No. 23-800C
(Senior Judge Margaret M. Sweeney)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA J. ANGEL,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

REGULATIONS

RULES

OTHER AUTHORITIES

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA J. ANGEL, Plaintiff, v. THE UNITED STATES, Defendant.	)))))))))	No. 23-800C (Senior Judge Margaret M. Sweeney)

DEFENDANT'S MOTION TO DISMISS

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 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

In 2008, in the midst of an unprecedented financial crisis centered around the collapse of the housing and financial markets, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA) to stabilize the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises or the GSEs), which stood on the brink of insolvency. HERA created the Federal Housing Finance Agency (FHFA) and authorized its Director to appoint the Agency as conservator or receiver for the Enterprises. Congress also authorized the Treasury Department to invest in the Enterprises to provide the extraordinary infusion of taxpayer funds that would be necessary to ensure their ongoing viability. The Director of FHFA placed both Enterprises into conservatorships on September 6, 2008, and the conservator immediately entered into agreements with Treasury to

secure the financial lifeline that the Enterprises needed. On August 17, 2012, Treasury and FHFA, as conservator of the Enterprises, amended the dividend structure in their agreement for the third time (the Third Amendment) to help ensure the Enterprises' financial stability.

In this suit, Mr. Angel, a holder of junior preferred stock in the Enterprises, challenges the non-payment of dividends on his stock in the wake of the Third Amendment to the funding agreement between Treasury and FHFA, as conservator. Mr. Angel's claims are among the latest in a long line of cases, filed in this Court and in district courts around the country, challenging the conservatorships, the actions of the conservator, the Third Amendment, or some combination of these. To date, these cases have met with little success. Indeed, the Supreme Court earlier this year denied a petition for a writ of certiorari with respect to a decision of the United States Court of Appeals for the Federal Circuit rejecting claims by Enterprise shareholders bringing challenges that mirror those brought by Mr. Angel. *Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (Fed. Cir. 2022), *cert. denied,* No. 22-100, 2023 WL 124023 (U.S. Jan. 9, 2023), and *cert. denied sub nom. Owl Creek Asia I, L.P. v. United States*, No. 22-97, 2023 WL 124020 (U.S. Jan. 9, 2023), and *cert. denied sub nom. Cacciapalle v. United States*, No. 22-98, 2023 WL 124021 (U.S. Jan. 9, 2023), and *cert. denied sub nom. Barrett v. United States*, No. 22-99, 2023 WL 124022 (U.S. Jan. 9, 2023). As a consequence, many of Mr. Angel's claims have already been substantively rejected in binding precedent.

Moreover, this is now Mr. Angel's fourth attempt to advance claims of this nature. He first filed his claims in the United States District Court for the District of Columbia, which dismissed his claims in March of 2019. *Angel v. Fed. Home Loan Mortg. Corp*., Case No. 1:18-cv-01142, 2019 WL 1060805 (D.D.C. Mar. 6, 2019), *aff'd*, 815 F. App'x 566, 569 (D.C. Cir. 2020). In 2020, Mr. Angel filed a complaint in this Court asserting claims substantively identical

to several of those he advances in this case. He later voluntarily dismissed that complaint but re-filed a nearly identical one four days later, in an apparent attempt to avoid a stay of proceedings that the Court had put in place. On May 12, 2023, the Court dismissed Mr. Angel's claims in their entirety. *Angel v. United States*, 165 Fed. Cl. 453 (2023). Just weeks later, Mr. Angel filed his complaint in this case, which closely mirrors the complaint that the Court dismissed in May.

Mr. Angel's claims in this case suffer from the same fatal flaws as did his previous attempts to seek relief, and should be dismissed. As a threshold matter, most of Mr. Angel's claims are time-barred. Although these allegations stem from transactions that occurred on September 7, 2008, and August 17, 2012, and accrued no later than early 2013, Mr. Angel did not file this complaint until June 1, 2023. The continuing claims doctrine does not apply to his allegations, and his claims are barred by this Court's six-year statute of limitations, as the Court previously found. *Id*. at 463-66. Moreover, the Court's previous determination that these claims are barred by the statute of limitations precludes the relitigation of the issue in this case.

Mr. Angel's claims—both those that closely mirror claims that this Court has already dismissed and the two claims that were not advanced in his prior complaints—should be dismissed for several additional reasons. To the extent that Mr. Angel pleads a claim for a breach of fiduciary duty, that claim has already been held to be outside this Court's jurisdiction. *Id*. at 469. Moreover, the Federal Circuit has already rejected any constitutional claim raised by Mr. Angel's complaint; because such a claim is substantively derivative, it may not be asserted by shareholders, and would fail as a matter of law even if it could be asserted derivatively. *Id*. at 470.

Additionally, in a claim not advanced in his prior complaint, this complaint seeks prospective declaratory relief that this Court lacks jurisdiction to provide and relies on Federal

bankruptcy law the Court lacks jurisdiction to adjudicate. Finally, the complaint fails to state a claim for breach of contract, express or implied, because it fails to plausibly allege the existence of a contract between Mr. Angel and the United States. This is true both of Mr. Angel's allegation—which the Court previously dismissed—that the Government guaranteed shareholder dividends, and also of Mr. Angel's allegation, included as part of his complaint for the first time, that the United States agreed to settle previous litigation that Mr. Angel filed in this Court. Accordingly, all of Mr. Angel's claims should be dismissed.

QUESTIONS PRESENTED

1. Whether Counts I, II, and V of Mr. Angel's complaint are barred by preclusion stemming from this Court's decision in *Angel*, 165 Fed. Cl. at 463-66.

2. Whether, pursuant to 28 U.S.C. § 2501, the Court lacks jurisdiction to entertain Counts I, II, and IV of Mr. Angel's claims when these claims were filed more than six years after they accrued.

3. Whether, to the extent that Count II alleges a breach of fiduciary duty, this Court lacks jurisdiction to entertain such a claim.

4. Whether, to the extent that Count II alleges an illegal exaction, that claim is substantively derivative and, therefore, belongs to the Enterprises and may not be asserted by shareholders like Mr. Angel.

5. Whether this Court lacks jurisdiction to entertain Count III of Mr. Angel's complaint, which alleges violations of the bankruptcy provisions of Title 11, United States Code and seeks only prospective declaratory relief.

