IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

TIMOTHY J. PAGLIARA, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, Defendant.	C.A. No. 16-193-GMS

DEFENDANT FEDERAL NATIONAL MORTGAGE ASSOCIATION'S RESPONSE BRIEF OPPOSING PLAINTIFF'S MOTION TO REMAND

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INTRODUCTION

Pagliara sued a federally chartered enterprise, operating under the conservatorship of a federal regulatory agency, in an action that he has no right to bring.[1] The Court should deny remand because Pagliara's action "arises under" federal law. The Federal Housing Finance Agency ("FHFA"), Fannie Mae's conservator, has moved under the Housing and Economic Recovery Act of 2008 ("HERA") to substitute itself for Pagliara on the ground that HERA—the federal statute governing all aspects of conservatorship operations—transferred all shareholder rights, including the inspection right Pagliara seeks to enforce here, to FHFA. If the Court resolves that motion in FHFA's favor, the Court need not reach Pagliara's remand motion.

In any event, the central premise underlying Pagliara's motion to remand—that Pagliara's cause of action arises under Delaware, not federal, law—is demonstrably erroneous. Pagliara claims that a company with a name similar to Fannie Mae's, Compl. ¶ 45 (D.I. 1-1), is incorporated under Delaware law, but not in good standing with the Delaware Secretary of State. *Id.*¶ 46 n.13. To the contrary, and as Fannie Mae has advised Pagliara, the inactive 2002 Delaware certificate of incorporation on which his remand motion is predicated does not pertain to Fannie Mae and is thus irrelevant to this litigation.[2] The United States Congress chartered

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[1] Because Fannie Mae is a federally chartered entity not incorporated in Delaware, 8 Del. C. § 220, upon which Pagliara exclusively relies, does not apply here. *See Norfolk Cty. Ret. Sys. v. Jos. A. Bank Clothiers, Inc.*, Civil No. 3443-VCP, 2009 WL 353746, at *5 (Del. Ch. Feb. 12, 2009) (a "stockholder of *a Delaware corporation* has a statutory right to inspect the books and records of the corporation under [§ 220]") (emphasis added). The conditional relevance to Fannie Mae of certain provisions of Delaware law is addressed *infra* at 7-8.

[2] Notably, the certificate of incorporation that Pagliara continues to attribute to Fannie Mae only authorizes the issuance of up to 1,500 shares of common stock. *See* Compl., Ex. C. In contrast, as we advised Pagliara in a letter and as is reflected in virtually every annual Fannie Mae SEC filing, Fannie Mae has issued more than a billion shares of common stock. *See* Letter from Jeffrey W. Kilduff to C. Barr Flinn (Aug. 4, 2016) ("Kilduff Letter") (attached as Ex. A); *see also, e.g.*, Fannie Mae Annual Report (Form 10-K), at 105 (Mar. 1, 2003) ("Fannie Mae 2002 10-K") (attached as Ex. B).

Fannie Mae pursuant to the Fannie Mae Charter Act. *See, e.g.*, *Delaware Cty., Pa. v. FHFA*, 747 F.3d 215, 219 (3d Cir. 2014); 12 U.S.C. § 1716, *et seq.* Fannie Mae is not incorporated in Delaware and Fannie Mae is not subject to 8 Del. C. § 220.

Remand for lack of federal jurisdiction would not be appropriate even if Pagliara's request to inspect Fannie Mae's books and records were governed by Delaware law (and it is not). Even when "a complaint alleges only state law claims, federal jurisdiction may also exist where federal law completely preempts a state law claim or where a state law claim raises a substantial embedded federal issue that can be addressed by the federal courts without disturbing congressional intent." *MHA LLC v. Healthfirst, Inc.*, 629 F. App'x 409, 411 (3d Cir. 2015). As we demonstrate below, the Court has federal question jurisdiction over this action on the basis of both "complete preemption" and "a substantial embedded federal issue." The Court should, therefore, deny Pagliara's motion to remand.

