UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA J. ANGEL, on behalf of himself and all others similarly situated, Plaintiff, v. THE UNITED STATES, Defendant.	No. 1:22-CV-00867-MMS

PLAINTIFF RESPONSE IN PARTIAL OPPOSITION

TO DEFENDANT MOTION TO STAY PROCEEDINGS

Pursuant to the Rules of the United States Court of Federal Claims ("Court"), Plaintiff Joshua J. Angel respectfully requests that the Court deny the Defendant request to stay all proceedings in the above-captioned case, and grant Defendant relief in the alternative limited to a 30-day enlargement of time up to and including November 3, 2022, for the Defendant to respond to the complaint.

I. Joshua J. Angel v. United States
No. 1:20-CV 00737 ("*Angel II*")

A. The *Angel II* Complaint

The Angel II complaint (" *Angel II* Complaint") consists of two counts: Count I – Breach of Contract, and Count II – Breach of Implied Covenant of Good Faith and Fair Dealing. Filed as a *pro se* putative class action, the *Angel II* Complaint expressly did not contest the legality of the August 17, 2012 Senior Preferred Stock Purchase Agreement ("SPSPA") – Third Amendment. Instead, the *Angel II* Complaint contests the legality of quarterly actions taken by Treasury after the Third Amendment.

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The *Angel II* Complaint alleges separate actionable Treasury quarterly Direct Injury wrongdoings by instructing GSE Boards of Directors ("BOD") to *not consider whether the declaration of a Junior Dividend was appropriate prior to each quarterly Net Worth Sweep, and not request Treasury's prior written consent to declare a Junior Preferred Share dividend*. According to the *Angel II* Complaint, the government in so doing breached its Implicit Guarantee of Junior Preferred share payments, and the shares' covenant of good faith and fair dealing.

Because the *Angel II* Complaint is grounded on the illegality of quarterly Treasury actions and not the invalidity of an SPSA amendment, Defendant's Motion to Dismiss statute of limitations defense is at most a partial rather than complete defense. There is an established decisional exception to 28 U.S.C. § 2501which , permits certain claims that may have been foreseeable over six years ago to be litigated, if "a plaintiff's claim is 'inherently susceptible to

being broken down into a series of independent and distinct events or wrongs, each having its own associated damages."' *Tamerlane, Ltd. v. United States*, 550 F.3d 1135, 1145 (Fed. Cir. 2008); *see also*, *Goodrich v. United States*, 434 F.3d 1329, 1336 (Fed. Cir. 2006).[1]

And, the *Angel II* Complaint's allegations of Direct Injury from quarterly Treasury actions stand separate and apart, from the myriad of post-2012 federal court litigations anchored in allegations of *per se* illegality of the third amendment to the SPSPA ("Third Amendment") and the profit sweep "Net Worth Sweep" contained therein (hereinafter collectively for narrative clarity the "*Fairholme* Third Litigations" and "*Fairholme* Third Plaintiffs").

B. Motion Practice

On August 18, 2020, the Defendant filed a Motion to Dismiss("MTD") the *Angel II* Complaint alleging: (i) lack of subject matter jurisdiction, and (ii) Tucker Act statute of limitations ("SOL") as a complete rather than partial defense.

On September 17, 2020, Plaintiff filed a motion for a continuance ("Motion for Continuance") to stay further briefing of the MTD so as to permit Plaintiff to obtain discovery to refute Defendant MTD allegations. In further motion practice, the Court on October 27, 2020, suspended briefing of the Motion for Continuance ("Order Suspending Briefing" or "OSB") until 30 days after the Supreme Court of the United States ("SCOTUS") issued a decision in *Collins v. Mnuchin* (hereinafter "*Collins*").

Collins' ruling as to the validity of the Third Amendment negatively impacted *Fairholme*

[1] Attachment No. 1: "Counsel Group January 2021 Memorandum – Application of 'Continuing Claims' and 'Equitable Tolling' Doctrines in Rebuttal to the Governments MTD the *Angel II* Complaint based on Tucker Act Statute of Limitations ("SOL") provisions."

Plaintiffs. The *Collins* decision s did not negatively impact this Plaintiff in this action,. The validity of the Third Amendment is irrelevant to this action which is based on quarterly Treasury actions, The *Collins* opinion did not address or even consider the validity of the quarterly Treasury action which is the subject matter of the *Angel II* Complaint.

C. Treasury GSE Recapitalization Plans

Treasury in 2019 issued the Treasury Housing Reform Plan of September 2019 ("Treasury 2019 GSE Reform Plan," or "Treasury 2019"). *Treasury 2019,* in part, proposed exchanging all or a portion of the liquidation preference of Treasury's Senior Preferred shares for more Fannie Mae and Freddie Mac stock. The Biden Administration, in January 14, 2021, announced that "Treasury ... [has] begun work to establish a timeline and process to terminate the conservatorship and raise capital" and that "Treasury ... endeavor[s] to transmit a proposal that details this work to both Houses of Congress on or prior to September 30, 2021." *See* Letter Agreement between Treasury and Fannie Mae (Jan. 14, 2021)("Biden Treasury Agreement").

Consistent with Treasury 2019, and the Biden Treasury Agreement, Plaintiff offered Defendant Parties in Stipulation and Agreement of Settlement July 2021 ("Settlement Agreement"), which resolves *Angel II* Complaint damage counts by agreed to *status quo ante* restoration of GSE Junior Preferred dividend entitlement 2013 through 2022 GSE director *ex post facto* declaration, and deferred payment, in GSE common shares, in lieu of cash, funded at conservatorship exit by Treasury restorative transfer of Senior Preferred capital reserve amounts from Treasury Senior Preferred shares, to Junior Preferred shares.[2]

[2] Attachment No. 2: "Counsel Group February 12, 2021, Memorandum "Appropriate Remedies for Treasury's Quarterly Actions Causing a Breach of Contract."

D. Settlement Agreement and Second Order Suspending Briefing

The Settlement Agreement was presented to Defendant and reviewed by the officials whom the Defendant deemed appropriate. The Settlement Agreement was scheduled for court filing July 2, 2021.

Defendant on or about July 20, 2021 requested an extension of the October 27, 2020 Order Suspending Briefing, from 30 days after *Collins* decision, to "within 30 days of a Federal Circuit decision final and non-appealable," in F*airholme Funds v. United States. The* rationale for Defendant extension was stated as follows:

> "The interlocutory appeal from the Court of Federal Claims to the Federal Circuit, *Fairholme Funds v. United States*, has been fully briefed and is scheduled for argument on August 4, 2021. *Indeed, the parties to the* Fairholme *Funds interlocutory appeal are required to file supplemental briefs, prior to argument, addressing the effect of the* Collins *decision on the cases appealed from the Court of Federal Claims.*"
>
> …
>
> "*Accordingly, to conserve judicial and party resources, the Court should continue to stay this case pending the Federal Circuit's resolution of* Fairholme. *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)*[3]

Fairholme was decided on February 22, 2022.

From July 23, 2021 up until March 15, 2022, Plaintiff was firm in belief of an agreed to Settlement Agreement that was set for Court courtesy ministerial filing as an attachment to a

[3] Court OSB ECF No. entered as "within 30 days," without any "final and unappealable language," major stretch to interpret other than Federal Rules final and non-appealable, rather than Supreme Court rule final and non-appealable.

March 24, 2022 joint status report ("JSR") \).[4]

II. Settlement Agreement Negation

A. March 16, 2022

On March 16, 2022, eight days short of the then-agreed-to filing date for case JSR with Settlement Agreement in attachment filing, Plaintiff was advised by an email from the Defendant that:

> "*…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*." (emphasis added)

B. March 24, 2022

On March 24, 2022, Defendant in Court filing reiterated and expanded its March 16th email Settlement Agreement negation in three main parts as follows:

> (a) "*We anticipate that, when and if proceedings in this case resume, we will again seek dismissal of Mr. Angel's complaint based on the Federal Circuit's*

[4] For example, on January 20, 2022, Defendant lead counsel advised, of an internal Defendant lead counsel rotation, Plaintiff advised both departing and incoming Defendant counsel, 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 J.P. Morgan Chase Bank."

decision in Fairholme*, among other reasons, including those previously explained in our earlier motion to dismiss in this case."*[5]

…

(b) "In his section of this joint report, above, plaintiff Mr. Angel suggests the existence of a stipulation and settlement agreement. No such agreement is in place, nor are the parties currently exploring settlement. To be clear, the United States has not agreed to any stipulation with Mr. Angel. Moreover, the United States has not agreed to settle the case, under the terms Mr. Angel describes above or under any other terms.[6]

…

(c) "Moreover, there are 11 other cases pending in this Court, including *Fairholme* itself, that are stayed until the decision in the *Fairholme* appeal becomes final and non-appealable…. The United States can discern no benefit to moving forward with this case while 12 other similar cases continue to be stayed, with no filings, including status reports, due until after the decision in these appeals become final and non-appealable. Instead, it serves the interests of the parties and the Court to continue to maintain these similar cases on a similar schedule."[7]

]

[5] ***Renewal of Defendant MTD will be met by Plaintiff cross motion for summary judgment on* Angel III *Complaint attendant to Defendant (a) abandonment of its jurisdictional defense in Collins defense; (b) admission of SOL defense as partial in Settlement Agreement agreement, and (c) government Settlement Agreement negation leading to Plaintiff MQD illegal extraction availability for* Angel III *Count III assertion – non-defensible $55 billion illegal extraction conversion – Direct Injury.***

[6] Internal shifting of Defendant lead counsel, in March 16, 2022 surprising "confirmation from appropriate authorities – of non-interest[ed] in further settlement discussion at this time" does not erase case history of Settlement Agreement accord prior to March 16, 2022.

[7] Settlement Agreement negation, a mere 8 days prior to March 24, 2022, agreed Court courtesy filing without further explanation, ethically troublesome as sharp litigation practice, and a bit rancid.

