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

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

Plaintiff concedes that he has filed an "unartfully" pleaded complaint. In fact, its defects are fatal. Even treating the explanations and amplifications contained in Plaintiff's opposition memorandum as though they were properly pleaded allegations in a complaint, Plaintiff fails to state a claim upon which relief may be granted.

Plaintiff's claims for breach of contract and breach of the implied covenant of good faith and fair dealing fail for numerous reasons. First, these claims are, by Plaintiff's own account, claims for anticipatory repudiation of a unilateral contract. Such claims are squarely barred by the law of the relevant jurisdictions, Delaware and Virginia. Second, to the extent Plaintiff's Complaint could be construed to allege that adoption of the Third Amendment, in and of itself, effected an immediate breach, Plaintiff's entire Complaint would be time-barred. Plaintiff failed to file his Complaint within the time period allowed by the longest of the potentially applicable statutes of limitation, and the exceptions Plaintiff attempts to invoke are inapplicable.

Third, Plaintiff fails to confront the D.C. Circuit's decision in *Perry Capital*, which is fatal to his breach of contract claim relating to dividends, as well as the lack of causation established by his own allegations. Plaintiff's claim for breach of implied covenant is also legally meritless. That claim differs in material ways from the implied covenant claims permitted in *Fairholme* and the legal framework of *Fairholme* in fact compels its dismissal.

Finally, Plaintiff's claim for tortious interference with contract fails at multiple levels. The contract Plaintiff alleges—a supposed guarantee by the government to pay dividends if and when declared by the Enterprises—simply does not exist as a matter of law. Nor does it exist as a matter of fact, even accepting Plaintiff's allegations as true: the allegations, public records, and other documents integral to the Complaint demonstrate that the government does not guarantee the payment of dividends to Enterprise equity holders. Moreover, Plaintiff can allege no

unlawful or unjustified action by the Individual or Enterprise Defendants that could have interfered with the non-existent contract rights. In particular, there is no legal or factual support for the suggestion that the Individual Directors acted tortiously by failing to declare dividends supposedly payable pursuant to a nonexistent government guarantee. In any event, when the Enterprises were placed in conservatorships the Conservator immediately succeeded to all rights, titles, powers, and privileges of the Enterprises and their directors to declare dividends, divesting the Directors of that power, and the Conservator eliminated all shareholder dividend payments before the Third Amendment. As for Plaintiff's claims against the Conservator, the D.C. Circuit and other courts have held that the Third Amendment was within the scope of the Conservator's statutory authority. Therefore, the Conservator's approval of the Third Amendment cannot form the basis for a claim for tortious interference.

ARGUMENT

I. COUNTS I AND II ARE ANTICIPATORY REPUDIATION CLAIMS THAT ARE PRECLUDED BECAUSE THE UNDERLYING CONTRACT IS UNILATERAL

Plaintiff's claims for breach of contract and implied covenant, as alleged in Counts I and II, are both anticipatory repudiation claims relating to a unilateral contract. Delaware and Virginia law do not permit such claims. Mem. in Supp. of Mot. to Dismiss the Compl. (Dkt. 11-1) ("Mot.") 13 n.13, 15-16; *see Fairholme v. FHFA*, 2018 WL 4680197, at *5-7 (D.D.C. Sept. 28, 2018).

Plaintiff does not dispute that the relevant contract is unilateral, that neither Delaware nor Virginia law allow claims for anticipatory repudiation of unilateral contracts, and that if Plaintiff's Counts I and II are determined to constitute anticipatory repudiation claims, they must be dismissed. Those points should all be treated as conceded. *See, e.g., Rosenblatt v. Fenty*, 734

F. Supp. 2d 21, 22 (D.D.C. 2010) ("[A]n argument in a dispositive motion that the opponent fails to address in an opposition may be deemed conceded").

While this Court's recent opinion in *Fairholme* did not address whether the implied covenant claims in those cases were barred by the limit on anticipatory repudiation (an issue as to which Defendants have moved for reconsideration), Plaintiff in this case also does not challenge Defendants' contention, Mot. 15-16, that the limit applies to implied covenant claims in the same manner as it does to their express-contract counterparts. Indeed, an implied covenant claim is but a species of a breach-of-contract claim; courts urge caution about using implied covenant theories to expand liability; and the implied covenant claim here—and in *Fairholme*—is anchored in the contract's provision for discretion in connection with future performance.

Thus, the only non-conceded point left for this Court to resolve is whether Plaintiff's claims in Count I and II are properly understood as anticipatory repudiation. They are. Plaintiff's own Complaint calls the Third Amendment an "anticipatory breach," Compl. ¶¶ 3, 75, and even his opposition to the pending motion "asserts that the Third Amendment was merely an anticipatory breach of the Junior Preferred dividend entitlements." Pl.'s Mem. in Opp. to Defs.' Mot. to Dismiss the Compl. ("Opp.") 24; *see also* Opp. 17 ("Here, the breach was anticipatory at the time of the Third Amendment. . . . [T]he Third Amendment breach was anticipatory"). Moreover, Plaintiff's substantive articulation of his legal theory precisely tracks the D.C. Circuit's articulation of the essence of an anticipatory breach claim. *Compare* Opp. 22 ("[B]y agreeing to and then implementing the Third Amendment, Defendants prevented themselves from determining whether to declare dividends," resulting in a "self-imposed impossibility to perform . . . ."), *with Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 632, 633 n.26 (D.C. Cir. 2017) (holding anticipatory repudiation consists of "a voluntary affirmative act which renders the

obligor unable… to perform" future obligations, and allegations that defendant "nullified" contractual rights "by rendering performance impossible" are in substance anticipatory repudiation claims).[1]

Moreover, Plaintiff's contract-based claims can only be understood as seeking to recover for the anticipated non-payment of future dividends, or anticipated non-exercise of discretion in whether to declare future dividends, in quarters that have yet to occur. It is undisputed that since the inception of the conservatorships, for reasons independent of the Third Amendment and not challenged by Plaintiff, the Conservator has barred Enterprise shareholders from receiving dividends. Compl. ¶ 78; *see also id*. ¶¶ 43, 87 ("common stock and [junior] preferred stock dividends will be eliminated."). As such, Counts I and II must be understood to allege that Defendants have repudiated their obligation to exercise their discretion reasonably with respect to the declaration of dividends at some undefined point *in the future* if present circumstances change. Plaintiff pointedly does not allege that absent the Third Amendment the Conservator would have declared, and Treasury would have approved, any dividend between 2013 and the present on any class of stock Plaintiff owns.

