IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID J. VOACOLO
44 Elkton Street
Hamilton, New Jersey 08619,

Plaintiff,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION
3900 Wisconsin Avenue, NW
Washington, DC 20016-2892,

and

FEDERAL HOUSING FINANCE AGENCY
400 7th Street, SW
Washington, DC 20219,

and

UNITED STATES DEPARTMENT OF THE TREASURY
1500 Pennsylvania Avenue, NW
Washington, DC 20220,

Defendants.

Civil Action No. 1:16-cv-01324-RC

MOTION TO DISMISS BY DEFENDANTS FEDERAL NATIONAL MORTGAGE ASSOCIATION AND FEDERAL HOUSING FINANCE AGENCY

Defendants Federal National Mortgage Association ("Fannie Mae") and Federal Housing Finance Agency ("FHFA" or the "Conservator"), as Conservator for Fannie Mae, hereby move to dismiss the Complaint in its entirety for the reasons set forth in Fannie Mae and FHFA's Memorandum in Support, filed contemporaneously herewith.

Dated: September 20, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2016, copies of the **MOTION TO DISMISS BY DEFENDANTS FEDERAL NATIONAL MORTGAGE ASSOCIATION AND FEDERAL HOUSING FINANCE AGENCY** and their **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** were filed electronically via the Court's ECF system, through which a notice of the filing will be sent to all counsel of record.

/s/ Howard N. Cayne
Howard N. Cayne

IN THE UNITED STATES DISTRICT COURT
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DAVID J. VOACOLO 44 Elkton Street Hamilton, New Jersey 08619, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION 3900 Wisconsin Avenue, NW Washington, DC 20016-2892, and FEDERAL HOUSING FINANCE AGENCY 400 7th Street, SW Washington, DC 20219, and UNITED STATES DEPARTMENT OF THE TREASURY 1500 Pennsylvania Avenue, NW Washington, DC 20220, Defendants.	Civil Action No. 1:16-cv-01324-RC

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BY DEFENDANTS FEDERAL NATIONAL MORTGAGE ASSOCIATION AND FEDERAL HOUSING FINANCE AGENCY

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

A. Fannie Mae, Freddie Mac, and the Conservatorships 2

B. The PSPAs and the Third Amendment 3

C. The Instant Action 4

STANDARD OF REVIEW 5

ARGUMENT 5

I. THE APA DOES NOT APPLY TO FANNIE MAE OR FHFA AS CONSERVATOR, AND EVEN IF IT DID, THE APA DOES NOT PERMIT CLAIMS FOR DAMAGES AND SECTION 4617(F) OF HERA FORECLOSES ANY ALTERNATIVE RELIEF ... 5

A. The Conservator and Fannie Mae Are Not Subject to the APA 5

B. Plaintiff Cannot Seek Damages Under the APA 6

C. HERA Forecloses Any Alternative Relief Plaintiff Might Be Seeking 7

II. THE CONSERVATOR HAS SUCCEEDED TO PLAINTIFF'S CLAIMS 10

III. THE DOCTRINE OF ISSUE PRECLUSION BARS PLAINTIFF FROM PROSECUTING THIS ACTION 15

IV. TO THE EXTENT PLAINTIFF IS ATTEMPTING TO ALLEGE CONSTITUTIONAL CLAIMS, THOSE CLAIMS ALSO FAIL 18

A. This Court Does Not Have Jurisdiction over Constitutional Claims Seeking Damages in Excess of $10,000 18

B. Plaintiff Does Not Have a Cognizable Property Interest 19

C. Plaintiff Has Not Alleged an Illegal Exaction 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Aerolineas Argentina v. United States,
77 F.3d 1564 (Fed. Cir. 1996)....................20

Ambase Corp. v. United States,
61 Fed. Cl. 794 (2004)....................18

Ameristar Fin. Servicing Co. v. United States,
75 Fed. Cl. 807 (2007)....................18

Arduini v. Hart,
774 F.3d 622 (9th Cir. 2014)....................16

Bair v. United States,
515 F.3d 1323 (Fed. Cir. 2008)....................19

Bank of Am. N.A. v. Colonial Bank,
604 F.3d 1239 (11th Cir. 2010)....................7

Banneker Ventures, LLC v. Graham,
798 F.3d 1119 (D.C. Cir. 2015)....................5

Budik v. United States,
949 F. Supp. 2d 14 (D.D.C. 2013)....................6

Cal. Hous. Sec., Inc. v. United States,
959 F.2d 955 (Fed. Cir. 1992)....................19

Canonsburg Gen. Hosp. v. Burwell,
807 F.3d 295 (D.C. Cir. 2015)....................15, 17

* *Cont'l W. Ins. Co. v. FHFA*,
83 F. Supp. 3d 828 (S.D. Iowa 2015).................... *passim*

Cty. of Sonoma v. FHFA,
710 F.3d 987 (9th Cir. 2013)....................8

Dep't of Army v. Blue Fox, Inc.,
525 U.S. 255 (1999)....................6

Dittmer Props., L.P. v. FDIC,
708 F.3d 1011 (8th Cir. 2013)....................7

Eastport S.S. Corp. v. United States,
372 F.2d 1002 (Ct. Cl. 1967) 21

Ernst & Young Ltd. v. Quinn,
No. CIV. A. 09-CV-1164JCH, 2009 WL 3571573 (D. Conn. Oct. 26, 2009) 14

Esther Sadowsky Testamentary Trust v. Syron,
639 F. Supp. 2d 347 (S.D.N.Y. 2009)..11

In re Fed. Home Loan Mortg. Corp. Derivative Litig.,
643 F. Supp. 2d 790 (E.D. Va. 2009) *aff'd sub nom. La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. May 5, 2011) 10, 12, 14

Fed. Home Loan Mortg. Corp. v. Shamoon,
922 F. Supp. 2d 641 (E.D. Mich. 2013)..6, 18

In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, ERISA Litig.,
629 F. Supp. 2d 1 (D.D.C. 2009) 14

Gail C. Sweeney Estate Marital Trust v. U.S. Treasury Dep't,
68 F. Supp. 3d 116 (D.D.C. 2014) 8, 12, 14

Golden Pac. Bancorp v. United States,
15 F.3d 1066 (Fed. Cir. 1994)..19

Haines v. Fed. Motor Carrier Safety Admin.,
814 F.3d 417 (6th Cir. 2016) 6

Hanson v. FDIC,
113 F.3d 866 (8th Cir. 1997) 9

Hennepin Cty. v. Fed. Nat'l Mortg. Ass'n,
742 F.3d 818 (8th Cir. 2014) 11

Herron v. Fannie Mae,
857 F. Supp. 2d 87 (D.D.C. 2012) 5, 18

In re Ionosphere Clubs, Inc.,
17 F.3d 600 (2d Cir. 1994)...13

In re J.P. Morgan Chase & Co. S'holder Litig.,
906 A.2d 766 (Del. 2006) 13

Kellmer v. Raines,
674 F.3d 848 (D.C. Cir. 2012) 10, 11, 12

Lawyers Title Ins. Corp. v. Phillips,
108 F. Supp. 2d 1382 (M.D. Ga. 2000) 6

Leon Cty., Fla. v. FHFA,
700 F.3d 1273 (11th Cir. 2012) 8

Lucas v. S.C. Coastal Council,
505 U.S. 1003 (1992)..19

Massachusetts v. FHFA,
54 F. Supp. 3d 94 (D. Mass. 2014) 8

Millican v. United States,
No. 05-1330C, 2006 WL 5640829 (Fed. Cl. Aug. 24, 2006) 6

