IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA J. ANGEL, Plaintiff, v. THE UNITED STATES, Defendant.	)	No. 20-737C (Chief Judge Sweeney)

DEFENDANT'S MOTION TO DISMISS PRO SE COMPLAINT

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August 18, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA J. ANGEL,	)	
	)	
Plaintiff,	)	No. 20-737C
	)	(Chief Judge Sweeney)
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS PRO SE COMPLAINT

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court dismiss the complaint filed by *pro se* plaintiff, Joshua J. Angel, for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. In support of this motion, we rely upon the complaint and the following brief.

INTRODUCTION

Mr. Angel, an alleged holder of junior preferred stock in the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises or GSEs), challenges a 2012 amendment to a 2008 funding agreement between the Federal Housing Finance Agency (FHFA) (as conservator of Fannie Mae and Freddie Mac) and the Department of the Treasury. Mr. Angel's claims are not new; other Enterprise stockholders have been litigating similar claims in this Court for seven years, and in numerous district courts, and in courts of appeals, across the country for the same length of time. This Court recently issued opinions on the Government's motion to dismiss in 11 shareholder cases, ten of which are now on appeal to the Federal Circuit. *See, e.g.*, *Fairholme Funds, Inc. v.*

United States, 147 Fed. Cl. 1 (2019), *pet. for interlocutory appeal granted*, No. 20-121 (Fed. Cir. Jun. 18, 2020).

The claims at issue are not new to Mr. Angel, either. Indeed, in his complaint, Mr. Angel acknowledges that he has also filed suit in the United States District Court for the District of Columbia. Compl. at 7 n.8. However, he fails to mention that the district court dismissed his complaint as time-barred, and the Court of Appeals for the District of Columbia Circuit affirmed the dismissal on April 24, 2020. *Angel v. Fed. Home Loan Mortg. Corp.*, No. 1:18-cv-01142, 2019 WL 1060805 (D.D.C. Mar. 6, 2019), *aff'd*, __ F. App'x __, 2020 WL 2611025 (D.C. Cir. Apr. 24, 2020).

Like his claims in district court, Mr. Angel's claims in this Court warrant dismissal because they are time-barred. Mr. Angel's allegations stem from a transaction that occurred on August 17, 2012, but Mr. Angel did not file his complaint until June 12, 2020, nearly eight years thereafter. And even accepting as true Mr. Angel's allegation that the breach occurred on January 1, 2013, *see* Compl. ¶¶ 3, 15, 51, the applicable six-year statute of limitations, 28 U.S.C. § 2501, would have expired on January 1, 2019, more than one year before the complaint was filed. Thus, regardless of whether the limitations period ran from August 17, 2012 or January 1, 2013, Mr. Angel's suit should be dismissed as time-barred.

Even if Mr. Angel's claims were timely, the allegations in the complaint do not establish the existence of a contract with the United States, and thus do not fall within the jurisdiction of this Court. Moreover, even assuming the duty that the complaint ascribes to Treasury existed and was enforceable in this Court, the complaint does not allege facts demonstrating that Treasury breached it. Because the Court lacks jurisdiction to entertain the complaint and the claims fail on the merits, this suit should be dismissed.

QUESTIONS PRESENTED

1. Whether the complaint should be dismissed as barred by the statute of limitations for actions filed in this Court, 28 U.S.C. § 2501.

2. Whether the complaint alleges a contract with the United States.

3. Whether the complaint states a claim for breach of contract.

STATEMENT OF THE CASE

I. Background

A. The Enterprises And Conservatorships

Fannie Mae and Freddie Mac are government-sponsored enterprises, chartered by Congress, that provide liquidity to the mortgage market by purchasing residential loans from banks and other lenders, thereby facilitating the ability of lenders to make additional loans. Compl. ¶ 21; *Fairholme*, 147 Fed. Cl. at 15. These entities, which own or guaranty trillions of dollars of residential mortgages and mortgage-backed securities (MBS), have played a key role in housing finance and the United States economy. *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 978 (2018). Over the years, both Enterprises issued multiple series of preferred stock, as well as common stock. Compl. ¶ 21. Although the Enterprises are government-sponsored, the statute that has governed regulation of the Enterprises since 1992 contains two separate provisions specifying that their securities are not guaranteed by the Federal Government:

> The Congress finds that . . . neither the enterprises . . . , nor any securities or obligations issued by the enterprises . . . , are backed by the full faith and credit of the United States.

