UNITED STATES COURT OF CLAIMS

JOSHUA J. ANGEL, on behalf of himself and all others similarly situated, Plaintiff, v. THE UNITED STATES, Defendant.	No. 1:23-CV-00800 (Senior Judge Margaret M. Sweeney)

PLAINTIFF'S MOTION FOR A CONTINUATION TO PERMIT DISCOVERY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ....iii, iv, v

PROCEDURAL HISTORY 1

QUESTION PRESENTED 3

STATEMENT OF THE CASE AND SUMMARY OF PLAINTIFF'S LEGAL THEORY 3

A. Implicit Guaranty of GSE Legal Obligations of Timely Payment 5

B. Senior Preferred Stock Purchase Agreement 7

C. The Third Amendment.................... 11

ARGUMENT 15

A. Standard for Granting Jurisdictional Discovery 16

B. Standard for Granting Discovery Pursuant to Rule 56(d) 20

C. Summary of 12(b)(1) and 12(b)(6) Standards for Granting Discovery....................22

D. Plaintiff Is Entitled to Discovery to Refute Factual Claims Made in the Government's Motion to Dismiss 24

E. Plaintiff Has Carried Its Burden to Establish That Plaintiff is Entitled to Discovery 24

1. The Angel *IV* Complaint 26
2. Discovery is reasonably likely to engender a genuine issue of material fact....................27
3. There are discoverable facts that are sufficient to raise a genuine and material issue 27

A. Treasury....................27

1. Treasury Administrative Logs....................27
2. Treasury Press Releases 28
3. Miscellaneous Treasury Administrative Logs....................28

B. Federal Reserve System 28

1. Federal Reserve System Working Papers 28

C. Federal Housing Finance Administration (FHFA) 29

1. FHFA Administrative Logs 29

D. U.S. Department of Justice 29

1. U.S. Department of Justice Administrative Log 29
2. Press Releases 29

E. Fannie Mae, Freddie Mac 29

1. Board of Directors Minutes 29
2. Plaintiff has not yet had an opportunity to obtain these facts 30
3. There are good grounds for Plaintiff's failure to discover the essential non-public facts sooner – namely, that Plaintiff has had no prior opportunity to conduct discovery 30

F. With Respect to the Motion to Dismiss Under RECFC 12 (b)(1), the Court Should, at a Minimum, Delay Resolution of the Motion Until the Completion of Full Discovery Because the Jurisdictional and Merits Issues are Intertwined 31

G. CONCLUSION 32

TABLE OF AUTHORITIES

Federal Cases

Advanced Cardiovascular,
988 F.2d at 1164-65 21

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, n.5 (1986) 21

Avedis v. Herman,
25 F. Supp. 2d 256 (S.D.N.Y. 1998) aff'd, 8F. App'x 69 (2d Cir. 2001) 31

Burnside-Ott Aviation Training Ctr., Inc. v. United States,
985 F.2d 1574 (Fed. Cir. 1993) 25

Fairholme,
26 F.4th 1293 5

Clear Creek Cmty. Servs. Dist. v. United States,
100 Fed. Cl. 78 (2011) 17, 20, 23, 25

DDB Techs., L.L.C. v. MLB Advanced Media, L.P.,
517 F.3d 1284 (Fed. Cir. 2008) 17, 32

Dunkin' Donuts of America, Inc. v. Metallurgical Exoproducts Co.,
840 F.2d 917 (Fed. Cir. 1988) 21

Eastern Trans-Waste of Maryland, Inc. v. United States,
27 Fed. Cl. 146 (1992) 16

Eaton v. Dorchester Dev., Inc.,
692 F.2d 727 (11th Cir. 1982) 32

Fairholme Funds, Inc. v. United States,
114 Fed. Cl. 718 (2014) 17, 18

Gulf Oil Corp. v. Copp Paving Co., Inc.,
419 U.S. 186, 203 n.19 (1974) 32

Indium Corp. of America v. Semi-Alloys, Inc.,
781 F.2d 879 (Fed. Cir. 1985) 17

Jade Trading, LLC v. United States,
60 Fed. Cl. 558 (2004) 30

Krim v. BancTexas Group, Inc.,
989 F.2d 1435 (5th Cir.1993) 23, 25

Land v. Dollar,
330 U.S. 731 (1947) 32

Metzger, Shadyac & Schwartz v. United States,
10 Cl. Ct. 107 (1986) 32

Mola Dev. Co. v. United States,
516 F.3d 1370 (Fed Cir. 2008) 21

Nuance Commc'ns, Inc. v. Abbyy Software House,
626 F.3d 1222 (Fed. Cir. 2010) 24

Oppenheimer Fund, Inc. v. Sanders,
437 U.S. 340, n. 13 (1978) 17, 20

Oswalt v. United States,
41 Fed. App'x 471 (Fed. Cir. 2002) 32

Patent Rights Prot. Group, LLC v. Video Gaming Techs., Inc.,
603 F.3d 1364 (Fed. Cir. 2010) 17

Pure Gold, Inc. v. Syntex (U.S.A.), Inc.,
739 F.2d 624 (Fed. Cir. 1984) 23, 25

Reynolds v. Army & Air Force Exch. Serv.,
846 F.2d 746 (Fed. Cir. 1988) 17

Samish Indian Nation v. United States,
No. 02-138L, 2006 WL 5629542, Fed. Cl. July 21, 2006 18

Simmons Oil Corp. v. Tesoro Petroleum Corp.,
86 F.3d 1138 (Fed. Cir. 1996) 23, 25, 26

Sizova v. Nat. Inst. of Standards & Tech,
282 F.3d 1320 (10th Cir.2002) 31, 32

Smith v. United States,
495 Fed. App'x 44 (Fed. Cir. 2012) 23, 24

Spruill v. Merit Sys. Prot. Bd.,
978 F.2d 679, n.12 (Fed. Cir. 1992) 32

Theisen Vending co., Inc. v. United States,
58 Fed. Cl. 194 (Fed. Cl. 2003) 23, 25, 26

Valentin v. Hospital Bella Vista,
254 F.3d 358 (1st Cir. 2001) 32

Williamson v. Tucker,
645 F.2d 404 (5th Cir. 1981) 32

Statutes and Rules

12 U.S.C. § 1467 (b)(2)(A)(i) 5

12 U.S.C. § 1467 (b)(2)(B)(i) 5

12 U.S.C. § 1467 (b)(2)(D)(ii) 6

28 U.S.C. § 12501 ....

Rules 6, 7 and 56(d) 20, 22, 24, 25

Rules 5, 6 and 60(d) ....

Rule 12(b)(1) 2, 3, 16,17, 20, 31, 32

Rule 12(b)(6) 2, 3, 16, 20, 31, 32

Rule 56(d) 2, 18, 20, 23, 25, 30

Rule 56(f) 30

Bankruptcy Code § 1124 .... 4, 6

15 U.S.C. § 72c 10

Miscellaneous

Comptroller of the Currency Administrator of National Banks, *Interpretive Letter #931*, April 2002, 2002
http://www.occ.gov/static/interpretations-and-precedents/apr02/int931.pdf 9

Henry M. Paulson, Jr., *On the Brink: Inside the Race to Stop the Collapse of the Financial System* (2d ed. 2013). 8, 28

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Tara Rice and Jonathan Rose, *When Good Investments Go Bad: The Contraction in Community Bank Lending After the 2008 GSE Takeover, Board of Governors of the Fed. Res. Sys., Int'l Fin. Discussion Papers IFDP 1045* (March 2012) ("Rose/Rice") at 1 28

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Mae and Freddie Mac's Obligations: Uncle Sam Will Pick Up the Tab (August 27, 2007); Georgia Law Review, vol. 42 (2008)... 10

U.S. Cong. Budget Office, Assessing the Public Costs and Benefits of Fannie Mae and Freddie Mac p. 9 (1996... 21

Procedural History

On May 12, 2023, this Court dismissed the complaint in *Angel v. United States,* 22-867C "Without Prejudice." On June 1, 2023, Plaintiff filed the complaint in within action (the "*Angel IV* Complaint"). On October 13, 2023, the Government moved to dismiss (hereinafter, the "MTD") the *Angel IV* Complaint on the following grounds:

(a) despite the dismissal having been without prejudice Counts I, II and V are allegedly barred as precluded by virtue of the Court's dismissal of the Complaint in *Angel v. United States,*22-867C;

(b) the Court lacks jurisdiction over the claims in Counts I, II and V as they allegedly accrued more than six years before the *Angel IV* Complaint was filed;

(c) to the extent that Count II alleges a breach of fiduciary duty, the Court allegedly lacks subject matter jurisdiction over such claim.

