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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

REPLY BRIEF IN SUPPORT OF FANNIE MAE AND FHFA'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO SUBSTITUTE FHFA AS THE PROPER PLAINTIFF

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PRELIMINARY STATEMENT

Pagliara's Response in Opposition is devoid of any reason to allow his books and records suit against Fannie Mae, a federally chartered, government sponsored enterprise, to proceed in this Court. As a threshold matter, Pagliara has failed to meet his burden to make a prima facie showing of jurisdiction. He resorts in large part to arguing waiver, because he cannot show that Fannie Mae is, or ever has been, a Delaware corporation subject to general jurisdiction here or to Section 220 of the D.G.C.L. As explained below, Fannie Mae is not now, nor has it ever been a Delaware corporation and has never waived its jurisdictional defense. Fannie Mae's bylaws, on which Pagliara purports to rely, establish that Fannie Mae is a federal Enterprise with no certificate of incorporation. Fannie Mae's charter makes clear that the District of Columbia is the only venue in which there is general jurisdiction over Fannie Mae, and binding federal law confirms that its corporate governance election is irrelevant to the jurisdictional inquiry. Pagliara's demand should therefore be dismissed.

At bottom, however, this case presents a simple, straightforward issue: when Congress, through HERA, transferred "***all rights***, titles, ***powers***, and privileges of [Fannie Mae], and of ***any stockholder***, officer, or director" of Fannie Mae to the FHFA as Conservator, 12 U.S.C. § 4617(b)(2)(A)(i) (emphases added), did that transfer include a stockholder's power to compel an inspection of Fannie

Mae's books and records? The answer is yes, as dictated by both the plain language of the statute, as well as its overall purpose. Indeed, in a materially-identical action brought by Pagliara against Freddie Mac, the court correctly held that Pagliara possesses no inspection rights while the Enterprises are in conservatorship. *See Pagliara v. Fed. Home Loan Mortg. Corp.*, 203 F. Supp. 3d 678 (E.D. Va. 2016) ("*Pagliara I"*). The exact same outcome is warranted here.

Finally, in addition to its other fatal flaws, Pagliara's suit also fails for lack of a proper purpose, as any conceivable claims he may bring as a result of his inspection would be barred by HERA, the statute of limitations, or both.

I. THIS COURT LACKS PERSONAL JURISDICTION OVER THE FEDERALLY-CHARTERED DEFENDANT FANNIE MAE.

Because Fannie Mae is a federally-chartered government-sponsored enterprise neither incorporated in Delaware nor at home in this state, jurisdiction is not proper under Delaware's long-arm statute. Nor has the defense been waived, because the instant motion represents Fannie Mae's first responsive pleading in this case. In addition, Section 220 of the D.G.C.L. by its terms only applies to Delaware corporations, and thus is inapplicable to Fannie Mae.

A. Fannie Mae Is Not A Delaware Corporation.

Fannie Mae is not, nor has it ever been, a Delaware corporation. Pagliara now argues for the first time, that Fannie Mae's Bylaws render it a Delaware

corporation, Opp. 23[1], but, tellingly, can point to no language in those Bylaws supporting his argument.[2] Fannie Mae's Bylaws in fact follow its long-standing federal charter and provide that "the principal office of [Fannie Mae] shall be in the District of Columbia." Ex. 1 to Mot. to Dismiss, Fannie Mae Bylaws, § 1.02; *accord* 12 U.S.C. § 1717(a)(2)(B) (Fannie Mae "shall maintain its principal office in the District of Columbia . . . and shall be deemed, for purposes of jurisdiction and venue in civil actions, to be *a District of Columbia corporation.*" (emphasis added)). Pagliara similarly fails to identify a single document—an SEC filing, Annual Report, OFHEO or FHFA Report to Congress, or investor presentation—that describes Fannie Mae as a Delaware corporation.

Pagliara's cited cases are inapposite. He gathers cases regarding businesses that are incorporated in more than one state, Opp. 32, but can marshal no evidence

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[1] *See* Pl. Timothy J. Pagliara's Answering Br. in Opp. to Fannie Mae and FHFA's Mot. to Dismiss or in the Alternative, to Substitute FHFA as Proper Pl. (filed Apr. 18, 2017) ("Opp.").

[2] To the contrary, the cited portions of Fannie Mae's Bylaws impliedly *disclaim* the existence of a Delaware certificate of incorporation by dedicating certain bylaws as certificate *analogues* for purposes of facilitating its corporate governance practices. *See* Ex. 1 to Mot. to Dismiss, Fannie Mae Bylaws § 1.05 (explaining that sections "designated as a 'Certificate Provision' in these Bylaws" constitute Fannie Mae's "'certificate of incorporation' for all purposes of the [D.G.C.L.]" and that the remaining sections constitute Fannie Mae's "'bylaws' for all purposes of the [D.G.C.L.]"). The Bylaws are not, and never have been, filed with the Delaware Secretary of State the way a certificate of incorporation would be under Delaware law. *See* 8 *Del. C.* § 1.03.

that any court (let alone this Court) has ever found Fannie Mae to be incorporated in Delaware or any other state. Although Pagliara argues that this Court should apply the 2002 Certificate of Incorporation (voided in 2004) to Fannie Mae, [3] the case he cites in fact counsels the opposite and favors dismissal of stockholder actions that attempt to exploit void certificates of incorporation. *Clabault v. Caribbean Select, Inc.*, 805 A.2d 913, 918 (Del. Ch. 2002) (dismissing stockholder action with prejudice, citing "powerful reasons to deny the relief requested" including that the company's "certificate of incorporation was voided years ago by the Delaware Secretary of State"), *aff'd*, 846 A.2d 237 (Del. 2003); *see also Klamka v. OneSource Techs., Inc.*, 2008 WL 5330541, at *2 (Del. Ch. Dec. 15, 2008) (dismissing stockholder action against corporation with void certificate).

