CHAD A. READLER
Acting Assistant Attorney General
DIANE KELLEHER
Assistant Branch Director
R. CHARLIE MERRITT
Trial Attorney (VA Bar No. 89400)
U.S. Department of Justice
Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel. (202) 616-8098
Fax (202) 616-8470
robert.c.merritt@usdoj.gov

CRAIG CARPENITO
United States Attorney
KRISTIN L. VASSALLO
Assistant United States Attorney
970 Broad Street, Suite 700
Newark, NJ 07102
Tel. (973) 645-2835
Fax (973) 297-2010
Email: kristin.vassallo@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DAVID J. VOACOLO, *Plaintiff,* v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, and THE UNITED STATES DEPARTMENT OF THE TREASURY *Defendants.*	HON. BRIAN R. MARTINOTTI No. 3:17-CV-5667 (BRM) (LHG) MOTION DAY: MAY 7, 2018

MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES DEPARTMENT OF THE TREASURY'S MOTION TO DISMISS THE COMPLAINT

CHAD READLER
Acting Assistant Attorney General

CRAIG CARPENITO
United States Attorney

DIANE KELLEHER
Assistant Branch Director

R. CHARLIE MERRITT
Trial Attorney

Attorneys for Defendant U.S. Department of the Treasury

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PRELIMINARY STATEMENT

During and after the financial crisis, the U.S. Department of the Treasury ("Treasury") committed hundreds of billions of dollars to ensure the solvency of the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, "the GSEs" or "the enterprises"). That commitment eventually became capital infusions of $187.5 billion, with an additional pledged commitment of $258 billion. "That $200 billion-plus lifeline is what saved the [GSEs] – none of the institutional stockholders were willing to infuse that kind of capital during desperate economic times." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 613 (D.C. Cir. 2017).

Nevertheless, Plaintiff, a shareholder in Fannie Mae, seeks to challenge, for the second time,[1] the Third Amendment to the Preferred Stock Purchase Agreements (the "Third Amendment") between Treasury and FHFA, the conservator of the enterprises. *See* Verified Class Action Complaint, ECF No. 1 ("Complaint"). That agreement changed the dividend formula on the preferred stock held by Treasury, replacing a fixed dividend with a variable dividend tied to the enterprises' net worth.

[1] In 2016, Plaintiff filed a complaint in the District Court for the District of Columbia, challenging the Third Amendment pursuant to the Administrative Procedure Act ("APA"). The defendants filed motions to dismiss, and when Plaintiff never responded, the Court granted the motions as conceded and dismissed the case without prejudice. *Voacolo v. Federal Nat'l Mortgage Ass'n*, 224 F. Supp. 3d 39 (D.D.C. 2016).

See Perry Capital, 864 F.3d at 612. Plaintiff alleges that his shares would be worth more without the Third Amendment, asserts that the Third Amendment deprived him of his property without due process and constituted an illegal exaction, and seeks a monetary judgment in the amount of $5 million. But Plaintiff – like other GSE shareholders who have unsuccessfully challenged the Third Amendment pursuant to a variety of legal theories in federal courts across the country[2] – has no claim to relief.

Fundamentally, he has not identified any waiver of sovereign immunity that would allow him to pursue his claim for money damages, in the amount demanded, against the United States in federal district court. Absent such a waiver, Plaintiff has failed to invoke this Court's jurisdiction, and his claims are barred.

Additionally, because Plaintiff's claims are derivative in nature, based not on any direct injury but on harm to the value of his shares in Fannie Mae, they are barred for two additional reasons. The first is claim preclusion: Plaintiff is in privity with

[2] *See Perry Capital*, 864 F.3d at 598–99 (*affirming in pertinent part Perry Capital v. Lew*, 70 F. Supp. 3d 208, 246 (D.D.C. 2014)); *Robinson v. FHFA*, 876 F.3d 220, 225 (6th Cir. 2017) (*affirming* 223 F. Supp. 3d 659, 665-671 (E.D. Ky. 2016)); *Roberts v. FHFA*, 243 F. Supp. 3d 950, 953–54 (N.D. Ill. 2017), *appeal argued*, No. 17-1880 (7th Cir. Oct. 30, 2017); *Collins v. FHFA*, 254 F. Supp. 3d 841, 845–48 (S.D. Tex. 2017), *appeal argued*, No. 17-20364 (5th Cir. March 7, 2018); *Saxton v. FHFA*, 245 F. Supp. 3d 1063, 1080 (N.D. Iowa 2017), *appeal docketed*, No. 17-1727 (8th Cir. Apr. 4, 2017); *Jacobs v. FHFA*, Civ. No. 15-708-GMS, 2017 WL 5664769, at *7 (D. Del. Nov. 27, 2017), *appeal docketed*, No. 17-3794 (3d Cir. Dec. 22, 2017); *Cont'l W. Ins. Co. v. FHFA*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015).

prior GSE shareholders who have challenged the Third Amendment in derivative suits, and the valid final judgments in those actions preclude his claims arising out of the same transaction. The second bar stems from the Housing and Economic Recovery Act ("HERA") – the statute authorizing Fannie Mae's current conservatorship – which includes a transfer-of-shareholder rights provision that "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits on behalf of the [GSEs]." *Perry Capital*, 864 F.3d at 623 (citation omitted).