(d) to the extent that Count II alleges an illegal exaction, the claim is allegedly substantively derivative, belongs to the GSEs and allegedly may not be asserted by shareholders such as the Plaintiff;

(e) the Court allegedly lacks jurisdiction to entertain Count III (impairment of claim or interest in insolvency) because it allegedly alleges violations of the Bankruptcy Code and seeks only prospective relief;

(f) Count IV allegedly fails to state a claim for breach of a contract settling a previous litigation between the parties for allegedly having failed to plausibly allege the existence of such a contract; and

(g) Count V allegedly fails to state a claim for breach of an implied-in-fact contract between the parties guaranteeing payment of dividend for allegedly having failed to plausibly allege the existence of such implied in fact contract.

In its motion, the Government argues for dismissal pursuant to RCFC 12(b)(1) because this Court lacks jurisdiction over Plaintiff's claims and pursuant to RCFC 12(b)(6) because Plaintiff's complaint fails to state a claim on which relief may be granted. In making both of these arguments, the Government relies upon factual assertions that go beyond and indeed conflict with the well-pleaded allegations of Plaintiff's complaint.[1] With respect to both its arguments on jurisdiction and its arguments on the merits, the Government's reliance on such factual assertions entitles Plaintiff to conduct discovery.

Accordingly, pursuant to Rule 56(d) of the rules of the United States Court of Federal Claims ("CFC")[2], and the Court's power to allow jurisdictional and other discovery, Joshua J. Angel ("Plaintiff"), respectfully cross-moves to: (a) suspend briefing relating to the MTD so that Plaintiff may undertake discovery needed to present facts essential for opposing the MTD, and; (b) grant plaintiff leave to conduct that discovery. Plaintiff also respectfully requests that during the pendency of the present motion, the briefing schedule for the MTD be suspended until the

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[1] *See infra., passim* for a discussion of the Government's factual assertions.

[2] **"Rule 56(d) When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) Defer considering the motion or deny it;

(2) Allow time to obtain affidavits or declarations or take discovery; or

(3) Issue any other appropriate order."

Court resolves the present motion.[3] The Department of Justice has represented to Plaintiffs that it will oppose this motion, including Plaintiff's request to suspend the briefing schedule pending the Court's resolution of this motion.

QUESTION PRESENTED

In its motion to dismiss under Rules 12(b)(1) and 12(b)(6), the Government disputed several of the material factual allegations of Plaintiff's complaint and has otherwise relied upon factual assertions that are not reflected in (and are inconsistent with) Plaintiff's complaint. The question thus presented here is whether the Court should suspend proceedings relating to the Defendant's Motion to Dismiss, so that Plaintiff can conduct the discovery needed to uncover the facts essential to an informed resolution of the MTD as filed, including, but not limited to, jurisdictional discovery?

STATEMENT OF THE CASE AND SUMMARY OF PLAINTIFF'S LEGAL THEORY

Plaintiff is a holder of *non-cumulative* preferred shares ("Junior Preferred Shares") issued by the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan

[3] The Defendant in advance of filing its MTD, in response to Plaintiff request for pre- Defendant MTD filing discovery, represented that it preferred a schedule for later proceedings in which its intended MTD filing would be followed by briefing and Court decision, before proceeding further with case discovery.

The Court on August 9, 2023, Dkt. No. 10, rejected Plaintiff request for pre- Defendant MTD filing discovery, stating:

"First, plaintiff's request for discovery is premature. Defendant has indicated that it anticipates filing a motion to dismiss the complaint. Until defendant has filed its motion to dismiss, defendant's specific arguments for dismissal are not fully disclosed to either plaintiff or the court. The need for discovery, if any, cannot be determined in advance of that filing.

Once plaintiff has had the opportunity to review the motion to dismiss, plaintiff has the option of moving to obtain targeted discovery for the purpose of opposing the motion to dismiss. The court could then consider the parties' arguments as to the appropriateness of plaintiff's request. At this time, however, a speculative request for discovery is premature and cannot be granted."

Mortgage Corporation ("Freddie Mac") (collectively, the "GSEs" or the "Companies"), purchased at various times following January 1, 2013.

The *Angel IV* action is being brought on behalf of Plaintiff and all other holders of Junior Preferred Shares of either or both Fannie Mae and Freddie Mac, issued prior to September 6, 2008 (the "Class"). Plaintiff, on behalf of himself and the Class, seeks to recover damages caused from June 1, 2017 to date by Defendant's: (a) quarterly breaches of the contractual dividend rights set forth in the Certificate of Designation of the Junior Preferred Shares (hereinafter, the "COD"), (b) continuous breaches from 2013 to date by means of illegal exaction by taking $22 billions of Junior Preferred contractual dividend rights in violation of Plaintiff's rights under the Fifth Amendment; (c) continuous breaches, from 2013 to date, by means of illegal extraction of more than $36 billion in proceeds recovered in certain "Private Label MBS Actions" (defined below at Footnote 3), in total absence of statutory authorization, and; (d) breach of the *Angel II* Settlement Agreement.

Plaintiff is also seeking relief in the form of declaratory findings concerning (i) the federal government's guaranty of timely payment of government's legal obligations to Junior Preferred shareholders, and; (ii) the federal government's impairment of Plaintiff's COD based contract claims with respect to Junior Preferred Shares, that under principles of insolvency law (as exemplified by Bankruptcy Code § 1124), require that at the conclusion of an insolvency proceeding such as the Conservatorship[4] authorized by HERA, holders of an impaired contract claims or interests which

[4] Defendant concedes that in 2008, the GSEs "stood on the brink of insolvency." MEMORANDUM IN SUPPORT OF MTD, Page 1."By 2007, the Enterprises owned or guaranteed more than $5 trillion in residential mortgage assets, nearly half of the residential mortgage market. In 2008, the Enterprises suffered overwhelming losses because of the collapse of the housing market. The Enterprises lost more in 2008 than they had earned in the prior 37 years combined. In response to this 4crisis, Congress enacted HERA [which in turn]created FHFA

had been challenged be made whole, if the claims or interests are to be reinstated as unimpaired, as they must be in order to reverse the $100 million in accounting paper losses at the end of the conservatorship, and/or the case.

In combination, *Angel IV* is an illegal exaction, illegal extraction, and breach of contract action. The Tucker Act waives the federal government's sovereign immunity and confers jurisdiction on this Court for claims founded on a breach of the Fifth Amendment to the United States Constitution, and "... any contract, express or implied, with the Government of the United States."

A. Implicit Guaranty of GSE Legal Obligations of Timely Payment

Fannie/Freddie Junior Preferred CODs are express contracts, creating contract rights in Plaintiff, and contract obligations in Defendant, by reason of the terms thereof. Defendant argues that CODs are contracts between the Enterprise shareholders and the Enterprises themselves. *Memorandum in support of MTD, page 28.* Citing *Fairholme,* 26 F.4th 1293-1296, they claim that shareholders are neither in privity with the United States, nor third party beneficiaries of any implied contract between FHFA and the Enterprises. However, they ignore the fact that under HERA, upon its appointment as Conservator of the GSEs, FHFA "immediately succeed[ed] to … all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U.S.C. §1467 (b)(2)(A)(i). FHFA was given the power to operate and conduct all business of the Enterprises, *id.,* §1467 (b)(2)(B)(i) including the power to take such actions as may be *appropriate to carry on the business of the regulated entity and preserve and conserve the assets and the property of the*

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to regulate and supervise the Enterprises (citations omitted). MEMORANDUM IN SUPPORT OF MTD, Page 6.

regulated entity. Id., §1467 (b)(2)(D)(ii). By these words, and by well established principles of insolvency law, FHFA, as conservator of the GSEs owes a fiduciary duty to the GSE's shareholders, including Plaintiff with respect to GSE's assets and owes all of the contract obligations that GSEs owe to their shareholders.