B. Fannie Mae's Election To Follow Delaware Corporate Governance Practices Does Not Confer Jurisdiction.

It is irrelevant to the jurisdictional inquiry that, in order to comply with a federal regulation, Fannie Mae has chosen to follow Delaware's corporate governance *practices* to the extent those practices are "not inconsistent" with "Federal law, rules, and regulations." 12 C.F.R. § 1239.3(a)-(b). As an initial

[3] In its Opening Brief, Fannie Mae identified numerous inconsistences, including in the capital structure, between the 2002 Certificate of Incorporation and Fannie Mae. Pagliara's only response is to speculate that these inconsistencies should be deemed "errors." Opp. 31.

matter, this governance election in no way amounts to Delaware incorporation.[4] And superseding federal laws and regulations foreclose Pagliara's arguments in two important respects. First, current regulations, effective before Pagliara filed his demand, expressly provide that Fannie Mae's governance election *does not* amount to jurisdictional consent. *Id.* § 1239.3(d). Second, Fannie Mae's charter, a federal statute, precludes Pagliara's argument that Fannie Mae has somehow consented to Delaware venue by its governance election. 12 U.S.C. § 1717(a)(2)(B) (establishing Fannie Mae as a District of Columbia corporation "*for purposes of jurisdiction and venue in civil actions*" (emphasis added)).

Pagliara repeatedly cites to 12 C.F.R. § 1710.10 (2002), which was repealed on November 19, 2015, prior to his own demand and, in any event, did not confer jurisdiction. Opp. 4-5; Compl. ¶ 43. Like the current corporate governance regulation for Fannie Mae, Section 1239.3, Section 1710.10 provided that Fannie Mae should select a body of law to structure its "corporate governance practices and procedures," and that the election was effective only "[t]o the extent not inconsistent" with federal law. 12 C.F.R. § 1710.10(b). Section 1710.10, like the current regulation, also provided that Fannie Mae could elect to follow the Revised

[4] Pagliara's argument that "Fannie Mae expressly consented to personal jurisdiction in Delaware," Opp. 27, strains credulity. This Court is familiar with contractual provisions by which parties expressly consent to the jurisdiction of Delaware's Courts. There is no such provision here.

Model Business Corporation Act, foreclosing Pagliara's argument that it intended to bestow general jurisdiction on a particular state or operate as a venue selection clause. *Id.*; *see also* 12 C.F.R. § 1239.3(b)(iii) (same).

C. Fannie Mae is Not "At Home" in Delaware and Therefore Is Not Subject to Personal Jurisdiction in this Court.

Pursuant to the Delaware Supreme Court's decision in *Genuine Parts Co. v. Cepec*, a corporation is subject to general personal jurisdiction in Delaware *only* if it is "essentially at home" in the state. 137 A.3d 123, 127 & n.9 (Del. 2016) (quoting *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014)). Fannie Mae has never been at home in Delaware. Pagliara argues that Fannie Mae has accepted "the benefits of the D.G.C.L.," Opp. 28, and is thus subject to general jurisdiction here. But *Cepec* overruled in part the line of cases he cites involving non-Delaware corporations like Fannie Mae and those cases are legally irrelevant here.[5] Pagliara's arguments on specific jurisdiction likewise misstate the applicable standard. Opp. 27. To support a finding of "specific jurisdiction, the nonresident defendant's minimum contacts with the forum *must give rise to the particular controversy*." *Sternberg*, 550 A.2d at 1118 (emphasis added), *overruled in part on*

[5] Specifically, under the Delaware Supreme Court's prior precedents beginning with *Sternberg v. O'Neill*, 550 A.2d 1105 (Del. 1988), all corporations conducting business in Delaware were subject to general jurisdiction, on the grounds Pagliara articulates, *Cepec*, 137 A.3d. at 125-26. But as the court explained, "after *Daimler*, it is not tenable to read Delaware's registration statutes as *Sternberg* did." *Id.* at 126.

other grounds by Cepec, 137 A.3d 123. Pagliara, a Tennessee resident, has alleged no dealings with Fannie Mae in Delaware.

D. Fannie Mae Did Not Waive Its Jurisdictional Defense.

Pagliara argues that Fannie Mae waived its jurisdictional defense, but this motion to dismiss is Fannie Mae's first responsive pleading or Rule 12 motion and thus is the proper vehicle in which to raise its jurisdictional arguments. *See* Ct. Ch. R. 12(h)(1) ("A defense of lack of jurisdiction . . . is waived . . . *if it is neither made by motion under this rule nor included in a responsive pleading* . . . " (emphasis added)). "Removal to federal court does not constitute waiver to object to . . . venue or exercise of personal jurisdiction." *Harrison v. L.P. Rock Corp.*, 2000 WL 19257, at *1 (E.D. Pa. Jan. 7, 2000). The federal court "takes up the case where the state court procedurally left off, and can address procedural issues such as venue and jurisdiction" at the appropriate time in a responsive pleading. *Id.* Where, as here, a case is remanded and a defendant never files a responsive pleading, the issue is properly raised in the state court on remand.

Pagliara's characterizations of other filings as dispositive motions are not supported by caselaw or procedural rules. He attempts to paint Fannie Mae's opposition to remand as a request "for a ruling on the merits," Opp. 15-17, but an opposition to remand is neither a Rule 12 motion nor responsive pleading, as other courts have recognized. *Usatorres v. Marina Mercante Nicaraguenses, S.A.*, 768

F.2d 1285, 1287 (11th Cir. 1985) (per curiam) ("The filings concerning the motion to remand were neither responsive pleadings nor Rule 12 motions. Personal jurisdiction was raised in the first responsive pleading and therefore was not waived.").

Fannie Mae's one-sentence suggestion that the federal district court should determine the proper party was an ordinary request for efficient resolution of the threshold issues facing the federal district court at that time and did not transform its opposition to remand into a dispositive motion. D.E. 17 at 3 n.3 (Remand Opp.). Pagliara also asks this Court to impute FHFA's motion to substitute itself for *plaintiff* to *defendant* Fannie Mae. Opp. 18-20. But that motion, again, was not a responsive pleading or dispositive motion under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12(b)-(f) (listing motions that do not include motions to substitute); *Villery v. District of Columbia*, 277 F.R.D. 218, 220 (D.D.C. 2011) ("[T]he named defendant—Unity—has filed neither an answer nor Rule 12(b), (e), or (f) motion; Unity *has simply filed a motion to substitute*." (emphasis added)). Rather, FHFA sought to substitute itself for plaintiff *Pagliara*.

