UNITED STATES DISTRICT COURT
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 OF LAW IN FURTHER SUPPORT OF *PRO SE* PLAINTIFF'S MOTIONS PURSUANT TO RULE 59(e) TO ALTER OR AMEND JUDGMENT AND RULE 15(a) FOR LEAVE TO AMEND THE COMPLAINT

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Pro Se Plaintiff

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Pro se Plaintiff Joshua J. Angel ("Plaintiff") respectfully submits this reply in further support of his combined motion ("Motion") and accompanying briefing ("Memorandum"), ECF Nos. 33 & 33-1, pursuant to Federal Rules of Civil Procedure 59(e) and 15(a), to respectively: (1) alter or amend the Opinion ("Opinion") and Order, ECF Nos. 24-25, to deny or grant without prejudice the Joint Motion to Dismiss ("MTD"), ECF No. 11; and (2) grant leave to amend the Complaint ("Complaint") by filing the Proposed First Amended Complaint ("FAC"), ECF No. 27-2.

The Complaint asserts breach of contract and the implied covenant for ongoing, bad-faith breaches of the Certificates of Designation ("CODs") for preferred shares ("Junior Preferred Shares") issued by former Defendant GSEs [1] before the Senior Preferred Stock Purchase Agreements ("SPSPA"). The Court and Defendants acknowledged that Plaintiff alleged quarterly breaches that caused damages. Yet, the Court held that he sought relief only for breach via the Third Amendment and that only the Third Amendment caused damages. Both findings are the result of clear errors of fact, law, and interpreting Plaintiff's allegations. Plaintiff could not and did not pursue relief for breach arising from the Third Amendment because the amendment could not have caused his damages. Directors' misconduct is the cause. The descriptive references to the Third Amendment as a possible repudiation did not and could not eradicate his claims of Directors' quarterly breaches. Those breaches occurred within the limitation periods, and several tolling doctrines apply to the prior breaches. Moreover, Defendants effectively concede that the Court failed to make the requisite determination to dismiss with prejudice. Respectfully, the Court clearly erred in applying the law. To correct those and other errors and to prevent manifest

[1] As used in the Motion and this reply, "Defendants" are the now-dismissed defendants named in the Complaint, "GSEs" are Fannie Mae and Freddie Mac, and "Directors" are the Defendants who are/were GSE Board members. "Proposed Defendants" are the defendants named in the FAC, which are limited to Directors and additional GSE Board members.

injustice, reconsideration of the Opinion and Order is warranted. As for leave to file the FAC, only Directors have standing to oppose it, and the Court should grant it for the reasons stated herein.

ARGUMENT

I. Conservator and GSEs Lack Standing to Oppose This Motion

Only Directors have standing to oppose the Motion. The Court dismissed all Defendants, see Order, and Plaintiff acknowledges herein that he has no claims against former Nominal Defendant FHFA as Conservator ("Conservator") and former GSE Defendants. See also Pl.'s Mem. to File Surreply, ECF No. 21 ("[The Complaint] alleges that [] Directors are liable."); FAC at 1 (naming only directors as defendants). Even if the Court were to deny the MTD, Plaintiff would have no claims against FHFA or GSEs. Thus, they lack standing to oppose the Rule 59(e) Motion, and their opposition is moot. They also lack standing to oppose the Rule 15(a) Motion because they are not Proposed Defendants. Accordingly, this reply addresses Defendants' opposition to this Motion ("Defendants' Brief"[2]) only to the extent that Directors oppose it.[3]

II. Directors Fail to Credibly Dispute the Merits of Plaintiff's Rule 59(e) Motion

The Court should deny the MTD or at a minimum, grant it without prejudice, because a dismissal, especially with prejudice, is clear error and manifestly unjust.

A. Directors Concede That Dismissal with Prejudice Was Clear Error

Directors do not oppose and thus, concede Plaintiff's leading argument on why dismissal with prejudice was clear error. See Mem. 7 (quoting Brink v. Contl. Ins. Co., 787 F.3d 1120, 1128-29 (D.C. Cir. 2015) (quoting Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996)));

[2] See Defs.' Mem. in Opp'n to Pl.'s Mots. to Alter or Amend J. & for Leave to Amend Compl. ("Defs.' Br."), ECF No. 29.

[3] If the Court were to find that Conservator or the GSEs do have standing to oppose either part of the Motion, this reply would apply to their arguments as well.

Cousart v. Metro Transit Police Chief, 101 F. Supp. 3d 27, 28–29 (D.D.C. 2015) ("treat as conceded any unopposed arguments"); Miller v. Rosenker, 578 F. Supp. 2d 107, 111 (D.D.C. 2008) ("It is clearly established that . . . a court may treat those unopposed arguments as conceded."), rev'd on other grounds sub nom., Miller v. Hersman, 594 F.3d 8 (D.C. Cir. 2010); Paylor v. Winter, 600 F. Supp. 2d 117, 125 (D.D.C. 2009) (same). Thus, any dismissal should have been without prejudice.

Even if Directors did oppose this argument, the Court clearly did not make the requisite Firestone determination to dismiss with prejudice. See Mem. 7 (citing Op.; quoting Firestone, 76 F.3d at 1208 ("[D]ismissal with prejudice is warranted only when a trial court determines that the allegation of other facts consistent with the [] pleading could not possibly cure the deficiency.") (first emphasis in original) (internal quotations and citations omitted)).

Moreover, had the Court made that determination, it could not have found that the Firestone standard was met. That "standard for dismissing a complaint with prejudice is high. . . [F]ail[ure] to state a claim warrants dismissal . . . but not dismissal with prejudice." Belizan v. Hershon, 434 F.3d 579, 583 (D.C. Cir. 2006) (emphasis added) (reversing denial of Rule 59(e) and 15(a) motion because "[i]n its order, the district court neither adverted to Firestone nor undertook the inquiry . . . require[d]"); accord Brink, 787 F.3d at 1128-29 (same, because the "high bar . . . was not met"). The standard is even higher when statutes of limitation are the basis for dismissal with prejudice. In Firestone, the court dismissed the original complaint with prejudice as time-barred and denied a motion under Rules 59(e) and 15(a). On appeal from both orders, the D.C. Circuit held:

