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

***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**

Pro se Plaintiff in the above-captioned action hereby moves to alter or amend the Memorandum Opinion [ECF No. 24] and Order [ECF No. 25] and for leave to file the Proposed First Amended Complaint [ECF No. 27-2] for the reasons set forth in the Memorandum of Law in Support filed with this motion. A proposed order granting the relief requested by this Motion is filed with this Motion.

Dated: March 18, 2019
New York, New York

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Pro Se Plaintiff

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MEMORANDUM OF LAW IN 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 Joshua J. Angel ("*pro se* Plaintiff") respectfully requests that the Court: (1) pursuant to Federal Rule of Civil Procedure ("Rule") 59(e), alter or amend the Memorandum Opinion, ECF No. 24 ("Opinion"), and Order, ECF No. 25 ("Order"), which grant Defendants' Joint Motion to Dismiss, ECF No. 11 ("Motion to Dismiss") to specify that any dismissal was without prejudice; and (2) pursuant to Rule 15(a), grant *pro se* Plaintiff leave to file his Proposed First Amended Complaint ("FAC"), attached hereto as Exhibit 1.[1]

STATEMENT OF FACTS

Pro se Plaintiff is an eighty-three-year-old retired investor who seeks an order altering or amending the Opinion and Order and granting leave to amend the Complaint to clarify what *pro se* Plaintiff asserted therein: that Directors actually (not anticipatorily) breached their contractual obligations pursuant to the "CODs" of the "Junior Preferred Stock,"[2] not at the time of the third amendment ("Third Amendment"), dated August 17, 2012, to the two Senior Preferred Stock Purchase Agreements ("SPSPAs"), but rather, at the end of each fiscal quarter thereafter. Indeed, as discussed below, the Complaint expressly alleges that the Third Amendment was a nonevent for Junior Preferred Stockholders because Directors were still able obligated to perform their dividend-related duties under the CODs. See, e.g., Compl. ¶ 78 at 23 ("The . . . SPSPA[s] [] merely suspended[] but did not abolish the [GSE] Boards' ability to declare[] and pay Junior Preferred [Stock] dividends[.]"). Thus, the Third Amendment could not alone have been a breach and was not the sole cause for *pro se* Plaintiff's damages of undeclared dividends.

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[1] To avoid unnecessary motion practice, on March 14, 2019 *pro se* Plaintiff contacted counsel for all Defendants to ask that they consent to his amending of the Complaint, but Defendants' counsel refused.

[2] The "CODs," or certificates of designation, are the contracts governing the "Junior Preferred Stock," which are the non-cumulative, preferred equity shares that each GSE issued before the execution of the Senior Preferred Stock Purchase Agreements ("SPSPAs").

Accordingly, if the Third Amendment even was a breach that triggered the running of the limitations periods for *pro se* Plaintiff's claims, subsequent breaches must have – and did – occur within the limitations periods and in fact, tolled them.

Plaintiff filed his Complaint, which he never amended, on May 21, 2018 against Federal National Mortgage Association ("Fannie Mae"), Federal Home Loan Mortgage Corporation ("Freddie Mac," and collectively, with Fannie Mae, the "GSEs" or "Companies"), and some of their Directors (collectively, "Defendants"). The Complaint asserted breach of contract and the implied covenant of good faith and fair dealing ("contract claims") and tortious interference with contract and breach of fiduciary duty ("tort claims") against Defendants. See, e.g., Compl. ¶¶ 100-25 at 30-34; Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss the Compl. 32 (ECF No. 17) ("Opposition Brief"); Opp'n Br. 16 n.16; Op. 1 n.1.

As to the contract law claims, the Complaint alleges that pursuant to the CODs, which are valid contracts, see Compl. ¶ 102, Directors "owed a duty each calendar quarter to exercise their sole discretion in determining whether to declare dividends to Junior Preferred Shareholders." Opp'n Br. 22 (emphases added); accord Opp'n Br. 3-4, 17 (citing, and quoting "quarterly dividends" from, the CODs to emphasize that quarterly dividends require Directors to determine every quarter whether to declare them); see also Compl. ¶¶ 6, 55, 78, 107. In other words, Directors had to perform an affirmative act every quarter.

Moreover, the Complaint expressly alleges – and even emphasizes with varying fonts – that "[t]he Third Amendment[ ] did **not** relieve . . . Defendants of their obligations to, *inter alia*, ensure that the Companies were not improperly stripped of their assets" so as to obviate that quarterly duty. Compl. ¶ 6 at 4 (emphasis in original); accord Compl. ¶ 55 at 17 (emphasis removed) (emphasis in original) ("*The SPSPA[s] . . . did not, however, otherwise eliminate the*

Companies' . . . contractual obligations with regard to such payment[.]"); Compl. ¶ 78 at 23 ("The . . . SPSPA [] merely suspended[] but did not abolish the [GSE] Boards' ability to declare[] and pay Junior Preferred [Stock] dividends[.]"); Compl. ¶ 107 at 31 (emphasis in original) ("**The Third Amendment was[ ] irrelevant to Plaintiff as a holder of [the] Junior Preferred[Shares.]**"). Indeed, the Third Amendment reserved Directors' COD duties by expressly stating that they could still declare and pay dividends. See, e.g., Compl. ¶ 55 at 17 ("The SPSPA[s] required [the Companies] . . . to obtain Treasury['s] permission before declaring and paying dividends on its [J]unior [P]referred [S]hares.").

However, once the Third Amendment became effective on January 1, 2013, Directors refused (i.e., intentionally omitted) to perform that requisite act. See Opp'n Br. 17 (citing the CODs, which are cited in the Complaint and attached as Exhibits 2 and 4 to Plaintiff's affidavit in support of his Opposition Brief) ("A breach occurred after each quarter in which Defendants failed to . . . determine whether to declare[] a dividend. . . . Here, Plaintiff's claims did not accrue, at the earliest, until the end of that quarter (and every quarter thereafter) because Defendants failed to consider whether to declare dividend payments."). Those quarterly omissions are breaches that are "continu[ing], [so] the limitations period has not yet expired. Most recently, Defendants failed to . . . determine whether to declare[] a dividend this past fiscal quarter, ending on June 30, 2018." Id.; see also Compl. ¶ 75 at 22 (emphases added) ("For [] Junior Preferred Shareholders[,] the Net Worth Sweep[,] while *initially* in anticipatory breach[3] of Junior Preferred contractual dividend entitlement . . . , *over time became absolute* in its taking *through the dividend entitlement breach*, and *otherwise was no[t] . . . an event for [the] Junior*

[3] It is clear that the Court misapprehended Plaintiff's use of the phrase "anticipatory breach" because he expressly alleged that Directors were still able to perform their COD duties despite the Third Amendment.

Preferred Shareholders."); Compl. ¶ 108 at 31 (emphasis added) ("By . . . *thereafter causing the Companies to . . . perform in accord with its provisions* . . . , the Defendants breached the Companies['] obligations to Plaintiff[.]"). Each quarterly breach caused damages in the form of lost dividends based on the profits earned in that quarter.

In his Opposition Brief and surreply papers, *pro se* Plaintiff made **four** "requests [for] leave to amend the Complaint." Opp'n Br. 16 n.14, 32 n.24; Pl.'s Mot. for Leave to File a Surreply 3, 4, ECF No. 21 ("Surreply Motion"); Pl.'s Proposed Surreply Br. in Opp'n to Mot. to Dismiss 3, 8, ECF No. 21-1 ("Surreply Brief"). He specified some of his intended amendments: clarify his causes of action; rename the GSEs to be solely Nominal Defendants; allege a class action; and voluntarily dismiss his tortious interference claim. He did not specify a purpose to cure statutes-of-limitations issues because (1) he expressly argued a continuing wrong in his Opposition Brief, so he saw no need to amend for that purpose and (2) the Opinion and Order identifying deficiencies had not yet been issued. Regarding the dismissal:

- "Plaintiff will voluntarily dismiss his tortious interference claim by filing an amended complaint that omits that claim," Surreply Mot. 3 (emphasis added);
- "Plaintiff requests leave to amend the Complaint to, *inter alia*, (1) omit Count III," which is the tortious interference claim, Surreply Mot. 4 (emphasis added);
- "Plaintiff seeks to dismiss this claim [for tortious interference]," Surreply Br. 8;
- "For the forgoing reasons, the Court should: . . . permit the dismissal of Count III; [and] grant Plaintiff leave to file an amended complaint that omits Count III," Surreply Br. 8 (emphasis added).

