**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff, v. BANK OF AMERICA, N.A. Defendant.	Case No. 1:17-cv-36-EGS

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT IN PART OR STRIKE IN PART

TABLE OF CONTENTS

Page

MOTION 1

BACKGROUND 3

A. Federal Law Requires Deposit-Insurance Assessments For Highly Complex Institutions And Provides Rules For Disputes Over Those Assessments 3

B. Procedural History 6

ARGUMENT 6

I. The FDIC's Unjust Enrichment Claim Must Be Dismissed 7

A. The FDIC, If Entitled To Recover At All, Has An Adequate Legal Remedy Under Section 1817(g) 8

B. Section 1817(g) Is Not Inadequate Simply Because The FDIC's New Claims Are Time-Barred 11

C. The FDIC's Unjust Enrichment Claim Should Be Dismissed Because It Does Not Seek To Recover A Benefit Conferred On BANA 12

II. The FDIC's New Claims For Underpaid Assessments For The Second Quarter Of 2012 Through The First Quarter Of 2013 Are Time-Barred 14

A. Section 1817(g) Contains A Three-Year Limitations Period 14

B. Section 1817(g)'s Three-Year Limitations Period Governs Any Unjust Enrichment Claim 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

4934, Inc. v. District of Columbia Dep't of Emp't Servs.,
605 A.2d 50 (D.C. 1992) 7

Am. Honda Motor Co. v. Motorcycle Info. Network, Inc.,
390 F. Supp. 2d 1170 (M.D. Fla. 2005)..9

In re APA Assessment Fee Litig.,
766 F.3d 39 (D.C. Cir. 2014)..8, 11

Ashcroft v. Iqbal,
556 U.S. 662 (2009)..6, 7, 16

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)..6

Bongat v. Fairview Nursing Care Ctr., Inc.,
341 F. Supp. 2d 181 (E.D.N.Y. 2004) 8, 9

Bregman v. Perles,
747 F.3d 873 (D.C. Cir. 2014)..14, 17

* *Brumbelow v. Law Offices of Bennett & Deloney, P.C.*,
372 F. Supp. 2d 615 (D. Utah 2005)..10

Carrero v. LVNV Funding, LLC,
No. 11-62439-CIV, 2014 WL 6433214 (S.D. Fla. Oct. 27, 2014) 9

Cope v. Anderson,
331 U.S. 461 (1947)..12

Cummins Law Office, P.A. v. Norman Graphic Printing Co.,
826 F. Supp. 2d 1127 (D. Minn. 2011)..9, 10

FDIC v. Bates,
838 F. Supp. 1216 (N.D. Ohio 1993)..18

FMC Corp. v. Holliday,
498 U.S. 52 (1990)..17

* *Ga. Dep't of Cmty. Health v. U.S. Dep't of Health & Human Servs.*,
79 F. Supp. 3d 269 (D.D.C. 2015)..8, 9

Gilbert v. City of Cambridge,
932 F.2d 51 (1st Cir. 1991)..18, 19

United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.,
772 F.3d 1102 (7th Cir. 2014) 16

Hettinga v. United States,
677 F.3d 471 (D.C. Cir. 2012)..7

United States ex rel. Landis v. Tailwind Sports Corp.,
No. 1:10-CV-00976 (CRC), 2017 WL 573470 (D.D.C. Feb. 13, 2017) 7

Major v. Plumbers Local Union No. 5,
370 F. Supp. 2d 118 (D.D.C. 2005) 19

United States ex rel. Modern Elec., Inc. v. Ideal Elec. Sec. Co.,
81 F.3d 240 (D.C. Cir. 1996) 7

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 9

* *Nguyen v. Nissan N. Am., Inc.*,
No. 16-CV-05591, 2017 WL 1330602 (N.D. Cal. Apr. 11, 2017). 9, 11

* *Norwest Bank Minn. Nat'l Ass'n v. FDIC*,
312 F.3d 447 (D.C. Cir. 2002) 17, 18

In re Porsche Cars N. Am., Inc.,
880 F. Supp. 2d 801 (S.D. Ohio 2012) 9

* *Rapaport v. U.S. Dep't of the Treasury*,
59 F.3d 212 (D.C. Cir. 1995) 8, 13

Square 345 Ltd. P'ship v. District of Columbia,
927 A.2d 1020 (D.C. 2007) 9

Terrace v. Thompson,
263 U.S. 197 (1923) 9, 12

Thanos v. District of Columbia,
109 A.3d 1084 (D.C. 2014) 8

* *United States v. Bame*,
721 F.3d 1025 (8th Cir. 2013) 10, 11

United States ex rel. Williams v. Martin-Baker Aircraft Co.,
389 F.3d 1251 (D.C. Cir. 2004) 7