Nat'l Trust for Historic Preserv. in U.S. v. FDIC,
21 F.3d 469 (D.C. Cir. 1994) 9

Norman v. United States,
429 F.3d 1081 (Fed. Cir. 2005)..21

O'Melveny & Myers v. FDIC,
512 U.S. 79 (1994)..18

Pa. Co. for Ins. v. Cox,
23 Del. Ch. 193 (1938) 20

Pagliara v. Fed. Home Loan Mortg. Corp.,
No. 1:16-cv-337, 2016 WL 4441978 (E.D. Va. Aug. 23, 2016) 1, 15

* *Perry Capital, LLC v. Lew*,
70 F. Supp. 3d 208 (D.D.C. 2014).. *passim*

Piszel v. United States,
No. 15-5100, 2016 WL 4394602 (Fed. Cir. Aug. 18, 2016) 21

Protas v. Cavanagh,
No. CIV.A. 6555-VCG, 2012 WL 1580969 (Del. Ch. May 4, 2012) 13

* *Robinson v. FHFA*,
2016 WL 4726555 (E.D. Ky. Sept. 9, 2016) 1, 8, 9

In re Sonus Networks, Inc. S'holder Derivative Litig.,
499 F.3d 47 (1st Cir. 2007)..15, 16, 18

Stone v. United States,
683 F.2d 449 (D.C. Cir. 1982)..19

Taylor v. Sturgell,
553 U.S. 880 (2008)..15, 16

Tooley v. Donaldson, Lufkin & Jenrette, Inc.,
845 A.2d 1031 (Del. 2004) 12, 13

Town of Babylon v. FHFA,
699 F.3d 221 (2d Cir. 2012)....................8

Trudeau v. FTC,
456 F.3d 178 (D.C. Cir. 2006)....................5

Volges v. RTC,
32 F.3d 50 (2d Cir. 1994)....................9

Waters v. Rumsfeld,
320 F.3d 265 (D.C. Cir. 2003)....................19

Westfed Holdings, Inc. v. United States,
52 Fed. Cl. 135 (2002)....................21

Statutes

5 U.S.C. § 701(a)(1)....................7

5 U.S.C. § 702....................6

5 U.S.C. § 706....................5

12 U.S.C. § 1451 *et seq*....................12

12 U.S.C. § 1716 *et seq*....................12

12 U.S.C. § 1821(j)....................7, 9

12 U.S.C. § 4501 *et seq*....................2

12 U.S.C. § 4617(a)....................2

12 U.S.C. § 4617(a)(2)....................2

12 U.S.C. § 4617(a)(4)(A)....................4

12 U.S.C. § 4617(b)(2)(A)....................12, 16, 19

12 U.S.C. § 4617(b)(2)(A)(i)....................2, 3, 10, 14

12 U.S.C. § 4617(b)(2)(B)(i)....................3

12 U.S.C. § 4617(b)(2)(D)....................3

12 U.S.C. § 4617(b)(2)(J)(ii)....................14

12 U.S.C. § 4617(f) .... *passim*

28 U.S.C. § 1346(a)(2) 18, 19

28 U.S.C. § 1491(a)(1) 18

Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (July 30, 2008) 1

Other Authorities

12 C.F.R. § 1710.10(a) 12

12 C.F.R. § 1710.10(b) 12

Fed. R. Civ. P. 12(b)(1) 5

Fed. R. Civ. P. 12(b)(6) 5

Fannie Mae Bylaws Section 1.05 (http://goo.gl/8md6Ru) 12

Fannie Mae, Quarterly Report (Form 10-Q) (Aug. 8, 2012), http://goo.gl/bGLVXz 4

Freddie Mac, Quarterly Report (Form 10-Q) (Aug. 7, 2012), http://goo.gl/2dbgey 4

U.S. Const. amend. V .... *passim*

INTRODUCTION

Plaintiff's Complaint, which is one of many actions that have been brought by shareholders of Fannie Mae and the Federal Home Loan Mortgage Corporation ("Freddie Mac", and together with Fannie Mae, the "Enterprises"), purports to challenge certain decisions and conduct of FHFA as the Enterprises' Conservator. Although the Complaint is unclear, Plaintiff appears to be asserting claims for violation of (1) the Administrative Procedure Act ("APA") and (2) his rights under the Fifth Amendment to the U.S. Constitution. Like other shareholder suits before his (one of which is currently pending on appeal in the D.C. Circuit),[1] Plaintiff's Complaint should be dismissed because it fails for four independent reasons.

First, to the extent that Plaintiff's claim can be construed as one for alleged violation of the APA, Compl. Count I, the claim fails. Defendants Fannie Mae and its Conservator, FHFA, are not government agencies subject to the APA. Moreover, the APA does not permit monetary damages, and the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (July 30, 2008), withdraws jurisdiction from the Court over claims for declaratory or other equitable relief. Under HERA, "no court may take any action to restrain or affect the exercise of powers or functions of the [FHFA] as a conservator." 12 U.S.C. § 4617(f).

Second, Plaintiff's APA and constitutional claims fail because the Conservator "succeed[ed]" by operation of law to "all rights, titles, powers and privileges" of Fannie Mae and its shareholders during conservatorship, including Plaintiff's right to pursue claims on behalf of the Enterprises, whether arising from his stock certificate or otherwise relating to his status as a

[1] *See Perry Capital, LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014), appeal pending; *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828 (S.D. Iowa 2015); *Robinson v. FHFA*, 2016 WL 4726555 (E.D. Ky. Sept. 9, 2016); *see also Pagliara v. Fed. Home Loan Mortg. Corp.*, No. 1:16-cv-337, 2016 WL 4441978 (E.D. Va. Aug. 23, 2016).

Fannie Mae shareholder. *See id.* § 4617(b)(2)(A)(i). Thus, Plaintiff has no rights to assert here and no standing to bring this action.

Third, the doctrine of issue preclusion bars Plaintiff's Complaint. Dispositive holdings in materially identical suits brought by other Fannie Mae shareholders on behalf of Fannie Mae are binding on Plaintiff and prohibit him from prosecuting his claims.

