UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA J. ANGEL,	)	
	)	
Plaintiff,	)	No. 23-CV-800
	)	(Senior Judge Margaret M. Sweeney)
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

PRELIMINARY STATEMENT

Plaintiff Joshua J. Angel ("Plaintiff" or "Angel") respectfully submits this Memorandum in Opposition to the Motion to Dismiss dated October 13, 2023 ("MTD"), filed by The United States ("Defendant," "United States," or the "Government").

STATEMENT OF THE CASE

A. IN GENERAL

Plaintiff commenced this action ("Angel IV") on June 1, 2023. (Dkt. No. 1.)[1]

Plaintiff is a holder of *non-cumulative* preferred shares ("Junior Preferred Shares") issued by the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, the "GSEs" or the "Companies"), purchased at various times following January 1, 2013.

The *Angel IV* action is being brought on behalf of Plaintiff and all other holders of Junior Preferred shares of either or both Fannie Mae and Freddie Mac, issued prior to September 6, 2008 (the "Class").

Plaintiff, on behalf of himself and the Class, seeks to recover damages caused by the United States': (a) quarterly breaches of Junior Preferred Certificate of Designation ("COD") express contractual dividend rights; (b) quarterly breaches of the federal government Implicit Guaranty of Junior Preferred contractual dividend rights; (c) wrongful serial exactions and extractions, and; (d) breach of the *Angel II* Settlement Agreement. Plaintiff also seeks relief in the form of declaratory findings regarding: (i) the federal government guaranty of timely payment of the Companies' Junior Preferred equity securities co-extensive, and on par with that of their debt securities legal

[1] As this Court is aware, this is not the first action brought by Plaintiff related to Junior Preferred shares of Fannie Mae and Freddie Mac. Most recently, by Opinion and Order dated May 12, 2023, this Court dismissed without prejudice the action captioned *Joshua J. Angel v. The United States*, 165 Fed.Cl. 453 (2023) ("Angel III").

obligations, and; (ii) permanent impairment of Junior Preferred share value by reason of government actions, rendering the shares mandatorily redeemable at conservatorship and/or case end.

This is an action for money damages arising out of Article 5 of the United States Constitution, for breach of both an express contract and an implied-in-fact contract with the Government, and federal statutes, most notably the Tucker Act, which waives the Federal Government's sovereign immunity and confers jurisdiction on this Court for "claims founded on... any contract, express or implied, with the Government of the United States."

Fannie Mae's and Freddie Mac's Junior Preferred CODs are express contracts, creating contract rights in Plaintiff, and contract obligations in Defendant. More specifically, the language of the CODs require the Companies' respective Boards of Directors ("BODs") to make reasonable, good-faith determinations every fiscal quarter as to whether to declare a dividend payment on the Junior Preferred shares, and, if a dividend declaration is proper and appropriate, whether the divided should be distributed or deferred.

The CODs of Fannie Mae and Freddie Mac's Junior Preferred stock, are respectively subject to and governed by Virginia and Delaware corporate governance law, which corporate law expressly creates quarterly dividend periods. Both the CODs and applicable state corporate governance law require directors of corporations whose stock provide for quarterly dividends to actually make a dividend determination every quarter. As the leading treatise on Delaware corporate law explains, "Declaration of a dividend is ordinarily the sole prerogative of the directors and the decision is protected by the business judgment rule ***[which] has no role where the directors have either abdicated their functions, or absent a conscious decision, failed to act." 11

Edward P. Welch et al, *Folk on the Delaware General Corporation Law*, section 141.02(B)(12)(6th ed 2019).

Thus, while a board of directors has discretion in determining what dividends to declare, a board of directors of a corporation that has issued stock with express quarterly dividend periods has a contractual duty to make a dividend determination every quarter. The Plaintiff and other holders of Junior Preferred Stock had express contractual rights to such quarterly dividend determinations by the BODs. Defendant's instructing the BODs of Fannie Mae and Freddie Mac not to consider whether to declare a quarterly dividend to Junior Preferred stock for that fiscal quarter breached these contract rights. Defendant's argument that "the breaches of contract that Mr. Angel alleges involves discretionary action"(MTD pp 9-10) is both inaccurate as well as inconsistent with state law regarding corporate dividends. Boards of directors of corporations that have issued stock with express quarterly dividend periods have "business judgment rule" discretion to make a reasonable, good faith determination each quarter whether or not to declare a dividend, and if so, whether or not to distribute same. But such boards do not have any discretion for each quarter to consider whether to declare dividends. As the then–FHFA director Melvin Watt stated in prepared remarks, "Under conservatorship, [Fannie Mae and Freddie Mac] continue to operate as business corporations, with boards of directors subject to corporate governance standards." Prepared Remarks of Melvin L. Watt, Director of FHFA at the Bipartisan Policy Center, Federal Housing Finance Agency (Feb 18, 2016) https://www.fhfa.gov/mobile/Pages/public–affairs–detail.aspx?PageName=Prepared–Remarks–Melvin–Watt–at–BPC.aspx

The Government's Implicit Guaranty of Junior Preferred share obligations is an implied-in-fact contract, created by the words and conduct of authorized Government officials and various Federal statutes that guaranty that the express contract rights created by the CODs will be

consistently recognized and protected by Government action and inaction. The bases for the Implicit Guaranty will be more fully explained below (See Section **B**).

On September 6, 2008, Fannie Mae and Freddie Mac were placed into conservatorship, and the Conservator, the Federal Housing Finance Administration ("FHFA"), on behalf of each GSE, entered into identical Senior Preferred Stock Purchase Agreements ("SPSPAs") with the United States, through the Department of the Treasury ("Treasury"), pursuant to which the GSEs each Company issued Senior Preferred shares to Treasury.