III. *Fairholme* Third Plaintiffs v. United States and Illegal Extraction Damages

A. *Fairholme* Third Litigations Complaint Wrinkles

\Plaintiff has described the myriad of post-2012 federal lawsuits that allege *per se* Third Amendment illegality as the *Fairholme* Third Litigations, without mentioning the "illegal extraction" damages counts contained in *Fairholme* Third Litigations filed in the Court of Federal Claims ("CFC"), beginning early 2018 (those litigations hereinafter "CFC 2018 Third Litigations," "CFC 2018 Third Plaintiffs."). added "illegal extraction" damages counts, The Supreme Court's June 30, 2022, opinion in *West Virginia v. EPA*, and *Fairholme* Third Plaintiff *certiorari* petition filing July 22, 2022, give greater significance to the legal concept of "illegal extraction."

i. CFC 2018 Complaints MTD

Initially filed February 23, 2018, the CFC 2018 Third Litigations Complaints, after first asserting the Third Amendment Net Worth Sweep as a Fifth Amendment taking of Junior Preferred GSE economic interests (Count I), allege in the alternative, that the Net Worth Sweep constitutes a Direct Injury of **"illegal extraction"** (Count II) to the same economic stock interests because the federal agencies (i.e., FHFA and Treasury) exceeded their statutory authority when they approved the SPSPA Third Amendment:

> "119. Through the Sweep Amendment, the United States, in obtaining for itself a quarterly payment in perpetuity equal to the Companies' entire net worth, has appropriate to itself the property of Owl Creek, holder of Junior Preferred Stock. This appropriate was, in effect, a forced payment of money by Owl Creek to the government."

Initiated nearly five years after the Third Amendment Litigations initial filings in 2013, the CFC 2018 Third Litigations were trial court MTD adjudicated in close proximity with the initial body of *Fairholme* Third Amendment Litigations. On June 8, 2020 in a ruling which tracked the Court's MTD ruling with regard ?to the earlier filed actions, and disposed of the CFC 2018 Complaints illegal extraction counts as (a) sounding in tort but nevertheless Tucker Act justiciable; (b) *Collins* duplicative, and (c) still old wine new bottle ***indirect and belonging to the Companies*** for reasons explained below.[8]

B. Federal Circuit – *Fairholme* Decision

The Federal Circuit *Fairholme* decision considered and disposed of the 2018 CFC Cacciapalle and Barrett Complaint of ***illegal extraction*** allegations as follows:

1. CFC 2018 Cacciapalle Complaint

> "However characterized, Count II of Cacciapalle's complaint [Illegal Extraction] must still be dismissed. First, *Perry II* did not hold that the Succession Clause is broad enough to bar derivative constitutional claims. *See Perry II*, 864 F.3d at 614 ("[HERA] does not prevent either constitutional claims (none are raised here) or judicial review through cognizable actions for damages like breach of contract."). Thus, to the extent Cacciapalle purports to sweep his constitutional derivative claims into Count II, by his own reasoning he has failed to assert a claim upon which relief may be granted. ***Second, even assuming that the right to assert non-constitutional derivative claims is a property right for Fifth Amendment purposes, the corporation on whose behalf a shareholder wishes to bring such a claim must itself possess an underlying cause of action that it could plausibly assert.***" [emphasis added][9]

[8] Illegal extraction claims are not unknown to Defendant E.g., (a) Settlement Agreement accord July 2020, (b) OSB extension requests October 27, 2020, and July 23, 2021 requested OSB extension till *Fairholme* decision final non-appealable, and (c) Federal Circuit February 22, 2022 *Fairholme* decision.

[9] *Fairholme Funds, Inc.. v. United States,* No. 20-1912 (Fed. Cir. 2022) Page 27.

2. CFC 2018 Barrett Complaint

"***Barrett fails to state a plausible illegal exaction claim under the theory that the FHFA's adoption of the net worth sweep exceeded the agency's statutory authority***. [emphasis added] In *Collins,* shareholders of the Enterprises also alleged that the FHFA exceeded its statutory authority under HERA by agreeing to the net worth sweep. 141 S. Ct. at 1775. The Supreme Court disagreed. *Id.* Citing HERA's grant of authority to the FHFA to act "in the best interests of the [Enterprises] *or the [FHFA],"* the Supreme Court reasoned that, "when the FHFA acts as a conservator, it may aim to rehabilitate the [Enterprises] in a way that, while not in the best interests of the [Enterprises], is beneficial to the [FHFA] and, by extension, the public it serves." *Id.* at 1776. Because "the FHFA could have reasonably concluded that it was in the best interests of members of the public who rely on a stable secondary mortgage market" to adopt the net worth sweep, the Court concluded that the net worth sweep was well within the FHFA's statutory authority under HERA. *Id.* at 1777; *accord Perry 11,* 864 F.3d at 607 ("FHFA's execution of the [net worth sweep] falls squarely within its statutory authority….").

Collins makes clear that Barrett cannot plausibly allege an illegal exaction claim predicated on his contention that adopting the net worth sweep fell outside the FHFA's statutory authority.

> "We, thus, reverse the Claims Court's refusal to dismiss Barrett's illegal exaction **claim to the extent that that claim is predicated on his contention that the net worth sweep was beyond the scope of the FHFA's authority under HERA**."[10] (emphasis added)

Again, *Collins* cannot be read as rejecting all illegal extraction claims, just illegal extraction claims based on the invalidity of the Third Amendment.

C. ***Fairholme*** Decision Synthesis

[10] *Fairholme Funds, Inc. v. United States*, Pages 47-48.

The above review of the *Fairholme* litigation shows, once again, Defendant's March 24, 2022, assertion of "the Federal Circuit's decision in *Fairholme* effectively forecloses Mr. Angel's claims" is at best legal sophistry, unsupportable in context of any fair reading of the *Fairholme* decision and Plaintiff's pleadings in this case.

D. ***West Virginia v. EPA*, and CFC 2018 Third Litigations**

The Supreme Court in *West Virginia v. EPA* decided on June 30, 2022, and the CFC 2018 Third Litigations are hindsight discovered legal Pen Pals[11] in shared counsel, and dotage on major questions doctrine ("MQD") challenge to federal agency actions as beyond congressional authority. On July 22, 2022, CFC 2018 Third Plaintiffs asserted government wrongful conduct in *certiorari* questions filing below[12]:

> (1) Whether, if the United States causes a company to transfer private shareholders' rights incident to their ownership of shares in the company to the United States for the public benefit, the private shareholders have a direct, personal interest in a cause of action challenging that taking; and (2) whether the rights to future dividends and other distributions held by petitioners are cognizable property rights protected by the takings clause of the Fifth Amendment.

Déjà vu all over again, no surprise in Defendant Federal Circuit *certiorari* question certification of illegal extraction, old wine old bottle and Defendant Motion to Stay Proceedings of *Angel III* clearly without legal justification.

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[11] *Cf New York Times Magazine*, August 28, 2022, "We Changed the Country! The Untold Story of How a Powerful Corporate Law Firm Moved American Government and Courts to the Right," by David Enrich.

[12] Timing of Defendant Lead Counsel January 20, 2022 announced shift, Supreme Court's scheduling *West Virginia v. EPA* oral argument January 28, 2022 and Defendant March 16, 2022 Settlement Agreement negation Plaintiff surmises as likely and more forthcoming in explanation of Defendant Settlement Agreement negation than Defendant March 24th "…discern no benefit to moving forward with this case…" *Ibid*. Footnote 9.

IV. The *Angel III* Complaint and Proposed Stipulation and Agreement of Settlement[13,14]

On August 8, 2022 Plaintiff filed *Angel III* Complaint to (a) forestall *Fairholme* Third Amendment Plaintiff copycat and/or interventive takeover of the *Angel II* Complaint causes of actions and theories of recovery , and (b) incorporate . *West Virginia* v. EPA June 30, 2022 rulings as to federal agencies' accountability for illegal extraction. *Angel III* Count III asserted Direct Injury dividend conversion ($20 billion), and Junior Preferred Share $33 billion permanent impairment straight line availability Plaintiff motion for summary judgment in cross motion to Defendant MTD.

A. Complaint

The bodies of the *Angel II* [15] and *Angel III* Complaints, and the Complaints' Counts I and II, slightly edited for age, are exactly in mirror of each other. The sole substantive difference between the actions is Count III in *Angel III* Complaint which is based on the Supreme Court's 2022 decision and alleges federal executive agency 10-year continuous quarterly illegal extraction conversion of Junior Preferred share dividend entitlement $20 billion, and Junior Preferred permanent impairment mandatory redemption at par value $33 billion:

> "56. Treasury engaged in wrongful acts in conducting the Conservator-ship, by each quarter directing and otherwise causing GSE directors to disregard Junior Preferred contractual payment rights and effecting quarterly outsized sweeps of Companies' profits, inclusive of approximately $20 billion of Junior Preferred share contractual dividend rights to itself;" and

[13] Attachment No. 4: Proposed *Angel III* "Stipulation and Agreement of Settlement."

[14] Attachment No. 5: "Effective Date of Settlement."

[15] *Angel II* was voluntarily dismissed by Plaintiff on August 4, 2022.

> "57. In effecting these quarterly unauthorized sweeps, Treasury rendered the $33 billion of GSE Junior Preferred shares principal outstanding incapable of payment breach restoration without Defendant's eschew of statute of limitations and agreement to make whole interest payment at conservator-ship end, and thus mandatory in damages payment in connection with this action."

B. Settlement

On August 8, 2022, the filing day of *Angel III* Complaint, Plaintiff in an email to Defendant counsel advising of the filing, stated: "Finally, please note my objective first and last and always SETTLEMENT, unchanged from August 24, 2020, and in paraphrase of my email of August 24, 2020, I hereby request informal "Scheduling of a meeting of counsel on or before August 22, 2022, for Plaintiff submission under FRD 408 of settlement proposal materials *Angel III* (Count III inclusive)." Defendant did not respond to this email in any way for 38 days. Defendant then filed its Motion to Stay Proceedings.

The Proposed *Angel III* Stipulation and Agreement of Settlement like the earlier negotiated Settlement Agreement provides for *status quo ante* restorative cure of Junior Preferred share dividend declaration breach January 1, 2013 through December 31, 2022, by balance sheet redivision of $22 billion of on hand Senior Preferred share capital reserve dollars, to Junior Preferred shares, GAAP accounting corrective balance sheet adjustment *rather than cash payment.*

The Proposed *Angel III* Stipulation and Agreement of Settlement (Attachment No. 4 hereto) "no cash" compromise is consistent with Treasury 2019, the Biden Treasury Agreement and current Treasury GSE recapitalization plans. And, the Proposed *Angel III* Stipulation and Agreement of Settlement is consistent with federal insolvency law which is based on the Bankruptcy Code. By Treasury's agreeing to forego its SOL defense for years prior to six years of *Angel III* Complaint filing, the Proposed *Angel III* Stipulation and Agreement of Settlement

provides a non-impairment curative restoration default cure which, consistent with Bankruptcy Code section 1124, thus eliminating of need for class certification, and class approval, of Proposed *Angel III* Stipulation and Agreement of Settlement.

