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 REPLY IN SUPPORT OF ITS MOTION TO DISMISS

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	)	
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DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Defendant, the United States, respectfully submits this reply in support of its request 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. *See* Mot to. Dismiss, ECF No. 16.

In his response, Mr. Angel attempts to reframe the allegations in his complaint to avoid the statute of limitations. In doing so, however, Mr. Angel only makes clear that his claims must be dismissed. Mr. Angel acknowledges that his allegations have no evidentiary basis whatsoever. Moreover, not only are his claims barred by the statute of limitations, but also, he cannot state a claim for a breach of contract because he fails to plausibly allege the existence of a contract with the United States or any breach of such a contract by the United States. Finally, Mr. Angel disclaims advancing any illegal exaction or tort claims, though any such claims fail as a matter of law in any event. Accordingly, the Court should dismiss Mr. Angel's complaint.

ARGUMENT

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

In our opening brief, we demonstrated that Mr. Angel's complaint is barred by this Court's statute of limitations because it was filed more than six years after its claims accrued.

Def. Mot. to Dismiss at 13-18. In his response, Mr. Angel attempts to reframe the allegations in his complaint to avoid the statute of limitations. Pl. Resp. at 13-16. Mr. Angel freely acknowledges that he has no evidence to support these reframed allegations. Pl. Resp. at 1, 9. Accordingly, we will demonstrate below that these allegations fail to plausibly allege a claim upon which the Court could grant relief, to the extent that they can be read to allege a claim within this Court's jurisdiction at all. Moreover, as we demonstrated in our opening brief, the substance of the allegations actually contained in the complaint is barred by the statute of limitations.

"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, Inc. v. United States*, 680 F.3d 1377, 1381 (Fed. Cir. 2012) (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)).

At bottom, the allegations in the complaint all stem from either the provisions in the original September 2008 Senior Preferred Stock Purchase Agreements (PSPAs) requiring the Enterprises to obtain Treasury's consent before declaring any dividends other than those owed to Treasury; the provisions of the August 17, 2012 Third Amendment altering the formula for calculating the dividend payable to Treasury; or both. *See*, *e.g.*, Compl. ¶¶ 3, 4, 19; Def. Mot. to Dismiss at 14-15. Because these events occurred a decade or more prior to Mr. Angel filing his complaint, he attempts to reframe his allegations. Acknowledging that he has no evidence in

support, he alleges that "each of the 39 fiscal quarter[s] from January 1, 2013, until August 8, 2022," the United States, via unstated means, "instruct[ed] the [boards of directors] of Fannie Mae and Freddie Mac to disregard Plaintiff's contract dividend rights by not considering whether to request Treasury approval of a declaration of a Junior Preferred stock dividend for that fiscal quarter." Pl. Mot. at 9. Leaving aside the various other fatal deficiencies of these unsupported and conclusory allegations, they continue to stem from the terms of the PSPAs and the Third Amendment thereto and, thus, come far too late. Despite his denials, Mr. Angel's allegations fundamentally challenge the requirement that the Enterprises obtain Treasury approval to declare any dividend on junior preferred shares and the Third Amendment alteration to the dividend structure that required payment of dividends to Treasury in a manner that all but eliminated, for the foreseeable future, the possibility of dividend payments to junior preferred shareholders. Such challenges needed to be filed by no later than August 2018 to fall within this Court's statute of limitations.

