ORAL ARGUMENT SCHEDULED FOR APRIL 7, 2020
No. 19-7062

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

JOSHUA J. ANGEL,
Plaintiff-Appellant,

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia
No. 1:18-cv-01142-RCL

BRIEF OF APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

The Plaintiff-Appellant in this case is Joshua J. Angel. Defendants-Appellees in this case are Federal Home Loan Mortgage Corporation ("Freddie Mac"), Federal National Mortgage Association ("Fannie Mae"), 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, Egbert L.J. Perry, Amy E. Alvin, William T. Forrester, Brenda J. Gaines, Frederick B. Harvey, III, Robert H. Herz, Timothy J. Mayopoulos, Diane C. Nordin, Jonathan Plutzik, David H. Sidwell, and the Federal Housing Finance Agency ("FHFA"), as Conservator for Freddie Mac and Fannie Mae. No amici have appeared in the district court or in this Court.

Fannie Mae is a government-sponsored enterprise chartered by Congress to establish secondary market facilities for residential mortgages, provide stability in the secondary market for residential mortgages, and promote access to mortgage credit throughout the nation. 12 U.S.C. § 1716. Fannie Mae does not have a parent corporation and, according to SEC filings, no publicly held corporation owns 10% or more of Fannie Mae's common (voting) stock.

Freddie Mac is a government-sponsored enterprise chartered by Congress to promote access to mortgage credit throughout the nation. 12 U.S.C. § 1451. Freddie Mac has no parent corporation. It is a publicly traded company and, according to public securities filings, no publicly held corporation owns 10% or more of Freddie Mac's common stock.

As a federal agency, FHFA is not required to file a corporate disclosure statement under Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1. The other appellees are individuals and as such are not required to file a corporate disclosure statement under the same rules.

B. Rulings Under Review

Appellant seeks review of the following rulings by the Honorable Judge Royce C. Lamberth of the United States District Court for the District of Columbia: (1) the Memorandum Opinion and the Order, both entered March 6, 2019, granting the Appellees' Joint Motion to Dismiss and dismissing the Complaint with prejudice, and (2) the Memorandum & Order denying Appellant's combined motion to alter judgment and for leave to amend entered on May 24, 2019. The District Court's March 6, 2019 Memorandum Opinion is available at *Angel v. Fed. Home Loan Mortg. Corp.*, No. 1:18-CV-01142, 2019 WL 1060805 (D.D.C. Mar. 6, 2019). Appellees are not aware of any official citations to the other above-mentioned rulings.

C. Related Cases

This case has not previously been before this or any other court besides the district court.

Appellees are not aware of "related cases" as defined in D.C. Circuit Rule 28(a)(1)(C), i.e., cases involving "substantially the same parties and the same or similar issues" pending in other United States courts of appeals or other courts in the District of Columbia. The parties stipulated below that this case was "closely related" to several other actions then pending (and still pending now) in the U.S. District Court for the District of Columbia, under the definition of "related" that the district court uses, because those actions "involve common issues of fact." Joint Mot. To Transfer, ECF 10 (A.90, 92) (citing D.D.C. LCvR 40.5(a)(3)).[1]

Appellees further note that there are several actions pending in other United States courts of appeals, the U.S. Court of Federal Claims, and various federal district courts that also challenge the same transactions at issue here (generally referred to as the "Third Amendment" to stock purchase agreements between the FHFA, as Conservator for Fannie Mae and Freddie Mac, and the U.S. Department

[1] *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigs.*, No. 13-mc-1288 (D.D.C.); *Fairholme Funds, Inc. v. FHFA*, No. 13-cv-1053 (D.D.C.); *Arrowood Indemnity Co. v. FHFA*, No. 13-cv-1439 (D.D.C.).

of the Treasury), but involve distinct legal theories and different plaintiffs from this case; most of them also involve different defendants.[2]

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[2] *Collins v. Mnuchin*, No. 17-20364 (5th Cir.), *petitions for cert. filed*, Nos. 19-422, 19-563; *Bhatti v. FHFA*, No. 18-2506 (8th Cir.) *Akanthos Opportunity Master Fund v. United States*, No. 1:18-cv-00369 (Fed. Cl.); *Appaloosa Inv. Ltd. P'ship v. United States*, No. 1:18-cv-00370 (Fed. Cl.); *Arrowood Indem. Co. v. United States*, No. 1:13-cv-00698 (Fed. Cl.); *CSS, LLC v. United States*, No. 1:18-cv-00371 (Fed. Cl.); *Fairholme Funds, Inc. v. United States*, No. 1:13-cv-465 (Fed. Cl.); *Fisher v. United States*, No. 1:13-cv-00608 (Fed. Cl.); *Mason Capital L.P. v. United States*, No. 1:18-cv-00529 (Fed. Cl.); *Owl Creek Asia I, L.P. v. United States*, No. 1:18-cv-00281 (Fed. Cl.); *Rafter v. United States*, No. 1:14-cv-00740 (Fed. Cl.); *Reid v. United States*, No. 1:14-cv-00152 (Fed. Cl.); *Washington Federal v. United States*, No. 1:13-cv-00385 (Fed. Cl.); *Rop v. FHFA*, No. 1:17-cv-00497 (W.D. Mich.); *Wazee Street Opportunities Fund IV LP v. FHFA*, No. 2:18-cv-03478 (E.D. Pa.); *Wazee Street Opportunities Fund IV LP v. United State*s, No. 1:18-cv-01124 (Fed. Cl.); *Cacciapalle v. United States*, No. 1:13-cv-466 (Fed. Cl.).

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

GLOSSARY

"Conservator" means the Federal Housing Finance Agency in its capacity as conservator of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

"Enterprise(s)" means the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

"Fannie Mae" means the Federal National Mortgage Association.

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

"FHFA" means the Federal Housing Finance Agency.

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

"**Senior Preferred Stock Purchase Agreement(s)"** means the Senior Preferred Stock Purchase Agreement(s) between Treasury and the Conservator on behalf of each of the Enterprises.

"Third Amendment" means the Third Amendments to the Senior Preferred Stock Purchase Agreements, dated August 17, 2012.

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

INTRODUCTION

Plaintiff owns Fannie Mae and Freddie Mac stock. In this lawsuit, he maintains that his dividend rights have been adversely affected by the terms of an agreement between Fannie Mae and Freddie Mac's Conservator and the Department of Treasury, which secured Treasury's continued backstop of hundreds of billions of taxpayer dollars. In filing the action, Plaintiff follows in the footsteps of numerous other shareholders who have brought claims challenging the relevant transaction, known as the "Third Amendment" and sometimes referred to as the "Net Worth Sweep." *See*, *e.g.*, *Perry Capital, LLC v. Mnuchin*, 864 F.3d 591 (D.C. Cir. 2017). Unlike the other shareholders, however, Plaintiff waited almost six years after that transaction to bring suit. That was too long under the Virginia and Delaware statutes of limitations that govern his claims.

On appeal, Plaintiff primarily argues that his claims are timely because his legal theory actually has nothing to do with the Third Amendment. But Plaintiff himself puts the Third Amendment at the center of his Complaint. Starting with paragraph 1—which describes "[t]his action" as being "for damages incurred in connection with each of the Companies' entry, on August 17, 2012, into [the] third amendment"—the Complaint describes the Third Amendment as the fundamental wrong that gives rise to a succession of denials of dividends to junior shareholders. While Plaintiff theorizes that each quarter he is denied a dividend represents a new

breach that resets the clock, the district court properly rejected that theory based on controlling principles of Virginia and Delaware law, to which Plaintiff offers no response.

The claims in this case are also meritless for reasons independent of the statutes of limitations, providing alternative grounds for affirmance. Plaintiff seeks to proceed based on an amended complaint that renounces any claims against the Conservator and the Enterprises, and pursues relief only from members of the Fannie Mae and Freddie Mac boards of directors. But that strategy both presupposes a contractual obligation on the part of the directors that does not exist, and overlooks that the relevant legal powers and functions of the directors have been transferred to the Conservator by operation of statute.

At bottom, Plaintiff's claims against directors for not regularly considering and declaring dividends envision an alternate universe in which the Enterprises have not been in conservatorship for the last decade and are not obligated to Treasury for the nearly $200 billion in taxpayer dollars that was necessary to keep them afloat—but rather function as garden-variety publicly traded corporations. That vision bears no resemblance to reality. This Court should affirm the judgment of dismissal.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the claims pursuant to 28 U.S.C. §§ 1331 and 1332(a) and 12 U.S.C. §§ 1452(f)(2), 1717(a)(2)(B), and 1723a(a). This Court has jurisdiction over the district court's final order pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Did the district court err in finding Plaintiff's contract and implied-covenant claims time-barred under Virginia and Delaware law and that no grounds for tolling applied?

II. Did the district court abuse its discretion in denying Plaintiff leave to file an amended complaint that pleaded a theory of recurring independent quarterly breaches that the court had already rejected?

III.A. Can the judgment be affirmed on the alternative ground that the director defendants owe no plausibly alleged contractual duty to Plaintiff, their powers and duties in relation to the Enterprises have transferred to the Conservator by operation of law, and Plaintiff has affirmatively abandoned any claims against defendants other than the directors?

III.B. Can the dismissal of Plaintiff's breach-of-contract claim be affirmed on the alternative ground that Circuit precedent bars a claim for breach of contract relating to dividends that are expressly subject to the issuer's discretion?