12 U.S.C. § 4501(4).

> This chapter may not be construed as implying that any such enterprise . . . , or any obligations or securities of such an enterprise . . . , are backed by the full faith and credit of the United States.

Id. § 4503.

During the housing crisis of 2008, the Enterprises "suffered a precipitous drop in the value of their mortgage portfolios[.]" *Perry Capital*, 864 F.3d at 599. "By 2008, the United States economy faced dire straits, in large part due to a massive decline within the national housing market . . . . Given the systemic danger that a Fannie Mae or Freddie Mac collapse posed to the already fragile national economy, among other housing market-related perils, Congress enacted the Housing and Economic Recovery Act ('HERA') on July 30, 2008." *Perry Capital v. Lew*, 70 F. Supp. 3d 208, 215 (D.D.C. 2014) (citing HERA, Pub. L. No. 110-289, 122 Stat. 2654 (2008), *aff'd in relevant part*, 864 F.3d 591). 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.*; Compl. ¶ 4.

HERA also granted the Director of FHFA the authority (which is mandatory, in certain circumstances) to place Fannie Mae and Freddie Mac in conservatorship, with FHFA as conservator, "for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity." 12 U.S.C. § 4617(a)(2). FHFA exercised this authority in September 2008, placing both Fannie Mae and Freddie Mac into conservatorship. Compl. ¶ 4. HERA provides that, upon its appointment as the conservator or receiver, FHFA will "immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity [*i.e.*, Fannie Mae and Freddie Mac], and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. § 4617(b)(2)(A)(i). The statute accords FHFA as conservator the power to "operate" and "conduct all business" of the

Enterprises, *id.* § 4617(b)(2)(B)(i), 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)(ii), and to "transfer or sell" any of the Enterprises' assets or liabilities, *id.* § 4617(b)(2)(G). Immediately upon declaration of conservatorship, FHFA as conservator announced that the Enterprises would not pay common or preferred stock dividends during conservatorship. *See* Fannie Mae, 2008 Annual Report (Form 10-K) (Fannie 2008 10-K) at 24 (Feb. 26, 2009); Freddie Mac, 2008 Annual Report (Form 10-K) (Freddie 2008 10-K) at 15, 27 (Mar. 11, 2009).[1]

FHFA as conservator reconstituted the boards of directors, who would thereafter act at the direction of and with the specific powers delegated by the conservator. FHFA as conservator subsequently delegated to the conservatorship directors authority to take certain specified operational actions, but retained all other powers for itself. Fannie 2017 10-K at 24, 35; Freddie 2008 10-K at 38. Of particular importance in this case, FHFA as conservator did not delegate to the directors of either Enterprise any authority to declare or pay dividends on stock. *See* Fannie Mae, 2011 Annual Report (Form 10-K) (Fannie 2011 10-K) at 207 (Feb. 29, 2012); Freddie Mac, 2011 Annual Report (Form 10-K) (Freddie 2011 10-K) at 325 (Mar. 9, 2012).[2]

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[1] *Available at* https://fanniemae.gcs-web.com/static-files/3699eca3-4bdf-4efc-8c5a-c2bcff38b09a (Fannie 2008 10-K); www.freddiemac.com/investors/financials/pdf/10k_021109.pdf (Freddie 2008 10-K). The Court may take judicial notice of information contained in SEC filings on a motion to dismiss. *See In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 354 n.5 (2d Cir. 2010); *see also Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 779 F.3d 1036, 1043 (9th Cir. 2015).