Moreover, as we demonstrated in our opening brief, the "continuing claims doctrine" does not apply to Mr. Angel's case. Def. Mot. at 16-18. In his response, Mr. Angel relies on a continuing claims case without factual or legal similarity to the instant case. Pl. Resp. at 16-17 (discussing *Baka v. United States*, 74 Fed. Cl. 692 (2006)). Unlike in *Baka*, Treasury officials pursuant to the PSPAs possessed discretion in each of the fiscal quarters to consent to any request by the Enterprises to declare a dividend declared on junior preferred shares. This discretionary element is fatal to Mr. Angel's continuing claims argument. Additionally, this Court, the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia have rejected the logic underlying Mr. Angel's continuing claims doctrine argument. Def. Mot. to Dismiss at 17-18; *Fairholme Funds, Inc. v.*

United States, 147 Fed. Cl. 1, 44-45 (2019) (rejecting similar arguments in the context of a takings claim stemming from the same operative facts); *Angel v. Fed. Home Loan Mortg. Corp*., 2019 WL 1060805, at *4 (D.D.C. Mar. 6, 2019), *aff'd*, 815 F. App'x 566, 569 (D.C. Cir. 2020) (finding similar factual allegations from Mr. Angel complained of "simply the continued ill effects of a single wrong."). Mr. Angel's insistence that these cases are irrelevant falls flat; despite any differences Mr. Angel may have generated through his attempt at creative pleading, his claims suffer from the same fundamental flaws as the claims the district court rejected, and this Court's logic in concluding that any takings claim accrued at the time of the Third Amendment applies here with equal force.

Furthermore, as Mr. Angel acknowledges, even if his unsupported claims could proceed and the continuing claims doctrine did apply, those claims related to fiscal quarters more than six years prior to filing of the complaint on August 8, 2022, would nevertheless be barred. Pl. Resp. at 18. Mr. Angel purports to allege quarterly breaches reaching back to 2013, but could under no circumstances pursue any claims prior to August 8, 2016, six years prior to the filing of his complaint.

Finally, Mr. Angel's invocation of Federal insolvency and bankruptcy law is completely inapposite. Pl. Resp. at 19-20. There are no bankruptcy-related allegations in the complaint, and this Court does not possess jurisdiction, which is instead exclusive to district courts, to entertain claims grounded in Title 11, United States Code. 28 U.S.C. §§ 151, 1334; *Blodgett v. United States*, 146 Fed. Cl. 104, 108 (2018). There is no insolvency at issue that could impact the Court's statute of limitations analysis. Moreover, Mr. Angel's attempt to negotiate a settlement via his response to our motion to dismiss is wholly inappropriate.

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

In our opening brief, we demonstrated that Mr. Angel's complaint fails to state a claim for breach of contract, failing to plausibly allege either the existence of a contract or a breach of any contractual duty. Def. Mot. to Dismiss at 20-24. As we describe above, in an apparent attempt to avoid the consequences of the statute of limitations, Mr. Angel in his response contorts the allegations in the complaint to try to fit the continuing claims doctrine. However, the resulting allegations, even if they could fit within that doctrine, are even more fatally flawed than those that appear from a more natural reading of the complaint. The allegations—that the Department of Treasury each and every quarter instructed the Enterprise boards of directors not to even consider whether to request Treasury consent to declare dividends on junior preferred shares—are utterly implausible. Indeed, Mr. Angel repeatedly acknowledges that he has no evidence whatsoever to support these claims. Pl. Resp. at 1, 9. Equally important, however, is that even if these fanciful claims were true, Mr. Angel has not pleaded a claim upon which this Court could grant relief. He has not plausibly alleged the existence of any contract under which he is in privity with the United States. And even if his general allegations that the Government implicitly guaranteed *payment of dividends* to shareholders could meet the plausibility standard, Mr. Angel does not allege that any dividends were declared but unpaid, nor does he plausibly allege that the United States assumed a contractual duty to consider whether to declare dividends on Enterprise junior preferred shares. Accordingly, Mr. Angel fails to state a claim for breach of contract.

