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

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTIONS TO ALTER OR AMEND JUDGMENT AND FOR LEAVE TO AMEND THE COMPLAINT

Defendants submit this memorandum in opposition to Plaintiff's motions to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) and for leave to amend under Rule 15(a). The Court should deny the motion to alter or amend the judgment because the Court accurately understood Plaintiff's arguments and reached the correct result in dismissing the complaint with prejudice. The Court should deny the motion for leave to amend because amendment would be futile: Plaintiff alleges no new facts that would save his claims from the applicable statutes of limitations that bar them.

A. The Court Should Deny the Motion to Alter or Amend the Judgment

"Courts should not grant a motion to alter or amend under Rule 59(e) unless one of three circumstances exist: (1) an 'intervening change of controlling law,' (2) 'the availability of new evidence,' or (3) 'the need to correct a clear error or prevent manifest injustice.'" *Rivera v. JPMorgan Chase Bank, N.A.*, 312 F.R.D. 216, 218-19 (D.D.C. 2015) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1280 (D.C. Cir. 1996)). In particular, "Rule 59(e) does not provide a vehicle 'to relitigate old matters, or to raise new arguments or present evidence that could have

been raised prior to the entry of judgment.'" *Id.* at 219 (quoting *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008); *see also Pub. Employees for Envtl. Responsibility v. U.S. Int'l Boundary & Water Comm'n*, 932 F. Supp. 2d 24, 27 (D.D.C. 2013) (motions for reconsideration should be denied if "the losing party is using the motion as an instrumentality for arguing the same theory or asserting new arguments that could have been raised prior to final judgment"). "Motions to amend judgments under Rule 59(e) are disfavored and should be granted only in extraordinary circumstances." *Rivera*, 312 F.R.D. at 219.

Here, there is no new evidence or intervening change in law, so the only possible route to altering or amending the judgment would be "clear error" or "manifest injustice." Plaintiff principally argues that the Court "'patently misunderstood' *pro se* Plaintiff's claims, the facts, or the law." Mot. at 7; *see also id.* at 8 ("clearly misunderstood"), 9 ("patently misunderstood another key fact"), 9 ("patently misunderstood the law"), 10 ("patent misunderstanding of law"). However, "patently misunderstood" is not part of the standard for Rule 59(e) motions in this jurisdiction. Plaintiff appears to confuse the standard for Rule 59(e) motions with the more flexible "as justice may require" standard for interlocutory motions for reconsideration under Rule 54(b). *Shvartser v. Lekser*, 330 F. Supp. 3d 356, 360 (D.D.C. 2018). In this District, courts frequently recognize "patently misunderstood a party" or "errors of apprehension" as grounds for an interlocutory Rule 54(b) motion. *Id.* But the decisions are equally clear that those more lenient standards do not carry over to the "high threshold" for Rule 59(e) motions to alter or amend a judgment. *See id.*; *Pinson v. Dep't of Justice*, 321 F.R.D. 1, 3-4 (D.D.C. 2017); *United States v. Slough*, 61 F. Supp. 3d 103, 107-08 (D.D.C. 2014).

In any event, even if a "misunderstanding" were a valid legal ground for altering or amending a judgment (as opposed to an interlocutory order), it is clear that the Court did not

misunderstand Plaintiff's allegations and arguments—patently or otherwise. As discussed below, the Court appropriately and straightforwardly construed Plaintiff's complaint and properly applied controlling Delaware and Virginia law to the allegations therein. Moreover, contrary to Plaintiff's arguments, the Court did not commit "clear error" by dismissing the complaint with prejudice or by not *sua sponte* granting Plaintiff leave to amend.

1. The Court Did Not Misunderstand The Complaint's Allegations Concerning the Third Amendment

Plaintiff contends that, in holding that Plaintiff's claims accrued in August 2012 when the Third Amendment was adopted, the Court patently misunderstood the significance of the Third Amendment to his legal theories. According to Plaintiff, his complaint "expressly alleges that the Third Amendment was a *nonevent* for Junior Preferred Shareholders," was not itself a breach, and "expressly allowed for dividends to shareholders like *pro se* Plaintiff." Mot. at 1, 7 (emphasis added).

