IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50201
Summary Calendar

MICHAEL SAMMONS,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

(Filed Jun. 19, 2017)

Before JOLLY, SMITH, and GRAVES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Michael Sammons, proceeding *pro se*, brought a takings claim against the United States. The district court concluded that, under the Tucker Act, Sammons must pursue his claim in the Court of Federal Claims ("CFC"), so it dismissed for want of subject-matter jurisdiction. Sammons contends that the Tucker Act is unconstitutional because it requires him to litigate his claim in an Article I court. We affirm.

I.

Congress created the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") to provide, among other things, liquidity to the residential mortgage market. During the financial crisis of 2008, the two entities faced a sharp reduction in the value of their assets and a loss of investor confidence. In response, Congress passed the Housing and Economic Recovery Act of 2008, which created the Federal Housing Finance Agency ("FHFA") and empowered it to act as conservator of Fannie Mae and Freddie Mac. Shortly after the FHFA placed the enterprises into conservatorship, the Treasury Department purchased $1 billion of preferred stock in each entity. That "Senior Preferred Stock" enjoyed preference as to all other preferred stock and was entitled to an annual cumulative dividend equal to ten percent of the money given to the enterprises from the Treasury. In 2012, the FHFA and the Treasury amended the stock-purchase agreement to change the dividend to one hundred percent of the current and future profits of the enterprises.

Sammons holds $1 million in noncumulative preferred shares in Fannie Mae and Freddie Mac, and he contends that the 2012 amendment permanently deprived him of the economic value of his preferred shares. He thus asserts that the amendment amounted to a regulatory taking and that he is entitled to $900,000 in just compensation.

The government moved to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) because the Tucker Act vests exclusive jurisdiction for takings claims over $10,000 in the CFC. 28 U.S.C. § 1491(a)(1). Sammons moved for a declaratory judgment that the Tucker Act is unconstitutional as applied to his claim. The court rejected Sammons's constitutional challenge and dismissed for lack of jurisdiction. We review *de novo* a Rule 12(b)(1) dismissal for lack of jurisdiction.[1]

II.

The Tucker Act provides that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States 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). It does not "create substantive rights, but [is] simply [a] jurisdictional provision[ ] that operate[s] to waive sovereign immunity for claims premised on other sources of law".[2]

Under the Tucker Act, the CFC has exclusive jurisdiction over claims against the United States for

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[1] *JTB Tools & Oilfield Servs., L.L.C. v. United States*, 831 F.3d 597, 599 (5th Cir. 2016).

[2] *United States v. Bormes*, 133 S. Ct. 12, 17 (2012) (quotation marks omitted and alteration adopted).

more than $10,000.[3] Sammons concedes that, because he seeks more than that, the district court had no statutory jurisdiction. He attempts to get around that by attacking the Tucker Act, theorizing that it violates Article III by vesting the power to hear constitutional takings claims in the CFC, an Article I court.

There are several classes of cases that Congress can permissibly assign to non-Article III courts.[4] One includes cases involving "public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."[5] One way a right can be "public" is if it is asserted against the United States in its sovereign capacity, such that the government has immunity.[6] In such circumstances, "Congress may set the terms of adjudicating a suit

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[3] *Chichakli v. Szubin*, 546 F.3d 315, 317 (5th Cir. 2008); 28 U.S.C. § 1491(a)(1). If the claim is for $10,000 or less, the Little Tucker Act vests the CFC and district courts with concurrent jurisdiction. *Bd. of Governors of Fed. Reserve Sys. v. DLG Fin. Corp.*, 29 F.3d 993, 999 n.18 (5th Cir. 1994); 28 U.S.C. § 1346(a)(2).

[4] *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64-70 (1982) (plurality opinion) (describing the categories of cases).

[5] *Stern v. Marshall*, 564 U.S. 462, 489-90 (2011) (quoting *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 (1855)).

[6] *Id.* at 489; *N. Pipeline*, 458 U.S. at 67 (plurality opinion); *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929).

when the suit could not otherwise proceed at all." *Stern*, 564 U.S. at 489.

