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From GC to Trial Lead: Fannie Mae’s Top Lawyer Before the Supreme Court

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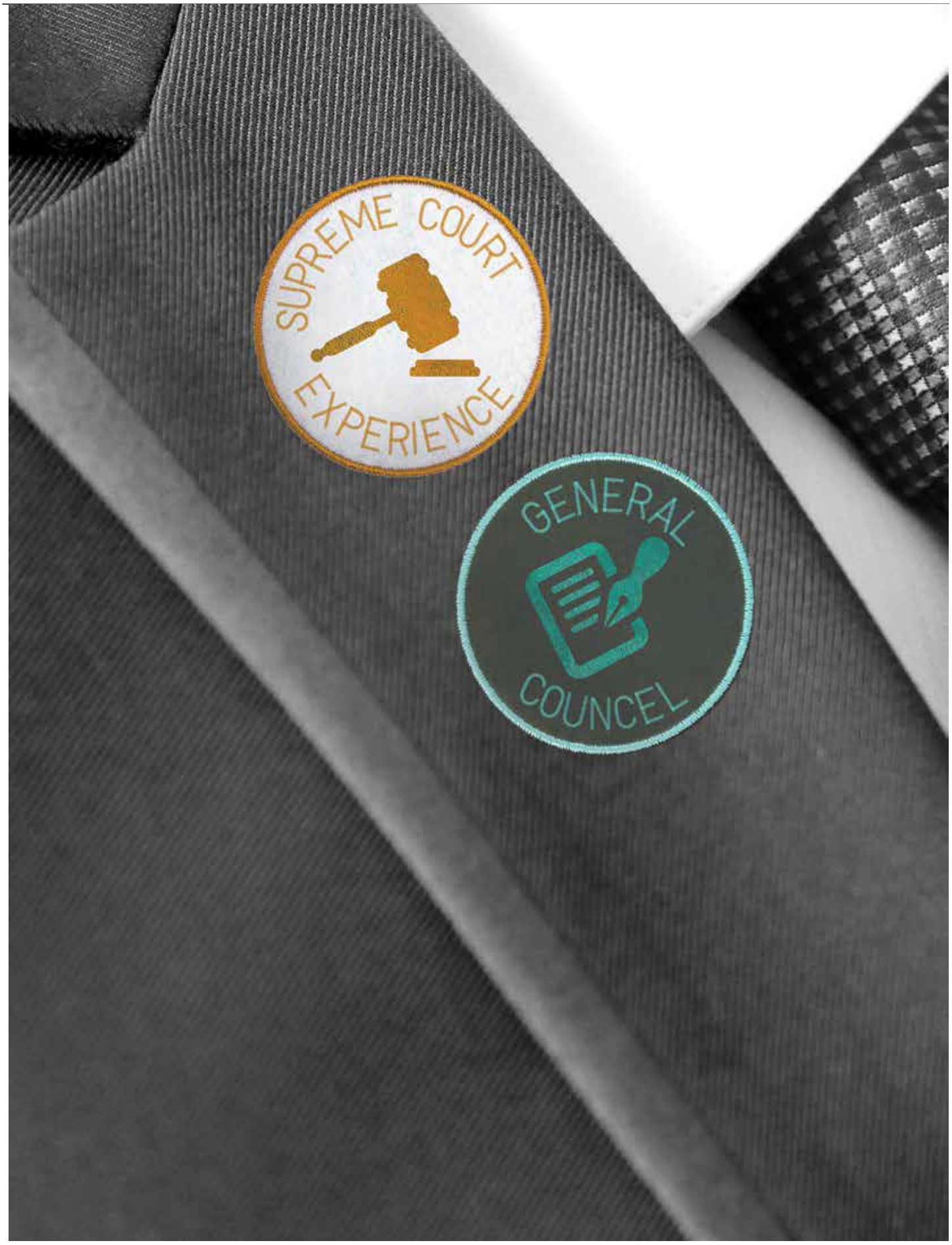
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CHEAT SHEET

- ***Representing yourself.*** It's important to do a risk assessment when deciding whether or not to represent your own company at the level of the US Supreme Court.
- ***Along for the ride.*** Make sure that in-house counsel are involved in the entire process, including moot courts — which can help identify important questions that may be asked.
- ***A curve ball.*** No amount of preparation will prepare you for the grandiose nature of the Supreme Court. Remember the core principles you learned as in-house counsel, and treat the law as a nuanced story in which everyone has a part to play.
- ***Uncharted territory.*** Because justices are issuing a final judgment, the level of rigor and time involved in arguing a case before the Supreme Court is enormous. Ensure that the benefits of in-house counsel involvement outweigh the substantial amount of time it will take from their normal responsibilities.

