IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MICHAEL SAMMONS, **Plaintiff,** **v.** **UNITED STATES OF AMERICA,** **Defendant.**	**CIVIL NO. SA-16-CA-1054-FB**

UNITED STATES OF AMERICA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

On January 9, 2017, the Defendant, the United States, moved to dismiss Plaintiff's Complaint under Rule 12(b) of the Federal Rules of Civil Procedure (the "Motion to Dismiss"). ECF No. 15. The Motion to Dismiss asserts two straightforward arguments, each of which assumes the truth of Plaintiff's well-pleaded factual allegations and challenges the legal sufficiency of his Complaint. First, the United States argues that, pursuant to well-established federal law, this Court lacks subject matter jurisdiction over Plaintiff's constitutional takings claim, which seeks more than $10,000 from the federal government. Second, it argues that even if this Court were to uproot decades of established precedent recognizing exclusive Court of Federal Claims jurisdiction over takings claims in excess of $10,000 and assume jurisdiction over this case, Plaintiff's Complaint nonetheless fails to state a cognizable claim under the Takings Clause.

Plaintiff has responded to these straightforward arguments with a number of confusing and often overlapping filings that obfuscate the clear arguments presented in the Government's Motion to Dismiss and rehash, time and again, Plaintiff's characterization

of the government action underlying this action. Nothing Plaintiff has filed, however, rebuts the arguments made in the Motion to Dismiss or demonstrates why his Complaint should not be dismissed under the standards applicable to reviewing Rule 12(b) motions.

ARGUMENT

I. This Court Lacks Jurisdiction Over Plaintiff's Takings Claim

Pursuant to the Tucker Act, 28 U.S.C. § 1491, the Court of Federal Claims has exclusive jurisdiction over Fifth Amendment takings claims seeking monetary compensation from the United States in excess of $10,000. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1998); *Amoco Prod. Co. v. Hodel*, 815 F.2d 352, 358 (5th Cir. 1987). "Because adjudication in a federal district court of a lawsuit that falls within the exclusive jurisdiction of the [Court of Federal Claims] would seriously undermine the purposes behind the Tucker Act," "the [Court of Federal Claims] is the sole forum for the adjudication of such a claim." *Hodel*, 815 F.2d at 358. Accordingly, this Court lacks subject matter jurisdiction over Plaintiff's takings claim, which seeks $900,000 in just compensation from the United States, and his Complaint should be dismissed.

Plaintiff recognizes that, under existing law, this Court lacks the statutory authority to hear his claim. He seeks to avoid this straightforward conclusion by seeking a drastic and far-reaching declaratory judgment that would invalidate a key component of the Tucker Act and require that all takings claims be heard by an Article III district court. Plaintiff's reliance on inapposite case law, *see Stern v. Marshall*, 564 U.S. 462 (2011) (addressing a bankruptcy court's ability to enter judgment on state common law tort claims between private litigants), and on a single law review article, does not justify the relief he seeks, which would invalidate decades of Court of Federal Claims jurisdiction over takings

claims and numerous federal decisions, *see, e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2431 (2015); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1020 (1984); *McGuire v. United States*, 707 F.3d 1351, 1356 (Fed. Cir. 2013), recognizing the authority of that court to hear such claims. Plaintiff's takings claim, which arises under the Constitution and seeks money damages from the federal government, and which is subject to appellate review by the Article III Federal Circuit, does not impinge upon the core judicial power reserved to Article III courts alone. *Cf. Stern*, 564 U.S. at 469 (finding that a non-Article III court violated Article III when it impermissibly "exercised the judicial power of the Unites States by entering final judgment on a common law tort claim"). As such, adjudication by the Court of Federal Claims does not violate Article III; the Tucker Act's grant of exclusive jurisdiction to that court is constitutional; this Court lacks jurisdiction to hear Plaintiff's Complaint; and the Complaint should be dismissed.