STATEMENT OF THE CASE

A. The Enterprises

Fannie Mae and Freddie Mac are entities created by Congress to provide liquidity in the secondary mortgage market, primarily by buying home loans, pooling them into securities, and selling those securities to investors. Although the Enterprises have operated as for-profit, publicly traded companies, Congress chartered them by statute. *See* 12 U.S.C. §§ 1716 *et seq*. (Fannie Mae); 12 U.S.C. §§ 1451 *et seq*. (Freddie Mac). The statutes cover the typical matters included in corporate charters, such as stock, corporate purpose, governance, and authorization to adopt bylaws. They also address capital distributions, including dividends, to shareholders. While the statutory charters generally allow "such capital distributions . . . as may be declared by the board of directors," they proscribe dividends "that would decrease the total capital of the corporation" below certain levels without the prior written approval of FHFA's Director. 12 U.S.C. §§ 1452(b), 1718(c).

Pursuant to the statutory authorizations, the Enterprises each have adopted bylaws. FHFA regulations provide that "[t]he corporate governance practices and procedures of each regulated entity . . . shall comply with and be subject to the applicable authorizing statutes and other Federal law, rules, and regulations, and shall be consistent with the safe and sound operations of the regulated entities."

12 C.F.R. § 1239.3. However, "[t]o the extent not inconsistent" with that provision, the Enterprises are to "elect to follow the corporate governance . . . practices and procedures" of a particular state, with such election to be designated in the Enterprise's bylaws. *Id.* Fannie Mae's bylaws designate the Delaware General Corporation Law, "to the extent not inconsistent with the Charter Act and other Federal laws, rules, and regulations." Compl. ¶ 26, ECF 1 (A.18); Fannie Mae Bylaws § 1.05, ECF 17-23 (A.200). Freddie Mac has elected Virginia law, but, again, only "[t]o the extent not inconsistent" with federal law. Compl. ¶ 25 (A.18); Freddie Mac Bylaws § 11.3(a), ECF 17-22 (A.198).

B. The Financial Crisis, the Recovery Act, and the Conservatorships

In 2008, "the United States economy fell into a severe recession, in large part due to a sharp decline in the national housing market." *Perry Capital*, 864 F.3d at 599; *see also* Compl. ¶ 35 (A.20). "Fannie Mae and Freddie Mac suffered a precipitous drop in the value of their mortgage portfolios, pushing the Companies to the brink of default." *Perry Capital*, 864 F.3d at 599.

"Congress concluded that resuscitating Fannie Mae and Freddie Mac was vital for the Nation's economic health, and to that end passed the Housing and Economic Recovery Act of 2008." *Id.* at 598. The Recovery Act created FHFA, an independent federal agency, to supervise and regulate Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. 12 U.S.C. §§ 4501 *et seq.*; *see also*

Compl. ¶ 36 (A.21).

The Recovery Act also granted FHFA's Director the authority to place the Enterprises in conservatorship, with FHFA as Conservator, "for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2). Upon appointment as Conservator, FHFA "immediately succeed[s] to . . . all rights, titles, powers, and privileges of the regulated entity [i.e., Fannie Mae and Freddie Mac], and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i). The statute empowers the Conservator to "operate" and "conduct all business" of the Enterprises, *id.* § 4617(b)(2)(B)(i), including the power to take such action as may be "appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity," *id.* § 4617(b)(2)(D)(ii).

In September 2008, shortly after passage of the Recovery Act, FHFA exercised its authority to place both Enterprises into conservatorship. Compl. ¶ 43 (A.22); *see Perry Capital*, 864 F.3d at 600. The next day, FHFA as Conservator announced that while the Enterprises' common and preferred stock would "continue to remain outstanding," dividends on such stock "will be eliminated" during conservatorship. Compl. ¶¶ 43, 87 (A.22-23, 35) (quoting Statement of

FHFA Director James B. Lockhart (Sept. 7, 2008)).[3] Fannie Mae explained that "the conservator has eliminated common and preferred stock dividends (other than dividends on the senior preferred stock issued to Treasury) during the conservatorship; and . . . we will no longer be managed with a strategy to maximize shareholder returns." Fannie Mae, 2008 Annual Report (Form 10-K) at 24 (Feb. 26, 2009), ECF 17-04 (A.152); *see also* Freddie Mac, 2008 Annual Report (Form 10-K) at 40 (Mar. 11, 2009), https://tinyurl.com/Freddie-10-K-2008 ("[t]he Conservator has eliminated common and preferred stock dividends (other than dividends on the senior preferred stock) during the conservatorship.").

The declaration of conservatorship triggered the statutory transfer to the Conservator of all of the "rights, titles, powers, and privileges" of the Enterprises' directors. 12 U.S.C. § 4617(b)(2)(A)(i). The Conservator subsequently delegated certain day-to-day operational functions to new boards appointed by the Conservator, but retained all other powers for itself. Compl. ¶¶ 48, 49 (A.23-24); Fannie Mae 2008 10-K at 24 (A.152); Freddie Mac 2008 10-K at 186. Consistent with the elimination of dividends discussed above, the Conservator did not

[3] A few days later the Conservator clarified that an already-declared Fannie Mae preferred stock dividend for the third quarter of 2008 would be paid as scheduled, on a one-time basis, notwithstanding the elimination of all future dividends. Compl. ¶¶ 14, 15, 89 (A.15-16, 36). The elimination of common stock and junior preferred stock dividends was not otherwise affected.

delegate to the post-conservatorship directors of either Enterprise any authority to declare or pay dividends to shareholders. Compl. ¶ 49 (A.23-24); Fannie Mae 2008 10-K at 226 (A.154); Freddie Mac 2008 10-K at 21.

In its regulatory capacity, FHFA promulgated a regulation further precluding capital distributions, including dividends, to common and junior preferred shareholders during conservatorship. 12 C.F.R. § 1237.12 (providing that except to the extent authorized by the FHFA Director based on certain factors, "a regulated entity shall make no capital distribution while in conservatorship").

C. Treasury's Quarter-Trillion Dollar Commitment

In addition to establishing the framework for the conservatorships, the Recovery Act provided authority for an agreement between Treasury and the Conservator to "infuse [the Enterprises] with massive amounts of capital to ensure their continued liquidity and stability." *Perry Capital*, 864 F.3d at 600. This was accomplished by amending the Enterprises' statutory charters to grant Treasury the authority to purchase Enterprise securities if necessary to "provide stability to the financial markets," "prevent disruptions in the availability of mortgage finance," and "protect the taxpayer." 12 U.S.C. §§ 1455(*l*)(1), 1719(g)(1). Any such purchase, however, must take into account, *inter alia*, "[t]he need for preferences or priorities regarding payments to the Government" and "[r]estrictions on the use of corporation resources, including limitations on the payment of dividends." *Id.*

On September 7, 2008, Treasury and the Conservator, on behalf of the Enterprises, entered into preferred stock purchase agreements. *Perry Capital*, 864 F.3d at 600-01; *see* Compl. ¶¶ 54-56 (A.26). Treasury initially committed to invest up to $100 billion in each Enterprise through quarterly payments to avoid net worth deficits.

In exchange for this massive commitment, and to effectuate the taxpayer-protection mandate, the agreements gave Treasury several forms of consideration. *First*, Treasury received a senior liquidation preference equal to a seed amount of $1 billion plus the cumulative funds each Enterprise drew under the agreements. *Perry Capital*, 864 F.3d at 601. *Second*, to "fully compensate [Treasury] for the support provided by the ongoing Commitment," the Conservator agreed to pay Treasury, starting in 2010, periodic commitment fees reflecting "the market value of the Commitment as then in effect." Fannie Mae Senior Preferred Stock Purchase Agreement § 5.1, https://tinyurl.com/FannieSPSPA; Freddie Mac Senior Preferred Stock Purchase Agreement § 5.1, https://tinyurl.com/FreddieSPSPA; Pay It Back Act, Pub. L. No. 111-203, § 1304(d), 124 Stat. 2134 (July 21, 2010) (addressing commitment fees as key component of compensation).[4] *Third*, the

[4] With the Enterprises remaining in dire condition, Treasury waived the periodic commitment fees in initial periods.

Conservator agreed to pay Treasury a quarterly dividend equal to 10% of the liquidation preference annually (i.e., 2.5% per quarter). If the Conservator missed a dividend payment, the rate for that dividend and future dividends would increase by 20% (until such time as all accrued dividends had been paid in cash), and the amount of the as-increased dividend would be added to the liquidation preference. And, *fourth*, Treasury received warrants to acquire 79.9% of the Enterprises' common stock. *Perry Capital*, 864 F.3d at 601.

Consistent with the statutory directive to include "limitations on the payment of dividends" to junior shareholders, 12 U.S.C. §§ 1455(*l*)(1), 1719(g)(1), the Treasury agreements "prohibited [the Enterprises], without Treasury's approval, from 'declar[ing] or pay[ing] any dividend (preferred or otherwise).'" *Perry Capital*, 864 F.3d at 609 (quoting Treasury agreements) (alterations in original). This covenant was to remain applicable until the Enterprises repaid the liquidation preferences.

