No. 22-867C
(Senior Judge Margaret M. Sweeney)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA J. ANGEL,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS

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DEFENDANT'S MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court dismiss the complaint filed by plaintiff, Joshua J. Angel, for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. In support of this motion, we rely upon the complaint and the following brief.

INTRODUCTION

In 2008, in the midst of an unprecedented financial crisis centered around the collapse of the housing and financial markets, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA) to stabilize the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises or GSEs), which stood on the brink of insolvency. HERA created the Federal Housing Finance Agency (FHFA) and authorized its Director to appoint the Agency as conservator or receiver for the Enterprises. Congress also authorized the Treasury Department to invest in the Enterprises to provide the extraordinary infusion of taxpayer funds that would be necessary to ensure their ongoing viability. The Director of FHFA placed both Enterprises into conservatorships on September 6, 2008, and the conservator immediately entered into agreements with Treasury to

secure the financial lifeline that the Enterprises needed. On August 17, 2012, Treasury and FHFA, as conservator of the Enterprises, amended the dividend structure in their agreement to help ensure the Enterprises' financial stability.

In this suit, Mr. Angel, a holder of junior preferred stock in the Enterprises, challenges the non-payment of dividends on his stock in the wake of the 2012 amendment to the funding agreement between Treasury and FHFA, as conservator. Mr. Angel's claims are among the latest in a long line of cases, filed in this Court and in district courts around the country, challenging the conservatorships, the actions of the conservator, the 2012 amendment to the funding agreement, or some combination of these. To date, these cases have met with little success. Indeed, the Supreme Court just this month denied a petition for a writ of certiorari with respect to a decision of the United States Court of Appeals for the Federal Circuit rejecting claims by Enterprise shareholders bringing challenges that mirror those brought by Mr. Angel. *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (Fed. Cir. 2022), *cert. denied sub nom. Owl Creek Asia I, L.P. v. United States*, No. 22-97, 2023 WL 124020 (U.S. Jan. 9, 2023), and *cert. denied sub nom. Cacciapalle v. United States*, No. 22-98, 2023 WL 124021 (U.S. Jan. 9, 2023), and *cert. denied sub nom. Barrett v. United States*, No. 22-99, 2023 WL 124022 (U.S. Jan. 9, 2023), and *cert. denied,* No. 22-100, 2023 WL 124023 (U.S. Jan. 9, 2023). As a consequence, Mr. Angel's claims have already been substantively rejected in binding precedent.

Moreover, this is Mr. Angel's third attempt to advance claims of this nature. He first filed his claims in the United States District Court for the District of Columbia, which dismissed his claims in March of 2019. *Angel v. Fed. Home Loan Mortg. Corp*., Case No. 1:18-cv-01142, 2019 WL 1060805 (D.D.C. Mar. 6, 2019), *aff'd*, 815 F. App'x 566, 569 (D.C. Cir. 2020). In 2020, Mr. Angel filed a complaint in this Court nearly identical to the one in this case, but later

voluntarily dismissed that complaint and re-filed this one four days later, in an apparent attempt to avoid a stay of proceedings that the Court had put in place. Mr. Angel's claims in this case suffer from the same fatal flaws as did his previous attempts to seek relief, however, and should be dismissed.

As a threshold matter, Mr. Angel's claims are time-barred. Although his allegations stem from transactions that occurred on September 7, 2008, and August 17, 2012, Mr. Angel did not file this complaint until August 8, 2022. Despite his attempt at creative pleading, the continuing claims doctrine does not apply to his allegations, and his claims are barred by this Court's six-year statute of limitations. Indeed, Mr. Angel's previous, similar suit in district court against FHFA and the Enterprises was dismissed as time-barred for reasons that likewise bar his suit here. *Angel*, 2019 WL 1060805, *aff'd*, 815 F. App'x at 569; *see also* 2019 WL 11320986, at *2 (D.D.C. May 24, 2019), *aff'd,* 815 F. App'x 566 (D.C. Cir. 2020) (denying leave to amend).

Even if not time-barred, Mr. Angel's complaint should be dismissed for several additional reasons. The complaint asserts tort claims over which this Court does not possess jurisdiction. Moreover, it fails to state a claim for breach of contract, express or implied, because it fails to plausibly allege the existence of a contract between Mr. Angel and the United States or facts that would amount to a breach of any such alleged contract. Finally, the Federal Circuit has already rejected any constitutional claim raised by Mr. Angel's complaint; because the claims are substantively derivative, they may not be asserted by shareholders, and would fail as a matter of law even if they could be asserted derivatively.

QUESTIONS PRESENTED

1. Whether, pursuant to 28 U.S.C. § 2501, the Court possesses jurisdiction to entertain Mr. Angel's claims when they were filed more than six years after the claims accrued.

2. Whether this Court possesses jurisdiction to entertain Mr. Angel's tort claims for conversion, breach of fiduciary duty, and tortious interference with a contract.

3. Whether the complaint states a claim for breach of contract when it fails to plausibly allege the existence of a contract between Mr. Angel and the United States and fails to plausibly allege facts that would amount to a breach of any such contract.

4. Whether any illegal exaction claim raised by the complaint is substantively derivative and, therefore, belongs to the Enterprises and may not be asserted by shareholders like Mr. Angel.

