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

Joshua J. Angel
2 Park Avenue
New York, New York 10016
(917) 714-0409
joshuaangelnyc@gmail.com
Pro Se Plaintiff

[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.*

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

PLAINTIFF'S PROPOSED SURREPLY BRIEF IN OPPOSITION TO DEFENDANTS' AND NOMINAL DEFENDANT'S JOINT MOTION TO DISMISS

Plaintiff Joshua J. Angel ("Plaintiff") files this surreply brief in opposition to the motion to dismiss ("Motion to Dismiss") jointly filed by the defendants in interest (collectively, "Defendants") and the nominal defendant ("Nominal Defendant").[1] Herein, Plaintiff directs this Court to relevant paragraphs in his complaint ("Complaint")[2] and the "New Materials"[3] in order

[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"). This brief incorporates the definitions in Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss ("Opp. Br.") for capitalized terms not defined herein.

[2] Citations to the Complaint are denoted as "¶ __" or "Compl. __."

[3] *See* Pl.'s Mot. for Leave to File a Surreply to Defs.' & Nominal Def.'s Joint Mot. to Dismiss at 3 (defining "New Materials").

to aid the Court in quickly and efficiently resolving the Motion to Dismiss in Plaintiff's favor, and granting Plaintiff 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 below, and with the amount of damages to be left for a subsequent determination.[4]

I. The Directors' Duties Owed to Conservator and Holders of GSE Securities

As established in Plaintiff's memorandum in opposition ("Opposition Brief") to Defendants' and Nominal Defendant's Motion to Dismiss, HERA provides for an exclusive agency relationship between each GSE and the Conservator. The Conservator is the GSEs' sole principal, and the GSEs are agents of the Conservator, as to the plenary management of the GSEs' affairs. The Directors, in turn, are agents of their respective GSE. Therefore, the Directors are sub-agents of the Conservator, exercising their authority as directed by, for, and with the approval of the Conservator. ¶ 36; Opp. Br. at 4 n.5, 5, 5 n.6, 6.

The legal tension between the duties that the Directors owed to the Conservator and the holders of junior preferred shares of the GSEs ("Junior Preferred Shares") regarding, in relevant part, dividend declaration and payment, was resolved upon the onset of conservatorship: the GSEs provided the Directors with full indemnification in the event of a conflict between those duties. Pl. Decl. Ex. 3 (Part IV, Item 10.15, "Post-August 2008 Fannie Mae Form of Indemnification Agreement for Directors and Officers of Fannie Mae").

[4] "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.*

II. Count I: Breach of Contract

Claims for breach of contract are comparable in both the *Fairholme* Actions and Complaint. The claims are related in that they allege that the agreement to and performance under the third amendment ("Third Amendment") to the Senior Preferred Stock Purchase Agreement ("SPSPA"), dated August 17, 2012, constituted an anticipatory breach as to duties regarding dividends and repayment of Junior Preferred principal. Otherwise, however, those claims diverge markedly in terms of defendants, theories of liability, and the relief sought.

The Defendants in the *Fairholme* Actions are the United States, FHFA, Conservator, and GSEs. The Defendants in this action are the GSEs, which Plaintiff intends to rename as nominal defendants in an amended class action complaint, and the Directors.

In the *Fairholme* Actions, the plaintiffs allege that the Third Amendment constitutes an anticipatory breach of the Junior Preferred Shares that ripened on August 17, 2012 and warrants the repayment of principal and payment of dividends. Here, however, Plaintiff alleges that the Fourth Amendment mooted the anticipatory breach caused by the Third Amendment. *See* Opp. Br. at 13. Contrary to Defendants' and Nominal Defendant's Reply Brief at 12, Plaintiff further alleges that an actual breach has occurred, and continues to occur, after the end of each fiscal quarter as of the first quarter ("Q1") of 2013. Opp. Br. at 24.

The *Fairholme* Action plaintiffs seek a refund of the "Net Worth Sweep"[5] payments in excess of the ten percent dividend under the SPSPA plus interest as of the date of the Third Amendment. Here, however, Plaintiff seeks the payment of defaulted, quarterly dividend payments since and including Q1 2013 and continuing quarterly thereafter to the present. *See* Compl. at 18-20, 35.

[5] *See* Opp. Br. at 1-2.

