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

MOTION TO DISMISS THE COMPLAINT

All Defendants in the above-captioned action hereby jointly move to dismiss Plaintiff's Complaint in its entirety with prejudice for the reasons set forth in the Memorandum in Support filed with this motion. A proposed order granting the relief requested by this motion is also being filed with this motion.

Dated: July 12, 2018

Respectfully submitted,

/s/ Howard N. Cayne
Howard N. Cayne (D.C. Bar # 331306)
Asim Varma (D.C. Bar # 426364)
David B. Bergman (D.C. Bar # 435392)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave NW
Washington, D.C. 20001
(202) 942-5000
Howard.Cayne@apks.com
Asim.Varma@apks.com
David.Bergman@apks.com

Attorneys for the Federal Housing Finance Agency

s/ Michael J. Ciatti
Michael J. Ciatti (D.C. Bar # 467177)
KING & SPALDING LLP
1700 Pennsylvania Ave. N.W.
Washington, DC 20006
Tel: (202) 626-5508
Fax: (202) 626-3737
mciatti@kslaw.com

Attorney for the Federal Home Loan Mortgage Corp. and individual directors

s/ Meaghan VerGow
Meaghan VerGow (D.C. Bar # 977165)
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
Tel: (202) 383-5300
Fax: (202) 383-5414
mvergow@omm.com

Attorney for the Federal National Mortgage Association and individual directors

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

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF FACTS 3

I. FANNIE MAE, FREDDIE MAC, AND FHFA 3

II. TREASURY'S PSPAs WITH THE ENTERPRISES 6

PROCEDURAL HISTORY 8

ARGUMENT 10

I. Plaintiff's Claims Are Time-Barred 10

II. Even if Not Time Barred, Plaintiff's Complaint Fails to State a Claim 12

A. Plaintiff's Breach of Contract Claim (Count I) Fails to State a Claim 12

B. Plaintiff's Implied Covenant Claim (Count II) Fails to State a Claim 13

1. Plaintiff Does Not State an Actionable Anticipatory Breach Under Governing Delaware or Virginia Law 15

2. Plaintiff Has Not Pleaded Facts That Plausibly Show a Breach of Implied Covenant 16

C. Plaintiff's Claim for "Aiding and Abetting in Federal Government's Implicit Guaranty Evasion and Payment Avoidance" (Count III) Fails to State a Claim 23

1. There Is No Federal Guaranty of Plaintiff's Alleged Contractual Rights 23

2. There is No Claim for Aiding and Abetting an Alleged Breach of Contract 26

D. Plaintiff's Claims Against the Individual Director Defendants Fail For Additional Reasons 27

1. Plaintiff Does Not Allege the Director Defendants Breached Any Contractual Duty They Personally Owed Him 28

2. Any Claims Against the Directors Fail Because the Directors Did Not Engage in the Alleged Misconduct 28

3. Certain of the Director Defendants Were Not Directors at the Time of the Relevant Events. 29

E. To the Extent Plaintiff's Background Allegations Might Be Construed to Suggest Breach of Fiduciary Duty, Such a Claim Would Fail 30

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases

A.W. Fin. Servs., S.A. v. Empire Resources, Inc.,
981 A.2d 1114 (Del. 2009) 30

Acclaim Sys., Inc. v. Infosys, Ltd.,
No. 13-7336, 2015 WL 4257463 (E.D. Pa. July 14, 2015) 27

Allen v. El Paso Pipeline GP Co., L.L.C.,
113 A.3d 167 (Del. Ch. 2014) 26

Allied Capital Corp. v. GC-Sun Holdings L.P.,
910 A.2d 1020 (Del. Ch. 2006) 17

Amazon.com, Inc. v. Hoffman,
No. 2239-VCN, 2009 WL 2031789 (Del. Ch. June 30, 2009) 18

Boilermakers Local 154 Retirement Fund v. Chevron Corp.,
73 A.3d 934 (Del. Ch. 2013) 20

Calderon v. Aurora Loan Serv., Inc.,
No. 1:10cv129, 2010 WL 2306343 (E.D. Va. June 3, 2010) 27

In re Cambridge Fin. Grp., Ltd.,
1987 WL 19677 (Del. Ch. Nov. 9, 1987) 29

Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood,
752 A.2d 1175 (Del. Ch. 1999) 26

Chamison v. HealthTrust, Inc. Hosp. Co.,
735 A.2d 912 (Del. Ch. 1999) 18

Colgate v. Disthene Grp., Inc.,
No. CL10-158, 2013 WL 8019576 (Va. Cir. Ct. Feb. 4, 2013) 29

Cumana Invs. S.A. v. Fluor Corp.,
593 F. Supp. 310 (D. Del. 1984) 15

DiLorenzo v. Norton,
No. 07-cv-144, 2009 WL 2381327 (D.D.C. July 31, 2009) 5

Dunlap v. State Farm Fire & Cas. Co.,
878 A.2d 434 (Del. 2005) 16, 17

Fairfax-Falls Church Community Servs. Bd. v. Herren,
337 S.E.2d 741 (Va. 1985) 15

Fike v. Ruger,
754 A.2d 254 (Del. 1999) 10, 11

Frechter v. Cryo-Cell Int'l, Inc.,
No. 11915-VCG, 2016 WL 5864583 (Del. Ch. Oct. 7, 2016)....................29

Gerber v. Enters. Prods. Holdings, LLC,
67 A.3d 400 (Del. 2013), *overruled on other grounds by Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013)....................17

Gerber v. EPE Holdings, LLC,
No. CIV.A. 3543-VCN, 2013 WL 209658 (Del. Ch. Jan. 18, 2013)....................26

Glenn v. Fay,
281 F. Supp. 3d 130, 140 (D.D.C. 2017)....................15, 16

Glinert v. Wickes Companies, Inc.,
16 Del. J. Corp. L. 764 (Del. Ch.),
aff'd 586 A.2d 1201 (Del. 1990)....................18

Hanback v. DRHI, Inc.,
94 F. Supp. 3d 753, 759 (E.D. Va. 2015),
aff'd, 647 Fed. Appx. 207 (4th Cir. 2016)....................11

Instituto Bancario Italiano SpA v. Hunter Engineering Co., Inc.,
449 A.2d 210 (Del. 1982)....................29

Jarosch v. Am. Family Mut. Ins. Co.,
837 F. Supp. 2d 980 (E.D. Wis. 2011) 27

Lafayette Fed. Credit Union v. Nat'l Credit Union Admin.,
960 F. Supp. 999 (E.D. Va. 1997),
aff'd, 133 F.3d 915 (4th Cir. 1998) 19

LaPoint v. AmerisourceBergen Corp.,
No. Civ.A. 327-CC, 2007 WL 1309398 (Del. Ch. May 1, 2007),
aff'd, 956 A.2d 642 (Del. 2008)....................13

Lavender v. Koenig,
No. K13C-08-024, 2017 WL 443696 (Del. Super. Ct. Feb. 1, 2017),
aff'd, 171 A.3d 1117 (Del. 2017) 10

Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH,
62 A.3d 62 (Del. Ch. 2013) 15

MicroStrategy Servs. Corp. v. OpenRisk, LLC,
No. 1:14cv1244, 2015 WL 1221263 (E.D. Va. Mar. 17, 2015) 27

Middleburg Training Center, Inc. v. Firestone,
477 F. Supp. 2d 719 (E.D. Va. 2007)....................20

Nemec v. Shrader,
991 A.2d 1120 (Del. 2010) 2, 14, 16, 17

Parker v. Moitzfield,
733 F. Supp. 1023 (E.D. Va. 1990)....................16

Perry Capital v. Lew,
70 F. Supp. 3d 208, 215 (D.D.C. 2014)....................4, 19

Perry Capital v. Mnuchin,
864 F.3d 591 (D.C. Cir. 2017) ....*passim*

Rastek Constr. & Dev. Corp. v. General Land Comm. Real Estate Co., LLC,
806 S.E.2d 740 (Va. 2017) 13

Remora Investments, LLC v. Orr,
673 S.E.2d 845 (Va. 2009) 31

Roberts v. FHFA,
889 F.3d 397 (7th Cir. 2018) 31

Robinson v. FHFA,
223 F. Supp. 3d 659 (E.D. Ky. 2016)....................30

Schupp v. Jump! Info. Techs., Inc.,
65 F. App'x 450 (4th Cir. 2003) 30

Sellman v. FloranceGordanBrown, PC,
No. CL09-4197, 2010 WL 11020167 (Va. Cir. Ct. Nov. 18, 2010) 27

Shareholder Representative Services, LLC v. Airbus Americas, Inc.,
791 S.E.2d 724 (Va. 2016) 26

Simmons v. Miller,
544 S.E.2d 666 (Va. 2001) 31

Skillstorm, Inc. v. Elec. Data Sys., LLC,
666 F. Supp. 2d 610 (E.D. Va. 2009)....................16

STAAR Surgical Co. v. Waggoner,
588 A.2d 1130 (Del. 1991) 22

SunTrust Mortg., Inc. v. Mortgages Unlimited, Inc.,
No. 3:11CV861-HEH, 2012 WL 1942056 (E.D. Va. May 29, 2012)....................................17

Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co.,
No. 1668, 2006 WL 2521426 (Del. Ch. Aug. 25, 2006)...16

