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,

—and—

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

Nominal Defendant-Appellee.

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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

KIRBY MCINERNEY LLP
PETER S. LINDEN
SETH M. SHAPIRO
250 Park Avenue, Suite 820
New York, New York 10177
(212) 371-6600

DAVID G. EPSTEIN
c/o UNIVERSITY OF RICHMOND
SCHOOL OF LAW
203 Richmond Way, Room 112
Richmond, Virginia 23173
(804) 289-8922

Counsel for Plaintiff-Appellant

JOSHUA J. ANGEL
2 Park Avenue
New York, New York 10016
(917) 714-0409

Plaintiff-Appellant

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GLOSSARY

Plaintiff uses the terms defined below to maintain consistency with the District Court's filings and his Appellant's Brief in order to aid this Court's understanding.

"**Agreement(s)**" means the Senior Preferred Stock Purchase Agreement(s) between Treasury and each of the Companies.

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

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

"**Companies"** means Fannie Mae and Freddie Mac.

"**Conservator**" means the Federal Housing Finance Agency in its capacity as conservator of the Companies.

"**Directors**" means all members of the Boards as of January 1, 2013.

"**Ex. __**" means, unless otherwise indicated, 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.

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

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

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

"**HERA**" means the Housing and Economic Recovery Act of 2008, Pub. L. 110-289, 122 Stat. 2654.

"**Junior Preferred Stock**" means the noncumulative junior preferred stock issued by each Company.

"**Junior Preferred Stockholders**" means the holders of the Junior Preferred Stock.

"**Net Worth Sweep**" means the dividend paid to Treasury every fiscal quarter by the Companies.

"**Senior Preferred Stock**" means the cumulative senior preferred stock issued by each Company to Treasury.

"**Succession Clause**" means the Succession Clause of HERA, codified in 12 U.S.C. §4617(b)(2)(A)(i).

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

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

"**Quarterly Duty**" means the requirement imposed by the Certificates and applicable state laws that each Board must determine whether to declare a dividend on the Junior Preferred Stock during each dividend period.

INTRODUCTION

Plaintiff,[1] a Junior Preferred Stockholder, asserted breach-of-contract and breach-of-implied-covenant claims against the Companies and their Directors for their failure each fiscal quarter since January 1, 2013 to consider whether to declare a Junior Preferred dividend based on then-current financial conditions. Those failures prevented Plaintiff's dividends.

In September 2008, pursuant to the original Agreements, the Companies issued to Treasury Senior Preferred Stock with mandatory, quarterly, 10% dividends. Appellant's Br. ("Pl. Br.") 4. The Agreements have been amended. Numerous times. Notably, the Third Amendment required the Companies to pay all quarterly profit as a dividend to Treasury every fiscal quarter, less a capital reserve amount (the "Net Worth Sweep"). *Id.* 7. As of May 31, 2019, the Companies paid Treasury $292 billion in Senior Preferred dividends. *Fannie Mae and Freddie Mac in Conservatorship: Frequently Asked Questions*, Congressional Research Service, at Summary (May 31, 2019), https://fas.org/sgp/crs/misc/R44525.pdf.[2] Contrary to Defendants' assertions, Appellees' Br. ("Def. Opp.") 9-10, that is $100.5 billion more than Treasury put into the Companies, *Fannie Mae and Freddie Mac in Conservatorship*, at Summary & 1. Of those dividends, $191 billion were paid under

[1] Defined terms have the same meaning as set forth in Plaintiff's Brief at vii-viii.
[2] *Williams v. Lew*, 819 F.3d 466, 473 (D.C. Cir. 2016) (judicial notice of federal government report).

the Net Worth Sweep. *Id.* at Summary. Had the Net Worth Sweep not gone into effect, Treasury would have received 10% of that: $19.1 billion. The difference, $171.9 billion, *id.*, is excess "profit[] that under the initial [A]greements could have been paid to [Company] shareholders who had retained their stakes in the [Companies]," Steven Solomon and David Zaring, *Transactional Administration*, 106 Geo. L.J. 1097, 1122 (2018).

So, it is not surprising that numerous lawsuits have questioned the legality of the Third Amendment and Net Worth Sweep. However, this is not such a suit. Contrary to the district court's finding, Mot. Dismiss Mem. Op. 2 (A.___), *this case does not challenge the legality of the Third Amendment*. The Third Amendment did *not* preclude Directors from performing their Quarterly Duty. Therefore, the court erroneously held that the Third Amendment triggered the running of the limitation periods and rendered Plaintiff's claims time barred. *Id.* 2, 4 (A.___).

This case is different; it arises from Directors' continued failure to perform their Quarterly Duty in the Certificates. The quarterly breaches, not the Third Amendment, "produce[d]…[Plaintiff's] damages." *Id.* 7. Neither the Agreements, the Third amendment, nor federal law eliminated any dividend duties, Pl. Br. 5-6, 11-12, 22, 45; Combined Br. 2-3 (A.___); Combined Reply 19 n.16 & corresponding text (A.___).

SUMMARY OF ARGUMENT

The Complaint was erroneously dismissed. Plaintiff asserted breaches of the Quarterly Duty, on which the court below did not rule. Part I.A. Directors owed that duty each quarter throughout the conservatorship. Part I.B. The court misconstrued those claims as part of Plaintiff's alternative claim for breach arising from the Third Amendment (the "Third Amendment breach"), Part I.C, which Plaintiff abandoned before the Dismissal Order, Part I.D. Regardless, Plaintiff's subsequent filings "effectively amended" the Complaint to add quarterly-breach claims. Part I.E.

Further, the court abused its discretion by imposing prejudice on the dismissal, Part II; denying Plaintiff's Rule 59(e) motion to reinstate the Complaint, which Defendants concede, *infra* note 19; and denying leave to amend the Complaint, Part III.

Defendants' contention that Plaintiff has not sued the proper parties is incorrect. Part IV.

Finally, the court applied incorrect standards for pleading, dismissing claims as time barred, and tolling, which precludes dismissal of the earliest quarterly-breach claims. Part V.

