ORIGINAL

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BRUCE J. SOLOWAY,	)	
	)	
Plaintiff	)	
	)	
	)	
v.	)	**Case No. 16-682 L**
	)	**Judge Susan G. Braden**
THE UNITED STATES	)	
	)	
Defendant.	)	
	)	

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

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DEFENDANT'S MOTION TO DISMISS

Pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"), defendant, the United States, respectfully requests that the Court dismiss the complaint of Plaintiff Bruce J. Soloway for lack of subject matter jurisdiction. In support of this motion, we rely upon Plaintiff's Complaint and the following brief.

INTRODUCTION

Plaintiff is a Michigan property owner who claims that the Federal Home Loan Mortgage Corporation's ("Freddie Mac") foreclosure of his property at sheriff's sale occurred "without notice as required … and without due process…." Compl. ¶ 13 (ECF No. 1). Plaintiff alleges that this foreclosure resulted in a Fifth Amendment Taking, because it resulted in an "unjust enrichment . . . on behalf of the United States" in violation of the Fifth Amendment. *Id.* ¶ 14. Plaintiff also alleges that the sheriffs sale of his property to Freddie Mac "constituted a violation of the 14th amendment Due process of law and equal protection under the law," because he alleges that Freddie Mac "could not foreclose at sheriff sale because they did not own the mortgage, and as such has no authority to invoke any jurisdiction anywhere in the land." *Id.* ¶ 16 & ¶ 35. Plaintiff argues that Freddie Mac's foreclosure of his property should constitute an action of the United States on account of the Federal Housing Finance Agency's ("FHFA") conservatorship of Freddie Mac.

At the peak of the 2008 financial crisis, the FHFA and the Department of the Treasury ("Treasury") made a bold commitment to restore the safety and soundness of the Federal National Mortgage Association ("Fannie Mae") and Freddie Mac (collectively, the "Enterprises"). Exercising authority expressly granted to the agency by Congress, FHFA placed the two failing mortgage giants into conservatorships, while the United States Government

simultaneously put billions of taxpayer dollars at risk to implement the rescue. Had the Government not acted the failure of the Enterprises would have had dire consequences for national and international financial markets.

The Court should dismiss Plaintiff's claims, because they suffer from a series of insurmountable legal flaws. First, Plaintiff cannot invoke this Court's jurisdiction to challenge Freddie Mac's actions, given clear precedent that a government regulator acting as a conservator is not the United States for purposes of the Tucker Act. Second, Plaintiff alleges tort-like claims, and they too fall outside of the Court's jurisdiction. Lastly, the Court does not have jurisdiction to consider claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

FACTUAL BACKGROUND

Congress chartered Fannie Mae and Freddie Mac to stabilize the United States home mortgage market and to promote access to mortgage credit. *See* "About Fannie Mae & Freddie Mac," http://www.fhfa.gov/SupervisionRegulation/FannieMaeandFreddieMac/Pages/About-Fannie-Mae---Freddie-Mac.aspx (last visited Sept. 16, 2016). Fannie Mae and Freddie Mac are both private, shareholder-owned corporations. *Id.*; *see also* U.S. Government Accountability Office, *Fannie Mae and Freddie Mac: Analysis of Options for Revising the Housing Enterprises' Long-term Structures* 12-14 (September 2009), http://www.gao.gov/products/GAO-09-782 (hereinafter "GAO-09-782"). These entities, which own or guarantee trillions of dollars of residential mortgages and mortgage-backed securities, have played and continue to play a key role in housing finance and the United States economy. *Id.* In 2007 and 2008, both Fannie Mae and Freddie Mac began to experience increasing losses. *Id.* at 7.

In July 2008, as the housing crisis grew, Congress passed the Housing and Economic

Recovery Act of 2008 ("HERA"). Pub. L. No. 110-289, 122 Stat. 2654. Through HERA, Congress transitioned regulatory oversight of Fannie Mae and Freddie Mac from the Office of Federal Housing Enterprise Oversight to its newly-organized successor, FHFA. 12 U.S.C. § 4617. As part of this transition, Congress provided FHFA with authority to place the Enterprises into Conservatorship and operate them, or to place them into receivership, and liquidate them. 12 U.S.C. § 4617(a)(2). As conservator or receiver, FHFA, by operation of law, "succeed[s] to . . . all rights, titles, powers, and privileges . . ." of the Enterprises and is authorized to "take over the assets of and operate the [Enterprises] with all the powers of the shareholders, the directors, and the officers." 12 U.S.C. § 4617(b)(2)(A)(i), (B)(i).