NATURE AND STAGE OF THE PROCEEDINGS

Pagliara filed this suit in Delaware Chancery Court on March 14, 2016, asserting a purported right under Delaware law to inspect Fannie Mae's corporate books and records. Fannie Mae removed the case to this Court on March 25, 2016. (D.I. 1). Pagliara now moves to remand the case to Delaware state court. *See generally* Br. (D.I. 11). Also pending before the Court and ripe for decision is FHFA's motion to substitute itself for Pagliara as plaintiff, Mot. to Substitute (D.I. 8), because Congress has explicitly provided for the statutory transfer to FHFA, for the duration of Fannie Mae's conservatorship, of "***all rights, titles, powers, and privileges*** of the regulated entity [in conservatorship], and of any ***stockholder***, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12

U.S.C. § 4617(b)(2)(A)(i) (emphasis added).[3]

SUMMARY OF ARGUMENT

1. This Court has federal question jurisdiction because Pagliara's claimed right to inspect Fannie Mae's books and records flows from ***federal,*** not Delaware state law. Pagliara asserts incorrectly (and he has been so advised in writing) that Fannie Mae is incorporated in Delaware. Rather, Fannie Mae is a federally chartered enterprise, and federal regulations require Fannie Mae to draw from one of three bodies of corporate law deemed acceptable by its federal regulator to fill in any gaps in its corporate governance and indemnification practices not addressed by federal law. *See* 12 C.F.R. 1239.3(b). But all of Fannie Mae's corporate obligations (including any right to allow shareholders to inspect its books and records) flow directly from federal laws, including its congressional charter, and Fannie Mae's and Bylaw provisions adopted pursuant thereto. Accordingly, this Court has federal question jurisdiction.

2. Regardless of where a shareholder may have derived a right to inspect Fannie Mae's books and records prior to the Company's placement into federal conservatorship, all shareholder rights and powers, including the right to inspect, were transferred to the Conservator during conservatorship pursuant to 12 U.S.C. § 4617(b)(2)(A). Because of this statutory transfer of all shareholder rights during conservatorship, the Court has federal question jurisdiction under the "complete preemption" doctrine. *See Beneficial Nat'l Bank v. Anderson,* 539 U.S. 1, 5, 10-11 (2003). Congress, in HERA, pre-empted any entity other than FHFA from conducting supervisory inspections of Fannie Mae's books and records, and gave the agency sole discretion to decide on any appropriate remedial measures.

[3] 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 substitute first, and incorporates FHFA's arguments by reference into this Opposition.

3. Even if Delaware law had applied directly to Pagliara's books-and-records demand on a federally chartered enterprise, this Court would still have federal question jurisdiction under the "embedded federal question" doctrine of *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313-14 (2005). Pagliara's affirmative case necessarily turns on substantial and disputed questions of federal law, including whether Pagliara has standing to pursue this action in light of 12 U.S.C. § 4617(b)(2)(A)'s transfer of "***all rights, titles, powers, and privileges*** of . . . any ***stockholder***. . .of [Fannie Mae]." *Id*. As such, removal was entirely proper and this Court should deny remand.

STATEMENT OF FACTS

In July 2008, in the wake of a national crisis in the U.S. housing market, Congress enacted HERA, which created FHFA as an independent federal regulator of Fannie Mae and Freddie Mac (collectively, "the Enterprises"). Pub. L. No. 110-289, 122 Stat. 2654 (2008) (codified as 12 U.S.C. § 4510 *et seq*.); *see also* Compl. ¶¶ 48-64. HERA granted FHFA authority to place the Enterprises in conservatorship and specifies that, upon conservatorship, FHFA shall "by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A). HERA also expressly empowers FHFA as Conservator to "[o]perate the [Enterprises] . . . with all the powers of the shareholders, the directors, and the officers" and to "conduct all business of the [Enterprises]." *Id.* § 4617(b)(2)(B). FHFA placed both Enterprises into conservatorship in September 2008, *see* Compl. ¶ 65; they remain in that status today. *See* Fannie Mae Bylaws (as amended through July 21, 2016) ("Fannie Mae Bylaws") (attached as Ex. C); *see also. Piszel v. United States*, __ F.3d. __, No. 2015-5100, slip op. at 4 (Fed. Cir. Aug. 18, 2016) (attached as Ex. D) (noting applicability of HERA § 4617(b)(2) once Fannie Mae and

Freddie Mac entered conservatorship).