Pagliara argues that Fannie Mae was required to answer or move to dismiss the complaint in April 2016, or July 2016 at the latest. Opp. 21. But Fannie Mae filed its Notice of Removal on March 28, 2016, which automatically stayed the state court action. 28 U.S.C. § 1446(d) ("Promptly after [a notice of removal], the

defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal *and the State court shall proceed no further unless and until the case is remanded*." (emphasis added)). Thus, it could not have filed its responsive pleading in this Court at the time Pagliara insists it was required.

Once in federal court, the case was stayed at the request of Fannie Mae. D.E. 4; *see also* Minute Order (Apr. 4, 2016). Once the stay was lifted in July 2016, Pagliara agreed to defer dispositive motion practice. *See* E-mail from B. Flinn (June 2, 2016) (attached as Exhibit 7). Pagliara now argues that Fannie Mae should have construed this agreement as temporary because Pagliara never reaffirmed it. Opp. 21-22. But the parties subsequently conferred on two separate occasions about briefing schedules. *See* D.E. 21 (Aug. 21, 2016 Stipulation to Extend Time) and D.E. 29 (Sep. 16, 2016 Stipulation to Extend Time). Pagliara never indicated that he expected Fannie Mae to then file dispositive motions. The Court should therefore reject his argument.

In any event, waiver is tied to the failure to present a defense in a party's first response, not the timeliness of that response. *Foss v. Klapka*, 95 F.R.D. 521, 523 (E.D. Pa. 1982) (observing that Rule 12(h) "merely dictates waiver if the defense is not made by motion or included in the responsive pleading, presumably whenever it may happen to be served" (emphasis omitted)); *Gray v. Lewis & Clark*

Expeditions, Inc., 12 F. Supp. 2d 993, 995 (D. Neb. 1998) (rejecting waiver argument because defendant's "first responsive pleading contained the 12(b) motion, so the personal jurisdiction objection was not waived").[6] Even if the Court disagrees with this construction of Rule 12, it should still "invoke [its] discretionary power to enlarge the time" for serving Fannie Mae's responsive pleading because it involves serious jurisdictional questions. *Torres v. Torres*, 603 F. Supp. 440, 442 (E.D.N.Y. 1985); *see* Ct. Ch. R. 6(b) (allowing court to enlarge time to respond at its discretion); *see also Lagana v. Kmart Corp.*, 1998 WL 372347, at *3 (E.D. Pa. June 19, 1998) (explaining that court had discretion to decide issues in motion filed after 20-day deadline).

E. Section 220 Does Not Apply to Fannie Mae as a Matter of Law.

Even if this Court had personal jurisdiction over Fannie Mae—which it does not—Pagliara's inspection demand would still fail because Section 220 by its terms applies only to Delaware corporations. *See* Br. 17. Fannie Mae is a federal, government-sponsored entity that is not, nor has it ever been, a Delaware corporation. Pagliara's unsupported arguments that Fannie Mae has "elected to be

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[6] Delaware Chancery Rule 12(h)(1) uses the same formulation, *id*. ("A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived . . . if omitted from a motion . . ."), and this Court looks to construction of the federal rules in interpreting its own rules, *Apt. Cmtys. Corp. v. Martinelli*, 859 A.2d 67, 70-71 (Del. 2004) (citation omitted).

treated as a Delaware corporation," Opp. 23, are flatly inconsistent both with Fannie Mae's Bylaws and with federal law, and should be rejected. *See supra* Sec. I(A)-(C).[7]

II. ISSUE PRECLUSION REQUIRES DISMISSAL OF PLAINTIFF'S COMPLAINT.

The doctrine of issue preclusion bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to a final judgment." *Nat'l Med. Imaging, LLC v. Ashland Funding LLC*, 648 F. App'x 251, 255 (3d Cir. 2016) (emphasis added). In this case, Pagliara has already litigated and lost an identical stockholder books-and-records inspection case, based on a finding that HERA transferred all stockholder inspection rights exclusively to FHFA during the conservatorship. *See Pagliara I*, 203 F. Supp. 3d 678.

Pagliara does not, and cannot, dispute that each of the elements of issue preclusion are met here—namely, that the same issue was actually litigated and determined by the final judgment in *Pagliara I*, and that that court's resolution of the issue was essential to its judgment. Nevertheless, Pagliara asks this Court to

[7] Pagliara makes an argument about "venue" under Section 220 providing "minimum contacts" with Delaware, Opp. 27-28, but Delaware law has long been clear that Section 220's "exclusive" jurisdiction does not require litigation in the State of Delaware. *See, e.g.*, *In re Daniel Kloiber Dynasty Trust*, 98 A.3d 924, 939 (Del. Ch. 2014).

apply a variety of exceptions to allow him to re-litigate the same issue before this Court. None of Pagliara's arguments has merit.

First, Pagliara argues that issue preclusion does not apply because other courts have allegedly disagreed with *Pagliara I*, and the question of whether HERA allows stockholder inspections during the conservatorship is supposedly "quite unsettled." *See* Opp. 42. Pagliara is wrong for multiple reasons, chief among them that no court has disagreed with *Pagliara I*, and at least one court has followed it. *See Edwards v. Deloitte & Touche, LLP*, 2017 WL 1291994, at *7 (S.D. Fla. Jan. 18, 2017) (following *Pagliara I* to reject conflict of interest exception). While issue preclusion may not apply where "there have been ***major*** changes in the law," *Montana v. United States*, 440 U.S. 147, 161 (1979) (emphasis added), no such changes have occurred here.[8] Further, although Pagliara initially sought appellate review of *Pagliara I* by filing a notice of appeal, he later dismissed that appeal with prejudice. *See* Order of Jan. 30, 2017, *Pagliara v. Fed. Home Loan Mortg. Corp.*, No. 16-2090 (4th Cir.). Thus, Pagliara cannot

[8] *See also* 18 Wright & Miller, *Federal Practice and Procedure* § 4425 (3d ed.) ("Preclusion also may be defeated by showing . . . that there has been a ***substantial change*** in the legal climate suggesting a new understanding of the governing legal rules that may require a different application.") (emphasis added); *Roche Palo Alto LLC v. Apotex, Inc.*, 526 F. Supp. 2d 985, 996 (N.D. Cal. 2007) (legal issues may be reconsidered only based on a "significant change in the legal climate").

now be heard to complain of the allegedly "unsettled" nature of this legal issue when he bypassed an opportunity to obtain review by the Fourth Circuit.