Plaintiff agrees with the *Fairholme* Opinion that "the doctrine of [anticipatory breach] traditionally does not apply to unilateral contracts especially when the only remaining performance is the payment of money." *Fairholme Funds v. Federal Housing Finance Agency*, No. 13 Civ. 1053 (RCL), 2018 WL 4680197, at *5 (D.D.C. Sept. 28, 2018). Plaintiff, however, respectfully directs the Court's attention to the fact that Junior Preferred Shares are noncumulative: the right to a potential dividend payment expires with each declaration date that passes. Accordingly, payment breaches become final and un-declarable after the end of each fiscal quarter. Plaintiff respectfully urges the Court to find that the foregoing exception to anticipatory breach does not apply, or is not dispositive, to payment breaches that are final and irretrievable by operation of law, such as dividend declaration and payment for noncumulative, preferred shares.

III. Count II: Breach of Implied Covenant Good Faith and Fair Dealing

Count II of the Complaint is based on the same law that supports this claim in the *Fairholme* Actions. However, the factual predicates of the respective claims are incompatible regarding the reasonable expectation values, particularly with regard to dividend receipt. The facts alleged by the *Fairholme* Plaintiffs which the *Fairholme* Opinion Court found sufficient with regard to breach of the Implied Covenant are for reasons set forth below at best supportive, rather than dispositive for simple reasons that they are grounded in a time frame beginning on August 17, 2012 rather than September 6, 2008 and are based on too narrow of a reading of HERA's enactment purpose.

In *Perry Capital LLC v. Mnuchin* ("*Perry II*"), the D.C. Circuit held that a "party to a contract providing for [] discretion violates the implied covenant if it 'act[s] arbitrarily or unreasonably.'" 864 F.3d 591, 631 (D.C. Cir. 2017) (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010)). The Complaint, Opposition Brief, and Exhibits to Plaintiff's Declaration in

Opposition to Defendants' Motion to Dismiss (the "Declaration") contain the following dispositive, factual averments, as well as other supportive factual averments, that are unique to Plaintiff's Complaint, prove Plaintiff's reasonable expectation of dividend payments, and prove that the Directors acted arbitrarily and unreasonably in the exercise of their discretion.

Plaintiff's Dispositive, Reasonable Averments of Dividend Receipt and Payment Expectation

- In addition to strengthening the U.S. government and GSE oversight, HERA was intended to mitigate foreclosures and provide affordable housing. *See* ¶¶ 29, 41, 42, 71; Pl. Decl., Ex. 3, at 6 n.5, Ex. 19; *see also* Henry D. Paulson Jr., *On the Brink: Inside the Race to Stop the Collapse of the Financial System*, Grand Central Publishing (2013), Forward at xvii, xx, xxvii-xxxi, xivi-xivii and at 13, 150, 397-98, 406.

- The U.S. government's imposition of $60 billion of unreimbursable costs on the GSEs pursuant to HASP, HARP, and HAMP program costs, in addition to the ongoing conservatorship, resulted in the de facto nationalization of the GSEs in 2009. *See* ¶¶ 29, 71; Pl. Decl., Exs. 5, 11, 14, 19, 20.

- The Third Amendment's Net Worth Sweep, while a second de facto nationalization event for the GSEs, was within the scope of HERA pursuant to the Succession Clause. Indeed, it was similar to the $60 billion imposition of costs on the GSEs. *See* ¶ 72.

- On September 11, 2008, Treasury publicly (a) affirmed the U.S. government's guarantee of payment obligations under the Junior Preferred Shares and (b) retracted FHFA Director Lockhart's cancellation of the payment of the $413 million in dividends that Fannie Mae declared in August 2008. In retracting the cancellation, Treasury declared, "Contracts are respected in this country as a fundamental part of rule of law," and "Dividends actually declared

by a GSE before the date of the senior preferred stock purchase agreement [i.e., the August 2008 $413 million Declared Dividend] will be paid on schedule." ¶¶ 14, 87; Pl. Decl., Exs. 6, 7, 14.

- While the Third Amendment permitted the Treasury to reap enormous benefits, it did provide a $3 billion capital reserve amount to each GSE on top of $223 billion of capital from the GSE preferred shares issued under the SPSPA (the "Senior Preferred Shares") and the Junior Preferred Shares, thus keeping with HERA's "safe and sound" mandate while avoiding any possible ill effects of the Net Worth Sweep. ¶¶ 90-93; Pl. Decl., Exs. 23-25.

- The Third Amendment was conceived of and enacted in bad faith by Directors with the express intent to lay to rest "the idea that the outstanding privately held pref[erred] will ever get turned back on." ¶ 70; Pl. Decl., Ex. 34.