Statutes

* 12 U.S.C. § 1817 ....1, 2, 3, 6, 7, 8, 11, 12, 14, 15, 16, 17, 18, 19

28 U.S.C. § 2415 ....17, 18

Regulations

12 C.F.R. § 327.3 ....3, 15

12 C.F.R. § 327.4 3

76 Fed. Reg. 10,672 (Feb. 25, 2011) 3, 4

79 Fed. Reg. 70,427 (Nov. 26, 2014) 5

Rules

Fed. R. Civ. P. 8 16

Fed. R. Civ. P. 9(b) 7, 16

Fed. R. Civ. P. 11(b)(3) 16

Fed. R. Civ. P. 12(b)(6) 1, 6, 7

Treatises

Restatement (Third) of Restitution & Unjust Enrichment (2011) 11, 12

Other Authorities

Fed. Deposit Ins. Corp.,
Call Report Amendments & the Statute of Limitations,
(last visited Apr. 18, 2017). 15

Fed. Fin. Insts. Examination Council,
Draft Instructions for Revised Call Report Schedule RC-O – Other Data for Deposit Insurance and FICO Assessments, for June 2011
(updated May 2, 2011) 4, 5

Fin. Accounting Standards Bd.,
Accounting Research Bulletin 51: Consolidated Financial Statements
(last visited May 2, 2017) 4

MOTION

Defendant Bank of America, N.A. ("BANA") moves under Federal Rule of Civil Procedure 12(b)(6) to dismiss the amended complaint of Plaintiff Federal Deposit Insurance Corporation ("FDIC") for failure to state a claim for relief. BANA moves to dismiss the FDIC's Count II in its entirety, and to dismiss Count I in part or in the alternative to strike those allegations that are barred by the applicable statute of limitations. BANA respectfully requests an oral hearing on this motion pursuant to this Court's Local Civil Rule 7(f).

This lawsuit is an attempt by the FDIC to force BANA to pay additional insurance premiums. In its initial complaint, the FDIC alleged that BANA underpaid contributions to the Deposit Insurance Fund by a total of approximately $542 million for the second quarter of 2013 through the fourth quarter of 2014. BANA disputes those allegations, based on the regulatory text that was applicable at the time. Accordingly, on February 23, 2017, BANA answered the FDIC's allegations and prepared to defend its calculations relating to deposit-insurance for those quarters. BANA also counterclaimed to challenge the lawfulness of the regulations on which the FDIC's complaint was predicated.

With its amended complaint, the FDIC struck back, adding claims for an additional $583 million based on assessment payments to the Fund that BANA made *prior to* the second quarter of 2013. This April 17, 2017 amendment also added a new cause of action for unjust enrichment.

Because the FDIC's new claims for an additional $583 million are based on assessment payments that BANA made no later than June 2013, those claims are barred by the unambiguous three-year statute of limitations in 12 U.S.C. § 1817(g)(2). The statute allows only one relevant exception to the three-year limitations period—if an insured depository institution made a false or fraudulent statement with intent to evade its assessment. *See id.* § 1817(g)(2)(C). But the FDIC's amended complaint does not allege that BANA acted with intent to evade, nor could it: As the

FDIC knows, for every quarter at issue here, BANA showed the FDIC that it was not calculating its deposit-insurance assessment obligations in the aggregated manner that the FDIC now claims was required. Because the FDIC's claims for these additional quarters are barred by the statute of limitations, those claims must be dismissed. Alternatively, the Court should strike the FDIC's allegations related to BANA's assessments for these quarters, under whatever cause of action.

The FDIC's newly asserted unjust enrichment claim must also be dismissed in its entirety for two reasons. *First*, the FDIC alleges essentially the same injury and seeks essentially the same relief as with its statutory claim under Section 1817(g). But the Federal Deposit Insurance Act, not a common-law theory of unjust enrichment, provides the rules that Congress set out for resolving *any* claims by the FDIC for underpayment of deposit-insurance assessments. The statute provides the FDIC with an adequate legal remedy under Section 1817(g), so the FDIC is not permitted to override the statutory dispute-resolution framework with a common-law claim.

Second, BANA's alleged failure to pay deposit-insurance assessments is not "unjust enrichment." The law of unjust enrichment allows a plaintiff to recover only a benefit that the defendant received from the plaintiff. But here the FDIC never gave the allegedly underpaid assessment fees to BANA, and the FDIC may not twist those fees into a benefit it supposedly conferred simply by asserting that BANA has been "able to offer insured accounts to its depositors despite not paying its fair share of assessments." Am. Compl. ¶ 93.

The FDIC, like any other insurer, no doubt would prefer to collect as much in insurance premiums as possible. But no less than any other insurer, the FDIC must operate within the boundaries of the law, including the applicable statute of limitations and other limitations on its claims for additional payments.

BACKGROUND

A. Federal Law Requires Deposit-Insurance Assessments For Highly Complex Institutions And Provides Rules For Disputes Over Those Assessments

Every quarter, BANA and other banks pay assessments into the Deposit Insurance Fund, which insures domestic bank deposits up to $250,000 per depositor. Under the Federal Deposit Insurance Act, 12 U.S.C. § 1817(b)(1), the FDIC must create a risk-based system for calculating the assessments that insured depository institutions pay to the Fund. As implemented by the FDIC, a bank's quarterly assessments depend on the bank's assessment rate, which is derived from its "risk assignment." 12 C.F.R. § 327.4.

