13.1-771(E) (addressing shareholders' "right of inspection"); *Bank of Giles Cty. v. Mason*, 98 S.E.2d 905, 908 (Va. 1957) (observing Va. Code Ann. § 13.1-771(A) codified "the rules of the common law with

respect to the *rights of a stockholder* to inspect the books and records of a corporation" (emphasis added)). But FHFA as Conservator has succeeded to "*all rights*" of Freddie Mac's stockholders, and "all rights" obviously includes the asserted "right" to inspect. 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added). Accordingly, if the Court does not stay this action, it should grant our alternative motion to substitute the Conservator for Plaintiff.

A. The Conservator Succeeds to "All Rights" of the Stockholders, Not Merely the Stockholders' Right to Pursue Derivative Claims

Despite HERA's explicit statement that the Conservator succeeds to "all rights" of Freddie Mac's stockholders, Plaintiff nevertheless argues that the Conservator "does *not* succeed to all possible rights" of Freddie Mac's stockholders. Opp. at 23 (emphasis added). Rather, according to Plaintiff, the Conservator succeeds only to one specific shareholder right—namely, the right to pursue derivative claims on behalf of Freddie Mac. *See* Opp. at 21-25. This is incorrect. Plaintiff may not rewrite the statute as he sees fit, and his arguments inviting the Court to omit the word "all" from "all rights" should be rejected.

First, Plaintiff incorrectly argues the statutory text provides that the Conservator succeeds only to derivative claims. Opp. at 22-24. According to Plaintiff, the "critical portion" of HERA is the language that says the Conservator succeeds to "all rights, titles, powers, and privileges of . . . any stockholder . . . *with respect to [Freddie Mac] and the assets of [Freddie Mac]*." Opp. at 22 (citing 12 U.S.C. § 4617(b)(2)(A)(i)) (emphasis added). But Plaintiff fails even to attempt to explain how this all-encompassing statutory phrase actually limits the claims to which the Conservator succeeds to a single type of claim. *See Levin v. Miller*, 763 F.3d 667, 673 (7th Cir. 2014) ("If 'rights . . . of any stockholder' was meant to refer only to derivative claims, it's a broad and roundabout way of expressing that narrower idea.") (Hamilton, J., concurring). Under the statute's plain language, Plaintiff's asserted right to inspect *Freddie Mac's* books and records

is plainly a shareholder right "*with respect to [Freddie Mac]*" and its assets, and thus falls within HERA's succession provision. Plaintiff fails to offer any plausible explanation otherwise.

Plaintiff argues that FHFA's interpretation of the succession provision "gives no meaning to the qualification 'with respect to the regulated entity and the assets of the regulated entity.'" Opp. at 24. Not so. This provision serves to make clear that the Conservator succeeds to "all rights" Freddie Mac's stockholders may have *as holders of Freddie Mac stock.* Accordingly, the Conservator does not purport to succeed to Plaintiff's rights "with respect to" other rights of Plaintiff, *i.e.*, rights flowing from his stock holdings in any other companies. Plaintiff's interpretation, on the other hand, would render the statutory succession to ***all*** stockholder rights superfluous, because the Conservator already succeeds to Freddie Mac's ability to pursue derivative claims by virtue of its succession to all of Freddie Mac's rights. *See Levin*, 764 F.3d at 673 ("The FDIC [as conservator or receiver] can already pursue what would be a derivative claim because the claim really belongs to the failed depository institution itself.") (Hamilton, J., concurring).

Second, Plaintiff argues his claim is direct, rather than derivative, but any such distinction is irrelevant in light of the Conservator's succession to "all" stockholder "rights, titles, powers, and privileges." *See* Opp. at 25-26. As such, the Court need not decide if the Conservator succeeds to all so-called "direct" claims because the right of a shareholder to inspect the company's books and records is clearly a "right . . . with respect to" Freddie Mac, regardless of how one labels any claim to enforce that right.