Thus, Counts I and II allege claims for anticipatory repudiation as to a unilateral contract and those claims should be dismissed as precluded by the laws of Delaware and Virginia.

II. PLAINTIFF'S CLAIMS ARE TIME-BARRED

To the extent Counts I and II could be construed not to allege anticipatory repudiation, they would be barred, along with Count III, by the applicable statutes of limitations.

[1] Against this backdrop, the passing statement on page 25 of Plaintiff's opposition that the limitation on anticipatory repudiation is "irrelevant" because Plaintiff "made no reference to anticipatory breach in Count II . . . and does not rely on that theory" cannot be credited. Plaintiff cannot cloak his claims in the anticipatory breach doctrine when convenient, only to shed that doctrine when confronted with its limitations.

A. Plaintiff's Contention That the Third Amendment Itself Constituted a Breach Is Time-Barred, and the Continuing-Violation Doctrine Does Not Apply

If, despite the plain language of the Complaint, Plaintiff is not contending that the Third Amendment was an anticipatory repudiation of future obligations, then his theory must be that the Third Amendment itself constituted an immediate, present breach. In that case, Plaintiff's claims are time-barred because over five-and-a-half years passed between the Third Amendment and Plaintiff's filing of this suit.[2] Plaintiff asks this Court to find that his claims are nevertheless timely under the continuing violation doctrine because the "wrongs [of the Third Amendment] continue." Opp. 17, 19. This argument fails because Virginia and Delaware case law make clear that neither state accepts Plaintiff's conception of the continuing-violation doctrine.[3]

Virginia law distinguishes between "acts that constitute a 'single continuous breach' and those that constitute a 'series of separate breaches.'" *Fluor Fed. Sols., LLC v. PAE Applied Techs., LLC*, 728 F. App'x 200, 202 (4th Cir. 2018) (citations and alterations omitted). "A single continuous breach occurs when 'the wrongful act is of a permanent nature' and 'produces all the damage which can ever result from it.' Conversely, when wrongful acts 'occur only at intervals,

[2] As set forth in Defendants' motion, the relevant Delaware statute of limitations for Plaintiff's claims is three years and the relevant Virginia statute of limitations is no more than five years. Mot. 10. Plaintiff does not contest that those are the applicable limitation periods. As discussed *infra* at Section III.C, Plaintiff's opposition brief recasts his Count III as a claim for tortious interference with contract. Regardless of how Count III may be construed, those same limitation periods are applicable. *See Dunlap v. Cottman Transmission Systems, LLC*, 754 S.E.2d 313, 315 (Va. 2014) (applying five-year statute of limitations to tortious interference); *WaveDivision Holdings, LLC v. Highland Capital Mgmt. L.P.*, No. CIV.A. 08C-11-132-JO, 2011 WL 13175837, at *9 (Del. Super. Ct. Oct. 31, 2011) (three-year catch-all statute of limitations covers tortious interference).

[3] The phrase "continuing violation" can be somewhat misleading, as the terminology can vary significantly in the case law. The primary distinction is between (1) a single event that gives rise to a cause of action and starts a single clock for purposes of the statute of limitations, even if some effects of that event are felt later; and (2) a series of separate, independent wrongs that each give rise to separate causes of action having separate statute-of-limitations clocks. Here, under both Virginia and Delaware law, Plaintiff's claims fall into the former category, and are accordingly time barred as explained herein.

each occurrence inflicts a *new injury* and gives rise to a new and separate cause of action.'" *Id.* (citation omitted). A limitations period is not extended by a single, continuous breach; rather, "the limitations period runs from the inception of that breach, even when the breach continues for years." *Id.* (citing *Westminster Investing Corp. v. Lamps Unlimited, Inc.*, 379 S.E.2d 316, 318 (Va. 1989)); *see also Hunter v. Custom Business Graphics*, 635 F. Supp. 2d 420, 433 (E.D. Va. 2009) ("[E]ach subsequent failure to pay did not constitute a new breach, but merely a continuation of the original breach."). "Virginia law makes clear that the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date." *Fluor*, 728 F. App'x at 203 (citation and internal quotations omitted).

Similarly, under Delaware law, a contract that causes a plaintiff's harm starts the clock for purposes of the statute of limitations where, as here, the subsequent alleged harms are caused simply by carrying out the terms of that contract. *See Elster v. Am. Airlines, Inc.*, 100 A.2d 219, 224 (Del. Ch. 1953), *disapproved of on other grounds by Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004); *see also Kahn v. Seaboard Corp.*, 625 A.2d 269, 271 (Del. Ch. 1993).

Plaintiff's claims, to the extent they do not sound in anticipatory repudiation, conceive of the Third Amendment as a single wrong with lasting harmful effects. Plaintiff alleges that the Third Amendment instantaneously "rendered the respective contractual rights of the Plaintiff . . . a nullity," and that all actions taken by Defendants subsequent to its adoption constitute a "mindless rubber stamp" of its effects. Compl. ¶ 124; *see also id.* ¶¶ 62 ("The Third Amendment language ensured that Treasury would thereafter receive the entire positive net worth of each of the Companies' [sic] quarter by quarter in perpetuity."), 4, 108, 120. Plaintiff's claims that the Third Amendment made it impossible for him to receive dividends in subsequent quarters

challenge the "continuing effect" of that purported breach. *Com. ex rel. Fair Hous. Bd. v. Windsor Plaza Condo. Ass'n, Inc.*, 768 S.E.2d 79, 94 (Va. 2014); *see also Kahn*, 625 A.2d at 271.