In February 2011, the FDIC promulgated a final rule that established a method for calculating the assessments owed by highly complex institutions ("HCIs") such as BANA. *See* Assessments, Large Bank Pricing, 76 Fed. Reg. 10,672 (Feb. 25, 2011). Under the 2011 Rule, HCIs submitted quarterly "call reports" to the FDIC with hundreds of line-items of data. The FDIC used the data in these reports in a complex algorithm to calculate each HCI's quarterly deposit-insurance assessment. Once the FDIC made this calculation, it would send the HCI an invoice, with payment due within approximately 90 days of the end of each quarter. *See id.* at 10,704; 12 C.F.R. § 327.3(b)(2).

Starting with the 2011 Rule, two of the many items of data requested by the FDIC in the call report asked each HCI to list the amount of its exposure to its largest counterparty, as well as the sum total of the HCI's exposure to its 20 largest counterparties. A counterparty is an entity that has a contractual relationship with an HCI under which the counterparty owes the HCI money, or certain other obligations that might affect the HCI's balance sheets if the counterparty defaults. *See* 76 Fed. Reg. at 10,721. For example, if BANA lends another company $1 billion, BANA's "exposure" to that counterparty is $1 billion.

The data that HCIs submitted under the 2011 Rule regarding the value of their counterparty exposures affected a component of the Rule known as the "concentration measure," which is designed to measure the extent to which an HCI's counterparty exposures are disproportionately spread among a small number of counterparties. There is no single, industry-standard measure of counterparty exposure or concentration. The FDIC's 2011 Rule elected to have HCIs calculate counterparty exposure as "the sum of Exposure at Default (EAD) associated with derivatives trading and Securities Financing Transactions (SFTs) and the gross lending exposure (including all unfunded commitments) for each counterparty or borrower *at the consolidated entity level*." 76 Fed. Reg. at 10,721 (emphasis added). In instructions that the FDIC provided for completing the call reports, it stated that "[c]ounterparty exposure is equal to the sum of (1) the exposure at default (EAD) associated with derivatives trading and securities financing transactions (SFTs) and (2) the gross lending exposure (including all unfunded commitments) for each counterparty or borrower at the consolidated entity level of the counterparty." Fed. Fin. Insts. Examination Council, *Draft Instructions for Revised Call Report Schedule RC-O – Other Data for Deposit Insurance and FICO Assessments, for June 2011* (updated May 2, 2011), *available at* https://www.fdic.gov/regulations/resources/call/crinst/2011-06/611rc-o050211drft.pdf.

Consolidation has a particular meaning in accounting. *See* Fin. Accounting Standards Bd., *Accounting Research Bulletin 51: Consolidated Financial Statements*, at ¶ 1, https://goo.gl/5hEzAc (last visited May 2, 2017). An entity's balance sheet, when considered on a consolidated basis, includes the entity's subsidiaries without regard to the legal distinctions between the target company (the "consolidated entity") and the subsidiaries under its control. *See id.* at ¶ 6. Intercompany transactions (*e.g.*, contracts between the target and its subsidiaries, or between two subsidiaries) disappear during consolidation. *Id.* Any entity within the umbrella of

a top-tier parent company can be evaluated on a "consolidated" basis. When this is done, the evaluation of that "consolidated entity" would involve its subsidiaries, but not its parent or sister companies.

In 2014, the FDIC published a new final rule that rewrote the instructions for reporting counterparty exposures. *See* Assessments, 79 Fed. Reg. 70,427 (Nov. 26, 2014). Among other changes, the FDIC removed the phrase "at the consolidated entity level" and replaced it with instructions stating that "[e]xposures to entities that are affiliates of each other are treated as exposures to one counterparty (or borrower)." *Id.* at 70,438. This new language, which was absent from the 2011 Rule and so did not control the assessments at issue in this case, instructed that when an HCI has exposures to multiple counterparties that are sister-companies of each other, those exposures should be aggregated and treated as a single exposure to the counterparties' top-tier parent company.

After the FDIC finalized this new rule with new text, it contended that the obligation on HCIs to aggregate their exposures at the consolidated entity level of the top-tier parent had been a part of its rules all along. As a result, the FDIC now alleges that under the 2011 Rule, the phrase "'at the consolidated entity level' means that exposures to counterparties that are affiliates of one another must be consolidated at the top-tier parent level of each company." Am. Compl. ¶ 37. The FDIC further alleges that BANA did not aggregate its counterparty exposures using this method for the quarters at issue in the amended complaint. *Id.* ¶ 42. The FDIC also alleges that none of the other eight HCIs calculated counterparty exposures in the same manner as BANA. *Id.* ¶¶ 8, 52. Notably, however, the FDIC does not allege that the other HCIs interpreted the 2011 Rule in the manner that the FDIC now says was required.

When the FDIC believes that a bank has underpaid an assessment, or when a bank believes that it has paid too much, 12 U.S.C. § 1817(g) provides for "[a]ssessment actions" in "any court of competent jurisdiction" to recover the "underpaid" or "overpaid amount of any assessment." The statute creates a cause of action for both sides, and also establishes a statute of limitations applicable to both sides, which is "3 years after the date the assessment payment was due," subject to certain exceptions. *Id.* § 1817(g)(2)(A)–(B).

