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Case No. 12105-VCMR

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

MOTION TO RECONSIDER ORDER GRANTING EXPEDITED PROCEEDINGS, IN ORDER TO ADDRESS DEFENDANT'S PENDING DISPOSITIVE MOTION

Pursuant to Court of Chancery Rule 59(f), Defendant Federal National Mortgage Association ("Fannie Mae") respectfully asks the Court to reconsider its Order setting this matter for trial on May 1, 2017, *see* Order Granting Expedited Proceedings (filed May 28, 2017) (the "Order"), and enter the [Proposed] Scheduling Order attached hereto.

Before setting this matter for trial, the Court should resolve Fannie Mae and FHFA's Motion to Dismiss Or, in the alternative, to Substitute FHFA as the Proper Plaintiff, filed today it also advances dispositive arguments that Fannie Mae and the Federal Housing Finance Agency ("FHFA") or the "Conservator" have not yet had to make due to the procedural posture of the case. This motion to dismiss explains why Plaintiff's suit is fatally flawed as a matter of law. Most

significantly, federal law makes clear that FHFA as Conservator has the exclusive right to pursue stockholder inspection demands during the conservatorship. Indeed, another court has dismissed a virtually identical books-and-records suit brought by Plaintiff Pagliara on this ground. *See Pagliara v. Fed. Home Loan Mortg. Corp.*, 203 F. Supp. 3d 678, 689 (E.D Va. 2016), *appeal dismissed by* Order (4th Cir. No. 16-2090, Jan. 30, 2017). Because the motion to dismiss presents pure issues of law that, if granted, would obviate the need for any further proceedings, it would be the most efficient use of judicial and party resources for this Court to resolve the motion to dismiss first, before setting this matter for trial.

In support of the present motion to reconsider, Fannie Mae respectfully states as follows:

BACKGROUND

1. FHFA is the federal agency regulator of Fannie Mae and Freddie Mac (together, the "Enterprises"). *See* Compl. ¶¶ 54, 55. FHFA was formed in 2008 pursuant to federal legislation known as the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified as 12 U.S.C. § 4511 *et seq.*). In September 2008, FHFA's Director placed both Enterprises into statutory conservatorships pursuant to 12 U.S.C. § 4617(a), and the Enterprises remain in conservatorship today. Compl. ¶ 65.

2. Upon its appointment as Conservator, FHFA "immediately suceed[ed] to "all rights, titles, powers, and privileges of [Fannie Mae], and of any stockholder" of Fannie Mae. 12 U.S.C. § 4617(b)(2)(A)(i).

3. Shortly after becoming Conservator, FHFA (on behalf of the Enterprises) entered into Senior Preferred Stock Purchase Agreements ("PSPAs"), with the United States Department of the Treasury ("Treasury"). Compl. ¶¶ 83-100. Through the PSPAs, Treasury agreed to provide billions of dollars for the Enterprises' continued operations in exchange for a comprehensive package of rights, including the right to a substantial quarterly dividend. *See Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1082 (D.C. Cir. 2017).

4. In August 2012, Treasury and FHFA, acting as Conservator for the Enterprises, entered into a Third Amendment to the PSPAs. Compl. ¶ 104. The Third Amendment adjusted the manner in which dividends are paid to Treasury under the PSPAs. *Id*. ¶¶ 117-125.

5. On January 19, 2016, Plaintiff sent an inspection demand letter to Fannie Mae, citing 8 *Del. C.* § 220 ("Section 220") and seeking production of an extensive set of corporate records purportedly designed to let Pagliara "assess whether he should initiate litigation against Fannie Mae's current and former directors, FHFA and Treasury" in connection with their role in the Third Amendment to the PSPAs. *See* Compl. ¶ 161. Because the Conservator assumed

all the rights and powers of Fannie Mae's shareholders during the conservatorship, Plaintiff's request was denied.

6. Pagliara then filed the present suit on March 14, 2016. Fannie Mae thereafter removed to the United States District Court for the District of Delaware. On March 8, 2017, that federal court remanded the case back to this Court. *See*, *Pagliara v. Fed. Nat'l Mortg. Ass'n*, Civil No. 16-193-GMS (D. Del. Mar. 9, 2017) (Order, Federal Docket #38).

7. At the time of remand, FHFA had two motions pending in the District Court: (1) a motion to substitute the Conservator in place of Plaintiff based on HERA's succession and non-interference clauses, 12 U.S.C. §§ 4617(b)(2)(A)(i) and 4617(f); and (2) a supplemental motion to substitute arguing that the doctrine of issue preclusion binds Pagliara to the ruling in the virtually identical books and records case he brought against Freddie Mac. The U.S. District Court for the District of Delaware never addressed these motions, leaving them for resolution by this Court on remand.[1]

8. On March 28, 2017, this Court entered an order setting this matter for trial on May 1, 2017. *See* Order (Mar. 28, 2017).

