Oral Argument Not Yet Scheduled

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

19-7062

JOSHUA J. ANGEL,

Plaintiff-Appellant,

—v.—

FEDERAL HOME LOAN MORTGAGE CORPORATION, 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, ANTHONY A. WILLIAMS, FEDERAL NATIONAL MORTGAGE ASSOCIATION, EGBERT L.J. PERRY, AMY E. ALVIN, WILLIAM T. FORRESTER, BRENDA J. GAINES, FREDERICK B. HARVEY III, ROBERT H. HERZ, TIMOTHY J. MAYOPOULOUS, DIANE C. NORDIN, JONATHAN PLUTZIK, and DAVID H. SIDWELL,

Defendants-Appellees,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
NO. 1:18-CV-01142-RCL

OPENING BRIEF FOR PLAINTIFF-APPELLANT

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Plaintiff-Appellant

—and—

FEDERAL HOUSING FINANCE AGENCY, as Conservator for Federal Home Loan Mortgage Corporation and Federal National Mortgage Association,

Nominal Defendant-Appellee.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The Plaintiff-Appellant in this case is Joshua J. Angel ("Appellant"). The Defendants-Appellants in this case are Federal Home Loan Mortgage Corporation ("Freddie Mac"), 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, Anthony A. Williams, Federal National Mortgage Association ("Fannie Mae"), Egbert L.J. Perry, Amy E. Alvin, William T. Forrester, Brenda J. Gaines, Frederick B. Harvey III, Robert H. Herz, Timothy J. Mayopoulous, Diane C. Nordin, Jonathan Plutzik, and David H. Sidwell.

The Nominal Defendant-Appellant is Federal Housing Finance Agency as Conservator for Freddie Mac and Fannie Mae.

B. Rulings under Review

Appellant seeks review of the following rulings rendered by the Honorable District Court Judge Royce Lamberth: (1) the Memorandum Opinion ("Memorandum Opinion") and the Order, both entered on March 6, 2019, granting Defendants' Joint Motion to Dismiss and dismissing the unamended Complaint with prejudice, and (2) the Memorandum & Order, entered on May 24, 2019, denying Appellant's combined motion to alter or amend judgment and for leave to amend the

Complaint. The Memorandum Opinion dated March 6, 2019 is available on Westlaw. *See Angel v. Fed. Home Loan Mortg. Corp.*, No. 1:18-CV-01142, 2019 WL 1060805, at *1 (D.D.C. Mar. 6, 2019).

C. Related Cases

This case was not previously before this Court or any other court other than the district court. Appellant is not aware of any other related cases currently pending in this Court or in any other court within the meaning of Circuit Rule 28(a)(1)(C).

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Cases:

*Authorities upon which we chiefly rely are marked with asterisks.

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GLOSSARY

Plaintiff uses the terms defined below in this brief to maintain consistency with his papers in the District Court in order to aid this Court's understanding.

"**¶ __**" means the specified paragraph in the Complaint.

"**Board(s)**" means the board(s) of directors of one (or both) of the GSEs.

"**Complaint**" means the initial complaint filed in the United States District Court for the District of Columbia, case number 18 Civ. 1142, captioned *Angel v. Federal Home Loan Mortgage Corporation et al.*, dated May 21, 2018 [ECF No. 1].

"**CODs**" means the certificates of designation governing the Junior Preferred Stock.

"**Combined Br.**" means the 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, dated March 18, 2019 [ECF No. 27-1].

"**Combined Mot.**" means *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, dated March 18, 2019 [ECF No. 27].

"**Combined Opp'n**" means Defendants' Memorandum in Opposition to Plaintiff's Combined Brief, dated Apr. 15, 2019 [ECF No. 29].

"**Combined Order**" means the District Court's Memorandum & Order denying Plaintiff's Motions to Alter or Amend Judgment and for Leave to Amend the Complaint, dated May 24, 2019 [ECF No. 34].

"**Combined Reply**" means the Reply Memorandum of Law in Further Support of Plaintiff's Combined Brief, dated May 6, 2019 [ECF No. 33].

"**Conservator**" means the Federal Housing Finance Agency.

"**Defendants**" means Defendants-Appellees Federal Home Loan Mortgage Corporation, 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, Anthony A. Williams, Federal National Mortgage Association, Egbert L.J. Perry, Amy E. Alvin, William T. Forrester, Brenda J. Gaines, Frederick B. Harvey Iii, Robert H. Herz, Timothy J. Mayopoulous, Diane C. Nordin, Jonathan Plutzik, and David H. Sidwell

"**DGCL**" means Delaware General Corporation Law.

"**Directors**" means all GSE Directors as of January 1, 2013.

"**District Court**" means the U.S. District Court for the District of Columbia.

"**Ex. __**" means an exhibit attached to the Declaration of Joshua J. Angel in Opposition to Defendants' Motion to Dismiss Complaint, dated September 10, 2018 [ECF No. 17-1].

"**FAC**" means the Proposed First Amended Complaint, dated Mar. 18, 2019 [ECF No. 27-2].

"**Fannie Mae**" means the Federal National Mortgage Association.

"**Freddie Mac**" means the Federal Home Loan Mortgage Corporation

"**FHFA**" means the Federal Housing Finance Authority.

"**Fourth Amendment**" means the fourth and operative amendment to the SPSPAs, dated Dec. 21, 2017.

"**GAAP**" means Generally Accepted Accounting Principles.

"**GSE(s)**" means Fannie Mae and Freddie Mac.

"**Junior Preferred Stock**" means noncumulative preferred stock in Fannie Mae and Freddie Mac.

"**MTD**" means Defendants' Joint Motion to Dismiss the Complaint, dated July 12, 2018, [ECF No. 11].

"**MTD Br.**" means the Defendants' Memorandum of Law in Support of Joint Motion to Dismiss the Complaint, dated July 12, 2018, [ECF No. 11-1].

"**MTD Mem.**" means the Memorandum Opinion granting the Motion to Dismiss, dated Mar. 6, 2019, [ECF No. 24].

"**MTD Opp'n**" means the Plaintiff's Memorandum in Opposition to the Defendants' Motion to Dismiss, dated Sept. 10, 2018, [ECF No. 17].

"**MTD Order**" means the Order Granting Motion to Dismiss, dated Mar. 6, 2019, [ECF No. 25].

"**Plaintiff**" means Plaintiff-Appellant Joshua J. Angel.

"**Senior Preferred Stock**" means cumulative senior preferred stock.

"**SPSPA**" means a Senior Preferred Stock Purchase Agreement with the U.S. Department of the Treasury.

"**Surreply Br.**" means Plaintiff's Proposed Surreply Brief in Opposition to Defendants' Motion to Dismiss, dated Mar. 6, 2019 [ECF No. 26].

"**Third Amendment**" means the Third Amendment to the SPSPAs, dated August 17, 2012.

"**Treasury**" means the U.S. Department of the Treasury.

"**Quarterly Duty**" means the requirement imposed by CODs and applicable state laws that the GSEs' Board of Directors must determine whether to declare a dividend during each dividend period.

"**VSCA**" means the Virginia Stock Corporation Act.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia ("District Court" or "the court") had subject matter jurisdiction over this action by way of: the "GSE" (defined below) Defendants, *see* 12 U.S.C. §§ 1452(f)(2), 1717(a)(2)(B), 1723a(a); federal question jurisdiction, *see* 28 U.S.C. § 1331; diversity jurisdiction, *see id.* § 1332(a); and supplemental jurisdiction over the state law claims, *see id.* § 1367.

On March 6, 2019, the District Court entered an order dismissing the original Complaint ("Compl."), ECF No. 1, with prejudice, which constitutes a final judgment. Order ("MTD Order"), ECF No. 25 (A.___). On May 24, 2019, the District Court entered an Order denying the motions to alter or amend judgment and for leave to amend the Complaint filed by Plaintiff-Appellant Joshua J. Angel ("Plaintiff"), acting *pro se*, also constituting a final judgment. Mem. & Order ("Combined Order"), ECF No. 34 (A.___). Plaintiff timely filed a notice of appeal on June 19, 2019, providing this Court with jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the District Court erred, by conflating (i) Plaintiff's claims arising from Directors' ongoing failure since January 1, 2013 to determine whether to declare dividends with (ii) Plaintiff's claims arising from GSEs' entry into the Third Amendment on August 17, 2013, in applying statutes of limitation.

2. Whether the District Court erred by failing to apply the correct legal standards for motions to dismiss.

3. Whether the District Court erred in giving prejudicial effect to its dismissal of the initial Complaint based on statutes of limitation and inadequate pleading of tolling.

4. Whether the District Court abused its discretion (or erred by relying on futility) in denying Plaintiff's motion to alter or amend judgment to reinstate the Complaint or in the alternative, dismiss without prejudice, thereby maintaining its prior ruling to dismiss with prejudice.

5. Whether the District Court abused its discretion in denying Plaintiff's motion for leave to amend his initial Complaint as futile based on the erroneous conclusion that his claims of ongoing breaches are time barred.

6. Whether the District Court erred in rejecting equitable tolling as to claims that accrued before the applicable time periods preceding the Complaint's filing.

STATEMENT OF THE CASE

I. RELEVANT FACTS

Plaintiff holds noncumulative preferred stock ("Junior Preferred Stock") in Defendants Federal Home Loan Mortgage Corporation ("Freddie Mac") and Federal National Mortgage Association ("Fannie Mae," and collectively with Freddie Mac, "GSEs"). ¶1 (A.___).[1] The right to receive a dividend on noncumulative stock from profits earned in a dividend period permanently expires when no dividend is declared during that dividend period "so long as the directors have acted within the scope of their discretion in withholding dividends." 18B Am. Jur. 2d Corporations § 1073; ¶¶19, 105 ("non-cumulative") (A.___).