In sum, Court approved *Angel III* Complaint settlement via Junior Preferred share *ex post facto* dividend declaration cure without cash payment, provides the last clear chance to fairly conclude *Angel III* without litigation and cash payment while effectively mooting *Fairholme* Third Amendment Litigation's rekindled certiorari claims.

Plaintiff, for reasons set forth above, respectfully proposes that the Defendant Motion to Stay Proceeding be denied, and Defendant's motion in alternative for an extension to respond to the Complaint be limited up to and including November 3, 2022.

Respectfully submitted,

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Attachment No. 1:

Application of "Continuing Claims," and "Equitable Tolling" Doctrines in Rebuttal to the Government's Motion To Dismiss The *Angel II* Complaint Based on Tucker Act Statute of Limitations ("SOL") Provisions

MEMORANDUM

To: Plaintiff, Joshua J. Angel

From: Counsel Group

Date: January 2021

Re: Application of "Continuing Claims," and "Equitable Tolling" Doctrines in Rebuttal to the Government's Motion To Dismiss The *Angel II* Complaint Based on Tucker Act Statute of Limitations ("SOL") Provisions

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This memorandum addresses the "Continuing Claims" and "Equitable Tolling" doctrines' employment in Rebuttal to Defendant Motion to Dismiss, based on Tucker Act statute of limitations ("SOL") provisions, the complaint filed by Joshua J. Angel against the United States in the U.S. Court of Federal Claims (the *"Angel II* Complaint").

A. The "Continuing Claims" Doctrine

1. Case Law

Pursuant to 28 U.S.C. § 2501, "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The continuing claims doctrine, however, permits certain claims that may have been foreseeable over six years ago to be litigated, but only if"a plaintiff's claim is 'inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages."' *Tamerlane, Ltd. v. United States,* 550 F.3d 1135, 1145 (Fed. Cir. 2008); *see also Goodrich v. United States,* 434 F.3d 1329, 1336 (Fed. Cir. 2006) ("[T]he obligation to sue arises once the permanent nature of the government action is evident, regardless of whether damages are complete and fully calculable"). Further, the actions being challenged may not be based on a discretionary agency decision. *West/ands Water Dist. v. United States,* 109 Fed. Cl. 177,213 (2013).

In *Fredericksburg Non-Profit Hous. Corp. v. United States,* 113 Fed. Cl. 244, 248 (2013), *ajf'd,* 579 F. App'x 1004 (Fed. Cir. 2014), the plaintiff entered into a Plan of Action and Use Agreement with the Department of Housing and Urban Development ("HUD") in 1995 that specified various incentives to be provided to enable Plaintiff to continue operating property as affordable housing. Among other things, the Plan of Action identified a five-year contract for $500,000 in annual Section 8 assistance for the building's 140 units. Although plaintiff never received any Section 8 subsidies during the five-year period beginning in 1995, there is no evidence that Plaintiff ever sought to rescind the Use Agreement by invoking voluntary termination procedures. *Id.* at 250.

The plaintiff commenced action in 2010 alleging, among other things, that under the Plan of Action, "substantial monetary concessions," such as the Section 8 assistance, should have been provided by HUD to the plaintiff but was not and that the language of the Plan of Action and Use Agreement contractually obligated the government to provide plaintiff with Section 8 subsidies for the duration of the apartment complex's useful life. *Id.* at 252. As such, the plaintiff contended that each month that the government failed to provide Section 8 subsidies to the plaintiff, the agreements were breached and therefore a continuing claim existed. *Id.*

The court rejected this claim and held that the continuing claims doctrine did not apply. The court reasoned that regardless of whether the government breached the agreement by failing to provide Section 8 subsidies, the Plan of Action made clear that any Section 8 subsidy contract was limited to $500,000 ***per year for only five years*** and thus, even assuming that the Plan of Action obligated the government to provide Section 8 subsidies for five years, the alleged breach would have accrued, at the latest, in December 2000-at the end of the 5-year period that began 1995. *Id.* Thus, plaintiffs complaint filed past the limitations period that was triggered in December 2000 was insufficient to warrant the application of the continuing claims doctrine.

Similarly, in *Wagstaff v. United States,* 105 Fed. CL 99, 112 (2012), the plaintiff sued the U.S. Department of Education based on the government's garnishment of plaintiff's wages and offsetting of tax refunds the plaintiff received after plaintiff failed to make payments on student loans. There, the court determined that Plaintiff may not invoke the continuing claims doctrine because the alleged illegal exaction claims (wage garnishments and offset of tax refunds) accrued when the events that fixed plaintiff's liability occurred, *i.e.,* when the Department of Education made its respective final determinations to offset Plaintiff's tax refunds and garnish Plaintiff's wages in order to recover a debt which here, was in May of 2005 and over six years before plaintiff filed her July 2011 complaint. *Id.* Importantly, the court noted that the fact that these exactions were ongoing until the plaintiff's debt was retired did not mean that the continuing claims doctrine applied. *Id.* at n. 12. The court held that plaintiff could have challenged either exaction within the six years and been assured that the exactions would stop, if a court were to have determined the exactions to be unlawful. *Id.; see also Voisin v. United States,* 80 Fed.CL 164, 176 (2008) (refusing to apply the continuing claims doctrine where plaintiffs alleged that the United States' "continued and repeated refusal to recognize [plaintiffs] as the rightful owners of [the disputed parcel] should be considered a continuing wrong.").

In contrast, in *Cherokee Nation of Oklahoma v. United States,* 26 Cl.Ct. 798 (1992), an Indian tribe sued the Government for trespass, claiming ownership of certain riverbed lands. There, the court treated each alleged trespass by the government *as its own individual wrong,* and thus because some of the trespass claims thereby accrued within the statute of limitations period, the plaintiff was given the opportunity to revive the potential trespass claims that would have accrued beyond the period. *Id.* at 803.

Similarly, in *Burich v. United States,* 366 F.2d 984, 986 (Ct. CL 1966), plaintiff was a U.S. Marshall who sued to recover overtime payments due but not paid. There, the court held that ‘‘the view that a suit for compensation due and payable periodically is, by its very nature, a ‘continuing claim’ which involves multiple causes of action, each arising at the time the Government fails to make the payment alleged to be due.” *Id.; see also_Westlands Water Dist.,*109 Fed. Cl. at 213 (“For example, when a plaintiff has an absolute statutory or contractual right to periodic payments (independent of discretionary administrative action}, a new claim accrues pursuant to the continuing claims doctrine with each failure to make a proper payment when it is due”).

2. Application

The *Angel II* Complaint does not challenge powers granted to Treasury based ipso facto on Third Amendment enactment. Rather, the Complaint challenges, Treasury quarterly direction to Fannie Mae, and Freddie Mac respective board of directors beginning in 2013, and continuing well after the Third Amendment July 2012 enactment, not to consider or seek permission to declare, quarterly dividends for the Companies’ Junior Preferred shares in contractual breach of Defendant’s Implicit Guarantee of Junior Preferred Share timely payment each quarter beginning January 1, 2013 outside of any ***discretionary*** decision granted pursuant to a HERA/FHFA vested power.

Paragraph 2 of the *Angel II* Complaint alleges that “Fannie and Freddie Mac’s respective certificates of designations... require their Board of Directors to make reasonable, good-faith determinations in their ‘sole discretion’ every fiscal quarter as to whether or not to declare a dividend payment on the Junior Preferred shares.” Paragraph 3 then asserts that “Treasury directed that GSE directors ignore Junior Preferred share contractual entitlements as they exercised their ‘sole discretion’ as to whether or not to declare preferred share dividend payments quarter by quarter beginning January 1, 2013... “ This wording is fully supportive of Plaintiffs alleging that the respective Boards were granted discretionary power with respect to making good-faith determinations regarding whether a dividend is justified (and thus, whether they should make a request to Treasury to allow the declaration}. The wording also is fully supportive of Plaintiffs alleging that Treasury had discretion to grant or deny such a request from the Board of Directors, but it did not have discretion to tell the respective Boards not to even consider making such a request. As a result, the holding in *West/ands Water Dist.* should not preclude our claim.

The *Angel II* Complaint further alleges that under the Implicit Guarantee, the Treasury guaranteed and was liable to the junior preferred shareholders for contractual payments such as declared but unpaid dividends, and that each quarter it was required to set aside funds for the junior preferred shareholders for such declared but unpaid dividends. Compl. Mi 14, 15. These allegations render the *Angel II* Complaint circumstance allegations, in line with the facts in *Burich* and *Cherokee Nation* as in there, the separate wrongs committed by the

government were considered independent actions sufficient to trigger a new statutory period for each breach.

The Defendant cites two cases to support its position that the continuing claims doctrine should not apply, both of which contain distinguishable *facts-Angel v. Fed. Home Loan Mortg. Corp.,* No. l:18-CV-01142, 2019 WL 1060805 (D.D.C. Mar. 6, 2019}, affd, 815 F. App'x 566 (D.C. Cir. 2020} *("Angel r')* and *Fairholme Funds, Inc. v. United States,* 147 Fed. CL 1 (2019). In *Angel I,* the action, unlike here, centered upon breaches based upon the government's entering into the Third Amendment as opposed to independent actions committed by the government after the Third Amendment was executed. *Id.* at *2. There, the court held that the continuing claims doctrine did not apply because the alleged original sin-the Third Amendment-produced all the damage that plaintiff claimed. *Id.* at *5.*

Fairholme is also distinguishable. There, plaintiffs asserted that the Net Worth Sweep initiated pursuant to the Third Amendment constituted a Fifth Amendment taking by the Treasury of Plaintiffs' economic interests in their stock. With respect to when the alleged takings occurred, the court held that the takings claim did not accrue with each payment to Treasury under the Third Amendment, but rather when the Third Amendment was effectuated. *Id.* at 45. In other words, Treasury's ability to obtain the Net Worth Sweep initiated under the Third Amendment is when the claim was triggered.

In contrast to the *Angel I* and *Fairholme* actions, the *Angel II* Complaint is unique and sui generis in the totality of Third Amendment litigations in not challenging Treasury's rights under the Third Amendment, but rather Treasury actions, each quarter, beginning January 1, 2013 being in breach of Junior Preferred share Implicit Guarantee by the government of timely payment. Specifically, the *Angel II* Complaint challenges events which fixed whether or not a dividend would be declared each quarter rather than at Third Amendment enactment. It challenges Treasury directions to the directors, each quarter to not consider whether a Junior Preferred share dividend declaration would be appropriate, or request approval from Treasury to declare a dividend, again after Third Amendment enactment.

