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BY E-FILING AND HAND DELIVERY

The Honorable Tamika Montgomery-Reeves
Vice Chancellor
Court of Chancery
500 N. King Street
Wilmington DE 19801

Re: *Pagliara v. Federal National Mortgage Association*
C.A. No. 12105-VCMR

Dear Vice Chancellor Montgomery-Reeves:

I write to correct the record regarding certain misstatements of fact and law in Plaintiff's opposition to Fannie Mae's motion for reconsideration.

(a) ***Personal Jurisdiction***. First, Fannie Mae's motion is not untimely. The parties agreed that no answer or other responsive pleading was due until the parties had the opportunity to confer.[1] Mot. for Recons. at 4 n.1; *see also* Ex. 1 (Pagliara's

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[1] Waiver, in all events, is tied to the failure to present a defense in a party's first response, not the timeliness of that response. *Foss v. Klapka*, 95 F.R.D. 521, 523 (E.D. Pa. 1982) (observing that Rule 12(h) "does not call for the assertion of the defense within the time provided in Rule 12(a) for serving a responsive pleading; it merely dictates waiver if the defense is not made by motion or included in the responsive pleading, presumably whenever it may happen to be served" (emphasis omitted)); *Gray v. Lewis & Clark Expeditions, Inc.*, 12 F.

counsel's confirmation that no response to the complaint is due until after a meet and confer). Pagliara, moreover, was clearly on notice that Fannie Mae was not a Delaware corporation and that Fannie Mae intended to argue as much. *See* Ex. 2 (letter to B. Flinn from J. Kilduff).

Second, Plaintiff argues that Fannie Mae waived its defense to this Court's jurisdiction when **FHFA** filed a Motion to Substitute in the U.S. District Court for the District of Delaware. But removal and arguments subsequently raised in federal court are wholly unrelated to the issue of a state court's jurisdiction. *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 157 n.4 (2d Cir. 1996) ("Removal does not waive any Rule 12(b) defenses."); *Rivera v. Bally's Park Place, Inc.*, 798 F. Supp. 2d 611, 615 (E.D. Pa. 2011) (same). "After removal to district court, the action is governed by the Federal Rules of Civil Procedure. . . . Rule 12 provides that a personal jurisdiction defense is waived only if omitted from a Rule 12 motion or from a responsive pleading. The filings concerning the motion to

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Supp. 2d 993, 995 (D. Neb. 1998) ("personal jurisdiction objection was not waived"). Fannie Mae's first responsive pleading raises substantial arguments that should be addressed on the merits. *See, e.g., U.S. to Use of Combustion Sys. Sales, Inc. v. E. Metal Prods. & Fabricators, Inc.*, 112 F.R.D. 685, 691 (M.D.N.C. 1986) (rejecting waiver argument where "the facts do not disclose willfulness" and defendant "made a sufficient showing of a meritorious defense"). Although these cases arise under the federal rules, construction of Delaware court rules is "greatly influenced by the federal judiciary's construction of the Federal Rules of Civil Procedure." *Apartment Communities Corp. v. Martinelli*, 859 A.2d 67, 70-71 (Del. 2004) (citing *Canaday v. Superior Court*, 119 A.2d 347, 352 (Del. 1956)).

remand were neither responsive pleadings nor Rule 12 motions. Personal jurisdiction was raised in the first responsive pleading and therefore was not waived." *Usatorres v. Marina Mercante Nicaraguenses, S.A.*, 768 F.2d 1285, 1287 (11th Cir. 1985) (per curiam).

Finally, Pagliara argues that by following Delaware corporate practices as a matter of *federal* regulation, Fannie Mae has somehow consented to general jurisdiction in Delaware. The text of the regulation expressly precludes this possibility (*see* Br. In Supp. of Mot. to Dismiss at 13-15), and any finding to the contrary would be inconsistent with the Delaware Supreme Court's holding that an exercise of general personal jurisdiction over a corporation violates due process unless the company is "at home" in Delaware, *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 127 & n.9 (Del. 2016), which Fannie Mae indisputably is not.