The liquidation preferences climbed to almost $200 billion as the Enterprises collectively drew a commensurate amount under the Treasury agreements. *Perry Capital*, 864 F.3d at 601. The caps on Treasury funding were amended multiple times, first to double the amount of permitted infusions (to $200 billion per Enterprise) and then to temporarily lift the caps altogether. *Id.* It was only by

virtue of the Enterprises' contractual rights under the Treasury agreements to take large and recurring draws that the Enterprises were able to avoid mandatory placement into liquidating receiverships, and maintain their critical role in the national economy during conservatorship. *Id.*

But it was also widely recognized that these 2008 measures gave the government a "complete claim to the equity" of the Enterprises, reducing junior stock to "negligible value." CONGRESSIONAL BUDGET OFFICE, CBO'S BUDGETARY TREATMENT OF FANNIE MAE AND FREDDIE MAC 10 n.26, 13 (2010), ECF No. 17-12 (A.172, 175); *see also* U.S. DEP'T OF TREASURY, PERFORMANCE AND ACCOUNTABILITY REPORT 21 (2010), https://tinyurl.com/Treasury-Rep (2008 agreements were "structured in such a way that ensures that virtually all profits in the company revert to the Government").

D. The Third Amendment

The dividends due Treasury exceeded the Enterprises' earnings, and they struggled to generate sufficient cash to pay them. In many quarters, they drew on the Treasury commitment in order to make their dividend payments, i.e., borrowing more money from Treasury in order to pay the obligations to Treasury based on what they had already borrowed. *Perry Capital*, 864 F.3d at 601-02. By August 2012, the amount the Enterprises had together drawn from Treasury's funding commitment had climbed to $189 billion. *Id.* at 601. Under the 10%

formula, this imposed upon the Enterprises a staggering $19 billion annual dividend obligation. The Enterprises stated in SEC filings that they "d[id] not expect to generate net income or comprehensive income in excess of [their] annual dividend obligation to Treasury over the long term."[5]

In a Third Amendment to the Treasury agreements dated August 17, 2012, the Conservator and Treasury adjusted how Treasury would be compensated for its financial assistance and continuing commitment beginning January 1, 2013. The parties accomplished this in twin provisions. In Section 3 of the Third Amendment, they replaced the fixed 10% dividend with a variable dividend equal to the Enterprise's net worth less a capital buffer. *Perry Capital*, 864 F.3d at 602; Freddie Mac Third Amendment at 4, ECF 17-17 (A.181); Fannie Mae Third Amendment at 4, https://tinyurl.com/Fannie-Third-Amd. In Section 4, they agreed that "for as long as" that revised dividend formula remained in effect, "no Periodic Commitment Fee shall be set, accrue, or be payable." Freddie Mac Third Amendment at 5 (A.182).

Accordingly, under the Third Amendment, if an Enterprise's net worth is negative or zero at the end of a given quarter, it pays no dividend to Treasury.

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[5] Fannie Mae, Quarterly Report (Form 10-Q), at 12 (Aug. 8, 2012), https://tinyurl.com/Fannie-10Q-Q212; *see also* Freddie Mac, Quarterly Report (Form 10-Q), at 10 (Aug. 7, 2012), https://tinyurl.com/Freddie-10Q-Q212.

Perry Capital, 864 F.3d at 602. If an Enterprise's net worth is positive, it pays that amount less the capital buffer. *Id.* Under this variable formula, the dividend component of Treasury's compensation turns out to be smaller in some quarters than it would have been under the prior fixed percentage, and larger in others. *Id.* In all quarters, the Conservator is relieved of paying commitment fees for the market value of Treasury's remaining quarter-trillion dollar backstop—fees the Government Accountability Office had recognized as a "long-term challenge to the enterprises' financial viability" prior to the Third Amendment. U.S. Gov't Accountability Office, GAO-09-782, *Analysis of Options for Revising the Housing Enterprises' Long-Term Structures* 53 (2009).

The Third Amendment did not alter the provisions in the original Treasury agreements, in effect since 2008, prohibiting dividends to junior shareholders. *See supra* at 10.

E. The *Perry Capital* Litigation and Decision

In 2013, other Enterprise shareholders brought numerous lawsuits attacking the Third Amendment, many of them in the U.S. District Court for the District of Columbia. *Perry Capital*, 864 F.3d at 602-03. Some of them brought claims against FHFA under the Administrative Procedure Act, while others "alleged that, in adopting the Third Amendment, FHFA and the Companies breached the terms governing dividends, liquidation preferences, and voting rights in [their] stock

certificates" and "implied covenants of good faith and fair dealing in those certificates." *Id.* at 603. In particular, the shareholders alleged that the Third Amendment "made it impossible" for the Enterprises "ever to have assets available for distribution to stockholders other than Treasury." *Id.* at 633 n.26 (alterations and internal quote marks omitted).

The district court in *Perry Capital* dismissed all of the shareholder claims, and this Court mostly affirmed. Of relevance here, this Court held the shareholders lacked any viable breach-of-contract claim relating to dividends. *Perry Capital*, 864 F.3d at 629 ("[T]he class plaintiffs have no enforceable right to dividends because the certificates accord the Companies complete discretion to declare or withhold dividends."). However, this Court held that the shareholders could pursue claims against FHFA as Conservator and the Enterprises under the implied covenant of good faith and fair dealing, which may be violated if such contractual discretion is exercised unreasonably and outside the reasonable expectations of contracting parties. *Id.* at 631. The Court remanded for "the district court to evaluate [the implied-covenant claims] under the correct legal standard, namely, whether the Third Amendment violated the reasonable expectations of the parties." *Id.* Those claims are currently pending on remand.

F. Plaintiff's Complaint

Plaintiff, an accomplished commercial insolvency lawyer in New York City,

owns shares of Fannie Mae and Freddie Mac junior preferred stock. Compl. ¶ 19 (A.17). Since "late 2013," issues relating to the conservatorships and Third Amendment have "consumed him." Compl. Ex. A at 28 (A.75). Plaintiff researched and authored a lengthy paper criticizing the Conservator's actions in February 2016. Compl. ¶ 34 n.4 (A.20). Plaintiff sent Defendants demand letters and drafted what became the Complaint in this case in early 2016, but opted to delay filing this case while the related *Perry Capital* litigation played out. Compl. ¶¶ 95-96 (A.38).

Plaintiff finally initiated this action on May 21, 2018—just shy of a decade after the declaration of conservatorships and elimination of junior shareholder dividends, nearly six years after the Third Amendment, and five years after *Perry Capital* was filed. Plaintiff sued "as holder of both Fannie Mae, and Freddie Mac preferred stock for damages incurred in connection with each of the Companies' entry, on August 17, 2012, into a third amendment of the September 6, 2008 senior stock purchase agreement" between Treasury and FHFA as Conservator of the Enterprises. Compl. ¶ 1 (A.11). Plaintiff alleged that "on August 17, 2012, the Conservator, with rubber stamp approval of each Board," entered into the Third Amendment in violation of Defendants' "contractual and fiduciary duties to the Plaintiff." Compl. ¶ 3 (A.12).

Like the prior shareholder lawsuits, the Complaint explains that the Third Amendment changed the formula for dividends on Treasury's senior preferred shares from a 10% fixed dividend to "endless payment . . . equal to substantially all of each Company's net worth," Compl. ¶ 4 (A.12), ensuring that "there would . . . be no remaining assets from which dividends could ever be paid on Plaintiff's Fannie/Freddie Junior Preferred shares," Compl. ¶ 68 (A.30).

Because of this, the Complaint alleges, the Enterprises' directors failed to perform an alleged *continuing* obligation to make determinations *each quarter* about whether to pay dividends to junior shareholders. Compl. ¶¶ 78-81 (A.32–33). Plaintiff alleged that these breaches occurred "[b]eginning on August 27, 2012, and [are] continuous to date." Compl. ¶ 16 (A.16); *see also id.* ¶ 108 (A.40) (breaches occurred both through entry into the Third Amendment, and "thereafter" through the Enterprises "perform[ing] in accord with its provisions").

Plaintiff pleaded two counts for relief that remain at issue.[6] Count I was for "Breach of Fannie Mae and Freddie Mac Contractual Dividend Payments." Plaintiff alleged that Fannie Mae's and Freddie Mac's junior preferred stock

[6] Plaintiff also asserted a Count III for "Aiding and Abetting in Federal Government's Implied Guaranty Evasion and Payment Avoidance." Compl. ¶¶ 123-125 (A.43). However, Plaintiff abandoned that claim in the district court, Surreply at 8, ECF 26 (A.221); Mem. Op. at 3, ECF 24 (A.203) ("Dismissal Op."), and raises no arguments about it on appeal.

certificates constitute "contracts between the Plaintiff and the Companies" that provide for "certain contractual rights including but not limited to contractually specified, non-cumulative dividend payments." Compl. ¶¶ 102, 105 (A.40). "By entering into the Net Worth Sweep, and thereafter causing the Companies to operate, and otherwise perform in accord with its provisions . . ., the Defendants breached the Companies [sic] obligations to Plaintiff to receive dividends on his Junior Preferred shares." Compl. ¶ 108 (A.40); *see also id.* ¶ 110 (A.41) (Third Amendment "rendered a nullity the contractual right of the Plaintiff to receive dividend payments").

Count II is for breach of the implied covenant of good faith and fair dealing. This count alleges that the contracts between Plaintiff and the Enterprises include an implied covenant by Defendants "to deal fairly with Plaintiff" and "to fulfill their obligations to, and the reasonable contractual expectations of, Plaintiff in good faith, and not to deprive Plaintiff of the fruits of his share ownership bargain." Compl. ¶ 118 (A.42). The Third Amendment allegedly breached this implied covenant because it "effectively deprived Plaintiff of any possibility of ever again receiving dividends." Compl. ¶ 120 (A.42).