B. Procedural History

On December 15, 2016, the FDIC invoiced Bank of America for $541,997,517.66, contending that BANA underpaid its assessments under the 2011 Rule by that amount for seven quarters: from the second quarter of 2013 through the fourth quarter of 2014. Am. Compl. ¶¶ 76–77. On January 9, 2017, the FDIC filed this lawsuit, pleading a cause of action under Section 1817(g) for that same amount. BANA filed its answer and counterclaim on February 24.

The FDIC thereafter expanded its demand to include allegedly underpaid assessments for five quarters preceding the second quarter of 2013; on March 8, it invoiced Bank of America for an additional $583,471,929.39 for the first quarter of 2012 through the first quarter of 2013. Am. Compl. ¶¶ 83–84. The FDIC then filed its amended complaint, increasing its total request for relief to $1.12 billion, and also adding a new cause of action for unjust enrichment. Am. Compl. ¶¶ 84, 91–94.

ARGUMENT

A complaint must be dismissed under Federal Rule of Civil Procedure 12(b)(6) unless it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court's first task on a motion to dismiss is to separate the complaint's

legal conclusions—including conclusory assertions and recitation of the elements of the cause of action—from genuine factual allegations. *Id.* at 678–79. The legal conclusions, unlike factual allegations, are not presumed true. *Id.* Once the legal conclusions are set aside, the Court determines whether the facts allow the Court to draw a plausible inference that the defendant is liable for the violation alleged. *Id.* at 678. In order to survive a motion to dismiss on an argument that requires the defendant to act with unlawful intent, such as Section 1817(g)(2)(C), the plaintiff must plead facts, not conclusory assertions, that plausibly suggest the defendant's intent. *See id.* at 683.

Allegations of fraud are also subject to a heightened pleading standard. Under Rule 9(b), "a party must state with particularity the circumstances constituting fraud." Those circumstances must include "the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud." *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004). As under Rule 12(b)(6) in general, "the Court need not accept inferences drawn by plaintiff if those inferences are not supported by the facts set out in the complaint, nor must the court accept legal conclusions cast as factual allegations." *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012).

I. The FDIC's Unjust Enrichment Claim Must Be Dismissed

"Recovery on an unjust enrichment theory requires a showing that 'a person retains a benefit . . . which in justice and equity belongs to another.'" *United States ex rel. Modern Elec., Inc. v. Ideal Elec. Sec. Co.*, 81 F.3d 240, 247 (D.C. Cir. 1996) (quoting *4934, Inc. v. District of Columbia Dep't of Emp't Servs.*, 605 A.2d 50, 55 (D.C. 1992)). To state a claim for unjust enrichment, a plaintiff must allege that: "(1) the plaintiff conferred a benefit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust." *United States ex rel. Landis v. Tailwind Sports Corp.*, No. 1:10-CV-00976 (CRC), 2017

WL 573470, at *17 (D.D.C. Feb. 13, 2017) (quoting *In re APA Assessment Fee Litig.*, 766 F.3d 39, 45–46 (D.C. Cir. 2014)). Since unjust enrichment is an equitable remedy, it is unavailable where a plaintiff has an adequate legal remedy under a statute. *See Bongat v. Fairview Nursing Care Ctr., Inc.*, 341 F. Supp. 2d 181, 188–89 (E.D.N.Y. 2004). Moreover, unjust enrichment is available only when a plaintiff seeks the value of a benefit it conferred on a defendant; unjust enrichment cannot be used simply to force a defendant to pay what it allegedly owes under a contract or regulatory scheme. *See Rapaport v. U.S. Dep't of the Treasury*, 59 F.3d 212, 217–18 (D.C. Cir. 1995). These two limitations separately and independently require dismissal of the FDIC's unjust enrichment claim.

A. The FDIC, If Entitled To Recover At All, Has An Adequate Legal Remedy Under Section 1817(g)

In the FDIC's original complaint, it sought to recover allegedly underpaid deposit-insurance assessments from BANA under the FDIC's statutory cause of action in 12 U.S.C. § 1817(g)(1). Compl. ¶¶ 54–57. A materially identical claim appears in Count I of the amended complaint. Am. Compl. ¶¶ 72–90. Now the FDIC has added a new Count II to the amended complaint seeking the very same relief under a theory of unjust enrichment. Am. Compl. ¶¶ 91–93. But it is well established that an equitable claim of unjust enrichment is not available when a plaintiff has an adequate remedy at law. Here, the FDIC has an adequate remedy under Section 1817, and so the unjust enrichment claim should be dismissed.

Unjust enrichment is an equitable cause of action. *See, e.g.*, *Ga. Dep't of Cmty. Health v. U.S. Dep't of Health & Human Servs.*, 79 F. Supp. 3d 269, 280–82 (D.D.C. 2015), *amended on other grounds by* 110 F. Supp. 3d 95 (D.D.C. 2015); *Thanos v. District of Columbia*, 109 A.3d 1084, 1093–94 (D.C. 2014). But equitable relief is not available if the plaintiff has an adequate legal remedy: "That a suit in equity does not lie where there is a plain, adequate and complete

remedy at law is so well understood as not to require the citation of authorities." *Terrace v. Thompson*, 263 U.S. 197, 214 (1923). Accordingly, because "[i]t is a 'basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law,'" a plaintiff "must show that it [does] not have an adequate remedy at law." *Georgia Department of Community Health*, 79 F. Supp. 3d at 281–82 (alterations in original) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992)); *see also Square 345 Ltd. P'ship v. District of Columbia*, 927 A.2d 1020, 1026 (D.C. 2007) ("It is axiomatic that equity has no jurisdiction over a controversy for which there is a complete and adequate remedy at law." (internal quotation marks omitted)).

