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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TIMOTHY PAGLIARA, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, Defendant.	)	C.A. No. 12105-VCMR

PLAINTIFF TIMOTHY J. PAGLIARA'S CORRECTED ANSWERING BRIEF IN OPPOSITION TO FANNIE MAE AND FHFA'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO SUBSTITUTE FHFA AS PROPER PLAINTIFF

YOUNG CONAWAY STARGATT & TAYLOR, LLP

C. Barr Flinn (No. 4092)
Emily V. Burton (No. 5142)
Lakshmi A. Muthu (No. 5786)
Gregory J. Brodzik (No. 5722)
Rodney Square
1000 N. King Street
Wilmington, DE 19801-0391
Telephone: (302) 571-6692
bflinn@ycst.com
eburton@ycst.com
lmuthu@ycst.com
gbrodzik@ycst.com

Attorneys for Plaintiff Timothy J. Pagliara

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Plaintiff, Timothy J. Pagliara (the "Stockholder") respectfully submits this answering brief in opposition to the Motion of defendant Federal National Mortgage Association ("Fannie Mae") and its conservator, the Federal Housing Finance Agency ("FHFA"), to Dismiss or, in the Alternative, to Substitute FHFA as Proper Plaintiff (the "Motion to Dismiss").

PRELIMINARY STATEMENT

There is no merit to any of Fannie Mae's dismissal arguments. Fannie Mae waived any personal jurisdiction defense by (1) moving the District Court, through FHFA, as its conservator, to dismiss the Stockholder's claim on the merits, (2) asking the District Court in its own name to decide the motion, before considering remand, and (3) only after the District Court ruled against Fannie Mae, raising the personal jurisdiction defense in this Court eight months too late.

Even if the personal jurisdiction defense had not been waived, the Court could exercise personal jurisdiction over Fannie Mae. In its bylaws and certificate, Fannie Mae agreed to be treated as a Delaware corporation for all purposes of the DGCL. Fannie Mae fails to grapple with its bylaw provisions electing the DGCL for its governance and incorporating the bylaws into its "'certificate of incorporation' for all purposes of the Delaware General Corporation Law." Having agreed to be treated as a Delaware corporation, Fannie Mae is subject to personal jurisdiction in Delaware. Fannie Mae fails to inform the Court that it made its election pursuant to

the 2002 regulations, not the December 2015 regulations so prominently quoted in Fannie Mae's brief.

On two issues, Fannie Mae asks the Court to give preclusive effect to the decision of the United States District Court for the Eastern District of Virginia (the "EDVA"), in the Stockholder's separate action for books and records against a different party, the Federal Home Loan Mortgage Corporation ("Freddie Mac"). For multiple reasons, preclusive effect may not be given on the first issue, concerning Section 4617(b)(2)(A)(i) (the "Succession Provision") of the Housing and Economic Recovery Act ("HERA"). On that issue, the EDVA decision has since been rejected by the United States District Court for the District of Delaware (the "District Court"), *in this case.* It also has since been rejected by a superior federal court, the United States Court of Appeals for the District of Columbia Circuit, in *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072 (D.C. Cir. 2017). Both courts held that the Succession Provision does not bar stockholders from asserting direct claims and rights against Fannie Mae, during conservatorship. The District Court did so with specific application to the Stockholder's books and records claim against Fannie Mae. Fannie Mae asks the Court to decide an issue on which it already lost in this case.

The second issue for which Fannie Mae seeks preclusion, concerning HERA's Section 4617(f) (the "Anti-Injunction Provision"), was not even addressed by the EDVA decision and therefore cannot give rise to preclusive effect.

In all events, the Anti-Injunction Provision does not bar the Stockholder's claim. It bars only orders that would "restrain or affect" the exercise of FHFA's powers as conservator. An order for inspection of books and records could not possibly do so because it would not affect any substantive decision by FHFA as conservator. Anything that FHFA could do before the order, it will be able to do after the order. Despite the Anti-Injunction Provision and the substantially identical provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), the courts have routinely granted similar relief, including ~~ordering~~ the production of documents ~~and even~~. They have specifically held that the FIRREA provision does not bar an accounting.

Finally, in arguing that the Stockholder lacks a proper purpose, Fannie Mae ignores the impropriety of resolving complex affirmative defenses in a summary books and records proceeding, without a fully developed record. The Complaint seeks to investigate multiple claims arising from each quarterly, discretionary dividend payment and other ongoing conduct – including claims well within the limitations period. Having prevented the Stockholder from investigating the claims

for over a year, Fannie Mae cannot prevail in arguing that the claims are now time barred; the limitations period would be tolled.

Most significantly, Fannie Mae ignores the Stockholder's other proper purposes for inspecting books and records. For example, as detailed in the Demand and Complaint, the Stockholder seeks the books and records also to foster discussions with other stockholders, the board of Fannie Mae (the "Board"), FHFA and the United States Treasury ("Treasury") concerning, among other issues, proposed reforms. The reforms that the stockholders would discuss concern the role of the dividends in depleting Fannie Mae's capital, Fannie Mae's need for additional capital and the necessity, in raising additional capital, of respecting the rights of existing stockholders.

STATEMENT OF FACTS

A. Fannie Mae Background

Fannie Mae is a publicly-traded, private corporation, chartered under the Federal National Mortgage Association Charter Act (the "Charter Act") and governed by Delaware law. (Compl. ¶¶ 22, 28; *see also Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1106 n.24 (D.C. Cir. 2017) (noting that Fannie Mae "agree[d] [the court] should apply Delaware law to claims regarding Fannie Mae").)

In 2002, Fannie Mae's then-regulator, the Office of Federal Housing Enterprise Oversight, directed Fannie Mae to choose to be governed by one of three

alternative bodies of corporation law, one of which was the DGCL. 12 C.F.R. § 1710.10 (2002). Fannie Mae's bylaws as of January 21, 2003 state that Fannie Mae "elected to follow the applicable corporate governance practices and procedures of the Delaware General Corporation Law, as the same may be amended from time to time" to the extent not inconsistent with federal law. (Fannie Mae Bylaws (am. through Jan. 21, 2003) § 1.05 (Ex. 1).)[1]

Although Fannie Mae disputes that it is a Delaware corporation, Fannie Mae's bylaws as of January 21, 2003 state, "The inclusion of provisions in these Bylaws shall constitute inclusion in the corporation's 'certificate of incorporation' for all purposes of the Delaware General Corporation Law." *Id.* Moreover, within weeks of the direction to elect a body of corporation law, Fannie Mae apparently filed a certificate of incorporation in Delaware. (Compl. Ex. C.)

B. The Conservatorship

On September 7, 2008, at the height of the 2007-09 financial crisis, Fannie Mae's new regulator, FHFA, placed Fannie Mae into temporary conservatorship ("Conservatorship") pursuant to HERA, with FHFA as conservator. (Compl. ¶¶ 65, 71.) Under HERA's Succession Provision, FHFA as conservator succeeded to "all

[1] Unless otherwise indicated, the numbered Exhibits referenced herein shall be the Exhibits attached to the Declaration of Gregory J. Brodzik in Support of Plaintiff Timothy J. Pagliara's Answering Brief in Opposition to Fannie Mae and FHFA's Motion to Dismiss, or in the Alternative, to Substitute FHFA as Proper Plaintiff

rights, titles, powers, and privileges of [Fannie Mae], and of any stockholder, officer, or director of [Fannie Mae] with respect to [Fannie Mae] and the assets of [Fannie Mae]." 12 U.S.C. § 4617(b)(2)(A)(i). As conservator, FHFA stands "in the shoes of" Fannie Mae and is authorized to act for Fannie Mae "to defend alleged breaches of [Fannie Mae's] obligations." *Perry Capital*, 848 F.3d at 1103 & n.22, 1111 (citations and internal quotation marks omitted).

On November 24, 2008, FHFA reconstituted Fannie Mae's Board and re-delegated to the Board some of the board powers to which FHFA had succeeded when the Conservatorship took effect, including the powers to "review and approve matters related to . . . paying dividends . . . ." (Fannie Mae Corporate Governance Guidelines, at 1 (Nov. 13, 2015) (Ex. 2).)

C. The Senior Preferred Stock and Treasury's Control

On the same day that the Conservatorship was imposed, also under authority provided by HERA, Treasury entered into a Preferred Stock Purchase Agreement (the "PSPA") with Fannie Mae and invested in the Senior Preferred Stock of Fannie Mae. (PSPA (Sept. 7, 2008) (Ex. 3).) HERA required that any such investment by Treasury be on terms agreeable to Fannie Mae: "Nothing in this subsection requires [Fannie Mae] to issue obligations or securities to the Secretary [of Treasury] without

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submitted herewith. The lettered Exhibits referenced herein are the Exhibits attached to Plaintiff's Verified Complaint, filed March 14, 2016.

mutual agreement between the Secretary and [Fannie Mae]." 12 U.S.C. § 1719(g)(1)(A).

The Senior Preferred Stock entitled Treasury to receive a cumulative cash dividend of 10% per annum of the Senior Preferred Stock's liquidation preference or, if the dividends were paid in kind, 12% per annum, until all cumulated dividends were paid in cash. (Certificate of Designation § 2(c) (Sept. 7, 2008) (Ex. 4).) Under the PSPA, Fannie Mae issued Treasury a warrant to purchase 79.9% of Fannie Mae's common stock for nominal consideration, ensuring Treasury's control. (PSPA §§ 1, 3.1 (Ex. 3).) The PSPA further gave Treasury the right to veto an extensive list of corporate actions. (*Id.* § 5.) As detailed in the Stockholder's Complaint, after the PSPA, Treasury was Fannie Mae's controlling stockholder.[2]

D. Fannie Mae's Return to Profitability and the Net Worth Sweep

By mid-2012, Fannie Mae had returned to profitability and stood on the verge of enormous net worth.[3] At this same time, however, Congress could not agree to

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[2] *See* Compl. ¶¶ 5-6, 12, 29, 53-54, 65-69, 83-88, 92-97, 101-02, 105, 109, 112, 116-24, 127-31, 139, 141.

