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Case No. 12105-VCMR

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TIMOTHY PAGLIARA, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, Defendant,	)))))))))))	C.A. No. 12195-VCMR

PLAINTIFF TIMOTHY J. PAGLIARA'S OPPOSITION TO MOTION TO RECONSIDER

Plaintiff Timothy Pagliara, by and through his undersigned counsel, hereby submits this opposition (the "Opposition") to the Motion to Reconsider Order Granting Expedited Proceedings, in Order to Address Defendant's Pending Dispositive Motion ("Motion for Reconsideration"), filed by Defendant Federal National Mortgage Association ("Fannie Mae").

INTRODUCTION

1. A books and records request is supposed to be a simple and efficient way for a stockholder to obtain information. A books and records action is a summary proceeding, generally resolved in 60 days or less.

2. Here, through a series of ultimately rejected procedural maneuvers, Fannie Mae has already delayed this action *by more than a year*. Fannie Mae's Motion for Reconsideration seeks further delay, for no practical reason. It asks the

Court to reconsider its grant of Mr. Pagliara's Motion to Expedite *first* to add an initial round of briefing (the "Succession Briefing") and *second* to put off trial until at least 45 days after May 1. The Court should reject this attempt at further delay.

3. *On the first point*, as a practical matter, the parties have already briefed: (a) the meaning of 12 U.S.C. § 4617(b)(2)(A)(i) (HERA's "Succession Provision"), (b) the contention that issue preclusion applies in determining the meaning of the Succession Provision, and (c) the meaning of 12 U.S.C. § 4617(f) (HERA's "Jurisdictional Bar") – the primary issues in the Succession Briefing. Fannie Mae urged the District Court to consider each of these issues on the merits.

4. The District Court's order remanding this case to the Court of Chancery (the "Remand Order") expressly rejected Fannie Mae's Succession Provision argument and implicitly rejected its issue preclusion and Jurisdictional Bar claims. Even if this Court decided to reconsider the District Court's determinations, what little briefing might be needed could be presented in pretrial briefing.[1] As could Fannie Mae's other arguments in the Succession Briefing.

5. *On the second point*, Fannie Mae has not explained why this Court should not issue a final ruling on the merits of this case simultaneously with ruling on the arguments presented in Fannie Mae's Succession Motion. Fannie Mae has

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[1] Additional necessary briefing seems limited to addressing the recent decision in *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072 (D.C. Cir. Feb. 21, 2017), and any other decisions rendered after briefing before the District Court.

not identified any material issue to litigate in this case not raised in its Succession Briefing. The Succession Briefing even addresses Mr. Pagliara's purpose for inspection, often the only contested issue in a books and records proceeding. Whatever unidentified issues remain to be addressed in a final adjudication on the merits can easily be presented for resolution by the Court on May 1. Mr. Pagliara has filed, along with this Opposition, a proposed schedule that does just that.

BACKGROUND

6. Mr. Pagliara served the books and records demand at issue in this case on January 19, 2016. (Compl. Ex. A.) Fannie Mae refused Mr. Pagliara's demand on January 27, 2016, forcing Mr. Pagliara to bring this action. (Compl. Ex. G.)

7. Mr. Pagliara filed the present action on March 14, 2016. Since then, Fannie Mae has piled procedural roadblock atop procedural hurdle to avoid an adjudication of Mr. Pagliara's right to review Fannie Mae's books and records. First, on March 25, 2016, Fannie Mae removed this case to the United States District Court for the District of Delaware, purportedly on the basis of federal question jurisdiction. (D. Del. D.I. 1.) Before Mr. Pagliara could address the improper removal, on March 28, 2016, FHFA filed a motion (the "MDL Motion") to have this case transferred and consolidated into a proposed multi-district litigation before the Judicial Panel on Multidistrict Litigation. (D. Del. D.I. 3.) On April 4, 2016, the District Court stayed this case pending a ruling on the MDL

Motion. (*See* Apr. 4 Minute Entry.) That stay remained in place until July 14, 2016, when the MDL Motion was denied in its entirety. (D. Del. D.I. 6, 7.)