On January 19, 2016, Pagliara's counsel sent demands to both Fannie Mae and Freddie Mac stating that as a shareholder in both Enterprises, Pagliara sought to inspect their books and records in order to evaluate claims relating to an amendment to a stock purchase agreement with the U.S. Treasury Department (the "Third Amendment"). *See* Compl., Ex. A. The request to Fannie Mae was denied because FHFA had succeeded to all the rights of Fannie Mae's shareholders during conservatorship. *See* Fannie Mae Bylaws.[4]

Pagliara then filed this suit in Delaware Chancery Court seeking to compel access to Fannie Mae's records. He claims to have filed in Delaware court because he believed Fannie Mae was incorporated in and operating under the laws of Delaware. Br. 7. But Fannie Mae has never incorporated in Delaware. Its congressional charter allows it to "conduct its business without regard to any qualification or similar statute in any State of the United States," 12 U.S.C. § 1723a(a), so there would have been no reason for Fannie Mae to incorporate in Delaware, and Fannie Mae has not done so.

Even though Fannie Mae explained to Pagliara that it has never been chartered by the State of Delaware, that the company on the certificate of incorporation that Pagliara attached to his complaint is not Fannie Mae, and that even if it were, that company was dissolved pursuant to Delaware law in 2004,[5] Pagliara continues to rely on that 2002 certificate of incorporation as support for his contention that his case was properly filed in Delaware Chancery Court. But the

[4] Similarly, Pagliara's request as a Freddie Mac shareholder to review that entity's books and records was denied by FHFA on Freddie Mac's behalf, and Pagliara thereafter filed a case materially similar to this one against Freddie Mac in Virginia. *See Pagliara v. Fed. Home Loan Mortg. Corp.*, No. 1:16-cv-00337 (E.D. Va.). Pagliara filed suit in the Circuit Court of Fairfax County on March 14, 2016, and Freddie Mac removed the case to the U.S. District Court for the Eastern District of Virginia on March 25, 2016.

[5] *See* Kilduff Letter (letter from Fannie Mae's counsel asking Pagliara to withdraw allegation that Fannie Mae filed a certificate of incorporation in Delaware in 2002).

2002 certificate of incorporation pertains to an entity known as "Federal National Mortgage Association, ***Inc.***" Compl., Ex. C. (emphasis added). As we advised Pagliara, "Federal National Mortgage Association, Inc." is ***not*** Fannie Mae. Fannie Mae's Charter and its Bylaws state that Fannie Mae shall be known as "Federal National Mortgage Association," or "Fannie Mae." 12 U.S.C. § 1717(a)(1), (a)(2)(B); Fannie Mae Bylaws § 1.01. Indeed, Pagliara did not sue "Federal National Mortgage Association, ***Inc.***" He filed this action against "Federal National Mortgage Association."[6] Compl. at 1.

Fannie Mae removed the suit to this Court. Pagliara now moves to remand, asserting that there is no federal question jurisdiction because "the law that created the Stockholder's cause of action is Section 220" of the Delaware General Corporation Law. Br. 18.

ARGUMENT

I. THIS COURT HAS FEDERAL QUESTION JURISDICTION BECAUSE THIS CASE ARISES UNDER THE LAWS OF THE UNITED STATES

This Court has federal question jurisdiction—and removal was thus proper—because Pagliara's demand to inspect Fannie Mae's books and records originates in *federal* (not in Delaware state) law. Fannie Mae is a federally-chartered corporation created by federal statute. *See, e.g.*, *Delaware Cty., Pa.*, 747 F.3d at 219; 12 U.S.C. § 1716, *et seq.*; *cf. Piszel*, slip op. at 3 ("Freddie Mac is a government sponsored enterprise, meaning that it is a privately owned but publicly chartered financial services corporation created by the United States"). As a federally