[2] *Available at* https://fanniemae.gcs-web.com/static-files/8368bbcf-1664-4cb3-8c2a-ca65a8d58289 (Fannie 2011 10-K); http://www.freddiemac.com/investors/financials/pdf/10k_020912.pdf (Freddie 2011 10-K).

B. Treasury's Stock Purchase Agreements With The Enterprises

In addition to establishing the framework for the conservatorships, HERA amended the Enterprises' statutory charters to grant Treasury the authority to purchase securities issued by the Enterprises, so long as Treasury and the Enterprises 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); *see also* Compl. ¶ 4. Congress required Treasury to determine that its actions are necessary to "protect the taxpayer," among other things, when exercising its new statutory authority to acquire interests in the Enterprises. 12 U.S.C. §§ 1719(g)(1)(C), 1455(*l*)(1)(C).

In September 2008, pursuant to this authority, Treasury and FHFA as conservator (on behalf of the Enterprises), entered into two Senior Preferred Stock Purchase Agreements (PSPAs), one for each Enterprise, through which Treasury agreed to infuse hundreds of billions of taxpayer dollars into the Enterprises as needed. Compl. ¶ 4.[3] As consideration for this massive and continuing commitment, the PSPAs gave Treasury a comprehensive bundle of rights—including (1) a senior liquidation preference that started at $1 billion per Enterprise and would increase dollar-for-dollar whenever the Enterprises drew Treasury funds, (2) a requirement that the Enterprises pay Treasury a 10 percent annual dividend, assessed quarterly, based on the total amount of the 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 percent of the Enterprises' common stock. *See* PSPA §§ 1, 3.1, 3.2; Certificate of Designation of Terms of Variable Liquidation Preference Senior Preferred Stock,

[3] The stock purchase agreements are available at https://go.usa.gov/xUyCz (Fannie Mae) and https://go.usa.gov/xUyCu (Freddie Mac).

Series 2008-2 § 2(c);[4] *see also* Compl. ¶ 55. The PSPAs suspended the payment of dividends to any entity other than Treasury without prior approval of Treasury. Compl. ¶¶ 6, 34; PSPA § 5.1. FHFA as conservator and Treasury subsequently amended the PSPAs twice in 2009, both times to raise the amount of Treasury's commitment.

On August 17, 2012, FHFA as the Enterprises' conservator and Treasury executed the Third Amendment to the stock purchase agreements, which, among other things, replaced the fixed, 10 percent dividend with a variable dividend equal to the net worth of the Enterprises (minus a capital reserve), and relieved the Enterprises of the obligation to pay periodic commitment fees. Compl. ¶¶ 10, 13; *see also* Third Amendment to Senior Preferred Stock Purchase Agreements, *available at* https://go.usa.gov/xUyaM (Fannie Mae) and https://go.usa.gov/xUyae (Freddie Mac). In other words, under the Third Amendment, "Fannie and Freddie pay whatever dividend they could afford—however little, however much . . . . If Fannie and Freddie made profits, Treasury would reap the rewards; if they suffered losses, Treasury would have to forgo payment entirely." *Perry Capital*, 864 F.3d at 612. The Third Amendment's variable dividend structure is commonly referred to as the "Net Worth Sweep." *See*, *e.g.*, Comp. ¶¶ 13, 16, 29, 50.

II. Procedural History

Prior to filing in this Court, Mr. Angel filed a similar complaint in the United States District Court for the District of Columbia against the Enterprises, their directors, and FHFA as conservator, alleging breach of contract. *Angel v. Fed. Home Loan Mortg. Corp.*, *et al.*, No. 1:18-cv-01142 (D.D.C.); *see also* Compl. ¶ 20 n.8. Although the complaint here mentions the

[4] The Senior Preferred Stock Certificates of Designation are available at https://go.usa.gov/xUyNA (Fannie Mae) and https://go.usa.gov/xUyN6 (Freddie Mac).

district court case, it implies that the district court case is ongoing; that is not accurate. The district court determined that Mr. Angel's claims were time-barred under Delaware and Virginia law and dismissed the complaint. *Angel v. Fed. Home Loan Mortg. Corp.*, No. 1:18-cv-01142, 2019 WL 1060805 (D.D.C. Mar. 6, 2019). The D.C. Circuit affirmed. *Angel v. Fed. Home Loan Mortg. Corp.*, __ F. App'x __, 2020 WL 2611025 (D.C. Cir. Apr. 24, 2020).

