

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JOSHUA J. ANGEL

Plaintiff,

v.

FEDERAL HOME LOAN MORTGAGE
CORPORATION, et al.,

Defendants,

and

The Federal Housing Finance Agency, as
Conservator for The Federal Home Loan
Mortgage Corporation and The Home Loan
Mortgage Association,

Nominal Defendant.

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

ORAL ARGUMENT REQUESTED

**PLAINTIFF’S MOTION FOR LEAVE TO FILE A SURREPLY TO
DEFENDANTS’ AND NOMINAL DEFENDANT’S JOINT MOTION TO DISMISS**

Plaintiff Joshua A. Angel (“Plaintiff”) respectfully moves for leave to file a surreply brief to the Motion to Dismiss the Complaint (“Motion to Dismiss”), dated July 12, 2018 and jointly filed by all defendants in interest (collectively, “Defendants”) and the nominal defendant (“Nominal Defendant”).¹

On September 10, 2018, Plaintiff filed his Memorandum in Opposition to Defendants’ Motion to Dismiss the Complaint (“Opposition Brief”). *See* ECF No. 17. On October 24, 2018,

¹ Defendants are Fannie Mae, Freddie Mac (collectively, the “GSEs”), and the members of each GSE’s board of directors as constituted on August 17, 2012 (collectively, the “Directors”). The Nominal Defendant is the Federal Housing Finance Agency in its capacity as conservator of the GSEs (“Conservator”).

Defendants and Nominal Defendant jointly filed a joint Reply Memorandum in Support of Motion to Dismiss the Complaint (“Reply Brief”). *See* ECF No. 20.

Between the filings of those two briefs, two significant events occurred. First, on September 28, 2018, this Court ruled on the motion to dismiss filed in certain related actions (collectively, the “*Fairholme* Actions”). *See Fairholme Funds v. Fed. Housing Fin. Agency*, No. 13 Civ. 1053, 2018 WL 4680197 (D.D.C. Sept. 28, 2018) (“*Fairholme* Opinion”). Second, on October 1, 2018, the United States, as a defendant in thirteen related actions pending in the U.S. Court of Federal Claims (collectively, the “Court of Claims Actions”), filed a ninety-nine-page motion to dismiss those actions (“Motion to Dismiss the Court of Claims Actions”) without joinder of the nominal defendants in those actions, Fannie Mae and Freddie Mac (collectively, the “GSEs”).

The *Fairholme* defendants are United States agencies: Federal Housing Finance Agency (“FHFA”), GSEs, and Conservator. The *Fairholme* Actions and Court of Claims Actions (collectively, the “Other Actions”), involve claims for breach of contract, breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, and violations of Delaware and Virginia statutory law. The Other Actions emanate from their respective defendants’ participation in the August 17, 2012 amendment (“Third Amendment”) to the senior preferred stock purchase agreement (“SPSPA”) between the U.S. Department of the Treasury (“Treasury”) and the GSEs, dated September 6, 2008. The Directors are not parties in the Other Actions.

Plaintiff’s complaint (“Complaint”)² alleges that the Directors are liable for breach of contract, breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, tortious interference with contract, and violations of Delaware and Virginia statutes regarding the

² Citations to the Complaint are denoted by “¶ ___.”

Directors' participation in the adoption of, and performance under, the Third Amendment, which was effective on January 1, 2013. The contract claims are based on the dividend rights and obligations stated in the certificates of designation for Plaintiff's junior preferred shares in the GSEs (collectively, the "Junior Preferred Shares"). The tortious interference claim arises from the United States' guaranty of payment pursuant to the Junior Preferred Shares.

As set forth in the proposed surreply brief ("Surreply Brief") attached to this motion, Plaintiff will voluntarily dismiss his tortious interference claim by filing an amended complaint that omits that claim. The December 17, 2017 amendment ("Fourth Amendment") to the SPSPA, the *Fairholme* Opinion, the Court of Claims Motion to Dismiss, and the Reply Brief (collectively, the "New Materials") collectively moot that claim.

In their reply brief in support of the motion to dismiss the *Fairholme* Actions, the defendants therein provide characterizations of the New Materials that are, at best, incomplete. The New Materials raise new arguments, present new issues, and provide new facts for the first time (other than in regard to the Fourth Amendment). That new information was unavailable to Plaintiff when he filed his Opposition Brief. Plaintiff proposes to file his Surreply Brief to direct this Court to relevant paragraphs in his Complaint and the New Materials in order to aid the Court in quickly and efficiently resolving the Motion to Dismiss. *See Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 85 (D.D.C. 2014).

Plaintiff respectfully requests that the Surreply Brief, if allowed, be considered in tandem with his Opposition Brief. Plaintiff further requests that this Court exercise its power to convert the Motion to Dismiss into a motion for partial summary judgment as to the issues of duty, breach, and causation regarding Counts I and II of the Complaint, together with other relief to be awarded, as set forth herein and in Plaintiff's Surreply Brief, and with the amount of damages to be left for

to be awarded.³ In addition, Plaintiff requests leave to amend the Complaint to, *inter alia*, (1) omit Count III, (2) pursue this lawsuit as a class action, and (3) rename the GSEs as nominal defendants such that the only defendants in interest would be the Directors. Finally, Plaintiff seeks any other relief that the Court deems to be just and proper.

Plaintiff conferred with counsel for the Defendants and Nominal Defendant and was informed that all counsel oppose this motion.

Dated: October 26, 2018



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³ “When a moving party introduces ‘matters outside the pleadings’ in support of a motion to dismiss, Rule 12(d) [of the Federal Rules of Civil Procedure] requires the district court either to ignore that evidence in deciding the motion under Rule 12(b)(6), or to convert the motion into one for summary judgment.” *Hurd v. D.C., Govt.*, 864 F.3d 671, 686 (D.C. Cir. 2017). Here, Plaintiff cited authorities in his Opposition Brief that were “outside the pleadings.” *Id.* Therefore, this Court may consider this “outside” information and convert the Motion to Dismiss to a motion for summary judgment. *Id.*