Moreover, to the extent Plaintiff is not relying on anticipatory repudiation, he cannot claim that dividend non-payments independently violate distinct contractual or implied covenant obligations giving rise to separate causes of action. As explained below, the subsequent non-payments are not distinct actionable breaches. *See* Section III.A-B, *infra*. And Plaintiff alleges no independent decision-making after the Third Amendment in any case. On the contrary, Plaintiff himself alleges that the Third Amendment "eliminated the Board's exercise of its contractual dividend declaration functions," Compl. ¶ 79, confirming that his real challenge is to the adoption of the Third Amendment itself. *See Elster*, 100 A.2d at 224 ("Assuming that . . . defendants did wrong to [Plaintiff] by entering into the [Third Amendment] contract it does not follow that they committed any wrong in carrying out the [Third Amendment] contract once it had been made.") (citation omitted); *cf. Am. Physical Therapy Ass'n v. Fed'n of Bds. of Physical Therapy*, 628 S.E.2d 928 (Va. 2006) (finding series of separate breaches where the defendant's serial actions required independent decision-making, which violated a contractual provision). Accordingly, Plaintiff's claims are time-barred under both Virginia and Delaware law.

B. Equitable Estoppel Did Not Toll Limitations for Plaintiff's Claims

Plaintiff argues that equitable estoppel tolled his limitations periods because he was "lulled into inaction by Defendants' assurances that they would honor their obligations." Opp. 18. But any tolling of Virginia and Delaware statutes of limitations would have to be authorized by Virginia and Delaware law, *Carter v. WMATA*, 764 F.2d 854, 855 (D.C. Cir. 1985), and Plaintiff cites no authority from those jurisdictions. In fact, the governing authority clearly shows that this exception is not available to Plaintiff.

Virginia recognizes an extremely narrow form of equitable tolling in circumstances amounting to fraud. *Lamers v. Org. Strategies, Inc.*, 2008 WL 779516, at *2 (E.D. Va. Mar. 24, 2008). But even then the plaintiff must diligently pursue his claim immediately when the fraud stops. *Id.* at *2-3 & n.3. Plaintiff, moreover, "has the burden of pleading facts that would support a finding of equitable estoppel," *Neal v. Stryker Corp.*, 2011 WL 841509, at *3 (E.D. Va. Mar. 8, 2011).

Under Delaware's version of equitable tolling, Plaintiff likewise "bear[s] the burden of pleading specific facts" supporting tolling. *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *6 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999). Moreover, the tolling is circumscribed. It applies only where "a plaintiff reasonably relies on the competence and good faith of a fiduciary," and tolling lasts only until the plaintiff is on inquiry notice of the challenged transaction. *Id.*

Plaintiff's Complaint comes nowhere close to meeting these exacting standards. There is no claim in this case that Defendants committed fraud or breached any fiduciary duty. The conclusory statement in his brief—missing from his Complaint—that he was "lulled" into not suing by unspecified "assurances" comes without any support or citation. And the Third Amendment was an open and public action as of the day it was announced. The provisions that Plaintiff now argues resulted in junior preferred shareholders continuing not to receive dividends were in plain view. Plaintiff himself represents that issues regarding the Third Amendment have "consumed" him "since late 2013," Compl. Ex. A at 28, and he has believed since at least as early as February 2016 that the Third Amendment violated his legal rights as a shareholder, Compl. ¶ 34 n.4 (describing February 2016 publication of analysis by Plaintiff). Equitable estoppel will not excuse his waiting years thereafter to bring suit. *See Neal*, 2011 WL 841509, at

*3 (no equitable tolling where plaintiff delayed filing two years after product recall that put him on notice); *Lamers*, 2008 WL 779516, at *2-3 & n.3 (similar).

Plaintiff protests that he had "proof positive" only once he saw (on an unspecified date) documents produced in other litigation. Opp. 18. But inquiry notice, not "proof positive," triggers the statute of limitations. Inquiry notice "does *not* require *actual* discovery of the reason for the injury," nor "plaintiffs' awareness of all of the aspects of the alleged wrongful conduct"; it merely requires "facts sufficient to put them on inquiry." *Dean Witter*, 1998 WL 442456, at *7. *See Jones v. Saxon Mortg., Inc.*, 980 F. Supp. 842, 847 (E.D. Va. 1997) ("Inquiry notice is triggered" by "possibility" of wrongdoing, not "complete exposure"), *aff'd*, 537 F.3d 320 (4th Cir. 1998). Plaintiff cannot rely on equitable estoppel to excuse his belated filing.

C. Class Action Tolling Did Not Toll Limitations for Plaintiff's Claims

Finally, class action tolling under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), does not save Plaintiff's claims from the time bar. Because Plaintiff brings exclusively state-law claims, Plaintiff can rely on class action tolling only to the extent that Virginia and Delaware have adopted such a doctrine. *See Carter*, 764 F.2d at 855; *Wade v. Danek Med., Inc.*, 182 F.3d 281, 289 (4th Cir. 1999).

The Virginia Supreme Court has explicitly rejected any form of class action tolling. *Casey v. Merck & Co., Inc.*, 722 S.E.2d 842, 846 (Va. 2012) ("[A] putative class action cannot toll the running of the statutory period for unnamed putative class members who are not recognized under Virginia law as plaintiffs or represented plaintiffs in the original action."). This holding is dispositive as to claims under Virginia law and governed by Virginia statutes of limitation regardless whether the claim is brought in state or federal court. *See, e.g., Flick v. Wyeth LLC*, 2012 WL 4458181, at *6 (W.D. Va. June 6, 2012); *Sanchez v. Lasership, Inc.*, 2012

WL 3730636, at *14 (E.D. Va. Aug. 27, 2012). Plaintiff's claims against Freddie Mac and its directors thus are not tolled.

While Delaware does not categorically reject *American Pipe* tolling, such tolling is subject to important limitations that make it inapplicable here. *American Pipe* tolls the statute only for the same claims,[4] and only as to the same defendants,[5] as in the prior class action. Further, any tolling ceases, and the running of the limitations period resumes, upon dismissal of the class action, regardless whether any claims are later reinstated on appeal. *In re Copper Antitrust Litig.*, 436 F.3d 782, 793 (7th Cir. 2006); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1382 (11th Cir. 1998) (*en banc*); *Stone Container Corp. v. United States*, 229 F.3d 1345, 1355 (Fed. Cir. 2000).