As a fiduciary, FHFA had a duty to enforce the requirement in the CODs, that on a quarterly basis the Companies' respective Boards of Directors (hereinafter, the "BODs") make reasonable, good-faith determinations in their "sole discretion as to whether to declare a dividend payment on the Junior Preferred Shares. If FHFA fails to do so, it violates its fiduciary duty to Plaintiff. If Treasury has directly or indirectly ordered it not to do so – issues of fact to be explored in discovery – it has breached the express and pre-conservative implied in fact contracts by the United States guaranteeing payment of Junior Preferred Share legal obligations (the "Implicit Guaranty").

The Implicit Guaranty is an implied-in-fact contract, created by the words and conduct of the federal government guaranteeing the timely payment of the GSEs' legal obligations. The Implicit Guaranty includes but is not limited to equity securities (*i.e.,* common and preferred shares), (a) cumulative dividends payable as specified in the cumulative preferred share COD for such payments, (b) legally declared common and preferred share dividends payable as board of directors ("BOD") specified at declaration, and (c) share principal face amounts or par payable at Junior Preferred share COD specified maturity, or mandatory redemption per Bankruptcy Code § 1124 at Companies' conservatorship end, in event of any then remaining payment impairment.

Defendant argues that Plaintiff has failed to plausibly allege facts that would support the existence of the aforesaid implied-in-fact contracts. The following authoritative statements issued before, contemporaneous with and subsequent to the adoption of HERA and the effective dates of the Senior Preferred Stock Purchase Agreement demonstrate that despite the statutory disclaimer

that shares issued by the GSEs were backed by the full faith and credit of the United States, the Federal Reserve, the Treasury, Comptroller of the Currency and the market had all decided to not treat the GSEs as if they were independent agencies that would be allowed to default. Indeed, the adoption of HERA was the Government's response to prevent the GSEs from plunging into default. All of the foregoing should be the subject of jurisdictional discovery.

Alan Greenspan, who served as chairman of the Federal Reserve Board from 1987 through his retirement in 2006, presumptively aware of the Federal government statutory disavowal of full faith and credit for GSEs securities, wrote in his 2007 memoir, "The Age of Turbulence," that the financial markets perceived Fannie Mae and Freddie Mac securities as guaranteed by the Federal government. He wrote at page 242 as follows:

> "They are granted a **de facto subsidy** by financial markets in the form of interest rates with very low credit-risk premiums on their debit – the **markets presume Uncle Sam will bail them out in the event of default**. Fannie and Freddie had been using this subsidy to pad their profits and grow." [Emphasis added.]

B. <u>Senior Preferred Stock Purchase Agreement</u>

On September 6, 2008, Fannie Mae and Freddie Mac were placed into conservatorship. The Conservator, the Federal Housing Finance Administration ("FHFA"), on behalf of each GSE, entered into identical Senior Preferred Stock Purchase Agreements ("SPSPAs") with the Treasury Department ("Treasury"), pursuant to which each GSE would issue Senior Preferred shares to Treasury, redeemable at Treasury's sole option and direction for cash in reorganizational repair of the companies' conservatorship capital deficits.

On that same day, Treasury Secretary, Henry M. Paulson, Jr. acknowledged that the holders of agency debt and mortgage backed securities ("MBS") believed them to be virtually risk free because ambiguity in the GSE Congressional charters have been perceived to indicate

governmental support for agency debt and guaranteed MBS. Indeed, the effect of the Government's implicit guaranty of those securities on the market was the driving force behind the conservatorships.

> *"These Preferred Stock Purchase Agreements were made necessary by the ambiguities in the GSE Congressional charters, which have been perceived to indicate government support for agency debt and guaranteed MBS. Our nation has tolerated these ambiguities for too long, and as a result GSE debt and MBS are held by central banks and investors throughout the United States and around the world who believe them to be virtually risk-free. Because the U.S. Government created these ambiguities; we have a responsibility to both avert and ultimately address the systemic risk now posed by the scale and breadth of the holdings of GSE debt and MBS.*
>
> * * *
>
> *Similarly, conservatorship does not eliminate the outstanding preferred stock, but does place preferred shareholders second, after the common shareholders, in absorbing losses. The federal banking agencies are assessing the exposures of banks and thrifts to Fannie Mae and Freddie Mac. The agencies believe that, while many institutions hold common or preferred shares of these two GSEs, only a limited number of smaller institutions have holdings that are significant compared to their capital."*

Significantly, neither Secretary Paulson's September 6th statement, nor SPSPA's specific language eliminated, or even attempted to eliminate either the Junior Preferred Shares, the differences between the contract rights of the Junior Preferred Shares and the Companies' common stock, or the federal government's guaranty of timely payment of the Companies' legal obligations.

In an April 2009 paper entitled "The 2008 Federal Intervention to Stabilize Fannie Mae and Freddie Mac," financial economist W. Scott Frame of the Federal Reserve Bank of Atlanta summarized the government's implicit guaranty of GSE securities as follows:

> *"The features of Fannie Mae's and Freddie Mac's federal charters, coupled with some past government actions, [have] long served to create a perception in financial markets that the federal government 'implicitly guarantees' the GSEs' financial obligations... despite explicit language on ...the GSEs' securities that they are not obligations of the federal government."*

Frame further noted that the GSEs issue "'**government securities**' as classified under the Securities Exchange Act of 1934."[5]

The question of whether GSE securities qualify as **government securities** is addressed and answered squarely in Comptroller of the Currency Administrator of National Banks Interpretive Letter #931 (hereinafter IL #931), dated March 15, 2002. Employing 12 U.S.C. 24(7) as its authority, IL #931 states as follows:

> Section 24 (Seventh) permits national banks to hold "mortgages, obligations, or other securities which are or even have been sold by [Freddie Mac] pursuant to section 305 or section 306 of the Federal Home Loan Mortgage Corporation Act." Section 306(g) of the Federal Home Loan Mortgage Corporation Act empowers Freddie Mac to issue "preferred stock on such terms and conditions as the Board of Directors shall prescribe." Freddie Mac preferred stock is a "security" that national banks may hold under section 24 (Seventh).[6]

Board of Governors of the Federal Reserve System Internal Discussion Paper dated March 2012 (Federal Reserve Paper 1045), analyzes the effect on community bank solvency, and lending practices, emanating from the GSE conservatorship September 2008 Dividend Suspension Announcement. Federal Reserve Paper 1045 conclusively establishes the existence of a federal government implicit guaranty of GSE preferred shares as indisputable, and central to the shares *de jure* marketing as "Government Securities," and federal government guaranty of Junior Preferred legal obligations timely payment (i.e., Implicit Guaranty), no different from that of GSE debt, as acknowledged by Treasury announcement September 11, 2008.[7]

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[5] W. Scott Frame, *The 2008 Federal Intervention to Stabilize Fannie Mae and Freddie Mac. (April 2009).* Federal Reserve Bank of Atlanta*, Working Paper* 2009-13 ("Frame") at pp. 3, n. 4, 6, n. 15.

[6] Comptroller of the Currency Administrator of National Banks Interpretive Letter #931, April 2002 http://www.occ.gov/static/interpretations-and-precedents/apr02/int931.pdf

[7] *De jure* marketing fostered by 15 U.S.C. § 78m (requiring every security issuer to file with SEC). If a securities issuer issues only "exempted securities," it need not register with the SEC, as required by 15 U.S.C. § 78c (defining "exempted securities" to include

While the SPSPA's requirement of Treasury's "prior written consent" modified the GSEs' procedure regarding the declaration and payment of Junior Preferred dividends, nothing in the 2008 SPSPAs can be read as terminating the Junior Preferred's COD based economic contract rights. Indeed, by changing the dividend procedures, the SPSAs expressly recognized that the Junior Preferred's contract rights were not eliminated. Indeed, Treasury went out of its way to confirm that they were not eliminated.