Plaintiff named as defendants, and served, Fannie Mae, Freddie Mac, certain

members of their boards of directors, and FHFA in its capacity as Conservator.[7] This action was assigned to the same district judge overseeing other Third Amendment litigation pending in D.C. federal court (i.e., the shareholder actions pending on remand from this Court's decision in *Perry Capital*), after the parties stipulated that this case was "closely related" to those. ECF 10 (A.90); ECF 12. In particular, "all parties agree[d] that the claims in this action" and the others "all grow out of the same event or transaction—the execution of the Third Amendment." ECF 10 at 3 (A.92).

G. Dismissal of the Complaint

Defendants moved to dismiss on a number of grounds, including the applicable statutes of limitations. Mot. to Dismiss, ECF 11. Plaintiff countered that his claims were timely because separate, recurring "breach[es] occurred after each quarter in which Defendants failed to declare, or determine whether to declare, a dividend" and therefore his claims "did not accrue, at the earliest, until

[7] The Complaint's caption listed FHFA as Conservator as a "[n]ominal" defendant. Compl. at 1 (A.10). While that status is sometimes used in shareholder derivative litigation to refer to the corporation on whose behalf shareholders assert claims derivatively, Plaintiff did not articulate what he meant by using the word "nominal" to refer to FHFA in this non-derivative case. Plaintiff now states that he did so "incorrectly." Br. 8 n.6. It is undisputed that FHFA as Conservator, which is responsible for management of the Enterprises and for the transactions challenged in the Complaint, was duly served and made a party defendant and participated fully in the litigation below.

the end of [each] quarter." Opp. at 17 (A.118); *see id.* at 19 (A.120) ("Defendants have engaged in the alleged wrongdoing in each quarter that they failed to determine a dividend to Junior Preferred Shareholders like Plaintiff.").

The district court dismissed Plaintiff's claims as time-barred. Because the Enterprises' bylaws refer to Virginia and Delaware law, the district court applied those states' statutes of limitations: Virginia for claims relating to Freddie Mac stock, and Delaware for claims relating to Fannie Mae stock. Dismissal Op. at 4 (A.204). The Virginia statute of limitations is five years for breach of contract and three years for implied covenant; the Delaware statute of limitations is three years for both types of claims. *Id.*; *see* Va. Code § 8.01-246(2), (4); 10 Del. Code § 8106.

The court accordingly found Plaintiff's claims time-barred because they "each accrued at the time of the enactment of the Third Amendment—over five years ago and outside the limitations period for any cause of action." Dismissal Op. at 5 (A.205). Based on Virginia and Delaware authority, the court rejected Plaintiff's arguments that new and distinct breaches occur "each quarter [defendants] fail to declare a dividend." *Id.* at 6-7 (A.206–07). "When the wrongful act is of a permanent nature and produces all the damage which can ever result from it, that act is a single continuous breach and the statute of limitations

begins to run at the time of the wrongful act." *Id.* at 7 (A.207) (internal quotation marks omitted). While "[i]t is true that each quarter the Third Amendment operates to deprive Mr. Angel of the possibility of a dividend," the court reasoned, "this is simply the continued ill effects of a single wrong." *Id.*[8]

H. Plaintiff's Request for Leave to Amend

Next, Plaintiff moved for leave to amend the Complaint, as well as to alter or amend the district court's opinion under Federal Rule of Civil Procedure 59(e). Plaintiff sought to file an amended complaint that he said "cure[d] the identified deficiency regarding the statutes of limitations." Mem. in Supp. of Mot. to Amend at 16, ECF 27-1 (A.242) ("Mot. to Amend Br."). In the same motion, Plaintiff also asked the district court to alter or amend its earlier order to make the dismissal of the original Complaint without prejudice, which Plaintiff understood to be necessary to clear the way for his amended complaint.[9]

For Plaintiff's attempt to cure the statute-of-limitations problem, the

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[8] The district court also rejected requests by Plaintiff for tolling on various other grounds, such as due to the pendency of class actions raising the same claims. *Id.* at 5-6, 8-12 (A.205–06, 208–12). Plaintiff does not raise these other grounds on appeal.

[9] The memorandum opinion dismissing the original Complaint did not specify whether it was with or without prejudice. Unless otherwise specified, Rule 12(b)(6) dismissals are deemed to be with prejudice. *See Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 131-32 (D.C. Cir. 2012) (Kavanaugh, J., concurring).

proposed amended complaint set forth an amplified version of the theory—already considered and rejected in the dismissal opinion—that Defendants have a contractual duty to "determine every quarter whether to declare dividends" and Defendants' "distinct, quarterly omissions constitute continuing wrongs that toll the statute of limitations." *Id*. at 16-17 (A.242–43). Yet the proposed amended complaint carried forward the core theme that by "requir[ing] perpetual, quarterly dividend payments to Treasury, in [the] amount of each GSE's entire net quarterly profits in perpetuity," the Third Amendment had the purpose and effect of "keep[ing] the companies in perpetual conservatorship" and "prevent[ing] their private shareholders from seeing any return on their investment." Proposed Am. Compl. ¶¶ 8, 52 n.19, ECF 27-2 (A.249, 259).

Plaintiff also sought to withdraw the Conservator and the Enterprises as defendants. Plaintiff renounced any intent to pursue claims against those entities, leaving only his claims against certain members of the Fannie Mae and Freddie Mac boards of directors. Proposed Am. Compl. at 2, n.1, ECF 27-2 (A.246).

I. Denial of Leave to Amend

The district court denied leave to amend. Mem. & Order, ECF 34 at 3-4 (A.314–15) ("Denial-of-Amendment Order"). The court found Plaintiff's proposed amended complaint futile because it "merely spills more ink rehashing [a] theory" to "skirt the relevant statutes of limitations" that "the Court already

rejected." *Id.* at 3 (A.314). This appeal followed.

SUMMARY OF ARGUMENT

I. The district court was correct in finding Plaintiff's 2018 lawsuit barred by the Virginia and Delaware five-year and three-year statutes of limitations. Plaintiff alleged that the Third Amendment, a 2012 transaction, rendered dividends to junior shareholders impossible by diverting all of the Enterprises' profits to Treasury. The claims accrued no later than that act. Plaintiff's Complaint pleads, in fact, that dividends had already been "eliminated" long before 2012, which would make his claims even more untimely.

Plaintiff's argument that the clock is reset each time that impossibility manifests itself in continued non-payment of junior shareholder dividends lacks merit under the applicable Virginia and Delaware case law. It was proper for the district court to decide this issue at the pleadings stage because the face of the Complaint and undisputed facts showed Plaintiff's claims to be time-barred, and Plaintiff pleaded no basis for tolling.

II. The district court correctly denied leave to amend because Plaintiff's proposed amended complaint did not avoid the time bar. The proposed amended complaint simply recycled the meritless theory of distinct recurring breaches that the district court had already rejected.

III. The Court could affirm on alternative grounds. Plaintiff seeks to proceed against certain members of the Fannie Mae and Freddie Mac boards of directors instead of against the Conservator. However, Plaintiff does not plausibly plead any basis for assigning personal contractual obligations relating to dividends to the directors. By operation of statute, moreover, the Conservator has succeeded to the powers and duties of the directors. Even if not time-barred, any contract or implied-covenant claims relating to corporate dividends would run against the Conservator, not the directors—and yet Plaintiff has affirmatively disavowed pursuing any claims against the Conservator. Plaintiff's breach-of-contract claim is independently barred by this Court's holding in *Perry Capital* that shareholders have no contractual entitlement to dividends.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of a motion to dismiss. *Emory v. United Air Lines, Inc.*, 720 F.3d 915, 921 (D.C. Cir. 2013). This Court reviews for abuse of discretion a district court's decision to deny a motion to amend a complaint, requiring only that the court base its ruling on a valid ground. *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996).

ARGUMENT

I. Plaintiff's Claims Are Barred by the Statutes of Limitations

It is undisputed that the applicable statutes of limitations are three and five

years and that Plaintiff filed this action in May 2018. Br. 23-24. Thus, if Plaintiff's claims accrued before May 2013, they are barred absent some form of tolling. The district court correctly held that Plaintiff's claims accrued in August 2012, and correctly rejected Plaintiff's theory of recurring quarterly breaches and other tolling arguments.

A. Plaintiff's Claims Accrued in August 2012

The Court properly held that Plaintiff's claims accrued in August 2012, the date of the Third Amendment transaction that was the target of the Complaint.

Paragraph 1 of the Complaint frames Plaintiff's claims: this action seeks "damages incurred in connection with each of the Companies' entry, on August 17, 2012, into a third amendment . . . ." Compl. ¶ 1 (A.11). "As set forth more fully below," the Complaint goes on, "on August 17, 2012, the Conservator, with rubber stamp approval of each Board, entered into a third amendment" in "breach" of Defendants' "contractual and fiduciary duties to the Plaintiff." *Id.* ¶ 3 (A.12). "[T]he Third Amendment provides for endless payment of a quarterly dividend to Treasury, equal to substantially all of each Company's net profits." *Id.* ¶ 4 (A.12-13); *see also id.* ¶ 62 (A.28) ("The Third Amendment language ensured that Treasury would thereafter receive the entire positive net worth of each of the Companies' [sic] quarter by quarter in perpetuity (*i.e.*, the Net Worth Sweep).").