[6] Fannie Mae filed its first Form 10-K for the year ending December 31, 2002 with the SEC on March 31, 2003, just over seven months after Pagliara alleges that Fannie Mae incorporated itself in Delaware. In that filing, Fannie Mae describes itself as a "Federally chartered corporation." Fannie Mae 2002 10-K, at Cover Page. The filing makes no mention of any certificate of incorporation in Delaware, nor does it state anywhere that Fannie Mae is a Delaware corporation. The same is true of Fannie Mae's 2003 Form 10-K. In any event, the certificate of incorporation Pagliara relies upon was voided by the Delaware Secretary of State in 2004. *See* Kilduff Letter, Attachment.

created and federally incorporated company, it is not directly subject to Delaware's corporation law (including the books-and-record inspection provision Pagliara invokes here). *See Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 143 (Del. 2012) (under Section 220, "'[s]tockholders of ***Delaware corporations*** enjoy a qualified right to inspect the corporation's books and records'" (emphasis added) (quoting *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002))).

As Pagliara himself explains, *see* Br. 7-8, he is suing under Delaware's books-and-records inspection statute only because Fannie Mae—as a matter of federal law—chooses to follow Delaware's corporate governance ***practices***. 12 C.F.R. 1239.3(a) provides that Fannie Mae's corporate governance practices "shall comply with and be subject to the applicable authorizing statutes and other Federal law, rules, and regulations." *Id*. It goes on to provide that, to the extent "not inconsistent" with its charter statute and "other Federal law, rules, and regulations," Fannie Mae must "elect to follow the corporate governance and indemnification practices set forth in one of the following: (i) The law of the jurisdiction in which the principal office of the regulated entity is located; (ii) The Delaware General Corporation Law . . . ;or (iii) The Revised Model Business Corporation Act." *Id.* at (a)-(b).[7]

This regulation makes clear that Pagliara is wrong that Fannie Mae's choice to follow Delaware corporate governance rules means it is "governed by Delaware law." If Congress or Fannie Mae's regulator intended for Fannie Mae's corporate governance election to subject Fannie Mae to the authority of any state court, it would not have provided Fannie Mae with the option choose to follow the Revised Model Business Corporation Act—a freestanding code developed by practitioners that does not derive from the law of any state or jurisdiction. And

[7] The regulation promulgated in 2002 by Fannie Mae's former regulator, the Office of Federal Housing Enterprise Oversight, was substantially similar. *See* 12 C.F.R. 1710.10 (2002).

nothing in the regulation precludes Fannie Mae from changing its election at any time. Moreover, the regulation provides that the election of a state body of law to follow does not "create any rights in any third party, … nor shall it cause or be deemed to cause any regulated entity to become subject to the jurisdiction of any state court with respect to entity's corporate governance." 12 C.F.R. 1239.3(d).[8]

Accordingly, Fannie Mae's current Bylaws provide that "[p]ursuant to Sections 12 C.F.R. 1236 and 1239 of the Federal Housing Finance Agency Regulations (the 'FHFA Regulation'), to the extent not inconsistent with the Charter Act and other Federal law, rules, and regulations, the corporation has 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." Fannie Mae Bylaws, § 1.05.

Pagliara's claimed shareholder right to inspect Fannie Mae's books and records is not, therefore, a "state law" claim at all. It arises entirely from ***federal*** law, including the federal regulations requiring Fannie Mae to select a body of corporate governance practices (*see, e.g.*, 12 C.F.R. 1239.3) and from Fannie Mae's federally required bylaws (*see, e.g.*, 12 U.S.C. § 1723(b)).[9] Because Pagliara's action arises under federal law, this Court has federal question jurisdiction. *See* 28 U.S.C. § 1331.

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[8] *See* 80 Fed. Reg. 72,327, 72,329 (Nov. 19, 2015) (explaining that 12 C.F.R. 1239.3(d) was meant to address concern that "by choosing a particular body of state law to follow [the Federal Home Loan Banks] could subject themselves to the jurisdiction of those states' courts and would allow their members to assert all of the rights available to stockholders of corporations organized under those state laws").