That same day, (then) Treasury Secretary Henry M. Paulson, Jr. announced:

> *These Preferred Stock Purchase Agreements were made necessary by the ambiguities in the GSE Congressional charters, which have been perceived to indicate government support for agency debt and guaranteed MBS. Our nation has tolerated these ambiguities for too long, and as a result GSE debt and MBS are held by central banks and investors throughout the United States and around the world who believe them to be virtually risk-free. Because the U.S. Government created these ambiguities, we have a responsibility to both avert and ultimately address the systemic risk now posed by the scale and breadth of the holdings of GSE debt and MBS.*

(Angel IV Complaint ¶ 22)

In August 2008, Fannie Mae, under authorization of its FHFA Administrator, declared an approximately $405 million dividend on its Junior Preferred Shares, and an approximately $8 million $0.05 dividend on its common shares (i.e., approximately $413 million in total dividends payable September 30, 2008), the share payment obligations as legally payable running concurrently with the instance of declaration. (Angel IV Complaint ¶ 56, note 12.)

Treasury Secretary Paulson, in his September 7 announcement of the Companies' conservatorship, further conditioned equity securities dividend declaration and payment absent Treasury prior written approval, for the duration of the conservatorship -- **Conditioned, not eliminated**. Neither Secretary Paulson's September 7th statement, nor SPSPA specific language eliminated or attempted to eliminate the Junior Preferred stock, the differences in the contract

rights of the Junior Preferred stock and the Companies' common stock, or the federal government guaranty of timely payment of the Companies' legal dividend obligations.

Although the SPSPA's requirement of Treasury's "prior written consent" modified the GSEs' procedure regarding the declaration and payment of Junior Preferred dividends, Plaintiff does not challenge these procedural modifications. But nothing in the 2008 SPSPAs can be read to terminate the substantive contract rights of holders of Junior Preferred shares. Indeed, by changing the dividend procedures, the SPSAs expressly recognized that those substantive contract rights were not eliminated.

On August 17, 2012, Treasury, and FHFA, on behalf of the GSEs, entered into the Third Amendment to the SPSPAs, effective as of January 1, 2013. The Third Amendment included a definitional "Net Worth Sweep" provision which, beginning January 1, 2013, required quarterly dividend payments to Treasury, equal to each GSE's calculated *profit*, for the immediately preceding fiscal quarter (emphasis added).

The Third Amendment did not expressly address, much less eliminate, Plaintiff's express and implied-in-fact contract rights. As long as they were reasonable and made in good faith – as opposed to have been dictated by Treasury -- the Fannie Mae and Freddie Mac board of director's quarterly dividend determinations, possible dividend declarations and possible dividend deferrals were in no way inconsistent with the Third Amendment's Net Worth Sweep. The issue before the Court – and the subject of its prior motion for discovery in aid of opposition to the MTD – is whether the BODs' quarterly dividend determinations independently originated with, and were made by them or whether they were dictated to them by Treasury. Indeed, such independent BODs' quarterly determinations must be an integral part of any quarterly Net Worth Sweep in order for the Net Worth Sweep to be as authorized by the Third Amendment.

The declaration of a dividend alone has a significant, positive financial and legal effect. Declaration of a dividend to the Junior Preferred stock creates a liability to the holders of Junior Preferred stock. *See* 11 William M. 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."). This creation of a liability is important here as it affects the Defendant's quarterly application of the Net Worth Sweep based on the words used in and defined by the Third Amendment.

Such a dividend declaration also affects the relative rights of the holders of Junior Preferred Stock and the holders of common stock. When the Companies' boards of directors declare a Junior Preferred non-cumulative dividend that "becomes a debt owed to the [Junior Preferred} shareholders" that must be paid before any distribution can be made to other shareholders.

Nonetheless, Treasury, commencing first quarter 2013 and each quarter thereafter through 2023, prevented the Companies' boards of directors from determining whether dividend declaration was proper and appropriate. It is these Government quarterly actions, not the 2012 creation of the Net Worth Sweep or the subsequent Net Worth Sweeps themselves, that are the factual bases for the Angel IV Complaint.

B. THE IMPLIED GUARANTY WAS BASED ON THE PERCEPTION CREATED BY THE GOVERNMENT THAT THE GOVERNMENT WOULD NOT ALLOW THE GSEs TO DEFAULT EVEN THOUGH THE PROSPECTUSES FOR THEIR SECURITIES EXPLICITLY STATED THAT THEY WERE NOT BACKED BY THE GOVERNMENT

Alan Greenspan, who served as chairman of the Federal Reserve Board from 1987 through his retirement in 2006, wrote in his 2007 memoir, "The Age of Turbulence," that the financial markets perceived Fannie Mae and Freddie Mac securities as guaranteed by the Federal government. He wrote at page 242 as follows (Angel IV Complaint ¶ 21):

> "They are granted a **de facto subsidy** by financial markets in the form of interest rates with very low credit-risk premiums on their debit – the **markets presume Uncle Sam will bail them out in the event of default**. Fannie and Freddie had been using this subsidy to pad their profits and grow."

(Emphasis added).

Three years before the conservatorship, Chairman Greenspan had testified before Congress on the subject of GSEs' securities. His testimony, as recounted in *Haggerty, The Fateful History of Fannie Mae, page 143 (2012)* should be considered whenever the issue of plausibility arises.

> "Congress had resumed its long stalled efforts to pass legislation to improve regulation of Fannie and Freddie. By now, one of the most powerful voices for change was that of Fed Chairman Alan Greenspan. He made his case for shrinking Fannie and Freddie at a hearing of the Senate Banking Committee on April 6, 2005. Typically, Greenspan spoke as if he were dictating an abstruse economic research paper rather than trying to make his thoughts clear to the typical voter or senator. On that day, he made himself quite clear.
>
> The problem, he said, was that investors had 'concluded that the government will not allow [Fannie and Freddie] (sic) to default' even though the prospectuses for their debt securities explicitly stated that the borrowings [the 1992 Act] were *not* (sic) backed by the government. The perceived government backing allowed Fannie and Freddie to borrow at low interest rates that were not available to even the top-rated banks and other financial institutions and to 'borrow essentially without limit.'"