> [T]he denial of the 59(e) motion was an abuse of discretion because the dismissal of the original complaint with prejudice was erroneous. Even [if] the [] court properly dismissed the complaint, neither the determination that [the] claims were time-barred, nor [] that their complaint failed to plead fraud with particularity[,] support a dismissal with prejudice. As we have repeatedly held, courts should hesitate to dismiss a complaint on statute of limitations grounds based solely on the

> face of the complaint. . . [W]e made clear that, because statute of limitations issues often depend on contested questions of fact, dismissal is appropriate only if the complaint on its face is conclusively time-barred. A dismissal with prejudice is warranted only when a trial court "determines that 'the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'"

Firestone, 76 F.3d at 1208–09 (first two emphases in original) (citations omitted).[4] In other words, the Court must consider "allegation[s] of other facts consistent with" the Complaint that are beyond "the face of [it]" and "could [] possibly cure the deficiency." Id. Tolling arguments further compound these fact issues, which is why courts frequently deny motions to dismiss adequately stated claims on limitations grounds. See, e.g., Smith v. Mattia, C.A. No. 4498-VCN, 2010 WL 412030, at *3 (Del. Ch. Feb. 1, 2010); Smith v. Washington Post Co., 962 F. Supp. 2d 79, 84 (D.D.C. 2013). Notably, Directors do not discuss any of these cases cited in the Memorandum.

Accordingly, the dismissal with prejudice was clear error. The Memorandum makes clear that Plaintiff asserted facts in the FAC and opposition to the MTD ("Opposition"), ECF No. 17, consistent with the Complaint that could possibly cure the purported deficiency that only the Third Amendment caused damages. See, e.g., Decl., Exs. 1-4.[5] They all allege that the Third Amendment could not be the sole, if any, cause of damages because it expressly allowed for junior preferred dividends. Id., Ex. 1. In fact, they clearly allege that one such dividend was allowed. Id., Ex. 2. They further allege that ongoing refusals to determine whether to declare dividends caused the damages and that the bad-faith purpose was to maximize Treasury's dividends at other shareholders' expense. Id., Ex. 3. Pursuant to SEC-imposed bookkeeping rules, declaring a

[4] Firestone and its progeny unequivocally refute Directors' denial of clear err on this basis and their claim that "it is common for courts to dismiss untimely lawsuits with prejudice." Defs.' Br. 7-9. Moreover, Directors did not cite one representative case in this Circuit. Directors also exaggerate that Plaintiff seeks to create a "rule against with-prejudice limitations dismissals." Id. 8. Firestone already created a rule to that effect, and it is clear error to not apply it here.

[5] "Decl., Ex. _" refer to the Declaration, and exhibits attached thereto, filed with this reply.

dividend on the Junior Preferred Shares would have saved that dividend from the net worth sweep. See id. 4. Those assertions are consistent with the Complaint, especially because the quarterly duty arises from the CODs, which are cited and incorporated in the Complaint. See, e.g., Compl. ¶¶ 4, 6, 102. They also directly address and "could [] possibly cure the deficiency" that the Third Amendment was the only cause of damages, Firestone, 76 F.3d at 1209, especially when "accept[ing] as true all [] factual allegations" and granting Plaintiff "the benefit of all inferences that can be derived" therefrom, as is required, Washington Post Co., 962 F. Supp. 2d at 84 (citation omitted); see also Mattia, 2010 WL 412030, at *1 ("not unreasonable to conclude . . . [on a] motion to dismiss, that the [contract] claims accrued . . . within the . . . limitations") (emphasis added).

Furthermore, allegations in the FAC support tolling for claims beyond the applicable years. First, the quarterly breaches are continuing and ongoing wrongs, and the bad-faith motivation has been continuous since January 1, 2013. See Opp'n Br. 19, 29; Mattia, 2010 WL 412030, at *1 (continuing, inadequate performance); FAC ¶¶ 16-17, 59, 62, 72. Second, the CODs provide for an undertaking of continued services that tolls the limitations periods until termination of the undertaking. See McCormick v. Romans, 214 Va. 144, 148-49 (1973) ("particularly appropriate . . . [where there is] confidence and trust inherent in that relationship"); Lone Mountain Processing, Inc. v. Bowser Morner, Inc., 94 F. App'x 149, 156 (4th Cir. 2004) (same); Va. Code Ann. § 13.1-690 (imposing fiduciary duties on corporate directors); FAC ¶¶ 4, 56. Third, the CODs are executory contracts, which tolls limitation periods. See Colchester Sec. II, LLC v. Krispy Kreme Doughnut Corp., 85 Va. Cir. 250, 250 (Va. Cir. Ct., Fairfax Cty. 2013). Fourth, the discovery rule applies because Plaintiff cannot know all decisions that Directors make or why, and the nonpayment of dividends, in and of itself, does not indicate wrongdoing. See Wal-Mart Stores, Inc. v. AIG Life Ins. Co., 860 A.2d 312, 319 (Del. 2004) ("inherently unknowable" injury and

"claimant is blamelessly ignorant of the wrongful act and injury"). Fifth, equitable estoppel applies.[6] See Opp'n 17-19. These are all fact-based inquiries.

Finally, even if the Court could properly rule on limitations issues on the MTD and find no tolling, Plaintiff adequately pled timely, quarterly breaches after June 30, 2015 against Fannie Mae Directors and after June 30, 2013 against Freddie Mac Directors. See FAC ¶¶ 3-4, 9-10, 54-72.

B. Dismissing Plaintiff's Original Complaint with Prejudice Is Manifestly Unjust

At a minimum, dismissal should be without prejudice to prevent manifest injustice. "[M]anifest injustice arises from 'rulings that upset settled expectations[] on which a party might reasonably place reliance.'" Mohammadi v. Islamic Republic of Iran, 947 F. Supp. 2d 48, 78 (D.D.C. 2013), aff'd, 782 F.3d 9 (D.C. Cir. 2015) (quoting Qwest Servs. Corp. v. FCC, 509 F.3d 531, 540 (D.C. Cir. 2007)). It "must entail at least (1) a clear and certain prejudice to the moving party that (2) is fundamentally unfair in light of governing law." Id. First, an original complaint was dismissed with prejudice based on statute of limitations, which involves fact issues improperly decided now. Second, the claims are not so clearly baseless to not deserve a chance to replead. Third, nor were Plaintiff's claims so unintelligible: the Court and Directors sufficiently understand Plaintiff's quarterly breach claims. See, e.g., Order 5 n.4. Yet, the Court cited Plaintiff's filings for the complete opposite propositions that he stated on the cited page, see, e.g., infra page 12, and found no breach without looking to or having full briefing on the CODs. Fourth, Plaintiff has shown an ability to plead and prove his claims. See supra Part II.A; infra Part III. Fifth, he reasonably expected that if dismissed, he could replead. Sixth, he is *pro se*.[7] Seventh, the decision would prejudice nonparty shareholders. Plaintiff should have at least one opportunity to replead.