6. Whether the complaint states a claim for breach of contract when it fails to plausibly allege the existence of a contract between Mr. Angel and the United States, either guaranteeing dividends to Enterprise shareholders or to settle prior litigation.

STATEMENT OF THE CASE

I. Background

A. The Enterprises

Congress created Fannie Mae in 1938 and Freddie Mac in 1970. Compl. ¶ 50; *see also Collins v. Yellen*, 141 S. Ct. 1761, 1770 (2021). The Enterprises operate as for-profit corporations with private shareholders, though they serve a public mission. Compl. ¶ 50; *see also Collins*, 141 S. Ct. at 1770. The Enterprises purchase residential loans from banks and other lenders, facilitating the ability of lenders to make additional loans. Compl. ¶ 50; *see also Collins*, 141 S. Ct. at 1771. These activities increase the liquidity of the national home lending market and promote access to mortgage credit. Compl. ¶ 50; *see also Collins*, 141 S. Ct. at 1771.

Over the years, both Enterprises have issued multiple series of preferred and common stock. Compl. ¶¶ 50, 51. The terms of these stock issuances are governed by the relevant certificates of designation (COD). Compl. ¶ 27.

Although the Enterprises are government-sponsored, the statute that has governed regulation of the Enterprises since 1992, and was incorporated into HERA in 2008, 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.

B. The 2008 Financial Crisis, HERA, And The Conservatorships

By 2007, the Enterprises owned or guaranteed more than $5 trillion in residential mortgage assets, nearly half the national mortgage market. *Collins*, 141 S. Ct. at 1771. In 2008, the Enterprises suffered overwhelming losses because of the collapse of the housing market. Compl. ¶ 39; *id*. The Enterprises lost more in 2008 than they had earned in the prior 37 years combined. *Collins*, 141 S. Ct. at 1771.

In response to this crisis, Congress enacted HERA, Pub. L. No. 110-289, 122 Stat. 2654 (2008) (12 U.S.C. §§ 4501-4642). HERA created FHFA to regulate and supervise the Enterprises. 12 U.S.C. § 4511.

HERA also authorized FHFA's Director to appoint FHFA as conservator or receiver of the Enterprises. 12 U.S.C. § 4617(a). The Director exercised this authority on September 6, 2008, placing both Fannie Mae and Freddie Mac into conservatorships. Compl. ¶ 57; *Collins*, 141 S. Ct. at 1772.

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).

C. Treasury's Stock Purchase Agreements With The Enterprises

In addition to laying out the powers and functions of the conservator, 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. That authorization "made it possible for Treasury to buy large amounts of Fannie and Freddie stock, and thereby infuse them with massive amounts of capital to ensure their continued liquidity and stability." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 600 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 978 (2018). Congress required Treasury to determine that exercising its new statutory authority to acquire securities of the Enterprises was necessary to "protect the taxpayer," among other things. 12 U.S.C. §§ 1719(g)(1)(C), 1455(*l*)(1)(C).

On September 7, 2008, FHFA, as conservator, entered into two Senior Preferred Stock Purchase Agreements (PSPAs), one for each Enterprise, with the Department of the Treasury, under which Treasury committed to provide up to $100 billion to each Enterprise. Compl. ¶ 4; *Collins*, 141 S. Ct. at 1772-73.[1] In return for this massive and continuing commitment, Treasury received 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

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

annual fee (known as the "periodic commitment fee") intended to compensate Treasury for its ongoing commitment; and (4) warrants to acquire up to 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, Series 2008-2 § 2(c);[2] *see also Collins,* 141 S. Ct. at 1773*;* Compl. ¶¶ 6, 7. The PSPAs precluded the payment of dividends to any entity other than Treasury without Treasury's prior approval. Compl. ¶ 9; PSPA § 5.1. FHFA as conservator and Treasury subsequently amended the PSPAs twice, 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 quarterly dividend equal to the net worth of the Enterprises (minus a capital reserve). Compl. ¶¶ 10, 11; *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, the Third Amendment required the Enterprises "to 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 often referred to as a "Net Worth Sweep." *See*, *e.g.*, Comp. ¶¶ 11, 31, 64.

[2] 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).

II. Procedural History

A. District Court Litigation

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. *Angel v. Fed. Home Loan Mortg. Corp., et al.*, No. 1:18-cv-01142 (D.D.C.). The district court dismissed the complaint, determining that Mr. Angel's claims were time-barred under Delaware and Virginia law, which governed the contract claims brought in that case. *Angel v. Fed. Home Loan Mortg. Corp.*, No. 1:18-cv-01142, 2019 WL 1060805 (D.D.C. Mar. 6, 2019). The United States Court of Appeals for the District of Columbia Circuit affirmed. *Angel v. Fed. Home Loan Mortg. Corp.*, 815 F. App'x 566, 569 (D.C. Cir. 2020).

B. Mr. Angel's First Complaint In This Court

On June 12, 2020, Mr. Angel filed his initial complaint in this Court, purportedly on behalf of both himself and a putative class of all other similarly situated owners of junior preferred shares in the Enterprises. *Angel v. United States*, No. 20-737C, ECF No. 1. The complaint alleged that junior preferred shareholders' CODs constituted contracts between the shareholders and the Enterprises, and that 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." *Id.* at ¶ 2. The complaint further alleged that the Government had implicitly guaranteed dividend payments to shareholders, *id*. at ¶ 4, and that Treasury's receipt of dividends pursuant to the Third Amendment violated that guarantee, *see id*. at ¶ 50. The complaint, however, failed to identify any provision in the CODs that impose a requirement that the Enterprises pay dividends to junior preferred shareholders, or any Treasury guarantee of dividend payments. *See id*. at ¶ 2,

3, 17 (noting that the Enterprises' determination whether or not to declare dividends was discretionary). The complaint contained two breach-of-contract claims based on Treasury's alleged failure to ensure that junior preferred shareholders received dividends and sought $16 billion in compensatory damages on behalf of the putative class. *Id*. at ¶¶ 45-55, 15.