A. Mr. Angel's Conclusory Allegations Fail To Meet The Pleading Standard

In his response to our motion to dismiss, Mr. Angel quite plainly states that his entire complaint rests on allegations for which he has no evidence: that unnamed Government officials, on unspecified dates each fiscal quarter for nearly a decade, via unstated means,

"instruct[ed] the [boards of directors] of Fannie Mae and Freddie Mac to disregard Plaintiff's contract dividend rights by not considering whether to request Treasury approval of a declaration of a Junior Preferred stock dividend for that fiscal quarter." Pl. Resp. at 1. Mr. Angel suggests that discovery might yield evidence of such baseless accusations, but points to no facts that might suggest that this is likely.[1]

Although a plaintiff need not prove his claims in his complaint, to survive dismissal and entitle him to engage in the costly process of discovery, he must bring allegations that state a plausible claim to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (the pleading standard "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. . . . [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss."). As the Supreme Court has explained, "[a]sking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the alleged fact]." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). This pleading requirement "serves the practical purpose of preventing a plaintiff with a largely groundless claim from tak[ing] up the time of a number of other people." *Id*. (citation and internal quotation marks omitted; alteration in original). This Court has likewise recently refused to allow plaintiffs with conclusory claims to proceed to discovery hoping to find evidence to substantiate them. *Chemehuevi Indian Tribe v. United States*, 150 Fed. Cl. 181, 220 (2020) (citing *DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) ("the price of entry, even to discovery, is for the plaintiff to allege a

[1] Mr. Angel also accuses the United States of "block[ing] [his] discovery efforts." Pl. Resp. at 9. But Mr. Angel is not even permitted to serve discovery requests until after the government has filed its answer to the complaint and the parties have conferred according to the Case Management Procedure outlined in this Court's Rules. RCFC 26(d)(1), Appx A ¶ 3.

factual predicate concrete enough to warrant further proceedings[;] . . . [c]onclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition"); *Reich v. Lopez*, 38 F. Supp. 3d 436, 459 (S.D.N.Y. 2014) ("reliance on 'conclusory' allegations is generally not enough ... as it may lead to an unwarranted 'fishing expedition' " (internal citation omitted)), *aff'd*, 858 F.3d 55 (2d Cir. 2017); *Oreman Sales, Inc. v. Matsushita Elec. Corp. of Am.*, 768 F. Supp. 1174, 1180 (E.D. La. 1991) ("plaintiff may no longer file a conclusory complaint not well-grounded in fact [and] conduct a fishing expedition for discovery")).

Here, Mr. Angel's allegations are conclusory, insubstantial, and plead no plausible claim for relief. Other than seeming to be a set of facts that might aid him in avoiding the statute of limitations, Mr. Angel provides no basis for the Court to conclude that his allegations might be true. He fails to allege who in the Government might have communicated the supposed instructions to the Enterprise boards; how that individual did so; when; why; or any other particular that might lead the Court to believe that there is a basis for such a claim. The Court should not permit Mr. Angel to survive dismissal based solely on allegations that he himself acknowledges have no basis in evidence and amount to no more than pure speculation.

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

As we demonstrated in our opening brief, even if Mr. Angel had pleaded a plausible theory for a breach of a contract, he has not alleged facts that would plausibly establish the existence of a contract between Mr. Angel and the United States. Def. Mot. to Dismiss at 21-24. In his response, Mr. Angel cites the wrong standard, relies on inapposite caselaw, and repeats the same threadbare recitals of a "general market perception" that Enterprise securities were risk-free. These allegations fall far short of plausibly supporting the existence of an implied contract

between Mr. Angel and the United States guaranteeing every aspect of his contract with the Enterprises.

In framing the questions presented to this Court, Mr. Angel lists "[d]oes Plaintiff's Complaint make a non–frivolous allegation of a contract with the government?" Pl. Resp. at 5. A non-frivolous allegation of the existence of a contract is sufficient only to establish jurisdiction in this Court to evaluate a contract claim, however. *Marchena v. United States*, 128 Fed. Cl. 326, 331 (2016), *aff'd,* 702 F. App'x 988 (Fed. Cir. 2017). Leaving aside whether Mr. Angel's implied contract allegations meet even this low bar, our motion to dismiss did not assert that the Court lacked jurisdiction over Mr. Angel's contract claims, but instead asks the Court to dismiss Mr. Angel's contract claims because they fail to state a claim upon which the Court could grant relief, a merits determination. 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).

