

**BEFORE THE UNITED STATES JUDICIAL
PANEL ON MULTIDISTRICT LITIGATION**

In Re:)	
)	
Third Amendment Litigation)	MDL No. 2713
)	

**RESPONSE OF JOSHUA J. ANGEL TO FEDERAL
HOSING FINANCE AGENCY’S MOTION FOR TRANSFER OF
ACTIONS TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

Joshua J. Angel (“Respondent”) respectfully submits this response (the “Response”) in opposition to the motion (the “Motion,” and the memorandum of law in support thereof, the “Memorandum”), filed by Federal Housing Finance Agency (“FHFA,” or “Movant”) in the Judicial Panel for Multidistrict Litigation (the “Panel”), for an order pursuant to 28 U.S.C. § 1407, transferring four pending actions (the “Pending Actions”) involving the FHFA and the U.S. Department of the Treasury (“Treasury”) to the United States District Court for the District of Columbia for coordinated or consolidated pretrial proceedings (“Coordinated/Consolidated Proceedings”). In support of the Response, Respondent respectfully alleges as follows:

PRELIMINARY STATEMENT

1. Lest silence be deemed consent, Respondent is compelled to submit this Response to address the impropriety of Movant’s request for relief in the Motion as it pertains to Respondent and the potential claims that Respondent may assert in any subsequent actions (“Subsequent Actions”) that may be commenced against, among others, the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac,” and together with Fannie Mae, the “GSEs”) and their respective boards of directors (the foregoing, collectively, the “Preferred Shareholder Fiduciaries”).

2. Movant has characterized the litigations in the Pending Actions as involving materially identical claims, seeking materially identical relief, and all challenging the Third Amendment to Amended and Restated Senior Preferred Stock Purchase Agreement dated as of August 17, 2012 (the “Third Amendment,” and the Senior Preferred Stock Purchase Agreement amended thereby, the “SPSPA”). Respondent takes no position as to whether the Pending Actions are substantially similar and should be subject to Coordinated/Consolidated Proceedings. However, Movant has taken the opportunity in the Motion to also seek prospective injunctive relief as against future plaintiffs in Subsequent Actions including, specifically, Respondent. Indeed, in support of Movant’s contention that Subsequent Actions likely will be filed by additional plaintiffs, Movant attaches Respondent’s letters (and attachments thereto) that were addressed to the directors of Fannie Mae and to the directors of Freddie Mac as Exhibits 6 and 7 to the Memorandum.¹ Movant seeks relief as to Subsequent Actions because, Movant argues, those actions also will be substantially identical to the Pending Actions. In this respect, Movant is incorrect as to Respondent’s potential actions.

3. Movant fundamentally misunderstands Respondent’s claims and how those claims are distinguishable from the Pending Actions. As set forth more fully below, unlike plaintiffs in the Pending Actions, Respondent does not seek rescission of the Third Amendment or to otherwise challenge the Third Amendment; rather, Respondent asserts that the GSEs entered into the Third Amendment without a *bona fide* business purpose and without concurrently restoring dividend payments to the Putative Preferred Share Class Members (defined below), and by so doing, the Preferred Shareholder Fiduciaries breached and continue to

¹ Exhibits 6 and 7 to Movant’s Memorandum exhibit list are identical letters dated March 1, 2016 which were written by Respondent and directed to the Preferred Shareholder Fiduciaries (the “Respondent Letters”). Attached to each Respondent Letter is a 43-page pamphlet which Respondent wrote and published in February 2016. The pamphlet is entitled “Government Perfidy and Mismanagement of the GSEs in Conservatorship” (hereinafter “Government Perfidy”).

breach their contractual and fiduciary duties to the Putative Preferred Share Class Members. Respondent further challenges dividend payments made under the Third Amendment in excess of 10% as being in continuing breach of Respondent's contractual rights to share payment.

4. Respondent thus objects to the Motion only to the extent that Movant seeks to preemptively adjudicate the forum in which Respondent may bring his claims based on Movant's faulty assumption that Respondent's claims are identical to those asserted in the Pending Actions.