In HERA Congress barred legal challenges to FHFA's decision to place the Enterprises in conservatorship, or to FHFA's operation of the Enterprises, except that an Enterprise could challenge its placement into Conservatorship not later than 30 days after the imposition of the conservatorship. 12 U.S.C. § 4617(a)(5). Beyond this single avenue for judicial review, Congress mandated in HERA that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver." 12 U.S.C. § 4617(f).

HERA also granted Treasury the authority to infuse taxpayer funds into Fannie Mae and Freddie Mac to stabilize the housing markets and the United States economy. 12 U.S.C. § 1719. Specifically, Treasury was permitted to purchase securities from the Enterprises to "(i) provide stability to the financial markets; (ii) prevent disruptions in the availability of mortgage finance; and (iii) protect the taxpayer." *Id.* § 1719(g)(1)(B)(i-iii).

In early September 2008, the FHFA Director placed the Enterprises into conservatorships pursuant to 12 U.S.C. § 4617. The decision to appoint the agency as

Conservator focused on maintaining the Enterprises as functioning market participants and avoiding the statutory trigger for receivership and liquidation.

ARGUMENT

I. Standard of Review

The United States moves to dismiss Plaintiff's claim pursuant to RCFC 12(b)(1) for lack of subject matter jurisdiction. "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)). 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).

When evaluating a motion to dismiss for lack of jurisdiction pursuant to RCFC 12(b)(1), "the court must assume that all undisputed facts alleged in the Complaint are true and must draw all reasonable inferences in the non-movant's favor." *Newby v. United States*, 57 Fed. Cl. 283, 290 (2003) (citation omitted). If the government's motion challenges the truth of the jurisdictional facts alleged in the complaint, the court may consider relevant evidence beyond the Complaint in order to resolve the factual dispute. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988) (citing *Land v. Dollar*, 330 U.S. 731, 735 (1947)). "Once the court's subject matter jurisdiction is put into question, it is 'incumbent upon [the plaintiff] to come forward with evidence establishing the court's jurisdiction. [The plaintiff] bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence.'" *Patton v. United States*, 64 Fed. Cl. 768, 773 (2005) (quoting *Reynolds*, 846 F.2d at 748 (alterations as in original)). The Court may look at evidence outside of the pleadings in order to determine its

jurisdiction over a case without converting a motion to dismiss into a motion for summary judgment. *See Legal Aid Soc'y of N.Y. v. United States*, 92 Fed. Cl. 285, 287 n.1 (2010) ("The requirement for conversion of a motion to dismiss to a motion for summary judgment contained in RCFC 12(d) does not apply to motions to dismiss for lack of jurisdiction brought under RCFC 12(b)(1).").

Since Plaintiff is appearing pro se, he is entitled to liberal construction of his pleadings. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (requiring that allegations contained in inmate's pro se complaint be held to "less stringent standards than formal pleadings drafted by lawyers"). However, "[w]hile documents filed by *pro se* claimants are liberally construed, the limited jurisdiction of the Court of Federal Claims will not bend for *pro se* claimants." *Fischer v. United States*, 96 Fed. Cl. 70, 75 (2011) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Kelley v. Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987); and *Sanders v. United States*, 252 F.3d 1329, 1336 (Fed. Cir. 2001)).

II. The Court Should Dismiss The Complaint Against The United States Because FHFA Is Not The United States For Purposes of the Tucker Act When It Acts As A Conservator.

Plaintiff claims that the allegedly improper foreclosure of his property by Freddie Mac resulted in a Fifth Amendment taking. Compl. ¶ 13. Plaintiff alleges that the United States includes Freddie Mac, because of the conservatorship of FHFA. *Id.* ¶ 10. Plaintiff contends that his claim can be pursued in this Court pursuant to the Tucker Act. Plaintiff is mistaken. Neither Freddie Mac nor FHFA in its capacity as Conservator is a Government actor for purposes of the Tucker Act or constitutional claims. Accordingly, Plaintiff's challenge to actions by Freddie Mac or FHFA as conservator must fail.