There are courtrooms, and then there is the US Supreme Court chamber. Lined with ivory-veined Spanish marble and 24 columns of fine Siena marble, the room is 82-feet wide, 91-feet long, and boasts a ceiling that soars over four stories high. What sticks in my head, however, is how intimate it is. Counsel presenting oral arguments at a lectern just a few feet away from the Justices' bench. There is nowhere to run and nowhere to hide.

I stood at that lectern on November 8, 2016, the day I took the unusual step of representing my employer before the US Supreme Court (for background on the case, see sidebar).

Lightfoot v. Cendant

On November 8, 2016, Fannie Mae Executive Vice President, General Counsel, and Corporate Secretary Brian P. Brooks argued before the US Supreme Court in *Lightfoot v. Cendant Mortgage Corporation*. The key issue in the case is whether Fannie Mae's charter, which authorizes it "to sue and be sued … in any court of competent jurisdiction, State or Federal," confers jurisdiction on the federal district courts in all cases brought by or against Fannie Mae. The case originated in 2002, after Cendant initiated foreclosure proceedings against a borrower who had defaulted on a Fannie Mae-guaranteed single-family mortgage loan. The borrower and her daughter sued Cendant and Fannie Mae in California state court, alleging a conspiracy to make loans to noncreditworthy borrowers for the purpose of acquiring the collateral properties by foreclosure. Fannie Mae removed the case to federal district court, an action based on the charter language cited above, and the district court dismissed plaintiffs' claims. On appeal, the Ninth Circuit directed the parties to brief whether the district court had jurisdiction on the basis of Fannie Mae's charter; the three-judge panel ultimately ruled two-to-one that it did. The Supreme Court granted certiorari on the jurisdictional question, and the solicitor general supported the plaintiffs' position. A transcript and audio of the oral argument can be found on the Supreme Court's website.

On January 18, the Court ruled in favor of the plaintiffs, holding that Fannie Mae's charter language does not grant federal court jurisdiction over all cases involving Fannie Mae, thus reversing the judgment of the Ninth Circuit Court of Appeals.

It is received wisdom that oral argument at the Supreme Court is a specialized and risky endeavor requiring a lawyer with experience. I had plenty of appellate experience, but had never before argued a case at the Supreme Court. It has a bar for a reason, and lawyers with a Supreme Court track record are in high demand among companies that have matters being decided by the highest court in the land. The incidence of in-house counsel appearing before the Court is small.

Yet, there I was. Of course I was anxious. Who wouldn't be? Even so, I felt confident because some of the best Supreme Court advocates had prepared me for this day, and more importantly, my own Fannie Mae colleagues were in the room with me. At each step on the months-long road to that November morning, Fannie Mae's team of stellar in-house lawyers had worked with extraordinary talent to represent their employer. I was just their spokesperson.

What follows are five lessons my colleagues and I learned from representing our client and employer at the Supreme Court.

1. **Always do a risk assessment as you weigh whether to represent yourself in court.** After all, there is a reason for the old saying that "a person who represents himself in court has a fool for a client."

In the case of *Lightfoot*, the two risks we weighed were: What was the likelihood of our losing? And what could happen if we lost?

When thinking about the first question, we considered two important facts. First, that the Court had granted cert in a case where there was no split decision in the lower courts. And second, the solicitor general had supported the plaintiffs' position. For these reasons, our expectation of a positive outcome was, shall we say, subdued.

As for what might happen if Fannie Mae lost the case, we did not foresee a material impact on our business.

Contemplating all this led us to conclude that, although the principle in question was important, expectations were limited and risk was contained, and therefore we could prudently decide to represent ourselves before the Court.