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[6] The Court wrongly rejected equitable estoppel based on the clear errors alleged herein. Op. 5-6.

[7] The Court properly construed his Complaint, at least in part, as "filed *pro se*" and should continue to treat his filings as such. Op. n.1. But see infra Part II.D, pages 8-9. First, Plaintiff explained

C. A Patent Misunderstanding Can Constitute Clear Error

Directors agree that Plaintiff must show "a clear error or [] manifest injustice." Mem. 6; see Defs.' Br. 2. However, they argue that Plaintiff applied another standard and that a patent misunderstanding cannot be clear error. See Defs.' Br. 2. As to the former, Plaintiff correctly applied the clear error standard. "Clear[] Err[or]" is in the heading for the Rule 59(e) motion, Mem. 10, and is discussed in every subsection therein, see Mem. 6-16 (stating "clearly erroneous," "clear error," and variations thereof twenty-seven times and other instances of "clear" thirteen times).

As to the latter, courts in this Circuit recognize that a patent misunderstanding can be clear error. See Flynn v. Dick Corp., 565 F. Supp. 2d 141, 145 (D.D.C. 2008) ("Reconsideration is appropriate when the Court has made a clear error of law or fact, or obviously misapprehended a party's position."), amended by 620 F. Supp. 2d 33 (D.D.C. 2009); Moses v. Dodaro, 856 F. Supp. 2d 99, 102-03 (D.D.C. 2012), aff'd, 685 F. App'x 1 (D.C. Cir. 2017) (recognizing principal that misapprehension of party's assertions can be clear error, but denying relief on the specific facts of that case); E.E.O.C. v. St. Francis Xavier Parochial Sch., 20 F. Supp. 2d 66, 68 (D.D.C. 1998) (misunderstanding statute); see also Mem. 7. Indeed, they should as a matter of plain English. "Patent" and "clear" are synonyms, see Merriam-Webster Thesaurus, "patent," https://www.merriam-webster.com/ thesaurus/patent, and of course, an error can result from a misunderstanding, as is the case here, see Mem. 7-10. None of Directors' cases refute this position.

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his background as an insolvency attorney with his Complaint. See Compl., Ex. A, at 42. Second, this Circuit has expressly not resolved the issue for "practicing lawyer" plaintiffs, and Plaintiff is not actively practicing. Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014). He retired more than six years ago. Third, he has a "gap" in relevant practice that "raises questions about the equity" of not treating him *pro se*: his age, retirement, inexperience in commercial litigation (see Compl.), and not being "barred in the District." Robinson v. Howard Univ., Inc., 335 F. Supp. 3d 13, 22 (D.D.C. 2018), appeal pending on other grounds, No. 18-7191 (D.C. Cir.); see Decl. ¶¶ 5-9.

See Defs.' Br. 2; Shvartser v. Lekser, 330 F. Supp. 3d 356, 360 (D.D.C. 2018) (stating that the Rule 54(b) standard is "more flexible"); Pinson v. Dep't of Justice, 321 F.R.D. 1, 4 (D.D.C. 2017) ("more discretion" under Rule 54(b)); United States v. Slough, 61 F. Supp. 3d 103, 107 (D.D.C. 2014) (barely mentioning Rule 59(e)). It is fallacious to argue that an error that satisfies a lower standard cannot satisfy a higher one, and Plaintiff has met the latter. Finally, patent misunderstandings are only one set of Plaintiff's bases for clear error, so Directors' incorrect argument does not apply to his other grounds. See Mem. i, 1, 6-7, 10-16.

D. The Court Clearly Erred on the Law and in Reading Plaintiff's Allegations

Based on selective quotations and misstatements, Directors attempt to support the Court's conclusions that the Third Amendment was the sole "wrongful act [] of a permanent nature" that "produce[d] all the damage," that Plaintiff initially pursued a claim for anticipatory breach and "abandoned" it for breach of contract, and that the alleged, quarterly breaches were merely accruals of damages.[8] Defs.' Br. 4 (quoting Op. 7) ("[T]he Court did not overlook th[is quarterly breach] argument; the Court confronted and rejected it."); Defs.' Br. 5 ("[T]he Third Amendment made it 'impossible' to pay dividends."); Op. 5 n.4. These findings demonstrate clear errors of law and fact and in understanding Plaintiff's allegations.

First, the Court failed to accept the factual allegations as true and make all reasonable inferences in Plaintiff's favor. See Washington Post Co., 962 F. Supp. 2d at 84. Had it not done so, the Court would have found adequate pleading of a quarterly COD duty, quarterly breaches

[8] They also incorrectly claim that the lack of "class allegations in the [FAC]. . . suggest[s that] Plaintiff [] abandoned the[m]." Defs.' Br. 9. Contra Bush v. Ruth's Chris Steak House, Inc., 277 F.R.D. 214, 216 (D.D.C. 2011) (allowing amendment for class allegations, despite already-alleged "pattern and practice" of discrimination and briefing on dispositive motions). Plaintiff may amend at any time pursuant to Rule 15, and Directors acknowledge notice of potential class claims, so there can be no "undue prejudice" on that basis. See id. Such unfounded "abandonment" would also prejudice nonparty, Junior Preferred Shareholders. Regardless, this issue is premature.

that are well within the limitation periods, and the fact that the Third Amendment could not and did not immunize Directors such breaches.[9] See Decl. Exs. 1, 3; Op. 4 n.3 (accepting the CODs as true); see also Twin City Fire Ins. Co. v. Del. Racing Ass'n, 840 A.2d 624, 630 (Del. 2003) ("[A]mbiguities in a contract should be construed against the drafter."). The Court also would have inferred facts that support tolling of the older claims on any of several applicable grounds. See supra Part II.A & D. Instead, the Court did the opposite by assuming facts against Plaintiff's interest to rule on fact-intensive determinations, e.g., limitations and tolling. That was clear error.