On August 18, 2020, the United States filed a motion to dismiss Mr. Angel's complaint. *Angel v. United States*, No. 20-737C, ECF No. 7. After Mr. Angel moved for an enlargement of time and then a continuance before filing his response, he moved for a stay pending the United States Supreme Court's resolution of *Collins v. Yellen*. *Angel v. United States*, No. 20-737C, ECF Nos. 8, 10, 14; *see Collins*, 141 S. Ct. 1761. On October 27, 2020, the Court granted the motion and stayed all proceedings in the case pending the decision in *Collins*. *Angel v. United States*, No. 20-737C, ECF No. 15. After the Supreme Court decided *Collins*, the parties jointly requested, and the Court granted, a continuation of the stay of proceedings while the United States Court of Appeals for the Federal Circuit considered a related appeal in *Fairholme Funds, Inc. v. United States*, Nos. 20-1912, 20-1914 (Fed. Cir.). *Angel v. United States*, No. 20-737C, ECF Nos. 25, 26; *see Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (Fed. Cir. 2022).

After the Federal Circuit decided *Fairholme* in favor of the United States, the parties disagreed on when litigation should resume, given that the appellants in *Fairholme* eventually filed multiple petitions for certiorari, which the Supreme Court denied on January 9, 2023. *Angel v. United States*, No. 20-737C, ECF Nos. 30, 31; *Fairholme Funds, Inc. v. United States*, No. 22-100 (U.S.). The Court then ordered the continuation of the stay until the Federal Circuit's *Fairholme* decision became both final and non-appealable—that is, until any Supreme Court proceedings were resolved. *Angel v. United States*, No. 20-737C, ECF No. 32. After

Mr. Angel unsuccessfully moved to lift the stay, he voluntarily dismissed his case on August 4, 2022. *See Angel v. United States*, No. 20-737C, ECF Nos. 33-38, 39.

C. Mr. Angel's Second Complaint In This Court

Four days later, on August 8, 2022, Mr. Angel filed another complaint in this Court. *Angel v. United States*, No. 22-867C, ECF No. 1. The second complaint closely mirrored Mr. Angel's previous complaint. It again was filed as a purported class action and raised essentially the same allegations contained in the original complaint. *Id*. The second complaint contained the same two breach-of-contract claims as the original complaint, based on Treasury's alleged failure to ensure that junior preferred shareholders received dividends. *Id*. at ¶¶ 42-51. It added a third claim for "wrongful acts in conducting conservatorship," *id*. at ¶¶ 52-57, though it was difficult to decipher the precise nature of the legal theory Mr. Angel was attempting to advance by that claim. The complaint sought $75 billion in compensatory damages on behalf of the putative class, as well as other relief. *Id*. at 16.

On May 12, 2023, the Court granted the United States' motion to dismiss the second complaint. *Angel*, 165 Fed. Cl. at 456. First, the Court found that all of Mr. Angel's claims were barred by the six-year statute of limitations established by 28 U.S.C. § 2501 and, thus, that the Court did not possess jurisdiction to entertain Mr. Angel's claims. *Id*. at 463-66. The Court found that each of Mr. Angel's claims accrued when his rights to dividends from the Enterprises were changed with the Third Amendment. *Id*. at 464. It found that Mr. Angel knew or should have known by early 2013, at the latest, of the alleged damage to his dividend rights and, thus, his claims needed to be filed by early 2019 to satisfy section 2501, but that he did not file suit until August 8, 2022. *Id*. Additionally, the Court rejected Mr. Angel's arguments that the "last

requisite fact" concept or continuing claim doctrine supported a view that his claims accrued each quarter rather than all by early 2013. *Id*. at 465-66.

The Court also found that, even if any of Mr. Angel's claims were timely, all the claims were foreclosed by the Federal Circuit's decision in *Fairholme*, in addition to other binding authorities. *Angel*, 165 Fed. Cl. at 467-70. Addressing each count of the complaint in turn, the Court explained that Count I, which was "premised upon an implied-in-fact contract between Mr. Angel and the United States guaranteeing the dividend rights of shareholders, under which Treasury had a duty to not interfere with quarterly dividend determinations by the boards of the Enterprises," *id*. at 467, did not state a plausible breach of contract claim. The Court found that Mr. Angel's reliance on market perception and general public statements of Government officials could not plausibly outweigh the clear statutory provisions "explicitly disavow[ing] any Treasury guarantee of the shares or obligations of the Enterprises." *Id*. Moreover, the Court found that none of the public statements that Mr. Angel identified "constitut[ed] an unambiguous offer of a dividend guarantee or a promise of noninterference in the actions of the boards of the Enterprises." *Id*. at 468. The Court, therefore, found that "Mr. Angel ha[d] not alleged facts that plausibly support the formation of an implied-in-fact contract between Treasury and shareholders of the Enterprises." *Id*.

The Court next explained that Count II failed for essentially the same reason. *Id*. Count II alleged breaches of the covenant of good faith and fair dealing implied within the alleged implied-in-fact contract described in Count I. *Id*. Having already rejected the plausibility of the existence of such a contract, the Court found that "[b]ecause the underlying contractual relationship asserted by Mr. Angel is not plausible, any implied covenant of good faith and fair dealing is also not plausible." *Id*.

The Court noted that Count III "suffer[ed] from a lack of clarity," but explained that the count "appear[ed] most likely to sound in breach of fiduciary duty or breach of contract." *Id*. at 469. Regarding a potential claim for breach of fiduciary duty, the Court found that it did not possess jurisdiction to entertain such a claim as pleaded because such a claim may only proceed in the Court of Federal Claims "if the fiduciary duty is imposed on the government by a money-mandating statute or regulation or, alternatively, by a contract." *Id*. (citations omitted). The Court explained that the Federal Circuit's holding in *Fairholme* "that the government 'owed no fiduciary duties to the shareholders under HERA,' . . . compels the dismissal of shareholder breach-of[-]fiduciary-duty claims based on HERA brought in this court as beyond the court's subject-matter jurisdiction." *Id*. (quoting *Fairholme*, 26 F.4th at 1297).

Additionally, the Court explained that, to the extent that Count III merely reiterated Counts I and II, as some of Mr. Angel's filings implied, it necessarily failed for the same reasons that those counts failed to state a claim: because Mr. Angel had not plausibly alleged the existence of a contract with the United States. *Id*. at 469-70. Finally, the Court also "addresse[d] whether any discernable illegal exaction claim [in Count III] could withstand defendant's motion to dismiss," *id*. at 469, answering that question in the negative. *Id*. at 470. The Court determined that, to the extent that Count III sought recovery for an illegal exaction, it failed to state a claim under the binding Federal Circuit ruling in *Fairholme*, which established "that the Enterprises' shareholders could not assert illegal exaction claims because such claims belong to the Enterprises." *Id*. (citing *Fairholme*, 26 F.4th at 1291-92).