[9] Fannie Mae's Bylaws go on to provide that "[n]othing in these Bylaws shall be deemed to affect the regulatory or conservatorship powers of [FHFA] under [HERA]." Fannie Mae Bylaws, Art. 8. This express language forecloses Pagliara's proposal to use Fannie Mae's Bylaws to justify an intrusive search of Fannie Mae's books and records for actionable misconduct, actions that would directly undermine HERA's clear intent that during conservatorship only FHFA would exercise supervision over Fannie Mae's books, records, and operations.

II. THIS COURT HAS FEDERAL QUESTION JURISDICTION BECAUSE HERA COMPLETELY PRE-EMPTS STATE LAW SHAREHOLDER CLAIMS, INCLUDING BOOKS-AND-RECORDS INSPECTION DEMANDS

Even if Delaware law applied directly to Pagliara's books-and-records demand (as explained above, it does not), the Court would still have jurisdiction under the "complete preemption" doctrine. In *Beneficial National Bank*, the Supreme Court held that "when a federal statute wholly displaces the state-law cause of action through complete pre-emption," the state-law claim can be removed. 539 U.S. at 8; *see Aetna Health Inc. v. Davila*, 542 US. 200, 207 (2004). *Beneficial National Bank* involved a state-law claim for usury, but the Court observed that, for banks chartered under the National Bank Act, federal law had completely pre-empted state-law usury claims. 539 U.S. at 10-11. Under these circumstances, federal question jurisdiction was proper over the purported state-law claim, because "[w]hen the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Aetna Health*, 542 U.S. at 207-08; *see Pascack Valley Hosp., Inc. v. Local 464A UFCW Welfare Reimbursement Plan*, 388 F.3d 393, 399 (3d Cir. 2004) (the "complete preemption" doctrine "recognizes that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character") (quotation marks omitted).

Here, Congress ***has*** completely pre-empted the field of shareholder books-and-records requests made to Fannie Mae or Freddie Mac during their conservatorship. When it created FHFA, Congress imbued it—when acting as Conservator—with "extraordinary" powers to conduct, direct, and oversee all aspects of Fannie Mae's or Freddie Mac's operations, activities and affairs, free from judicial challenge and interference. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 225 (D.D.C. 2014). Congress transferred to FHFA "all rights, titles, powers, and privileges of the regulated entity [in conservatorship], and of any ***stockholder***, officer, or director

of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added). Congress also insulated from judicial review the Conservator's exercise of the "rights, titles, powers, and privileges" to which it had succeeded by operation of law, prohibiting the courts from "tak[ing] any action to restrain or affect the exercise of [the Conservator's] powers or functions." 12 U.S.C. § 4617(f); *cf. FHFA v. City of Chicago*, 962 F. Supp.2d 1044, 1058-60 (N.D. Ill. 2013) (finding that HERA works field preemption over the supervision and regulation of Fannie Mae and Freddie Mac).

Taken together, these federal statutory provisions reserve to FHFA the exclusive right to review Fannie Mae's books and records, to identify any misconduct, and to take appropriate remedial action. These federal statutes were designed to reserve to FHFA—and FHFA alone—the power of supervisory review that Pagliara seeks to exercise here. By ensuring only FHFA has the power to conduct such reviews, HERA completely pre-empts state-law shareholder books-and-record demands like Pagliara's. Thus, the Court has "complete preemption" jurisdiction pursuant to *Beneficial National Bank*, and the Court should deny Pagliara's motion to remand.