RESPONSE

5. Respondent, a graduate of Columbia Law School Class of '59, specialized in corporate reorganizations for nearly his entire legal career - first at Angel and Frankel, P.C., which he founded, and where he served as managing partner for nearly forty-six years, and then from January 2007 to date as senior counsel to the firm of Herrick, Feinstein LLP.

6. Respondent is an individual investor owner of both Fannie Mae and Freddie Mac preferred shares.² Respondent, together with all other GSE preferred share owners are hereinafter referred to collectively as the "Putative Preferred Share Class Members."

7. Concerned with the breaches of fiduciary duty by the Preferred Shareholder Fiduciaries, on March 1, 2016, Respondent prepared and delivered to the boards of directors of each GSE the Respondent Letters. The Respondent Letters provide, in salient part, as follows:

I am an attorney, and Freddie Mac [Fannie Mae] *preferred shareholder*. My Freddie Mac [Fannie Mae] shares together with preferred shares of Fannie Mae [Freddie Mac] which I also own comprise a significant portion of my personal net worth. I am 80 years old, and the shares amid recent revelations of Treasury looting now provide considerable anxiety, emanating in great part,

² The GSEs preferred shares are in all cases non-cumulative, non-voting, perpetual capital. The shares differ solely in entitlement in regard to their respective call dates, and dividend rates. One minor arcane series of Fannie Mae preferred shares, which do not trade publicly, is convertible into common at the holder's sole option.

from your consistent failure to exercise even a tiny modicum of the fiduciary duty you as directors owe to me, and to the Company.

Not having the luxury of time afforded to younger persons, which might allow me to wait for an ultimate arrival of justice to correct the breaches of duty by you, and the Company as outlined below, I wrote and published "Government Perfidy and Mismanagement of the GSEs in Conservatorship (attached hereto). In addition I have engaged counsel to commence suit against you, and the Company for class redress for breach of duty, and breach of contract.

However, before directing counsel to proceed I am writing to you in the hope that litigation can be avoided by your accepting my urging to seek and obtain clarification from outside counsel regarding your duties and liabilities as members of the Freddie Mac Board [Fannie Mae] of Directors, and to begin taking steps to behave as an informed, active board. As detailed below, I believe that you are a board of directors subject to Virginia [Delaware] law, that you owe a fiduciary duty to the Company, and its *preferred stock shareholders*, and that you may be held liable for a breach of your statutory obligations as directors and of the duties owed to the Company and its *preferred shareholders* with respect to the payment of dividends and other matters."

Respondent Letters (emphasis added).

8. The Respondent Letters were not addressed to either the FHFA or Treasury, and to date, the Respondent Letters have not been responded to by any of the Preferred Shareholder Fiduciaries.

9. Notwithstanding that Respondent did not address the letters to the FHFA, and notwithstanding that the letters clearly set forth Respondent's intention to assert his rights as a *preferred shareholder* and on behalf of other *preferred shareholders*, Movant nevertheless attached the Respondent Letters as exhibits to the Memorandum, and incorrectly characterized them as demand letters emanating from *shareholders* (*i.e.*, common and preferred shareholders collectively) rather than emanating from Respondent on behalf of *preferred* share owner class

members.³ For the reasons stated below, this error is misleading, and prejudicial to Respondent and other Putative Preferred Share Class Members.

10. Movant's use of the word "shareholders" in the Motion and the Memorandum to singularly describe disparate common shareholders and preferred shareholders in the context of shareholder claims and demands ignores the true nature of the claims of Respondents and other Putative Preferred Share Class Members. For example, common shareowner entitlement to dividends are subordinate in the first instance to preferred share dividend payments. In addition, a board of directors is granted a great deal of deference to declare, or not declare, common dividends, and the decision to declare or not declare common dividends is virtually unassailable. On the other hand, preferred share dividends are fixed contractually, and the failure of a board of directors to declare, or not declare, a dividend is subject to a good faith business judgment standard. In addition, the decision by a board of directors to declare a dividend and then not pay a dividend after it has been declared will constitute a breach of the board's contractual obligations. The significant differences in contractual rights and fiduciary obligations in connection with preferred and common shares arises from, among other things, the issuance of GSE preferred shares as virtually risk-free investments by reason of the implicit federal government guaranty of payment of preferred shares.