The Certificates of Designation ("CODs") of Freddie Mac and Fannie Mae's Junior Preferred Stock, respectively governed by Virginia and Delaware corporate governance law, call for quarterly dividend determinations. ¶¶25-26, 66 (A.___). Each COD and its applicable state law require the GSE's Board of Directors ("Board") to determine whether to declare a dividend during each dividend period (the "Quarterly Duty"). Pl.'s Mem. in Opp'n to Mot. to Dismiss ("MTD Opp'n") 8, 17-19, 22, ECF No. 17. The CODs' implied covenant of good faith and fair dealing ("implied covenant") requires Directors to make that discretionary decision reasonably and in good faith. *Id.* 25-26; ¶¶81, 118-22 (A.___); *Perry Capital LLC*

[1] Citations to paragraphs in the Complaint are denoted as "¶ __."

v. Mnuchin, 864 F.3d 591, 631 (D.C. Cir. 2017) ("*Perry II*"); *Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency*, No. 13 Civ. 1053, 2018 WL 4680197, at *7 (D.D.C. Sept. 28, 2018) (Lamberth, J.) ("*Perry III*"). Each COD also incorporates governing state law. ¶30 (A.___); *Perry III*, 2018 WL 4680197, at *8 (citing cases).

In September 2008, the Federal Housing Finance Authority ("FHFA") placed the GSEs into conservatorship under the control of FHFA as Conservator ("Conservator") to combat the then-existing financial crisis. ¶10 (A.___). For financing, each GSE entered into an Amended and Restated Senior Preferred Stock Purchase Agreement ("SPSPA") with the U.S. Department of the Treasury ("Treasury") for the issuance of cumulative senior preferred stock ("Senior Preferred Stock") to Treasury as the sole shareholder. Junior Preferred Stockholders did not vote on the SPSPAs or any amendment thereto. ¶28 (A.___).

The first step in the dividend process is for the board of directors to determine each dividend period whether to declare a dividend. *Morse v. Bos. & M.R.R.*, 160 N.E. 894, 896 (Mass. 1928) (quoting *Bassett v. U.S. Cast Iron Pipe & Foundry Co.*, 73 A. 514, 514 (N.J. 1909)). That requires an assessment of then-current financial circumstances. *See id.* Because the dividend process is a discretionary function, the implied covenant requires Directors to perform it reasonably and in good faith. *See Perry III*, 2018 WL 4680197, at *10 (*Perry II*, 864 F.3d at 631) ("[A] party to a contract providing for [] discretion violates the implied covenant if it 'act[s]

arbitrarily or unreasonably.'"). The CODs set quarterly dividend periods and therefore, require Directors to make that determination every quarter (the Quarterly Duty). *See* Ex. 17 (COD for Series P stock of Fannie Mae) ("Fannie Mae P Series COD") § 2(a) (A.___); Ex. 2 (Freddie Mac COD for Fixed-to-Floating Rate Non-Cumulative Perpetual Preferred Stock) ("Freddie Mac Offering Circular") at 3 (A.___).[2] Once that determination is made, the board determines the record date, payment date, and dividend amount and then, declares a dividend. Declaration creates a corporate liability to stockholders. *See U.S. Indus., Inc. v. Anderson*, 579 F.2d 1227, 1230 (10th Cir. 1978).

The SPSPAs inserted into the dividend declaration process a requirement that Directors seek and obtain Treasury's "prior written consent" before Directors could "declare or pay any dividend." SPSPAs[3] § 5.4; *see infra* note 5. That requirement did not eliminate the Quarterly Duty or implied covenant and did not apply, if at all,[4] until after Directors decided to declare a dividend. *See generally id.*; *infra* III.A.1; ¶¶46, 55, 57 (A.___); Compl., Ex. A at 20-21 (A.___). The SPSPAs, through all

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[2] "Ex. _" denotes a citation to an exhibit attached to the Declaration of Joshua J. Angel in Opposition to Defendants' Motion to Dismiss Complaint, ECF No. 17-1.

[3] 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.

[4] The requirement's invalidity is nongermane to this appeal. *See* MTD Opp'n 8.

four of its amendments, maintained the Quarterly Duty and implied covenant. ¶¶46, 55, 57 (A.___). In addition, all SPSPA versions and the GSEs' filings with the U.S. Securities and Exchange Commission ("SEC") expressly state that the Boards may declare and pay Junior Preferred Stock dividends with Treasury's prior written consent. *See, e.g.*, Fannie Mae 2014 Form 10-K, at 28 (A.___) ("The [SPSPA] . . . require[s] the prior written consent of Treasury before we can . . . pay[] dividends . . . on [] our equity securities (other than the senior preferred stock or warrant)[.]"); Freddie Mac 2014 Form 10-K, at 23, 247 (A.___) ("The [SPSPA] . . . provides that . . . we may not, without the prior written consent of Treasury . . . pay dividends on [] our equity securities (other than the senior preferred stock or warrant) . . . . Conservator has delegated to the Board . . . authority to function in accordance with the duties and authorities set forth in applicable statutes[.]").[5]

The Third Amendment to the SPSPAs ("Third Amendment"), dated August 17, 2012, required the GSEs to pay their entire "Net Worth Amount" (i.e., profits) each fiscal quarter as a dividend to Treasury, less a capital reserve amount (the "Net Worth Sweep"). Ex. 16 at 4 (Third Amendment § 3) (A.___). The fourth and

[5] Plaintiff respectfully requests that this Court take judicial notice of these public records. *See Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007) (citation omitted) ("[The] 'court may consider [on a motion to dismiss] . . . matters of which it may take judicial notice.'"); *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004) (permitting judicial notice of public records on motion to dismiss).

operative amendment to the SPSPAs ("Fourth Amendment"), dated December 21, 2017, maintained the Net Worth Sweep and a capital reserve amount. Ex. 26 at 2-3 (Letter from Treasury Secretary Mnuchin to Director Watt, dated Dec. 21, 2017) (A.___).

As of January 1, 2013, the effective date of the Third Amendment, through the present, the Boards' members ("Directors"), while continually declaring Senior Preferred dividends, never determined whether to declare a Junior Preferred dividend. ¶¶63-64 (A.___).

Throughout the relevant time period, the GSEs' SEC filings and internal governing documents, and Directors' certifications to their respective GSE, do not disclose their breaches of the Quarterly Duty and implied covenant, and Fannie Mae claims compliance with all laws. *See, e.g.*, Fannie Mae 2014 Form 10-K, at 112 (A.___) ("policies and procedures to help ensure that Fannie Mae and its employees comply with the law"), 197 (requiring Directors to "annually certify compliance"); Freddie Mac 2014 Form 10-K, at 250 (requiring Directors "to be bound" to "director code") (A.___).

II. PROCEDURAL HISTORY AND RULINGS PRESENTED FOR REVIEW

On May 21, 2018, Plaintiff filed his *pro se* Complaint to recoup his wrongfully undeclared dividends, asserting breach of contract, breach of the implied covenant, and tortious interference with contract against certain Directors and both GSEs as

defendants (collectively, "Defendants") and Conservator as a nominal defendant.[6] *See* Compl. at 1-3 (A.___). In its Memorandum Opinion on the MTD ("MTD Mem."), 1 n.1, ECF No. 24 (A.___), the court accepted Plaintiff's waiver of his tortious interference claim but not his waiver of all claims against Conservator and GSEs, so they remain as parties in this action despite the impropriety of Conservator as a nominal defendant and their lack of standing below and in this appeal, *see* Combined Reply 2, 15.

The Complaint alleges two sets of actionable wrongs arising from breaches of contractual and corporate governance duties. First, Directors breached their duties to Plaintiff by entering into the Third Amendment. Second, as of January 1, 2013 through the present, Directors continuously breached (1) the Quarterly Duty by failing to perform it (i.e., determine whether to declare dividends on Junior Preferred Stock) and (2) the implied covenant by, *inter alia*, failing to perform the Quarterly Duty reasonably and in good faith (the "quarterly breaches"). *Infra* III.A.1-2. The quarterly breaches short-circuited the dividend declaration process, preventing the

[6] Plaintiff, acting *pro se*, incorrectly named nominal defendants. He asserts no claims against Conservator and no derivative claims at all, and Conservator did not "succeed" to the causes of action, so Conservator was not a proper party in any capacity. *See Perry II*, 864 F.3d at 624 ("[T]he Succession Clause [did not] transfer[] to the FHFA [] the . . . contract-based claims[, which] may therefore proceed."); Reply Mem. in Further Supp. of Combined Br. ("Combined Reply") 2, ECF No. 33. Plaintiff's proposed first amended complaint ("FAC"), ECF 33, does not name Conservator as a defendant.

declaration of dividends on Plaintiff's stock. If not redressed, the breaches will wrongfully allocate GSE value to common stockholders instead of Junior Preferred Stockholders after the conservatorship, when debts, including declared but unpaid dividends, must be paid before equity.

The District Court recognized in its March 6, 2019 Memorandum Opinion on the Motion to Dismiss ("MTD"), ECF No. 11, that Plaintiff had abandoned the Third Amendment breach claims and maintained the ongoing breach claims. MTD Mem. 5 n.4 ("[Plaintiff] has abandoned that position stating that the 'anticipatory breach caused by the Third Amendment' is moot and clarifying that he seeks relief for 'an actual breach' that 'has occurred, and continues to occur.'"), 6-7 ("[Plaintiff] claims that defendants continue to breach the contracts and implied covenant each quarter they fail to declare a dividend[.]") (A.___). Nevertheless, contrary to Plaintiff's remaining factual allegations and despite Defendants' failure to address the ongoing breach claims in their MTD and supporting brief ("MTD Br."), ECF No. 11-1, *infra* IV.A, the court conflated the claims in holding that the Third Amendment was the sole cause of damages, MTD Mem. 7 (A.___). Because the Third Amendment was executed in 2012, the court held that Plaintiff's claims are time barred. *Id.* 5 (A.___). In addition, the court, in its March 6, 2019 MTD Order, dismissed the Complaint with prejudice – without holding, as required, that Plaintiff could not possibly cure

the perceived limitations deficiency, *infra* III.A.4, and without explaining why it denied leave to amend.