Those characterizations are striking because the complaint actually alleges the opposite: "By entering into the Net Worth Sweep, and operating in compliance with its terms, the Defendants effectively deprived Plaintiff of any possibility of ever again receiving dividends." Compl. ¶ 120. As Plaintiff explained, "[w]ith the entire net worth of the Companies payable in perpetuity to the Senior Preferred Stock, . . . there would . . . be no remaining assets from which dividends could *ever* be paid on Plaintiff's Fannie/Freddie Junior Preferred Stock." *Id.* ¶ 68 (emphasis added). In the complaint's words, "[t]he Net Worth Sweep . . . effectively *nullified*, and *eliminated* the Board's exercise of contractual dividend declaration functions." *Id.* ¶ 79 (emphasis added); *see also id.* ¶ 4 ("[T]he Third Amendment provides for endless payment of a quarterly dividend to Treasury, equal to substantially all of each Company's net profits."), ¶ 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 (*i.e.*, the Net Worth Sweep)."), ¶ 74 (calling the Third Amendment a "per se de facto nationalization event").

Plaintiff doubled down on these characterizations in his briefing opposing Defendants' motion to dismiss. On the first page of Plaintiff's opposition brief, he insisted the August 17, 2012 Third Amendment "made the payment of dividends to all other shareholders impossible after January 1, 2013." ECF No. 17 at 1. "[B]y agreeing to and then implementing the Third Amendment, Defendants prevented themselves from determining whether to declare dividends as required by Plaintiff's contracts"—a "self-imposed impossibility to perform." *Id.* at 22; *see also id.* at 23 ("[B]ecause the Third Amendment required Defendants to never declare dividends, Defendants prevented themselves from ever exercising their sole discretion in determining whether to declare dividends."). The Third Amendment breached the implied covenant, in Plaintiff's view, "by making no funds legally available and eliminating the ability of the GSEs to exercise their sole discretion in determining whether to declare dividends," and all later consequences flowed simply from "operating in compliance with its terms." *Id.* at 26 (quoting Compl. ¶ 120).

In short, no reader of Plaintiff's pleading and legal arguments could reasonably have formed an impression that Plaintiff was contending the so-called "Net Worth Sweep" was a "nonevent," the word he now uses. There was no misunderstanding.

To be sure, Plaintiff also alleged that Defendants "continue to breach the contracts and implied covenant each quarter they fail to declare a dividend." Opinion at 6. The Court did not overlook that argument; the Court confronted and rejected it under Virginia and Delaware common-law principles. "When 'the wrongful act is of a permanent nature' and 'produces all the damage which can ever result from it,' that act is a single continuous breach and the statute

of limitations begins to run at the time of the wrongful act." Opinion at 7 (quoting *Hampton Rds. Sanitation Dist. v. McDonnell*, 360 S.E.2d 841, 843 (Va. 1987)). Under Plaintiff's theory, the Third Amendment made it "impossible" to pay dividends. *See* Compl. ¶¶ 4, 62, 68, 79, 81, 120. That this alleged wrongful act resulted in undeclared dividends each quarter does not, as Plaintiff argues, renew the statute of limitations.

Plaintiff also now insists that the Third Amendment "expressly allowed" dividends to junior shareholders. Mot. at 7. However, that argument collapses on examination of the Third Amendment, which is in the record as Exhibit 16 to Plaintiff's opposition to the motion to dismiss (ECF No. 17-17): it says nothing about declaration or payment of dividends to shareholders other than Treasury. Plaintiff's citations for this point (Compl. ¶ 55) refer to a covenant in the *original* Treasury stock agreements in which the Enterprises promised to *refrain from* a variety of forms of payment, including dividends, to junior shareholders for as long as the Treasury preferred stock is outstanding.[1] Plaintiff seizes on the phrase "without the prior written consent of [Treasury]" to argue that this prohibition actually should be read as an affirmative grant of permission subject to a condition. But even if that sleight of hand could be credited, the theoretical possibility of Treasury consenting to a junior preferred dividend is irrelevant to the