ARGUMENT

I. Plaintiff Stated Timely, Quarterly-Breach Claims.

A. Defendants and the Court Misconstrued Plaintiff's Claims.

Neither Defendants nor the court squarely addressed Plaintiff's Quarterly Duty claims, and on appeal, Defendants do not dispute their failure below. Pl. Br. 10-11, 18 n.7, 33-34. Rather, Defendants persist in arguing that the claims arise from the Third Amendment.[3] Def. Opp. 22-32. Plaintiff asserts quarterly-breach claims that the Third Amendment did *not* cause, Pl. Br. 16-29, making Defendants' cases about contractually required conduct irrelevant, Def. Opp. 26-29.

Duty. Directors must perform their contractual Quarterly Duty, contained in the Certificates, to consider whether to declare Junior Preferred dividends each quarter.[4] *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 594 (Del. Ch. 1986) ("[T]he duty of the corporation *and its directors*" specific to "preferred stock…is…contractual[.]") (emphasis added); *HB Korenvaes Invs., L.P. v. Marriott Corp.*, No. CIV.A. 12922, 1993 WL 205040, at *5 (Del. Ch. June 9, 1993) ("[P]referred stock [rights]…are…created contractually by the certificate of

[3] "[T]he court disregarded" Defendants' failure to address Plaintiff's "ongoing breach claims" even after Plaintiff raised that point in his Combined Motion. Pl. Br. 33. Defendants' and the court's failure to address those claims make dismissal improper, Pl. Br. 33-34, and Defendants cannot challenge those claims now on appeal, *Manitoba v. Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019).

[4] Plaintiff asserts a right to that performance, *not* a right to *receive* dividends every quarter. *Contra* Def. Opp. 14, 17, 50-51.

designation."); Pl. Br. 3-4, 17-23, 33-34. This Circuit already rejected Defendants' argument, raised again here,[5] that Directors' "'sole discretion' about whether…to declare dividends" is unfettered. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 629-32 (D.C. Cir. 2017) ("*Perry II*") (requiring reasonable and good-faith discretion).

Alternatively, the Quarterly Duty is an implied covenant that applies to Directors' discretionary, dividend decisions. *Perry II*, 864 F.2d at 630-31. The duty to consider is necessary for Directors to make a reasonable dividend decision. Without consideration, Directors would have no reason to not declare dividends. Having no reason is necessarily unreasonable. Unreasonableness breaches the Certificates' implied covenant regarding dividends. *Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency*, No. 13 Civ. 1053, 2018 WL 4680197, at *7 (D.D.C. Sept. 28, 2018) ("*Perry III*").

Defendants' two-sentence, conclusory response on appeal is inadequate. *See* Def. Opp. 46 ("the stock certificates neither set forth nor imply such duty"; "that dividends…are…on a quarterly cycle does not impose an affirmative contractual obligation to…deliberate on any particular schedule"). "A party forfeits an argument by mentioning it only []in the most skeletal way." *Manitoba*, 923 F.3d at 179. Defendants' contentions also ignore Plaintiff's citations to cases, statutes, and

[5] *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 301 (D.C. Cir. 2015) (precluding party from raising issue that party raised in a prior case and was resolved in that case).

the Certificates that contradict those conclusory assertions, Pl. Br. 4-5, 11-12, 18-21; *see Penn v. Pemberton & Penn, Inc.*, 189 Va. 649, 649 (1949) ("[R]efus[al] to declare a dividend…[despite] surplus…i[f] so arbitrary or so unreasonable…is subject to judicial review."); *Lehman Bros. Holdings Inc. v. Spanish Broad. Sys., Inc.*, No. CIV.A. 8321, 2014 WL 718430, at *4 (Del. Ch. Feb. 25, 2014), *aff'd*, 105 A.3d 989 (Del. 2014) (noting board "determin[ation]…[to] not…declare or pay the…cash dividend").

Defendants' contention that quarterly dividend periods "do[] not impose a[] [duty]…to…deliberate on any particular schedule" disregards the real effect of Directors' failure to do so each quarter. Because the Junior Preferred Stock is noncumulative, Directors' inaction each quarter has a real, negative, economic effect on Junior Preferred Stockholders: the lost possibility of dividends. The mere declaration of a dividend has a real, positive, economic effect on those stockholders: a debt owed to Junior Preferred Stockholders. 11 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations §5322 (perm. ed., rev. vol. 2019) ("After a dividend…[is] declared…, it becomes a corporate debt owed to the shareholders."); Pl. Br. 4-5, 20.

Defendants' contention also ignores that Directors' failures effectively enhance the value of the common stock at the expense of the Junior Preferred Stock in breach of the Certificates. *E.g.*, Angel Decl., Ex. 2, at 3 (requiring "preference

over…common stock…as to dividends") (A.___); Ex. 4, at § 2(b) (Fannie Mae T Series Certificate) (prohibiting dividends on common stock "unless dividends have been declared and paid…on th[is preferred] Series…for the…quarterly Dividend Period") (A.___).

In addition, Directors' post-Certificate, pre-litigation conduct strongly supports their contractual duty "to deliberate on a[] [quarterly] schedule." Def. Opp. 46. Such conduct "is entitled to the greatest weight" in contract interpretation. 2 E. Allan Farnsworth, Farnsworth on Contracts, at 318 (2d ed. 1998) (citing 4th Circuit case). Directors declared Junior Preferred dividends every quarter from Q1 2000 through Q3 2008. *E.g.*, Freddie Mac 2000 Q1 Form 10-Q at 9; Freddie Mac 2007 Q4 Form 10-Q at 116; Fannie Mae 2002 Form 10-K at 153; and Fannie Mae 2007 Form 10-Q Q1 at 74; Pl. Br. 6 n.5 (citing judicial notice cases). Thus, Directors necessarily performed their Quarterly Duty to consider whether to declare those dividends.

Defendants' conclusory contentions that the Quarterly Duty is "implausible," "pointless," or "hollow" cannot be resolved at the pleading stage and are irrelevant to statutes of limitation. Moreover, Defendants are incorrect: a declared, unpaid "dividend…is…set aside…as money in hand for…the stockholders." Edward P. Welch et al., Folk on the Delaware General Corporation Law §170.07 (6th ed. 2019). The Third Amendment did not eliminate any possibility of this "money in hand."

That possibility was eliminated each quarter by Directors' ongoing failures to consider a dividend and if required, Pl. Br. 6 n.4, to request Treasury's consent to declaration, *id.* 22-23, 24-30.