8. Once the stay was lifted, on August 1, 2016, Mr. Pagliara moved to remand the case to this Court. But, while his motion to remand was pending, non-party FHFA filed two different motions. The first motion presented FHFA's and Fannie Mae's contention that HERA transferred Mr. Pagliara's direct right to inspect books and records to FHFA through (a) HERA's Succession Provision, and (b) HERA's Jurisdictional Bar. (D. Del. D.I. 8, 9.) The second motion claimed that issue preclusion dictated a determination that the Succession Provision transferred Mr. Pagliara's direct right to books and records to FHFA. (D. Del. D.I. 24, 25.) Mr. Pagliara had to respond to both motions. (D. Del. D.I. 13, 30.)

9. On March 8, 2017, the District Court not only remanded this action, but also rejected FHFA's and Fannie Mae's fully briefed motions. (Remand Order, D. Del. D.I. 38 ("The normal procedure for enforcing a shareholder's right to inspect the books and records is not altered or preempted by [the Succession Provisions]. . . . [The Succession Provision] did not bar 'direct claims and rights in [Fannie Mae] . . . during the conservatorship.'").)

10. As soon as the case was remanded, through counsel, Mr. Pagliara reached out to Fannie Mae to seek a trial date. (Email from E. Burton to M. Hurd (March 16, 2017), Ex. A.) Fannie Mae ignored that effort. *Id.* Then, Mr. Pagliara

sent a proposed schedule leading to a prompt trial, without interim motion practice. (Email from E. Burton to M. Hurd (March 23, 2017), Ex. B.) Fannie Mae promised a response, but never provided one. *Id*.

11. Twenty days after the case was remanded, on March 28, this Court granted Mr. Pagliara's Motion to Expedite, which had been filed more than a year ago and *never* opposed by Fannie Mae. (Order Granting Expedited Proceedings, D.I. 15.) The Court set trial for May 1. *Id.* Mr. Pagliara contacted Fannie Mae again and proposed a schedule to take this matter to trial on May 1. (*See* Ex. B.)

12. On March 29, after its deadline to answer the Complaint under Rule 12(a) had passed, Fannie Mae finally responded to Mr. Pagliara's efforts to move this case to trial, proposing abandoning the trial date in favor of re-briefing the issues already presented to and rejected by the District Court. (*See* Ex. B.) When Mr. Pagliara refused to have trial delayed again to re-brief the same arguments rejected by the District Court, Fannie Mae filed this Motion for Reconsideration.

ARGUMENT

I. Fannie Mae Has Not Met the Rule 59(f) Standard for Reconsideration.

13. "A court may grant reargument under Rule 59(f) when it appears that the [c]ourt has overlooked a decision or principle of law that would have controlling effect or the [c]ourt has misapprehended the law or the facts so that the outcome of the decision would be [affected]." *Matter of Restatement of*

Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trust Dated Feb. 9, 2012, 2014 WL 2538887, at *3 (Del. Ch. June 4, 2014) (denying motion for reconsideration) (quotations removed), *aff'd sub nom. Ravet v. N. Trust Co. of Delaware*, 2015 WL 631588 (Del. Feb. 12, 2015); *see also Carlyle Inv. Mgmt., LLC v. Moonmouth Co., S.A.*, 2014 WL 4104702, at *2 (Del. Ch. Aug. 21, 2014) (denying motion for reconsideration).