2. **There are times when in-house counsel are best suited to represent a company inside a courtroom.** But only if you bring something to the lectern that outside counsel doesn't have.

Fannie Mae has long retained firms with seasoned lawyers who have successfully represented the company in many litigation matters. Lawyers from these firms have argued on their clients' behalf in multiple cases before the Supreme Court. Those lawyers would have performed with excellence on Fannie Mae's behalf in the Lightfoot case. Nevertheless, as we considered the facts of the case, and the procedural points at issue, it became clear that an in-house lawyer would bring something that an outside counsel could not. Let me explain.

The case was about the interpretation of statutory language regarding federal or state court jurisdiction. The question was whether Fannie Mae's federal charter, written by the US Congress,

creates federal court jurisdiction. The charter states that Fannie Mae may sue or be sued in "in any court of competent jurisdiction, State or Federal." Fannie Mae, a defendant in the underlying case, argued that federal jurisdiction was granted by virtue of this charter language. The plaintiffs argued otherwise.

Outside counsel would have argued the case logically on the principles of federal jurisdiction. Our lawyers at Fannie Mae believed that the matter also turned on housing policy and legislative history, in particular the legislation Congress enacted in 1934 and amended in 1954 that created the modern Federal National Mortgage Association, or Fannie Mae, as it came to be known. We saw it as a matter of housing legislation and Congressional intent when it drafted that legislation.

This insight was at the heart of our decision to use in-house counsel to argue before the Court: Who better to talk about the policy and history of Fannie Mae's Charter Act than a lawyer who actually works at Fannie Mae? The question before the Supreme Court did not require intimate knowledge of the facts of the underlying case: It required intimate knowledge of our company and the laws that created it.

Our bet was that an expert on housing policy would offer something more in the way of arguments than someone who is an expert at litigating Supreme Court cases. Knowledge of the subject at hand — the Congressional charter that created Fannie Mae — is nowhere more concentrated than among the in-house lawyers at Fannie Mae. To speak as one of them would be a meaningful advantage. If I could prepare adequately, the benefit of this approach would outweigh the risk of being a novice Supreme Court advocate (more on this later). Putting this decision in the context of Fannie Mae's philosophy with respect to the use of in-house v. outside counsel may be helpful. Fannie Mae, despite its unique business and the particulars of its current situation (it is operating under conservatorship of the Federal Housing Finance Agency), faces legal risks quite similar to most large, regulated financial institutions. And, like most other large financial institutions, Fannie Mae makes use of outside counsel for the vast majority of its litigation-related work. Understanding of jurisdictional matters is one reason for this approach; another is that lawyers with the most (and most current) courtroom litigation experience are found in law firms.

At Fannie Mae, there is one exception to this approach, and it is a common one: employment litigation. Fannie Mae's in-house legal team directly handles court cases involving our employees. They do this for some of the same reasons that we chose to use in-house counsel to argue before the Supreme Court. Primarily, a lawyer steeped in the policies, history, and culture of Fannie Mae employment (i.e., a lawyer who is also an employee) is a better court advocate than a lawyer hired for the occasion.

As it related to the Supreme Court, we believed that housing legislation and its history would be the basis of resolving the issue at hand. And not only the legislation from 1954, but also a law passed 20 years earlier, when Congress passed the National Housing Act of 1934 (and related amendments in 1938) to stem the tide of foreclosures and create the Federal Housing Administration.

Mustering the legislative history in this instance required old-fashioned research. I belong to the last generation of lawyers who actually conducted legal research in hard copy: *The Decennial Digest*, statutory "pocket facts," and the like. This case required such work — going back to printed transcripts of Senate floor debate on the 1934 law — as well as the 1938 amendments to that law which led to the creation of Fannie Mae.

This touches, in very broad strokes, the kind of minute understanding of foundational federal housing

laws we believed were at issue in the case. Ultimately, we believed that presenting to the Justices an in-house lawyer, steeped in these laws and the contemporaneous debates, would make a difference in court.

3. **Make sure your in-house lawyers are involved in all preparation, including moot courts.**

I put myself through three moot courts.