[3] As detailed in the Complaint, Fannie Mae (1) reported net income of $5.1 billion for the second quarter of 2012, (2) expected to reverse its prior write-off of deferred tax assets that would produce more than $50 billion in net worth for Fannie Mae in the first quarter of 2013, (3) also expected to reverse its prior increase in provisions for credit losses that would produce more than an additional $40 billion in net worth for Fannie Mae during the few years immediately to follow and (4) foresaw lucrative settlements with numerous financial institutions that would

increase the federal debt ceiling, and Treasury thus faced a looming budgetary crisis. (Compl. ¶¶ 112-16.) Absent an agreement by Congress, Treasury's only solution to the crisis was to find a massive influx of revenue somewhere. *Id.*

On August 17, 2012, Fannie Mae and Treasury – Fannie Mae's controlling stockholder – entered into a blatantly unfair, self-dealing transaction. By the Third Amendment to the PSPA, Fannie Mae and Treasury agreed to increase the dividend on the Senior Preferred Stock 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"). (*See* Compl. Ex. D § 3 (Third Amendment).) For zero return consideration, Fannie Mae gave up its entire net worth to its controlling stockholder in perpetuity. (Compl. ¶ 123.)

Fannie Mae has paid the Net Worth Sweep dividends for every quarter since the Third Amendment took effect. (Compl. ¶ 141.) After the reversal in early 2013 of about $50 billion of the prior write-off of deferred tax assets, Fannie Mae paid Treasury a dividend of $59.4 billion for only the second quarter of 2013 (as compared to a pre-existing dividend of $2.9 billion per quarter at the 10% rate). (Compl. ¶ 124.) Since the Third Amendment, the total increase in dividends has been $76.1 billion. (*See id.*; Fannie Mae, Annual Report, at F4, F46-F47 (Form

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produce more than $18 billion in net worth for Fannie Mae in 2013 and early 2014. (Compl. ¶¶ 104-111.)

10-K) (December 31, 2016) (excerpt) (Ex. 5).) The Net Worth Sweep can be explained only by Treasury's control of Fannie Mae and need for revenue.

E. The Demand

On January 19, 2016, pursuant to Section 220 of the DGCL, counsel for the Stockholder served his demand for books and records on Fannie Mae (the "Demand"). (Compl. Ex. A.) The Stockholder seeks the books and records primarily for three purposes: (1) to advance communications with other stockholders about apparent misconduct by the Board, FHFA, and Treasury; (2) to better value his investment in Fannie Mae; and (3) to investigate the apparent misconduct by the Board, FHFA, and Treasury to better evaluate legal claims against them.

As to the third purpose, the Demand and Complaint detail the Stockholder's credible bases to suspect misconduct concerning the Third Amendment, failure to prevent harm from the Third Amendment, payments of Net Worth Sweep dividends to Treasury, and the investment of tens of millions of Fannie Mae's dollars in a common mortgage security offering that will eliminate Fannie Mae's market advantage. The corporate records the Stockholder seeks will clarify these credible bases for misconduct, and provide information sufficient to fully evaluate claims against the Board, Treasury, and FHFA, including direct claims for breaches of fiduciary, contractual and statutory duties seeking damages.

On January 27, 2016, FHFA rejected the Demand on behalf of Fannie Mae (Compl. Exs. G, H.) As a result, Section 220 of the DGCL entitles the Stockholder to a summary proceeding in the Delaware Court of Chancery for the inspection of books and records of Fannie Mae. 8 *Del. C.* § 220(c). Exercising that right, the Stockholder filed his Verified Complaint (the "Complaint") against Fannie Mae on March 14, 2016 commencing this action (the "Action").

F. The History of This Action

As a summary proceeding, this Action should have proceeded to trial within 60 days. *See Sullivan v. Elcom Int'l, Inc.*, 2015 WL 881074, at *13 (Del. Ch. Jan. 15, 2015) (TRANSCRIPT) ("Generally speaking . . . we handle 220 cases on a summary basis. We do aim to have trials of those kind of cases within 60 days."). But here, through a series of ultimately rejected procedural maneuvers and unsuccessful attempts to dismiss the Stockholder's claim on the merits, Fannie Mae has delayed this Action by more than a year.

First, on March 25, 2016, Fannie Mae removed this Action to the District Court, purportedly on the basis of federal question jurisdiction. (D. Del., Dkt. No. 1.)[4] Before the Stockholder could address the improper removal, on March 28, 2016, FHFA filed a motion (the "MDL Motion") to have this Action transferred and consolidated into a proposed multi-district litigation before the Judicial Panel on

Multidistrict Litigation ("JPML"). (D. Del., Dkt. No. 3.) On April 4, 2016, the District Court stayed this Action pending a ruling on the MDL Motion. (*See* D. Del., Apr. 4, 2016 Minute Entry.) On June 2, 2016, the JPML denied the MDL Motion in its entirety. (D. Del., Dkt. No. 6.) The District Court lifted the stay on July 14, 2016, after three months had been spent on the pointless maneuver. (D. Del., Dkt. No. 7.)

Fannie Mae still did not answer the Complaint. Instead, on July 18, 2016, FHFA, as Fannie Mae's conservator, filed with the District Court a Motion to Substitute itself as plaintiff. (D. Del., Dkt. Nos. 8, 9, the "Substitution Motion") The Substitution Motion argued that the Stockholder's Action was barred by (i) HERA's Succession Provision and (ii) HERA's Anti-Injunction Provision. *Id.* The Substitution Motion did not assert a personal jurisdiction defense.

On August 1, 2016, the Stockholder moved to remand the Action to this Court. (D. Del., Dkt. Nos. 10, 11, the "Motion to Remand".) In its opposition to the Stockholder's Motion to Remand (the "Remand Opposition"), Fannie Mae argued that the Court should decide the Substitution Motion first:

> Simultaneously with this Opposition, FHFA is filing a brief that urges the Court to resolve the substitution question before turning, if necessary, to this remand motion. ***Fannie Mae agrees that the Court should resolve the potentially fully-dispositive motion to***

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[4] References to "D. Del." shall refer to the docket in *Pagliara v. Federal National Mortgage Association*, C.A. No. 16-193-GMS (D. Del.).

> ***substitute first, and incorporates FHFA's arguments by reference into this Opposition***.

(D. Del., Dkt. No. 17 at 3 n.3 (emphasis added).) As the relief sought in its Remand Opposition, Fannie Mae wrote: "[T]he Court should decide FHFA's substitution motion before turning to [the Stockholder's] remand motion." (*Id.* at 18; *see also id.* at 1 ("If the Court resolves [the Substitution Motion] in FHFA's favor, the Court need not reach [the Stockholder's] remand motion."); *id.* at 2 ("Also pending before the Court and ripe for decision is FHFA's [Substitution Motion]."); *id.* at 3 ("[A]ll shareholder rights and powers, including the right to inspect, were transferred to the conservator during the conservatorship . . . ."); *id.* at 14 ("As explained in FHFA's [Substitution Motion], therefore, [the Stockholder] lacks standing to pursue the shareholder rights he asserts here.").) Fannie Mae did not mention any objection to personal jurisdiction when asking the District Court to reach the merits of this dispute. In response, the Stockholder argued that the District Court should address the Motion to Remand first. (D. Del., Dkt. Nos. 22 at 1 n.3, 27.)

On September 2, 2016, FHFA filed a supplemental motion to substitute, contending that the same Succession Provision argument it raised in its Substitution Motion should bar the Action by issue preclusion. (D. Del., Dkt. Nos. 24, 25, together with the Substitution Motion, the "Substitution Motions".) On the Substitution Motions and the Motion to Remand, the parties submitted eleven briefs, including five by the Stockholder, and several letters.

While the Substitution Motions and Motion to Remand were pending, the United States Court of Appeals for the District of Columbia Circuit, in *Perry Capital*, rejected Fannie Mae's position that the Succession Provision bars claims like the Stockholder's claim, holding specifically that the Succession Provision does not bar direct stockholder claims against Fannie Mae. 848 F.3d at 1104 ("We conclude the Succession [Provision] transfers to the FHFA without exception the right to bring derivative suits but *not* direct suits." (emphasis added)).

On March 8, 2017, the District Court entered its Order remanding this Action to this Court. In doing so, the District Court determined that the Succession Provision argument raised by the Substitution Motions was a defense directed to the *merits* of the Stockholder's books and record claim. (D. Del., Dkt. No. 38 at 1-2 n.1, the "Remand Order" (Ex. 6).) (explaining that the issues raised by the Substitution Motions go not to the Stockholder's standing but to the Stockholder's "likelihood of succeeding on the merits of his claim").[5] The District Court agreed with the Stockholder that his claim arose under only Delaware law and that Fannie Mae's defense under the Succession Provision was irrelevant to the jurisdictional analysis. (*Id.* at 3 n.1.)

[5] Other courts agree that such arguments are directed to the merits and not standing. *See, e.g.*, *Perry Capital*, 848 F.3d at 1104 ("[W]hether the Succession Clause bars the claims has no bearing upon standing . . . . [We] examine the issue under Rule 12(b)(6)." (citations omitted)).