The dispute thus reduces to whether the United States, in the absence of the Tucker Act, has sovereign immunity over takings claims. If it does, then Congress can attach conditions to its Tucker-Act waiver, such as requiring claimants to litigate in the CFC. The government maintains that before Congress passed the Tucker Act in 1887, it had not waived sovereign immunity over takings claims. The government observes that, before then, citizens had to request individual waivers of sovereign immunity through private bills in Congress.[7] Sammons counters that the Fifth Amendment automatically waives sovereign immunity. He principally relies on Supreme Court precedent describing the "self-executing" nature of the takings clause.[8]

But whatever the merits of the parties' positions, the issue is foreclosed. "It is well-established in this circuit that one panel of this Court may not over-rule another." *United States v. Segura*, 747 F.3d 323, 328 (5th Cir. 2014). Moreover, "[t]he binding force of a prior-panel decision applies not only to the result but also to

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[7] *See Library of Cong. v. Shaw*, 478 U.S. 310 n.3 (1986); *Langford v. United States*, 101 U.S. 341, 343 (1879) ("It is to be regretted that Congress has made no provision by any general law for ascertaining and paying . . . just compensation.").

[8] *See, e.g., First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S. 304, 314-16 (1987) ("We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation . . . ") (quotation marks omitted).

those portions of the opinion necessary to that result." *Id.* (quotation marks omitted and alteration adopted).

We have decided, in a way that was necessary to the holding, that the Fifth Amendment does not automatically waive sovereign immunity. In *Ware v. United States*, 626 F.2d 1278, 1279-80 (5th Cir. 1980), the plaintiff brought a claim against the United States in district court under the Federal Tort Claims Act and asserted a pendent claim under the Tucker Act. We characterized the Tucker Act claim as a takings claim under the Fifth Amendment. The plaintiff sought $331,607.89 but contended that the Tucker Act's $10,000 limitation on district-court jurisdiction applied only to original jurisdiction and not to pendent claims. *Id.* at 1286.

We rejected the plaintiff's position, explaining that "[t]he United States, as sovereign, is immune from suit except as it waives its immunity, and the terms of its waiver, as set forth expressly and specifically by Congress, define the parameters of a federal court's subject matter jurisdiction to entertain suits brought against it." *Id.* We stated that "[a]ssuming that [the plaintiff] present[ed] a valid Fifth Amendment taking claim, the *only* express waiver of sovereign immunity which vests the district court with jurisdiction over taking claims against the United States [was the Little Tucker Act] and it limits the district court jurisdiction to claims involving $10,000 in damages or less." *Id.* (emphasis added). We said that "this court cannot, by using the judge-made doctrine of pendent jurisdiction

waive the immunity of the United States where Congress, constitutional guardian of this immunity, has declined to do so." *Id.* at 1287 (citation omitted and alteration adopted). "[S]ince the government [had] not specifically consented to such a claim," the district court was "powerless to entertain the claim." *Id.* That holding necessarily assumes that the Fifth Amendment does not provide a self-executing waiver of sovereign immunity. We have reached a similar result in other cases.[9]

Because, under our binding precedent, the United States's sovereign immunity can bar cases against it based on the Takings Clause, those cases fall into the "public rights" category. *See Stern*, 564 U.S. at 489. Thus, Congress can constitutionally require such cases to be heard in an Article I court, as it did in the Tucker Act. *Id.* So Sammons's constitutional challenge to the Tucker Act fails, and the court properly dismissed for want of jurisdiction.

The judgment of dismissal is AFFIRMED.

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[9] *E.g., Wilkerson v. United States*, 67 F.3d 112, 119 & n.13 (5th Cir. 1995) (holding that a district court had no jurisdiction to hear a takings claim because "there [was] no waiver [of sovereign immunity] except to have the claims heard in the Court of Claims"); *United States v. Land*, 213 F.3d 830, 837 (5th Cir. 2000) (holding that landowners could not challenge certain aspects of a condemnation damages award because, among other reasons, Congress had not waived sovereign immunity).

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

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

ORDER ACCEPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Before the Court are the Report and Recommendation of the United States Magistrate Judge (docket no. 30), plaintiff's written objections (docket no. 31) thereto, defendant's response (docket no. 32) in opposition to plaintiff's written objections.