Defendants observed that *pro se* "Plaintiff's filing is not really a surreply at all, but rather a motion for leave to amend." Defs.' Opp'n to Pl.'s Mot. for Leave to File Surreply, ECF No. 23.

Respectfully, the Court entered the Opinion and Order, which: (1) granted the Motion to Dismiss without specifying whether the dismissal was with prejudice; (2) granted the Surreply Motion without discussing the merits; and (3) did not rule on or even mention any of the multiple

requests for leave to amend. See generally Op.; Order. The Court's docket indicates that the case "Terminated" on the date of the Order. See Angel v. Fed. Home Loan Mortg. Corp. et al., No. 18 Civ. 1142 (D.D.C.).

The legal analysis in the Opinion is limited to statutes of limitations, without discussing the merits of the claims. See Op. 3-12. The Court concluded that "the [contract] claims . . . accrued [only] at the time of the enactment of the Third Amendment," which was executed "outside the limitations period[s]." Id. 5. The Court further held that the limitations periods were not tolled.

Regarding the Freddie Mac Directors, the Court held that the "continuing violation doctrine" did not apply because *pro se* Plaintiff alleged "a single contin[uous] breach" rather than a "series of separate breaches." Id. 7 (citation omitted). The Court believed that the Third Amendment was the only breach and that it "produce[d] all the damage . . . claim[ed]." Id. The Court believed that the lack of dividends each quarter was merely an accrual of damages rather than the result of a distinct breach in each quarter. The Court also stated only "further action [ ] by the FHFA as conservator" could stop the loss of dividends each quarter. Id.

Regarding the Fannie Mae Directors, the Court found no tolling because "Mr. Angel could have brought the suit [when] the [Third Amendment was] announced" or within the three-year limitations period. Id. 8. *Pro se* Plaintiff understands this to mean that he did not bring suit within the limitations period but respectfully submits that this ruling seems to overlook his tolling arguments and assertion of a repeated and continuing wrong.

ARGUMENT

The Court should (1) amend the Opinion and Order pursuant to Rule 59(e) to specify that any dismissal was without prejudice and (2) grant leave to file the FAC pursuant to Rule 15(a).[4]

I. The Opinion and Order Must Be Amended Because the Court Clearly Erred by Dismissing with Prejudice Rather Than Without Prejudice

Due to the Court's clear error in dismissing the Complaint with prejudice, as opposed to without prejudice, and ignoring Plaintiff's requests for leave to amend, the Opinion and Order must be amended to state that the dismissal was without prejudice and grant leave to amend the *pro se*, unamended Complaint. A Rule 59(e) motion "need not be granted unless the district court finds[, *inter alia*,] . . . the need to correct a clear error or prevent manifest injustice." Firestone v. Firestone, 76 F.3d 1205, 1208 (D.D.C. 1996) (quoting Nat'l Tr. v. Dep't of State, 834 F. Supp. 453, 455 (D.D.C. 1993)). The "denial of the Rule 59(e) motion . . . is an abuse of discretion if the dismissal of the complaint with prejudice was erroneous; that is, the Rule 59(e) motion should be granted unless 'the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" Brink v. Contl. Ins. Co., 787 F.3d 1120, 1128-29 (D.C. Cir. 2015) (emphasis added) (quoting Firestone, 76 F.3d at 1209; Belizan v. Hershon, 434 F.3d 579, 583 (D.C. Cir. 2006)).

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[4] By filing these motions, *Pro se* Plaintiff follows this Circuit's procedure but does not concede that dismissal was correct. See, e.g., ; Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (requiring a combined motion under Rules 59(e) and 15(a) to amend a complaint that was dismissed with prejudice); Brink v. Cont'l Ins. Co., 787 F.3d 1120, 1128 (D.C. Cir. 2015) (same). Plaintiff respectfully believes that the dismissal was erroneous regardless of prejudice and reserves the right to appeal the Opinion and Order on that and other grounds.

A. The Court Failed to Determine That Other Consistent Facts "Could Not Possibly Cure the Deficiency"

The dismissal with prejudice, as opposed to without prejudice, was clearly erroneous. 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." Id. at 1209 (first emphasis in original) (internal quotation marks omitted). Neither the Opinion nor Order make that determination, which constitutes "clear error" under Rule 59(e). The court must amend its judgment to "correct [this] clear error." Firestone, 76 F.3d at 1208.

B. The Court Patently Misunderstood the Claims and Certain Facts and Law

Even if the Opinion and Order did not need to discuss the foregoing determination, the Court did not and could not have made that determination unless it "patently misunderstood" *pro se* Plaintiff's claims, the facts, or the law, which constitutes clear error. Gregg v. Am. Quasar Petroleum Co., 840 F. Supp. 1394, 1401 (D. Colo. 1991); accord Benedictine College, Inc. v. Cent. Off. Prods., Inc., 866 F. Supp. 1323, 1326 (D. Kan. 1994) ("A motion to reconsider is appropriate when the court has obviously misapprehended a party's position or the facts . . . ."). Had the Court considered other facts consistent with the Complaint, it would have held that pleading them could possibly cure the deficiency, so it was clear error to dismiss with prejudice.

First, contrary to the Court's holding, it cannot be true that the Third Amendment was the single wrong from which all damages resulted. The Complaint clearly alleges that the Third Amendment expressly allowed for dividends to shareholders like *pro se* Plaintiff. See supra Statement of Facts ("SOF") pp. 2-3 (citing Compl. ¶¶ 6, 55, 75 78, 107, 108) (alleging, *inter alia*, that dividends could be declared and paid upon receiving "prior written consent" from Treasury). Thus, the Third Amendment clearly could not have been the only breach that "produce[d] all the

damages" of undeclared dividends. Op. 7. Accordingly, the Court patently misunderstood the allegations and facts. See Gregg, 840 F. Supp. at 1401; Benedictine College, Inc., 866 F. Supp. at 1326.

Moreover, *pro se* Plaintiff alleged the breaches that caused his damages. As discussed above and in the Opposition Brief, and as alleged in the Complaint and FAC, the causes of the damages were Defendants' repeated, quarterly breaches of express and implied contractual duties. See supra SOF pp. 3-4 (citing Compl. ¶¶ 6, 55, 75 78, 107, 108); see also FAC ¶¶ 1, 14, 17, 34, 52, 59, 60, 65. Every quarter since January 1, 2013, Defendants failed to determine whether to declare a dividend on the Junior Preferred shares, and they additional failed to seek consent from Treasury to declare a dividend. See supra SOF p.3 (citing Compl. ¶¶ 6, 55, 75 78, 107, 108); see also FAC ¶¶ 1, 14, 17, 34, 52, 59, 60, 65). Both failures each quarter constitute a distinct omission in breach of Directors' express and implied contractual duties. See supra SOF p.1 (citing Compl. ¶¶ 6, 55, 75 78, 107, 108); see also FAC ¶¶ 1, 14, 17, 34, 52, 59, 60, 65. Plaintiff's briefing on the motion to dismiss also made this crystal clear. See supra SOF at ¶¶ p.3-4 (citing Opp'n Br. 3-4, 17, 22); see also Opp'n Br. 23-24 ("Plaintiff does not assert that Defendants breached the contract by failing to declare dividends but rather, by failing to determine whether to declare them and failing to do so in their sole discretion each fiscal quarter."). Defendants continued to owe that duty despite the Third Amendment. See supra SOF p.1 (citing Compl. ¶¶ 6, 55, 78, 107). Each breach caused additional damages, i.e., the undeclared dividends based on the profits earned each quarter. Those distinct, continuing wrongs have tolled the statutes of limitations on the contract law claims since January 1, 2013. Because the Court clearly misunderstood these allegations and facts as well, the dismissal was not based on the merits, and the dismissal with prejudice constitutes clear error. Moreover, the

crystal-clear explanations in Opposition Brief make it obvious that the recurring, quarterly breaches "could [] [possibly] cure the deficiency" by invoking the continuing wrongs doctrine, which tolls the statutes of limitations. Firestone, 76 F.3d at 1209. Therefore, dismissal may not be made with prejudice.