STATEMENT OF THE CASE

I. Background

A. The Enterprises

Congress created Fannie Mae in 1938 and Freddie Mac in 1970. Compl. ¶ 25; *see also Collins v. Yellen*, 141 S. Ct. 1761, 1770 (2021). The Enterprises operate as for-profit corporations with private shareholders, though they serve a public mission. Compl. ¶ 25; *see also Collins*, 141 S. Ct. at 1770. The Enterprises purchase residential loans from banks and other lenders, facilitating the ability of lenders to make additional loans. Compl. ¶ 25; *see also Collins*, 141 S. Ct. at 1771. These activities increase the liquidity of the national home lending market and promote access to mortgage credit. Compl. ¶ 25; *see also Collins*, 141 S. Ct. at 1771.

Over the years, both Enterprises issued multiple series of preferred and common stock. Compl. ¶¶ 25, 26. The terms of these stock issuances are governed by the relevant certificate of designation (COD). Compl. ¶ 27.

Although the Enterprises are government-sponsored, the statute that has governed regulation of the Enterprises since 1992, and mirrored by HERA in 2008, contains two separate provisions specifying that their securities are not guaranteed by the Federal Government:

> The Congress finds that . . . neither the enterprises . . . , nor any securities or obligations issued by the enterprises . . . , are backed by the full faith and credit of the United States.

12 U.S.C. § 4501(4).

> This chapter may not be construed as implying that any such enterprise . . . , or any obligations or securities of such an enterprise . . . , are backed by the full faith and credit of the United States.

Id. § 4503.

B. The 2008 Financial Crisis, HERA, And The Conservatorships

By 2007, the Enterprises owned or guaranteed more than $5 trillion in residential mortgage assets, nearly half the national mortgage market. *Collins*, 141 S. Ct. at 1771. In 2008, the Enterprises suffered overwhelming losses because of the collapse of the housing market. Compl. ¶ 39; *id*. The Enterprises lost more in 2008 than they had earned in the prior 37 years combined. *Collins*, 141 S. Ct. at 1771.

In response to this crisis, Congress enacted HERA, Pub. L. No. 110-289, 122 Stat. 2654 (2008) (12 U.S.C. §§ 4501-4642). HERA created FHFA to regulate and supervise the Enterprises. 12 U.S.C. § 4511.

HERA also authorized FHFA's Director to appoint FHFA as conservator or receiver of the Enterprises. 12 U.S.C. § 4617(a). The Director exercised this authority on September 6, 2008, placing both Fannie Mae and Freddie Mac into conservatorships. Compl. ¶ 32; *Collins*, 141 S. Ct. at 1772.

HERA provides that, upon its appointment as the conservator or receiver, FHFA will "immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity [*i.e.*, Fannie Mae and Freddie Mac], and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i). The statute accords FHFA as conservator the power to "operate" and "conduct all business" of the Enterprises, *id.* § 4617(b)(2)(B)(i), including the power to take such action as may be "appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity," *id.* § 4617(b)(2)(D)(ii), and to "transfer or sell" any of the Enterprises' assets or liabilities, *id.* § 4617(b)(2)(G). Immediately upon declaration of the conservatorships, FHFA as conservator announced that the Enterprises would not pay common or preferred stock dividends during conservatorship. *See* Fannie Mae, 2017 Annual Report (Form 10-K) (Fannie 2017 10-K) at 13, 36 (Feb. 14, 2018); Freddie Mac, 2017 Annual Report (Form 10-K) (Freddie 2017 10-K) at 190 (Feb. 15, 2018).[1]

C. Treasury's Stock Purchase Agreements With The Enterprises

In addition to laying out the powers and functions of the conservator, HERA amended the Enterprises' statutory charters to grant Treasury the authority to purchase securities issued by the Enterprises, so long as Treasury and the Enterprises reached "mutual agreement" on the terms. *See* 12 U.S.C. § 1719(g)(1)(A) (Fannie Mae); 12 U.S.C. § 1455*(l)*(1)(A) (Freddie Mac); *see also* Compl. ¶ 6. That authorization "made it possible for Treasury to buy large amounts of Fannie

[1] *Available at* https://fanniemae.gcs-web.com/static-files/5e4a8dbd-9ad7-464b-a580-dfcd677219b7 (Fannie 2017 10-K); http://www.freddiemac.com/investors/financials/pdf/10k_021518.pdf (Freddie 2017 10-K). The Court may take judicial notice of information contained in SEC filings on a motion to dismiss. *See In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 354 n.5 (2d Cir. 2010); *see also Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 779 F.3d 1036, 1043 (9th Cir. 2015).

and Freddie stock, and thereby infuse them with massive amounts of capital to ensure their continued liquidity and stability." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 600 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 978 (2018). Congress required Treasury to determine that exercising its new statutory authority to acquire securities of the Enterprises was necessary to "protect the taxpayer," among other things. 12 U.S.C. §§ 1719(g)(1)(C), 1455(*l*)(1)(C).