Pagliara asserts that the D.C. Circuit "rejected" *Pagliara I* in its recent decision in *Perry Capital v. Mnuchin,* 848 F.3d 1072, 1082 (D.C. Cir. 2017). That is wrong. The D.C. Circuit did not, and had no reason to, address whether the Conservator succeeds to any stockholder right to inspect books and records under state law. This is because the D.C. Circuit addressed a different issue: whether the Conservator succeeded to certain stockholder claims for breach of contract and breach of the implied covenant of good faith and fair dealing. To resolve that issue, the D.C. Circuit focused on the distinction between direct and derivative claims, concluding the stockholders' contract-based claims were direct.

The Court in *Pagliara I*, by contrast, found that the direct versus derivative distinction has "little bearing on the issues in this case," because "the issue here is not whether Pagliara may pursue his right [to inspect books and records] through a direct lawsuit, but whether he possesses the [inspection] right he believes was infringed." *Pagliara I*, 203 F. Supp. 3d at 687. The court in *Pagliara I* explained:

> There are many stockholder rights, in addition to the right to inspect records, that are arguably enforceable through a direct lawsuit. For example, before the conservatorship Freddie Mac's common stockholders possessed the right to elect directors . . ., to seek removal of directors, . . . to petition a court to force Freddie Mac to hold an annual meeting, . . . , and to call a special meeting . . . . ***If the Court were to adopt Pagliara's***

> ***derivative-versus-direct distinction wholesale, the Court must also likely accept that common stockholders continue to possess those other rights enforceable through a direct lawsuit. To read the above list of rights is to understand that a stockholder's exercise of at least some of those rights would directly conflict with HERA's clear intention to transfer as [much] governance authority to FHFA as possible.*** That undesirable consequence supports the Court's conclusion that the derivative-versus-direct distinction should remain confined to the limited context that fostered its creation, namely inquiries into a stockholder's standing to pursue a claim.

Pagliara I, 203 F. Supp. 3d at 687 (emphasis added).

Moreover, in finding the contract-based claims did not transfer to the Conservator, the D.C. Circuit emphasized that HERA "permits the FHFA [as Conservator] in some circumstances to repudiate contracts the Companies concluded before the conservatorship indicates that the Companies' contractual obligations otherwise remain in force." *Perry Capital*, 848 F.3d at 1111 (discussing 12 U.S.C. § 4617(d)(1), (2)). Here, by contrast, there is no support in HERA for the notion that stockholders' right to inspect books and records "remains in force" during conservatorship.

Finally, even the stockholder plaintiffs in *Perry Capital* agreed that *Pagliara I* was "inapposite" to, and presents "a completely different question" from, the issues presented in the D.C. Circuit. *See* Letter dated Aug. 24, 2016 (*Perry Capital v. Mnuchin*, No. 14-5243 (D.C. Cir.). Thus, the *Perry Capital*

plaintiffs did not dispute "*Pagliara* [*I*]'s suggestion that during conservatorship HERA suspends many of the usual corporate governance mechanisms stockholders possess for ensuring management's loyalty and care," including the ability to inspect books and records. *Id*. In sum, Pagliara is simply wrong that *Perry Capital* is inconsistent with *Pagliara I.*

Second, Pagliara asserts that the District Court's decision remanding the case to this Court resolved the succession issue on the merits, and thus should be given "the ultimate preclusive effect." Opp. 43. The District Court did no such thing. Instead, the District Court—expressly *agreeing* with *Pagliara I*—ruled that the arguments against remand raised merits issues, and did not establish jurisdiction. *See* D.E. 38 at 2-3 (Remand Order) ("At most, Defendants raise a defense under federal law . . . [which] is not enough to establish federal question jurisdiction."). Further, the District Court concluded its order by stating "it would be improper to deprive the Chancery Court—a court very capable of interpreting federal law—of its exclusive jurisdiction over § 220 actions." *Id*. at 3. Thus, having determined that the court lacked federal subject matter jurisdiction, Judge Sleet did not rule on HERA's succession provision, or issue preclusion.

Further, even if the District Court did rule on the merits of HERA's succession clause—again, it did not—that ruling could not be given any preclusive effect due to the District Court's ruling that it lacked jurisdiction. "A court that

admits its own lack of power to decide should not undertake to bind a court that does have power to decide." 18 Wright & Miller, *Federal Practice and Procedure* § 4421 (3d ed.) (observing "preclusion is inappropriate as to [any] findings on the merits" after court concludes it lacks jurisdiction).

Third, Pagliara argues that issue preclusion cannot apply here because HERA's impact on stockholder inspection rights is "a pure question of law." Opp. 44-45. That too is wrong. The limited exception for "'unmixed questions of law" applies "only when the previously determined issue is one of law, ***and*** *either* (1) the two actions involve claims that are substantially unrelated ***or*** (2) a new determination is warranted . . . to avoid inequitable administration of the laws." *Burlington N. R.R. Co. v. Hyundai Merch. Mar. Co., Ltd.*, 63 F.3d 1227, 1237 (3d Cir. 1995) (emphases added) (internal quotation marks and citation omitted). Indeed, the Third Circuit has explained that "estoppel should be applied unless the issue of law arises in a successive case that is so *unrelated* to the prior case that relitigation is warranted." *Nat'l R.R. Passenger Corp. v. Pa. P.U.C.*, 288 F.3d 519, 530 (3d Cir. 2002) (internal quotation marks and citation omitted); *see also United States v. Stauffer Chem. Co.*, 464 U.S. 165, 172 (1984) (exception for unmixed questions of law applies only to "successive actions involving unrelated subject matter").