For this reason, courts routinely dismiss claims for unjust enrichment where the plaintiff has an adequate statutory remedy, as is the case here. *See, e.g.*, *Carrero v. LVNV Funding, LLC*, No. 11-62439-CIV, 2014 WL 6433214, at *5 (S.D. Fla. Oct. 27, 2014) (dismissing a claim of unjust enrichment where a state statute provided an adequate remedy); *In re Porsche Cars N. Am., Inc.*, 880 F. Supp. 2d 801, 843–44 (S.D. Ohio 2012) (same); *Am. Honda Motor Co. v. Motorcycle Info. Network, Inc.*, 390 F. Supp. 2d 1170, 1178 (M.D. Fla. 2005) (same); *Bongat*, 341 F. Supp. 2d at 188–89 (dismissing claim of unjust enrichment where "plaintiffs' [Fair Labor Standards Act] claim . . . would provide an adequate remedy at law"). "[T]he availability of statutory claims (whether state or federal) will preclude the assertion of an unjust-enrichment or other equitable claim seeking the same relief." *Cummins Law Office, P.A. v. Norman Graphic Printing Co.*, 826 F. Supp. 2d 1127, 1132 (D. Minn. 2011). In *Nguyen v. Nissan North America, Inc.*, for example, the court dismissed an unjust enrichment claim where the plaintiff brought statutory claims "to compensate for 'the exact same' alleged harm 'that forms the basis of' Plaintiff's requests for" equitable relief. No. 16-CV-05591, 2017 WL 1330602, at *4 (N.D. Cal. Apr. 11, 2017).

The overlap between a statutory claim and an equitable claim for unjust enrichment—and thus the adequacy of the statutory claim—is especially clear where the unjust enrichment allegedly arose out of a violation of the same statute that already provides the plaintiff with a cause of action. For instance, in *Brumbelow v. Law Offices of Bennett & Deloney, P.C.*, 372 F. Supp. 2d 615 (D. Utah 2005), the plaintiff sued a debt collector under a state fair-collection law and brought a separate claim for unjust enrichment. The district court granted the collector summary judgment on the claim for unjust enrichment because "the defendants were only unjustly enriched if the [statute] was violated," and "[a]s such, the [statute] appears to provide an adequate remedy." *Id.* at 623.

A claim of unjust enrichment is also precluded when the remedy sought is the same as the plaintiff's statutory remedy. The Eighth Circuit explained this principle in *United States v. Bame*, 721 F.3d 1025, 1030 (8th Cir. 2013), where the United States pled causes of action under a state fraudulent transfer law, the Federal Debt Collection Procedure Act, and an equitable theory of unjust enrichment. The court noted that "it appears that adequate remedies at law were available to the government" where it "sought the exact same damages under both [its] statutory and equitable claims," as opposed to "seek[ing] any relief in equity which it could not obtain under the statutory claims." *Id.* at 1031; *see also Cummins Law Office*, 826 F. Supp. 2d at 1132 (noting that a statutory claim "seeking the same relief" is adequate).[1]

In the insurance context specifically, courts have employed similar reasoning to conclude that an insurer cannot sue an insured for unjust enrichment where an insurance contract is in place, because "a court will not displace the terms of that contract and impose some other duties not

[1] In *Bame*, the Eighth Circuit reversed the district court's grant of summary judgment to the government on other grounds, and therefore did not resolve in the first instance the question whether the government's legal remedy was adequate on the facts of that case. 721 F.3d at 1029–30.

chosen by the parties" under a theory of unjust enrichment. *In re APA Assessment Litig.*, 766 F.3d 39, 46 (D.C. Cir. 2014); *see also* Restatement (Third) of Restitution & Unjust Enrichment § 2(2) (2011) ("A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment."). It makes even less sense to permit the government to use unjust enrichment to circumvent Congress's definition of private parties' obligations.

All of these principles compel dismissal of the FDIC's unjust enrichment claim here. As in *Nguyen*, the FDIC seeks damages under a statutory remedy "for 'the exact same' alleged harm 'that forms the basis of'" its equitable count for unjust enrichment. 2017 WL 1330602, at *4. As in *Brumbelow*, the FDIC contends that BANA was unjustly enriched only if BANA violated its statutory obligation under Section 1817 by "not paying its fair share of assessments" under the 2011 Rule. Am. Compl. ¶ 93. And as in *Bame*, the FDIC is seeking the exact same relief—payment of $1.12 billion—under both its statutory claim and its unjust enrichment claim. *Compare* Am. Compl. ¶ 75 (seeking "assessment fees of $1.12 billion" allegedly owed under the statute) *with* Am. Compl. ¶ 92 (seeking "$1.12 billion that [BANA] owes the FDIC" under the law of unjust enrichment). Neither count seeks any other relief. In short, the legal and equitable claims in the amended complaint rise or fall together. The FDIC's remedy therefore lies in the cause of action provided by the statute, not in an equitable theory of unjust enrichment.