Tooley v. Donaldson, Lufkin & Jenrette, Inc.,
845 A.2d 1031 (Del. 2004)..32

Tysons Toyota, Inc. v. Commonwealth Life Ins.,
No. 94638, 1990 WL 10039336 (Va. Cir. Ct. Aug. 9, 1990)..27

Va. Elec. & Power Co. v. Peters,
No. 17-cv-259, 2018 WL 1995523 (E.D. Va. Apr. 27, 2018)...11

Ward's Equip., Inc. v. New Holland N. Am., Inc.,
493 S.E.2d 5165 (Va. 1997)..16

Weyerhaeuser Co. v. Domtar Corp.,
61 F. Supp. 3d 445, 451 (D. Del. 2014),
aff'd, 721 Fed. Appx. 186 (3d Cir. 2018)..11

whiteCryption Corp. v. Arxan Technologies, Inc.,
2015 WL 3799585 (N.D. Cal. June 18, 2015)...27

Rules and Statutes

12 U.S.C.
§ 24(Seventh) ... 25
§ 1451 note ... 19
§ 1454 ... 24
§ 1455(f) ... 24
§ 1455(h)(2) ... 24, 25
§ 1455(*l*) ... 21
§ 1455(*l*)(1)(A) ... 6
§ 1455(*l*)(1)(C) ... 6
§ 1716 ... 19
§ 1719(g) ... 21
§ 1719(g)(1)(A) ... 6
§ 1719(g)(1)(C) ... 6
§ 4501 ... 4
§ 4501(4) ... 4, 24, 25
§ 4503 ... 4, 24, 25
§ 4617(a)(2) ... 4
§ 4617(b)(2)(A)(i) ... 3, 5, 28, 31
§ 4617(b)(2)(B)(i) ... 5
§ 4617(b)(2)(D)(ii) ... 5
§ 4617(b)(2)(G) ... 5
§ 4617(b)(2)(J)(ii) ... 21, 22, 30

10 Del. Code
§ 8106 ... 10

Pub. L. 102-550, Title XIII, § 1302, 106 Stat. 3941 (Oct. 28, 1992) ... 24

Va. Code
§ 8.01–246(2) ... 10
§ 8.01–246(4) ... 10
§ 8.01–248 ... 10

Other Authorities

Black's Law Dictionary (10th ed. 2014) ... 26

Restatement (Second) of Contracts § 253, comment c (1981) ... 15

Williston on Contracts § 63:62 (4th ed. 2002) ... 15

INTRODUCTION

Plaintiff, a holder of preferred stock in Fannie Mae and Freddie Mac, challenges a 2012 amendment to a 2008 funding agreement between FHFA (as Conservator of Fannie Mae and Freddie Mac) and the Department of Treasury (Treasury). Most of Plaintiff's claims are not new: other Enterprise stockholders have been litigating similar claims in this Court for nearly five years. In 2017, the D.C. Circuit affirmed this Court's 2014 dismissal of many such claims in *Perry Capital v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017). The remaining claims were remanded to this Court and are presently awaiting resolution of pending motions to dismiss. *See Fairholme Funds, Inc. v. FHFA*, No. 13-1053 (RCL) (D.D.C.); *Arrowood Indemnity Co. v. Federal National Mortgage Ass'n*, No. 13-1439 (RCL) (D.D.C.); *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations*, Misc. No. 13-01288 (RCL) (D.D.C.). The only differences between this case and the previous ones before this Court are that Plaintiff has named a number of current and former directors of Fannie Mae and Freddie Mac and is asserting a claim based on a purported "implicit guaranty." But these differences do nothing to change the effect of the previous decisions; they simply provide additional reasons why the claims should be dismissed.

Plaintiff's claims are easily resolved. All of the claims are time-barred. The statutes of limitations relevant to Plaintiff's claims are two years (Virginia) and three years (Delaware). Plaintiff challenges a transaction that occurred on August 17, 2012 but did not file his complaint until May 21, 2018, more than five years thereafter. All limitations periods that could potentially apply have expired.

Even if it were timely—and it is not—Plaintiff's complaint also fails to state a valid claim for numerous other reasons. In Count I, Plaintiff asserts that Defendants breached purported contractual rights to dividends that Plaintiff claims he enjoys as a preferred

stockholder. In *Perry Capital*, the D.C. Circuit affirmed this Court's dismissal of an identical claim, holding that Enterprise stockholders like Plaintiff do not have a contractual right to dividends. That binding precedent forecloses Count I.

Plaintiff's claim in Count II—anticipatory breach of the implied covenant of good faith and fair dealing—is nearly identical to claims made by Enterprise stockholders in the other pending cases on remand from *Perry Capital*, and fails for the same reasons. In particular, neither Virginia nor Delaware law allows claims for anticipatory breach where, as here, the underlying contract is unilateral, *i.e.*, the plaintiff has no further obligations and the alleged obligation of the defendant is simply a future monetary payment. Additionally, Plaintiff fails to plead facts plausibly supporting the "limited and extraordinary" remedy of implied covenant. *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010). The implied covenant is a narrow gap-filling mechanism to fulfill the "reasonable expectations" of the parties to a contract without rewriting it. *Id.* at 1127. Here, as a stockholder of these Government-chartered and highly regulated Enterprises, Plaintiff could not have had a reasonable expectation that he would continue to receive dividends.

In Count III, Plaintiff asserts a claim styled as "Aiding and Abetting in Federal Government's Implicit Guaranty Evasion and Payment Avoidance." This claim must also be dismissed as there is no actionable "Implicit Guaranty" by the federal government that would support Plaintiff's claim and there is no cause of action for aiding and abetting a breach of contract under Delaware or Virginia law. Accordingly, as a matter of law, Count III fails to state a claim.

As noted above, Plaintiff also asserts all three counts against a number of individuals who were appointed by the Conservator to serve as members of the Fannie Mae and Freddie Mac

Boards of Directors. The claims against these defendants fail for additional reasons beyond all of the above grounds. Most fundamentally, the Conservator has succeeded to all rights and powers of the 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, it expressly excluded from this delegation the authority to declare stockholder dividends.

Finally, Plaintiff's complaint cannot plausibly be construed to assert a breach of fiduciary duty claim, but if it did, that claim would also be barred; Plaintiff's claims are derivative in nature, and the D.C. Circuit has recognized that federal law bars stockholder derivative claims while the Enterprises are in conservatorship. Independently, the majority of the named director defendants were not directors at the time of the alleged breach, making the claims asserted against them meritless.

In short, Plaintiff's complaint should be dismissed in its entirety with prejudice.

STATEMENT OF FACTS

I. FANNIE MAE, FREDDIE MAC, AND FHFA

Fannie Mae and Freddie Mac are government-sponsored enterprises, chartered by Congress, that provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby facilitating the ability of lenders to make additional loans. Compl. ¶ 24. These entities, which own or guaranty trillions of dollars of residential mortgages and mortgage-backed securities ("MBS"), have played a key role in housing finance and the U.S. economy. Over the years, both Enterprises issued multiple series of preferred stock, as well as common stock. Although the Enterprises are government-sponsored, the statute that has governed regulation of the Enterprises since 1992 contains two separate provisions explaining that their securities are not guaranteed by the federal government:

> The Congress finds that . . . neither the enterprises . . . , nor any securities or obligations issued by the enterprises . . . , are backed by the full faith and credit of the United States.

12 U.S.C. § 4501(4).

> This chapter may not be construed as implying that any such enterprise . . . , or any obligations or securities of such an enterprise . . . , are backed by the full faith and credit of the United States.

Id. § 4503.

During the housing crisis of 2008, the Enterprises suffered multi-billion dollar losses on their mortgage portfolios and guarantees. *See* Compl. ¶ 35. "By 2008, the United States economy faced dire straits, in large part due to a massive decline within the national housing market . . . . Given the systemic danger that a Fannie Mae or Freddie Mac collapse posed to the already fragile national economy, among other housing market-related perils, Congress enacted the Housing and Economic Recovery Act ('HERA') on July 30, 2008." *Perry Capital v. Lew*, 70 F. Supp. 3d 208, 215 (D.D.C. 2014) (citing HERA, Pub. L. No. 110-289, 122 Stat. 2654 (2008)); *see also* Compl. ¶ 36. HERA created FHFA, an independent federal agency, to supervise and regulate Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. 12 U.S.C. §§ 4501 *et seq.*; *see also* Compl. ¶ 36.