B. The "Equitable Tolling" Doctrine

1. Case Law

The equitable tolling doctrine permits courts to toll applicable limitations periods in light of equitable considerations. *John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 133, 128 S. Ct. 750, 753 (2008). However, the requirement that claims against the United States, such as our client's, be brought within six years after the claim first accrues pursuant to 28 U.S.C. § 2501 has been deemed "absolute" or "jurisdictional" by the United States Supreme Court and not subject to equitable tolling. *Id.* at 133-134. Thus, our client's claims brought in the Federal Court of Claims under 28 U.S.C. § 250 I may not be equitably tolled.

That being said, although equitable tolling of the six-year statute of limitations in the Court of Federal Claims is not available, "claim accrual" may be suspended "until the claimant knew or should have known that the claim existed." *Yu v. United States,* 150 Fed. Cl. 11, 18 (2020) (citing *Martinez v. United States,* 333 F.3d 1295, 1319 (Fed. Cir. 2003)). To successfully invoke the accrual suspension rule, a plaintiff must demonstrate that either (1) the government "concealed its acts" or (2) the plaintiffs injury was "inherently unknowable." *Yu,* 150 Fed. Cl. at 18. Further, this rule is "strictly and narrowly applied," and when determining whether the facts that gave rise to a claim were "inherently unknowable" courts have held that where "observable, objective facts" exist to put a party on notice of an alleged injury and were capable of being detected through the "exercise of reasonable diligence," the accrual suspension rule will not apply. *Texas Nat. Bank v. United States,* 86 Fed. Cl. 403,414 (2009) (citing *Ramirez-Carlo v. United States,* 496 F.3d 41, 47 (1st Cir. 2007)); *Martinez,* 333 F.3d at 1319. In *Japanese War Notes Claimants Ass'n of Philippines, Inc. v. United States,* 373 F.2d 356,359 (Ct. Cl. 1967) the court gave an illustrative example of an "inherently unknowable" fact: when a "defendant delivers the wrong type of fruit tree to plaintiff and the wrong cannot be determined until the tree bears fruit." *Id.*

2. Application

Arguing for an Equitable Tolling suspension of Tucker SOL rule would be a waste of time, hardly worthy ofreal effort to extend SOL beyond six years available from the June 12, 2020 *Angel II* Complaint filing.

C. Conclusion

Plaintiff should offer to settle the Defendant Motion to Dismiss Tucker SOL allegations as partial rather than complete *(i.e.* jurisdictional) in application. Plaintiff should further offer to fix the seven year period of June 2014 thru June 2021 as the agreed period for *Angel II* Complaint damage computation ("Damage Computation Period").

With dividend entitlement of approximately $2 billion per year, plus post judgement interest for seven years, the *Angel II* Complaint cash damage total of $16 billion ("Damage Total") should be employed in connection with settlement discussions.

Counsel Group
January 2021

Attachment No. 2:

Appropriate Remedies for Treasury Quarterly Actions Causing a Breach of Contract

MEMORANDUM

To: Plaintiff, Joshua J. Angel

From: Counsel Group

Date: February 12, 2021

Re: Appropriate Remedies for Treasury's Quarterly Actions Causing a Breach of Contract

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I. Breach of Contract Action

The *Angel II* Complaint is based on the actions of the United States Department of Treasury, each and every quarter since the first quarter of 2013, to prevent the board of directors of Fannie Mae and Freddie Mac (the "Companies" or "GSEs") from declaring dividends to the holders of Fannie Mae and Freddie Mac Junior Preferred Stock. Such actions resulted in a breach of the federal government's Implicit Guarantee of timely payment, the terms of the Junior Preferred Certificates of Designation and the covenant of good faith and fair dealing contained therein. Thus, four times a year for each of the past eight years, Treasury actions resulted in a breach of the United States Government's contract with the holders of Fannie Mae and Freddie Mac's Junior Preferred Stock.

The *Angel II* Complaint is not a takings claim based on the Third Amendment. Instead, it is grounded on eight years of the Treasury's quarterly interference with contract rights. As stated in *Sunrise Village Mobile Home Park, L.C. v. United States,* 42 Fed. Cl 392 (1998), "if the government's actions breached a contract, the appropriate remedy is a breach of contracts claim, not a claim for compensation pursuant to the Takings Clause."

II. General Measure of Damages for Breach of Contract

The general objective of breach of contracts damages is protection of the non-breaching party's expectation interest. When a person makes a contract, they expect the other contracting party will not breach. Accordingly, protection of the expectation interest means a remedy that will put the non-breaching party in the same position as if the other party had performed without breach. *See* David G. Epstein, Bruce Markell & Lawrence Ponoroff, Contracts, ch. 7 (West Academic 5th ed 2018). As the United Supreme Court said in *Trainor Co v. Aetna Casualty & Surety,* 54 Sup. Ct. 1 (1933) "In fixing compensation for damages resulting from breach of contract, the general rule is that the injured party should be placed in the same position as if there had been no breach. The object of the law is to place the party in the same position as if the contract had been kept." Similar statements can be found in the reported opinions of the United States Court of Federal Claims. *E.g., Hughes Communications Gallery, Inc. v. United States,* 47 Fed. Cl. 236, 238 (2000) (The purpose of contract damages is to place the injured party in the same position as if the contract had been fully performed.").

The *Angel II* Complaint seeks breach of contract damages of $16 billion, based on an annual dividend loss of2 billion dollars each year since 2013. This is an appropriate measure of damages for the quarterly breaches of contract under the facts of this case. The immediate cash payment of $16 billion would put the injured party in the same position as if "the contract had been kept." This is an appropriate measure of damages for the breach of contract resulting from Treasury's actions each quarter since 2013 and the remedy that a federal or state court would order in an ordinary breach of contract action involving private parties.

While this is a breach of contract action, *Angel II* is not an ordinary breach of contract action involving private parties. There are two "non-ordinary" factors in this breach of contract action that warrant further consideration in determining the appropriate remedy for the Treasury's quarterly actions that caused the breaches of contract.

III. "Non-ordinary" Factors in this Case

In determining what the appropriate remedy for the Treasury quarterly actions that caused the breaches of contract, it is important to consider (1) the nature of Fannie Mae and Freddie Mac and (2) the nature of the conservatorship provisions in HERA.

A. The Nature of Fannie Mae and Freddie Mac

As the Supreme Court noted by way of dictum in *Selia Law LLC v. Consumer Financial Protection Bureau,* 140 S.Ct 2183, 2202 (2020), Fannie Mae and Freddie Mac as Government- sponsored entities are "not purely private actors." Professor Aaron Nielson of Brigham Young University Law School, who was asked by the Supreme Court to submit an amicus curiae brief in, *Collins v. Mnuchin* emphasizes the differences between Fannie Mae and Freddie Mac and "ordinary" businesses: "The charters of Fannie Mae and Freddie Mac reflect their unique nature. These charters ... mandate public goals, including 'providing stability to the market, ... Fannie and Freddie thus serve 'important public missions.'" Brief for Court-Appointed Amicus 28 https://www.supremecourt.gov/DocketPDF/l9/19-422/157945/20201016124102195_Co1lins%20v.%20Mnuchin%20Appointed%20Amicus%20Brief.pdf.

Just as Professor Nielson concluded that Fannie Mae and Freddie Mac's not 'purely private character' has constitutional significance, the United States Court of Federal Claims could conclude that Fannie Mae and Freddie Mac's ''not purely private character" has significance in determining the appropriate remedy for the Treasury's quarterly breaches of contract. Consider just one possibility. The Treasury Department in *Treasury Department in the United States Department of Treasury Housing Reform Plan of September 2019* proposed exchanging all or a portion of the liquidation preference of Treasury's Senior Preferred shares for more Fannie Mae and Freddie Mac stock. Similarly, the Treasury Department could now argue and United States Court of Federal Claims could conclude that in this case the "stability to the marketplace" and the GSEs' other "important public missions" call for the issuance of more Fannie Mae and Freddie Mac stock to the Junior Preferred, rather than the immediate payment of $16 billion as the appropriate remedy for the Junior Preferred's loss of their dividend preference as a result of the quarterly breaches of contract.

B. The Nature of the Conservatorship

A Cato Institute Working Paper, *The Conservatorship of Fannie Mae and Freddie Mac: Actions Violate HERA and Established Insolvency Principles,*

https://investorsunite.org/wp-content/uploads/2015/01/K.rimminger-Calabria-HERA-White-Paper-Jan-29.pdf, No. 26/CMFA No.2, authored by Michael Krimminger, who was senior policy adviser with the FDIC at the time of the creation of HERA, and Mark Calabria, who was tone of the senior professional staff to Senator Richard Shelby, Chairman of the United States Senate Committee on Banking, Housing and Urban Affairs at that time, makes three general policy observations about the conservatorship provision of HERA:

(1) HERA's conservatorship provisions are a part of the insolvency laws of the United States which are grounded on "fair treatment of stakeholders." *Id.* at 7.

(2) HERA's conservatorship provisions are based on the FDIA's conservatorship provisions. *Id.* at 4.

(3) Both the FDIA and HERA provide protections to stakeholders that parallel the protections that the Bankruptcy Code provides to stakeholders. *Id.* at 8.

The Bankruptcy Code would use the term "executory contract" to describe the contract between the GSEs and the holders of Junior Preferred Stock resulting from the Implicit Guarantee and certificates of designation. The Bankruptcy Code would use the term "default" to describe the Government's quarterly direction to the GSEs not to declare and pay dividends as contemplated by the Implicit Guarantee. Under section 365(b)(l) of the Bankruptcy Code (11 USC 365(b)(1)) the trustee may not assume an executory contract on which there has been a default unless the trustee "promptly cures **or** provides adequate assurance that the trustee will promptly cure." *Id.* (emphasis added). Immediate payment is not required; adequate assurance of a prompt "cure" is statutorily and judicially recognized alternative.

There is no statutory definition of the term "cure" as used in section 365 of the Bankruptcy Code. Legislative history, however, is instructive. Senate Report 989, 95th Cong. 2d Session on page 59 states that the purpose of cure is to "provide the other party to the contract with the benefit of its economic bargain." The leading bankruptcy treatise, Collier on Bankruptcy, concludes "if the trustee is able to provide a remedy that offers the other party to the contract the substantial equivalent to its economic rights under the trustee will have provided an adequate cure." 3 Collier on Bankruptcy 365-56 (2020).