And, in any event, Plaintiff's claims fail on the merits because he fails to allege that he has been deprived of any cognizable property interest, as required to invoke the Due Process clause and state an illegal exaction claim. Accordingly, the Court should dismiss this suit in its entirety.

BACKGROUND

I. FANNIE MAE AS A GOVERNMENT SPONSORED ENTERPRISE

Fannie Mae and Freddie Mac are government-sponsored enterprises. Congress created them to, among other things, "promote access to mortgage credit throughout the Nation . . . by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing." 12 U.S.C. § 1716(4). These entities, which own or guarantee trillions of dollars of residential mortgages and mortgage-backed securities, have played a

key role in housing finance and the United States economy. *Perry Capital*, 864 F.3d at 599.

"[I]n 2008, the United States economy fell into a severe recession, in large part due to a sharp decline in the national housing market. Fannie Mae and Freddie Mac suffered a precipitous drop in the value of their mortgage portfolios, pushing the Companies to the brink of default." *Id*. In response to the developing financial crisis, in July 2008, Congress passed HERA, Pub. L. No. 110-289, 122 Stat. 2654 (2008). *Id*. at 598. HERA created FHFA, an independent federal agency, to supervise and regulate Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. 12 U.S.C. § 4501 *et seq.* HERA also granted the Director of FHFA the authority to place Fannie Mae in conservatorship or receivership. *See* 12 U.S.C. § 4617(a). FHFA could use this discretionary authority to "be appointed conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." *Id*. § 4617(a)(2). The statute provides that, upon its appointment as the conservator or receiver, FHFA would "immediately succeed 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). In addition, the statute accords the conservator the power to "operate" and "conduct all business" of Fannie Mae, *id*. § 4617(b)(2)(B), including the power to take such action as may be

"appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity," *id*. § 4617(b)(2)(D), and to "transfer or sell" any of Fannie Mae's assets or liabilities, *id*. § 4617(b)(2)(G).

HERA also amended Fannie Mae's statutory charter to grant the Secretary of the Treasury the authority to purchase "any obligations and other securities" issued by Fannie Mae "on such terms and conditions as the Secretary may determine and in such amounts as the Secretary may determine," provided that Treasury and Fannie Mae reached a "mutual agreement" for such a purchase. *See* 12 U.S.C. § 1719(g)(1)(A). Treasury was required to determine, prior to exercising this purchase authority, that the purchase was necessary to "provide stability to the financial markets," "prevent disruptions" in mortgage financing, and "protect the taxpayer." *Id*. § 1719(g)(1)(B). This purchase authority would expire on December 31, 2009, *id*. § 1719(g)(4), but the statute expressly recited that Treasury would retain the power to exercise its rights with respect to previously-purchased securities after that sunset date, *id*. § 1719(g)(2)(D).

II. CONSERVATORSHIP AND TREASURY'S SENIOR PREFERRED STOCK PURCHASE AGREEMENT WITH FANNIE MAE

In September 2008, the Director of FHFA placed Fannie Mae into conservatorship. Complaint ¶ 4, ECF No. 1 ("Compl."). That same month, and in connection with the conservatorship decision, Treasury used its authority to "promptly invest billions of dollars in Fannie and Freddie to keep them from

defaulting. Fannie and Freddie had been 'unable to access [private] capital markets' to shore up their financial condition, 'and the only way they could [raise capital] was with Treasury support.'" *Perry Capital*, 864 F.3d at 601 (citation omitted). Treasury entered into a Senior Preferred Stock Purchase Agreement (the "PSPA") with Fannie Mae, through FHFA as conservator. *See* Ex. A, Fannie Mae Amended and Restated Preferred Stock Purchase Agreement ("Fannie Mae PSPA") (cited in Compl. ¶ 5).[3] Under the PSPA, Treasury committed to advance funds to Fannie Mae for each calendar quarter in which its liabilities exceeded its assets, in accordance with generally accepted accounting principles, so as to maintain the solvency (*i.e.*, positive net worth) of Fannie Mae. If a draw was needed, FHFA submitted a request to Treasury to allow Fannie Mae to draw on the funds committed under its PSPA. Treasury would then provide funds sufficient to eliminate any net worth deficit. *See* Fannie Mae PSPA §§ 2.1, 2.2. Under HERA, Fannie Mae enters mandatory receivership, and its assets must be liquidated, if it maintains a negative net worth for 60 days. *See* 12 U.S.C. § 4617(a)(4)(A). "As of June 30, 2012, Fannie [Mae] and Freddie [Mac] together had drawn $187.5 billion from Treasury's funding commitment." *Perry Capital*, 848 F.3d at 601.

