IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

TIMOTHY J. PAGLIARA, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, Defendant.	C.A. No. 1:16-cv-00193

REPLY IN SUPPORT OF SUPPLEMENTAL MOTION TO SUBSTITUTE THE FEDERAL HOUSING FINANCE AGENCY AS PLAINTIFF

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Plaintiff's Opposition[1] offers no reason why the Court should not apply the doctrine of issue preclusion to bind Mr. Pagliara to the Eastern District of Virginia's ruling in a copycat case Pagliara brought simultaneously with this one. The earlier decision held that immediately upon the September 6, 2008 appointment of FHFA as Conservator of Fannie Mae and Freddie Mac (together, the "Enterprises"), HERA automatically transferred all shareholder books-and-records inspection rights exclusively to FHFA. *See Pagliara v. Fed. Home Loan Mortg. Ass'n*, No. 16-cv-00337, 2016 WL 4441978, at **1, 4-5, 8 (E.D. Va. Aug. 23, 2016) ("EDVa Decision") (citing 12 U.S.C. § 4617(b)(2)(A)(i)). The Court should, accordingly, grant this dispositive motion.

A. Issue Preclusion Applies to Questions of Law

Pagliara's main argument is that a "pure question of law does not give rise to issue preclusion when raised by a different defendant."[2] That assertion is flatly wrong because, in the words of the Third Circuit, "the doctrine of issue preclusion applies equally to issues of law." *Delaware River Port Auth. v. Fraternal Order of Police*, 290 F.3d 567, 578 n.22 (3d Cir. 2002). The doctrine thus "bars successive litigation of an issue of fact ***or law*** actually litigated and resolved in a valid court determination essential to the prior judgment." *Nat'l Medical Imaging, LLC v. Ashland Funding LLC*, 648 F. App'x 251, 255 (3d Cir. 2016) (emphasis added); *Continental W. Ins. Co. v. FHFA*, 83 F. Supp.3d 828, 833 (S.D. Iowa 2015) (same).

In limited circumstances not present here, courts recognize a narrow exception to the otherwise applicable doctrine of issue preclusion for "unmixed questions of law." *Burlington N. R..R. Co. v. Hyundai Merchant Marine Co., Ltd.*, 63 F.3d 1227, 1237 (3d Cir. 1995). But the

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1 *See* Pl. Timothy J. Pagliara's Answering Br. in Opp. to Suppl. Mot. to Substitute FHFA as Pl. (filed Sept. 23, 2016) [D.I. 30] ("Opp."); Mem. in Supp. of Suppl. Mot to Substitute FHFA as Pl. (filed Sept. 2, 2016) [D.I. 25] ("Opening Br.").

2 *See* Opp. 1, 4, 10-12.

exception applies "only when the previously determined issue is one of law, ***and*** *either* (1) the two actions involve claims that are substantially unrelated ***or*** (2) a new determination is warranted . . . to avoid inequitable administration of the laws." *Id.* (bold emphasis added) (internal quotation marks and citation omitted). Indeed, the Third Circuit has explained that "estoppel should be applied unless the issue of law arises in a successive case that is so *unrelated* to the prior case that relitigation is warranted." *Nat'l R.R. Passenger Corp. v. Pennsylvania P.U.C.*, 288 F.3d 519, 530 (3d Cir. 2002) (internal quotation marks and citation omitted).

This case meets neither requirement necessary to invoke this limited exception. ***First***, the two books-and-record complaints that Pagliara simultaneously filed against the two Enterprises plainly are ***not*** "substantially unrelated." Just the opposite, they are substantially identical. Pagliara filed books-and-records complaints against both Enterprises on the same date. *See* Opp. 6. In both cases, FHFA has moved to be substituted as plaintiff, in place of the current Plaintiff Pagliara.[3] And both cases present precisely the same issue: whether HERA's succession provision, § 4617(b)(2)(A), transferred Pagliara's shareholder books-and-records inspection rights exclusively to FHFA.

Second, there has been no change in the "intervening legal context" that might require a new determination of the § 4617(b)(2)(A) issue. The Eastern District of Virginia issued its dispositive ruling just last month, and Pagliara identifies no intervening events that might call its controlling resolution of the identical legal issue into question.