Nevertheless, as Fannie Mae requested, the District Court also addressed the merits of Fannie Mae's defense under the Succession Provision – although not with the result for which Fannie Mae had hoped. Following *Perry Capital*, the District Court held that the Succession Provision did not bar the Stockholder's claim for books and records. (*Id.* ("The normal procedure for enforcing a shareholder's right to inspect the books and records is not altered or preempted by [the Succession Provision].").)

On March 28, 2017, twenty days after remand, this Court granted the Stockholder's Motion to Expedite. (Dkt. No. 15.) The Court set a trial date for May 1. *Id.* On March 31, 2017, Fannie Mae and FHFA filed with this Court their Motion to Dismiss. (Dkt. Nos. 17, 18.) Now that their defense under the Succession Provision has been rejected by *Perry Capital* and the District Court, they asserted a lack of personal jurisdiction for the first time. (*See* Dkt. No. 18 at 9-16, the "Mot.") This came nearly a year after the Stockholder filed his Verified Complaint.[6]

[6] The twenty-day period to respond to the Stockholder's Complaint commenced March 15, 2016, the date on which Fannie Mae was effectively served with the Stockholder's Complaint and Summons. (*See* Ch. Ct. R. 12(a); 10 *Del. C.* § 3104(d)(3), (g) (date of mailing commences twenty-day period when served by mail with return receipt); J. Meyer Affidavit of Service (Ex. 7).)

ARGUMENT

I. The Court May Exercise Personal Jurisdiction Over Fannie Mae.

Fannie Mae has waived any personal jurisdiction defense. But, even if the defense was not waived, Fannie Mae is nevertheless subject to personal jurisdiction in Delaware.

A. Fannie Mae Has Waived Any Personal Jurisdiction Defense.

Fannie Mae waived any personal jurisdiction defense in three separate ways: by engaging on the merits of its claims, by moving to dismiss without asserting the defense, and by failing to raise the defense within the time required to answer the Complaint.

1. Fannie Waived the Defense by Seeking a Merits Determination.

When a defendant seeks a merits determination or otherwise engages on the merits, it submits itself to the court's jurisdiction and waives any personal jurisdiction defense, whether or not previously asserted. *See, e.g.*, *Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 443 (3d Cir. 1999) ("[W]here a party seeks affirmative relief from a court, it normally submits itself to the jurisdiction of the court with respect to the adjudication of claims arising from the same subject matter."); *Clarke v. Marriott Int'l, Inc.*, 2013 WL 4758199, at *3 (D.V.I. Sept. 4, 2013) ("A defendant can waive its objection to personal jurisdiction by engaging in litigation on the merits without first securing a court's determination on its

jurisdictional challenge."); *see also Gerber v. Riordan*, 649 F.3d 514, 519 (6th Cir. 2011) (explaining that personal jurisdiction defense waived where "submissions, appearances, [or] filings . . . give [plaintiff] a reasonable expectation that [defendant] will defend the suit on the merits or must cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking") (quotations and citation omitted); *Bigelow/Diversified Secondary P'ship Fund 1990 v. Damson/Birtcher P'rs*, 2001 WL 1641239, at *6 (Del. Ch. Dec. 4, 2001) (explaining that personal jurisdiction defense may be waived where "defendant has abandoned a solely defensive posture and become an actor in the cause").[7]

As the United States District Court for the Eastern District of Pennsylvania observed in *Marshall v. Park Plaza Condominium Association*,

> When [a defendant] join[s] . . . other defendants in requesting this court to address the merits, it [i]s calling upon the court to exercise jurisdiction over this action and itself. By requesting the court to bind [a plaintiff] on the merits, it agree[s] to be bound also. Although [a defendant] join[s] in the motion of another party, the effect of requesting a meritorious decision is the same. By invoking the jurisdiction of this court, [a defendant] waive[s] any objection it had to [lack of personal jurisdiction for] improper service.

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[7] *See also Hornberger Mgmt. Co. v. Haws & Tingle Gen. Contractors, Inc.*, 768 A.2d 983, 988 (Del. Super. Ct. 2000) (finding that defendant may waive personal jurisdiction defense where defendant's conduct does not "reflect a continuing objection to the power of the court to act over the defendant's person." (citations omitted)).

1999 WL 689735, at *2 (E.D. Pa. Sept. 3, 1999).

A defendant waives a personal jurisdiction defense when it engages on the merits, regardless of whether the court later decides the merits. *See, e.g.*, *Ocean Mar, Inc. v. Hess*, 2002 WL 1825435, at *4 (Wash. Ct. App. 2002) (finding that personal jurisdiction defense is waived if defendant "presents arguments on the merits and fails to ask for an immediate ruling on the jurisdiction issue"); *German Am. Fin. Advisors & Trust Co. v. Rigsby*, 623 F. App'x 806, 808-09 (7th Cir. 2015) (finding defendant waived personal jurisdiction defense by filing a motion with "propose[d] defenses for the district court to evaluate" which "signaled that she would defend the suit").[8]

By urging the District Court to rule on the Substitution Motion, Fannie Mae submitted itself to the jurisdiction of the Delaware Courts and waived any personal jurisdiction defense. (*See* Remand Opposition at 18 ("[T]he Court should decide FHFA's substitution motion before turning to [the Stockholder's] remand motion.").) Having asked for a ruling on the merits of this Action in Delaware, Fannie Mae cannot contest personal jurisdiction to avoid a disadvantageous ruling.

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[8] *See also Sloan v. Bettega*, 2002 WL 31424982, at *1 (Cal. Ct. App. Oct. 30, 2002) (finding defendant waived personal jurisdiction defense "by filing a response on the merits and appearing through counsel to contest [a] petition"); *Bullard v. Bader*, 450 S.E.2d 757, 759 (N.C. Ct. App. 1994) (finding defendant waived personal jurisdiction defense by seeking "affirmative relief from the court" through "submitting information relevant to the merits of the case").

2. Fannie Mae Waived the Defense by Moving to Dismiss Without Asserting the Defense.

Fannie Mae's first responsive pleading was the Substitution Motion, which did not assert a personal jurisdiction defense. As Fannie Mae acknowledges, a defendant waives a personal jurisdiction defense if it does not assert it in its first pleading in response to the Complaint. (*See* Dkt. No. 24, Apr. 4, 2017 Ltr. from M. Hurd to V.C. Montgomery-Reeves, at 1 n.1 ("M. Hurd Ltr."); *see also Am. Econ. Ins. Co. v. Rutledge*, 2006 WL 3924786, at *1 (M.D. Ala. Dec. 20, 2006) ("[A] defense based on lack of personal jurisdiction is waived if not raised in the defendant's first responsive pleading, whether it be in a pre-answer motion or in the answer itself."); *Hunter v. Serv-Tech, Inc.*, 2009 WL 2858089, at *2 (E.D. La. Aug. 28, 2009) (explaining that defendants waive personal jurisdiction defense if not included in "their first responsive pleading, either a Rule 12 motion to dismiss or an answer"). Thus, Fannie Mae has waived any defense of lack of personal jurisdiction.[9]

Fannie Mae cannot avoid responsibility for the Substitution Motion on the ground that FHFA nominally made the Motion. For purposes of the Motion, FHFA

[9] In a related action pending before the District Court, Fannie Mae similarly waived its defense for lack of personal jurisdiction by failing to assert it in its first responsive pleading. *See Jacobs v. FHFA, et al.*, C.A. No. 15-708-GMS, D.I. 17, 18 (D. Del.) (Fannie Mae and Freddie Mac's Motion to dismiss for lack of subject matter jurisdiction and failure to state a claim). Fannie Mae will now be defending that case in Delaware.

was acting as Fannie Mae. FHFA is not a separate party in this Action; it did not move to intervene. Instead, as previously explained, FHFA asserted the Motion in its capacity as conservator of Fannie Mae. As conservator, FHFA stands "in the shoes" of Fannie Mae. HERA expressly authorizes FHFA to act for Fannie Mae in litigation. Moreover, the defenses it asserted in the Substitution Motion were Fannie Mae's. If the Substitution Motion had been granted, the litigation against Fannie Mae would have been dismissed.