[3] On a motion to dismiss, the Court may consider documents integral to or relied upon in the complaint without converting the motion to dismiss into a motion for summary judgment. *See In re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997).

In exchange for the capital commitment and infusion that it provided to Fannie Mae, Treasury received senior preferred stock with a liquidation preference,[4] warrants to purchase 79.9 percent of Fannie Mae's common stock, and commitment fees. Fannie Mae PSPA §§ 3.1-3.4. The face value of the liquidation preference on Treasury's senior preferred stock was $1 billion from each enterprise, and it increased dollar-for-dollar as Fannie Mae drew on its PSPA funding capacity. Fannie Mae PSPA §§ 3.1, 3.3. Treasury received no additional shares of stock when Fannie Mae made draws under the PSPAs. *See* Fannie Mae PSPA § 3.1.

Treasury also received quarterly dividends on the liquidation preference of its senior preferred stock. *Perry Capital*, 848 F.3d at 601. Prior to the Third Amendment, Fannie Mae paid dividends at an annual rate of ten percent of its liquidation preference. Ex. B, Fannie Senior Preferred Stock Certificate § 5.[5] (The quarterly dividend payment thus amounted to 2.5% of the liquidation preference). Treasury would provide funds to Fannie Mae to cure its negative net worth, which

[4] A liquidation preference is "[a] preferred shareholder's right, once the corporation is liquidated, to receive a specified distribution before common shareholders receive anything." BLACK'S LAW DICTIONARY 1298 (9th ed. 2009).

[5] A copy of the preferred stock certificate is publicly available at https://www.treasury.gov/press-center/press-releases/Documents/certificatefnm2.pdf. When considering a motion to dismiss, a court may generally consider, in addition to the allegations in the complaint and exhibits attached thereto, "matters of public record." *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

was caused in part by the payment of dividends to Treasury. *See Perry Capital*, 848 F.3d at 601.

The original PSPA also restricted dividend payments to all shareholders who were subordinate to Treasury in the capital structure. Fannie Mae PSPA § 5.1. Under this agreement, Fannie Mae cannot pay or declare a dividend to subordinate shareholders without the prior written consent of Treasury so long as Treasury's preferred stock is unredeemed. *Id*. Nor can Fannie Mae "set aside any amount for any such purpose" without the prior written consent of Treasury. *Id*.

The original PSPA further required Fannie Mae to pay a periodic commitment fee to Treasury beginning on March 31, 2010. Fannie Mae PSPA §§ 3.1, 3.2. The periodic commitment fee "is intended to fully compensate [Treasury] for the support provided by the ongoing Commitment following December 31, 2009." *Id*. § 3.2(b). The amount of the fee for this continuing indefinite commitment of taxpayer funds was to be "determined with reference to the market value of the Commitment as then in effect," as mutually agreed between Treasury and Fannie Mae, in consultation with the Chair of the Federal Reserve. *Id*. Treasury's rights under the PSPA – senior preferred stock with accompanying dividend rights, warrants to purchase common stock, and periodic commitment fees – reflected the significant commitment taxpayers had made to Fannie Mae.

In August 2012, Treasury and FHFA, acting as conservator for Fannie Mae, entered into the Third Amendment to the PSPA. Compl. ¶ 8. The amendment eliminated the 10 percent fixed annual dividend in favor of a quarterly variable dividend in the amount (if any) of Fannie Mae's positive net worth, minus a capital reserve. Ex. B, Third Amendment to Amended and Restated Fannie Mae PSPA, § 4 (Aug. 17, 2012) (cited in Compl. ¶ 8). If Fannie Mae's net worth is negative in a quarter, no dividend is due. *Id*. Since the execution of the Third Amendment, Fannie Mae has not drawn funds from Treasury to pay dividends to Treasury.

III. THIS SUIT

Plaintiff filed his Complaint on August 2, 2017, ECF No. 1, and completed service upon Treasury over six months later, on February 13, 2018.[6] *See* ECF No. 13. Plaintiff alleges that, following Fannie Mae's entry into conservatorship, he purchased 64,000 shares of Fannie Mae's stock "at the rate of seventy-seven cents per share." Compl. ¶ 6. Plaintiff currently owns 50,000 shares and alleges, without

[6] The Federal Rules provide that in order to serve the United States or one of its agencies, a plaintiff must, among other things, deliver a copy of the summons and complaint to the United States Attorney for the district in which the action is brought, or send copies of each by registered or certified mail, addressed to the civil process clerk at the office of the United States Attorney. Fed. R. Civ. P. 4(i)(1)(A). Moreover, if a defendant is not served "within 90 days after the complaint is filed," then the court must dismiss the action without prejudice or order that service be made within a specified time. Fed. R. Civ. P. 4(m). After Plaintiff failed to serve Treasury within this time period, the Court entered an order requiring Plaintiff to make proper service upon Treasury "by no later than January 5, 2018." *See* ECF No. 10. Plaintiff missed that deadline, but served Treasury on February 13, 2018. *See* ECF No. 13.