Mr. Angel fails to allege facts that would plausibly give rise to the existence of a contract between Mr. Angel and the United States. The stock certificates on which Mr. Angel relies 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), *cert. denied sub nom. Owl Creek Asia I, L.P. v. United States*, No. 22-97, 2023 WL 124020 (U.S. Jan. 9, 20*23), 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) (finding that Enterprises'

stock certificates are contracts between shareholders and Enterprises, and that plaintiffs failed to demonstrate privity with the United States). The Federal Circuit has conclusively determined that the stock certificates are not contracts with the United States, and that shareholders are neither in privity with the United States nor are they third party beneficiaries of any implied contract between the Federal Housing Finance Agency (FHFA) and the Enterprises. *See Fairholme*, 26 F.4th at 1293-96.

In his response, Mr. Angel returns to his allegation that the Government implicitly guaranteed to shareholders the payment of dividends under their contracts with the Enterprises. Pl. Resp. at 20-23. As we demonstrated in our opening brief, however, the allegation of an implicit guarantee itself is a legal conclusion, not a factual allegation, and not entitled to any presumption of truth. *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). To support the legal conclusion of an implied contract, Mr. Angel must plead facts that, if true, would plausibly establish the existence of such a contract. Mr. Angel has failed to plead such facts, as we demonstrated in our opening brief. Def. Mot. to Dismiss at 21-24.

In his response, Mr. Angel relies on his allegations that Government policies regarding Enterprise shares "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." Pl. Resp. at 21 (citing Compl. ¶ 4). He further relies on 2008 comments by then-Secretary of the Treasury Henry M. Paulson allegedly acknowledging this market perception. *Id*. (citing Compl. ¶ 5). As Mr. Angel frames it:

> Secretary Paulson essentially admitted that it was the Government's implicit support for government securities that resulted in the

> widespread acceptance of these securities as risk free that caused the Government to assume responsibility for both averting and addressing the systemic risk now posed by the scale and breadth of the holdings of GSE debt and MBS.

Pl. Resp. at 22. But this allegation, even if true, falls far short of establishing the elements of an implied contract with the Government, including unambiguous offer and acceptance and a clear indication of intent to contract by an official with authority to bind the Government. *See Fairholme*, 26 F.4th at 1293. Moreover, "[a]n agency's performance of its regulatory or sovereign functions does not create contractual obligations." *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, 1378-79 (Fed. Cir. 2003).

Mr. Angel's reliance on this Court's opinion in *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 450 (2017), *rev'd,* 892 F.3d 1311 (Fed. Cir. 2018), *rev'd and remanded sub nom. Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308 (2020), is misplaced. Pl. Resp. at 24-25. First, that trial court opinion was reversed on appeal. Mr. Angel relies on the portion of the trial court opinion in which it determined that it possessed jurisdiction over plaintiff's implied contract claim because plaintiff had made a non-frivolous allegation of the existence of a contract. Pl. Resp. at 24-25. As we explain above, however, non-frivolous allegations are sufficient only to establish jurisdiction to evaluate a contract claim – whether those allegations state a claim upon which this Court can grant relief is a separate question. *Mendez v. United States*, 121 Fed. Cl. 370, 378-81 (2015). In *Moda Health Plan*, this Court went on to find that an implied-in-fact contract with the Government was formed. 130 Fed. Cl. at 462-65. The Federal Circuit, however, reversed that finding, holding that "no statement by the government evinced an intention to form a contract;" that "[t]he statute, its regulations, and [agency's] conduct all simply worked towards crafting an incentive program;" and that "[t]hese

facts cannot overcome the 'well-established presumption' that Congress and [the agency] never intended to form a contract by enacting the legislation and regulation at issue here." 892 F.3d at 1330. The Federal Circuit thus found that the plaintiff in that case, like Mr. Angel here, could not state a contract claim. *Id*. Although the Supreme Court reversed the Federal Circuit, it did so on other grounds and did not reach the implied-in-fact contract claims. *Maine Cmty. Health Options v. United States*, 40 S. Ct. 1308, 1331 n.15 (2020).