B. Section 1817(g) Is Not Inadequate Simply Because The FDIC's New Claims Are Time-Barred

The statutory cause of action provided by Section 1817(g)(2) is not rendered inadequate by the fact that it carries a limitations period that bars the FDIC's new claims relating to payments for the first quarter of 2012 through the first quarter of 2013. *See Bame*, 721 F.3d at 1031 ("[T]he fraudulent transfer statutes are an adequate remedy at law even if recovery under these statutes is

time-barred."); *cf.* Third Restatement of Restitution & Unjust Enrichment § 31 ("There is no claim under this section if enforcement of the agreement is barred by the applicable statute of limitations, nor in any other case in which the allowance of restitution would defeat the policy of the law that makes the agreement unenforceable."). Longstanding Supreme Court precedent makes clear that "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy." *Cope v. Anderson*, 331 U.S. 461, 464 (1947). This makes abundant sense, since any other rule would allow a plaintiff with an adequate legal remedy to evade the bar on pleading equitable claims simply by bringing time-barred claims. And in any event, Section 1817(g)(2)'s statute of limitations applies generally to "actions relating to assessments, notwithstanding any other provision in Federal law, or the law of any State." The plain text bars any claim that BANA was unjustly enriched prior to the second quarter of 2013 by the underpayment of assessments. *See infra* at 14–16.

In sum, the FDIC has pled a claim for unjust enrichment that is based on the exact same facts, asserts the same legal error, and seeks the exact same relief, as its claim for violation of Section 1817. The FDIC may not use unjust enrichment to circumvent the legal rules governing its relationship with BANA—any more than any other insurer would be permitted to proceed against its insured in this way. Rather, because the statutory remedy in Section 1817(g) is "as complete, practical and efficient as that which equity could afford," *Terrace*, 263 U.S. at 214, the Court should dismiss the FDIC's unjust enrichment claim.

C. The FDIC's Unjust Enrichment Claim Should Be Dismissed Because It Does Not Seek To Recover A Benefit Conferred On BANA

The FDIC's claim for $1.12 billion in unjust enrichment should also be dismissed because it does not seek to recover any benefit given to BANA by the FDIC. The FDIC alleges that "Bank of America has unjustly enriched itself at the expense of the FDIC by retaining $1.12 billion that

it owes the FDIC." Am. Compl. ¶ 92. But this claim violates a fundamental principle of unjust enrichment: the claim exists to recover a benefit given to the defendant by the plaintiff, not to compensate a plaintiff for some other loss.

"[T]he fundamental characteristic of unjust enrichment is 'that the defendant has been unjustly enriched by receiving something that properly belongs to the plaintiff, thereby forcing restoration to the plaintiff.'" *Rapaport*, 59 F.3d at 217 (alterations and citation omitted). In *Rapaport*, the Federal Savings and Loan Insurance Corporation approved insurance for the Great Life Savings Association on the condition that Rapaport, the majority shareholder, maintain Great Life's capitalization at the level required by regulation. *Id.* at 213. After Great Life failed, the Office of Trust Supervision, as the successor agency to the Corporation, alleged that Rapaport had failed to maintain the required capital by $1.5 million. *Id.* at 214. In rejecting the claim, the D.C. Circuit explained that "[t]he agency's argument that Rapaport was 'unjustly enriched' by his failure to pay the amount he owed under the Agreement . . . fails to satisfy even the first element of a claim for unjust enrichment." *Id.* at 217. "If Rapaport 'benefitted' from his failure to contribute capital to Great Life—and that is at best an odd way to describe what happened—it was not because the OTS or its predecessor conferred something upon him." *Id.* As such, "Rapaport's alleged failure to contribute as agreed in order to maintain Great Life's required level of capital does not amount to . . . unjust enrichment." *Id.* at 220.

Here too, the FDIC's claim fails to satisfy the first element of a claim for unjust enrichment: BANA did not receive the purportedly underpaid assessment fees from the FDIC. BANA, like Rapaport, "just failed to pay up as allegedly required," *id.* at 217, which does not state a claim for unjust enrichment.

II. The FDIC's New Claims For Underpaid Assessments For The Second Quarter Of 2012 Through The First Quarter Of 2013 Are Time-Barred

The Amended Complaint purports to add $583 million to this dispute by including a new allegation that BANA underpaid its assessments for the first quarter of 2012 through the first quarter of 2013. Am. Compl. ¶¶ 83–88. But the FDIC's claims for those alleged underpayments are barred by the straightforward three-year statute of limitations in 12 U.S.C. § 1817(g)(2). Thus, the Court should dismiss those claims, or, alternatively, strike the FDIC's new allegations related to those quarters. *See Bregman v. Perles*, 747 F.3d 873, 875 (D.C. Cir. 2014) (dismissal on limitations grounds is appropriate "if the complaint on its face is conclusively time-barred") (internal quotation marks omitted).