III. GIVEN THE NECESSARY RESOLUTION OF SUBSTANTIAL FEDERAL STATUTORY QUESTIONS, THIS CASE "ARISES UNDER" FEDERAL LAW

Even if Delaware law applied directly to Pagliara's books-and-records demand, the Court would still have jurisdiction under the "embedded federal question" doctrine. To sustain a Section 220 demand to inspect books and records, Pagliara must show that he "(i) is a stockholder, (ii) complied with statutory requirements specifying the form and manner for making a demand, and (iii) possesses a proper purpose for conducting the inspection." *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 775 (Del. Ch. 2015); *see Cent. Laborers Pension Fund*, 45 A.3d at 144. As explained in detail below, Pagliara's ability to establish a

prima facie case turns entirely on the disputed federal questions of whether: (1) he has standing to pursue this suit; and (2) whether the "proper purpose" he asserts exists, considering that HERA likely precludes him from bringing the underlying corporate mismanagement action he claims to be investigating. Under these circumstances, the Court has federal question jurisdiction and the removal was entirely proper. *See, e.g., Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 314 (2005).

A. Federal Question Jurisdiction Does Not Require A Federal Cause Of Action Where, As Here, There Is A Substantial Disputed Question of Federal Law

Although in most cases a claim arises under federal law only if it asserts a federal cause of action, the U.S. Supreme Court has recognized "for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable*, 545 U.S. at 312. Pagliara does not once mention this alternate way of satisfying federal question jurisdiction, but simply repeats his assertion that a federal defense cannot create a federal cause of action. *See, e.g.*, Br. at 19-20. That admonition is beside the point. Indeed, even the case Pagliara relies on most heavily in favor of remand makes clear the availability of this alternate path to "arising under" federal jurisdiction: "Even though state law creates appellant's causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 13 (1983).

This alternate route to federal question jurisdiction was discussed most extensively in *Grable*, in which a federal taxpayer brought an action to quiet title in state court against a purchaser who had bought the taxpayer's prior property from the U.S. Government. 545 U.S. at 310. The taxpayer asserted the IRS was prohibited from selling the property because the agency

did not follow the proper procedure in giving the required notice when it seized the property. *Id.* at 310-11. The defendant removed, claiming federal question jurisdiction because "the claim of title depended on the interpretation of the notice statute in the federal tax law." *Id.* at 311.

After surveying 100 years of case law applying the "commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law," *id.* at 312, the *Grable* court reaffirmed that a federal cause of action is not a necessary prerequisite to federal question jurisdiction: "Instead, the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314.

B. HERA's Application To Pagliara's Claim Is A Necessary, Disputed Question Of Federal Law That Creates Federal Question Jurisdiction

The Supreme Court later synthesized *Grable*'s approach to federal question jurisdiction into a four-part test: "[F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013). Applying this test to Pagliara's claim easily resolves the "arising under" question in favor of federal jurisdiction.

1. HERA's Applicability Is "Necessarily Raised"

Given HERA's sweeping language truncating shareholders' rights and access to courts, the meaning of that statute is "necessarily raised" here. Indeed, FHFA has already raised it in its substitution motion.

a. *Standing*

To begin with, Pagliara cannot meet his affirmative burden of demonstrating standing to

pursue this suit without explaining why federal law—specifically 12 U.S.C. § 4617(b)(2)(A)—has not transferred to FHFA his purported shareholder power to demand a books-and-records inspection. Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," *Bock v. Pressler & Pressler, LLP*, __ F. App'x __, 2016 WL 4011150 (3d Cir. 2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)), and the "burden to establish standing rests with the plaintiffs," *Finkelman v. Nat'l Football League*, 810 F.3d 187, 194 (3d Cir. 2016) (citing *Berg v. Obama*, 586 F.3d 234, 238 (3d Cir. 2009)). But Pagliara cannot establish standing here, because instead of asserting "his or her own legal rights and interests," he is improperly trying to "rest [his] claim to relief on the legal rights or interests of third parties." *Hill v. Umpstead*, 639 F. App'x 60, 62 n.3 (3d Cir. 2016) (citing *Powers v. Ohio*, 499 U.S. 400, 410 (1991)).

Pagliara purports in this suit to assert a *shareholder* right to inspect the books and records of Fannie Mae. When FHFA placed Fannie Mae in conservatorship on September 6, 2008, however, federal law transferred to FHFA "***all rights, titles, powers, and privileges*** of the regulated entity [in conservatorship], and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added).