Fourth, to the extent Plaintiff is attempting to allege claims for a taking or illegal exaction in violation of the Fifth Amendment to the U.S. Constitution, his claims fail for the additional reason that this Court does not have jurisdiction to hear them. Moreover, such claims, to the extent Plaintiff asserts them, fail as a matter of law.

BACKGROUND

A. Fannie Mae, Freddie Mac, and the Conservatorships

Fannie Mae and Freddie Mac are government-sponsored enterprises chartered by Congress to facilitate liquidity in the housing market by purchasing loans from mortgage lenders, thereby freeing up capital for additional mortgage lending. *See* Compl. ¶ 11. In July 2008, in the wake of a national crisis in the U.S. housing market, Congress enacted HERA, which created FHFA as an independent federal agency to supervise and regulate Freddie Mac, Fannie Mae, and the Federal Home Loan Banks. 12 U.S.C. § 4501 *et seq*. HERA also granted FHFA's Director the authority to place Freddie Mac and Fannie Mae in conservatorship or receivership in specific circumstances. *See* 12 U.S.C. § 4617(a). Facing a crisis in the national housing market, *see* Compl. ¶¶ 14-15, the Director exercised that authority in September 2008 by placing the Enterprises into conservatorships "for the purpose of reorganizing, rehabilitating, or winding up the[ir] affairs," and appointing FHFA as the Enterprises' Conservator. 12 U.S.C. § 4617(a)(2). Both Enterprises remain in conservatorships today.

As Conservator, FHFA "by operation of law, immediately succeeds to . . . all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." *Id.* § 4617(b)(2)(A)(i). HERA also empowers FHFA as Conservator to take such action as may be "necessary to put the regulated entity in a sound and solvent condition" and "appropriate to carry on the business of the regulated entity." *Id.* § 4617(b)(2)(D). FHFA as Conservator thus enjoys full authority to "operate the regulated entity" and "conduct all business of the regulated entity." *Id.* § 4617(b)(2)(B)(i). HERA bars courts from granting any relief that would "restrain or affect the exercise" by the Conservator of those expansive "powers" and "functions." *Id*. § 4617(f).

B. The PSPAs and the Third Amendment

Shortly after becoming Conservator, FHFA, on behalf of the Enterprises, entered into Senior Preferred Stock Purchase Agreements (the "PSPAs") with the U.S. Department of the Treasury ("Treasury"). *See* Compl. ¶ 16. Under the PSPAs, Treasury agreed to provide hundreds of billions of dollars for the Enterprises' continued operations. In exchange, the PSPAs granted Treasury a comprehensive package of rights, including: (1) an initial senior liquidation preference of $1 billion for each Enterprise; (2) warrants to acquire 79.9% of the Enterprises' common stock for a nominal payment; (3) payment from each Enterprise of a mandatory dividend in the amount of 10% per year of the total amount of funds Treasury provided; and (4) a periodic commitment fee ("PCF") "intended to fully compensate" taxpayers for the continuing Treasury commitment of hundreds of billions of dollars of taxpayer funds.[2]

[2] The PSPAs and each of their amendments are publicly available on FHFA's website at www.fhfa.gov/conservatorship/pages/senior-preferred-stock-purchase-agreements.aspx.

Both Fannie Mae and Freddie Mac took their first Treasury draws after their placement in conservatorships, and to date, Fannie Mae has drawn more than $116 billion from Treasury to cure negative net worth positions and avoid mandatory receivership under HERA. 12 U.S.C. § 4617(a)(4)(A). Both Enterprises have also paid dividends to Treasury pursuant to the PSPAs. *See* Compl. ¶ 21.

On August 17, 2012, FHFA and Treasury executed a third amendment to the PSPAs (the "Third Amendment"). At that time, the 10% cash dividend had grown to $18.9 billion per year, an amount that exceeded the Enterprises' historical annual earnings for nearly every year since their founding.[3] In addition, the Enterprises were obligated to pay Treasury the PCF to compensate taxpayers fully for Treasury's massive and ongoing commitment of public funds to maintain the Enterprises' operations. In the Third Amendment, the Conservator agreed to trade (a) a stream of profits that historically averaged less than $19 billion in exchange for relief from (b) $19 billion per year in fixed dividends *and* payment of the PCF. Thus, under the Third Amendment, Treasury agreed to accept the risk that the Enterprises' profits in any given year might be less than the fixed 10% dividend amount plus the amount of the PCF. Indeed, should the Enterprises earn no profits in any given year, they would owe Treasury *no* dividend.

C. The Instant Action

Plaintiff, who owns shares of stock in Fannie Mae, Compl. ¶¶ 17-18, brought suit against FHFA, Fannie Mae, and Treasury contending that FHFA and Treasury acted arbitrarily, capriciously, or otherwise not in accordance with law in entering into the Third Amendment. *See* Compl., Relief Requested ¶ A. Plaintiff also alleges that the Third Amendment "deprived"

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[3] *See* Fannie Mae, Quarterly Report (Form 10-Q), at 4 (Aug. 8, 2012), http://goo.gl/bGLVXz; Freddie Mac, Quarterly Report (Form 10-Q), at 8 (Aug. 7, 2012), http://goo.gl/2dbgey.

him of the value of his stock in violation of the Fifth Amendment to the U.S. Constitution and "amounted to an illegal exaction." Compl. ¶¶ 30-31, 34.

STANDARD OF REVIEW

Defendants Fannie Mae and FHFA move to dismiss all claims pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Where, as here, a motion to dismiss for lack of jurisdiction pursuant to Rule 12(b)(1) is limited to a facial attack on the pleadings, it is subject to the same standard as a motion brought under Rule 12(b)(6). *See, e.g.*, *Trudeau v. FTC*, 456 F.3d 178, 187-93 (D.C. Cir. 2006). Under this standard, the court must "accept all the well-pleaded factual allegations of the complaint as true," but should disregard "threadbare recitals" and "mere conclusory statements." *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015). To survive the motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

ARGUMENT

I. THE APA DOES NOT APPLY TO FANNIE MAE OR FHFA AS CONSERVATOR, AND EVEN IF IT DID, THE APA DOES NOT PERMIT CLAIMS FOR DAMAGES AND SECTION 4617(F) OF HERA FORECLOSES ANY ALTERNATIVE RELIEF

A. The Conservator and Fannie Mae Are Not Subject to the APA

The APA permits judicial review of "*agency* action, findings, and conclusions," and confers jurisdiction to "compel *agency* action." *See* 5 U.S.C. § 706 (emphasis added). Neither Fannie Mae nor the Conservator is an "agency" within the meaning of the APA. Fannie Mae is a private entity and FHFA stepped into Fannie Mae's shoes upon its appointment as Conservator. Thus, neither Fannie Mae nor the Conservator is subject to the APA. *Cf. Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 94-95 (D.D.C. 2012) (on appeal) (holding that conservatorship does not

convert Fannie Mae into a government actor and that the Conservator is not a government actor for constitutional purposes); *Fed. Home Loan Mortg. Corp. v. Shamoon*, 922 F. Supp. 2d 641, 644-45 (E.D. Mich. 2013) (same, collecting cases).