Accordingly, the Court dismissed Mr. Angel's complaint in its entirety. *Angel*, 165 Fed. Cl. at 471.

D. Mr. Angel's Third Complaint In This Court

On June 1, 2023—less than three weeks after the Court dismissed his previous complaint—Mr. Angel filed this action. Compl, ECF No. 1. Once again, the complaint closely mirrors Mr. Angel's previous complaints. It again is filed as a purported class action, with Mr. Angel serving both as the class representative and as class counsel.[3] *Id*. at ¶¶ 1, 62-68. The new complaint again alleges that junior preferred shareholders' CODs constituted contracts that 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." *Id.* at ¶ 3. The complaint again alleges that the Government's pre-conservatorship actions created a general market perception that the Enterprises would be bailed out in the event of default and, thus, that the United States somehow implicitly guaranteed dividend payments to shareholders. *Id*. at ¶ 20-27. It again alleges that Treasury's receipt of dividends pursuant to the Third Amendment violated that alleged implied guarantee. *Id*. at ¶¶ 18, 73. Like Mr. Angel's previous complaints, however, the new complaint fails to identify any provision in the CODs that imposes a requirement that the Enterprises pay dividends to junior preferred shareholders, or to plead facts that would provide any basis for concluding that Treasury guaranteed dividend payments. *See id*. at ¶ 3 (noting that the Enterprises' determination whether to declare dividends was discretionary).

Mr. Angel's current complaint contains five counts. Count I is identical to Count I in Mr. Angel's previous complaint that this Court dismissed in May, with the sole apparent

[3] Although not a basis for dismissal, this is not permissible. 1 Newberg and Rubenstein on Class Actions § 3:77 (6th ed. 2022) ("Class counsel cannot also serve as the class's representative. Courts have uniformly held that the class will not be adequately represented under these circumstances.").

difference being a change in alleged damages from $20 billion to $22 billion. *Compare id*. at ¶¶ 69-74 with *Angel v. United States*, No. 22-867C, ECF No. 1 at ¶¶ 42-47. Likewise, Count II, titled "Illegal Extraction," is nearly identical to Count III of Mr. Angel's previous, dismissed complaint, except for the title and alleged damages. *Compare* Compl. ¶¶ 75-80 *with Angel v. United States*, No. 22-867C, ECF No. 1 at ¶¶ 52-57.

The legal theory underlying Count III is difficult to discern, but the count appears to be grounded in general conservatorship law and Federal insolvency law under Title 11, United States Code. Compl. ¶¶ 81-89. Although not detailed within his previous complaint, Mr. Angel raised these allegations in briefing in his previous case. *Angel v. United States*, No. 22-867C, ECF No. 13 at 19-20. The United States responded in its reply brief. *Angel v. United States*, No. 22-867C, ECF No. 16 at 4.

Likewise, although not previously included in a complaint, Mr. Angel has previously included in various filings the allegations contained in Court IV, in which he alleges that the United States accepted his offer to settle a previous suit. Compl. ¶¶ 90-95; *Angel v. United States*, No. 22-867C, ECF No. 7 at 5-7, 12-14; ECF No. 13 at 19-20; *Angel v. United States*, No. 20-737C, ECF No. 30 at 2-3, ECF No. 33.

Finally, Count V of the complaint appears to reiterate the contract law theory stated in Count I, alleging an implied-in-fact contract arising from an implied Government guarantee of Enterprise shareholder dividend rights. Compl. ¶¶ 96-103. As stated above, Count I of the complaint in this case is essentially identical to Count I of the complaint that this Court previously dismissed in its entirety. Count V seeks unspecified declaratory relief. *Id*. at ¶ 103.

For the reasons stated below, the Court should dismiss the complaint in its entirety.

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).

"[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).

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 the complaint if it 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 '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)).

Finally, when the complaint "indicate[s] the existence of an affirmative defense that will bar the award of any remedy," the complaint should be dismissed pursuant to Rule 12(b)(6). *Corrigan v. United States*, 82 Fed. Cl. 301, 304 (2008) (internal quotations and citations omitted). This Court has held that the United States properly raises a defense of claim preclusion (res judicata) or issue preclusion (collateral estoppel) on a Rule 12(b)(6) motion. *See Avant Assessment, LLC v. United States*, 159 Fed. Cl. 632, 637 (2022) (claim preclusion); *Copar Pumice Co. v. United States*, 112 Fed. Cl. 515, 527 (2013) (citing *Lewis v. United States*, 99 Fed. Cl. 772, 781 (2011) (both)).

II. Preclusion Bars Counts I, II, And V Of Mr. Angel's Complaint

As we have explained above, this Court has already found that several claims substantively identical to those that Mr. Angel presents here fail as a matter of law. *Angel*, 165 Fed. Cl. at 463-71. As a consequence, Mr. Angel is precluded from relitigating these claims.

"Under the doctrine of claim preclusion, a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)). "Claim preclusion requires (1) an identity of parties or their privies, (2) a final judgment on the merits of the first suit, and (3) the later claim to be based on the same set of transactional facts as the first claim such that the later claim should have been litigated in the prior case." *Bowers Inv. Co., LLC v. United States*, 695 F.3d 1380, 1384 (Fed. Cir. 2012) (citation omitted).

Similarly, issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor*, 553 U.S. at 892. Unlike claim preclusion, which requires a final judgment on the merits in the first suit, issue preclusion can also apply to a court's determination that it lacks jurisdiction to hear a particular claim. *Lea v. United States*, 126 Fed. Cl. 203, 213 (2016) ("[T]his court may be precluded from exercising subject matter jurisdiction in an ongoing action when the same action, based on the same facts, has been previously dismissed on jurisdictional grounds and the jurisdictional flaw that necessitated dismissal on the first suit has not been cured.) (citations omitted); *Amgen Inc. v. U.S. Int'l Trade Comm'n*, 902 F.2d 1532, 1536 n.5 (Fed. Cir. 1990) ("Dismissals for lack of jurisdiction may be given res judicata effect as to the jurisdictional issue.") (citing *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n,* 455 U.S. 691, 706 (1981)).