Even if Fannie Mae and FHFA had been separate parties, Fannie Mae could not avoid responsibility for the Substitution Motion because Fannie Mae was the real party in interest on the Motion. Fannie Mae was indeed the only party in interest on the Motion because it was – and remains – the only defendant. *See Bigelow/Diversified Secondary P'ship Fund*, 2001 WL 1641239, at *6-7 (finding certain defendants waived personal jurisdiction defense raised in their answers where they were the "real parties in interest" to a motion brought by a different party, and had "abandoned [their] solely defensive posture and [became] . . . actor[s] in the cause"); *Marshall*, 1999 WL 689735, at *2 ("Although [a defendant] join[s] in the motion of another party, the effect of requesting a merit[s] decision is the same. By invoking the jurisdiction of this court, [a defendant] waive[s] any objection it had to [lack of personal jurisdiction for] improper service.") This is a second

independent basis on which Fannie Mae's personal jurisdiction defense was waived.[10]

3. Fannie Mae Waived the Defense by Failing to Assert It Within the Required Twenty Days.

In this Court, if a defendant does not assert a personal jurisdiction defense on or before the deadline for responding to the Complaint, under Rule 12(a), the defense is waived. *Stonington P'rs, Inc. v. Lernout & Hauspie Speech Prods., N.V.*, 2003 WL 21555325, at *3 n.16 (Del. Ch. Jul 8, 2003) ("[W]hether raised by motion or pleading, the maximum time allowed [to assert a lack of personal jurisdiction defense is] 20 days from service of the complaint on a defendant."); *Tuckman v. Aerosonic Corp.*, 394 A.2d 226, 233 (Del. Ch. 1978) (same); *see also In re Kingsley*, 950 A.2d 659, 2008 WL 2310289, at *8 (Del. 2008) (TABLE) (applying procedural rules substantially identical to Court of Chancery Rule 12 and holding that where a respondent "failed to answer the petition or otherwise move within twenty days of its service" the respondent "waived the defense of lack of personal jurisdiction"). The contrary cases cited by Fannie Mae are not Delaware law. Delaware courts

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[10] Contending that its defense has not been waived, Fannie Mae cites cases that support the proposition that "[r]emoval does not waive any 12(b) defenses." (*See* M. Hurd Ltr. at 2 (citing cases).) That is a correct statement of the law: "Removal, ***in itself***, does not constitute a waiver of any right to object to lack of personal jurisdiction." *Nationwide Eng'g & Control Sys., Inc. v. Thomas*, 837 F.2d 345, 347-48 (8th Cir. 1988) (emphasis added). However, Fannie Mae did not limit its participation in this litigation to "removal."

have uniformly held that a personal jurisdiction defense must be asserted within twenty days of service of the Complaint.

Fannie Mae did not assert its personal jurisdiction defense within the required twenty days, far from it. The Complaint was served by March 15, 2016 at the latest. (*See supra* at p. 14 n.6.) Exactly twenty days then elapsed before the District Court stayed the Action on April 4, 2016, pending a ruling on the MDL Motion. Even if the stay tolled the time for assertion of the personal jurisdiction defense, that time expired on July 15, 2016, the day after the stay was lifted. Fannie Mae did not assert the personal jurisdiction defense until its Motion to Dismiss in this Court on March 31, 2017. Fannie Mae therefore missed the deadline for assertion of this defense by more than eight months, thereby waiving the defense. Indeed, the primary policy of Delaware's requirement is to avoid the situation that occurred here, where a litigant raises a defense of personal jurisdiction for the first time more than a year into the litigation.

There is no merit to Fannie Mae's assertion that the June 2, 2016 email from the Stockholder's counsel extended the time for the assertion of the defense by eight months. It would be unreasonable to consider the email as extending the time to assert the defense by anything more than a week and some days. (M. Hurd Ltr. at 1 & Ex. 1 ("I will be out of the office tomorrow and most of the next week for vacation. *In the meantime,* I confirm that you do not need to answer until after we

speak." (emphasis added).) In the email to which counsel was responding, Fannie Mae had requested an extension "until after the briefing on Pagliara's [anticipated] remand motion." *Id.* That extension was never granted. And even if it had been, the Motion to Remand was fully briefed months ago.

In all events, those emails were soon superseded by the lifting of the stay on July 14, 2016 and Fannie Mae's response to the Complaint by the Substitution Motion on July 18, 2016.[11] *See Ross Hldg. & Mgmt. Co. v. Advance Realty Grp., LLC*, 2010 WL 1838608, at *11 (Del. Ch. Apr. 28, 2010) ("[A] litigant must exercise great diligence in challenging personal jurisdiction or venue; he should do so at the time he makes his first defensive move.") (quoting *Hornberger*, 768 A.2d at 987-88). Thus, Fannie Mae waived personal jurisdiction in three separate ways.

B. Fannie Mae is Subject to Personal Jurisdiction.

Fannie Mae is subject to personal jurisdiction in Delaware for at least two independent reasons.

[11] Finally, Fannie Mae cannot argue that the remand of this Action could operate to resurrect its waived defenses. *See, e.g.*, *Velco Chemicals, Inc. v. Polimeri Europa Americas, Inc.*, 2004 WL 1965643, at *4-5 (Tex. App. Sept. 7, 2004) (holding that appellant waived objection to state court's personal jurisdiction when, prior to remand, it answered and counterclaimed in federal court without objecting to personal jurisdiction).

1. Fannie Mae Agreed to Personal Jurisdiction for a Books and Records Action in Delaware.

Fannie Mae is subject to personal jurisdiction in Delaware, as a Delaware corporation would be, because Fannie Mae elected to be treated as a Delaware corporation. In its bylaws, Fannie Mae elected to be governed by the DGCL and incorporated this election into its certificate of incorporation for all purposes of Delaware law. It therefore elected to be governed by the DGCL's Section 220, including its provision that, upon refusal of a demand for inspection, the "stockholder may apply to the Court of Chancery for an order to compel such inspection. The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought." 8 *Del. C.* § 220(c). Fannie Mae therefore agreed that an action for books and records may be venued in the Delaware Court of Chancery. *See, e.g.*, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013) ("[B]ylaws, together with the certificate of incorporation and the broader DGCL, form part of a flexible contract between corporations and stockholders[.]").

Having agreed to venue in Delaware, Fannie Mae has agreed to personal jurisdiction in Delaware as a matter of law. *See, e.g.*, *Nw. Nat. Ins. Co. v. Frumin*, 739 F. Supp. 1307, 1310 (E.D. Wis. 1990) ("[W]hen a party consents to venue in a particular court, it implicitly consents to the exercise of personal jurisdiction by that court."); *Mut. Fire, Marine & Inland Ins. Co. v. Kemper*, 1987 WL 5164, at *2 (E.D.

Pa. Jan. 5, 1987) ("By agreeing to venue in Philadelphia, the defendants necessarily consented to personal jurisdiction. Otherwise, the venue provision would be meaningless."); *Mut. Fire, Marine & Inland Ins. Co. v. Barry*, 646 F. Supp. 831, 833-34 (E.D. Pa. 1986) ("[T]he courts have determined that venue selection clauses contain an implied consent to personal jurisdiction."). For this reason, even if there had been no waiver, the Court may exercise personal jurisdiction over Fannie Mae in this Action. *See id.* at 832 (finding consent despite defendants filing a motion to dismiss for lack of personal jurisdiction); *Frumin*, 739 F. Supp. at 1309 (same).

Contrary to Fannie Mae's contention, FHFA's December 2015 regulations did not revoke Fannie Mae's pre-existing agreement to personal jurisdiction in Delaware. Prior to the December 2015 regulations, the 2002 regulations had already required Fannie Mae and Freddie Mac to elect a body of corporation law to govern their affairs, Fannie Mae and Freddie Mac had already made their elections, and the elections had already had their jurisdictional effect. The December 2015 regulations were directed at other regulated entities, specifically the Banks; they required the Banks to make similar elections. *Responsibilities of Boards of Directors, Corporate Practices and Corporate Governance Matters*, 80 FR 72327-02, 2015 WL 7273798, at *72329 (Nov. 19, 2015) ("This choice of law provision would be new only for the Banks because the OFHEO regulations had previously imposed the requirements on the Enterprises.") The December 2015 regulations did not affect Fannie Mae, which

was then in conservatorship. FHFA's own comments to the December 2015 regulations expressly state that the regulations were not intended to affect entities in conservatorship. To the contrary, they state that the regulations "are intended to address matters of corporate practice and governance for regulated entities that are *not in conservatorship* . . . ." 2015 WL 7273798, at *72328.

The December 2015 regulations did not even *purport to* revoke Fannie Mae's pre-existing agreement to personal jurisdiction in Delaware. They indeed did not purport to have retroactive effect: They rather were forward looking: "Nothing is this part shall . . . cause or be deemed to cause any regulated entity to *become* subject to jurisdiction of any state court. . . ." 12 C.F.R. § 1239.3(d) (2015) (emphasis added). Nor could the new regulations have revoked Fannie Mae's pre-existing agreement. That agreement arose from Fannie Mae's bylaws and certificate. The bylaws and certificate constituted a contract between Fannie Mae and its stockholders. *Boilermakers*, 73 A.3d at 740. Although Fannie Mae might have amended the bylaws or the certificate, it did not do so during the time relevant to the personal jurisdiction analysis. On this issue, the bylaws and certificate remained unchanged when the Complaint was filed. Personal jurisdiction is determined at the time the complaint is filed. *See Lewis v. Pension Ben. Guar. Corp.*, 2015 WL 5577377, at *3 n.3 (N.D. Ga. Aug. 11, 2015) ("Personal jurisdiction is [] a determination based on a continuum of events leading up to the time the complaint is

filed."); *see also Round Rock Research LLC v. ASUSTeK Computer Inc.*, 967 F. Supp. 2d 969, 974 (D. Del. 2013) ("[T]he existence of personal jurisdiction is evaluated at the time the complaint was filed.").[12]

In all events, the December 2015 regulations should not be interpreted as effectuating or requiring an amendment to Fannie Mae's bylaws or certificate to revoke consent to personal jurisdiction in Delaware. Otherwise, they would produce a conflict with 8 *Del. C.* § 115. That section provides that "no provision of the certificate of incorporation or bylaws may prohibit bringing [internal corporate] claims in the courts of this State." The December 2015 regulations should not be interpreted to produce such a conflict because they do not evince a clear and manifest intent to preempt Delaware corporate law, which is in the province of the State. *See Marsh v. Rosenbloom*, 499 F.3d 165, 176-81 (2d Cir. 2007) (rejecting argument that a federal law displaced Delaware corporate law; explaining that "corporate law is overwhelmingly the province of the states. . . . [T]he [U.S.] Supreme Court expressly has cautioned against displacement of state law in areas traditionally occupied by the states."); *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (warning that preemption of "areas that have been traditionally occupied by the States" is inappropriate absent "clear and manifest" congressional intent to

[12] Months after the claim arose and the Complaint was filed, Fannie Mae amended its bylaws to reference the December 2015 regulations on July 21, 2016.

supersede state law) (citation and quotations omitted); *Boyle v. Anderson*, 849 F. Supp. 1307, 1317 (D. Minn. 1994) (finding that state law within the scope of the "State's police powers . . . should not be superseded by federal regulations unless that was the clear intent of Congress"), *aff'd*, 68 F.3d 1093 (8th Cir. 1995) (citation omitted).