B. Plaintiff Cannot Seek Damages Under the APA

Even if the APA applied to Fannie Mae or the Conservator—and it does not—Plaintiff's claims would fail. Plaintiff's Complaint, though inartfully pleaded, appears to allege a violation of the APA as a basis for an "award [of] monetary relief in the sum of $2,500,000." *See* Compl. ¶¶ 7, 29, 35, Relief Requested ¶ B. But the plain text of the APA permits only those claims "seeking relief *other* than money damages." 5 U.S.C. § 702 (emphasis added). Thus, "when a plaintiff seeks money damages," he "cannot rely on the APA, and instead must invoke a different waiver of sovereign immunity such as the one embodied in the Tucker Act." *Millican v. United States*, No. 05-1330C, 2006 WL 5640829, at *6 (Fed. Cl. Aug. 24, 2006). This rule is well-established. *See, e.g.*, *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) ("the APA[] prohibit[s] . . . suits for money damages"); *Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417, 426 (6th Cir. 2016) ("[T]o the extent that [a plaintiff] seeks monetary damages under the APA, we lack jurisdiction over his claim."). Accordingly, courts routinely dismiss APA claims seeking money damages. *See, e.g.*, *Haines*, 814 F.3d at 426 (affirming dismissal of APA claim); *Budik v. United States*, 949 F. Supp. 2d 14, 27 (D.D.C. 2013) (dismissing APA claim "insofar as it seeks money damages"); *Lawyers Title Ins. Corp. v. Phillips*, 108 F. Supp. 2d 1382, 1386 (M.D. Ga. 2000) ("Here, money damages are exactly what the Defendants/Third-Party Plaintiffs are seeking" and "the APA [thus] does not provide the Defendants/Third-Party Plaintiffs with a cause of action in this suit."). Monetary damages are

precisely what Plaintiff requests here,[4] and to the extent it is premised on that relief, his APA claim cannot go forward.

C. HERA Forecloses Any Alternative Relief Plaintiff Might Be Seeking

In addition to the deficiencies described above, the Court lacks jurisdiction over Plaintiff's APA claim to the extent it seeks declaratory or injunctive relief. The only relief that Plaintiff seeks—other than the prohibited monetary damages—is a declaration that "Defendants' actions in executing and implementing the Third Amendment were arbitrary, capricious, or otherwise not in accordance with the law." Compl., Relief Requested ¶ A. Section 4617(f) withdraws jurisdiction of claims seeking such declaratory or injunctive relief, thus precludes Plaintiff's request, and, in turn, deprives the Court of jurisdiction to consider it. 5 U.S.C. § 701(a)(1).

When enacting HERA, Congress expressly insulated the Conservator's actions from all judicial review that would impede its management of the Enterprises, providing that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator . . . ." 12 U.S.C. § 4617(f). The analysis required to determine whether Section 4617(f) precludes judicial review is straightforward and "quite narrow." *Bank of Am. N.A. v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010) (discussing 12 U.S.C. § 1821(j)). The court must "first determine whether the challenged action is within the [Conservator's] power or function" under HERA. *Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1016-17 (8th Cir. 2013) (citing *Bank of Am.*, 604 F.3d at 1243). "A conclusion that the challenged acts were directed to an institution in conservatorship and within the powers given to the conservator ends

[4] *See, e.g.*, Compl. ¶¶ 30-31, Relief Requested ¶ B (alleging Plaintiff has been "deprive[d] . . . of what his shares would otherwise be worth" and that "[b]ut for the operation of the Third Amendment" his shares "would be valued at approximately $35 . . . per share" and seeking $2.5 million in "monetary relief").

the [Section 4617(f)] inquiry," *Town of Babylon v. FHFA*, 699 F.3d 221, 228 (2d Cir. 2012); the Conservator "is insulated from review[,] and th[e] case must be dismissed." *Cty. of Sonoma v. FHFA*, 710 F.3d 987, 992 (9th Cir. 2013).

Here, the Conservator plainly acted within its statutory powers and functions pursuant to HERA in executing the Third Amendment, and Section 4617(f) therefore bars Plaintiff's APA claim. In fact, Plaintiff does not allege that FHFA acted *ultra vires* when executing the Third Amendment, and any such allegation would be baseless. Every court to consider such allegations has concluded that the Conservator acted within its statutory powers when it executed the Third Amendment and that Section 4617(f) bars claims seeking "declaratory, injunctive, or other equitable relief" based on allegations "of arbitrary and capricious decision making." *See Perry Capital*, 70 F. Supp. 3d at 221-22, 224-29; *Cont'l W. Ins.*, 83 F. Supp. 3d at 840 n.6 (agreeing that FHFA "did not act outside the power granted to [it] by HERA" and that "HERA bars Continental Western's claims under the APA"); *Robinson*, 2016 WL 4726555 at * 8 (in executing and implementing the Third Amendment, FHFA carries out "a quintessential statutory power . . . clearly authorized by statute" to "transfer or sell any asset . . . of the regulated entity"). These decisions accord with other cases applying Section 4617(f), which have construed that section broadly to effect Congress's purposes in empowering the Conservator to manage the Enterprises without outside interference. *See, e.g.*, *Cty. of Sonoma*, 710 F.3d at 993; *Leon Cty., Fla. v. FHFA*, 700 F.3d 1273, 1278-79 (11th Cir. 2012); *Town of Babylon*, 699 F.3d at 228; *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 101-02 (D. Mass. 2014); *Gail C. Sweeney Estate Marital Trust v. U.S. Treasury Dep't*, 68 F. Supp. 3d 116, 119 (D.D.C. 2014). They are also consistent with a substantial body of case law interpreting the materially identical provision governing Federal Deposit Insurance Corporation ("FDIC") conservatorships and receiverships,

12 U.S.C. § 1821(j), which like Section 4617(f), "'effect[s] a sweeping ouster of courts' powers to grant equitable remedies' . . . regardless of the claimant's likelihood of success on the merits of his underlying claims." *Hanson v. FDIC*, 113 F.3d 866, 871 (8th Cir. 1997) (quoting *Freeman v. FDIC*, 56 F.3d 1394, 1399 (D.C. Cir. 1995)); *see also Nat'l Trust for Historic Preserv. in U.S. v. FDIC*, 21 F.3d 469, 472 (D.C. Cir. 1994) (Wald, J., concurring) ("[G]iven the breadth of the statutory language . . . the statute would appear to bar a court from acting in virtually all circumstances.").