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[1] Based on correspondence with counsel for Pagliara, Fannie Mae understood that until a meet and confer regarding scheduling occurred between the parties, which did not occur, Fannie Mae was not required to move, answer, or otherwise respond to Pagliara's complaint.

9. Contemporaneous with the filing of the present motion, Fannie Mae and FHFA have filed a motion to dismiss, which addresses the arguments raised in the earlier-filed motion to substitute in the District Court. In addition to explaining why Plaintiff's suit is barred by federal law, the motion to dismiss also explains why Plaintiff's suit should be dismissed for lack of personal jurisdiction and lack of a proper purpose.

ARGUMENT

The Court Should Resolve the Pending Motion to Dismiss, which Raises Threshold Issues, Before Setting this Matter for Trial.

10. Judicial economy is best served by establishing a schedule that resolves Fannie Mae and FHFA's dispositive motions first, then setting an expeditious trial schedule if still necessary. Even in § 220 suits, this Court frequently resolves dispositive motions regarding standing issues *before* turning to the merits of the § 220 demand. *See, e.g.*, *Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139 (Del. 2012) (affirming Court of Chancery's dismissal of § 220 suit for lack of standing due to failure to comply with statutory procedural requirements); *Graulich v. Dell Inc.*, 2011 WL 1843813 (Del. Ch. May 16, 2011) (dismissing § 220 suit for lack of proper purpose because derivative suit being investigated would be barred by limitations).

11. Resolving Fannie Mae and FHFA's motion to dismiss before setting this case for trial is the most efficient course, because that motion raises substantial

issues—including the absence of personal jurisdiction and the fact that Plaintiff lacks the right to pursue this action—that may resolve this matter completely.[2] As described more fully in the motion to dismiss, dismissal is appropriate for numerous threshold reasons.

12. *First*, this Court lacks personal jurisdiction over Fannie Mae because it is neither incorporated in Delaware nor does it have its principal place of business in Delaware. Instead, Fannie Mae is a federally-chartered corporation with its principal place of business in the District of Columbia.

13. *Second*, Pagliara's claims are barred by issue preclusion because he has litigated the very same issue—his ability as a stockholder to review the books and records of an enterprise under FHFA's conservatorship—in another court and lost, with that court's finding that during conservatorship Pagliara no longer has any inspection rights.

14. *Third*, even if the Court were to reach the merits of Pagliara's claim, the Court should likewise hold that he has no right to inspect Fannie Mae's books and records. Under HERA, FHFA as Conservator has succeeded to "all rights,

[2] Pagliara may argue that because his case has been pending for over a year, the time for filing and resolving threshold motions has passed because threshold issues must be resolved more than 45 days before any trial. The schedule proposed by Fannie Mae and FHFA accommodates Pagliara's concern without depriving Fannie Mae and FHFA of their right to be heard on threshold issues.

titles, powers, and privileges" of Fannie Mae's stockholders, including any right of Plaintiff to inspect Fannie Mae's books and records. 12 U.S.C. § 4617(b)(2)(A)(i).

15. *Fourth*, Plaintiff lacks a proper purpose for the proposed inspection because the lawsuits he claims to be investigating in this § 220 proceeding—based on the execution of the Third Amendment in August 2012—would be barred by any applicable statute of limitations. *See Graulich*, 2011 WL 1843813, at *6 ("'[A] time bar defense . . . would eviscerate any showing that might otherwise be made in an effort to establish a proper shareholder purpose.").

16. Finally, Plaintiff will suffer no prejudice if this Court resolves the motion to dismiss before forcing the parties to expend significant resources litigating on an expedited basis. Fannie Mae respectfully proposes that the Court convert the May 1, 2017 trial date into a hearing to present oral argument on the motion to dismiss, the briefing of which will be completed before May 1. In the event the Court denies the motion to dismiss, the Court could then set a prompt trial date to follow—*i.e.*, within 45 days after the Court's ruling. Such a procedure strikes the proper balance between moving expeditiously while sequencing the proceedings in an efficient manner to address the threshold, dispositive legal issues first.

CONCLUSION

For these reasons, Fannie Mae respectfully requests that the Court reconsider its Order setting this matter for trial, and enter the attached [Proposed] Scheduling Order to govern the remaining proceedings in this suit.

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March 31, 2017

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2017, a copy of the foregoing was served, by File and ServeXpress, on the following attorneys:

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