[3] *Compare* Opening Br. *with* Memorandum in Support of Freddie Mac and FHFA's Combined Motion to Dismiss or, in the Alternative, to Substitute FHFA as Plaintiff, *Pagliara v. Fed. Home Loan Mortg. Corp.*, No. 1:16-cv-00337 (E.D. Va. June 17, 2016), ECF No. 34. The same federal agency, FHFA, serves as the Conservator of both Fannie Mae and Freddie Mac.

"Preclusion ordinarily should apply if two cases present the same issue of law application. Identity of the issue is established by showing that the same general legal rules govern both cases and that the facts of both cases are indistinguishable as measured by those rules." 18 C. Wright, et al., Fed. Prac. & Proc. Juris. § 4425 (2d ed. 2016). The substitution issue now before the Court presents exactly the same question, under the same provision of HERA, as already resolved by the Eastern District of Virginia. Under these circumstances, Pagliara is bound by the EDVa Decision.

B. There Is No Exception to Issue Preclusion Based on Supposedly Alternative Holdings in the EDVa Decision

Pagliara also fails in his attempt to evade the preclusive effect of the EDVa Decision by asserting that it supposedly rests on "alternative grounds." *See* Opp. 15-18. The Eastern District of Virginia explicitly predicated its dismissal of Pagliara's books-and-records complaint on HERA's substitution provision: "The Court concludes that the statutory transfer of power to the conservator destroyed the stockholder's right to inspect corporate records. Accordingly, the Court will dismiss Plaintiff's complaint." *Pagliara*, 2016 WL 4441978, at *1. *Cf. Nat'l Satellite Sports, Inc. v. Time Warner Entm't Co., L.P.*, 217 F. Supp. 2d 466, 469 (S.D.N.Y. 2002) (Where "one ground for the decision is clearly primary and the other only secondary, the secondary ground is not 'necessary to the outcome' for the purposes of issue preclusion." (quoting *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 910 (6th Cir. 2001)).

In any event, this Court will apply "federal common law principles of issue preclusion since we are examining the issue preclusive effect of a prior federal court action." *Peloro v. United States*, 488 F.3d 163, 175 n.11 (3d Cir. 2007) (citation omitted). Accordingly, this Court will look to Third Circuit law, which—as Pagliara concedes—affords preclusive effect to ***each*** alternative holding of the earlier judgment. *See* Opp. 16 n.15; *Jean Alexander Cosmetics, Inc. v.*

L'Oreal USA, Inc., 458 F.3d 244, 255 (3d Cir. 2006) ("[W]e will follow the traditional view that independently sufficient alternative findings should be given preclusive effect."); *Int'l Union, UAW v. Visteon Corp.*, No. 13-1742-RGA, 2015 WL 4126742, at *6 (D. Del. July 9, 2015) (same). Accordingly, even if the EDVa Decision is viewed as having alternative holdings, each (including the HERA substitution holding at issue here) are entitled to preclusive effect.[4]

C. The Exception for Inconsistent Prior Judgments Does Not Apply

Pagliara further errs in arguing that the EDVa Decision "is not consistent with the rulings of other courts." *See* Opp. 13. Pagliara relies on the same supposedly inconsistent rulings that he presented to the Eastern District of Virginia, which had no trouble distinguishing them. For example, in *Levin v. Miller*, the parties in a breach of fiduciary duty case *agreed* that the FDIC equivalent of the HERA provision at issue here transferred only derivative claims to the FDIC. 763 F.3d 667, 672 (7th Cir. 2014). Accordingly, the succession question was not disputed and the Court had no opportunity to evaluate or rule on it. Similarly, in *Lubin v. Skow*, 382 F. App'x 866 (11th Cir. 2010) and *Kellmer v. Raines*, 674 F.3d 848 (D.C. Cir. 2012), there was no dispute—and the courts thus had no opportunity to consider or rule on—whether HERA or its FDIC equivalent transferred shareholder direct claims. Thus, these rulings are not inconsistent with the EDVa Decision. Indeed, courts have consistently found that "Congress has transferred

[4] Pagliara's speculation that the result might be different if this Court remands to Delaware state court and that court chooses to apply only the law of the Eastern District of Virginia (Opp. 16-17) is beside the point. FHFA's motion is pending in this Court, not Delaware state court, and as explained *infra* this Court should resolve the substitution issue before even considering remand.

everything it could to the [conservator]." *Kellmer*, 674 F.3d at 851 (emphasis added) (alteration in original).[5]

In all events, this Court has discretion to apply issue preclusion even if there were inconsistent prior rulings (and there are not). *See, e.g.*, *Lutz v. Int'l Ass'n of Machinists & Aerospace Workers*, 121 F. Supp. 2d 498, 504 (E.D. Va. 2000). Because this case presents exactly the same substitution issue on which FHFA prevailed in the Eastern District of Virginia, it would be unfair and inefficient to require that the issue be relitigated here just months after that court's decision. *See, e.g.*, *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 172 (1984).