14. The May 1 trial date did not result from misapprehension: petitions for inspection under Section 220 are summary proceedings, generally tried within 60 days. *See Forbes v. Consert, Inc.*, C.A. No. 8130-VCG, at 16-17 (Del. Ch. Jan. 31, 2013) (TRANSCRIPT) (referencing "the normal 45 to 60 day standard" for Section 220 proceedings); *Lavi v. Wideawake Deathrow Entm't, LLC*, 2011 WL 284986, at *1 (Del. Ch. Jan. 18, 2011) ("[B]ooks and records actions are summary proceedings. What that means is that they are to be promptly tried. . . . [T]he case can be tried within two months of filing."). If Fannie Mae believed it necessary to diverge from that process, it was obligated to bring that justification to the Court's attention sooner. Fannie Mae did not do so. Fannie Mae's belated Substitution Briefing does not render the Court's prior factual understandings "misapprehended" for purposes of Rule 59(f): "'[T]he court's focus on a motion under Rule 59(f) is solely on the facts in the record at the time of the decision.'" *In re ML/EQ Real Estate P'ship Litig.*, 2000 WL 364188, at *3 (Del. Ch. Mar. 22,

2000) (quoting *Price v. The Continental Ins. Co*., C.A. No. 17219-NC, let. op. at 2 (Del. Ch., Mar. 3, 2000)).[2]

15. This Court did not overlook any law or fact in setting trial for May 1. Fannie Mae's Motion for Reconsideration should be denied for this reason alone.

II. The Schedule Fannie May Seeks Is Inefficient.

16. Setting aside Rule 59(f)'s standard, Fannie Mae's scheduling proposal should be rejected on its own merits. Case dispositive motions are rarely efficient in the context of summary proceedings. *Lavi*, 2011 WL 284986, at *1 ("Rarely is dispositive motion practice efficient when the case can be tried within two months of filing."). Neither case cited by Fannie Mae refutes this point. *Central Laborer's Pension Fund v. New Corporation*, C.A. No. 6287-CC, was scheduled by stipulation of the parties. *See* Stipulated Briefing Schedule and Proposed Order (Apr. 26, 2011). *Graulich v. Dell*, C.A. No. 5846-CC, is similarly devoid of any scheduling dispute. The existence of two cases in the universe of 220 actions, where the parties agreed that preliminary motion practice would be efficient, does not undermine the general rule or its application here.

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[2] *Cf. Carlyle Inv. Mgmt. L.L.C. v. Nat'l Indus. Grp. (Hldg.)*, 2012 WL 4847089, at *5 (Del. Ch. Oct. 11, 2012), *aff'd*, 67 A.3d 373 (Del. 2013) ("To permit a defaulting party a free shot to reargue the merits would make defaulting a cost-free option for the defaulting party, but impose on litigation adversaries and society as a whole great costs in terms of delay, expense, and the inefficient use of judicial resources.").

17. Fannie Mae's proposal is particularly inappropriate here for two reasons. *First*, Mr. Pagliara and Fannie Mae (or FHFA) have already briefed the issues at the heart of Fannie Mae's Substitution Briefing. (*See* FHFA's Motion to Substitute FHFA as Plaintiff and briefing thereto (D. Del. D.I. 8, 9, 13, 15); FHFA's Supplemental Motion to Substitute FHFA as Plaintiff and briefing thereto (D. Del. D.I. 24, 25, 30, 32)). The District Court already rejected Fannie Mae's arguments. Fannie Mae's demand that Mr. Pagliara brief those issues yet again, before finally scheduling trial, is excessive. If this Court decides to reevaluate the Succession Provision, the relevant briefing is complete. Any adjustments to address those issues to this Court could be done alongside any other issues for trial.

18. *Second*, Fannie Mae's Motion for Reconsideration asserts that this Court should delay trial until mid-July at the earliest for efficiency, but never explains what issues will remain after this Court disposes of the Substitution Motion. Trial in a Section 220 Action typically addresses a stockholder's purpose and the appropriate scope of production.[3] Fannie Mae's Substitution Motion already addresses Mr. Pagliara's purpose. Thus, the only question apparently left for trial would be the scope of production.

19. It would be needlessly burdensome and unfair to delay Mr. Pagliara's investigation further and impose further briefing on the off chance that doing so

[3] Mr. Pagliara attached proof of his stockholdings to the demand. Fannie Mae has not disputed his standing in the year that this case has been pending.

might avoid briefing the scope of production. The appropriate scope of Fannie Mae's document production can be efficiently addressed alongside the issues Fannie Mae claims are issues left over from the District Court's Remand Order.