Where no party has objected to a Report and Recommendation of the United States Magistrate Judge, the Court need not conduct a de novo review of the Report and Recommendation. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Report and Recommendation and determine whether it is clearly erroneous or contrary to law. *United States*

v. Wilson, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918 (1989).

On the other hand, any Report and Recommendation to which objection is made requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

The Court has thoroughly analyzed plaintiff's submission in light of the entire record. As required by Title 28 U.S.C. § 636(b)(1)(c), the Court has conducted an independent review of the entire record in this cause and has conducted a de novo review with respect to those matters raised by the objections. After due consideration, the Court concludes plaintiff's objections lack merit.

Plaintiff, proceeding *pro se*, filed this action against the United States alleging an unconstitutional taking of his property in violation of the Fifth Amendment to the United States Constitution. Plaintiff contends he is the holder of "non cumulative preferred stock" issued by the Federal National Mortgage Association ("Fannie Mae") and the Federal Home loan Mortgage Corporation ("Freddie Mac"), the value of which was destroyed when the United States Department of Treasury and the Federal Housing Finance Agency amended a stock purchase agreement with

Fannie Mae and Freddie Mac in order to stabilize the economy in 2012. He alleges this agreement expropriated his property interest in his preferred stock, destroyed his reasonable investment-backed expectations and permanently deprived him of the economic value of his shares. Plaintiff now seeks compensation in the amount of $900,000 from the United States.

Defendant contends plaintiff's takings claim must be brought before the Court of Federal Claims, an Article I tribunal, while plaintiff argues jurisdiction is properly maintained in this Article III Court. The Magistrate Judge found that congressional delegation of decision-making to the Court of Federal Claims via the Tucker Act does not violate Article III. The report therefore concludes that this Court lacks subject matter jurisdiction over plaintiff's complaint and recommends that defendant's motion to dismiss pursuant to Rule 12(b)(1) be granted.

Plaintiff argues "that all of the Article III legal arguments presented by the Magistrate Judge were refuted" by Professor Michael P. Goodman in his law review article, *Taking Back Takings Claims: Why Congress Giving Just Compensation Jurisdiction to the Court of Federal Claims is Unconstitutional*, 60 Vill. L. Rev. 83 (2015). Although Professor Goodman argues that takings claims must be brought before Article III judges, he calls on Congress – not the courts – to rectify the problem. (Docket no. 16, Exhibit 1, pages 55-62). Accordingly, plaintiff's reliance on Professor Goodman's article is misplaced.

IT IS THEREFORE ORDERED that the Report and Recommendation of the United States Magistrate Judge (docket no. 30) is ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) such that Plaintiff's Motion for Declaratory Judgment (docket no. 3) is DENIED and the United States of America's Motion to Dismiss and Opposition to Plaintiff's Motion for Declaratory Judgment on Jurisdiction (docket no. 15) is GRANTED IN PART as to the 12(b)(1) dismissal and DISMISSED AS MOOT as to the 12(b)(6) dismissal. Plaintiff's claims against defendant the United States of America are DISMISSED WITHOUT PREJUDICE to refiling in the proper court.

IT IS FURTHER ORDERED that motions pending with the Court, if any, are Dismissed as Moot and this case is CLOSED.

It is so ORDERED.

SIGNED this 9th day of March, 2017.

/s/ Fred Biery
FRED BIERY
UNITED STATES
DISTRICT JUDGE

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

MICHAEL SAMMONS,	§	
Plaintiff,	§	
	§	
v.	§	**CAUSE NO.**
	§	**SA-16-CV-1054-FB**
THE UNITED STATES OF AMERICA,	§	
	§	
Defendant.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

(Filed Feb. 7, 2017)

To the Honorable United States District Judge Fred Biery:

This Report and Recommendation concerns Plaintiff's Motion for Declaratory Judgment on Jurisdiction [#3] and United States of America's Motion to Dismiss and Opposition to Plaintiff's Motion for Declaratory Judgment on Jurisdiction [#15]. Also before the Court are Plaintiff's Reply to the Government's Response to "Motion for Declaratory Judgment on Jurisdiction" [#16], Plaintiff's Response to the Government's Motion to Dismiss [#21], and United States of America's Reply in Support of its Motion to Dismiss [#29]. All dispositive pretrial matters in this case have been referred to the undersigned for disposition pursuant to Western District of Texas Local Rule CV-72 and Appendix C