In a September 11, 2008 release regarding government payment guaranty support for the timely payment of Junior Preferred obligations, the Treasury stated:

> "Some may speculate that a future Congress could pass a law that would abrogate the agreement. But any such law would be inconsistent with the U.S. government's longstanding history of honoring its obligations. Such action would also give rise to government liability to parties suing to enforce their rights under the agreement.
>
> The U.S. Government stands behind the preferred stock purchase agreements and will honor its commitments. Contracts are respected in this country as a fundamental part of rule of law."

and

> "What happens to the declared dividends for investors of existing GSE preferred stock? Dividends actually declared by a GSE before the date of the senior preferred stock purchase agreement will be paid on schedule."

"government securities") and (defining "government securities" to include Fannie and as Freddie securities). The GSEs' securities may also be exempt pursuant to 15 U.S.C § 77c because they are "instrumentalities" of the United States. *See also* Rice and Rose, Board of Governors of the Federal Reserve System Internal Discussion Paper 1045, *When Good Investments Go Bad*, March 2012 ("*IFDP 1045*"). See also, David Reiss, *The Federal Government's Implied Guarantee of Fannie Mae and Freddie Mac's Obligations: Uncle Sam Will Pick Up the Tab* (August 27, 2007); Georgia Law Review, vol. 42 (2008).

C. <u>The Third Amendment</u>

As explained below, the Third Amendment to the SPSPA was designed to eliminate the buildup of capital in the GSEs certain to occur attendant to a reversal of the "Accounting Paper Losses" (see pages 10-12, *infra.*) upon the Companies' return to profitability.

On August 17, 2012, Treasury, and FHFA, on behalf of the GSEs, entered into the Third Amendment to the SPSPAs, effective as of January 1, 2013. The Third Amendment included a definitional "Net Worth Sweep" provision which, beginning January 1, 2013, required quarterly dividend payments to Treasury, equal to each GSE's profit for the immediately preceding company fiscal quarter. The Third Amendment was designed to, and in fact did eliminate the further buildup of GSEs capital beyond December 31, 2012.

A full understanding of the Third Amendment requires an understanding of the Obama Administration's policy for a post-conservatorship companies' early wind-down. This policy was cogently enunciated in Treasury's February 2011 White Paper, which was preceded by a direction by the Obama Administration Treasury of an overly aggressive write down of the Companies' financial statements' bad debt loss reserves, and tax asset capital impairing in excess of more than $100 billion (hereinafter, the "Accounting Paper Loss").

The Obama Administration Treasury's deliberately maximized the accounting loss for dollar matching Senior Preferred capital cash infusion in accounting reversal, providing nearly $100 billion of the $130 billion cash net worth sweep payments to the Treasury in excess of the ten (10%) percent dividend pursuant to the 2013-2014 GSE Net Worth Sweep. The was in perfect harmony with (a) the December 2010 Treasury memorandum from Jeffrey A. Goldstein, then Undersecretary of the Treasury for Domestic Finance, to Treasury Secretary Geithner, of accounting loss reversal false profits, to wit: "*...the Administration's commitment to ensure*

existing common equity holders will not have access from the GSEs' [accounting loss reversals] in the future;" (b) the February 2011 Treasury White Paper; and; (c) the July 2012 SASPA Third Amendment.

The only other alternative for dealing with the ersatz accounting profit would have been for the Companies to have redeemed the Senior Preferred Shares. However, under both HERA and the SPSPA they were prohibited from doing so absent permission from the Treasury, which permission was not given. All of the foregoing should be explored in jurisdictional discovery needed to establish the plausibility of the allegations Counts I, II, III and V in the *Angel IV* Complaint

There is no Congressional authorization in the Housing and Economic Recovery Act of 2008 ("HERA") or elsewhere for FHFA to (a) cause the Companies to convey any Junior Preferred Share economic (i.e., legal payment) entitlements to Treasury; (b) illegally exact without payment of fair consideration, approximately $22 billions of Junior Preferred share dividend entitlement; or (c) extract more than $36 billions of "Private MBS Label Actions"[8] litigation proceeds to Treasury, by means of Net Worth Sweep dividend payments from January 1, 2013 to date. Moreover, lest the Government continue to erroneously contend that Plaintiff is arguing that the Third Amendment is not valid, Plaintiff once again repeats that it is not challenging its validity.

[8] On September 2, 2011, the FHFA as GSE's conservator filed lawsuits in Fannie and Freddie names, and behalf, against a bevy of financial institutions alleging, *inter alia*, the institutions' violation of federal securities laws in the sale of $200 billions of defective residential private label MBS to the GSEs ("Private Label MBS Actions") resulting in GSEs billions in loss damages. GSEs financial statements thereafter reflective of the suits' filing, and approximately $25 billions of settlement proceeds garnered between 2013 and 2016. In August 2023, Plaintiff's counsel discovered more than an additional $11 billions of settlement proceeds from 2017 to date, making a total illegal extraction by the Defendant of more than $36 billion.

The Third Amendment does not purport to supply the missing authorization either. It neither eliminated, nor in any way altered either (a) the Fannie, Freddie right to retain property such as the proceeds of the Private Label MBS Actions; or (b) the Fannie/Freddie Junior Preferred C.O.D. quarterly dividend express and implied-in-fact contract rights, and/or the government's implicit guaranty of timely payment of Junior Preferred share contractual obligations.

Nonetheless, commencing first quarter 2013 to date, Plaintiff believes that – and wishes to conduct jurisdictional discovery whether -- Treasury instructed the Companies' directors not to seek Treasury's consent to declare dividends to the holders of Junior Preferred Shares, essentially exacting $22 billion in Junior Preferred Share dividend entitlements. In addition, commencing first quarter 2013 to date, Treasury serially extracted more than $36 billion in proceeds recovered in certain Private Label MBS Actions (hereinafter, the illegal exaction of $22 billion in Junior Preferred Share dividend entitlement and $36 billion in MBS Action litigation recoveries collectively the "$58 billion Illegal Takings").

Over time, these Private Label MBS Actions litigation proceeds' extractions, and quarterly exactions of Junior Preferred contractual quarterly dividend rights inflated the Companies' quarterly profit amounts, available for Third Amendment sweep, and outsize Senior Preferred dividend payments of $58 billion Illegal Takings Defendant engorgement, in tandem with Fannie, Freddie equity owners' economic loss.

The *Angel IV* Complaint Count II Illegal Extraction in $58 billion Illegal Takings in combination of (1) Defendant's wrongful actions each and every quarter, beginning January 1, 2013 to date, directing the Companies' board of directors from (a) considering, or otherwise de-claring Junior Preferred share dividends, and/or (b) seeking Treasury permission to at least declare but not pay such dividend amounts. Each such action constitutes a separate exaction in breach of

the Junior Preferred substantive contract rights, $22 billion in total to date in collateral damage to that the Third Amendment's enacted dividend calculation procedural change; and (2) Defendant wrongful actions, beginning January 1, 2013 to date: (a) instructing the Companies to include more than $36 billions of Private Label MBS Actions litigation proceeds in engorged Net Worth Sweep to Defendant, and/or (b) failing to instruct the Companies to exclude more than $36 billions of Private Label MBS Actions litigations proceeds from inclusion in Net Worth Sweep to Defendant, and/or (c) failing in chargeable knowledge duty to, upon notice of appearance filing, inform Plaintiff in near attendant declination of Plaintiff request for pre-MTD discovery, Defendant counsel RMBS Working Group knowledge of the respective dates and amounts of the RMBS Working Group's then approximate $36 billions of "Private Label MBS Actions litigation recoveries," remitted to either Fannie Mae or Freddie Mac between January 1, 2016 and beyond.[9]

Thought to total just $25 billion, and time barred in collection 2013-2016 (i.e., outside to *Angel IV* S.O.L. six-year inclusive June 1, 2017 forward) the *Angel IV* Complaint excluded Defendant conversion of Private Label MBS Actions litigation proceeds from the complaint damage demand at Footnote 6 as follows:

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[9] Absence of information causing Plaintiff to erroneously view the RMBS Working Group recovery amounts as $25 billion 2013-2016, and *sui-generis* non-inclusive in *Angel IV* Count II Illegal Extraction damages demand by reason of S.O.L. jurisdictional expiration more than six years prior to *Angel IV* Complaint filing.