On March 18, 2019, Plaintiff filed motions to alter judgment and for leave to amend the Complaint ("Combined Motion") along with a Proposed First Amended Complaint ("FAC"), ECF No. 27. *See* Fed. R. Civ. P. 59(e), 15(a). The FAC omits Conservator and GSEs as parties and the abandoned allegations, names additional Directors as Defendants, and asserts breach of contract and the implied covenant due to ongoing breaches. On May 24, 2019, the court, in its Combined Order, denied the Combined Motion, finding neither error in its prior rulings nor futility in amending the Complaint for the first time due to statutes of limitation. Plaintiff appeals from the MTD Memorandum, MTD Order, and Combined Order.

SUMMARY OF ARGUMENT

The District Court dismissed the Complaint as time barred by erroneously conflating the two wrongs alleged therein. As to the first set of wrongs, Directors breached their duties to Plaintiff by entering into the Third Amendment on August 17, 2012. Tolling of the limitation periods is essential for those claims to proceed. The court recognized that Plaintiff "abandoned" those claims. MTD Mem. 5 n.4.

As to the second set of wrongs alleged in the Complaint, the court recognized that Plaintiff maintained those claims. *See id.* 5 n.4, 6-7. They are not based on a single improper action by Directors but rather, their ongoing breaches of the CODs

throughout each fiscal quarter. *Infra* III.A.1-2. Specifically, Directors' ongoing failure to determine whether to declare a dividend on Junior Preferred Stock based on then-current financial conditions breached the Quarterly Duty at the end of each fiscal quarter. *See* Pl.'s Mem. in Opp'n. to Defs.' Mot. to Dismiss ("MTD Opp'n") 18 [ECF No. 17] ("the right to benefit from quarterly Board determinations of whether to declare dividends"); *e.g.*, *Morse*, 160 N.E. at 896 (quoting *Bassett*, 73 A. at 514) ("[T]he preferred stockholders 'are not entitled, of right, to dividends, payable out of the net profits accruing in any particular [dividend period], unless the directors . . . formally declare, or ought to declare, a dividend payable out of such profits; and whether a dividend should be declared in any year is a matter belonging in the first instance to the directors to determine, with reference to the condition of the company's property and affairs as a whole.'"). In addition, Directors continually breached the implied covenant by failing to perform the Quarterly Duty reasonably and in good faith. Neither the SPSPAs nor their amendments altered or eliminated those duties. *See Perry II*, 864 F.3d at 629-32; ¶¶46, 55, 57 (A.___).

Each of the ongoing breaches caused a loss to Plaintiff by preventing the declaration of dividends on his stock based on the profit earned each fiscal quarter. *Infra* III.A.3. A conservatorship, like a bankruptcy, is a limited-term remedy. Post conservatorship, GSE value must be allocated first to debt and then, to equity. Such debt includes any such declared but unpaid dividends as they could have been paid

at any time. *See Anderson*, 579 F.2d at 1230 (citing *Estate of Smith v. Comm'r*, 292 F.2d 478, 479 (3rd Cir. 1961), *cert. denied*, 368 U.S. 967 (1962) ("Dividends which are declared but unpaid are merely a corporate debt owed to the shareholders and failure to pay such dividends when due gives the shareholders a Cause of action on the debt."); *Morse*, 160 N.E. at 896 (quoting *Bassett*, 73 A. at 514); 18B Am. Jur. 2d Corporations § 1073 (citing cases) ("[T]he [noncumulative] stockholder's right to dividends survives the [dividend period] in which the profits were made . . . [if] the corporate directors [] declare and pay such dividends in subsequent years."); ¶¶12-14 (A.___) (alleging that Fannie Mae was obligated to pay the dividend according to the terms of the declaration); Ex. 7 ("The U.S. Government stands behind the preferred stock purchase agreements and will honor its commitments. . . . Dividends actually declared . . . will be paid on schedule."). Had Directors performed their Quarterly Duty and obligations under the implied covenant to determine whether to declare dividends, Plaintiff could have received dividends, even if after the conservatorship.

The ongoing nature of these breaches means that most of them occurred within the limitation periods, so those claims are timely. *Infra* III.A.4. The claims for breach of the Quarterly Duty accrued, and continue to accrue, at the end of each fiscal quarter since January 1, 2013 because throughout those periods, Directors failed to determine whether to declare a dividend on Plaintiff's stock based on then-

existing financial conditions. The claims for breach of the implied covenant have been continuously accruing since January 1, 2013 due to Directors' unreasonable nonperformance of their Quarterly Duty. As to the fraction of claims that arose from breaches that occurred before the limitation periods, tolling applies. *Infra* VIII.

The Third Amendment is irrelevant to these quarterly breach claims and therefore, could not have caused Plaintiff's damages. *Infra* III.B. Thus, those claims did not arise when the Third Amendment was executed in 2012. The court erred on corporate governance and contract law in holding otherwise.

The court also erred by applying the wrong legal standards on a motion to dismiss generally and regarding the statute-of-limitations defense. *Infra* IV. Among other errors, the court rejected Plaintiff's factual allegations, dismissed the ongoing breach claims even though Defendants conceded them by failing to dispute them, discredited alternative allegations, and conclusively ruled on the claims as time-barred, despite inherent factual issues, in contravention of Circuit precedent.

Even if dismissal of the Complaint were proper, the court erred by dismissing with prejudice, precluding Plaintiff from amending his Complaint even a single time. *Infra* V. The court failed to make the requisite determination that no other facts could possibly cure the deficiency. *See Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996)). Moreover, the court could not have made that finding because Plaintiff clearly articulated such facts in his MTD Opposition. The court also

violated Circuit precedent that strongly discourages dismissals with prejudice based on the limitations defense due to their fact-intensive nature.

In denying Plaintiff's Rule 59(e) motion, the court necessarily abused its discretion by erring on substantive law, making other clear errors, and improperly denying the motion based on futility. *Infra* VI. The Court should have granted the motion and reinstated the Complaint or at a minimum, removed prejudice.

The court also abused its discretion in denying Plaintiff's Rule 15(a) motion to amend, maintaining that the claims are time barred even though the FAC clearly pleads timely, ongoing breaches and even though this Circuit requires a finding that no facts could possibly cure the limitations deficiency in order to dismiss. *Infra* VII. The court also found futility even though it does not apply by definition, and futility cannot cure the noncompliance with *Firestone*.

Finally, the court erroneously rejected tolling as to the fraction of claims that accrued before the limitation periods by applying the wrong legal standards. *Infra* VIII. Plaintiff can prove facts that would support tolling.

Accordingly, Plaintiff respectfully requests that this Court reverse the District Court's rulings in the MTD Memorandum, MTD Order, and Combined Opinion.

ARGUMENT

I. STANDARD OF REVIEW

"This Court reviews *de novo* the dismissal of a complaint for failure to state a claim." *Momenian v. Davidson*, 878 F.3d 381, 387 (D.C. Cir. 2017) (citation omitted). The imposition of prejudice is reviewed for abuse of discretion. *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1259 (D.C. Cir. 2004). The denial of the Rule 59(e) motion is reviewed for abuse of discretion, which "necessarily occurs when a district court misapprehends the underlying substantive law, and we examine the underlying substantive law de novo." *Osborn v. Visa, Inc.*, 797 F.3d 1057, 1063 (D.C. Cir. 2015). Further, to the extent that the denial of the Rule 59(e) motion was based on the perceived futility of the FAC, that denial is reviewed *de novo*. *Id.* at 1062. The denial of the Rule 15(a)(2) motion for futility is also reviewed de novo. *Id.*

II. THE APPLICABLE LEGAL STANDARDS

"To survive a motion to dismiss, a complaint must . . . state a claim to relief that is plausible on its face." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The Court must "accept[] a plaintiff's factual allegations as true," *Momenian*, 878 F.3d at 387 (quoting *Vila v. Inter-Am. Inv., Corp.*, 570 F.3d 274, 278 (D.C. Cir. 2009)), and "construe the complaint 'liberally,' granting plaintiff 'the

benefit of all inferences that can be derived from the facts alleged,'" *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004) (citation omitted).

> A complaint will be dismissed . . . as "conclusively time-barred" if "a trial court 'determines that the allegation of other facts consistent with the [complaint] could not possibly cure the deficiency.'" Yet "courts should hesitate to dismiss a complaint on statute of limitations grounds based solely on the face of the complaint" because "statute of limitations issues often depend on contested questions of fact."

Momenian, 878 F.3d at 387 (quoting *Firestone*, 76 F.3d at 1209); *see Jones v. Rogers Mem'l Hosp.*, 442 F.2d 773, 775 (D.C. Cir. 1971 ("[T]he complaint cannot be dismissed [as conclusively time barred] unless it appears beyond doubt that . . . no state of facts [can be proven] in support of [the] claim[.]").

III. THE DISTRICT COURT IMPROPERLY DISREGARDED THE QUARTERLY BREACHES THAT PLAINTIFF PLED AND THUS, MISCALCULATED THE LIMITATION PERIODS

The District Court erroneously concluded that Plaintiff's claims, as pled in the Complaint, are time barred. The court calculated the limitation periods based on the date of the Third Amendment because, according to the court, the Third Amendment was the only breach that caused Plaintiff's damages. However, that is incorrect because Plaintiff asserted in the Complaint ongoing breaches of the Quarterly Duty and implied covenant as well as a breach in agreeing to the Third Amendment. *Infra* III.A. In briefing the MTD, Plaintiff abandoned the latter theory of liability, which the court acknowledged. *See* Pl.'s Proposed Surreply Br. in Opp'n to Defs.' Mot. to Dismiss ("Surreply Br.") 3, ECF No. 26 (citing MTD Opp'n 13, 24) ("[T]he Fourth

Amendment mooted the anticipatory breach caused by the Third Amendment. Plaintiff further alleges that an actual breach has [] and continues to occur[] after . . . each fiscal quarter as of the first quarter [] of 2013."); MTD Mem. 5 n.4.

The unabandoned claims arise from ongoing breaches of contractual and corporate governance duties in the CODs. *Infra* III.A. Had the court calculated the limitation periods based on those breaches, it could not have dismissed the claims as conclusively time barred. *Infra* III.A. Thus, the court's dismissal constitutes reversible error.