[#5].[1] The undersigned has authority to enter this recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, it is recommended that Plaintiff's Motion for Declaratory Judgment on Jurisdiction [#3] be DENIED and United States of America's Motion to Dismiss [#15] be **GRANTED IN PART AND OTHERWISE DISMISSED AS MOOT**.

I. Background

By this action, Plaintiff Michael Sammons, proceeding *pro se*, seeks just compensation for an alleged unconstitutional taking of his property in violation of the Fifth Amendment to the United States Constitution. (Compl. ¶ 1.) Sammons claims that he is the holder of "noncumulative preferred stock" issued by the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"), the value of which was destroyed when the United States Department of Treasury and the Federal Housing Finance Agency amended a stock purchase agreement with the companies in order to stabilize the economy in 2012. (Compl. ¶¶ 1, 9, 15.) According to Sammons, this agreement expropriated his property interests in his preferred stock; destroyed his reasonable, investment-backed expectations; and permanently deprived him of the economic value of his

[1] This case was initially referred to Magistrate Judge Pamela Mathy on October 26, 2016 [#5], but was administratively reassigned to the undersigned's docket on January 18, 2017, upon Judge Mathy's retirement.

shares. (Compl. ¶¶ 99-103.) Sammons now seeks just compensation in the amount of $900,000 from the United States. (Compl. ¶ 104.)

Fannie Mae and Freddie Mac are federally chartered corporations, commonly referred to as Government-Sponsored Enterprises. *Town of Babylon v. Fed. Hous. Fin. Agency*, 699 F.3d 221, 225 (2d Cir. 2012). Fannie Mae and Freddie Mac provide liquidity to the mortgage market by purchasing mortgages originated by third-party lenders, pooling the mortgages into investment instruments, and selling those mortgage-backed securities to raise capital for further purchases. *Montgomery Cty., Md. v. Fed. Nat. Mortg. Ass'n*, 740 F.3d 914, 918 (4th Cir. 2014). (*See also* Compl. ¶ 33). By providing capital to lenders, these activities promote access to mortgage credit throughout the Nation and stabilize the secondary market for residential mortgages. *See Bd. of Com'rs of Montgomery Cty., Ohio v. Fed. Hous. Fin. Agency*, 758 F.3d 706, 708 (6th Cir. 2014).

According to Sammons's complaint, he was one of many private investors who purchased publicly traded common or preferred stock from Fannie Mae and Freddie Mac at a time in which the companies enjoyed great profitability.[2] (Compl. ¶ 3.) However, after the mortgage-related financial crisis of 2008, the companies

[2] The Court accepts as true the well-pleaded facts in Sammons's complaint for purposes of ruling on the United States' motion to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6). *See Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988) and Section II *infra.*

faced a steep reduction in the value of their assets and a loss of investor confidence in the mortgage market. (Compl. ¶ 5.) In reaction to this crisis, Congress enacted the Housing and Economic Recovery Act of 2008, which facilitated the placement of Fannie Mae and Freddie Mac into conservatorship. (Compl. ¶ 6.) As part of the conservatorship, the United States Treasury provided the companies with necessary capital, and the companies ceded control of their assets to the Federal Housing Finance Agency ("FHFA") as conservator. (Compl. ¶¶ 6, 7.)

Early in the conservatorship, the Treasury and FHFA entered into agreements to purchase securities of Fannie Mae and Freddie Mac. (Compl. ¶ 9.) These purchase agreements provided that the Treasury would invest in a newly created class of securities, known as "Senior Preferred Stock" or "Government Stock," as necessary to maintain the companies' positive net worth. (Compl. ¶ 9). The Treasury received $1 billion of this Government Stock in both Fannie Mae and Freddie Mac as a commitment fee. (Compl. ¶ 9.) This Government Stock enjoyed senior priority as to all other preferred stock and was entitled to a cumulative annual dividend in the amount of the Treasury's $1 billion commitment fee plus the total amount of Government Stock outstanding. (Compl. ¶ 9.)