Here, Plaintiff himself insists that the prior class actions on which he premises his plea for tolling "assert different claims against mostly different defendants based on different theories." Opp. 2; *see also* Opp. 14-15 (emphasizing critical "differences" between this case and previous ones). Indeed, none of the class actions consolidated in this Court under No. 13-mc-1288 named as defendants any Fannie Mae or Freddie Mac directors, who comprise the vast majority of defendants in the instant case. Plaintiff emphasizes as well that the tortious interference claim he contends is presented by Count III was "not asserted" in any prior class

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[4] *See, e.g.*, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 467 & n.14 (1974) (tolling in *American Pipe* depended on the prior class action including "exactly the same cause of action subsequently asserted," *i.e.*, "complete identity of the causes of action"); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 27 F. Supp. 3d 1015, 1020–21 (N.D. Cal. 2014) (same).

[5] *See*, e.g., *Arneil v. Ramsey*, 550 F.2d 774, 782 n.10 (2d Cir. 1977) ("nothing in *American Pipe* suggests that the statute be suspended from running in favor of a person not named as a defendant in the class suit"), *overruled on other grounds by Muto v. CBS Corp.*, 668 F.3d 53 (2d Cir. 2012); *Ballard v. Tyco Int'l Ltd.*, 2005 WL 928537 (D.N.H. Apr. 22, 2005); *Anderson v. Cornejo*, 1999 WL 258501, at *4 (N.D. Ill. Apr. 21, 1999); *Lindner Dividend Fund v. Ernst & Young*, 880 F. Supp. 49, 53-54 (D. Mass. 1995); *Mott v. R.G. Dickinson & Co.*, 1993 WL 63445, at *5 (D. Kan. Feb. 24, 1993).

actions. Opp. 15. Plaintiff's suggestion that tolling should still apply because "the facts asserted by Plaintiff here are practically identical" (Opp. 21) strains credulity: none of the prior complaints even mention the supposed "implied guarantee" that is the foundation of Count III.

Finally, even if class action tolling applied to Plaintiff's claims, they would still be time-barred because the applicable limitations periods have expired even after subtracting periods of time in which the claims in the class actions were pending. The Third Amendment was adopted on August 17, 2012. Compl. ¶ 1. The first class action, *Liao v. Lew*, No. 13-cv-1094, was filed on July 16, 2013, after eleven months had already passed. The class action claims were then dismissed by final judgment on September 30, 2014, *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014), until some of them were ultimately revived by the D.C. Circuit on February 21, 2017. Thus, the statutes ran for eleven months before the first class action was filed (August 17, 2012 through July 16, 2013) and for another 29 months (September 30, 2014 through February 21, 2017) while the class actions were dismissed, for a total of 40 months, exceeding the three-year (36-month) Delaware statute of limitations. Plaintiff's Delaware claims were thus *already* time-barred at the time the D.C. Circuit revived certain of the class action claims.[6]

[6] Contrary to a suggestion Plaintiff makes in a footnote, the Virginia procedural statute requiring that limitations defenses be raised via responsive pleading does not preclude consideration of Defendants' limitations defense on this motion to dismiss. "It is axiomatic that a federal court sitting in diversity will apply state substantive law and federal procedural law." *ABLV Bank v. Advanced Def. Studies Inc.*, 2015 WL 12517012, at *2 (E.D. Va. Apr. 21, 2015) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). Thus, federal courts routinely dismiss Virginia claims on limitations grounds at the Rule 12(b)(6) stage where, as here, untimeliness is evident from the face of the complaint. *See, e.g.*, *Lamers*, 2008 WL 779516, at *2; *Neal*, 2011 WL 841509, at *3; *Jones*, 980 F. Supp. at 847; *Flick*, 2012 WL 4458181, at *6; *Sanchez*, 2012 WL 3730636, at *14.

III. EVEN IF NOT TIME-BARRED, PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM

A. Plaintiff Fails to State a Claim for Breach of Contract (Count I)

D.C. Circuit precedent requires dismissal of Plaintiff's claim for breach of "the contractual right of the Plaintiff to receive dividend payments" (Compl. ¶ 110). Enterprise shareholders (like most shareholders generally) "do not have a present or absolute right to dividends which are subject to the discretion of the board." *Perry Capital*, 70 F. Supp. 3d at 237 (D.D.C. 2014). And "[w]ithout a contractual right to dividends, the plaintiffs cannot state a claim for breach of contract specifically based on their alleged dividend entitlements." *Id.* at 237-38. The D.C. Circuit agreed: Enterprise shareholders have "no enforceable right to dividends because the certificates accord the Companies complete discretion to declare or withhold dividends." 864 F.3d at 629.

To avoid this dispositive decision, Plaintiff appears to re-characterize Count I as a claim that "Defendants prevented themselves from determining whether to declare dividends," resulting in a "self-imposed impossibility to perform." Opp. 22; *see also id.* 23 ("Defendants prevented themselves from ever exercising 'their sole' discretion"). The D.C. Circuit was well aware, however, that "the Third Amendment makes it impossible for the class plaintiffs to receive dividends," 864 F.3d at 629, but nevertheless held that plaintiffs did not state a claim for breach of contractual obligations regarding dividends. That holding is dispositive here.

Plaintiff similarly makes no effort to deal with the causation flaw in Count I: Plaintiff's own allegations plead that dividends stopped and the Fannie Mae and Freddie Mac boards of directors lost any discretion to declare dividends when the conservatorships started *in 2008*, four years before the Third Amendment. Mot. 13 (citing Compl. ¶¶ 43, 78, 87). Plaintiff's opposition brief, in fact, highlights the causation problem by disclaiming any challenge to those

2008 actions. Opp. 1. Plaintiff says that Defendants' causation argument "fails" because his assertion is not "that Defendants breached the contract by failing to declare dividends but rather, by failing *to determine whether* to declare them," Opp. 24 (emphasis added). That distinction is both meaningless and non-responsive. If Plaintiff received zero dividends with the Third Amendment in place, but also would have received zero dividends absent the Third Amendment, any injury he claims to have suffered with regard to dividends cannot have been caused by the Third Amendment.[7] The Court should dismiss Count I.