A. Directors' Breaches of the Quarterly Duty and Implied Covenant Caused Plaintiff's Damages

Throughout each quarter, Directors failed to determine whether to declare Junior Preferred Stock dividends based on then-existing financial conditions and did so unreasonably. Those repeated failures constituted breaches of contractual and corporate governance duties that caused Plaintiff's damages.

Moreover, the District Court understood the ongoing breach claims that Plaintiff asserted and did not hold that any elements were inadequately pled.[7] *See* MTD Mem. 5 n.4 ("[Plaintiff] seeks relief for 'an actual breach' that 'has occurred,

[7] Defendants never disputed, thereby conceding, Plaintiff's quarterly breach claims. *See infra* IV.A (*Fourth*).

and continues to occur.'"), 1 ("Because [Plaintiff]'s claims are time-barred, [Defendants'] motion will be GRANTED.").

Nevertheless, the court simply held that the claims are time barred based solely on the allegations concerning the Third Amendment, which the court recognized that Plaintiff had abandoned. However, as demonstrated, the ongoing breaches that Plaintiff asserted are not barred because the breaches occurred each quarter within the limitation periods.

1. Duty

The CODs are valid, enforceable contracts governed by either Delaware or Virginia law,[8] and they incorporate the duties of either Delaware or Virginia corporate governance law. *See Perry II*, 864 F.3d at 625-26 ("[T]heir contract-based claims may proceed."); ¶¶25-26, 30 (A.___).

The CODs require Directors to perform the Quarterly Duty, i.e., to decide every quarter whether to declare a dividend based on then-current financial conditions. *See* Ex. 17 Fannie Mae Series P COD § 2(a) (A.___); Ex. 2 Freddie Mac Offering Circular at 3 ("non-cumulative dividends quarterly") & § 2(a) (Nov. 29, 2007) (A.___); MTD Mem. 23 ("quarterly Dividend Period[s]"); ¶2 (A.___) (emphasis added) ("duties which [Directors] owed – and *continue to owe*").

[8] Defendants concede this fact. *See, e.g.*, MTD Br. 2, 10, 11 (applying Delaware and Virginia law); *see also Perry II*, 864 F.3d at 626 n.24; ¶ 101.

The CODs create quarterly "Dividend Period[s]," hence the *Quarterly* Duty to decide whether to declare a dividend. "Dividend Period" is defined as "the period from and including the preceding Dividend Payment Date . . . to but excluding such Dividend Payment Date." Ex. 17 § 2(a) (Fannie Mae Series P COD) (A.___); MTD Opp'n 13. The "Dividend Payment Date[s]" are March 31, June 30, September 30, and December 31 of each year, i.e., at the end of each fiscal quarter. On any of those dates, Junior Preferred Stockholders are "entitled to receive . . . non-cumulative quarterly dividends" "if declared by the Board . . . in its sole discretion out of funds legally available therefor." Ex. 17 § 2(a) (Fannie Mae Series P COD) (A.___); MTD Opp'n 3-4. The only way for a corporation to declare a dividend is for the directors to first decide whether to do so. Accordingly, making that decision during each dividend period is essential to the performance of their duties. MTD Opp'n 22. Because Junior Preferred Stockholders have the right ("entitled") to receive a dividend each quarter if declared by the Boards, the Boards have a corresponding duty to decide every quarter whether to declare the dividend. *See SW (Delaware), Inc. v. Am. Consumers Indus., Inc.*, 450 A.2d 887, 890 (Del. 1982) ("[S]ervices [] contracted to be performed…involv[e]…a performing relationship of interacting rights and duties[.]"); *Swift v. Richardson*, 32 A. 143, 149 (Del. Super. Ct. 1886) (regarding corporate governance statute, "the duty . . . and the corresponding right to have it performed . . . are . . . impliedly contained in such grants as necessary

incidents to the due and proper fulfilment"); *Cf. Walker v. Beauchler*, 68 Va. 511, 517 (1876) ("This right could not exist . . . unless there existed . . . a corresponding duty[.]"); *Black's Law Dictionary* 615 (10th ed. 2014) (defining "duty" as "that which one is bound to do, and for which somebody else has a corresponding right"). That duty is the Quarterly Duty. *See* MTD Opp'n 3-4 (citing ¶56).

The nature of Plaintiff's stock underscores the importance of performing the Quarterly Duty. As noncumulative stock, any right to a dividend for a given dividend period expires if a dividend is not declared during that period. *See id.*; ¶¶6, 63.

Furthermore, because funds must be "legally available therefor," and because Directors cannot know that availability in advance nor whether the financial conditions of a future quarter would make a dividend appropriate, Directors must perform their Quarterly Duty during each quarter. *See also* DGCL § 170 (requiring dividends to be paid from surplus); VSCA § 13.1-653(C) (same); DGCL § 174 (providing for director liability for unlawful dividends); VSCA § 13.1-692 (same). Directors here were obliged to adhere to their contractual duties.

In addition, the implied covenant of good faith and fair dealing exists in the CODs and requires Directors to exercise their discretion reasonably and in good faith to not deprive stockholders like Plaintiff of their dividend-related rights. *See Perry II*, 864 F.3d at 630-31 ("Virginia and Delaware law impos[e] an implied covenant of good faith and fair dealing[.]"); *Perry III*, 2018 WL 4680197, at *7 ("Plaintiffs

effectively state a claim for breaches of the implied covenant."); ¶¶81, 118-19. The Quarterly Duty is discretionary. *See Perry III*, 2018 WL 4680197, at *10 ("Plaintiffs could reasonably expect the GSEs to exercise discretion as it relates to dividends . . . [but not] arbitrarily or unreasonably."); *Morse*, 160 N.E. at 896 (quoting *Bassett*, 73 A. at 514); 18B Am. Jur. 2d Corporations § 1073; MTD Opp'n 4; ¶¶56, 63.

Directors "were obligated to act consistently with" the CODs. ¶119. "No [COD] provision. . . reserves . . . any right to repudiate or nullify the . . . contractual dividend payment obligations to Plaintiff as a Junior Preferred [] Shareholder." ¶112.

2. Breach

Directors breached the Quarterly Duty every quarter since January 1, 2013 by failing to decide whether to declare a dividend. *See, e.g.*, ¶¶112, 119, 2 (emphasis added) ("Defendants' . . . breach[ed] the contractual [] duties which they owed – and *continue to owe*[.]"). The duty can be performed any time during each Dividend Period, so nonperformance constitutes a new breach as each Dividend Period ends.

Directors continuously breached the implied covenant on and since January 1, 2013 by depriving Plaintiff of dividends by unreasonably failing to perform their Quarterly Duty. *See Perry III*, 2018 WL 4680197, at *7 (holding that plaintiffs stated claim for breach of implied covenant for unreasonable exercise of discretion regarding dividends); ¶¶81, 118-19.

3. Causation of Damages

Directors' breaches caused Plaintiff's damages by unlawfully depriving Plaintiff of potential dividends since January 1, 2013. ¶118. Only Directors could be the cause. The Third Amendment did not eliminate the possibility of Junior Preferred Stock dividends, *see infra* III.B.1, and the CODs and governing state law required Directors to determine whether to declare a dividend based on then-existing financial conditions, *see infra* III.B.2. Once Directors decide to declare a dividend based on then-existing financial conditions, they must do so. Whether they would have made that decision based on those conditions is a factual inquiry that cannot be resolved on a motion to dismiss. Thus, Plaintiff adequately pled causation.

Nevertheless, the court erred on substantive, corporate governance law by rejecting causation on the basis that only Conservator could stop the "flow" of funds to Treasury. MTD Mem. 7. The declaration of a dividend on the Junior Preferred Stock would not stop that "flow." Directors could have declared a dividend and deferred distribution to Junior Preferred Stock until the end of the conservatorship.

4. These Causes of Action Are Necessarily Timely, Even Without Tolling

The nature of the breaches at issue is such they are necessarily timely. A cause of action for breach of contract accrues upon breach, in this case, of the Quarterly Duty. *See* MTD Mem. 5 (citing cases). Thus, a cause accrued on each March 31, June 30, September 30, and December 31. *See supra* III.A. The limitation periods

under Delaware and Virginia law are respectively three and five years, and Plaintiff filed the Complaint on May 21, 2018. *See* MTD Mem. 4 (citing cases). Accordingly, if Plaintiff can prove the facts supporting those claims, *infra* IV, then at a minimum, he would have timely breach-of-contract claims, without the need for any tolling, that accrued beginning June 30, 2015 against Freddie Mac's Directors (less than three years prior to the filing of the Complaint) and beginning June 30, 2013 against Fannie Mae's Directors (less than five years prior to the filing of the Complaint). Thus, the court erred in dismissing these claims.

Claims for breach of the implied covenant also accrue upon breach. *See* MTD Mem. 4 (citing cases). The limitations period is three years under Delaware and Virginia law. *See id.* Since Plaintiff can prove the facts supporting breaches of the implied covenant within three years prior to the filing of this action, *see infra* IV.B, then he would have timely claims, without tolling, that accrued on and since May 22, 2015 against the Director-Defendants. Thus, the court erred in dismissing these claims as well.

As to the Quarterly Duty and implied covenant claims that accrued prior to the above dates, Plaintiff can prove facts that would support tolling. *See infra* VIII. Thus, the District Court also erred in dismissing those earlier claims as time barred.

B. The Third Amendment Could Not Have Caused Plaintiff's Damages Resulting from Directors' Failure to Perform the Quarterly Duty and Implied Covenant

While the preceding section is sufficient to demonstrate that the Complaint sufficiently alleged the ongoing breach claims and that such claims are necessarily timely, this section highlights additional legal errors by the District Court in holding the Third Amendment solely caused Plaintiff's damages. That cannot be correct given Plaintiff's abandonment of that claim. In fact, Plaintiff abandoned that claim *because* the Third Amendment did not cause his damages.

1. The SPSPAs Expressly Allow Junior Preferred Stock Dividends with Treasury's Prior Written Consent

Contrary to the District Court's ruling, MTD Mem. 7, the Third Amendment could not have precluded the declaration of Junior Preferred Stock dividends because every version of the SPSPAs expressly allow such declarations.

