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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DAVID J. VOACOLO, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, and UNITED STATES of AMERICA, Defendants.	Civil Action No. 17-5667 (BRM)(LHG) **NOTICE OF MOTION TO DISMISS COMPLAINT PURSUANT TO FED.R.CIV.P. 12(b)(1) and 12(b)(6)**

TO: Ravi P. Shah
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Attorneys for Plaintiff

PLEASE TAKE NOTICE that on Monday, May 21, 2018, at 10 a.m. or as soon thereafter as counsel may be heard, Proposed Intervenor/Defendant Federal Finance Housing Agency ("FHFA") and Defendant Federal National Mortgage Association ("Fannie Mae") will move, by and through their undersigned counsel, before the Honorable Brian R. Martinotti, U.S.D.J., Clarkson S. Fisher Building & U.S. Courthouse, 402 East State Street, Trenton, New Jersey, for

entry of an Order dismissing Plaintiff's Verified Class Action Complaint pursuant to Fed.R.Civ.P. 12(b)(1) and Fed.R.Civ.P. 12(b)(6).

PLEASE TAKE FURTHER NOTICE that, in support of this motion, FHFA and Fannie Mae will rely on the Memorandum of Law submitted herewith, together with any papers they may submit in reply to any opposition filed.

PLEASE TAKE FURTHER NOTICE that a proposed form of Order is also submitted.

Date: March 26, 2018

Respectfully submitted,

/s/ Thomas R. Curtin
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DAVID J. VOACOLO, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, and UNITED STATES OF AMERICA, Defendants	: : : : : : : :	Civil Action No. 17-05667 (BRM)(LHG) **Motion Returnable: May 21, 2018**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT FEDERAL NATIONAL MORTGAGE ASSOCIATION AND PROPOSED INTERVENOR FEDERAL HOUSING FINANCE AGENCY'S MOTION TO DISMISS THE COMPLAINT

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In September 2008, pursuant to the Housing Economic Recovery Act ("HERA"), 12 U.S.C. § 4617(a), the Federal Housing Finance Agency's Director placed Defendant Federal National Mortgage Association ("Fannie Mae") into conservatorship. *See* Verified Class Action Complaint ("Complaint" or "Compl.") ¶ 4. Pursuant to its authority under HERA, Defendant the Department of Treasury ("Treasury") and the Conservator, on behalf of Fannie Mae, entered into a Senior Preferred Stock Purchase Agreement (the "PSPA"), through which Treasury agreed to infuse hundreds of billions of taxpayer dollars into Fannie Mae as needed. As consideration for this massive commitment, the PSPA gave Treasury a comprehensive bundle of rights—including the right to a 10% dividend based on the total amount drawn by Fannie Mae from Treasury, known as the liquidation preference. As required by the terms of the PSPA, Treasury began infusing billions of dollars into Fannie Mae in each quarter in which its liabilities exceeded its assets. On August 17, 2012, FHFA, the Conservator and Treasury executed the Third Amendment to the PSPA, which replaced the fixed-rate 10% annual dividend with a variable dividend in the amount (if any) of Fannie Mae's net worth.

Plaintiff David J. Voacolo alleges that he purchased Fannie Mae stock in August 2009, after the conservatorship commenced, for $0.77 per share. Compl. ¶ 6. He claims that the price should have increased to $35.00 per share—more

than 45 times what he paid for them—or $1.75 million in total. *Id.* at ¶ 10. Plaintiff blames Defendants Fannie Mae and Treasury for this "deprivation," and demands $5 million as compensation. *See id.* at ¶¶ 10-11, 16.

Plaintiff alleges that the Third Amendment deprived him of his due process rights because he "had no involvement in the entering of the Third Amendment, nor had he had an opportunity to have his objection heard." *Id.* ¶¶ 12-13. He also contends that the Third Amendment constituted an illegal exaction. *Id.* ¶ 13. He claims that Fannie Mae and FHFA led Fannie Mae shareholders to believe that FHFA's "conservatorship would end once Fannie Mae was deemed solvent," but that they had always intended "that the conservatorship would, in reality, continue until such time as Defendant U.S. Treasury deems that taxpayers have received a sufficient return on their investment." *Id.* ¶ 15.

Plaintiff's lawsuit fails for several reasons. First, Fannie Mae, a private entity, is not a proper party to this action because due process and illegal exaction claims can be brought only against the United States. Second, Plaintiff's due process and illegal exaction claims fail because he lacks a cognizable property interest. Third, Plaintiff's claims are inherently derivative in nature, not direct, and Plaintiff lacks the right to bring a derivative action. Fourth, the district court lacks jurisdiction over Plaintiff's illegal exaction claim because he seeks damages in excess of $10,000. Fifth, Plaintiff's illegal exaction claim fails because such a

claim can succeed only if a plaintiff has actually paid money to the United States, *not* when a plaintiff alleges that he did not achieve gains to which he believes he is entitled.[1]

STATEMENT OF FACTS

I. FANNIE MAE AND FHFA

Fannie Mae, a corporation organized and existing under the laws of the United States, was established as a government sponsored enterprise to provide stability and liquidity to the secondary housing market. 12 U.S.C. § 1716(1), (4). Pursuant to its statutory mission, Fannie Mae owns or guarantees millions of home loans throughout the United States.

The Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654, which Congress enacted on July 30, 2008, established FHFA as an independent federal agency. FHFA is the primary regulatory and oversight authority for Fannie Mae and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (together, "the Enterprises").