This principle is confirmed not only by HERA's plain text, but also by consideration of another shareholder right: the right to vote to elect Freddie Mac's board of directors. According to Plaintiff's own authorities, shareholder voting rights belong to the shareholder individually

and thus give rise to direct—not derivative—claims. *See* Principles of Corp. Governance § 7.01 cmt. c (1994) (cited at Opp. at 25) (describing direct claims to include "actions to enforce the right to vote . . . [and] actions to inspect corporate books and records"); *see also In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1049 (Del. Ch. 2015) (describing "the right to vote" as a "classic example[]" of a direct claim). Further, like the right to inspect Freddie Mac's books and records, the right to vote to elect Freddie Mac's board is a right given to Freddie Mac's stockholders by statute (*see* 12 U.S.C. § 1452(a)(2)(A) ("The Board of Directors of the Corporation . . . shall be elected annually by the voting common stockholders.")).[9]

Nevertheless, no stockholder can seriously dispute the Conservator has succeeded to its previously-held right of a stockholder to vote on the election of Freddie Mac's board. Through HERA's succession provision, Congress "inten[ded] to transfer as much control of Freddie Mac as possible to the FHFA" as Conservator. *See In re Fed. Home Loan Mortg. Corp. Deriv. Litig.*, 643 F. Supp. 2d 790, 797 (E.D. Va. 2009) ("*In re Freddie Mac*") (observing HERA's succession provision "clearly demonstrates Congressional intent to transfer as much control of Freddie Mac as possible to the FHFA"). And one way in which the Conservator has exercised its power to control and operate Freddie Mac is to reconstitute the management and board of directors, notwithstanding the common stockholders' pre-Conservatorship right to elect the directors.[10] Because this voting right is one of the "rights . . . of [a] stockholder . . . with respect to [Freddie Mac]," the Conservator has succeeded to it, even if a claim seeking to enforce that right is in

[9] Freddie Mac's common stock certificate also provides common shareholders "the right to vote" for the election of the board. *See* Freddie Mac Voting Common Stock § 3(a), *available at* http://goo.gl/UeVr32.

[10] *See* Freddie Mac, Annual Report (Form 10-K) at 19 (Mar. 11, 2009), *available at* http://goo.gl/encrgA (describing Conservator's appointment of new board of directors in the months following FHFA's appointment as Conservator).

some sense direct. Here, the same principle applies to any shareholder right to inspect Freddie Mac's books and records: the Conservator has succeed to "all" such rights, regardless of label.[11]

Third, Plaintiff incorrectly argues that courts have established a "clear rule" applying HERA's succession provision only to derivative, not direct, claims. *See* Opp. at 21-23. While it appears no court has addressed the question presented here—namely, whether a conservator's succession to "all" shareholder rights includes a shareholder right to inspect the company's books and records—numerous courts, including this one, have held that HERA's succession provision applies to at least shareholder derivative claims. *See, e.g.*, *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012); *In re Freddie Mac*, 643 F. Supp. 2d at 794-95; *Esther Sadowsky Testamentary Tr. v. Syron*, 639 F. Supp. 2d 347, 350 (S.D.N.Y. 2009). Contrary to Plaintiff's suggestion, *none* of those decisions expressly or implicitly limited their interpretation of HERA to derivative claims. In fact, in granting a motion by FHFA to substitute in place of shareholder plaintiffs asserting derivative claims, this Court observed that "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 Freddie Mac*, 643 F. Supp. 2d at 795, *aff'd sub nom La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. 2011) (emphasis added); *see also Kellmer*, 674 F.3d at 851 (observing HERA's succession provision reflects Congress's intent to "transfer everything it