Each SPSPA provides, and Directors agree, that the Board "shall not, . . . without [Treasury's] prior written consent [], declare or pay any dividend . . . other than with respect to the Senior Preferred Stock." SPSPAs § 5.1 (A.___); Compl., Ex. A, 20-21; MTD Opp'n 7; *see* Defs.' Mem. in Opp'n to Pl.'s Mots. to Alter or Amend J. & for Leave to Amend the Compl. ("Combined Opp'n") 5, ECF No. 29 ("Plaintiff[] . . . refer[s] to a covenant in the original Treasury stock agreements[.]"). Thus, the Third Amendment did not prevent their declaration. At most, the Third

Amendment added a step after the Quarterly Duty before the Boards could declare a dividend. *See supra* page 5.

That fact is confirmed by Fannie Mae's payment of a Junior Preferred Stock dividend while the SPSPAs were in effect. ¶¶12-14 (A.___); MTD Opp'n 7-8; Exs. 5-7. That fact is also confirmed by Directors themselves in the GSEs' Forms 10-K filed with the SEC, including those attached to Plaintiff's declaration in opposition to the MTD and cited in his MTD Opposition. *See* MTD Opp'n 43 (quoting Ex. 12, Freddie Mac 2011 Form 10-K, at 374) ("[T]he Board . . . [has] authority to function in accordance with the duties and authorities set forth in . . . our Bylaws and Board committee charters."); Fannie Mae 2014 Form 10-K, at 28 (A.___) ("The [SPSPA] . . . contain[s] covenants that…require the prior written consent of Treasury before we can . . . pay[] dividends . . . on [] our equity securities (other than the senior preferred stock or warrant)….Conservator has delegated to the Board…authority to function [according to] the[ir] duties and authorities[.]"); Freddie Mac 2014 Form 10-K, at 23, 247 (A.___) (same); *see also supra* note 5.

Thus, given Directors' authority to declare, and duty to determine whether to declare, dividends on Junior Preferred Stock, and given Treasury's purported prior consent authority, the District Court erred in holding that only "further action [] taken by . . . [C]onservator" could prevent "100% of the net worth of each [GSE from] flow[ing] to Treasury each quarter." MTD Mem. 7.

Moreover, even if that holding were correct, it is relevant to dividend payment, not declaration. Directors still had to perform their Quarterly Duty because their COD duties continued into conservatorship. *See Perry II*, 864 F.3d at 626 ("[T]heir contract-based claims may proceed."); *Perry III*, 2018 WL 4680197, at *7 ("Plaintiffs effectively state a claim for breaches of the implied covenant [in the CODs]."). Directors could have declared dividends without paying them until after the conservatorship. Thus, Conservator's control over payment by GSEs is not determinative.

2. Only the Directors, and Not a Contract Like the Third Amendment, Can Make Dividend Determinations

The District Court further erred in holding that the Third Amendment "produce[d] all the damage that [Plaintiff] claims," MTD Mem. 7, for another reason: only Directors have the authority to decide whether or not to declare dividends. The authority and discretion of directors are essential under Delaware and Virginia corporate law. *See* DGCL § 141(a) ("The business and affairs of every corporation…shall be managed by…a board of directors[.]"); VSCA § 13.1-673 ("All corporate powers shall be exercised by…, and the business and affairs of the corporation [shall be] managed under the direction…of[,] the board of directors[.]"), § 13.1-674(B) (prohibiting directors from "limit[ing] the[ir] ability…to discharge [their] duties as a director"); *Abercrombie v. Davies*, 123 A.2d 893, 899 (Del. 1956) ("[T]his Court cannot give legal sanction to agreements which have the effect of

removing from directors in a very substantial way their duty to use their own best judgment on management matters."). Hence, only the board may authorize dividend declarations. *See* DGCL § 170(a) ("The directors of every corporation…may declare and pay dividends[.]"), § 141(c)(1) ("[U]nless…expressly so provide[d], no [] committee shall have the . . . authority to declare a dividend[.]"); VSCA § 13.1-653 ("The board of directors may authorize and the corporation may make distributions to its shareholders[.]"), § 13.1-603 (defining "distribution," in relevant part, as a "transfer of cash . . . by a corporation to or for the benefit of its shareholders in respect of any of its shares"), § 13.1-689(D)(6) (prohibiting board from delegating to a committee "the authority . . . [to a]uthorize or approve a distribution, except according to a formula or method, or within limits prescribed by the board").

Moreover, each COD expressly limits dividend determinations to Directors' "sole discretion." *E.g.*, Fannie Mae COD Series P § 2(a) ("Holders of record of Series P Preferred Stock . . . will be entitled to receive, when, as and if declared by the Board of Directors of Fannie Mae . . . in its sole discretion . . . , non-cumulative quarterly dividends[.]"); Freddie Mac Offering Circular (Nov. 29, 2007) ("[D]ividends are payable only if declared by our Board of Directors in its sole discretion[.]"); MTD Opp'n 4; Combined Br.[9] 4; Combined Reply 16.

[9] Mem. in Supp. of *Pro Se* Pl.'s Mots. to Alter or Amend J. & for Leave to Amend Compl., ECF No. 27-1.

Furthermore, each dividend declaration requires an action by the board, namely, a vote on a resolution to declare. *See* DGCL § 141(b) ("The vote of the majority of [a quorum of] the directors present at a meeting . . . shall be the act of the board[.]"); VSCA § 13.1-688(A)-(C) (same); *see also* DGCL § 174 (exempting from liability any director who was absent or "dissented from the act or resolution" to unlawfully pay a dividend). A contract like the Third Amendment is not the equivalent of a board of directors, so it cannot make dividend decisions. Only Directors can. Thus, Directors' failure to determine whether to declare a dividend is the cause of the non-declaration of dividends.

The Third Amendment neither eliminated nor caused a breach of any of the foregoing duties and did not cause the non-declaration of dividends, so it did not trigger the running of the limitation periods.[10] The court erred in ruling that the Third Amendment "produce[d] all the damage[s]." MTD Mem. 7 (A.___).

IV. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO APPLY THE CORRECT LEGAL STANDARDS

A. General Legal Standards for Motions to Dismiss

First, the court neither accepted Plaintiff's factual allegations as true nor made all inferences that can be derived from the allegations in Plaintiff's favor. *See Momenian*, 878 F.3d at 387; *Barr*, 370 F.3d at 1199. For example, the court held

[10] Moreover, even if the Third Amendment could have been a breach that caused Plaintiff's damages, no damages resulted at that time, so he had no cause of action.

that the Third Amendment was the sole cause of damages despite acknowledging that Plaintiff "abandoned that position . . . and clarif[ied] that he seeks relief for 'an actual breach' that 'has occurred, and continues to occur.'" MTD Mem. 5 n.4.

Indeed, Plaintiff asserted in the Complaint breaches of ongoing contractual duties that Directors owed regardless of the Third Amendment. ¶2 ("breach of the contractual [] duties which [Directors] owed - and continue to owe"), ¶119 ("[Directors] were obligated to act consistently with . . . [the GSEs'] responsibilities under their respective [CODs.]"). Those duties are the Quarterly Duty and implied covenant. ¶¶2, 118, 119.

This breach did not occur at the time of the Third Amendment but each quarter thereafter by not performing the Quarterly Duty and implied covenant. Moreover, the Complaint does not suggest that the Third Amendment itself gave rise to the causes of action based on Directors' quarterly failure to determine whether to declare a dividend on the Junior Preferred Stock.

Rather, those ongoing breaches are independent of the Third Amendment and were necessary events that gave rise to Plaintiff's claims. Thus, Plaintiff alleged:

> HERA, however, did not provide license to . . . the Freddie Mac or Fannie Mae Boards to disregard direct non-operational corporate governance, contractual and fiduciary obligations owed to Freddie Mac and Fannie Mae respective shareholders under VSCA law and the Companies' preferred share Certificates of Designations.

¶51 (emphasis removed).

Those actual, ongoing breaches pertain to the Quarterly Duty and the implied covenant, but the court did not accept the allegations of those duties and breaches as true, or construe the Complaint liberally, granting Plaintiff the benefit of all inferences for the facts alleged.[11] *See, e.g.*, MTD Opp'n 17 (citing Angel Decl. Exs. 2, 4) ("A breach occurred after each quarter in which Defendants failed to . . . determine whether to declare[] a dividend."). In addition, the court did not accept as true that the SPSPAs allowed for Junior Preferred Stock dividends. *See, e.g.*, MTD Opp'n 43 ("Directors always had the authority to declare and determine whether to declare dividends."), 6-8 (quoting ¶¶85-86; Angel Decl. Ex. 3, Fannie Mae 2008 Form 10-K, Part II, at 76) ("Thus, . . . Fannie Mae maintained the power to determine whether to declare dividends."); *see generally* Ex. 17, Third Amendment (not altering SPSPA provision allowing for Junior Preferred dividends).

Had the court accepted Plaintiff's facts as true and drawn all reasonable inferences therefrom, the court would have concluded that Plaintiff adequately alleged that the Directors' breaches of the Quarterly Duty and the implied covenant (not a breach based on the Third Amendment, a claim that Plaintiff abandoned) caused Plaintiff's damages and triggered the running of the limitation periods. Thus,

[11] To the extent that the court determined that Plaintiff did not plead the ongoing breaches in the Complaint or his papers in opposition to the motion to dismiss, there is no indication in the District Court's opinion that it reviewed the CODs to identify the Quarterly Duty before concluding that the Third Amendment was the sole cause.

the court would have held, at a minimum, that the claims for breaches within the limitation periods were timely.

Second, the District Court violated Plaintiff's right to alternative pleading by using his alternative allegations against him. *See Am. Action Network, Inc. v. Cater Am., LLC*, 983 F. Supp. 2d 112, 124 (D.D.C. 2013) (citing Fed. R. Civ. P. 8(d)(2)-(3)) ("allowing alternative pleading of inconsistent claims or defenses"). The court relied on Plaintiff's allegation that the Third Amendment "effectively nullified, and eliminated the Board's exercise of its contractual dividend declaration functions" to conclude that the Third Amendment "produce[d] all the damage[s]." MTD Mem. 5 (quoting ¶¶79, 81), 7 (A.___).

