UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSHUA J. ANGEL

Plaintiff,

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION, et al.,

Defendants.

Case No. 1:18-cv-01142 (RCL)

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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Plaintiff Pro Se

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Plaintiff Joshua J. Angel ("Plaintiff") respectfully files this memorandum in opposition to Defendants' Motion to Dismiss the Complaint, filed by defendants "Fannie Mae," "Freddie Mac," (collectively, the "GSEs"),[1] and the directors ("Directors") who served on the GSE Boards of Directors ("Boards") as constituted on August 17, 2012 (all collectively, "Defendants").

Plaintiff purchased and holds certain preferred shares in the GSEs ("Junior Preferred Shares"). Plaintiff alleges, and the government has publicly acknowledged, a federal government guarantee of full and timely payments to holders of GSE securities ("GSE Securities") issued before September 6, 2008. On that date, during the financial crisis, Federal Housing Finance Agency (FHFA), acting as conservator ("Conservator"), placed the GSEs into conservatorship. The Conservator agreed to a Senior Preferred Stock Purchase Agreement ("SPSPA") between each GSE and the U.S. Department of the Treasury ("Treasury") that gave Treasury, *inter alia*, a dividend equal to ten percent per year, paid quarterly and senior in payment to the Junior Preferred Share. Plaintiff does not challenge the Governmental authority exercised in connection with the SPSPA's formation.

Four years later, after consistent and exponential profitability, the FHFA, as purported Conservator, directed the GSE to enter into a third "amendment" to the SPSPAs ("Third Amendment") with Treasury. The amendment converted the ten percent dividend into a "Net Worth Sweep," which required the GSEs to pay dividends equal to the full amount of their net worth to Treasury every quarter, save a small reserve. That amendment made the payment of dividends to all other shareholders impossible after January 1, 2013, regardless of the amount of

[1] "Fannie Mae" refers to the Federal National Mortgage Association. "Freddie Mac" refers to Federal Home Loan Mortgage Association. Both are government-sponsored entities ("GSEs" or the "Companies").

profits that the GSEs generated, absent written Treasury consent. Defendants do not dispute these facts, all of which are pled and must be accepted as true as this stage.

Plaintiff is a pro se individual seeking to receive the benefit of his bargain: compensation for the elimination of Junior Preferred Share dividend rights.

Defendants argue that because dividends are not specifically guaranteed, they cannot be liable for intentionally, unreasonably, and arbitrarily acting for the purpose of avoiding the guarantee payment and the effect of eliminating Plaintiff's dividend rights, the very essence of his contracts. Defendants also argue that *they* cannot be liable because the *Government* has broad authority in conservatorship. Neither is true. Moreover, even if Government authority applied to Defendants, they, like the Government, would still be liable for their authorized conduct that causes cognizable damages. Defendants also argue that Plaintiff's claims fail as have related cases, but most those cases, though based on the same transactions, mostly assert different claims against mostly different defendants based on different theories.

Accordingly, Plaintiff asserts breach of contract and breach of the implied covenant of good faith and fair dealing regarding the loss of his dividend rights effected by the Net Worth Sweep and Defendants' concealment of their bad faith. He also asserts tortious interference by Defendants with the contract between the federal government and Plaintiff that guarantees full, timely payment on his shares. Plaintiff respectfully asks the Court to recognize the basic fairness underlying his claims and the legal support for them.

STATEMENT OF FACTS

I. Fannie Mae and Freddie Mac

Initially chartered by Congress, the GSEs eventually converted by statute into publicly traded corporations with the stated missions of stabilizing and providing liquidity to the primary and secondary mortgage markets. *See* 12 U.S.C. §§ 1451, 1716; Compl. at ¶ 24.[2] The Federal Housing Finance Agency (FHFA), the Board of Governors of the Federal Reserve System (the "Fed" or "Federal Reserve"), and the Treasury (collectively, the "Agencies" and collectively with all other federal government entities, the "Government") play significant roles in the conduct of the GSEs' business and in furthering those objectives. *Id.* The GSEs purchase residential loans from mortgage originators and securitize them into mortgage-backed securities ("MBS"), with a guarantee of their payment, and sell. The GSEs have issued multiple series of debt, MBS, preferred shares, and common stock.

II. The Junior Preferred Shares

Plaintiff holds Junior Preferred Shares, which are perpetual capital, noncumulative, nonvoting.[3] ¶ 19; Compl. Appx. A. The shares are contractual agreements governed by their certificates of designation ("CODs"), the GSEs' charters and bylaws, and the corporate governance laws of Delaware or Virginia, the states that Fannie Mae and Freddie Mac respectively elected to follow in conducting their operations. ¶ 30; Angel Decl., Exs. 2, 4, 17, 22, 23, 29.

Regarding dividends, the substance of the Fannie Mae and Freddie Mac CODs are virtually identical. Fannie Mae's CODs provide, *inter alia*, that the shareholders are "entitled to receive, when, as and if declared by the Board of Directors . . . , in its *sole discretion* out of funds *legally available* therefor, non-cumulative *quarterly* dividends." Ex. 29 (emphases added).[4] The Freddie

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[2] References herein to the Complaint, filed on May 21, 2018, are cited herein as "¶ __."

[3] The certificates of designation ("CODs") do not qualify these securities as "junior." Since the issuance of these shares, the GSEs issued more senior preferred stock to the Government. *See supra* SOF § IV. To distinguish those senior shares, Plaintiff refers to them as "Senior Preferred Stock" and his stock as "Junior Preferred Stock."

[4] References to "Ex. __" are to a document attached, in whole or excepted form, as an exhibit to the Declaration of Joshua J. Angel ("Angel Decl.").

Mac CODs similarly provide that the shareholders are "entitled to receive non-cumulative, *quarterly* cash dividends . . . . [D]ividends are payable only if declared by our Board of Directors in its *sole discretion*, out of funds *legally available* for dividend payments." Ex. 4, 12-13. Accordingly, the CDOs provide the potential right to receive quarterly dividends pursuant to the sole discretion of the GSE Boards. ¶ 56.

III. HERA: The Laws Governing Conservatorship of the GSEs

At the height of the financial crisis, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, Stat. 2654 (2008). HERA, *inter alia*, established the Federal Housing Finance Agency ("FHFA") as an independent administrative agency to supervise and regulate the GSEs. 12 U.S.C. § 4501 *et seq.* HERA provides discretionary and mandatory grounds for the FHFA Director ("Director") to place the GSEs into conservatorship, and the FHFA may appoint itself as the conservator. 12 U.S.C. §§ 4617(a)(1)-(4).

As conservator, HERA vests the FHFA (or "Conservator") with a litany of powers. *See* 12 U.S.C. § 4617(b). ¶ 36. It "immediately succeed[s] to— (i) all rights, titles, powers, and privileges of the [GSE], and any stockholder, officer, or director of such [GSE] with respect to the [GSE] and [its] assets." 12 U.S.C. § 4617(b)(2)(A)(i) ("Succession Clause") (emphasis added).[5] This Circuit holds that "the Succession Clause transfers to the FHFA [] the right to bring derivative suits but not direct suits." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017) ("*Perry II").* The Conservator may "operate" and "conduct all business" of the GSEs, including any appropriate action to preserve, conserve, transfer, or sell the GSEs' assets and liabilities. *Id.* § 4617(b)(2). The Conservator "may disaffirm or repudiate any [GSE] contract" on specified

[5] That succession is "except for their right to payment, resolution, or other satisfaction of their claims." 12 U.S.C. § 4617(b)(2)(K)(i).

grounds but must determine whether to exercise that authority "within a reasonable period following [its] appointment." *Id.* § 4617(d)(1)-(2); *see* ¶¶ 103-04, 112-13. Accordingly, HERA creates an exclusive agency relationship between the GSEs and Conservator whereby the Conservator becomes their sole principal and empowered to conduct the plenary management of the GSEs' affairs. ¶¶ 36-37. The GSEs acknowledge this relationship.[6]

Notably, GSE equity owners maintain economic rights in conservatorship, such as direct claims against liable entities. *See id.* § 4617(b)(2)(A)(i). HERA does not authorize the Conservator to modify the GSEs' contracts, charters, or bylaws, and the Conservator must compensate the parties to contracts that it repudiates. *See id.* § 4617(b)(2)(K)(ii), (d)(3); Ex. 5; Ex. 7 ("Contracts are respected in this country as a fundamental part of rule of law . . . . As with any contract, the parties to the agreement may modify the covenants by mutual agreement only.") (regarding the Conservator's duty to honor enforceable contracts).[7]

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[6] Form 10-K, Fannie Mae (2017), Ex. 23, at 12 (emphasis added) ("Our directors serve on behalf of the conservator and exercise their authority as directed by and with the approval, where required, of the conservator. Our directors have no fiduciary duties to any person or entity except to the conservator.")

[7] "Management of the Company during Conservatorship

"The conservator subsequently delegated specified authorities to our Board of Directors and delegated to management the authority to conduct our day-to-day operations. In connection with its delegation of authority, FHFA has instructed the Board to oversee that management has in place a compliance program that includes procedures or obtaining a decision from the conservator before taking action in any of the areas described in Directors, Executive Officers and Corporate Governance—Corporate Governance—Conservatorship and Delegation of Authority to Board of Director." FHFA's instructions also require the company to notify FHFA of activities that represent a significant change in current business practices, operations, policies or strategies. The conservator retains the authority to amend or withdraw its delegations at any time.

"Our directors serve on behalf of the conservator and exercise their authority as directed by and with the approval, where required, of the conservator. Our directors have no fiduciary duties to any person or entity except to the conservator. Accordingly, our directors are not obligated to consider the interests of the company, the holders of our equity or debt) securities, or the holders of Fannie Mae MBS unless specifically directed to do so by the conservator.

IV. Conservatorship of the GSEs and the Government Guarantee of GSE Securities

On September 6, 2008, after collaboration between the Agencies, FHFA Director James B. Lockhart ("Lockhart") placed the GSEs into conservatorship and appointed the FHFA as Conservator. ¶ 43. On September 7, 2008, Treasury Secretary Henry M. Paulson, Jr. ("Paulson") announced the conservatorship and explained the Government's guarantee of payments owed on GSE Securities ("Guarantee"). ¶ 85-86.