On September 7, 2008, FHFA, as conservator, entered into two Senior Preferred Stock Purchase Agreements (PSPAs), one for each Enterprise, with the Department of Treasury, under which Treasury committed to provide $100 billion to each Enterprise. Compl. ¶ 6; *Collins*, 141 S. Ct. at 1772-73.[2] In return for this massive and continuing commitment, Treasury received a comprehensive bundle of rights, including: (1) a senior liquidation preference that started at $1 billion per Enterprise and would increase dollar-for-dollar whenever the Enterprises drew Treasury funds; (2) a requirement that the Enterprises pay Treasury a 10 percent annual dividend, assessed quarterly, based on the total amount of the liquidation preference; (3) an annual fee (known as the "periodic commitment fee") intended to compensate Treasury for its ongoing commitment; and (4) warrants to acquire up to 79.9 percent of the Enterprises' common stock. *See* PSPA §§ 1, 3.1, 3.2; Certificate of Designation of Terms of Variable Liquidation Preference Senior Preferred Stock, Series 2008-2 § 2(c);[3] *see also Collins,* 141 S. Ct. at 1773*;* Compl. ¶¶ 6, 7. The PSPAs precluded the payment of dividends to any entity other than Treasury without Treasury's prior approval. Compl. ¶¶ 7, 8; PSPA § 5.1. FHFA as conservator

[2] The stock purchase agreements are available at https://go.usa.gov/xUyCz (Fannie Mae) and https://go.usa.gov/xUyCu (Freddie Mac).

[3] The Senior Preferred Stock Certificates of Designation are available at https://go.usa.gov/xUyNA (Fannie Mae) and https://go.usa.gov/xUyN6 (Freddie Mac).

and Treasury subsequently amended the PSPAs twice, both times to raise the amount of Treasury's commitment.

On August 17, 2012, FHFA, as the Enterprises' conservator, and Treasury executed the Third Amendment to the stock purchase agreements, which, among other things, replaced the fixed, 10 percent dividend with a variable quarterly dividend equal to the net worth of the Enterprises (minus a capital reserve). Compl. ¶¶ 10, 11; *see also* Third Amendment to Senior Preferred Stock Purchase Agreements, *available at* https://go.usa.gov/xUyaM (Fannie Mae) and https://go.usa.gov/xUyae (Freddie Mac). In other words, under the Third Amendment, "Fannie and Freddie pay whatever dividend they could afford—however little, however much . . . . If Fannie and Freddie made profits, Treasury would reap the rewards; if they suffered losses, Treasury would have to forgo payment entirely." *Perry Capital*, 864 F.3d at 612. Mr. Angel refers to the Third Amendment's variable dividend structure as a "Net Worth Sweep." *See*, *e.g.*, Comp. ¶¶ 11, 12, 37.

III. Procedural History

Prior to filing in this Court, Mr. Angel filed a similar complaint in the United States District Court for the District of Columbia, against the Enterprises, their directors, and FHFA as conservator. *Angel v. Fed. Home Loan Mortg. Corp., et al.*, No. 1:18-cv-01142 (D.D.C.). The district court dismissed the complaint, determining that Mr. Angel's claims were time-barred under Delaware and Virginia law, which governed the contract claims brought in that case. *Angel v. Fed. Home Loan Mortg. Corp.*, No. 1:18-cv-01142, 2019 WL 1060805 (D.D.C. Mar. 6, 2019). The United States Court of Appeals for the District of Columbia Circuit affirmed. *Angel v. Fed. Home Loan Mortg. Corp.*, 815 F. App'x 566, 569 (D.C. Cir. 2020).

On June 12, 2020, Mr. Angel filed his initial complaint in this Court, purportedly on behalf of both himself and all other similarly situated owners of junior preferred shares in the Enterprises. *Angel v. United States*, No. 20-737C, ECF No. 1. The complaint alleged that junior preferred shareholders' CODs constituted contracts between the shareholders and the Enterprises, and that the CODs require the Enterprises' "Boards 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." *Id.* at ¶ 2. The complaint further alleged that the Government had implicitly guaranteed dividend payments to shareholders, *id*. at ¶ 4, and that Treasury's receipt of dividends pursuant to the Third Amendment violated that guarantee, *see id*. at ¶ 50. The complaint, however, failed to identify any provision in the CODs that impose a requirement that the Enterprises pay dividends to junior preferred shareholders, or to any Treasury guarantee of dividend payments. *See id*. at ¶ 2, 3, 17 (noting that the Enterprises' determination whether or not to declare dividends was discretionary). The complaint contained two breach-of-contract claims based on Treasury's alleged failure to ensure that junior preferred shareholders received dividends and sought $16 billion in compensatory damages on behalf of the putative class. *Id*. at ¶¶ 45-55, 15.

On August 18, 2020, the United States filed a motion to dismiss Mr. Angel's initial complaint. *Angel v. United States*, No. 20-737C, ECF No. 7. After Mr. Angel moved for an enlargement and then a continuance before filing his response, he moved for a stay pending the United States Supreme Court's resolution of *Collins v. Yellen*. *Angel v. United States*, No. 20-737C, ECF Nos. 8, 10, 14; *see Collins*, 141 S. Ct. 1761. On October 27, 2020, the Court granted the motion and stayed all proceedings in the case. *Angel v. United States*, No. 20-737C, ECF No. 15. After the Supreme Court decided *Collins*, the parties jointly requested, and the Court

granted, a continuation of the stay of proceedings while the United States Court of Appeals for the Federal Circuit considered a related appeal in *Fairholme Funds, Inc. v. United States*, Nos. 20-1912, 20-1914 (Fed. Cir.). *Angel v. United States*, No. 20-737C, ECF Nos. 25, 26; *see Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (Fed. Cir. 2022).

After the Federal Circuit decided *Fairholme* in favor of the United States, the parties disagreed on when litigation should resume, given that the appellants in *Fairholme* eventually filed multiple petitions for certiorari, which the Supreme Court recently denied on January 9, 2023. *Angel v. United States*, No. 20-737C, ECF Nos. 30, 31; *Fairholme Funds, Inc. v. United States*, No. 22-100 (U.S.). The Court ordered the continuation of the stay until the Federal Circuit's *Fairholme* decision became both final and non-appealable—that is, until any Supreme Court proceedings were resolved. *Angel v. United States*, No. 20-737C, ECF No. 32. After Mr. Angel unsuccessfully moved to lift the stay, he voluntarily dismissed his case on August 4, 2022. *See Angel v. United States*, No. 20-737C, ECF Nos. 33-38, 39.