HERA also granted the Director of FHFA the authority (mandatory in certain circumstances) to place Fannie Mae and Freddie Mac in conservatorship, with FHFA as Conservator, "for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2). FHFA exercised this authority in September 2008, placing both Fannie Mae and Freddie Mac into conservatorship. Compl. ¶ 43. HERA provides that, upon its appointment as the conservator or receiver, FHFA will "immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity [*i.e.*, Fannie Mae and Freddie

Mac], and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i). The statute accords the conservator the power to "operate" and "conduct all business" of the GSEs, *id.* § 4617(b)(2)(B)(i), including the power to take such action as may be "appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity," *id.* § 4617(b)(2)(D)(ii), and to "transfer or sell" any of the Enterprises' assets or liabilities, *id.* § 4617(b)(2)(G). Immediately upon declaration of conservatorship, FHFA, as Conservator, announced that the Enterprises would not pay common or preferred stock dividends during conservatorship. Compl. ¶ 43 (quoting Statement of FHFA Director James B. Lockhart (Sept. 7, 2008)); Fannie Mae, 2017 Annual Report (Form 10-K) ("Fannie 2017 10-K") at 13, 36 (Feb. 14, 2018); Freddie Mac, 2017 Annual Report (Form 10-K) ("Freddie 2017 10-K") at 190 (Feb. 15, 2018).[1]

When the Enterprises were placed into conservatorship, the individual directors no longer had any powers or duties; the Conservator by operation of law, succeeded to all of their "rights, titles, powers, and privileges." 12 U.S.C. § 4617(b)(2)(A)(i). Accordingly, the Conservator reconstituted the post-conservatorship boards of directors who would act at the direction of and with the specific powers delegated by the Conservator. The Conservator subsequently delegated to the post-conservatorship directors authority to take certain specified operational actions, but retained all other powers for itself. Fannie 2017 10-K at 157; Freddie 2017 10-K at 177. Of

---

[1] *Available at* http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2017/10k_2017.pdf (Fannie 2017 10-K); http://www.freddiemac.com/investors/financials/pdf/10k_021518.pdf (Freddie 2017 10-K). Filings with the Securities and Exchange Commission "are matters of public record" and thus "are properly the subject of judicial notice." *DiLorenzo v. Norton*, No. 07-cv-144, 2009 WL 2381327, at *2 n.7 (D.D.C. July 31, 2009) (citing *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 n.6 (D.C. Cir. 1993)). "[T]herefore [a] [c]ourt may . . . consider them on review of [a] motion to dismiss." *Id.*

particular importance in this case, the Conservator did not delegate to the post-conservatorship directors of either Enterprise any authority to declare or pay dividends on stock. *See* Fannie Mae, 2011 Annual Report (Form 10-K) ("Fannie 2011 10-K") at 207 (Feb. 29, 2012); Freddie Mac, 2011 Annual Report (Form 10-K) ("Freddie 2011 10-K) at 325 (Mar. 9, 2012).[2]

II. TREASURY'S PSPAs WITH THE ENTERPRISES

In addition to establishing the framework for the conservatorships, HERA amended the Enterprises' statutory charters to grant Treasury the authority to purchase securities issued by the Enterprises, so long as Treasury and the Enterprises reached "mutual agreement" on the terms. *See* 12 U.S.C. § 1719(g)(1)(A) (Fannie Mae); 12 U.S.C. § 1455*(l)*(1)(A) (Freddie Mac). Congress required Treasury to determine that its actions are necessary to "protect the taxpayer," among other things, when exercising its new statutory authority to acquire interests in the Enterprises. 12 U.S.C. §§ 1719(g)(1)(C), 1455(*l*)(1)(C).

In September 2008, pursuant to this authority, Treasury and the Conservator (on behalf of the Enterprises), entered into two Senior Preferred Stock Purchase Agreements (the "PSPAs"), one for each Enterprise, through which Treasury agreed to infuse hundreds of billions of taxpayer dollars into the Enterprises as needed.[3] As consideration for this massive and continuing commitment, the PSPAs gave Treasury a comprehensive bundle of rights—including (1) a senior liquidation preference that started at $1 billion per Enterprise and would increase dollar-for-dollar whenever the Enterprises drew Treasury funds, (2) a requirement that the

---

[2] *Available at* http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2011/10k_2011.pdf (Fannie 2011 10-K); http://otp.investis.com/clients/us/federal_homeloan/SEC/sec-show.aspx?FilingId=8473177&Cik=0001026214&Type=PDF&hasPdf=1 (Freddie 2011 10-K).

[3] *Available at* 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.

Enterprises pay Treasury a 10% annual dividend, assessed quarterly, based on the total amount of liquidation preference, (3) an annual fee (known as the "periodic commitment fee") intended to compensate Treasury for its ongoing commitment, and (4) warrants to acquire 79.9% of the Enterprises' common stock. *See* PSPA §§ 1, 3.1, 3.2; Certificate of Designation of Terms of Variable Liquidation Preference Senior Preferred Stock, Series 2008-2 § 2(c);[4] *see also* Compl. ¶ 55. The PSPAs suspended the payment of dividends to any entity other than Treasury as long as the agreements remain in place. Compl. ¶ 78; PSPA § 5.1.

As required by the terms of the PSPAs, Treasury began infusing billions of dollars into the Enterprises in each quarter in which an Enterprise's liabilities exceeded its assets. Due to the substantial amounts drawn from Treasury, the Enterprises' dividend obligations—calculated as 10% of the Treasury liquidation preference—became substantial. Between 2009 and 2011, the Enterprises' net worth was insufficient to pay the Treasury dividend, and the Enterprises drew billions more from Treasury to make dividend payments back to Treasury. Those draws, in turn, increased Treasury's liquidation preference and the Enterprises' future dividend obligations. While the PSPAs initially capped Treasury's commitment at $100 billion per Enterprise, this amount proved inadequate, and the parties amended the PSPAs via the "First Amendment" to double the cap to $200 billion per Enterprise.[5] When it appeared that even that amount might be insufficient, the parties amended the PSPAs again via a "Second Amendment," which permitted

---

[4] *Available at* https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2008-9-7_SPSPA_FannieMae_Certificate_N508.pdf; https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2008-9-7_SPSPA_FreddieMac_Certificate_508.pdf.

[5] *See* Amendment to Amended & Restated Senior Preferred Stock Agreement (May 6, 2009), *available at* https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2009-5-6_SPSPA_FannieMae_Amendment_508.pdf (Fannie Mae); https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2009-5-6_SPSPA_FreddieMac_Amendment_508.pdf (Freddie Mac).

the Enterprises to draw *unlimited* amounts from Treasury to cure net-worth deficits through 2012.[6] Under the Second Amendment, Treasury's commitment became fixed at the end of 2012, and future draws would reduce the remaining funds available. By June 30, 2012, the Enterprises were obligated to pay Treasury approximately $19 billion per year—an amount that exceeded the Enterprises' average historical earnings per year.[7]

On August 17, 2012, FHFA, as Conservator of the Enterprises, and Treasury executed the Third Amendment to the PSPAs, Compl. ¶ 1, which (1) eliminated the fixed-rate 10% annual dividend, (2) added a quarterly variable dividend in the amount (if any) of each Enterprise's positive net worth, subject to a specified reserve, and (3) suspended the periodic commitment fee while the quarterly variable dividend is in effect. *See* Third Amendment to Amended & Restated Senior Preferred Stock Purchase Agreement ¶¶ 2-4.[8] The Third Amendment has been in effect since January 1, 2013. *Id.* ¶¶ 2-3.

PROCEDURAL HISTORY

On May 21, 2018, Plaintiff filed a Complaint against Fannie Mae, Freddie Mac, numerous individuals who are current or former post-conservatorship directors of Fannie Mae or

---

[6] *See* Second Amendment to Amended & Restated Senior Preferred Stock Agreement (December 24, 2009), *available at* https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2009-12-24_SPSPA_FannieMae_Amendment2_508.pdf (Fannie Mae); https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2009-12-24_SPSPA_FreddieMac_Amendment2_N508.pdf (Freddie Mac).

[7] *See* Fannie Mae, Quarterly Report (Form 10-Q), at 4 (Aug. 8, 2012) ("The amount of this [$11.7 billion] dividend payment exceeds our reported annual net income for every year since our inception."), http://goo.gl/bGLVXz; Freddie Mac, Quarterly Report (Form 10-Q), at 8 (Aug. 7, 2012) ("As of June 30, 2012, our annual cash dividend obligation . . . of $7.2 billion exceeded our annual historical earnings in all but one period."), http://goo.gl/2dbgey.

[8] *Available at* https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2012-8-17_SPSPA_FannieMae_Amendment3_508.pdf (Fannie Mae); https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2012-8-17_SPSPA_FreddieMac_Amendment3_N508.pdf (Freddie Mac).

Freddie Mac, and FHFA in its capacity as Conservator challenging the Third Amendment.[9] The complaint contains three counts:

Count I alleges that all Defendants, by approving or acquiescing to the payment of dividends under the Third Amendment, deprived junior preferred shareholders of future dividends and thereby breached contracts consisting of the Certificates of Designation for Fannie Mae and Freddie Mac junior preferred stock. Compl. ¶¶ 100-14.

Count II alleges that all Defendants, by approving or acquiescing to the payment of dividends under Third Amendment, deprived junior preferred shareholders of dividends and thereby breached "the implied covenant of good faith and fair dealing inherent in the Certificates of Designation." *See* Compl. ¶¶ 115-22.

Count III is titled "Aiding and Abetting in Federal Government's Implicit Guaranty Evasion and Payment Avoidance." This claim appears to allege that the federal government was legally obligated to ensure the payment of dividends to junior preferred shareholders as a result of a purported "implicit guaranty," and that Defendants aided and abetted the federal government in avoiding this supposed obligation. Compl. ¶¶ 123-25.

Plaintiff seeks declaratory relief, compensatory damages with interest, and costs and expenses. Compl., Prayer for Relief. Plaintiff attached to the Complaint a 38-page paper that he wrote titled "Government Perfidy and Mismanagement of the GSEs in Conservatorship." *See* Compl., Ex. A.

---

[9] The Conservator is identified as a nominal defendant.