Moreover, as these and other decisions recognize, allegations that the Conservator acted unwisely, improperly, or unlawfully "do[] not alter the calculus" so long as the Conservator is carrying out one of its statutory powers or functions. *Volges v. RTC*, 32 F.3d 50, 52 (2d Cir. 1994). Indeed, the courts in *Perry Capital*, *Continental Western*, and *Robinson* all considered—and all rejected as insufficient to overcome HERA's jurisdictional bar—allegations that "FHFA's underlying motives" in executing the Third Amendment were to "increase payments to Treasury," to "keep the [Enterprises] in a holding pattern," or otherwise were improper. *Perry Capital*, 70 F. Supp. 3d at 226; *see also Cont'l W. Ins.*, 83 F. Supp. 3d at 839 n.6 ("it is not the role of this Court to wade into the merits or motives of FHFA and Treasury's actions"); *Robinson*, 2016 WL 476555 at *5-8 (rejecting allegations that "FHFA acted as an 'anti-conservator' by using the [Enterprises] as 'ATM machines'" and "failed to satisfy its duty to . . . return [the Enterprises] to private control").

Plaintiff's allegations here that the Third Amendment improperly benefits "taxpayers" instead of Plaintiff and that it was executed at a time when Fannie Mae "was again making profits" and its CFO said the company's "financial condition had improved" are thus of no moment. Compl. ¶¶ 4, 19-20, 25-26. Plaintiff's cursory efforts to discredit and second-guess the

Conservator's exercise of its statutory powers to operate and carry on the business of Fannie Mae do nothing to undermine the conclusion that FHFA acted "within its broad statutory authority as a conservator" under HERA. *Perry Capital*, 70 F. Supp. 3d at 225, 227-28 n.20 (describing HERA, which "grants the agency expansive discretion to act as it sees fit" and "wide latitude to flexibly operate the GSEs," as a statute "of exceptional scope"). Accordingly, Section 4617(f) bars Plaintiff's claim.

II. THE CONSERVATOR HAS SUCCEEDED TO PLAINTIFF'S CLAIMS

In enacting HERA, Congress provided expressly and clearly that when FHFA is appointed Conservator, it "immediately succeed[s] to . . . *all rights, titles, powers, and privileges* of the [Enterprises], and *of any stockholder*, officer, or director *of [the Enterprises]* with respect to the [Enterprises] and [their] assets." 12 U.S.C. § 4617(b)(2)(A)(i) (emphases added). Plaintiff's Complaint—which plainly purports to assert "rights . . . of [a] stockholder" of Fannie Mae[5]—fails for the additional, independent reason that by this language, Congress has transferred to the Conservator all of the rights Plaintiff purports to exercise here.

HERA's succession provision is far-reaching and clear. As the D.C. Circuit has observed, Section 4617(b)(2)(A)(i)'s broad, unequivocal language evidences Congress's intent to "transfer[] everything it could to the [Conservator]" and to ensure "that nothing was missed." *Kellmer v. Raines*, 674 F.3d 848, 851 (D.C. Cir. 2012) (quoting *Pareto v. FDIC*, 139 F.3d 696, 700 (9th Cir. 1998)). Pursuant to Section 4617(b)(2)(A)(i)'s plain meaning, "all rights previously held by [the Enterprises'] stockholders . . . now belong exclusively to the FHFA." *In*

[5] Indeed, Plaintiff's Complaint undoubtedly relates to shareholder interests. *See, e.g.*, Compl. ¶¶ 30-31 (alleging that "operation of the Third Amendment" has depleted the "value[] . . . per share" of Fannie Mae stock and thus "deprives Plaintiff of what his shares would otherwise be worth"); *id.* ¶ 25 (alleging that "the United States always intended that the taxpayers," instead of the shareholders, "would reap a profit from the Treasury's investment").

re Fed. Home Loan Mortg. Corp. Derivative Litig., 643 F. Supp. 2d 790, 795 (E.D. Va. 2009) *aff'd sub nom. La. Mun. Police Emps. Ret. Sys. v. FHFA*, 434 F. App'x 188 (4th Cir. May 5, 2011) ("*In re Freddie Mac*"); *Esther Sadowsky Testamentary Trust v. Syron*, 639 F. Supp. 2d 347, 351 (S.D.N.Y. 2009) (in conservatorship, "[t]he shareholders' rights are now the FHFA's"); *see also Hennepin Cty. v. Fed. Nat'l Mortg. Ass'n*, 742 F.3d 818, 822 (8th Cir. 2014) (applying the "interpretive rule[]" of "'all' means all" to HERA's exemption of FHFA from "all taxation") (internal citation omitted).

Courts have thus uniformly held that HERA's transfer of stockholder rights to the Conservator bars Enterprise shareholders from asserting claims during the conservatorships. For example, in *Kellmer*, the D.C. Circuit affirmed the district court's substitution of FHFA as Conservator in place of the plaintiffs—shareholders of Fannie Mae—who had asserted a variety of shareholder claims. The Court held:

> [T]o resolve this issue, we need only heed Professor Frankfurter's timeless advice: "'(1) Read the statute; (2) read the statute; (3) read the statute!'" *See* Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes, in* Benchmarks 196, 202 (1967). HERA provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges . . . of any stockholder." 12 U.S.C. § 4617(b)(2)(A). *This language plainly transfers shareholders' ability to bring derivative suits—a "right[ ], title[ ], power[ ], [or] privilege[ ]"—to FHFA.*

674 F.3d at 850 (emphasis added). Numerous decisions are in accord. *See, e.g.*, *Cont'l W. Ins*, 83 F. Supp. 3d at 840 n.6 ("HERA grants all shareholder rights, including the right to bring a derivative suit, to FHFA."); *Sadowsky*, 639 F. Supp. 2d at 351 (same, holding that "Congress has

clearly announced that the FHFA has inherited all rights and powers of the Freddie Mac shareholders . . . [including] the right to substitute for shareholders in suits such as this one.").[6]

Moreover, while it is irrelevant whether Plaintiff's Complaint is characterized as derivative or direct because the Conservator has succeeded to "all" shareholder rights, the derivative nature of Plaintiff's Complaint underscores Section 4617(b)(2)(A)'s effect. *See, e.g.*, *Kellmer*, 674 F.3d at 850; *Perry Capital*, 70 F. Supp. 3d at 232 ("HERA's plain language bars shareholder derivative suits, without exception."). The difference between derivative and direct claims is well-established and governed by two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).[7] Both parts of the inquiry confirm the derivative nature of Plaintiff's claims here.

With respect to the first prong, Plaintiff challenges "Defendants' actions in executing and implementing the Third Amendment," which he alleges "deprive[d] [him] of what his shares

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[6] *See also Sweeney*, 68 F. Supp. 3d at 119 (substituting FHFA in place of shareholder plaintiffs, observing "[i]t is undisputed that the plain language of HERA provides that only the Conservator may bring suit on behalf of [the Enterprises]"); *In re Freddie Mac*, 643 F. Supp. 2d at 795 (same, holding that "the plain meaning of the statute is that all rights previously held by Freddie Mac's stockholders, including the right to sue derivatively, now belong exclusively to the FHFA").