Breach. Below, Defendants never denied the factual allegation that they failed to consider dividends every quarter. Instead, they tacitly admit breach by calling the Quarterly Duty "pointless." Def. Opp. 47; *supra* page 7. Regardless, the court was required to accept Plaintiff's fact as true. Combined Reply 8-9 & n.9 (A.___); Pl. Br. 29-31.

Regarding Plaintiff's implied-covenant claim, the failure to consider dividends is unreasonable. Furthermore, any consideration or lack thereof was in bad faith due to self-dealing, as the government stands "on both sides" of the dividend transactions. *Infra* note 28.

Causation. Plaintiff adequately pled that Directors' ongoing failure to consider Junior Preferred dividends prevented the declaration of quarterly dividends. Contrary to the court's ruling, it is Directors' quarterly breaches, not the Third Amendment, that "produces all [of Plaintiff's] damage[s]." Mot. Dismiss Mem. Op. 7 (A.___). Whether those breaches in fact caused damages must be accepted as true at this stage. Pl. Br. 15.

Damages. They are undisputed.

Thus, Plaintiff stated valid, quarterly-breach claims.[6]

B. Directors Owed the Quarterly Duty Throughout the Conservatorship.

Defendants dismiss Plaintiff's quarterly claims as an "alternative universe [in which the Companies] function as garden variety publicly traded corporations," "bear[ing] no resemblance to reality." Def. Opp. 2. However, Plaintiff's claims are in the same "universe" as then-FHFA Director Melvin Watt, who stated, "Under conservatorship, the [Companies] continue to operate as business corporations with boards of directors *subject to corporate governance standards*."[7] *Accord* Conference, *Proceedings of the Fall 2014 Conference: The Future of Fannie and Freddie*, 10 N.Y.U. J.L. & Bus. 223, 248 (2014) (quoting Peter Wallison) ("[In] conservatorship…the…directors still run[] the firm;…[the] directors of both [Companies]…and their managements are still in place. [A]bove them is the conservator…, who sets policies for them."). "HERA,"[8] which governs the conservatorship and authorizes regulations and the Agreements, including the Third Amendment, did not eliminate contract or corporate-governance obligations. The

[6] Plaintiff's responses to Defendants' breach-of-contract arguments apply regardless of whether the Quarterly Duty is express or implied.

[7] *Prepared Remarks of Melvin L. Watt Director of FHFA at the Bipartisan Policy Center*, FEDERAL HOUSING FINANCE AGENCY (Feb. 18, 2016) (emphasis added), https://www.fhfa.gov/Media/PublicAffairs/Pages/Prepared-Remarks-Melvin-Watt-at-BPC.aspx.

[8] Pub. L. 110-289, 122 Stat. 2654.

district court should have applied corporate governance and contract law standards to Directors' nonperformance of the Quarterly Duty.

1. No Federal Law Eliminated the Quarterly Duty

Defendants incorrectly argue that HERA and regulations thereunder eliminated or transferred Certificate duties to Conservator. Def. Opp. 31.

This Circuit already rejected that argument, holding that HERA's Succession Clause, 12 U.S.C. §4617(b)(2)(A)(i), *see* Addendum at 31, did not apply to contract claims arising from the Certificates regarding dividends.[9] *Perry II*, 864 F.3d at 624-26, 630-31; Pl. Br. 30 (citing ¶¶2, 119). The claim could not have proceeded against the Companies unless the Companies continued to owe dividend duties in the Certificates during the conservatorship.[10] That holding applies to all dividend duties in the Certificates regardless of whether they bind the Companies or Directors. Defendants are precluded from making the same argument again. *Burwell*, 807 F.3d at 301. They are also precluded from denying their own assertions in SEC filings, Def. Opp. 6-7, which unequivocally state that Directors are authorized to declare

[9] Additionally, the Succession Clause does not apply because it transferred "rights, titles, powers, and privileges," Addendum, not "duties, obligations, or liabilities of…[D]irectors," First Am. Compl. ¶41 (A.___); Pl. Br. 8 n.6.

[10] Plaintiff mistakenly stated that this claim was asserted against Directors. Pl. Br. 46. However, contrary to Defendants' assertion, Def. Opp. 48, Plaintiff correctly stated that "[t]his Circuit" held that the Companies could "be liable…for breaching the Certificates," Pl. Br. 46. *Perry II*, 864 F.3d at 630-31 (remanding implied-covenant claim).

dividends with Treasury consent, Fannie Mae 2008 Form 10-K, at 226 ("[C]onservator directed the Board to…obtain…approval of the conservator before taking…actions involving…dividends."); *see also* Pl. Br. 26 (quoting Forms 10-K).

Furthermore, Defendants contradict that holding in *Perry II* without any basis, Def. Opp. 31 (challenging Complaint), 45 (challenging amended complaint), and by adding the word "alone," which does not appear in the Succession Clause. *Compare* Addendum at 31*with* Def. Opp. 48 ("Conservator alone has held all 'rights, titles, powers, and privileges' that otherwise would be held and exercised by…Directors.").

In any event, no HERA provision eliminates the Boards or their *duties* to shareholders, Conference, *supra* at 9, at 248, including their dividend duties.

While it is axiomatic that boards of directors have discretion in determining whether to declare dividends, and that determination is governed by the business judgment rule, 1 Folk §170.06 ("[D]eclaration of a dividend is ordinarily the sole prerogative of the…directors and the decision is protected by the business judgment rule[.]"), the business judgment rule only protects directors' actions, not inactions, and "has no role where directors have either abdicated their functions, or absent a conscious decision, failed to act," *id.* §141.02(B)(12). The Certificates incorporate those corporate governance duties. *Perry III*, 2018 WL 4680197, at *8 ("[I]nvestor's

contract with the corporation includes…the corporate law under which the corporation is formed and regulated.").