Neither of the limited exceptions fits here. The two books-and-records complaints that Pagliara simultaneously filed against the two Enterprises are ***not*** "substantially unrelated." Just the opposite, they are substantially identical. Pagliara filed books-and-records complaints against both Enterprises on the same date, seeking substantially the same books and records from the two entities in FHFA conservatorship: Fannie Mae (in this Court) and Freddie Mac (in the Eastern District of Virginia). In both cases, FHFA as Conservator moved to be substituted as plaintiff, in place of the current Plaintiff Pagliara. And both cases present precisely the same issue: whether HERA's succession provision, 12 U.S.C. § 4617(b)(2)(A), transferred Pagliara's stockholder books-and-records inspection rights exclusively to FHFA. Moreover, there is nothing "inequitable" about holding Pagliara to the results of substantially identical case he filed and litigated in *Pagliara I.*

Fourth, Pagliara cannot avoid issue preclusion by contending that *Pagliara I*'s holding that HERA transferred stockholder inspection rights to FHFA was an "alternative" holding. Opp. 44. HERA's succession provision was clearly the primary and central basis for the *Pagliara I* court's dismissal of Pagliara's books-and-records complaint. *See* 203 F. Supp. 3d at 680 (concluding first paragraph of opinion by stating: "The Court concludes that the statutory transfer of power to the conservator destroyed the stockholder's right to inspect corporate

records. Accordingly, the Court will dismiss Plaintiff's complaint."); *cf. Nat'l Satellite Sports, Inc. v. Time Warner Entm't Co., L.P.*, 217 F. Supp. 2d 466, 469 (S.D.N.Y. 2002) ("Where one ground for the decision is clearly primary and the other only secondary, the secondary ground is not 'necessary to the outcome' for the purposes of issue preclusion." (quoting *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 910 (6th Cir. 2001))). The Court's analysis of the issue was careful, thorough, and lengthy—far from the kind of passing dicta for which courts may be less inclined to give preclusive effect. *See* Restatement (Second) of Judgments § 20 cmt. e (1982) (noting that an alternative holding "may not have been as carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense it has some of the characteristics of dicta").

Moreover, a "dismissal may be based on two or more determinations, each of which, standing alone, would render the judgment a bar to another action on the same claim. In such a case, the judgment operates as a bar." *Id.*[9] *Pagliara I* held that Pagliara lacked a proper purpose for his proposed inspection because he lacked the ability to pursue the Third Amendment-related lawsuits he purported to be investigating. 203 F. Supp. 3d at 689-92. The rationale for this holding in *Pagliara I* applies with equal force here, and is an additional reason to deny his

[9] The Fourth Circuit follows the Restatement (Second) of Judgments. *See Prosise v. Haring*, 667 F.2d 1133, 1139 (4th Cir. 1981).

inspection demand in this case as well. *See infra*, Section V. Accordingly, each of the bases for *Pagliara I* are sufficient to bar Pagliara's suit here, and the Court should dismiss based on issue preclusion.

Finally, contrary to Pagliara's contention, *Pagliara I* relied on HERA's anti-injunction provision, 12 U.S.C. § 4617(f), in ruling that stockholders lost their inspection rights during the conservatorship. Opp. 45. Pagliara asserts that the decision only addressed § 4617(f) in connection with the "proper purpose" argument. In fact, *Pagliara I* expressly relied on § 4617(f) in holding that HERA's broad grant of authority to FHFA required a finding that HERA had transferred stockholder § 220 rights to FHFA for the duration of the conservatorship. *See* 203 F. Supp. 3d at 688 (noting that § 4617(f) evidenced Congress's "substantial grant of authority to FHFA," which required a finding that Pagliara "does not possess the [stockholder inspection] right he seeks to enforce").

III. THE COURT SHOULD DISMISS THE COMPLAINT OR SUBSTITUTE FHFA AS PLAINTIFF BECAUSE ONLY FHFA HAS THE RIGHT TO INSPECT FANNIE MAE'S BOOKS AND RECORDS.

Even if the Court were to reach the merits of the issue, the Court should hold, as did the court in *Pagliara I*, that the Conservator has succeeded to any stockholder right or power to inspect Fannie Mae's books and records. Federal law dictates that, during the conservatorship, FHFA "succeed[s] to . . . *all* rights, titles, powers, and privileges . . . of any stockholder [of Fannie Mae] with respect

to [Fannie Mae] and the assets of [Fannie Mae]." 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added). The phrase "all rights" means what it says—"*all* rights," which necessarily includes any stockholder "right" or "power" based in state law to inspect Fannie Mae's books and records. *See Arnold v. State*, 49 A.3d 1180, 1183 (Del. 2012) ("[I]f statutory text is unambiguous, this Court's role is limited to an application of the literal meaning of the statute's words."); *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155, 158, 160 (Del. Ch. 2013) (Strine, C.) ("To indulge the Seller's argument would conflict with the only reasonable interpretation of the statute, which is that *all* means *all* as to the enumerated categories, and that this includes *all* privileges, including the attorney-client privilege."); *Delaware Cty., Pa. v. FHFA*, 747 F.3d 215, 223 (3d Cir. 2014) ("Accordingly, we will join our sister circuits, interpret the phrase 'all taxation' [in HERA] to mean precisely what it says, and hold that the Enterprises are statutorily exempt from paying state and local real estate transfer taxes.").