B. Plaintiff Fails to State A Claim for Breach of Implied Covenant (Count II)

Plaintiff's claim for breach of implied covenant differs in material ways from the implied covenant claims that this Court declined to dismiss in *Fairholme*, and applying the legal holdings in *Fairholme* to the different allegations of Plaintiff's Complaint leads to a different result. Moreover, we respectfully contend that the claims for breach of implied covenant in *Fairholme* bore the same defects that required dismissal of the contract claims—they are all prohibited claims for anticipatory repudiation of a unilateral contract. For both of these reasons, Plaintiff's implied covenant claims should be dismissed.

1. Plaintiff's Allegations Regarding "*De Facto* Nationalization" of the Enterprises Distinguish His Complaint from Those of the Plaintiffs in *Fairholme*

This Court held in *Fairholme* that the plaintiffs there, based on the allegations in their complaints, had sufficiently alleged that they could have reasonably expected in August 2012 that the Enterprises would "work back toward normalcy" and that shareholders therefore "could

[7] To the extent Count I purports to plead breach of contractual dividend obligations that will come due *in the future*, it would sound in anticipatory breach and would fail due to the limitations on such claims as discussed in Defendants' motion at 15-16 [and *supra* at Section I]. Regardless, the binding Circuit precedent that Enterprise holders cannot state claims for breach of a contractual obligation to pay dividends independently requires dismissal of Count I in its entirety.

not reasonably expect the Net Worth Sweep." *Fairholme*, 2018 WL 4680197, at *13. We respectfully believe this holding is incorrect, including because the relevant expectation centers on the shareholder contract itself, and whether the parties would have included a provision in it forbidding the Third Amendment had they addressed the matter in writing. *Blaustein v. Lord Baltimore Capital Corp.*, 84 A.3d 954, 959 (Del. 2014) ("[T]he implied covenant is used in limited circumstances to include what the parties would have agreed to themselves had they considered the issue in their original bargaining positions at the time of contracting." (internal quotation marks omitted)); *see also Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) ("Only when it is clear from the writing that the contracting parties would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to that matter may a party invoke the covenant's protections." (internal quotation marks omitted) (alteration in original)). Regardless, applying this Court's framing of the analysis in *Fairholme* to the allegations in Plaintiff's Complaint requires dismissal of the implied covenant claims.

Plaintiff's factual allegations here are materially different from those supporting the implied covenant claims in *Fairholme*. Plaintiff's Complaint does not allege that it would have been reasonable in August 2012 to expect the Enterprises to "return to normalcy." To the contrary, Plaintiff alleges that the GSEs had been "*de facto* nationalized" prior to the Third Amendment and that the Third Amendment was a "mere extension" of this nationalization. *See* Compl. ¶ 29 (in 2009, the Enterprises were "*de facto* nationalized"); Compl. ¶ 71 (the Enterprises were "effectively nationalized … from the conservatorship start … [with] little inclination to pay Fannie Mae, Freddie Mac or their equity owners"); Compl. ¶ 72 (Third Amendment is a "mere extension of GSEs 2009 de facto Nationalization"). Thus, the allegations in Plaintiff's Complaint do not allow for a reasonable expectation for private shareholder

dividends or a return to normalcy or anything else other than continued operation of the Enterprises as, in Plaintiff's words, "effectively nationalized" entities. Accordingly, even under the *Fairholme* analysis, Plaintiff's claim for breach of implied covenant should be dismissed.

2. Plaintiff Cannot State an Implied Covenant Claim Based on an Alleged Duty to Exercise "Sole Discretion" to Decide Whether to Issue Dividends

Plaintiff's Opposition alleges that the Defendants, by agreeing to the Third Amendment, breached the implied covenant in two ways: (i) they allegedly made it impossible for Plaintiff to realize value from dividend rights, Opp. 25 (citing Compl. ¶¶ 81, 121), and (ii) the Individual Defendants allegedly gave up "their 'sole discretion' in deciding whether to issue dividends," Opp. 25 (citing Compl. ¶¶ 6 & n.2, 56, 63).

The first of these alleged breaches tracks the claim in *Fairholme*. This Court made two key legal holdings in *Fairholme* that require dismissal of Plaintiff's claim for breach of implied covenant: (1) federal law, including HERA, is incorporated into the shareholder contract, and (2) if there is a gap in the shareholder contract to be filled by the implied covenant, it should be consistent with what the parties would have expected the contract to provide had they addressed the matter at the time, here in August 2012. *Fairholme*, 2018 WL 4680197, at *9. As this Court held, HERA—and therefore the shareholder contract—permits the Conservator to act in the best interests of the Agency, authorizes the Conservator to take action without regard for the interests of private shareholders, and preempts any fiduciary duty otherwise owed to shareholders. *Fairholme*, 2018 WL 4680197 at *15-16. In these circumstances, to the extent the shareholder contract—including HERA—can be thought to have a gap, it must be filled consistent with the other terms of the shareholder contract and the parties' reasonable expectations of their contract rights in August 2012. We submit that, in light of these legal holdings, this Court's decision in *Fairholme*, even accepting the *Fairholme* allegations as true, is incorrect. No one could have

reasonably expected in August 2012 that the shareholder contract incorporating HERA would have included an implied covenant that silently overruled HERA and imposed duties on the Conservator to act in the interests of private shareholders over those of the Agency.

The second of these alleged breaches—relating to the Individual Directors supposedly "giv[ing] up" their discretion to declare dividends—is not addressed in *Fairholme*, but cannot support an implied covenant claim under the logic of the decision. As an initial matter, the Individual Directors lost their ability to declare dividends long before the Third Amendment. *See* 12 U.S.C. § 4617(b)(2)(A)(i) (transferring directors' powers and privileges to the Conservator in 2008). Moreover, any alleged failure to exercise "discretion" did not cause Plaintiff's damages, a critical element of an implied covenant claim. *See* Section III.B.1, *supra*; *Allen v. El Paso Pipeline GP Co., L.L.C.*, 2014 WL 2819005, at *10 (Del. Ch. June 20, 2014) ("[T]he elements of an implied covenant claim remain those of a breach of contract claim"); *Carr v. Fed. Nat'l Mortg. Ass'n*, 92 Va. Cir. 472, 2013 WL 12237855, at *4 (2013) ("It is well-settled that Virginia law does not recognize an independent cause of action for breach of the implied warranty of good faith and fair dealing, but it does give rise to a breach of contract claim.").