Finally, 12 C.F.R. §1237.12 does not advance Defendants' position. Defendants misrepresent that regulation. *Compare* Def. Opp. 31 ("[D]ividends are…prohibited by regulation.") *with* Addendum, at 31 (quoting §1237.12) ("[FHFA] may delegate the authority to authorize…a capital distribution"). Additionally, Defendants *admitted* in their SEC filings, which they may not now deny, that Directors have dividend authority with Treasury consent. *Supra* pages 10-11 (citing Companies' Forms 10-K). Moreover, the regulation is limited to "mak[ing]," not declaring, dividends, and only "while in conservatorship." §1237.12(a). Therefore, Directors could have declared dividends every quarter and deferred payment until any factor in §1237.12(b) is satisfied or post conservatorship. Moreover, as parties in *Perry II*, Defendants know that the purported "suspen[sion]" of dividends, Def. Opp. 31, has no bearing on whether they continued to owe dividend duties under state law, 864 F.3d at 630-31.

2. Neither the Agreements nor Their Amendments Eliminated the Quarterly Duty.

HERA, which authorized the Agreements, provides no authority to eliminate Directors' Certificate duties. *Perry II*, 864 F.3d at 630-31. Indeed, the Agreements' text expressly allows Junior Preferred dividends. Pl. Br. 25-27; ¶6.

Defendants, however, without quoting the Agreements, simply state that the Agreements "contained…a contractual prohibition" on those dividends. Def. Opp. 29 (citing *Perry II*, 864 F.3d at 601). That statement is, at best, misleading. *See* 864 F.3d at 601 (emphasis added) (noting "a flat prohibition on…'declar[ing] or pay[ing] any dividend…' *without Treasury's advance consent*"). That italicized language, retained by all amendments, expressly acknowledges the possibility of dividends. The language imposes a condition, not a prohibition.[11] Furthermore, Defendants' own SEC filings acknowledge that authorization. *E.g.*, Fannie Mae 2014 Form 10-K at 38 (Agreements require Directors to obtain "Treasury's prior written consent" to "declare or pay any [Junior Preferred] dividend"); Freddie Mac 2014 Form 10-K at 161 (same);[12] Fannie Mae 2008 Form 10-K at 76 ("We were permitted to pay [during the conservatorship]…unpaid dividends on our [junior] preferred stock for the third quarter [that were declared pre-conservatorship]."). Mot. Dismiss Opp'n 7-8 (A.___).

[11] Defendants' assertion that Plaintiff "neither pleaded nor developed" the effect of this prior-consent requirement on his claims is conclusory and baseless. Pl. Br. 4-6, 25-27; Compl., Ex. A, at 20-21 (A.___); Ex. 7 (Treasury FAQ) (A.___); Mot. Dismiss Opp'n 7-8 (A.___); Pl. Combined Br. 7-8 (A.___); Combined Reply 9-10, 17, 18-20 (A.___).

[12] Defendants do not dispute judicial notice of the Companies' 2014 Forms 10-K. *See* Pl. Br. 6 n.5.

C. Plaintiff Pled Quarterly-Breach Claims in the Alternative.

Defendants' arguments that Plaintiff did not alternatively plead his two theories of liability, Def. Opp. 32-35, are unavailing, Pl. Br. 8-10, 10-13, 16-29, 32 (explaining both theories); *McNamara v. Picken*, 950 F. Supp. 2d 125, 129 (D.D.C. 2013) ("reasonable to infer…alternative" allegations). *First*, contrary to Defendants' assertion, Def. Opp. 33, there is no "magic words" requirement to plead in the alternative, *McNamara*, 950 F. Supp. 2d at 128 ("[P]laintiff 'need not use particular words to plead in the alternative as long as it can be reasonably inferred[.]'"), and alternative allegations "may [be] set out…in a single count," Fed. R. Civ. P. 8(d)(2).

Second, in making their argument, Defendants cherry-pick Plaintiff's allegations regarding the Third Amendment claim, Def. Opp. 32-34, and do not address the allegations uniquely supporting the quarterly breach theory, e.g., ¶¶2, 51, 107, 118-19 (A.____), *see* Pl. Decl. in Supp. of Combined Reply, Exs. 1-3 (A.___). That Plaintiff *also* pled a Third Amendment breach does not mean he failed to plead quarterly breaches. Crediting this erroneous argument, as the district court did, eviscerates the right to alternative pleading and effectively allows defendants to redraft complaints. Pl. Br. 32.

Third, Defendants seek, Def. Opp. 33, to stretch an inapplicable ruling to swallow the federal standard for alternative pleading, Fed. R. Civ. P. 8(d)(2)-(3) ("A

party may state…many…claims…regardless of consistency."); Pl. Br. 32. In *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 876-77 (D.C. Cir. 2014), the court refused to treat allegations of naturally and non-naturally occurring substances as alternatively pled because those facts are not mutually exclusive. *Id.* at 877. Here, Plaintiff alternatively pled legal theories, not facts.[13] Moreover, both theories are mutually exclusive, so they necessarily were pled alternatively. Either the Third Amendment precluded Plaintiff's dividends (constituting a breach), or it did not (no breach).

D. Plaintiff Abandoned the Third Amendment Breach Theory.

The court erroneously ruled on Plaintiff's abandoned claim. Defendants recognize that Plaintiff "abandoned the position that the Third Amendment constituted an 'anticipatory breach.'"[14] Def. Opp. 35. Nevertheless, attempting to tether Plaintiff to that time-barred claim, Defendants argue that Plaintiff did not abandon a claim that the Third Amendment was an "actual breach." *Id.* That argument makes no sense. "Anticipatory breach" is a doctrine that allows a person to "su[e] for damages" upon "repudiation," i.e., an act that makes performance

[13] The court did not address the quarterly-breach claims at all and therefore, did not decide which theory of liability is correct. *See* Mot. Dismiss Mem. Op. 3 (holding that when a breach arises from executing a contract, no subsequent breaches arise from performance) (A.___). The court addressed alleged quarterly breaches only in the context of the Third Amendment breach theory and only as to tolling.

[14] Plaintiff did so because the Third Amendment did not prevent his dividends.

impossible. *Perry II*, 864 F.3d at 632; Combined Reply 13 (A.___). Filing suit "ripen[s the repudiation] into a breach." *Id.* Therefore, there is no "actual breach" distinct from the repudiation. There also was no repudiation because performance was still possible, hence Plaintiff's abandonment of that claim.

Defendants may not challenge the court's ruling on that issue because they did not file a notice of appeal. *Draper v. U.S. Postal Serv. Headquarters*, 777 F. App'x 523 (D.C. Cir. 2019).