Defendant wrongful withholding per-se in Plaintiff entitlement to MTD pre-response discovery, and Defendant Agreement or direction Angel IV Complaint footnote 6, Amendment #6 to read as follows:

"Approximately $36 billions of litigation proceeds obtained in actions maintained by FHFA on behalf of and in name of Fannie Mae and Freddie Mac against 18 major domestic and foreign banks, mortgage originators and rating agencies for their alleged conduct in violation of securities laws, foisting more than $200 billions of defective mortgage product on the Companies (hereinafter 'Private Label MBS Action Litigation Proceeds') and (B) $22 billions of Junior Preferred share contractual dividend rights."

> "[6]Approximately $25 billions of litigation proceeds obtained in actions against mortgage originators for activities in violation of securities laws in foisting more than $200 billions of defective mortgage product on Fannie, Freddie illegally Net Worth Sweep swept to Treasury 2013-2015 are *sui generis* and thus not complained of herewith."

The financial consequences of these wrongful extractions and exactions may well be significantly greater than alleged in the Complaints. Plaintiff's counsel recently discovered a D.O.J. U.S. Attorney Eastern District press release dated August 14, 2023, that indicated more than $36 billion in Private Label MBS Actions litigation recoveries 2013 through then date, $11 billions of which being well within any Angel IV, June 1, 2017 statute of limitations period. As the letters attached to this motion show, Plaintiff counsel's requests for information regarding the $11 billion dollars have been disregarded.

The Angel IV Complaint illegal exactions and extractions allegations like the Angel IV breach of contract allegations are completely unrelated to the Third Amendment enactment. This Complaint cannot be reasonably read as a direct or even indirect challenge to the validity of Third Amendment. The Complaint instead is grounded in ten (10) years of Treasury's continuous contractual breaches, and $58 billion Illegal takings.

ARGUMENT

This Complaint states express contract claims and implied-in-fact contract claims. The express contracts are the dividend provisions in the CODs and the Angel II Settlement Agreement. The implied-in-fact contract is the Implicit Guaranty. On pages 29-32 of its MEMORANDUM IN SUPPORT OF MTD, the Government makes factual allegations that no one in authority agreed to Settle the Angel II litigation; that Plaintiff has failed to allege the existence of an unambiguous settlement agreement between the parties; that no one with actual authority to do so was involved in the transactions that on which Plaintiff relies to support the existence of an implied in fact

contract; that Plaintiff has alleged that the United States impliedly guaranteed payment of dividend to the holders of Junior Preferred shares and "also specifically promised" as opposed to necessarily promised not to interfere in the quarterly declaration of dividends by the Enterprises.[10] In addition, Plaintiff alleges that the Treasury's quarterly extractions of the Companies' funds exceeded any statutory authorization. In addition, Plaintiff alleges that the Treasury's quarterly extractions of the Companies' funds exceeded any statutory authorization.

The Government contends that dismissal is required under RCFC 12(b)(1) because this Court lacks subject matter jurisdiction over Plaintiff's claims, and under RCFC 12(b)(6) because the Complaint fails to state a claim on which relief may be granted. In making this contention, , the Government, as shown in the above paragraphs and the footnote below, heavily relies on factual assertions that conflict with the Government relies on factual assertions that conflict with the well-pleaded factual allegations in the Complaint, thereby entitling Plaintiff to conduct discovery.[11]

A. <u>Standard for Granting Jurisdictional Discovery</u>

When deciding a motion to dismiss for lack of subject matter jurisdiction under RCFC 12(b)(1), the Court typically assumes all factual allegations in the complaint are true and draws all reasonable inferences in the plaintiff's favor. *See, e.g., Eastern Trans-Waste of Maryland, Inc. v. United States*, 27 Fed. Cl. 146, 147-48 (1992). In this case, however, because the Government's motion goes beyond and challenges the truth of the jurisdictional facts alleged in the complaint, the Court may consider evidentiary matters outside the

[10] MEMORANDUM IN SUPPORT OF MTD, page 29, para 3.

[11] See, for example, MEMORANDUM IN SUPPORT OF MTD, Page 2, ll, 1-3 (purpose of Third Amendment was to help ensure the Enterprises' financial stability); Page 3, ll, (On May 12, 2023, the court dismissed the Complaint in its entirety) without disclosing that the dismissal was without prejudice; Page 3, para 1, ll, 3-4) (These allegations stem from transactions that occurred on September 7, 2008 and August 17, 2012)

pleadings. *See Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 883-84 (Fed. Cir. 1985). But in considering evidentiary matters outside the pleading, the Court should afford Plaintiff an opportunity to explore and rebut the critical facts raised by the Government's motion. *See Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) ("[T]he party asserting jurisdiction must be given an opportunity to be heard before dismissal is ordered.").

This Court was faced with precisely this situation on similar facts in *Fairholme Funds, Inc. v. United States,* 114 Fed. Cl. 718 (2014), and ruled both that plaintiffs were entitled to discovery on matters raised by the Government's motion to dismiss and that a stay of consideration of the Government's motion was warranted while plaintiffs took discovery.[12] This Court found that, while the burden of establishing this Court's jurisdiction is on the party invoking it, once jurisdiction is challenged the Court "may examine relevant evidence

[12] This Court's ruling in *Fairholme* was well grounded in precedent. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) ("[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues."); *Reynolds*, 846 F.2d at 748 (vacating a dismissal under Rule 12(b)(1) because the record did not disclose whether the non-moving party had been afforded an opportunity to establish disputed questions of jurisdictional fact); *Patent Rights Prot. Group, LLC v. Video Gaming Techs., Inc.*, 603 F.3d 1364, 1372 (Fed. Cir. 2010) (court abused its discretion when it denied jurisdictional discovery because the "request for jurisdictional discovery is not based on a mere hunch"); *DDB Techs., L.L.C. v. MLB Advanced Media, L.P.*, 517 F.3d 1284, 1294 (Fed. Cir. 2008) (district court abused its discretion when it denied jurisdictional discovery because the requested discovery was "relevant" to the existence of subject matter jurisdiction); *Clear Creek Cmty. Servs. Dist. v. United States*, 100 Fed. Cl. 78, 81 (Fed. Cl. 2011) ("It is well established that when a motion to dismiss challenges a jurisdictional fact alleged in a complaint, a court may allow discovery in order to resolve the factual dispute." (quotation marks omitted)); *see also* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER ET AL., FEDERAL PRACTICE & PROCEDURE § 2008.3, at n.5 & accompanying text (3d ed. 2013) (footnote omitted) ("[D]istrict courts may be found to have abused their discretion in denying discovery regarding issues of personal jurisdiction or subject matter jurisdiction.").

in order to decide any factual disputes when ruling upon a motion to dismiss for lack of subject matter jurisdiction. . . . Moreover, it is 'well established that when a motion to dismiss challenges a jurisdictional fact alleged in a complaint, a court may allow discovery in order to resolve the factual dispute.'" *Id.* at 720-21, *quoting Samish Indian Nation v. United States*, No. 02-138L, 2006 WL 5629542, at *4, Fed. Cl. July 21, 2006 (other citations omitted). This Court concluded, "Thus, motions for discovery to meet a challenge to the court's jurisdiction should be granted to effectuate justice." *Id.* at 721.[13]

The Government argues that this Court lacks subject matter jurisdiction over the Complaint because Plaintiff's claims are time-barred as they were not brought within six years of the Third Amendment. The Motion to Dismiss implicitly disputes the Complaint's central allegation regarding Treasury's quarterly actions beginning on January 1, 2013. The Government continues to argue that (i) the Plaintiff's contract rights created by the dividend language in the CODs were terminated by the Third Amendment, and that (ii) therefore the Plaintiff no longer had contract rights after the Third Amendment, and that (iii) therefore no quarterly breach of contract could have occurred within the jurisdictionally required six year period. The Complaint anticipates this argument and shows how the Government's argument is inconsistent with both the language of the Third Amendment[14] and inconsistent with other contested facts. The Government has never contended in any of the Third Amendment litigation that the Third Amendment:

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[13] This court noted that motions to take discovery to oppose a motion for summary judgment are specifically contemplated under RCFC 56(d) and are generally favored and liberally granted while there is no such provision in Rule 12(b), but found that the procedural distinction was of "no consequence." *Fairholme*, 114 Fed. Cl. at 721.