any further detail, that without the Third Amendment his shares would now be valued at $35 per share, for a total of $1,750,000. Compl. ¶ 10. On this basis, Plaintiff alleges that his constitutional rights have been violated, namely that he has been "deprived of his property," *id*., and that the Third Amendment "constituted an illegal exaction," *id*. ¶ 13. Plaintiff further asserts that he "had no involvement in the entering of the Third Amendment, nor had he had an opportunity to have his objection heard." *Id*. ¶ 12. As relief, Plaintiff seeks a judgment in the amount of $5 million. *Id*. ¶ 16.

As noted above, this is not the first time Plaintiff has attempted to collect money damages through a challenge the Third Amendment based, in part, on alleged due process violations and illegal exactions. Plaintiff had no claim then, and he does not have one now.

LEGAL STANDARD

Treasury moves to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). When considering a facial challenge to its jurisdiction under Rule 12(b)(1), a court applies the same standard it uses when considering a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 & n.1 (3d Cir. 2006). The issue is "whether the allegations on the face of the complaint, taken as true, allege sufficient facts to invoke the jurisdiction

of the District Court." *Culver v. U.S. Dep't of Labor Occupational Safety and Health Admin.*, 248 Fed. App'x 403, 406 (3d Cir. 2007).

Actions are also subject to dismissal when a party fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In ruling on a motion to dismiss, the court must take the well-pleaded facts as true but is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.*

ARGUMENT

I. SOVEREIGN IMMUNITY BARS PLAINTIFF'S CLAIMS AGAINST TREASURY

It is fundamental that "the United States, as sovereign, is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Dalm*, 494 U.S. 596, 608 (1990) (citations omitted); *accord, e.g.*, *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *CNA v. United States*, 535 F.3d 132, 140–41 (3d Cir. 2008); *Becton Dickinson & Co. v. Wolckenhauer*, 215 F.3d 340, 345 (3d Cir. 2000). A waiver of sovereign immunity cannot be implied, but must be unequivocally expressed, *Mitchell*, 445 U.S. at 538; and it must be strictly construed in favor of the sovereign. *See United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992). Where the United

States has not consented to suit, the court lacks jurisdiction over the subject matter of the action, and dismissal is required. *Richards v. United States*, 176 F.3d 652, 654 (3d Cir. 1999). A plaintiff seeking to invoke the court's jurisdiction in an action against the United States "bears the burden of showing an unequivocal waiver of immunity." *Global Fin. Corp. v. United States*, 67 Fed. App'x 740, 742 (3d Cir. 2003) (quoting *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1988)).

Here, the sole relief that Plaintiff seeks is a judgment against the defendants in the amount of $5 million. But Plaintiff has not even attempted to identify a waiver that would allow him to bring such a suit for money damages against the United States in federal district court;[7] indeed, his Complaint identifies no basis for

[7] No such waiver exists. Because Plaintiff seeks money damages, his claims do not fit within the APA's "limited waiver of sovereign immunity," *Semper v. Gomez*, 747 F.3d 229, 234 (3d Cir. 2014), which only applies to an action seeking "relief other than money damages." 5 U.S.C. § 702. Moreover, although the Tucker Act, 28 U.S.C. § 1491(a)(1) and its companion statute, the "Little Tucker Act," *id.* § 1346(a)(2), waive immunity for certain types of monetary claims against the United States, those waivers combine to confer "exclusive jurisdiction" upon the Court of Federal Claims where the claim at issue seeks money damages "exceeding $10,000." *See E. Enters. v. Apfel*, 524 U.S. 498, 520 (1998); *Jan's Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1304 (Fed. Cir. 2008) ("Actions on [Tucker Act] claims exceeding $10,000, except suits in admiralty, must be brought in the Court of Federal Claims." (citation omitted)). Finally, the Federal Tort Claims Act ("FTCA") provides a waiver "for tort claims 'caused by the negligent or wrongful act or omission of any employee of the Government'" in certain circumstances. *Lomando v. United States*, 667 F.3d 363, 372 (3d Cir. 2011) (citation omitted). But the FTCA merely "provides a mechanism for bringing a state law tort action against the federal government," *id.*, and does not apply to Plaintiff's due process and illegal exaction claims, which are based in federal law and do not sound in tort.

jurisdiction at all. In the absence of such a waiver, the United States is immune from suit, and Plaintiff has failed to carry his burden of demonstrating this Court's jurisdiction; his claims against the United States should be dismissed. *See, e.g.*, *Kokkonen v. Guardian Life Ins Co. of Am.*, 511 U.S. 375, 377 (1994) (burden of establishing the "limited jurisdiction" of the federal courts "rests upon the party asserting jurisdiction"); *Merida Delgado v. Gonzales*, 428 F.3d 916, 919–21 (10th Cir. 2005) (affirming dismissal under Rule 12(b)(1) because plaintiff failed to identify a waiver of sovereign immunity).