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[1] Specifically, Section 5.1 of the Preferred Stock Purchase Agreements provides: "Seller shall not, and shall not permit any of its subsidiaries to, in each case without the prior written consent of Purchaser, declare or pay any dividend (preferred or otherwise) or make any other distribution (by reduction of capital or otherwise), whether in cash, property, securities or a combination thereof, with respect to any of Seller's Equity Interests (other than with respect to the Senior Preferred Stock or the Warrant) or directly or indirectly redeem, purchase, retire or otherwise acquire for value any of Seller's Equity Interests (other than the Senior Preferred Stock or the Warrant), or set aside any amount for any such purpose."
https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2008-9-26_SPSPA_FannieMae_RestatedAgreement_N508.pdf;
https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2008-9-26_SPSPA_FreddieMac_RestatedAgreement_508.pdf.

rationale in the Court's opinion—that under Plaintiff's theory, the Third Amendment was the source of the alleged injury. Plaintiff alleged that the Third Amendment "ma[de] it impossible for the [junior preferred] holders . . . to realize value" by diverting "100% of the net worth . . . to Treasury," not by contractually prohibiting dividends. Compl. ¶ 81, *cited in* Opinion at 7; *see also* Compl. ¶ 68 ("With the entire net worth of the Companies payable in perpetuity to the Senior Preferred Stock, . . . there would . . . be no remaining assets from which dividends could ever be paid on Plaintiff's Fannie/Freddie Junior Preferred Stock."). Without available funds to pay a dividend to junior preferred shareholders, Treasury's hypothetical consent to such a dividend would be of no consequence.

2. The Court's Statement That the Third Amendment Prevents Junior Shareholder Dividends "Unless Further Action is Taken By the FHFA as Conservator" Does Not Reflect Any Misunderstanding

Plaintiff's contention that the Court misunderstood the relationship between the Conservator and the Enterprises' directors is equally misguided. Plaintiff objects to the Court's observation that "*[u]nless further action is taken by the FHFA as conservator*, 100% of the net worth of each company will flow to Treasury each quarter . . ." (Opinion at 7; emphasis added) because Plaintiff believes "it was the Directors, not FHFA, who could have prevented additional damages." Mot. at 9.

The Court was right and Plaintiff is wrong. While the Enterprises have directors during conservatorship, the directors answer to the Conservator and lack authority to take action inconsistent with the Treasury Agreements, including the Third Amendment, entered into by the Conservator. By operation of HERA, FHFA as Conservator immediately succeeded to "all rights, titles, powers, and privileges" of any "director." 12 U.S.C.A. § 4617(b)(2)(A)(i). To the extent Plaintiff alleges otherwise, erroneous legal conclusions in pleadings must of course be

disregarded. *See*, *e.g.*, *Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1, 4 (D.C. Cir. 2014).

3. The Court Did Not Misunderstand the Law Concerning Tolling

Plaintiff's charge that the Court "patently misunderstood the law with respect to tolling" (Mot. at 9) is equally meritless. Plaintiff asserts that "[t]he Court did not discuss tolling at all" but rather "reasoned only that *pro se* Plaintiff did not file within the limitations period." *Id.* That is simply wrong: eight of the twelve pages of the Court's opinion addressed Plaintiff's various tolling arguments, including the continuing violation theory, which is the only one Plaintiff still presses. Opinion at 5-12. Indeed, the very next paragraph of Plaintiff's motion acknowledges that the Court did, in fact, discuss Delaware case law on continuing violation tolling. Mot. at 9 (purporting to distinguish "[t]he case that the Court cited" regarding "continuing wrongs"). Plaintiff has issues, to be sure, with the Court's interpretation of that case. But disagreement over the meaning of a case is not the same as ignoring an argument, and does not rise to the high bar for altering or amending a judgment. *See Wannall v. Honeywell Int'l, Inc.*, 2013 WL 12321549, at *3 (D.D.C. Oct. 24, 2013) ("mere disagreement does not support a Rule 59(e) motion").