Similarly, there is no statutory definition of "adequate assurance." or "promptly" in section 365 of the Bankruptcy Code. The meaning of these three specific statutory terms-cure, adequate assurance and promptly- and the application of these terms in section 365(b)(l) is left to be developed by the facts and circumstances of each case. See 1 David G. Epstein, Steve Nickles, James J. White, Bankruptcy 480 (West 1992).

Particularly instructive in ascribing relevance to the language and principles of section 365I(b)(l) to the facts of the case are comments in section 365 cases that urge a "pragmatic approach." *E.g., In re Tampa Beef Packing, Inc.,* 277 B.R. 407,411 (Bankr. N.D. Iowa 2002) ("In making the determination of 'adequate assurance', the Court must give a practical *pragmatic* construction based on the circumstances of each case."); *In re Sanshoe World-wide Corp.,* 139 **B.R.** 585,592 (Banlcr. S.D. N.Y. 1992) ("the courts have concluded that Congress intended that the words 'adequate assurance' be given a practical *pragmatic* construction to be determined under the facts of each particular case."

Under the circumstances of this "particular case" the United States Court of Federal Claims could reasonably conclude that ordering Treasury to make a cash payment of16 billions dollars is not the "practical, pragmatic" remedy in this case. The explanation of GAAP accounting for declared dividends in paragraphs 28 and 29 of the Complaint suggests an alternative that the United States Court of Federal Claims might deemed more "practical" and "pragmatic."

GAAP mandates that once a dividend is declared by the board of directors that the amount of the dividend be treated as a liability on the company's balance sheet (more specifically Junior Preferred dividend payable) and as an expense item on the company's income statement (more specifically Junior Preferred dividend expense). Thus, if Treasury's quarterly actions had not caused quarterly breaches of contract, then each quarter the declaration of dividends would have resulted in a (i) $2 billion reduction of quarterly net income, (ii) $2 billion reduction of profits available for Treasury's Net Worth Sweep and (iii) $2 billion increase in Junior Preferred dividend payable. The United States Court of Federal Claims could conclude that the holders of the Junior Preferred Stock can also be put in the same position as if there had been no breach by a court's ordering the GSEs to:

(1) declare the dividends which should have been declared each quarter since January 2013; and

(2) make the appropriate GAAP mandated accounting changes to reflect the declaration of dividends payable to the Junior Preferred Stock which would result in a Junior Preferred Share balance sheet 16 billion dollars Capital Reserve Amount.

IV. Conclusions

The Complaint's prayer for relief in the form of an award of $16 billion in compensatory damages is supported by general contract law concepts of breach of contract damages and case law. Nonetheless, because of the amount and other "non-ordinary factors" in this case, we should be creative and flexible as to possible remedies in any discussions with the United States.

The Counsel Group
February 2021

Attachment No. 3:

Count III Award

MEMORANDUM

To: Plaintiff, Joshua J. Angel

From: Counsel Group

Date: July 2022

Re: Count III Award

The award of $55,000,0000 in compensatory damages under *Count* III is required because of the combined effect of (i) Treasury's quarterly bad acts that resulted in quarterly violations of Junior Preferred's contract rights since January 1, 2013 (ii) Justice Department's continued assertions that the statute of limitations prevent payment of part, if not all, of the contractually required dividends, and (iii) federal insolvency law.

Federal insolvency law requires that a final resolution of the conservatorship leaves unaltered the legal, equitable, and contractual rights of the Junior Preferred unless the holders of Junior Preferred agree to any impairment. The Justice Department's refusal to abandon its statute of limitations arguments precludes payment breach restoration to meet this requirement of federal insolvency law, Because of the Justice Department's refusal to abandon its statute of limitations arguments, the Junior Preferred Stock that has an aggregate par value of $33 billion, is permanently impaired Accordingly, the appropriate measure of damages is the sum of (i) the value of the permanently impaired Junior Preferred – at least the $33 billion of par value, (ii) the contractually entitled dividends - $ 20 billion and (iii) interest - $2 billion.

Alternatively, the requirements of federal insolvency law can be satisfied without a cash payment and without the approval of holders of Junior Preferred. The legal, equitable and contractual rights of the Junior Preferred would not be impaired if the parties enter into a a settlement agreement providing for a transfer of balance sheet capital reserve amounts, with all future legal entitlements inherent therein, from Fannie Mae Senior Preferred Shares to Fannie Mae Junior Preferred Shares and a transfer of balance sheet capital reserve amounts, with all future legal entitlements from Freddie Mac Senior Preferred Shares to Freddie Mac Junior Preferred Shares in an amount exactly equal to both GSEs' total appropriate dividends that were undeclared, or were to be declared between January 1, 2013 and December 31, 2023.

Counsel Group
January 2021

Attachment No. 4:

Proposed Angel III Stipulation and Agreement of Settlement

UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA J. ANGEL, on behalf of himself and all others similarly situated, Plaintiff, v. THE UNITED STATES, Defendant.	No. 1:22-CV-00867-MMS

PROPOSED *ANGEL III* STIPULATION AND AGREEMENT OF SETTLEMENT

Plaintiff Joshua J. Angel ("Plaintiff") and Defendant the United States ("Defendant") (each individually a "Party" and collectively, the "Parties"), through their respective counsel of record in the above-captioned litigation (the "Action") pending in the United States Court of Federal Claims (the "Court"), hereby make and enter into this Proposed *Angel III* Stipulation and Agreement of Settlement (the "Settlement Agreement"). The Parties intend the Settlement Agreement to fully, finally, and forever resolve, discharge, release and settle the Settled Plaintiff Claims (as defined below) and the Settled Defendant Claims (as defined below), upon and subject to the terms and conditions hereof and subject to the Court's approval.

WHEREAS:

A. Plaintiff holds *non-cumulative* junior preferred shares (collectively, "Junior Preferred Shares") of the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, the "GSEs");

B. On August 8, 2022, Plaintiff, on behalf of himself and all others similarly situated, filed a putative class action complaint against Defendant (the "Complaint");

C. The Complaint alleges Defendant's conduct and activities were instrumental in the creation of a general market perception of the GSEs' debt and equity securities (collectively, including Junior Preferred Shares, "GSE Securities") being risk free, by virtue, *inter alia*, of: (a) the GSEs' government charters; (b) the GSE Securities' exemption from regulation under the Securities Act of 1933 and the Securities Exchange Act of 1934, and the GSE Securities' designation under those acts as "government securities"[16];and (c) a federal government's general fostering of a public financial market understanding of a legally binding,

[16] On September 7 and 11, 2008, Treasury officials issued a statement wherein, and whereby the Implicit Guarantee of GSEs securities payment was made explicit stating, "Contracts are respected in this country as a fundamental part of rule of law"). The federal government Implicit Guarantee of GSEs financial obligations was critical to the GSEs' ability to market, and successfully sell, hundreds of billions of dollars of GSEs guaranteed mortgage backed securitized debt ("MBS"), and approximately $22 billion of GSEs Junior Preferred Shares, as riskless perpetual capital suitable for financial institution as tier one capital in the pre- conservatorship period of less than one year, beginning late 2007 through May 2008. Fannie Mae's ability, in May 2008, to sell $4.8 billion of 8.75% mandatory convertible Junior Preferred shares, four months prior to the Company's September 6, 2008 entry into conservatorship, was the undoubted result of market acceptance, and reliance on the government Implicit Guarantee of Junior Preferred Share payments. *See* W. Scott Frame, *The 2008 Federal Intervention to Stabilize Fannie Mae and Freddie Mac*, Federal Reserve Bank of Atlanta (2009); Tara Rice & Jonathan Rose, *When Good Investments Go Bad: The Contraction of Community Bank Lending After the 2008 GSE Takeover*, Board of Governors of the Fed. Res. Sys., Int'l Fin. Discussion Papers 1045 (2012); and Comptroller of the Currency Administrator of National Banks Interpretive Letter #931, April 2002 http://www.occ.gov/static/interpretations-and-precedents/apr02/int931.pdf.

federal government implicit guarantee of timely payment, for the GSE Securities (the "Implicit Guarantee");

D. The Complaint against the United States seeks damages of approximately $55 billion, due to the United States Department of Treasury's ("Treasury"): (a) breaching the contract obligations created by the Certificates of Designation of Fannie Mae and Freddie Mac ("CODs"), (b) breaching the federal government's guaranty of Fannie Mae and/or Freddie Mac non-cumulative preferred ("Junior Preferred") quarterly dividend rights, and (c) breaching HERA "Federal Agency" authorization in directing quarterly sweep of approximately $500 million (i.e. $2 billion annual) of GSE's funds which by contract should have remained with the GSEs for post-conservatorship dividend payment to Junior Preferred shareholders, in major question doctrine ("MQD") violative in payment total of approximately $20 billion, from January 1, 2013 to December 31, 2022, to Senior Preferred shares.[17]

E. On September 6, 2008, the GSEs were placed into conservatorship, and the conservator, the Federal Housing Finance Agency ("FHFA"), on behalf of the GSEs, entered into identical Senior Preferred Stock Purchase Agreements ("SPSPAs") with the United States Department of the Treasury ("Treasury"), pursuant to which the GSEs each issued their own Senior Preferred Shares (collectively, "Senior Preferred Shares") to Treasury in exchange for Treasury Cash Purchase Amounts;

F. At all times, the sole holder of Senior Preferred Shares was and is Treasury;

[17] In Federal Court decisional invocation, the major questions doctrine ("MQD") in loose definition is generally defined as federal administrative agency need to point to "clear congressional authorization" when claiming power to make decision of "vast economic and political significance." *See West Virginia v. EPA*, Supreme Court, June 30, 2022.

G. Section 5.1 of the SPSPAs require the GSEs' respective Board of Directors to obtain Treasury's "prior written consent" before the GSEs' respective Board of Directors may "declare or pay any dividend" (other than the Senior Preferred Dividend), and before the GSEs' Board of Directors "set aside any amount for any such purpose." In other words, under Section 5.1 of the SPSPAs, the GSEs' respective Board of Directors were still permitted each quarter to declare or pay any dividend on Junior Preferred Shares ("Junior Preferred Dividend") or set aside any funds to do so, with Treasury's prior written consent;

H. The SPSPAs, and the first and second amendments thereto (respectively the "First Amendment" and the "Second Amendment"), defined the dividend amount for Senior Preferred Shares (the "Senior Preferred Dividend") to mean ten percent of the then-current liquidation preference (i.e., 10% of par value);

I. On August 17, 2012, FHFA (on behalf of the GSEs) and Treasury entered into a third amendment to the SPSPAs (the "Third Amendment"). The Third Amendment included a so-called "Net Worth Sweep" provision, which set the Senior Preferred Dividend for each GSE as equal to each GSE's profit for the immediately preceding fiscal quarter;

J. The Third Amendment did not eliminate the GSEs' respective Board of Directors' power and obligation to declare Junior Preferred Dividends or set aside any funds to do so;

K. According to the Complaint, the GSEs' respective Board of Directors had a contractual duty under the GSEs' respective Junior Preferred Shares' certificates of designation ("CODs") to evaluate, on a quarterly basis, whether a Junior Preferred Dividend is warranted and, if so, in compliance with Section 5.1 of the SPSPAs, to seek Treasury's consent to declare a Junior Preferred Dividend.