A. The Tucker Act Grants The Court of Federal Claims Jurisdiction Over Claims Against The United States

The Tucker Act establishes – and thus limits – this Court's jurisdiction. 28 U.S.C. § 1491; *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Under the Tucker Act, the Court may only "render judgment upon any claim against the United States. . ." 28 U.S.C. § 1491(a)(1); *see Brown v. United States*, 105 F.3d 621, 624 (Fed. Cir. 1997). Plaintiffs bear the burden of establishing the Court's jurisdiction and must establish that the party they are suing is, in fact, the United States. *See Taylor v. United States*, 303 F.3d 1357, 1359-60 (Fed. Cir. 2002).

B. When Acting As Conservator For Fannie Mae And Freddie Mac, FHFA Is Not The United States For Purposes Of The Tucker Act

The Court should dismiss the complaint as it relates to FHFA's actions because courts have ruled that a government regulatory agency – acting as conservator – is not acting as the United States for constitutional claims. The District Court for the District of Columbia has held that "FHFA as conservator of Fannie Mae is not a government actor." *Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 96 (D.D.C. 2012); *see also Parra v. Fed. Nat'l Mortg. Ass'n,* No. 13-cv-04031, 2013 WL 5638824, at *3 (C.D. Cal. Oct. 16, 2013) ("FHFA, which took over as Fannie Mae's conservator, also does not qualify as a government actor [for Fifth Amendment purposes]."). Other courts have reached the same conclusion in the context of the Federal Deposit Insurance Corporation (FDIC) acting as conservator or receiver of banks. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) (FDIC acting as receiver "is not the United States"); *Ameristar Fin. Servicing Co. v. United States*, 75 Fed. Cl. 807, 812 (2007) (dismissing claim because the FDIC as conservator "was not acting as the United States").

Here, FHFA, as conservator, stands in the shoes of the Enterprises. Plaintiff's claims

against FHFA are actually claims against Freddie Mac – which is not a Government entity.[1] This Court has jurisdiction only "to hear cases in which a plaintiff seeks just compensation for a taking under the Fifth Amendment as such a claim is 'against the United States founded . . . upon the Constitution.'" *Souders v. S.C. Pub. Serv. Auth.*, 497 F.3d 1303, 1307-08 (Fed. Cir. 2007) (citation omitted). Indeed, the Fifth Amendment applies solely to Government action. *See Alves v. United States*, 133 F.3d 1454, 1458 (Fed. Cir. 1998); *767 Third Ave. Assocs. v. United States*, 48 F.3d 1575, 1580 (Fed. Cir. 1995). Accordingly, Plaintiff's challenge to Freddie Mac's actions must fail.

This case is similar to *Ameristar*, where plaintiff sued the FDIC under the Tucker Act for the FDIC's actions as conservator for a failed bank. 75 Fed. Cl. at 809. The Court, relying on the Supreme Court's *O'Melveny* decision and the FDIC conservatorship statute, held that the FDIC "was not acting as the United States" when it "stepped into the shoes" of a bank in conservatorship. *Id.* at 812. The Court dismissed the complaint because Ameristar's claims were between two non-governmental entities and the FDIC was "not the United States" for purposes of the Tucker Act. *Id.*

This principle applies equally to FHFA, which operates pursuant to a conservatorship statute, patterned after the FDIC statute, that authorizes FHFA to "step into the shoes" of the Enterprises. *See Herron*, 857 F. Supp. at 94. "Thus, like FDIC when it serves as a conservator