> [C]onservatorship was the only form in which I would *commit taxpayer money to the GSEs*. . . .
>
> These Preferred Stock Purchase Agreements were made necessary by the *ambiguities in the GSE Congressional charters*, which have been *perceived to indicate government support for agency debt and guaranteed MBS*. Our Nation has *tolerated these ambiguities* for too long, and as a result GSE debt and MBS are held by central banks and investors throughout the United States and around the world who believe them to be *virtually risk-free*. Because the U.S. Government created these ambiguities, we have a responsibility to both avert and ultimately address the systemic risk now posed by the scale and breadth of the holdings of GSE debt and MBS.

¶ 85; Ex. 6[8] (emphases added).

"Because we are in conservatorship, our common stockholders currently do not have the ability to elect directors or to vote on other matters. The conservator eliminated common and preferred stock dividends (other than dividends on the senior preferred stock issued to Treasury) during the conservatorship." Ex. 21, at 12 (emphasis added).

[8] It is well accepted in this Circuit that a "'court may consider [on a motion to dismiss] the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice.'" *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007) (quoting *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006). Thus, this Court may fairly consider Plaintiff's exhibits that are attached to the Angel Decl. and cited in the Complaint or its exhibits. These include Exs. 5, 6, 10, 11, 13, 14, 16, 20, 23, 24, & 26-28. In addition, the court may consider "matters of which . . . judicial notice" may be taken, such as public records. *E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997); *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004) (finding that court may take judicial notice of public records on motion to dismiss); *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 32 n.14 (D.D.C. 2013); *Morris v. Fed. Bureau of Prisons*, No. 09 Civ. 2034 (RJL), 2010 WL 2574142, at *1 (D.D.C. June 25, 2010) (collecting cases and concluding that "the Court may take judicial notice of matters of public record, such as prior court proceedings."). Exs. 1-17, 20-24, 26, 31, 32 & 34. Additionally, a "court may take judicial notice of the existence of newspaper articles in the Washington, D.C., area that publicized" certain facts. *See Wash. Post v. Robinson*, 935 F.2d 282,

Lockhart, alongside Paulson, then delivered his statement. ¶ 87. He affirmed the continued validity of outstanding equity GSE Securities but announced the elimination of GSE dividends during conservatorship:

> Between them, the [GSEs] have $5.4 Trillion of *guaranteed* Mortgage backed securities (MBS) and debt outstanding which is equal to the publicly held debt of the United States. . . .
>
> In order to conserve over $2 billion in capital every year, the common stock and preferred stock dividends will be eliminated, *but the common and all preferred stocks will continue to remain outstanding.* Subordinated debt interest and principal payments will continue to be made.

Ex. 5 (emphases added); *see also* ¶ 87. Four days later, the Treasury issued a press release to announce, *inter alia*, that a $413-million Junior Preferred Share dividend declared by the Fannie Mae Board in August 2008 and cancelled by Director Lockhart on September 7, 2008, would be reinstated and timely paid, stating:

> Contracts are respected in this country as a fundamental part of rule of law . . . .
>
> As with any contract, the parties to the agreement may modify the covenants by mutual agreement only . . . .
>
> Dividends actually declared by a GSE before the date of the senior preferred stock purchase agreement will be paid on schedule.

¶ 89; Ex. 7. "The Treasury believed *it was legally obligated* to make the payments given the prior announcement." Ex. 14, at 6 n.5 (emphasis added). Thereafter, Fannie Mae described these events surrounding the dividends in its 2008 Form 10-K, Part II, at 76 (emphasis added):

> [T]he senior preferred stock purchase agreement prohibits us from declaring or paying any dividends on [other] Fannie Mae equity securities . . . *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.*

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291 (D.C. Cir. 1991); *Sandza v. Barclays Bank PLC*, 151 F. Supp. 3d 94, 113 (D.D.C. 2015), *appeal dismissed* (Mar. 7, 2016) (taking judicial notice of the existence of news articles but not accepting these articles for the truth of their assertions). Exs. 7, 15, 25, 28. Finally, a court may take judicial notice of "historical, political, or statistical facts, and any other facts that are verifiable with certainty." *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 67 (D.D.C. 2014). Exs. 1, 5-7, 10, 11, 14, 15, 18, 19, 25, 27, 28 & 29.

¶¶ 85-88; Ex. 3. Thus, even in Conservatorship, Fannie Mae maintained the power to determine whether to declare dividends and with Treasury's written consent, the power to pay dividends.

In 2009, the Federal Reserve Bank of Atlanta published a study regarding the contradiction between public acceptance and reliance upon the Guarantee in GSE securities issuance practice, and the statutory camouflage of GSE Securities being required to state that the Government does not back them with "full faith and credit":

> [T]he obligations of [the GSEs] must state that they are not guaranteed by the federal government. . . . Nevertheless, as discussed [ ], financial markets have long viewed the GSEs' obligations as carrying an "implicit" *government guarantee*. The federal government's recent actions were *intended* to send a strong signal to financial markets that the U.S. would *protect the interests of holders* of [GSE] obligations on an ongoing basis. . . .
>
> The features of [the GSEs'] federal charters, coupled with some past government actions, [have] long served to create a perception in Financial markets that *the federal government "implicitly guarantees" the GSEs financial obligations*. . . .

Ex. 10, 3 n.4, 6. Federal Reserve Chairman Ben S. Bernanke agreed:

> The greatest risks [of the GSEs] originated in what was probably *a deliberate ambiguity on the part of Congress* when it created the GSEs. Officially, . . . the U.S. government had no obligation to protect [GSE securities holders]. . . .
>
> And yet, investors assumed that the government would never let Fannie or Freddie fail, for fear of the damage to the U.S. housing market, financial markets in general, and the economy. *This belief in an implicit government guarantee in turn enabled the GSEs to borrow at interest rates not much above those at which the government itself could borrow*. The regulator of Fannie and Freddie . . . had long required the companies to hold only small capital cushions against possible losses. *Still, investors' confidence in the GSEs and the implicit guarantee had remained largely unshaken through the ups and downs of the economy and housing market*.

Ex. 18, at 227-28. Pre-conservatorship, Federal Reserve Board Chairman Alan Greenspan stated: "Although prospectuses for GSE debt are required by law to stipulate that such instruments are not backed by the full faith and credit of the U.S. government, investors worldwide have concluded that our government will not allow GSEs to default." Ex. 1. ¶¶ 33-34.

A study by the Fed analyzed the key role that the Guarantee played in the issuance and marketing of GSE Junior Preferred Shares and outsized bank ownership as risk-free Tier One securities. *See* Ex. 14, at 34-35, Federal Reserve March 2012 Table 1: GSE Preferred Stock Issuances Panel A; Fannie Mae, Panel B: Freddie Mac.

> These GSE preferred securities were assigned an Aa3[9] credit rating and were widely held by banks . . . [g]iven the advantages of holding these securities, including . . . the low perceived risks . . . . [E]ven though banks are normally restricted from investing substantially in equity securities, an exemption[10] . . . was established for the GSE investments.

Ex. 14, at 1-2. This study shows that the most sophisticated market participants believed that GSE Preferred Shares were very low risk. The Government furthered that perception by creating an exemption for banks to hold more of those shares. The Treasury acknowledged in a 2011 report to Congress that it benefits from the guarantee. The Treasury has since discussed the report in a filing before this Court, and the Court agreed with it:

> [T]he GSEs have benefitted from a public perception that the federal government had implicitly guaranteed the securities they issued; this perception allowed the GSEs to purchase more mortgages and [mortgage-backed securities], at cheaper rates, than would otherwise prevail in the private market.[11]

See Mem. Op. at 4, *Perry Capital LLC v. Lew*, No. 13 Civ. 1025 (D.D.C. Sept. 30, 2014), ECF No. 51 (quoting Treasury Def.'s Mot. to Dismiss, or, in the Alternative, for Summ. J. at 6 (D.D.C.

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[9] The Aa3 credit rating, the fourth-highest that Moody's has, are for securities of "high quality … with 'very low credit risk[.]'" Ex. 14, at 1-2; *Aa3 Definition*, Nasdaq, https://www.nasdaq.com/investing/glossary/a/aa3.

[10] *See* 12 U.S.C § 24 (Seventh).

[11] GSE Securities could not have sold as much as they did without the Guarantee. Between September 28, 2007, and May 19, 2008 Fannie Mae sold $11.13 billion of its total Junior Preferred shares of $19.1 billion. Freddie Mac in the same time period sold $8.6 billion of its total Junior Preferred shares $14.1 billion. Treasury complicity in the $22 billion 2007/May 2008 GSE Junior Preferred capital raise, and the Guarantee employment in the marketing and distributing of the Junior Preferred shares is unmistakable. Ex. 14, at 6.

Jan. 17, 2014) (citing the Treasury Report to Congress attached as Ex. 13 to the Angel Decl.)) *Reforming America's Housing Finance Market*, Report to Congress, Dept. of Treasury and Dept. of Housing and Urban Development, at 8 (Feb. 2011) ("Treasury Report to Congress," Ex. 13))).

V. *De Facto* Nationalization of the GSEs in 2009

In 2009, the Government implemented the Home Affordability and Stability Plan ("HASP"). The GSEs would "play a role in administering HASP on behalf of Treasury." Ex. 3, at 5; ¶ 29. The GSEs would pay incentive fees to loan servicers to reduce at-risk borrowers' monthly mortgage payments. The GSEs would pay the borrowers as well, bear the full costs of the modifications, and not receive a reimbursement from the Treasury. As a result, it was "likely that the costs we incur . . . will be substantial, and these programs would therefore likely have a material adverse effect on our business, results of operations, financial condition and net worth." Fannie Mae Form 10-K (2009), Ex. 3, at 5.

Later in 2009, the Government replaced HASP with the Making Home Affordable Refinance Program ("HARP") and Making Home Affordable Mortgage Program ("HAMP"). Like HASP, these programs provided for monthly mortgage payment modifications for qualified homeowners. HARP pertained to mortgages owned or guaranteed by the GSEs, and HAMP pertained to other mortgages. The Treasury reimbursed mortgage servicers that participated in the programs but did not reimburse the GSEs. ¶¶ 29, 71. Fannie Mae's provision for credit losses attributable to credit-impaired loans under these programs was $20 billion for 2009, up from $2.4 billion in 2008. *See* Fannie Form 10-K, Table 8: Credit Related Expenses (2009), Ex. 8, at 92.