The court did not independently assess Plaintiff's other theory that Directors owed the Quarterly Duty and implied covenant and that their breaches of those duties caused Plaintiff's damages. ¶107 (A.___) ("The Third Amendment was[] [] irrelevant to Plaintiff as a holder of Freddie/Fannie Junior Preferred Stock[.]"). Doing so would have necessitated a finding that at a minimum, the claims arising from breaches within the limitation periods are timely.

Third, despite acknowledging that Plaintiff "abandoned th[e] position" that the Third Amendment caused his damages, on the very same page of the opinion, the District Court improperly ruled on those allegations anyway. MTD Mem. 5 n.4, 5 (A.___) ("[T]he claims for breach of contract and breach of the implied covenant

each accrued at the time of the enactment of the Third Amendment[.]"); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016) ("In light of petitioner's abandonment of its argument..., the Court need not, and does not, address it."); *Glob. Tel*Link v. F.C.C.*, 866 F.3d 397, 408 (D.C. Cir. 2017) ("[I]t would make no sense...to determine whether the disputed agency positions...warrant *Chevron* deference when the agency has abandoned those positions."); *Bahlul v. United States*, 840 F.3d 757, 782 (D.C. Cir. 2016) (quoting *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1304 (2015)) ("[T]he Court eschewed consideration of any...Article III [objection] because that argument was abandoned..., and thus 'it is not before us.'"). This was particularly erroneous because Plaintiff's briefs clearly lay out his Quarterly Duty theory.[12]

Fourth, the court disregarded Defendants' concession to Plaintiff's ongoing breach claims. The entirety of Defendants' briefs below misleadingly focus on only (1) Plaintiff's abandoned theory that the Third Amendment constituted a breach and caused his damages and (2) a claim, which Plaintiff never asserted, that he has a

[12] At a minimum, Plaintiff's briefs established that he could allege timely claims, so even if dismissal were proper, imposing prejudice was not. *See infra* V.A. Moreover, he acknowledged the need to amend by requesting leave *four* times. *See* MTD Opp'n 16 n.14, 32 n.24; Pl.'s Mot. Leave to File Surreply 3, 4, ECF No. 21; Surreply Br. 3, 8; Defs.' Opp'n to Pl.'s Mot. for Leave to File Surreply 2, ECF No. 22 ("Plaintiff's filing is not really a surreply at all, but rather a motion for leave to amend.").

right to receive dividends. MTD Opp'n 24 ("Defendants misconstrue the claim here. Plaintiff does not assert that Defendants breached the contract by failing to declare dividends but rather, by failing to determine whether to declare them . . . each fiscal quarter."); *see generally* MTD Br.; Combined Opp'n. They "simply made no effort to respond to" Plaintiff's allegations of the Quarterly Duty, implied covenant, breaches thereof, and causation of damages. *Davis v. Transp. Sec. Admin.*, 264 F. Supp. 3d 6, 10-11 (D.D.C. 2017). "[I]t is not the Court's duty to articulate a theory for [Defendants]." *Id.* at 11 (quoting *Hewitt v. Chugach Gov't Servs., Inc.*, 16-cv-2192, 2016 WL 7076987, at *3 (D.D.C. Dec. 5, 2016)). Thus, the court should have "treat[ed] [Plaintiff's ongoing breach] arguments as conceded." *Id.* at 10-11; *Unity08 v. F.E.C.*, 596 F.3d 861, 869 (D.C. Cir. 2010) ("[T]he Commission evidently abandons this argument, as it nowhere mentions it in its brief."). The court's failure to treat Plaintiff's claims as conceded was erroneous.

Fifth, the District Court "err[ed] in failing to consider a *pro se* litigant's complaint 'in light of' all filings, including filings responsive to a motion to dismiss." *Brown v. Whole Foods Mkt. Grp., Inc.*, 789 F.3d 146, 152 (D.C. Cir. 2015) (quoting *Richardson v. United States*, 193 F.3d 545, 548 (D.C. Cir. 1999) (holding that *pro se* plaintiff's opposition to motion to dismiss effectively amended complaint, required denial of motion, and mooted consideration of whether leave to amend should have been granted)); Combined Reply 6 n.7. Here, "the district court

did not appear to consider all of [Plaintiff's] allegations—including those in [his MTD O]pposition," which clearly allege claims for ongoing breaches of the Quarterly Duty and implied covenant. *Brown*, 789 F.3d at 152 (requiring "revers[al] and remand [of] the dismissal"); *Schnitzler v. United States*, 761 F.3d 33, 38 (D.C. Cir. 2014); *Anyanwutaku v. Moore*, 151 F.3d 1053, 1058 (D.C. Cir. 1998); *supra* III.A.1-4.

B. The Court Misapplied the Standards for a Statute-of-Limitations Defense

The District Court expressly applied the wrong standard for dismissing a complaint on limitations grounds.[13] "As our case law makes clear, 'because statute of limitations issues often depend on contested questions of fact, dismissal is appropriate only if the complaint on its face is conclusively time-barred.'" *de Csepel v. Republic of Hungary*, 714 F.3d 591, 603 (D.C. Cir. 2013) (quoting *Firestone*, 76 F.3d at 1209).

Here, the Complaint alleges that the breach did not occur at the time of the Third Amendment but rather, thereafter by failing to "act consistently with" the CODs "in breach of the[ir] contractual []duties which [Directors] owed – and continue to owe," causing the dividends to be paid to Treasury without any

[13] Indeed, Defendants later conceded this argument by failing to address it in their opposition to Plaintiff's Rule 59(e) motion. *See* Combined Reply 2-3.

declaration of a divided on Plaintiff's stock. ¶119, ¶2 (A.___). Courts must "determine that the allegation of other facts consistent with the [complaint] could not possibly cure the deficiency." *Id.*; *Jones*, 442 F.2d at 775 ("[I]t [must] appear[] beyond doubt that the plaintiff can prove no state of facts in support of his claim[.]"). Only "if 'no reasonable person could disagree on the date' on which the cause of action accrued, the court may dismiss a claim on statute of limitations grounds.'" *Bancroft Glob. Dev. v. United States*, 330 F. Supp. 3d 82, 96 (D.D.C. 2018). Without such findings, courts cannot "dismiss a complaint on statute of limitations grounds based solely on the face of the complaint." *Momenian*, 878 F.3d at 387-88 (quoting *Firestone*, 76 F.3d at 1209); *Adams v. District of Columbia*, 740 F.Supp.2d 173, 180 (D.D.C. 2010), *aff'd*, 618 F. App'x 1 (D.C. Cir. 2015); *Smith v. Brown & Williamson Tobacco Corp.*, 3 F. Supp. 2d 1473, 1475 (D.D.C. 1998); *Kuwait Airways Corp. v. Am. Sec. Bank, N.A.*, 890 F.2d 456, 463 n.11 (D.C. Cir. 1989).

Yet, the District Court expressly applied a much lower, incorrect standard based on an inapposite case. *See* MTD Mem. 3 (quoting *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998)) (A.___) ("Defendants may raise a statute of limitations defense in a motion to dismiss 'when the facts that give rise to the defense are clear from the face of the complaint.'"). The *Smith-Haynie* court held that defendants *may raise* a limitations defense in a motion to dismiss, not that a court could readily dismiss a complaint on that basis. 155 F.3d at 578 ("[W]e now

explicitly hold that an affirmative defense may be raised by pre-answer motion under Rule 12(b) when the facts that give rise to the defense are clear from the face of the complaint."). Furthermore, the claims in that case were dismissed on summary judgment, not on the pleadings. *See id.* at 579 (emphasis added) ("[W]e [] conclude that Smith-Haynie failed to *present sufficient proof* to send the issue to a jury.").

Had the District Court applied the correct standard, it would have necessarily concluded that Plaintiff set forth "facts consistent with the [Complaint that] could [] possibly cure the [limitations] deficiency." *Momenian*, 878 F.3d at 387-88; *Brink v. Contl. Ins. Co.*, 787 F.3d 1120, 1128-29 (D.C. Cir. 2015); *Belizan v. Hershon*, 434 F.3d 579, 583 (D.C. Cir. 2006); *Firestone*, 76 F.3d at 1209. Such facts, discussed herein, show that (1) the Quarterly Duties and the implied covenant, not the Third Amendment, caused Plaintiff's damages, (2) Directors owed duties that they continued to breach, and (3) breaches within the limitation periods gave rise to timely claims.[14] *See generally* MTD Opp'n; Combined Br.; Combined Reply.

This Circuit's ruling in *de Csepel* is instructive. The bailment claims accrued upon refusal to return the property. Plaintiff was negotiating with defendants for the return her property and then filed suit in Hungary in 1999. The district court held that the lawsuit indicated a refusal to return the property, so the claims accrued in

[14] In addition, facts discussed below, if proven, would support tolling as to breaches that occurred before the limitation periods. *See infra* VIII.

1999 and were time barred when plaintiff filed her 2010 complaint in the district court; however, equitable tolling applied. This Circuit reversed because the "complaint nowhere alleges that [plaintiff] sued [in 1999] because Hungary refused to engage in further negotiations," so "nothing in the complaint indicates that the [] claims [] accrue[d]" in 1999. *de Csepel*, 714 F.3d at 603-04. Filing suit could have been a means to increase pressure to settle rather than an indication of refusal. Thus, "the complaint on its face [wa]s [not] conclusively time-barred," and the court "ha[d] no need to [rule on] equitable-tolling." *Id.* at 603; *Firestone*, 76 F.3d at 1209 (dismissing with prejudice requires a finding that "facts consistent with the [complaint] could not possibly cure the deficiency"). Similarly, Plaintiff's allegations of ongoing breaches by Directors are consistent with the Complaint and cure the limitations deficiency, so the court erred in dismissing the claims as time barred and rejecting tolling. Nor does the Complaint simply assert that the claims accrued in 2012. To the contrary, it alleges that claims accrued afterward through breaches of continued duties. ¶¶2, 112, 119 (A.___).