In September 2008, pursuant to HERA, 12 U.S.C. § 4617(a), FHFA's Director placed the Enterprises into conservatorships. *See* Compl. ¶ 4. In its capacity as Conservator, FHFA succeeded to "all rights, titles, powers, and

[1] In addition to the arguments discussed herein, Fannie Mae (and FHFA as proposed intervenor) hereby incorporate by reference the argument in Treasury's brief that Plaintiff's claims are barred by claim preclusion. *See* Treasury Br., Section II.

privileges" of the Enterprises and their respective stockholders, boards of directors and officers. *See* 12 U.S.C. § 4617(b)(2)(A)(i). Accordingly, the Conservator is authorized to participate, at its discretion, in litigation involving the Enterprises in a manner consistent with the Conservator's duties. In addition, FHFA is empowered as Conservator to "take such action as may be — (i) necessary to put [the Enterprises] in a sound and solvent condition; and (ii) appropriate to . . . preserve and conserve the assets and property of [the Enterprises]," 12 U.S.C. § 4617(b)(2)(D), and has authority to "take over the assets of and operate [the Enterprises] with all the powers of the shareholders, the directors, and the officers of [the Enterprises] and conduct all business of [the Enterprises]," 12 U.S.C. § 4617(b)(2)(B)(i).

HERA amended the Enterprises' statutory charters to grant the United States Treasury authority to purchase securities issued by the Enterprises, so long as they reached "mutual agreement" on the terms. *See* 12 U.S.C. § 1719(g)(1)(A) (Fannie Mae); 12 U.S.C. § 1455*(l)*(1)(A) (Freddie Mac). Pursuant to this authority, Treasury and the Conservator, on behalf of the Enterprises, entered into two Senior Preferred Stock Purchase Agreements (the "PSPAs"), one for each Enterprise, through which Treasury agreed to infuse hundreds of billions of taxpayer dollars into the Enterprises as needed. As consideration for this massive commitment, the PSPAs gave Treasury a comprehensive bundle of rights—including (1) a senior

liquidation preference that started at $1 billion per Enterprise and increases dollar-for-dollar whenever the Enterprises draw Treasury funds, (2) a requirement that the Enterprises pay Treasury a 10% annual dividend, assessed quarterly, based on the total amount of liquidation preference, (3) an annual fee (known as the "periodic commitment fee") intended to compensate Treasury for its ongoing commitment, and (4) warrants to acquire 79.9% of the Enterprises' common stock. *See* Amended & Restated Senior Preferred Stock Purchase Agreement (Sept. 26, 2008).[2] Treasury's acquisition of these rights in connection with the PSPAs is consistent with Congress's explicit statutory requirement that Treasury "protect the taxpayers" when exercising its new statutory authority to acquire interests in the Enterprises. 12 U.S.C. §§ 1719(g)(1)(C), 1455(*l*)(1)(C),.

As required by the terms of the PSPAs, Treasury began infusing billions of dollars into Fannie Mae in each quarter in which its liabilities exceeded its assets. Due to the substantial amounts drawn from Treasury, the Enterprises' dividend obligations—calculated as 10% of the Treasury liquidation preference—were also substantial. Between 2009 and 2011, the Enterprises' net worth was insufficient to pay the Treasury dividend, and thus the Enterprises drew billions more from

[2] *Available at* https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2008-9-26_SPSPA_FannieMae_RestatedAgreement_N508.pdf (Fannie Mae); https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2008-9-26_SPSPA_FreddieMac_RestatedAgreement_508.pdf (Freddie Mac).

Treasury to make their dividend payments. Those draws, in turn, increased Treasury's liquidation preference and the Enterprises' future dividend obligations. While the PSPAs initially capped Treasury's commitment at $100 billion per Enterprise, this amount proved inadequate, and the parties amended the PSPAs via the "First Amendment" to double the cap to $200 billion per Enterprise. When it appeared that even that amount might be insufficient, the parties amended the PSPAs again via a "Second Amendment," which permitted the Enterprises to draw *unlimited* amounts from Treasury to cure net-worth deficits through 2012. Under the Second Amendment, Treasury's commitment became fixed at the end of 2012, and future draws would reduce the remaining funds available. By June 30, 2012, the Enterprises were obligated to pay Treasury approximately $19 billion per year—an amount that exceeded the Enterprises' average historical earnings per year.[3]

On August 17, 2012, FHFA, as Conservator of the Enterprises, and Treasury executed the Third Amendment to the PSPAs, Compl. ¶ 8, which (1) eliminated the fixed-rate 10% annual dividend, (2) added a quarterly variable dividend in the amount (if any) of each Enterprise's positive net worth, subject to a declining

[3] *See* Fannie Mae, Quarterly Report (Form 10-Q), at 4 (Aug. 8, 2012) ("The amount of this [$11.7 billion] dividend payment exceeds our reported annual net income for every year since our inception."), http://goo.gl/bGLVXz; Freddie Mac, Quarterly Report (Form 10-Q), at 8 (Aug. 7, 2012) ("As of June 30, 2012, our annual cash dividend obligation . . . of $7.2 billion exceeded our annual historical earnings in all but one period."), http://goo.gl/2dbgey.

reserve, and (3) suspended the periodic commitment fee while the quarterly variable dividend is in effect. *See* Third Amendment to Amended & Restated Senior Preferred Stock Purchase Agreement ¶¶ 2-4.[4] The Third Amendment went into effect on January 1, 2013. *Id.* ¶¶ 2-3.

II. SUMMARY OF CASE

On August 2, 2017, Plaintiff David J. Voacolo filed a Verified Class Action Complaint ("Complaint") against Fannie Mae and the United States. Plaintiff claims that he purchased 64,000 shares of Fannie Mae's stock for seventy-seven cents per share in August 2009,[5] "relying on statements by the Defendants that the conservatorship would terminate once Defendant Fannie Mae became solvent again." Compl. ¶ 6. Plaintiff later sold some of these shares but continues to hold 50,000 of them. *Id.* Plaintiff claims that the Third Amendment has deprived him of the value of his shares, which he estimates would now be worth $35.00 each (more than 45 times what he paid for them), for a total of $1,750,000, "[i]f not for the operation of the Third Amendment." *Id.* ¶ 10.

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[4] *Available at* https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2012-8-17_SPSPA_FannieMae_Amendment3_508.pdf (Fannie Mae); https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2012-8-17_SPSPA_FreddieMac_Amendment3_N508.pdf (Freddie Mac).