Thus, according to the Complaint, "[b]y entering into the Net Worth Sweep,

and operating in compliance with its terms the Defendants effectively deprived Plaintiff of any possibility of ever again receiving dividends." *Id.* ¶ 120 (A.42). "With the entire net worth of the Companies payable in perpetuity to the Senior Preferred Stock, . . . there would . . . be no remaining assets from which dividends could *ever* be paid on Plaintiff's Fannie/Freddie Junior Preferred Stock." *Id.* ¶ 68 (A.30) (emphasis added). "The Net Worth Sweep triggered a dividend payment breach . . . and in doing so effectively *nullified*, and *eliminated* the Board's exercise of contractual dividend declaration functions." *Id.* ¶ 79 (A.33) (emphasis added). Plaintiff patterned his claims on the shareholder state-law contract and implied-covenant counts that this Court addressed in *Perry Capital*, and in stipulating to reassignment to the judge presiding over those cases, agreed that his claims too "grow out of . . . the execution of the Third Amendment." ECF 10 at 3 (A.92). In all, the Complaint contains 56 references to the Third Amendment or Net Worth Sweep.

In light of Plaintiff's allegations, the district court did not err in finding that Plaintiff's claims accrued at the time of the adoption of the Third Amendment. Plaintiff does not dispute the district court's holding that the applicable statutes of limitations "begin[] to run from the date of the alleged breach," Dismissal Op. at 5 (A.205), and his Complaint pervasively characterizes the Third Amendment as

"breaching" his contract and implied-covenant rights. *See, e.g.*, Compl. ¶¶ 2, 3, 16, 108, 113, 120, 122 (A.12, 16, 40–43).

To be sure, Plaintiff alleged that Defendants "continue[d] to breach the contracts and implied covenant each quarter" thereafter by not declaring a dividend on Plaintiff's shares. Dismissal Op. at 6 (A.206). But after surveying Virginia law, the district court correctly observed that "[w]hen 'the wrongful act is of a permanent nature' and 'produces all the damage which can ever result from it,' that act is a single continuous breach and the statute of limitations begins to run at the time of the wrongful act." *Id*. at 7 (A.207) (quoting *Hampton Rds. Sanitation Dist. v. McDonnell*, 360 S.E.2d 841, 843 (Va. 1987)). Similarly, under Delaware law, "'[w]here suit can be brought immediately and complete and adequate relief is available, a cause of action cannot be tolled as a continuing violation.'" *Id.* at 8 (A.208) (quoting *Kerns v. Dukes*, No. Vic.A.1999-S, 2004 WL 766529, at *4 (Del. Ch. Apr. 2, 2004)).

These principles of Virginia and Delaware law are unassailable and undisputed by Plaintiff in his brief. "In cases like this in which an alleged breach spans an extended period of time, [Virginia] courts have distinguished between acts that constitute a single continuous breach and those that constitute a series of separate breaches." *Fluor Fed. Solutions, LLC v. PAE Applied Techs., LLC*, 728

Fed. App'x 200, 202 (4th Cir. 2018) (internal quotation marks and alterations omitted). "A single continuous breach occurs when the wrongful act is of a permanent nature and produces all the damage which can ever result from it," in which case "the limitations period runs from the inception of that breach, even when the breach continues for years," and even if "actual or substantial damages do not occur until a later date." *Id.* at 202, 203 (internal quotation marks and alterations omitted).

For example, in *Westminster Investing Corp. v. Lamps Unlimited, Inc.*, 379 S.E.2d 316 (Va. 1989), a shopping center tenant sought to recover from its landlord for breaching a contractual requirement to maintain and enforce uniform business hours in the shopping center. The breach began in 1976 and continued through 1983. Suing in 1985, the tenant argued that the breach was "continuous" and "a new cause of action accrued" for each recurring, periodic failure to enforce. *Id.* at 318. The Virginia Supreme Court held, however, that the cause of action accrued at the inception of the breach, in 1976, and thus was time-barred. *Id.* at 319.[10]

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[10] *See also Virginia v. Windsor Plaza Condo. Ass'n, Inc.*, 768 S.E.2d 79, 94 (Va. 2014) (violation occurred, and limitations period started running, when condo association first allowed non-disabled residents to park in handicapped spaces, regardless of continuation of that practice for years thereafter); *Hunter v. Custom*

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Delaware law is similar. For example, when a corporation entered into a self-dealing contract enriching insiders, the shareholders' claims accrued at the time of original entry into that contract, not at each subsequent interval when the corporation performed under the contract and shareholders were thereby injured. *Kahn v. Seaboard Corp.*, 625 A.2d 269, 271 (Del. Ch. 1993) (involving alleged sweetheart deal that gave away corporate assets for inadequate value over a ten-year period).[11]

Applying these principles, the district court found that under Plaintiff's allegations, "the alleged original sin—the Third Amendment—produces all the damages that Mr. Angel claims." Dismissal Op. at 7 (A.207). "Unless further

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Business Graphics, 635 F. Supp. 2d 420, 430-33 (E.D. Va. 2009) (employee's claims for breach of employment contract accrued when employer first started dishonoring the alleged contractual obligations, notwithstanding that employer maintained that position for years thereafter); *Fluor Federal Solutions*, 728 Fed. App'x at 203 (finding "single continuous breach" where plaintiff "allege[d] that [defendant] initially breached and continued to breach the contract in exactly the same manner for the next dozen years").

[11] *Accord Kerns*, 2004 WL 766529, at *5 (claims against county challenging new sewer district and associated assessments accrued back when ordinance adopting district was enacted, not when residents were subsequently billed for assessments); *cf. Elster v. American Airlines, Inc.*, 100 A.2d 219, 223-24 (Del. Ch. 1953) (holding that shareholder's claims challenging alleged giveaway of stock to employees accrued at the time the original stock option contract was entered into, rather than at each subsequent grant of stock under that contract, for purposes of rule barring derivative suits for transactions predating plaintiff's purchase of stock).

action is taken by the FHFA as conservator," the necessary consequence of the Third Amendment was to make it continuously "'impossible for the holders of each Company's Junior Preferred to realize value from their contractual dividend entitlement rights.'" *Id.* (A.207) (quoting Compl. ¶ 81). While "each quarter" the Third Amendment may "operate[] to deprive Mr. Angel of the possibility of a dividend," that is "simply the continued ill effects of a single wrong." *Id.*

Plaintiff does not confront the Virginia and Delaware authority relied on by the district court. Rather, his principal strategy on appeal is to try to minimize the relevance of the Third Amendment, insisting for example that it "did not cause his damages" because it supposedly allows dividends on junior preferred stock. Br. 24-25, 31. To the extent Plaintiff means the Third Amendment did not contractually prohibit dividends on junior preferred stock, that overlooks that the underlying 2008 stock agreements that were being amended *already* contained such a contractual prohibition. *Perry Capital*, 864 F.3d at 601. Therefore, there was no need for the Third Amendment to address the dividend issue again. Moreover, that such a prohibition, like virtually any contractual covenant, could hypothetically be waived with Treasury's prior written consent does not convert the prohibition into an authorization, much less an affirmative obligation to pursue a waiver—an assertion that Plaintiff has neither pleaded nor developed.

At any rate, the theory at the heart of the Complaint is not that the Third Amendment legally forbade dividends to junior shareholders, but that it made them *factually impossible*. *See, e.g.*, Compl. ¶ 68 (A.30) ("With the entire net worth of the Companies payable in perpetuity to the Senior Preferred Stock, . . . there would . . . be no remaining assets from which dividends could ever be paid on Plaintiff's Fannie/Freddie Junior Preferred shares."); *id.* ¶ 81 (A.33) (Third Amendment "ma[de] it impossible for the [junior preferred] holders . . . to realize value"); *id.* ¶ 120 (A.42) (Third Amendment "effectively deprived Plaintiff of any possibility of ever again receiving dividends"). Plaintiff himself stresses that the possibility of dividends depends on the existence of funds "legally available therefor." Br. 20. Thus, Plaintiff's contention that the lack of an explicit contractual prohibition in the Third Amendment means that it "did not cause his damages" under his theory rings hollow.

Plaintiff also disputes (Br. 26) the district court's reasoning that the effects of the Third Amendment would persist "[u]nless further action is taken by the FHFA as conservator." Dismissal Op. 7 (A.207). Plaintiff insists that the *directors* possess authority to declare dividends on junior preferred stock, and could thereby act on their own to reverse what he characterized as the effects of the Third Amendment, without Conservator involvement. Br. 26. That argument is at direct

odds with the Recovery Act and applicable regulations. Under the Recovery Act, the directors' authority transferred to the Conservator at the inception of the conservatorships. 12 U.S.C. § 4617(b)(2)(A); *see infra* 48-50. Moreover, dividends are both suspended by the Conservator and prohibited by regulation. *See supra* 6-7, 8. The Conservator entered into the stock agreements and Third Amendment on behalf of the Enterprises, and the Conservator and Treasury alone have the power to alter those instruments or whatever their effects may be.

* * *

In addressing the futility of Plaintiff's claims on their own terms, Defendants must emphasize that they do not concede that the Third Amendment was, in fact, the cause of Plaintiff's non-receipt of dividends. On the contrary, the prospect of dividends to junior shareholders had already evaporated long before the Third Amendment for a host of other, independent, and unchallenged reasons. The Enterprises' statutory charters do not allow dividends unless and until the Enterprises are sufficiently capitalized to carry out their public mission. Dividends were suspended immediately upon entry into conservatorship, were prohibited by the original Treasury agreements in 2008, and were barred by regulation as of 2011. By the time of the Third Amendment, Treasury had to be repaid almost $200 billion before junior shareholders could see a dime, and massive periodic fees

for Treasury's continuing quarter-trillion-dollar commitment loomed on the horizon.