D. Applying Issue Preclusion Here Will Not Foreclose the Development of Law on HERA's Substitution Provision

Pagliara argues for another narrow exception to issue preclusion, asserting that its application here would "prevent the court from performing its function of developing the law." *See* Opp. 11 (quoting *Pharm. Care Mgmt. Ass'n v. District of Columbia*, 522 F.3d 443, 446-47 (D.C. Cir. 2008) and citing *Wade v. Brady*, 460 F. Supp. 2d 226 (D. Mass 2006) and *Glicktronix Corp. v. AT&T*, 603 F. Supp. 552 (D.N.J. 1984)). Developing the law is a poor euphemism for

[5] Further, as the Eastern District of Virginia explained, "[t]he derivative-versus-direct distinction discussed in the cases Pagliara cites . . . has little bearing on the issue in this case. The 'right' at issue in the cases Pagliara cites was the right to bring a claim on behalf of a corporation, i.e., derivative standing. *See, e.g.*, *Levin*, 763 F.3d at 672 (addressing whether FIRREA transferred "all *claims* held by any stockholder" (emphasis added) . . . . The courts were discussing a stockholder's right to bring a derivative suit as compared to a stockholder's standing to bring a lawsuit to remedy his own direct injuries. In that context, the derivative-versus-direct distinction is informative, because standing to bring a lawsuit to remedy a personal injury is not easily categorized as a right with respect to the corporation. The present case, however, questions whether a stockholder possesses the underlying right that he seeks to enforce through a direct lawsuit. In other words, the issue here is not whether Pagliara may pursue his right through a direct lawsuit, but whether he possesses the right he believes was infringed. The cases Pagliara cites do not bear on that issue." *Pagliara*, 2016 WL 4441978, at *6.

seeking a different result in a different court, and in any event there are ample opportunities for the law to develop outside this particular case.

This Court (and potentially the Third Circuit) will have a full opportunity to address § 4617(b)(2)(A)'s transfer of Enterprise shareholder rights in the *Jacobs* case currently pending before this Court. *See* Opening Br. in Support of Mot. to Dismiss of the Dep't of the Treasury, at 18-22, *Jacobs v. FHFA*, Civ. No. 15-708 (D. Del. filed Nov. 13, 2015) [D.I. 20] (arguing that plaintiffs in that case cannot pursue shareholder claims based on the Third Amendment against FHFA and Treasury because § 4617(b)(2)(A) transferred shareholder rights to FHFA). The law will thus develop notwithstanding that Pagliara is bound by the Eastern District of Virginia's ruling in a case Pagliara chose to bring in that forum.

In any event, as Pagliara acknowledges, the "development of law" exception to the doctrine of issue preclusion applies only where the precluded party was not given an equivalent opportunity to litigate the issue in an earlier case. Opp. at 11 n. 10; Restatement (Second) of Judgments § 29 (Non-mutual issue preclusion applies unless the party against whom it is asserted "lacked [a] full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue"). Here, Pagliara had a full opportunity to contest it in the case he brought in the Eastern District of Virginia. There is no doubt Pagliara's opportunity to litigate the HERA substitution issue in that court "was at least the equivalent" of that otherwise awaiting him in this Court. The Eastern District of Virginia accepted full briefing and afforded Pagliara oral argument before ruling that HERA had transferred his shareholder books-and-records inspection powers to FHFA. And Pagliara retains—and is currently exercising—his right to appeal the EDVa Decision to the United States

Court of Appeals for the Fourth Circuit.[6] Thus, the "development of law" exception to issue preclusion does not apply.