About five weeks out, we held the first moot court among what I call “friends and family.” Held in Washington, DC, it was arranged by our outside counsel. The panel included a few seasoned Supreme Court advocates, as well as a group of in-house counsel led by Fannie Mae’s head of litigation. At that moot court, about a dozen in-house lawyers asked me questions — most of which focused on the housing laws at issue, and how I would respond to specific points or questions related to those laws.

The second moot court took place three weeks before the argument, at the Jenner & Block Supreme Court and Appellate Clinic at the University of Chicago, which was run by my old federal jurisdiction professor David A. Strauss. Three moot justices heard my arguments and asked questions in front of an audience of law students. This was my most daunting moot court: It is scary to argue in front of your former professor.

The third moot court, just a week prior to the argument, took place before a panel of seasoned Supreme Court advocates. It included partners from four DC-area law firms.

Each moot court was a different experience, but that was purposeful. Each one identified important questions that the Justices ultimately asked. They warned me of approaches that I had thought were good ideas, but were actually terrible ideas.

The moot courts also produced another important outcome, one that highlights the benefit of in-house lawyers bringing to bear their own subject matter knowledge and experience. During the moots, our in-house lawyers raised a key question: In arguing for federal jurisdiction, wasn’t Fannie Mae arguing that every foreclosure case involving Fannie Mae be removed from state court to federal court? This is critical because Fannie Mae at any given moment is involved in foreclosure cases in nearly every state, and most of these are brought in state courts. The Supreme Court advocates on the moot courts did not believe that the Justices were likely to raise this question. Nevertheless, our in-house lawyers considered it Fannie Mae’s procedural Achilles’ heel. They knew foreclosure law, and they knew that any federal judge would likely zero in on this question right away: The notion that thousands of foreclosure cases involving Fannie Mae would suddenly clog the federal court system if our argument won out. Thanks to my colleagues, I was prepared for this question.

Sure enough, Chief Justice John Roberts started with, “Your friend on the other side scares me when he says there are 60,000 cases that are going to be added to the Federal docket. Do you have an answer to that?”

I did have an answer, thanks to moot court and my colleagues’ close attention. Interestingly, my answer, injected with an ad-libbed aside, produced an instance of rare courtroom humor among the Justices. (See sidebar for more about humor in the Supreme Court.)

Getting laughs at the US Supreme Court

The “Guide for Counsel in Cases To Be Argued Before the Supreme Court of the United States” provides direct and detailed advice to lawyers making oral arguments before the highest court in the country. This advice includes these two points:

“Attempts at humor usually fall flat. The same is true of attempts at familiarity.”

Brian Brooks, the general counsel of Fannie Mae who represented his employer in a recent case before the Supreme Court, does not appear to have followed this advice. According to the transcript of his oral argument in *Lightfoot v. Cendant Mortgage Corporation*, Brooks’ time at the lectern included five instances of “laughter.”

Jay Wexler, a professor of law at Boston University and self-described Supreme Court laughter documentarian, said it was a remarkable feat for a first-timer to the court to elicit multiple bouts laughter from the Justices.

“The cases about fish and such, they produce laughter,” Wexler said. “Fish can be inherently funny. There was nothing inherently funny in this case. But [Brooks] got in a few good ones, I thought.”

Wexler has made studies of laughter at the Supreme Court, determining, for instance, that Justice Antonin Scalia was the funniest Justice of the modern court. Wexler said that there is a big difference between the Justices making jokes (which often are at the counsel’s expense) and counsel’s making jokes (which run the risk of being at the Justices’ expense).

“You generally don’t make jokes because the risk is greater than the reward,” Wexler said. “I’m sure if he had practiced those jokes at moot court, his counsel would have advised him not to do it.”

Brooks said he did not intend nor practice any humor as part of his argument. The opportunity presented itself, however, and he took it.

“I found an updraft, and floated on it,” he said.

Wexler said another notable aspect of Brooks’s argument was he told a joke “against interest.” That is, he made a joke touching on the court itself and in a way that did not support his argument. Nevertheless, the sarcasm is evident in the exchange with Chief Justice John Roberts and Justice Anthony Kennedy. It seemed to work, as the transcript and recording indicate.