Second, the Court patently misunderstood another key fact: holding that only "action [ ] by the FHFA as conservator" could have stopped the loss of dividends each quarter. Id. The Complaint expressly alleges the contrary: "HERA also did not abrogate the basic contractual and fiduciary duties owed by . . . the Defendants[] to" *pro se* Plaintiff. Compl. ¶ 38 (emphasis added). The plural form of "Defendants" clearly refers to more than one, so it could not just be FHFA, and moreover, FHFA is clearly named a Nominal Defendant." See id. 1 (naming FHFA as a Nominal Defendant). Those contractual duties include the quarterly duties to determine whether to declare dividends and to seek Treasury consent. Thus, it was the Directors, not FHFA, who could have prevented additional damages. This patent misunderstanding constitutes clear error. See Gregg, 840 F. Supp. at 1401; Benedictine College, Inc., 866 F. Supp. at 1326.

Third, the Court patently misunderstood the law with respect to the tolling of claims against Fannie Mae Directors. The Court did not discuss tolling at all. See Op. 8. Rather, it reasoned only that *pro se* Plaintiff did not file within the limitations period. Plaintiff acknowledges that, hence his tolling arguments, particularly the continuing wrongs doctrine on the basis that the wrongdoing was repeated every quarter. See SOF pp.5-6 (citing Complaint and Opposition Brief).

The case that the Court cited holds that for the continuing wrongs doctrine to apply, damages need not result from each continuing wrong so long as another kind of relief, like an injunction, was available. Kerns v. Dukes, No. Civ.A.1999-S, 2004 WL 766529, at *4 (Del. Ch.

Apr. 2, 2004) ("The only element missing from Plaintiffs' cause of action at the time [of] the [breach] was significant money damages giving Plaintiffs an incentive to bring their action. Injunctive relief, however, was available to prevent or reduce any damages."). *Pro se* Plaintiff does not dispute that. Regardless of when damages began to accrue or what relief was available, distinct continuing wrongs have tolled the limitations period. This patent misunderstanding of law led the Court to not address tolling of the Fannie Mae claims. All of the foregoing "patent[] misunderst[andings]" constitute clear errors that warrant amending the judgment to make the dismissal without prejudice. Gregg, 840 F. Supp. at 1401; Benedictine College, Inc., 866 F. Supp. at 1326.

C. The Prejudice Is Clear Error Because the Court Did Not Rule on the Merits

The Court did not rule on the merits but rather, on misapprehensions of the merits, so dismissal with prejudice was a clear error. "Unless the dismissal order states otherwise, [an involuntary dismissal] . . . operates as an adjudication on the merits." Rule 41(b). "Adjudication on the merits . . . means dismissal with prejudice." Sodexo Operations, LLC v. Not-for-Profit Hosp. Corp., No. CV 12-108 (RWR), 2013 WL 12333596, at *1 (D.D.C. Dec. 19, 2013) (citing Rollins v. Wackenhut Servs., Inc., 703 F.3d 122, 131 (D.C. Cir. 2012). The Opinion and Order did not state otherwise, so Rule 41(b) dictates that the dismissal was on the merits, which "means dismissal with prejudice." Id. However, the Court did not rule on the merits, so the dismissal could not lawfully have been "with prejudice." Id. Thus, the Court clearly erred by dismissing with prejudice.

D. It Was Clear Error to Dismiss the Complaint with Prejudice Under Rule 8(a)(2)

The Court clearly erred by dismissing the unamended Complaint pursuant to Rule 8(a)(2). That rule requires complaints to contain a "plain statement of the claim showing . . .

entitle[ment] to relief." Plaintiff has clearly shown that he has pled, or at the least, can adequately plead, facts that invoke the continuing wrongs doctrine to toll the statutes of limitations. However, the Court found no continuing wrong due to the misapprehensions discussed above. Furthermore, the court did not consider the merits of the causes of action at all. Thus, the dismissal was not on the merits. Accordingly, it must have been due to the failure to plainly state entitlement to relief. See id. A "failure to comply with Rule 8(a)(2) in an initial complaint does not justify dismissal of an action with prejudice." Beranek v. Klassen, 19 Fed. R. Serv. 2d 1460 (D.C. Cir. 1975) (citing DeWitt v. Pail, 366 F.2d 682, 685 (9th Cir. 1966); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2373, at 239 (1971)).

E. The Court Clearly Erred in Failing to Grant Leniency to *Pro Se* Plaintiff, Which Would Have Required a Dismissal Be Made Without Prejudice

It was clear error for the Court to not grant *pro se* leniency to Plaintiff. See, e.g., Dees v. Vendel, 996 F.2d 310 (10th Cir. 1993) ("[I]n light of [P]laintiff's pro se status, however, the court will dismiss the instant claims without prejudice."). Moreover, this is "his initial pro se complaint[, which] has not been amended." Hines v. Wainwright, 539 F.2d 433, 434 (5th Cir. 1976) (cited in Hogan v. Provident Life & Acc. Ins. Co., 08-CV-1897-ORL-19K, 2009 WL 2169850, at *3 (M.D. Fla. July 20, 2009)). Even when a "district court correctly f[i]nd[s] that the complaint does not now state a claim against the defendant[,] the [*pro se*] plaintiff should have the opportunity to advance such a claim if it exists." Id. Here, however, the Court did not even rule on whether *pro se* Plaintiff stated a claim. Rather, it ruled on only statutes of limitations, notwithstanding that Plaintiff's alleged sufficient facts to overcome a statute of limitations argument. See supra Part I.B. Thus, the prejudicial dismissal was clear error.

Further evidence of the Court's failure to grant leniency relates *pro se* Plaintiff's multiple requests for leave to amend the Complaint. He made at least such requests. See supra Statement of Facts ("SOF") 2. One reason was to voluntarily dismiss his tortious interference. See Surreply Mot. 3, 4; Surreply Br. 8. On the very same page, he also stated, "Plaintiff seeks to dismiss this claim [for tortious interference]." Op. 3 (quoting Surreply Br. 8). The latter sentence clearly and directly contradicts the other three, which are consistent with each other and in the very same papers. See SOF 2. Thus, the Court clearly erred in ignoring the three consistent statements and relying on the one contradictory sentence to rule in a manner that was detrimental to Plaintiff's interests. Moreover, due to his *pro se* status, the Court's decision was an abuse of discretion because courts are supposed to treat *pro se* litigants with leniency. See generally Op.

The error of this harshness is even clearer when juxtaposed with the Court's decisions regarding *pro se* Plaintiff's other reasons to amend the Complaint, which he did not contradict. His requests for leave to amend to allege a class action and rename the GSEs were consistent, yet the Court did not address them. The Court chose to "oblige[]" the only request that was both contradicted and detrimental to Plaintiff. See Op. 3 ("In Mr. Angel's surreply, he concedes his cause of action for tortious interference and 'seeks to dismiss this claim.' The Court obliges. That claim will be dismissed[.]").

In addition, regardless of any specific purpose to amend, the Court's lack of leniency toward *pro se* Plaintiff is further evident regarding his requests for leave generally to more clearly allege his claims. See Opp'n Br. 16 n.14, 32 n.24. Even Defendants, who are adverse, observed that *pro se* Plaintiff's surreply was "not really a surreply at all, but rather a request for

leave to amend."[5] Defs.' Opp'n to Pl.'s Mot. for Leave to File Surreply, ECF No. 23. Strikingly, Defendants' reading was more generous than the Court's, which is obligated to be lenient with *pro se* litigants. See, e.g., Defs.' Opp'n to Pl.'s Mot. for Leave to File Surreply, ECF No. 23. The Court had full, discretionary authority to construe his surreply papers as a motion for leave to amend or otherwise rule on any of his four requests for leave to amend. However, the Court did neither. Rather, it completely ignored all four unequivocal requests that would have benefited *pro se* Plaintiff while granting his contradicted request to his detriment. Had the Court granted leave to amend, Plaintiff would have more clearly alleged the continuing wrongs that he argued in his Opposition Brief, which clearly warrant tolling. Such treatment of a *pro se* Plaintiff with an unamended Complaint is at least clear error, if not an abuse of discretion.