As this Court thus observed in *Perry Capital*, the "effective exclusion" of junior stockholders was "already put in place by the unchallenged and thus presumptively proper Stock Agreements and Amendments that predated the Third Amendment." 864 F.3d at 609. The Third Amendment "just locked in an exclusive allocation of dividends to Treasury that was already made possible by—and had been in practice under—the previous agreements." *Id.* Plaintiff himself characterizes the Third Amendment as "a mere extension" of a "de facto Nationalization" carried out in 2009. Compl. ¶ 72.

Of course, to the extent Plaintiff's alleged injury resulted not from the Third Amendment but from events that had occurred years before, that would only serve to make his claims even more untimely. At a minimum, the claims could not have accrued later than the date of the Third Amendment. Because Plaintiff's claims are too late even treating the Third Amendment as the accrual date, the Court need not address whether they may have accrued even earlier.

B. Plaintiff Did Not Plead in the Alternative and Did Not Abandon His Third Amendment Challenge

In a further effort to circumvent the statutes of limitations, Plaintiff now characterizes his Third Amendment references as "alternative pleading" and argues

that he "abandoned" those claims. Br. 17-18, 24, 32-33. That is revisionist history with no support in the record. Plaintiff pleaded a single breach-of-contract count based on the Third Amendment "expropriating the entirety of the Company's net worth" and "rendering a nullity the contractual right of the Plaintiff" (Compl. ¶ 110 (A.41)), and a single implied-covenant count based on "eliminating [Plaintiff's] rights and interests entirely through the Net Worth Sweep" (*id.* ¶ 121 (A.42-43)). Both counts "incorporate[d] by reference and reallege[d] each and every allegation set forth in this Complaint, as though fully set forth herein." Compl. ¶¶ 100, 115 (A.39, 42). The phrase "plead in the alternative" or the like is nowhere to be found in the Complaint.

This Court has rejected similar attempts by litigants to shed inconvenient admissions by belatedly claiming "alternative pleading." In *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 876-77 (D.C. Cir. 2014), a company challenging EPA action at a Superfund site pleaded facts that backfired by making its claims non-reviewable under a jurisdictional-withdrawal statute. This Court acknowledged that "El Paso was entitled to plead in the alternative and, to the extent it did so, to not be bound in one claim by an allegation pled only as to its alternative claim." *Id.* at 876-77. But "that is not what happened": the plaintiff, rather, "incorporated *all* of the allegations cited above in [the relevant] claims,"

and included some of the self-defeating allegations in those very claims. *Id.* at 877. Likewise here, the Complaint made no attempt to distinguish or compartmentalize between Third Amendment-based and non-Third Amendment-based claims.[12]

Nor did Plaintiff "abandon" his attack on the Third Amendment. On the contrary, his opposition to Defendants' motion to dismiss amplified the position that the Third Amendment "made the payment of dividends to all other shareholders impossible after January 1, 2013." Opp. at 1, ECF 17 (A.102).[13] And

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[12] Plaintiff, a highly credentialed and experienced attorney, pleads for special leniency because he chose to represent himself in the court below. Br. 34-35. The court did give Plaintiff the benefit of liberal construction of his pleadings, Dismissal Op. at 1 n.1 (A.201), but was not required to bend over backwards to accommodate Plaintiff. Unlike the typical *pro se* litigant, Plaintiff has a law degree from Columbia and practiced for nearly six decades as a leader in the bankruptcy and insolvency bar, during which time he authored "'briefs, affidavits, motions, articles, and other arguments numbering in the many thousands.'" Denial-of-Amendment Order at 2 (A.313) (quoting Complaint). *Cf. Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194-95 (D.C. Cir. 1983) (remarking that member of Maryland bar with 31 years of practice was "poor candidate for special treatment").

[13] *See also id.* at 22 (A.123) ("[B]y agreeing to and then implementing the Third Amendment, Defendants prevented themselves from determining whether to declare dividends as required by Plaintiff's contracts"—a "self-imposed impossibility to perform."), 23 (A.124) ("[B]ecause the Third Amendment required Defendants to never declare dividends, Defendants prevented themselves from ever exercising their 'sole discretion' in determining whether to declare dividends."), 26 (A.127) (Third Amendment breached the implied covenant "by making no 'funds legally available' and eliminating the ability of the GSEs to

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Plaintiff knew how to affirmatively withdraw a claim because he *did* so with regard to certain other aspects of his claims. For example, Plaintiff's surreply announced that "Plaintiff seeks to dismiss" his tortious interference claim (Count III). Surreply at 8 (A.221). As the district court noted (Dismissal Op. at 5 n.4 (A.205)), Plaintiff also abandoned the position that the Third Amendment constituted an "anticipatory breach," as opposed to an *actual* breach. Surreply at 3 (A.216).[14] He did nothing of the sort with regard to his myriad allegations implicating the Third Amendment as the source of his alleged injury.

C. Dismissal on Limitations Grounds Is Proper Where, as Here, the Time Bar Is Evident on the Face of the Complaint

The district court did not commit any procedural violation or misapply any standards by dismissing the Complaint at the pleadings stage. It is axiomatic that

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exercise their sole discretion in determining whether to declare dividends," with later consequences flowing from "operating in compliance with its terms") (quoting Compl. ¶ 120 (A.42)).

[14] Plaintiff repeatedly mistakes the court's reference to Plaintiff's abandonment of his *anticipatory breach* theory as an "acknowledgment" that Plaintiff abandoned his central theme that the Third Amendment made dividends to junior shareholders impossible. Br. 17, 18, 19, 29-30, 32-33. That is wrong. Anticipatory breach is a distinctive branch of contract doctrine that "gives the plaintiff the option to treat [a] promise to breach . . . as a breach itself." *Perry Capital*, 864 F.3d at 632-33 (internal quotation marks omitted). Plaintiff's clarification that he was no longer seeking to recover on a theory that the Third Amendment was actionable as a "promise to breach" in the future had no effect on the theory baked into the Complaint that the Third Amendment constituted a present breach in and of itself.

"if the allegations . . . show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim." *Jones v. Bock*, 549 U.S. 199, 215 (2007); *see* Wright & Miller, Federal Practice and Procedure § 1357, at n.69 (3d ed.) (collecting hundreds of "illustrative cases" of Rule 12(b)(6) dismissals because "the face of the complaint" showed that "the governing statute of limitations has run"); *Smith-Haynie v. Dist. of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998) (statute-of-limitations 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").

Plaintiff relies on cases discouraging pleadings-stage dismissals when "statute of limitations issues . . . depend on contested questions of fact." *de Csepel v. Republic of Hungary*, 714 F.3d 591, 603-04 (D.C. Cir. 2013) (internal quotations omitted) (denying motion to dismiss where timeliness of bailment claim for non-return of artwork stolen in Nazi era turned on when exactly Hungary made its final decision not to return the artwork).[15] In this case, however, the limitations issues did *not* depend on contested questions of fact. Even now, Plaintiff does not point

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[15] *See Momenian v. Davidson*, 878 F.3d 381, 387-88 (D.C. Cir. 2017) (cautioning courts to "hesitate" to dismiss a complaint when timeliness turns on disputed facts); *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) ("statute of limitations issues *often* depend on contested questions of fact" precluding dismissal) (emphasis added).

to any outstanding factual disputes that bear on the accrual date, and he admits that "[c]ontract interpretation is a matter of law." Br. 42. Fact development would have served no useful purpose in adjudicating those issues, and would only have injected further delay in the disposition of these belated claims.

Indeed, "[s]tatutes of limitation serve an important and salutary purpose," *Westminster Investing Corp.*, 379 S.E.2d at 318 (internal quotations omitted), and the policy interests in finality, repose, and avoidance of serial relitigation are, if anything, *more* compelling than when dismissals rest on other grounds. It would defeat the whole purpose of statutes of limitation to make defendants sued on untimely claims fend off multiple iterations of complaints and tolling theories before they can finally have peace.

D. Plaintiff Asserts No Valid Basis for Equitable Tolling

The district court was also correct to hold that Plaintiff's vague suggestions that he was "lulled into inaction" by unspecified assurances did not qualify him for equitable tolling. Dismissal Op. at 5–6 (A.205–06). Virginia and Delaware both have very exacting standards for equitable tolling. Virginia requires fraud or the equivalent. *Boykins Narrow Fabrics Corp. v. Weldon Roofing and Sheet Metal, Inc.*, 266 S.E.2d 887, 890 (Va. 1980). In Delaware, there must be "affirmative acts to conceal the wrong," *Kerns*, 2004 WL 766529, at *5, resulting in the facts being "so hidden that a reasonable plaintiff could not timely discover them," *Weiss v.*

Swanson, 948 A.2d 433, 451 (Del. Ch. 2008).