Although the December 2015 regulations do not change the jurisdictional effect of Fannie Mae's election to be governed by the DGCL, they implicitly acknowledge the effect by purporting to remove it for future elections. 2015 WL 7273798, at *72329 ("The Banks expressed concern that by choosing a particular body of state law to follow, they could subject themselves to the jurisdiction of those states' courts . . . .").

Even if Fannie Mae had not expressly consented to personal jurisdiction in Delaware, the Court may exercise specific personal jurisdiction over Fannie Mae. By electing to be governed by Section 220, including its placement of venue in the Delaware Court of Chancery, Fannie Mae established "minimum contacts" with Delaware, for purposes of a claim under Section 220. The minimum contacts analysis requires that it be reasonably foreseeable to the defendant that his contact with the forum might require him to defend the related litigation in Delaware. *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 293-94 & n.67 (Del. 2016) (finding that a defendant was subject to personal jurisdiction because he could "foresee that he

would be subject to litigation in Delaware," and citing United States Supreme Court precedent for the foreseeability standard); *Haisfield v. Cruver*, 1994 WL 497868, at *5 (Del. Ch. Aug. 25, 1994) ("The touchstone of the minimum contacts analysis is foreseeability—whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.") (citing *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980) (quotations omitted)). Due to Section 220's venue provision, it was entirely foreseeable that Fannie Mae's contact with the forum – its election to be governed by Section 220 – might require Fannie Mae to defend a books and records claim in Delaware. It was indeed so foreseeable that the Banks raised this issue with FHFA before the December 2015 regulations were adopted.

Delaware's long-arm statute is satisfied by Fannie Mae's acceptance of the benefits of the DGCL. *See AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 439-40 (Del. 2005) (finding the long-arm statute satisfied where a "foreign corporation . . . avail[ed] itself of the benefits and protections of the laws of the State of Delaware" by operating a Delaware subsidiary headquartered in Minnesota); *see also Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 978 (Del. Ch. 2000) (finding that a foreign corporation "transacted business in Delaware" where it "secur[ed] the benefits and protections of Delaware law . . . by participating in several agreements and transactions" governed by Delaware law); *Macklowe v.*

Planet Hollywood, Inc., 1994 WL 586838, at *7 (Del. Ch. Oct. 13, 1994) (finding that a limited partnership was "doing business" in Delaware for statutory purposes and also satisfied the minimum contacts requirement where it "consciously and purposefully elected to use a Delaware corporation *and the common and statutory law governing its operation*") (emphasis added).

Fannie Mae may not accept the benefits of the DGCL, while evading its venue provisions.

2. Fannie Mae is a Delaware Corporation.

Fannie Mae not only elected to be treated as a Delaware corporation; it is a Delaware corporation. (Compl. ¶ 45 & n.13.) This Court obviously may exercise personal jurisdiction over Fannie Mae as such. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (noting that a corporation's place of incorporation is a "paradigm" basis for general jurisdiction).[13] Fannie Mae does not dispute this legal proposition, but denies being a Delaware corporation. The evidence strongly supports the Stockholder's position.

First, only days after Fannie Mae was directed to elect a body of corporation law to govern its affairs, the certificate of incorporation attached to the Complaint

[13] To the extent the Court finds any "factual dispute[]" regarding Fannie Mae's status as a Delaware corporation, that dispute should be viewed in a light most favorable to the Stockholder at this stage of the proceedings. *See Total Hldgs. USA, Inc. v. Curran Composites, Inc.*, 999 A.2d 873, 877 (Del. Ch. 2009).

was filed in Delaware. The timing of the filing of the certificate implies that it was part of Fannie Mae's election to be governed by Delaware law.

Second, the certificate must be Fannie Mae's because, under the Charter Act, only Fannie Mae can use its name, for any purpose, including as part of another name. 12 U.S.C. § 1723a(e) ("No[one] . . . except [Fannie Mae] . . . shall hereafter use the words 'Federal National Mortgage Association,' . . . or any combination of such words, as the name or a part thereof under which the individual, association, partnership, or corporation shall do business."). The name could not be used by even a subsidiary or affiliate of Fannie Mae.

Finally, and most importantly, Fannie Mae's bylaws expressly incorporate themselves into Fannie Mae's "'certificate of incorporation' for all purposes of the Delaware General Corporation Law." (Fannie Mae Bylaws (am. through Jan. 21, 2003) § 1.05 (Ex. 1).) Unless the Charter Act was violated and Fannie Mae's bylaws are wrong, Fannie Mae has a Delaware certificate of incorporation and therefore is a Delaware corporation.

The evidence cited by Fannie Mae is either irrelevant or hardly dispositive. That the certificate filed with the secretary of state has lapsed for failure to pay franchise taxes is irrelevant for purposes of personal jurisdiction. Such lapse concerns only Fannie Mae's relationship with the State of Delaware; it does not affect Fannie Mae's relationship with other third parties, including Fannie Mae's

stockholders. *See, e.g.*, *Frederic G. Krapf & Son, Inc. v. Gorson*, 243 A.2d 713, 715 (Del. 1968) (finding that a void corporation continued to exist because "failure to pay franchise taxes is an issue solely between the corporation and the State"); *Clabault v. Caribbean Select, Inc.*, 805 A.2d 913, 914 (Del. Ch. 2002) (finding that where a corporation's certificate was voided for non-payment of franchise taxes 15 years prior, the entity was "not in good standing and . . . not current in its reporting obligations, [but] retain[ed] certain attributes of a publicly traded corporation") *aff'd*, 846 A.2d 237 (Del. 2003). The failure to pay taxes is an issue "solely between the corporation and the State" of Delaware. *Gorson*, 243 A.2d at 715.

Next, the addition in the certificate after Fannie Mae's name of the suffix "Inc." and the number in the certificate for Fannie Mae's authorized shares do not prevent the certificate from serving as Fannie Mae's certificate, under Delaware law. In view of the express reference to the certificate in Fannie Mae's bylaws, they are almost certainly errors. As such, they do not affect the validity of the certificate. *See Siegman v. Palomar Med. Techs., Inc.*, 1998 WL 118201, at *5 & n.13 (Del. Ch. Mar. 9, 1998) (finding that, despite an error in the certificate of incorporation, the corporation existed and was able to take action even before filing a certificate of correction pursuant to 8 *Del. C.* § 103(f)).

Finally, that Fannie Mae's federal charter has a provision that Fannie Mae is deemed a D.C. corporation also does not prevent the certificate from serving as

Fannie Mae's. A corporation may be both federally chartered and state incorporated, and may also be incorporated in more than one state. *See, e.g.*, *DZ Bank AG Deutsche Zentral-Genossenschaftsbank v. Connect Ins. Agency, Inc.*, 2016 WL 2620132, at *2 n.4 (W.D. Wash. May 9, 2016) ("A single company may be incorporated in more than one state."); *Novik v. Kleen Energy Sys., LLC*, 2013 WL 1192985, at *3 (D. Conn. Mar. 25, 2013) (explaining that although a corporation may have "only one 'principal place of business'" it "may be incorporated in more than one State"); *see also Wachovia Bank v. Schmidt*, 546 U.S. 303, 318 & n.9 (2006) ("Congress has prescribed that a corporation 'shall be deemed to be a citizen of any State by which it has been incorporated *and* of the State where it has its principal place of business.'") (emphasis in original) (citing 28 U.S.C. § 1332(c)(1)).

Based upon the above, if it decides to reach the issue despite Fannie Mae's waiver of any personal jurisdiction defense, the Court should hold now that Fannie Mae is a Delaware Corporation. In the alternative, the Court should hold at least that the Stockholder has made a *prima facie* showing that this is so. *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 2005 WL 583828, at *5 (Del. Ch. Feb. 4, 2005) (A plaintiff need only present a "*prima facie*" case establishing jurisdiction to survive a motion to dismiss for lack of personal jurisdiction.). If the Court holds the latter, the action may not be dismissed for lack of personal jurisdiction; jurisdictional discovery must first be permitted. *See Hart Hldg. Co. Inc. v. Drexel Burnham Lambert Inc.*, 593

A.2d 535, 539 (Del. Ch. 1991) ("Where the plaintiff's [personal jurisdiction] claim is not clearly frivolous, the . . . court should ordinarily allow discovery on jurisdiction in order to aid the plaintiff in discharging [its] burden.") (citation omitted).

Due to the prior delays and the fact that this is a summary proceeding, the Stockholder respectfully requests that the Court not delay this matter further for jurisdictional discovery. Fannie Mae's waiver and agreement to jurisdiction provide ample bases for the Court's exercise of personal jurisdiction. If the Court finds a waiver, the question whether Fannie Mae is a Delaware corporation might be addressed in a subsequent litigation.[14]

Even if Fannie Mae was not a Delaware corporation, since its bylaws incorporate themselves into a certificate of incorporation for all purposes of the DGCL, Fannie Mae must be deemed a Delaware corporation for all purposes of the DGCL.