F. The Refusal of *Pro Se* Plaintiff's Requests for Leave to Amend Without Providing a Justification Were Clear Errors

The Court's refusal of *pro se* Plaintiff's requests for leave to amend was more than sufficient to demonstrate a clear error and thus, must amend the judgment. Regardless of *pro se* status, "refusal to grant leave to amend without justifying [the] reason is abuse of discretion and inconsistent with [the] spirit of [the] Federal Rules." Dees, 996 F.2d 310 (citing Foman v. Davis, 371 U.S. 178, 182 (1962)) (refusing to grant leave to amend without justification is abuse of discretion and inconsistent with spirit of Federal Rules). Plaintiff's satisfaction of an abuse of discretion standard a fortiori satisfies the lesser clear error standard. *Pro se* Plaintiff made four requests for said leave in his papers opposing the Motion to Dismiss, but the Court did not

[5] Perhaps, this apparent lack of merit to the Surreply Motion and Brief is why the Court did not discuss their merits in the Opinion. This begs the question of why the Court granted an unsubstantiated motion only to selectively grant the relief that was detrimental to *pro se* Plaintiff.

address or rule on them at all when ruling on the motion. See supra SOF 2.[6] Furthermore, the Court refused any future leave to amend by dismissing the Complaint with prejudice and did not provide a reason for the prejudice. Prejudice precludes leave to amend the complaint and is tantamount to a refusal to grant leave to amend. Thus, the refusal to grant leave without any stated justification by ignoring the requests for leave and dismissing with prejudice are abuses of discretion and therefore, clear error.

G. Regardless of a Stated Justification, the Court Clearly Erred in Refusing Leave to Amend

The Court was required to grant Plaintiff's requests for leave to amend because it was not certain from the face of the complaint that amendment would be futile. "Unless it is certain from the face of the complaint that any amendment would be futile or otherwise unwarranted, the district court should grant leave to amend after granting a motion to dismiss," even if the plaintiff is not *pro se*. Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & N.W. Indiana, 786 F.3d 510, 519-20 (7th Cir. 2015) (emphasis in original) (citation omitted). According to Professors Wright and Miller:

> The federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that plaintiff be given every opportunity to cure a formal defect in his pleading. This is true even though the court doubts that plaintiff will be able to overcome the defects in his initial pleading. Amendment should be refused only if it appears to a certainty that plaintiff cannot state a claim. The better practice is to allow at least one amendment regardless of how unpromising the initial pleading appears because except in unusual circumstances it is unlikely that the court will be able to determine conclusively on the face of a defective pleading whether plaintiff actually can state a claim.

[6] Statutes of limitations as a ground for dismissal, without more, is insufficient to justify dismissal with prejudice. See infra Part I.G p.16 (quoting Dees, 996 F.2d 310).

Id. (emphases added) (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (2d ed. 1990)).

As discussed above, it is not certain from the face of the Complaint that amendment would be futile. Runnion ex rel. Runnion, 786 F.3d at 519-20. The Complaint alleges that the Third Amendment allowed for potential dividends to *pro se* Plaintiff. See Compl. ¶¶ 4-6, 64, 81, 83, 107, 108. Therefore, the Third Amendment could not have been the breach that caused all of his damages. See Compl. ¶¶ 16, 99, 107. Rather, each quarter, in breach of express and implied covenants, Directors failed to determine whether to declare dividends and failure to obtain Treasury's consent to declare a dividend. See Compl. ¶¶ 6, 55, 75, 78, 107, 108. Each omission caused additional damages based on the profits earned in each such quarter. See id. Those omissions independent, continuing breaches that toll the statutes of limitations on all asserted contract and tort claims.

Third, leave to amend must be granted because "justice so requires" in light of Plaintiff's pro se status and no prior amendments. Rule 15(a); Foman v. Davis, 371 U.S. 178, 182 (1962) ("[L]eave shall be freely given when justice so requires."). In countless federal appeals, the courts held that district courts abuse their discretion by denying *pro se* Plaintiffs leave to amend.

> Although we agree with the district court that Plaintiff's complaint is fatally deficient . . . , we believe that dismissal of Plaintiff's claim at this juncture is premature. The district court gave no explanation for refusing Plaintiff's request to amend. In light of Plaintiff's pro se status, and in light of Fed. R. Civ. P. 15(a)'s requirement that leave to amend be "freely given," we hold that the court's refusal to grant Plaintiff leave to amend was an abuse of discretion.

Dees, 996 F.2d 310 (quoting Foman, 371 U.S. at 182). The dismissal with prejudice was similarly an abuse because it foreclosed Plaintiff's right to obtain leave to amend.

This law applies even if the "pro se litigant's pleadings . . . [, being] construed liberally and held to a less stringent standard . . . [, still] fail[ed] to allege sufficient facts," and even if the "Plaintiff's complaint would probably now be barred" "given the applicable two-year statute of limitations." Dees, 996 F.2d 310 (10th Cir. 1993) (quoting Roman-Nose v. New Mexico Dep't of Human Servs., 967 F.2d 435, 438 (10th Cir. 1992)) ("[W]e hold that justice requires that the district court allow Plaintiff an opportunity to amend his complaint.").

For all of the foregoing reasons, the dismissal with prejudice, rather than without prejudice, and the refusals to rule on the requests for leave to amend were clear errors (and abuses of discretion). Accordingly, the Court should amend the Order and/or Opinion to specify that the dismissal is without prejudice.

RULE 15(a) MOTION

II. The Court Must Grant *Pro Se* Plaintiff Leave to Amend His Initial Complaint

The Court should grant *pro se* Plaintiff leave to amend. *Brink*, 787 F.3d at 1128 (quoting Rule 15(a)(2)) ("The court should freely give leave when justice so requires."). First, it would be an abuse of discretion to deny this additional request for leave to amend as it was for Plaintiff's prior requests. See supra Part I.F pp.10-12.

Second, the FAC cures the identified deficiency regarding the statutes of limitations, so amendment is not futile. As discussed above, the CODs of the Junior Preferred Stock require Defendants to (1) determine every quarter whether to declare dividends and (2) seek consent from Treasury to declare a dividend. See FAC ¶¶ 10, 13, 30, 52, 59, 64. The Third Amendment allowed for potential dividends to *pro se* Plaintiff. See FAC ¶¶ 8, 9, 13. Thus, the Third Amendment could not have been the breach that caused all of his damages. See FAC ¶¶ 1, 11, 13, 14, 51, 52, 59, 60, 65. Rather, Directors' omissions to perform the above duties each quarter

caused additional damages based on the profits earned in each such quarter. See id. Those distinct, quarterly omissions constitute continuing wrongs that toll the statute of limitations. See id. Those wrongs trace back to when the Third Amendment went into effect (on January 1, 2013) because that was when Directors began their bad-faith efforts to deny dividends to Junior Preferred Shareholders in order to maximize dividends to Treasury. See id. ¶¶ 8, 13-16, 31, 59, 65.

CONCLUSION

The Court should (1) amend the Opinion and Order to specify that any dismissal was without prejudice and (2) grant *pro se* Plaintiff leave to file the FAC.

Dated: March 18, 2019
New York, New York

By: /s/ Joshua J. Angel

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Pro Se Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Joshua J. Angel,

Plaintiff,

v.

WILLIAM T. FORRESTER II, BRENDA J. GAINES, CHARLYNN GOINS, FREDERICK B. HARVEY III, ROBERT H. HERZ, PHILIP A. LASKAWY, TIMOTHY J. MAYOPOULOS, EGBERT L.J. PERRY, JONATHAN PLUTZIK, DAVID H. SIDWELL, CAROLYN H. BYRD, DONALD H. LAYTON, CHRISTOPHER S. LYNCH, NICOLAS P. RETSINAS, EUGENE B. SHANKS, JR., and ANTHONY A. WILLIAMS,

Defendants.

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

DEMAND FOR JURY TRIAL

[PROPOSED] FIRST AMENDED COMPLAINT

Joshua J. Angel ("Plaintiff"), brings this action pro-se[1] against the individual members (collectively, "Directors" or "Defendants") of the Boards of Directors (collectively, the "Boards") of Federal National Mortgage Association ("Fannie Mae"), as constituted on June 30, 2015 and thereafter as reconstituted from time to time to date,[2] and of Federal Home Loan Mortgage Corporation ("Freddie Mac," and collectively with Fannie Mae, the "GSEs" or "Companies"), as constituted on June 30, 2013 and thereafter as reconstituted from time to time to date.[3] Plaintiff alleges the following based on personal knowledge or information and belief. Plaintiff's information and belief are based on, *inter alia*, public documents and testimony (including the sources identified in and attached to Plaintiff's declaration in opposition to Defendants' motion to dismiss, and other court filings in this case and related cases), speeches, studies, books, and Plaintiff's investigation.