Attempting to escape the fact that HERA, not the Third Amendment, deprived the Individual Directors of "sole discretion" over dividends, Plaintiff argues that the Individual Directors breached the implied covenant not by failing to declare dividends but by failing to "exercise their sole discretion in *determining whether to declare dividends*." Opp. 26 (emphasis added); *see also* Opp. 24 (alleging that the contractual breach was not "failing to declare dividends but rather, by failing to *determine whether to declare* them." (emphasis added)). This

is a distinction without a difference.[8] Moreover, if the distinction had any validity, Plaintiff cannot claim that he was harmed by the Directors' failure to determine whether to declare dividends they had no authority to issue unilaterally, nor can he seriously claim that he had a reasonable expectation that the Boards would engage in that pointless exercise.[9] *See* Section III.A, *supra* (explaining the failure to plead causation).

C. Plaintiff's Count III Fails to State a Claim for Tortious Interference With Contract

On its face, the Complaint does not assert a claim for tortious interference with contract. Count III instead alleges that Defendants "aid[ed] and abett[ed]" a purported government breach of contract. Compl. ¶¶ 123-25. As addressed in Defendants' opening brief, and not contested by Plaintiff, there is no such cause of action as aiding and abetting a breach of contract. Mot. 27. Accordingly, Count III fails to state a claim and should be dismissed.

Plaintiff acknowledges that Count III is "unartfully" pleaded, Opp. 32, and seeks to "reserve[] his right to replead" to "clearly allege" a claim for tortious interference with contract. Opp. 32 n.24.[10] But repleading here would be futile because Plaintiff's Opposition demonstrates

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[8] Contrary to Plaintiff's repeated assertions, the stock certificates grant the directors "sole discretion" to "declare" dividends, not to "determine whether to declare" them. *See, e.g.*, Opp. Ex. 2 at 20 ("However, dividends are payable only if declared by our Board of Directors in its sole discretion . . ."); *compare* Opp. 28 (paraphrasing this language as saying that the GSE Boards' have "'sole discretion' to *determine whether to declare* dividends" (emphasis added)).

[9] Plaintiff cannot rely on what he calls the "Retraction" (the September 11, 2008 reversal of Director Lockhart's decision to cancel the declared August 2008 Fannie Mae dividend, *see, e.g.*, Compl. ¶ 14, Opp. 7-8), to argue that the PSPAs preserved the Boards' "sole discretion" to declare dividends. Treasury's press release announcing this action makes clear that it applies to "[d]ividends actually declared by a GSE *before the date of the senior preferred stock purchase agreement*." Opp. 7 (quoting Opp. Ex. 7) (emphasis added). It does not provide the Boards with any discretion to continue declaring dividends after the date of the PSPAs (that is, after September 2008).

[10] Plaintiff's status as a *pro se* litigant does not entitle him to any special solicitude. Plaintiff is not only a sophisticated investor, but a prominent attorney who has practiced many years.

Footnote continued on next page

that he cannot, as a matter of law, state a claim for tortious interference with contract. Even an amended complaint containing all of the factual assertions made in Plaintiff's Opposition would fail to allege the essential elements of tortious interference with contract: Plaintiff cannot allege (1) an underlying contract between Plaintiff and the government whereby the government guaranteed to pay dividends that the Enterprise Boards of Directors did not pay, and (2) that Defendants tortiously interfered with any such contract.

1. The Government Has Never Guaranteed to Pay Dividends Declared on Equity Securities Issued by the Enterprises

Plaintiff's theory, as newly explained in his Opposition, rests on alleged purported government guarantee to pay any dividends that the Enterprise Boards declared but failed to pay to Junior Preferred Shareholders. Opp. 32. That purported guarantee is the alleged contract between Plaintiff and the government with which Defendants supposedly interfered. Opp. 33.

But neither the allegations of the Complaint nor the facts contained in the Opposition support the existence of a contractual promise by the government to guarantee payment of dividends. Indeed, such an alleged implied-in-fact guarantee would violate the unambiguous congressional statement that no "securities or obligations issued by the [E]nterprises . . . are backed by the full faith and credit of the United States." 12 U.S.C. § 4501(4). *See also In the Matter of Penn Central*, 831 F.2d 1221, 1229 (3d Cir. 1987) (holding there was no implied-in-

Footnote continued from previous page
Compl. Ex. A at 42. As this Court has held, "the benefits of the liberal standards that are afforded to *pro se* litigants" do not apply to *pro se* litigants who are licensed attorneys and such a "plaintiff's *pro se* status will not weigh in favor of denying the defendants' motions to dismiss." *Richards v. Duke Univ.*, 480 F. Supp. 2d 222, 235 (D.D.C. 2007); *see also, e.g., Tracy v. Freshwater*, 623 F.3d 90, 102 (2d Cir. 2010) ("a lawyer representing himself ordinarily receives no such solicitude at all").

fact contract where statutory provisions "repudiated the [alleged] commitment" and "no government official had the authority to enter into such a contract").

Even if that statutory pronouncement could somehow be disregarded, Plaintiff alleges no express writing memorializing the purported dividend-guarantee, no public or private statements promising the dividend-guarantee, and no course of conduct establishing or reflecting the supposed dividend-guarantee.