4. The Court Did Not Clearly Err By Dismissing the Complaint With Prejudice

Plaintiff also argues that dismissing the complaint with prejudice constituted "clear error" because the Court "did not rule on the merits" or "consider the merits of the causes of action at all." Mot. at 10-11.[2] On the contrary, the Court found that the claims lacked merit because they

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[2] Although the Opinion and Order do not explicitly say "with prejudice," Plaintiff is correct (Mot. at 10) that a dismissal under Rule 12 is deemed with prejudice unless otherwise stated. *See Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 132 (D.C. Cir. 2012) (Kavanaugh, J. concurring) ("[W]hen a district court grants a Rule 12(b)(6) motion to dismiss for failure to state a claim, that dismissal 'operates as an adjudication on the merits' under Rule 41(b) '[u]nless the

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were time-barred. "[A] dismissal on statute-of-limitations grounds" is treated the same way as any other "dismissal for failure to state a claim . . .: as a judgment on the merits." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995); *accord Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006).

Plaintiff intimates that dismissals on limitations grounds are somehow improper or disfavored. Mot. at 10. But as the Court observed, and Plaintiff seems to overlook, Defendants may raise a statute of limitations defense in a motion to dismiss where, as here, "'the facts that give rise to the defense are clear from the face of the complaint.'" Opinion at 3 (quoting *Smith-Haynie v. Dist. of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998)).

Indeed, it is common for courts to dismiss untimely lawsuits with prejudice. *See*, *e.g.*, *Shelford v. New York State Teachers Retirement Sys.*, 889 F. Supp. 89, 90 (E.D.N.Y. 1994) ("claims are time-barred by the three-year statute of limitations . . . and [plaintiffs'] Complaint is hereby dismissed with prejudice"); *Olagues v. Frost*, 325 F. Supp. 3d 1315, 1320 (S.D. Fla. 2018); *Vernon v. Port Auth. Of New York and New Jersey*, 154 F. Supp. 2d 844, 850 (S.D.N.Y. 2001).[3] Plaintiff's proposed rule against with-prejudice limitations dismissals would be anomalous: if anything, the policy interests in finality, repose, and avoidance of serial

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dismissal order states otherwise.' And 'an adjudication on the merits' is synonymous with a dismissal with prejudice. Therefore, a district court order that dismisses a case under Rule 12(b)(6) without stating whether it is with or without prejudice operates as a dismissal with prejudice." (citation omitted)).

[3] Contrary to Plaintiff's portrayal (Mot. at 14 n.6, 16), *Dees v. Vendel*, 996 F.2d 310 (Table), 1993 WL 191815 (10th Cir. May 28, 1993), does not hold that "[s]tatutes of limitations as a ground for dismissal, without more, is insufficient to justify dismissal with prejudice." Mot. at 14 n.6, 16. The ground for dismissal in *Dees* was failure to allege substantive facts, not the statute of limitations. The court allowed the plaintiff to amend a timely complaint because, given the passage of time while the case had been pending, he would have been time-barred if he had to start over by filing a new case.

relitigation when claims are time-barred are more, not less, compelling as compared to dismissals on other grounds.

5. The Court Did Not Clearly Err By Not *Sua Sponte* Granting Leave to Amend in the Absence of a Proper, Non-Futile Motion

Lastly, Plaintiff protests that the Court "clearly erred by ignoring" his "multiple requests for leave to amend the Complaint." Mot. at 12-14. Those protests ring hollow. Plaintiff did not file any motion for leave to amend, but rather simply made passing expressions in opposition and surreply briefs about his desire to make certain amendments, without attaching any proposed amended pleading. It is well-established in this Circuit that a "bare request in an opposition to a motion to dismiss . . . does not constitute a motion within the contemplation of Rule 15(a)." *Confederate Mem'l Ass'n, Inc. v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993); *accord Bernstein v. Kelly*, 584 F. App'x 7 (D.C. Cir. 2014); *United States ex rel. Williams v. Martin-Baker Aircraft Co., Ltd.*, 389 F.3d 1251, 1259 (D.C. Cir. 2004); *Kowal v. MCI Comm'cns Corp.*, 16 F.3d 1271, 1280 (D.C. Cir. 1994); *Kim v. United States*, 840 F. Supp. 2d 180, 189-90 (D.D.C. 2012); *Woodruff v. DiMario*, 197 F.R.D. 191, 195 (D.D.C. 2000). "As [Plaintiff] did not properly request leave to amend [his] claim, it could hardly have been an abuse of discretion for the [Court] not to have afforded [him] such leave *sua sponte*." *Confederate Mem'l Ass'n*, 995 F.2d at 299.

