IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

TIMOTHY J. PAGLIARA, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, Defendant.	C.A. No. 16-193-GMS

PLAINTIFF TIMOTHY J. PAGLIARA'S ANSWERING BRIEF IN OPPOSITION TO SUPPLEMENTAL MOTION TO SUBSTITUTE THE FEDERAL HOUSING FINANCE AGENCY AS PLAINTIFF

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Plaintiff Timothy J. Pagliara ("Stockholder"), a stockholder of defendant Federal National Mortgage Association ("Fannie Mae"), hereby opposes the supplemental motion by the Federal Housing Finance Agency ("FHFA") to substitute itself as plaintiff (the "Issue Preclusion Motion") (D.I. 24).

I. INTRODUCTION

FHFA again urges the Court to take up the merits of the Stockholder's claim before determining whether this Court has jurisdiction to do so. As previously explained, FHFA's original Motion to Substitute (D.I. 8) raises a merits issue and therefore may not be decided unless and until the Court determines it has jurisdiction, in response to the Motion to Remand (D.I. 10). (*See* D.I. 27 at 4-7.) FHFA's Issue Preclusion Motion is no different. Under the uniform authority cited herein, an argument that a claim is barred by issue preclusion raises a merits issue that may not be decided unless and until the Court determines that it has jurisdiction. As previously explained, this Court does not have jurisdiction over the Stockholder's claim. The question of issue preclusion, like the question of substitution, therefore may be decided only by the Delaware Court of Chancery.

In all events, when the Delaware Court of Chancery takes the question up, it will find that issue preclusion does not apply here for multiple reasons. Most importantly, the portion of the decision of the United States District Court for the Eastern District of Virginia (the "EDVA Decision") on which FHFA relies to argue issue preclusion involves a pure question of law: whether the Stockholder's claim is barred by Housing and Economic Recovery Act of 2008 ("HERA") Section 4617(b)(2)(A)(i) (the "Succession Provision"). A pure question of law does not give rise to issue preclusion when raised by a different defendant, here Fannie Mae rather than the Federal Home Loan Mortgage Corporation ("Freddie Mac"). As the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") held, in *Pharmaceutical*

Care Management Association v. District of Columbia, "To apply collateral estoppel under these circumstances would prevent the court from performing its function of developing the law." 522 F.3d 443, 447 (D.C. Cir. 2008).[1] Indeed, the Judicial Panel on Multidistrict Litigation ("JPML") denied FHFA's motion to transfer multiple cases for coordinated or consolidated proceedings to permit multiple courts to address precisely the same HERA Section 4617(b)(2)(A)(i) issue for which FHFA seeks preclusion.

Issue preclusion also does not apply here because the EDVA Decision is inconsistent with other decisions on the subject. Under the uniform authority cited herein, issue preclusion does not arise from a decision that is inconsistent with other decisions.

Finally, issue preclusion does not apply here because the portion of the EDVA Decision on which HERA relies was an alternative ground for the Decision. Under the law of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"), which the Court of Chancery will apply when it takes up the question, issue preclusion does not arise from a ruling that is an alternative ground and therefore not essential to the rendering court's ultimate determination.

Even if the question were before this Court, this Court should still not address issue preclusion at this time because the D.C. Circuit is expected imminently to address substantially the same issue for which FHFA seeks preclusion and the EDVA Decision is pending appeal before the Fourth Circuit.

II. NATURE AND STAGE OF THE PROCEEDINGS

On March 14, 2016, the Stockholder filed this action in the Delaware Court of Chancery asserting one claim for inspection of certain books and records of Fannie Mae under Section 220

[1] Issue preclusion is also known as collateral estoppel. *See, e.g.*, *Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 189 (3d Cir. 1993) (noting that issue preclusion is "otherwise known as collateral estoppel"). The terms are used interchangeably in this brief.

of the Delaware General Corporation Law (the "Action"). On March 25, Fannie Mae removed the Action to this Court, pursuant to 28 U.S.C. §§ 1331, 1441(a) and 1446, purportedly on the basis of federal question jurisdiction.

On March 28, FHFA sought to have this action transferred and coordinated or consolidated into a proposed multi-district litigation before the JPML. Including this Action, FHFA sought to coordinate or consolidate a total of six actions. On April 4, this Court stayed this Action pending a ruling by the JPML on FHFA's request. On June 2, the JPML denied FHFA's request, and on July 14, this Court lifted the stay in this Action.

Thereafter, the Stockholder filed his Motion to Remand and FHFA filed its Motion to Substitute.[2] By the Motion to Remand, the Stockholder asserts that this Court lacks federal jurisdiction and requests that the Court remand the Action to the Court of Chancery. By the Motion to Substitute, FHFA contends that HERA Section 4617(b)(2)(A)(i) bars the Stockholder's claim, transferring it to FHFA. (D.I. 25 at 2.) The Motion to Remand and Motion to Substitute have been fully briefed and are pending.

On September 2, 2016, FHFA filed its Issue Preclusion Motion and opening brief in support thereof. By the Issue Preclusion Motion, FHFA argues that the Motion to Substitute should be granted on the ground of issue preclusion.