Former Treasury Secretary Henry M. Paulson, Jr. in a conservatorship press announcement on September 7, 2008, similarly noted the market's perception of an Implicit Guaranty for timely payment of GSE securities to gain market adherence as follows:

> "These Preferred Stock Purchase Agreements were made necessary by the ambiguities in the GSE Congressional charters, which have been perceived to indicate government support for agency debt and guaranteed MBS. Our nation has tolerated these ambiguities for too long, and as a result GSE debt and MBS are held by central banks and investors throughout the United States and around the world who believe them to be virtually risk-free. Because the U.S. Government created these ambiguities; we have a responsibility to both avert and ultimately address the systemic risk now posed by the scale and breadth of the holdings of GSE debt and MBS."

(Emphasis added.) (Angel IV Complaint ¶ 22).

Treasury in a September 11, 2008 official press release affirmed its guaranty obligation and rescinded the $413 million legally declared dividends suspension as follows (Angel IV Complaint ¶ 23):

> "Some may speculate that a future Congress could pass a law that would abrogate the agreement. But any such law would be inconsistent with the U.S. government's longstanding history of honoring its obligations. Such action would also give rise to government liability to parties suing to enforce their rights under the agreement.
>
> The U.S. Government stands behind the preferred stock purchase agreements and will honor its commitments. Contracts are respected in this country as a fundamental part of rule of law."

In an April 2009 paper entitled "The 2008 Federal Intervention to Stabilize Fannie Mae and Freddie Mac," financial economist W. Scott Frame of the Federal Reserve Bank of Atlanta summarized the government's implicit guaranty of GSE securities as follows (Angel IV Complaint ¶ 24):

> *"The features of Fannie Mae's and Freddie Mac's federal charters, coupled with some past government actions, [have] long served to create a perception in financial markets that the federal government 'implicitly guarantees' the GSEs' financial obligations... despite explicit language on ...the GSEs' securities that they are not obligations of the federal government."*

In this working paper, Frame further noted that the GSEs issue "**'government securities'** as classified under the Securities Exchange Act of 1934."[2] (emphasis added) (Angel IV Complaint ¶ 25.)

The question of whether GSE securities qualify as government securities is addressed and answered squarely in Comptroller of the Currency Administrator of National Banks Interpretive

[2] W. Scott Frame, *The 2008 Federal Intervention to Stabilize Fannie Mae and Freddie Mac. (April 2009)*. Federal Reserve Bank of Atlanta, *Working Paper* 2009-13 ("Frame") at pp. 3, n. 4, 6, n. 15. *See* 15 U.S.C. § 78m, requiring every security issuer to file with the SEC and then exempting any issuers who issue only "exempted securities" from registration requirements, pursuant to 15 U.S.C. § 78c, defining "exempted securities" to include "government securities," and defining "government securities" to include Fannie Mae and Freddie Mac securities, and 15 U.S.C § 77c because they are "instrumentalities" of the United States.

Letter #931 (hereinafter IL #931), dated March 15, 2002. Employing 12 U.S.C. 24(7) as its authority, IL #931 states as follows (Angel IV Complaint ¶ 26):

> Section 24(Seventh) permits national banks to hold "mortgages, obligations, or other securities which are or even have been sold by [Freddie Mac] pursuant to section 305 or section 306 of the Federal Home Loan Mortgage Corporation Act." Section 306(g) of the Federal Home Loan Mortgage Corporation Act empowers Freddie Mac to issue "preferred stock on such terms and conditions as the Board of Directors shall prescribe." Freddie Mac preferred stock is a "security" that national banks may hold under section 24(Seventh).[3]

And, a Board of Governors of the Federal Reserve System Internal Discussion Paper dated March 2012 (Federal Reserve Paper 1045), treats the existence of a federal government implicit guaranty of GSE preferred shares contract rights as indisputable, and central to the shares *de jure* marketing as "Government Securities." (Angel IV Complaint ¶ 27.)[4] Significantly, the Government has never challenged either the existence, or Plaintiff's description of the meaning of either IL# 931 or Federal Reserve Paper 1045.

C. PRIVATE LABEL MBS ACTIONS

At the end of August 2023, Plaintiff discovered a press release dated August 14, 2023, issued by the U.S. Attorney for the Eastern District New York stating that the office had finalized the disposition of the 2011 Private Label MBS Actions in random recovery from litigation totaling approximately $36 billion. (See Exhibit "D" to Plaintiff's motion to amend his complaint (Dkt No. 23).

By Opinion and Order dated February 21, 2024 (Dkt. No. 27), this Court denied Plaintiff's request to amend the Angel IV Complaint to add an allegation concerning the U.S. Attorney's press release as futile. Most respectfully, the allegation is not "futile" since litigation proceeds fall

[3] Comptroller of the Currency Administrator of National Banks Interpretive Letter #931, April 2002 http://www.occ.gov/static/interpretations-and-precedents/apr02/int931.pdf

[4] *See* alos David Reiss, *The Federal Government's Implied Guaranty of Fannie Mae and Freddie Mac's Obligations: Uncle Sam Will Pick Up the Tab* 42 Georgia Law Review 1019, 1055-66 (200).

outside the definition of "profits" that were subject to the Quarterly Net Worth Sweeps authorized by the Third Amendment.

On September 2, 2011, the FHFA as GSE's conservator filed lawsuits in Fannie's and Freddie's names and behalf, against numerous financial institutions, alleging, *inter alia*, the institutions' violation of federal securities laws, in the sale of $200 billions of defective residential private label mortgage backed securities ("MBS") to the GSEs (the "Private Label MBS Actions"). The GSEs financial statements thereafter show receipt of approximately $36 billion in Private Label MBS Actions litigation proceeds. beginning late 2013/2014 Apparently, the procedure was for government counsel to remit the Private Label MBS Actions litigation proceeds to the Companies as/when obtained, and for the Companies to then transfer the Private Label MBS litigation proceeds to Treasury pursuant to the quarterly Net Worth Sweeps.

The language of the Third Amendment and the language of government officials explaining the Net Worth Sweep both provide that the Treasury is to take only Fannie Mae and Freddie Mac's profits. Private Label MBS Actions litigations proceeds are not profits.