Second, the Court failed to apply the adequate pleading standard. The Court expressly recognized, and Directors concede, that Plaintiff alleged actual, quarterly breaches subsequent to the Third Amendment. See, e.g., Op. 5 n.4 (citing Opp'n Br. 17) ("Mr. Angel . . . seeks relief for an actual breach' that 'has occurred, and continues to occur.'"); Compl. ¶¶ 54, 56, 85-88. Thus, Directors had "fair notice of what the . . . claim[s] [are]," so the MTD should have been denied. Washington Post Co., 962 F. Supp. 2d at 84. Any inconsistent statements regarding the Third Amendment did not deprive Directors of fair notice of the claims and in any event, are permissible as alternative pleading. See id.; Fed. R. Civ. P. 8(d)(2). "[T]he Court's role is not to police whether the Plaintiff has filed the best complaint, so long as the complaint states a claim for relief and provides adequate notice to the Defendant as to the claims." Street v. D.C., 962 F. Supp. 2d 117, 121–22 (D.D.C. 2013). Even if dismissal could have been proper, the prejudice was clear error.

Third, the Third Amendment did allow Junior Preferred Share dividends. Contra Defs.' Br. 5. In fact, it does so expressly: "[the GSE] shall not, . . . without the prior written consent of

[9] Directors avoided addressing this duty in their reply to their MTD despite the clear assertions of that duty in the Opposition. See Decl., Ex. 2. Instead, they chose to irrelevantly argue that there is no right to receive dividends. See Defs.' Reply 12 (quoting Perry, 864 F.3d at 629). They also never denied that they breached the duty. Rather, they disputed causation, which is thoroughly discredited herein. See infra Part II.E.

[Treasury], declare or pay any dividend . . . other than with respect to the Senior Preferred Stock or the Warrant." SPSPA § 5.1 (Sept. 26, 2008); Compl., Ex. A, 20-21. That provision necessarily means that junior preferred dividends were allowed. Directors counter that the original SPSPA states this requirement, but that supports Plaintiff's position. That language was maintained in each subsequently amended SPSPA, so such dividends were always allowed. Indeed, Plaintiff alleged one such instance in which they were. See Compl. ¶¶ 11-15. Thus, the Third Amendment cannot be the only cause of Plaintiff's damages.

Fourth, the Court erred on fact and law in finding that the Third Amendment deprived the GSEs of profits in a way that prevented junior preferred dividends. Directors argue that no funds were available to declare such dividends.[10] See Defs.' Br. 6. First, that is irrelevant: it has nothing to do with the adequacy of the pleading. In fact, Defendants' ability to respond with a fact issue over causation, which cannot be resolved now, shows that Plaintiff adequately stated a claim. It is further irrelevant: the issue is not payment but rather, the failure to determine whether to declare dividends, thereby increasing quarterly and outsized net worth profit that sweeps to Treasury. Directors could have performed their duty and declared dividends before the quarterly sweep.

[10] Directors also claim that Plaintiff construes the prior consent requirement as imposing an affirmative duty. See Defs.' Br. 5-6. However, Directors concede that the point "is irrelevant to the [Court's] rationale." Id. Regardless, as discussed below, the FAC expressly doubts the validity of that requirement, see FAC ¶¶ 9 n.8, 57, and even if it were valid, the duty to comply with it is conditional and arises from the CODs, not the SPSPAs. See infra Part III.C, page 19. Furthermore, such consent had been given when GSEs were bankruptcy, so it surely could have been given when they were profitable. See Decl., Ex. 2. Finally, Directors' position cannot be reconciled with their position, though their principals, in related litigation. See Defs.' Reply in Supp. Mem. for Partial Recons. of Denial of Mem. to Dismiss Implied Covenant Claims at 7, No. 1:13-mc-01288-RCL (D.D.C.) (ECF No. 92) (quoting Perry, 864 F.3d at 631 (quoting stock certificates)) ("[T]he D.C. Circuit . . . in Perry [] understood those [implied-covenant] claims not as calling for a free-floating reasonableness test, but as closely tied to the express provisions of the shareholder contract that '"provide for dividends 'if declared by the Board of Directors, in its sole discretion.'"').

GAAP rules require declared dividend amounts, immediately upon declaration, to be recorded as an expense on the income statement and as a liability on the balance sheet to be paid. Regardless of payment, declaration and requisite GAAP book entries would save those amounts from the net worth sweep of profits. See, e.g., FAC ¶¶ 31-32. Second, Directors' assertion is false. The Third Amendment, a contract, cannot declare dividends. Only a corporate board can, and it must do so for each dividend. *See* 8 Del. C. §§ 141, 170; VA Code Ann. § 13.1-645. Thus, Directors' conduct must be a cause of damages, and they were always able to declare junior preferred dividends, so the Third Amendment cannot be the sole cause. The Court clearly erred on law and fact in concluding otherwise.

Fifth, the Court clearly erred in more ways to the extent that it dismissed the Complaint as asserting anticipatory breach for the Third Amendment. That claim is legally unactionable. First, anticipatory breach is mutually exclusive with breach of contract, which he expressly pled in his first cause of action. See Compl. 30, 33. Once a breach occurs, it cannot be anticipatory, so the proper claim is breach of contract. See Nowland v. Tri Core, Inc., 60 Va. Cir. 469, 469 (Va. Cir. Ct., City of Richmond 2000) ("[A] claim for anticipatory breach may [be] brought before [] performance was due . . . . [O]nce [] performance was past due . . . , plaintiffs' claims . . . are properly pleaded as breach of contract[.]") (emphasis added) (citing Bd. of Supvrs. of Fairfax Cty. v. Ecology One, Inc., 219 Va. 29 (1978)); Carteret Bancorp, Inc. v. Home Group, Inc., 13 Del. J. Corp. L. 1115, 1125-26 (Del. Ch. 1988). Second, Plaintiff chooses to "treat[] the mutual obligations as being still in force," which is impermissible for anticipatory breach claims. Carteret Bancorp, Inc., 13 Del. J. Corp. L. at 1125-26; Simpson v. Scott, 189 Va. 392, 398 (1949). He seeks to enforce the terms of the CODs as to past and ongoing actualized breaches. Thus, the Court clearly erred in finding that Plaintiff asserted anticipatory breach.