These doctrines "preclud[e] parties from contesting matters that they have had a full and fair opportunity to litigate," and thus "protect against the expense and vexation attending

multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Taylor*, 553 U.S. at 892 (citation and internal quotation marks omitted).

As we described above, several of the counts in Mr. Angel's complaint in this case closely mirror the counts that the Court dismissed in Mr. Angel's prior complaint. Specifically, Count I is essentially identical to Count I in Mr. Angel's previous complaint, and Count II is nearly identical to Count III of Mr. Angel's previous complaint. *Compare* Compl. ¶¶ 69-74, 75-80 *with Angel v. United States*, No. 22-867C, ECF No. 1 at ¶¶ 42-47, 52-57. Moreover, Count V seeks declaratory relief but reiterates the contract law theory stated in Count I. Compl. ¶¶ 96-103. Thus, like Count I, Count V is essentially identical in substance to Count I of the complaint that this Court previously dismissed.

The Court dismissed each of the claims in Mr. Angel's previous complaint for lack of subject matter jurisdiction because all the claims are barred by the Court's six-year statute of limitations. *Angel*, 165 Fed. Cl. at 463-66. Mr. Angel's new complaint does not, because it cannot, cure the statute of limitations bar. There is no substantive difference between the two complaints related to Counts I and II, and Count V appears to merely seek declaratory relief based on the same theory stated in Count I. We explain in the next section that these claims are barred by the statute of limitations for the same reasons upon which the Court dismissed Mr. Angel's previous complaint. But the Court need not actually reach the issue of whether these claims are barred by the statute of limitations; because the Court already decided the issue in a prior case and Mr. Angel's complaint does not cure the limitations issue, Mr. Angel is precluded from relitigating the limitations issue in this case.

III. Counts I, II, And V Of Mr. Angel's Complaint Are Barred By The Statute Of Limitations

The complaint in this case was filed more than six years after the claims advanced in Counts I, II, and V accrued. These claims, therefore, are untimely, as the Court already determined when considering Mr. Angel's previous complaint. *Angel*, 165 Fed. Cl. at 463-66. Mr. Angel again attempts to structure his complaint to take advantage of the continuing claims doctrine, but this doctrine does not apply to Mr. Angel's claims, as the Court previously correctly held. Id. at 465-66. Accordingly, even if Mr. Angel were not precluded from relitigating this issue, these counts of the complaint should be dismissed because they are barred by this Court's statute of limitations.

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

The Tucker Act provides that "[e]very 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. The Tucker Act statute of limitations is jurisdictional and not subject to equitable tolling. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 135 (2008); *FloorPro, Inc. v. United States*, 680 F.3d 1377, 1382 (Fed. Cir. 2012) ("Because section 2501's time limit is jurisdictional, the six-year limitations period cannot be extended even in cases where such an extension might be justified on equitable grounds."). "In general, a cause of action against the government accrues when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *FloorPro*, 680 F.3d at 1381 (internal quotation marks and citation omitted). "[T]he proper focus in determining the date of accrual "is upon the time of the [defendant's action or inaction], not upon [the time at which] the *consequences* of the acts became most painful." *Butte Cnty., Idaho*

v. United States, 151 Fed. Cl. 808, 816 (2021), *aff'd,* No. 2021-1779, 2022 WL 636101 (Fed. Cir. Mar. 4, 2022) (quoting *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)).

The harms that Mr. Angel alleges in Counts I, II, and V of his complaint all stem from the provisions of the PSPAs: the provisions in the original September 2008 PSPAs requiring the Enterprises to obtain Treasury's consent before declaring any dividends other than those owed to Treasury, and the provisions of the August 17, 2012 Third Amendment altering the formula for calculating the dividend payable to Treasury. The Court previously found that nearly identical claims in Mr. Angel's previous complaint accrued by early 2013, and listed allegations in that complaint that supported that determination. *Angel*, 165 Fed. Cl. at 463-64. Mr. Angel's new complaint repeats many of these same allegations. Compl. ¶ 8 n.3 (alleging that the Third Amendment "unilaterally changed" the dividend entitlement so that Treasury would obtain a "quarterly sweep of all profits"); ¶ 13 (alleging that the net worth sweep allowed FHFA to convey shareholder entitlements to Treasury); ¶ 16 ("Treasury, commencing first quarter 2013 and each quarter thereafter, caused the [the Enterprises'] directors not to consider, and disregard Junior Preferred contractual timely dividend declaration entitlement rights."); ¶¶ 18, 79 (alleging wrongful Government actions underlying Count II of the complaint beginning in the first quarter of 2013 and continuing quarterly thereafter); ¶ 74 (stating that the claim in Counts I is founded on alleged Government actions beginning in 2013). Aside from some minor wording adjustments, these allegations are essentially unchanged from the allegations the Court listed in its opinion in the prior case.

Likewise, Count V in the complaint alleges that the Government implicitly guaranteed shareholder dividend payments. Compl. ¶¶ 96-103. Count V does not allege a breach of such a contract and, thus, the legal theory Mr. Angel pursues is unclear. Even if any such contract

existed—which it does not—any breach would have become apparent by early 2013, under the same logic detailed above and in the Court's prior opinion.

Accordingly, as the Court determined with regard to the allegations in Mr. Angel's prior complaint, these allegations accrued no later than early 2013. Moreover, the Court was correct to reject Mr. Angel's invocation of the concept of the "last requisite fact" to argue that his claims accrued quarterly when dividends were not paid. *Angel*, 165 Fed. Cl. at 464-65. As the Court determined, "[o]nce Mr. Angel knew or should have known of the damage to his dividend rights caused by the net worth sweep in early 2013, his claims accrued because he could have maintained a suit at that time." *Id*. at 465.

Instead, Mr. Angel filed this complaint on June 1, 2023, well over six years after these claims accrued. The Court, therefore, does not possess jurisdiction to entertain these claims because they are barred by the six-year Tucker Act statute of limitations. 28 U.S.C. § 2501; *Angel*, 165 Fed. Cl. at 463-64.

B. The Continuing Claims Doctrine Does Not Apply

Mr. Angel again attempts to structure his allegations to support a theory that a breach occurs every quarter that dividends are not paid to junior preferred shareholders. *See, e.g.*, Compl. ¶¶ 1, 17, 18, 19, 59, 69-80. Mr. Angel thereby appears to invoke the "continuing claims doctrine." As the Court correctly determined when analyzing his previous complaint, however, that doctrine does not save his complaint from dismissal on statute of limitations grounds. *Angel*, 165 Fed. Cl. at 465-66.