Profits come from operations, not litigation. Private Label MBS actions are not profits from operations. Instead the emanate from the more than hundred billion dollars of 2009/2010 Fannie/Freddie bad debt and tax asset accounting reserve reversals, initial capital loss covered by Treasury dollar for dollar cash exchange for Senior Preferred shares. Under GAAP, such false accounting (ersatz) profits would best be reflected in reversal (i.e., redemption) of the Senior Preferred shares, a course of action prohibited under the SPSPA agreements, in the absence of written permission from Treasury. Nevertheless, these litigation proceeds are Fannie Mae's and Freddie Mac's assets; which assets affect the monetary value of Plaintiff's Junior Preferred Stock. But there is no reasoned argument based on the language of the Third Amendment, generally

accepted accounting principles or case law to treat the Private Label Action litigation proceeds as profits for purposes of the quarterly Net Worth Sweeps.

The Count Two Illegal Extraction Claim in the Angel IV Complaint is bottomed on the wrongful inclusion of the Private Label MBS Action litigation proceeds as profits as and when received and Treasury's periodically takings of these MBS Action litigation proceeds in Net Worth Sweeps.

The Press Release demonstrates that it is reasonable – not improbable -- to conclude that at least a portion of the Private Label MBS litigation proceeds were swept to Treasury after the statute of limitations repose date applicable to Angel IV, and therefore still actionable. Accordingly Plaintiff respectfully requests that the Court take note of the United States Attorney's Office, Eastern District of New York, press release dated August 14, 2023, as referenced as Exhibit D in the Motion to Amend the Complaint, as an adjudicated fact not subject to reasonable dispute and otherwise without legal sanction, per Federal Rule of Evidence 201.

According to the Press Release, approximately $36 billion of the Private Label MBS Actions proceeds were swept up and paid to Treasury since the New Worth Sweep payments began. However, a release issued on July 12, 2017 by FHFA reported that as of then, $23,707,980,000 in litigation proceeds has been received in respect of Private Label MBS Actions. https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Final-Update-on-Private-Label-Securities-Actions-9172018.aspx This Court may take judicial notice of this official July 12, 2017, release by FHFA. By deducting the amount reported to have been recovered as of July 12, 2017 from the amount reported to have been recovered as of August 14, 2023, it is apparent that at least $12 billion in additional Private Label MBS Actions proceeds were recovered by the Companies in the six years prior to the filing of Angel IV. Plaintiff has thus stated a factual basis

for the Government's wrongful extraction of $12 billion of Private Label MBS Actions litigation proceeds within the limitations period.

D. *ANGEL II* SETTLEMENT AGREEMENT BREACH OF CONTRACT

Count IV of the Angel IV Complaint in this action states a claim for breach of a contract between Plaintiff and Defendant, in settlement of earlier litigation between the parties (hereinafter as developed, The "*Angel II* Settlement Agreement"). During June and July 2021 the parties exchanged a series of emails and telephone calls culminating on July 20, 2021 when the Government's then lead counsel advised Plaintiff that: (a) the Government had agreed in principle to the June 10th draft Settlement Agreement as it contained all of the material terms of the proposed settlement and; (b) that the government had authorized its counsel to submit the Settlement Agreement for formal finalization, and Court filing on July 22, 2021.

On or about July 21, 2021, Defendant requested, and Plaintiff consented, to suspend the agreed-to *Angel II* Settlement Agreement court filing, from "30 days after *Collins* decision," to "30 days after the Federal Circuit decision in *Fairholme* became final and non-appealable." The filing extension rationale for Defendant's motion stated as follows:

> "The Federal Circuit's rulings in *Fairholme* will likely provide binding guidance in this case. Moreover, the extent of the stay likely would be modest given that the *Fairholme* appeal is fully briefed and scheduled for argument on August 4, 2021."
>
> . . .
>
> **"If the Court grants the stay, the parties respectfully propose that, within 30 days of the date the Federal Circuit's decision in *Fairholme* becomes final and unappealable, the parties submit a joint status report proposing a schedule for further proceedings in this case"** (emphasis added).

Plaintiff was given no reason to believe that Defendant's request for an extension of the filing date was in any way connected to, or resulted from a change in the Government's position that the parties had reached an agreement in principle on track for ministerial formalization, Indeed, from the July 23, 2021 extension of the October 27, 2020 Briefing Suspension Stay Order to the *Fairholme*

Decision becoming final and non-appealable, through close of business March 15, 2022, Plaintiff was provided no basis to question his firm belief in an unconditional and mutually binding *Angel II* Settlement Agreement that was on track for ministerial formalization, to be included as an attachment to the joint status report ("JSR") to be filed with the Court on March 24, 2022.

On the previous January 20, 2022, Defendant's (then) lead counsel advised of an internal rotation and change in Defendant's lead counsel. Not wanting to further delay court approval of the Angel II Settlement Agreement, Plaintiff advised both departing and incoming Defendant's lead counsel the same day, as follows:

> "Per our recent conversations, I prepared the attached documents with intent of submission to you in tandem with Fairholme decision entry, and pre-Joint Status Report filing:
>
> (1) Plaintiff's proposed, revised "Stipulation and Agreement of Settlement" ("SAS") for attachment to the Joint Status Report ("JSR") to be filed with the Court on or before 2022;
>
> (2) Plaintiff's draft Stipulation and Notice of Voluntary Dismissal Pursuant to R.C.F.C. 31(a)(1)(A)(i); and
>
> (3) Wire instructions for Fannie/Freddie attorney fee payments to Joshua J. Angel PLLC attorney escrow account at [deleted] Bank."

There were no further communications from Defendant to Plaintiff regarding the Angel II Settlement Agreement until, on March 16, 2022, eight days short of the then-agreed-to *Angel II* date for Settlement Agreement filing, Defendant, without stating a factual or legal basis, informed Plaintiff by email:

> "…*will not be accepting your settlement offer, nor entering any stipulations at this time. Moreover, we are not interested in further settlement discussion at this time… We anticipate* *** *that we will likely seek dismissal of your complaint, along with the complaints in the other cases that are currently stayed, in reliance upon* Fairholme *and* Washington Federal. *We will also seek to resume the Court's consideration of the statute of limitations issue in your case*."

The Parties then agreed to the March 24, 2022 Joint Status Report filing with separate statements of Plaintiff/Defendant positions regarding the Angel II Settlement Agreement.