(b) ***HERA's Succession Provision***. Plaintiff incorrectly asserts that the District Court "expressly rejected Fannie Mae's Succession Provision argument and implicitly rejected its issue preclusion and Jurisdictional Bar claims." Opp. ¶ 4; *see also* Opp. ¶¶ 21-24. The District Court did no such thing. Instead, the District Court ruled that the arguments against remand raised merits issues, not jurisdictional issues, and that this Court retains jurisdiction to resolve all such issues in the first instance. Remand Order at 2-3 (Federal Docket #38). In so doing, the District Court agreed with the decision in *Pagliara v. Fed. Home Loan*

Mortg. Corp., in which the court held that "the question of the existence of the right at issue goes to the merits of Pagliara's claim, not to his jurisdictional allegations." 203 F. Supp. 3d 678, 685 (E.D. Va. 2016). But the District Court did not rule on the merits question of whether Plaintiff possesses any such rights; it merely held that Plaintiff has standing to pursue his claim. Remand Order at 2.

Even more significantly, the District Court held—in language conspicuously omitted from Plaintiffs' opposition—that "[a]t most, Defendants raise a defense under federal law . . . [which] is not enough to establish federal question jurisdiction." Remand Order at 3. The District Court thus concluded by stating "it would be improper to deprive the Chancery Court—a court very capable of interpreting federal law—of its exclusive jurisdiction over § 220 actions." Remand Order at 3. This portion of the Remand Order alone defeats Plaintiff's argument that the District Court rejected FHFA's Succession Provision argument on the merits.[2]

Moreover, there is nothing in the District Court's Remand Order that purports to rule on FHFA's issue preclusion argument or HERA-based argument

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[2] Tellingly, before the District Court issued its Remand Order, Plaintiff himself argued that the "question of substitution," as well as the "question of issue preclusion," "may be decided only by the Delaware Court of Chancery," in light of Plaintiff's belief that the District Court "does not have jurisdiction over [Plaintiff]'s claim." *See* Pl.'s Answering Br. in Opp'n to Suppl. Mot. to Substitute, at 1 (Federal Docket #29). Plaintiff's attempted U-turn should be rejected.

that 12 U.S.C. § 4617(f) bars Plaintiff's demand for an order to produce books and records. Nor is there any "implicit" rejection of these arguments. The District Court, agreeing with Plaintiff's arguments before the District Court, ruled these were merits defenses that are within the jurisdiction of this Court to resolve. Remand Order at 2-3.

(c) ***Improper Purpose.*** Pagliara has the burden of explaining how he has a proper purpose to investigate breach of contract and breach of fiduciary duty claims based on the August 2012 Third Amendment despite the expiration of the three-year statute of limitations before Pagliaria filed this suit on March 16, 2016. Although legally irrelevant, Pagliara cites only one authority for the notion that § 220 suits toll limitations for the underlying suit being investigated. *See* Opp. ¶ 26 (citing *Technicorp Int'l II v Johnston*, 2000 WL 71350, at *9 (Del. Ch. May 31, 2000)). Pagliara fails to disclose, however, that *Technicorp* has been narrowed and has no application here. *See Coleman v. PriceWaterhouse Coopers*, 2003 WL 22765851, at *6 (Del. Super. Ct. Nov. 18, 2003), *rev'd on other grounds*, 854 A.2d 838 (Del. 2004) (noting that limitations period would not be tolled pending resolution of § 220 case in the absence of "findings previously made in ancillary litigation" that "point to intentional concealment by defendants of material facts . . . necessary to plaintiff's action" (quotations and alterations omitted)). Because Plaintiff has not—and could not—allege that Fannie Mae has engaged in

intentional or fraudulent concealment of the material facts "*Technicorp* is inapposite." *Coleman*, 2003 WL 22765851, at *6.

Finally, Pagliara is wrong that there is nothing to litigate in this case apart from the potentially-dispositive motion to dismiss or substitute. *See* Opp. at 1-2. Should that motion be denied, Fannie Mae intends to take Pagliara's deposition to explore the basis for the overbroad inspection request. The request for inspection is massively overbroad (*See* Compl., Ex. A), and Pagliara will have to explain how his request is narrowed "with rifled precision" to seek only those documents "essential to the accomplishment of the stockholder's articulated purpose for the inspection." *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 371 (Del. 2011) (quotations and alterations omitted).

This is an unusual case, and potentially dispositive issues raised by Fannie Mae and FHFA's motion to dismiss are pending for this Court to resolve. We request that the Court set that motion for a prompt hearing on May 1, 2017, with trial on the scope of the inspection request to follow (if still necessary) promptly thereafter.

Respectfully,

/s/ S. Mark Hurd

S. Mark Hurd (#3297)

Enclosures

cc: Register in Chancery (w/encl; by e-filing)
C. Barr Flinn, Esq. (w/encl; by efiling)
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