II. PLAINTIFF'S CLAIMS ARE BARRED BY CLAIM PRECLUSION

As noted above, Plaintiff is not the first shareholder in one of the GSEs to bring a lawsuit alleging harm to share value arising out of the Third Amendment. Because the claims he asserts are derivative in nature (*i.e.*, they allege harm solely to the value of Plaintiff's shares in the enterprise), and could have been asserted in prior derivative suits challenging the Third Amendment, Plaintiff is barred by claim preclusion from presenting them here.

The "central purpose" of the doctrine of claim preclusion is to "require a plaintiff to present all claims arising out [of] the same occurrence in a single suit." *Blunt v. Lower Merion School Dist.*, 767 F.3d 247, 277 (3d Cir. 2014) (quoting *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 260 (3d Cir. 2010)). In doing so, the doctrine "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s]

judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Davis v. Wells Fargo*, 824 F.3d 333, 341–42 (3d Cir. 2016) (citation omitted). In particular, claim preclusion "bars suit when three elements are present: '(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action.'" *Id*. at 341 (quoting *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 963 (3d Cir. 1991)).

Each element is satisfied here. Shareholders in Fannie Mae, as well as Freddie Mac, have already brought prior, unsuccessful derivative actions in federal court claiming harm to their share value based on the Third Amendment. Plaintiff is in privity with those shareholders because he too asserts a derivative claim belonging to Fannie Mae, the true party in interest in each derivative suit. And his claims arise out of the same transaction, the Third Amendment, that gave rise to the previous shareholder suits. Accordingly, claim preclusion bars Plaintiff's present attempt to assert derivative claims arising from the Third Amendment.

A. Prior Third Amendment Actions Resulted in Final Decisions on the Merits

In two prior Third Amendment cases, federal courts rejected shareholder derivative claims seeking to undo the Third Amendment through injunctive relief. *See Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 228–29 (D.D.C.), *aff'd*, 864 F.3d 591 (D.C. Cir. 2017); *Saxton v. FHFA*, 245 F. Supp. 3d 1063, 1077–79 (N.D. Iowa

2017), *appeal docketed*, No. 17-1727 (8th Cir. April 4, 2017).[8] *Perry Capital* and *Saxton* represent final decisions on the merits by courts of competent jurisdiction rejecting derivative claims by GSE shareholders. The first element of claim preclusion is satisfied.

B. This Action Involves Privies of the Parties to the Prior Actions

In general, a judgment rendered in a shareholder derivative suit precludes subsequent litigation by both the corporation and its shareholders. *See, e.g.*, *Cottrell v. Duke*, 737 F.3d 1238, 1242-43 (8th Cir. 2013); *In re Sonus Networks, Inc. S'holder Derivative Litig.*, 499 F.3d 47, 64 (1st Cir. 2007) ("[I]f the shareholder can sue on the corporation's behalf, it follows that the corporation is bound by the results of the suit in subsequent litigation, even if different shareholders prosecute the suits."); *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) ("[I]n shareholder derivative actions arising under Fed. R. Civ. P. 23.1, parties and their privies include the corporation and all nonparty shareholders."). Thus, although Plaintiff was not a named party in the prior derivative actions challenging the Third Amendment, he is in privity with his fellow GSE shareholders because his claims, based purely on harm

[8] In *Perry Capital*, the shareholder plaintiffs expressly framed their claims as derivative. 70 F. Supp. 3d at 229. In *Saxton*, while the shareholder plaintiffs took the position that their claims were not derivative, the court analyzed them and found them to be derivative. 245 F. Supp. 3d at 1072–73. The pending appeal in *Saxton* does not lessen its preclusive effect. *See Horsehead Indus., Inc. v. Paramount Commc'ns, Inc.*, 258 F.3d 132, 142 (3d Cir. 2001).

to the value of his shares, are entirely derivative. *See In re Sunrise Secs. Litig.*, 916 F.2d 874, 886 (3d Cir. 1990) ("Underlying the rule that diminution in share value is an injury to the corporation and shareholders generally is the principle that decreases in share value reflect decreases in the value of the company."); Brief in Support of Def. Fannie Mae & Proposed Intervenor FHFA's Mot. to Dismiss the Complaint at 20-22 ("FHFA and Fannie Mae Brief").