[7] The Enterprises must comply with federal law and their federal charters, which were created by Congress. *See* 12 U.S.C. § 1716 *et seq.*; *id.* § 1451 *et seq.*; 12 C.F.R. § 1710.10(a). For issues not addressed by federal law or their charters, the Enterprises may follow the applicable corporate governance practices and procedures of Delaware law (or the law of the jurisdiction in which the principal office of the Enterprise sits) but only to the extent that state law is not inconsistent with federal law or the charters. 12 C.F.R. § 1710.10(b). In its bylaws, Fannie Mae elected to follow the applicable corporate governance practices and procedures of Delaware law for such issues. *See* Fannie Mae Bylaws Section 1.05 (http://goo.gl/8md6Ru). Here, for purposes of the present motion only, FHFA assumes without conceding that Delaware law concerning whether a claim is direct or derivative is not inconsistent with federal law, and thus could apply here. Fannie Mae is not, however, subject to Delaware law and nothing in its bylaws provides as much.

would otherwise be worth" and prevented him from receiving "a portion of [dividend] benefits . . . in proportion to his Shares." Compl. ¶ 22, 31; *id.* Relief Requested ¶ A. Plaintiff's theory that the Third Amendment allegedly deprives shareholders of Fannie Mae's "profits," Compl. ¶¶ 21-22, is a "classically derivative" injury. *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 771 (Del. 2006). It is indeed well-established that a reduction in stock value is an "indirect injury" to a shareholder that is derived from—and thus derivative of—an injury to the company itself; "[i]t does not arise out of any independent or direct harm to the stockholders, individually." *Tooley*, 845 A.2d at 1037. Accordingly, where, as here, the alleged wrongdoing "deplete[d] corporate assets that might otherwise [have] be[en] used to benefit the stockholders, such as through a dividend," the claims are derivative because the wrongdoing "harms the stockholders only derivatively so far as their stock loses value." *Protas v. Cavanagh*, No. CIV.A. 6555-VCG, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012).

Plaintiff's claims are also derivative under *Tooley*'s second prong, which provides that a claim is direct only if the relief sought "flows directly to the stockholders, not to the corporation." *Tooley*, 845 A.2d at 1036. The fact that Plaintiff (wrongly) requests direct money damages does not transform the claims from derivative to direct. Instead, the court "should look to the nature of the wrong and to whom the relief *should* go." *Id*. at 1039 (emphasis added); *see also In re Ionosphere Clubs, Inc.*, 17 F.3d 600, 605 (2d Cir. 1994) (holding claim derivative because "payment of damages directly to the plaintiff-stockholders for the diminution in the value of their stock would be inappropriate"). Because the fundamental injury alleged here constitutes harm to Fannie Mae—i.e., the allegedly improper transfer of assets from Fannie Mae to Treasury in the form of dividends, Compl. ¶¶ 6, 21-22, 32—the relief (if any) that would flow

from such an asserted injury is the return of those dividends to Fannie Mae rather than a direct payment to Plaintiff.[8]

In sum, as the *Perry Capital* court recognized, shareholder claims that allege a "loss . . . in share value" or "damage to the price of [Enterprise] shares, as valued by the market," are considered derivative and are "barred under HERA." *Perry Capital*, 70 F. Supp. 3d at 235 n.39. Plaintiff alleges just such claims here. Accordingly, he cannot proceed.

Further, the transfer of all rights to the Conservator effectuates other key provisions of HERA, including that the Conservator exclusively "determines [what] is in the best interests" of the Enterprises, 12 U.S.C. § 4617(b)(2)(J)(ii), and that no court may "restrain" or "affect" the Conservator's exercise of its statutory power. *Id.* § 4617(f). Thus, Plaintiff's Complaint that he had "no opportunity to voice objections or otherwise be heard prior to the execution of the Third Amendment," Compl. ¶ 33, is beside the point. HERA vests all control over the Fannie Mae exclusively in the Conservator, with no obligation to confer with Plaintiff or any other shareholder.[9] As one district court recently recognized, Section 4617(b)(2)(A)(i) should

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[8] Plaintiff's imprecise and conclusory allegations that he relied on "statements by the Defendants that the conservatorship would terminate once the Companies became solvent" in purchasing his stock (Compl. ¶¶ 16-17) does not render his claim direct. *See, e.g.*, *Ernst & Young Ltd. v. Quinn*, No. CIV. A. 09-CV-1164JCH, 2009 WL 3571573, at * 6 (D. Conn. Oct. 26, 2009) (claims that but for negligent misrepresentation plaintiffs "would not have 'purchased, continued to purchase, or retained their . . . investment interests in the [company]'" were derivative because they depended upon injury to the company in the first instance; "These claims are only actionable . . . because of the injuries sustained to the [company]."). Moreover, Plaintiff does not actually appear to challenge the continuation of the conservatorship or otherwise seek relief in connection with his supposed reliance on statements about the potential termination of the conservatorship.

[9] Indeed, numerous courts have held that Section 4617(f) on its own displaces shareholder plaintiffs' attempts to pursue derivative claims. *See Sweeney*, 68 F. Supp. 3d at 125 (concluding "plaintiff's lawsuit would 'affect' and 'interfere' with the Conservator's exercise of its powers"); *In re Freddie Mac*, 643 F. Supp. 2d at 799 ("find[ing] that allowing the [shareholder] plaintiffs to remain in this action would violate § 4617(f)"); *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, ERISA Litig.*, 629 F. Supp. 2d 1, 4 n.4 (D.D.C. 2009) ("allowing [shareholder] plaintiffs to continue to pursue derivative claims independent of FHFA would require this Court to take

Footnote continued on next page

therefore be interpreted and applied "[i]n light of [HERA's] substantial grant" of an "extraordinary amount of authority to FHFA as conservator." *Pagliara*, 2016 WL 4441978, at *7.

III. THE DOCTRINE OF ISSUE PRECLUSION BARS PLAINTIFF FROM PROSECUTING THIS ACTION

Even if Plaintiff possessed the right to bring this Complaint—and he does not—the doctrine of issue preclusion would bar the action. The decisions of other courts dismissing materially identical claims brought by other Fannie Mae shareholders are binding on Plaintiff. *Perry Capital*, 70 F. Supp. 3d at 229-39 & n.14, n.24; *Cont'l W. Ins.*, 83 F. Supp. 3d at 838.

Issue preclusion, or collateral estoppel, "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted). In this Circuit, "a party is barred from relitigating an issue if three conditions are met: First, the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case. Second, the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case. Third, preclusion in the second case must not work a basic unfairness." *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 301 (D.C. Cir. 2015). Here, each condition is satisfied.