Sixth, even if Plaintiff could have asserted that claim, he clearly did not. The Court clearly misunderstood his allegations and assertions. First, Plaintiff's explicit causes of action are breach of contract and the implied covenant, not anticipatory breach, which is a distinct claim. See Compl. at 30. Second, Plaintiff named Directors who were not directors when the Third Amendment was executed, which Directors acknowledged, see MTD 37, exactly because Plaintiff was not asserting claims on that basis. Third, Plaintiff's Complaint and Opposition, also quoted in the Memorandum, clearly reject anticipatory breach as a claim for relief, see Decl., Ex. 1 ¶ 1, and assert (1) a continuous, quarterly duty in the CODs, (2) ongoing breaches of that duty, and (3) causation of damages in unpaid dividends, see id. ¶¶ 1, 3; see also, e.g., Compl. ¶ 107 (emphasis in original) ("**The Third Amendment was[ ] irrelevant to Plaintiff as a holder of Freddie/Fannie Junior Preferred[.]**"). Those allegations reject a claim for anticipatory breach. Despite the unambiguous statements, the Court concluded that Plaintiff was pursuing anticipatory breach. In fact, the Court cited a page in Plaintiff's own Opposition for the exact opposite position that he clearly stated on that page. Compare Op. 5 n.4 (citing Opp'n Br. 17) ("In Mr. Angel's opposition, he claimed that his breach of contract claim was actually a claim for anticipatory breach."), with Opp'n Br. 17 ("A breach occurred after each quarter in which [Directors] failed to [] determine whether to declare[] a dividend. . . Plaintiff's claims [for those breaches] did not accrue, at the earliest, until the end of th[e first] quarter [of 2013] (and every quarter thereafter)[.]"). The Court clearly erred in misunderstanding the claims against Directors. See supra Part II.B. Fourth, the purportedly inconsistent allegations were consistent. See, e.g., Op. 5 n.4; Defs.' Br. 3-7. The assertions of a past repudiation (the Third Amendment) and that "the breach was anticipatory" are merely descriptive. Opp'n Br. 23 (cited in Op. 5 n.4). They cannot

mean, without more, that Plaintiff was pursuing a distinct, unasserted claim for anticipatory breach and not pursuing any other claim against Directors. See also supra page 8; infra page 15.

Seventh, the Court clearly erred on the law of anticipatory breach by finding such inconsistency as a basis for dismissal. The doctrine of anticipatory breach assumes a future, actual breach and allows claims for damages upon repudiation before the actual breach occurs.

> Under the doctrine of anticipatory breach, . . . a repudiation . . . "ripens into a breach prior to the time for performance . . . if the promisee elects to treat it as such." . . . In other words, anticipatory breach . . . "gives the plaintiff the option to have the law treat . . . the act . . . as a breach itself."

Perry Capital LLC v. Mnuchin, 864 F.3d 591, 632–33 (D.C. Cir. 2017) (citations omitted) (emphasis added), cert. denied sub nom., Cacciapalle v. Fed. Hous. Fin. Agency, 138 S. Ct. 978 (2018), and cert. denied, 138 S. Ct. 978, (2018), and cert. denied sub nom., Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency, 138 S. Ct. 978 (2018) ("Perry"). Thus, it is consistent to assert claims for breach of contract while acknowledging a past repudiation, as Plaintiff did. Furthermore, Plaintiff exercised his right to not pursue a claim for anticipatory breach. See id.; see e.g., Compl. ¶ 75 (emphases removed) ("[T]he Net Worth Sweep[,] while initially in anticipatory breach of [their COD] dividend [rights] . . . , over time became absolute . . . through the [quarterly] dividend [] breach[.]"); Compl. ¶ 81 (emphasis added) (alleging that the "initial[] [] anticipatory breach . . . became absolute . . . through the [] breach" of the CODs).[11] That cannot preclude him from asserting timely breach-of-contract claims independent of the Third Amendment against Directors. The Court clearly erred in concluding otherwise.

E. Directors Are Liable for Contract Breaches Regardless of Conservatorship

[11] Accordingly, the Third Amendment was a nonevent for Plaintiff's claims. See, e.g., Compl. ¶ 81 ("[T]he Net Worth Sweep . . . was no more of an event for [] Junior Preferred Shareholders than it was for the GSE debt holders[.]"). Contra Defs.' Br. 4. The actual breaches are the pertinent events for his claims, not the Third Amendment. See Compl. ¶¶ 75, 81, 107.

Directors attempt to defend the Court's assertion 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." Defs.' Br. 6. The Court relied on that assertion to conclude that "the Third Amendment—produces all the damage that Mr. Angel claims." Op. 7. That assertion demonstrates another clear error regarding Plaintiff's allegations. Conservator is not the only requisite actor. As discussed above, Directors must first determine each quarter whether to declare dividends. Directors can breach that duty regardless of what Conservator might later decide.

The assertion also shows clear legal error in interpreting and applying HERA. Directors know, and Plaintiff alleged, that the conservatorship did not dispense with Directors' contractual duties under state law. Compare Defs.' Br. 6-7 with Perry, 864 F.3d 624, and Compl. ¶ 75 ("HERA left in place the [GSE]s' federal charters, and did not otherwise alter the provisions of bylaws, implemented pursuant to federal law[.]"). Directors owe such duties regardless of their duties to Conservator. While Directors do "answer to the Conservator," Defs.' Br. 6, they are still liable for violating state law, even if at Conservator's behest. Directors were always obligated to perform their quarterly duty and liable for breach. Directors' performance of their quarterly duty was and remains absolute and a prerequisite to Conservator's conduct (i.e., consenting to the decision to declare a dividend, if so decided). Directors never bothered to seek Conservator's consent because the Directors chose to breach their duty, and Directors never disputed that Directors failed to seek such consent in response to any of Plaintiff's filings. Compare Compl., Ex. A, at 21-22 (consent requirement), with Mem. to Dismiss 1-32 (discussing consent requirement); Opp'n Br.7-8 with Defs.' Reply Br. 15-16; Mem. 7-9, 15-16 with Defs.' Opp'n to Mem. 5-6, 12-14.

Due to these clear errors, the Court held that the Third Amendment caused all damages and that the alleged quarterly breaches were merely accruals of damages, not continuing breaches that

tolled the limitations period. See Op. 7. Thus, the claim was dismissed as time-barred. Directors incorrectly argue that Plaintiff merely "disagree[s] over the meaning of a case." Defs.' Br. 7. Plaintiff agrees with the cases, but they do not apply here because the Court clearly ruled on a claim that Plaintiff could not and did not assert. See supra Part II.D. As discussed above, the Court clearly erred in misunderstanding the allegations, assertions, facts, and law, and in applying the wrong law and legal standards. Thus, reconsideration is justified.