[11] For similar reasons, Plaintiff's alleged constitutional concerns are without merit. Opp. at 24-25. As an initial matter, Plaintiff is obviously not asserting any constitutional claims here. Further, by moving to substitute, the Conservator is not attempting to assert any "ownership" over Plaintiff's stock, or "prevent[ing] him from selling his stock (or mak[ing] him sell it)." Opp. at 23-24. Nor is FHFA attempting to act as "the conservator *of Mr. Pagliara*." Opp. at 24 (emphasis in original). Instead, the Conservator is merely exercising its succeeded-to right to control access to Freddie Mac's books and records, just as it has exercised its succeeded-to right to re-constitute Freddie Mac's board of directors. The Conservator holds these shareholder rights for the duration of the conservatorship (12 U.S.C. § 4617(b)(2)(A)(i)) and, in any subsequent receivership, the shareholders regain the right to assert claims against the receivership estate. *See id.* § 4617(b)(2)(K)(i). There is thus no constitutional issue to avoid.

could to the [conservator]" and "to be sure that nothing was missed" (second alteration in original)).

Plaintiff's only other support for his supposed "clear rule" is a handful of passing statements in cases applying FIRREA, in which the issue of the conservator or receiver's succession to non-derivative claims was not squarely presented or briefed. Opp. at 22 (citing cases). For example, in both *Barnes v. Harris*, 783 F.3d 1185, 1192 (10th Cir. 2015) and *In re Beach First Nat'l Bancshares, Inc.*, 702 F.3d 772, 777 (4th Cir. 2012), the courts did not consider or address the issue, but simply held the FDIC as receiver had succeeded to nearly all of the shareholder's claims, which the court found to be derivative. The only claims not succeeded to were based on injuries to the shareholder "unrelated" to the failed institution. *See In re Beach First Nat'l Bancshares, Inc.*, 702 F.3d at 780; *Barnes*, 783 F.3d at 1196. Similarly, in *Lubin v. Skow*, 382 F. App'x 866, 871 (11th Cir. 2010) (unpublished), the court made a passing statement that "FIRREA would not be a bar to standing" if the shareholder had asserted a direct claim. But that position was not advocated by the parties or the relevant issue resolved by the court and the statement therefore was pure dicta: specifically, the court held all of the claims were derivative, not direct, and were barred by FIRREA's succession provision. *Id*. at 871. The court thus had no need to address FIRREA's impact on direct claims, none of which had been presented in that case. Finally, although the majority of the panel in *Levin* made statements indicating that FIRREA's succession provision may not extend to direct claims, no party had advocated or briefed that issue. *See* 763 F.3d at 672. Moreover, Judge Hamilton's well-reasoned concurrence clearly articulated why the majority's statement about direct claims should not be embraced or followed by other courts:

> It is not obvious to me that the language must be interpreted so narrowly, nor did the cases cited at page 2 of the opinion confront

> this issue or require that result. *The FDIC [as conservator or receiver] can already pursue what would be a derivative claim because the claim really belongs to the failed depository institution itself.* So what does the language referring to "the rights . . . of any stockholder" add to the meaning and effect of the statute? The doctrine that statutes should not be construed to render language mere surplusage is not absolute, but it weighs in favor of a broader reach that could include direct claims. If "rights ... of any stockholder" was meant to refer only to derivative claims, it's a broad and roundabout way of expressing that narrower idea.

Id. at 673 (Hamilton, J., concurring) (emphasis added).

Accordingly, the cases cited by Plaintiff do not establish a "rule," much less a "clear" one, that the Conservator's statutory succession to "all rights" of the stockholders must be construed to mean something less than succession to "*all* rights" of the stockholders. The only interpretive "rule" needed to interpret HERA's succession provision is the simplest: "(1) Read the statute; (2) read the statute; (3) read the statute!" *Kellmer*, 674 F.3d at 850 (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks 196, 202 (1967)); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("[I]nquiry must cease" where "the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.").