Then in 2012, the Treasury and FHFA implemented a "Third Amendment" to the Government Stock agreements, which changed the Government Stock's dividend to 100% of all current and future profits of the Companies. (Compl. ¶ 15.) Sammons refers to

this amendment as the "Net Worth Sweep." (Compl. ¶ 15.) According to Sammons, the Net Worth Sweep illegally circumvented the rules of securities priority and expropriated for the Government the value of the preferred and common stock held by private investors, resulting in a total loss of their investment. (Compl. ¶ 16.) By his lawsuit, Sammons seeks to recover the $900,000 he alleges in losses due to the 2012 amendment of the Government Stock agreements.

The parties have filed cross motions on the threshold question of this court's subject-matter jurisdiction over Sammons's lawsuit. The United States moves to dismiss Sammons's complaint under Rule 12(b)(1) based on the Tucker Act, which vests exclusive jurisdiction over takings claims in excess of $10,000 in the Court of Federal Claims. FED. R. CIV. P. 12(b)(1); 28 U.S.C. § 1491. Sammons seeks a declaratory judgment that the Tucker Act is unconstitutional as applied to Fifth Amendment takings claims and that this court has subject-matter jurisdiction over his case. In the alternative, the United States seeks dismissal for failure to state a claim pursuant to Rule 12(b)(6). FED. R. CIV. P. 12(b)(6).

II. Legal Standard

Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case. FED. R. CIV. P. 12(b)(1); *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The burden of

proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998). Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).

Where a motion to dismiss for lack of jurisdiction is limited to a facial attack on the pleadings, as here, it is subject to the same standard as a motion brought under Rule 12(b)(6). *See Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008); *Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992). In either case, the Court must "take the well-pled factual allegations of the complaint as true and view them in the light most favorable to the plaintiff." *Lane*, 529 F.3d at 557; *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). Under Rule 12(b)(6), a claim should not be dismissed unless the court determines that it is beyond doubt that the plaintiff cannot prove a plausible set of facts that support the claim and would justify relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This analysis is generally confined to a review of the complaint and its proper attachments. *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006). However, in ruling on a motion to dismiss for lack of subject-matter jurisdiction, the court may consider any of the following: (1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's

resolution of disputed facts. *Walch v. Adjutant Gen.'s Dep't of Tex.*, 533 F.3d 289, 293 (5th Cir. 2008).

When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. *Ramming*, 281 F.3d at 161. This requirement prevents a court without jurisdiction from prematurely dismissing a case with prejudice. *Id.* The court's dismissal of a plaintiff's case because the plaintiff lacks subject-matter jurisdiction is not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction. *Id.*

III. Jurisdictional Analysis

A. The Tucker and Little Tucker Acts

Sovereign immunity shields the United States from suit absent a consent to be sued that is "unequivocally expressed." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992) (internal citation omitted). Through the Tucker Act, 28 U.S.C. § 1491, and the Little Tucker Act, 28 U.S.C. § 1346, the United States has unequivocally waived sovereign immunity for certain civil actions for money damages "founded either upon the Constitution, or any Act of Congress." 28 U.S.C. §§ 1346(a)(2), 1491(a)(1); *United States v. Bormes*, 133 S. Ct. 12, 16-17 (2012). The Tucker Act and Little Tucker Act do not themselves "creat[e] substantive rights," but "are simply jurisdictional provisions that operate to waive sovereign immunity for

claims premised on other sources of law." *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009). Together, the Acts operate to vest the Court of Federal Claims with exclusive jurisdiction for all constitutional claims against the federal government for money damages exceeding $10,000 in amount. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1); *Chichakli v. Szubin*, 546 F.3d 315, 317 (5th Cir. 2008). Those claims seeking money damages not exceeding $10,000 in amount are heard exclusively in the United States district courts. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1); *Bormes*, 133 S. Ct. at 16.