ARGUMENT

I. Plaintiff's Claims Are Time-Barred

Plaintiff alleges breach of contract under Virginia law with respect to Freddie Mac and under Delaware law with respect to Fannie Mae (Count I), breaches of implied covenants of good faith and fair dealing associated with those same contracts (Count II), and a claim entitled "aiding and abetting in federal government's implicit guaranty evasion and payment avoidance" (Count III). These claims are barred by all applicable statutes of limitation.

The Virginia statute of limitations for breach of a contract "which is in writing and signed by the party to be charged thereby" is five years. Va. Code § 8.01–246(2). The statute of limitations for "actions upon any unwritten contract, express or implied" is three years. *Id.* § 8.01–246(4). Virginia also has a catch-all statute of limitations of two years for all claims "for which no limitation is otherwise prescribed." *Id.* § 8.01–248. The two-year catch-all statute applies to Counts I and II because the alleged contract is neither "signed" nor "unwritten" and covers Count III because that count does not resemble any recognized cause of action under Virginia law. However, the Court need not resolve conclusively which of the three Virginia limitations provisions applies because, as established below, the claims are untimely under the longest potential limitations period (five years).

The Delaware statute of limitations on breach of contract and implied covenant claims is three years. 10 Del. Code § 8106; *Fike v. Ruger*, 754 A.2d 254, 260 (Del. 1999) (breach of contract); *Lavender v. Koenig*, No. K13C-08-024, 2017 WL 443696, at *3 (Del. Super. Ct. Feb. 1, 2017), *aff'd*, 171 A.3d 1117 (Del. 2017) (breach of implied covenant). The same three-year statute of limitations also serves as Delaware's catch-all statute of limitations. 10 Del. Code § 8106(a).

Under Virginia and Delaware law alike, "a cause of action for breach of contract accrues" and the "limitation period commences to run from the date of the alleged breach." *Hanback v. DRHI, Inc.*, 94 F. Supp. 3d 753, 759 (E.D. Va. 2015), *aff'd*, 647 Fed. Appx. 207 (4th Cir. 2016); *see also Weyerhaeuser Co. v. Domtar Corp.*, 61 F. Supp. 3d 445, 451 (D. Del. 2014), *aff'd*, 721 Fed. Appx. 186 (3d Cir. 2018) (similar).

Here, Plaintiff's claims are time-barred because they all accrued more than five years before he filed the Complaint. Plaintiff alleges that the Conservator's execution of the Third Amendment breached a contractual obligation for the Enterprises to pay him dividends (Count I), as well as an implied covenant of good faith and fair dealing associated with that obligation (Count II). *See*, *e.g.*, Compl. ¶¶ 1, 3, 79, 110, 120. Count III is similarly founded on Defendants' "complicit agreement to the Third Amendment expropriation." *Id.* ¶ 124. The Conservator and Treasury executed the Third Amendment on August 17, 2012. *See id.* ¶¶ 1, 3. Thus, Plaintiff's claims accrued on August 17, 2012 and were time barred by any of the potentially applicable statutes of limitations no later than August 17, 2017.

Plaintiff did not file this action until May 21, 2018—more than five and a half years after Plaintiff's claims accrued. Plaintiff's claims are thus untimely under the Delaware three-year statute of limitations and any of the potentially applicable Virginia statutes of limitation (two years, three years, or five years). Therefore, the Court should dismiss all of Plaintiff's claims as barred by the applicable statutes of limitations.[10] Although the statute of limitations puts an end

[10] Plaintiff does not plead a claim for breach of fiduciary duty, but the narrative section of his complaint occasionally alludes to alleged fiduciary conduct. *See, e.g.*, Compl. ¶¶ 30, 51, 53, 82-84; *see also infra* Section II.E. If Plaintiff could bring a breach of fiduciary duty claim, that claim likewise would be time-barred. *See Fike*, 754 A.2d at 260 (in Delaware, the same three-year statute of limitations that applies to breach of contract also covers claims for breach of fiduciary duty); *Va. Elec. & Power Co. v. Peters*, No. 17-cv-259, 2018 WL 1995523, at *4 (E.D. Va. Apr. 27, 2018) (in Virginia, statute of limitations is two years).

to this case, there are multiple additional reasons, discussed below, to dismiss each of Plaintiff's three claims.

II. Even if Not Time Barred, Plaintiff's Complaint Fails to State a Claim

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

In Count I, Plaintiff alleges that the Third Amendment breached the Enterprises' supposed contractual obligation to pay him dividends. Count I is barred by the D.C. Circuit's ruling in *Perry Capital v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017), which affirmed dismissal of a materially identical claim.

Plaintiff's breach of contract claim here is no different from that advanced in *Perry Capital*, where plaintiffs alleged that the adoption of the Third Amendment was a breach of the stockholder contracts between the Enterprises and plaintiffs because it deprived the plaintiffs of a purported contractual right to receive dividends. *Id.* at 629. The D.C. Circuit rejected this argument, holding that the preferred and common stockholders "have no enforceable right to dividends because the certificates accord the Companies complete discretion to declare or withhold dividends." *Id.* The court reached this conclusion based on the plain language of the certificates, which make clear that dividends are discretionary. *Id.*; *see also* Fannie Mae, Certificate of Designation of Terms of 8.25% Non-Cumulative Preferred Stock, Series T ("Fannie Series T Preferred Certificate") Exhibit A, ¶ 2(a) (issued May 19, 2008) (providing that stockholders will "be entitled to receive, ratably, *when, as and if declared by the Board of Directors, in its sole discretion* . . . [,] non-cumulative cash dividends" (emphasis added))[11]; Freddie Mac, Certificate of Creation of Fixed-To-Floating Rate Non-Cumulative Perpetual

[11] *Available at* http://www.fanniemae.com/resources/file/ir/pdf/stock-info/series_T_05152008.pdf.

Preferred Stock ("Freddie Fixed-To-Floating Preferred Certificate") Appendix A, ¶ 2(a) (issued Dec. 4, 2017) (same).[12]

Because there is no difference between the breach of contract claim here and the corresponding claim in *Perry Capital*, binding Circuit precedent bars Count I.[13]

Plaintiff's breach of contract claim also fails because the complaint's own allegations defeat the causation that would be necessary for that claim. For a breach of contract claim under both Virginia and Delaware law, a plaintiff must plead facts to establish that the alleged breach caused the plaintiff's injury. *See Rastek Constr. & Dev. Corp. v. General Land Comm. Real Estate Co., LLC*, 806 S.E.2d 740, 748 (Va. 2017); *LaPoint v. AmerisourceBergen Corp.*, No. Civ.A. 327-CC, 2007 WL 1309398, at *7 (Del. Ch. May 1, 2007), *aff'd*, 956 A.2d 642 (Del. 2008). Plaintiff's alleged injury is the denied "dividends on his Junior Preferred shares." Compl. ¶ 108. But the Third Amendment did not halt the dividends. Indeed, Plaintiff's own allegations make clear he did not stand to receive dividends during conservatorship even if the Third Amendment had never been adopted, eliminating the Third Amendment as a cause of his alleged injury. Compl. ¶¶ 43, 78, 87. For all of these reasons, the Court should dismiss Count I.

B. Plaintiff's Implied Covenant Claim (Count II) Fails to State a Claim

In Count II, Plaintiff alleges that Defendants breached implied covenants of good faith and fair dealing associated with the same alleged contractual rights and obligations that are the

---

[12] *Available at* http://www.freddiemac.com/investors/pdf/FtFPrefStock-oc.pdf. Defendants cite these two preferred stock certificates as illustrative, but the Enterprises' other preferred stock certificates contain materially identical language. *See Perry Capital*, 864 F.3d at 629 (stating that the Enterprises' stock certificates are the same, with "irrelevant variations in wording").

[13] Although the Court need not reach the issue because Count I is so clearly barred by Circuit precedent directly on point, the limitation on anticipatory repudiation (discussed below in connection with Count II, *see infra* Section II.B) also provides an independent basis for dismissing Count I. Like Count II, Count I alleges anticipatory repudiation of an alleged such contractual obligation to pay future dividends. Because any such contractual obligation, if it existed, would be unilateral, as explained below, Count I fails for this additional reason.

subject of Count I. According to Plaintiff, by entering into the Third Amendment, the Enterprises "deprived Plaintiff of any possibility of ever again receiving dividends, and thus breached the implied covenant of good faith and fair dealing." *Id.* ¶ 120.[14]

This count is substantially similar to implied covenant claims in the *Fairholme*, *Arrowood*, and putative class cases pending in this Court and lacks merit for the same reasons. First, Plaintiff alleges that the Third Amendment constituted an "anticipatory breach" of Defendants' alleged duties. Compl. ¶ 3. But Virginia and Delaware do not allow claims for anticipatory breach where, as here, the underlying contract is unilateral, *i.e.*, the plaintiff has no further obligations and the alleged obligation of the defendant is simply a future monetary payment. Second, this count fails for the independent reason that Plaintiff does not plead facts plausibly establishing the "limited and extraordinary legal remedy" of implied covenant. *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010). The implied covenant is an exceedingly narrow gap-filling mechanism to fulfill the "reasonable expectations" of the parties to a contract without rewriting the terms of their agreement or imposing contractual obligations that do not exist. *Id.* at 1127. Here, shareholders of these Government-chartered and pervasively regulated Enterprises could not possibly have had a reasonable expectation that the Enterprises, after being placed in conservatorship and receiving massive and continuing capital infusions by the federal government, would pay dividends to private shareholders.