Pagliara argues that the *Perry Capital* decision is inconsistent with the District Court's remand order and *Pagliara I*. Opp. 34-35. As explained above, that is wrong. The District Court's Remand Order addressed only jurisdiction, not the merits. *See supra* 15. And *Perry Capital* addressed different claims and

different issues, including the direct/derivative distinction that the *Pagliara I* court correctly found to be irrelevant to the issues presented here. *See supra* Section II.[10]

Moreover, even if the direct/derivative distinction were relevant here, Pagliara's suit presents precisely the type of right or power that Congress intended to transfer to the Conservator, even if they could be considered to give rise to a "direct" claim. Through HERA, Congress vested in the Conservator total control over the Enterprises and their operations. *See Perry Capital*, 848 F.3d at 110 n.22 (during conservatorship, "FHFA, as conservator, exercises complete control over [Fannie Mae and Freddie Mac]"); *see also In re Fed. Home Loan Mortg. Corp. Deriv. Litig.*, 643 F. Supp. 2d 790, 797 (E.D. Va. 2009), *aff'd sub nom. La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. 2011)) (in HERA, Congress "inten[ded] to transfer as much control of [the Enterprises] as possible to the FHFA" as Conservator). Any interpretation of HERA's unambiguous succession provision that would permit stockholders to *retain* the power to inspect

[10] Because *Perry Capital* is distinguishable for the reasons explained herein, this Court need not address the correctness of the D.C. Circuit's holding that HERA's succession provision does not transfer certain contract-based claims asserted by the stockholders in that case. *See* 848 F.3d at 1104-05. Nevertheless, Fannie Mae and FHFA note that they respectfully disagree with this holding by the D.C. Circuit. To the extent this Court deems it necessary to reach this issue, Fannie Mae and FHFA urge the Court to reject the D.C. Circuit's interpretation and application of the succession clause, and instead apply the plain language of HERA to include the inspection rights Pagliara seeks to enforce here.

the Enterprises' books and records—and attempt to supervise their operations—is directly contrary to this Congressional purpose.[11]

Pre-conservatorship, Pagliara and other stockholders may have attempted to exercise a degree of influence or control over the Enterprises through not only books and records inspections, but also by electing and removing corporate directors. *See Pagliara I*, 203 F. Supp. 3d at 686. Stockholder voting rights are generally considered to belong to the stockholder individually, presenting a "classic example[]" of a direct claim. *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1049 (Del. Ch. 2015). *See also* Am. Law Institute, Principles of Corp. Governance § 7.01 cmt. c (1994) (describing "actions to enforce the right to vote . . . [and] actions to inspect corporate books and records" as "direct" actions).

Yet, no stockholder can seriously dispute that the Conservator has succeeded to the stockholder's previously-held right to vote on the election of Fannie Mae's board. Concluding otherwise would be antithetical to HERA's purposes. Indeed, one way in which the Conservator has exercised its exclusive power to control and operate Fannie Mae is to reconstitute the management and board of directors,

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[11] At oral argument in the *Pagliara I* litigation, Pagliara's counsel conceded that "[t]he succession provision strips shareholders of their ability to try to operate the company." *See* Hearing Transcript at 15 (D.E. 40 in *Pagliara v. Fed. Home Loan Mortg. Ass'n*, No 1:16-cv-337 (E.D.Va. Aug. 4, 2016)).

notwithstanding the common stockholders' pre-Conservatorship right to elect the directors. Because this voting right is one of the "rights . . . of [a] stockholder . . . with respect to [Fannie Mae]," the Conservator has succeeded to it, even if a claim seeking to enforce that right might in some sense be considered direct.

The same principle applies to any pre-conservatorship stockholder power to inspect Fannie Mae's books and records: the Conservator has succeeded to this and "all" other powers previously held by Fannie Mae stockholders. *See Pagliara I*, 203 F. Supp. 3d at 687 ("To read the above list of rights is to understand that a stockholder's exercise of at least some of those rights would directly conflict with HERA's clear intention to transfer as [much] governance authority to FHFA as possible.").

IV. HERA ALSO BARS PAGLIARA FROM PURSUING THIS SUIT BECAUSE IT WOULD RESTRAIN AND AFFECT THE EXERCISE OF THE CONSERVATOR'S POWERS.

The Anti-Injunction provision of HERA, 12 U.S.C. § 4617(f), bars federal and state courts from taking "any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator." This HERA provision bars any sort of "litigative interference—through judicial injunctions, declaratory judgments, or other equitable relief—with FHFA's statutorily permitted actions as conservator or receiver." *Perry Capital*, 848 F.3d at 1087. Conduct shielded from injunctive interference includes FHFA's efforts as Conservator to "'[o]perate [Fannie Mae

and Freddie Mac]," 12 U.S.C. § 4617(b)(2)(B), to "reorganiz[e] their affairs, *id.* § 4617(a)(2);" and to "'take such action as may be . . . appropriate to carry on the[ir] business,' *id.* § 4617(b)(2)(D)(ii)." *Perry Capital*, 848 F.3d at 1087-88 (internal quotations omitted). Pagliara's Opposition offers nothing that would justify his demand that this Court issue injunctive relief requiring Fannie Mae to produce documents.

Pagliara argues incorrectly that granting his books-and-records injunction demand would not interfere with FHFA's powers and functions as Conservator. Opp. 37-38. But allowing a stockholder like Pagliara to conduct his own investigation into Fannie Mae despite the Conservator's conclusion that such an investigation is not in its own interest or the interest of the Enterprise directly interferes with the Conservator's ability to operate Fannie Mae and carry on its business.

Pagliara points to the fact that in other cases, courts have ordered Fannie Mae to produce discovery. But HERA specifically contemplates that FHFA and Fannie Mae will participate in litigation during the conservatorship. *See, e.g.*, 12 U.S.C. § 4617(b)(10) (allowing FHFA to secure a brief stay of litigation); *id.* § 4617(b)(11) (addressing rights of Conservator in litigation). By contrast, there is nothing in HERA to suggest that the Enterprises in conservatorships will be subject to stockholder books and records demands.