Four days later, on August 8, 2022, Mr. Angel filed the complaint in this case. Compl., ECF No. 1. The complaint closely mirrors Mr. Angel's previous complaint. It again is filed as a purported class action, with Mr. Angel serving both as the class representative and as class counsel.[4] *Id.* at ¶¶ 1, 35-41. The new complaint again alleges that junior preferred shareholders' CODs constituted contracts that require the Enterprises' "Boards 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." *Id.* at ¶¶ 2, 3. The

[4] Although not a basis for dismissal, this is not permissible. 1 Newberg and Rubenstein on Class Actions § 3:77 (6th ed. 2022) ("Class counsel cannot also serve as the class's representative. Courts have uniformly held that the class will not be adequately represented under these circumstances.").

complaint again alleges that the Government's pre-conservatorship actions created a "general market perception of [the] GSEs being effectively risk free" and, thus, somehow implicitly guaranteed dividend payments to shareholders. *Id*. at ¶ 4. It again alleges that Treasury's receipt of dividends pursuant to the Third Amendment violated that guarantee. *Id*. at ¶ 19. The complaint, however, like the original complaint, fails to identify any provision in the CODs that impose a requirement that the Enterprises pay dividends to junior preferred shareholders, or to plead facts that would provide any basis for concluding that Treasury guaranteed dividend payments. *See id*. at ¶ 3 (noting that the Enterprises' determination whether or not to declare dividends was discretionary).

The complaint contains the same two breach-of-contract claims as the previous complaint, based on Treasury's alleged failure to ensure that junior preferred shareholders received dividends. *Id*. at ¶¶ 42-51. It adds a third claim for "wrongful acts in conducting conservatorship." *Id*. at ¶¶ 52-57. As we explain below, this claim appears to either advance tort claims outside the jurisdiction of this Court or to reassert illegal exaction claims that the Federal Circuit has rejected. The complaint seeks $75 billion in compensatory damages on behalf of a putative class, as well as other relief. *Id*. at 16.

For the reasons stated below, the Court should dismiss the complaint, with prejudice, in its entirety.

ARGUMENT

I. Standards Of Review

A. Rule 12(b)(1)

"Jurisdiction is a threshold issue and a court must satisfy itself that it has jurisdiction to hear and decide a case before proceeding to the merits." *Ultra-Precision Mfg., Ltd. v. Ford*

Motor Co., 338 F.3d 1353, 1356 (Fed. Cir. 2003) (quoting *PIN/NIP, Inc. v. Platte Chem. Co.*, 304 F.3d 1235, 1241 (Fed. Cir. 2002)); RCFC 12(b)(1). If the Court determines that "it lacks jurisdiction over the subject matter, it must dismiss the claim." *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006); RCFC 12(h)(3).

"[C]laims brought in the Court of Federal Claims under the Tucker Act are 'barred unless the petition thereon is filed within six years after such claim first accrues.' The six-year statute of limitations . . . is a jurisdictional requirement for a suit in the Court of Federal Claims." *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354 (Fed. Cir. 2006) (quoting 28 U.S.C. § 2501).

B. Rule 12(b)(6)

Rule 12(b)(6) requires dismissal when a complaint does not plausibly give rise to an entitlement to relief. RCFC 12(b)(6). To avoid dismissal for failure to state a claim under Rule 12(b)(6), "a complaint must allege facts 'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). The Court should dismiss the complaint if it fails to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A claim is facially implausible if it does not permit the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). Allegations "that are 'merely consistent with' a defendant's liability" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*.

When deciding a Rule 12(b)(6) motion, in addition to the pleading and its exhibits, the Court "must consider . . . documents incorporated into the complaint by reference, and matters of

which a court may take judicial notice." *Bell/Heery v. United States*, 106 Fed. Cl. 300, 307 (2012) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). "Moreover, '[e]ven where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint.'" *Id.* (quoting *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006)).

Finally, when the complaint "indicate[s] the existence of an affirmative defense that will bar the award of any remedy," the complaint should be dismissed pursuant to Rule 12(b)(6). *Corrigan v. United States*, 82 Fed. Cl. 301, 304 (2008) (internal quotations and citations omitted).

II. Mr. Angel's Claims Are Barred By This Court's Statute Of Limitations

The complaint in this case was filed more than six years after the claims accrued and is, therefore, untimely. Mr. Angel attempts to structure his complaint to take advantage of the continuing claims doctrine, but this doctrine does not apply to Mr. Angel's claims, as several courts have previously correctly held. Accordingly, the complaint should be dismissed because it is barred by this Court's statute of limitations.

A. The Complaint Was Filed More Than Six Years After The Claims Accrued

"Every 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." 28 U.S.C. § 2501. The Tucker Act statute of limitations is jurisdictional and not subject to equitable tolling. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 135 (2008); *FloorPro, Inc. v. United States*, 680 F.3d 1377, 1382 (Fed. Cir. 2012) ("Because section 2501's time limit is jurisdictional, the six-year limitations period cannot be extended even in cases

where such an extension might be justified on equitable grounds."). "In general, a cause of action against the government accrues when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *FloorPro*, 680 F.3d at 1381 (internal quotation marks and citation omitted). "[T]he proper focus in determining the date of accrual "is upon the time of the [defendant's action or inaction], not upon [the time at which] the *consequences* of the acts became most painful." *Butte Cnty., Idaho v. United States*, 151 Fed. Cl. 808, 816 (2021), *aff'd,* No. 2021-1779, 2022 WL 636101 (Fed. Cir. Mar. 4, 2022) (quoting *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)).