[14] Although the interpretation of a writing's words is an issue of law, the presence or absence of words in a writing is an issue of fact.

(i) eliminated Fannie Mae or Freddie Mac Junior Preferred stock or Fannie Mae or Freddie Mac common stock; or

(ii) combined the two classes of Fannie Mae or Freddie Mac stock into a single class that had the same dividend rights; or

(iii) eliminated the Fannie Mae or Freddie Mac BODs.

Similarly, the Government has never disputed that the Third Amendment changed the process by which these BODs could declare dividends. Common sense raises the obvious question of why would the Third Amendment change the process by which the BODs could declare dividends if the Third Amendment had eliminated all dividend rights, i.e., totally breached the CODs' express dividend contract?

If, as the Plaintiff alleges, the facts are that the Government each quarter took action to prevent the Companies' boards of directors from declaring dividends, such quarterly actions would be inconsistent with, and undermine the Government's assertion that the words of the Third Amendment should be construed as having terminating Plaintiff's contractual dividend rights. Plaintiff should be intitled to jurisdictional discovery on this issue

Indeed, the existence of the required quarterly calculation of profits demonstrates that contrary to Defendant's factual contention each quarterly claim is different, involving different conduct, a different calculation and a different amount of money. Jurisdictional discovery will allow the Plaintiff to obtain additional factual support that his claim did not accrue when the Third Amendment was adopted.

Again, because the Government in essence challenges the truth of the jurisdictional facts alleged in the Complaint (i.e., Treasury's quarterly direction to the GSE's respective directors), the Court should afford Plaintiff the opportunity for discovery in order to refute the Government's

jurisdictional challenge.[15] Discovery is likely to disclose additional information highly relevant to the disputed question of whether the Third Amendment totally ended all Junior Preferred express contract dividend rights. More specifically, discovery will show whether the Treasury officials administering the Conservatorship treated the Third Amendment as terminating all Junior Preferred express contract dividend rights or whether these Treasury officials instead found it necessary to give quarterly directions to the Companies' directors to neither make reasonable good faith determinations as to whether or not to declare a dividend payment on the Junior Preferred Shares, nor seek Treasury's consent to declare dividends prior to each Net Worth Sweep.

The Government is certain to be in possession of any such Treasury quarterly communications to the GSEs' directors regarding dividends, Plaintiff should be afforded the opportunity to serve interrogatories, take depositions, and request the production of those documents relevant to this factual dispute. This information is solely in the hands of the Government, and it is not otherwise publicly available.

B. <u>Standard for Granting Discovery Pursuant to Rule 56(d)</u>

The motion to dismiss also invokes RCFC 12(b)(6). More specifically, the Government in its Motion to Dismiss argues that Plaintiff has failed to state a claim because neither the Implicit Guaranty nor the *Angel II* Settlement Agreement exist.

The Government's motion to dismiss thus relies upon its own factual allegations: (i) that the Implicit Guaranty alleged by the Plaintiff does not exist and (ii) that the *Angel II* Settlement

[15] *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n. 13 (1978) ("[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues."); *Clear Creek Cmty. Servs. Dist. v. United States*, 100 Fed. Cl. 78, 81 (2011) ("It is well established that when a motion to dismiss challenges a jurisdictional fact alleged in a complaint, a court may allow discovery in order to resolve the factual dispute." (internal quotations omitted)).

Agreement does not exist. Plaintiff therefore is entitled to limited discovery to refute those factual claims.

In its Motion to Dismiss, the Government alleges "Mr. Angel has failed to allege even a 'cloud of evidence.'" The Congressional Budget Office would strongly disagree with the Government's allegation, having stated there is "a strong implication... that GSE obligations are safe from risk of default."[16]

The Government takes this term "cloud of evidence" from *Mola Dev. Co. v. United States*, 516 F.3d 1370, 1378 (Fed Cir. 2008). Indeed, the Government relies primarily on *Mola* to support its argument that "The Complaint Fails to Plausibly Allege the Existence of a Contract with the United States."

Mola is a case that considers the question of whether the defendant is entitled to summary judgment.[17] That is not the question now before this Court, Here the question is whether the plaintiff should have the opportunity to conduct discovery before the Court grants Defendant's motion to dismiss because "The Complaint Fails to Plausibly Allege the Existence of a Contract with the United States." As used by Defendant in the MTD, plausibility is a substitute for knowing and not disclosing to Plaintiff the facts that he needs to convert allegedly implausible allegations of fact into well pleaded allegations of fact presumed true for purposes of a motion to dismiss.

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[16] *U.S. Cong. Budget Office, Assessing the Public Costs and Benefits of Fannie Mae and Freddie Mac* p. 9 (1996).

[17] Cf *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 n.5 (1986) (summary judgment must "be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition"); *Advanced Cardiovascular*, 988 F.2d at 1164-65; *Dunkin' Donuts of America, Inc. v. Metallurgical Exoproducts Co*., 840 F.2d 917, 919 (Fed. Cir. 1988) ("[S]ummary judgment is inappropriate unless a tribunal permits the parties adequate time for discovery.").

As discussed above in the context of the argument for jurisdictional discovery, despite the Government's reliance on a statutory disclaimer that the Companies' securities were not entitled to the full faith and credit of the United States, Treasury, the Comptroller of the Currency, the SEC and Alan Greenspan all treated those securities as if they were guaranteed by the Government. Indeed, it is apparent that the GSEs were placed into conservatorships, rather than just being allowed to fail because of the effect of insolvency would have had on the holders of GSE Preferred shares presumed to have been guaranteed by the Government. Document and deposition discovery is likely to disclose evidence highly relevant to the disputed factual issues about whether an Implicit Guaranty actually existed.

The parties both agree that a proposed *Angel II* Settlement Agreement was sent to the Government. Where they differ is whether or not it was accepted. The only way to resolve the dispute is to review the facts upon which the Defendant relies in alleging that there was no meeting of the minds. This information is not publicly available, but rather is solely in the possession of the Government. Such discovery should include not only interrogatories but also the production of relevant e-mails and other communications of Government officials relating to the Implicit Guaranty and to *Angel II* Settlement Agreement. . Such discovery might also include targeted depositions of officials with knowledge regarding the Implicit Guaranty and/or the *Angel II* Settlement Agreement.

C. <u>Summary of 12(b)(1) and 12(b)(6) Standards for Granting Discovery</u>

To warrant jurisdictional discovery, a party must "explain with sufficient specificity how discovery would help him overcome the various jurisdictional bars to his suit," and must "identify

facts that would support his claims for jurisdiction or explain how the documents he requested would show that the Court had jurisdiction."[18]Plaintiff has done so.

A similar standard governs discovery under RCFC 56(d). The Federal Circuit has required that the party moving for discovery must "state with some precision the materials he hope[s] to obtain with further discovery, and exactly how he expect[s] those materials would help him in opposing summary judgment."[19] Yet the Federal Circuit emphasized that "[t]he rule does not require clairvoyance on the part of the moving party." *Id.* The party requesting discovery need only "set out, usually in an affidavit by one with knowledge of specific facts, what specific evidence could be offered at trial."[20] This Court has sometimes applied a five-part test that requires the non-movant to: (1) specify the particular factual discovery being sought, (2) explain how the results of the discovery are reasonably expected to engender a genuine issue of material fact, (3) provide an adequate factual predicate for the belief that there are discoverable facts sufficient raise a genuine and material issue, (4) recite the efforts previously made to obtain those facts, and (5) show good grounds for the failure to have discovered the essential facts sooner.[21]

Plaintiff has satisfied the "relevancy" standard for jurisdictional discovery, and has satisfied RCFC 56(d)'s requirement to state the materials he hopes to obtain through discovery and how those materials will be helpful in opposing the Government's motion.[22] Assuming without

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[18] *Smith v. United States*, 495 Fed. App'x 44, 49 (Fed. Cir. 2012).

[19] *Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F.3d 1138, 1144 (Fed. Cir. 1996) (quoting *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1443 (5th Cir.1993)).

[20] *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984).

[21] *Theisen Vending co., Inc. v. United States*, 58 Fed. Cl. 194, 198 (Fed. Cl. 2003); *see also Clear Creek*, 100 Fed. Cl. at 83.