Pagliara cites *Goldstein v. FDIC*, 2012 WL 1819284 (D. Md. May 16, 2012) for the notion that courts have ordered the FDIC in its capacity as receiver to conduct accountings notwithstanding the FIRREA equivalent of § 4617(f). But Pagliara fails to disclose that *Goldstein* reached that result only because it concluded that Goldstein sought money damages rather than an "equitable" remedy, which is what § 4617(f) and its FIRREA equivalent prohibit. *See Goldstein*, 2012 WL 1819284, at *13 (the FIRREA counterpart of § 4617(f) "does not appear to bar *non* injunctive relief against the FDIC, such as the accounting HENO seeks"). Accordingly, *Goldstein* is irrelevant here.

V. PAGLIARA HAS FAILED TO IDENTIFY A PROPER PURPOSE FOR THE INSPECTION HE DEMANDS.

Pagliara cannot meet the "not insubstantial" burden of showing that he has a proper purpose entitling him "to an inspection of every item sought." *See Thomas & Betts Corp. v. Leviden Mfg. Co.*, 681 A.2d 1026, 1028 (Del. 1988); *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 123 (Del. 2006). Pagliara contends the main reason he needs to inspect Fannie Mae's books is to investigate bringing suit against Fannie Mae, its Directors, and FHFA for entering into and implementing the Third Amendment. *See* Compl. ¶ 164; Opp. 9.[12] But Pagliara admits that

[12] There already has been extensive litigation challenging the Third Amendment, including seventeen lawsuits filed in the federal district courts and three appeals. *See Perry Capital LLC v. Mnuchin*, 848 F.3d 1072 (D.C. Cir. 2017) (addressing ten

Footnote continued on next page.

HERA bars him from pursuing derivative claims on behalf of Fannie Mae. *See* Opp. 13.[13] And he does not dispute that the statute of limitations applicable to breach of contract and breach of fiduciary duty claims is three years, meaning that the limitations had expired long *before* he made his books and records demand on Fannie Mae.[14]

Contrary to Pagliara's assertion, the Court may consider the statute of limitations in deciding whether Pagliara has identified a proper purpose for the inspection he proposes. Opp. 46-47. Indeed, he concedes ,Opp. 47, that courts routinely find no proper purpose where a stockholder demands an inspection to

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lawsuits); *Roberts v. FHFA*, --- F. Supp. 3d ----, 2017 WL 1049841 (N.D. Ill. Mar. 20, 2017); *Saxton v. FHFA*, --- F. Supp. 3d ----, 2017 WL 1148279 (N.D. Iowa Mar. 27, 2017), *appeal docketed*, No. 17-1727 (8th Cir.); *Voacolo v. Fed. Nat'l Mortg. Ass'n*, --- F. Supp. 3d ----, 2016 WL 7349952 (D.D.C. Dec. 19, 2016); *Robinson v. FHFA*, --- F. Supp. 3d ----, 2016 WL 4726555 (E.D. Ky. Sept. 9, 2016), *appeal docketed*, No. 16-6680 (6th Cir.); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828 (S.D. Iowa 2015); *Collins v. FHFA*, No. 4:16-cv-3113 (S.D. Tex.) (filed Oct. 20, 2016); *Jacobs v. FHFA*, No. 1:15-cv-708 (D. Del.) (filed Aug. 17, 2015).

[13] Pagliara suggests that he might be able to pursue "direct" claims for breach of fiduciary duty, but makes no attempt to identify any claim that would not be derivative in nature under *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).

[14] The statute of limitations for such claims is three years. *See Stepanov v. O'Connor*, 2009 WL 1059640, at *9 (Del. Ch. Apr. 21, 2009) (three-year limitations period for claims based on breach of fiduciary duty, citing 10 *Del. C.* § 8106); *Levey v. Brownstone Asset Mgt., L.P.*, 76 A.3d 764, 768 (Del. 2012) (three-year limitations period for claims based on contract, also citing § 8106).

investigate lawsuits that would be barred by a limitations or similar defense. *See Graulich v. Dell Inc.*, 2011 WL 1843813, at *6 (Del. Ch. May 16, 2011) (Chandler, C.) ("a time bar defense or a claim or issue preclusion defense would eviscerate any showing that might otherwise be made in an effort to establish a proper stockholder purpose" (quoting *Amalgamated Bank v. UICI*, 2005 WL 1377432, at *2 n.14 (Del. Ch. Feb. 12, 2009))); *Beatrice Corbin Living Irrev. Trust v. Pfizer, Inc.*, 2016 WL 4548101, at *6 (Del. Ch. Aug. 31, 2016) ("stockholder does not have a credible basis to investigate . . . if the litigation the stockholder is investigating would be barred by issue preclusion, lack of standing, or the statute of limitations"); *Se. Pa. Transp. Auth. v. AbbVie, Inc.*, 2015 WL 1753033, at *13 n.106 (Del. Ch. Apr. 15, 2015) (same), *aff'd*, 132 A.3d 1 (Del. 2016) (TABLE).

Pagliara asserts that his inspection of Fannie Mae's books *might* turn up evidence of "an affirmative act of concealment" that *might* toll the statute of limitations. Opp. 47. But this is pure speculation. Pagliara identifies no plausible reason to believe Fannie Mae or FHFA concealed anything. To the contrary, FHFA issued a press release and posted the Third Amendment to its website shortly after it was executed. *See* https://goo.gl/h6Cm74.

Similarly, Pagliara is wrong that the pendency of § 220 litigation, without more, tolls the statute of limitations for future claims that a stockholder may bring based on the results of his review of corporate books and records Opp. 48-49. He

cites *Technicorp Int'l II, Inc. v. Johnson*, 2000 WL 71350, at *9 (Del. Ch. May 31, 2000) for this proposition, but fails to disclose that *Technicorp* was subsequently narrowed and has no application here. *See Coleman v. PriceWaterhouse Coopers*, 2003 WL 2276851, at *6 (Del. Super. Ct. Nov. 18, 2003), *rev'd on other grounds*, 854 A.2d 838 (Del. 2004) (limitations tolled pending resolution of § 220 case only where "findings previously made in ancillary litigation" point to "intentional concealment by defendants of material facts"). Because Pagliara has not alleged—and cannot allege—that Fannie Mae engaged in intentional or fraudulent concealment of material facts, "*Technicorp* is inapposite." *Coleman*, 2003 WL 22765851, at *6.[15]