III. Directors' Opposition to Leave to File the FAC Are Meritless

Directors waive, by silence, any argument as to prejudice in granting leave to file the FAC. See Defs.' Br. 11-16. They also:

> [Do] not argue that the [FAC's] allegations fail to state a claim, or do not provide adequate notice of the legal basis for the [his] claims. Reasonable parties may disagree as to whether the allegations . . . are necessary or useful. [T]he Court's role is not to police whether the Plaintiff has filed the best complaint, so long as the complaint states a claim for relief and provides adequate notice to the Defendant as to the claims it must defend against.

Street, 962 F. Supp. 2d at 121–22. This basis alone is sufficient to grant leave to file the FAC, especially because "the Court lacks an adequate record from which to determine" limitations, tolling, and whether Proposed Defendants may be held liable. Id.

Directors solely argue futility in that the FAC does not cure the limitations issue and that the Proposed Defendants cannot be liable. However, Directors contest the timeliness as to a claim based on the Third Amendment, so the argument is irrelevant because the claims against Directors are not based on the Third Amendment but rather, on quarterly breaches. Moreover, Directors lack standing to defend Proposed Defendants who are not named in the Complaint. Notably, they omit any mention of the low bar for leave to amend and the high bar for futility because they cannot meet the latter, and Plaintiff meets the former. Plaintiff established, see Mem. 6-16, and further shows herein that the "well-established policy of freely granting leave to amend" warrants

the granting of this motion, De Sousa v. Dep't of State, No. 09-0896 (RMU), 2010 WL 11594933, at *2 (D.D.C. June 4, 2010) (quoting Firestone, 76 F.3d at 1208). Moreover, Directors fail to show futility of amendment: that is "beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief." Miller-McGee v. Washington Hosp. Ctr., 920 A.2d 430, 437 (D.C. 2007) (emphases added) (quoting Fingerhut v. Children's Nat'l Med. Ctr., 738 A.2d 799, 803 (D.C. 1999)). Thus, the Court should grant this motion.

A. Directors Lack Standing to Argue on Behalf of All Proposed Defendants

Directors have no standing, nor do they claim it, to defend the Proposed Defendants not named in the Complaint. This part of the Motion is unopposed as to those Proposed Defendants.

B. The FAC Adequately Pleads Claims for Relief

Directors concede by not disputing that the FAC adequately pleads a *prima facie* case for breach of contract and the implied covenant. Regarding the former, Plaintiff alleges that the duty arises from his "entitle[ment] to receive, when, as and if declared by the Board of Directors of [each GSE] . . . , in its sole discretion out of funds legally available therefor, non-cumulative quarterly dividends." Fannie Mae Series P § 7(c) (quoted in FAC ¶ 4); see also Freddie Mac, Offering Circular, A-2 (Nov. 29, 2007); Fannie Mae, Ex[.] to Current Report (Ex[.] 4.2 to Form 8-K), 2(a) (Sept. 11, 2008). Quarterly dividends necessarily means that Directors must determine every quarter whether to declare them. Virginia and Delaware law, which govern the GSEs, see FAC ¶ 3, require discretion to be exercised reasonably and in good faith, see id. ¶¶ 4, 10. Thus, the "CODs require Directors to . . . make a reasonable, good-faith determination in their 'sole discretion' every [] quarter as to whether [] to declare a dividend payment on the Junior Preferred shares (the 'Quarterly Dividend Duty')." Id. ¶¶ 4, 5. As to breach, "since January 1, 2013, Directors breached the CODs by failing to perform th[at] Quarterly Dividend Duty." Id. ¶ 59. "As

a result of those omissions, no dividends were declared or paid on the Junior Preferred Shares. . . , caus[ing] . . . damages based on the profits earned [] each [] quarter." Id. ¶ 60.

As to breach of implied covenant, the FAC alleges the duty "to avoid unreasonable or bad-faith conduct that would deprive the other parties of the fruits of the contract." Id. ¶ 68. Plaintiff reasonably expected "reasonable, good-faith determinations by Directors[] in their sole discretion as to (a) whether to declare Junior Preferred shares dividends, and (b) whether in good faith request Treasury written consent to Junior Preferred share dividend declaration." Id. ¶ 71; see also Perry, 864 F.3d at 631. As to breach, "Directors committed willful, bad-faith, and unreasonable breaches of the implied covenant every quarter as of and since January 1, 2013" by engaging in a scheme to maximize profits for the net worth sweep by failing to make dividend declaration determinations. FAC ¶ 72. That "caused Fannie Mae Junior Preferred shares to suffer $5 billion[and] Freddie $4 billion" within just the applicable limitations periods, i.e., excluding tolled claims. Id.

The FAC went beyond those elements by rebutting the claim that the Third Amendment was the only cause of damages. It alleges that the requirement that Directors "obtain Treasury's 'prior written consent'" to "declare or pay any dividend' on the Junior Preferred Shares," Id. ¶ 6, "did not eliminate Directors' performance of their [Quarterly Dividend D]uty." Id. ¶ 7 (quoting Series Q, § 2(a)). See also FAC ¶ 57 ("The Third Amendment did not affect the Directors' obligation to perform the Quarterly Dividend Duty, nor could it have without breaching the CODs' requirements for amending the CODs."). "Therefore, the Third Amendment did not cause Directors to not declare or pay dividends on the Junior Preferred Shares." Id. ¶ 58.

C. Directors' Arguments Are Irrelevant and Fail to Meet the High Futility Standard That Plaintiff Cannot Possibly Prove Tolling

Directors applied the wrong standards by relying on the Complaint, not the FAC, and arguing over proof, not adequate pleading. Any such arguments that could properly be considered

are irrelevant, based on glaring misstatements, or are insufficiently briefed to justify denial of leave to amend.

Directors barely, and superficially, reference the FAC because it is adequately pled and not futile. They mostly rely on the Complaint and Order, see, e.g., Defs.' Br. 12 ("Plaintiff's overarching theory has always been . . ."), but they are irrelevant.[12] The FAC is what matters. To prop up this tactic, Directors claim in conclusory terms that the FAC merely restates the Complaint, but a cursory comparison disproves that. See Defs.' Br. 12 (citing Mem. 16). Moreover, Directors undercut their own argument by indirectly citing (and not discussing) new allegations. See id. (citing Mem. 16 (citing FAC ¶¶ 13, 30)). The FAC even more clearly[13] establishes that the quarterly breaches were in fact breaches and not mere accruals of damages. See FAC ¶¶ 9, 56-60.