[5] Plaintiff does not specify whether his shares are common stock or preferred stock, but the price for which he purchased them suggests that they are common shares. *See* http://www.nasdaq.com/symbol/fnma/historical (ticker symbol "FNMA") (showing prices around 77 cents for Fannie Mae common stock in early August 2009).

Plaintiff alleges that the Third Amendment deprived him of his due process rights under the Fifth Amendment to the U.S. Constitution because he "had no involvement in the entering of the Third Amendment, nor had he had an opportunity to have his objection heard." *Id.* ¶¶ 12-13. He also contends that the Third Amendment constituted an illegal exaction. *Id.* ¶ 13. He claims that Fannie Mae and the United States led potential shareholders to believe that "the conservatorship would end once Fannie Mae was deemed solvent," in order to induce them to invest in Fannie Mae. *Id.* ¶ 15. Plaintiff contends that such representations were false and that Defendants had always intended "that the conservatorship would, in reality, continue until such time as Defendant U.S. Treasury deems that taxpayers have received a sufficient return on their investment." *Id.* Plaintiff seeks a judgment of $5,000,000, *id.* ¶ 16, almost three times what he contends his shares would be worth in the absence of the Third Amendment, *see id.* ¶ 10, and about 130 times what he paid for these shares, *see id.* ¶ 6.[6]

[6] On the date Plaintiff filed his Complaint, August 2, 2017, Fannie Mae's stock closed at $2.74, meaning that his shares were worth 3.5 times what he alleges he paid for them. *See* http://www.nasdaq.com/symbol/fnma/historical (ticker symbol "FNMA") (Aug. 2, 2017). On the day before the Third Amendment was executed, Plaintiff's shares closed at $0.295, which means that his shares were worth approximately 9.1 times more on the date he filed the Complaint than they were prior to the Third Amendment. *Id.* (Aug. 16, 2012). The court may take judicial notice of publicly available stock price data capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be

This action is not Plaintiff's first lawsuit challenging the Third Amendment. On June 26, 2016, Plaintiff filed a complaint in the U.S. District Court for the District of Columbia with allegations very similar to those in this Complaint. *See* Complaint, *Voacolo v. Fed. Nat'l Mortg. Ass'n, et al.*, No. 1:16-cv-1324 (D.D.C. June 26, 2016) ("D.D.C. Complaint"). Plaintiff brought that action against Fannie Mae, FHFA, and the U.S. Department of the Treasury. Plaintiff 's previous suit rested on the same theories as this suit—allegations of a due process violation and an illegal exaction, *see* D.D.C. Complaint ¶¶ 6, 34—but they were framed as part of a claim brought under the Administrative Procedure Act ("APA") rather than as freestanding constitutional claims, *id.* at ¶¶ 28-36.[7] Plaintiff demanded $2,500,000 in damages, half of what he demands now. *Id.*, Relief Requested ¶ B. FHFA and Fannie Mae filed a joint motion to dismiss, and Treasury filed a motion to dismiss.

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questioned—here, the Nasdaq website. *See In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1331 (3d Cir. 2002) (taking judicial notice of stock price data compiled by the Dow Jones news service); *see also Di Donato v. Insys Therapeutics Inc.*, No. CV-16-00302-PHX-NVW, 2017 WL 3268797, at *18 (D. Ariz. Aug. 1, 2017) (taking judicial notice of historical stock prices from the official Nasdaq website).

[7] Numerous other lawsuits have been brought to challenge the Third Amendment under the APA. So far, all of them have been dismissed. *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072 (D.C. Cir. 2017), *reissued as modified*, 864 F.3d 591 (D.C. Cir. 2017) (affirming dismissal of APA claims), *cert. denied* (U.S. Feb. 20, 2018); *Robinson v. FHFA*, 876 F.3d 220 (6th Cir. 2017) (same); *Collins v. FHFA*, 254 F. Supp. 3d 841 (S.D. Tex. 2017) (same), *appeal argued*, No. 17-20364 (5th Cir. Mar. 7, 2018); *Saxton v. FHFA*, 245 F. Supp. 3d 1063 (N.D. Iowa 2017) (same), *appeal docketed*, No. 17-1727 (8th Cir. May 24, 2017); *Roberts v. FHFA*, 243 F. Supp. 3d 950 (N.D. Ill. 2017) (same), *appeal argued*, No. 17-1880 (7th Cir. Oct. 30, 2017).

Mot. to Dismiss by Defs.' Fannie Mae & FHFA, *Voacolo*, No. 1:16-cv-1324 (D.D.C. Sept. 20, 2016); Mot. to Dismiss by U.S. Dep't of the Treasury, *Voacolo*, No. 1:16-cv-1324 (D.D.C. Sept. 20, 2016). Plaintiff did not respond to either motion to dismiss, nor did he respond to other filings and court orders, so the court granted the motions to dismiss and dismissed the action without prejudice. *See Voacolo v. Fed. Nat'l Mortg. Ass'n*, 224 F. Supp. 3d 39, 43 (D.D.C. 2016).

ARGUMENT

I. Fannie Mae Is Not a Government Entity for Purposes of Constitutional Claims

Fannie Mae is not subject to due process or illegal exaction claims under the Fifth Amendment because it is a private entity, not a government entity, for purposes of constitutional claims. It is well established that the Fifth Amendment sets forth "rights that a citizen may assert against the government, not against a private party." *LeJon-Twin El v. Marino*, Civ. No. 16-2292, 2017 WL 592232, at *6 (D.N.J. Feb. 14, 2017). Because Fannie Mae is a private party, all of Plaintiff's claims against Fannie Mae fail as a matter of law.