III. SUMMARY OF THE ARGUMENT

1. The Issue Preclusion Motion raises an issue that goes to the merits of the Stockholder's claim and therefore may not be decided unless and until the Court determines that

[2] The Stockholder did not file the Motion to Remand in response to the Motion to Substitute, as FHFA has contended. Rather, the Stockholder wanted to avoid burdening the Court with additional briefs addressing any amendments by Fannie Mae to the notice of removal. Thus, he filed the Motion to Remand promptly after the expiration of the amendment period for Fannie Mae's notice of removal.

it has jurisdiction.

2. In all events, issue preclusion does not apply. *First*, it would be improper to give preclusive effect to the EDVA Decision because it concerns a pure question of law. Issue preclusion does not apply to pure questions of law, because it would freeze the courts' development of law.

3. *Second*, it would be improper to give preclusive effect to the EDVA Decision because it conflicts with case law interpreting HERA's Succession Provision and a substantially-identical provision in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). While the United States District Court for the Eastern District of Virginia ("Eastern District of Virginia") concluded that the Succession Provision divested the Stockholder of *all* rights, other courts have concluded that such succession provisions only divest stockholders of the right to bring some derivative claims.

4. *Third*, the portion of the EDVA Decision on which FHFA relies to argue issue preclusion cannot be given preclusive effect because it was only one of two alternative grounds for the Decision. It therefore was not essential to the EDVA Decision. Thus, the Delaware Court of Chancery will find that it could not have preclusive effect for that reason alone under the applicable authority of the Fourth Circuit.

5. *Finally*, the Court should exercise its discretion to postpone consideration of FHFA's issue preclusion argument until after (a) the D.C. Circuit has issued its imminent ruling on the meaning of HERA's Succession Provision and (b) the Fourth Circuit has decided the Stockholder's appeal of the EDVA Decision.

IV. STATEMENT OF FACTS

Since 2012, numerous lawsuits have been filed across the country against Fannie Mae, its conservator (FHFA), its controlling stockholder (the United States Treasury ("Treasury")) and

others. These lawsuits stem from Fannie Mae's entry into a blatantly unfair, self-dealing transaction with Treasury on August 17, 2012. (D.I. 1 Ex. A ("Complaint" or "Compl.") ¶ 117; *see id.* ¶ 7.) By the transaction (the "Third Amendment"), Fannie Mae and Treasury agreed to increase the dividend on Senior Preferred Stock held by Treasury from 10% in cash (12% if paid in kind) to the *entirety of Fannie Mae's future net worth in perpetuity* (the "Net Worth Sweep").[3] (Compl. Ex. D. § 3.) Fannie Mae received no consideration for giving up its entire net worth to its controlling stockholder. Fannie Mae has paid the Net Worth Sweep dividends for every quarter since the Third Amendment took effect. (Compl. ¶ 141.) The Net Worth Sweep has resulted in an increase of nearly $80 billion in dividends paid to Treasury. (*See* Compl. ¶ 124.)

A. The Perry Capital Action Challenges the Third Amendment.

On July 7, 2013, Perry Capital LLC ("Perry Capital") filed in the United States District Court for the District of Columbia (the "D.C. District Court") a lawsuit against Treasury, the Secretary of Treasury, FHFA and FHFA's acting director. In the suit, Perry Capital challenged the validity of the Third Amendment. In late 2013, the D.C. District Court coordinated Perry Capital's lawsuit with three other lawsuits, including one consolidated class action, that also challenged the Third Amendment (collectively, the "Perry Capital Action"). *See* Order, *Perry Capital LLC v. Lew*, No. 1:13-cv-01025-RCL, D.I. 24 (D.D.C. Nov. 18, 2013).

In challenging the Third Amendment, the plaintiffs in the Perry Capital Action, as stockholders of Fannie Mae and Freddie Mac and representatives of such stockholders, brought claims alleging breaches of stock certificates, breaches of fiduciary duties, unconstitutional

[3] Freddie Mac, which had also been placed into conservatorship by FHFA, and Treasury entered into a substantially identical transaction resulting in a net worth sweep of Freddie Mac's profits on a quarterly basis. (Complaint for Inspection of Corporate Records ¶¶ 9-10, *Pagliara v. Fed'l Home Loan Mortg. Corp.*, No. 1:16-cv-00337-JCC-JFA, D.I. 1 Ex. A (E.D. Va.).) This transaction has also resulted in numerous lawsuits.

takings and violations of the Administrative Procedure Act. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 218 (D.D.C. 2014). The defendants moved to dismiss the claims for lack of jurisdiction pursuant to Rule 12(b)(1) and failure to state a claim pursuant to Rule 12(b)(6). *Id.*

On September 30, 2014, the D.C. District Court granted the defendants' motions to dismiss the Perry Capital Action. As discussed *infra* in Section IV(E), the plaintiffs appealed the D.C. District Court's decision and that appeal is currently pending.