III. Fannie Mae's "Case Dispositive" Motions Are Unlikely to Dispose of the Case.

20. The Substitution Briefing that Fannie Mae asks this Court to rule on prior to even scheduling trial raises essentially three arguments: (1) that HERA's Succession and Jurisdictional Bar Provisions transferred Mr. Pagliara's right to books and records to FHFA; (2) that this Court lacks personal jurisdiction over Fannie Mae; and (3) that Mr. Pagliara lacks a proper purpose for inspection. To the extent that these arguments raise new issues, Mr. Pagliara will fully brief them at an appropriate time. None is likely to make trial unnecessary.

21. *First*, Fannie Mae's arguments on the Succession Provision are unlikely to prevail. As the United States Court of Appeals for the District of Columbia Circuit held in *Perry Capital LLC v. Mnuchin*, the Succession Provision does not bar direct claims by stockholders of Fannie Mae. 848 F.3d at 1105 ("[C]laims a shareholder may lodge directly against the Company are retained by the shareholder in conservatorship . . . ."). The District Court held the same in the instant action: that the Succession Provision does not bar Mr. Pagliara's claim for books and records. (Remand Order, D. Del. D.I. 38 ("The Court is persuaded . . . that [the Succession Provision] did not bar 'direct claims and rights in [Fannie

Mae] . . . during the conservatorship.'") (citing *Perry Capital*, 848 F.3d at 1105)). In holding that Mr. Pagliara's claim for books and records was not transferred to FHFA, the Court necessarily rejected Fannie Mae's and FHFA's arguments that issue preclusion and the Jurisdictional Bar Provision required the converse determination. Fannie Mae and FHFA urged the District Court to decide these issues before deciding whether to remand. (D. Del. D.I. 17 at 3 n.3 ("FHFA is filing a brief that urges the Court to resolve the substitution question before turning . . . to this remand motion."). Now that the District Court has done so, it is law of the case. *Gannett Co. v. Kanaga*, 750 A.2d 1174, 1181 (Del. 2000) ("The law of the case doctrine requires that there must be some closure to matters already decided in a given case . . . .").

22. *Second*, Fannie Mae's personal jurisdiction argument is unlikely to prevail. As a threshold matter, the argument has been waived. A party waives a personal jurisdiction defense when it invokes the Court's jurisdiction to address the merits. *See 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."). A party may not urge the Court to make a determination on the merits and then, when the Court rules against it, raise personal jurisdiction as a defense.

23. Fannie Mae did just that. When FHFA briefed the arguments on the Succession Provision and Jurisdictional Bar to the District Court, it expressly did so on behalf of Fannie Mae (D. Del. D.I. 9, 1; D. Del. D.I. 24, 1)); FHFA did not move to intervene as a separate party. Fannie Mae expressly urged the District Court to rule on these motions. (D. Del. D.I. 17, 3 n.3) ("[T]he Court should resolve the . . . motion to substitute first[.]").) The District Court expressly held that the motion to substitute went to the merits of Mr. Pagliara's claim. (Remand Order at 1-2 n.1 (D. Del. D.I. 38) (explaining that the issues raised by the motion to substitute go not to the Stockholder's standing but to the Stockholder's "likelihood of succeeding on the merits of his claim").) Fannie Mae cannot begin contesting personal jurisdiction now – after engaging on the merits.