The district court did not err in finding nothing of the sort alleged in the Complaint. As the court observed, "the Third Amendment was public the day it was announced" and "[t]he intricacies of the transaction were not hidden." Dismissal Op. at 6 (A.206). Indeed, the Complaint contains numerous allegations affirmatively *negating* any notion of equitable tolling. The conservatorship and Third Amendment issues have "consumed" Plaintiff "since late 2013," when he began applying his considerable skills as an experienced insolvency attorney to researching and investigating those issues. Compl. Ex. A at 28 (A.75). By February 2016, Plaintiff had written a detailed 42-page paper setting out what he believed to be the basis for his claims, which he attached to a demand letter he sent to Defendants the next month. Compl. ¶¶ 34 n.4, 95 (A.20, 38). As of April 2016, Plaintiff had prepared a first draft of the Complaint he eventually filed over two years later to initiate this case. Compl. ¶ 95 (A.38). Plaintiff explains in the Complaint that he delayed over two years not because anything was hidden from him, or because anyone said anything to lull him into inaction—but because he made a tactical decision to wait until a "myriad" of other Third Amendment litigations "were finally disposed of." Compl. ¶ 96 (A.38).

Against this backdrop, Plaintiff's contention that "the District Court applied

the wrong legal standard by requiring the Complaint to allege facts supporting equitable tolling" (Br. 49) rings hollow. The Complaint does not merely fail to support equitable tolling, it affirmatively refutes it. In any event, Plaintiff is wrong that he was not required to plead a factual basis for equitable tolling. *See, e.g.*, *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007) (rejecting tolling on appeal of Rule 12(b)(6) dismissal because plaintiff "fail[ed] to allege sufficient facts to support equitable tolling"); *Birchwood-Manassas Assocs., L.L.C. v. Birchwood at Oak Knoll Farm, L.L.C.*, 773 S.E.2d 162, 163 (Va. 2015) (affirming dismissal with prejudice where plaintiffs sought equitable tolling but failed to plead supporting facts); *Neal v. Stryker Corp.*, No. 1:11-cv-62, 2011 WL 841509, at *3 (E.D. Va. Mar. 8, 2011) ("[T]he plaintiff has the burden of pleading facts that would support a finding that equitable estoppel applies.").

The makeweight grounds for equitable tolling Plaintiff asserts in his appellate brief do not advance his case. Plaintiff contends that the basis for his claims was hidden because non-declaration of dividends "is not inherently unlawful" and omissions "are difficult to detect" and occurred at board meetings where he was not present. Br. 51-52. But those allegations come nowhere near the fraud or the affirmative acts of concealment required under the exacting strictures of Delaware and Virginia law. Plaintiff's argument (Br. 52) that the Enterprises'

SEC filings "failed to disclose" the non-performance of dividend obligations is exactly backwards: for years, the Enterprises' SEC filings have cautioned shareholders that they would not receive, and should not expect to receive, dividends during the conservatorships. *See supra* at 7-8.

II. The District Court Did Not Abuse Its Discretion by Denying Leave to Amend

The district court's denial of leave to amend on futility grounds was not an abuse of discretion.[16] As Plaintiff acknowledges, "[a]n 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." Br. 47 (quoting 3 Moore's Federal Practice § 15.15(3) (3d ed. 2000)); *see Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012).[17]

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[16] In addition to challenging the denial of leave to amend for futility, Plaintiff assigns error to the district court's dismissal of the original Complaint without specifying "with prejudice" or "without prejudice," which had the effect of making that dismissal with prejudice. Br. 39-42; *see supra* at 20 n.9. However, once the district court took up Plaintiff's subsequent motion to amend and found the proposed amendment futile on its own terms, that issue ceased to have practical significance, because the district court did not actually treat the original dismissal as barring Plaintiff's attempt to amend. There was no "fail[ure] to comply" (Br. 39) with *Firestone*, 76 F.3d 1205, because the court's futility analysis established that Plaintiff was unable to cure the deficiency.

[17] Plaintiff attempts to tilt the standard in his favor by citing a decision of the local D.C. Court of Appeals that amendment must be permitted unless it is "beyond doubt that plaintiff can prove no set of facts to support the claims." Br. 47, 48. But that seeks to revive the obsolete rule of *Conley v. Gibson*, 355 U.S. 41, 45-46

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A common example of futility is when the proposed amendment "merely restates the same facts as the original [dismissed] complaint in different terms." *Bell v. United States*, 301 F. Supp. 3d 159, 165 (D.D.C. 2018); *accord He Depu v. Yahoo! Inc.*, 334 F. Supp. 3d 315, 320-21 (D.D.C. 2018) (holding amended complaint was futile where plaintiffs claimed "new factual allegations" cured defect, but beyond superficial "wording differences," the underlying factual content was "not 'new'"). If an original complaint is found to be time-barred, and the proposed amended complaint fails to overcome that problem, leave to amend is properly denied. *Washington Tennis & Educ. Found., Inc. v. Clark Nexsen, Inc.*, 324 F. Supp. 3d 128, 132 (D.D.C. 2018); *Palacios v. MedStar Health, Inc.*, 298 F. Supp. 3d 87, 89 (D.D.C. 2018); *Rife v. One West Bank, F.S.B.*, 873 F.3d 17, 21 (1st Cir. 2017).

Here, the proposed amended complaint simply converted into pleading form a legal theory of distinct quarterly breaches that the district court had already, and correctly, rejected. As the district court put it, "Angel tried that already." Denial-

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(1957) ("a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support"). The Supreme Court has repudiated that approach for federal courts: it is no longer enough for a pleading merely to "le[ave] open the possibility" of establishing relevant facts; rather, it must include sufficient heft to cross the line "from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561, 570 (2007).

of-Amendment Order 3 (A.314). Although Plaintiff engaged in window-dressing to try to make his proposed amended complaint look new and different, the underlying theme carried through: the Third Amendment "required perpetual, quarterly dividend payments to Treasury, in the amount of each GSE's entire net quarterly profits in perpetuity"—thus leaving nothing available as dividends for junior preferred shareholders. Proposed Am. Compl. ¶ 8 (A.249).

Accordingly, the proposed amended complaint still referred in paragraph 1 to the Third Amendment as the genesis of Plaintiff's claims. *Id.* ¶ 1 (A.246-47). It emphasized "repetitive" and "serial non-performance" "[b]eginning on January 1, 2013," the opening date of the first quarter covered by the Third Amendment. *Id.* ¶¶ 14, 15, 17 (A.250–51); *see also id.* ¶¶ 59-60 (A.260) (referring to perpetual "omissions" "[a]s of and since January 1, 2013").[18] It alleged that the "outsized Senior Preferred Net Worth Sweep dividends" to Treasury, which were contractually fixed by the Third Amendment as of August 2012, were a "per se breach" of Plaintiff's contract and implied-covenant rights. *Id.* ¶ 18 (A.251); *see also id.* ¶ 72 (A.262-63). Those "outsized Net Worth Sweep dividend payments"

[18] The outcome would not change if the accrual date were deemed to be January 1, 2013, rather than the August 17, 2012 date of execution of the Third Amendment, because the Complaint was filed in May 2018, more than five years after January 1, 2013.

set as of August 2012 were part of a "scheme intended to keep the companies in perpetual conservatorship." *Id.* ¶ 52 (A.259). Indeed, "[o]n the day the Net Worth Sweep was announced" (i.e., August 17, 2012), the purpose and effect according to Plaintiff were "to prevent [the Enterprises'] private shareholders from seeing any return on their investment." *Id.* ¶ 52 n.19 (A.259).

Statements in the proposed amended complaint like "[t]he Third Amendment did not affect the Directors' obligation to perform the Quarterly Dividend Duty" (*id.* ¶ 57 (A.260)) do not sever the link. The original Complaint similarly alleged that the Third Amendment "did *not* relieve . . . Defendants of their obligations." Compl. ¶ 6 (A.13) (emphasis in original). But the reason the claims accrued as of the Third Amendment is that by mandating "perpetual, quarterly dividends to Treasury, in amount of each GSE's entire net quarterly profits in perpetuity," Proposed Am. Compl. ¶ 8 (A.249), the Third Amendment is alleged to have rendered junior shareholder dividends *factually impossible*, not to have altered or relieved any alleged legal obligations. *See supra* at 29-30. That, not any change in legal obligations, is the reason why the court found the claims accrued at the time of the Third Amendment. In any event, to the extent there is any inconsistency, a complaint cannot avoid dismissal by contradicting itself, and it is well established that the court need not accept bare conclusory statements or inferences "unsupported by the facts set out in the complaint." *Kowal v. MCI*

Comm'cns Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994).

In challenging the denial of leave to amend, Plaintiff remarkably leads with the argument that "Defendants effectively conceded Plaintiff's Rule 15(a) motion by failing to challenge the First Amended Complaint's allegations." Br. 44. The record easily puts that to rest. Defendants argued that "The Court Should Deny the Motion for Leave to Amend the Complaint," because, *inter alia*, "The Proposed Amended Complaint Fails to Cure the Statute-of-Limitations Problem." Defs.' Opp. to Mot. to Amend at 11-16, ECF 29 (A.268–73). Contrary to Plaintiff's portrayal, these arguments relied on the contents of the proposed amended complaint and joined issue on whether the proposed amended complaint was materially different from the original one. *Id.* at 12-13 (A.269-70) (citing, *inter alia*, Proposed Am. Compl. ¶¶ 8, 11, 52 n.19 (A.249-50, 259)). That hardly constitutes a "tacit acknowledgment that Plaintiff sufficiently pled his claims." Br. 45.