Neither the March 22, 2022, email nor any further contemporaneous communication from the Defendant nor any pleading filed by the Defendant expressly deny the factual allegations in the Angel IV Complaint that the Angel II Settlement Agreement had been approved in principle by an appropriate Government official.

ARGUMENT

I. THE COURT SHOULD DENY THE MOTION TO DISMISS AND ALLOW THE CASE TO GO FORWARD

In its motion to dismiss, the Government argues for dismissal pursuant to RCFC 12(b)(1) because this Court lacks jurisdiction over Plaintiff's claims and pursuant to RCFC 12(b)(6) because Plaintiff's complaint fails to state a claim on which relief may be granted. Under RCFC 12(b)(1), the Government argues that Plaintiff's claims accrued more than six years ago and thus fall outside this Court's jurisdiction under the Tucker Act. The Government also urges that Plaintiff's contract claims fail to state a plausible cause of action and thus should be dismissed under RCFC 12(b)(6).

A. ANGEL IV SHOULD NOT BE DISMISSED ON THE STATUTE OF LIMITATIONS

The government argues that Angel IV should be dismissed - on the same grounds advanced to dismiss Angel III - that more than six years have passed since accrual of Plaintiff's contract claims, and therefore as the statute of limitations has run this Court lacks jurisdiction over his claims. The United States advances two theories in support of this conclusion. The first is that this Court has already decided the issue and therefore Plaintiff is precluded under grounds of res judicata from raising his claims again. The second is that under the facts with respect to the implied

contract as alleged in Angel IV the claim accrued more than six years before filing and therefore is time barred. Neither contention is correct.

B. RES JUDICATA DOES NOT APPLY TO THE DECISION DISMISSING ANGEL III

The United States argues that because of this Court's decision in Angel III, "Mr. Angel is precluded from relitigating these claims." MTD at 17. This is incorrect. This Court's decision in Angel III, the holding of which was limited to the statute of limitations issue, was explicitly "without prejudice." May 12 Decision at 20. By dismissing Angel III without prejudice, this Court plainly invited the revised pleading now under consideration as Angel IV, which must be reviewed independently for plausibility.

Well established precedent holds that a dismissal without prejudice has no preclusive effect on a new pleading. *See Semtek Internat'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) ("The primary meaning of 'dismissal without prejudice,' we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim."); *Perez v. Kipp DC Supporting Corp.*, 70 F.4th 570, 571-72 (D.C. Cir. 2023) (same); *Jet, Inc. v. Sewage Aeration Systems*, 223 F.3d 1360, 1364 (Fed. Cir. 2000) ("Dismissal without prejudice indicates that judgment is not on the merits and will have no preclusive effect.").

This Court's May 12 Decision was without prejudice. It can have no preclusive effect on Angel IV and Angel IV's revised and augmented allegations.

C. THE "LAST ACT" OR "CONTINUING ACTION" DOCTRINES HOLD THAT PLAINTIFF'S CLAIMS ARE NOT TIME-BARRED

The relevant statute of limitations circumscribing this Court's jurisdiction is six years. Claims accruing more than six years before the filing of a complaint are thus time-barred, absent an exception.

While Plaintiff believes that the continuing claims doctrine applies to this case, as discussed below, the Government misconstrues this as plaintiff's primary reason why the statute of limitations does not bar his contracts claims here. The present claims as pled specifically in Angel IV in respect of the contracts claims as plausible – which are distinct from and augmenting to any prior pleadings – is that the inclusion of dividends on Junior Preferred shares in each quarterly Net Worth Sweep required an intervening independent act, namely the failure of the GSEs' BODs to make a reasonable good faith determination each fiscal quarter whether to declare a dividend on the Junior Preferred shares, and if so, whether the dividend should be distributed or deferred.

The *Angel IV* Complaint alleges that each quarter, Treasury directed the respective BODs not to consider whether to declare dividends to Junior Preferred shareholders. Each such direction constituted a separate and distinct breach of contract. Indeed, the new allegations of Angel IV (*see* Angel IV Complaint at ¶¶ 21-28, 55-59) overwhelmingly set forth the case for express contracts in the form of CODs and an implied-in-fact contract in the form of the Implicit Guaranty – which have been breached independently each quarter since 2013.

This Court acknowledged the changed nature of the Angel IV allegations from those of Angel III in denying Plaintiff's motion in this case to take discovery when it stated: "As explained more fully below, the Court denies Mr. Angel's request because the discovery he seeks is irrelevant to the resolution of defendant's motion [to dismiss]." Opinion and Order of January 23, 2024, at p.1. Thus, this Court has recognized the plausible viability of Angel IV.

Neither the SPSAs nor the amendments thereto – including the Third Amendment -- addressed much less breached Plaintiff's substantive contract rights to a quarterly good faith determination by the boards of directors of Fannie Mae and Freddie Mac whether to declare

dividends. Neither the Third Amendment nor the Net Worth Sweeps pursuant thereto were the Government actions that caused the contract breaches alleged in Angel IV.

For purposes of the statute of limitations, a cause of action for breach of contract does not accrue until the time of the breach. See 18 W. Jaeger, Williston on Contracts §2021A, p. 697 (3d ed.1978). As the Supreme Court said in applying 28 U.S.C. § 2501, in the Franconia case, "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607, 120 S.Ct. 2423, 147 L.Ed.2d 528 (internal quotation marks omitted). Under applicable "principles of general contract law," *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411, 68 S.Ct. 123, 92 L.Ed. 32 (1947), whether petitioners' claims were filed "within six years after [they] first accrue[d]," 28 U.S.C. § 2501, depends upon when the Government breached . . ." *Franconia Associates v. United States*, 536 U.S. 129, 142 (2002). *See also* 1 C. Corman, Limitations of Actions §7.2.1, p. 482 (1991 ("The cause of action for breach of contract accrues, and the statute of limitations begins to run, at the time of the breach.").

The CODs of Fannie Mae and Freddie Mac's Junior Preferred stock expressly provide for non-cumulative quarterly dividend determinations. Boards of directors of corporations whose stock provide for quarterly dividends are required to make that dividend determination every quarter.