E. Plaintiff's Filings Effectively Amended the Complaint

Even if this Court finds that quarterly-breach claims were unalleged, the district court erroneously "fail[ed] to consider…[*pro se* plaintiff's C]omplaint 'in light of' all filings" asserting those claims.[15] Pl. Br. 34. Defendants do not dispute that law. Def. Opp. 34 n.12. They dispute only the applicability of *pro se* status to Plaintiff. However, Defendants, having filed no notice of appeal, cannot challenge the court's ruling granting *pro se* leniency. *Draper*, 777 F. App'x at 523. Regardless, the court properly granted it. Mot. Dismiss Mem. Op. 1 n.1 (A.___).

[15] *Brown v. Whole Foods Mkt. Grp., Inc.*, 789 F.3d 146, 152 (D.C. Cir. 2015); *Richardson v. United States*, 193 F.3d 545, 546 (D.C. Cir. 1999) (reversing dismissal because plaintiff's opposition brief "effectively amended [the] complaint to state a legitimate claim"); *Lindsey v. United States*, 448 F. Supp. 2d 37, 61-63 (D.D.C. 2006) (granting *pro se* plaintiff leave to replead *sua sponte*), *abrogated on other grounds*, *Ramer v. United States*, 620 F. Supp. 2d 90 (D.D.C. 2009); Pl. Br. 34-35.

This Circuit has allowed such leniency for attorneys based on equitable factors that apply here. Pl. Br. 35 (citing Combined Reply 6 n.7).[16]

II. Defendants Fail to Dispute the Impropriety of Imposing Prejudice.

"Defendants conceded [Plaintiff's] *Firestone* [argument]" below, so they may not dispute it on appeal. Pl. Br. 43. Regardless, Defendants do not dispute that the court imposed prejudice without explanation. *See* Pl. Br. 39-42. Rather, in a footnote, they argue – without authority – that those failures did not violate *Firestone* because they "ceased to have practical significance" given that the court entertained Plaintiff's motion to amend.[17] Def. Opp. 40 n.16. First, "practical significance" is not the standard. *See* Pl. Br. 39 (quoting *Belizan v. Hershon*, 434 F.3d 579, 584 (D.C. Cir. 2006)) ("'[F]ail[ure to] adequately…explain, with reference to the standard [] in *Firestone*, why it dismissed [the] complaint with prejudice' requires vacatur of the order.").

Second, there *was* practical significance. The court ruled on futility *after* Plaintiff had prepared his briefings to amend the Complaint, so he could not address

[16] Plaintiff meets the relevant standard. *Richardson*, 193 F.3d at 548-49 (holding that *pro se* plaintiff's filings amended his complaint).

[17] Defendants explain that the ruling on Plaintiff's subsequent motion to amend as futile means that the court did not "treat the original dismissal as barring Plaintiff's attempt to amend." Def. Opp. 40 n.16. The proposition lacks authority and sense. *First*, the court designated "the case [as] 'Terminated' on the date of the [Dismissal] Order," and that designation remains. Combined Br. 5 (A.___). *Second*, merely hearing a motion for reconsideration to remove prejudice cannot remove prejudice.

the court's rationale beforehand. *See* Pl. Br. 40-43. Worse, that prejudice continues on appeal because even "when advised of the failure to comply with *Firestone*" in the Dismissal Order, the court again "failed to make the *Firestone* determination" in its subsequent order. *Id.* 41-42 & n.15 (quoting Combined Order 2). The court again did even address Plaintiff's quarterly-breach claims.[18] Thus, Plaintiff is still in the dark as to why he could not amend his complaint.

III. The District Court Abused Its Discretion in Denying Amendment to the Complaint.[19]

The court erroneously denied leave to amend as futile by again ruling on the Third Amendment claim without considering the quarterly-breach claims. Pl. Br. 44-49. Leave to amend should be "freely grant[ed]." *De Sousa v. Dep't of State*, No. 09 Civ. 0896, 2010 WL 11594933, at *2 (D.D.C. June 4, 2010); Pl. Br. 16, 43-49. Below and on appeal, Defendants misconstrue the quarterly-breach claims in the amended complaint as arising from the time-barred, Third Amendment claim.

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[18] The court noted quarterly breaches only as to tolling under the continuing-wrongs doctrine, not as a distinct claim. Mot. Dismiss Mem. Op. 6-7 (A.___). Furthermore, the court rejected such tolling because the Third Amendment was "the alleged original sin…[that] produces all the damage," *id.* 7 (A.___), showing that the court did not consider the distinct claims arising from quarterly breaches not caused by the Third Amendment.

[19] The court also abused its discretion in denying Plaintiff's Rule 59(e) motion. Pl. Br. 43-51. By ignoring Plaintiff's argument, Defendants concede the point. *Id.* 34 (citing cases). Therefore, this Court should reinstate the Complaint. Am. Proposed Order (A.___).

First, Defendants dispute that they effectively conceded Plaintiff's Rule 15(a) motion below,[20] but they did not substantively challenge the actual allegations. Pl. Br. 44-49; *Manitoba*, 923 F.3d at 179 ("A party forfeits an argument by mentioning it only 'in the most skeletal way[.']"). Even on appeal, in two sentences, Defendants merely quote a heading and cite three amended complaint paragraphs (¶¶8, 11, 52 n.19)[21] that they cited in their brief below to argue that their opposition below was substantive. Def. Opp. 44.

Regardless, Defendants did not dispute *Plaintiff's* allegations below, but rather, allegations that Defendants misinterpreted in a transparent effort to support their position that only the Third Amendment breach was pled. *Compare* First Am. Compl. ¶8 ("The Third Amendment…required…quarterly dividend[s]…to Treasury…amount[ing to]…each [Company]'s entire net quarterly profits[.]") (A.___) *with* Combined Opp'n 12-13 (quoting First Am. Compl. ¶8 and adding, "—

[20] Defendants made the conclusory assertion that the amended complaint was just like the original and then proceeded to rely on, nearly exclusively, the original's allegations. Combined Opp'n 12-14 (A.___). On appeal, Defendants also rely on the *original* Complaint's allegations, which are irrelevant. Def. Opp. 43 (citing Compl. ¶6 (A.___)).