On June 12, 2020, Mr. Angel filed a putative class-action complaint in this Court.[5] The complaint alleges that junior preferred shareholders' certificates of designation (CODs) constituted contracts between the shareholders and the Enterprises. As alleged, the CODs require the Enterprises' "Boards of Directors to make reasonable, good-faith determinations in their 'sole discretion' every fiscal quarter as to whether or not to declare a dividend payment on the Junior Preferred shares." Compl. ¶ 2. Mr. Angel alleges that because all Enterprise profits were paid to Treasury under the Third Amendment, no funds were available to pay dividends to junior preferred shareholders, resulting in such dividends being "irretrievably lost." *See* Compl. ¶¶ 13, 17. The complaint also alleges that Treasury, by virtue of an "implicit guaranty" of the Enterprises' contractual obligations, was required to set aside funds each quarter to pay dividends to junior preferred shareholders after the conservatorship ended. Compl. ¶¶ 14-15. Mr. Angel, however, points to no provision in the COD that imposes a Treasury-guaranteed requirement that the Enterprises pay dividends to junior preferred shareholders. To the contrary, several paragraphs of his complaint emphasize that the Enterprises' determination whether or not to declare dividends was a matter of their "sole discretion." *See* Compl. ¶¶ 2, 3, 17.

[5] As demonstrated below, despite the class allegations, the Court should treat Mr. Angel's complaint as though it were brought only on his behalf.

The complaint contains two breach-of-contract claims based on Treasury's alleged failure to ensure junior preferred shareholders received dividends, and seeks $16 billion in compensatory damages (plus interest and attorney fees) on behalf of the putative class. Compl. ¶¶ 45-55; *id.* at 15.

ARGUMENT

I. Standards Of Review

A. Rule 12(b)(1)

"Jurisdiction is a threshold issue and a court must satisfy itself that it has jurisdiction to hear and decide a case before proceeding to the merits." *Ultra-Precision Mfg., Ltd. v. Ford Motor Co.*, 338 F.3d 1353, 1356 (Fed. Cir. 2003) (quoting *PIN/NIP, Inc. v. Platte Chem. Co.*, 304 F.3d 1235, 1241 (Fed. Cir. 2002)); RCFC 12(b)(1). If the Court determines that "it lacks jurisdiction over the subject matter, it must dismiss the claim." *Matthews v. United States*, 72 Fed. Cl. 274, 278 (2006); RCFC 12(h)(3). To the extent that the United States or the Court questions the factual basis of jurisdiction, the plaintiff must bring forth relevant, adequate proof to establish jurisdiction by a preponderance of evidence. *See Fairholme Funds, Inc. v. United States*, 114 Fed. Cl. 718, 720 (2014) (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988)).

"[C]laims brought in the Court of Federal Claims under the Tucker Act are 'barred unless the petition thereon is filed within six years after such claim first accrues.' The six-year statute of limitations . . . is a jurisdictional requirement for a suit in the Court of Federal Claims." *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354 (Fed. Cir. 2006) (quoting 28 U.S.C. § 2501).

Pleadings of a *pro se* plaintiff "are held to 'less stringent standards'" than those of litigants represented by counsel. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)).[6] Nevertheless, "[t]he fact that [a plaintiff] acted *pro se* in the drafting of his complaint may explain its ambiguities, but it does not excuse its failures, if such there be." *Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995). In particular, a *pro se* plaintiff is not excused from the burden of meeting the Court's jurisdictional requirements. *Kelley v. Sec'y, U.S. Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987). As such, "'[t]here is no duty [on the part] of the trial court . . . to create a claim which [a plaintiff] has not spelled out in his pleading.'" *Bussie v. United States*, 96 Fed. Cl. 89, 94 (2011) (quoting *Scogin v. United States*, 33 Fed. Cl. 285, 293 (1995)).