---

[14] While Count II appears to assert a claim for breach of the implied covenant of good faith and fair dealing with respect to *dividends*, one paragraph in Count II also mentions *liquidation preferences*, albeit in connection with Freddie Mac only. Compl. ¶ 121 ("Through the implied covenant of good faith and fair dealing, Freddie Mac was prohibited from eliminating the rights and interests of the Junior Preferred Shareholders, including Plaintiff, with respect to dividends *and their liquidation preferences*."). It is not clear from this stray reference whether Plaintiff intends to plead an implied covenant claim against Freddie Mac relating to liquidation preferences, as distinct from dividends. In any event, the same analysis would preclude that alternative claim too.

1. Plaintiff Does Not State an Actionable Anticipatory Breach Under Governing Delaware or Virginia Law

Plaintiff alleges that the Third Amendment was an "anticipatory breach" of Defendants' alleged contractual obligations to pay junior preferred shareholders dividends and the implied covenant of good faith and fair dealing "inherent" in those contractual obligations. Compl. ¶¶ 3, 75, 118, 120. According to Plaintiff, the Third Amendment "effectively deprived Plaintiff of any possibility of ever again receiving dividends" in the future. Compl. ¶ 120. Plaintiff must rely on anticipatory repudiation of *future* dividends because, as noted above, his own allegations demonstrate that he could not have received or reasonably expected to receive dividends *at present* (i.e., during conservatorship) regardless of the Third Amendment. *See id.* ¶¶ 43, 78, 87 (alleging that dividends on preferred stock were suspended at the time of entry into conservatorship in September 2008).

Plaintiff's claim for anticipatory repudiation fails because that doctrine "is inapplicable to all unilateral contracts for future payment of money only," which is the kind of contract at issue here. *Glenn v. Fay*, 281 F. Supp. 3d 130, 140 (D.D.C. 2017); *accord* Restatement (Second) of Contracts § 253, comment c (1981) ("an obligor's repudiation alone . . . gives rise to no claim for damages at all if he has already received all of the agreed exchange for it."); Williston on Contracts § 63:62 (4th ed. 2002) ("the doctrine of anticipatory breach has no application to suits to enforce contracts for future payment of money only" (quoting *John Hancock Mut. Life Ins. Co. v. Cohen*, 254 F.2d 417 (9th Cir. 1958)). Both Virginia and Delaware apply this well-established limitation on liability for anticipatory breach. *See*, *e.g.*, *Fairfax-Falls Church Community Servs. Bd. v. Herren*, 337 S.E.2d 741 (Va. 1985); *Cumana Invs. S.A. v. Fluor Corp.*, 593 F. Supp. 310, 314 (D. Del. 1984); *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 78 n.102 (Del. Ch. 2013).

This limitation is fatal to Plaintiff's implied covenant claim. The alleged contract is plainly unilateral because Plaintiff has paid the purchase price for his shares of stock and does not have any further obligations under his shareholder contract with the Enterprises. Plaintiff, therefore, cannot bring claims for anticipatory repudiation of obligations to pay dividends at some point in the future, or for "depriv[ing] Plaintiff of any possibility" of receiving dividends at some point in the future. Compl. ¶ 120. *See*, *e.g.*, *Glenn*, 281 F. Supp. 3d at 139-40 (holding that lawyer's disavowal of contractual obligation to share a potential monetary recovery with co-counsel was not actionable until the judgment was collected and the non-performance of the sharing obligation actually occurred); *Parker v. Moitzfield*, 733 F. Supp. 1023, 1026 (E.D. Va. 1990) (dismissing claim for $220,000 due four months from date of decision under repudiated indemnity agreement).

2. Plaintiff Has Not Pleaded Facts That Plausibly Show a Breach of Implied Covenant

Count II should be dismissed for a separate and independent reason—Plaintiff fails to plead facts that plausibly entitle him to the "limited and extraordinary legal remedy" of an implied covenant claim. *Nemec*, 991 A.2d at 1128. Virginia and Delaware courts are equally emphatic that the implied covenant "cannot be the vehicle for rewriting an unambiguous contract in order to create duties that do not otherwise exist." *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 493 S.E.2d 5165 (Va. 1997); *see also Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (implied covenant does not create a "free-floating duty . . . unattached to the underlying legal document"); *Skillstorm, Inc. v. Elec. Data Sys., LLC*, 666 F. Supp. 2d 610, 620 (E.D. Va. 2009) (implied covenant does not permit a party to "attempt to rewrite" a contract term that later "proves unfavorable to [him]."). As such, imposing an implied covenant "is a cautious enterprise and instances should be rare." *Superior Vision Servs., Inc. v. ReliaStar Life*

Ins. Co., No. 1668, 2006 WL 2521426, at *6 (Del. Ch. Aug. 25, 2006). As now Delaware Supreme Court Chief Justice Strine emphasized, "Delaware courts apply the implied covenant rarely, and only in narrow circumstances," namely to "implement any clear interstitial intent discernible from the language" in the parties' express contract. *Allied Capital Corp. v. GC-Sun Holdings L.P.*, 910 A.2d 1020, 1032 (Del. Ch. 2006).

"The covenant is best understood as a way of implying terms in the agreement, whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions." *Dunlap*, 878 A.2d at 441 (internal quotation marks and citations omitted). The implied covenant asks "what the parties would have agreed to themselves had they considered the issue in their original bargaining positions at the time of contracting." *Gerber v. Enters. Prods. Holdings, LLC*, 67 A.3d 400, 418-19 (Del. 2013), *overruled on other grounds by Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013). Thus, as the D.C. Circuit held in addressing substantially identical claims, this analysis hinges on the parties' "reasonable expectations at the time of contracting." *Perry Capital*, 864 F.3d at 631; *see also, e.g.*, *Nemec*, 991 A.2d at 1126; *Dunlap*, 878 A.2d at 442 (implied covenant "ensure[s] the parties' 'reasonable expectations' are fulfilled") (citation omitted); *SunTrust Mortg., Inc. v. Mortgages Unlimited, Inc.*, No. 3:11CV861-HEH, 2012 WL 1942056, at *3 (E.D. Va. May 29, 2012) (under Virginia law, implied covenant includes "consistency with the justified expectations of the other party [to a contract]") (citations omitted).

Here, Plaintiff cannot plausibly allege that the Third Amendment violated any reasonable expectations as a stockholder of either Enterprise as to the continued receipt of dividends. Plaintiff's contractual expectations were necessarily informed by the express terms of Plaintiff's stock certificates, the nature of investing in heavily regulated government sponsored enterprises,

the governing statutory provisions in HERA, and the terms of the PSPAs. In light of this combination of factors, Plaintiff could not have had a reasonable expectation of receiving dividends or a liquidation payout following an extraordinary federal intervention and infusion of funds:

1. The starting point is the provisions of the stock certificates themselves. These certificates expressly provide that the Enterprises' Boards (and, thus, the Conservator) have "sole discretion" to declare dividends, and that Plaintiff would "have no claim" (or "shall not have any claim") for unpaid dividends unless the Enterprises pay dividends to more junior stockholders, which has not occurred. *See* Fannie Mae Series T Preferred Certificate at 33, Exhibit A, ¶¶ 2(a), (b); Freddie Fixed-To-Floating Preferred Certificate, Appendix A, ¶¶ 2(a), 2(c). What is more, the stock certificates expressly allow the Enterprises, and the Conservator acting on their behalf, to issue more senior stock without the consent of the Plaintiff as a stockholder, even if such stock issuance would "materially and adversely affect[]" Plaintiff's ability to receive dividends. Fannie Series T Preferred Certificate Exhibit A ¶ 7(b); Freddie Fixed-To-Floating Preferred Certificate Appendix A ¶ 9(h)(ii). The import of this language is clear: the Enterprises have the right to create and expand entitlements to senior stock, and the exercise of that right (here, by altering the dividend structure on the Treasury senior preferred stock) may affect junior shareholders' ability to receive dividends and liquidation payouts. Courts routinely reject implied covenant claims that rest on a supposed duty that is excluded by the express terms of the contract.[15]

---

[15] *See Amazon.com, Inc. v. Hoffman*, No. 2239-VCN, 2009 WL 2031789, at *4 (Del. Ch. June 30, 2009) (rejecting implied covenant claims where express contract terms contradicted the implied duty sought to be imposed); *Chamison v. HealthTrust, Inc. Hosp. Co.*, 735 A.2d 912, 920-21 (Del. Ch. 1999) (implied covenant cannot be contrary to the "spirit" of the agreement); *Glinert v. Wickes Companies, Inc.*, 16 Del. J. Corp. L. 764, 778-80 (Del. Ch. Mar. 27, 1990),

Footnote continued on next page

2. The Enterprises' Government-created origins and highly regulated status also cut sharply against there being any implied duty to ensure the continued availability of dividends to private investors. From day one, the charters of the Enterprises made clear their special, public missions. 12 U.S.C. § 1716 (Fannie Mae's purpose is, *inter alia*, to "provide stability in" and "ongoing assistance to the secondary market for residential mortgages" and to "promote access to mortgage credit throughout the Nation"); *see also id.* § 1451 note (Freddie Mac's purpose is, *inter alia*, to "provide stability in" and "ongoing assistance to the secondary market for residential mortgages" and to "promote access to mortgage credit throughout the Nation").