II. HERA's Succession Provision Does Not Bar the Stockholder's Claim.

Fannie Mae's contention that the Succession Provision, 12 U.S.C. § 4617(b)(2)(A)(i), bars the Stockholder's direct claim against Fannie Mae for books

[14] If the Court does not find personal jurisdiction based upon the prior arguments, it should permit jurisdictional discovery instead of dismissing this case, regardless of any resulting delay.

and records has already been rejected. The United States Court of Appeals for the District of Columbia Circuit held in *Perry Capital*,

> We conclude the Succession [Provision] transfers to the FHFA without exception the right to bring derivative suits but not direct suits….[HERA] thereby transfers to the FHFA all claims a shareholder may bring derivatively on behalf of [Fannie Mae] whilst claims a shareholder may lodge directly against [Fannie Mae] are retained by the shareholder in conservatorship but terminated during receivership….[S]hareholders' direct claims against and *rights in* [Fannie Mae] survive during conservatorship.

Perry Capital, 848 F.3d at 1104-05 (emphasis added). As the District Court in this Action held, following *Perry Capital*,

> The normal procedure for enforcing a shareholder's right to inspect the books and records is not altered or preempted by [the Succession Provision]. The court is persuaded by the [*Perry Capital*] decision on [the Succession Provision]. That Court found that [the Succession Provision] did not bar "direct claims against and rights in [Fannie Mae]…during conservatorship."

Remand Order at 3 n.1 (citations omitted). Every other federal court has applied the Succession Provision to bar only derivative claims,[15] with the exception of the EDVA decision, discussed below.

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[15] *See, e.g.*, *Gail C. Sweeney Estate Marital Tr. v. U.S. Treasury Dep't*, 68 F. Supp. 3d 116, 117, 126 (D.D.C. 2014) (granting motion to substitute in "shareholder derivative lawsuit"); *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012) (HERA "transfers shareholders' ability to bring derivative suits"); *Esther Sadowsky Testamentary Tr. v. Syron*, 639 F. Supp. 2d 347, 350 (S.D.N.Y. 2009) (granting motion to substitute in a derivative "action on Freddie Mac's behalf"); *In re Fed.*

In addressing a substantially identical succession provision in FIRREA, courts have uniformly held that the provision transfers only derivative, not direct claims.[16] *See, e.g.*, *Levin v. Miller*, 763 F.3d 667, 672 (7th Cir. 2014) (finding that FIRREA "transfers to the FDIC only stockholders' claims 'with respect to . . . the assets of the institution'—in other words, those that investors . . . would pursue derivatively on behalf of the failed bank[,]" and noting that "[n]o federal court has read [FIRREA otherwise]"); *In re Beach First Nat'l Bancshares, Inc.*, 702 F.3d 772, 776, 778-81 (4th Cir. 2012) (affirming dismissal of "*derivative claims* [that] had been divested by statute in favor of the FDIC" under FIRREA, but allowing Trustee to proceed with "a direct claim against the [d]irectors") (emphasis added); *Lubin v. Skow*, 382 F. App'x 866, 870-72 (11th Cir. 2010) ("FIRREA grants the FDIC ownership over all shareholder derivative claims against the Bank's officers. . . . The question then becomes whether the claims against the Bank's officers are derivative claims."); *see also Barnes v. Harris*, 783 F.3d 1185, 1192-95 (10th Cir. 2015).[17]

Nat'l Mortg. Ass'n Sec., Deriv., & ERISA Litig., 629 F. Supp. 2d 1, 4 (D.D.C. 2009) (granting motion to substitute "for the shareholder derivative plaintiffs").

[16] *See* 12 U.S.C. § 1821(d)(2)(A)(i) (FDIC "shall, as conservator or receiver, and by operation of law, succeed to . . . all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution[.]")

[17] Finally, contrary to Fannie Mae and FHFA's position in this Action, FHFA has previously followed the distinction between direct and derivative claims, consistent with the authority above. FHFA, for example, moved to substitute in the

Fannie Mae's remaining argument lacks merit. Fannie Mae argues that even if the Succession Provision does not bar a direct "claim," it nonetheless bars a direct "right," with the result that the Stockholder's direct "claim" therefore must be dismissed because it is predicated upon a direct "right." (Mot. at 24-25.) Both the D.C. Circuit and the District Court made clear that the Succession Provision does not bar either a direct "claim" or a direct "right." *Perry Capital*, 848 F.3d at 1105 (holding that "direct claims against and *rights* in [Fannie Mae] survive during conservatorship") (emphasis added); Remand Order at 3 n.1 (same). And the distinction that Fannie Mae attempts to make is nonsense. All direct claims are based upon direct rights. It therefore would be pointless to permit direct claims, if there were no direct rights.[18]

Kellmer litigation "only with respect to the derivative claims asserted by Fannie Mae shareholders," and FHFA did not dispute that a shareholder plaintiff could continue to pursue claims for disclosure violations under federal securities laws, brought "in his individual capacity." (*See Kellmer v. Raines*, C.A. No. 07-1173, D.I. 68 at 1 n.1 (D.D.C. 2009) (Ex. 8 (motion)); *see also* C.A. No. 08-1093, D.I. 1 (D.D.C. 2008) (Ex. 9 (complaint consolidated with *Kellmer*)).) The fact that FHFA has in the past taken a much narrower view of HERA's Succession Provision further undermines Fannie Mae and FHFA's position in this Action.

[18] *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 nonderivative, or direct, action . . . .'") (quoting D. Block, N. Barton & S. Radin, *The*

III. The Anti-Injunction Provision Does Not Bar the Stockholder's Claim.

There also is no merit to Fannie Mae's contention that the Anti-Injunction provision, 12 U.S.C. § 4617(f), bars the Stockholder's claim. The Anti-Injunction Provision bars the Court only from taking "any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator." An order requiring Fannie Mae to make books and records available for inspection by the Stockholder would not restrain or affect FHFA's exercise of powers as conservator. Although Fannie Mae cites some of FHFA's enumerated powers, it does not even attempt to explain how an order permitting inspection might interfere with them. Such an order would not even interfere with FHFA's own power to inspect the books and records. The books and records would remain as available to FHFA as they are at present.

The courts have granted similar relief against Fannie Mae during the conservatorship. For example, the courts have required Fannie Mae to respond to discovery. *In re United States*, 2017 WL 406243 (Fed. Cir. Jan. 30, 2017) (affirming in part order granting a motion to compel documents from Fannie Mae in litigation challenging the Third Amendment and Net Worth Sweep); *Ackerman v. PNC Bank, Nat'l Ass'n*, 2013 WL 9596080, at *13, *14-15 (D. Minn. Mar. 10, 2013) (compelling Fannie Mae to produce documents in litigation); *Tara Woods Ltd. P'ship v. Fannie Mae*, 265 F.R.D. 561, 567-70 (D. Colo. 2010) (same). The courts

also have ~~granted~~held that an accounting ~~despite the contention that~~was not barred by the substantially identical provision in FIRREA ~~barred the relief~~. As the United States District Court for the District of Maryland held in *Goldstein v. F.D.I.C.*, an accounting was not barred because "the FDIC ha[d] cited no cases holding that an accounting is the type of equitable remedy that would 'restrain or affect the exercise of powers or functions' of the FDIC." 2012 WL 1819284, at *13 (D. Md. May 16, 2012).

The Anti-Injunction Provision could not possibly bar an inspection order because it would not affect the substance of any decision by FHFA in managing Fannie Mae. *Compare Perry Capital*, 848 F.3d at 1086 (holding that Section 4617(f) barred an injunction of the Third Amendment because "[s]uch management of [Fannie Mae's] assets, debt load, and contractual dividend obligations during [Fannie Mae's] ongoing business operation sits at the core of FHFA's conservatorship function"); *Cty. of Sonoma v. FHFA*, 710 F.3d 987, 993 (9th Cir. 2013) (finding Section 4617(f) barred suit challenging FHFA directive to discontinue the purchase of certain risky assets because "the ability to decide which mortgages to buy is an inherent component of FHFA's charge[.]"); *Town of Babylon v. FHFA*, 699 F.3d 221, 227 (2d Cir. 2012) (finding Section 4617(f) barred suit challenging FHFA directive to discontinue the purchase of certain risky assets,

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216 (1987)).

explaining that FHFA has the power to take "protective measures against perceived risks" without judicial intervention); *Bank of Am. Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239, 1244 (11th Cir. 2010) (invoking FIRREA's analogous anti-injunction provision to bar injunctive relief against FDIC's disposition of property).

Fannie Mae contends that an inspection order would interfere with its supposed right to prosecute "this sort of action." (Mot. at 26.) But Fannie Mae cites only decisions holding that FHFA has the exclusive right to prosecute *derivative* actions on behalf of Fannie Mae.[19] This action is not a derivative action. As detailed above, FHFA has no right to prosecute this sort of action – a direct claim against Fannie Mae for books and records. The Stockholder's prosecution of this Action therefore would not interfere with any right of FHFA.