The Plaintiff and other holders of Junior Preferred Stock had contractual rights to such quarterly dividend determinations by the BODs. Defendant's instructing the BODs of Fannie Mae and Freddie Mac not to determine whether to declare a quarterly dividend to Junior Preferred stock for that fiscal quarter breached these contract rights,

And, neither the 2008 SPSPA nor any of the amendments thereto eliminated the Junior Preferred stock held by the Plaintiff or eliminated any of the contract rights of the holders of the Junior Preferred stock including the contractual dividend rights . Angel IV Complaint ¶¶ 15-19. The 2008 SPSPA did insert into the dividend declaration process a requirement that the boards of directors of Fannie Mae and Freddie Mac seek and obtain Treasury's "prior written consent" before the boards could "declare or pay any dividends." Angel IV Complaint ¶ 9. Their alleged failure to do so plausibly demonstrates that the BODs had been directed not to make quarterly good faith determinations whether to declare dividends on the Junior Preferred shares.

This change in the dividend declaration process is very different from an elimination of the dividend rights of the holders of Junior Preferred stock. Indeed, later filings with the United States Securities and Exchange Commission expressly state that the boards of Fannie Mae and Freddie Mac can still declare and pay dividends to holders of Junior Preferred stock – but only with the prior written consent of Treasury. Angel IV Complaint ¶ 59, n.12.

Notwithstanding the acknowledged continuing ability of the Fannie Mae and Freddie Mac BODs to determine and declare dividends to the holders of Junior Preferred stock after the Third Amendment, no Junior Preferred stock dividends have been even considered from January 2013 until the present date. Angel IV Complaint ¶¶ 16-18. Throughout all relevant time–periods, Fannie Mae and Freddie Mac's SEC filings and Fannie Mae and Freddie Mac's internal governing documents and directors' certifications to Fannie Mae and Freddie Mac do not disclose any quarterly consideration by the boards of directors of declaration of dividends to the holders of Junior Preferred stock even though Fannie Mae and Freddie Mac became immensely profitable beginning in 2013.

> "After the third amendment took effect, the companies' financial condition improved, and they ended up transferring immense

> amounts of wealth to Treasury. In 2013, the companies paid a total of $130 billion in dividends. In 2014, they paid over $40 billion. In 2015, they paid almost $16 billion. And in 2016, they paid almost $15 billion."

Collins v. Yellin, 594 U.S. 141 S. Ct. 1761 (2021).

A cause of action first arose in the first quarter after passage of the Third Amendment, when the BODs, acting under Government direction, did not even consider making a Junior Preferred share dividend declaration That it played out this way was not preordained from the Third Amendment. Indeed the GSEs' filings with the United States Securities and Exchange Commission expressly state that the boards of Fannie Mae and Freddie Mac can still declare and pay dividends to holders of Junior Preferred stock – but only with the prior written consent of Treasury. Angel IV Complaint ¶ 59, n.12.

In other words, as a matter of law, and at any time, and for any particular quarter, the United States could have changed its actions. Treasury could have consented to the declaration of Junior Preferred Share dividends thereby honoring its contractual duties and not breaching its obligations to the Junior Preferred shareholders for that particular quarter.

The Angel IV Complaint clearly alleges each quarterly Government action precluding that quarter's dividend determination by the Fannie Mae and Freddie Mac boards of directors was a separate event necessary in order for there to be a breach of the Plaintiff's dividend rights for that quarter, *See* Angel IV Complaint at ¶¶ 7, 16, 17, 18. These well-pleaded factual allegations cannot be disregarded on a motion to dismiss, where the inferences must be in favor of the Plaintiff.

The statement of facts as alleged in Angel IV are distinguishable from those in Angel III Counts I, II, and III, and distinguishable in turn from those at issue in *Hart v. United States*, 910 F.2d 815 (Fed. Cir. 1990), discussed at length in the decision dismissing the Angel III Complaint without prejudice. In Hart, the government's liability was fixed once and only once, even if the

quantum of damages might have varied over the years. There were no additional administrative decisions periodically following the first one. Any liability necessarily would have to be based on this single administrative decision fixing or denying benefits.

Here, the government's liability was not fixed for future quarters upon implementation of the Third Amendment. Defendant has never challenged Plaintiff's factual assertions that even after the Third Amendment the Fannie Mae and Freddie Mac boards of directors could still meet each quarter to determine whether to declare dividends.

Similarly, Defendant has never challenged Plaintiff's factual assertions that even after adoption of the Third Amendment in 2012 and the Government's wrongful action in or about January, 2013 preventing that quarter's dividend determination by the GSEs' BODs, Plaintiff could not have sued for future quarters in advance based on either the adoption of the Third Amendment, or the government's actions following the first quarter.

While it may now be obvious that the Government did the same thing quarter after quarter following the Third Amendment, and indeed Plaintiff alleges that it did, as a matter of law, it was not necessarily obvious at the end of the first quarter that the Government would do the same thing, regardless of how profitable Fannie Mae and Freddie Mac had been during that quarter. Each quarter the Government made a new decision to breach Plaintiff's contractual right to dividend a new dividend determination for that quarter. That is the essence of the claim in Angel IV.

Hypothetically, if in any subsequent quarter, the Government had not directed the Fannie Mae and Freddie Mac boards to refrain from dividend making a dividend determination that quarter, all parties would agree there was no contract breach for that quarter. Similarly, in that same hypothetical, if following the quarter for which it allowed the BODs to determine junior preferred dividends the Government the next quarter returned to the former pattern of not allowing

board of director dividend determination, that quarter would be a new breach. Each quarter there was a separate Government action that was a separate breach, which gives rise to a separate breach of contract claim.

Brown Park Ests.-Fairfield Dev. Co. v. United States, 127 F.3d 1449 (Fed Cir. 1997) can be distinguished from Angel IV. In that case, the Court noted that the "continuing claim" doctrine cannot apply where claims are "based upon a single distinct event, which may have continued ill effects later on." Id. at 1456. Plaintiff's claims here are not based upon a single distinct event with continued ill effects. Rather, they are founded on "a series of independent and distinct events or wrongs, each having its own associated damages." Id. While each of Plaintiff's repeated claims are based on similar sets of facts, each set of facts occurred at different times, i.e. , different dividend quarters. Each gives rise to a distinct damage claim, that for the particular dividends that would have been determined for that particular quarter, which may vary.