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[1] Courts have consistently held that the Enterprises while in conservatorship are not government actors subject to constitutional constraints. *Mik v Fed. Home Loan Mortg. Corp.*, 743 F.3d 149, 168 (6th Cir. 2014) ("Freddie Mac is not a government actor [for constitutional purposes]."); *Fed. Home Loan Mortg. Corp. v. Shamoon*, 922 F. Supp. 2d 641, 645 (E.D. Mich. 2013) (FHFA conservatorship "does not and cannot transform that private corporation [Freddie Mac] into a government actor" for purposes of constitutional claims.), appeal dismissed (Sept. 5, 2013); *Syriani v. Freddie Mac Multiclass Certificates*, Series 3365, No. CV 12-3035-JFW JEMX, 2012 WL 6200251, at *4 (C.D. Cal. July 10, 2012) ("Freddie Mac does not become a governmental actor for Fifth Amendment purposes merely because it is placed into conservatorship.").

or receiver of a private entity, FHFA when it serves as conservator 'step[s] into the shoes' of the private corporation." *Id.*[2] (footnote omitted, alterations in original). Because FHFA as conservator does not act as the United States, the Court should dismiss Plaintiff's allegations insofar as the complaint challenges the actions of FHFA as conservator. *See Ameristar*, 75 Fed. Cl. at 812; *see also Frazer v. United States*, 288 F.3d 1347, 1354 (Fed. Cir. 2002) (citing *O'Melveny*, 512 U.S. at 85); *Ambase Corp. v. United States*, 61 Fed. Cl. 794, 796-97 (2004) (claim that FDIC mismanaged receivership is not a claim against the Government); *AG Route Seven P'ship v. United States*, 57 Fed. Cl. 521, 534 (2003) (as receiver, "the FDIC's attendant role herein is tantamount to that of a private party and not the government *per se*" (footnote omitted)), *aff'd*, 104 F. App'x 184 (Fed. Cir. 2004).

C. The Court Lacks Jurisdiction To Entertain Plaintiff's Claims Because They Are Based On Wrongful Conduct

The Court should also dismiss Plaintiff's claims for lack of jurisdiction because they are based on the allegedly wrongful conduct of Freddie Mac, and the Court is without authority to consider such claims.

Even assuming that conduct of Freddie Mac is government action, the Tucker Act expressly precludes the Court from exercising jurisdiction over claims sounding in tort. 28 U.S.C. § 1491(a)(1); *see Smithson v. United States*, 847 F.2d 791, 794 (Fed. Cir. 1988). Thus, the Tucker Act cannot support a takings claim based on allegations that a Government agency

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[2] The FDIC's conservatorship statute authorizes the FDIC, as conservator, to "succeed to . . . all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution . . ." 12 U.S.C. § 1821(d)(2)(A)(i). Similarly, FHFA's enabling statute authorizes the agency, as conservator, to "immediately succeed to . . . all rights, titles, powers, and privileges of [the Enterprises], and of any stockholder, officer, or director . . . ." 12 U.S.C. § 4617(b)(2)(A)(i).

misused its discretion. Because the Plaintiff's claims alleging that Freddie Mac acted wrongfully when it foreclosed upon Plaintiff's property sound in tort, the Court should reject those claims.

Because these allegations sound in tort, the Tucker Act expressly precludes the Court from exercising jurisdiction over the complaint. *Golden Pac. Bancorp v. United States*, 25 Cl. Ct. 768, 770 n.2 (1992), *aff'd*, 15 F.3d 1066 (Fed. Cir. 1994); *see Smithson*, 847 F.2d at 794; *Adams v. United States*, 20 Cl. Ct. 132, 138-39 (1990); *see also Rick's Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1343 (Fed. Cir. 2008) (no jurisdiction over professional negligence claim); *Brown v. United States*, 105 F.3d 621, 623 (Fed. Cir. 1997) (no jurisdiction over fraud claim); *De-Tom Enters. v. United States*, 552 F.2d 337, 339 (Ct. Cl. 1977) (finding no jurisdiction to entertain wrongful coercion claim in a takings case).

Here, Plaintiff does not concede the validity of Freddie Mac's actions. Although he asserts he is not bringing a tort claim against the United States, his claims are entirely based on the allegedly illegal foreclosure of his property. For example, Plaintiff describes his suit as an action "for relief due to an unlawful Governmental taking." Compl. ¶ 13. Plaintiff alleges that "Defendant had no right to prosecute foreclosure against Plaintiff." *Id.* ¶ 18. Plaintiff further alleges that Freddie Mac "could not foreclose at sheriff sale because they did not own the mortgage, and as such [had] no authority to invoke any jurisdiction anywhere in the land." *Id.* ¶ 35. Finally, Plaintiff alleges that "Defendant had no foundation in law to prosecute a foreclosure." *Id.* ¶ 42.