B. The Stockholder Initiates Books and Records Actions against Fannie Mae and Freddie Mac.

On March 14, 2016, the Stockholder commenced (1) a books and records action against Fannie Mae pursuant to Section 220 of the Delaware General Corporation Law in the Delaware Court of Chancery and (2) a books and records action against Freddie Mac pursuant to Sections 13.1-771 and -773 of the Virginia Stock Corporation Act in the Circuit Court for Fairfax County, Virginia (the "Freddie Mac Action"). In this Action, the Stockholder primarily sought information concerning the actions and omissions of Fannie Mae's board of directors in the Third Amendment, Net Worth Sweep and investment of tens of millions of dollars in a common mortgage security offering to be shared with Fannie Mae's competitors (the "Common Offering").[4] Both this Action and the Freddie Mac Action were removed to federal court.[5]

[4] The Common Offering is comprised of Common Securitization Solutions, LLC, the Common Securitization Platform and the Single Security, all as defined in the Stockholder's Complaint.

[5] The Stockholder did not contest the Eastern District of Virginia's subject matter jurisdiction in the Freddie Mac Action because, by statute, any civil suit to which Freddie Mac is a party is deemed to have federal question jurisdiction and may be removed to federal court. *See* 12 U.S.C. § 1452(f)(2)-(3). By contrast, there is no similar statute for Fannie Mae. *See* 12 U.S.C. § 1716 *et seq.*

C. The JPML Rejects FHFA's Request to Coordinate or Consolidate this Action, the Freddie Mac Action and Other Litigation.

On March 15, 2016, FHFA filed before the JPML a motion to transfer the following four actions challenging the Third Amendment to the D.C. District Court for coordinated or consolidated proceedings: (1) *Saxton v. FHFA*, No. 1:15-cv-00047 (N.D. Iowa); (2) *Jacobs v. FHFA*, No. 1:15-cv-00708 (D. Del.); (3) *Robinson v. FHFA*, No. 7:15-cv-00109 (E.D. Ky.);[6] and (4) *Roberts v. FHFA*, No. 1:16-CV-02107 (N.D. Ill.). In support of its motion to transfer, FHFA argued, among other things, that the D.C. District Court was the appropriate venue as it had been the venue for the Perry Capital Action. (Opening Brief in Support of Motion to Transfer at 11 (Ex. A).)[7] FHFA based its motion to transfer on avoiding the "plaintiffs . . . relitigating the same legal issues over and over in hopes of finding a court that will rule in their favor." (*Id.* at 1-2.)

On March 28, 2016, FHFA asked that the JPML also transfer for coordinated or consolidated proceedings this Action and the Stockholder's Freddie Mac Action. (D.I. 3 Ex. 1 at 3 (Notice of Related Actions).) FHFA argued that the Stockholder's "actions present the same legal issues and common facts as do the four related cases that formed the basis for FHFA's original motion to transfer." (*Id.* at 2.)

In particular, FHFA argued that a common issue in each of the actions it sought to transfer was whether shareholders of Fannie Mae and Freddie Mac can "bring these actions in

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[6] Since FHFA's motion to transfer was filed and ultimately denied, the action filed in the United States District Court for the Eastern District of Kentucky was dismissed based on findings that FHFA did not violate its duties as conservator under HERA. *See Robinson v. Fed'l Hous. Fin. Agency*, 2016 WL 4726555, at *6-8 (E.D. Ky. Sept. 9, 2016). This decision did not address the meaning of HERA's Succession Provision. *See generally id.*

[7] Unless otherwise indicated, the Exhibits referenced herein shall be the Exhibits attached to the Declaration of C. Barr Flinn in support of this answering brief in opposition to the Issue Preclusion Motion, submitted herewith.

light of HERA's statutory mandate that the Conservator has succeeded to 'all rights, titles, powers, and privileges' of Fannie Mae's and Freddie Mac's shareholders." (*Id.*; *see also* Reply Brief in Support of Motion to Transfer at 5 (Ex. B) ("Plaintiffs' attempts to highlight purported differences between their actions—specifically their legal theories—do not override the fact that HERA (12 U.S.C. § 4617) disposes of Plaintiffs' claims.").)

Plaintiff's counsel argued that transfer to consolidate or coordinate consideration of this legal issue was inappropriate because

> Congress wants these cases, big important issues, to be addressed to percolate up. So if there is a disagreement, if there is a division, there's a Supreme Court that's there to address and probably would. If there's a circuit split --[.]

(Transcript of Hearing on Motion to Transfer ("Tr.") at 17 (Ex. C).)

On June 6, 2016, the JPML denied FHFA's motion to transfer. (D.I. 6 Ex. A (Order Denying Transfer).) Noting that the defendants' argument that HERA bars judicial review of the plaintiffs' claims is a "common legal" question, the JPML nonetheless concluded that "avoid[ing] two federal courts having to decide the same issue" did not justify centralization. (*Id.* at 2.) One JPML member expressly noted that as a result of the denial of transfer, the issue of whether HERA barred the plaintiffs' actions was a "legal" question that would be "decided again and again" with actions proceeding in some jurisdictions, but not others. (Tr. at 16-17 (Ex. C).)

D. The Eastern District of Virginia Dismisses the Freddie Mac Action.

On August 23, 2016, the Eastern District of Virginia dismissed the Freddie Mac Action for inspection of books and records of Freddie Mac on two alternative grounds. *First*, the court determined that dismissal was warranted because, under HERA's Succession Provision, the Stockholder "does not possess the right he seeks to enforce." *Pagliara v. Fed'l Home Loan Mortg. Corp.*, 2016 WL 4441978, at *8 (E.D. Va. Aug. 23, 2016). *Second*, the court determined

that "[e]ven if [the Stockholder] did possess that right, the Court will dismiss the Complaint because [the Stockholder] does not have a proper purpose" for inspecting Freddie Mac's books and records under Virginia law. *Id.* at *10. On September 21, 2016, the Stockholder filed a notice of appeal of the EDVA Decision with the Fourth Circuit. (Notice of Appeal (Ex. D).)