V. THE DISTRICT COURT ABUSED ITS DISCRETION BY DISMISSING WITH PREJUDICE

A. The District Court Erred by Imposing Prejudice

First, the District Court erred by imposing prejudice *sub silentio* without explaining why. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) ("[R]efusal to grant the leave without any justifying reason...is merely abuse of that discretion and

inconsistent with the spirit of the Federal Rules."). The failure to explain is notable given the court's acknowledgement of Plaintiff's ongoing breach claims.

Second, the court failed to comply with *Firestone*. "The standard for dismissing a complaint with prejudice is high" and requires the district court to "determine[] that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Belizan*, 434 F.3d at 583 (quoting *Firestone*, 76 F.3d at 1209). That determination must be made in the order dismissing the complaint. *Id.* at 584. "[F]ail[ure] adequately to explain, with reference to the standard we set in *Firestone*, why it dismissed [the] complaint with prejudice" requires vacatur of the order. *Id.* Here, the District Court, in its MTD Memorandum, "neither adverted to *Firestone* nor undertook the inquiry required by that decision," so the failure is an abuse of discretion. *Id.*

Moreover, even if the court did endeavor to comply with *Firestone*, it could not have found that its impossibility standard as satisfied. Plaintiff's MTD Opposition at 17 (alleging distinct, quarterly claims) made clear that he can possibly plead facts that would cure the identified limitations deficiency. Thus, even if the Complaint did not adequately plead the ongoing-breach claims – even though the court expressly acknowledged those claims, *see* MTD Mem. 5 n.4, 6-7 (A.___) – Plaintiff should have had the right to replead because his claims do not suffer from

any limitations deficiency. Yet, the court dismissed the Complaint with prejudice anyway. *See* MTD Order (A.___); *see also* Combined Br. 7.

The abuse of discretion in imposing prejudice is compounded by several factors. *See* Combined Reply 3-6. First, prejudice was imposed *sub silentio* without a statement disallowing amendment, and no finding of futility was made until the court ruled on Plaintiff's Combined Motion. *See Rollins v. Wackenhut Servs.*, 703 F.3d 122, 131 (D.C. Cir. 2012) (holding that *Firestone* was met despite not making the *Firestone* finding because the district court held that amendment was futile and that the plaintiff had not "indicated that she would be able to plead sufficient facts to state a plausible claim for relief"). Second, the District Court dismissed on limitation grounds, the exact ground that *Firestone* held should not be the basis of dismissal on the pleadings, especially with prejudice. *Firestone*, 76 F.3d at 1208-09 ("As we have repeatedly held, courts should hesitate to dismiss a complaint on statute of limitations grounds based solely on the face of the complaint."). Third, Plaintiff was never given an opportunity to amend his Complaint at all. Fourth, while Plaintiff recognizes that the court did not have to treat the request in his brief to amend the Complaint, his MTD Opposition made clear that he had, and was able to plead, valid and timely claims. Fifth, Plaintiff was *pro se*. *See* Combined Reply 6 n.7. Thus, the rulings should be reversed.

B. When Advised of the Failure to Comply with *Firestone*, the District Court Still Failed to Make the *Firestone* Determination

Plaintiff moved the court pursuant to Rule 59(e) to remove prejudice due to the failure to comply with *Firestone*, failure to satisfy the *Firestone* standard, clear errors of law and fact, including misapprehending Plaintiff's assertions, and manifest injustice. *See* Combined Br. 6-9; Combined Reply 2-11; *see also supra* III-V. However, without addressing any of those arguments, the District Court merely held that it "clearly—and correctly—dismissed [Plaintiff]'s complaint with prejudice" and explained what Plaintiff had already acknowledged[15]: that the dismissal was with prejudice. Combined Order 2. Having denied the Rule 59(e) motion, the court denied Plaintiff's 15(a) motion as futile. *See* Combined Order 3-4 (A.___). To the extent that the court was suggesting that *Firestone*'s impossibility standard was met, that delayed, post-hoc explanation for dismissing with prejudice cannot cure noncompliance with *Firestone*.

[15] Plaintiff made clear that he understood that prejudice was imposed as it was not specified. *E.g.*, Combined Br. 7 ("The dismissal with prejudice, as opposed to without prejudice, was clearly erroneous."). Defendants agreed: "Plaintiff is correct that a dismissal...is deemed with prejudice." Combined Opp'n 7 n.2. Yet, the District Court read Plaintiff's papers differently than his own adversaries. Combined Order 2 ("[Plaintiff] feigns ignorance as to whether the dismissal carried prejudicial effect[.]").

VI. THE COURT FURTHER ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S 59(e) MOTION

In addition to the abuse of discretion in denying Plaintiff's 59(e) motion with respect to removing prejudice, *see supra* V.B, the District Court abused its discretion "necessarily . . . [by] misapprehend[ing] the underlying substantive law" and Plaintiff's assertions. *Osborn*, 797 F.3d at 1063; *see* Combined Br. 7-9; Combined Reply 6-11. Plaintiff's 59(e) briefs made the court's errors of contractual and corporate governance law clear, *see* Combined Br. 7-9; Combined Reply 6-11, as did his MTD Opposition, 16-18, 22-26, before the court erred. These errors are discussed herein. *See* III-IV.

Contract interpretation is a of law. *J & R Enters. v. Ware Creek Real Estate Corp.*, No. 170854, 2018 WL 4786370, at *2 (Va. Oct. 4, 2018) ("subject to *de novo* review"); *accord KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 749 (Del. 2019) (same). The SPSPAs allow dividends on Junior Preferred Stock. *Supra* III.B.1. Thus, the court erred on contract law in holding that the Third Amendment was a breach that prohibited such dividends. Combined Br. 7-8 (citing ¶¶ 6, 55, 75, 78, 107-08); Combined Reply 4-5; *supra* III.B.2.

Directors have a duty under state law and the CODs to determine every quarter whether to declare a dividend. *See supra* III.A.1. A contract like the Third Amendment cannot invalidate those state law duties at all nor the COD duties without the requisite shareholder consent, which was never given. *See id.* Thus,

Directors' continual failure to determine whether to declare dividends would be actionable breaches. *See supra* III.A; Combined Br. 3-4, 8; Combined Reply 4-5, 6.

The court also abused its discretion by continuing to limit its rulings to Plaintiff's claims arising from the Third Amendment. It had acknowledged that Plaintiff abandoned those claims and was aware of Plaintiff's clear, repeated assertions of quarterly breach in his briefings. MTD Mem. 5 n.4, 6-7, (A.___); MTD Opp'n 8, 17-19, 23; Combined Br. § I.A-B, at 6-9; *supra* III.

The court further abused its discretion in failing to remove prejudice despite Plaintiff's *Firestone* argument, Combined Br. § I.A at 7, and argument on reply that Defendants conceded the *Firestone* issue, Combined Reply 2-3 ("Directors do not oppose and thus, concede Plaintiff's leading argument on why dismissal with prejudice was clear error.").

Finally, this Circuit held that Conservator's control over Directors does not relieve them of liability for breaching the duties in the CODs, *see Perry II*, 864 F.3d at 625-26, which incorporate corporate governance duties, *see* ¶30 (A.___); *Perry III*, 2018 WL 4680197, at *8. Thus, the court erred on the law in holding that Directors could not be liable because only Conservator could prevent Plaintiff's damages. *Supra* IV.A. Accordingly, the court erroneously denied Plaintiff's Rule 59(e) motion.

VII. THE COURT ERRONEOUSLY DENIED LEAVE TO AMEND

First, Defendants effectively conceded Plaintiff's Rule 15(a) motion by failing to challenge the FAC's allegations, so the court should not have denied Plaintiff's motion for leave to amend. Directors applied the wrong standards by relying on the Complaint, not the FAC, and arguing over facts to be proven, not the adequacy of the pleading. *See Alon Ref. Krotz Springs, Inc. v. E.P.A.*, 936 F.3d 628, 647 (D.C. Cir. 2019) ("[T]hey never actually attack the 2010 rule as originally promulgated; instead, they challenge only the 2017 denial[.]"); *Cousart v. Metro Transit Police Chief*, 101 F. Supp. 3d 27, 29 (D.D.C. 2015) ("treat as conceded any unopposed arguments"). Any such arguments that could properly be considered are irrelevant, based on glaring misstatements, or are insufficiently briefed to justify denial of leave to amend.

Directors barely, and superficially, reference the FAC because it is adequately pled and not futile. They mostly rely on the Complaint and Order, *see, e.g.*, Combined Opp'n 12 ("Plaintiff's overarching theory has always been…"), but they are irrelevant.[16] The FAC is what matters. To prop up this tactic, Directors claim in conclusory terms that the FAC merely restates the Complaint, but a cursory comparison disproves that. *See* Combined Opp'n 12 (citing Combined Br. 16).

[16] Furthermore, reliance on the Order is unavailing due to the clear errors set forth in Parts III-VIII herein.

Moreover, Directors undercut their own argument by indirectly citing (and not discussing) new allegations. *See id.* (citing Combined Br. 16 (citing FAC ¶¶13, 30)). The FAC even more clearly established that the quarterly breaches were in fact separate breaches and not mere accruals of damages. *See* FAC ¶¶9, 56-60.

Additionally, regardless of what Plaintiff's "overarching theory" was, which Directors misstated, the FAC expressly contradicts Directors' incorrect characterization. *See, e.g.*, FAC ¶7 (alleging that the consent requirement "did not eliminate" Directors' quarterly duty); ¶57 (A.___) (same). Directors ignore those allegations. Instead, they attempt to assign new, self-serving meanings to the FAC's allegations that contradict the stated allegations.

Directors' effort to rewrite Plaintiff's allegations is a tacit acknowledgement that Plaintiff sufficiently pled his claims. Furthermore, reliance on the MTD Order is unavailing due to the clear errors that Plaintiff has set forth. *Supra* III-VIII.

Defendants also repeated the arguments that Plaintiff disproved above. *Supra* III.B.-VIII. Yet, the District Court erroneously agreed with Defendants and denied Plaintiff's motion. Thus, the court erroneously denied a conceded motion and ruled on unasserted claims.