Finally, Fannie Mae contends incorrectly that the Anti-Injunction Provision bars the stockholder's claim simply because FHFA opposes it. (*See* Mot. at 27.) This is obviously not the law. The courts have granted or permitted equitable relief despite the analogous provision in FIRREA and the FDIC's opposition. *See, e.g.*, *Goldstein*, 2012 WL 1819284, at *13-15 (~~granting~~permitting plaintiff to pursue equitable remedy of accounting despite FDIC's assertion of FIRREA's analogous

[19] *See* Mot. at 26 (citing *Gail C. Sweeney Estate Marital Tr.*, 68 F. Supp. 3d at 119; *Sadowsky*, 639 F. Supp. 2d at 350; *In re Fed. Nat'l Mortg.*, 629 F. Supp. 2d at 4 n.4 (D.D.C. 2009); *In re Fed. Home Loan Mortg. Corp. Deriv. Litig.*, 643 F. Supp. 2d 790, 797 (E.D. Va. 2009).)

anti-injunction provision); *Cummings Properties Mgmt., Inc. v. F.D.I.C.*, 786 F. Supp. 144, 146-47 (D. Mass. 1992) (issuing a preliminary injunction against FDIC preventing it from removing an automatic teller machine from plaintiff's property, and observing that FIRREA's analogous anti-injunction provision invoked by FDIC "does not elevate the FDIC to the position of a sacred cow which may graze upon the rights of others at will, unchecked by the courts"), *order vacated, appeal dismissed*, 1992 WL 366909 (1st Cir. Sept. 1, 1992) (dismissing in view of settlement).

The courts have also granted injunctive relief against Fannie Mae and Freddie Mac during the conservatorship. *See, e.g.*, *Cameron v. Acceptance Capital Mortg. Corp.*, 2013 WL 12107729, at *1-2 (W.D. Wash. Sept. 25, 2013) (temporarily restraining Fannie Mae from evicting plaintiffs, where plaintiffs showed a likelihood of succeeding on the merits); *Barnett v. BAC Home Loan Servicing L.P.*, 772 F.Supp.2d 1328, 1334-38 (D. Or. 2011) (temporarily restraining Fannie Mae from proceeding with foreclosure where plaintiff demonstrated a likelihood of prevailing on claims for violation of Oregon state law and breach of contract); *cf. Bolone v. Wells Fargo Home Mortg., Inc*., 2011 WL 3706600, at *4-6 (E.D. Mich. Aug. 24, 2011) (enjoining Freddie Mac from evicting plaintiff from home where plaintiff demonstrated a substantial likelihood of prevailing on breach of contract).

Finally, the District Court's Remand Order implicitly rejects the notion that the Anti-Injunction Provision bars the Stockholder's claim. Fannie Mae had argued

that the supposed bar preempted the Stockholder's claim. (Remand Opposition at 9-10; Substitution Motion at 10-11.) Although the District Court did not directly address this argument, it implicitly rejected it by holding that the Succession Provision did not preempt the claim. (*See* Remand Order at 2-3 n.1.) There would have been no point in so holding if the Anti-Injunction Provision preempted the claim.

IV. Issue Preclusion Does Not Bar the Stockholder's Claim.

Contrary to Fannie Mae's contention, the decision of the EDVA, in the Stockholder's separate action against Freddie Mac under Virginia law, does not give rise to preclusive effect in this Action.[20] To the extent that the EDVA held that the Succession Provision barred the Stockholder's direct claim against Freddie Mac, its determination has since been rejected by the United States Court of Appeals for the District of Columbia Circuit, in *Perry Capital* (848 F.3d at 1104-05) and, in the instant Action, by the District Court. (Remand Order at 3 n.1.) As explained above, it also is inconsistent with the decisions concerning the analogous provision in FIRREA. (*See supra* at pp. 35-36.)

Given the conflict between the EDVA's ruling and these other federal court rulings, including the District Court's ruling in this case, issue preclusion cannot apply. *See, e.g.*, *Lutz v. Int'l Ass'n of Machinists & Aerospace Workers*, 121 F.

Supp. 2d 498, 504 (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.").[21] This is particularly true when the conflicting authority is from a higher court, as here.[22]

Issue preclusion also cannot possibly be applied here because the District Court has already rejected the proposition for which issue preclusion is invoked. The District Court's holding that the Succession Provision does not bar this Stockholder's claim is law of the case. *Gannett Co. v. Kanaga*, 750 A.2d 1174, 1181

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[20] *See Pagliara v. Fed'l Home Loan Mortg. Corp.*, 203 F. Supp. 3d 678 (E.D. Va. 2016) (the "EDVA Decision").

[21] *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").

[22] *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 a statute's retroactive application, where the Supreme Court in a later decision "invalidated retroactive application" of a different, but analogous statute).

(Del. 2000) ("The law of the case doctrine requires that there must be some closure to matters already decided in a given case . . . ."). Having urged the District Court to address the issue, Fannie Mae is estopped from contending otherwise. Even if this were not so, and Fannie Mae were correct that the EDVA Decision may have preclusive effect, the District Court's decision should be given the ultimate preclusive effect. It is more recent and involves precisely the same parties, as it concerned the Stockholder's claim against Fannie Mae.

The EDVA's holding on the Succession Provision could not be given preclusive effect for two additional reasons. *First*, it involved a pure question of law. *See, e.g.*, *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.'") (quoting *United States v. Moser*, 266 U.S. 236, 242 (1924)). 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, 447 (D.C. Cir. 2008) (citations omitted).[23] *Second*, it was an alternative

[23] *See also Glictronix Corp. v. American Telephone & Telegraph Co.*, 603 F. Supp. 552, 571 (D.N.J. 1984) (declining to 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"); *Lutz*, 121 F. Supp. 2d at 504 (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").

holding. *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 purposes where it was one of two alternative bases for the district court's decision); *United States v. Maxwell*, 189 F. Supp. 2d 395, 403-04 (E.D. Va. 2002) (same).[24]

Nor should the Court give preclusive effect to a supposed holding by the EDVA that the *Anti-Injunction Provision* barred an order for inspection of books and records. The EDVA reached no such holding. It rather cited this provision as evidence of "HERA's extraordinarily broad grant of operational discretion to FHFA." *See* EDVA Decision, 203 F. Supp. 3d at 691. It cited such evidence as part of its proper purpose analysis under Virginia law.[25] *See id.* at 689-92.

Fannie Mae does not contend that the EDVA's holding on *proper purpose* should be given preclusive effect, nor would it have been correct to do so. The

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[24] Under Delaware law, the "preclusive effect of a foreign judgment is measured by [the] standards [used by] the rendering forum." *See 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); *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 Court should therefore apply Fourth Circuit law.

EDVA's holding on proper purpose was governed by Virginia law and therefore did not concern an issue that is the same in the case, as required for issue preclusion to apply. The Delaware law that applies here is different. In contrast to the interpretation of Virginia law set forth in the EDVA Decision, Delaware law permits a stockholder to inspect books and records to evaluate a claim adverse to 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.).

V. The Claim May Not Be Dismissed For Lack of Proper Purpose Based Upon Future Proposed Limitations Period Defenses.

Finally, Fannie Mae's contention that this Action for books and records should be dismissed due to defenses that Fannie Mae and others *might* raise to litigation that the Stockholder *might* bring based upon the inspection lacks merit for three separate reasons:

First, as this Court explained in *Amalgamated Bank v. UICI*, the "potential availability of affirmative defenses . . . cannot solely act to bar a plaintiff under Section 220." 2005 WL 1377432, at *2 (Del. Ch. June 2, 2005). With specific reference to a limitations period defense, the Court explained,

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[25] Even if the EDVA had reached such a holding, it too would not have preclusive effect because it would have been inconsistent with other authority,

> First, these are summary proceedings; the factual development necessary to assess fairly the merits of a time-bar affirmative defense, for example, as to each potential claim, is not consistent with the statutory purpose. Second, courts should not be called upon to evaluate the viability of affirmative defenses to causes of actions that have not been, and more importantly may not ever be, asserted. Third, that a claim arising out of a particular transaction may be barred does not mandate the conclusion that documents relating to that transaction are not "necessary, essential, and sufficient" for a shareholder's proper purpose with respect to more recent transactions.

Id.

The cases cited by Fannie Mae do not vary this rule. They hold that a limitations period defense may bar a books and record claim only in a "specific factual setting" where it "*would eviscerate any showing that might otherwise be made in an effort to establish a proper shareholder purpose*." *See, e.g.*, *Graulich v. Dell Inc.*, 2011 WL 1843813, at *6 (Del. Ch. May 16, 2011) (emphasis added) (quotations and citation omitted) (*cited by* Mot. at 28). That is not the case here.

Limitations period defenses may not apply to the older claims and certainly will not apply to the more recent. Depending upon the outcome of the inspection of books and records, the Stockholder may later assert claims based upon Fannie Mae's entry into the Third Amendment in 2012. For those claims, depending upon the outcome of the investigation, tolling may apply. *See, e.g.*, *Carsanaro v. Bloodhound*

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involved a pure question of law and been an alternative holding.

Techs., Inc., 65 A.3d 618, 647 (Del. Ch. 2013) (finding limitations period may be tolled where there is an "affirmative act of concealment by a defendant . . . that prevents a plaintiff from gaining knowledge of the facts or some misrepresentation that is intended to put a plaintiff off the trail of inquiry" (citation omitted)); *Ryan v. Gifford*, 918 A.2d 341, 359–60 (Del. Ch. 2007) (same).