"[T]he plain meaning of the statute is that *all* rights previously held by Freddie Mac's [and Fannie Mae's] stockholders . . . now belong exclusively to the FHFA." *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 795 (E.D. Va. 2009), *aff'd sub nom La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. 2011). HERA's succession provision "clearly demonstrates Congressional intent to transfer as much control of [the Enterprises] as possible to the FHFA," *id.* at 797, and serves to "assure the expeditious and

orderly protection of all who are interested in [Fannie Mae] by placing the pursuit of its rights, protection of its assets, and payment of its liabilities firmly in the hands of a single, congressionally designated agency." *Pareto v. FDIC*, 139 F.3d 696, 700 (9th Cir. 1998) (interpreting a materially similar provision in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101–73, 103 Stat. 183).

As explained in FHFA's motion to substitute as plaintiff (D.I. 8, 9), therefore, Pagliara lacks standing to pursue the shareholder rights he asserts here. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." (quotation marks omitted)). Accordingly, Pagliara's ability to establish a *prima facie* case turns entirely on the substantial federal question of whether HERA has transferred a shareholder inspection right from stockholders like Pagliara to FHFA.

b. *Proper Purpose*

Pagliara's affirmative case also requires him to show a "proper purpose" for his books-and-records demand. *Amalgamated Bank*, 132 A.3d at 775. The statute defines "proper purpose" as anything "reasonably related to such person's interest as a stockholder." *W. Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 641 (Del. Ch. 2006). If the purported purpose is to consider litigation relating to corporate misconduct, "the plaintiff must have standing to pursue the underlying suit to have a proper purpose." *Id.*; *Graulich v. Dell, Inc.*, Civ. No. 5846-CC, 2011 WL 1843813, at *5 (Del. Ch. May 16, 2011) ("If plaintiff would not have standing to bring suit, plaintiff does not have a proper purpose to investigate wrongdoing because its stated purpose is not reasonably related to its role as a stockholder."); *see also United Techs. Corp. v. Treppel*, 109 A.3d 553, 559 (Del. 2014) (same).

In order to meet this essential element of his *prima facie* case, Pagliara will have to

grapple with the federal law question of whether he has standing to pursue litigation concerning the alleged corporate wrongdoing, notwithstanding HERA's assignment of "***all*** rights, titles, powers, and privileges of . . . any stockholder . . . with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added). Pagliara's affirmative books-and-records demand will turn, therefore, on the substantial federal question whether he has standing to bring the shareholder suit he purports to be considering, notwithstanding HERA's unambiguous transfer of all shareholder rights to FHFA.[10]

2. HERA's Application Is Disputed

There can be no question that the parties (and FHFA as a putative plaintiff) dispute HERA's application here. As discussed above, FHFA claims Pagliara has no rights to assert and, alternatively, that he cannot enforce them by a court action. Pagliara, by contrast, claims HERA bars only *derivative* claims, *see* Compl. ¶ 62, and that HERA's anti-injunction provision does not apply to this action at all, *see* Pl's Opp'n to Mot. to Substitute at 19-20 (D.I. 13). For Fannie Mae's part, its notice of removal makes clear its disagreement with Pagliara regarding HERA's application. *See, e.g.*, Notice of Removal at 4 (D.I. 1). Clearly, the threshold, dispositive question of HERA's effect on Pagliara's claims is actually disputed.

3. The Interpretation of HERA Presented By This Case Is A Substantial Question Of Federal Law

"The substantiality inquiry under *Grable* looks . . . to the importance of the issue to the federal system as a whole." *Gunn*, 133 S. Ct. at 1066. Resolving the questions this case presents under HERA—namely, whether HERA's transfer of rights includes the shareholder inspection

[10] In the unlikely event that the Court finds that HERA's transfer of rights does not deprive Pagliara of standing to bring the shareholder suit he purports to be considering, he would then have to grapple with the federal question of how a court can grant the relief he purports to seek without violating HERA's anti-injunction provision. 12 U.S.C. § 4617(f); *see also* FHFA Mot. to Substitute at 10-11 (D.I. 9).

right that Pagliara seeks to enforce here, and whether HERA's anti-injunction provision bars Pagliara from usurping the rights that HERA vests in FHFA alone—is important to delineating the scope of FHFA's powers as Conservator, an important question of federal law that Congress clearly sought to address in the statute. Given the government's and Fannie Mae's "clear interest . . . in the availability of a federal forum, there is no good reason to shirk from federal jurisdiction over the dispositive and contested federal issue at the heart of the state-law . . . claim." *Grable*, 545 U.S. at 319-20.