Despite his attempts at artful pleading, discussed further in the next section, the harms that Mr. Angel alleges all stem from the provisions of the PSPAs: the provisions in the original September 2008 PSPAs requiring the Enterprises to obtain Treasury's consent before declaring any dividends other than those owed to Treasury, and the provisions of the August 17, 2012 Third Amendment altering the formula for calculating the dividend payable to Treasury. Mr. Angel alleges that the CODs that form shareholder contracts with the Enterprises "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," Compl. ¶ 3; that Treasury implicitly guaranteed dividend payments to shareholders, *e.g*. Compl. ¶ 4; and that Treasury, "each and every quarter beginning [in the] first quarter of 2013, [prevented] the Companies' [boards of directors] from declaring Junior Preferred share dividends." Compl. ¶ 19.

The complaint is unclear on the mechanism by which Treasury allegedly prevented the boards from declaring dividends; all plausible possibilities, however, are barred by the statute of limitations. First, the complaint accurately alleges that the PSPAs required the Enterprise boards

of directors to obtain Treasury's prior written consent before declaring dividends other than those owed to Treasury.[5] Compl. ¶ 7; PSPA § 5.1. This provision, however, was agreed to by Treasury and FHFA, as conservator of the Enterprises, in September 2008. Compl. ¶ 7; PSPA § 5.1. Any allegation that this agreement breached Mr. Angel's CODs or any other contract, express or implied, needed to be filed by September 2014 to fall within this Court's statute of limitations.

Second, the complaint alleges that the Third Amendment to the PSPAs, agreed to on August 17, 2012, "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." Compl. ¶ 11. This provision, according to the complaint, "was designed to eliminate further GSEs capital build beyond December 31, 2012," Compl. ¶ 12, and constituted a "de facto conversion of approximately $20 billion of GSEs contractual dividend entitlement from GSEs to Treasury from January 1, 2013 to date," Compl. ¶ 13. The Third Amendment, however, was agreed to in August 2012. Mr. Angel's allegation that its structure deprived the Enterprises of the profits upon which their boards might declare dividends[6] needed to be filed by August 2018 to fall within this Court's statute of limitations.

Instead, Mr. Angel failed to file his initial complaint in this Court until June 12, 2020. Compounding his timeliness problem, Mr. Angel voluntarily dismissed that complaint, and filed

[5] Indeed, the Enterprises have not declared any dividends, other than those owed to Treasury, while under conservatorship. *See, e.g.*, Fannie Mae, Annual Report (Form 10-K), at 11 (Feb. 13, 2020) ("The conservator eliminated common and preferred stock dividends (other than dividends on the senior preferred stock issued to Treasury) during the conservatorship.").

[6] *See* Compl. ¶ 24 ("Plaintiff's claims emanate from Treasury Agency unauthorized taking for itself of approximately $20 billion of Fannie Mae and Freddie Mac funds which by law should have remained with the companies.").

the instant complaint in August 2022. This filing was at least four years too late, for challenges emanating from the Third Amendment, and nearly eight years too late for challenges emanating from the original PSPAs.

B. The Continuing Claims Doctrine Does Not Apply

In the complaint, Mr. Angel attempts to structure his allegations to support a theory that a breach occurs every quarter that dividends are not paid to junior preferred shareholders. *See, e.g.*, Compl. ¶¶ 1, 18, 19, 20, 34, 42-57. Mr. Angel thereby appears to invoke the "continuing claims doctrine." That doctrine, however, does not save his complaint from dismissal on statute of limitations grounds.

This Court has explained that "[c]ase law draws sharp boundaries around the doctrine's application." *Jordan v. United States*, 158 Fed. Cl. 440, 455 (2022). "For the continuing claims doctrine to apply, (1) the case must turn on pure issues of law (or specific issues of fact to be decided by the court for itself); (2) any facts involved must be 'sharp and narrow'; and (3) no discretionary agency decision can be at issue." *Westlands Water Dist. v. United States*, 109 Fed. Cl. 177, 213 (2013) (citing *Hatter v. United States*, 203 F.3d 795, 799 (Fed. Cir. 2000)).

The continuing claims doctrine does not apply here for at least two reasons. First, the breaches of contract that Mr. Angel alleges involve discretionary action. Even if there were some contract between junior preferred shareholders and the United States—and there is not—the complaint acknowledges that the PSPAs granted Treasury discretion over whether to consent to any dividends on junior preferred shares, should the Enterprises declare any. Compl. ¶ 7; PSPA § 5.1. The PSPAs do not describe any circumstances under which Treasury must grant or deny a request to declare dividends; rather, Treasury's consent is entirely discretionary. This

discretionary element is fatal to Mr. Angel's suggestion that the continuing claims doctrine applies here.