The "last act" doctrine holds that a cause of action does not accrue until the last act necessary for liability to be determined has occurred. Here, the last acts were the quarterly decisions of the BODs acting under the United States' direction. Thus, each last act was a distinct event that has happened each quarter, as alleged in the Angel IV Complaint.

The "continuing action" doctrine is similar, though related and often mixed. However, under either name, the statute of limitations does not run on any particular BOD action undertaken under the direction of the United States until it is made, which happened quarterly.

This same statute of limitations analysis applies to the Angel IV Count Two Illegal Exactions claims more fully explained in III below:

II. THE ANGEL IV COMPLAINT STATES A CAUSE OF ACTION FOR BREACH OF AN IMPLIED-IN-FACT CONTRACT

A. THE RULE 12(B)(6) TEST FOR MOTION TO DISMISS AN IMPLIED-IN FACT CONTRACT CLAIMS IS "PLAUSIBLE"

In deciding a motion to dismiss for failure to state a claim, the trial court must accept as true the factual allegations in the complaint. *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1355 (Fed. Cir. 2011). The standards for considering a motion to dismiss are well known, and all questions should be resolved in favor of the plaintiff and against granting a motion to dismiss. "When considering a motion to dismiss brought under RCFC 12(b)(6), 'the allegations of the complaint should be construed favorably to the pleader.'" *Spectre Corp. v. United States*, 132 Fed. Cl. 626 (2017), *quoting Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90* (1974. As the Court of Appeals for the Federal Circuit stated in *First Mortgage Corp. v. United States*, 961 F.3d 1331, 1338 (Fed. Cir. 2020, the complaint only need provide "'a short and plain statement of the claim showing the pleader is entitled to relief,'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quoting Fed. R. Civ. P. 8(a)(2, with "sufficient factual matter ... to 'state a claim to relief that is plausible on its face[.]'"

None of these standards are in dispute, of course. It is quite clear that, as this Court stated in numerous opinions, "Where plaintiff claims that the Government has breached an implied–in–fact contract, it need only make a plausible claim of a contract with the government." *Spectre Corporation v. United States*, 132 Fed l 626, 629 (2017). Indeed, under *Mendez v. United States*, 212 Fed. Cl. 370, 378 (2015), to survive a 12(b)(1) motion to dismiss, a plaintiff need only make a "non-frivolous allegation" of a contract with the government.

The question is whether Plaintiff alleged sufficient facts from which it can be concluded that the alleged implied-in-fact contract is plausible. Whether it is possible or even likely that Plaintiff can ever prove the contract by a preponderance of the evidence sufficient to establish liability is not the question.

B. PLAINTIFF'S IMPLIED-IN-FACT CONTRACT CLAIM IN ANGEL IV IS "PLAUSIBLE"

Plaintiff is mindful that in *dicta*, this Court in Angel III expressed an opinion that the implied-in-fact contract claim is not plausible. The conclusions in the Angel II opinion that it was implausible that investors would ever believe or rely upon statements by governmental officials that the Government would guaranty the GSEs' securities even though the prospectuses said it would not are limited to Angel III's factual pleadings and are in no way dispositive of the Angel IV Complaint.

The Angel IV Complaint greatly augments the allegations regarding the government announcements of guarantee. *See* Angel IV Complaint at ¶¶ 21-29, 55-59, and notes 8, 10 and 12[5], as well as pp12-15, *supra*. Based on the plethora of authoritative governmental statements it is implausible to conclude that no investor could ever have believed that the Government would allow the GSEs to default. Moreover, Plaintiff emphasizes that his claims are based on his purchases of Fannie Mae and Freddie Mac Junior Preferred shares after passage of the Third Amendment in 2013, so that whatever conclusions could reasonably be drawn by purchasers prior to the financial crisis in 2008 are not the same as those that could

[5] In light of these new, augmented, allegations, the Government's assertions that the allegations and claims of Angel IV are "identical" or "nearly identical" to those of Angel III (*see, e.g.*, MTD at pp. 19, 21, 29) are misplaced, at least in this crucial aspect.

be plausibly drawn by purchasers after the financial crisis, informed as they were by the several declarations in the market of implicit guarantee by government representatives.

At its core, the implied-in-fact contract claim in Angel IV can be stated simply as this: the United States Government, by its words and actions, implicitly guaranteed the express contract obligations to the holders of Fannie Mae and Freddie Mac non-cumulative Junior Preferred CODs to make quarterly dividend determinations. That's how Fannie and Freddie did business prior to 2008. That's why its securities were so widely held. And that's why the Government was forced to adopt HERA, rather than just let the GSEs default as it did with Lehman Brothers.

After having convinced the market of the existence of an implied-in-fact contractual obligation, the Government, starting with the first quarter after the Third Amendment, breached both the express contracts created by the CODs and this Implicit Guaranty by preventing the Fannie Mae and Freddie Mac boards of directors from making the quarterly dividend determinations required by the CODs.

The Government breached this Implicit Guaranty in a succession of separate actions each quarter since and including the first quarter of 2013 and through the first quarter of 2024, These were breaches of the United States' contractual obligations, as described in in the introductory section above.

The Angel IV Complaint alleges that Defendant's actions prior to the 2008 conservatorship created a general market perception of an implied guaranty of quarterly dividend payments to the holders of Junior Preferred stock. Treasury Secretary Paulson acknowledged this implied guaranty in a September 7, 2008 press conference. *See, e.g.*, Angel IV Complaint ¶¶ _5, 6_;

see also Angel IV Complaint at ¶¶ 21-29, 55-59, and notes 8, 10 and 12. *See also, generally,* https://money.cnn.com/2008/09/07/news/economy/ paulsonstatement/index.htm[6]

In light of the copious, well-pleaded allegations of Implicit Guaranty statements by responsible Government officials, whether such contractual obligations existed is a fact question notwithstanding problematic statutory language that cannot be decided through the expedient of calling such a conclusion implausible. For purposes of this 12(b)(6) motion, the Angel IV Complaint should be permitted to stand.