CHIEF JUSTICE ROBERTS: Your friend on the other side scares me when he says there are 60,000 cases that are going to be added to the federal docket. Do you have an answer to that?

MR. BROOKS: Your honor, the easiest answer is this. The easiest answer is no –

JUSTICE KENNEDY: Don’t tell us we’re not working hard enough.

(Laughter.)

MR. BROOKS: I do recall, Justice Kennedy, that once upon a time, the Court took 150 cases a year. Maybe foreclosures could be among them.

JUSTICE KENNEDY: They were easier cases.

MR. BROOKS: Perhaps I should sit down.

(Laughter.)

SOURCE

4. **No amount of preparation will prepare you for what happens.**

I have a good deal of experience in both corporate law and as a litigator. And I have been fortunate to have educational and professional opportunities that molded me as an attorney. However, preparing for and then executing a Supreme Court appearance provided me an entirely new sense of both my capabilities and my limitations.

I would have failed without the team at Fannie Mae and their intimate knowledge of the legislative foundations of federal housing policy. Further, in the actual act of presenting my arguments, I found myself relying more on my high school debate club training than I did my prior courtroom experience. That is, the learned ability to pick up verbal and non-verbal cues, extemporaneous lines of reasoning, and humor in real time. I was certainly nervous, but I found myself relying on old habits and skills from my youth. The feeling was, at certain moments, surreal.

Add to this the enormous room, filled with hundreds of spectators, including a large group of lawyers in uniform from the Judge Advocate General Corps in attendance. Here again, I found myself relying on tricks learned early on: keeping eye contact, timing, and vocal variety. For me, the experience was a reminder of core principles I have as a lawyer: Treating the law as a nuanced story in which every one of us, not just lawyers and judges, is a character with a part to play.

Of course, I was not thinking this at the time — at least not consciously. The case dealt with arcane aspects of jurisdiction and legislative interpretation. The evening news did not cover our case that day — there were no big Constitutional questions at hand. Nevertheless, it was hard not to feel exhilarated, not only for myself, but also for the Fannie Mae colleagues who were there with me. It is rare, and rarely advisable, for an in-house counsel to do what I did that day. But once the decision was made, we made the most of it.

5. **Arguing before the Supreme Court is entirely different from any other appellate argument.**

The Justices know they are making a final judgment, and the level of rigor they apply to the lawyers and arguments is an order of magnitude greater than anything I have experienced.

Getting ready for it was a significant undertaking. If you are ever in the position of weighing whether outside counsel or inside counsel should represent your company before the Supreme Court, make sure it is worth the substantial time and attention it will take from your day job.

It is a fact that most experienced Supreme Court advocates don’t have to attend risk committee meetings, answer inquiries from a board of directors, supervise a large team of lawyers, or complete any of the other countless, worthy, and necessary jobs a general counsel or their deputies undertake. Attorneys at large companies, particularly financial firms, typically are managers, advisors, and

transaction lawyers, not litigators. So, make sure the benefits of inside counsel arguing a case before the Supreme Court outweigh the costs, which are often substantial.

It is also a fact that preparing for a Supreme Court argument is not a solitary job: It takes a team. In this case, Fannie Mae's in-house legal team was crucial to our ability to represent Fannie Mae at the Court. Simply put, the Fannie Mae lawyers who worked on this case are superb. For many of them, working on this case was the opportunity of a lifetime. In all, more than 20 lawyers inside Fannie Mae helped prepare our brief and oral arguments, and six Fannie Mae lawyers became members of the Supreme Court Bar on the day of the argument.

It was a professional development and team-building exercise like none I've ever experienced. Many Fannie Mae lawyers who worked on this case are already business and legal leaders within our organization, but adding Supreme Court experience to their career journey was a unique opportunity that many in-house career lawyers never have. Each of them grabbed it with gusto, for which I am tremendously proud and grateful, without regard to the eventual outcome.

Brian P. Brooks

Executive Vice President, General Counsel, and Corporate Secretary

Fannie Mae

He oversees the legal department and government and industry relations. He also serves as a senior advisor to the CEO and the board of directors.