I. INTRODUCTION

1. Plaintiff brings this action on behalf of himself as the holder of non-cumulative preferred shares of both Companies issued prior to September 6, 2008 (collectively, "Junior Preferred"). Plaintiff seeks to recover his pro-rata share of damages emanating from Directors' continuing breaches of Junior Preferred contractual obligations, and duties in violation of law,

[1] Plaintiff files this complaint ("Complaint") as the first amendment to the initial complaint ("Initial Complaint") filed in this action by Plaintiff on May 21, 2018, in accordance with the Memorandum Decision, and the Order of the Court dated March 6, 2019 ("Memorandum Decision"), dismissing the Initial Complaint. Pursuant to the Memorandum Decision, the Companies, and the Federal Housing Finance Agency conservator ("FHFA" and "Conservator") defendants have been removed as defendant parties in the Complaint.

[2] "Fannie Mae Directors" as of June 30, 2015 are William T. Forrester II, Brenda J. Gaines, Charlynn Goins, Frederick B. Harvey III, Robert H. Herz, Philip A. Laskawy, Timothy J. Mayopoulos, Egbert L.J. Perry, Jonathan Plutzik, and David H. Sidwell.

[3] The "Freddie Mac Directors" as of June 30, 2013 are Carolyn H. Byrd, Donald H. Layton, Christopher S. Lynch, Nicolas P. Retsinas, Eugene B. Shanks, Jr., and Anthony A. Williams (collectively with the Fannie Mae Directors, "Directors" or "Defendants").

attendant to their actions beginning June 30, 2013 for Freddie Mac Directors, and June 30, 2015 for Fannie Mae Directors since the execution of the third amendment ("Third Amendment"), dated August 17, 2012, to the two Senior Preferred Stock Purchase Agreements ("SPSPAs"),[4] dated September 6, 2008, between Conservator and the U.S. Department of the Treasury ("Treasury").[5]

2. Under the SPSPAs, the GSEs issued preferred share securities to Treasury, superior to the Companies Junior Preferred shares in dividend declaration and payment, but otherwise substantially the same in general preferred share securities classification, ("Senior Preferred"), with Treasury as the sole Senior Preferred shareholder.[6]

3. Contractual obligations owed by Directors to Junior Preferred Shareholders, particularly regarding the declaration and payment of dividends, emanate from the shares' certificate of designations (collectively, "CODs"), which incorporate the Companies' corporate

[4] The SPSPAs are available at *Senior Preferred Stock Purchase Agreements*, FED. HOUSING FIN. AGENCY, https://www.fhfa.gov/Conservatorship/Pages/Senior-Preferred-Stock-Purchase-Agreements.aspx (last visited Feb. 15, 2019) (click on the links at the bottom of the page under the heading "Senior Preferred Stock Purchase Agreements").

[5] Although *Pro se* Plaintiff may assert claims against all Directors who served on the Boards since January 1, 2013, he chooses to limit Defendants to only the Directors who served on the Boards as constituted on the specified dates.

[6] "Under the PSPAs, Treasury's financial support is in the form of an equity investment in the Enterprises. The investment is not in common stock, but rather in senior preferred stock. Preferred stock is typically regarded as a hybrid instrument in that it has some features like bonds and others like common stock. Preferred stock is an equity interest, like common stock. However, like a bond, it usually does not confer voting rights, and offers a liquidation preference. A liquidation preference gives the preferred shareholder the right, in the event that the company is dissolved, to receive compensation for its preferred stock typically before common stockholders (but not before bondholders). Senior preferred stock has priority over other preferred stock. A dividend, should one be paid under the terms of preferred stock, is typically a quarterly payment based on a specified rate applied to the amount of preferred stock held." White Paper: *FHFA-OIG's Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements*, 7 (Mar. 20, 2013), https://www.fhfaoig.gov/Content/Files/WPR-2013-002_2.pdf (emphasis omitted).

charters, bylaws, and the corporate law of the state under which the Companies are regulated—Delaware in the case of Fannie Mae and Virginia in the case of Freddie Mac.[7]

4. Fannie Mae and Freddie Mac CODs require Directors to, in relevant part, make a reasonable, good-faith determination in their "sole discretion" every fiscal quarter as to whether or not to declare a dividend payment on the Junior Preferred shares (the "Quarterly Dividend Duty"). *See, e.g.*, Fannie Mae, Exhibit to Current Report (Exhibit 4.1 to Form 8-K), 2(a) (Oct. 4, 2007) (hereinafter, the "Series Q") ("[H]olders . . . will be entitled to receive, when, as and if declared by the Board of Directors of Fannie Mae . . . , in its sole discretion out of funds legally available therefor, non-cumulative quarterly dividends."); Freddie Mac, Offering Circular, A-2 (Nov. 29, 2007); and Fannie Mae, Exhibit to Current Report (Exhibit 4.2 to Form 8-K), 2(a) (Sept. 11, 2008).

5. Attendant to the financial crisis, the GSEs on September 6, 2008 were placed into conservatorship, the Conservator, on behalf of each GSE, entered into the SPSPAs with Treasury, and the Companies issued Senior Preferred shares to Treasury, at all times, the sole holder of those shares. The SPSPAs and the first, and second SPSPA amendments all defined the "Dividend Amount" for the Senior Preferred shares to mean ten percent of the then-current liquidation preference.

6. The SPSPAs required Directors to obtain Treasury's "prior written consent" before Directors could "declare or pay any dividend" on the Junior Preferred Shares.

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[7] Per the Memorandum Decision, the Virginia statute of limitations (5 years) and the Delaware statute of limitations (3 years) apply with regard to Junior Preferred contractual breaches, and Complaint allegations against the Defendants as herein set forth are grounded solely on contractual breach occurrence after August 17, 2012, specifically occurring after June 1, 2013 in regards to Freddie Mac Directors, and specifically occurring after June 1, 2015 as to Fannie Mae Directors.

7. The requirement of "prior written consent" in the SPSPAs modified but did not eliminate Directors' performance of their duty, to both Junior Preferred and Senior Preferred Shareholders, to exercise their "sole discretion" in declaring dividends on Junior Preferred and Senior Preferred Shares. *E.g.*, Series Q, § 2(a).

8. Attendant to the GSEs return to profitability in 2012, Treasury and Conservator on August 17, 2012, entered into the Third Amendment to the SPSPAs, effective as of January 1, 2013. The Third Amendment included a "Net Worth Sweep," provision which in essence, required perpetual, quarterly dividend payments to Treasury, in amount of each GSE's entire net quarterly profits in perpetuity.

9. The Third Amendment, neither amended, altered or otherwise eliminated Preferred Share [economic] Governance Covenants, or the Directors' Quarterly Dividend Duty.[8]

10. At all relevant times, the CODs required Directors to determine every quarter in their sole discretion, in good faith, and within reason, whether to declare dividends on the Companies' Junior Preferred Shares.

11. In addition, the Directors were required to seek the prior, written consent of Treasury prior to declaring and paying dividends on the Junior Preferred Shares. Because the Third Amendment expressly allowed for the declaration and payment of dividends on Junior Preferred Shares, the Third Amendment could not have been the cause for the failure of Directors to declare and pay dividends on the Junior Preferred Shares. The causes were Directors' intentional, bad-faith, and unreasonable failures each quarter since January 1, 2013 to (1) determine in good faith, in their sole discretion, and within reason whether to declare a

[8] It would have been unlawful for the SPSPAs to eliminate the Quarterly Dividend Duty because doing so would have unlawfully amended the CODs and/or required Directors to breach the CODs. Any purported or effective amendment of the CODs by way of the Third Amendment would have to fall within the CODs' circumscribed grounds to be lawful and valid.

dividend and (2) seek to obtain the prior, written consent of Treasury. Those quarterly failures are omissions that continually breached, and continue to breach, the CODs.

12. Statute of limitations applicability with regard to Directors' Discretionary function to declare or pay dividends begin to run from the time specified for the function's performance, there being no logical way to pre-breach the obligation to act reasonably in connection with the performance of the specific discretionary function before the time to act reasonably and perform the function has arrived.

13. Junior Preferred share dividend amounts once declared could have been avoided from the Net Worth Sweep, irrespective of nonpayment, by simple application of the GAAP rule[9] mandate for declared dividend expense reflection on the Companies' financial statements in the period of dividend declaration.