> - For GSEs['] Junior Preferred Shareholders[,] the Net Worth Sweep[,] while initially in anticipatory breach of Junior Preferred contractual dividend entitlement and de facto nationalized Junior Preferred value taking, over time became absolute in its [dividend] taking through the dividend entitlement breach, and otherwise[,] was no more of an event for GSE Junior Preferred Shareholders than it was for the GSE debt holders, with both GSE debt and Junior Preferred equity owners operating under the same protection of payment afforded by the FG Implicit Guaranty of payment. ¶ 75 (emphasis removed).

- Between December 31, 2008 and December 31, 2017, the GSEs' year-end, audited and certified balance sheets have consistently reflected $34 billion of collective Junior Preferred Share capital (i.e., $19.13 billion in Fannie Mae and $14.1 billion in Freddie Mac) in balance sheet placement immediately below the Senior Preferred Shares and above the Capital Reserve Amount in liquidation entitlement. ¶ 76; Pl. Decl., Exs. 23-24.

- Other than the Senior Preferred Shares' status as senior in priority of payment to the Junior Preferred Shares, Fannie and Freddie's audited balance sheets reflect auditor verification that (a) the Junior Preferred Shares continued to build capital and exist as a matter of law and (b)

the sole meaningful difference between the two types of preferred shares is their relative priority of payment. *See* ¶ 77; Pl. Decl., Ex. 2, 4.

- The Fourth Amendment's reinstatement of a permanent, $3 billion "Capital Reserve Amount"[6] for each GSE effected a status quo ante return to GSEs' balance sheets at August 17, 2012 and cured the Third Amendment anticipatory breach of all Junior Preferred payments, except for GSE dividends, whose declaration and payment were rendered impossible by the passage of the declaration date and the impossibility of a cure. ¶¶ 90, 92, 93.

Plaintiff's Supportive Reasonable Averments of Dividend Receipt and Payment Expectation in Common with *Fairholme* Action Plaintiffs

- When the Third Amendment was enacted, the GSEs, FHFA, and Treasury understood that the GSEs were about to achieve sustained profitability. *See* ¶ 62.

- The GSEs and FHFA knew that this profitability would permit the GSEs to pay the 10% dividend under the SPSPA without the necessity of drawing from the Treasury. ¶¶ 57-58.

- Prior to August 17, 2012, Defendants knew that the GSEs' massive profits would require the resumption of good faith decisions by the GSEs' boards of directors regarding dividend declarations and payment. ¶ 61.

- When the GSEs returned to huge profitability, Plaintiff reasonable expected the GSEs to eventually be healthy enough to require a good faith return "to normal business operations," as the FHFA as regulator and conservator had vowed when the conservatorships were established. ¶ 62.

[6] "Capital Reserve Amount" is the quarterly dividend paid to the Treasury by the GSEs, equal to the GSEs' entire net worth, less a capital buffer. Opp. Br. at 12.

IV. Count III: Tortious Interference with Contract

The Fourth Amendment mooted Count III of the Complaint, so Plaintiff seeks to dismiss this claim.

V. Federal Government Guaranty of GSEs Securities Payments

Plaintiff is entitled to summary judgement on the sub-textual issue common to all three of Plaintiff's Counts, to wit, the United States payment guaranty of GSEs securities. The Conservator's self-joinder in the reply without identifying itself as a nominal, rather than an actual, defendant, is highly improper and confusing to the Court. The signature of the Nominal Defendant (the Conservator) above that of the real Defendants (the GSEs and Directors), neither elevates the Conservator to real defendant status nor elevates their reply brief to that of a principal (*i.e.*, FHFA), rather than that of an agent (*i.e.*, GSEs and Directors). Lacking any probative value, other than that of opinion, Plaintiff is entitled to a Court finding with regard to the United States guaranty of GSEs securities, with the issue of the guaranty's payment remaining subsumed within Counts I and II, should the primary obligors (the Directors) and secondary obligors (the GSEs, which indemnified the Directors) fail to make payment with regard thereto.

V. Conclusion

For the forgoing reasons, the Court should: deny the Motion to Dismiss; grant Plaintiff's motion for partial summary judgment, permit the dismissal of Count III; grant Plaintiff leave to file an amended complaint that omits Count III, seeks class-wide relief, and renames the GSEs as nominal defendants rather than defendants in interest; and award any other relief that the Court deems just and proper.

Dated: October 26, 2018

Joshua J. Angel
2 Park Avenue
New York, New York 10016
(917) 714-0409
joshuaangelnyc@gmail.com
Pro Se Plaintiff