Even if tolling would not apply, the Stockholder may investigate the entry into the Third Amendment because records reflecting that transaction will nonetheless "contribute[] to the investigation," "provide background and context," and otherwise shed light on the claims arising from the more recent misconduct clearly within the limitations period, even without tolling considerations. *Amalgamated Bank*, 2005 WL 1377432, at *2-3 ("[A]n appreciation of an earlier, but connected, transaction may be essential to a proper perception of a more recent transaction.").[26]

The Stockholder also seeks to investigate claims for which the limitations period would normally have expired while this Action has been pending, such as

[26] *Cf. Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 117 (Del. 2002) ("Even where a stockholder's only purpose is to gather information for a derivative suit, the date of his or her stock purchase should not be used as an automatic 'cut-off' date in a § 220 action. First, the potential derivative claim may involve a continuing wrong that both predates and postdates the stockholder's purchase date. In such a case, books and records from the inception of the alleged wrongdoing could be necessary and essential to the stockholder's purpose. Second, the alleged post-purchase date wrongs may have their foundation in events that transpired earlier.").

some of the claims related to improper dividend payments. For those claims tolling almost certainly will apply. *Technicorp Int'l II, Inc. v. Johnston*, 2000 WL 713750, at *9 (Del. Ch. May 31, 2000) ("It is settled Delaware law that the institution of other litigation to ascertain the facts involved in the later suit will toll the statute while that litigation proceeds."); *id.* at *9 n.26 ("The pursuit of a books and records action under § 220 has been regarded as 'strong evidence that plaintiff was aggressively asserting its claims at that time . . . .'" (quoting *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 714 A.2d 96, 105 (Del. Ch. 1998)); *see also Cahall v. Burbage*, 119 A. 574, 576 (Del Ch. 1922) ("Delay pending other proceedings has frequently been held excusable . . . where the termination of such proceedings was necessary for the ascertainment of facts involved in the later suit.").[27] And, for the remainder of the claims, the limitations period has not yet run.

There is no merit to Fannie Mae's contention that each dividend payment since the Third Amendment did not give rise to a separate claim. Under the DGCL, the Charter Act, and even the Third Amendment, there was no requirement that

[27] Fannie Mae's reliance on *Coleman v. Pricewaterhousecoopers LLP*, 2003 WL 22765851, at *6 (Del. Super. Ct. Nov. 18, 2003), *rev'd sub nom. Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d 838 (Del. 2004) is misplaced for at least two reasons. (M. Hurd Ltr. at 5.) First, *Coleman* misreads *Technicorp*, which discusses concealment as an independent basis of tolling without abrogating the well-established proposition that pursing a books and records action to ascertain necessary facts may toll a limitations period. *See Technicorp*, 2000 WL 713750, at *7-9. Second, Fannie Mae has actively concealed information, as evidenced by its rejection of the Stockholder's Demand.

Fannie Mae pay dividends under the Net Worth Sweep. (*See* 12 U.S.C. § 1718(c)(1) (2008); 8 *Del. C.* § 170(a); Compl. Ex. D.) All three leave the decision to pay dividends in the Board's discretion. *See Teachers' Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 666 (Del. Ch. 2006) (where complaint challenged annual "discretionary decision[s]" to continue business under contract, finding limitations to run from the date of those discretionary decisions, and not "time of the decision to contract"); *Dweck v. Nasser*, 2012 WL 161590, at *22 (Del. Ch. Jan. 18, 2012) (relying on *Aidinoff* and determining that each challenged payment was to be "evaluated separately for laches" because "[e]ach payment represented a discrete decision to perpetuate an unfair course of conduct").[28] Moreover, it appears that each dividend payment may have violated Section 170 of the DGCL.[29] Thus, each improper

[28] *See also Buerger v. Apfel*, 2012 WL 893163, at *3 (Del. Ch. Mar. 15, 2012) (relying on *Aidinoff*, and explaining that "[w]hen fiduciaries have the power to terminate or modify an agreement, the decision to leave the agreement in place and continue to receive self-dealing benefits can be challenged as a breach of duty").

[29] Based upon the information available, Fannie Mae's capital in respect of its issued shares of preferred stock was impaired as of each of the dates for which dividends were paid under the Net Worth Sweep. (Compl. ¶¶ 197-200.) Therefore, by approving or acquiescing in each of the dividend payments, the Board repeatedly violated Section 170 of the DGCL. Also by approving or acquiescing in each of the dividend payments, the Board repeatedly breached its fiduciary duties by approving dividends on stock that is void or voidable, and transactions that were not entirely fair to Fannie Mae and its shareholders. (Compl. ¶¶ 201-03.) Any claims brought with respect to the foregoing misconduct will include direct claims seeking damages. It is well-established that violations of the DGCL are direct claims. *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1049 (Del. Ch. 2015). Further, the breaches of fiduciary duties will support direct claims because, for

dividend payment would spring from a separate breach of fiduciary duty or statutory requirement.

Fannie Mae also ignores the ongoing failure to avoid the harm of the Third Amendment, such as by refinancing the Senior Preferred Stock.[30] *See, e.g.*, *Price v. Wilm. Tr. Co.*, 1995 WL 317017, at *2 (Del. Ch. May 19, 1995) (involving "numerous repeated wrongs of similar, if not same, character over an extended period" and finding that each incident "[gave] rise to separate cause of action" for limitations period analysis); *Bean v. Fursa Capital P'rs, LP*, 2013 WL 755792, at *5 (Del. Ch. Feb. 28, 2013) (finding that "repeated failures to prepare and deliver audited annual financial statements for 2008 through 2011 are each separate wrongful transactions" for limitations period analysis).[31] This failure to ameliorate the Third Amendment has continued unabated to the present date.

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example, the Board's actions or omissions have caused a severe shift in value from the shares of junior preferred stockholders to the shares of Fannie Mae's controlling stockholder, Treasury. *See, e.g.*, *Gentile v. Rossette*, 906 A.2d 91, 101-03 (Del. 2006).

[30] These breaches of fiduciary duties will support direct claims because, for example, the Board or FHFA's actions or omissions caused a severe shift in value from the shares of junior preferred stockholders to the shares of Fannie Mae's controlling stockholder, Treasury. *See, e.g.*, *Gentile*, 906 A.2d at 101-03. The relief the Stockholder will seek for such claims will include damages.

[31] When a board fails to take action to prevent harm to the corporation or its shareholders – just as the Board has repeatedly failed to do here – it breaches its fiduciary duties. *See, e.g.*, *Bennett v. Propp*, 187 A.2d 405, 411 (Del. 1962) (finding that a director breached his fiduciary duties by doing "nothing" to prevent

In all events, the limitations period is irrelevant to the Stockholder's other proper purposes. The Stockholder's other proper purposes standing alone would be enough to support the Stockholder's books and records Demand. For example, the Stockholder seeks Fannie Mae's book and records to advance communications with other stockholders about apparent misconduct by the Board, FHFA, and Treasury. This is a proper purpose under Delaware law. *See Weiss v. Anderson*, 1986 WL 5970, at *2 (Del. Ch. May 22, 1986) ("To inform fellow shareholders of one's view concerning the wisdom or fairness . . . of a [transaction] and to encourage fellow shareholders to [take action], in light of one's own view of the merits of the . . . transaction, states a purpose that relates to one's interest as a stockholder of the company and an interest that is arguably shared by all fellow shareholders.").

As a result of their communications, Fannie Mae shareholders may wish to seek an audience before the Board, FHFA or Treasury to discuss proposed reforms concerning the depletion of Fannie Mae's capital by the dividends paid under the Net Worth Sweep, Fannie Mae's need for additional capital and the necessity, in

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controlling stockholder's improper use of corporate funds to increase control, and noting that the director "could surely have called a directors' meeting" to notify the other directors of the controller's misconduct); *Grace Bros. v. Uniholding Corp.*, 2000 WL 982401, at *12-13 (Del. Ch. Jul. 12, 2000) (denying motion to dismiss because plaintiff pled facts sufficient to support inference that defendant directors were aware of a transaction that would benefit a controlling stockholder group to the detriment of minority stockholders and "stood by and did nothing to stop it").

raising additional capital, of respecting the rights of existing stockholders. *Robotti & Co., LLC v. Gulfport Energy Corp.*, 2007 WL 2019796, at *2 (Del. Ch. July 3, 2007) ("Stockholders may use information about corporate mismanagement, waste, or wrongdoing in several ways[, including] . . . [to] seek an audience with the board of directors to discuss proposed reform . . . ."). The books and records sought may facilitate communication among Fannie Mae shareholders on whether to re-elect the current Board upon termination of the conservatorship or to take other action to seek to speed the termination of the conservatorship.

The Stockholder also seeks books and records to better value his investment in Fannie Mae. This too is a proper purpose that neither Fannie Mae nor FHFA confront. *Ostrow v. Bonney Forge Corp.*, 1994 WL 114807, at *11 (Del. Ch. Apr. 6, 1994) ("The valuation of shares has long been recognized to be a 'proper purpose' within the meaning of Section 220."). The Stockholder requires access to the documents underlying the Third Amendment and related dividend payments to more accurately assess the likelihood that the Third Amendment or the dividend payments will be reversed, repealed, or otherwise corrected through legal or political action, possibilities that directly affect the value of the Stockholder's Fannie Mae stock.

CONCLUSION

For all the foregoing reasons, the Stockholder respectfully requests that the Court deny Fannie Mae and FHFA's Motion to Dismiss or, in the Alternative, to Substitute FHFA as Proper Plaintiff.

YOUNG CONAWAY STARGATT
& TAYLOR, LLP

/s/ C. Barr Flinn

C. Barr Flinn (No. 4092)
Emily V. Burton (No. 5142)
Lakshmi A. Muthu (No. 5786)
Gregory J. Brodzik (No. 5722)
Rodney Square
1000 N. King Street
Wilmington, DE 19801-0391
Telephone: (302) 571-6692
bflinn@ycst.com
apoff@ycst.com
lmuthu@ycst.com
gbrodzik@ycst.com

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Attorneys for Plaintiff Timothy J. Pagliara

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