14. Attendant to the Third Amendment's January 1, 2013 effective date, Defendants serially ignored, refused and failed to perform their Quarterly Dividend Duty as they concurrently ignored and failed to seek Treasury written consent for Junior Preferred dividend declaration. In time, beginning on January 1, 2013, that neglect gave rise to absolute final, repetitive Director quarter annual breaches of the CODs, active participated furtherance of the government's scheme to inflate Third Amendment Net Worth Sweep dividend payments to Senior Preferred with Junior Preferred entitlement monies.

15. Beginning on January 1, 2013, dividend amounts rightfully accruing to GSE Junior Preferred shares were converted into Senior Preferred dividends by artifice of Junior

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[9] "GAAP" is the acronym for Generally Accepted Accounting Principles, which are the preeminent accounting rules and standards for financial reporting. The GSEs, as publicly traded companies, are required to maintain their books and records in accordance with GAAP. Stated simply, the GAAP Rule for Preferred Share dividends is that once declared the dividend amount is reflected as an income statement expense in reduction of Net Profit, and a balance sheet liability amount for future payment.

Preferred dividend non-declaration. Directors' employment of the artifice was discriminatory in its favoring of Senior Preferred, over Junior Preferred in direct breach of Director's implied covenant of good faith and fair dealing (or "Implied Covenant").

16. Directors' discriminatory favoritism served to inflate the quarterly profits available for Net Worth Sweep dividend payments to Senior Preferred in approximate total of $12 billion between January 1, 2013, and December 31, 2018.[10]

17. Directors' serial non-performance of the Quarterly Dividend Duty after January 1, 2013 was particularly egregious because non-cumulative preferred share dividends, once passed, are irretrievably lost forever in each period for which the Quarterly Dividend Duty is ignored, without good faith board review.

18. Directors' declarations of outsized Senior Preferred Net Worth Sweep dividends swollen with Junior Preferred share passed dividend entitlements were in per se breach of Junior Preferred share implied covenant entitlement to non-discriminatory, ratable (i.e., proportionable in constant ratio) dividend treatment with other preferred share securities.

II. THE PARTIES

19. *Pro se* Plaintiff Joshua J. Angel is a resident of New York, and he owns Junior Preferred Shares of both Fannie Mae and Freddie Mac.

20. Defendants Egbert L.J. Perry, Amy E. Alvin, William T. Forrester, Brenda J. Gaines, Frederick B. Harvey III, Robert H. Herz, Timothy J. Mayopoulos, Diane C. Nordin, Jonathan Plutzik, and David H Sidwell were Fannie Mae Directors on June 30, 2015.

[10] Mindful of the Memorandum Decision statute of limitations ruling, Plaintiff seeks recovery; from Fannie Mae directors solely for breaches occurring after July 1, 2015, and from Freddie Mac directors solely for breaches occurring after July 1, 2013, of Plaintiff's pro-rata share of approximately $9 billion of Junior Preferred dividends converted during the applicable periods.

21. Defendants Christopher S. Lynch, Raphael W. Bostic, Carolyn H. Byrd, Lance F. Drummond, Thomas M. Goldstein, Richard C. Hartnack, Steven W. Kohlhagen, Donald H. Layton, Sara Mathew, Saiyid T. Naqvi, Nicolas P. Retsinas, Eugene B. Shanks, and Anthony A. Williams were Freddie Mac Directors on June 30, 2013.

III. JURISDICTION AND VENUE

22. This Court has jurisdiction over this action pursuant to 12 U.S.C. §§ 1452, 1455, 1717, 1723a(a), and 4617, and 28 U.S.C. §§ 1331 and 1367. This Court also has jurisdiction pursuant to 28 U.S.C. § 1332(a) in that Plaintiff and Defendants are citizens of different states, and the matter in controversy exceeds $75,000, exclusive of interest and costs.

23. Venue is proper in this district under 28 U.S.C. § 1391 because a substantial portion of the transactions and wrongs alleged against Defendants occurred in this district, and Defendants have engaged in numerous activities and business here that have had an effect in this district.

IV. FACTUAL ALLEGATIONS

A. The GSEs and the Junior Preferred Shares

24. The GSEs are federally chartered, privately owned companies that serve public interest purposes, namely: (1) making homes affordable, (2) providing foreclosure relief keeping the secondary mortgage market competitive, stable, and efficient, and (3) increasing secondary mortgage market liquidity.[11] To achieve their goals, the GSEs publicly issue stock and purchase and securitize mortgages as mortgage-backed securities for sale to the public.

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[11] *See* Timothy Howard, *The Mortgage Wars: Inside Fannie Mae, Big-Money Politics, and the Collapse of the American Dream* 65-70, 84, 85, 93 (2014); Henry M. Paulson, Jr., *On the Brink: Inside the Race to Stop the Collapse of the Financial System* xvii, xx, xxvii, xxxi, xivi, xivii, 13, 150, 397-98, 406 (2d ed. 2013) (hereinafter, "Brink").

25. The Delaware General Corporation Law governs Fannie Mae's corporate governance to the extent that it is consistent with Fannie Mae's enabling legislation and other applicable federal laws and regulations.

26. The Virginia Stock Corporation Act governs Freddie Mac's corporate governance to the extent consistent with its enabling legislation and other applicable federal laws and regulations.

27. No federal corporate law governs the GSEs' corporate governance.

28. Pursuant to Delaware and Virginia law, each GSE's charter are incorporated in its contracts, respectively. The GSEs and Defendants admit that fact. *See Matulich v. Aegis Commc'ns Grp., Inc.*, 942 A.2d 596, 600 (Del. 2008); Defs.' Br. 20 (ECF No. 11-1).

29. Among the stock that the GSEs issued are the Junior Preferred Shares. The GSEs issued each series of Junior Preferred Shares pursuant to a substantially similar COD. The COD is a contract between the GSE and the holders of the shares issued under that COD. Accordingly, incorporated in each COD are the respective GSE's charter, bylaws, and governing state law. *See Matulich*, 942 A.2d at 600; Defs.' Br. 20 (ECF No. 11-1).

30. All series of Junior Preferred Shares rank in parity with each other, including as to dividend rights. *See, e.g.*, Series Q, 2(a), 2(b); Freddie Mac, Offering Circular, A-2-4 (Nov. 29, 2007). Within the general class "preferred share securities," Junior Preferred shares enjoy inherent equality of treatment rights in common with other preferred share securities, and Directors may not prefer one security in the class over another security in the class by subterfuge of non-declaration, in effect, taking monies legally belonging to one class member to increase payments to another class member.

31. Dividend rights are the defining characteristic of preferred shares. Dividends are payable to shareholders from surplus at a defined dividend period. A corporate board of directors determines whether to declare a dividend, and that determination for noncumulative shares must be made within a specific time prior to the time fixed for dividend payment. Once a dividend is declared by the board, GAAP requires the declared dividend amount to be reflected as a liability on the company's balance sheet (i.e., Preferred Dividend payable); and as an expense on its income statement (i.e., Preferred Dividend Expense).

32. Had the Directors performed and not violated their Quarterly Dividend Duty quarter-by-quarter after January 1, 2013, GAAP treatment for the declared dividend amounts would have removed the purloined dividend amount from Net Profit Sweep and saved the amounts within the Companies available thereafter for future payment to Junior Preferred owners in like dollar amount.

33. By definition, "non-cumulative" preferred share dividends passed without declaration ("Passed Dividends") in a particular year or period are gone forever, and there is no obligation to pay a Passed Dividend when the next dividend declaration period arrives.

34. The Directors by simple devise of seeking Junior Preferred dividend declaration written consent from Treasury could have preserved $12 billion of Junior Preferred Passed Dividends from Senior Preferred Net Worth Sweep conversion.[12]

35. Intended to serve as permanent GSEs capital, Junior Preferred share approximate $33 billion in par issuance at September 6, 2008 (i.e., Fannie Mae $19 billion, 57 percent; Freddie Mac $14 billion, 43 percent) has remained constant to date. Fannie Mae Director breaches of the Quarterly Dividend Duty between June 30, 2015 and December 31, 2018 have

[12] Ibid, n.8.

resulted in Junior Preferred damages of approximately $5 billion, while the damages suffered by Freddie Mac Junior Preferred for the period June 30, 2015 has resulted in share damages of approximately $4 billion.[13]

B. HERA and Conservatorship of the GSEs

36. In July 2008, during the financial crisis of 2007 to 2008, the GSEs' regulator certified both GSEs to be adequately capitalized.