The contours of FHFA's power is an important question that is often litigated in federal courts. Indeed, multiple federal courts (this district among them) currently are addressing the same federal law questions raised by Pagliara's complaint, including the availability of any injunctive or equitable relief against Fannie Mae during conservatorship, and HERA's preclusion of shareholders' claims during conservatorship.[11] Moreover, the many cases (including this one) in which FHFA has moved to substitute itself as plaintiff show the federal government's interest in defining the agency's powers and controlling suits of this nature.[12]

Furthermore, resolving the HERA questions at issue in this case will not only resolve them for these parties, but will encourage uniformity throughout the federal system. "*Grable* presented a nearly 'pure issue of law,' one 'that could be settled once and for all and thereafter

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[11] *See, e.g., Saxton v. FHFA*, No. 1:15-cv-00047 (N.D. Iowa May 28, 2015); *Jacobs v. FHFA*, No. 1:15-cv-00708 (D. Del. Aug. 17, 2015); *Robinson v. FHFA*, No. 7:15-cv-00109 (E.D. Ky. Oct. 23, 2015); *Roberts v. FHFA*, No. 1:16-cv-02107 (N.D. Ill. Feb. 10, 2016); *see also Perry Capital LLC*, 70 F. Supp. 3d 208; *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828 (S.D. Iowa 2015).

[12] *See, e.g., Kellmer v. Raines*, 674 F.3d 848 (D.C. Cir. 2012); *La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. 2011); *Gail C. Sweeney Estate Marital Trust v. United States Treasury Dep't*, 68 F. Supp. 3d 116 (D.D.C. 2014); *see also Esther Sadowsky Testamentary Tr. v. Syron*, 639 F. Supp. 2d 347, 350 (S.D.N.Y. 2009) (substituting FHFA for claims against Freddie Mac).

would govern numerous tax sales cases.'" *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700 (quoting R. Fallon, D. Meltzer, & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 65 (5th ed. 2003)). Similarly, the HERA provisions at issue in this case can be resolved by simply reading the statute and the pleadings in this case, and deciding them will determine the rights of FHFA and putative shareholder plaintiffs in future cases. Given the importance of HERA's transfer and anti-injunction provisions to the operation of the housing financing system Congress sought to reorganize, these provisions present a substantial federal issue that deserves resolution in a federal forum.

4. Resolving This HERA Question in Federal Court Will Not Disrupt The Federal-State Balance Approved By Congress

Finally, exercising federal jurisdiction over this case will not disrupt the "balance of federal and state judicial responsibilities" set by Congress. *Grable*, 545 U.S. at 314; *see also Gunn*, 133 S. Ct. at 1068. "[I]t is the rare [shareholder records-inspection] action that involves contested issues of federal law." *Grable*, 545 U.S. at 319. Reading the disputed HERA provisions as creating "arising under" jurisdiction will only apply to Section 220 actions filed against Fannie Mae, a federally chartered entity that is not incorporated in the State of Delaware and whose corporate governance practices have their foundation in federal law, not state law. *See* Responsibilities of Boards of Directors, Corporate Practices and Corporate Governance Matters, 80 Fed. Reg. 72,327 (2015). Exercising federal jurisdiction in this case will thus have no effect on the "normal currents of litigation" by shareholders of Delaware corporations. *Grable*, 545 U.S. at 319.

CONCLUSION

For all of these reasons, the Court should decide FHFA's substitution motion before turning to Pagliara's remand motion. If the Court denies FHFA's substitution motion, the Court should deny Pagliara's remand motion because his claims arise under federal law.

August 18, 2016

Respectfully submitted,

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