24. More recently, Fannie Mae waived any defense of lack of personal jurisdiction by not asserting it within the twenty-day period required by Court of Chancery Rule 12(a).[4]

25. Finally, putting aside the issue of waiver, Fannie Mae consented to the Court of Chancery's jurisdiction when it elected to be governed by Delaware law, including Section 220(c)'s provision that, upon refusal of a demand for inspection, the stockholder may apply to the Court of Chancery for an order to compel such

[4] Fannie Mae claims that it believed that its deadline to answer had been extended based on correspondence with counsel – without enclosing that correspondence. (See Motion for Reconsideration, at 4 n.1.) The relevant emails are described above and filed herewith and do not support this argument. (*See* Exs. A and B.)

inspection. More generally, a corporation may not elect to be governed by Delaware law and then contend that it is not subject to the jurisdiction of the Delaware Courts.[5] *Cf.* 8 *Del. C.* § 115 ("[N]o provision of the certificate of incorporation or the bylaws may prohibit bringing [internal corporate] claims in the courts of this State."). Although it hardly matters, Fannie Mae is also wrong to contend that it is not a Delaware corporation.[6]

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[5] Fannie Mae's claim that its election of Delaware law did not have a jurisdictional effect is meritless. The FHFA regulation it relies upon, 12 C.F.R. § 1239.3, was adopted long after Fannie Mae made the election and does not purport to have retroactive effect. Moreover, FHFA's comments to the regulation expressly state, "None of these provisions is intended to address conservatorship matters at [Fannie Mae and Freddie Mac]." Responsibilities of Boards of Directors, Corporate Practices and Corporate Governance Matters, 80 Fed. Reg. 72327, 72328 (Nov. 19, 2015) (to be codified at 12 C.F.R. 1239).

[6] A corporation may be both federally chartered and state incorporated and may also be incorporated in more than one state – as Fannie Mae is. *Cf. 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."). The Delaware certificate of incorporation attached to the Complaint must be for Fannie Mae because, under Fannie Mae's chartering statute, only Fannie Mae can use, as any part of its name, the words "Federal National Mortgage Association." 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."). Finally, the lapse of the certificate for failure to pay franchise taxes has no effect on the validity of the certificate as between Fannie Mae and its stockholders. *See, e.g.*, *Frederic G. Krapf & Son, Inc. v. Gorson*, 243 A.2d 713 (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").

26. *Third*, Fannie Mae's claim that Mr. Pagliara lacks a proper purpose for inspection because supposedly all the claims he seeks to investigate are barred by the statute of limitations misinterprets both Mr. Pagliara's claims and Delaware law. Mr. Pagliara seeks to investigate claims arising from the entry into the Third Amendment, the payment of dividends to Treasury every quarter since and, more generally, the ongoing failure of potential defendants to take action to prevent the harm to Fannie Mae arising from the Net Worth Sweep. (*See* Demand Letter, Compl. Ex. A.) Due to Fannie Mae's failure to disclose information and subsequent refusal to respond to Mr. Pagliara's books and records demands, the limitations period has been tolled for some time. *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."). The later breaches to be investigated are ongoing – some occurring every quarter – and therefore have occurred within the three-year limitations period.

27. Moreover, a statute of limitations problem with respect to the wrongs to be investigated only bars a request to inspect books and records where it will inevitably apply. *See Amalgamated Bank v. UICI*, 2005 WL 1377432, at *2 (Del. Ch. June 2, 2005) ("The potential availability of affirmative defenses . . . cannot solely act to bar a plaintiff under Section 220. . . . [T]hese are summary

proceedings; the factual development necessary to assess fairly the merits of a time-bar affirmative defense . . . is not consistent with the statutory purpose.”). Thus, even if Fannie Mae’s statute of limitations argument accurately characterized Mr. Pagliara’s Complaint, it would not provide grounds to dismiss this action.

CONCLUSION

28. Fannie Mae’s Motion for Reconsideration does not meet the standard for reconsideration. And, Fannie Mae’s proposed schedule is neither appropriate for a Section 220 action, nor efficient for this proceeding. The most likely outcome of granting the relief Fannie Mae seeks would be to require a third round of briefing on substantially the same issues, and then to hold a further delayed trial. Mr. Pagliara has already waited more than one year for inspection. For the reasons set forth above, he should not have to wait through much of a second year.

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DATED: April 3, 2017

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CERTIFICATE OF SERVICE

I, Meryem Y. Dede, Esquire, do hereby certify that on April 3, 2017, I caused a copy of the foregoing document to be served upon the following counsel in the manner indicated below:

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