³ For example, the Memorandum states as follows:

It is all but certain that the number of pending complaints challenging the Third Amendment will continue to grow. The boards of directors for Fannie Mae and Freddie Mac have received seven demand letters from three Enterprise *shareholders* presaging litigation. (Attached hereto as Exhibit 1 through 7). Each of these letters asserts that the Enterprises' directors have breached purported duties to the Enterprises and the Enterprises' *shareholders* by performing under the Third Amendment, and concludes that *shareholders* are entitled to file suit to seek equitable and legal relief absent action by the boards. Thus, although this motion pertains directly to only the four pending Related Cases, it is likely that there will soon be additional cases that should also be transferred for coordinated or consolidated pretrial proceedings.

Memorandum p. 6 (emphasis added).

11. Having had no response to the Respondent Letters, counsel for Respondent commenced preparing draft complaints (hereinafter the “Intended Complaints”) against the Preferred Shareholder Fiduciaries under the laws of Delaware (Fannie Mae), and Virginia (Freddie Mac).⁴ The Intended Complaints, which Respondent intends to file absent an adequate response to the Respondent Letters from the Preferred Shareholder Fiduciaries and pending the adjudication of the Motion, are based entirely on state law corporate governance principles, fiduciary duties, and contractual entitlements, none of which are abrogated by the enactment of Housing and Economic Recovery Act of 2008 (“HERA”) and/or the conservatorship of the GSEs.

12. The Intended Complaints draw upon the principles, ideas and arguments the Respondent enunciated in Government Perfidy, which he shared with the Preferred Shareholder Fiduciaries as an attachment to the Respondent Letters. Government Perfidy is divided into two parts. Part One outlines the federal government’s implicit guaranty of payment of the GSE preferred shares and the promotion of the preferred shares as being essentially riskless.⁵ Part Two addresses the FHFA and Treasury mismanagement of the GSEs in conservatorship.

13. Prior to September 7, 2008, despite widespread news coverage of the GSEs’ financial distress, the likely enactment of HERA, and a rumored government takeover of the GSEs, the GSEs preferred share market prices, in comparison to their common share prices, held

⁴ The Fannie Mae Bylaws as amended through January 30, 2009, provide that “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 same may be amended from time to time.” Fannie Mae Bylaws § 1.05. The Freddie Mac preferred shares are governed by the Virginia Stock Corporation Act, which is in substantial conformity with the law governing Fannie Mae (Delaware).

⁵ See Board of Governors of the Federal Reserve System Internal Discussion Paper dated March 2012, attached hereto as Exhibit A, which is the seminal publication on the issue of the implicit government guaranty of preferred shares.

up well, by reason of the market's continued acceptance of the federal government's implicit guaranty of the shares' payment.

14. The GSEs were thus able to sell \$22 billion of the \$34 billion of their pre-conservatorship outstanding preferred share capitalization between late 2007 and May 2008.

15. Fannie Mae's ability to sell \$4.8 billion of preferred shares in the market less than four months prior to the company's September 7, 2008, entry into conservatorship was a result of market trust, reliance on the federal government's implicit guaranty of GSEs securities, and Treasury's and other governmental agencies' promotion of the preferred shares as essentially risk free investments by virtue of the implicit guaranty employment as marketing tool in their sale.⁶

16. The implicit guaranty's widespread market acceptance is graphically illustrated in Exhibit C hereto, a chart that tracks the price movements of Fannie Mae's common shares, and 8.25% preferred shares from the preferred shares' May 2008 issuance, through September 11, 2008. The chart illustrates Fannie Mae T preferred share ability to maintain market pricing at roughly 60% of the shares' stated values through September 7, 2008. *See* Exhibit C, hereto.