A. Section 1817(g) Contains A Three-Year Limitations Period

Section 1817(g)(2) establishes a three-year statute of limitations that "shall apply to actions relating to assessments, notwithstanding any other provision in Federal law, or the law of any State." The same three-year limitations period applies to actions by the FDIC for underpayment as to actions by an insured depository institution for refund of an overpayment. With respect to actions brought by the FDIC, Section 1817(g)(2)(B) provides that:

> *Any* action by the Corporation to recover from an insured depository institution the underpaid amount of any assessment shall be brought within 3 years after the date the assessment payment was due, subject to the exceptions in subparagraphs (C) and (E).

12 U.S.C. § 1817(g)(2)(B) (emphasis added). This limitations period applies to *every* lawsuit in which the FDIC seeks to recover allegedly underpaid assessments. The three-year limitations period has only two exceptions: Subparagraph (C) provides that if a bank "has made a false or fraudulent statement *with intent to evade* any or all of its assessment, the Corporation shall have until 3 years after the date of discovery of the false or fraudulent statement in which to bring an

action to recover the underpaid amount." 12 U.S.C. § 1817(g)(2)(C) (emphasis added). The exception in subparagraph (E) applies to claims for underpaid assessments that were due before January 2007. *Id.* § 1817(g)(2)(E).

Here, BANA's quarterly assessments were "due" approximately 90 days after the end of each quarter. 12 C.F.R. § 327.3(b)(2). Thus, BANA's assessment payment for the first quarter of 2013 was due June 30, 2013—more than three years before the FDIC filed its amended complaint in April 2017 (or even before the original complaint in January 2017). Likewise, BANA's payments for the first, second, third, and fourth quarters of 2012 were due more than three years before the FDIC filed its complaint related to these payments. Section 1817(g)(2)(B) now bars the FDIC from seeking the purported "underpaid amount[s]" for those quarters.[2]

The FDIC itself recognizes that Section 1817(g)'s limitations period runs from the original due date for each quarter's assessments. For example, the call-report instructions on the FDIC's website state that, in the event an underpayment is discovered, "in order for the Corporation to bill for [the] underpayment . . . Call Report amendments must be made within the three-year statute of limitations period." Fed. Deposit Ins. Corp., *Call Report Amendments & the Statute of Limitations*, https://www.fdic.gov/deposit/insurance/assessments/statute_of_limitations.pdf (last visited Apr. 18, 2017).

The exceptions in Section 1817(g)(2) do not apply to this case. The disputed assessments obviously were not due before January 2007, and the amended complaint does not—and could not—allege that BANA "made a false or fraudulent statement with intent to evade any or all of its

---

[2] The FDIC's allegations that BANA underpaid its assessments for the second quarter of 2013 through the fourth quarter of 2014 (the quarters at issue in the FDIC's original complaint) were the subject of a tolling agreement between the FDIC and BANA. Thus, none of those alleged underpayments is time-barred under Section 1817(g).

assessment," such that the extended limitations period in Section 1817(g)(2)(C) would apply. The amended complaint suggests that the FDIC was unaware of BANA's method for calculating counterparty exposures (and therefore the purported underpayments) because the call reports "report only the *amounts* of [BANA's] counterparty exposures, and not the *identities* of its counterparties." Am. Compl. ¶¶ 35, 42. But that merely describes the FDIC's own call-report forms, not any fraudulent "intent to evade" on BANA's part. *See* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). Even under Rule 8, in order to survive a motion to dismiss on any argument that requires the defendant to act with unlawful *intent* (such as Section 1817(g)(2)(C)), the plaintiff must plead facts, not conclusory assertions, that plausibly suggest the defendant's intent. *See Iqbal*, 556 U.S. at 683 (the plaintiff failed to state a claim for relief under Rule 8 because the "complaint does not contain any factual allegation sufficient to plausibly suggest [the defendants'] . . . state of mind"); *cf. United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1106 (7th Cir. 2014) (in order to plead a violation of the False Claims Act for making a false record or statement material to a "false or fraudulent claim," the plaintiff must include in the complaint "non-conclusory allegations" that the defendant "had decided to [violate the law] at the time it promised otherwise"). Here, the FDIC does not even generally allege that BANA intentionally concealed the identities of its counterparties. The FDIC's belated allegation in this litigation that it did not discover BANA's reporting method until 2016 is entirely irrelevant to the limitations period, which lapsed three years after each quarterly assessment's due date.[3]

[3] The FDIC cannot allege that BANA intentionally sought to conceal its method for calculating counterparty exposures for the purpose of reducing its assessments, in light of the facts as the FDIC knows them to be. *See* Fed. R. Civ. P. 11(b)(3). The FDIC specifically requested that BANA provide the data underlying its top counterparty exposure amounts as early as May

B. Section 1817(g)'s Three-Year Limitations Period Governs Any Unjust Enrichment Claim

As shown above, the FDIC's newly added unjust enrichment claim must be dismissed in its entirety because the FDIC has an adequate legal remedy. But even if the FDIC were entitled to bring a claim for unjust enrichment, the FDIC may not use that cause of action to evade Section 1817(g)'s express three-year limitations period. By its plain terms, Section 1817(g) governs all "actions *relating to* assessments." 12 U.S.C. § 1817(g)(2) (emphasis added). The phrase "relat[ing] to" is "conspicuous for its breadth" and encompasses any "connection" or "reference" to allegedly underpaid assessments. *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990) (interpreting the phrase "relate to" in 29 U.S.C. § 1144(a)) (internal quotation marks omitted). If that were not clear enough, the statute itself states that its limitations periods apply "notwithstanding *any* other provision in Federal law." 12 U.S.C. § 1817(g)(2) (emphasis added). Thus, whenever the FDIC seeks to recover underpaid assessments (just as when a bank seeks to recover overpayments), the three-year limitations period in Section 1817(g)(2) applies regardless of the label that the FDIC attaches to its causes of action. And if for some reason Section 1817(g)(2) did not apply, it would make no difference, because unjust enrichment claims are subject to a three-year limitations period under District of Columbia law. *See Bregman*, 747 F.3d at 876.