[22] *See Simmons Oil*, 86 F.3d at 1144.

conceding that Plaintiff must comply with the five-part test of Theisen, Plaintiff has satisfied that test, too.

D. Plaintiff Is Entitled to Discovery to Refute Factual Claims Made in the Government's Motion to Dismiss

Although a motion to dismiss should only challenge the legal sufficiency of the complaint, the Government's motion to dismiss amounts to a counter-statement of facts that disputes many of the material allegations of Plaintiff's complaint. The Government then relies upon its own factual allegations to argue that the Court lacks jurisdiction over the complaint and that the complaint fails to state a claim. Specifically, the Government's counter-statements of fact are relevant to its arguments that (1) Plaintiff's claims are not ripe, (2) this Court lacks jurisdiction over FHFA, and (3) Plaintiff has failed to state a claim for a taking. Although Plaintiff does not concede the materiality of the Government's factual allegations, the Government relies on its factual claims to support its legal arguments. Plaintiff therefore must be entitled to discovery to refute those factual claims.

E. Plaintiff Has Carried Its Burden to Establish that Plaintiff is Entitled to Discovery

To warrant jurisdictional discovery, a party must "explain with sufficient specificity how discovery would help him overcome the various jurisdictional bars to his suit,' and must identify facts that would support his claims for jurisdiction or explain how the documents he requested would show that the Court had jurisdiction." *Smith v. United States*, 495 Fed. App'x 44, 49 (Fed. Cir. 2012); *see also Nuance Commc'ns, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1235 (Fed. Cir. 2010) (explaining that under Ninth Circuit law, "discovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary" (citation omitted)). A party is entitled to jurisdictional discovery so long as it can establish that the evidence sought is "relevant" to the disputed question of

jurisdictional fact. *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993).

A similar standard governs discovery under RCFC 56(d). The Federal Circuit has not elaborated in great detail the test this Court should apply to motions for discovery under Rule 56(d), but it has required that the party moving for discovery must "state with some precision the materials he hope[s] to obtain with further discovery, and exactly how he expect[s] those materials would help him in opposing summary judgment." *Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F3d 1138, 1144 (Fed. Cir. 1996) (alteration in original) (quoting *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1443 (5th Cir. 1993)). Yet the Federal Circuit has emphasized that "[t]he rule does not require clairvoyance on the part of the moving party." *Id.* The party requesting discovery need only "set out, usually in an affidavit by one with knowledge of specific facts, what specific evidence could be offered at trial." *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984). This Court has sometimes applied a five-part test that requires the non-movant to:

> (1) Specify the particular factual discovery being sought, (2) explain how the results of the discovery are reasonably expected to engender a genuine issue of material fact, (3) provide an adequate factual predicate for the belief that there are discoverable facts sufficient to raise a genuine and material issue, (4) recite the efforts previously made to obtain those facts, and (5) show good grounds for the failure to have discovered the essential facts sooner.

Theisen Vending Co., Inc. v. United States, 58 Fed. Cl. 194, 198 (Fed. Cl. 2003*); see also Clear Creek*, 100 Fed. Cl. At 83; *Love Terminal*, 97 Fed. Cl. At 400.

Plaintiff has satisfied the "relevancy" standard for jurisdictional discovery. *See Burnside-Ott*, 985 F.2d at 1582. And they have satisfied their burden under RCFC 56(d) to state the materials they hope to obtain through discovery and how those materials will be helpful in opposing the

Government's motion. *See Simmons Oil*, 86 F.3d at 1144. Assuming without conceding that Plaintiff must comply with the five-part test of *Theisen*, Plaintiff has satisfied that test, too. Both this motion and the attached Declaration of Joshua J. Angel in Support of Plaintiff's Motion for a Continuance to Permit Discovery explain why Plaintiff needs discovery to respond to the motion to dismiss and have satisfied all applicable requirements for discovery.

1. The *Angel IV* Complaint.

1. Count I of the *Angel IV* complaint, Plaintiff alleges that each fiscal quarter from January 1, 2013, to date 2022, the Defendant breached Plaintiff's contract rights, *inter alia*, instructing the BODs of Fannie Mae and Freddie Mac to disregard Plaintiff's contract dividend rights by not considering whether to request Treasury approval of a declaration of a Junior Preferred stock dividend for that fiscal quarter.

2. Count II of the *Angel IV* complaint, Plaintiff alleges that Defendant Treasury engaged in wrongful acts of illegal exaction/extraction in conducting the Conservatorship of the GSEs by causing their BODs to disregard the contractual payment rights of Junior Preferred shareholders in Third Amendment Net Worth Sweep misapplication. These wrongful quarterly breaches of Plaintiff's contract rights resulted in wrongful quarterly illegal exactions/extractions $58 billion Illegal Takings.[23]

3. Count IV of the *Angel IV* complaint at paragraphs 35 through 45, alleges Defendant March 16, 2022 rejection of the Angel II Settlement Agreement as wrongful in breach of an existing contract for which Plaintiff is entitled to receive contract damages.[24]

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[23] Assumes *Angel IV* complaint Footnote 6 amended as follows:

"[6]Approximately $36 billions of litigation proceeds obtained in actions maintained by FHFA on behalf of and in name of Fannie Mae and Freddie Mac against 18 major domestic and foreign banks, mortgage originators, and rating agencies for their alleged conduct in violation of securities laws, foisting more than $200 billions of defective mortgage product on the Companies (hereinafter "Mortgage Litigation Proceeds") and (B) $22 billions of Junior Preferred share contractual dividend rights."

[24] **On March 23, 2022**, Defendant agreed to March 24, 2022 joint status report court filing with Angel II Settlement Agreement in attachment to Plaintiff statement of case as follows:

"Thank you for sending the updated draft. We continue to believe that your section of the JSR gives the reader the mistaken impression that a settlement has been agreed to, when it has not. ***That said, should you insist on filing as drafted, we agree to the filing, provided no further changes are made. Should you make any further changes prior to filing, please send me an updated draft prior to doing so."*** *[Emphasis supplied]*

4. Count III of the *Angel IV* complaint, (See paras, 28-34 and fn 10), Plaintiff alleges entitlement to Declaratory Relief of impairment of during the FHFA Conservatorship, and entitlement to reinstatement, or mandatory redemption of the $33 billions of Junior Preferred share issuance at end of Conservatorship.

5. Count V of the *Angel IV* complaint at paragraphs 20 through 27, and footnotes 8 and 9, Plaintiff alleges entitlement for the federal government guaranty of timely payment for Junior Preferred share legal obligations being in privity with the shares CODs.

2. Discovery is reasonably likely to engender a genuine issue of material fact. Plaintiff discharged this burden in the previous section of this motion, where Plaintiff explained why discovery is necessary to dispel Court confusion regarding *Angel III* Complaint factual allegations, and implicit guaranty, and $58 billion Illegal Takings allegations, create a genuine issue of material fact in dispute of Defendant arguments. To the extent the Defendant's motion depends upon the factual assertions discussed above, discovery is likely to produce information that supports the allegations in Plaintiff's complaint and disputes those in the Defendant MTD.

3. There are discoverable facts that are sufficient to raise a genuine and material issue. The Government is almost certainly in possession of non-public information concerning each of the factual disputes identified in this motion. It is a near-absolute certainty – to posit that Treasury, FHFA, the United States Justice Department, and perhaps other Government agencies have full knowledge with regard to:

A. Treasury

1. Treasury Administrative Logs

2008 Senior Preferred Stock Purchase Agreement ("SPSPA")

A. Third Amendment July 27, 2012

B. Fourth Amendment June 14, 2023

1. Fourth Letter Agreement December 2019

2. Fifth Letter Agreement September 2019

2010 Memorandum, Jeffrey A. Goldstein Treasury Undersecretary for Domestic Finance to Treasury Secretary Geithner, "...the administration's commitment to ensure existing common equity holders will not have access to any positive earnings from the GSEs in the future."

2011 Treasury White Paper, "Reforming America's Housing Finance System."

2019 Treasury Housing Reform Plan.

2. <u>Treasury Press Releases</u>

1. September 7, 2008 – Secretary Henry M. Paulson
2. September 11, 2008 – Frequently Asked Questions
3. January 14, 2021 – "Treasury Department and PHFA Amend Terms of Preferred Stock Purchase Agreement for Fannie Mae and Freddie Mac Conservatorship Release."