Federal courts have uniformly held that Fannie Mae and similarly situated Freddie Mac are not subject to suit on constitutional claims. *See, e.g.*, *Herron v. Fannie Mae*, 861 F.3d 160, 167-69 (D.C. Cir. 2017) (holding that Fannie Mae is not "part of the government for constitutional purposes"); *Mik v. Fed. Home Loan Mortg. Corp.*, 743 F.3d 149, 168 (6th Cir. 2014) (dismissing a due process claim

against Freddie Mac "because Freddie Mac is not a government actor who can be held liable for constitutional violations").[8] These courts apply *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), in which the Supreme Court "sets forth a three-part standard to determine whether a government-created corporation is part of the government for constitutional purposes." *Herron*, 861 F.3d at 167. *Lebron* states that such a corporation is part of the government only if all of the following three requirements are satisfied: (1) the government created the corporation by special law, (2) for the furtherance of governmental objectives, and (3) retains for itself permanent authority to appoint a majority of the directors of that corporation. *Herron*, 861 F.3d at 167 (citing *Lebron*, 513 U.S. at 400).

Although Fannie Mae was created by Congress for governmental objectives, it is not a government entity under *Lebron* because the government lacks *permanent* control over the corporation. *See, e.g.*, *Northrip v. Fed. Nat'l Mortg. Ass'n*, 527 F.2d 23, 30-32 (6th Cir. 1975).[9] Fannie Mae's statutory charter does

[8] Although the Third Circuit has not directly addressed whether Fannie Mae and Freddie Mac are private entities for purposes of constitutional claims, it has described them as private entities in other contexts. *See, e.g.*, *Delaware County v. Fed. Hous. Fin. Agency*, 747 F.3d 215, 219 (3d Cir. 2014) (Fannie Mae and Freddie Mac "are federally-chartered but *privately owned* corporations that issue publicly traded securities" (emphasis added)); *Keisling v. Renn*, 425 F. Appx. 106, 108 n.2 (3d Cir. May 2, 2011) (explaining that Freddie Mac, as a "private actor," was not amenable to suit under 42 U.S.C. § 1983).

[9] *See also Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1407–09 (9th Cir. 1996) (reaching the same conclusion about Freddie Mac).

not place it under federal government control. *See* 12 U.S.C. §§ 1716b, 1718(a), 1723(b). And FHFA's conservatorship likewise did not establish permanent control. "Although there is no specific termination date, the purpose of the conservatorship is to restore Fannie Mae to a stable condition. 'This is an inherently temporary purpose.'" *Herron*, 861 F.3d at 169 (quoting *Rubin v. Fannie Mae*, 587 F. Appx. 273, 275 (6th Cir. 2014)). Such "indefinite but temporary control does not transform Fannie Mae into a government actor." *Id.* (citing *Lebron*, 513 U.S. at 399); *see also Mik*, 743 F.3d at 168.

The four federal appellate courts to have considered the question agree that, under *Lebron*, FHFA's conservatorship has not transformed Fannie Mae and Freddie Mac into government actors. Along with the D.C. Circuit and the Sixth Circuit, which held in *Herron* and *Mik* that is the Enterprises are not government actors for purposes of *constitutional* claims, the Fourth and Ninth Circuits have recently applied *Lebron* to hold that the Enterprises are not government actors for other purposes. *See Meridian Invs., Inc. v. Fed. Home Loan Mortg. Corp.*, 855 F.3d 573, 579 (4th Cir. 2017) (Freddie Mac was not a government instrumentality for statute of limitations purposes); *U.S. ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1260-61 (9th Cir. 2016) (the Enterprises are not federal instrumentalities under the False Claims Act).

Plaintiff also cannot bring his claims against FHFA in its capacity as

Conservator of Fannie Mae because FHFA is not a government actor when it acts in this capacity.[10] FHFA as Conservator succeeded to "all rights, titles, powers, and privileges" of Fannie Mae. 12 U.S.C. § 4617(b)(2)(A)(i). Pursuant to this statutory language, the Conservator stepped into Fannie Mae's private shoes and thereby "shed[ ] its government character and . . . [became] a private party." *See Herron*, 861 F.3d at 169 (quoting *Meridian Invs.* 855 F.3d at 579); *see also Adams*, 813 F.3d at 1261 (explaining that the FHFA as conservator stepped into Fannie Mae's shoes, and "not the other way around"). The Third Circuit expressly endorsed the reasoning of *Herron* and *Adams* when it held that the Small Business Administration, when acting in its capacity as receiver, is not the government for purposes of the False Claims Act. *U.S. ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497, 503-04 & nn.28-29, 33 (3d Cir. 2017) (citing *Adams*, 813 F.3d at 1260-61, and *Herron v. Fannie Mae*, 857 F. Supp. 3d 87, 94-95 (D.D.C. 2012), *aff'd by Herron*, 861 F.3d 160). Thus, Plaintiff could not redeem his claims by pleading them against the Conservator rather than Fannie Mae.

Neither the Conservator nor Fannie Mae is a government entity subject to suit on constitutional claims, and the claims against Fannie Mae therefore should be dismissed in their entirety.

[10] FHFA has filed an unopposed motion to intervene in its capacity as Conservator concurrently with this motion to dismiss.

II. Plaintiff Lacks a Cognizable Property Interest

Plaintiff's constitutional claims also fail as a matter of law because he has failed to allege a cognizable property interest. "In order to succeed in a due process or takings case under the Fifth Amendment, the plaintiff must first show that a legally cognizable property interest is affected by the Government's action in question." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 428 (3d Cir. 2004). Similarly, the "lack of a property interest . . . is fatal" to an illegal exaction claim. *Texas State Bank v. United States*, 423 F.3d 1370, 1380 (Fed. Cir. 2005). To establish a property interest, a person must show "a legitimate claim of entitlement" to property, not merely "an abstract need or desire for" or "unilateral expectation of" the property. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Plaintiff's purported "property" interest—"what his shares would otherwise be worth" if not for the operation of the Third Amendment, *i.e.*, $1,750,000, Compl. ¶ 10—is not a cognizable property interest for purposes of a due process or illegal exaction claim.