This Court has explained that "[c]ase law draws sharp boundaries around the doctrine's application." *Jordan v. United States*, 158 Fed. Cl. 440, 455 (2022). "In order for the continuing claim doctrine to apply, the plaintiff's claim must be inherently susceptible to being broken down

into a series of independent and distinct events or wrongs, each having its own associated damages." *Brown Park Ests.-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997). "The doctrine cannot apply, however, when a claim is 'based upon a single distinct event, which may have continued ill effects later on.'" *Angel*, 165 Fed. Cl. at 465 (quoting *Brown Park*, 127 F.3d at 1456.

The continuing claims doctrine does not apply here. Mr. Angel's claims are fundamentally based on a single event—the Third Amendment to the PSPAs—from which all of the alleged harms result. The complaint contends that, after the Third Amendment went into effect, each payment of dividends to Treasury caused a new breach of contract. Compl. ¶ 17. As the Court rightly determined, "the adoption of the Third Amendment in August 2012 and the nonpayment of dividends to Mr. Angel in January 2013 established all of the elements of his claims against the United States." *Angel*, 165 Fed. Cl. at 466. The claims in Counts I, II, and V, therefore, accrued at that time and the continuing claims doctrine does not apply.

IV. The Court Does Not Possess Jurisdiction To Entertain Any Claim Mr. Angel Asserts For Breach Of Fiduciary Duty

As we explain above, Count II of Mr. Angel's complaint, titled "Illegal Extraction," is nearly identical to Count III of Mr. Angel's prior complaint that the Court dismissed. *Compare* Compl. ¶¶ 75-80 *with Angel v. United States*, No. 22-867C, ECF No. 1 at ¶¶ 52-57. In examining this count of the prior complaint, the Court noted the difficulty in identifying the legal theory on which Mr. Angel relies. *Angel*, 165 Fed. Cl. at 461. That same difficulty remains in interpreting Mr. Angel's current complaint. In resolving essentially this same count, the Court analyzed it under three different possible theories: 1) breach of fiduciary duty; 2) breach of contract; and 3) illegal exaction." *Angel*, 165 Fed. Cl. at 469-70. In this section, we will demonstrate that, like his previous complaint, any breach of fiduciary duty claim does not fall

within this Court's subject-matter jurisdiction. In the next section, we will demonstrate that any illegal exaction claim fails as a matter of law under binding precedent. Finally, in Section VII, we will demonstrate that, like the contract claims in Counts I, IV, V, any contract claim in Count II does not state a claim because it fails to plausibly allege the existence of a contract between Mr. Angel and the United States.

Like his previous complaint, the complaint in this case alleges that "[a] conservator of an entity owes a fiduciary duty, not only to the creditors of that entity, but also to the owners of that entity." Compl. ¶ 78. To the extent that this allegation suggests an attempt to raise a claim for breach of fiduciary duty, such a claim fails, as the Court previously held.

"[A] claim for breach of fiduciary duty is normally classified as a tort." *Fairholme*, 26 F.4th at 1296 (citing *Newby v. United States*, 57 Fed. Cl. 283, 294 (2003)). This Court, however, possesses jurisdiction over such claims in a narrow category of cases "alleging the breach of a fiduciary duty that the government 'specifically accepts by statute or regulation.'" *Id*. (citing *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015)). In *Fairholme*, first this Court and then the Federal Circuit examined whether the Court of Federal Claims possesses jurisdiction to entertain precisely this same breach of fiduciary duty claim, with each Court in turn concluding that it does not. 147 Fed. Cl. at 38-40; 26 F.4th at 1296-99. The Courts found that neither HERA nor the PSPAs establish any fiduciary duty binding the United States to Enterprise shareholders, with the Federal Circuit emphasizing that the Supreme Court came to the same conclusion in *Collins*. 26 F.4th at 1297-98. The Court recognized these holdings in dismissing Mr. Angel's previous complaint. *Angel*, 165 Fed. Cl. at 469. Under the same binding rationale, Mr. Angel cannot maintain a claim for breach of fiduciary duty in this case.

V. To The Extent That Mr. Angel Brings A Claim For Illegal Exaction, That Claim Has Been Conclusively Rejected In Binding Precedent

To the extent that Count II of Mr. Angel's complaint, titled "Illegal Extraction," instead pleads an illegal exaction, such a claim fails under binding precedent, as the Court previously recognized. *Angel*, 165 Fed. Cl. at 470. This claim has already been asserted by Enterprise shareholders and conclusively rejected by the Federal Circuit. *Fairholme*, 26 F. 4th at 1287-92.

In *Fairholme*, the Federal Circuit examined takings and illegal exaction claims brought by Enterprise shareholders challenging the Third Amendment to the PSPAs. *Id*. The Court held that, "though directly styled, shareholders' claims [were] substantively derivative." *Id*. at 1291, These claims, therefore, belonged to the Enterprises and could not be asserted by shareholders. *Id*. at 1287-92. Moreover, even if Mr. Angel could somehow assert a claim that the Third Amendment constituted an illegal exaction, the Federal Circuit held that such a claim fails as a matter of law, because the Supreme Court in *Collins* has definitively concluded that FHFA did not exceed its statutory authority under HERA in agreeing to the Third Amendment. *Id*. at 1304 (citing *Collins*, 141 S. Ct. at 1775).

Mr. Angel's claims share the same substance as those that the Federal Circuit has unequivocally rejected in *Fairholme*, which the Supreme Court made final through its denial of certiorari. Any illegal exaction claim, therefore, cannot prevail and should be dismissed.

VI. The Court Does Not Possess Jurisdiction To Entertain Count III Of Mr. Angel's Complaint Because It Is Grounded In The Bankruptcy Provisions Of Title 11, United States Code, And Seeks Only Prospective Declaratory Relief

Count III of Mr. Angel's complaint seeks declaratory relief based on alleged violation of Title 11, United States Code. Compl. ¶¶ 81-89. This Court, however, does not possess jurisdiction to entertain claims grounded in Title 11, United States Code. Instead, jurisdiction

over such claims is exclusive to the district courts. 28 U.S.C. §§ 151, 1334; *see Blodgett v. United States*, 146 Fed. Cl. 104, 108 (2018).