37. On August 8, 2008, the Fannie Mae Board declared a $413 million dividend on the Fannie Mae's Junior Preferred Shares, payable on September 30, 2008 (the "$413 million Pre Conservatorship Declared/Unpaid Junior Preferred Dividend").

38. On September 6, 2008, FHFA placed the GSEs into conservatorship and appointed itself Conservator of the Companies. On September 7, 2008, then-FHFA Director Lockhart, in joint statement with then-Treasury Secretary Paulson, announced a conservatorship duration suspension of GSE Junior Preferred dividend declaration and payment without prior Treasury written consent.

39. On September 11, 2008 Treasury awoke to the fact that the $413 million Pre Conservatorship Declared/Unpaid Junior Preferred Share Dividend was a legally enforceable liability of Fannie Mae backed by federal government full faith and credit "Implicit Guaranty" (defined below) of payment.[14]

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[13] Director liability for such damages are fully indemnified under Article 8 of each Company's bylaws, and individual indemnification agreements between the Companies, and the Directors.

[14] Prior to Fannie Mae and Freddie Mac entry into conservatorship on September 6, 2008, federal government guarantee of payment for GSEs securities, (including Junior Preferred Shares), was implicit ("Implicit Guaranty"). On September 7 and 11, 2008, Treasury officials issued statements wherein, and whereby that Implicit Guaranty of GSEs securities payment was made explicit (the "Guaranty"). The federal government Implicit Guaranty of GSEs financial obligations was critical to the Companies' ability to market, and successfully sell, hundreds of billions of dollars of GSEs guaranteed mortgage backed securitized debt ("MBS"), and

40. On September 11, 2008, Treasury unequivocally confirmed the enforceability and validity of a Fannie Mae declared dividend liability, and retracted the dividend's September 7, 2008 cancellation stating, "Contracts are respected in this country as a fundamental part of rule of law. . . . Dividends actually declared by a GSE before the date of the senior preferred stock purchase agreement will be paid on schedule."

41. HERA, *inter alia*, grants Conservator "all rights, titles, powers, and privileges of the [GSEs], and of any stockholder, officer, or director of such [GSEs] with respect to the [GSEs] and the assets of the [GSE]." 12 U.S.C. § 4617(b)(2)(A)(i) (the "Succession Clause"). Notably, the clause does not impose on or delegate to Conservator all duties, obligations, or liabilities of the GSEs or their stockholders, officers, or directors.

42. The Succession Clause grants full Conservator control in the plenary management of the GSEs. Accordingly, Conservator may, and did, appoint directors to the GSEs' Boards to serve as Conservator's agents in plenary management of the GSEs day to day affairs, with a duty of loyalty running solely from shareholders to Conservator. [15]

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approximately $22 billion of GSEs Junior Preferred shares, as riskless perpetual capital suitable for financial institution as tier one capital in the pre-conservatorship period of less than one year, beginning late 2007 through May 2008. Fannie Mae's ability, in May 2008, to sell $4.8 billion of 8.75% mandatory convertible Junior Preferred shares, four months prior to the Company's September 6, 2008 entry into conservatorship, was the undoubted result of market acceptance, and reliance on the government Implicit Guaranty of Junior Preferred share payments. *See* W. Scott Frame, *The 2008 Federal Intervention to Stabilize Fannie Mae and Freddie Mac*, Federal Reserve Bank of Atlanta (2009); Tara Rice & Jonathan Rose, *When Good Investments Go Bad: The Contraction of Community Bank Lending After the 2008 GSE Takeover*, Board of Governors of the Fed. Res. Sys., Int'l Fin. Discussion Papers 1045 (2012); and Josh Angel, *Government Perfidy and Mismanagement of The GSEs in Conservatorship* (2016), www.gselinks.com/pdf/Govt_Perfidy_Angel.pdf.

[15] *See, e.g.*, Fannie Mae, Annual Report (Form 10-K), 13 (Dec. 31, 2017).

> "Management of the Company during Conservatorship
>
> "Our directors serve on behalf of the conservator and exercise their authority as directed by and with the approval, where required, of the conservator. Our

43. The shift in plenary management loyalty did not in any way eliminate Directors' economic contractual obligations and duties owed to Junior Preferred share per their CODs, Quarterly Dividend Duty, and Non-Discrimination Duty. Indeed, unequivocally excluded from Succession Clause's grant of power are "the stockholders['] . . . right to payment, resolution, or other satisfaction of their claims." 12 U.S.C. § 4617(b)(2)(K)(i).

44. Shareholders' retention of economic Contractual Governance Covenants rights is further evident from provisions in HERA. HERA permits Conservator to repudiate certain GSE contracts within a reasonable amount of time after the onset of conservatorship. In such cases, HERA requires compensation to the parties of the repudiated contracts.[16] Conservator never exercised that right as to Junior Preferred Shares, and that right has expired.

45. HERA provides broad immunity to the GSE directors in regard to liability arising from their actions in connection with plenary management of the Companies' affairs in conservatorship.[17]

46. The Complaint asserts claims on the part of Junior Preferred shares against Directors based on economic contractual rights and duties which exist in favor of Junior Preferred, beyond the scope of the Succession Clause's grant of Company plenary management authority to the Conservator.

> directors have no fiduciary duties to any person or entity except to the conservator. Accordingly, our directors are not obligated to consider the interests of the company, the holders of our equity or debt securities, or the holders of Fannie Mae MBS unless specifically directed to do so by the conservator."

Id. As noted, however, expressly excluded from Succession Clause's grant of power are "the stockholders['] . . . right to payment, resolution, or other satisfaction of their claims." 12 U.S.C. § 4617(b)(2)(K)(i).

[16] 12 U.S.C. § 4617(b)(2)(K)(ii), (d)(3).

[17] *Jacobs v. FHFA*, 908 F.3d 884, 887-96 (3d Cir. 2018).

C. *De Facto* Nationalization of the GSEs

47. In 2009, the GSEs, were *sub silentio* federal government *de facto* nationalized, as the government introduced, and began operating a series of programs (i.e., namely HARP and HAMP), designed, *inter alia*, to stem mortgage foreclosures, and make homes affordable to low- and middle-income families.[18]

48. In order to fund and implement those programs, the government imposed non-reimbursable costs for the programs maintenance which Plaintiff estimates now total nearly $60 billion and continue to accrue.

49. The government's imposition and affecting the making homes affordable program costs on the Companies without reimbursement, effectively served to *de facto* nationalize the GSEs into an arm of the state.

D. The SPSPAs and the Third Amendment

50. At the September 6, 2008 GSEs conservatorship onset, Treasury elected to exercise its HERA authority to purchase GSE securities by entering into the SPSPAs for their conservatorship financing.

51. The SPSPAs provided for the issuance of preferred shares senior in payment to other preferred shares (i.e., Senior Preferred) to Treasury as the senior Preferred shares sole holder. The shares carried a quarter-annual right to dividends of 10%. Specifically, Senior Preferred SPSPAs "provide that the senior preferred stock shall accrue dividends at the annual rate per share equal to 10 percent on the then-current liquidation preference." Senior Preferred shares are substantially the same as the Junior Preferred Shares.

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[18] *See About HARP*, HOME AFFORDABLE REFINANCE PROGRAM ("HARP") (2018), https://www.harp.gov/About; *Home Affordable Modification Program: Overview*, HOME AFFORDABLE MODIFICATION PROGRAM ("HAMP"), https://www.hmpadmin.com/portal/programs/hamp.jsp (last visited Mar. 15, 2019).