First, damage to stock price is not a protected property interest. The D.C. Circuit addressed this question in *General Electric Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010), holding that "damage to stock price" does "not qualify as [a] constitutionally protected property interest[]" for purposes of the due process clause. 610 F.3d at 128. The D.C. Circuit explained that changes in the price of

stock result not from the government extinguishing or modifying a property interest "but rather from independent market reactions" to a government action. *Id.* at 119-20. If actual "damage to stock price" is not a protected property interest, then Plaintiff certainly cannot claim a property interest in the hypothetical *rise* in stock price that he alleges should have occurred.[11]

Second, the legislative and regulatory environment at the time of Plaintiff's stock purchase confirms that he had no protected property interest in a rise in stock price. "[T]o define the range of interests that qualify for protection as 'property'," courts examine "existing rules or understandings" that stem from the legislative and regulatory environment. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992); *see also Roth*, 408 U.S. at 578 (explaining that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source").

Courts have held that when a federal statute permits regulators to place an entity in conservatorship or receivership, a shareholder in that entity has no protected property interest in the value of the shares. *See, e.g.*, *Golden Pacific*

[11] Even assuming *arguendo* that an effect on stock price could ever qualify as a property interest, Plaintiff's claim that his stock should be worth $35 per share is far too speculative to trigger due process protection given the many factors that could affect the price. A "'purely speculative property interest' . . . cannot be the property interest at the root of a due process claim." *Westchester Cty. Indep. Party v. Astorino*, 137 F. Supp. 3d 586, 624 (S.D.N.Y. 2015) (quoting *Spinelli v. City of N.Y.*, 579 F.3d 160, 169 (2d Cir. 2009)).

Bancorp v. United States, 15 F.3d 1066, 1073-76 (Fed. Cir. 1994). In *Golden Pacific*, a shareholder in a bank argued that the Comptroller of Currency's decision to place the bank into receivership "deprived [the shareholder] of its property within the meaning of the Fifth Amendment" 15 F.3d at 1073. The Federal Circuit explained because the bank was part of a "highly regulated industry"—governed by a statute that gave financial regulators the right to place the bank into conservatorship or receivership—the bank lacked the "right to exclude" the government. *Id.* at 1074-75; *see also Cal. Hous. Sec., Inc. v. United States,* 959 F.2d 955, 959 (Fed. Cir. 1992) (reaching the same conclusion regarding another financial institution). Because the shareholder "chose to invest in an entity—the Bank—which did not possess the right to exclude others," the shareholder could not allege that it possessed a property interest protected by the Fifth Amendment. *Golden Pacific*, 15 F.3d at 1074-75.

Plaintiff's assertion that he has a protected property interest is even weaker than that of the shareholder in *Golden Pacific*. Plaintiff did not purchase the shares with the awareness that Fannie Mae *could* be placed into conservatorship; he purchased his shares after Fannie Mae was *already* in conservatorship (and, thus, after "all rights, titles, powers, and privileges" of Fannie Mae had been statutorily transferred to the Conservator, *see* 12 U.S.C. § 4617(b)(2)(A)(i)). *See* Compl. ¶ 6. He alleges that Fannie Mae was insolvent in September 2008, that the Conservator

was appointed on September 7, 2008, and that he purchased his shares in August 2009 following that appointment. Compl. ¶¶ 3-6. Indeed, Plaintiff's subjective expectation of an enormous return on his investment apparently *depended* on the conservatorship and on Treasury's investment in Fannie Mae. *See id.* ¶ 6 (stating that he "rel[ied] on statements by the Defendants that the conservatorship would terminate once Defendant Fannie Mae became solvent again" when making his purchase). Like the shareholder in *Golden Pacific*, Plaintiff "voluntarily entered" a highly-regulated industry by "choosing to invest" in an entity that lacked the fundamental right to exclude others.[12] *See* 15 F.3d at 1073. Accordingly, Plaintiff lacks a cognizable property interest in his shares at all—let alone a property interest in a 45-fold increase in the value of his shares.

In *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208 (D.D.C. 2014), the U.S. District Court for the District of Columbia held that shareholders of Fannie Mae and Freddie Mac who challenged the Third Amendment did not have a cognizable property interest under the Fifth Amendment for purposes of a takings claim.[13]

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[12] Plaintiff's claim that he had a right to "involvement" in the decision to enter the Third Amendment, Compl. ¶ 12, fails because the Conservator succeeded to "all rights, titles, powers, and privileges of [Fannie Mae], and of any stockholder" of Fannie Mae. 12 U.S.C. § 4617(b)(2)(A)(i). Moreover, the D.C. Circuit has ruled that the stock certificates of Fannie Mae and Freddie Mac did not provide a right to vote on the Third Amendment. *Perry Capital*, 864 F.3d at 629.

[13] The *Perry Capital* plaintiffs did not appeal the dismissal of their takings claim to the D.C. Circuit. *See Perry Capital*, 864 F.3d at 603 n.6.

Applying *Golden Pacific* and *California Housing Securities*, the *Perry Capital* court concluded that Enterprise shareholders "necessarily lack the right to exclude the government from their investment when FHFA places the [Enterprises] under governmental control—*e.g.*, into conservatorship." *Id.* at 241. "[B]y lacking the right to exclusive possession of their stock certificates—and therefore lacking a cognizable property interest—at the time of the Third Amendment, the plaintiff shareholders could not have 'developed a historically rooted expectation of compensation' for any possible seizures that occurred during FHFA's conservatorship." *Id.* at 245 (quoting *Cal. Hous.*, 959 F.2d at 958). Because Plaintiff lacks a Fifth Amendment property interest for the same reasons as the shareholders in *Perry Capital*, his due process and illegal exaction claims fail.

Plaintiff attempts to manufacture a cognizable property interest by pointing to a "Questions and Answers" page on FHFA's website, which states: "Upon the Director's determination that the Conservator's plan to restore the Company to a safe and solvent condition has been completed successfully, the Director will issue an order terminating the conservatorship."[14] Compl. ¶ 4. The sentence Plaintiff cites itself indicates that the Director has full discretion to make the "determination" whether the Conservator's plan has been completed successfully.