17. At a press conference held on Sunday September 7, 2008 Secretary Paulson announced the FHFA's having that day placed the GSEs into conservatorship. Secretary Paulson's September 8, 2008 announcement (the "Paulson Announcement") is annexed hereto as Exhibit D.

18. Secretary Paulson stated, "common and preferred shareholders bear losses ahead of the new government senior preferred shares." He further said that "conservatorship does not eliminate the outstanding preferred stock but does place preferred shareholders second after the common shareholders in absorbing losses." *See* Paulson Announcement.

⁶ A compilation of Treasury's behind-the-scenes marketing assistance in Fannie Mae's preferred share issuance of \$4.8 billion in May 2008 is especially illuminating. The compilation, which appears in the Appendix to Government Perfidy, is annexed hereto as Exhibit B.

19. As a consequence of the market misinterpretation of the Paulson Announcement as a rejection and repudiation of the implicit government guaranty of repayment on the preferred shares, on the following Monday's market opening, Fannie Mae Series T preferred share price collapsed from the Friday September 5th closing price of \$13.70 to \$3 (*i.e.*, nearly 78%).

20. Freddie Mac neither declared nor paid any share dividends in the third quarter of 2008. Consistent with the Paulson Announcement, Freddie Mac in its 2008 year end 10k disclosed the following:

Restriction Relating to Conservatorship

As Conservator, FHFA announced on September 7, 2008 that we would not pay any dividends of the common stock or on any series of preferred stock (other than the senior preferred stock). FHFA has also instructed our Board of Directors that it should consult with and obtain the approval of FHFA before taking actions involving dividends.

Restrictions Under Purchase Agreement

The Purchase Agreement prohibits us from declaring or paying any dividends on Freddie Mac equity securities (other than the senior preferred stock) without the prior written consent of Treasury.

Freddie Mac 10K, December 31, 2008, Part II, pp. 60-61.

21. Fannie Mae in its 2008 year end 10K made the following dividend announcement:

The conservator announced on September 7, 2008, that we would not pay any dividends on the common stock or on any series of outstanding preferred stock. In addition, the senior preferred stock purchase agreement prohibits us from declaring or paying any dividends on Fannie Mae equity securities (other than the senior preferred stock) without the prior written consent of Treasury. ***We were permitted to pay previously declared but unpaid dividends on our outstanding, preferred stock for the third quarter.***

Fannie Mae 10K, December 31, 2008, Part II, p. 76 (emphasis added).

22. As Secretary Paulson explained in the Paulson Announcement, all dividend payments on GSE preferred shares, whether dividends were declared or not, were strictly prohibited, because of the GSEs' entry into conservatorship and the SPSPA.

23. Nevertheless, *Fannie Mae, in the days which followed the Paulson Announcement, timely made Treasury-directed dividend payments totaling \$413 million to the holders of its preferred shares.*

24. The Fannie Mae 10Q for the period ending September 30, 2008 states the following with regard to its regulatory capital requirements;

On March 19, 2008, OFHEO⁷ reduced from 30% to 20% the amount of capital we are required to hold in excess of our statutory minimum capital requirement. On *June 9, 2008, OFHEO announced that we were classified as adequately capitalized as of March 31, 2008* (the most recent date for which results have been published by OFHEO). With the completion of our capital raise in May 2008, OFHEO further reduced the amount of capital we are required to hold in excess of our statutory minimum capital requirement to 15%. OFHEO had also indicated its intention to reduce our excess capital requirement to 10% in September 2008, based upon our continued maintenance of excess capital well above OFHEO's regulatory requirement and no material adverse change to our ongoing regulatory compliance. *As our new safety, soundness and mission regulator under the Regulatory Reform Act, FHFA will have responsibility for making this determination in September.* Under the Regulatory Reform Act, FHFA has the authority to increase our minimum capital levels and to establish additional capital and reserve requirements with respect to any product or activity. FHFA also has the authority to increase our minimum capital levels temporarily if the Director of FHFA determines it necessary and the authority to adjust our capital classification at any time.