C. Plaintiff's Claims Arise Out of the Same Transaction as the Prior Claims and Share Identity of Cause of Action

With respect to the third element, whether two suits are based on the same "cause of action," the Third Circuit takes a "broad view, looking to whether there is an 'essential similarity of the underlying events giving rise to the various legal claims.'" *CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 194 (3d Cir. 1999) (quoting *United States v. Athlone Indus.*, 746 F.2d 977, 984 (3d Cir. 1984)). Put simply, this element requires a plaintiff to "present in one suit all claims for relief that he may have arising out of the same transaction or occurrence." *Strunk v. Wells Fargo Bank, N.A.*, 614 Fed. App'x 586, 589 (3d Cir. 2015) (quoting *Lubrizol Corp.*, 929 F.2d at 963); *see also Sheridan*, 609 F.3d at 261 ("[A] claim extinguished [by the doctrine of claim preclusion] includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction . . . out of which the action arose." (quoting *Restatement* (Second) of Judgments § 24(1)).

Plaintiff's claims arise out of the same transaction – the Third Amendment – as the shareholder derivative suits in *Perry Capital* and *Saxton*, and Plaintiff's claims could have been asserted in those actions. His Complaint might assert slightly different legal theories, but "when applying the transactional approach to claim preclusion," courts "focus on the 'core of operative facts' for the plaintiff's claims and causes of actions, not the legal labels attached to them." *Serna v. Holder*, 559 Fed. App'x 234, 237 (4th Cir. 2014) (citation omitted); *see also Sheridan*, 609 F.3d at 261 (test does not focus on the "specific legal theory invoked," and it is "not dispositive that a plaintiff asserts a different theory of recovery or seeks different relief in the two actions"). Plaintiff's claims are based on the same alleged act of wrongdoing – the execution of the Third Amendment – that has been (unsuccessfully) challenged in multiple shareholder actions. At some point, claim preclusion means courts must be able "to put an end to litigation." *Purter v. Heckler*, 771 F.2d 682, 690 (3d Cir. 1985). The Court should thus dismiss Plaintiff's Complaint and put an end to this latest addition to the string of "piecemeal litigation" challenging the Third Amendment. *Sheridan*, 609 F.3d at 262.

III. PLAINTIFF'S CLAIMS ARE BARRED BY HERA'S TRANSFER OF SHAREHOLDER-RIGHTS PROVISION

HERA's transfer of shareholder rights provision, 12 U.S.C. § 4617(b)(2)(A)(i), provides that FHFA "shall, as conservator or receiver, and by operation of law, immediately succeed to . . . all rights, titles, powers, and privileges

of the regulated entity." The provision "plainly transfers [to the FHFA the] shareholders' ability to bring derivative suits." *Perry Capital*, 864 F.3d at 623 (quoting *Kellmer v. Raines*, 674 F.3d 848, 850 (D.C. Cir. 2012)). As touched on above and demonstrated more fully in the motion to dismiss filed by Fannie Mae and FHFA, FHFA and Fannie Mae Brief at 20-22, Plaintiff asserts derivative claims in this action based on an alleged decrease in the value of his shares, a harm that is suffered by Fannie Mae in the first instance. *See* Compl. ¶ 10 ("If not for the operation of the Third Amendment, Plaintiff's shares would be [worth more]."); *Fares v. Lankau*, 953 F. Supp. 2d 524, 529 (D. Del. 2013) ("Generally, most equity dilution claims are derivative, and not direct, causes of action because the corporation is injured by the dilution of its value and the appropriate remedy, restoring the company's lost value, would repair the corporation rather than individual shareholders."). Consequently, the right to assert such claims, for alleged violations of due process or otherwise, has been transferred from Plaintiff to FHFA, as conservator for Fannie Mae. *See, e.g.*, *Perry Capitial* at 623–24; *Saxton*, 245 F. Supp. 3d at 1079 ("As a general matter, under § 4617(b)(2)(A), FHFA assumes shareholders' rights to pursue derivative claims.")

That Plaintiff is pursuing constitutional claims makes no difference. Whether a claim is direct or derivative turns on the nature of his injury and relief sought; it does not depend on the source of law on which a shareholder plaintiff relies. *See*,

e.g., *Sinclair v. Hawke*, 314 F.3d 934, 939 (8th Cir. 2003) (applying shareholder standing rule to dismiss First and Fifth Amendment claims, as well as federal statutory civil rights claims); *Pagan v. Calderon*, 448 F.3d 16, 28-29 (1st Cir. 2006) (shareholders lacked standing to pursue substantive due process and equal protection claims because they failed to allege that they "sustained a particularized, nonderivative injury" separate from any injury to the corporation); *Duran v. City of Corpus Christi*, 240 Fed. App'x 639, 642-43 (5th Cir. 2007) (concluding that "only the corporation [had] standing to seek redress" for an alleged First Amendment violation). Because Plaintiff's only alleged injury is based on harm suffered by Fannie Mae, his claims are derivative and barred by the shareholder succession provision.

IV. IN ANY EVENT, PLAINTIFF FAILS TO STATE A CLAIM ON THE MERITS

Even if this Court were to determine that it had jurisdiction over Plaintiff's claims for monetary damages against the federal government, and that such derivative claims were not barred, it should still dismiss the Complaint because it fails, as a matter of law, to state either a due process or an illegal exaction claim.