HARP and HAMP are ongoing and have generated more than approximately $60 billion in unreimbursed costs to the GSEs. *See* ¶ 29. That imposition of costs demonstrates the *de facto* nationalization of the GSEs. In 2010, the Congressional Budget Office agreed: "those [ownership and direction] actions make Fannie Mae, and Freddie Mac part of the government, and imply that their operations should be reflected in the federal budget." Ex. 11. Similarly, Former Treasury Secretary Timothy Geithner stated, under oath: "we had already effectively nationalized the GSEs . . . , and could decide how to carve up, dismember, sell or restructure those institutions." Ex. 20, at 227.

Eventually, GSE profitability increased. Having been nationalized, the Treasury sought to harness the cash flows to finance programs in addition to HARP and HAMP, such as Obamacare. *See* Ex. 19, at 389-90; *see also* Ex. 25.

VI. The Senior Preferred Stock Purchase Agreement

A. Ten Percent Dividend

On September 6, 2008, the day when the conservatorship began, Treasury exercised its authority to purchase GSE Securities and entered into the "Senior Preferred Stock Purchase Agreement ("SPSPA") with the Conservator acting in the name of the Companies. ¶¶ 54-56.

In consideration for the SPSPA funding, the GSEs issued Senior Preferred shares in amount equal to their specific SPSPA funding draws. The SPSPA provided for the GSEs to pay quarterly dividends to the Senior Preferred shareholders, "when as and if declared by the Board of Directors, in its sole discretion out of funds legally available therefore," at an annual rate of 10%. ¶ 54.

The original SPSPAs diluted, but did not eliminate, the economic interests of the Companies' common shareholders. As FHFA Director Lockhart assured Congress shortly after the agreements were signed, the Companies' "shareholders are still in place," and "both the preferred and common shareholders have an economic interest in the companies," which "going forward… may [have] some value." Ex. 8.

B. Third Amendment and the Net Worth Sweep

By Summer 2012, Treasury knew that the GSEs would generate huge profits, far exceeding the Senior Preferred dividend requirements, and obtain billions of dollars in recoveries from lawsuits alleging material misstatements and omissions in their sales offering documents.

> In the third quarter of 2011, FHFA, as conservator for us and for Freddie Mac, filed 16 lawsuits on behalf of us and Freddie Mac against various financial institutions, their officers and affiliated and unaffiliated underwriters who were responsible for marketing and selling private-label mortgage-related securities to us. The lawsuits seek to recover losses we and Freddie Mac incurred on the securities.

Ex. 12, at 77. Recoveries from that litigation now total approximately $25 billion. *See* Ex. 32.

On August 17, 2012, days after the GSEs announced their return to profitability, Defendants, at the Conservator's direction, executed a third amendment (the "Third Amendment") to their SPSPA. The Third Amendment imposed a net worth sweep ("Net Worth Sweep") that required the GSEs to pay Treasury a quarterly dividend, starting in 2013 and continuing in perpetuity, equal to the GSEs' entire net worth, less a capital buffer (the "Applicable Capital Reserve Amount") that the Companies had to gradually repay until full repayment in 2018. ¶¶ 62-63. Thus, the 10% cash dividend to the Treasury converted into quarterly payments of the GSEs' entire net worth, regardless of the amount, in perpetuity, after they became profitable. ¶ 65.

Unbeknownst to Plaintiff or the public, Defendants and the Government were designing this amendment with the intent to eliminate Plaintiff's dividends rights. *See, e.g.*, ¶ 70; Ex. 34.

C. Fourth Amendment

By letter agreement dated December 21, 2017, the FHFA Regulator, Treasury and Conservator, anticipating the Companies incurrence of a massive accounting loss, agreed to reinstate the $3 billion Applicable Capital Reserve Amount for each of the Companies so as to restore a status quo ante return to post Third Amendment GSEs positive Net Worth (the "Fourth Amendment" or "Letter Agreement"). ¶ 91. In short, they agreed to change the terms of the Third

Amendment of the SPSA so as to permit to each Company to retain a $3 billion capital reserve each quarter stating:

> As a result of these agreements each GSE will only pay a dividend to Treasury if the net worth at the end of a quarter is more than $3 billion. The terms as described, apply to any quarterly dividend paid for the fourth quarter of 2017 and each quarter thereafter.

Ex. 26. As a result, effective January 1, 2018, each SPSA Senior Preferred COD "Applicable Capital Reserve Amount" was amended to read as follows:

> Applicable Capital Reserve Amount" means, as of any date of determination, (A) for each Dividend Period from January 1, 2013, through and including December 31, 2013, $3,000,000,000; (B) for each Dividend Period occurring within each 12-month period, so that for each Dividend Period from January 1, 2017, $3,000,000,000 reduced by $600,000,000; and (C) for each Dividend Period from January 1, 2018, and thereafter $3,000,000,000. Notwithstanding the foregoing, for each Dividend Period from January 1, 2018, and thereafter, following any Dividend Payment Date with respect to which the Board of Directors does not declare and pay a dividend or declares and pays a dividend in an amount less than the Dividend Amount, the Applicable Capital Reserve Amount shall thereafter be zero. For the avoidance of doubt, if the calculation of the Dividend Amount for a Dividend Period does not exceed zero, then no Dividend Amount shall accrue or be payable for such Dividend Period.
>
> For the avoidance of doubt, following the amendment of the Certificate, as amended hereby, shall be deemed to be in form and content substantially the same as the form and content of the Senior Preferred Stock in effect on September 30, 2012.

Ex. 26. The Fourth Amendment cured the Third Amendment breach, if any, of Junior Preferred certificates of designation contract provisions, except with regard to dividends whose declaration dates had passed. Most importantly, the Fourth Amendment avoided the Companies having to be put into HERA mandated receivership.

To date, after ten years of conservatorship, the Conservator has not exercised its power to repudiate the Junior Preferred Share contracts. *See* 12 U.S.C. § 4617(d)(2) (requiring the power to be exercised "within reasonable period following [the FHFA's] appointment" as Conservator); see

¶¶ 112-13; see also Ex. 7 (“Contracts are respected in this country . . . .”).

ARGUMENT

I. Standard of Review

The court may not dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) unless “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Williams v. Holiday Inn Washington, DC on the Hill*, 295 F. Supp. 2d 27, 28 (D.D.C. 2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)). “[A]ll factual allegations in the complaint are taken as true.” *Williams*, 295 F. Supp. 2d 29 (citation omitted); *De Csepel v. Republic of Hung.*, 714 F.3d 591, 597 (D.C. Cir. 2013). “[T]he complaint is construed liberally in the plaintiffs’ favor, and . . . plaintiffs [receive] the benefit of all inferences that can be derived from the facts alleged.” *Kowal v. MCI Commc’ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

II. *Perry II* Requires the Denial of Defendants’ Motion to Dismiss.

Defendants incorrectly argue that most of Plaintiff’s claims fail because of rulings in other lawsuits regarding the Junior Preferred Shares. Defs.’ Mot. to Dismiss at 1, ECF No. 11 (“Defs.’ Br.”) (citing “*Perry II*,”[12] a consolidated appeal from, *inter alia*, *Perry Capital LLC v. Lew*, No. 14 Civ. 5243 (D.D.C.) (“*Perry I*”); *Fairholme Funds, Inc. v. FHFA*, No. 13 Civ. 1053 (D.D.C.) (“*Fairholme*”); and *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigs.*, Misc. No. 13 MC 01288 (D.D.C.) (the “Class Action”)). In fact, Defendants acknowledge the very “differences between this case and the previous ones before this Court” that

[12] *Perry II*, 864 F.3d at 625, *cert. denied sub nom. Cacciapalle v. Fed. Hous. Fin. Agency*, 138 S. Ct. 978 (Mem) (2018), *cert. denied*, *, and cert. denied sub nom. Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency*, 138 S. Ct. 978 (Mem) (2018).

render those cases irrelevant. Defs.' Br. 1. Due to those differences, Defendants' motion must be denied.

First, unlike in those cases, Plaintiff does not challenge the Government's authority to take the actions that it took regarding GSE operations in conservatorship. He does not assert any claims against, or seek relief from, any public person or assert any statutory claims. *See* Compl. Rather, Plaintiff argues that Defendants must compensate him for violations of his contracts regarding his Junior Preferred dividend rights and tortious interference with his Guarantee.

Second, as discussed below, Plaintiff's breach of contract claims rest on a different theory than that alleged in the Class Action, although based on the same facts, so the ruling on that claim is not dispositive here. *Contrast Perry II*, 864 F.3d at 616-17, 621-34, *with infra* Argument ("Arg.") §§ III-IV.

Third, Defendants are correct that *Perry II* addresses Plaintiff's claim for breach of the implied covenant of good faith and fair dealing with respect to dividend rights. Plaintiff alleges several theories for those breaches. *Perry II* involves one of them, and this Circuit reversed the dismissal of and remanded that claim, which is pending before this Court. *See Perry II*, 864 F.3d at 633-34. *Perry II* is irrelevant to Plaintiff's other theories, and as discussed below, these claims must survive Defendants' motion to dismiss.

Fifth, *Perry II* cannot support the dismissal of claims not asserted therein: tortious interference with contract and claims against the Directors.[13] However, Plaintiff asserts all three. Thus, *Perry II* is irrelevant to those claims.

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[13] The Directors are indemnified pursuant to the GSEs' bylaws and HERA. *See* Ex. 21, at 26; Ex. 22, at 14-15; P. Law 110-289, Pub. L. No 110-289, 122 Stat. 2679. However, that does not absolve them of primary liability.

Finally, *Perry II* irrelevant to the extent that it involves derivative claims. Plaintiff asserts only direct claims. Therefore, *Perry II*'s relevant, binding authority is limited to the claim for breach of the implied covenant of good faith and fair dealing regarding dividends. Accordingly, as this Circuit has ruled, that claim cannot be dismissed.

III. Plaintiff's Claims Are Not Time-Barred.

Plaintiff alleged three causes of action under Virginia law against Freddie Mac and its Directors and under Delaware law against Fannie Mae and its Directors: breach of contract as to their duty to determine in their sole discretion whether declare dividends (Count I); breach of the implied covenant of good faith and fair dealing regarding dividends and related misconduct (Count II); and tortious interference with contract as to the Government's Guarantee (Count III).[14] There are numerous barriers to Defendants' arguments that statutes of limitation bar these claims.[15] Plaintiff's claims are timely, regardless of the relevant statute of limitations for each claim.[16]

[14] While the Complaint asserts a claim entitled "Aiding and Abetting in Federal Government's Implicit Guarantee Evasion and Payment Avoidance," ¶¶ 123-25, the Court can and should fairly construe that Plaintiff, acting *pro se*, asserted a claim for tortious interference with contract. Should the Court find otherwise, Plaintiff respectfully requests leave to amend the Complaint.