B. Rule 12(b)(6)

Rule 12(b)(6) requires dismissal when a complaint does not plausibly give rise to an entitlement to relief. RCFC 12(b)(6). To avoid dismissal for failure to state a claim under Rule 12(b)(6), "a complaint must allege facts 'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). The Court should dismiss if the complaint fails to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A claim is facially implausible if it does not permit the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). Allegations "that are

[6] The district court questioned whether Mr. Angel should enjoy the normal solicitude afforded pro se litigants, as he is "an alumnus of Columbia Law School who practiced law for nearly six decades and boasts of writing briefs, affidavits, motions, articles, and other arguments numbering in the many thousands[.]" Mem. & Order at 2, *Angel v. Fed. Home Loan Mortg. Corp., et al.*, No. 1:18-cv-01142 (D.D.C. May 24, 2019), ECF No. 34.

'merely consistent with' a defendant's liability" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*.

When deciding a Rule 12(b)(6) motion, in addition to the pleading and its exhibits, the Court "must consider . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Bell/Heery v. United States*, 106 Fed. Cl. 300, 307 (2012) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). "Moreover, '[e]ven where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint.'" *Id.* (quoting *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006)).

II. Mr. Angel May Not Represent A Class of Shareholders

Acting *pro se*, Mr. Angel purports to represent, along with his own interests, the interests of "all others who hold Junior Preferred shares of either or both Fannie Mae and Freddie Mac issued prior to September 6, 2008." Compl. ¶ 1. However, that Mr. Angel seeks to represent a class is irrelevant to this motion; if his own claims are untimely or do not state a claim upon which relief may be granted, he cannot proceed at all, either individually or on behalf of a putative class. In any event, the Court must disregard Mr. Angel's class allegations and treat the complaint as if it were brought only on Mr. Angel's behalf because a *pro se* plaintiff may not represent a class. RCFC 83.1(a)(3); *accord Green v. United States*, No. 15-988, 2015 WL 8529463, at *1-2 (Fed. Cl. Dec. 11, 2015).

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

The complaint in this case was filed more than six years after Mr. Angel's claims accrued. Thus, putting aside whether the United States is a party to any contract with Mr. Angel,

which it is not, the complaint should be dismissed because it is barred by this Court's statute of limitations.

A. The Complaint Was Filed More Than Six Years After The Claims Accrued

"Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. According to the complaint, the action that forms the basis of the claims was Treasury's failure to set aside funds for the declaration of dividends for the junior preferred shareholders each time it "swept" the Enterprises' profits pursuant to the Third Amendment, beginning on January 1, 2013. Compl. ¶ 15; *see also* Compl. ¶¶ 50-51. Because the complaint was filed on June 12, 2020, more than six years after January 1, 2013, the complaint must be dismissed for failure to commence Mr. Angel's action within the six-year limitations period.

B. The Continuing Claims Doctrine Does Not Apply

Although Mr. Angel appears to invoke the "continuing claims doctrine," *see, e.g.*, Compl. ¶¶ 3, 50 (alleging that Treasury breached contract rights of the junior preferred shareholders every quarter), that doctrine does not protect his complaint from dismissal on statute-of-limitations grounds. "For the continuing claims doctrine to apply, (1) the case must turn on pure issues of law (or specific issues of fact to be decided by the court for itself); (2) any facts involved must be 'sharp and narrow'; and (3) no discretionary agency decision can be at issue." *Westlands Water Dist. v. United States*, 109 Fed. Cl. 177, 213 (2013) (citing *Hatter v. United States*, 203 F.3d 795, 799 (Fed. Cir. 2000)); *see also Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997) ("[A] claim based upon a single distinct event, which may have continued ill effects later on, is not a continuing claim.").