Although lacking in factual allegations supporting any claim to relief, Plaintiff appears to allege two causes of action. First, he asserts that the "the Third Amendment violated [his] Due Process rights under the Fifth Amendment." Compl. ¶ 13. In particular, he alleges that he has been "deprived of his property" to the

extent that his shares in Fannie Mae would be more valuable if not for the Third Amendment, *id*. ¶ 10, and that he did not have an opportunity to "have his objection [to the Third Amendment] heard," *id*. ¶ 12. Second, he claims, without any further allegations, that the Third Amendment constituted an illegal exaction. *Id*. ¶ 13. Because he has alleged no cognizable property interest in the value of his shares in an entity in conservatorship, both claims fail. Moreover, Plaintiff's illegal exaction claim should be dismissed for the additional reason that he has not alleged any payment of money to the government.

A. Plaintiff's Due Process Claim Fails Because He Has Not Alleged Any Legally Cognizable Property Interest

"To invoke the protections of the fifth amendment, a litigant must first establish that the individual interest asserted is encompassed within its terms." *Matter of Roberts*, 682 F.2d 105, 107 (3d Cir. 1982) (per curiam). Because Plaintiff alleges that he has been deprived of property, his ability to establish a legally cognizable property interest "is a prerequisite for a successful due process claim." *Yu v. U.S. Dep't of Veterans Affairs*, 528 Fed. App'x 181, 186 (3d Cir. 2013) (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 570–71 (1972)). As the Supreme Court explained in *Roth*, property interests do not arise from the Constitution; rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source . . . – rules or understandings that secure certain benefits and that support claims of entitlement to

those benefits." *Roth*, 408 U.S. at 577. In order for Plaintiff to claim a property interest in the value of his shares in Fannie Mae, Plaintiff must have a "legitimate claim of entitlement to" this property, as opposed to an "abstract need or desire for" it, or a "unilateral expectation" of the property. *Baraka v. McGreevey*, 481 F.3d 187, 205 (3d Cir. 2007) (quoting *Roth*, 408 U.S. at 577). Plaintiff has no such interest in "what his shares would otherwise be worth" if not for the Third Amendment. Compl. ¶ 10.

Fundamentally, Plaintiff lacks a property interest in the value of his shares in an entity (Fannie Mae) that has long been subject to conservatorship and that, according to Plaintiff's own allegations, was in conservatorship at the time he purchased his shares. *Id*. ¶ 6. The legal framework governing conservatorship is the type of background principle that both inheres in the Plaintiff's "property" in share value in Fannie Mae and defines the scope of that property interest. *See Perry Capital v. Lew*, 70 F. Supp. 3d at 240-41 (D.D.C. 2014) (noting that "existing rules, "understandings," or "background principles," derived from legislation governing oversight of the GSEs, including provisions creating the "specter of conservatorship or receivership," inhere in the stock certificates of GSE stock). As has been recognized in the context of Fifth Amendment takings claims (which similarly turn on the existence of a cognizable property interest), regulated financial institutions lack "the fundamental right to exclude the government from [their] property;" as

such, shareholders in those institutions hold "less than the full bundle of property rights." *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1073-74 (Fed. Cir. 1994); *see also Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 957 (Fed. Cir. 1992). The same result holds here.

Since their inception, the GSEs have been subject to federal oversight and regulation. Further, they have been subject to appointment of a conservator, first under the Safety and Soundness Act, 12 U.S.C. § 4619, and more recently under HERA, 12 U.S.C. § 4617. Congress granted FHFA the authority to appoint a conservator "for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2). While Fannie Mae is in conservatorship, FHFA is authorized to take over the assets and conduct Fannie Mae's business, with all the powers of shareholders, directors, and officers, *id*. § 4617(b)(2), including the authority to "transfer or sell any asset or liability" of Fannie Mae, *id*. § 4617(b)(2)(G). Not only does HERA give FHFA the authority to operate Fannie Mae, the statute broadly authorizes FHFA to take any action that FHFA determines to be in the best interests of Fannie Mae. *Id*. § 4617(b)(2)(J). This is the regulatory framework governing the entity in which Plaintiff chose to purchase shares, and as a result he lacks the cognizable property interest that is a necessary prerequisite for the due process claim he attempts to assert.

Plaintiff's alleged property rights are similar to those found insufficient in *Golden Pacific* and *California Housing Securities*. Like the regulators in each of those cases, FHFA possessed the statutory right to place the GSEs into conservatorships, and this right inhered in the Plaintiff's shares. Indeed, in this case, FHFA had already exercised that right at the time Plaintiff bought his shares. *See* Compl. ¶ 10. As a shareholder in regulated financial institutions, Plaintiff lacks the right to exclude others, and specifically lacks the right to exclude federal regulators. *See Golden Pac.*, 15 F.3d at 1073–74. Plaintiff made a voluntary choice to invest in regulated entities and his investment is thus subject to these limitations. *See id*. at 1073 ("Golden Pacific voluntarily entered into the highly regulated banking industry by choosing to invest in the Bank.").