Consistent with those public missions, the Enterprises have long been pervasively regulated by the Government. As this Court held in dismissing takings claims by other Enterprise shareholders (which dismissal was not appealed), "[t]here can be no doubt that the plaintiff shareholders understood the risks intrinsic to investments in entities as closely regulated as the GSEs, and, as such, have not now been deprived of any *reasonable* investment backed expectations." *Perry Capital*, 70 F. Supp. 3d at 245 (emphasis in original). This Court noted that "[f]or decades—and at the time each of the class plaintiffs purchased their GSE stock—the GSEs have been under the watchful eye of regulatory agencies and subject to conservatorship or receivership largely at the government's discretion." *Id.* at 244. The Court accurately explained that "[t]he tradeoff when investing in government-sponsored entities that receive meaningfully different benefits than private corporations is increased regulation and the prospect of a government takeover." *Id.* at 244 n.56; *cf. Lafayette Fed. Credit Union v. Nat'l Credit Union*

Footnote continued from previous page
aff'd 586 A.2d 1201 (Del. 1990) (refusing to invoke implied covenant where there were no plausible allegations that the "parties would have regarded another form of corporate transaction that *accomplished the same thing* [as had been expressly allowed] . . . as implicitly forbidden") (emphasis added).

Admin., 960 F. Supp. 999, 1005 (E.D. Va. 1997), *aff'd*, 133 F.3d 915 (4th Cir. 1998) (dismissing due process claim because "the heavily-regulated nature of the financial services industry and the intrusiveness of federal regulations, including those set forth in FIRREA, diminish a credit union's (and by extension, the credit union's shareholders') expectations that the government will not seize the institution's assets under FIRREA").

3. Moreover, HERA itself—which authorized the Third Amendment—forms an integral part of Plaintiff's contracts with the Enterprises. While Plaintiff portrays the relevant contract as limited to the four corners of his stock certificate, it is well-established under Delaware and Virginia law alike that "when [investors] purchase stock," they enter into a "binding broader contract" that includes not only the stock certificate itself, but also the corporate charter, bylaws, and corporate law under which the corporation is formed and regulated. *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 939-40 (Del. Ch. 2013); *accord Middleburg Training Center, Inc. v. Firestone*, 477 F. Supp. 2d 719, 725 (E.D. Va. 2007) (shareholder contract includes "the corporation's articles of incorporation, its corporate charter," and "the general corporation laws of the state of incorporation"). For state-chartered corporations, the contract includes the state corporate law under which the corporation was organized, but for entities like Fannie Mae and Freddie Mac, which were chartered by Congress, the contract includes relevant federal law, including those provisions of HERA that govern the shareholders' relationship with the Enterprises during a conservatorship.[16] Indeed, the D.C. Circuit specifically

[16] Because the contractual relationship between a corporation and its shareholders is continuously updated with changes in the instruments and applicable law, and the contractual relationship is defined by those matters as they exist at the time of the alleged breach, the "time of contracting" for the reasonable expectations analysis is properly viewed as the time when the components of the contract were last updated prior to the alleged breach. Thus, while Plaintiff does not allege when he bought his Fannie Mae and Freddie Mac preferred stock, his contract as a shareholder includes HERA regardless of whether he purchased before or after the enactment of HERA. However, regardless of the date he purchased his stock, Plaintiff's claims would fail

Footnote continued on next page

underscored the relevance of HERA to the "reasonable expectations" analysis for implied covenant claims by Enterprise shareholders challenging the Third Amendment. *See Perry Capital*, 864 F.3d at 631 (directing the district court to consider on remand "Section 4617(b)(2)(J)(ii) (authorizing the FHFA to act 'in the best interests of the [Companies] or the Agency')").

HERA undercuts Plaintiff's implied covenant claim in multiple ways. First, HERA amended the Enterprises' charters, empowering the Enterprises (and thus the Conservator acting on their behalf) to issue, and Treasury to purchase, stock on terms mutually agreeable between the Enterprises and Treasury. *See* 12 U.S.C. §§ 1719(g), 1455*(l)*. Significantly, Congress authorized Treasury to expend taxpayer funds to purchase Enterprise stock "in such amounts as the Secretary [of the Treasury] may determine" because it was necessary to enable the Enterprises to continue their critical operations. *Id.* In so doing, Congress made clear that a guiding principle and primary purpose of HERA was to empower Treasury to "protect the public interest" and "protect the taxpayer," who was the ultimate source of these funds. *Perry Capital*, 864 F.3d at 600, 608 (citations and quotation marks omitted).

Second, HERA gave FHFA extraordinary powers to operate the Enterprises in conservatorship and place them into receivership. With those extraordinary powers as the backdrop, Plaintiff reasonably expected (or should have reasonably expected) that (i) the Enterprises could be placed in conservatorships and receiverships, (ii) in conservatorships, all stockholder rights would be transferred to the Conservator, (iii) the Conservator could operate Enterprises with all of the powers of the Enterprises, their boards, and their stockholders, and

---

Footnote continued from previous page
because i) the stock certificates themselves preclude any reasonable expectation of the continued receipt of dividends and ii) the highly regulated status of the Enterprises cut against the continued payment of dividends. *See supra* Section II.B.2.

(iv) the Conservator could transfer or sell any Enterprise assets without approval or consent. Most tellingly, as the D.C. Circuit specifically observed, HERA's provision authorizing the FHFA to act "in the best interests of the [Companies] or the Agency" informs the reasonable expectations analysis. 864 F.3d at 631; 12 U.S.C. § 4617(b)(2)(J)(ii).

Consistent with the understood breadth of these extraordinary powers, Plaintiff himself effectively acknowledges that, long before the Third Amendment, he lacked a reasonable expectation of continued receipt of dividends. Plaintiff alleges three separate times that on September 6, 2008—the day the conservatorships began—FHFA made public statements that "the common stock and preferred stock dividends will be eliminated." Compl. ¶ 43; *see also id.* ¶¶ 87 (same), 78 (alleging that "the 2008 imposition of conservatorship" and the PSPAs "suspended" dividends on his preferred stock). Indeed, Plaintiff repeatedly alleges that the Enterprises were "nationalized" as early as 2008. *See e.g.*, Compl. ¶¶ 29, 71, 72, 74. Having been put on notice four years earlier that future dividends were not in the offing, Plaintiff simply has no basis to claim that the Third Amendment violated any "reasonable expectation" that the flow of dividends to him would resume.

4. Finally, the PSPAs themselves became part of Plaintiff's shareholder contract and thus inform the reasonable expectations of the parties for purposes of an implied covenant analysis. *See Perry Capital*, 864 F.3d at 631 (directing district court to consider "Provision 5.1 of the [PSPAs] . . . permitting the Companies to declare dividends and make other distributions only with Treasury's consent"); *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991) (preferred stock "amends the certificate of incorporation and fundamentally alters the contract between all the parties"). With the PSPAs as the backdrop, Plaintiff knew that (i) for as long as the preferred stock issued to Treasury remained outstanding, Plaintiff could not and would not

receive any dividends absent Treasury's consent, (ii) the Enterprises owed Treasury substantial, ongoing dividends and periodic commitment fees, (iii) the Enterprises could not be released from conservatorship other than into a receivership without the consent of Treasury, and (iv) payment of dividends and the periodic commitment fee to Treasury would not reduce Treasury's liquidation preference. Notably, all of these conditions were put in place by the *original* PSPAs executed in 2008 (not challenged by Plaintiff), not by the Third Amendment that Plaintiff challenges as a violation of his "reasonable contractual expectations." Compl. ¶ 118. Given the totality of information available to Plaintiff as an Enterprise shareholder, Plaintiff lacked any reasonable expectation that dividends that by 2012 had been suspended for years would be resumed.

C. Plaintiff's Claim for "Aiding and Abetting in Federal Government's Implicit Guaranty Evasion and Payment Avoidance" (Count III) Fails to State a Claim

In Count III, Plaintiff argues that Defendants have eliminated Plaintiff's alleged contractual rights to receive dividend payments and thereby "aided and abetted the federal government in avoiding $10 billion of its implicit guaranty of such payments." Compl. ¶ 124. The "Implicit Guaranty" is, according to Plaintiff, the "implicit guaranty of payment" that "became universally accepted for GSEs' debt and equity securities' full embrace." Compl. ¶ 8. Count III fails three times over because neither the supposed contractual right to dividends, an "implicit guaranty" of dividends of the government of such a contractual right, nor any cause of action for "aiding and abetting" a breach of such a guaranty, actually exists.

1. There Is No Federal Guaranty of Plaintiff's Alleged Contractual Rights

There is no "implicit" federal government guaranty of a "right[]" to receive dividend payments. As explained above in connection with Counts I and II, there is no "right" to

dividends under a contract or implied covenant theory. Because there can be no "implicit guaranty" of a right that does not exist, Count III fails for the same reasons as Counts I and II.