Moreover, Count III seeks no money damages, but only prospective declaratory relief, asking the Court to declare certain rights for junior preferred Enterprise shareholders in the event of a termination of the conservatorships at some uncertain future date. Compl. ¶¶ 88-89. The Court lacks jurisdiction to provide such relief.

Under the Tucker Act, this Court has authority to render judgment upon any claim "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). "The Supreme Court has interpreted this language to mean that a plaintiff who seeks redress in the Court of Federal Claims must present a claim for 'actual, presently due money damages from the United States.'" *Terran v. Secretary of Health and Human Servs.*, 195 F.3d 1302, 1309 (Fed. Cir. 1999) (quoting *United States v. King*, 395 U.S. 1, 3 (1969)). "[L]imited equitable relief sometimes is available in Tucker Act suits." *James v. Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998). "However, that equitable relief must be 'an incident of and collateral to' a money judgment." *Id.* (quoting 28 U.S.C. § 1491(a)(2) (1994)). "Stated another way, the Court of Federal Claims has no power 'to grant affirmative nonmonetary relief unless it is tied and subordinate to a money judgment.'" *Id.* (citation omitted).

In Count III, Mr. Angel does not seek "actual, presently due money damages." *See Terran*, 195 F.3d at 1309. Mr. Angel's claim would require the Court to adjudge the parties' future relations by prospectively declaring the rights of junior preferred Enterprise shareholders at the time of the termination of the conservatorships. The relief Mr. Angel seeks, therefore, is

not incident of or collateral to any money judgment that might issue; rather, it would turn on future developments and, thus, would be more akin to a form of injunctive relief that this Court is not empowered to grant. *See Westlands Water Dist. v. United States*, 109 Fed. Cl. 177, 217 (2013) ("Declaratory relief is prospective, and therefore beyond the court's jurisdiction, if the consequences of adjudication would flow through the contractual scheme governing the party's relationship and have a future impact on that relationship.") (citation omitted).

Accordingly, the Court should dismiss Count III of Mr. Angel's complaint. In addition, although Count V appears merely to reiterate Count I, to the extent that it seeks separate, prospective declaratory relief, it should be dismissed for the same reasons.

VII. Mr. Angel Fails To State Any Claim For Breach Of Contract

In the complaint, Mr. Angel appears to rely on contract theories in Counts I, IV, V, and potentially in Count II as well. In Counts I, V, and potentially II, Mr. Angel alleges that the Government entered into an implied contract guaranteeing dividend payments to junior preferred Enterprise shareholders. *E.g.*, Compl. ¶¶ 71, 99. In Count IV, Mr. Angel alleges that the United States agreed to settle prior litigation on some unspecified date in 2021 or 2022. The Court, examining the first alleged contract in Mr. Angel's prior litigation, found that allegations substantively indistinguishable from those in the complaint in this case did not plausibly allege the existence of a contract with the United States and, thus, failed to state a claim. *Angel*, 165 Fed. Cl. at 467-68. The Court should reach that same result here, not only for Mr. Angel's repeated allegation that the United States impliedly guaranteed dividends, but also for his equally implausible allegations regarding a nonexistent settlement agreement.

A. The Complaint Fails To Plausibly Allege The Existence Of A Contract With The United States Guaranteeing Shareholder Dividends

Mr. Angel, in Counts I, V, and possibly in Count II as well, alleges that the Government entered into an implied-in-fact contract guaranteeing dividends to junior preferred Enterprise shareholders. As the Court previously determined is dismissing essentially the same claim, however, the complaint fails to allege facts that would plausibly give rise to the existence of a contract between Mr. Angel and the United States. Rather, the contracts on which Mr. Angel relies—the CODs—are contracts between Enterprise shareholders and the Enterprises themselves. *See*, *e.g.*, Compl. ¶¶ 3, 70; *Cacciapalle v. United States*, 148 Fed. Cl. 745, 779-80 (2020), *aff'd sub nom. Fairholme Funds, Inc. v. United States*, 26 F.4th 1274 (Fed. Cir. 2022) (finding that Enterprises' stock certificates are contracts between shareholders and Enterprises, and that plaintiffs failed to demonstrate privity with the United States). Indeed, the Federal Circuit has already determined that the stock certificates are not contracts with the United States. *See Fairholme*, 26 F.4th at 1293-96. Shareholders are neither in privity with the United States via their stock certificates, *id*. at 1295-96, nor are they third party beneficiaries of any implied contract between FHFA and the Enterprises, *id*. at 1294.

Mr. Angel alleges that the Government somehow implicitly guaranteed to shareholders the payment of dividends under these CODs. *See* Compl. ¶¶ 2, 21-27, 71. This is a legal conclusion, however, not a factual allegation, and thus the Court should not accept it as true for the purposes of a motion to dismiss. *Iqbal*, 556 U.S. at 678 ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation.") (internal citation and quotation marks omitted). The facts that Mr. Angel pleads in support of this legal

conclusion fail as a matter of law to demonstrate the existence of an implied contract between Mr. Angel and the United States.

"An implied-in-fact contract is one 'founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.'" *Fairholme*, 26 F.4th at 1293 (internal quotation marks and citations omitted). "Like an express contract, an implied-in-fact contract requires: (1) mutuality of intent to contract; (2) consideration; and (3) unambiguous offer and acceptance." *Id*. (citing *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990)). Additionally, "[w]hen the government is a party, an implied-in-fact contract also requires that (4) the government representative whose conduct is relied upon must have actual authority to bind the government in contract." *Id*. at 1293-94.

Examining nearly identical allegations in his prior case, this Court found that "[t]here is no plausibility . . . in Mr. Angel's allegations of an implied-in-fact contract whereby the United States guaranteed the payment of dividends to the holders of Junior Preferred shares in the Enterprises and also specifically promised to not interfere in the quarterly declaration of dividends by the Enterprises." *Angel*, 165 Fed. Cl. at 467. Like in that case, Mr. Angel again "relies on public statements of government officials in 2008, and market perceptions of the special nature of shares in the Enterprises, to establish the government's offer of a guarantee of dividend rights." *Id*.; Compl. ¶¶ 21-27. As the Court explained, however, "[s]ince 1992 . . . the United States has explicitly disavowed any Treasury guarantee of the shares or obligations of the Enterprises." *Angel*, 165 Fed. Cl. at 467 (citing 12 U.S.C. §§ 4501(4), 4503). Therefore, the Court explained:

> [I]t is not plausible that a federal official could have offered a guarantee that is explicitly disavowed by statute, nor is it plausible

> that any investor could have interpreted the public statements of federal officials or market perceptions regarding shares in the Enterprises as overriding the express statutory disavowal of any guarantee by Treasury concerning the shares and obligations of the Enterprises.