E. The Perry Capital Action Is Pending Appeal Before the D.C. Circuit.

An imminent decision is expected from the D.C. Circuit on the meaning of the Succession Provision. On October 2, 2014, the plaintiffs in the Perry Capital Action appealed the D.C. District Court's decision to dismiss their action (the "Perry Capital Appeal"). This appeal is currently pending in the D.C. Circuit. In opposition to the plaintiffs' appeal, the defendants have argued, among other things, that HERA's Succession Provision bars direct claims. (*See* Appellees' Brief dated Dec. 21, 2015, at 47 (Ex. E) (arguing that "[e]ven if Class Plaintiffs' fiduciary duty claim were direct, HERA would bar it in light of the Conservator's succession to 'all' shareholder rights").) Accordingly, the D.C. Circuit is expected to opine on the meaning of HERA's Succession Provision. The D.C. Circuit held oral argument in the Perry Capital Appeal on April 15, 2016 and is expected to issue its decision imminently.

V. ARGUMENT

A. The Issue Preclusion Motion Raises a Merits Issue That May Not Be Decided Unless and Until the Court Determines That It Has Jurisdiction.

As the Stockholder has previously explained, the Motion to Substitute concerns the merits of the Stockholder's claim. (D.I. 27 at 4-7.) The Court may not address the merits unless and until it determines that it has jurisdiction on the Motion to Remand. (*Id.* at 7; *see also* D.I. 11 at 2; D.I. 13 at 3.) The same applies to the Issue Preclusion Motion. The issue that it raises, issue preclusion, is a merits issue. *Duvall v. Ellwood*, 336 F.3d 228, 234 (3d Cir. 2003) (referring to "the merits, i.e., the collateral estoppel issue"); *see also In re Dunbar*, 245 F.3d

1058, 1063 n.5 (9th Cir. 2001) ("[C]ollateral estoppel and res judicata are affirmative defenses that have nothing to do with a federal court's jurisdiction."); *Johnson v. Freeburn*, 144 F. Supp. 2d 817, 822 n.1 (E.D. Mich. 2000) (same). Issue preclusion may not be decided by the Court unless and until the Court has determined that it has jurisdiction. *Duvall*, 336 F.3d at 234 (vacating judgment of district court and holding: "[T]he District Court had no jurisdiction to entertain [the] petition. . . . Hence, the District Court should have dismissed [the] petition without reaching the merits, i.e., the collateral estoppel issue advanced by [petitioner]."); *City of Lincoln v. Lincoln Lumber Co.*, 2006 WL 1479043, at *2 n.2 (D. Neb. May 23, 2006) ("This memorandum and order concludes that no federal question jurisdiction exists. However, to reach that conclusion, I need not and have not addressed the merits of the . . . collateral estoppel claims.").[8] As previously explained, the Court lacks jurisdiction. (D.I. 11 at 18-20; D.I. 22.) It therefore will be for the state court to decide the Issue Preclusion Motion.[9]

B. Issue Preclusion Does Not Apply.

1. The EDVA Decision Concerned a Pure Question of Law.

There is no merit to FHFA's contention that the Stockholder's claim is barred by issue preclusion because the Eastern District of Virginia's ruling on the meaning of HERA's Succession Provision is a pure question of law. *See Estate of Arrington v. Michael*, 738 F.3d

[8] *See also Nagim v. Suncor Energy, Corp.*, 2012 U.S. Dist. LEXIS 58965, at *5 (D. Colo. Apr. 27, 2012) ("The action clearly lacks subject matter jurisdiction. The Court, therefore, will refrain from addressing any issue preclusion . . . ."); *Bass v. Butler*, 2005 WL 3348862, at *3 n.3 (E.D. Pa. Dec. 6, 2005) ("The Third Circuit noted that the 'District Court would not reach [claim and issue preclusion] should the Court conclude that the *Rooker-Feldman* doctrine divests it of subject matter jurisdiction.'").

[9] *See also City of Lincoln*, 2006 WL 1479043, at *2 n.2 ("[C]ollateral estoppel may be relevant to the underlying merits of this case, but this court has no subject matter jurisdiction over the merits. Therefore, the . . . collateral estoppel claims should be, and have been, reserved for determination by the state court upon remand.").

599, 605 (3d Cir. 2013) ("[T]he interpretation of the statute is not a 'factual dispute' that requires jury deliberation, but rather a pure question of law.") (citing *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)); *First Union Corp. v. Am. Cas. Co. of Reading, PA*, 222 F. Supp. 2d 767, 770 (W.D.N.C. 2001) ("[T]he doctrine of collateral estoppel should not be applied to 'unmixed questions of law.'") (citing *United States v. Moser*, 266 U.S. 236, 242 (1924)).