[15] The motion to dismiss of Freddie Mac and its Directors on account of the statute of limitations is not even properly before this Court. Under Va. Code § 8.01-235, the "objection that an action is not commenced within the limitation period prescribed by law can only be raised as an affirmative defense specifically set forth in a responsive pleading." Va. Code § 8.0-235 (2008). Further, "[n]o statutory limitation period shall have jurisdictional effects and the defense that the statutory limitation period has expired cannot be set up by demurrer. *Id.*; *see Pisner v. Conley*, No. 170862, 2018 WL 3583748, at *1 (Va. July 26, 2018).

[16] Plaintiff's Complaint can also be fairly read to plead a direct claim for breach of fiduciary duty. *See* ¶¶ 30, 51, 53, 82-84. This claim is timely for the same reasons Plaintiff's other claims are timely. When corporate officers and directors exercise "control over the corporate machinery to cause an expropriation of economic value and voting power from the public shareholders" for the benefit of a dominant shareholder, "a separate and distinct harm results to the public shareholders, apart from any harm caused to the corporation, and from which the

As an initial matter, any limitations period would begin to run upon actual breach. A breach occurred after each quarter in which Defendants failed to declare, or determine whether to declare, a dividend. *See* Ex. 4("quarterly dividends"); Ex. 2, at 3(same). The limitations period would not commence to run from the date of any anticipatory breach in August 2012, as Defendants argue. *See* Defs.' Br. 11. Defendants mistakenly rely on case law suggesting that under Virginia and Delaware law, "a cause of action for breach of contract accrues and the limitation period commences to run from the date of the alleged breach." *Hanback v. DRHI, Inc*., 94 F. Supp. 3d 753, 759 (E.D. Va. 2015), *aff'd*, 647 Fed. Appx. 207 (4th Cir. 2016); *see also Weyerhaeuser Co. v. Domtar Corp.*, 61 F. Supp. 3d 445, 451 (D. Del. 2014), *aff'd*, 721 Fed. Appx. 186 (3d Cir. 2018) (similar). Those cases are inapposite. Here, the breach was anticipatory at the time of the Third Amendment on August 17, 2012. ¶ 75. However, as this Court has determined in *Perry II*, the Third Amendment breach was anticipatory and "a ripeness requirement prevents the Court from deciding a case "contingent [on] future events that may not occur as anticipated, or indeed may not occur at all." 864 F.3d at 622-23. Here, Plaintiff's claims did not accrue, at the earliest, until the end of that quarter (and every quarter thereafter) because Defendants failed to consider whether to declare dividend payments. As demonstrated below, those wrongs continue, and the limitations period has not yet expired. Most recently, Defendants failed to declare, and determine whether to declare, a dividend this past fiscal quarter, ending on June 30, 2018.

Moreover, Defendants' other conduct has extended the running the limitations period under various equitable doctrines. First, the doctrine of equitable estoppel extends the

public shareholders may seek relief in a direct action." *Gatz v. Ponsoldt*, 925 A.2d 1265, 1274, 1281 (Del. 2007); *see also Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006).

limitations period when a plaintiff "has received inadequate notice, when court has led plaintiff to believe that she had done everything required of her, or when affirmative misconduct on part of defendant lulled plaintiff into inaction." 4 Fed. Prac. & Proc. Civ. § 1056 (4th ed.); *see also Smith-Haynie v. District of Columbia*, 155 F.3d 575, 332 (D.C. Cir. 1998). Here, Plaintiff was lulled into inaction by Defendants' assurances that they would honor their obligations. Later, Government statements that were not publicly available or known to Plaintiff provided proof positive of its intent to implement a Net Worth Sweep to keep the GSEs under Government control and avoid the restoration of the rights to declare and pay dividends to Junior Preferred Shareholders. *See, e.g.*, ¶ 70; Ex. 34 (citing James Parrott, then-senior advisor to the Obama Administration on the National Economic Council (Aug. 17, 2012 8:30 AM) ("[W]e've closed off [the] possibility that [Fannie and Freddie] ever [ ] go (pretend) private again.")). Defendants acted in concert with the Government to commit the wrongs alleged herein and concealed that information from the public. Given the Defendants' complicit participation in the Government's bad-faith elimination of Plaintiff's dividend rights and concealment of that bad-faith intent, Defendants should be estopped from arguing that Plaintiff claims are time-barred.

Here, Plaintiff could not have known that Defendants and the Government, acting in concert, concealed their agenda to keep the Companies private and deprive Junior Preferred Shareholders of (1) the possibility of obtaining dividends, (2) the right to benefit from quarterly Board determinations of whether to declare dividends, (3) the right to have the Boards make those determination in their "sole discretion," and (4) the right to be dealt with in good faith and fair dealing. Further, this extraordinary circumstance of bad faith prevented Plaintiff from asserting his right earlier. In any event, as discussed, class action litigation was already pending and under *American Pipe* tolling, so Plaintiff had every reason to believe that his claims were timely.

Third, the continuing violation doctrine also serves to extend the limitations periods here. Defendants have engaged in the alleged wrongdoing in each quarter that they failed to determine a dividend to Junior Preferred Shareholders like Plaintiff. Most recently, in June 2018, Defendants failed to even determine whether to declare a dividend, let alone award a dividend, to Junior Preferred Shareholders including plaintiff. Where the wrongdoing is ongoing and continuous the statute of limitations has not yet expired. In *Commonwealth ex rel. Fair Hous. Bd. v. Windsor Plaza Condominium Ass'n, Inc.*, the Supreme Court of Virginia recognized that continuing violations extend the running of the statute of limitation:

> The continuing violation doctrine is one in "which acts occurring outside the statute of limitations may be considered when there is a 'fixed and continuing practice' of unlawful acts both before and during the limitations period." *Scoggins*, 718 F.3d at 271 (citation and internal quotation marks omitted). One federal district court has explained the difference in continuing violations and continuing effects of past violations: "[A] continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." *Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 495 (E.D.Va.2002) (citations and internal quotation marks omitted).

768 S.E.2d 79 (Va. 2014) (though declining to extend the statute as a continuing effect), quoting *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 271 (4th Cir. 2013). Similarly, the Delaware courts have recognized that "otherwise untimely claims [may] proceed under the 'continuing violations doctrine.'" *Henlopen Landing Homeowners Ass'n v. Vester*, No. 7229 MA, 2015 WL 5316864 at *3 (Del. Ch. Ct. Sept. 14, 2015) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) ("Statutes of limitations . . . are intended to keep stale

claims out of courts . . . . Where the challenged violation is a continuing one, the staleness concern disappears.”)).[17]

In any event, the *American Pipe* doctrine tolled the running of the statute of limitations against Plaintiff. In *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), the Supreme Court held that the filing of a timely class action complaint commences the action for all class members and tolls the running of the statute of limitations. *Id.* at 550, 553. Once a class action is commenced, this doctrine pauses the statute of limitations on the claims of all purported class members until either (a) class certification is denied, or (b) the class member in question opts out of the class. The Supreme Court found that such tolling was necessary for the proper application of Rule 23 of the Federal Rules of Civil Procedure. Specifically, the court reasoned that Rule 23 was designed to “avoid, rather than encourage, unnecessary filing of repetitious papers and motions,” *Am. Pipe*, 414 U.S. at 550, and therefore, requiring absent class members to “individually meet the timeliness requirements” would result in “precisely the multiplicity of activity which Rule 23 was designed to avoid.” *Id.* at 550-51. Notably, the court also held that due to *American Pipe* tolling, absent class members need not “take note of the suit . . . or exercise any responsibility with respect to it” until a decision on class certification has been rendered. *See id.* at 552; *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 801 (1985) (“[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course[.]”); *McKowan Lowe & Co. Ltd. v. Jasmine Ltd.*, 295 F.3d 380, 384 (3d Cir. 2002) (“[*American Pipe* is] protective of passive, even unwitting, members of the class.”).

[17] Furthermore, if the Court were to determine that the wrongdoing was not continuing, then Defendants would still be responsible for all breaches of the agreement since the beginning of the applicable statute of limitations. ¶ 68.

Here, Plaintiff is a member of the classes asserted in various pending class action cases. *See* Class Action, No. 13-mc-1288. Those cases concerned the same transactions that are the gravamen of Plaintiff's claims here and asserted breach of contract claims and violations of the covenant of good faith and fair dealing on behalf of both Freddie Mac and Fannie Mae shareholders. Thus, at a minimum, Plaintiff's claims against the Companies for these claims were tolled from the time that those claims were asserted in the Class Action, filed on December 3, 2013, through the filing of Plaintiff's complaint.[18] Plaintiff has added a tortious interference with contractual relations claim and had named the directors of the two Companies, but these claims arise out of the same transactions. As such, these claims should also be tolled under *American Pipe* by the commencement of a first class action lawsuit, since the facts asserted by Plaintiff here are practically identical. *Mitchell Tracey v. First Am. Title Ins. Co.*, 935 F. Supp. 2d 826, 840 n.16 (D. Md. 2013); *see also Dubroff v. Wren Holdings, LLC*, No. 3940, 2011 WL 5137175 at *13, *13 n.82 (Del. Ch. Ct. Oct. 28, 2011) (holding that where the claims pled in the complaint are analogous or "closely related" to the claims pled in the class action, those claims were tolled while the putative class action was pending) (citing *Crown, Cork & Seal*, 462 U.S. 345, 355 (Powell, J., concurring) (1983)).

Defendants misinterpret the applicable statutes of limitations. The Virginia statute of limitations for breach of a contract "which is in writing and signed by the party to be charged thereby" is five years. Va. Code § 8.01–246(2). Contrary to Defendants' assertions, that statute is applicable to the breach alleged here.[19]

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[18] Class certification has not yet been decided.

[19] Plaintiff's breach of contract claim is based upon the Junior Preferred Shares Certificate of Designation, a signed, written contract. These CODs are exhibits to the Companies' Form 10-K, which are signed by the officers and directors of the Companies.