Second, Mr. Angel's claims are fundamentally based on a single event—the Third Amendment to the PSPAs—from which all of the alleged harms result. The complaint contends that, after the Third Amendment went into effect, each payment of dividends to Treasury, without Treasury setting aside some portion of those funds to pay dividends to junior preferred shareholders, caused a new breach of contract. Compl. ¶ 18. Setting aside the unfounded legal contentions regarding the alleged contractual relationships between the entities, the allegations boil down to this: the Third Amendment's dividend structure modification eliminated the possibility that funds could be used to declare dividends on junior stock.

This is the same continuing claims theory that the Court addressed and rejected in *Fairholme*. *Fairholme Funds, Inc. v. United States*, 147 Fed. Cl. 1, 44-45 (2019). In *Fairholme*, addressing a takings claim stemming from the same operative facts upon which the instant complaint is based, this Court, analyzing the applicability of the continuing claims doctrine, held that "[t]here is only one taking when a 'single governmental action causes a series of deleterious effects, even though those effects may extend long after the initial governmental [action].'" *Id*. (second alteration in original); *see also Brown Park Ests.-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997) ("[A] claim based upon a single distinct event, which may have continued ill effects later on, is not a continuing claim."). The Court explained that "there is one event that caused all of plaintiffs' purported losses: the execution of the PSPA Amendments. It is of no import to the accrual of plaintiffs' . . . claim that, based on the PSPA Amendments, the Enterprises make regular payments to Treasury because those payments are just the consequences of the PSPA Amendments." *Id*. at 45. The same logic applies in this case,

which rests on the same factual premises as the *Fairholme* litigation. Because the Third Amendment took place once, in August 2012, the complaint has not stated claims that fall within the continuing claims doctrine.

Finally, the D.C. District Court and D.C. Circuit have already rejected Mr. Angel's continuing claims doctrine argument. *Angel*, 2019 WL 1060805, at *4, *aff'd*, 815 F. App'x at 569. In the district court, Mr. Angel directly challenged the Enterprises' failure to declare dividends to junior preferred shareholders. 2019 WL 1060805, at *2. The district court concluded that Mr. Angel's alleged harm resulted from the Third Amendment, and the Enterprises' quarterly failure to declare dividends was "simply the continued ill effects of a single wrong." *Id. at *4*; *see also id.* ("Unless further action is taken by the FHFA as conservator, 100% of the net worth of each company will flow to Treasury each quarter pursuant to the Third Amendment, making it impossible for the holders of each Company's Junior Preferred to realize value from their contractual dividend entitlement rights." (alterations omitted)). The D.C. Circuit affirmed, finding that Mr. Angel's "theory is an especially poor fit for a case like this," as it would illogically require "the directors of a corporation that has no funds with which to pay a dividend, and under current law will never have any such funds, . . . [to] deliberate every quarter about whether to declare a dividend." *Angel*, 815 F. App'x at 569. Mr. Angel's attempted invocation of the continuing claims doctrine in this Court fails for the same reasons.

III. The Court Does Not Possess Jurisdiction To Entertain Mr. Angel's Tort Claims

Mr. Angel's complaint appears to advance several claims that sound in tort. This Court, however, does not possess jurisdiction to entertain tort claims. To the extent that the complaint contains any tort claims, therefore, they should be dismissed.

The Tucker Act provides this Court with jurisdiction to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). Accordingly, "[t]he court, pursuant to the Tucker Act, lacks jurisdiction over tort claims." *Fairholme*, 147 Fed. Cl. at 38.

Mr. Angel's complaint appears to suggest several tort theories that this Court does not possess jurisdiction to entertain. First, the complaint multiple times refers to conversion or "de facto conversion" of funds. Compl. ¶ 13, 20. "It is well-settled that a claim for conversion of property . . . sounds in tort," and that "the Court of Federal Claims does not have jurisdiction over matters sounding in tort." *Block v. United States*, 66 Fed. Cl. 68, 72 (2005).

Second, the complaint alleges that "[a] conservator of an entity owes a fiduciary duty, not only to the creditors of that entity, but also to the owners of that entity." Compl. ¶ 55. To the extent that this allegation suggests an attempt to raise a claim for breach of fiduciary duty, such a claim fails.

"[A] claim for breach of fiduciary duty is normally classified as a tort." *Fairholme*, 26 F.4th at 1296 (citing *Newby v. United States*, 57 Fed. Cl. 283, 294 (2003)). This Court, however, possesses jurisdiction over such claims in a narrow category of cases "alleging the breach of a fiduciary duty that the government 'specifically accepts by statute or regulation.'" *Id*. (citing *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015)). In *Fairholme*, first this Court and then the Federal Circuit examined whether the Court of Federal Claims possesses jurisdiction to entertain precisely this same breach of fiduciary duty claim, with each Court in turn concluding that it does not. 147 Fed. Cl. at 38-40; 26 F.4th at 1296-99. The Courts found

that neither HERA nor the PSPAs establish any fiduciary duty binding the United States to Enterprise shareholders, with the Federal Circuit emphasizing that the Supreme Court came to the same conclusion in *Collins*. 26 F.4th at 1297-98. Under the same binding rationale, Mr. Angel cannot maintain a claim for breach of fiduciary duty in this Court.

Third, in the final count of his complaint, Mr. Angel appears to allege, entirely without factual support, that Treasury officials interfered with the Enterprise boards' exercise of their duties under the CODs. Compl. ¶ 56 ("Treasury engaged in wrongful acts in conducting the Conservatorship, by each quarter directing and otherwise causing GSE directors to disregard Junior Preferred contractual payment rights . . . ."). Even if such a bare allegation, supported by no specific factual allegations, were properly raised, the gravamen of this claim appears to be one for tortious interference with a contract, a claim which sounds in tort and lies outside this Court's jurisdiction. *Lea v. United States*, 592 F. App'x 930, 933 (Fed. Cir. 2014). The final count of Mr. Angel's complaint could also be read as either a breach of fiduciary duty claim, discussed above, or a constitutional claim for a taking or illegal exaction. As we discuss further in Section V below, the Federal Circuit has firmly rejected substantively identical constitutional claims in *Fairholme*, which binds this Court. Accordingly, these claims fail as a matter of law.