Federal courts have held that when a defendant seeks to invoke issue preclusion based on a ruling involving the plaintiff, but not the defendant (i.e., non-mutual collateral estoppel),[10] as FHFA does here, preclusive effect will not arise when "[t]he issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based." *Wade v. Brady*, 460 F. Supp. 2d 226, 240 (D. Mass. 2006).[11] "To apply collateral estoppel under these circumstances would prevent the court from performing its function of developing the law. . . . [and] would not aid judicial economy." *Pharm. Care Mgmt. Ass'n v. District of Columbia*, 522 F.3d 443, 446-47 (D.C. Cir. 2008) (citations omitted).

For example, in *Glictronix Corp. v. American Telephone & Telegraph Co.*, 603 F. Supp. 552 (D.N.J. 1984), a case involving non-mutual collateral estoppel, the Third Circuit declined to

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[10] In cases involving mutual collateral estoppel, a party may not foreclose the application of issue preclusion merely by showing that the question at issue is a pure question of law. The party must also demonstrate that "(a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws[.]" Restatement (Second) of Judgments § 28(2).

[11] *See also* Restatement (Second) of Judgments § 29(7) (noting that issue preclusion does not apply where the "issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based"); *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1086 (9th Cir. 2007) ("Considering whether to grant preclusive effect to a legal determination is constrained in a case like this one where '[i]f the rule of issue preclusion is applied . . . [we are] foreclosed from an opportunity to reconsider the applicable rule, and thus to perform [our] function of developing the law.'") (citing Restatement (Second) of Judgments § 29 cmt. i).

give preclusive effect to a ruling on a pure question of law rendered by the Second Circuit where doing so "would be to foreclose the Third Circuit from independently considering this legal question." 603 F. Supp. at 571 (citing Restatement (Second) of Judgments § 29(7)); *see also Lutz v. Int'l Ass'n of Machinists and Aerospace Workers*, 121 F. Supp. 2d 498, 504 (E.D. Va. 2000) (declining to give preclusive effect to a ruling on a pure question of law rendered by the Fifth Circuit where "the Fourth Circuit ha[d] yet to address the issue").

Because neither the Delaware Court of Chancery nor, as would be the case if the Motion to Remand were denied, a court in this circuit has had the opportunity to rule on the meaning of HERA's Succession Provision, it would be improper to give preclusive effect to the Eastern District of Virginia's ruling.[12] Allowing the development of law on the meaning of HERA's Succession Provision is particularly important here because the meaning is of significant interest to the countless stockholders holding the millions of outstanding shares of Fannie Mae preferred and common stock, as they have all been impacted by HERA, and the Supreme Court of the United States has not ruled on the issue. *See* Restatement (Second) of Judgments § 29 cmt. i (noting that the "rule of preclusion should ordinarily be superseded by the less limited principle of stare decisis" when "the issue is of general interest and has not been resolved by the highest appellate court that can resolve it").[13] Indeed, when denying the transfer of this Action, the

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[12] The Third Circuit has also not yet been afforded the opportunity to rule on the meaning of HERA's Succession Provision.

[13] Section 29 of the Restatement (Second) of Judgments concerns non-mutual collateral estoppel. Both the Fourth Circuit and Third Circuit look to the Restatement (Second) of Judgments for guidance in the area of issue preclusion. *See, e.g.*, *O'Reilly v. Cty. Bd. Of Appeals for Montgomery Cty., Md.*, 900 F.2d 789, at 794 (4th Cir. 1990) (citing Section 29 for guidance on "principles of collateral estoppel"); *Doe v. Hesketh*, 828 F.3d 159, 173-74 (3d Cir. 2016) ("[A]t its core, collateral estoppel is an equitable doctrine. Thus, . . . we recognize the equitable exceptions to the general rule of collateral estoppel codified in the Restatement (Second) of Judgments.") (citations omitted); *Schulman v. J.P. Morgan Inv. Mgmt., Inc.*, 35 F.3d 799, 805 &

JPML noted its expectation that multiple courts would be allowed to rule on the meaning of the Succession Provision. *See supra* § IV(C).

2. The EDVA Decision Is Inconsistent with Other Courts' Rulings.

Issue preclusion does not apply also because the portion of the EDVA Decision upon which FHFA relies – that HERA's Section 4617(b)(2)(A)(i) divested the Stockholder of his direct rights against Freddie Mac – is not consistent with the rulings of other courts. As previously explained, other courts have uniformly held that Section 4617(b)(2)(A)(i) and the substantially identical provision of FIRREA do not divest the Stockholder of direct claims. The Eastern District of Virginia acknowledged this authority, but nonetheless disagreed, holding that Section 4617(b)(2)(A)(i) divests all rights. *See* 2016 WL 4441978, at *5 ("[T]he language means what it plainly says; HERA transferred 'all rights previously held by Freddie Mac's shareholders.'"). The Eastern District of Virginia disagreed with the textual analyses of the other courts. *Compare id. with Levin v. Miller*, 763 F.3d 667, 672 (7th Cir. 2014) ("[T]he court asked counsel whether [FIRREA] § 1821(d)(2)(A)(i) should be understood . . . to transfer to the FDIC *all* claims held by any stockholder of a failed bank . . . . No federal court has read the statute that way, however, and counsel for all litigants declined to adopt that understanding. Section 1821(d)(2)(A)(i) transfers to the FDIC only stockholders' claims 'with respect to . . . the assets of the institution'—in other words, those that investors (but for § 1821(d)(2)(A)(i)) would pursue derivatively on behalf of the failed bank.") (emphasis in original); *Lubin v. Skow*, 382 F. App'x 866, 870-72 (11th Cir. 2010) ("FIRREA grants the FDIC ownership over all shareholder derivative claims . . . . The question then becomes whether the claims [at issue] are derivative

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n.10 (3d Cir. 1994) (citing Restatement (Second) of Judgments §§ 27-29, for guidance on "general principles of collateral estoppel or issue preclusion").

claims."); *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2001) (concluding that HERA "plainly transfers shareholders' ability to bring derivative suits").