Second, the court itself misread the FAC and applied an incorrect legal standard in doing so. The court reasoned that Plaintiff "allege[s]…that FHFA breached the purported contract and implied covenant," but Plaintiff made no such

allegation. He has no contract with FHFA. Combined Order 3. He alleged ongoing breaches by Directors throughout the FAC. FAC ¶¶2-3, 7-8. This Circuit has already held that Directors can be liable to GSE stockholders for breaching the CODs. *Perry III*, 2018 WL 4680197, at *10.

Furthermore, by way of the foregoing errors, the District Court improperly rejected the FAC's factual allegations. *Supra* II, IV ("*First*"). *Compare* Combined Order 3 (stating that Plaintiff alleges ongoing breaches by *FHFA* for "failing to declare a dividend"), *with* FAC ¶¶4, 59 (alleging breach of *Quarterly Duty* by *Directors*). Crediting those allegations would have precluded a finding of futility.

Third, the FAC fails to meet the definition of futility. *See Camp v. D.C.*, No. CIV.A. 04-234, 2006 WL 667956, at *5 (D.D.C. Mar. 14, 2006) (citing 3 Moore's Federal Practice § 15.15(3) (3d ed. 2000) ("An amendment is futile if it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled…or could not withstand a motion to dismiss.")). Contrary to the District Court's ruling that Plaintiff's claims arise from the Third Amendment, the FAC alleges an ongoing "Quarterly Dividend Duty" and implied covenant that the "Third Amendment did not affect" and that Directors breached "every quarter," thereby causing "Junior Preferred Stock dividend non-declaration." FAC ¶¶ 4, 57, 59, 69, 72. The futility definition does not apply.

Fourth, even if the court had applied the proper standard and Directors had raised relevant arguments, Directors failed to meet the high futility standard. *See Miller-McGee v. Washington Hosp. Ctr.*, 920 A.2d 430, 436-37 (D.C. 2007) ("[A]mendment would not have been futile, as it is not 'beyond doubt that [] plaintiff can prove no set of facts [to] support [the claims.']").

Notably, Defendants omitted any mention of the low bar for leave to amend and the high bar for futility because they cannot meet the latter, and Plaintiff meets the former. Plaintiff established below, *see* Combined Br. 16-17, and herein that the "well-established policy of freely granting leave to amend" warrants the granting of the Rule 15(a) motion, *De Sousa v. Dep't of State*, No. 09 Civ. 0896, 2010 WL 11594933, at *2 (D.D.C. June 4, 2010) (quoting *Firestone*, 76 F.3d at 1208).

Moreover, Directors fail to show futility of amendment: that is "beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief." *Miller-McGee*, 920 A.2d at 437 (emphases added) (quoting *Fingerhut v. Children's Nat'l Med. Ctr.*, 738 A.2d 799, 803 (D.C. 1999)). Thus, this Court should reverse the denial of Plaintiff's Rule 15(a) motion.

To the extent that any factual allegations asserted herein were required in the Complaint to state plausible claims and avoid dismissal on limitation grounds, the FAC alleges them, *see generally* FAC, so the court erred in denying Plaintiff's Rule 15(a) motion, *see Firestone*, 76 F.3d at 1209; *Brink*, 787 F.3d at 1128-29. The FAC

pleads that Directors owed the Quarterly Duty and implied covenant, *see*, *e.g.*, FAC ¶¶4, 8-9, 15, and continuously breached those duties – by failing to perform the Quarterly Duty at all and failing to perform it in good faith – within the three and five years preceding the filing of the Complaint, *see*, *e.g.*, *id.* ¶¶10, 14, 59, 66, thereby preventing the declaration of dividends to Plaintiff, *see*, *e.g.*, *id.* ¶11. Thus, the FAC adequately pleads claims for relief.

The FAC also pleads that the claims are timely, alleging that the Third Amendment did not cause Plaintiff's damages for the reasons discussed herein. *Supra* III.A.4-III.B; FAC ¶11, ¶9 n.8. Furthermore, Plaintiff's briefings assert facts that can possibly be proven to support tolling of the claims that accrued prior to those three- and five-year periods. FAC ¶52 & n.19; MTD Opp'n 17-19; Combined Reply 6 & n.6; *infra* VIII. The District Court erroneously found futility based on limitations grounds, and its denial should be reversed.

VIII. THE DISTRICT COURT ERRONEOUSLY REJECTED EQUITABLE TOLLING

Plaintiff can prove facts that would support tolling as to the ongoing-breach claims that arose prior to the three- or five-year periods preceding the filing of his Complaint. *See supra* III.A.4. *First*, the District Court applied the wrong legal standard by requiring the Complaint to allege facts supporting equitable tolling. *See* MTD Mem. 6 (emphasis added) ("[W]hile plaintiff claims to have been 'lulled into inaction' by defendants' assurances, the Court finds no facts supporting this

conclusory statement anywhere *in the complaint*."). That is contrary to the law: "an affirmative defense . . . [is] not something the plaintiff must anticipate and negate in her pleading." *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1986 n.9 (2017); *see de Csepel*, 714 F.3d at 607-08 (citation omitted) ("[P]laintiffs . . . are 'not required to negate an affirmative defense in [their] complaint."); *Jones*, 442 F.2d at 775 ("The statute of limitations…need not be negatived by the language of the complaint."). Thus, the court erred in rejecting equitable tolling on the basis that the Complaint does not allege supporting facts.

Second, the District Court rejected equitable tolling on the erroneous basis that the Third Amendment "form[s] the basis of [Plaintiff]'s claims," MTD Mem. 6, despite acknowledging that he abandoned those claims, *id.* 5 n.4. The District Court observed that the Third Amendment "was public the day it was announced," so it was "not hidden." *Id.* at 6. However, the Third Amendment is not "the basis of [Plaintiff's] claims." *Id.*; *supra* III.B. The basis of his claims is that Directors breached the Quarterly Duty each quarter and continually breached the implied covenant. *Supra* III.A. Thus, the court's ruling is erroneous.

Had the court applied the correct standard to Plaintiff's unabandoned claims that require tolling, it could not have dismissed the claims because Plaintiff can

possibly prove facts supporting equitable tolling.[17] *Supra* III.A.4. Delaware's equitable tolling doctrine applies when "the facts underlying a claim are so hidden that a reasonable plaintiff could not timely discover them."[18] MTD Mem. 6 (citation omitted). The facts underlying the breaches are hidden from reasonable persons because: (1) the non-declaration of dividends, unlike the failure to determine whether to declare dividends, is not inherently unlawful, so it cannot provide notice of misconduct; (2) Directors' omissions occurred at Board meetings that Plaintiff could not join; (3) omissions, unlike affirmative actions, are difficult to detect; and (4) Directors did not disclose the nonperformance of their dividend-related duties in SEC filings.

Knowledge of the mere non-declaration of dividends is insufficient without knowledge of the underlying facts that made the non-declaration unlawful.

[17] In addition, Plaintiff could establish tolling as to claims against Fannie Mae Directors under the "inherently unknowable injuries" doctrine. *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (tolling when the "claimant is blamelessly ignorant of the wrongful act and the injury"); MTD Opp'n 18 ("Plaintiff could not have known[.]"). The facts underlying the breaches are inherently unknowable: (1) the non-declaration of dividends is generally lawful, so it cannot provide notice of misconduct; and (2) shareholders cannot attend Board meetings to observe Directors' breaches.

[18] Equitable tolling under Virginia law requires proof of facts that cannot be determined on a motion to dismiss and would be developed during discovery. *See F.D.I.C. v. Cocke*, 7 F.3d 396, 402 (4th Cir. 1993) (requiring "character of fraud...involving moral turpitude" with the intent and effect of "conceal[ing] the discovery of the cause of action by trick or artifice").

JPMorgan Chase Bank, N.A. v. Ballard, No. CV 2018-0274, 2019 WL 3022338, at *21 (Del. Ch. July 11, 2019) ("[M]ere knowledge of the transfers, without more, does not mean [that plaintiff] had the 'facts necessary to plead the [] claim[.]'"); *Gibralt Capital Corp. v. Smith*, No. 17422, 2001 WL 647837, at *10 (Del. Ch. May 9, 2001) (holding that even though the transaction was disclosed, "the [purchaser] was not disclosed, [so] the statute of limitations was equitably tolled").

Directors' misrepresentations by omission further justify equitable tolling because they failed to disclose their ongoing nonperformance of their Quarterly Duty, which is a material risk, in their SEC filings. Fannie Mae 2014 Form 10-K at 68 (A.___) (acknowledging duty to disclose information when "directly or contingently liable for a material obligation under an off-balance sheet arrangement"); Freddie Mac 2014 Form 10-K at 29 (A.___) (same); *Chao*, 508 F.3d at 1059; *Kaempe*, 367 F.3d at 965; MTD Opp'n 43. Such omissions justify equitable tolling. *Birchwood-Manassas Assocs., L.L.C. v. Birchwood at Oak Knoll Farm, L.L.C.*, 290 Va. 5, 7 (2015); *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 812 (Del. Ch. 2009).

In addition, "[P]laintiff reasonably relie[d] on the competence and good faith of [Directors] a[s] fiduciar[ies]," *Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008), and thus, relied on their SEC filings, which omitted mention of wrongdoing.

Finally, "wrongful self-dealing" supports equitable tolling. *Id.* Directors are agents of the federal government during conservatorship. Treasury is also an agency of the federal government. Thus, Directors' refusal to perform the Quarterly Duty, which maximized dividends to Treasury, constitutes self-dealing.

CONCLUSION

For the foregoing reasons, this Court should reverse the dismissal of the Complaint, vacate the Order dismissing with prejudice, reverse the denials of the motions to alter judgment and amend the Complaint, and remand with instructions to permit Plaintiff to amend his Complaint.

Dated: October 15, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,036 words.

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Dated: October 15, 2019

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 15, 2019, I electronically filed the Opening Brief for Plaintiff-Appellant using the CM/ECF system which will serve notice of such filing upon all parties of record.

Dated: October 15, 2019

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