IV. Defendants Breached Their Contract Obligations Regarding Dividends.

Plaintiff's Junior Preferred Share Certificates of Designation are contracts that legally bind Defendants. *Matulich v. Aegis Commu'n Grp., Inc.*, 942 A.2d 596, 600 (Del. 2008) ("The contract at issue . . . is the Certificate of Designation for the [ ] Preferred Stock."). "Under Delaware law, the elements of a breach of contract claim are: (1) a contractual obligation; (2) a breach of that obligation by the defendant; and (3) a resulting damage to the plaintiff." *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003) (citation omitted). Similarly, under Virginia law, "[t]he elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Filak v. George*, 594 S.E.2d 610, 614 (Va. 2004). "The rules of construction which are used to interpret contracts and other written instruments are applicable when construing corporate charters and certificates of designation." *Matulich*, 942 A.2d at 600. To the extent there is any ambiguity in the provisions of the contracts, the Certificates of Designation, such "ambiguities in a contract should be construed against the drafter." *See Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 629 (Del. 2003).

Defendants owed a duty each calendar quarter to exercise their sole discretion in determining whether to declare dividends to Junior Preferred Shareholders. *See* Ex. 29; Ex. 2; *supra* SOF § II. Despite that duty, Defendants agreed to the Third Amendment, which made no funds available to declare dividends to Junior Preferred Shareholders. Defendants are prohibited from declaring dividends when funds are not available. Therefore, by agreeing to and then implementing the Third Amendment, Defendants prevented themselves from determining whether to declare dividends as required by Plaintiff's contracts. That self-imposed impossibility to perform constituted a breach as of the first quarter Defendants failed to pay a dividend after January

1, 2013, when the amendment went into effect, when Defendants breached, and continue to breach, their duty to determine whether to declare dividends each quarter.

Furthermore, because the Third Amendment required Defendants to never declare dividends, Defendants prevented themselves from ever exercising "their sole" discretion in determining whether to declare dividends. After each quarter as of January 1, 2013, Defendants breached, and continue to breach, their duty to exercise their sole discretion in determining whether to declare dividends.

Defendants had ample opportunities to correct the language in their CODs. Despite its various iterations through amendment, the SPSPA has not amended the Junior Preferred Shareholders' right to receive dividends: "when, as and if declared by the Board of Directors . . . in its sole discretion out of funds legally available therefor." Ex. 29, at 1; ¶ 76.

On December 21, 2017, Treasury and the Companies, by letter agreement, amended the SPSPAs (the "Fourth Amendment") so that effective January 1, 2018, the "Applicable Capital Reserve Amount" for each GSE, then near zero, was restored to $3 billion:

> For the avoidance of doubt, following the amendment of the Certificate, as amended hereby, shall be deemed to be in form and content substantially the same as the form and content of the Senior Preferred Stock in effect on September 30, 2012.

Ex. 26. The Fourth Amendment cured the Third Amendment breach of Junior Preferred Share CODs, except with regard to dividends whose "quarterly Dividend Period[s]" to declare dividends had passed. Ex. 29, at 1. Most importantly, the Fourth Amendment prevented the GSE from having to be put into receivership under HERA, so the breach was anticipatory. As a result, the statute of limitations has not yet begun to run.

Defendants argue that Plaintiff's breach of contract claim is no different than the anticipatory breach claim that was dismissed in *Perry I* as unripe. The argument is misguided.

Defs' Br. 12. In *Perry I,* plaintiffs asserted that the contract was breached by making a dividend payment impossible. Here, by contrast, Plaintiff asserts that the Third Amendment was merely an anticipatory breach of the Junior Preferred dividend entitlements. The actual breach occurred at the end of each quarter after January 1, 2013, as Defendants, including Directors, failed to even consider whether or not to award a dividend on the Junior Preferred Shares.

Likewise, Defendants' argument that Plaintiff's allegations defeat causation also fails. Defendants misconstrue the claim here. Defs.' Br. 13. Plaintiff does not assert that Defendants breached the contract by failing to declare dividends but rather, by failing to determine whether to declare them and failing to do so in their sole discretion each fiscal quarter.

Having failed to reject the Companies' Junior Preferred contracts in reasonable time, the Conservator in effect repeatedly reaffirmed the Junior Preferred contracts in their entirety. Without interruption from September 7, 2008, Junior Preferred share capital amounts have continued to be reflected on the Companies audited balance sheets, and although the share dividends are noncumulative, the Companies Senior Preferred and Junior Preferred Shares' combined capitalization of approximately $213 billion together with operating profits, restored balance sheet writings, and litigation recoveries after January 1, 2013 would have relegated the director dividend declaration mandatory rather than optional, and at least to then be reflected on the financial statements as payments in arrears. *See, e.g.*, Ex. 24, at 1-116.

V. Plaintiff Stated Claims for Breach of the Implied Covenant of Good Faith and Fair Dealing

A. Plaintiff Adequately Stated a Prima Facie Case

Plaintiff asserted claims for breach of the implied covenant of good faith and fair dealing against Defendants regarding his dividend rights. *See, e.g.*, ¶¶ 81, 108, 115-22. The elements of this claim are "a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff." *Fitzgerald v. Cantor*, No. C.A. 16297, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998); Defs.' Br. 13-23.

Defendants do not dispute Plaintiff's pleading of causation and damages. *See* Defs.' Br. 13-23. Rather, they dispute the other elements based on allegations that he does not make and misstatements of law. Based on three isolated references to anticipatory breach, they argue that Plaintiff relies on that theory because no actual breach occurred. *See* Defs.' Br. 14-16. That is a red herring. Plaintiff clearly pled breach for this claim, *see* ¶¶ 120-21, made no reference to anticipatory breach in Count II, *see* ¶¶ 115-122, and does not rely on that theory. Thus, this argument is irrelevant.

Defendants also argue that Plaintiff fails to allege any cognizable, implied covenants owed to him. They claim that he has no right to "the continued receipt of dividends" or a claim "for unpaid dividends." Defs.' Br. 17, 18. However, Plaintiff alleges neither, so this argument is also irrelevant.

Plaintiff pled valid implied covenants. The implied covenant "requires 'a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain." *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005). Plaintiff alleges that inherent in the CODs is a duty to deal fairly with Plaintiff, act reasonably and in good faith, and not deprive him of "the fruits of his agreement with [the GSEs]." ¶¶ 63, 81, 118, 121. Specifically, he alleges that Defendants could not take any action for the purpose and with the effect of "mak[ing] it impossible for [him] . . . to realize any value from [his] dividend [ ] rights." ¶ 81, 121. He further alleges that Defendants cannot give up their "sole discretion" in deciding whether to issue dividends. ¶¶ 6 & n.2, 56, 63.

Plaintiff pled breaches of those covenants. He alleges that Defendants planned and agreed to the Net Worth Sweep for the purpose and with the effect of "eliminating [his] rights and interests . . . with respect to dividends." ¶ 121; *see* ¶¶ 70, 108, 120. The Net Worth Sweep by "made it impossible for [him] . . . to realize value from [his] contractual dividend entitlement rights, and in so doing denied Plaintiff the fruits of his agreement with both [GSEs]." ¶¶ 70, 81; *see also* Second Am. Consolidated Class Action Compl. and Derivative Compl., *Class Action*, No. 13 MC 1288, ECF No. 71; Compl. ¶ 70 (Feb. 1, 2018) (quoting an October 1, 2013 public statement from Freddie Mac's CEO: "By taking all of their profits going forward, we are making clear that the GSEs will not ever be allowed to return to profitable entities at the center of our housing finance system.") (emphasis omitted). The Sweep did so by making no "funds legally available" and eliminating the ability of the GSEs to exercise their sole discretion in determining whether to declare dividends. ¶¶ 56, 63, 81, 118-121. The breach recurred every quarter when a SPSPA dividend was paid to the Treasury. ¶¶ 120 ("By . . . operating in compliance with its terms"). Those breaches are arbitrary, unreasonable, and in bad faith.

Plaintiff further alleges breaches by Defendants in concealing their wrongful intent to commit the foregoing acts. Those efforts underscore their bad faith in the underlying breaches. Furthermore, Defendants engaged in all of these breaches in concert with each other and other persons. These breaches prevented Plaintiff from discovering the underlying breach, thereby compounding his losses and delaying his rightful recovery of the fruits of his agreements.

Finally, Plaintiff alleges, without dispute, that he sustained damages due to Defendants' conduct. ¶¶ 123-25. Accordingly, Plaintiff adequately stated his claims for breach of the implied covenant of good faith and fair dealing, so Defendants' motion should be denied.

B. Plaintiff Reasonably Expected When He Purchased His Shares That Defendants Would Not Breach Those Implied Covenants

Defendants engage in a longwinded attempt to dispute the merits of this claim by arguing that he "cannot plausibly allege that the Third Amendment violated any reasonable expectations as a stockholder." Defs.' Br. 17. In *Perry II*, the circuit court remanded this cause of action for this Court to evaluate it "under the correct legal standard, namely, . . . the reasonable expectations of the parties."[20] 864 F.3d at 631. Those expectations are "what the parties would have agreed to themselves had they considered the [Net Worth Sweep] in their original bargaining positions at the time of contracting." Defs.' Br. 17 (quoting *Gerber v. Enterprise Prod. Holdings, LLC*, 67 A.3d 400, 418 (Del. 2013)). Granting Defendants' motion on that basis would require the Court to make factual findings that contradict Plaintiff's allegations and the undisputed facts. Thus, the Court cannot resolve this question against Plaintiff at this stage.

Defendants argue that the relevant time to determine reasonable expectations is not based on the "original bargaining positions at the time of contracting" but rather, after HERA and the first two SPSPA amendments. However, the Court need not resolve this issue because as discussed below, reasonable parties would never have expected what Defendants did.

Defendants' arguments are based on implied covenants that Plaintiff does not allege, so their argument is irrelevant. Even if applied to his alleged implied covenants, their arguments fail. Reasonable parties would never have expected or agreed that Defendants could (1) give away the GSEs' entire net worth to the Treasury, in perpetuity, regardless of the amount, after four years of profitability, in exchange for essentially nothing or (2) do so with the bad-faith intent to eliminate Plaintiff's dividend rights. Defendants fail to show that those expectations were unreasonable.