L. The CODs are contracts, creating contract rights in the Plaintiff and contract obligations in the Defendant .

M. More specifically, the CODS require the Companies' respective boards of directors ("BOD") to make reasonable, good-faith determinations in their "sole discretion" every fiscal quarter as to whether to declare a dividend payment on the Junior Preferred shares.

N. Treasury overt actions in *inter alia* Junior Preferred share underwriting, public market share pricing, and general complicitly in the shares being government agency classified as "Government Securities" exempt from registration under the Securities Act of 1934, were instrumental in creating a pre-conservatorship, general market perception of GSE securities (i.e., debt and preferred equity) being effectively risk free by virtue of the government Implicit Guaranty of dividend rights.[18]

O. This market perception, and the U.S. government's responsibility for the Implicit Guaranty were acknowledged by Treasury Secretary Paulson, at a September 7, 2008 press conference:

> "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)

P. One day earlier, On September 6, 2008, attendant to the financial crisis, Fannie Mae and Freddie Mac were placed into conservatorship, and the Conservator, the Federal

[18] Dividend rights are what distinguish a preferred class of stock from a corporation's other stock. If the Junior Preferred dividend rights are disregarded, then it is not actually "preferred."

Housing Finance Administration ("FHFA"), on behalf of each GSE, entered into identical Senior Preferred Stock Purchase Agreements ("SPSPAs") with Treasury, pursuant to which the GSEs each issued Senior Preferred shares to Treasury.

Q. Section 5.1 of the SPSPAs require the GSEs' respective Board of Directors to obtain Treasury's "prior written consent" before the GSEs' could "declare or pay any dividend" (other than the aforementioned Senior Preferred dividend), or "set aside any amount for any such purpose."[19]

[19] "Under the SPSPAs, Treasury's financial support is in the form of an equity investment in the Enterprises. The investment is not in common stock, but rather in senior preferred stock. Preferred stock is typically regarded as a hybrid instrument in that it has some features like bonds and others like common stock. Preferred stock is an equity interest, like common stock. However, like a bond, it usually does not confer voting rights, and offers a liquidation preference. A liquidation preference gives the preferred shareholder the right, in the event that the company is dissolved, to receive compensation for its preferred stock typically before common stockholders (but not before bondholders).

Senior preferred stock has priority in payment order over other preferred stock. A dividend, should one be paid under the terms of preferred stock, is typically a quarterly payment based on a specified rate applied to the par amount of preferred stock held." White Paper: FHFA-OIG's Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements, 7 (Mar. 20, 2013), https://www.fhfaoig.gov/Content/Files/WPR-2013- 002_2.pdf (emphasis omitted).

GSE Senior Preferred share dividends being cumulative, and Junior Preferred share dividend declaration and payment SPSPA contractually suspended, Company and director directorial discretion with regard to Senior Preferred quarterly dividend declaration and payment evolved to a sole question of cash availability. However, when the third amendment to the SPSPA (the "Third Amendment" unilaterally changed the Senior Preferred dividend entitlement from 10% annual payable quarter annually to a quarterly sweep of all profits, attendant to the GSEs' year-end 2012 capital surplus being fixed at approximately $223 billion (i.e., Junior Preferred $33 billion, Senior Preferred $189 billion), the GSEs' directors duty to consider, and seek Treasury written approval for Junior Preferred share dividend declaration without payment, automatically revived itself. That revival was in tandem with director's enlarged duty to consider allocation of GSE quarterly profit amounts available for the Senior Preferred profit dividend sweep, which dividend sweep resulted in Treasury MQD illegal taking of approximately $20 billions of GSE Junior Preferred dividend property in 5th amendment illegal extraction, and

R. While the SPSPA's requirement of Treasury's "prior written consent" modified the GSEs' procedure regarding the declaration and payment of Junior Preferred dividends, the SPSPAs did not eliminate or even amend the substantive contractual obligations created by the CODs.. See, e.g., Series Q, § 2(a).[20]

S. Similarly, The SPSAs did not eliminate the federal government implicit guaranty of Junior Preferred dividend rights.

T. On August 17, 2012, attendant to the GSEs return to yearly profitability, Treasury, and FHFA, on behalf of the GSEs, entered into the Third Amendment to the SPSPAs, effective as of January 1, 2013.

U. The Third Amendment included a "Net Worth Sweep" provision which, beginning January 1, 2013, required quarterly dividend payments to Treasury, equal to each GSE's profit for the immediately preceding company fiscal quarter.

V. The Third Amendment was designed to eliminate further GSEs capital build beyond December 31, 2012, attendant to the companies return to profitability, by net worth profit sweep as SPSPA defined, beginning January 1, 2013, and thus compatible with Treasury White Paper of February 2011 announced intent for GSE future liquidation.

W. Unannounced and unauthorized under any section of the Housing and Economic Recovery Act of 2008 ("HERA") statute invocation of FHFA as the GSE's administrator was any clear congressional authorization allowing for the Federal Agencies to convert any of the Junior Preferred share economic (i.e., payment) entitlements to themselves without payment of

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breach of Treasury's in fact contractual guaranty of GSE share payments, quarter by quarter beginning January 1, 2013 to date.

[20] Junior Preferred shares being contractually bilateral, required shareholder consent for effective amendment. Any purported amendment of the CODs by way of unilateral SPSPA provision, other than within the CODs' circumscribed grounds, would be both unlawful and invalid.

fair consideration, and Treasury ensuing MQD violative conversion of approximately $20 billion of GSEs contractual dividend entitlement from January 1, 2013 through December 31, 2022 in prospective conversion damages, together with mandatory share redemption at par of $33 billion.

X. The Third Amendment in "Net Worth Amount" definition exclusion of "Any obligation in respect of any capital stock of the Company" while SPSPR governance definition acceptable, was GAAP "Net Worth Amount" polar contrary and unacceptable.

Y. The Third Amendment neither eliminated nor in any way altered the quarterly dividend contract rights created by the CODs.

Z. The Third Amendment neither eliminated or in any way altered the government Implicit Guaranty of contractual quarterly dividend rights.

AA. Nonetheless, Treasury, commencing first quarter 2013 and each quarter thereafter, caused the GSE directors to disregard Junior Preferred contractual quarterly dividend rights, by *inter alia* instructing GSE directors *not even to seek* Treasury's prior written consent to declare a Junior Preferred dividend. Each such instruction being a separately actionable breach of the shares COD and covenant of good faith and fair dealing.

BB. These quarterly breaches of Junior Preferred contractual quarterly dividend rights inflated Companies' quarterly profit amount, and inflated Senior Preferred dividend payments, depriving the Companies of value that by contract would be allocated to the Junior Preferred when the conservatorship is terminated.

CC. The aforesaid breaches in total being MQD damages actionable recovery of $20 billion of Junior Preferred share contractual dividend entitlement conversion, and $33 billion share par value mandatory redemption.

DD. The Complaint is anchored in Treasury's wrongful actions, each and every quarter beginning first quarter of 2013, of preventing the Companies' BOD from declaring Junior Preferred share dividends. Those quarterly wrongful actions were in continuous quarter annual breach of CODs contract provisions regarding Junior Preferred dividends, and the Implicit Guaranty of Junior Preferred share dividend rights in their quarterly sweeping GSE's funds which by contract should have remained with the Companies for post-conservatorship allocation to Junior Preferred. Those quarterly wrongful actions resulted in approximately $20 billion of GSEs Junior Preferred share dividend, and $33 billion mandatory share redemption damages.

EE. The Complaint is not a takings claim based on a challenge to the validity of the Third Amendment. The Complaint is instead grounded on ten (10) years of Treasury quarterly contract breaches and conversion payments, in deliberate breach of Federal Agency authorization, following the promulgation of the Third Amendment.

FF. The Complaint is MQD government quarterly wrongful acts in conducting conservatorship actionable for Plaintiff recover of $20 billion Junior Preferred share dividend conversion entitlement, plus $33 billion of 65E Junior Preferred share mandatory redemption by reason of the shares otherwise being incapable of reinstatement as permanently impaired and otherwise being permanently impaired, incapable of reinstatement, immediately redeemable as damages, at either termination of the Action, or the conservatorships. *See* Bankruptcy Code §1124.

GG. Plaintiff and his counsel and Defendant and its counsel, diligently investigated the claims, defenses, and underlying events and transactions that are the subject of the Action. This process has included analyzing, among other things, publicly filed documents and records,

investigative reports, and news stories; and reviewing and corroborating the allegations and developments;

HH. On [date] the Parties agreed, subject to Court approval, to settle all claims in the Action as set forth below;

II. Defendant denies and continues to deny that it has committed any act or omission giving rise to any liability and/or violation of law. Defendant has denied and continues to deny each and every one of the claims and allegations asserted in the Action, including all claims in the Complaint. Defendant also has denied and continues to deny that it made any material misstatements or omissions, that Plaintiff (or similarly situated Persons) have suffered any damages, or that Plaintiff (or similarly situated Persons) were harmed by any conduct alleged in the Action or that could have been alleged therein. Defendant has asserted and continues to assert that, at all times, it acted in good faith and in a manner it reasonably believed to be in accordance with applicable rules, regulations, and laws. This Settlement Agreement, whether or not consummated, nor any of its terms nor any proceedings relating thereto, shall not be construed as, or deemed to be evidence of, an admission or concession on the part of Defendant with respect to any claim of any fault or wrongdoing or damage whatsoever, or of any infirmity in any defense that Defendant has or could have asserted. Defendant does not admit any liability or wrongdoing in connection with the allegations set forth in the Action, or any facts related thereto;

JJ. Defendant has determined that, taking into account the uncertainty and risks inherent in any litigation, especially in complex cases like this Action, it is desirable and beneficial to Defendant that the Action be settled in the manner and upon the terms and conditions set forth in this Settlement Agreement to avoid the further expense, inconvenience,

and burden of this Action, the distraction and diversion of personnel and resources, and to obtain the conclusive and final dismissal and/or release of this Action;

KK. Based on their investigation and review of the claims, underlying events, and transactions alleged in this Action, Plaintiff and his counsel group believe that the claims asserted in the Action have merit. Nonetheless, Plaintiff and his counsel group recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the Action against Defendant, including the inherent uncertainties and risks of any complex litigation, including discovery issues, enforcing a judgment and collecting from Defendant. Thus, after weighing the substantial and immediate benefits that Plaintiff will receive under this Settlement Agreement (and the substantial benefits that other holders of Junior Preferred Shares will receive as well), against the risks, costs and uncertainties of further litigation, Plaintiff and the Counsel Group believe that the terms and conditions of this Settlement Agreement are fair, reasonable and adequate, and are in Plaintiff's best interest (and also inure to the substantial benefit of other holders of Junior Preferred Shares).