III. THE ANGEL IV COMPLAINT STATES CLAIMS FOR ILLEGAL EXACTION AND ILLEGAL EXTRACTION

A. ILLEGAL EXACTION

The Angel IV Complaint also alleges quarterly wrongful exactions by the Government. This court has jurisdiction over claims based on the Government's wrongful exactions. *See United States v. Testan*, 424 U.S. 392, 401–02 (1976)

In *Longshore v. United States*, 77 F.3d 440,442 (Fed Cir. 1996) the Federal Circuit stated that the "definitive issue" in a wrongful exaction case is "whether appellant had a property interest that was taken from him by government action." A contract right is of course a property interest. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 221 (1985)

The CODs created a contract right to quarterly dividend determinations. That contract right belongs to Plaintiff and to other holders of Junior Preferred Stock. Each quarter after the

[6] "In determining whether to grant a Federal Rule 12(b)(6) motion, district courts primarily consider the allegations in the complaint. The court is not limited to the four corners of the complaint, however. Numerous cases, as the note below reflects, have allowed consideration of matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the district judge without converting the motion into one for summary judgment. These matters are deemed to be a part of every complaint by implication." Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, section 1357 (April 2022).

Third Amendment, that contract right/property interest was taken from them by Government actions – wrongful Government exactions.

Plaintiff's wrongful exaction claim in Angel IV is supported by the major questions doctrine of *West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022). In that case, Justice Roberts explained the major question doctrine as

> "an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between those decisions. So have we."
>
> at

597 U.S. 724.

Here the Government's quarterly actions in precluding the Fannie Mae and Freddie Mac's boards of directors from making quarterly dividend determinations is "beyond what Congress could reasonably be understood to have granted." And, as this Court stated in Angel III, the question of whether a government action was unauthorized is a key element of illegal exaction." *Angel v. United States*, 165 Fed Cl 453, 470 (2023).

This Court in Angel III equated Plaintiff's wrongful exaction claim with the wrongful exaction claims in *Fairholme*. But they are very different, grounded as they were on two very different sets of Government actions.

In the *Fairholme* pleadings and opinions, there was no mention of the Junior Preferred Shareholders' contract rights to quarterly dividend determinations by the Fannie Mae and Freddie Mac boards of directors, nor any mention of the Government's having quarterly prevented such dividend determinations from being made.

Instead, the Fairholme plaintiffs were challenging the legality of the Third Amendment and its Net Worth Sweep and asserting that the Net Worth Sweep itself constituted the wrongful

exaction. That's why the Federal Circuit held in *Fairholme* that the wrongful exaction claims based on the Net Worth Sweep belong to the Enterprises. 26 F.4th at 1291-92.

In Angel IV, Plaintiff is not challenging the legality of the Third Amendment and its Net Worth Sweep or asserting that the Net Worth Sweep constituted the wrongful exactions. Instead, the Plaintiff in Angel IV is asserting that all Junior Preferred Shareholders have a contract right to quarterly dividend determinations and the Government's quarterly actions preventing the Fannie Mae and Freddie Mac's boards of directors from making dividend determinations were the wrongful Government actions. In Angel IV, unlike Fairholme, the wrongful exaction took away a contract right/property interest that belonged to the Plaintiff.

B. ILLEGAL EXTRACTION

Plaintiff's illegal extraction claim differs from his illegal exaction claim. The illegal exaction claim is bottomed on the Government having prevented the GSEs' BODs from quarterly making an independent good faith determination whether to declare and distribute dividends to Junior Preferred shareholders. In contrast, Plaintiff's illegal extraction claim is based on Defendant having treated the proceeds recovered in the Private Label MBS Actions as if they were profits that were subject to being transferred to Treasury each quarter pursuant to the Quarterly Net Worth Sweep.

This Court may take judicial notice of this official July 12, 2017, release by FHFA. By deducting the amount reported to have been recovered as of July 12, 2017 from the amount reported to have been recovered as of August 14, 2023, it is apparent that at least $12 billion in additional Private Label MBS Actions proceeds were recovered by the Companies in the six years prior to the filing of Angel IV. Plaintiff has thus stated a factual basis for the Government's wrongful extraction of $12 billions of Private Label MBS Actions litigation proceeds within the limitations period.

IV. COUNT IV OF THE COMPLAINT STATES A CAUSE OF ACTION FOR BREACH OF CONTRACT ON BREACH OF THE ANGEL II SETTLEMENT AGREEMENT

The Government has moved to dismiss Count IV of the Angel IV Complaint on the grounds that the contract alleged in Count IV, the Angel II Settlement Agreement, did not exist and that Plaintiff's allegations are not plausible. At this pleading stage in the case, the Government is incorrect.

As discussed above, the Angel IV Complaint describes the circumstances under which the Angel II Settlement Agreement was entered. Angel IV Complaint alleges that (i) Counsel for the United States represented to Plaintiff that the Angel II Settlement Agreement had been approved in principle, by the necessary Government officials, with formalization, a ministerial act to follow. The dispute was resolved. Plaintiff proceeded on that basis.

Now, the United States argues that the Angel II Settlement Agreement as alleged is not plausible because Plaintiff has not alleged the responsible official of the United States Government who approved it. That the identity of the responsible Government official, whoever he or she was, is presently unknown to Plaintiff is of no relevance to this court's ruling on the Government's motion to dismiss and cannot shield the United States from further litigation of the question.

Plaintiff has properly alleged facts that the United States represented to him that the Angel II Settlement Agreement was agreed to by the responsible Government officials. These facts, for pleading purposes, must be accepted as true. And, accepting these facts as true, a contract existed. The identity of the responsible Government officials will be disclosed during discovery and become part of the factual record on a decision on the merits. For purposes of the Government's present motion, Plaintiff has alleged adequately the existence of a contract of settlement.

CONCLUSION

The Motion to Dismiss should be denied and the parties should be directed to submit a joint status report to the Court.

Dated: March 21, 2024

Respectfully submitted,
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