Even more importantly, the potential amendments Plaintiff mentioned in his briefs had nothing to do with the statute-of-limitations issue anyway. They were (1) to add class action allegations, (2) to withdraw his tortious interference claim, and (3) to rename the Enterprises as so-called "nominal defendants." Mot. at 4. Plaintiff concedes none of these amendments would have addressed the statute-of-limitations issue: he intentionally "did not specify a purpose to cure statutes-of-limitations issues" because he did not think there was a statute-of-limitations

problem. Mot. at 4. Thus, as to the issue that ended up being dispositive, it is undisputed that the potential amendments Plaintiff contemplated would have been futile.

Moreover, the potential amendments Plaintiff contemplated were either effectively allowed, or have been abandoned. The Court essentially granted Plaintiff's leave to amend to withdraw the tortious interference claim. Opinion at 3. As for Plaintiff's proposed class amendments, termination of a would-be class representative's individual claim moots any attempt to proceed on behalf of a class; and there are no class allegations in the proposed amended pleading attached to Plaintiff's motion—suggesting Plaintiff has now abandoned the class idea anyway. In these circumstances, the Court did not err, let alone clearly so, by focusing directly on a threshold dispositive issue rather than inviting digressions into new pleadings on extraneous issues.

Nothing in the foregoing analysis is changed by the fact that Plaintiff is representing himself in this case. While Plaintiff appears determined to ensure his *pro se* status cannot be overlooked—mentioning it 56 times in a 17-page brief—this Court and others have frequently held that "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).[4] Plaintiff is a prominent attorney who graduated from Columbia Law School, practiced for almost six decades as a leader in the bankruptcy and insolvency bar, and

[4] *Accord Tracy v. Freshwater*, 623 F.3d 90, 102 (2d Cir. 2010) ("a lawyer representing himself ordinarily receives no such solicitude at all"); *Comm. on the Conduct of Attorneys v. Oliver*, 510 F.3d 1219, 1223 (10th Cir. 2007) ("While we generally construe pro se pleadings liberally, we decline to extend the same courtesy to Mr. Oliver, a licensed attorney.") (internal quotation marks omitted); *Cole v. Comm'r of Internal Revenue*, 637 F.3d 767, 773 (7th Cir. 2011) ("We note that pro se litigants who are attorneys are not entitled to the flexible treatment granted other pro se litigants.").

has written briefs and other legal documents "numbering in the many thousands" by his rough count. Compl. Ex. A at 42. In ruling on the motion to dismiss, the Court in any event treated Plaintiff as a *pro se* litigant and gave him the benefit of more liberal standards. Opinion at 1 n.1. Going forward, there is no injustice or hardship in holding Plaintiff to the same standards that apply to lawyers representing others as clients.

B. The Court Should Deny the Motion for Leave to Amend the Complaint

Because Plaintiff does not satisfy the "stringent standard" for altering or amending the judgment to make it "without prejudice," the Court need not address the second part of Plaintiff's motion, which seeks leave to amend the complaint under Rule 15(a). *Firestone*, 76 F.3d at 1208. In this posture, Rule 15(a)'s standard for granting leave to amend governs *only* "once the Court has vacated the judgment." *Id.* Since, as established above, Plaintiff has failed to establish the "extraordinary circumstances" necessary to do so, *Rivera*, 312 F.R.D. at 219, no occasion arises to consider the Rule 15(a) issues.

In any event, should the Court reach the issue, it should deny leave to amend under Rule 15(a) because amending would be futile. *See Palacios v. MedStar Health, Inc.*, 298 F. Supp. 3d 87, 89 (D.D.C. 2018) ("[I]f an amendment would not survive a motion to dismiss—such as where a claim sought to be added is barred by the statute of limitations—amendment is futile and should be denied."); *Washington Tennis & Educ. Found., Inc. v. Clark Nexsen, Inc.*, 324 F. Supp. 3d 128, 132 (D.D.C. 2018) (denying leave to amend to add another defendant because claim would be "barred by the statute of limitations," and therefore futile); *Rife v. One West Bank, F.S.B.*, 873 F.3d 17, 21 (1st Cir. 2017) (affirming denial of leave to amend his complaint because plaintiff was "unable to dodge the applicable statute of limitations"). The proposed amended complaint alleges no new facts that establish legally sufficient tolling. It is also futile because it

names as defendants only parties who had no control or authority over the relevant matters, and expressly drops claims against the Conservator, who had such control and authority, as well as the Enterprises.