IV. Mr. Angel Fails To State A Claim For Breach Of Contract

Although the complaint asserts claims for breach of contract, it fails to plead facts that, if true, would support such a claim. To state a claim for a breach of contract, a plaintiff must plausibly allege "(1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach." *San Carlos Irrigation & Drainage Dist. v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989). The complaint does not allege facts that plausibly give rise to the existence of a contract between Mr. Angel and the United States. Moreover, the complaint fails to plead facts that establish a duty under any

such contract, a breach by Treasury, or that any damages resulted from any such breach. Accordingly, the complaint fails to state a claim for breach of contract, express or implied.

A. The Complaint Fails To Plausibly Allege The Existence Of A Contract With The United States

Although the complaint asserts two contract claims—for breach of contract and breach of the implied covenant of good faith and fair dealing, Compl. ¶¶ 42-51—it fails to allege facts that would plausibly give rise to the existence of a contract between Mr. Angel and the United States. Rather, the contracts on which Mr. Angel relies—the CODs—are contracts between Enterprise shareholders and the Enterprises themselves. *See*, *e.g.*, Compl. ¶ 3; *Cacciapalle v. United States*, 148 Fed. Cl. 745, 779-80 (2020), *aff'd sub nom. Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (Fed. Cir. 2022) (finding that Enterprises' stock certificates are contracts between shareholders and Enterprises, and that plaintiffs failed to demonstrate privity with the United States). Indeed, the Federal Circuit has already determined that the stock certificates are not contracts with the United States. *See Fairholme*, 26 F.4th at 1293-96. Shareholders are neither in privity with the United States via their stock certificates, *id*. at 1295-96, nor are they third party beneficiaries of any implied contract between FHFA and the Enterprises, *id*. at 1294.

Mr. Angel alleges that the Government somehow implicitly guaranteed to shareholders the payment of dividends under these CODs. *See* Compl. ¶¶ 2, 4-5, 9, 44. This is a legal conclusion, however, not a factual allegation, and thus the Court should not accept it as true for the purposes of a motion to dismiss. *Iqbal*, 556 U.S. at 678 ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation.") (internal citation and quotation marks omitted). The facts that Mr. Angel pleads in support of this legal

conclusion fail as a matter of law to demonstrate the existence of an implied contract between Mr. Angel and the United States.

"An implied-in-fact contract is one 'founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.'" *Fairholme*, 26 F.4th at 1293 (internal quotation marks and citations omitted). "Like an express contract, an implied-in-fact contract requires: (1) mutuality of intent to contract; (2) consideration; and (3) unambiguous offer and acceptance." *Id*. (citing *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990)). Additionally, "[w]hen the government is a party, an implied-in-fact contract also requires that (4) the government representative whose conduct is relied upon must have actual authority to bind the government in contract." *Id*. at 1293-94.

Moreover, to establish an implied contract a plaintiff must point to "something more than a cloud of evidence that could be consistent with a contract." *Mola Dev. Corp. v. United States*, 516 F.3d 1370, 1378 (Fed. Cir. 2008) (quoting *D & N Bank v. United States*, 331 F.3d 1374, 1377 (Fed. Cir. 2003); *see also Grady v. United States*, 656 F. App'x 498, 499-500 (Fed. Cir. 2016). Instead, a plaintiff must allege facts establishing a "clear indication" of intent to contract and the other elements of a contract. *Mola Dev. Corp.*, 516 F.3d at 1378 (quoting *D & N Bank*, 331 F.3d at 1378). "An agency's performance of its regulatory or sovereign functions does not create contractual obligations." *Id*.

Mr. Angel has failed to allege even a "cloud of evidence" supporting the existence of a contract, let alone the "clear indication" required by this Court to establish an implied-in-fact contract. Indeed, whatever the "general market perception," Compl. ¶ 4, no allegation remotely supports the proposition that the United States intended any of its unspecified policies to

constitute an open offer to any prospective shareholder to enter into a contract with the United States under which the United States would guarantee their investment. Moreover, Mr. Angel does not specify how Government policies providing favorable treatment for investment in the Enterprises, Compl. ¶ 4, demonstrate a clear intent by the United States to enter into a contract with prospective shareholders, or that any official with authority to bind the Government in contract issued such an offer. Instead, Mr. Angel merely makes the conclusory assertion that "Treasury overt actions . . . were instrumental in creating a pre-conservatorship, general market perception of GSEs being effectively risk free by virtue of the government Implicit Guaranty of dividend rights." Compl. ¶ 4. Such "[t]hreadbare recitals" of the Government's "offer" and the Mr. Angel's alleged "acceptance" are not presumed to be true. *Iqbal*, 556 U.S. at 678-79.

Nothing in the complaint provides any "clear indication" that the United States intended to contract with Enterprise shareholders. *See Mola Dev. Corp.*, 516 F.3d at 1378. On the contrary, HERA expressly states that neither the Enterprises nor their securities are guaranteed by the United States. 12 U.S.C. § 4501(4) ("[N]either the enterprises . . . nor any securities or obligations issued by the enterprises . . . are backed by the full faith and credit of the United States;"); 12 U.S.C. § 4503 ("This chapter may not be construed as implying that any such enterprise . . . or any obligations or securities of such an enterprise . . . are backed by the full faith and credit of the United States.").