The continuing claims doctrine does not apply here for at least two reasons: first, Mr. Angel alleges breach by way of discretionary action. The PSPAs restricted the Enterprises from declaring dividends on junior preferred stock without Treasury's consent. Compl. ¶ 6; PSPA § 5.1. The PSPAs do not describe circumstances under which Treasury must grant or deny a request to declare dividends; rather, Treasury's consent is discretionary.

Second, the claims are fundamentally based on a single event – the Third Amendment to the PSPAs – from which all of the alleged harms result. Mr. Angel contends that, after the Third Amendment went into effect, each payment of Third Amendment dividends to Treasury, without Treasury setting aside some portion of those dividends to pay to junior preferred shareholders post-conservatorship, caused a new breach of the contract between the shareholders and the Enterprises. Compl. ¶ 15. Setting aside the unfounded legal contentions regarding the alleged contractual relationships between the entities, Mr. Angel's allegations boil down to this: the Third Amendment's dividend structure modification eliminated the possibility that funds could be used to pay dividends on junior preferred stock.

This theory has already been rejected – both by the U.S. District Court and D.C. Circuit in Mr. Angel's own prior case, and by this Court's own reasoning in *Fairholme*. First, the district court in Mr. Angel's prior case correctly rejected his continuing claims doctrine argument, and the D.C. Circuit affirmed. *Angel*, 2019 WL 1060805, at *4. There, Mr. Angel directly challenged the Enterprises' failure to declare dividends to junior preferred shareholders. *Id.* at *2. The district court concluded that Mr. Angel's alleged harm resulted from the Third Amendment, and the Enterprises' quarterly failure to declare dividends was "simply the continued ill effects of a single wrong." *Id.*; *see also id.* ("Unless further action is taken by the FHFA as conservator, 100% of the net worth of each company will flow to Treasury each quarter

pursuant to the Third Amendment, making it impossible for the holders of each Company's Junior Preferred to realize value from their contractual dividend entitlement rights." (alterations omitted)). Any attempted invocation of the doctrine in this Court fails for the same reason.

Second, this Court's own decision in *Fairholme* also eviscerates Mr. Angel's continuing claim theory. In *Fairholme*, addressing the continuing claims doctrine in the context of a Fifth Amendment takings claim, the Court noted that "[t]here is only one taking when a 'single governmental action causes a series of deleterious effects, even though those effects may extend long after the initial governmental [action].'" *Fairholme*, 147 Fed. Cl. at 44-45 (alteration in original). Applying that rule, the Court rejected Fairholme's contention that each quarterly dividend payment by FHFA to Treasury comprised a new claim: "Here, there is one event that caused all of plaintiffs' purported losses: the execution of the PSPA Amendments. It is of no import to the accrual of plaintiffs' . . . claim that, based on the PSPA Amendments, the Enterprises make regular payments to Treasury because those payments are just the consequences of the PSPA Amendments." Similarly, because the Third Amendment was executed once for each Enterprise, in August 2012, Mr. Angel's complaint does not state a claim to which the continuing claims doctrine applies.

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

In his complaint, Mr. Angel fails to allege a contract over which this Court possesses jurisdiction. "To maintain a cause of action pursuant to the Tucker Act that is based on a contract, the contract must be between the plaintiff and the government." *Ransom v. United States*, 900 F.2d 242, 244 (Fed. Cir. 1990); 28 U.S.C. § 1491(a)(1). "In other words, there must be privity of contract between the plaintiff and the United States." *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998).

Mr. Angel alleges two contract claims – breach of contract and breach of the covenant of good faith and fair dealing, Compl. ¶¶ 45-55 – yet he never alleges the existence of a contract with the United States. Rather, the alleged contracts at issue – the CODs – are between Enterprise shareholders and the Enterprises themselves. *See* Compl. ¶¶ 26, 46 ("The Junior Preferred CODs are valid contracts that govern the rights and duties of Directors and the Junior Preferred Shareholders with respect to the Junior Preferred Shares."); *see also Cacciapalle v. United States*, No. 13-466C, 2020 WL 3618894, at *24-26 (Fed. Cl. Jun. 26, 2020) (finding Enterprises' stock certificates are contracts between shareholders and Enterprises, and plaintiffs failed to demonstrate privity with the United States).