25. Following approval of its regulatory capital requirement by OFHEO, on August 8, 2008, the board of directors of Fannie Mae announced \$413 million of third quarter 2008

⁷ OFHEO is the acronym for Office of Federal Housing Enterprise Oversight. HERA combined OFHEO and the Federal Housing Finance Board to create FHFA.

preferred share dividends, and dividend payment dates (the “\$413 million Fannie Mae Third Quarter Preferred Dividend,” annexed as Exhibit E hereto). At some point after September 9, 2008, Treasury was alerted to the fact that the failure by Fannie Mae to timely pay the \$413 million Fannie Mae Third Quarter Preferred Dividend cancelled on September 7, 2008 would result in Fannie Mae being in substantial breach of the shares’ contractual implicit guaranty of payment.

26. Thereafter, on September 11, 2008, Treasury hastily issued an announcement wherein it obliquely corrected Secretary Paulson’s preferred share risk of loss announcement error, and affirmed the shares implicit government guaranty of payment in a disjointed announcement statement that included the following language: “Contracts are respected in this country as a fundamental part of rule of law”, and “Dividends actually declared by a GSE before the date of the senior preferred stock purchase agreement [*i.e.*, the \$413 million Third Quarter Preferred Dividends] will be paid on schedule.” The September 11, 2008 announcement from Treasury is annexed hereto as Exhibit F. A breach of the preferred share contractual guaranty of dividend payment was thus avoided by Fannie Mae’s Treasury-directed \$413 million of Third Quarter Dividend Payment.

27. However, the GSEs entry into the Third Amendment without a genuine business purpose rendered preferred share dividend declaration and or payment impossible,⁸ and the Preferred Shareholder Fiduciaries were thus in breach of the preferred shareholders’ entitlement

⁸ This is acknowledged by Movant in the Motion:

The Conservator — acting on behalf of the Enterprises-- and Treasury entered into two [senior] preferred stock purchase agreements (“PSPAs”) wherein Treasury agreed to commit billions of U.S. taxpayer dollars to ensure that the Enterprises did not enter mandatory receivership. *See* 12 U.S.C. §4617(a)(4). ***Under the PSPAs, an Enterprise must draw funds from Treasury if its net worth is negative*** — defined as liabilities exceeding assets in accordance with U.S. Generally Accepted Accounting Principles — in any calendar quarter. ***Combined, the Enterprises have made 24 draws totaling approximately \$187 billion on the Treasury commitment.***

Motion ¶ 3 (emphasis added).

to receive dividend payments. To add insult to injury, Third Amendment serial payments totaling \$130 billion were thereafter made to Treasury, in excess of the 10% dividend originally mandated under the SPSPA, and in continuing breach of the preferred shareholders' contractual right to receive preferred share payments.

28. Thus, based on all of the foregoing, it is evident that the Pending Actions and Respondent's Intended Complaints are not substantially identical, as Movant claims. In all of the litigation that has occurred with respect to the Third Amendment, no party has asserted that the failure to pay preferred shareholder dividends violates the GSEs preferred shares implicit federal guaranty of payment, a concept that is explored in great detail in *Government Perfidy*.

29. Respondent neither questions nor intends to question the plenary operational authority of the FHFA as conservator of the GSES and its management of the GSEs in conservatorship. Respondent neither questions nor intends to question the FHFA succession to shareholder rights as the GSEs conservator. Respondent neither questions nor intends to question the Third Amendments enactment as being outside of HERA's statutory grant.

30. However, a preferred share of stock is a preferred share of stock, and HERA did not abrogate the basic duties owed by the Preferred Shareholder Fiduciaries to the preferred share owners. The Preferred Shareholder Fiduciaries breached their fiduciary duties to pre-conservator preferred shareholders by unfairly elevating the rights of post-conservator preferred shareholders at the expense of pre-conservator preferred shareholders. The Preferred Shareholder Fiduciaries are enacting *Animal Farm* equality, where all preferred shares are equal, but some are more equal than others.

Dated: April 1, 2016

Respectfully submitted,

/s/ Hanh V. Huynh

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