Angel, 165 Fed. Cl. at 467 (citation omitted).

Mr. Angel's new complaint does nothing to remedy this problem. Instead, he relies largely on the same statements he alleged in his prior complaint. *Compare, e.g.*, Compl. ¶¶ 22, 23, 58 & n.11, *with Angel v. United States*, No. 22-867C, ECF No. 1 at ¶¶ 5, 33 n.7. As the Court previously found:

> Nowhere in the public statements referenced by Mr. Angel is there a plausible inference that there was a meeting of the minds between Treasury and the Enterprises' shareholders as to a guarantee of dividends or a duty on the part of Treasury to not interfere with the declaration of dividends by the boards of the Enterprises.

Angel, 165 Fed. Cl. at 468 (citation omitted).

Accordingly, as the Court previously determined, "Mr. Angel has not alleged facts that plausibly support the formation of an implied-in-fact contract between Treasury and shareholders of the Enterprises." *Id*. The same is true of Mr. Angel's new complaint, which barely differs from his previous one in advancing claims related to the alleged implied guarantee. The Court should again dismiss these claims.

B. The Complaint Fails To Plausibly Allege The Existence Of A Settlement Agreement With The United States

Although his prior complaints did not contain claims alleging breach of a settlement agreement, Mr. Angel has previously included in various filings the allegations contained in Court IV, in which he alleges that the United States accepted his offer to settle a previous suit. Compl. ¶¶ 90-95; *Angel v. United States*, No. 22-867C, ECF No. 7 at 5-7, 12-14; ECF No. 13 at 19-20; *Angel v. United States*, No. 20-737C, ECF No. 30 at 2-3, ECF No. 33. Like Mr. Angel's

implied guarantee claims, however, Mr. Angel's settlement agreement allegation fails to plausibly allege the existence of an unambiguous agreement between himself and a Government representative with actual authority to bind the United States in contract. Count IV, therefore, should be dismissed for failure to state a claim.

We stated above the elements of an implied-in-fact contract; the elements of an express contract are the same. *Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997) ("The general requirements for a binding contract with the United States are identical for both express and implied contracts.") (citations omitted). To show that he entered into a binding settlement agreement with the United States, Mr. Angel must demonstrate "a mutual intent to contract including an offer, an acceptance, and consideration." *Id*. (citations omitted). Where, as here, the United States is a party to the alleged contract, Mr. Angel must demonstrate that "the Government representative who entered or ratified the agreement had actual authority to bind the United States." *Id*. (citation omitted). To avoid dismissal for failure to state a claim, Mr. Angel's complaint must, for each of these elements, include "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

Mr. Angel's complaint fails to plausibly allege that these elements are satisfied and that he entered into a binding settlement agreement with the United States. Mr. Angel did not include a signed settlement agreement with his complaint, nor any other written affirmation signed by an authorized Government representative. Indeed, Mr. Angel does not even allege that such a signed agreement exists; he alleges that he attached a "finalized" agreement to a filing in a previous case, but that document is signed only by Mr. Angel. *Angel v. United States*, No. 20-737C, ECF No. 30-1. In the absence of a writing, Mr. Angel does not even allege any other "objective manifestation of voluntary, mutual assent," which is required to establish the

existence of a contract. *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003) (citation omitted). Instead, he merely alleges that unspecified "words and conduct of Defendant's agents from June 2021 to January 2022 constituted an acceptance." Compl. ¶ 93. This vague allegation falls far short of plausibly alleging an unambiguous acceptance of Mr. Angel's alleged settlement offer, or of any intent on the part of the United States to enter into a contract with Mr. Angel.

Moreover, Mr. Angel's failure to identify the individual that he alleges agreed to the settlement offer on behalf of the United States is also fatal to his claims in Count IV. "A government agent possesses express actual authority to bind the government in contract only when the Constitution, a statute, or regulation grants it to that agent in unambiguous terms." *Jumah v. United States*, 90 Fed. Cl. 603, 612 (2009) *aff'd*, 835 F. App'x 987 (Fed. Cir. 2010) (citing, *inter alia*, *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990) ("the issue is not whether some authority exists that prohibits [the agent] from obligating the Government in contract; rather, the issue is whether [the agent] had been granted the authority to affirmatively obligate the Government.")). Authority to supervise litigation on behalf of the United States is vested in the Attorney General. 28 U.S.C. §§ 516, 519. Settlement authority is delegated by Federal regulation to specified senior officials within the Department of Justice. *See, e.g.*, 28 C.F.R. §§ 0.160 (delegating authority to Assistant Attorneys General to settle claims up to certain monetary thresholds), 0.161 (authorizing the Deputy Attorney General or Associate Attorney General to settle matters exceeding these thresholds), 0.168 (authorizing limited additional delegation); 28 C.F.R. § Pt. 0, Subpt. Y, App. (detailing delegation for the Civil Division).

Mr. Angel's complaint in the case that he alleges was settled sought $16 billion in compensatory damages, exceeding the dollar limit of each of these delegations. *Angel v. United States*, No. 20-737C, ECF No. 1 at 15; 28 C.F.R. § 0.160. This would require that a settlement be authorized by the Attorney General, Deputy Attorney General, or Associate Attorney General. Mr. Angel does not allege that any of these officials authorized settlement. His settlement allegation, therefore, fails to plausibly allege that the settlement that Mr. Angel proposed was accepted or authorized by an official with authority to bind the United States to such a settlement. Count IV, therefore, should be dismissed for failure to plausibly allege authority. *See*, *e.g.*, *Sahagun-Pelayo v. United States*, 602 F. App'x 822, 825 (Fed. Cir. 2015) (affirming dismissal of vague allegations of implied promises from unnamed Government officials for failure to plausibly allege authority).

CONCLUSION

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

Respectfully submitted,

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