Additionally, the absence of a contract between Mr. Angel and the United States defeats his claim for breach of the implied covenant of good faith and fair dealing. Where no contract exists, no implied covenant of good faith and fair dealing exists. *See Scott Timber Co. v. United States*, 692 F.3d 1365, 1372 (Fed. Cir. 2012) ("As our sister circuits have explained, 'because the existence of the covenant of good faith and fair dealing depends on the existence of an

underlying contractual relationship, there is no claim for a breach of this covenant where a valid contract has not yet been formed.'" (quoting *Mountain Highlands, LLC v. Hendricks*, 616 F.3d 1167, 1171 (10th Cir. 2010) (alterations omitted)).

Accordingly, Mr. Angel has failed to plausibly allege the existence of a contract between himself and the United States and, thus, fails to state a claim for breach of contract as a matter of law.

B. The Complaint Fails To State A Claim That Treasury Failed To Perform A Duty

Moreover, even assuming that Treasury had an enforceable duty to guarantee the alleged contractual obligations of the Enterprises, Mr. Angel fails to allege any breach of such a duty. The only duty on the part of the United States that Mr. Angel alleges is an unspecified "implicit guaranty of GSE equity securities contractually mandated dividends," Compl. ¶ 1, whereby Treasury purportedly was required to ensure that payments "mandated" under the CODs were paid to junior preferred shareholders. Compl. ¶¶ 1, 4, 44. In support, the complaint describes a scenario in 2008 when Treasury consented to Fannie Mae paying dividends that had been declared before its placement in conservatorship. Compl. ¶¶ 31-33.

Mr. Angel, however, does not allege that, during conservatorship, the Enterprises declared dividends that Treasury failed to guarantee. On the contrary, Mr. Angel acknowledges that dividends on junior preferred shares were not declared during conservatorship. Compl. ¶ 6; *see also Angel*, 2019 WL 1060805, at *2 (describing Mr. Angel's suit against the Enterprises in district court as challenging their failure to declare dividends). Because the complaint fails to identify a declared-but-unpaid dividend on Mr. Angel's stock that Treasury refused to guarantee, it fails to state a claim upon which relief may be granted.

V. To The Extent That Mr. Angel Brings A Claim For Illegal Exaction, That Claim Has Been Conclusively Rejected In Binding Precedent

The third count in Mr. Angel's complaint, titled "quarterly wrongful acts in conducting conservatorship," alleges that Treasury effected "quarterly unauthorized sweeps" of Enterprise profits. Compl. ¶¶ 52-57. We have explained above why this claim, if read as a tort claim for conversion, tortious interference with a contract, or breach of fiduciary duty, is beyond this Court's jurisdiction. The only other plausible way to interpret this claim is as attempting to assert that the dividend structure put in place by the Third Amendment to the PSPAs constitutes an illegal exaction.[7] This claim, however, has already been asserted by Enterprise shareholders and conclusively rejected by the Federal Circuit. *Fairholme*, 26 F. 4th at 1287-92.

In *Fairholme*, the Federal Circuit examined takings and illegal exaction claims brought by Enterprise shareholders challenging the Third Amendment to the PSPAs. *Id*. The Court held that, "though directly styled, shareholders' claims [were] substantively derivative." *Id*. at 1291, These claims, therefore, belonged to the Enterprises and could not be asserted by shareholders. *Id*. at 1287-92. Moreover, even if Mr. Angel could somehow assert a claim that the Third

[7] Primarily in footnotes, Mr. Angel also vaguely alleges that dividend payments to Treasury violated the "major questions doctrine" discussed by the Supreme Court in *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2607-09 (2022). *See* Compl. ¶ 1, n.2, n,4. This allegation is entirely undeveloped and should be rejected out of hand. *See Twombly*, 550 U.S. at 557; *see also Seventh Dimension, LLC v. United States*, 161 Fed. Cl. 110, 129 (2022) ("[I]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (internal quotation marks omitted). Moreover, Mr. Angel does not tie this allegation to any legal claim, much less demonstrate that any such claim falls within this Court's limited jurisdiction. To the extent that the allegation relates to any claim for an illegal exaction that the complaint may advance, *see* Compl. at n.4 (alleging that the "dividend sweep resulted in Treasury [major questions doctrine] illegal taking of approximately $20 billion[] of GSE Junior Preferred dividend property"), that claim fails for the reasons discussed in this section, including that the Supreme Court has held that FHFA did not exceed its statutory authority under HERA in agreeing to the Third Amendment. *Collins*, 141 S. Ct. at 1777.

Amendment constituted an illegal exaction, the Federal Circuit held that such a claim fails as a matter of law, because the Supreme Court in *Collins* has definitively concluded that FHFA did not exceed its statutory authority under HERA in agreeing to the Third Amendment. *Id*. at 1304 (citing *Collins*, 141 S. Ct. at 1775).

Mr. Angel's claims share the same substance as those that the Federal Circuit has unequivocally rejected in *Fairholme*, which the Supreme Court has now made final through its denial of certiorari. Mr. Angel's claims, therefore, cannot prevail and should be dismissed.

CONCLUSION

For these reasons, the Court should dismiss plaintiff's complaint for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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