[21] Defendants cited two other amended allegations in opposition to the amended complaint but fail to address them on appeal. Combined Opp'n 14, 13 (citing ¶¶47, 58) (A.___)). Regardless, Defendants did not discuss the content of ¶58 at all and cited ¶47 for an irrelevant point that they also abandoned by not raising it on appeal. *United States v. Wheeler*, 403 F. App'x 518, 519 (D.C. Cir. 2010) ("[A]rgument[s]...raised for the first time at oral argument [are] forfeited[.]").

thus leaving nothing available as dividends for junior preferred shareholders") (A.___).[22] That added language contradicts Plaintiff's other allegations. First Am. Compl. ¶11 ("[T]he Third Amendment could not have…cause[d]…the…failure of Directors to declare and pay dividends[.]"), ¶¶57-58 ("The Third Amendment did not affect the Directors' obligation to perform the Quarterly [] Duty…no[r] cause Directors to not declare or pay dividends[.]") (A.___). Defendants argue that these allegations "do not sever the link" from the Third Amendment, Def. Opp. 43, but Plaintiff has shown otherwise, Pl. Br. 24-26; *supra* Part I.B. Defendants also called ¶11 "conclusory," quoting only one sentence. Combined Opp'n 13 (A.___). The preceding sentence and other allegations provide factual support. First Am. Compl. ¶11 (alleging that Directors could declare dividends with Treasury's consent); *id.* ¶6 (same, quoting the Agreements) (A.___); Mot. Dismiss Opp'n 7-8 (same, quoting Fannie Mae 2008 Form 10-K, Part II, at 76) (A.___); First Am. Compl. at 2 (incorporating "[t]he sources…attached to Plaintiff's declaration in opposition to Defendants' motion to dismiss") (A.___). Defendants misrepresent ¶52 n.19 of the amended complaint as alleging causation, Combined Opp'n 13 (A.___), rather than bad-faith motive, *infra* pages 21-22.

Defendants' remaining arguments on appeal fare no better.

[22] *See also* Def. Opp. 42 (same statement on appeal).

First, Defendants' incorrectly argue that the Complaint "contradict[s] itself." Def. Opp. 44. They contend that it is "factually impossible" for Junior Preferred dividends to be declarable when the Companies' entire net worth had to be paid as Senior Preferred dividends. *Id.* 43. Yet, Defendants completely ignore Plaintiff's explanation to the contrary. Pl. Br. 24-28; *supra* Part I.B. That explanation shows why Plaintiff abandoned his Third Amendment claim from his amended complaint, so Defendants quote it from the original Complaint. Furthermore, Defendants' factual-impossibility rationale concerns *payment*. Def. Opp. 44. Net worth dividends did not prevent Directors from *considering* whether to declare Junior Preferred dividends and deferring payment post conservatorship. Pl. Br. 24-28.

Second, Defendants' observation that the alleged quarterly breaches began on the effective date of the Third Amendment, January 1, 2013, does not show causation by the Third Amendment. Def. Opp. 42-43. Directors "fail[ed] to perform their Quarterly…Duty" beginning on that date in order "to inflate [Treasury's senior preferred]…dividend payments." First Am. Compl. ¶14 (A.___); *see also id.* ¶66 ("Defendants breached…the implied covenant…and the Quarterly…Duty every quarter…to artificially increase [Company] quarterly profits") (A.___). Thus, the Third Amendment provides a motive for, but did not cause, Directors' quarterly

failures and Plaintiff's damages. Directors' quarterly failures independently prevented dividend declaration.[23] Pl. Br. 22, 24-26.

Third, Defendants attempt to excuse as irrelevant, Def. Opp. 44, that the court "misunderstood" the amended complaint as asserting claims against FHFA, Pl. Br. 10 (the court "erroneously conflat[ed]" the claims), 16 (same). However, the quarterly-breach claims arise from state law, which governs Directors, not FHFA. Pl. Br. 44-46 ("Plaintiff made no such allegation [against FHFA]."). The court's finding that Plaintiff alleged contractual breaches by FHFA underscores that the district court did not rule on Plaintiff's quarterly-accruing breach claims independent of the Third Amendment. Combined Order 3 (A.___); *supra* Part I; Pl. Br. 16-28.

IV. Directors Are Proper Defendants.

Defendants abandoned the argument that Directors are improper defendants as nonparties to the Certificates, Def. Opp. 45-46, because Defendants failed to raise it in opposition to Plaintiff's Combined Motion, Combined Opp'n 14-16 (arguing that Directors are "wrong defendants" *solely* because "any such duty would have transferred to…Conservator") (A.___). Because the argument is not "properly raised" on appeal, Def. Opp. 45 (citation omitted), it may not be a basis for affirming any ruling below. Regardless, Directors are proper defendants. *E.g.*, *Gale v.*

[23] Though unnecessary to plead the claim, motive also goes to bad faith, which, alternatively with unreasonableness, is an element of the implied-covenant claim.

Bershad, No. CIV.A. 15714, 1998 WL 118022, at *1 (Del. Ch. Mar. 4, 1998) (allowing breach-of-contract and implied-covenant claims arising from preferred stock certificates to proceed against directors).

Defendants' other arguments are irrelevant: they bear on whether the Quarterly Duty exists, not whether Directors are proper parties.[24] Regardless, those arguments lack merit. *Supra* pages 4-8.

V. Tolling Applies to the Earliest Quarterly-Breach Claims.

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

Defendants make the conclusory assertion that no limitations issues in this case "depend on contested questions of fact." Def. Opp. 37. That is wrong. As demonstrated above, Plaintiff alleges that Junior Preferred dividends were still possible even after the Third Amendment, a fact that Defendants contest. This

[24] Plaintiff properly named the Companies as Defendants in the Complaint. Defendants assert that Plaintiff "renounced any intent to pursue claims against" the Companies. Def. Opp. 21. However, such waiver requires "an intentional…abandonment of a *known* right." *Barber v. Page*, 390 U.S. 719, 725 (1968) (emphasis added). Plaintiff while appearing *pro se*, believed that he "ha[d] no" claims against the Companies, Combined Reply 2 (emphases added) ("Plaintiff…*has no claims* against…[the Companies]. Even if the Court were to deny the [Motion to Dismiss], Plaintiff *would have no claims* against…[them].") (A.___). If this Court holds that Directors are improper defendants for the contract-law claims, Plaintiff should be permitted, on remand, to conform his amended complaint to maintain the Companies as defendants as to those claims.

contested question of fact precludes resolution of the limitations defense at this stage.