52. The legal correctness of the SPSPA provisions allowing for director declaration, and company payment of Senior Preferred share dividends to the exclusion of Junior Preferred shares absent prior written consent of Treasury is not in issue herein in this Complaint. In issue herein, rather, is the Directors' responsibility for ignoring, breaching, and otherwise violating the Quarterly Dividend Duty in the CODs, the CODs' implied covenant, the duty to seek the prior, written consent of Treasury, and the Directors' mindless participation in a government scheme for periodic award of funds, more rightfully belonging to Junior Preferred, with outsized Net Worth Sweep dividend payments to Senior Preferred shares in total scheme intended to keep the companies in perpetual conservatorship.[19]

53. Stated simply, Directors are liable for their intentional and bad-faith omissions of their obligations in the CODs every quarter, namely, their Quarterly Dividend Duty, their Duty to seek Treasury's written consent, and their implied covenant.[20, 21]

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[19] Materials produce in discovery in *Fairholme Funds, Inc. v. United States*, No. 13 Civ. 465 (Fed. Cl.), and later made public, further undermine the government's death spiral narrative. Indeed, those materials reveal that the Net Worth Sweep was adopted not out of a concern that the Companies would earn too little, but rather out of concern that the Companies would make *too much* and thus would complicate the Administration's plans to keep Fannie and Freddie in perpetual conservatorship and to prevent their private shareholders from seeing any return on their investments. As a senior White House official stated in an email to a senior Treasury official on the day the Net Worth Sweep was announced, "we've closed off [the] possibility that [Fannie and Freddie] ever[] go (pretend) private again." That same official stated in another email that Peter Wallison of the American Enterprise Institute was "exactly right on substance and intent" when he said that "[t]he most significant issue here is whether Fannie and Freddie will come back to life because their profits will enable them to re-capitalize themselves and then it will look as though it is feasible for them to return as private companies backed by the government. . . . What the Treasury Department seems to be doing here . . . is to deprive them of all their capital so that doesn't happen." An internal Treasury document dated August 16, 2012, expressed the same sentiment: "By taking all of their profits going forward, we are making clear that [Fannie and Freddie] will not ever be allowed to return to profitable entities . . . ." These actions were totally contrary to the proper functioning of a conservatorship." *See* Complaint, *Perry Capital LLC v. United States*, No. 18 Civ. 1226 (Fed. Cl. Aug. 15, 2018), ECF No. 1.

[20] Directors failed to follow the example set in September 2008 with regard to Fannie Mae's declaration of a $413 million dividend. An exercise in futility? Not so, it worked in 2008 with

V. CAUSES OF ACTION

COUNT I
BREACH OF CONTRACT

54. Plaintiff realleges every allegation in this Complaint as if fully set forth herein.

55. The CODs are valid contracts that govern the rights and duties of Directors and the Junior Preferred Shareholders with respect to the Junior Preferred Shares.

56. The CODs require Directors to perform the Quarterly Dividend Duty.

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.

58. Therefore, the Third Amendment did not cause Directors to not declare or pay dividends on the Junior Preferred Shares.

59. As of and since January 1, 2013, Directors breached the CODs by failing to perform their Quarterly Dividend Duty.

60. As a result of those omissions, no dividends were declared or paid on the Junior Preferred Shares. Each quarter's omission caused a different amount of damages based on the profits earned by each Company that quarter.

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regard to the $413 million Pre Conservatorship Declared/Unpaid Junior Preferred Dividend, and would most certainly have to been agreed to by Treasury in 2013 and beyond least it be in danger once again of Implicit Guaranty payment dishonor.

[21] Irrefutable evidence of the Companies' option to determine whether or not to declare dividends and pay them with Treasury prior written consent as a power intended for use, and not just fluff, can be found in Fannie Mae's Form 10-K, dated December 31, 2008, regarding the $413 million Pre Conservatorship Declared/Unpaid Junior Preferred Share Dividend as follows:

> "[T]he senior preferred stock purchase agreement prohibits us from declaring or paying any dividends on [other] Fannie Mae equity securities . . . *without the prior written consent* of Treasury. *We were permitted to pay previously declared but unpaid dividends on our outstanding preferred stock for the third quarter*."

Fannie Mae, Annual Report (Form 10-K), 76 (Dec. 31, 2008) (emphasis added).

61. In addition, the SPSPAs require that Directors obtain "prior written consent" of Treasury in order to declare and pay dividends on the Junior Preferred Shares. To the extent that this duty might be lawful and valid for not breaching the CODs, Directors were required to seek that consent before declaring a dividend on the Junior Preferred Shares.

62. Every quarter, Directors intentionally, unreasonably, and in bad faith failed to seek the prior written consent of Treasury to declare a dividend on the Junior Preferred Shares.

63. Those omissions caused no such dividends to be declared.

64. Directors serve as agents of the Conservator, in the plenary management of the Companies' affairs, with responsibility for their actions running solely to the Conservator principal.

65. Despite the plenary management agency obligation running directly solely to the Conservator, Director are bound by economic obligations and duties owing to Junior Preferred shares emanating, *inter alia*, from the shares Contractual Governance Covenants, the Implicit Covenant of Good Faith and Fair Dealing and the Quarterly Dividend Duty.

66. Defendants breached the CODs, the implied covenant of good faith and fair dealing, and the Quarterly Dividend Declaration Duty very quarter since January 1, 2013 through at least December 31, 2018 by, *inter alia*, failing to:

(a) make reasonable, good faith determination in their sole discretion whether or not to declare Junior Preferred share dividends;

(b) request Treasury written consent to at least declare Junior Preferred dividends; and

(c) participated in the Third Amendment government scheme to artificially increase GSE quarterly profits subject to Net Profit Sweep by artificial device of ignoring and non-declaration of the Quarterly Dividend Declaration Duty.

67. Director actions after June 30, 2015, as aforesaid, caused Fannie Mae Junior Preferred shares to suffer damages for contractual breach of approximately $5 billion; and Director actions after June 30, 2013 caused Freddie Mac Junior Preferred shares to suffer[22] damages for contractual breach of approximately $4 billion.

COUNT II
BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

68. Plaintiff realleges every allegation in this Complaint as if fully set forth herein.

69. As contracts, the CODs contain an implied covenant of good faith and fair dealing, which requires each party to avoid unreasonable or bad-faith conduct that would deprive the other parties of the fruits of the contract.

70. That implied covenant requires the contracting parties to deal reasonably, fairly, and in good faith in the discharge of their respective contractual duties.

71. Plaintiff was entitled to rely on Directors' 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.

72. Directors committed willful, bad-faith, and unreasonable breaches of the implied covenant every quarter as of and since January 1, 2013 in discriminatory award of outsized Net

[22] Pursuant to Delaware and Virginia law, all the rights and liabilities associated with corporate stock, including causes of action, transfer with the shares. *See* 6 Del.C. § 8-302; Va. Code Ann. § 8.8A-302; and *Fairholme Funds, Inc. v. FHFA*, No. 13 Civ. 1053 (RCL), 2018 WL 4680197 (D.D.C. Sept. 28, 2018).

Profit Sweep dividends to Senior Preferred by artifice enlisting in government scheme to manipulate profits by Junior Preferred dividend non-declaration caused Fannie Mae Junior Preferred shares to suffer $5 billion, Freddie $4 billion.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

A. Enter a declaratory judgment that Defendants have continually breached the CODs and their implied covenant;

B. Issue a permanent injunction restraining Defendants, and their agents, employees, representatives, and any other persons acting directly or indirectly with Defendants, from breaching the CODs and their implied covenant;

C. Permit interested parties to join the action pursuant to Fed. R. Civ. Pro. 20;

D. Award compensatory damages in an amount to be determined by the jury at trial;

E. Award prejudgment and post-judgment interest on those compensatory damages;

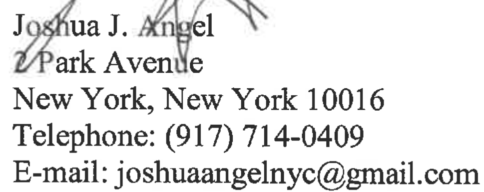
F. Award Plaintiff reasonable attorneys' fees (based on a percentage of the awarded damages) and costs; and

G. Order such other relief as this Court deems just and equitable.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiffs demand a trial by jury of all issues in this case.

Dated: March 18, 2019
New York, New York



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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**

[PROPOSED] ORDER

Now before the Court is the Combined Motion to Amend or Alter Judgment and for Leave to Amend the Compliant [ECF No. 27] by *pro se* Plaintiff. For the reasons set forth in the accompanying memorandum opinion, his motion is **GRANTED**. Accordingly, the Memorandum Opinion [ECF No. 24] and Order [ECF No. 25] are hereby amended to deny to specify that Plaintiff's claims are dismissed without prejudice and to grant Plaintiff leave to file his proposed First Amended Complaint. Additionally, the clerk is directed to enter *pro se* Plaintiff's First Amended Complaint [ECF No. 27-2] on the docket.

SO ORDERED.

DATE:

Royce C. Lamberth
United States District Judge

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

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