Even assuming *arguendo* that such a right to dividends existed, there is no legally-enforceable "implicit guaranty" of this purported right, and shareholders have long been on notice of this fact. The statute that has governed the Enterprises since 1992 states *twice* that the Enterprises' "securities or obligations" are *not* "backed by the full faith and credit of the United States." 12 U.S.C. § 4501(4), 4503.[17] Similarly, since 1992 Freddie Mac's statutory charter has repudiated the notion of any implied guaranty. 12 U.S.C. § 1455(h)(2) ("obligations and securities" issued by the corporation under §§ 1454 and 1455—which includes preferred stock (§ 1455(f))—must state that they "are not guaranteed by the United States and do not constitute a debt or obligation of the United States or of any agency or instrumentality thereof other than the Corporation.").

Moreover, the offering circulars for each series of preferred stock expressly state that they are not guaranteed by the U.S. government. *See, e.g.*, Fannie Mae, Offering Circular, 8.25% Non-Cumulative Preferred Stock, Series T (May 19, 2008) at 1 ("The obligations related to the Preferred Stock, including any dividend payments, are solely the obligation of Fannie Mae. The Preferred Stock is not guaranteed by, and is not a debt or obligation of, the United States or of any of its agencies and instrumentalities."); Freddie Mac, Offering Circular, Fixed-to-Floating Rate Non-Cumulative Perpetual Preferred Stock (Dec. 4, 2007) at 1 ("We alone are responsible for our obligations under and for making payments on the Preferred Stock. The Preferred Stock is not guaranteed by, and is not a debt or obligation of, the United States or any

[17] These provisions were enacted over 25 years ago as part of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992. *See* Pub. L. 102-550, Title XIII, § 1302, § 1304, 106 Stat. 3941, 3944 (Oct. 28, 1992). Congress left these provisions in force and unchanged when it enacted HERA.

federal agency or instrumentality other than Freddie Mac.”). These provisions made it abundantly clear to shareholders over a decade ago that there was not and is not any government guaranty of their preferred stock.

In the face of these repeated, unambiguous rejections of any guaranty, Plaintiff nevertheless alleges that such a guaranty “arose over time through a combination of (a) their interpretation of various Federal Government agencies statutory [*sic*] as ‘Government Securities’, and (b) the Federal Government’s complicity in allowing, and not refuting, the general perception of Fannie/Freddie Financial Obligations enjoyment of a[n] FG Implicit Guaranty of payment.” Compl. ¶ 9. However, Plaintiff provides no support for his claim that one agency’s classification of the Enterprises’ preferred stock as “Government Securities” for purposes of defining national banks’ permitted investments somehow equates to a federal government guaranty of dividends.[18] And contrary to Plaintiff’s assertion that the government did “not refut[e]” the existence of an “implied guaranty,” statutes governing the Enterprises contain no fewer than *three* express disclaimers on this issue. 12 U.S.C. §§ 4501(4), 4503, § 1455(h)(2). Plaintiff offers no basis to conclude that there was a legally enforceable guaranty that he would be paid dividends.

[18] Plaintiff claims that the preferred shares were “federal regulatory agency accepted as ‘Government Securities’ suitable for bank tier one capital holding (*i.e.*, risk free) investment.” Compl. ¶ 27; *see also id.* ¶ 33. Apparently, Plaintiff bases this claim on an interpretive letter issued by the OCC in 2002, in which the OCC said that a national bank may invest in perpetual preferred stock of Fannie Mae and Freddie Mac without limit. Compl., Exhibit A at 3-4 (quoting OCC, Interpretive Letter #931 (April 2002)). The Interpretive Letter is based on the language of 12 U.S.C. § 24(Seventh), which states that Fannie and Freddie obligations are “investment securities.” Neither the OCC letter nor § 24(Seventh) says that the Enterprises’ shares are guaranteed by the government.

2. There is No Claim for Aiding and Abetting an Alleged Breach of Contract

Even if there were an "implied guaranty," as a matter of Delaware and Virginia law there is no viable cause of action for "aiding and abetting" a breach thereof, as Count III alleges. As a guaranty is but a form of contract,[19] Count III attempts to allege a claim for aiding and abetting a breach of contract. However, Delaware courts have repeatedly held that there is no such cause of action. *See Allen v. El Paso Pipeline GP Co., L.L.C.*, 113 A.3d 167, 193 (Del. Ch. 2014) (holding that "Delaware law generally does not recognize a claim for aiding and abetting a breach of contract," whether asserted directly or derivatively) (citing *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 172 (Del. 2002)); *Gerber v. EPE Holdings, LLC*, No. CIV.A. 3543-VCN, 2013 WL 209658, at *11 (Del. Ch. Jan. 18, 2013) ("Delaware law does not recognize a claim for aiding and abetting a breach of contract"); *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1180 (Del. Ch. 1999) ("It is a general principle of contract law that only a party to a contract may be sued for breach of that contract").

Similarly, although Virginia has not expressly addressed the issue, there is no basis to conclude that Virginia courts would recognize such a claim, given that Virginia's case law regarding contracts is generally consistent with Delaware's. *See, e.g.*, *Shareholder Representative Services, LLC v. Airbus Americas, Inc.*, 791 S.E.2d 724, 729 (Va. 2016) ("with respect to the rules of contract interpretation applicable here, Delaware law and Virginia law are entirely consonant."). Moreover, Virginia courts have dismissed a similar legal claim—aiding and abetting a tort—because "the Supreme Court of Virginia has not specifically recognized"

---

[19] *See* Black's Law Dictionary (10th ed. 2014) (defining "contract" as "[a] promise or set of promises by a party to a transaction, enforceable or otherwise recognizable at law").

such a claim. *Sellman v. FloranceGordanBrown, PC*, No. CL09-4197, 2010 WL 11020167, at *3 (Va. Cir. Ct. Nov. 18, 2010) (citation omitted); *see also MicroStrategy Servs. Corp. v. OpenRisk, LLC*, No. 1:14cv1244, 2015 WL 1221263, at *3 (E.D. Va. Mar. 17, 2015); *Calderon v. Aurora Loan Serv., Inc.*, No. 1:10cv129, 2010 WL 2306343, at *6 (E.D. Va. June 3, 2010); *Tysons Toyota, Inc. v. Commonwealth Life Ins.*, No. 94638, 1990 WL 10039336, at *1 (Va. Cir. Ct. Aug. 9, 1990). Thus, there is no basis to conclude that Virginia courts would permit a novel claim for aiding and abetting a breach of contract when Delaware courts have refused to do so and when they have repeatedly rejected claims for aiding and abetting a tort.[20]

D. Plaintiff's Claims Against the Individual Director Defendants Fail For Additional Reasons

In addition to all of the other grounds established above, Plaintiff's claims against the individual director defendants fail for numerous other reasons. The dividend obligations and attendant implied covenants that Plaintiff alleges were breached were obligations he claims *the Enterprises*—not the directors—owed him. The individual directors exercise their authority at the direction of the Conservator. The directors are accordingly not proper defendants on those counts, nor could they be alleged to have aided and abetted the breach of contract claims since there is no such cause of action. Moreover, the directors have no authority to declare or pay dividends and therefore could not have engaged in the alleged misconduct. Finally, a number of the individual director defendants were not even directors at the time of the Third Amendment, which Plaintiff alleges was the source of his injury.

---

[20] Cases in other jurisdictions are in accord. *See, e.g.*, *whiteCryption Corp. v. Arxan Technologies, Inc.*, 2015 WL 3799585, at *4 & n.3 (N.D. Cal. June 18, 2015) (citing cases stating that aiding and abetting a breach of contract is not a recognized cause of action in California, Delaware, New York, Illinois, and Arizona); *Acclaim Sys., Inc. v. Infosys, Ltd.*, No. 13-7336, 2015 WL 4257463, at *5 (E.D. Pa. July 14, 2015); *Jarosch v. Am. Family Mut. Ins. Co.*, 837 F. Supp. 2d 980, 1003 (E.D. Wis. 2011).

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

In his assertions against the individual Directors Plaintiff predicates his breach of contract and implied covenant claims on the Enterprises' preferred stock certificates, which he characterizes as "contracts between the Plaintiff *and the Companies*." Compl. ¶ 102 (emphasis added); *see also id.* ¶¶ 117-20. Plaintiff never alleges that the Directors were parties to the stock certificates nor does Plaintiff allege that the Directors personally owed Plaintiff any contractual duties to pay him dividends. For this reason alone, Plaintiff's claims against the individual director defendants for breach of contract and breach of implied covenant fail. Plaintiff's claim that the director defendants are liable for "aiding, abetting, and directing the Companies in their near mindless Third Amendment adoption and execution performance [*sic*]," Compl. ¶ 113, likewise fails. As discussed above, black letter law in Delaware rejects liability for adding and abetting a breach of contract, and there is no basis to suppose that Virginia courts would invent such a novel cause of action. Count III should be dismissed.

2. Any Claims Against the Directors Fail Because the Directors Did Not Engage in the Alleged Misconduct

Moreover, any purported claims against the directors fail because the directors did not engage in the alleged offending acts. By virtue of the Succession Clause, the Conservator alone holds 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, expressly excluded from this delegation is the authority to declare stockholder dividends. Fannie 2011 10-K at 207; Freddie 2011 10-K at 325. As a result, the Conservator (not the boards of directors) executed the Third Amendment on behalf of the Enterprises, and all dividend payments made by

the Enterprises to Treasury have been made pursuant to directives of the Conservator (not the boards of directors). Further, as noted in the Enterprises' regularly filed disclosures, the Enterprises' existing boards of directors "serve on behalf of, and exercise authority as directed by, the Conservator." *See* Freddie Mac, 2012 Annual Report (Form 10-K) at 1 (Feb. 28, 2013);[21] *see also* Fannie Mae, 2012 Annual Report (Form 10-K) at 172 (Apr. 2, 2013).[22] ("The directors serve on behalf of the conservator and exercise their authority as directed by and with the approval, where required, of the conservator."). Because the directors could not have engaged in the alleged misconduct, any claims against them fail.