[20] Notably, the GSEs, which are parties to *Perry II*, improperly ask this Court to use a heightened standard that is contrary to this Circuit's ruling with cherry-picking phrases from case law and editorializations. *See, e.g.*, Defs.' Br. 16 ("limited and extraordinary"), 14 ("exceedingly narrow").

1. Defendants argue that the CODs (and HERA) expressly provide that the increase of stock or issuance of new stock does not require shareholder consent. Ex. 4, at (7); Ex. 2, at A-8. However, first, Defendants know that they did not issue new securities under Third Amendment, *see Perry I*, 70 F. Supp. 3d at 224, and it would have been illegal for them to do so to Treasury in 2012, *see Perry II*, 864 F.3d at 600 (referring to a sunset provision); *Perry I*, 70 F. Supp. 3d at 216. Even the Treasury agreed. *See* Mem. in Supp. of Mot. to Dismiss, or in the Alternative, for Summ. J. at 4, 36, *Class Action*, No. 13 MC 1288, ECF No. 19-1; Reply in Supp. of Dispositive Mot. & Opp. to Pls.' Summ. J. Mot. at 29-38, *Class Action*, No. 13 MC 1288, ECF No. 38. Defendants cannot now claim otherwise.

In addition, the right to issue new stock could not have created the reasonable expectation that Defendants could do what they did. Third, the parties would have a reasonable expectation that the issuance of new securities would be accompanied by some investment from the recipient of those securities back to the GSEs.[21] However, no meaningful consideration was given.[22]

Defendants correctly argue that the Junior Preferred Share CODs require the GSE Boards' "sole discretion" to determine whether to declare dividends. Ex. 2, at 20. Thus, there is an implied covenant that Defendants would not arbitrarily, unreasonably, or in bad faith remove their ability to exercise that discretion because doing so would prevent them from declaring dividends.

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[21] *See Perry Capital v. Lew*, 70 F. Supp. 3d 208, 224 (20104) ("*Perry I*") (finding that Treasury did not buy new securities under the Third Amendment because Treasury did not grant the GSEs any "additional funding commitment"); *Robinson v. FHFA*, 876 F.3d 220, 234 (6th Cir. 2017) (same).

[22] The Third Amendment's "suspen[sion]" of the Periodic Commitment Fee (Mot. to Dismiss Am. Compls. at 24, *Class Action*, No. 13 MC 1288, ECF No. 66; *see also* Exhibit E at 56 § (4)(d), 64 (4)(d)) was not meaningful consideration because Treasury had always waived that fee. Exhibit E (Freddie Preferred Stock) at 11, No. 13 MC 1288 ("The [] fee was not charged by Treasury during the first four years of the PSPAs and had not been assessed as of the time of the Third Amendment.").

Nevertheless, the GSEs did so by making no "funds legally available" for dividends via the Net Worth Sweep. Without available funds, the GSEs had no discretion to declare dividends. Ex. 2, at 20-23; Ex. 4, at (2). No reasonable person would pay for a contract that requires the other party to exercise "sole discretion" in a matter while allowing that party to not exercise that discretion.

Furthermore, as Defendants know, "A party to a contract providing for such discretion violates the implied covenant if it 'act[s] arbitrarily or unreasonably.'" *Perry II*, 864 F.3d at 631 (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010)); *Historic Green Springs, Inc. v. Brandy Farm, Ltd.*, No. 4872 C, 1993 WL 13029827, at *3 (Va. Cir. Ct. 1993) ("[W]here discretion is lodged in one of two parties to a contract . . . [it] must, of course, be exercised in good faith.") (citation and internal quotation marks omitted). *Contrast with Perry I*, 70 F. Supp. 3d at 238 n.43. Specifically, corporate actions that make it impossible for shareholders ever to receive dividends, for that very purpose (*see* ¶¶ 70, Ex. 34)—and without obtaining anything meaningful in return—violate reasonable expectations even though dividend rights are otherwise contingent. No reasonable person pays for a security if he reasonably expected the issuer to, in bad faith, prevent any payout.

2. Defendants contend that the "highly regulated" nature of the GSEs "cut[s] sharply against there being any implied duty to ensure the continued availability of dividends to private investors." Plaintiff does not allege such an affirmative duty. Rather, Plaintiff alleges a duty to *not* unreasonably, arbitrarily, or in bad faith make dividends unavailable.

Further, these regulations empower the Government, not the GSEs. Defendants may not rely on the Government's authority as a basis to avoid liability. Moreover, no applicable regulations allow the Government to violate contracts without providing just compensation, even in conservatorship and receivership, and the Government has expressly stated so. *See* ¶ 14 (quoting

Treasury's enforcement of Fannie Mae's dividend declaration that required payment during receivership, Ex. 7); *see also supra* SOF § II.

3. Defendants argument regarding HERA also fail. They contend that HERA authorizes the Third Amendment, *see* Defs.' Br. 20, but that is irrelevant. Plaintiff's common law rights "remain in force" after HERA, and Defendants owed him a duty to act in "good faith." *Perry II*, 864 F.3d at 612, 630-31. Statutory authority does not mean that common law violations can go unremedied. Accordingly, it is also irrelevant whether Plaintiff should have expected the GSEs to "be put in conservatorship or receivership." Defs.' Br. 21-22. HERA enforces the principle that the Government must compensate for violating economic rights. It provides the authority to repudiate contracts but requires compensation, *see* 12 U.S.C. § 4617(d), it imposes an elaborate claims process in receivership, *see id.* § 4617(b)(2)(K), and it allows shareholders to assert direct, legal claims, as Plaintiff does here, *see* 12 U.S.C. § 4617(b)(2)(A)(i). The Government has also stated that conservatorship and receivership cannot justify the violation of economic rights without compensation. Just four days into the conservatorship at the height of the financial crisis, Treasury reinstated the $413 million divided that Fannie Mae had already declared. *See* ¶ 14. Defendants rely on powers that neither exist nor apply to them. No amount of regulation in an industry could make Plaintiff reasonably expect Defendants' conduct at all or in these circumstances. Furthermore, Plaintiff reasonably expected that Virginia and Delaware law would protect their contract rights pursuant to federal regulation. 67 Fed. Reg. 38,361, 38,364, 38,367 (2002).

In addition, no other HERA provisions that Defendants cite would have given Plaintiff any reason to expect the Net Worth Sweep. Defendants point to § 4617(b)(2)(J)(ii), which allows FHFA to act in its own "best interests," but this Circuit held that this provision does not defeat Plaintiff's implied covenant claims. *Compare* Mot. to Dismiss Am. Compls. at 23-24 n.8 & 29, Class Action, No. 13 MC 1288, ECF No. 66, *with Perry II*, 864 F.3d at 630. Finally, Defendants say that the power to "transfer or sell any Enterprise assets without approval or consent" somehow put Plaintiff on notice that their contract rights might be deliberately nullified in exchange for no meaningful consideration. Mot. to Dismiss Am. Compls. at 29, Class Action, No. 13 MC 1288, ECF No. 66. That makes no sense and is meritless.

4. The SPSPAs had the opposite effect that Defendants claim: they reinforce his reasonable expectations. First, under the SPSPAs, the GSEs gave Treasury Senior Preferred Stock in exchange for a funding commitment and investments. Based on this precedent, Plaintiff would reasonably expect that to continue, but that did not happen with the Third Amendment. Further, if the GSES were to return to profitability, the SPSPAs made clear that Treasury could enjoy profits above the 10% dividend on the Senior Preferred Stock without nullifying Plaintiff's contract rights. The Treasury could exercise its right to acquire 79.9% of the GSEs' common stock for a nominal value and receive additional dividends through that stock, in which case, the GSEs would have been required to pay dividends to the private preferred shareholders, like Plaintiff. *See* Exhibit C (Fannie Preferred Stock) at § 2(b), *Class Action*, No. 13 MC 1288, ECF No. 66-3; Exhibit D (Freddie Preferred Stock) at § 2(c), *Class Action*, No. 13 MC 1288, ECF No. 66-4.

In addition, the requisite consent from the Treasury to declare and pay dividends does not absolve Defendants of their duty to determine in good faith whether to declare dividends. That could not have put Plaintiff on notice that Treasury would withhold consent when the GSEs were profitable, especially since the Treasury *required* the payment of declared dividends when the

GSEs were first entered conservatorship. *See supra* SOF § II. Therefore, Defendants' arguments fail to defeat Plaintiff's reasonable expectation at all relevant times.[23]

VI. *Pro Se* Plaintiff Adequately Stated a Claim for Tortious Interference with Contract.

As Count III, pro se Plaintiff adequately pled, albeit unartfully, a claim for tortious interference with contract that can and should be inferred from his allegations.[24] Determining the merits of this claim requires a factual inquiry that is improper on a motion dismiss. Therefore, Defendants' motion should be denied.

The contract at issue for this claim is the Guarantee,[25] pursuant to which the Government guaranteed full and timely payment of declared dividends to Junior Preferred Shareholders. The Government Guaranteed full and timely payment of declared dividends to Junior Preferred Shareholders. The precondition for the Government's performance of its Guarantee is a GSE's declaration of dividends. Defendants intentionally foreclosed the occurrence of that precondition by agreeing to the Third Amendment and thereafter failed to consider declaring dividends in each

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[23] Thus, there is no need to determine the relevant time of "reasonable expectation." That said, the relevant "time of contracting" is certainly the time of issuance: (1) that is when the parties were in their original bargaining positions at the time of contracting, *see Nemec*, 991 A.2d at 1126; *Gerber*, 67 A.3d at 418; (2) determining the expectation at the time of each agreement would be a circular tautology that would obliterate the implied covenant from all shareholder contracts; (3) whereas state provides for incorporation of charters and state laws into corporate contracts, *see* 8 Del. C. § 394 (2013), Defendants cite no authority for incorporating federal laws like HERA into contracts; and (4) the "time of contracting" is when the securities were issued, *see Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1034-35 (Del. Ch. 2006), because rights, including causes of action, transfer with the shares, *see* 6 Del. Code § 8-302 (2006); Va. Code § 8.8A-302 (2001), *Schultz v. Ginsburg*, 965 A.2d 661, 667 n.12 (Del. 2009).

[24] Plaintiff reserves his right to replead, especially if the Court finds that he must do so to more clearly allege his claims.