[14] Federal Housing Finance Agency, "FAQs: Questions and Answers on Conservatorship," Sept. 7, 2008, *available at* https://www.fhfa.gov/Media/PublicAffairs/Pages/Fact-Sheet-Questions-and-Answers-on-Conservatorship.aspx.

It does not purport to make any enforceable promises to shareholders about the timing or outcome of that process.

Plaintiff argues that this statement was "made in order to encourage potential shareholders" to invest in Fannie Mae, while concealing the reality that "the United States intended that the taxpayers would reap a profit from the Treasury's investment in Defendant Fannie Mae." Compl. ¶ 14-15.[15] Plaintiff's argument ignores the fact that HERA and the PSPAs, not a cherry-picked sentence from FHFA's website, establish the "rules or understandings" that determine whether Plaintiff has a property interest.[16] And HERA and the PSPAs confer broad discretion to the Conservator and Treasury. As the D.C. Circuit has explained, HERA thus "does not compel [the Conservator] in any judicially enforceable sense, to preserve and conserve Fannie's and Freddie's assets and to return the

[15] Plaintiff's premise that Defendants were trying to encourage investment in Fannie Mae makes little sense because Plaintiff purchased his shares on the *secondary* market, as did every other shareholder (except Treasury) who purchased shares during conservatorship. Plaintiff does not explain why Defendants would have had any incentive to encourage secondary market share purchases that did not infuse any new capital into Fannie Mae.

[16] Courts have rejected similar attempts by other litigants to invoke cherry-picked statements by FHFA to limit the broad discretion conferred by HERA. *See, e.g.*, *Robinson v. FHFA*, 223 F. Supp. 3d 659, 669 (E.D. Ky. 2016) (relying on HERA's "statutory text to determine the scope of FHFA's powers and responsibilities" and describing "Plaintiff's references to various policy statements and internal communications" as "unavailing"), *aff'd by* 876 F.3d 220 (6th Cir. 2017); *Perry Capital*, 70 F. Supp. 3d at 228 n.20 (similar), *aff'd by Perry Capital*, 864 F.3d 591.

Companies to private operation." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 607 (D.C. Cir. 2017).

Moreover, any contention that benefitting taxpayers was an impermissible goal is belied by 12 U.S.C. § 1719(g), the provision authorizing Treasury to invest in Fannie Mae, which expressly instructs Treasury to "protect the taxpayer" when making its investment. 12 U.S.C. § 1719(g)(1)(B), (C). The PSPAs themselves include provisions designed to protect the taxpayer, including a liquidation preference for Treasury, PSPA § 3.3, a Periodic Commitment Fee "to fully compensate" Treasury (and therefore the taxpayer) for its ongoing commitment to support the Enterprises, *id.* § 3.2, and a provision requiring Treasury's approval before the Conservatorship can be terminated, *id.* § 5.3. HERA and the PSPAs were publicly available at the time Plaintiff purchased his shares, so he should have been fully aware that the Conservator and Treasury were not required to operate Fannie Mae for the sole benefit of shareholders.

III. Plaintiff's Claims Are Inherently Derivative, Not Direct, and HERA Deprives Plaintiff of the Right to Bring Derivative Claims on Behalf of Fannie Mae

A. Plaintiff's Claims Must Be Dismissed Because They Are Inherently Derivative

Plaintiff argues that he has been harmed because the Third Amendment supposedly depressed the market price of Fannie Mae common stock. *See, e.g.*, Compl. ¶ 10. However, claims based on the market value of stock are inherently derivative because they affect shareholders collectively, constituting a harm to the

corporation rather than individual shareholders. "Where all of a corporation's stockholders are harmed and would recover pro rata in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature." *In re SemCrude, L.P.*, 796 F.3d 310, 319 (3d Cir. 2015) (quoting *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008)); *see also Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732 (3d Cir. 1970) (under federal law, "[a] stockholder of a corporation does not acquire standing to maintain an action in his own right, as a shareholder, when the alleged injury is inflicted upon the corporation and the only injury to the shareholder is the indirect harm which consists in the diminution in value of his corporate shares . . . .").[17]

When the alleged harm is derivative in nature, stockholders have no standing to bring claims on their own behalf. Rather, because only the company (or shareholders acting derivatively on behalf of the company) has standing to pursue claims for derivative injuries, any purportedly direct claims based on the alleged derivative injuries must be dismissed. *See, e.g., Winer Family Tr. v. Queen*, 503

[17] Because Plaintiff pleads claims under the U.S. Constitution and HERA is a federal statute, federal law governs whether these claims are direct or derivative. *See, e.g., Starr Int'l Co. v. United States*, 856 F.3d 953, 965 (Fed. Cir. 2017). However, the applicable law makes little difference here, since Defendants are not aware of any jurisdiction that would permit claims for damage to stock value like Plaintiff's to be brought as direct claims. *See, e.g., Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) ("Delaware courts have long recognized that actions charging 'mismanagement which depress[ ] the value of stock [allege] a wrong to the corporation; *i.e.*, the stockholders collectively, to be enforced by a derivative action'").

F.3d 319, 338 (3d Cir. 2007) (upholding dismissal of a stockholder's purportedly direct claims alleging "diminution in value of [the company's] stock" because the claims were inherently derivative, and the company "alone ha[d] standing to sue" based on the alleged injury). By alleging harm to the value of his shares, Plaintiff pleads a classically derivative injury, and his Complaint must be dismissed because Plaintiff lacks standing to bring a direct action for that injury.

The constitutional nature of Plaintiff's claims does not change the fact that they are derivative. Courts have recognized the "firmly established" rule that financial institution shareholders lack standing to pursue claims, including constitutional claims, based on alleged harm to the value of their stock. *Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981) (due process and equal protection claims based on harm to stock value are derivative); *see also Sinclair v. Hawke*, 314 F.3d 934, 939 (8th Cir. 2003) (similar); *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*, 20 F.3d 1311, 1316-17 (4th Cir. 1994) (shareholder had no direct constitutional claim for injury resulting when allegedly unconstitutional state statute caused "the corporation's loss of revenue and earnings").