Accordingly, the Court should dismiss Plaintiff's takings claim. By relying upon allegations of statutory and regulatory violations by Freddie Mac, Plaintiff fails to state a valid Fifth Amendment claim against the United States. *See Lion Raisins, Inc. v. United States*, 416

F.3d 1356, 1369 (Fed. Cir. 2005) ("a claim premised on a regulatory violation does not state a claim or a taking.").

D. The Court Lacks Jurisdiction To Entertain Plaintiff's Due Process Claims

The Court should also dismiss Plaintiff's Fourteenth Amendment due process and equal protection claims for lack of jurisdiction. The Tucker Act grants jurisdiction to the Court of Federal Claims over "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).

The Tucker Act has been construed as providing a grant of jurisdiction and a limited waiver of sovereign immunity. *United States v. Mitchell*, 463 U.S. 206, 212 (1983), *superseded by statute on other grounds by Todd Construction, L.P. v. United States*, 85 Fed. Cl. 34 (2008). However, the Tucker Act does not give rise to "any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). "Instead, the substantive right must appear in another source of law, such as a 'money-mandating constitutional provision, statute or regulation that has been violated, or an express or implied contract with the United States.'" *Duncan v. United States*, 98 Fed. Cl. 318, 324 (2011) (quoting *Loveladies Harbor, Inc.v. United States*, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc)), *aff'd*, 456 F. App'x 891 (Fed. Cir. 2011).

Plaintiff's Fourteenth Amendment due process and equal protection claims do not give rise to subject matter jurisdiction over Plaintiff's claims in this Court. The law is well-settled that the Fourteenth Amendment due process and equal protection clauses are not money mandating in suits against the United States. "A Fifth or Fourteenth Amendment due process

violation … does not create an independent cause of action for money damages."*McCauley v. United States*, 38 Fed. Cl. 250, 266 (1997), *order aff'd*, 152 F.3d 948 (Fed. Cir. 1998) (footnote omitted). "The Fifth Amendment's Due Process Clause, and the Eighth, Thirteenth, and Fourteenth Amendments do not mandate the payment of money damages for their violation…Thus, this Court has no jurisdiction over such claims. Such claims may only be brought in the federal district court." *Humphrey v. United States*, 52 Fed. Cl. 593, 598 (2002) (citing 28 U.S.C. §§ 1343, 1491) (other internal citations omitted), *aff'd*, 60 F. App'x 292 (Fed. Cir. 2003).

In *LeBlanc v. United States*, the Federal Circuit held that the Fourteenth Amendment due process clause was not a money mandating provision. 50 F.3d 1025, 1028 (Fed. Cir. 1995) (finding that none of Plaintiff's claims under "the Due Process Clauses of the Fifth and Fourteenth Amendments, the Equal Protection Clause of the Fourteenth Amendment, and the doctrine of separation of powers" provided a sufficient basis for jurisdiction because "they do not mandate payment of money by the government" (citation omitted)).

The Federal Circuit again re-affirmed this holding in *Crocker v. United States*, finding that the Court of Federal Claims properly determined that it did not have jurisdiction over plaintiff's procedural due process claim. 125 F.3d 1475, 1476 (Fed. Cir. 1997). "The remedy for violations of the Due Process Clause, apart from Just Compensation claims, and the Equal Protection Clause, is not the payment of money but equitable relief that can only be afforded by an Article III court." *Bernard v. United States*, 59 Fed. Cl. 497, 502 (internal citation omitted), *aff'd*, 98 F. App'x 860 (Fed. Cir. 2004). Plaintiff's claim for a violation of the Fourteenth Amendment's due process and equal protection clauses therefore does not give rise to jurisdiction in this Court.

CONCLUSION

For the reasons set forth above the United States respectfully requests that the Court dismiss Plaintiff's Complaint for lack of subject matter jurisdiction.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of September, 2016, the foregoing Notice of Appearance was filed with the Court and served manually, by U.S. Mail, upon the following pro se party:

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