3. <u>Miscellaneous Treasury Administrative Logs</u>

Angel v. United States No. 20-CV-737 ("*Angel II*"), "Settlement Agreement" as attached to the Parties' joint status report ("JSR") filed March 24, 2022, Dkt. No. , 2020 thru 2023.

B. <u>Federal Reserve System</u>

1. <u>Federal Reserve System Working Papers</u>

Board of Governors Federal Reserve System – International Finance Discussion Papers IFDP 1045, March 2012, "When Good Investments Go Bad," Tara Rice and Jonathan Rose.

Federal Reserve Bank of Atlanta – "The 2008 Federal Intervention to Stabilize Fannie Mae and Freddie Mac" – Working Paper 2009-13, W. Scott Frame.

C. Federal Housing Finance Administration (FHFA)

1. FHFA Administrative Logs

2008 SPSPA, as amended July 27, 2012 and June 14, 2021 per Fourth and Fifth Letter Agreements December 2017 and September 2019 respectively.

FHFA 2011-2023 logs regarding September 2, 2011 announced private label securities actions ("Private Label MBS Actions") against 18 financial institutions.

D. U.S. Department of Justice

1. U.S. Department of Justice Administrative Log

Angel v. United States No. 20-CV-737 ("*Angel II*"), "Settlement Agreement" as attached to the Parties' joint status report ("JSR") filed March 24, 2022, Dkt. No. , 2020 thru 2023.

2. Press Releases

May 24, 2012 RMBS Working Group

August 14, 2023 U.S. Attorney Office Eastern District of New York RBS Settlement $1.435 billion. Resolving final Private Label MBS Actions, total recoveries more than $36 billion.

E. Fannie Mae, Freddie Mac

1. Board of Directors Minutes

2008 SPSPA, as amended July 27, 2012 and June 14, 2021 per Fourth and Fifth Letter Agreements December 2017 and September 2019 respectively.

Dividend Meetings 2012-2023.

Angel II Settlement Agreement 2020-2023.

Documents and communications between and among Treasury, FHFA, and other Government agencies and officials that will disclose what role Treasury played in FHFA's "decision" to enter into the Third Amendment. It is certain, too, that the Government is in possession of e-mails and other non-public documents concerning all of the topics discussed in

this motion, including the Government's genuine purpose in entering into the Third Amendment and the Government's economic projections for Fannie and Freddie.

2. Plaintiff has not yet had an opportunity to obtain these facts. Plaintiff has had no prior opportunity to obtain the facts Plaintiff seeks. As discussed in the attached Declaration of Joshua J. Angel, Plaintiff has expended substantial effort to comb through publicly available materials relating to the factual matters discussed above (including but not limited to the Administrative Record that was recently filed in a parallel case in the District Court for the District of Columbia), but those sources do not contain the information that Plaintiff seeks.

3. There are good grounds for Plaintiff's failure to discover the essential non-public facts sooner – namely, that Plaintiff has had no prior opportunity to conduct discovery.

As noted, discovery has not yet begun, and the required facts are not publicly available. There was no way for Plaintiff to obtain the facts sooner. This case therefore presents an even stronger case for discovery than in *Jade Trading, LLC v. United States*, 60 Fed. Cl. 558 (2004), where this Court granted a motion under RCFC 56(d)[25] because "only preliminary discovery has been had, and there was no failure on Defendant's part to have discovered these facts any sooner in this litigation." *Id*. At 566; *see also id*. ("The as yet unprobed nature of the transactions and intent of the parties which are at the heart of this case satisfy [RCFC56(d)'s] requirement that Defendant could not present facts essential to its opposition to Plaintiff's partial summary judgment motions at this juncture.")

[25] At the time of the decision in *Jade Trading*, RCFC 56(d) was codified as RCFC 56(f).

F. With Respect to the Motion to Dismiss Under RCFC 12(b)(1), the Court Should, at a Minimum, Delay Resolution of the Motion Until the Completion of Full Discovery Because the Jurisdictional and Merits Issues are Intertwined.

This Court should also grant the Plaintiff an opportunity for jurisdictional discovery because, to the extent the Court believes that the Government's factual assertions are relevant to the Government's motion, the Government's factual claims about jurisdiction are intertwined with its factual claims about the merits. For example, as discussed earlier, the purpose for which FHFA and Treasury entered into the Net Worth Sweep implicates both the Government's jurisdictional argument that FHFA is not "the United States" for purposes of the Tucker Act and the Government's merits argument that Plaintiff cannot satisfy the *Penn Central* balancing test.

When the jurisdictional and merits arguments are intertwined, this Court should defer decision on the motion to dismiss for lack of jurisdiction until the completion of full discovery, and only then decide both the jurisdictional and merits arguments.[26] As the Supreme Court has explained:

> [When there exists] an identity between the "jurisdictional" issues and certain issues on the merits, . . . [there is] no objection to reserving the jurisdictional issues until a hearing on the merits. By the same token, [ ], there is no objection to use, in appropriate cases, of summary judgment procedure to determine whether there is a genuine issue of material fact.

[26] The one exception to the rule that a motion to dismiss under Rule 12(b)(1) cannot be converted into a motion for summary judgment applies where the jurisdictional question is intertwined with the merits, in which case the Court may resolve the issue under Rule 56. *Sizova v. Nat. Inst. of Standards & Tech*., 282 F.3d 1320, 1324 (10th Cir. 2002); *Avedis v. Herman*, 25 F. Supp. 2d 256, 262 (S.D.N.Y. 1998) *aff'd*, 8 F. App'x 69 (2d Cir. 2001)(citing cases from the Fourth, Ninth, and Eleventh Circuits; 5C WRIGHT & MILLER ET AL., FEDERAL PRACTICE & PROCEDURE, §1366 ("Although conversion of a Rule 12(b)(1) motion is usually inappropriate, there is one exception to this general rule. When the jurisdictional question is intertwined with the merits of the case, as when subject matter jurisdiction depends upon the same statue as the substantive claim, consideration of the matter under summary judgment standards is acceptable.").

Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186, 203 n.19 (1974); *see also Land v. Dollar*, 330 U.S. 731, 735, 738-39 (1947). The Federal Circuit and this Court regularly apply this rule and require that intertwined jurisdictional and merits arguments should only be decided after the completion of full discovery. *See., e.g., DDB Technologies*, 517 F.3d at 1291 ("[T]he degree of intertwinement of jurisdictional facts, and facts underlying the substantive claim, should determine the appropriate procedure for resolution of those facts."); *Oswalt v. United States*, 41 Fed. App'x 471, 473 (Fed. Cir. 2002); *Spruill v. Merit Sys. Prot. Bd*., 978 F.2d 679, 688-89 & n.12 (Fed. Cir. 1992); *Metzger, Shadyac & Schwartz v. United States*, 10 Cl. Ct. 107, 110 (1986) (declining to rule on a motion under Rule 12(b)(1) until the completion of a full trial on the merits because the jurisdictional argument was "so entwined with the facts on the merits that the jurisdictional determination must be delayed" so that "[t]he responding party [may] be given an opportunity to develop the facts" in opposition to the motion).[27]

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court suspend briefing relating to the Government's Motion to Dismiss under RCFC 12(b)(1) and 12(b)(6) so that Plaintiff may undertake discovery needed to present facts essential to the opposition of the motion to Dismiss. Plaintiff also respectfully requests that the Court suspend the briefing schedule for the Motion to Dismiss until the Court resolves the present motion for a continuance to permit discovery.

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[27] See also, e.g., *Sizova v. Nat'l. Inst. of Standards & Tech*., 282 F. 3d 1320, 1324-25 & n.2 (10th Cir. 2002); Valentin v. Hospital Bella *Vista*, 254 F.3d 358, 363 (1st Cir. 2001) (collecting cases); *Eaton v. Dorchester Dev., Inc*. 692 F.2d 727, 734 (11th Cir. 1982); *Williamson v. Tucker*, 645 F.2d 404, 412-15 (5th Cir. 1981).

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Respectfully submitted,

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