Golden Pacific and *California Housing* "stand for the general notion that investors have no right to exclude the government from their alleged property interests when the regulated institution in which they own shares is placed into conservatorship or receivership." *Perry Capital*, 70 F. Supp. 3d at 242. As the court in *Perry Capital* found, the reasoning from these cases are persuasive in the context of the GSEs and FHFA:

> By statutory definition, the GSEs are subject to governmental control at the discretion of FHFA's director. 12 U.S.C. § 4617(a)(2). Therefore, the GSE shareholders necessarily lack the right to exclude the government from their investment when FHFA places the GSEs under governmental control—*e.g.*, into conservatorship. This conclusion is especially true since the statute explicitly grants FHFA the power to

> assume "all rights ... of the regulated entity, and of any stockholder. . . ." *See* 12 U.S.C. § 4617(b)(2)(i).

Id. at 241–42.

Here, as in *Golden Pacific* and *Perry Capital*, the lack of a cognizable property interest defeats the claim. For these reasons, Plaintiff's asserted property interests are non-cognizable and insufficient to state a claim under the due process clause.

B. Plaintiff Alleges No Illegal Exaction

As discussed above, this Court lacks jurisdiction to entertain Plaintiff's "illegal exaction" claim because it does not fit within the Tucker Act's waiver of sovereign immunity for non-tort claims against the United States seeking monetary relief and "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department." 28 U.S.C. § 1491(a). In order to bring such a claim in district court, it must "not exceed[] $10,000;" otherwise, to the extent there is jurisdiction at all, the claim lies within the exclusive jurisdiction of the Court of Federal Claims. 28 U.S.C. § 1346(a)(2); *see also Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (noting that Court of Federal Claims has jurisdiction over illegal exaction claims "when the exaction is based upon an asserted statutory power"). But even if Plaintiff could somehow pursue an illegal exaction claim in district court in an amount exceeding the Little Tucker Act jurisdictional ceiling, he fails to state such a claim here.

Fundamentally, Plaintiff's claim fails because "[t]here can be no illegal exaction . . . if the money exacted was never the property of [the plaintiff.]" *Tex. State Bank v. United States*, 423 F.3d 1370, 1380–81 (Fed. Cir. 2005). As discussed above, Plaintiff can claim no cognizable property interest in the value of his shares in Fannie Mae, and, as is the case in the context of his due process claim, the "lack of a property interest" is "fatal" to Plaintiff's illegal exaction claim. *Id*.

Moreover, an illegal exaction claim can be maintained only "when the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum that was improperly paid, extracted, or taken from [him] in contravention of the Constitution, a statute, or a regulation.'" *Piszel v. United States*, 833 F.3d 1366, 1382 (Fed. Cir. 2016) (quoting *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572–73 (Fed. Cir. 1996)). Here, Plaintiff has not alleged that he paid any money to the government, either directly or indirectly, and appears to base his claim on the same deprivation of share value that he relies on to plead a due process violation. But according to those allegations, as was the case in *Piszel*, "there was no exaction . . . because there was no payment." *Id*.; *see also Auto Club Ins. Ass'n v. United States*, 103 Fed. Cl. 268, 273 (Ct. Fed. Claims 2012) (no illegal exaction claim where the plaintiff "has not paid any funds to the federal government, the government is not keeping any funds belonging to Plaintiff, nor has

a federal agency . . . assessed any payment from Plaintiff based on a federal statute or regulation").[9]

CONCLUSION

For the foregoing reasons, Treasury respectfully requests that the Court grant its motion and dismiss Plaintiff's Complaint with prejudice.

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Respectfully submitted,

CHAD READLER
Acting Assistant Attorney General

DIANE KELLEHER
Assistant Branch Director

/s/ R. Charlie Merritt
R. CHARLIE MERRITT
Trial Attorney (VA Bar No. 89400)
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
Tel. (202) 616-8098
Fax (202) 616-8460
Email: robert.c.merritt@usdoj.gov

CRAIG CARPENITO
United States Attorney

KRISTIN L. VASSALLO
Assistant United States Attorney
970 Broad Street, Suite 700
Newark, NJ 07102
Tel. (973) 645-2835
Fax (973) 645-2010
Email: kristin.vassallo@usdoj.gov

Attorneys for Defendant U.S. Department of the Treasury

[9] Plaintiff's citation to the Court of Federal Claims' decision in *Starr International Company v. United States*, 121 Fed. Cl. 428, 435 (Ct. Fed. Claims 2015), does not change this point because the *Starr* opinion was vacated by the Federal Circuit. *See* 856 F.3d 953, 957 (Fed. Cir. 2017) ("We therefore vacate the Claims Court's judgment that the Government committed an illegal exaction . . .").