While disagreeing with the analyses of the other courts, the Eastern District of Virginia nonetheless attempted to square its conclusion with those of the other courts: The Eastern District of Virginia explains that the other courts held only that a stockholder retains direct *claims*, not direct *rights*. But, of course, "claims" and "rights" cannot be separated. All direct claims are predicated upon direct rights. It would have been pointless for the other courts to discuss whether the stockholders retained direct claims if the stockholder had no direct rights. *See, e.g., Allen v. El Paso Pipeline GP Co., L.L.C.*, 90 A.3d 1097, 1105 (Del. Ch. 2014) (recognizing that a stockholder can "assert a direct claim if the cause of action involved 'a contractual right of shareholders that is independent of the corporation's rights'") (citation omitted); *Cede & Co. v. Technicolor*, 542 A.2d 1182, 1188 n.10 (Del. 1988) ("'[B]reach of an individual shareholder's 'membership' contract or some other interference with the rights that are traditionally viewed as incident to the individual's ownership of stock gives rise to a non-derivative, or direct, action . . . .'") (quoting D. Block, N. Barton & S. Radin, *The Business Judgment Rule: Fiduciary Duties of Corporate Directors and Officers* at 216 (1987)).

Given this conflict between the Eastern District of Virginia's ruling and other federal courts' rulings, issue preclusion does not apply here.[14] *See, e.g., Lutz v. Int'l Ass'n of Machinists*

[14] The Eastern District of Virginia's other ground for dismissal – that the Stockholder lacked a proper purpose for his inspection demand under Virginia law – is both inapplicable and inconsistent with Delaware law. *See* 2016 WL 4441978, at *10. The Eastern District of Virginia found that the Stockholder's prior letters to Freddie Mac concerning the impropriety of the net worth sweep dividends "indicate[d] he will use his records inspection to undermine FHFA's administration of Freddie Mac." *Id.* In contrast, under Delaware law, it is proper for a stockholder to ask a board of directors to alter a company's practices, including its payment of dividends. *See Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 120 (Del. 2006) ("Section 220 provides stockholders of Delaware corporations with a 'powerful right' . . . . Stockholders may

& Aerospace Workers, 121 F. Supp. 2d 498, 503-04 (E.D. Va. 2000) (declining to give collateral estoppel effect to prior decision where "the legal issue presented [was] quite unsettled" as "there [was] a conflict among the circuits" on the issue and "the Fourth Circuit ha[d] yet to address the issue"); *Glictronix Corp. v. Am. Tel. & Tel. Co.*, 603 F. Supp. 552, 571-72 (D.N.J. 1984) (declining to apply collateral estoppel and holding: "In view of the fact that the *Litton* court's holding appears to be at odds with the positions of other circuits, it would be inappropriate to bind this court to the *Litton* court's holding."). Until this inconsistency in the law is settled, this Court should not bind itself to a single court's interpretation of HERA's Succession Provision.

3. The EDVA Decision Was Decided on Alternative Grounds.

There is no merit to FHFA's contention that the Stockholder's claim is barred by issue preclusion for the additional reason that the portion of the EDVA Decision that FHFA contends precludes the Stockholder's claim here – that HERA's Section 4617(b)(2)(A)(i) barred the Stockholder's claim against Freddie Mac – was one of two alternative grounds for decision. *See Pagliara v. Fed. Home Loan Mortg. Corp.*, 2016 WL 4441978, at *8, *10 (E.D. Va. Aug. 23, 2016) ("Even if [the Stockholder] did possess that right [to inspect], the Court will dismiss the Complaint because [the Stockholder] does not have a proper purpose."). As detailed below, it therefore was not "necessary" to the EDVA Decision and did not give rise to issue preclusion.

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use information . . . [to] seek an audience with the board of directors to discuss proposed reform or . . . prepare a stockholder resolution . . . .") (quotations and alterations omitted); *Dobler v. Montgomery Cellular, Inc.*, 2001 WL 1334182, at *3 (Del. Ch. Oct. 19, 2011) ("[I]t is well-settled" that "seeking to evaluate the non-payment of dividends . . . is proper when combined with a request to value shares of the corporation."). Moreover, under Delaware law, it is proper for a stockholder to seek books and records to bring litigation against the corporation. *See, e.g.*, *Compaq Comput. Corp. v. Horton*, 631 A.2d 1, 2 (Del. 1993) ("[S]eeking to solicit the participation of other shareholders in legitimate non-derivative litigation against the defendant corporation" is a proper purpose for inspection.).