B. Permitting Plaintiff to Proceed Without Substituting the Conservator Would Violate 12 U.S.C. § 4617(f)

The motion to substitute should also be granted because allowing Plaintiff to pursue his far-reaching investigation of Freddie Mac's books and records, absent the Conservator's substitution, would "restrain or affect" the Conservator's exercise of its powers and functions in direct violation of HERA's anti-injunction bar, 12 U. S.C. § 4617(f). Plaintiff unabashedly seeks an order permitting him to inspect a virtually unlimited trove of documents from Freddie Mac, all for the purpose of policing the Conservator's management of Freddie Mac, beginning at the first instant of conservatorship on September 7, 2008. For example, Plaintiff seeks to inspect all

documents that constitute FHFA "directives and/or instructions to the Company"—unlimited by date or subject matter. *See* Compl. Ex. A at 3. Plaintiff also seeks to inspect all board materials, accounting records, and documents concerning Freddie Mac's "solvency or insolvency," its "payment of dividends," and "the involvement of FHFA and/or Treasury in [its] management." *Id*. at 2-4. (Compl. Ex. A). Indeed, it is difficult to conceive of documents, at least between FHFA and Freddie Mac, that would *not* be included within Plaintiff's inspection demand.

Permitting Plaintiff's sweeping investigation into the Conservator's management and operation of Freddie Mac would necessarily "interfere with and potentially usurp precisely the powers granted to the FHFA by HERA." *Sweeney*, 68 F. Supp. 3d at 125-26 (The decision whether to bring suit arising from the sale of assets during conservatorship is the type of "decision Congress entrusted to the Conservator in HERA" and protected by Section 4617(f)). Indeed, numerous decisions substituting FHFA in place of Freddie Mac or Fannie Mae shareholder plaintiffs—including one issued by this Court—recognize that Section 4617(f) bars shareholders from continuing actions in their own names that "would be inconsistent with the Conservator's exercise of its statutory purposes." *Sadowsky*, 639 F. Supp. 2d at 350.

In particular, this Court previously held that, "in this case, the FHFA has properly moved to substitute itself for shareholders who lack standing. It is acting well within its statutory authority under HERA, and the shareholders do not have any 'rights' that are implicated. Accordingly, the Court finds that allowing the plaintiffs to remain in this action would violate § 4617(f) as well." *In re Freddie Mac*, 643 F. Supp. 2d at 799; *see also In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, ERISA Litig.*, 629 F. Supp. 2d 1, 4 n.4 (D.D.C. 2009) ("[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).). So

too here: allowing Plaintiff to undertake an investigation of FHFA's performance as a conservator would contravene Congress's decision to leave oversight of Freddie Mac during conservatorship exclusively in the hands of FHFA.

Plaintiff responds only by asserting that he "has a right under the VSCA to inspect Freddie Mac's corporate records, and Freddie Mac (and FHFA as conservator) has no discretion in responding to the inspection demand." Opp. at 29. This, of course, is simply a regurgitation of Plaintiff's erroneous contention that the Conservator has not actually succeeded to his claimed right to inspect. Moreover, Plaintiff's argument ignores the fact that, in HERA, Congress not only transferred "all" stockholder rights to the Conservator, it also empowered the Conservator alone 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]." 12 U.S.C. § 4617(b)(2)(B). Additionally, HERA provides that only the Conservator can "determine[] [what] is in the best interests" of the Enterprises, *id.* § 4617(b)(2)(J)(ii), and empowers the Conservator to take any action "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). Taken together, these provisions ensure that the Conservator, "not . . . Freddie Mac's shareholders," has "broad, sweeping authority over Freddie Mac[]" during conservatorship. *In re Freddie Mac,* 643 F. Supp. 2d at 798 ("Congress made it clear that it left to the FHFA, not to Freddie Mac's shareholders," the decision "how best to manage [Freddie Mac].").

CONCLUSION

For the foregoing reasons, the Court should follow the path taken by each of the 7 other courts that already have addressed this issue, and stay this action pending the Panel's ruling on FHFA's motion to transfer. In the alternative, the Court should substitute FHFA as Conservator

in place of the current Plaintiff. HERA unambiguously vests the Conservator with the ability to exercise, during conservatorship, "all rights" and "powers" of Freddie Mac's stockholders, which necessarily includes Plaintiff's asserted "right" to inspect Freddie Mac's books and records.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on April 29, 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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