Plaintiff relies heavily on a September 7, 2008 statement by Treasury Secretary Paulson referring to "ambiguities in the [Enterprises'] charters, which have been perceived to indicate government support for [Enterprise] debt and guaranteed MBS." Opp. 6, 35-36. But this statement does not support Plaintiff's allegation that the government has contractually guaranteed the payment of dividends to Junior Preferred Shareholders such as Plaintiff. It does not refer to dividends, or Junior Preferred Shareholders, or any other equity securities issued by the Enterprises at all, but only to Enterprise ***debt and mortgage backed securities***. Even as to such securities, the Treasury Secretary's Statement merely comments on certain perceptions; it in no way recognizes—much less creates— a binding contractual guarantee. The Complaint's reliance on the Treasury Secretary's statement is wholly insufficient to allege a contract between the government and Plaintiff.[11]

[11] There can be no dispute that Plaintiff's Junior Preferred Stock constitutes equity in—not debt of—the Enterprises. *See, e.g.* Fannie Mae, 2017 Annual Report (Form 10-K) ("Fannie 2017 10-K") at 55 (listing preferred stock as equity on balance sheet); Freddie Mac, 2017 Annual Report (Form 10-K) ("Freddie 2017 10-K") at 216 (same); Fannie Mae, Offering Circular, 8.25% Non-Cumulative Preferred Stock, Series T (May 19, 2008) at 22 ("dividend payments on our equity securities, including Preferred Stock, may not be paid"). In addition, FHFA Director Lockhart testified to Congress that the Enterprises' "preferred stock is part of the issuing firm's equity account and is issued to absorb losses ahead of debt holders," demonstrating in one statement that the preferred shares were (i) equity, and (ii) not guaranteed but instead served to absorb losses ahead of debt. Statement of the Honorable James B. Lockhart III, Director FHFA, Before the Senate Committee on Banking, Housing, and Urban Affairs (Sept. 23, 2008).

Plaintiff cites myriad other sources in his Opposition brief to try to shore up the Complaint, but none of these materials demonstrates a government guarantee to pay dividends to Junior Preferred Shareholders. Indeed, the materials contradict Plaintiff's position by expressly disclaiming such a guarantee. For example, the Freddie Mac Offering Circular states: "We [Freddie Mac] alone are responsible for our obligations under and for making payments on the Preferred Stock. ***The Preferred Stock is not guaranteed by, and is not a debt or obligation of, the United States*** or any federal agency or instrumentality other than Freddie Mac." Freddie Mac, Offering Circular, Fixed-to-Floating Rate Non-Cumulative Perpetual Preferred Stock (Dec. 4, 2007) at 1 (emphasis added); *see also* Fannie Mae, Offering Circular, 8.25% Non-Cumulative Preferred Stock, Series T (May 19, 2008) at 1 (similar). The Enterprises' filings with the SEC similarly and expressly state that their securities are not guaranteed by the government. *See, e.g.*, Freddie 2017 10-K at 163 ("Our securities and other obligations are not guaranteed by the U.S. government and do not constitute a debt or obligation of the U.S. government or any agency or instrumentality thereof, other than Freddie Mac"); Fannie 2017 10-K at 4 ("[T]he U.S. government does not guarantee our securities or other obligations.").

Thus, Plaintiff cannot allege the most fundamental element of a claim for tortious interference with contract: the existence of an underlying contract with which Defendants could have interfered. *See, e.g.*, *Boyer v. Wilmington*, 1997 WL 382979, at *10 (Del. Ch. June 27, 1997) (to allege a claim for tortious interference with contract, "there must be a contract"); *Chaves v. Johnson*, 230 Va. 112, 121, 335 S.E.2d 97, 103 (Va. 1985).

2. Plaintiff Has Not Alleged—and Cannot Allege—That Defendants Acted Tortiously To Interfere With the Purported Contract Between Plaintiff and the Government

Besides failing to allege an underlying contract between himself and the government, Plaintiff cannot state a claim for tortious interference because Plaintiff fails to allege that Defendants acted tortiously.

a. Plaintiff's Allegation That the Individual and Enterprise Defendants Failed to Determine Whether to Declare Dividends Fails to State a Claim

Plaintiff states in his Opposition brief that Defendants' supposedly tortious conduct was to "fail[] to even determine whether to declare dividends due to the Net Worth Sweep." Opp. 40. This allegation, even if it were made in the Complaint, would not state a claim.

First, Plaintiff's tortious interference claim amounts to a theory that a principal whose obligation would be guaranteed by a third party commits an actionable tort if it fails to decide whether to take on the underlying obligation that would be guaranteed. Not surprisingly, Plaintiff cites no case law and offers no basis to predict that Delaware or Virginia would recognize tortious interference liability on such a dubious and counterintuitive basis.

In any event, the Individual and Enterprise Defendants had no authority to declare a dividend—that decision rested entirely with FHFA as Conservator. Under HERA, the Conservator has succeeded to all rights, titles, powers, and privileges of the Enterprises and their officers and directors. *See* 12 U.S.C. § 4617(b)(2)(A)(i). The Conservator eliminated all dividends to junior shareholders in 2008 at the commencement of the conservatorships. Compl. ¶ 43 (quoting Statement of FHFA Director James B. Lockhart (Sept. 7, 2008)). It cannot have been wrongful for the Enterprises and Individual Defendants to follow the directive of the Conservator that no dividends would be paid during conservatorship. Accordingly, even accepting the allegations in the Opposition, these Defendants' actions were lawful and

justifiable, and as such they cannot form the basis for a claim for tortious interference. *See, e.g.*, *Glass v. Glass*, 228 Va. 39, 54, 321 S.E.2d 69, 78 (1984) (holding no tortious interference because "[defendants'] actions being lawful, whether they acted in a spirit of actual malice, hostility, or ill will toward plaintiffs is of no legal consequence."); *WaveDivision Holdings, LLC v. Highland Capital Mgmt., L.P.*, 49 A.3d 1168, 1174 (Del. 2012) (alleged interference must be without justification). Thus, the Conservator alone has the authority to declare dividends.

b. Because The Third Amendment Was Within the Scope of the Conservator's Statutory Authority, It Cannot Form the Basis for a Claim of Tortious Interference Against FHFA

To the extent that Plaintiff is asserting that the decision of FHFA as Conservator to execute the Third Amendment constitutes tortious interference, he is wrong and his claim must be dismissed. As the D.C. Circuit acknowledged, HERA expressly authorizes the Conservator to act in the best interests of the Enterprises or the Agency, 12 U.S.C. § 4617(b)(2)(J)(ii). *Perry Capital*, 864 F.3d at 607-08. Because the Third Amendment was neither "wrongful" nor "without justification," it cannot support a claim for tortious interference. *See, e.g.*, *Boyer*, 1997 WL 382979, at *10 (rejecting claim for tortious interference); *Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 708 S.E.2d 867 (2011) (same). Indeed, as this Court held, HERA preempts state tort law that would conflict with or limit the Conservator's expansive statutory powers and authorities. *Fairholme*, 2018 WL 4680197, at *15.