The other alternative ground was that the Stockholder did not have a proper purpose, under Virginia law, to inspect books and records.

If this Court determines that it lacks jurisdiction and remands the Action to the Delaware Court of Chancery, the Court of Chancery will determine whether the EDVA Decision has preclusive effect. Under Delaware law, the "preclusive effect of a foreign judgment is measured by [the] standards [used by] the rendering forum." *Nelson v. Emerson*, 2008 WL 1961150, at *6 (Del. Ch. May 6, 2008) ("The [defendants] base their collateral estoppel claim on the findings and conclusions of the U.S. Bankruptcy Court for the Northern District of Illinois and the U.S. District Court for the Northern District of Illinois, and therefore the collateral estoppel standard of the U.S. Court of Appeals for the Seventh Circuit applies.") (citations omitted); *see Yucaipa Am. All. Fund I, LP v. SBDRE LLC*, 2014 WL 5509787, at *11 (Del. Ch. Oct. 31, 2014) ("Here, because the Bankruptcy Court [of the District of Delaware] rendered the relevant opinion, I look to the law of the United States Court of Appeals for the Third Circuit."). In this case, the rendering forum was the Eastern District of Virginia, which is in the Fourth Circuit, and the Delaware Court of Chancery will therefore apply Fourth Circuit law.[15]

Under Fourth Circuit law, a decision will not have a preclusive effect where multiple alternate grounds are provided for the decision. *See, e.g., Tuttle v. Arlington Cty. Sch. Bd.*, 195 F.3d 698, 704 (4th Cir. 1999) (holding that prior ruling was not "necessary" for issue preclusion

[15] If the Court were to determine that it has jurisdiction and deny the Motion to Remand, Third Circuit law would apply. *See, e.g., Manuel v. NRA Grp., LLC*, 2016 WL 4158797, at *3 n.3 (M.D. Pa. Aug. 5, 2016) (citing Third Circuit authority when considering preclusive effect of decision from Middle District of Florida). Third Circuit law conflicts with Fourth Circuit law on the question of whether alternative findings should be given preclusive effect. *See Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 255 (3d Cir. 2006). That the Delaware Court of Chancery would apply different law to evaluate the preclusive effect of the EDVA Decision, further underlines the extent to which the question of jurisdiction must be resolved before the question of issue preclusion may be taken up.

purposes where it was one of two alternative bases for the district court's decision); *United States v. Maxwell*, 189 F. Supp. 2d 395, 403-404 (E.D. Va. 2002) (same); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 119 (4th Cir. 1989) ("When a dismissal is based on two determinations, one of which would not render the judgment a bar to another action on the same claim, the dismissal should not operate as a bar.").[16] Courts have explained, under the Fourth Circuit's authority, that an alternative ruling cannot establish issue preclusion because it is not necessary or essential to a court's ultimate decision in light of the court's other ruling. *See Maxwell*, 189 F. Supp. 2d 395, 402-03 (E.D. Va. 2002) (explaining that an alternative ruling "clearly was not a necessary part of any such decision" because the court's decision was mandated by another finding); *Cannon v. Wells Fargo Bank, N.A.*, 2014 WL 672687, at *13 (D. Md. Feb. 20, 2014) (noting, while considering an issue preclusion argument, that "an issue or fact that is 'critical and necessary' to a judgment must be one that is essential to support the judgment, and not merely an alternative basis independently capable of supporting a judgment") (citation and quotations omitted).[17] Under Delaware law, the EDVA Decision does not have

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[16] *See also Morrison v. Holding*, 539 Fed. Appx. 272, 273 n.1 (4th Cir. 2013) ("We decline to affirm the district court's dismissal on res judicata grounds because, although [plaintiff's] previous action was dismissed on statute of limitations grounds, it was also . . . dismissed for lack of subject matter jurisdiction.") (citing *Pizlo*, 884 F.2d at 119); *Rhone-Poulenc Agro S.A. v. Monsanto Co.*, 445 F. Supp. 2d 531, 539 (M.D.N.C. 2006) ("Because the Arbitration's discussion of Dr. Comai's contributions [to the invention] were alternative grounds to its denial of Calgene's claims on procedural grounds, it will not be afforded preclusive effect in this case."); Restatement (Second) of Judgments § 20 cmt. e ("A dismissal may be based on two or more determinations, at least one of which, standing alone, would not render the judgment a bar to another action on the same claim. In such case, if the judgment is one rendered by a court of first instance, it should not operate as a bar. . . Even if another of the determinations, standing alone would render the judgment a bar, that determination may not have been carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense has some of the characteristics of dicta.") (followed by Fourth Circuit and cited by, among other cases, *Pizlo*, 884 F.2d at 119).

[17] *Cf. Ritter v. Mount St. Mary's Coll.*, 814 F.2d 986, 993-94 (4th Cir. 1987) (observing that a "corollary to the general rule of collateral estoppel is that, where the court in the prior suit has

preclusive effect because the court that rendered the decision would not give it preclusive effect in such an action.