[25] In his Complaint, Plaintiff refers to the Guarantee as "FG Implicit Guarantee" and similar names. ¶ 8. Regardless of the name used for definitional purposes, the substance of the Guarantee, as established in *supra* § V.A., is express, implied in fact, and implied at law.

fiscal quarter. That amendment defined "Dividend Amount" to equal zero[26] in order to prevent the GSEs from ever paying – and therefore, ever declaring – any dividends. By intentionally preventing dividend declarations, Defendants improperly prevented the Government from ever performing its Guarantee, which caused Plaintiff to suffer damages.

Plaintiff adequately pled the elements for this cause of action under Delaware and Virginia law, both of which follow Restatement (Second) of Torts § 767 (1979). *See, e.g.*, *NAMA Holdings, LLC v. Related WMC LLC*, No. C.A. 7934, 2014 WL 6436647, at *25 (Del. Ch. Nov. 17, 2014)); *see DurretteBradshaw, P.C. v. MRC Consulting, L.C.*, 670 S.E.2d 704, 706 (Va. 2009)). The elements of the claim are: (i) a valid contract; (ii) knowledge of it; (iii) an intentional act that caused a breach or termination of the relationship; and (iv) resulting damage. *See Bhole, Inc. v. Shore Invs., Inc.*, 67 A.3d 444, 453 (Del. 2013); *DurretteBradshaw*, 670 S.E.2d at 706-07.

A. The Guarantee Is a Valid, Enforceable Contact

The Guarantee is a valid and enforceable contract, whether in fact or implied at law, and Defendants may not deny that as a matter of law. First, Defendants argue that "[t]here is no 'implicit' federal government Guarantee of a 'right[]' to receive dividend payments." Defs.' Br. at 23. They reason that there is no right to receive dividends, so there cannot be a guarantee of a nonexistent right. Defendants are correct. Plaintiff does not make that argument, so their argument fails. *See supra* § II (discussing Plaintiff's right to the *opportunity* to be paid dividends by way of his Dividend Determination right).

Second, Defendants may not deny the validity of the Guarantee because they are not parties to the contract. They are not in the position to determine or dispute what the parties agreed to,

[26] The Fourth Amendment, which is still in effect, also ensured that no dividends could be paid. That amendment required a cash reserve that could not be used to pay dividends. Therefore, after the Fourth Amendment, the GSEs would still have no cash that could be used to pay dividends.

especially here, because both parties have expressed agreement by word and deed. *See supra* SOF § IV.

In addition, it would be unlawful for Defendants to deny the validity and enforceability of the Guarantee because they are statutorily mandated agents of the FHFA. Agency is a fiduciary relationship in which a person acts on another's behalf and subject to that other's control. *See Acordia of Virginia Ins. Agency, Inc. v. Genito Glenn, L.P.*, 263 Va. 377, 384 (2002); *Jackson Walker L.L.P. v. Spira Footwear, Inc.*, No. CIV.A. 3150, 2008 WL 2487256, at *5 & n.55 (Del. Ch. June 23, 2008). Defendants admit that "serve on behalf of, and exercise authority as directed by, the Conservator." Defs.' Br. 29. Thus, by definition, they are agents of the Conservator. The FHFA and its collaborative Agencies have repeatedly affirmed the Guarantee and its benefits. *See* ¶¶ 85-86; *supra* SOF § IV; Ex. 18, at 289 ("This belief in an implicit government guarantee in turn enabled the GSEs to borrow at interest rates not much above those at which the government itself could borrow."). Therefore, Defendants would violate their duties to the Conservator under HERA by denying the validity of the Guarantee, so they may not deny it.

Third, the Government has expressly affirmed and received consideration for the Guarantee. *See id.* In exchange for it, the financial markets absorbed $24 billion of $34 billion in GSE Preferred Shares as Tier One regulatory capital in the crisis period of 2007 through May 2008. The Guarantee generated widespread market confidence in and purchases of the GSE Junior Preferred Shares to enhance the GSE capitalization. *See, e.g.*, Mem. Op. at 4, *Perry I*, No. 13 Civ.1025, ECF No. 51 (D.D.C. Sept. 30, 2014) ("GSEs [] benefitted from a public perception that the Government had implicitly guaranteed the securities they issued; this perception allowed the GSEs to purchase more mortgages and [mortgage-backed securities], at cheaper rates, than would otherwise prevail in the private market)"[27]; Ex. 1 (describing the GSE securities as "a powerful vehicle for achieving profits that are virtually guaranteed" and analogizing the massive revenues generated from their sales as a "market-granted subsidy"); Ex. 30 (setting forth a number of Government incentives for banks to buy GSE preferred stock). Thus, the Guarantee furthered the achievement of the Government's express purposes for the GSEs, and the Government saved money by making the GSEs less reliance on Government funds due to their profitability. *See* 12 U.S.C. §§ 1451, 1716; Ex. 5 ("Fannie Mae and Freddie Mac share the critical mission of providing stability and liquidity to the housing market."). The mutual assent and consideration render the Guarantee a valid and enforceable contract.

Even if not express, Plaintiff and the Government's bargained-for agreement to the Guarantee is implied by their conduct and thus, equally valid and enforceable. *See* § 4 ("A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct."). "The features of [the GSEs'] federal charters, coupled with some past government actions, ha[ve] long served to create a perception in financial markets that the Government 'implicitly guarantees' the GSEs' financial obligations." Ex. 10, at 6; *see also* ¶¶ 35-39. The Government has acknowledged that ambiguities that it created in the charters led the public to believe that the Guarantee existed, and the Government never sought to sufficiently dispel that perception because it wanted to be bound in order to receive the consideration discussed above. Ex. 6. *See* Ex. 19, at 227 ("[T]hat was probably *a deliberate ambiguity on the part of Congress* when it created the GSEs.") (emphasis added). The Government created the ambiguity because it wanted to avoid

[27] Between September 28, 2007, and May 19, 2008 Fannie Mae sold $11.13 billion of its total Junior Preferred shares $19.1 billion. Freddie Mac in the same time period sold $8.6 billion of its total Junior Preferred shares $14.1 billion. Treasury complicity in the $22 billion 2007/May 2008 GSE Junior Preferred capital raise FG Guarantee employment is unmistakable. ¶¶ 33-34.

being in open violation of the statute that purported the nonexistence of the Guarantee. Further, ambiguities are construed against the drafter, and Defendants admit that the GSE charters are incorporated in the contracts. *See Matulich*, 942 A.2d at 600; Defs.' Br. 20.

The Government also manifested that intent through conduct that dates to the 1970s. *See Zutrau v. Jansing*, No. CIV.A. 7457, 2014 WL 3772859, at *16 (Del. Ch. July 31, 2014) ("[T]he evidence of [that] conduct . . . comports with an original intent by [the Government] to keep the alleged promises."), *aff'd*, 123 A.3d 938 (Del. 2015), *and aff'd*, 123 A.3d 938 (Del. 2015); Ex. 10, at 6, 6 n.15 (discussing two "episodes during which the Government assisted troubled GSEs"). More recently, "[t]he actions of the FHFA and the Treasury last September [2008] stabilized Fannie Mae and Freddie Mac by *effectively guaranteeing* their debt and mortgage-backed obligations." *Id.* at 2-3 (emphasis added). The Government did so by providing the GSEs with over $130 billion for them to honor their debts and guarantees. *See* Ex. 13, at 7. In February 2011, the Government publicly asserted the known effect of that conduct in a coauthored report to Congress. *See id.* The Treasury then cited that part of the report in a motion to dismiss before this Court, on which the court relied in its opinion. *See* Mem. Op. at 4, *Perry I*, No. 13 Civ.1025 (D.D.C. Sept. 30, 2014), ECF No. 51 ("[T]he GSEs have benefitted from a public perception that the Government had implicitly guaranteed the securities they issued; this perception allowed the GSEs to purchase more mortgages and [MBS], at cheaper rates, than would otherwise prevail in the private market.") (quoting Treasury Def.'s Mot. to Dismiss, or, in the Alternative, for Summ. J. at 6 (D.D.C. Jan. 17, 2014) (citing Dept. of Treasury and Dept. of Housing and Urban Development, "Reforming America's Housing Finance Market," Report to Congress, at 8 (Feb. 2011))).

Those Government "actions were *intended to send a strong signal to financial markets that the U.S. would protect the interests of holders* of Fannie Mae and Freddie Mac obligations on an ongoing basis." Ex. 10, at 3 n.4 (emphasis added). Because of that conduct, "investors assumed that the government would never let Fannie or Freddie fail, for fear of the damage to the U.S. housing market, financial markets in general, and the economy." Ex. 18, at 228. In other words, the Government wanted to, and did, manifest its intent to Guarantee GSE securities in order to justifiably induce the public into buying them. Plaintiff accepted that intent to be bound by purchasing his Junior Preferred Shares. Thus, the Guarantee is a valid and enforceable contract.

Plaintiff justifiably relied on the Government's express affirmations, deliberate nondenials, and performances of its Guarantee of GSE Securities payments. *See* § 2(1). Defendants might argue, unpersuasively, that Plaintiff's belief was unjustified because:

> [T]he obligations of Fannie Mae and Freddie Mac must state that they are not guaranteed by the federal government. . . . Nevertheless, as discussed [ ], financial markets have long viewed the GSEs' obligations as carrying an "implicit" government guarantee. The federal government's recent actions were intended to send a strong signal to financial markets that the U.S. would protect the interests of holders of Fannie Mae and Freddie Mac obligations on an ongoing basis.

Ex. 9, at 3 n.4; *See* Defs.' Br. 24. All three agencies that oversee the GSEs agree. *See supra* SOF § IV. Indeed, in statements, conduct, and nondisclosures, the Government intentionally and successfully convinced countless persons worldwide, including the most sophisticated investors and market actors, that the Guarantee existed. *See id.*; Ex. 10, at 6. In fact, the Guarantee induced public purchases of the Junior Preferred Shares by such a scale and breadth that the Government considered the risk of those securities to be "systemic" and the revenues from their sales as "subsidies" to the GSEs.

The Government acknowledged in a study the benefits of its manifested intent to Guarantee GSE Securities. *See* Ex. 13, at 8. Moody's, a credit rating agency, assigned "[t]hese GSE preferred securities [ ] an Aa3 credit rating," the fourth-highest rating, because Moody's was convinced that the Junior Preferred Shares were "of high quality and [] subject to very low credit risk." Ex. 14, at 1-2; Ex. 33. Only the Guarantee could have caused those securities in such highly speculative, MBS companies to receive such a high rating. The market, particularly sophisticated actors like banks and credit rating agencies, could not have treated such risky securities as low-risk but for the Guarantee.