First, because Plaintiff's claim is derivative, *supra* Section II, Fannie Mae is the real party in interest, just as it was also the real party in interest to the derivative claims in *Perry Capital*. "It is a matter of black-letter law that the plaintiff in a derivative suit represents the corporation [here, Fannie Mae], which is the real party in interest." *In re Sonus Networks, Inc.*

Footnote continued from previous page
action that would 'restrain or affect' FHFA's discretion, which HERA explicitly prohibits"), *aff'd sub nom. Kellmer*, 674 F.3d 848.

S'holder Derivative Litig., 499 F.3d 47, 63 (1st Cir. 2007) (citing *Clark v. Lacy*, 376 F.3d 682, 686 (7th Cir. 2004)). Accordingly, where a second shareholder derivative action follows the resolution of a prior derivative action, the corporation (and its shareholders) necessarily are bound by the issues decided in the first action, "even if different shareholders prosecute the suits." *Sonus*, 499 F.3d at 64; *see also Arduini v. Hart*, 774 F.3d 622, 634 (9th Cir. 2014) ("[W]here the shareholders are acting on behalf of the corporation and its shareholders and the underlying issue . . . is the same regardless of which shareholder brings suit," "shareholders bringing derivative suits are in privity for the purposes of issue preclusion."). *Perry Capital* addressed and dismissed avowedly derivative claims challenging the Third Amendment. *See* 70 F. Supp. 3d at 218. Just as Fannie Mae was the real party in interest there, it is here as well.

Second, the issues in this case and in *Perry Capital* are the same. The district court in *Perry Capital* considered derivative claims brought as part of a putative class action on behalf of Fannie Mae and Freddie Mac shareholders and concluded that: (1) Section 4617(f) barred the equitable relief, including declaratory relief, sought in the derivative action, and (2) Section 4617(b)(2)(A) barred any derivative claims by shareholders concerning the Third Amendment. 70 F. Supp. 3d at 229-39 & nn.14, 24.[10] Issue preclusion prohibits Plaintiff from re-litigating those same questions. *See, e.g.*, *Taylor*, 553 U.S. at 892 ("Issue preclusion . . . bars successive litigation . . . even if the issue recurs in the context of a different claim.") (citation omitted).

[10] Further, as the *Perry Capital* court also held in dismissing the derivative plaintiffs' claims, "HERA provides no qualification for its bar on shareholder derivative suits," and, accordingly, there is no "conflict of interest" exception to the statute's succession provision. 70 F. Supp. 3d at 231-32. While Plaintiff does not appear to argue that there is such an exception, or that it would apply here, he would be precluded from making that argument for the same reasons discussed above.

Third, the *Perry Capital* court decided the issues of HERA's bar on equitable relief and the transfer of shareholder rights to the Conservator. Thus, the "actually and necessarily determined" element is also met. *Canonsburg Gen. Hosp.*, 807 F.3d at 301; *see also Cont'l W. Ins. Co.*, 83 F. Supp. 3d at 839-40 (holding that shareholder plaintiff was precluded by *Perry Capital* from re-litigating "the ultimate issue" of "whether FHFA and Treasury exceeded the statutory authority granted to them by HERA."). Further, the dismissal in *Perry Capital* was a "final judgment" for purposes of issue preclusion. *Id*.

Finally, application of issue preclusion here would not be unfair to Plaintiff. The "equitable exceptions to issue preclusion" considered by this prong of the analysis permit avoidance of issue preclusion in only "certain limited circumstances." *Canonsburg Gen. Hosp.*, 807 F.3d at 306. Those exceptions do not apply here. *See id.* (observing that the only exceptions the D.C. Circuit has recognized are for "an intervening change in controlling legal principles" or where "the party to be bound lacked an incentive to litigate in the first trial") (citations omitted). To the contrary, this is precisely the type of case in which issue preclusion applies. Defendants have already fully litigated, and a court in this District has already resolved, the precise issues Plaintiff's claim presents here. Application of the doctrine here appropriately "protects the functioning of the courts" and the parties' interests "by promoting finality and avoiding the unnecessary expenditure of judicial resources." *Id*. at 307.

In sum, Plaintiff is bound by the district court's determinations in *Perry Capital*, the first derivative action brought by Fannie Mae and Freddie Mac shareholders challenging the Third Amendment. The issues to be litigated with respect to Plaintiff's derivative claim here would be the same "no matter which shareholder served as nominal plaintiff," and "defendants have

already been put to the trouble of litigating the very question at issue." *Sonus*, 499 F.3d at 64. "[T]he policy of repose strongly militates in favor of preclusion." *Id.*

IV. TO THE EXTENT PLAINTIFF IS ATTEMPTING TO ALLEGE CONSTITUTIONAL CLAIMS, THOSE CLAIMS ALSO FAIL

As noted above, Plaintiff's allegations are unclear and his Complaint is inartfully pleaded. To the extent Plaintiff is asserting Fifth Amendment takings or illegal exaction claims,[11] however, those theories of recovery fail as a matter of law for three reasons: (1) this Court lacks jurisdiction under the Little Tucker Act, 28 U.S.C. § 1346(a)(2); (2) Plaintiff does not have a cognizable property interest; and (3) there is no illegal exaction because Plaintiff has not alleged that he made any payments to the United States.[12]

A. This Court Does Not Have Jurisdiction over Constitutional Claims Seeking Damages in Excess of $10,000

As a general rule, constitutional claims for damages may be brought against the United States only in the U.S. Court of Federal Claims. *Id.* § 1491(a)(1). Federal district courts have concurrent jurisdiction with the Court of Federal Claims only over claims against the United States "not exceeding $10,000 in amount, founded . . . upon the Constitution." *Id.* § 1346(a)(2). Plaintiff seeks $2,500,000 in damages. Compl. Relief Requested, ¶ B. That requested relief far

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[11] *Compare* Compl. ¶¶ 7-9 *with* Compl. ¶ 34.

[12] Plaintiff's constitutional claims fail for the additional reason that Fannie Mae and the Conservator "[are] not [] government actor[s]" for purposes of any constitutional theories Plaintiff may be using as a predicate for the relief he seeks here. *See Herron*, 857 F. Supp. 2d at 94-95 (on appeal); *see also Shamoon*, 922 F. Supp. 2d at 644-45 (collecting cases). This conclusion accords with courts' consistent and uniform holdings that the FDIC is "not the United States" when acting in its capacity as receiver, *see O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994), and the FDIC is not the United States for purposes of takings claims under the Little Tucker Act. *See, e.g.*, *Ameristar Fin. Servicing Co. v. United States*, 75 Fed. Cl. 807, 812 (2007) (relying on *O'Melveny* to dismiss Tucker Act claim because FDIC as conservator "was not acting as the United States"); *Ambase Corp. v. United States*, 61 Fed. Cl. 794, 796-97 (2004) ("Ambase's claim that the FDIC has mismanaged the [] receivership is a claim against the FDIC, but for purposes of this litigation this is not a claim against the government.").

surpasses the statutory limit on this Court's jurisdiction under 28 U.S.C. § 1346(a)(2). For this reason alone, the Court does not have jurisdiction over Plaintiff's constitutional claims.[13]