Plaintiff also says that the district court must have misunderstood his amendment because the court mentioned Defendant FHFA, whereas Plaintiff sought to drop FHFA in his proposed amended complaint. Br. 46. But Plaintiff fails to explain why this is relevant to the statute of limitations and futility analyses; his claims are equally time-barred no matter against which defendant he seeks to assert them. Moreover, Plaintiff's insistence that the alleged breach was

committed by the directors, rather than by the Conservator, stems from his own confusion over who is in charge during conservatorship. Under the Recovery Act, FHFA as Conservator controls the management and operation of the Enterprises and, in fact, has succeeded to all "rights, titles, powers, and privileges" of the directors. 12 U.S.C. § 4617(b)(2)(A)(i). Plaintiff's unwillingness to accept the clear import of the succession provision does not cast doubt on the district court's futility analysis. If anything, it makes his claims even *more* futile because, in addition to being time-barred, those claims target the wrong defendants. *See infra* Section III.A.

III. Dismissal May Be Affirmed on Alternative Grounds

Several other grounds, argued below but not reached by the district court, independently support dismissal. Because this Court "review[s] the district court's judgment, not its reasoning," it "may affirm on any ground properly raised." *EEOC v. Aramark Corp.*, 208 F.3d 266, 268 (D.C. Cir. 2000).

A. The Directors Are Not Proper Defendants

For reasons additional to the statutes of limitations, Plaintiff fails to allege cognizable claims against the individual director defendants, who are not proper defendants under any of Plaintiff's theories. And Plaintiff has now abandoned and disavowed his claims against any defendants other than the directors. This provides an alternative ground for affirmance of the rulings below.

1. Plaintiff seeks to recover based solely on contractual and implied-covenant duties that allegedly emanate from his stock certificates. But Plaintiff never pleads that the directors are parties to the stock certificates. On the contrary, Plaintiff characterizes the stock certificates as "contracts between the Plaintiff *and the Companies*." Compl. ¶ 102 (A.40) (emphasis added); *see also id.* ¶¶ 117-20 (A.42). If a dividend is declared, it is the company that pays it, not the directors.

Plaintiff hypothesizes a contractual "Quarterly Dividend Duty" on the part of the directors. But the stock certificates neither set forth nor imply such duty. On the contrary, they recognize the directors' "sole discretion" about whether and when to declare dividends. ECF 17-18 at 2 (A.187) (providing that holders of preferred stock "will be entitled to receive, when, as and if declared by the Board of Directors . . ., in its sole discretion out of funds legally available therefor, non-cumulative quarterly dividends"); *see* Br. 28. The fact that dividends, when they are payable, are handled on a quarterly cycle does not impose an affirmative contractual obligation to meet or deliberate on any particular schedule. To the extent the proposed amended complaint contains conclusory statements to the contrary, *see*, *e.g.*, Proposed Am. Compl. ¶¶ 3, 4 (A.247-48), legal propositions in

pleadings are not entitled to be credited. *See*, *e.g.*, *Kowal*, 16 F.3d at 1276.[19]

The notion that the directors were obliged to affirmatively consider declaring dividends on a quarterly basis is particularly implausible here given that the exercise would have been pointless. As Plaintiff admits, dividends are only available to the extent there are "funds legally available therefor," Br. 19, but factors outside the directors' control foreclosed dividends altogether. Plaintiff's central thesis is that the Third Amendment structurally guaranteed that there would *not* be funds legally available to declare dividends to junior shareholders, *see*, *e.g.*, Compl. ¶ 68 (A.30) ("there would, (as history has confirmed) be no remaining assets from which dividends could ever be paid"), and Plaintiff also acknowledges that junior shareholder dividends were "eliminated" immediately upon entry into conservatorship back in 2008. Compl. ¶¶ 43, 87 (A.22-23, 35). Even if, *arguendo*, there was a contractual duty to engage in hollow quarterly deliberations about dividends that could not be awarded, these pleaded facts rule out that there could have been any damages (*i.e.*, missed dividend payments) from failure.

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[19] Nor does Plaintiff plead any plausible basis upon which the directors could be deemed to owe a contractual duty to Plaintiff "to seek the prior written consent of Treasury to declare a dividend on the Junior Preferred Shares." Proposed Am. Compl. ¶ 62 (A.261). The Treasury agreements *prohibit* dividends to junior shareholders. *See supra* at 20. That the prohibition could hypothetically be waived with Treasury's consent does not give rise to a contractual duty to press Treasury for such a waiver.

Plaintiff asserts that "[t]his Circuit has already held that Directors can be liable to Company stockholders for breaching the Certificates." Br. 46 (citing *Fairholme Funds, Inc. v. FHFA*, Nos.13-1053, 13-1439, 2018 WL 4680197, at *10 (D.D.C. Sept. 28, 2018)). That assertion is mistaken twice over. The cited decision is not this Court's but the district court's opinion on remand from *Perry Capital*. And that district court decision did not address claims against the directors, because there were and are no such claims in that proceeding. The cited decision declines Rule 12(b)(6) dismissal of implied-covenant claims against *FHFA, as Conservator*, and the *Enterprises*. Those are the same defendants whom Plaintiff has expressly *abandoned* pursuing.

2. Moreover, under the Recovery Act's Succession Clause, since September 2008 the Conservator alone has held all "rights, titles, powers, and privileges" that otherwise would be held and exercised by the Enterprises' boards of directors. 12 U.S.C. § 4617(b)(2)(A)(i). Plaintiff concedes that "[t]he Succession Clause grants full Conservator control in the plenary management of the GSEs." Proposed Am. Compl. ¶ 42 (A.256).

As such, the Conservator manages the Enterprises and is responsible for the transactions and decisions of which Plaintiff complains. The delegation the Conservator made to the boards for day-to-day operations did not include the

authority to declare or pay dividends, and the Conservator, *not* the directors, entered into the Third Amendment. *See supra* at 7, 12.

Plaintiff characterizes this Court's decision in *Perry Capital* as holding that the directors' supposed duties and authority regarding dividend declaration nevertheless "continued into conservatorship." Br. 26 (citing *Perry Capital*, 864 F.3d at 626). That is once again mistaken. When this Court said the "contract-based claims may proceed," the claims to which it was referring were claims against FHFA, as Conservator, and the Enterprises themselves, not any directors.

Plaintiff takes the position that the Conservator's plenary control somehow "did not in any way eliminate Directors' economic contractual obligations and duties owed to Junior Preferred [shareholders]" because 12 U.S.C. § 4617(b)(2)(K)(i) "exclude[s]" shareholders' "right to payment, restitution, or other satisfaction of their claims" from succession. Proposed Am. Compl. ¶ 43 (A.257). This argument is confused on multiple levels. Section 4617(b)(2)(K)(i) provides that in a *receivership*, the receiver's succession to *shareholders'* rights has the effect of terminating those rights, save for the ability to assert claims against the receivership estate. That provision is not implicated here, because (a) the Enterprises are not in receivership, (b) what matters is the Conservator's succession to the *directors'* duties and powers, not the shareholders' rights or

claims, and (c) Plaintiff seeks to recover solely from the directors and not from the Enterprises, the Conservator, or the conservatorship estate.

In sum, the "Quarterly Dividend Duty" on which Plaintiff's proposed amended complaint focuses is a fiction. But assuming *arguendo* such a duty did exist, either as a matter of contract or implied covenant, it would have transferred to the Conservator by operation of law during conservatorship, so it would no longer fall on the directors. A complaint that sues the wrong defendants fails to state a claim, and an amendment that names only the wrong defendants while dropping the right ones is the archetype of futility.

B. Count I Is Barred by *Perry Capital*

Finally, Count I, for breach of contract, is barred by binding Circuit precedent. In *Perry Capital*, similarly situated shareholders brought the same claim, and this Court affirmed its dismissal. Those shareholders alleged that, "in adopting the Third Amendment, FHFA and the Companies breached the terms governing dividends . . . in [their] stock certificates." 864 F.3d at 603. This Court held: "the class plaintiffs have no enforceable right to dividends because the certificates accord the Companies complete discretion to declare or withhold dividends." *Id.* at 629.

Count I here is indistinguishable: "By entering into the Net Worth Sweep, . . . the Defendants breached the Companies [sic] obligations to Plaintiff to

receive dividends on his Junior Preferred shares." Compl. ¶ 108 (A.40); *see id.* ¶ 110 (A.41) ("the Net Worth Sweep rendered a nullity the contractual right of the Plaintiff to receive dividend payments"). Plaintiff acknowledges that the dividend provision in his stock certificates is subject to the same "sole discretion" as drove this Court's holding in *Perry Capital*. Br. 28. Of course, a theory predicated on "the contractual right of the Plaintiff to receive dividend payments," Compl. ¶ 110 (A.41), cannot be viable when Plaintiff has "no enforceable right to dividends" under his contract, *Perry Capital*, 864 F.3d at 629.

Plaintiff cannot avoid the clear import of *Perry Capital* by recasting the alleged contractual obligation as a duty merely to *determine whether to* declare dividends. The breach-of-contract count relies on a supposed "contractual right of the Plaintiff *to receive dividend payments*," not a procedural right to a determination. Compl. ¶ 110 (A.41) (emphasis added). Plaintiff's prayer for relief thus seeks compensatory damages with "interest thereon from the respective *missed dividend payment* dates." Compl. at 35 ¶¶ C, D, E (A.44) (emphasis added). In any event, for the reasons stated above, Plaintiffs fail to plausibly plead any viable theory of an actionable contract duty to make affirmative determinations on a quarterly basis. *See supra* at 46-48.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Dated: February 12, 2020

Respectfully submitted,

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I hereby certify as follows:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 11,843 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii);

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Dated: February 12, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2020, I electronically filed the foregoing document with the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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