II. Plaintiff's Complaint Fails to State a Cognizable Takings Claim

Even assuming this Court had jurisdiction over this case, Plaintiff's Complaint fails to state a claim under the Fifth Amendment's Takings Clause. Plaintiff's response to the Motion to Dismiss spends fifteen pages documenting his version of the relevant facts leading up to the Third Amendment. *See* Pl.'s Resp. to the Government's Mot. to Dismiss at 1–15, ECF No. 21. Much of this is nothing more than a restatement of the factual allegations in Plaintiff's Complaint. But even when the truth of his well-pleaded factual allegations is assumed for purposes of this Rule 12(b)(6) motion, Plaintiff can demonstrate neither a cognizable property interest in his shares in the GSEs nor the basic elements of a regulatory taking. Plaintiff's response offers a lengthy argument for unnecessary discovery, copied out of context from other cases in which other parties are also

challenging the Third Amendment. It does very little, however, to counter the legal arguments actually advanced by the United States in the instant Motion to Dismiss.

The crux of Plaintiff's takings claim is that, by executing the Third Amendment, the United States "took" his property, which he defines as shares in the GSEs and future earnings (in the form of dividends and a liquidation preference) deriving from those shares. *See* Compl. ¶ 90. As argued in the Motion to Dismiss, Plaintiff's Complaint fails to state a takings claims for three reasons.

First, because Plaintiff is a shareholder in regulated financial institutions that were, from the time of his purchase of the shares in 1999[1], subject to federal conservatorship, he lacks the right to exclude others from his shares in the GSEs. Accordingly, while the GSEs are in conservatorship, pursuant to which FHFA has authority to "transfer or sell any asset or liability" of the GSEs and take any action that it determines to be in the best interests of the GSEs, 12 U.S.C. § 4617(b)(2), Plaintiff lacks any property interest cognizable under the Fifth Amendment in his GSE shares.

Second, even if Plaintiff could demonstrate a property interest in his shares, he cannot show that the Third Amendment effected a regulatory taking because it has had "no economic impact" on Plaintiff's alleged property rights, *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 244 (D.D.C. 2014), *appeals docketed*, Nos. 14-5243, 14-5254, 14-5260, 14-5262 (D.C. Cir. Oct. 8, 2014), and did not deprive Plaintiff of "any *reasonable* investment-

[1] The GSEs have been subject to appointment of a conservator since 1992, first under the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, §§ 1301-1395, 106 Stat. 3672, 3941-4012, and more recently under the Housing and Economic Recovery Act, 12 U.S.C. § 4617.

backed expectations," given the "risks intrinsic to investments in entities as closely regulated as the GSEs," *id*. at 245.

Third, even if Plaintiff could bring a takings claim based on the loss of value of shares in the GSEs, his claim is premised upon contractual agreements between Treasury and each GSE, through FHFA as conservator. In those transactions Treasury acted in its proprietary capacity, rather than in its sovereign capacity. Because "takings claims do not arise [where] the government is acting in its proprietary rather than its sovereign capacity," *St. Christopher Assocs., LP v. United States*, 511 F.3d 1376, 1385 (Fed. Cir. 2008), Plaintiff's allegations fail to state a claim under the Takings Clause.

As noted above, Plaintiff's response brief is largely concerned with repeating the factual allegations made in the Complaint and demanding unnecessary discovery to defend against the Motion to Dismiss. His only response to the United States' legal argument that Plaintiff's well-pleaded allegations fail to state a claim is a citation to *Piszel v. United States*, 833 F.3d 1366 (Fed. Cir. 2016). Plaintiff cites this case—in which a Federal Circuit panel unanimously affirmed the dismissal of a takings claim—for the uncontroversial proposition that valid contracts generally give rise to property rights under the Fifth Amendment. *See* Pl.'s Resp. to the Government's Mot. to Dismiss at 17, ECF No. 21. The United States of course does not dispute that a contract *can* give rise to property rights that are cognizable under the Fifth Amendment.