Moreover, regardless of what Plaintiff's "overarching theory" was, which Directors misstate, see supra Part II.C, the FAC expressly contradicts Directors' mischaracterization. See, e.g., FAC ¶ 7 (alleging that the consent requirement "did not eliminate" Directors' quarterly duty); ¶ 57 (same). Directors ignore those allegations. Instead, they attempt to assign new, self-serving[14] meanings to the FAC's allegations that glaringly contradict the allegations.[15] Directors' need to rewrite Plaintiff's allegations is a tacit acknowledgement that Plaintiff sufficiently pled his claims.

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[12] Furthermore, reliance on the Order is unavailing due to the clear errors set forth in Part II.

[13] The Complaint sufficiently pled these allegations.

[14] Curiously, Directors accuse Plaintiff of "self-serving" allegations. Complaints are inherently self-serving. Adequate pleading is the issue and is met here. Directors' arguments are fabricated.

[15] Compare Defs.' Br. 12-13 (quoting FAC ¶ 8) (emphasis added to Directors' untruthful addition) ("[T]he Third Amendment 'required perpetual, quarterly dividend payment to Treasury . . . '—thus leaving nothing available as dividends for junior preferred shareholders."), with FAC ¶ 13 (footnote omitted) (emphasis added) ("Junior Preferred share dividend amounts once declared could have been avoided from the Net Worth Sweep . . . by simple application of the GAAP rule mandate for declared dividend[s to be] reflect[ed] on the [] financial statements[.]"), and FAC ¶¶ 31-32 ("GAAP treatment for [] declared [junior preferred] dividend amounts would have removed the[m] . . . from Net Profit Sweep[.]"), and FAC ¶ 13 n.6 (explaining GAAP rule).

Directors then repeat the argument that the CODs do not allow for dividends to junior preferred shareholders. As discussed, that argument is unavailing, see supra Part II.D, page 12, and for a motion for leave to amend, it is wholly irrelevant. First, Directors base their argument on the Complaint and the Order, which are irrelevant here. Compare Street, 962 F. Supp. 2d at 121–22, with Defs.' Br. 13 (quoting Op. 7). Second, the FAC expressly disclaims that the Third Amendment was the sole, if any, cause of damages, see, e.g., FAC ¶¶ 8-9, 57, which Directors even acknowledge, see Defs.' Br. 13 ("[T]he Third Amendment could not have been the cause."), so Directors' argument is also factually incorrect. See also supra Part II.C, page 7.

Directors then argue about the consent requirement in the SPSPAs. See Defs.' Br. 13-14. However, first, Directors completely ignore the FAC's allegations explaining why the requirement is invalid.[16] See, e.g., FAC ¶¶ 9 n.8, 57 (alleging that the consent requirement purports to modify the CODs in a manner that requires shareholder consent, which was never given). Since they are undisputed, and since the Court must assume that the allegations are true and construe them favorably to Plaintiff, the Court should disregard Directors' consent-requirement arguments.

Second, the Court should disregard the second argument: "(b) Plaintiff does not allege or offer any plausible reason to believe Treasury would have given consent if requested." Defs.' Br. 14.[17] That goes to proof, not adequate pleading, which is improper at this stage of the proceedings. Directors understand the allegations so as to respond, and they cure the limitations issue, so the FAC is not futile. See Miller-McGee, 920 A.2d at 436-37 (quoting Fingerhut, 738 A.2d at 803).

[16] For avoidance of doubt, Plaintiff never alleged that the federal government lacked authority to enter into the SPSPAs. Rather, he alleges that the SPSPAs' Treasury consent requirement, if valid, breaches the CODs' amendment clause. See, e.g., FAC ¶¶ 57, 9 n.8; Fannie Mae, Series P § 7(c).

[17] The third argument, that the Third Amendment was the sole cause of damages, has already been thoroughly and repeatedly rebutted herein.

Third, even if the court could properly consider these arguments at this stage, the consent requirement is irrelevant, regardless of validity. See Defs.' Br. 13-14. Performance of the quarterly duty must precede performance of that consent duty. See infra note 9. Of course, a party can breach a duty despite owing subsequent duties. Furthermore, the quarterly duty could be a condition precedent, the material breach of which is sufficient to prove breach of contract, regardless of any conditions subsequent (e.g., the purported consent requirement). See, e.g., Commonwealth Const. Co. v. Cornerstone Fellowship Baptist Church, Inc., C.A. No. 04L-10-101 RRC, 2006 WL 2567916, at *1 (Del. Super. Ct., New Castle Cty. Aug. 31, 2006) (finding breach of contract because of a "material[] breach[] [] by failing to comply with . . . a condition precedent under the Agreement"); Countryside Orthopaedics, P.C. v. Peyton, 261 Va. 142, 155 (2001). Moreover, materiality is "a factual inquiry" that cannot be resolved at the pleading stage. SLMSoft.Com, Inc. v. Cross Country Bank, No. Civ.A. 00C09163JRJ, 2003 WL 1769770, at *5 n.22 (Del. Super. Ct. Apr. 2, 2003). Thus, these consent-duty arguments are improper at this stage and irrelevant.

Directors next argue that "dividends to junior preferred shareholders were suspended at the outset of the conservatorships [] and were generally prohibited in the original [SPSPA.]" Defs.' Br. 14.[18] That too is irrelevant. It says nothing of the sufficiency of Plaintiff's pleading and requires proof later in litigation, so it is improper for consideration now. Street, 962 F. Supp. 2d at 121–22. Furthermore, Plaintiff need not assert all possible causes of damages, and regardless of any federal government prohibition, the Directors were still liable to Plaintiff under state law to

[18] Directors also reference the "*de facto* nationaliz[ation]" alleged in the FAC but fail to clearly explain its significance to their argument, so Plaintiff is unsure of how to address it. Defs.' Br. 14. To the extent that Directors argue that this even could be another cause of Plaintiff's damages, that assertion is irrelevant at this pleading stage because it goes to provability.

perform their contractual duties. See Perry, 864 F.3d at 612, 624; FAC ¶¶ 3, 25-26. Even HERA recognizes that compensation is required if contracts are repudiated. 12 U.S.C. § 4617(d).