B. Plaintiff Does Not Have a Cognizable Property Interest

Plaintiff's constitutional claims also fail as a matter of law because Plaintiff has failed to allege a cognizable property interest. To state a valid takings claim, the Court "must determine as a threshold matter whether [Plaintiff] has established a property interest for purposes of the Fifth Amendment." *Bair v. United States*, 515 F.3d 1323, 1327 (Fed. Cir. 2008). The legislative and regulatory environment "define[s] the range of interests that qualify for protection as property under the Fifth Amendment." *Perry Capital*, 70 F. Supp. 3d at 241 (discussing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-30 (1992)). The Enterprises "have been subject to regulatory oversight, including the specter of conservatorship" since 1992, and conservatorship became a reality for Fannie Mae in September 2008. *Perry Capital*, 70 F. Supp. 3d at 240-41. Following that appointment of the Conservator under HERA, Plaintiff "necessarily lack[s] the right to exclude the government from [his] investment." *See id.* at 241 (relying on *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1073 (Fed. Cir. 1994), and *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 959 (Fed. Cir. 1992)). The Conservator's succession to "all rights, titles, powers, and privileges" of Plaintiff as a Fannie Mae shareholder reinforces this conclusion. *See* 12 U.S.C. § 4617(b)(2)(A); *Perry Capital*, 70 F. Supp. 3d at 241.

Plaintiff's Complaint plainly demonstrates that he was aware of the regulatory environment and the conservatorship when he purchased his shares. He alleges that Fannie Mae was insolvent in September 2008 upon the appointment of the Conservator, and he purchased his

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[13] While a plaintiff may expressly disclaim damages in excess of $10,000, *Waters v. Rumsfeld*, 320 F.3d 265, 270 (D.C. Cir. 2003); *Stone v. United States*, 683 F.2d 449, 454 n.8 (D.C. Cir. 1982), Plaintiff has not done that here.

shares in August 2009 following that appointment . Compl. ¶¶ 14, 17. Indeed, he seemingly relied on Treasury's investment in and the Conservator's management of Fannie Mae to attempt to realize a return on his investment. *See id.* ¶¶ 15-17, 26. Plaintiff, therefore, cannot seriously contend that his ownership of Fannie Mae stock gives him the "right to exclude" the government from the operation and regulation of the Enterprises. Fannie Mae was and is a highly regulated, government-sponsored enterprise, and Plaintiff's shareholdings were plainly subject to a well-developed regulatory regime. Accordingly, Plaintiff does not have a cognizable property interest under the Fifth Amendment, and, therefore, his takings theory fails as a matter of law.

C. Plaintiff Has Not Alleged an Illegal Exaction

Plaintiff contends that "[b]ut for the Third Amendment, [he] would have been entitled to a portion of the benefit of [Fannie Mae's] profits in proportion to his Shares," and that the Third Amendment therefore "constituted an illegal exaction."[14] Compl. ¶¶ 21-22, 31, 34. Plaintiff's allegations are fundamentally deficient: Plaintiff has not—and indeed cannot—assert that he paid any money to the government, which is the most basic element of an illegal exaction claim. *See Aerolineas Argentina v. United States*, 77 F.3d 1564, 1572 (Fed. Cir. 1996) (noting that illegal exaction claims seek to recover all or part of the sums of "monies that the government has

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[14] Plaintiff has no present right to any dividends. Plaintiff does not identify whether he owns preferred or common stock. All the same, Fannie Mae shareholders may receive dividends only "when, as and if declared by the Board of Directors," "in its sole discretion," and only "out of funds legally available therefor," and only after all dividends owed to more senior preferred shareholders have been paid. *See, e.g.*, Fannie Mae, Cert. Design. for Series T Preferred Stock, § 2(a), (c), (d). Delaware courts have interpreted this standard contractual language to mean that a shareholder's right to a dividend does not vest unless a dividend has been declared. *See, e.g.*, *Pa. Co. for Ins. v. Cox*, 23 Del. Ch. 193, 198 (1938) (interpreting similar language to mean "shareholders have no right to dividends until they are declared"). The Conservator has succeeded to the Fannie Mae Board of Directors' power to declare dividends, and it has not declared any dividends for any series of Fannie Mae preferred stock or Fannie Mae common stock; therefore, Plaintiff has neither received nor been entitled to any dividends that were instead paid to Treasury. In other words, the Third Amendment has not deprived Plaintiff of any "portion of the benefit" of any Fannie Mae "profits in proportion to his Shares." *See* Compl. ¶ 22.

required *to be paid* contrary to law" (emphasis added)); *see also Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967) (similar). There is no exaction where, as Plaintiff apparently alleges here, money is "prevent[ed] from coming into [a] plaintiff's account." *Westfed Holdings, Inc. v. United States*, 52 Fed. Cl. 135, 153 (2002); *see also Piszel v. United States*, No. 15-5100, 2016 WL 4394602, at *11 (Fed. Cir. Aug. 18, 2016) (affirming dismissal of illegal exaction claim because the plaintiff alleged "[n]o facts . . . concern[ing] *the payment of money by*" the plaintiff) (emphasis added). Plaintiff's illegal exaction theory fails for the same reason: he has not pleaded that he has made any payments that he now seeks to recover.

Nor can Plaintiff establish that the Third Amendment violates a provision of "the Constitution, a statute, or a regulation," as would be necessary to recover under an illegal exaction theory. *See Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005). As discussed above, every federal district court to decide the question of the Third Amendment's legality has concluded that FHFA acted within its powers as Conservator when it executed the Third Amendment. *See supra* Section I.C. The Third Amendment, therefore, cannot serve as the predicate for Plaintiff's illegal exaction claim.

CONCLUSION

For the reasons stated herein, the Court should dismiss the Complaint in its entirety, with prejudice.

Dated: September 20, 2016

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID J. VOACOLO
44 Elkton Street
Hamilton, New Jersey 08619,

Plaintiff,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION
3900 Wisconsin Avenue, NW
Washington, DC 20016-2892,

and

FEDERAL HOUSING FINANCE AGENCY
400 7th Street, SW
Washington, DC 20219,

and

UNITED STATES DEPARTMENT OF THE TREASURY
1500 Pennsylvania Avenue, NW
Washington, DC 20220,

Defendants.

Civil Action No. 1:16-cv-01324-RC

[PROPOSED] ORDER

Upon consideration of the motion by Defendants Federal Housing Finance Agency ("FHFA"), as Conservator for the Federal National Mortgage Association ("Fannie Mae"), and Fannie Mae to dismiss the Complaint as to all claims in the above-captioned action, it is hereby

ORDERED that the Motion to Dismiss by FHFA and Fannie Mae is GRANTED and the Complaint in the above-captioned actions shall be and is hereby DISMISSED WITH PREJUDICE.

Dated:_______________, 2016

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UNITED STATES DISTRICT JUDGE