The Government's success in convincing the most sophisticated market actors and an enormous number of investors worldwide that the Guarantee existed is proof that its conduct "prevent[ed] [Plaintiff and the public] from learning [the] fact" that the Guarantee did not exist. § 160. As established, the Government intended that result and knew that the result would be likely. Therefore, the law requires that the Government is held to have asserted the opposite of what it concealed. In other words, the Guarantee exists and is enforceable as a matter of law.

Finally, even if the Guarantee did not actually exist, it is nevertheless enforceable due to the Government's misrepresentations and intentional failures to correct them. *See Rader v. Com. of Virginia*, 15 Va. App. 325, 330 (1992) ("Rader's representations and conduct, taken together, demonstrate fraudulent intent."); Restatement § 160 ("Action intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist."). The Government knew that the public perceived the Guarantee from its own statements (e.g., GSE charters and public statements, *see supra* § IV) and conduct and knew that disclosing its nonexistent was necessary to prevent its prior statements from being misrepresentations that the Guarantee existed. *Id.* § 161. The Government knew that perception of the Guarantee was "a basic assumption on which" the public, including Plaintiff, purchased the Junior Preferred Shares. § 161(b). That perception induced such a massive "scale and breadth of the holdings of GSE [securities]" that it subjected the country to "systemic risk." It is neither in good faith nor a reasonable standard of fairness to knowingly "tolerate[]" another to be mistaken so that the other enters into a contract. Disclosing the nonexistence of the Guarantee would have corrected Plaintiff's mistake that it existed. However, the Government did not do so. For all these reasons, the Guarantee is valid and enforceable, and Defendant may not deny it.

B. Defendants Knew of the Guarantee

Defendants knew of the Guarantee because it was publicly known (or perceived) and arose from their own charters and their own conduct with the Government.

C. Defendants Wrongfully Interfered with Plaintiff's Guarantee from the Government

Defendants wrongfully interfered with the Government's performance of the Guarantee by foreclosing any possibility that the precondition for the Government's performance would ever occur. The "improper methods" to interfere need not be illegal or independently tortious. *Maximus, Inc. v. Lockheed Info. Mgt. Sys. Co.*, 493 S.E.2d 375, 378 (Va. Sup. Ct. 1997); *Duggin v. Adams*, 360 S.E.2d 832, 837 (Va. Sup. Ct. 1987) (violating "an established standard of a trade or profession . . . or [] unethical conduct" may suffice). Wrongfulness is based on:

> (a) [T]he nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties.

See Bhole, Inc. v. Shore Invs., Inc., 67 A.3d 444, 453 (Del. 2013) (quoting R.2d Torts § 767). Notably, it does not matter whether the contract party induced by the interference acted lawfully. *See ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749, 751 (Del. 2010). Accordingly, it is irrelevant whether the Government lawfully passed the Third Amendment. "The focus of [the] claim . . . is upon the *defendant's* wrongful inducement of a [change in the] contract[ual relationship], not upon whether th[at change] itself was legally justified." *Id.*

One of Defendants' improper methods was their failure to determine each quarter whether to declare dividends. The Certificates of Designation require the Boards to do so in their sole discretion and in good faith. *See supra* § III. Accordingly, those quarterly determinations are a precondition to dividend declaration. Dividend declaration, in turn, is a precondition to the Government's performance of the Guarantee.

Defendants improperly interfered with Plaintiff's Guarantee by completely foreclosing any possibility that the precondition for his Guarantee would occur. Defendants did so by failing to even determine whether to declare dividends due to the Net Worth Sweep. ¶¶ 69-77. Thus, the Third Amendment prohibited the Government from ever performing on the Guarantee. Defendants did so intentionally in order to deprive Plaintiff (and other Junior Preferred Shareholders) of any possibility of receiving dividend payments.

Although Plaintiff did not have the right to receive dividends, he had the right to the opportunity to receive dividends. That opportunity is the entire purpose of purchasing junior preferred stock. No reasonable person would purchase ostensibly junior preferred stock if there were no possibility of receiving dividends. In fact, without that possibility, the instrument would not be junior preferred stock. Therefore, by implementing the Third Amendment each quarter by failing to declare dividends in their sole discretion, Defendants breached Plaintiff's Certificates of Designation. That breach prohibits the Government from ever performing on the Guarantee, which deprives Plaintiff the benefit of his bargain with the Government. Therefore, that breach of contract is a violation of law that constitutes improper methods of intentional interference with Plaintiff's contract with the Government.

The furtive communications between Defendants and the Government constitute a second set of wrongful acts intended to interfere with Plaintiff's Guarantee. Defendants used those improper means and methods for the purpose of depriving Plaintiff (and others) of his rightful opportunities to receive dividends and benefit from the Guarantee. *See* ¶ 70 (quoting Jim Parrot, E-mail (Aug. 17, 2012) ("The principle of 'full income sweep of all future earnings to benefit taxpayers' should lay to rest permanently the idea that the outstanding privately held pref. will ever get turned back on.")). Those unlawful discussions dated back to December 2010, when the Treasury discussed "the Administration's commitment to ensure [that] existing common equity holders will not have access to any positive earnings from the GSEs in the future" and told the FHFA of Treasury's intention "that future positive earnings of the Enterprises [will be] returned to taxpayers as compensation for their investment." Class Action, ECF No. 33, at 14. The Treasury's goal was to "[t]he maximum financial upside possible should be retained for the taxpayer if/when the GSEs return to sustained profitability." *Id.* There is no way that Defendants did not know of the Government's intent. Furthermore, regardless, Defendants knew the import of the Third Amendment and chose to give away all shareholder value in violation of its contractual, good-faith, and fair-dealing duties. Moreover, as an agent for the FHFA, Defendants acted for the benefit of the FHFA and therefore, had to and did know of its wishes and instructions. Defendants engaged in these communications in bad faith, unethically, and in violation of customary and reasonable practices in corporate governance with the intent to interfere with Plaintiff's Guarantee.

Third, Defendants concealed those means and methods until they were legally obligated to disclose them in discovery in another lawsuit. *See* ¶¶ 70; Ex. 34. The concealment was intended to, and did, prevent Plaintiff from sooner discovering his causes of action against Defendants and perpetuate the underlying, tortious interference. As such, the concealment constitutes an additional actionable, improper interference with Plaintiff's Guarantee.

Fourth, if, *en arguendo*, the Government had no intent to be bound to its Guarantee, *see supra* SOF § III, then Defendants aided and abetted that fraud. That constitutes another improper interference with Plaintiff's Guarantee. *See supra* SOF § IV.B. The Government intentionally misrepresented the existence of the Guarantee to Plaintiff (and the public) to induce Plaintiff into purchasing the Junior Preferred Stock. As established, Plaintiff reasonably relied on those misrepresentations in purchasing that stock. *See supra* § V.A. That constitutes fraud. Defendants aided and abetted that fraud by intentionally and knowingly assisting the Government to evade its Guarantee obligations by entering into the Third Amendment with the Government. That Amendment foreclosed any possibility that the Government would perform its Guarantee. Accordingly, Defendants' unlawful conduct in aiding and abetting the Government's fraud constitutes an additional wrongful act of interference with Plaintiff's Guarantee.

Plaintiff adequately alleged that due to the foregoing, intentional and wrongful interferences with his Guarantee, Defendants eliminated his dividend rights and violated his reasonable expectations as a Preferred Shareholder, causing him to suffer damages. Therefore, Defendants are liable to Plaintiff for tortious interference with contract.

VII. *Pro Se* Plaintiff Adequately Pled Claims Against the Directors

Defendants' arguments fail to show that Directors are not liable. First, Plaintiff did allege duties that Directors individually owed. See Defs.' Br. 28. He alleges that his contracts expressly require the "Board of Directors" to perform the dividend duties discussed above in their "sole discretion." ¶¶ 1-4 (quoting Ex. 4 § 2(a); Ex. 2, at 20). Thus, Directors are liable for breaching those duties. See *supra* Argument §§ IV-V. To the extent, if any, that they could be deemed nonparties to the contracts and thus, not liable for breaching them or their implied covenants, they are liable for tortious interference with those contracts, which can be fairly inferred from the Complaint. The Directors knew that the contracts existed and wrongfully interfered with them by preventing themselves from performing, and then not performing each quarter, the dividend-related actions required in the contracts. ¶70; *see supra* Argument §§ IV-V.

Second, the Directors always had the authority to declare and determine whether to declare dividends. The GSEs' 2011 Forms 10-K expressly acknowledge that authority:

> The Conservator has delegated to the Board . . . authority to function in accordance with the duties and authorities set forth in . . . our Bylaws and Board committee charters . . . . The Conservator has instructed the Board that it should consult with and obtain the approval of the Conservator before taking action . . . involving [ ] dividends . . . .

Ex. 12 at 325 (emphasis added); *accord* Ex. 12 at 207. Contrast with Defs.' Br. 28 ("[E]xpressly excluded . . . is the authority to declare [] dividends.") (emphasis added). The GSE bylaws and charters provide for that authority, which the Conservator expressly delegated to Directors. See Exs. 22, 23; ¶¶ 48-49. Furthermore, the Conservator never repudiated Plaintiff's contracts, so the Directors still owed those contractual duties. *See* ¶¶ 112-113. In addition, Directors never bothered to seek regulatory approval to declare dividends, even though such approval was given during the conservation. Thus, the Directors owed the alleged duties. See supra Argument §§ IV-V.

Third, directors are liable for corporate misconduct resulting from their decisions as a Board. The named Directors caused the GSE misconduct that gave rise to Plaintiff's claims, so they are liable. See supra Argument §§ IV-VI; *supra* n.14.

Finally, Defendants incorrectly claim that certain named Directors "were not directors at the time of the alleged wrongdoing." Defs.' Br. 29. That time was not just "when the Third Amendment was executed." *Id.* 30. The wrongdoing also predated execution, when Defendants engineered the Third Amendment, and at the end of every fiscal quarter since it went into effect. *See supra* §§ IV-VI. Thus, Directors are individually liable for the alleged misconduct.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the complaint should be denied in its entirety.

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Respectfully submitted,

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