E. This Court Can and Should Decide the HERA Substitution Issue Before Deciding Pagliara's Motion to Remand

Pagliara is wrong that the Court lacks power to decide FHFA's motion to substitute before turning to his motion to remand this proceeding to Delaware state court. *See* Opp. 9-10. As FHFA has previously explained, this Court has full authority to rule on the motion to substitute first, and indeed ***should*** rule on substitution first in the interests of judicial economy. *See* Opp. of Proposed Substitute Pl., FHFA as Conservator of Fannie Mae, to Pl.'s Mot. to Remand (filed Aug. 18, 2016) [D.I. 16]; *see also Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 583-85 (1999) (The court is ***not*** obligated to "accord[] priority to the requirement of subject-matter jurisdiction because it . . . delimits federal-court power"). Instead, where the parties' filings raise other "threshold grounds for denying audience to [the] case on the merits," the district court may properly "choose among [those grounds]." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431-32, 436 (2007) (ruling on *forum non conveniens* prior to challenge to subject matter jurisdiction appropriate because "judicial economy" was served by "bypassing questions of subject-matter . . . jurisdiction" in order to "take[] the less burdensome course" to resolve the case).[7]

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[6] *See Pagliara v. Fed. Home Loan Mortg. Corp.*, No. 16-2090 (4th Cir. docketed Sept. 22, 2016).

[7] *Duvall v. Ellwood* 336 F.3d 228 (3d Cir. 2003) (*see* Opp. 9-10), offers no support for Pagliara on this issue. In *Duvall*, an immigration case, the Third Circuit held that the trial court should have dismissed for lack of subject matter jurisdiction where the plaintiff had not received a final order of removal and had failed to exhaust administrative remedies that Congress explicitly provided as prerequisites to bringing suit. *Id.* at 234. The case says nothing about the order in which the Court may decide FHFA's substitution motion. Moreover, Pagliara's claim that *Duvall* (or any case) stands for a universal proposition that "issue preclusion[] is a merits

(footnote continued on next page)

Here, judicial economy will be served by ruling first on FHFA's dispositive HERA substitution motion. If FHFA prevails on that motion, then it will be substituted as plaintiff and will promptly dismiss this litigation altogether. A ruling on Pagliara's motion to remand, in contrast, will not be dispositive, resulting in further proceedings (including a necessary ruling on the HERA substitution motion) in this Court or Delaware state court. Moreover, this Court will face the impact of HERA's § 4617(b)(2)(A) in related litigation brought by Fannie Mae shareholders in *Jacobs v. FHFA*, No. 15-708-GMS. *See supra*, at 6.

F. There is No Reason to Postpone the Court's Ruling on FHFA's HERA Substitution Motion

The Court should not postpone ruling on FHFA's HERA substitution motion pending resolution of appeals in *Perry Capital* and the underlying EDVa Decision. *See* Opp. 18-20. The law is clear that a "pending appeal does not vitiate the preclusive effect of a trial court judgment." *Tucker v. Bristol-Myers Squibb*, 143 Fed. App'x 411, 413 n.** (3d Cir. 2005); Restatement (Second) of Judgments § 13 comment f. If this Court enters judgment based on issue preclusion and Pagliara is later successful in appealing the EDVa Decision, he can seek relief in this Court pursuant to Fed. R. Civ. P. 60(b)(5) (permitting the Court to relieve a party from judgment if "the judgment . . . is based on an earlier judgment that has been reversed or

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(footnote continued)
issue," Opp. at 9, is simply incorrect. Issue preclusion is a litigation tool designed to promote judicial economy, and it applies when an "issue is actually necessarily decided by a court of competent jurisdiction." *Burlington*, 63 F.3d at 1232. Some issues go to the merits, as was the case in *Duvall*. But other issues, like personal jurisdiction, *forum non conveniens*, and party substitution, are threshold matters that can be decided before subject matter jurisdiction. Using collateral estoppel as a tool to efficiently decide such issues does not transform them into "merits" determinations.

vacated."); *see also In re Nave*, No. 09-00651, 2011 WL 4344544, at 1 n.1 (Bankr. D.D.C. Sept. 15, 2011).

CONCLUSION

Pagliara is bound in this Court by the Eastern District of Virginia's ruling that the "statutory transfer of power to the conservator destroyed the stockholder's right to inspect corporate records." *Pagliara*, 2016 WL 4441978, at *1. This Court should grant FHFA's motion to substitute FHFA for Pagliara as the only proper plaintiff in this suit.

Dated: October 3, 2016
Wilmington, Delaware

Respectfully submitted,

/s/ Robert J. Stearn, Jr.

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