Finally, even if Directors applied the proper standard and raised relevant arguments that are proper at this stage, Directors cannot meet the high futility standard. See Miller-McGee, 920 A.2d at 436-37 ("beyond doubt that [] plaintiff can prove no set of facts [to] support [the claims]"). Certainly, Plaintiff can possibly prove that Directors owed and breached the quarterly duty every quarter since 2013 and did so continuously in bad faith. See supra Parts II.A, III.B. Moreover, the limitation periods for breaches of those duties "begin[] to run from the time specified for the function's performance." FAC ¶ 12. Performance is required any time during each quarter. As shown above, continuous breaches of a recurring contractual duty toll the running of limitations. See supra Parts II.A, III.B. Thus, Plaintiff can possibly prove tolling, so the FAC is not futile.

D. Directors' Arguments That They Cannot Be Liable Are Meritless

Directors claim that the FAC is futile because they cannot be liable. Directors raise three sets of arguments: (1) Conservator had sole authority over dividends; (2) there is no contractual right to discretionary dividends; and (3) Directors are not obligated to pay dividends. The first is false, the latter two are irrelevant, and none bear on whether claims for relief are adequately stated.

Directors cite the Succession Clause in HERA, see Defs.' Br. 14-15, and the GSEs' Forms 10-K to falsely contend that "responsibility for all matters relating to dividends . . . rested entirely with the Conservator," Defs.' Br. 15-16 (citing Fannie 2011 10-K at 207; Freddie 2011 10-K at 325), but those forms clearly state the exact opposite. Directors know that after operation of the Succession Clause, Conservator delegated authority back to them:

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

Freddie 2011 10-K at 325; accord Fannie 2011 10-K at 207. The second sentence necessarily means that the Boards did have authority to act as to dividends.[19] Furthermore, Conservator delegated authority to Directors to act pursuant the bylaws and board committee charters, which are governed by state corporate governance laws that require compliance with contract law. See 8 Del. C. § 122(13); Va. Code Ann. § 13.1-690. Thus, Directors were still authorized and required to perform under the CODs. Directors disproved their own argument.

That argument also failed in Perry, 864 F.3d at 624-26 (shareholders can assert direct, contract claims). Finally, the Succession Clause provides for succession of "rights, titles, powers, and privileges," not duties, obligations, or liabilities, which Directors do not dispute. FAC ¶ 41.

Directors' remaining two arguments are equally unavailing as they rest on the same false premise. They argue that "there [is no] 'contractual right to discretionary dividends'" and that Directors do not owe "any contractual obligation to pay dividends." Defs.' Br. 16 n.7. However, they know that Plaintiff alleges neither claim, so their arguments are irrelevant. See id. 12 ("Plaintiff maintains [] allegations that his stock certificates 'require [Directors] to [] determine every quarter whether to declare dividend."). Accordingly, Directors fail to show at all, let alone meet the high futility standard, that Plaintiff has not adequately pled claims against Directors.

CONCLUSION

The Court should (1) deny the motion to dismiss or alternatively, amend the Opinion and Order to state that any dismissal is without prejudice, and (2) grant Plaintiff leave to file the FAC.

Dated: May 6, 2019
New York, New York

By: _____
Joshua J. Angel

[19] Directors' lack of complete authority is irrelevant. Their duty to act on behalf of Conservator does not immunize them from state law claims. See Perry, 864 F.3d at 624-25; FAC ¶ 3. Because Directors materially breached a condition precedent, the quarterly duty, it is irrelevant whether they owed a subsequent duty to obtain Treasury or Conservator's consent. See id.; supra Part II.D.

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Pro Se Plaintiff

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

DECLARATION OF JOSHUA J. ANGEL IN FURTHER SUPPORT OF *PRO SE* PLAINTIFF'S MOTIONS PURSUANT TO RULE 59(e) TO ALTER OR AMEND JUDGMENT AND RULE 15(a) FOR LEAVE TO AMEND THE COMPLAINT

I, Joshua J. Angel, declare as follows:

1. I am the *pro se* Plaintiff named in the above caption. As such, I have knowledge of the matters set forth in this declaration. I submit this declaration in further support of my Motions Pursuant to Rule 59(e) to Alter or Amend Judgment and Rule 15(a) for Leave to Amend the Complaint.

2. I am eighty-three years old.

3. I graduated from law school in 1959.

4. After graduating, I practiced commercial insolvency law with a minor litigation thrust for nearly fifty-four years.

5. When my wife of fifty years passed away in 2013, I retired from the active practice of law other than closing open matters.

6. I did not file this lawsuit *pro se* due to any meaningful choice.

7. I did not file this lawsuit *pro se* as a coda to an active career of a commercial litigation. I never had any such career.

8. I filed *pro se* out of necessity. I am an aggrieved private investor in the Junior Preferred Shares of Fannie Mae and Freddie Mac seeking redress against their directors' actions in breach of my certificates of designation for those shares.

9. Attached hereto as Exhibit 1 are true and correct excerpts from the Complaint ("Complaint") [ECF No. 1], Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss the Complaint ("Opposition") [ECF No. 11], and the Proposed First Amended Complaint ("FAC") [ECF No. 27-2] showing that: "The[] [Complaint, Opposition, and FAC] all allege that the Third Amendment could not be the sole, if any, cause of damages because it expressly allowed for junior preferred dividends." Pl.'s Reply Br. 4.

10. Attached hereto as Exhibit 2 are true and correct excerpts from the Complaint, Opposition, and FAC showing that: "In fact, the[] [Complaint, Opposition, and FAC] clearly allege that [a junior preferred] dividend was allowed." Pl.'s Reply Br. 4.

11. Attached hereto as Exhibit 3 are true and correct excerpts from the Complaint, Opposition, and FAC showing that: "The[] [Complaint, Opposition, and FAC] further allege that ongoing refusals to determine whether to declare dividends caused the damages and that the bad-faith purpose was to maximize Treasury's dividends at other shareholders' expense." Pl.'s Reply Br. 4.

12. Attached hereto as Exhibit 4 are true and correct excerpts from the FAC showing that: "Pursuant to SEC-imposed bookkeeping rules, declaring a dividend on the Junior Preferred Shares would have saved that dividend from the net worth sweep." Reply Br. 3-4.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: May 6, 2019
New York, New York

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