Because neither the Tucker Act nor Little Tucker Act create substantive rights, a Tucker Act claimant "must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983) (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)). "It is undisputed that the Takings Clause of the Fifth Amendment is a money-mandating source for purposes of Tucker Act jurisdiction." *Jan's Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1309 (Fed. Cir. 2008). In fact, "courts have uniformly held that jurisdiction under the 'founded upon the Constitution' grant of the Tucker Act is limited to claims under the 'takings clause' of the Fifth Amendment." *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 194 F.3d 622, 625-26 n.6 (5th Cir. 1999) (internal citations omitted). Accordingly, courts have repeatedly held that takings claims fall within the Tucker Act and those exceeding the $10,000 jurisdictional ceiling are subject to the

exclusive jurisdiction of the Court of Federal Claims. *See, e.g.*, *Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1998); *Wilkerson v. United States*, 67 F.3d 112, 118-19 (5th Cir. 1995); *Ware v. United States*, 626 F.2d 1278, 1287 (5th Cir. 1980).

Sammons acknowledges that the Tucker Act, by its clear statutory text, deprives this Court of jurisdiction to hear his takings claim. (Mot. for Declaratory. J. at 5.) He further acknowledges that countless courts, relying on the Tucker Act's statutory text, have "correctly held" that the Court of Federal Claims is the exclusive forum for claims like that raised by Sammons. (Mot. for Declaratory J. at 5.) Nonetheless, Sammons asks this Court to disregard decades of Supreme Court, circuit, and district court precedent, much of which is binding on this Court, to hold that the Tucker Act is unconstitutional as applied to claims arising from the Fifth Amendment. (Mot. for Declaratory J. at 16.)

It is Sammons's position that the Tucker Act violates Article III and the separation-of-powers doctrine by improperly granting exclusive jurisdiction over Fifth Amendment takings claims to a non-Article III court. (Mot. for Declaratory. J. at 2, 7.) Sammons argues that his claim is governed by the Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462 (2011), which held that an Article I Bankruptcy Court lacked constitutional authority to enter a final judgment on a common law tort claim. According to Sammons, the *Stern* decision requires this Court to ignore the Tucker Act's explicit statutory jurisdictional directive and to

conclude that the act is unconstitutional as applied to his claim. (Mot. for Declaratory J. at 2, 7.)

The United States counters that the Court of Federal Claims has consistently asserted jurisdiction over takings claims under the Tucker Act for decades, including litigation arising out of the "Net Worth Sweep" that is the subject of Sammons's complaint. *See Fairholme Funds, Inc. v. United States*, No. 1:13-CV-00465-MMS (Fed. Cl. Sept. 30, 2016).[3] (Def.'s Mot. to Dismiss at 7-8; Def.'s Reply to Pl.'s Resp. to Def.'s Mot. to Dismiss at 2-3.) The United States further argues that Sammons greatly overstates the holding in *Stern*, which was decisively narrow and completely inapposite to Sammons's claim. (Def.'s Mot. to Dismiss at 12.)

B. Article III and *Stern v. Marshall*

Article III, § 1, of the Constitution commands that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." That Article further provides that the judges of those courts shall hold their offices during good behavior, without diminution of salary. Art. III,

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[3] Sammons attempted to intervene in this suit, raising the same constitutional challenge he raises here. *See Fairholme Funds, Inc. v. United States*, No. 1:13-cv-00465-MMS (Fed. Cl. Sept. 30, 2016). The court denied the motion, finding Sammons's arguments to be "frivolous" and "vexatious." *Id.* Sammons's appeal of that case is currently pending before the Federal Circuit. *See Fairholme Funds v. United States*, No. 17-1015 (Fed. Cir. 2016).

§ 1. As such, Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982).

The separation-of-powers doctrine, which flows from Article III, has been invoked in numerous cases to challenge all manner of adjudication by non-Article III entities, and yet, as pointed out by the United States, the Supreme Court has only found a constitutional violation in two cases, both of which involved congressional grants of jurisdiction to bankruptcy courts to hear state common law claims between private individuals. *See id.* at 62; *Stern*, 564 U.S. at 469. (*See also* Def.'s Mot. to Dismiss at 13.) The holding in each case was narrow.