In any event, accrual occurs upon each quarterly breach. Mot. Dismiss Mem. Op. 7 (A.___). Defendants conceded quarterly breaches below, having "never denied that" Directors failed to consider Junior Preferred dividends every quarter. Combined Reply 9 n.9 (A.___). Moreover, Defendants tacitly admit quarterly breach on appeal. Def. Opp. 47; *supra* page 7. By conceding quarterly breaches, Defendants concede quarterly accrual of claims. Most of those claims are timely without tolling,[25] so they were improperly dismissed as time barred. *See* Pl. Br. 21-22, 23-24.

Defendants also "attempt[] to [discredit a] standard in [Plaintiff's] favor" on a basis that this Circuit has already rejected.[26] Def. Opp. 41 n.17. Dismissal on limitations grounds "is appropriate only if the complaint on its face is *conclusively* time-barred," i.e., "the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Momenian v. Davidson*, 878 F.3d

[25] They accrued on and after June 30, 2015 against Freddie Mac and June 30, 2013 against Fannie Mae. Pl. Br. 23-24. Tolling applies to earlier claims. *Infra* Part V.B.

[26] Defendants also attempt to dispute the standard on the basis that Plaintiff relies on a local court opinion, Def. Opp. 41 n.17, but Plaintiff quoted that same standard from an opinion by this Circuit as well, Pl. Br. 16, 36 (quoting *Jones v. Rogers Mem'l Hosp.*, 442 F.2d 773, 775 (D.C. Cir. 1971)); *see also Momenian v. Davidson*, 878 F.3d 381, 388 (D.C. Cir. 2017)) (cited in Pl. Br. 15, 16, 29, 36, 37).

381, 387 (D.C. Cir. 2017); Pl. Br. 15, 16, 29, 36, 37. 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.'" Pl. Br. 36 (quoting *Bancroft Glob. Dev. v. United States*, 330 F. Supp. 3d 82, 96 (D.D.C. 2018)). Rejecting Defendants' argument that this standard is a pre-*Twombly*, "obsolete rule," Def. Opp. 41 n.17, this Circuit held: "*Twombly*…did not alter the principle that '[c]omplaints need not… attempt to plead around[] potential affirmative defenses.'…[A]s long as a plaintiff's potential 'rejoinder to the affirmative defense [is not] foreclosed by the allegations in the complaint,' dismissal at the Rule 12(b)(6) stage is improper." *de Csepel v. Republic of Hungary*, 714 F.3d 591, 608 (D.C. Cir. 2013) (cited in Pl. Br. 35, 38, 49).

Tellingly, Defendants admit that the standard "favor[s]" Plaintiff. *Id.* 41 n.17. The court erroneously dismissed the claims as time barred.

B. Tolling Precludes Dismissal.

Defendants' arguments against tolling similarly fail for applying the incorrect tolling standards. Def. Opp. 37-40, 40 n.16; Pl. Br. 49-52.

The substance of Defendants' three arguments fares no better. *First*, Defendants' authorities, which required "a factual basis for equitable tolling" in the complaint, are inapposite. Def. Opp. 39. Defendants' state court case, *Birchwood-Manassas*, is irrelevant here because pleading requirements are procedural, Fed. R.

Civ. P. 8, and "federal courts are to apply…federal procedural law," *Burke v. Air Serv Int'l, Inc.*, 685 F.3d 1102, 1107 (D.C. Cir. 2012); *see Perry II*, 864 F.3d at 603 n.6, 626 n.24 (applying federal procedural rules).

The plaintiffs in Defendants' two federal cases, *Neal v. Stryker Corp.* and *Felter v. Kempthorne*, failed to raise Plaintiff's argument that complaints need not allege facts in anticipation of defenses, so "[t]hose cases…do not support [Defendants'] argument." *Bouknight v. D.C.*, 109 F. Supp. 3d 244, 249 (D.D.C. 2015). Regardless, Defendants' federal cases contradict Supreme Court precedent. *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1986 n.9 (2017); *see* Pl. Br. 49-50; *Firestone v. Firestone*, 76 F.3d 1205, 1210 (D.C. Cir. 1996) ("Nor [must]…plaintiff[]…plead fraudulent concealment in the complaint" concerning D.C. claims, but rather, "only when defendant raises the…limitations…defense[.]").

Second, Defendants misleadingly argue that Plaintiff's pleadings "affirmatively *negat[ed]*…tolling." Def. Opp. 38. *Compare* Compl., Ex. A, at 28 ("[T]he…conservatorship is…has consumed me as an investor since late 2013.") (A.___) *with* Def. Opp. 38 (emphasis added) ("The conservatorship *and Third Amendment* issues have 'consumed' Plaintiff 'since late 2013[.]'"). Moreover, the Third Amendment has no bearing on whether Plaintiff knew sufficient facts showing that the non-declaration of dividends wrongful so that he could plead a claim. Pl. Br. 51-52. Defendants do not dispute that such knowledge is required. Def. Opp.

37-40. Assuming, without conceding, that Plaintiffs knew sufficient facts of wrongfulness in 2016 to plead a claim, Def. Opp. 38 (citing ¶ 34 n.4), then tolling applies up to that date. *Certainteed Corp. v. Celotex Corp.*, No. CIV.A. 471, 2005 WL 217032, at *7 (Del. Ch. Jan. 24, 2005); *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 120 (2008) ("[P]laintiff failed to [timely] discover those facts [that are the basis of plaintiff's claim.]"). That Plaintiff filed suit two years, *id.* 38-39, is irrelevant because he had three years to file.

Third, Defendants misstate state law, Def. Opp. 37-38, arguing that Plaintiff failed to identify fraud or affirmative concealment, *id.* 39-40. Delaware requires neither. Mot. Dismiss Mem. Op. 6 ("situations absent fraud…'where the facts underlying a claim are so hidden that a reasonable plaintiff could not timely discover them'") (A.___).[27] Virginia requires "moral turpitude," such as bad faith, which falls short of fraud, and affirmative concealment. Pl. Br. 51 n.18.