NOW THEREFORE, without any admission or concession whatsoever on the part of Plaintiff of any lack of merit of the Action, and without any admission or concession whatsoever on the part of Defendant of any liability or wrongdoing on its part or of any lack of merit in its defenses, it is hereby STIPULATED AND AGREED, by and among the Parties to this Settlement Agreement, through their respective undersigned attorneys, and subject to approval of the Court that, in consideration of the immediate and substantial benefits flowing to the Parties hereto from the Settlement (and the substantial benefits flowing to holders of Junior Preferred Shares), all Settled Plaintiff Claims (as defined below) as against the Released Defendant Parties (as defined below) and all Settled

Defendant Claims (as defined below) as against the Released Plaintiff Parties (as defined below) shall be compromised, settled, released, and dismissed with prejudice, and without costs, except for as agreed to herein, upon and subject to the below terms and conditions.

ADDITIONAL DEFINITIONS

As used in this Settlement Agreement, the following terms shall have the following meanings:

(a) "Person(s)" means any individual, corporation (including all divisions and subsidiaries), general or limited partnership, limited liability partnership, association, joint stock company, limited liability company or corporation, variable interest entity, professional corporation, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, and any other business or legal entity, including his, her or its spouses, heirs, predecessors, successors, representatives, or assigns.

(b) "Released Defendant Parties" means the United States, and any of its agencies.

(c) "Released Plaintiff Parties" means Plaintiff and each and all of his past or present partners, insurers, co-insurers, reinsurers, attorneys, advisors, investment advisors, personal or legal representatives, agents, assigns, executors, estates, administrators, related or affiliated Persons or entities, predecessors, successors; Plaintiff's immediate family members, spouses, children; and any trust of which Plaintiff is the settlor or which is for the benefit of any of his immediate family members.

(d) "Settled Defendant Claims" means all claims, debts, demands, rights, liabilities, sanctions, and causes of action of every nature and description whatsoever (including, but not limited to, any claims for damages, interest, attorneys' fees, expert or consulting fees, and any

other costs, expenses or liabilities whatsoever), whether known or Unknown, whether based on federal, state, local, statutory, common or foreign law or any other law, rule or regulation, whether fixed or contingent, suspected or unsuspected, foreseen or unforeseen, ripened or unripened, accrued or unaccrued, liquidated or unliquidated, and whether matured or unmatured whether arising in equity or under the law of contract, tort, malpractice, statutory breach, or any other legal right or duty, whether direct, class, individual representative, derivative, or in any other capacity, and to the fullest extent that the law permits their releases in this lawsuit that any Defendant may have against any Released Plaintiff Party that arise out of or relate in any way to the Action, the institution, prosecution, settlement or resolution of the Action or the Settled Defendant Claims. Defendant may hereafter discover facts other than or different from those which it now knows or believes to be true with respect to the subject matter of the Settled Defendant Claims. Nevertheless, Defendant shall expressly, fully, finally and forever settle and release, and upon the Effective Date, shall be deemed to have, and by operation of the Settlement Approval Order (defined below) shall have, fully, finally, and forever settled and released, any and all Settled Defendant Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Defendant acknowledges that the inclusion of Unknown claims in the definition of Settled Defendant Claims was separately bargained for and is a key element of the Settlement. Excluded from Settled Defendant Claims are claims based upon, relating to, or arising out of the interpretation or enforcement of the Settlement.

(e) "Settled Plaintiff Claims" means any and all claims, debts, demands, rights, liabilities, and causes of action of every nature and description whatsoever (including, but not limited to, any claims for damages) interest, attorneys' fees, expert or consulting fees, and any

other costs, expenses or liability whatsoever, whether known or Unknown (as defined below), whether based on federal, state, local, statutory, common or foreign law or any other law, rule or regulation, whether fixed or contingent, suspected or unsuspected, foreseen or unforeseen, ripened or unripened, accrued or un-accrued, liquidated or unliquidated, and whether matured or unmatured whether arising at law or in equity or under the law of contract, tort, malpractice, statutory breach, or any other legal right or duty, whether direct, class, individual representative, derivative, or in any other capacity, and to the fullest extent that the law permits their releases in this lawsuit that Plaintiff (i) asserted in the Complaint, or (ii) could have asserted in the Action or any other forum against any of the Released Defendant Parties, which arise out of, or are based upon or related in any way to, the allegations, transactions, facts, reports, communications, matters or occurrences, representations or omissions involved in the Complaint. Plaintiff may hereafter discover facts other than or different from those which he now knows or believes to be true with respect to the subject matter of the Settled Plaintiff Claims. Nevertheless, Plaintiff shall expressly, fully, finally and forever settle and release, and upon the Effective Date, shall be deemed to have, and by operation of the Settlement Approval Order shall have, fully, finally, and forever settled and released, any and all Settled Plaintiff Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Plaintiff acknowledges that the inclusion of Unknown claims in the definition of Settled Plaintiff Claims was separately bargained for and is a key element of the Settlement. Excluded from Settled Plaintiff Claims are claims based upon, relating to, or arising out of the interpretation or enforcement of the Settlement.

(f) "Settlement" means settlement of the Action on the terms set forth in this Settlement Agreement.

(g) "Settlement Approval Order" means the entry of an order in the Action, by the United States Court of Federal Claims approving this Settlement Agreement.

(h) "Settlement Consideration" means the settlement consideration set forth in numbered paragraph 6 of the Settlement Agreement.

(i) "Unknown" means, as used in connection with claims, any and all Settled Plaintiff Claims against the Released Defendant Parties, which any Released Plaintiff Party does not know or suspect to exist in his, her or its favor as of the Effective Date (defined below), and any Settled Defendant Claims against the Released Plaintiff Parties, which any Released Defendant Party does not know or suspect to exist in his, her, or its favor as of the Effective Date, which if known by the Released Plaintiff Party or Released Defendant Party might have affected his, her, or its decision(s) with respect to the Settlement.

EFFECTIVE DATE OF SETTLEMENT

1. Except as otherwise provided in numbered paragraph 2 of this Settlement Agreement, the effective date of Settlement Agreement ("Effective Date"), shall be the date on which the Court enters the Settlement Approval Order approving the Settlement Agreement *in its entirety*, as written and executed by the Parties as of the date hereof.

2. The Parties agree that if the Court issues an Order approving anything other than the Settlement Agreement in its entirety, as written and executed by the Parties as of the date hereof, the Effective Date of the Settlement Agreement shall be the date on which the Parties, at their sole discretion and under no obligation to do so, enter into a written modification or amendment to the Settlement Agreement signed by the Parties or their respective successors.

3. In the event the Effective Date, as defined in numbered -paragraphs 1 or 2 of this Settlement Agreement, fails to occur for any reason, the Parties shall be deemed to have reverted to their respective litigation positions in the Action as of the execution date of this Settlement Agreement and, except as otherwise expressly provided herein, the Parties shall proceed in all respects as if this Settlement Agreement and any related orders had not been entered. In such event, this Settlement Agreement, and any aspect of the discussions or negotiations leading to this Settlement Agreement shall not be admissible in this Action and shall not be used against or to the prejudice of Defendant or against or to the prejudice of Plaintiff or any putative or certified class, in any court filing, deposition, at trial, or otherwise.

SCOPE AND EFFECT OF SETTLEMENT

4. The obligations incurred pursuant to this Settlement Agreement shall be in full and final disposition of: (a) the Action against Defendant, (b) any and all Settled Plaintiff Claims, and (c) any and all Settled Defendant Claims.

5. (a) Upon the Effective Date, Plaintiff: (i) shall be deemed to have, and by operation of the Settlement Approval Order shall have, fully, finally, and forever waived, released, relinquished, and discharged all Settled Plaintiff Claims; (ii) shall forever be enjoined from prosecuting any Settled Plaintiff Claims against any of the Released Defendant Parties; and (iii) agrees and covenants not to sue any of the Released Defendant Parties on the basis of any Settled Plaintiff Claims, or, unless required by subpoena or other operation of law, to assist any third party in commencing or maintaining any suit against the Released Defendant Parties related to any Settled Plaintiff Claims.

(b) Upon the Effective Date, Defendant: (i) shall be deemed to have, and by operation of the Settlement Approval Order shall have, fully, finally, and forever released and discharged each and all of the Released Plaintiff Parties from each and every one of the Settled Defendant Claims, (ii) shall forever be enjoined from prosecuting the Settled Defendant Claims; and (iii) agrees and covenants not to sue any of the Released Plaintiff Parties on the basis of any Settled Defendant Claims or, unless required by subpoena or other operation of law, to assist any third party in commencing or maintaining any suit against the Released Plaintiff Parties related to any Settled Defendant Claims.