Moreover, Mr. Angel cannot plausibly allege that the United States is a party to the COD under the theory that the United States implicitly or explicitly guaranteed dividends on Mr. Angel's stock, because the U.S. Code expressly disclaims such a guarantee. *See* 12 U.S.C. § 4501(4) ("The Congress finds that . . . neither the enterprises . . . , nor any securities or obligations issued by the enterprises . . . , are backed by the full faith and credit of the United States."); *id.* § 4503 ("This chapter may not be construed as implying that any such enterprise . . . , or any obligations or securities of such an enterprise . . . , are backed by the full faith and credit of the United States."). By making clear that dividends are in the "sole discretion" of the Enterprises, the CODs also negate any suggestion of such a guarantee. Fannie Mae COD § 2(a) ("[H]olders of outstanding shares . . . shall be entitled to receive, ratably, *when, as and if declared* by the Board of Directors, *in its sole discretion, out of funds legally available therefore*, cumulative cash dividends. . . ." (emphasis added)), *available at* https://go.usa.gov/xUyNA; Freddie Mac COD § 2(a) (same), *available at* https://go.usa.gov/xUyN6.

The absence of a contract between Mr. Angel and the United States also defeats his claim for breach of the implied covenant of good faith and fair dealing. Indeed, where no contract exists, no implied covenant of good faith and fair dealing exists. *See Scott Timber Co. v. United States*, 692 F.3d 1365, 1372 (Fed. Cir. 2012) ("As our sister circuits have explained, 'because the existence of the covenant of good faith and fair dealing depends on the existence of an underlying contractual relationship, there is no claim for a breach of this covenant where a valid contract has not yet been formed.'" (quoting *Mountain Highlands, LLC v. Hendricks*, 616 F.3d 1167, 1171 (10th Cir. 2010) (alterations omitted)).

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

Finally, even assuming Treasury had an enforceable duty to guarantee the contractual obligations of the Enterprises (which it does not), the complaint fails to allege a breach of such a duty.

The only duty on the part of the United States alleged by Mr. Angel is an unspecified "guaranty" whereby Treasury purportedly was required to ensure that payments "mandated" under the CODs, "such as declared but unpaid dividends, and share redemptions at par in the event of liquidation," were paid to junior preferred shareholders. Compl. ¶¶ 1, 8 ("Treasury's actions were instrumental in creating a pre-conservatorship, general market perception that GSEs securities (debt and equity) were effectively risk free by virtue of an implicit federal government guaranty of dividend payments (*i.e.*, the Implicit Guarantee)."), 14. The complaint describes a scenario in 2008 whereby the Enterprises were permitted by Treasury to pay out dividends while in conservatorship that had been declared but not yet paid prior to conservatorship. Compl. ¶¶ 33-36.

However, the complaint does not allege that, during conservatorship, the Enterprises declared dividends but failed to pay those dividends, and Treasury then failed to pay those

dividends. To the contrary, the complaint acknowledges that dividends on junior preferred shares simply were not declared at all during conservatorship. Compl. ¶ 6; *see also Angel*, 2019 WL 1060805, at *2 (describing Mr. Angel's suit against the Enterprises in district court as challenging their failure to declare dividends). Thus, even under Mr. Angel's misconceived theory, the ostensible triggering event for the alleged guaranty by Treasury to come into play never occurred. Because Mr. Angel has failed to identify a declared-but-unpaid dividend on his stock that Treasury refused to pay, his complaint fails to state a claim upon which relief may be granted.

CONCLUSION

For these reasons, the Court should dismiss Mr. Angel's complaint for lack of subject matter jurisdiction or, in the alternative, for failure to state claims upon which relief can be granted.

Respectfully submitted,

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August 18, 2020

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