1. The Proposed Amended Complaint Fails to Cure the Statute-of-Limitations Problem

Plaintiff maintains that allegations that his stock certificates "require Defendants to (1) determine every quarter whether to declare dividends and (2) seek consent from Treasury to declare a dividend" cure the statute-of-limitations problem. Mot. at 16 (citing Proposed First Am. Compl. ¶¶ 10, 13, 30, 52, 59, 64). However, the original complaint already contained allegations about quarterly dividend declaration determinations, and the Court already took those allegations into account in rendering its opinion. *See* Opinion at 5 (construing complaint as alleging "elimina[tion] [of] the Board's exercise of its contractual dividend declaration functions"), 6 ("Mr. Angel claims that defendants continue to breach the contracts and implied covenant each quarter they fail to declare a dividend"). "An amendment is futile if it merely restates the same facts as the original [dismissed] complaint in different terms . . . ." *Bell v. United States*, 301 F. Supp. 3d 159, 165 (D.D.C. 2018); *accord He Depu v. Yahoo! Inc.*, 334 F. Supp. 3d 315, 320-21 (D.D.C. 2018) (holding amended complaint was futile where plaintiffs claimed "new factual allegations" cured defect, but beyond superficial "wording differences," the underlying factual content was "not 'new'").

The allegations about quarterly dividend duties as pleaded in the original complaint failed to support a later accrual date because Plaintiff's overarching theory has always been that the Third Amendment once and for all made it impossible for Defendants to perform that alleged duty to Plaintiff's satisfaction. The proposed amended complaint sounds the same theme: the Third Amendment "required perpetual, quarterly dividend payments to Treasury, in amount of

each GSE's entire net quarterly profits in perpetuity"—thus leaving nothing available as dividends for junior preferred shareholders. Proposed First. Am. Compl. ¶ 8; *see also id.* ¶ 52 n.19 (alleging that "the Net Worth Sweep was adopted . . . . to prevent [the Enterprises'] private shareholders from seeing any return on their investment"); Mot. at 17 ("[t]hose wrongs trace back to when the Third Amendment went into effect").

To be sure, the proposed amended complaint also includes self-serving conclusory recitations attempting to create distance between the Third Amendment and Plaintiff's alleged injury, *e.g.*, "Because the Third Amendment expressly allowed for the declaration and payment of dividends on Junior Preferred Shares, the Third Amendment could not have been the cause for the failure of the Directors to declare and pay dividends on the Junior Preferred Shares." Proposed First Am. Compl. ¶ 11; *see id.* ¶ 58. But those statements are *non sequiturs* that the Court need not and should not credit. *See*, *e.g.*, *Kowal*, 16 F.3d at 1276 ("the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint," nor "legal conclusions cast in the form of factual allegations").

As discussed above, the Third Amendment did *not* "expressly allow[]" the payment of dividends on junior preferred shares. *See supra* at 5-6. And even if the Third Amendment could be construed to permit dividend payments in theory, the Court construed Plaintiff's complaint as alleging injury caused by the Third Amendment not on the ground that the Third Amendment contractually prohibited junior shareholder dividends, but because—as Plaintiff previously alleged—it sends "100% of the net worth of each company . . . to Treasury each quarter," making dividends impossible as a matter of fact. Opinion at 7. Plaintiff's theory that his stock certificates obligated Defendants to seek Treasury's consent to declare junior shareholder dividends fails to overcome this problem because (a) the stock certificates actually say nothing of

the sort, (b) Plaintiff does not allege or offer any plausible reason to believe Treasury would have given consent if requested, and most importantly, (c) consent would be a hollow act if, as Plaintiff alleges, the Third Amendment made it impossible for there to be funds out of which to pay such a dividend anyway. In short, nothing in the proposed new complaint alters the fact that Plaintiff "could have brought the suit [when] the Companies and Treasury announced the deal." Opinion at 8.