B. HERA Bars Derivative Claims

If Plaintiff's claims are deemed derivative, they fail because HERA bars prosecution of such shareholder claims during conservatorship. Congress provided

that when FHFA is appointed Conservator, it "immediately succeed[s] to . . . *all rights*, titles, powers, and privileges of the [Enterprises], and *of any stockholder*" of the Enterprises. 12 U.S.C. § 4617(b)(2)(A)(i) (emphases added). Here, Plaintiff, a stockholder, purports to assert "rights" of a stockholder under the Fifth Amendment. But the Conservator now holds "all" such rights exclusively, leaving Plaintiff with no stockholder rights or interests to assert.

Courts have uniformly held that HERA's transfer of "all rights, titles, powers, and privileges" of the Enterprises to the Conservator bars derivative actions that assert the Enterprises' rights. For example, in *Kellmer v. Raines*, 674 F.3d 848, 852 (D.C. Cir. 2012), the D.C. Circuit affirmed the district court's substitution of the Conservator in place of the plaintiffs—shareholders of Fannie Mae—who had asserted a variety of shareholder derivative 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). Likewise, *Perry Capital* held that HERA transfers to FHFA "without exception the right to bring derivative suits." *Perry*

Capital, 864 F.3d at 624; *see also Cont'l W. Ins. Co.*, 83 F. Supp. 3d 828, 840 n.6 (S.D. Iowa 2015) ("HERA grants all shareholder rights, including the right to bring a derivative suit, to FHFA.").[18]

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). Together, these provisions manifest Congress's intent to vest all control over the Enterprises exclusively in the Conservator, not the shareholders.[19]

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[18] Although two decisions interpreting FIRREA adopted a "conflict of interest" exception that would allow shareholders of entities in receivership under FIRREA to bring derivative suits under certain circumstances, *see First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1294-95 (Fed. Cir. 1999); *Delta Savs. Bank v. United States*, 265 F.3d 1017, 1021-24 (9th Cir. 2001), there is no such "conflict of interest" exception in HERA, and every court that has addressed this issue under HERA has soundly rejected the creation of any such exception. *See Perry Capital*, 864 F.3d at 625 (finding such an exception would be "contrary" to "the plain statutory text" and holding that "the Succession Clause does not permit shareholders to bring derivative suits on behalf of the Companies even where the FHFA will not bring a derivative suit due to a conflict of interest"); *Saxton*, 245 F. Supp. 3d at 1079 ("The court finds no ambiguity in the provision's meaning and, therefore, refuses to judicially alter the provision to allow for an unstated conflict-of-interest exception."); *Edwards v. Deloitte & Touche, LLP*, No. 16-21221-CIV, 2017 WL 1291994, at *7 (S.D. Fla. Jan. 18, 2017) ("Looking at the plain wording of HERA's succession clause, there is no exception to the bar on derivative suits."); *Pagliara v. Fed. Home Loan Mortg. Corp.*, 203 F. Supp. 3d 678, 691 n.20 (E.D. Va. 2016) ("All courts known to have considered that [conflict of interest] argument in the context of HERA have found the argument unavailing.").

[19] Indeed, numerous courts have held that Section 4617(f) *itself*

IV. The Court Lacks Jurisdiction Over Plaintiff's Illegal Exaction Claim Against the United States Because He Seeks Damages in Excess of $10,000

Even if Fannie Mae could be deemed to be the United States, *but see supra* Section I, this Court would lack jurisdiction over Plaintiff's illegal exaction claim against the United States because the requested damages exceed $10,000. The Court of Federal Claims has exclusive jurisdiction over constitutional claims against the United States that exceed $10,000 in amount. *See* 28 U.S.C. § 1346(a)(2). Federal district courts have concurrent jurisdiction with the Court of Federal Claims over any "civil action or claim against the United States . . . founded . . . upon the Constitution" only with respect to claims "not exceeding $10,000 in amount." *Id.*

Plaintiff seeks $5,000,000 in damages from the United States and Fannie Mae for the purported illegal exaction. Compl. ¶ 16. That requested relief far exceeds the statutory limit on this Court's jurisdiction under § 1346(a)(2). For this

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displaces shareholder plaintiffs' attempts to pursue derivative claims. *See Gail C. Sweeney Estate Marital Tr. v. U.S. Treasury Dep't.*, 68 F. Supp. 3d 116, 126 (D.D.C. 2014) (concluding shareholder "plaintiff's lawsuit would 'affect' and 'interfere' with the Conservator's exercise of its powers"); *In re Fed. Home Loan Mortg. Corp. Litig.*, 643 F. Supp. 2d 790, 799 (E.D. Va. 2009) ("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 action that would 'restrain or affect' FHFA's discretion, which HERA explicitly prohibits"), *aff'd sub nom. Kellmer*, 674 F.3d 848.

reason alone, the Court does not have jurisdiction over Plaintiff's illegal exaction claim against the United States. *See, e.g., Summit Bank v. U.S. Dep't of Treasury*, 24 F. Supp. 2d 382, 385-88 (D.N.J. 1998) (dismissing monetary claims against the United States for damages exceeding $10,000 because the Court of Federal Claims has exclusive jurisdiction over such claims).[20]

V. Plaintiff Fails to Allege an Illegal Exaction Because He Has Not Paid Any Money to the Government

Even if this Court had jurisdiction over Plaintiff's illegal exaction claim, this claim would fail as a matter of law because Plaintiff has not alleged that he paid any money to the government. "[A]n illegal exaction claim may be maintained 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, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996) (internal quotation marks omitted). In short, an illegal exaction claim requires that "the Government has the citizen's money in its pocket." *Id.* at 1573.