3. Certain of the Director Defendants Were Not Directors at the Time of the Relevant Events.

Finally, several of the named individual director defendants were not directors at the time of the alleged wrongdoing and thus could not be responsible for the actions complained of by Plaintiff. *See Frechter v. Cryo-Cell Int'l, Inc.*, No. 11915-VCG, 2016 WL 5864583, at *2 (Del. Ch. Oct. 7, 2016) (noting that a claim to hold the Company's directors liable for breaches of fiduciary duty when the current directors did not create the breaching provision "was not meritorious when filed"); *see also Colgate v. Disthene Grp., Inc.*, No. CL10-158, 2013 WL 8019576, at *8 (Va. Cir. Ct. Feb. 4, 2013) (noting that "a cause of action for breach of fiduciary duty accrues at the time of the breach").[23]

---

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

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

[23] Indeed, for a Delaware court to even authorize service of process on a nonresident director, "the defendant must be a director in the Delaware corporation *at the time of* the alleged breach of fiduciary duty." *In re Cambridge Fin. Grp., Ltd.*, 1987 WL 19677, at *2 (Del. Ch. Nov. 9, 1987) (emphasis added); *Instituto Bancario Italiano SpA v. Hunter Engineering Co., Inc.*, 449 A.2d 210, 227-28 (Del. 1982) ("The [Delaware director consent] statute does not contemplate consent by a director for acts that were not performed in his capacity as a director.").

Defendants Amy Alving and Diane Nordin were not Fannie Mae directors in 2012, when the Third Amendment was executed. *See* Fannie Mae, 2013 Annual Report (Form 10-K),[24] at 166, 168 ("Dr. Alving has been a Fannie Mae director since October 2013"; "Ms. Nordin has been a Fannie Mae director since November 2013"). Likewise, Defendants Saiyid Naqvi, Sara Mathew, Steven Kohlhagen, Richard Hartnack, Thomas Goldstein, Lance Drummond, and Rachel Bostic were not Freddie Mac directors when the Third Amendment was executed. *See* Freddie Mac, 2015 Annual Report (Form 10-K), at 337-43[25] ("Raphael W. Bostic . . . Director Since: January 2015"; "Lance F. Drummond . . . Director Since: July 2015"; "Thomas M. Goldstein . . . Director Since: October 2014"; "Richard C. Hartnack . . . Director Since: May 2013"; "Steven W. Kohlhagen . . . Director Since: February 2013"; "Sara Mathew . . . Director Since: December 2013"; "Saiyid T. Naqvi . . . Director Since: August 2013"). This Court should dismiss the claims as against these defendants for this reason as well.

E. To the Extent Plaintiff's Background Allegations Might Be Construed to Suggest Breach of Fiduciary Duty, Such a Claim Would Fail

Although Plaintiff's complaint does not assert any claim for breach of fiduciary duty, it does contain various background allegations that allude to alleged breaches of fiduciary duties.[26] *See, e.g.*, Compl. ¶¶ 30, 51, 53, 82-84. While there is no reason to construe these allegations as

---

[24] *Available at* http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2013/10k_2013.pdf.

[25] *Available at* http://www.freddiemac.com/investors/financials/pdf/10k_021816.pdf.

[26] Plaintiff does not distinguish between Defendants in making allegations regarding breach of fiduciary duties. To the extent he asserts that Fannie Mae or Freddie Mac breached a fiduciary duty, those claims fail as a matter of law. "Under Delaware law, the issuing corporation does not owe fiduciary duties to its stockholders." *A.W. Fin. Servs., S.A. v. Empire Resources, Inc.*, 981 A.2d 1114, 1127 n.36 (Del. 2009). There is also "no indication Virginia courts would permit such [a breach of fiduciary duty] action directly against the corporation." *Schupp v. Jump! Info. Techs., Inc.*, 65 F. App'x 450, 454 (4th Cir. 2003). Nor does the Conservator have a fiduciary duty to Enterprise shareholders. *See Robinson v. FHFA*, 223 F. Supp. 3d 659, 666 n.3 (E.D. Ky. 2016). Indeed, the Conservator is authorized to act "in the best interests" of the Enterprise *or* FHFA itself. *See Perry Capital*, 848 F.3d at 613 (discussing 12 U.S.C. § 4617(b)(2)(J)(ii)).

asserting any cause of action, Defendants explain here—out of an abundance of caution—why such a claim would fail as a matter of law, if asserted.

Any claim against the directors for breach of fiduciary duty would be, in essence a shareholder derivative claim. But HERA provides that the Conservator "succeed[s] to—all rights, titles, powers, and privileges" of the Enterprises and of "any stockholder" of the Enterprises. 12 U.S.C. § 4617(b)(2)(A)(i). In *Perry Capital*, the D.C. Circuit affirmed that this Succession Clause "does not permit shareholders to bring derivative suits on behalf of the Companies even where the FHFA will not bring a derivative suit due to a conflict of interest." *Perry Capital*, 864 F.3d at 625; *see also Roberts v. FHFA*, 889 F.3d 397, 408 (7th Cir. 2018) (holding that FHFA acquires under HERA the sole right to bring derivative actions).

Here, even if Plaintiff's allegations supported a breach of fiduciary duty claim, which they do not, as *Perry Capital* held, such claims are barred by applicable law.[27]

Indeed, under Virginia law—which Freddie Mac has elected to follow for corporate governance issues not addressed by federal law or its charter (*see* Compl. ¶¶ 25, 82; Freddie Mac Bylaws § 11.3)—there is no such thing as a direct (non-derivative) stockholder claim for breach of fiduciary duty; *all* breach of fiduciary duty claims alleging misconduct by a corporate officer or director *must* be brought derivatively. *See Remora Investments, LLC v. Orr*, 673 S.E.2d 845 (Va. 2009) (affirming plaintiff's claim for claim for breach of fiduciary duty must be brought derivatively); *Simmons v. Miller*, 544 S.E.2d 666, 674-75 (Va. 2001) (same). Accordingly, any breach of fiduciary duty claim asserted with respect to Freddie Mac's

[27] For purposes of the present motion only, FHFA assumes, without conceding, that Delaware and Virginia law concerning whether a claim is direct or derivative are not inconsistent with federal law. To the extent Plaintiff's claims would be based on alleged state law duties that are inconsistent with HERA, those claims would be preempted by federal law.

directors would be derivative under Virginia law and thus, as *Perry Capital* held, barred by HERA.

The same result follows under Delaware law, which Fannie Mae has elected to follow for corporate governance issues not addressed by federal law or its charter (see Compl. ¶¶ 26, 82; Fannie Mae Bylaws § 1.05). Under Delaware law, a claim is direct only if the "claimed direct injury [is] independent of any alleged injury to the corporation" and the plaintiff can "prevail without showing an injury to the corporation[s]." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004). Here, any breach-of-fiduciary duty claim by Plaintiff based on the allegations in the complaint would necessarily be derivative under Delaware law because his theory is that the Third Amendment harmed the Enterprises, which in turn harmed his interests as a stockholder. It is well-established that a reduction in stock value is an "indirect injury" to a shareholder that is derivative of an injury to the company itself because "[i]t does not arise out of any independent or direct harm to the stockholders, individually." *Id.* at 1037.

As such, even if Plaintiff's complaint were construed to assert a claim for breach of fiduciary duty, that claim would be derivative and thus barred by HERA.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's complaint.

Dated: July 12, 2018

Respectfully submitted,

/s/ Howard N. Cayne
Howard N. Cayne (D.C. Bar # 331306)
Asim Varma (D.C. Bar # 426364)
David B. Bergman (D.C. Bar # 435392)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave NW
Washington, D.C. 20001
(202) 942-5000
Howard.Cayne@arnoldporter.com
Asim.Varma@arnoldporter.com
David.Bergman@arnoldporter.com

Attorneys for the Federal Housing Finance Agency

s/ Michael J. Ciatti
Michael J. Ciatti (D.C. Bar # 467177)
KING & SPALDING LLP
1700 Pennsylvania Ave. N.W.
Washington, DC 20006
Tel: (202) 626-5508
Fax: (202) 626-3737
mciatti@kslaw.com

Attorney for the Federal Home Loan Mortgage Corp. and individual directors

s/ Meaghan VerGow
Meaghan VerGow (D.C. Bar # 977165)
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
Tel: (202) 383-5300
Fax: (202) 383-5414
mvergow@omm.com

Attorney for the Federal National Mortgage Association and individual directors

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

[PROPOSED] ORDER

Upon consideration of the Defendants' Motion to Dismiss the Complaint in the above-captioned action, the Memorandum in Support, and the entire record of this case, it is hereby

ORDERED that the motion to dismiss is GRANTED and that the Complaint shall be and hereby is DISMISSED WITH PREJUDICE.

Dated: ________________, 2018

____
UNITED STATES DISTRICT JUDGE