By addressing the futility of the proposed amended complaint on its own terms, Defendants do not concede that the Third Amendment was, in fact, the cause of Plaintiff's non-receipt of dividends. On the contrary, dividends to junior preferred shareholders were suspended at the outset of the conservatorships in 2008 and were generally prohibited in the original Treasury preferred stock agreements entered that year. Indeed, the proposed amended complaint itself characterizes the Enterprises as having been "*de facto* nationalized" as early as 2009. Proposed First Am. Compl. ¶ 47. Of course, to the extent events in 2008 or 2009, rather than the Third Amendment, caused Plaintiff not to receive the continual stream of dividends to which he believes himself entitled, his claims would only be even more untimely. Thus, to find Plaintiff's proposed amendment futile, the Court need not reach whether events even earlier than the Third Amendment may have been the true cause of Plaintiff's asserted injury.

2. The Proposed Amended Complaint Names the Wrong Defendants

The proposed amended complaint is also futile for a new and distinct reason: it names the wrong defendants. The proposed amended complaint names *only* directors of the Enterprises, and drops any and all claims against the Conservator and the Enterprises themselves. However, by virtue of HERA's Succession Clause, since September 2008 the Conservator alone has held all "rights, titles, powers, and privileges" that otherwise would be held and exercised by

the Enterprises' boards of directors. 12 U.S.C. § 4617(b)(2)(A)(i). As such, it is the Conservator that directs the operations of the Enterprises. While the Conservator has delegated to the directors the authority to oversee the day-to-day operations of the Enterprises, those delegations expressly carve out and reserve for the Conservator the authority to declare stockholder dividends. Fannie 2011 10-K at 207; Freddie 2011 10-K at 325. The Enterprises' regularly-filed disclosures are clear that their directors "serve on behalf of, and exercise authority as directed by, the Conservator." Freddie Mac, 2012 Annual Report (Form 10-K) at 1 (Feb. 28, 2013);[5] *see also* Fannie Mae, 2012 Annual Report (Form 10-K) at 172 (Apr. 2, 2013) ("The directors serve on behalf of the conservator and exercise their authority as directed by and with the approval, where required, of the conservator.").[6]

Thus, while the breach-of-contract and implied-covenant claims against the directors in the proposed amended complaint are predicated on a so-called "Quarterly Dividend Duty" the directors supposedly violated, Proposed Am. Compl. ¶¶ 4, 9, 14, 17, 32, 35, 43, 52, 53, 56, 57, 59, 65, any such duty would have transferred to the Conservator by operation of HERA during conservatorship. Simply put, the directors lacked authority to take the actions that Plaintiff claims they should have taken.

To be clear, Defendants dispute that *anyone* owed the purported legal obligations Plaintiff calls the "Quarterly Dividend Duty." However, the Court need not reach that issue in order to find Plaintiff's proposed amendment futile. What should be beyond dispute is that at all relevant times, responsibility for matters relating to dividends, dividend declarations, the Third

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[5] *Available at* http://otp.investis.com/clients/us/federal_homeloan/SEC/sec-show.aspx?FilingId=9124227&Cik=0001026214&Type=PDF&hasPdf=1.

[6] *Available at* http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2012/10k_2012.pdf.

Amendment, and dealings with Treasury rested entirely with the Conservator. Yet Plaintiff has made a tactical choice to abandon his claims against the Conservator (and the Enterprises). Even if the proposed amended complaint might be deemed to cure the statute-of-limitations problem, that abandonment and Plaintiff's decision to proceed solely against parties who had no role or responsibility for the complained-of matters independently render amendment futile.[7]

CONCLUSION

For the foregoing reason, the Court should deny Plaintiff's motions to alter or amend the judgment and for leave to amend the complaint, and should enter final judgment for Defendants.

Dated: April 15, 2019

Respectfully submitted,

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[7] With respect to Count I for Breach of Contract, the proposed amended complaint is also futile because it is barred by binding Circuit precedent. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 629 (D.C. Cir. 2017) (affirming dismissal of breach-of-contract claim for dividends because there cannot be a "contractual right to discretionary dividends"). Moreover, to the extent there was any contractual obligation to pay dividends, that obligation would be on the part of the corporation (which Plaintiff elects *not* to name in the amended complaint), not individual directors of the corporation; thus, again, the proposed amendment targets the wrong defendants.

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