THE SETTLEMENT CONSIDERATION

6. In consideration of the releases provided herein, and in full settlement of the Settled Plaintiff Claims, Defendant:

a. shall, within two days after the Effective Date, cause: (i) Fannie Mae to transfer balance sheet capital reserve amounts, with all future legal entitlements inherent therein, from Fannie Mae Senior Preferred Shares to Fannie Mae Junior Preferred Shares in an amount exactly equal to the Fannie Mae *Ex Post Facto* Dividend Declaration Restoration Amount (defined in paragraph 6b below); and (ii) Freddie Mac to transfer balance sheet capital reserve amounts, with all future legal entitlements inherent therein, from Freddie Mac Senior Preferred Shares to Freddie Mac Junior Preferred Shares in an amount exactly equal to the Freddie Mac *Ex Post Facto* Dividend Declaration Restoration Amount (defined in paragraph 6b below);

b. shall, within two days after the Effective Date, cause each GSE's Board of Directors to make an *ex post facto* declaration of a Junior Preferred Dividend equal to that

GSE's total appropriate dividends that were undeclared, or were to be declared between January 1, 2013 and December 31, 2023 (respectively, the "Fannie Mae *Ex Post Facto* Dividend Declaration Restoration Amount" and the "Freddie Mac *Ex Post Facto* Dividend Declaration Restoration Amount," and collectively, the "Total *Ex Post Facto* Dividend Declaration Restoration Amount"); and

c. shall, if either or both GSEs, are in conservatorship at year end 2023, cause the SPSPA to be amended to eliminate all SPSA changes in the procedures for the GSEs' boards of directors' declaration and payment of dividends to the Junior Preferred

d. Shall pay attorneys' fees to Joshua J. Angel PLLC equal to two (2%) percent of the Total *Ex Post Facto* Dividend Declaration Restoration Amount ("Attorneys' Fees"). Within two days after the Effective Date, by wire transfer. To be clear, the Attorneys' Fees are separate and apart from Defendant's obligations set forth in subparagraphs (a) – (b) of this numbered paragraph 6 of the Settlement Agreement and shall not offset, reduce, or otherwise impact Defendant's obligations set forth in subparagraphs (a) – (b) of this numbered paragraph 6 of the Settlement Agreement. The Attorney's Fees shall be distributed among Joshua J. Angel PLLC and the Counsel Group in accordance with their separate agreement dated August 1, 2022. Defendant bears no responsibility for the distribution of the Attorneys' Fees after they have been received by Joshua J. Angel, PLLC.

7. In further consideration of the releases provided herein, and in full settlement of the Settled Plaintiff Claims and the Settled Defendant Claims, the Parties agree to jointly move the Court to issue and enter an Order approving the Settlement Agreement *in its entirety* (the "Settlement Approval Order").

8. The Parties agree that if the Court issues an Order approving anything other than the Settlement Agreement *in its entirety*, as written and executed by the Parties as of the date hereof, the Settlement Agreement shall not be deemed to be modified or amended, nor any of its provisions waived, except by a further writing signed by the Parties or their respective successors.

NO ADMISSION OF WRONGDOING

9. Defendant denies that it has committed any act or omission giving rise to any liability and/or violation of law, and states that it is are entering into this Settlement to eliminate the burden and expense of further litigation. This Settlement Agreement, whether or not consummated, including any and all of its terms, provisions, exhibits, and prior drafts, and any negotiations or proceedings related or taken pursuant to it:

(a) shall not be offered or received against Defendant as evidence of a presumption, concession, or admission by Defendant with respect to the truth of any fact alleged by Plaintiff or the validity of any claim that has been or could have been asserted in the Action or any litigation; or the deficiency of any defense that has been or could have been asserted in the Action or any litigation;

(b) shall not be offered or received against Defendant as evidence of a presumption, concession, or admission with respect to any liability, negligence, fault, or wrongdoing, or in any way referred to for any other reason as against Defendant in any other civil, criminal, or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of this Settlement Agreement; provided, however, that if

this Settlement Agreement is approved by the Court and becomes effective pursuant to its terms, Defendant may refer to it to effectuate the liability protection granted them hereunder;

(c) shall not be construed as or received in evidence as an admission, concession, or presumption against Plaintiff or any putative or certified class that any of their claims are without merit, or that any defenses asserted by Defendant have any merit, or that damages recoverable under the Complaint would not have exceeded the Settlement Consideration; and

(d) notwithstanding the foregoing, Defendant, Plaintiff and/or the Counsel Group may file the Settlement Agreement in any action that may be brought against Defendant, Plaintiff and/or the Counsel Group to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction, offset or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

MISCELLANEOUS PROVISIONS

10. The Parties to this Settlement Agreement intend the Settlement to be a final and complete resolution of all disputes asserted or which could be asserted by Plaintiff against the Released Defendant Parties with respect to the Action and the Settled Plaintiff Claims, and of all disputes asserted or which could be asserted by Defendant against the Released Plaintiff Parties with respect to the Action and the Settled Defendant Claims. Accordingly, Plaintiff and Defendant agree not to assert in any forum that the Action was brought by Plaintiff or defended by Defendant in bad faith or without a reasonable basis. The Parties and their respective counsel hereto further agree that each has complied fully with Rule 11 of the Rules

of the United States Court of Federal Claims (and all similar federal, state, local or court rules), and agree not to assert in any judicial proceeding that any Party or their respective counsel violated Rule 11 of the Rules of the United States Court of Federal Claims (and all similar federal, state, local or court rules), in connection with the commencement, maintenance, defense, litigation, and/or resolution of the Action. The Parties agree that the Settlement Consideration and the other terms of the Settlement were negotiated at arm's length and in good faith by the Parties and their respective counsel and reflect a settlement that was reached voluntarily based upon adequate information and after consultation with experienced legal counsel.

11. This Settlement Agreement may not be modified or amended, nor may any of its provisions be waived, except by a writing signed by all Parties hereto or their respective successors.

12. The headings herein are used for the purpose of convenience only and are not intended to have and do not have any legal effect.

13. The Court shall retain jurisdiction for the purpose of entering orders relating to the implementation and the enforcement of the terms of this Settlement Agreement.

14. The waiver by one Party of any breach of this Settlement Agreement by any other Party shall not be deemed a waiver of any other breach of this Settlement Agreement.

15. This Settlement Agreement constitutes the entire agreement among the Parties hereto concerning the Settlement of the Action, and no representations, warranties, or inducements have been made by any Party hereto concerning this Settlement Agreement other than the representations, warranties, and covenants contained and memorialized herein.

16. This Settlement Agreement may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument provided that counsel for the Parties to this Settlement Agreement shall exchange among themselves original signed counterparts. Signatures sent by facsimile or pdf via email by any member of the Counsel Group or Defendant's counsel shall be deemed originals.

17. Plaintiff represents and warrants that it has not assigned, pledged, loaned, hypothecated, conveyed, or otherwise transferred, voluntarily or involuntarily, to any other person or entity the Settled Plaintiff Claims, or any interest in or part or portion thereof, specifically including any rights arising out of the Settled Plaintiff Claims.

18. Defendant represents and warrants that it has not assigned, pledged, loaned, hypothecated, conveyed, or otherwise transferred, voluntarily or involuntarily, to any other person or entity the Settled Defendant Claims, or any interest in or part or portion thereof, specifically including any rights arising out of the Settled Defendant Claims.

19. This Settlement Agreement shall be binding upon, and inure to the benefit of, the successors, assigns, executors, administrators, heirs, and legal representatives of the Parties hereto. No assignment shall relieve any Party hereto of obligations owed hereunder.

20. Without further order of the Court the Parties may agree, in writing, to reasonable extensions of time to carry out any of the provisions of this Settlement Agreement.

21. The construction, interpretation, operation, effect, and validity of this Settlement Agreement, and all documents necessary to effectuate it, shall be governed by the federal laws of the United States.

22. This Settlement Agreement shall not be construed more strictly against one Party than another merely by virtue of the fact that it, or any part of it, may have been

prepared by counsel for one of the Parties, it being recognized that it is the result of arm's-length negotiations between the Parties and all Parties have contributed substantially and materially to the preparation of this Settlement Agreement.

23. Each counsel and each other person executing this Settlement Agreement or any related Settlement documents, warrant and represent that they have the full authority to do so and that they have the authority to take appropriate action required or permitted to be taken pursuant to the Settlement Agreement to effectuate its terms.

24. The Counsel Group and Defendant's counsel agree to cooperate fully with one another in seeking Court approval of the Settlement Agreement, and of the Settlement, and in consummating the Settlement in accordance with its terms, and further agree to promptly agree upon and execute all such other documentation as may be reasonably required do so.

25. All proceedings in this Action shall be stayed and all statutes of limitations tolled until the Court approves or refuses to approve the Settlement Agreement.

26. Except as otherwise provided herein, each Party shall bear its own costs.

27. By entering into this Settlement Agreement, Defendant waives any potential defenses relating to service of process in connection with the effectuation of this Settlement of this Action.

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Dated: _____, 2022
District of Columbia

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Attachment No. 5:

Effective Date of Settlement

MEMORANDUM

To: Plaintiff, Joshua J. Angel

From: Counsel Group

Date: August 19, 2022

Re: Effective Date of Settlement

The provision in the Stipulation and Agreement of Settlement relating to its effective date, i.e., "the date on which the Court enters the Settlement Approval Order," is consistent with relevant legal principles and with the United States Department of Treasury's reform objectives.

1. Relevant Legal Principles

A Cato Institute Working Paper, *The Conservatorship of Fannie Mae and Freddie Mac: Actions Violate HERA and Established Insolvency Principles,* https://investorsuite.org/wp-content/uploads/2015/01/Krimminger-Calabria-HERA-White-Paper-Jan-29.pdf, No. 26/CMFA No.2, authored by Michael Krimminger who was senior policy adviser with the FDIC at the time of the creation of HERA and Mark Calabria who was one of the senior professional staff to Senator Richard Shelby, Chairman of the United States Senate Committee on Banking, Housing, and Urban Affairs, at that time, makes two relevant statements about the legal principles governing the conservatorship provision of HERA:

(1) HERA's conservatorship provisions are a part of the insolvency laws of the United States which are grounded on "fair treatment of stakeholders," Id. at 7.

(2) Both the FDIA and HERA provide protections to stakeholders that parallel the protections that the Bankruptcy Code provides to stakeholders, Id. at page 8.

In bankruptcy cases involving businesses that continue operating during the bankruptcy, contract claims are resolved by a court-approved plan. As asserted throughout the litigation, the claims of the holders of Joshua Angel and other holders of Junior Preferred Stock are contract claims. And, the Stipulation and Agreement of Settlement "parallels" such a bankruptcy plan.

In bankruptcy case involving an operating business, the plan which is to be approved by the court can set out the effective date of the plan, and such a plan is often effective at the time it is approved by the court. Accordingly, the Stipulation and Agreement of Settlement can and

should make its effective date "the date on which the Court enters the Settlement Approval Order."

2. Treasury Reform Objectives

A settlement agreement should reflect the rights and needs of both parties. The U.S. Department of Treasury Housing Reform Plan issued September 2019 calls for the government to "begin the process of ending the GSE's conservatorships," p. 3 and indicates that an end to conservatorships requires reforming the capital structure of the GSEs, p27. The Stipulation and Agreement of Settlement's provision establishing its effective date as "the date on which the Court enters the Settlement Approval Order" is consistent with Treasury's Reform Objectives.

The Counsel Group
August 2022