Finally, in this case, Mr. Angel fails to allege any "clear indication" that the United States intended to contract with Enterprise shareholders, *Mola Dev. Corp.*, 516 F.3d at 1378. Indeed, the relevant statute, the Housing and Economic Recovery Act of 2008 (HERA), instead 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."). 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.

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

As we demonstrated in our opening brief, even if the Government had an enforceable duty to guarantee the alleged contractual obligations of the Enterprises, Mr. Angel fails to allege that Treasury breached such a duty. Def. Mot. to Dismiss at 24. Mr. Angel fails to substantively respond to this point, effectively conceding it. The allegations in the complaint vaguely allude to 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 stock certificates were paid to junior preferred shareholders. Compl. ¶¶ 1, 4, 44. But even if the Government had implicitly guaranteed the *payment* of dividends to shareholders, Mr. Angel does not allege that any dividends were declared but unpaid. Nor does Mr. Angel plausibly allege that the United States assumed a contractual duty to consider whether to declare dividends on Enterprise junior preferred shares. That duty belonged to the Enterprise boards under the stock certificates and was assumed, along with all other duties, by the conservator FHFA pursuant to HERA's succession clause. 12 U.S.C. § 4617(b)(2)(A)(i). Mr. Angel has not alleged and cannot allege that Treasury assumed this duty.

Accordingly, Mr. Angel's allegation that Treasury instructed the Enterprise boards each quarter not to consider whether to request Treasury's consent to declare a dividend on junior preferred shares, in addition to admittedly lacking any evidentiary basis, does not state a claim for a breach of contract in any case. First, it is FHFA, rather than the Enterprise boards, that now possesses the authority to make such a request of Treasury. PSPA § 5.1. Second, neither the Enterprise boards nor FHFA would be under any obligation to heed an instruction from Treasury not to consider requesting Treasury permission to declare a dividend, in the event that such an implausible instruction were given. Indeed, Mr. Angel acknowledges this fact, stating that "[n]otwithstanding the [PSPAs] and the Third Amendment, the Fannie Mae and Freddie Mac [boards] could have decided to request permission to declare a dividend to the holders of Junior Preferred stock" for each relevant fiscal quarter. Pl. Resp. at 14. Treasury could not have breached any contract by giving instructions that the recipient could have freely ignored. And had FHFA, as conservator of the Enterprises, requested Treasury's consent to declare a dividend, Treasury retained sole discretion as to whether to grant such a hypothetical request. Compl. ¶¶ 7, 8; PSPA § 5.1.

Mr. Angel, therefore, has failed to state a claim for breach of contract by the United States.

III. Any Tort Or Illegal Exaction Claims Pleaded In The Complaint Must Be Dismissed

In our opening brief, we demonstrated that, despite Mr. Angel's complaint appearing to attempt to advance several tort theories, this Court does not possess jurisdiction to entertain such claims. Def. Mot. to Dismiss at 18-20. We also demonstrated that, to the extent that Mr. Angel attempts to assert that the dividend structure put in place by the Third Amendment to the PSPAs constitutes an illegal exaction, such a claim by Enterprise shareholders has been conclusively rejected by the Federal Circuit. Def. Mot. to Dismiss at 25-26 (citing *Fairholme*, 26 F.4th at 1287-92).

In response, Mr. Angel clarifies that he does not intend to advance any tort claims, Pl. Resp. at 4, and that "[t]here are no constitutional claims raised in the Complaint," Pl. Resp. at 5. Any such claim, therefore, is waived, and at any rate should be dismissed for the reasons we explained in our motion to dismiss.

CONCLUSION

For these reasons and those stated in our motion to dismiss, ECF No. 12, 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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