In *Northern Pipeline*, the Supreme Court considered whether bankruptcy judges serving under the Bankruptcy Act of 1978 – appointed by the President and confirmed by the Senate, but lacking the tenure and salary guarantees of Article III – could "constitutionally be vested with jurisdiction to decide [a] state-law contract claim" against an entity that was not otherwise part of the bankruptcy proceedings. *Stern*, 564 U.S. at 485 (citing *N. Pipeline*, 458 U.S. at 53, 87, n.40). The Court held that assignment of such state-law claims for resolution by non-Article III judges violates the Constitution. *N. Pipeline*, 458 U.S. at 52, 87. In *Stern*, the Court similarly found that an Article I Bankruptcy Court impermissibly exercised the judicial power of the United States by entering final judgment

on a common law tort claim that was not resolved in the process of ruling on a creditor's proof of claim. *Stern*, 564 U.S. at 469.

Outside of these narrow exceptions, the Court has made clear that the Constitution "does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). Nor does the Supreme Court require "an absolute construction of Article III," as the Court has "long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decision-making authority in tribunals that lack the attributes of Article III courts." *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 583 (1985).

For example, the Court has long recognized what it has termed a "public-rights doctrine" with respect to Article III decision-making. *See Stern*, 564 U.S. at 485-93. The public-rights doctrine recognizes that there is a category of cases involving "public rights" that Congress can constitutionally assign to "legislative" courts for resolution. *Id.* at 485. This doctrine extends "only to matters arising between" individuals and the Government "in connection with the performance of the constitutional functions of the executive or legislative departments . . . that historically could have been determined exclusively by those" branches. *N. Pipeline*, 458 U.S. at 67-68 (internal quotation marks omitted).

The Supreme Court first recognized the public-rights doctrine in *Murray's Lessee v. Hoboken Land &*

Improvement Co., 59 U.S. 272 (1856), a case that is instructive here. That case involved the Treasury Department's sale of property belonging to a customs collector who had failed to transfer payments to the Federal Government that he had collected on its behalf. *Id.* at 274-75. The plaintiff, who claimed title to the same land through a different transfer, objected that the Treasury Department's calculation of the deficiency and sale of the property was void, because it was a judicial act that could not be assigned to the Executive under Article III. *Id.* at 274-75, 282-83. The Court ruled that this challenge to the Treasury Department's sale of land fell into the public-rights category of cases, "because it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity." *Stern*, 564 U.S. at 489 (citing *Murray's Lessee*, 59 U.S. at 283-284). Thus *Murray's Lessee* stands for the important principle that "Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all." *Stern*, 564 U.S. at 489. *See also Juda v. United States*, 13 Cl. Ct. 667, 687 (1987) ("The doctrine of public rights is based, in part, on the traditional principle of sovereign immunity, which recognizes that the government may attach conditions to its consent to be sued.").

Subsequent decisions from the Supreme Court distinguished between cases within the reach of the public-rights doctrine – those arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"

– and those that were instead matters "of private right, that is, of the liability of one individual to another under the law as defined." *Stern*, 564 U.S. at 489 (citing *Crowell v. Benson*, 285 U.S. 22, 50, 51 (1932)). The Court has continued "to limit the [public-rights doctrine] to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority." *Stern*, 564 U.S. at 490. "In other words, it is still the case that what makes a right 'public' rather than private is that the right is integrally related to particular federal government action." *Id.* at 490-91. *See also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54-55 (1989) ("If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.").

Although Sammons attempts to place his claim within the purview of *Stern* and *Northern Pipeline*, these cases are instructive only insofar as they serve to illustrate why Sammons's claim is ***not*** constitutionally limited to an Article III court. Sammons's takings claim is neither a claim between two private individuals nor a claim based on a common-law private right of action, as in the contract and tort claims at issue in *Stern* and *Northern Pipeline. See Stern*, 564 U.S. at 469; *N. Pipeline*, 458 U.S. at 53, 87, n.40. Rather, it is plainly a claim between an individual and the Government for monetary damages, as in *Murray's Lessee*, which could

only be brought through the Federal Government's waiver of sovereign immunity. *See* 59 U.S. at 283-84. As such, Congress may constitutionally attach conditions to its consent to be sued, such as specifying the forum in which such claims must proceed. *See Stern*, 564 U.S. at 489; *Juda*, 13 Cl. Ct. at 687.