Plaintiff has not alleged that he paid any money to the United States, "directly or in effect." He has alleged only that he purchased Fannie Mae shares on the secondary market and that the 45-fold increase to which he believes he is

[20] Plaintiff does not appear to plead a takings claim, but even if his allegations could be construed as the basis of a takings claim, § 1346(a)(2) would deprive this Court of jurisdiction over that claim as well.

entitled did not occur. Even assuming *arguendo* that Fannie Mae is a government entity, which it is not, *see supra* Section I, nothing in Plaintiff's Complaint states that he paid money "directly" to the government.

Nor has Plaintiff paid any money "in effect" to the United States. Courts applying the "in effect" language have made clear that it does not apply to any situation when a plaintiff loses money as a result of government action. Rather, "an 'in effect' illegal exaction may occur when the government requires a plaintiff to make a payment on its behalf to a third-party or when the government exacts property which it later sells and for which it receives money." *eVideo Owners v. United States*, 126 Fed. Cl. 95, 102 (2016). These situations are plainly inapplicable here, since Plaintiff does not allege that the government required him to make a payment on its behalf, nor does he allege that the government exacted property from him that it later sold. Courts have emphasized repeatedly that an illegal exaction claim does not apply when, as here, there is no alleged payment. In *Lummi Tribe of the Lummi Reservation, Washington v. United States*, 870 F.3d 1313 (Fed. Cir. 2017), the Federal Circuit dismissed an illegal exaction claim based on the government's failure to disperse funds, explaining: "An illegal exaction claim must be based on property *taken* from the claimant, not property left *unawarded* to the claimant, rendering the Tribes' exaction claim invalid on its face." 870 F.3d at 1319. Similarly, in *Piszel v. United States*, 833 F.3d 1366 (Fed.

Cir. 2016), the Federal Circuit rejected a former Freddie Mac officer's claim that Freddie Mac's failure to pay him severance (in accordance with the Conservator's instructions) "was in essence a payment [by the officer] sufficient to amount to an illegal exaction." 833 F.3d at 1382.

Plaintiff cites the decision in *Starr International Co. v. United States*, 121 Fed. Cl. 428 (Fed. Cl. 2015) for the proposition that "taking 79.9% of the shares of AIG was an illegal exaction in violation of the Due Process Clause." 121 Fed. Cl. at 434-35; Compl. ¶ 13. This decision was vacated by the Federal Circuit before Plaintiff even filed suit, on the ground that the shareholder lacked standing to bring a direct illegal exaction claim. *Starr Int'l Co. v. United States*, 856 F.3d 953, 957 (Fed. Cir. 2017). "[V]acated decisions have no legal effect whatever. They are void." *United States v. W.B.H.*, 664 F.3d 848, 853 n.3 (11th Cir. 2011) (internal quotation marks omitted). Moreover, the Court of Federal Claims' decision in *Starr* is inapplicable on its own terms, as it was based on the court's conclusion that the Federal Reserve lacked statutory authority to take over AIG in the manner it did. *Starr*, 121 Fed. Cl. at 468-72. The Third Amendment was within the Conservator's statutory authority, in contrast, as every court to consider the question has ruled. *See, e.g.*, *Perry Capital*, 864 F.3d at 607 ("FHFA's execution of the Third Amendment falls squarely within its statutory authority . . . ."); *Robinson*, 876 F.3d at 235 (concluding that the appellant "has failed to

demonstrate that FHFA or Treasury exceeded the statutory authority granted to them by HERA" when they agreed to the Third Amendment); *Jacobs v. Fed. Hous. Fin. Agency*, No. 1:15-cv-708-GMS, 2017 WL 5664769, at *3 (D. Del. Nov. 27, 2017) ("This court concludes, like several other courts, that [FHFA] acted within its powers under HERA when it entered into the Third Amendment."), *appeal docketed*, No. 17-3794 (3d Cir. Feb. 27, 2018); *Collins*, 254 F. Supp. 3d at 846 (plaintiffs "fail to demonstrate that the FHFA's conduct was outside the scope of its broad statutory authority as conservator"); *Saxton*, 245 F. Supp. 3d at 1076 ("FHFA's adoption of the Third Amendment was within its powers as conservator."); *Roberts*, 243 F. Supp. 3d at 963 ("under the facts alleged, neither FHFA nor Treasury acted outside the scope of its authority under [HERA]").

CONCLUSION

For the foregoing reasons, the Court should grant this motion and dismiss Plaintiff's Complaint with prejudice.

DATED this 26th day of March, 2018.

/s/ Thomas R. Curtin

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DAVID J. VOACOLO, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, and UNITED STATES of AMERICA, Defendants..	Civil Action No. 17-5667 (BRM)(LHG) **ORDER GRANTING MOTION TO DISMISS COMPLAINT**

THIS MATTER having been brought before the Court upon the motion of Proposed Intervenor/Defendant Federal Housing Finance Agency ("FHFA") and Defendant Federal National Mortgage Association ("Fannie Mae") for entry of an Order granting their motion to dismiss the Plaintiff's Verified Class Action Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6), and the Court having considered the papers submitted in support of the motion, and in opposition thereto, and for good cause having been shown,

IT IS on this _____ day of _____, 2018, ORDERED AS FOLLOWS:

1. Plaintiff's Verified Class Action Complaint is hereby dismissed with prejudice.

HON. BRIAN R. MARTINOTTI
United States District Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DAVID J. VOACOLO, Plaintiff, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, and UNITED STATES of AMERICA, Defendants.	Civil Action No. 17-5667 (BRM)(LHG) **CERTIFICATE OF SERVICE**

The undersigned member of the bar of this Court hereby certifies that service was made of Proposed Intervenor/Defendant Federal Housing Finance Agency ("FHFA") and Defendant Federal National Mortgage Association ("Fannie Mae")'s Notice of Motion to Dismiss Plaintiff's Verified Class Action Complaint, Memorandum of Law, text of proposed Order and this Certificate of Service by serving true electronic copies of these documents upon all counsel of record via Electronic Court Filing on March 26, 2018.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

/s/ Kathleen N. Fennelly
Kathleen N. Fennelly

Dated: March 26, 2018