For these reasons, the six-year statute of limitations for government actions "founded upon any contract express or implied in law or fact," 28 U.S.C. § 2415(a), has no bearing here. Indeed, the D.C. Circuit has already held that Section 1817(g) trumps the "general, catchall" limitations periods in title 28. *See Norwest Bank Minn. Nat'l Ass'n v. FDIC*, 312 F.3d 447, 451 (D.C. Cir.

2012. BANA complied with that request and—beginning with the report for the fourth quarter of 2011—provided the FDIC quarterly spreadsheets listing BANA's top-20 counterparties by name, including several counterparties that obviously were affiliated companies with the same top-tier parent.

2002); *cf. FDIC v. Bates*, 838 F. Supp. 1216, 1217 (N.D. Ohio 1993) ("Specific limitations take precedence over general statutes of limitations."). In *Norwest*, the D.C. Circuit held that Section 1817(g), not the six-year default limitations period for civil actions against the United States, applied to an action by a bank to recover alleged overpayments to the deposit insurance fund. *Id.* Here, similarly, Section 2415 is a default limitations period that applies "except as otherwise provided by Congress," *id.*, and Section 1817(g) provides a shorter limitations period specifically applicable to FDIC actions to recover underpaid assessments. Moreover, the FDIC's unjust enrichment claim is not "founded upon" a contract within the meaning of Section 2415(a); it is an equitable claim.

Thus, the plain text of both statutes unambiguously demonstrates that disputes related to deposit-insurance assessments are governed by the specific time limits in Section 1817(g), not Section 2415(a)'s general provisions for contract claims. Here, as in *Norwest*, allowing the FDIC to recover alleged underpayments under Section 2415(a)'s six-year limitations period would render Section 1817(g)(2)(B)'s three-year period "superfluous," 312 F.3d at 451, permitting the FDIC to breathe new life into a time-barred claim simply by recasting it as an attempt to recover the "unjust enrichment" that supposedly resulted from a bank's alleged underpayments. Moreover, allowing the FDIC six years to recover allegedly underpaid assessments would upset Congress's decision to provide the same three-year limitations period to all actions relating to assessments disputes, whether brought by the FDIC or by a bank. *See* 12 U.S.C. § 1817(g)(2).

The same result is compelled by the general rule for determining limitations periods when no period is prescribed by statute. In those circumstances, to determine whether a claim is time-barred "courts must necessarily focus upon the substance of [the] asserted claim as opposed to its form." *Gilbert v. City of Cambridge*, 932 F.2d 51, 57 (1st Cir. 1991). Where, as here, a plaintiff's

equitable claim is a mirror image of its claim for relief under a statute "which has a specific limitations period, the specific period of time will govern." *Id.* at 58 (internal quotation marks omitted). Otherwise, plaintiffs could "mak[e] a mockery of the statute of limitations by the simple expedient of creative labeling." *Id.* at 57; *cf. Major v. Plumbers Local Union No. 5*, 370 F. Supp. 2d 118, 127 (D.D.C. 2005) ("Courts have been wary of plaintiffs transforming what would otherwise be claims of discrete discrimination into a pattern or practice claim to avoid the statute of limitations.").

There can be no serious doubt that the FDIC's unjust enrichment claim is an "action[ ] relating to" BANA's allegedly underpaid deposit-insurance assessments. 12 U.S.C. § 1817(g)(2). And "any" such action is subject to a three-year limitations period. *Id.* The FDIC may not sidestep this explicit limitations provision simply by adding a new unjust enrichment claim.

CONCLUSION

The Court should dismiss Count II of the FDIC's amended complaint in its entirety. The Court should also dismiss the FDIC's new claims for alleged underpayments for the first quarter of 2012 through the first quarter of 2013, under whatever cause of action. In the alternative, the Court should strike the FDIC's allegations related to those new alleged underpayments.

Plaintiff respectfully requests an oral hearing on this motion pursuant to this Court's Local Civil Rule 7(f).

Dated: May 5, 2017

Respectfully submitted,

/s/ Eugene Scalia

Eugene Scalia (DC Bar No. 447524)
Michael R. Huston (DC Bar No. 1012841)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: 202.955.8500
Facsimile: 202.467.0539

Gabrielle Levin (admitted pro hac vice)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
Telephone: 212.351.4000
Facsimile: 212.351.4035

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2017, I filed and therefore caused the foregoing document to be served via the CM/ECF system in the United States District Court for the District of Columbia on all parties registered for CM/ECF in the above-captioned matter.

/s/ Eugene Scalia
Eugene Scalia