This is precisely what Congress sought to do in creating the Court of Federal Claims. The modern Court of Federal Claims was established as an Article I court pursuant to the Federal Courts Improvement Act of 1982. *See Bowen v. Massachusetts*, 487 U.S. 879, 908 n.46 (1988). It is a "trial court of limited jurisdiction that was created by Congress as a forum where private parties could sue the government for money claims, other than those sounding in tort, where the claims would otherwise be barred by sovereign immunity." *Kanemoto v. Reno*, 41 F.3d 641, 644 (Fed. Cir. 1994); *see also Delmarva Power & Light Co. v. United States*, 79 Fed. Cl. 205, 213 (2007) ("The Court of Federal Claims was established to provide a forum for the vindication of public rights, i.e., to provide a mechanism for holding government accountable to suits by private citizens.").

Moreover, the relevant facts surrounding Sammons's claim provide further support for the applicability of the public-rights doctrine here. Sammons's takings claim arises out of executive agency action to stabilize the economy in a time of national economic emergency. Sammons may disagree with the wisdom and necessity of the decision of the Treasury Department and FHFA to engage in the Net Worth Sweep, but

he concedes that his losses arose from the policy decisions of the legislative and executive branch of government, i.e., "in connection with the performance of the constitutional functions of the executive or legislative departments." *See Crowell*, 285 U.S. at 50. In *Stern*, the Supreme Court expressly stated that where a claim arises from a federal regulatory scheme and is integrally related to a particular federal government action, it may be delegated to an expert government agency or Article I tribunal. *Stern*, 564 U.S. at 490. In short, Sammons's takings claim is "closely intertwined with a federal regulatory program Congress ha[d] power to enact," and his claim "exists against the Federal Government." *See Granfinanciera*, 492 U.S. at 54-55. Accordingly, the Constitution does not require that this claim be heard by an Article III court. *See id.* Sammons's claim does not concern a matter of private right as it does not require adjudication of the liability of one individual to another as defined under the law. *See Crowell*, 285 U.S. at 51. In short, Congressional delegation of decision-making to the Court of Federal Claims via the Tucker Act does not violate Article III.

The undersigned therefore concludes that the Tucker Act's grant of exclusive jurisdiction to the Court of Federal Claims over all takings claims exceeding $10,000 in amount is constitutional. Thus, this Court lacks subject-matter jurisdiction over Sammons's complaint, and the complaint should be dismissed pursuant to Rule 12(b)(1).

IV. Conclusion and Recommendation

Accordingly, having considered Plaintiff's complaint, the parties' motions, as well as the parties' responses and replies, the undersigned recommends that Plaintiff's Motion for Declaratory Judgment on Jurisdiction [#3] be **DENIED** and United States of America's Motion to Dismiss and Opposition to Plaintiff's Motion for Declaratory Judgment on Jurisdiction [#15] be **GRANTED IN PART** as to the 12(b)(1) dismissal **AND DISMISSED AS MOOT** as to the 12(b)(6) dismissal. Plaintiff's claims against Defendant United States of America should be **DISMISSED WITHOUT PREJUDICE** to refiling in the proper court.

V. Instructions for Service and Notice of Right to Object/Appeal.

The United States District Clerk shall serve a copy of this report and recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Written objections to this report and recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). The party shall file the objections with the clerk of the court, and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or

recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149-52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this report and recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED this 7th day of February, 2017.

/s/ Elizabeth S. Chestney
ELIZABETH S. ("BETSY") CHESTNEY
U.S. MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50201

MICHAEL SAMMONS,

Plaintiff-Appellant

versus

UNITED STATES OF AMERICA,

Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas, San Antonio

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ON PETITION FOR REHEARING EN BANC

(Filed Aug. 30, 2017)

(Opinion 6/19/17, 5 Cir., ___, ___, F.3d ___)

Before JOLLY, SMITH, and GRAVES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry Smith
UNITED STATES
CIRCUIT JUDGE