Defendants do not dispute Plaintiff's factual assertions showing why "his claims [were] hidden" enough to prevent timely discovery of his claims. Def. Opp.

[27] Defendants fabricate an equitable-tolling requirement, "affirmative act[s] of concealment," by citing a case on fraudulent-concealment tolling. Def. Opp. 38 (quoting *Kerns v. Dukes*, No. CIV.A. 1999-S, 2004 WL 766529, at *5 (Del. Ch. Apr. 2, 2004)).

39-40 (disputing that those facts rise to fraud, which is irrelevant). That alone precludes dismissal of the Delaware claims.[28] Pl. Br. 51.

Defendants also do not dispute that self-dealing tolls the limitations period under Delaware law.[29] Pl. Br. 52.

Finally, contrary to Defendants' assertion, the Companies' SEC filings show affirmative acts of concealment. Def. Opp. 40. Defendants cite the Companies' 2008 Form 10-Ks, at 24, which state that the "conservator has *eliminated* common and preferred stock dividends []other than dividends on the senior preferred stock…during the conservatorship." *Id.* 7 (emphasis added); *see also* Compl., Ex. A, at 20-21 (quoting Freddie Mac 2008 10-K) (A.___). Those statements affirmatively conceal the fact that dividends were possible. *Supra* page Part I.B.; Pl. Br. 24-29; *supra* page 27 (discussing Virginia standard). They affirmatively

[28] This also invokes inherently-unknowable-injuries tolling because Plaintiff "is blamelessly ignorant of the wrongful act and…injury." Pl. Br. 50 n.17; Pl Combined Reply 6 (A.___).

[29] The Government, controlling Conservator, the Companies, and Treasury, 12 U.S.C. §§1452(f)(1), 1717(a)(1), 4511(b), Mot. Dismiss Opp'n 4-5 (A.___), stood "on both sides" of the dividend transactions and benefited from the non-declaration of Junior Preferred dividends, First Am. Compl. ¶¶14, 66 (A.___); *Howland v. Kumar*, No. 2018 Civ. 0804, 2019 WL 2479738, at *7 n.50 (Del. Ch. June 13, 2019); *RCS Creditor Tr. v. Schorsch*, No. 2017 Civ. 0178, 2018 WL 1640169, at *2 (Del. Ch. Apr. 5, 2018) ("classic example of self-dealing by corporate fiduciaries"); *O'Brien v. Midgett*, 96 Va. Cir. 177 (2017) (interest-free loan to director's parents was not "an arm's-length bargain"); *supra* Part I (explaining that the excessive dividends were not at arm's length).

misrepresent that the Agreements allow dividend declaration and payment with Treasury's consent. *Supra* Part I.B; Pl. Br. 24-26. "[A]ffirmative misrepresentation...tolls the running of the statute of limitations...if...intended...to obstruct the filing of the action." *Newman v. Walker*, 270 Va. 291, 293 (2005); *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 812 (Del. Ch. 2009) (misrepresentations in SEC filings warranted "equitable tolling...while…plaintiff…reasonably relied upon the competence and good faith of a fiduciary" and "[n]o evidence of actual concealment is necessary"). Material omissions in SEC filings that Defendants were breaching their Quarterly Duty also warrant equitable tolling. Pl. Br. 52. Plaintiff can "possibly" prove facts showing that Defendants intended these misrepresentations to conceal the claims, so the claims were erroneously dismissed as time barred. *Momenian*, 878 F.3d at 387; Pl. Br. 48-51.

CONCLUSION

This Court should reverse the district court rulings that Plaintiff challenges.

Dated: January 22, 2020

Respectfully submitted,

KIRBY McINERNEY LLP
/s/ Peter S. Linden
Peter S. Linden (D.C. Bar 61848)
Seth M. Shapiro (D.C. Bar 61961)
250 Park Avenue, Suite 820
New York, New York 10177
Telephone: (212) 371-6600
Facsimile: (212) 699-1194
E-mail: plinden@kmllp.com
sshapiro@kmllp.com

David G. Epstein (D.C. Bar 61998)
c/o UNIVERSITY OF RICHMOND SCHOOL OF LAW
203 Richmond Way, Room 112
Richmond, VA 23173
Telephone: (804) 289-8922
Facsimile: (804) 289-8992
E-mail: depstein@richmond.edu

Counsel for Plaintiff-Appellant

Joshua J. Angel
2 Park Avenue
New York, NY 10016
Telephone: (917) 714-0409

Plaintiff-Appellant

ADDENDUM OF PERTINENT STATUTORY AND REGULATORY TEXT

12 U.S.C. §4617(b)(2)(A)(i) Authority Over Critically Undercapitalized Regulated Entities

(b) Powers and Duties of the Agency as Conservator or Receiver

…

(2) General powers

(A) Successor to regulated entity

The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to--

(i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity.

12 C.F.R. §1237.12 Capital distributions while in conservatorship.

(a) Except as provided in paragraph (b) of this section, a regulated entity shall make no capital distribution while in conservatorship.

(b) The Director may authorize, or may delegate the authority to authorize, a capital distribution that would otherwise be prohibited by paragraph (a) of this section if he or she determines that such capital distribution:

(1) Will enhance the ability of the regulated entity to meet the risk-based capital level and the minimum capital level for the regulated entity;

(2) Will contribute to the long-term financial safety and soundness of the regulated entity;

(3) Is otherwise in the interest of the regulated entity; or

(4) Is otherwise in the public interest.

(c) This section is intended to supplement and shall not replace or affect any other restriction on capital distributions imposed by statute or regulation.

Federal Rule of Civil Procedure 8. General Rules of Pleading

…

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) ***In General.*** Each allegation must be simple, concise, and direct. No technical form is required.

(2) ***Alternative Statements of a Claim or Defense.*** A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) ***Inconsistent Claims or Defenses.*** A party may state as many separate claims or defenses as it has, regardless of consistency.

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 6,461 words.

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Dated: January 22, 2020

/s/ Peter S. Linden
Peter S. Linden

Counsel for Plaintiff-Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 22, 2020, I electronically filed the Reply Brief for Plaintiff-Appellant using the CM/ECF system, which will serve notice of such filing upon all parties of record.

Dated: January 22, 2020

/s/ Peter S. Linden
Peter S. Linden

Counsel for Plaintiff-Appellant