Nor can Pagliara escape his statute of limitations problem by asserting that new causes of action arose each time Fannie Mae made a dividend payment under the Third Amendment or otherwise failed to "avoid the harm of the Third Amendment." Opp. 49-50. The law is clear that a where a cause of action for breach of contract or breach of fiduciary duty alleges injury from an unlawful contract, the claim accrues at the time of the formation of the wrongful contract. *See In re Sirius XM S'holder Litig.*, 2013 WL 5411268, at *4-6 (Del. Ch. Sept. 13, 2013) (Strine, C.) ("Under Delaware law, a plaintiff's cause of action accrues at

[15] Pagliara argues that *Coleman* was wrongly decided. Opp. 49 n.27. He does not dispute, however, that *Coleman* narrowed *Technicorp* in a fashion that renders it completely inapposite here.

the moment of the wrongful act—not when the harmful effects of the act are felt." (internal quotes and citation omitted)).[16]

Citing *Teachers' Retirement Sys. of Louisiana v. Adinoff*, 900 A.2d 654, and *Dweck v. Nasser*, 2012 WL 161590 (Del Ch. Jan. 18, 2012), Pagliara argues that because Fannie Mae's dividend payments are "discretionary" the usual contract accrual rules should not apply. Opp. 49. But Fannie Mae's dividend payment obligations were not truly discretionary and therefore *Adinoff* and *Dweck* are inapposite. *See, e.g.*, *Hopkins v. MedApproach Holdings, Inc.*, 2014 WL 3926811, at *5 (S.D.N.Y. Aug. 11, 2014) (applying Delaware law and noting that where defendant did *not* have a discretionary right to terminate a contract, cases like *Adinoff* do not apply and the claims accrue at the time the contract is executed).

Pagliara argues that Fannie Mae's decision to pay dividends is left entirely to the discretion of its Board of Directors. Opp. 49-50. The truth, however, is that under the Third Amendment Fannie Mae owes the dividend amount to Treasury one way or the other: to the extent the Conservator, stepping into the shoes of the

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[16] *See also Kahn v. Seaboard Corp.*, 625 A.2d 269, 271 (Del. Ch. 1993); *Teachers' Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 666 & n.11 (Del. Ch. 2006) (Strine, V.C.) (stating that "when a contract is contended to have resulted from fiduciary misconduct, the statute of limitations begins running at the time of the decision to contract"); *In re Marvel Entm't Grp., Inc.*, 273 B.R. 58, 73 (Bankr. D. Del. 2002) ("Delaware law supports finding that where the claimed breach of fiduciary duty is an allegedly unfair contract, the limitations period begins to run when the contract is formed")

Board of Directors, declines to declare a dividend, Treasury is entitled to an increase of the same amount in its liquidation preference.[17] Accordingly, the obligation is *not* discretionary and cases like *Adinoff* are entirely inapposite here.

Finally, Pagliara wrongly contends that he has identified valid purposes *other* than investigating his time-barred proposed litigation, including to facilitate consultation with other stockholders in preparation for a meeting with Fannie Mae's Board of Directors, FHFA, or Treasury to "discuss proposed reforms concerning the depletion of Fannie Mae's capital by the dividends paid under the net worth sweep." Opp. 51-53. But Pagliara misconceives the current status of Fannie Mae's Board. HERA also transferred all rights and powers of Fannie's Mae's *directors* to the Conservator. *See* 12 U.S.C. § 4617(b)(2)(A)(i). Accordingly, FHFA appoints Fannie Mae's Board, and neither the Board of Directors nor FHFA has a fiduciary duty to Fannie Mae's stockholders. *See, e.g.*, *Robinson*, 2016 WL 4726555, at *4 n.3. Indeed, FHFA is empowered to cause Fannie Mae's Board to act "in the best interests" of Fannie Mae or FHFA, as opposed to the stockholders. *See* § 4617(b)(2)(J)(ii). By noting his intention to seek an audience with Fannie Mae's board and Treasury, Pagliara has "indicate[d]

[17] *See* Compl., Exhibit 4.1, at § 2(b) (Treasury Stock Certificate at § 2(b): "To the extent not paid pursuant to Section 2(a) above, dividends on the Senior Preferred Stock shall be added to the Liquidation Preference pursuant to Section 8, whether or not there are funds legally available for the payment of such dividends and whether or not dividends are declared").

he will use his records inspection to undermine FHFA's administration" of Fannie Mae, which is not a proper purpose. *Pagliara I*, 203 F. Supp. 3d at 678; *see also id*. (concluding Pagliara lacked a proper purpose for inspection because "Pagliara is pursuing extrajudicial means of encouraging Freddie Mac's board to break away from FHFA's direction") (citing 12 U.S.C. § 4617(f)).

Moreover, Pagliara's supposed "purpose" is pretextual. Pagliara already *has* all the information he needs to have such a discussion. As evidenced by his Complaint, Pagliara has an *extensive* understanding of the Third Amendment and its consequences for Fannie Mae's capital. *See* Compl. ¶¶ 5-18; 117-45; 168-203. Moreover, Pagliara is the founder of Investors Unite "a non-profit coalition that facilitates discussion and information exchange concerning Fannie Mae." Compl. ¶ 20. The Investors Unite website demonstrates that Pagliara has had access to volumes of public records and has developed a fixed opinion concerning the Third Amendment. *See* investorsunite.org.

Pagliara is also incorrect that he can justify his proposed books-and-records inspection as necessary to value his investment in Fannie Mae. Pagliara argues that he needs Fannie Mae records concerning the Third Amendment 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." Opp. 53. But those decisions will be made in court and in

Congress; not by Fannie Mae or its Board of Directors. *See Pagliara I*, 203 F. Supp. 3d at 691-92 ("The Court has little confidence Pagliara seeks these records for valuation purposes.").

CONCLUSION

The Court should dismiss Pagliara's books and records inspection demand or, in the alternative, substitute FHFA as the only proper plaintiff for this suit.

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Dated: April 25, 2017

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