4. The Court Should Postpone Considering Issue Preclusion.

Even if the Court could address the merits before deciding the Motion to Remand, it should postpone consideration of FHFA's issue preclusion argument in light of (a) the imminent ruling of the D.C. Circuit on the meaning of HERA's Succession Provision in the Perry Capital Appeal and (b) the pending appeal of the EDVA Decision. *See Holms v. City of Wilmington*, 79 F. Supp. 3d 497, 509 (D. Del. 2015) ("The application of the doctrine of collateral estoppel is within the 'broad discretion' of the trial court.") (quoting *Parkland Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979)); *Dimensional Music Publ'g, LLC v. Kersey*, 448 F. Supp. 2d 643, 656 (E.D. Pa. 2006) ("In the exercise of its sound discretion, a court may hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues.") (quotations and citations omitted).[18]

a. The D.C. Circuit's Forthcoming Decision in the Perry Capital Appeal

At issue in the Perry Capital Appeal is substantially the same question considered by the Eastern District of Virginia: Does HERA's Succession Provision bar direct claims by stockholders against Fannie Mae and Freddie Mac? (Transcript of Oral Argument in Perry Capital Appeal, at 95 (Ex. F) (Attorney for Secretary of Treasury: "[T]o state the obvious the question that's presented by Judge Lamberth's opinion is whether the two critical provisions of

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determined two issues, either of which could independently support the result, then neither determination is considered essential to the judgment[,]" but finding an exception where a "case features, in comparison to the 'prior' suit, the same parties, the same issues, the same facts, and even the same court").

[18] *See also Duhaney v. Att'y Gen. of the U.S.*, 621 F.3d 340, 351 (3d Cir. 2010) ("[C]ollateral estoppel was borne of equity and is therefore 'flexible,' bending to satisfy its underlying purpose in light of the nature of the proceedings.") (quotations and citations omitted).

HERA, the explicit bar on judicial review, and the transfer of rights provision bar these claims[.]"); Appellees' Brief dated Dec. 21, 2015, at 47 (Ex. E) (arguing that "[e]ven if Class Plaintiffs' fiduciary duty claim were direct, HERA would bar it in light of the Conservator's succession to 'all' shareholder rights").)

A ruling by the D.C. Circuit that conflicts with the Eastern District of Virginia's ruling on the meaning of the Succession Provision would constitute an intervening change in the law, providing an additional reason for the Court not to apply issue preclusion. *See, e.g., Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 550 (6th Cir. 2001) (finding "a change in the legal climate" and declining to give preclusive effect to the "myriad [of decisions upholding] the constitutionality" of the statute's retroactive application, where the Supreme Court in a later decision "invalidated retroactive application" of a different, but analogous statute); *Brock v. Williams Enters. of Ga., Inc.*, 832 F.2d 567, 574 (11th Cir. 1987) (finding an "intervening change in legal principles" and therefore denying request for application of collateral estoppel where, contrary to a prior determination of the Occupational Safety and Health Review Commission, three other circuits later found that 29 C.F.R. § 1926.105(a) applies to the steel erection industry.).[19]

b. The Appeal of the EDVA Decision

The Court should postpone consideration of FHFA's issue preclusion argument also until after the Stockholder's appeal of the EDVA Decision is decided by the Fourth Circuit. The

[19] *See also CBN Corp. v. United States*, 176 Ct. Cl. 861, 865 (1966) ("In regard to the aforementioned *change or development in controlling legal principles or change in the legal atmosphere* it has been stated that these standards do not mean that the earlier decision must have been overruled or that the second ruling be inconsistent with the first. The above italicized language means rather that the 'second Court should be freed from the prior determination if there has been some marked advance or alteration in relevant orientation, approach, reasoning, or principles.'") (citation omitted) (emphasis in original).

Third Circuit has recognized that where two cases, like this Action and the Freddie Mac Action, have progressed at different speeds, application of doctrines such as issue preclusion "can create later problems if a first judgment, relied upon in a second proceeding, is reversed on appeal." *United States v. 5 Unlabeled Boxes*, 572 F.3d 169, 175 (3d Cir. 2009).[20] To avoid this result, the Court may exercise its discretion to postpone the question of whether to apply issue preclusion. *See* Restatement (Second) of Judgments § 13, cmt. f ("The pendency . . . of an appeal from a judgment[] is relevant in deciding whether the question of preclusion should be presently decided in the second action. It may be appropriate to postpone decision of that question until the proceedings addressed to the judgment are concluded.") (cited by *5 Unlabeled Boxes*, 572 F.3d at 175).[21]

VI. CONCLUSION

For the foregoing reasons, the Stockholder respectfully requests that the Court address his Motion to Remand before FHFA's Issue Preclusion Motion and remand this Action to the Delaware Court of Chancery.

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[20] *See also* 18A Charles Alan Wright, et al., *Federal Practice & Procedure* § 4433 (2d ed. 2016) ("Substantial difficulties result from the rule that a final trial-court judgment operates as res judicata while an appeal is pending. The major problem is that a second judgment based upon the preclusive effects of the first judgment should not stand if the first judgment is reversed. . . . This result should always be avoided[.]" One option is to "delay[] further proceedings in the second action pending conclusion of the appeal in the first action[.]").

[21] *See also Bailey v. Ness*, 733 F.2d 279, 282 (3d Cir. 1984) (noting that "[i]rrespective of whether the judgment in the state court operated as res judicata pending appeal, the federal court should take into consideration the possibility of reversal of that judgment") (quotations and citations omitted).

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