The salient point here is that contract rights are necessarily limited by the regulatory framework in existence when the contract is formed. *Piszel* confirms as much, explaining that "if a regulation existed at the time of contract formation, the regulation would have inhered in the title" the plaintiff acquired, but noting that the regulation at issue *post-dated*

the plaintiff's contract. *Piszel*, 833 F.3d at 1374. Here, by contrast, the relevant regulatory limitation on Plaintiff's contractual right existed long *before* the contract was created, and Plaintiff bought his shares subject to the condition that the government might place the GSEs into conservatorships. As detailed in the Motion to Dismiss, there is much authority—which *Piszel* does not disturb and Plaintiff does not address—suggesting that whatever effect the government's exercise of its regulatory prerogatives might have on the shares of such entities, it does not work a compensable taking. *See Branch v. United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995); *Golden Pacific Bancorp v. United States*, 15 F.3d 1066, 1073–74 (Fed. Cir. 1994); *Cal. House Sec. Inc., v. United States*, 959 F.2d 955, 957 (Fed. Cir. 1992); *Perry Capital LLC v. Lew*, 70 F. Supp. 3d 208, 240–42 (D.D.C. 2014). As Plaintiff's asserted property interests in this case are non-cognizable and non-compensable as a taking, his Complaint should be dismissed for failure to state a claim.

III. Plaintiff is Not Entitled to Discovery to Defend Against the Government's Motion to Dismiss

The remainder of Plaintiff's response to the Motion to Dismiss consists of argument that he is entitled to discovery prior to resolution of the Rule 12(b) motion. *See* Pl.'s Resp. to the Government's Mot. to Dismiss at 17–22, ECF No. 21. Plaintiff made identical arguments in a previously filed "Motion to Suspend Briefing on the Government's Motion to Dismiss Pending Jurisdictional Discovery," in which he requested that the Court "suspend briefing relating to the Government's motion to dismiss under FRCP 12(b)(1) and 12(b)(6) so that Plaintiff may undertake discovery needed to present facts essential to the opposition of the issues raised in the motion to dismiss." ECF No. 18 at 2. Consideration of these arguments is unnecessary, however, because they are moot. On January 18, 2017, the same day Plaintiff filed his response to the Motion to Dismiss and

only nine days after he filed his motion to suspend briefing and for discovery, Plaintiff filed a notice withdrawing the "motion for jurisdictional discovery." *See* Notice of Withdrawl [sic] of Mot. for Jurisdictional Disc., ECF No. 22. The Court dismissed the motion as moot the following day. *See* Order, Jan. 19, 2017, ECF No. 27.

It is unclear why, having withdrawn his motion for jurisdictional discovery, Plaintiff proceeded to argue in favor of such discovery in his response to the Motion to Dismiss. In any case, to the extent those arguments have not been mooted by Plaintiff's own filings, they are plainly meritless. As the United States points out in its opposition to that motion, the arguments presented in its Motion to Dismiss are purely legal and Plaintiff has identified no basis upon which to justify the unusual step of discovery to defend a Rule 12(b) motion. *See* United States of America's Resp. in Opp'n to Pl.'s Mot. to Suspend Briefing Pending Jurisdictional Disc., ECF No. 19. The issue has already been fully briefed and the United States respectfully refers the Court to that briefing for a fuller explanation of why Plaintiff's request for discovery at this stage in the litigation is inappropriate and should be denied.[2]

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of jurisdiction, or Rule 12(b)(6) of those Rule for failure to state a claim.

Dated: February 1, 2017 Respectfully submitted,

[2] *See* ECF Nos. 18–20. Indeed, Plaintiff's arguments regarding discovery in his response to the Motion to Dismiss, ECF No. 21, are copied almost verbatim from his reply brief in support of his motion to suspend briefing and for jurisdictional discovery, ECF No. 20.

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2017, a copy of the foregoing pleading was filed electronically via the Court's ECF system which sent notification of such filing to counsel of record.

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