IV. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE INDIVIDUAL DEFENDANTS

A. Plaintiff Does Not Allege that the Director Defendants Breached Any Contractual Duty They Personally Owed Him

As noted in the motion to dismiss, Plaintiff's breach of contract and implied covenant claims against the Directors are predicated on the Enterprises' preferred stock certificates. Compl. ¶¶ 104, 108. But Plaintiff does not allege that the Directors were parties to the contracts.

See Mot. 27-28. Instead, he alleges only that these contracts were "between the Plaintiff *and the Companies*." Compl. ¶ 102 (emphasis added); *id.* ¶¶ 117-20; Mot. 28.

Moreover, Plaintiff cannot state a claim against the Individual Defendants because in 2008, when the GSEs entered conservatorship, FHFA as Conservator "immediately succeed[ed] to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, *or director* of such regulated entity . . . ." 12 U.S.C. § 4617(b)(2)(A)(i) (emphasis added). In fact, the Conservator eliminated common and preferred stock dividends (other than dividends on the senior preferred stock issued to Treasury) during the conservatorship. Plaintiff argues that the Individual Defendants were delegated back the "sole discretion" to declare dividends. Opp. 43. But the language that Plaintiff quotes demonstrates that the Conservator did *not* delegate "sole discretion" over dividends to the boards; it says that the Board must "consult with and *obtain the approval* of the Conservator before taking action . . . involving capital stock, dividends, [and] the senior preferred stock purchase agreement." Opp. Ex. 12 at 207 (emphasis added) (cited at Opp. 43).

B. Plaintiff Does Not Adequately Plead a Tortious Interference Claim Against the Individual Directors

Plaintiff argues that even if the Directors were not parties to the contract, they should be held liable for tortious interference with contract. The claim asserted against the Individual Directors must fail for additional reasons than those noted above, Section III.C, *supra*. The elements of the claim require "(1) a contract, (2) about which defendant knew, *and* (3) an intentional act that is a significant factor in causing the breach of such contract, (4) without justification, (5) which causes injury." *Bhole, Inc. v. Shore Invs., Inc.*, 67 A.3d 444, 453 (Del. 2013); *see also Dunlap v. Cottman Transmission Sys., LLC*, 754 S.E.2d 313, 318 (Va. 2014). Under Delaware law, the plaintiff "must plead[] and prove[] that the [interfering party] sought

not to achieve permissible financial goals but sought maliciously or in bad faith to injure plaintiff." *Bhole*, 67 A.3d at 453. Virginia law likewise requires plaintiffs in a case like this to allege and prove "that the defendant employed 'improper methods.'" *Dunlap*, 754 S.E.2d at 318. The only allegation of bad faith or impropriety by any party was an email exchange by "Treasury/Obama Administration officials," not by the Board of Directors. *See* Compl. ¶ 70. Plaintiff does not adequately plead facts to support any allegation that the Directors improperly sought to injure Plaintiff.

In addition, Plaintiff cannot allege that the Directors engaged in any intentional act that prevented the Government "from ever performing on the" alleged guarantee of the opportunity to potentially be issued a dividend. *See* Opp. 33. Most charitably construed, Plaintiff asserts that the Directors *refrained* from taking a specific action. *Id.* 42 (asserting that the Board of Directors failed "to perform the dividend duties . . . in their 'sole discretion'"). But mere refusal to act—even if it induces a party to break its contract—is generally not enough to constitute tortious interference. *See Kable Prods. Servs., Inc. v. TNG GP*, 2017 WL 2558270, at *8 (Del. Super. Ct. June 13, 2017) (granting motion to dismiss on tortious interference claim in part because mere refusal to deal with a party does not support a claim of tortious interference).

More importantly, Plaintiff fails to allege how any action (or inaction) taken by the Directors caused the *Government* to breach its alleged contract. As Plaintiff concedes, authority to approve a dividend rests exclusively in the hands of the Conservator. *See* Opp. 43 ("The Conservator [*i.e.*, the Federal Housing Finance Agency] has instructed the Board that it should consult with and obtain the approval of the Conservator before taking action . . . involving [] dividends . . . . "). Plaintiff does not allege that the Directors induced the Conservator not to issue a dividend. Rather, Plaintiff asserts that the Directors "prevented *themselves* from

performing . . . the dividend-related actions required in the contract." Opp. 43 (emphasis added). Because the Directors only allegedly "prevented themselves" from performing certain actions—and did not prevent the Government from fulfilling any supposed guarantee—the Directors cannot be liable for any tortious interference of Plaintiff's contract with the Government.

C. Many of the Director Defendants Were Not Directors at the Time of the Relevant Events

In addition to the defects already noted, many of the named directors were not directors until after the Third Amendment was executed. *See* Mot. 29-30. Directors cannot be liable for wrongs they did not commit. *See Greening v. Moran*, 953 F.2d 301, 306 (7th Cir. 1992) (affirming an award of sanctions based on naming defendants who "were not directors at the time of the complaint" when the plaintiff sought "damages for past wrongs"). Plaintiff attempts to evade this limitation by arguing that abiding by the Third Amendment constituted breach, but this is flawed logic. *See supra* at Section II.A. This is a separate and independent reason to dismiss all claims asserted against Defendants Amy Alving, Diane Nordin, Saiyid Naqvi, Sara Mathew, Steven Kohlhagen, Richard Hartnack, Thomas Goldstein, Lance Drummond, and Raphael Bostic.

CONCLUSION

For the reasons set forth above and in Defendants' opening brief, the Court should dismiss Plaintiff's Complaint in its entirety.

Dated: October 24, 2018

Respectfully submitted,

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